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# A Proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of "Refugee"

TODD STEWART SCHENK*

## I. INTRODUCTION: THE NEED FOR CHANGE

Asylum[1] is provided for in the modern law of civilized nations to protect victims of selected human rights violations occurring worldwide. The typical human rights victim is portrayed in both legal and human rights literature as a male dissident, tortured or imprisoned by the State.[2] The statistics, however, tend to dispel the notion that asylees are predominantly male. Indeed, most of the world's asylee population is female.[3]

In addition to the basic needs shared with all asylum applicants, female asylum applicants have particular needs that reflect their gender and their position within society. Women require greater protection from sexual assault, abuse, and institutionalized gender discrimination than do men.[4] These unique needs of females are a function not of innate gender differences, but of pervasive gender discrimination and women's resulting inferior position in most societies.[5] Unfortunately, the current asylum laws

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1. "[T]he act or custom of affording shelter or protection to one under or in danger of persecution." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 136 (1981).

2. Ruth Rosen, *Women's Rights Are The Same As Human Rights*, L.A. TIMES, Apr. 8, 1991, at B5 (reporting the opinion of Charlotte Bunch, Director of Douglass College Center for Global Issues and Women's Leadership).

3. *The Activities and Programme of the United Nations High Commissioner for Refugees on Behalf of Refugee Women, Report of the Secretary-General*, Provisional Agenda Item 7, U.N. Doc. A/CONF.116/11 (1985).

4. SUSAN F. MARTIN, REFUGEE WOMEN 16 (1992). Women's particular needs also include protection against sexual and physical abuse and exploitation, and protection against sexual discrimination. *Id.*

5. Women require greater protection from certain types of human rights abuses than men because women's position in society is unique. The particular rights that require protection fall neatly within the category of human rights. They do not make up "special" rights, nor do they provide any evidence of naturally-existing gender differences. *See infra* text accompanying notes 176-79.

of the international community do not adequately address these concerns; a change in the law of asylum is necessary. This paper advocates the addition of a category of "gender" to the internationally-recognized definition of "refugee."[6]

Section II of this paper describes the types and scope of physical and sexual violence committed against women around the world. Frequently, officials of the government are directly responsible for such acts of violence. Other times, the government of a State knowingly tolerates or approves of a social pattern of widespread violence against women, making the government indirectly responsible for the violence.

The international documents forming the basics of the modern asylum law framework and international human rights standards are discussed briefly in Section III. The current U.N. definition of "refugee," which serves as a model for the domestic asylum laws of most western nations, establishes that "persecution" or a "well-founded fear of persecution" on the basis of race, religion, nationality, political opinion, or membership of a particular social group constitutes valid grounds for seeking asylum. The U.N. definition of "refugee" does not recognize persecution or well-founded fear of persecution on the basis of gender as grounds for asylum.

While there is no authoritative definition of persecution, scholars, judges, practitioners, and legislators have typically equated persecution with serious human rights violations. In any event, it is widely accepted that acts of physical and sexual violence against women qualify as persecution. Likewise, numerous widely accepted human rights documents imply that acts of physical and sexual violence committed against women constitute human rights abuses. Therefore, this paper will focus strictly upon asylum remedies for physical and sexual violence against women, staying safely within the boundaries of the generally accepted definition of persecution.[7]

Like most western nations, the United States has adopted the U.N. asylum law framework. The United States faces problems common to many countries with respect to the application and interpretation of the U.N. definition of "refugee" and is used as a model for this paper. Although this

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6. A "refugee" is one eligible for asylum in any country. *See infra* text accompanying notes 39-41.

7. In the future, commentators must produce a more precise definition of what actions against women constitute persecution. Nonetheless, it is currently clear that acts of severe physical and sexual abuse, such as rape, assault, and torture, do qualify as persecution. Other acts may qualify as persecution, but are beyond the scope of this paper.

paper focuses upon the experience of the United States, that experience is not unique among the nations of the world. Therefore, all nations should consider remedying the existing gender bias found in the U.N. and U.S. definitions of "refugee."

Section IV outlines the asylum laws and associated administrative regime of the United States. Section V analyzes a variety of problems encountered by women who have faced gender-based persecution in their home country and subsequently applied for asylum in the United States. In order to avoid these problems, women suffering gender-based persecution have begun to seek refugee status based upon membership in particular social groups typically defined along lines of gender. Section VI discusses this trend. Courts in the United States have resisted efforts to expand the "particular social group" category to include groups defined in terms of gender for reasons both legitimate and illegitimate.

Section VII contains a proposal to add a sixth category of "gender" to the current U.S. and U.N. definition of "refugee." The refugee definition, drafted in post-World War II Europe, is terribly outdated and does not reflect modern human rights standards. The addition of a sixth category would provide much needed protection to victims of gender-based persecution worldwide. Adding a separate category also accords greater attention and respect to the issue of gender-based persecution than do efforts to expand the particular social group category to include groups defined in terms of gender. In the United States, implementing this proposal is simply a matter of legislative amendment to the existing asylum laws. The administrative and adjudicative frameworks are already in place.

The world community should amend the U.N. definition of refugee to include a gender category even though doing so is comparably more difficult. Determinations made by the U.N. in the field of human rights carry strong persuasive authority and exert considerable influence over domestic law formulations. Amending the U.N. definition of "refugee" to include a category of gender would remove existing gender bias and likely create sweeping global change in the treatment of women in asylum law.

Section VIII concludes by discussing some criticisms of attempts to recognize gender-based persecution as grounds for granting asylum. Although these criticisms have some merit, in light of the gross inadequacy of asylum law in the protection of women from acts of physical and sexual violence, none demonstrate sufficient reason not to add a sixth category of gender to the U.S. and U.N. definition of refugee.

## II. THE WORLDWIDE PROBLEM OF PHYSICAL AND SEXUAL VIOLENCE COMMITTED AGAINST WOMEN

### *A. Acknowledgment of the Problem's Global Nature*

When discussing the discrimination against and abuse of women, observers often think first of developing countries. While developing countries are home to some egregious violations of women's human rights, they are not alone in failing to adequately protect women from abuse or discrimination; this is a problem of global scale.[8] Nonetheless, most instances of violence and abuse qualifying as persecution[9] occur in developing countries. Therefore, the following representative examples of the problem of gender-based persecution are taken almost entirely from developing countries.

### *B. Acts of Abuse Committed By Representatives of the State*

Sexual and physical assault committed against women by members of the military or other representatives of the State is perhaps one of the most common forms of State-sanctioned abuse of women. When the abuse is committed by government officials or representatives, the victim finds it difficult or impossible to report, prosecute, or obtain protection. The victim is effectively sequestered from aid by the State and must continue to suffer any form of abuse the State agent may inflict, with little or no effective recourse.

Some examples of State-sanctioned physical violence against women have occurred in the countries of Somalia, Mozambique, Guatemala, and Eritrea. There, women between the ages of eighteen and forty are frequently taken to camps to be raped by those countries' soldiers.[10] If a victim's husband learns of the occurrence, he may and often does kill his wife to avoid the shame and cultural stigma associated with rape.[11] Likewise, in Liberia there are documented reports of local soldiers

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8. *See generally* CRIMES AGAINST WOMEN: PROCEEDINGS OF THE INTERNATIONAL TRIBUNAL (Diana E.H. Russell & Nicole Van de Ven eds., 1976).

9. *See infra* text accompanying notes 83-89 (giving a definition of persecution and examples of the types of abuse or discrimination that can qualify as persecution).

10. MARTIN, *supra* note 4, at 24.

11. *Id.*

committing gang rapes, kidnapping young girls to serve as concubines, and attacking pregnant women and extricating and mutilating the fetuses.[12] Iraq even had an official office in the civil service for the rape and torture of women.[13]

As stated above, victims frequently encounter difficulty when seeking protection from State-sanctioned crimes. For example, although Amnesty International reports that sexual assault by military personnel is frequent and widespread in Peru, there are no published government reports or documented convictions regarding this practice.[14] Indeed, Peruvian government officials have said that these crimes are to be expected and are "natural" when troops are stationed in rural areas.[15]

### C. *Violence Against Women as Cultural and Social Norms*

In many societies, acts of violence against women are so commonplace they are accepted or viewed as part of the status quo.[16] There are numerous cases of violence committed against women who have transgressed established social mores.[17] In fact, in a case reported by Amnesty International, a woman was flogged in the streets for wearing lipstick under her veil.[18] There have also been documented cases of the lapidation of women accused of adultery and the killing of girls who have voluntarily or involuntarily lost their virginity.[19]

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12. DELEGATION TO COTE D'IVOIRE, GUINEA, AND LIBERIA, WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, OUR FORGOTTEN FAMILY, LIBERIANS: THE PLIGHT OF REFUGEES AND THE DISPLACED 12 (1991).

13. Kanan Makiya, *Rape in the Service of the State: Power and Patriarchy in Iraq*, 256 THE NATION 627, 628 (1993). State-sanctioned official rape was widespread in Iraq. *Id.*

14. AMNESTY INT'L, WOMEN IN THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN 5 (1990).

15. *Id.*

16. Lori Heise, *When Women are Prey: Around the World, Rape Is Commonplace—and the Victims Can't Fight Back*, WASH. POST, Dec. 8, 1991, at C1.

The powers that established culture, tradition, and religion have impeded social change to maintain such status quos of prevalent violence against women. "[S]ocial ritualization and stratification . . . [are] responsible for the vast social inertia that retards . . . women's advancement . . . and social reforms. And religious stratification and ritualization have so compounded prevailing negativism and inertia as to hamper social change in many economically underdeveloped societies." THEODORA F. CARROLL, WOMEN, RELIGION, AND DEVELOPMENT IN THE THIRD WORLD 2 (1983).

17. MARTIN, *supra* note 4, at 23.

18. *Id.*

19. *Id.*

The cultural values surrounding sexual and bodily integrity also lead to the abuse of women. In Sudan, among many of the southern tribes, "forcible sexual intercourse is common. No blame attaches to the practice."[20] In Saudi Arabia the purchase and sale of women for prostitution and marriage is common.[21] Societal and legal conceptions of women as "property" may lie behind failures to protect the bodily integrity of women.

### *D. Governments Often Unwilling or Unable to Prevent Abuse*

The abuses of women flowing from cultural and social norms are not always directly inflicted by the government or its representatives. Often the culprits are members of the general populace. Nevertheless, the government is involved indirectly in the commission of many of these abuses. While some nations may pass laws designed to protect females and officially proclaim that violence against women will not be tolerated, cultural, social, and religious motivations routinely work to prevent effective law enforcement and protection.[22]

Scholars have recognized that governments often fail to demand compliance with their own stated standards and laws regarding the rights and protection of women.[23] Charlotte Bunch has identified four reasons a government might not fulfill its obligation to enforce laws that protect women: 1) sexual discrimination is seen as trivial; 2) the abuse of women is seen as a cultural, private, or individual issue; 3) women's rights are not seen as human rights; and 4) the problems are seen as too pervasive to be confronted.[24] When these reasons lead to non-enforcement of laws designed to protect women, or to unequal enforcement of laws designed to

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20. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990: REPORT SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS 395 (1991).

21. Kathleen Barry, *Female Sexual Slavery: Understanding the International Dimensions of Women's Oppression*, 3 HUM. RTS. Q. 44, 47 (1981).

22. RUTH L. SIVARD, WOMEN . . . A WORLD SURVEY 32 (1985).

23. Margaret E. Galey, *International Enforcement of Women's Rights*, 6 HUM. RTS. Q. 463 (1984). "The primary enforcement mechanism [sic], national governments, often lack the political will or resources to promote compliance with the standards that they have obligated themselves to support." *Id.*

24. Charlotte Bunch, *Women's Rights as Human Rights: Towards a Revision of Human Rights*, 12 HUM. RTS. Q. 486, 488 (1990).

protect citizens in general, the government is passively encouraging and legitimizing the abuse of women. This type of government assent to violence against women should be considered persecution for the purposes of asylum law, deeming the government an accomplice to the crime.[25]

## III. INTERNATIONAL DOCUMENTS RELATING TO THE LAW OF ASYLUM

### *A. The United Nations Charter (1945)*

Traditionally, human rights and their protection were matters of domestic jurisdiction.[26] The historical origin of the international protection of human rights is found in the Charter of the United Nations (U.N. Charter).[27] The U.N. Charter represents the intent to "assert an international interest" in the human rights of individuals.[28] Among the purposes of the U.N. Charter is the creation of international cooperation in "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, *sex,* language, or religion."[29] An explicit definition of human rights was not included in the U.N. Charter.

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25. *See* Bolanos-Hernandez v. INS, 749 F.2d 1316 (9th Cir. 1984).

26. ROBERT E. RIGGS & JACK C. PLANO, THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND WORLD POLITICS 240 (1988).

27. U.N. CHARTER pmbl.

28. The U.N.'s primary role is to formulate standards of conduct, encourage compliance with standards, and condemn egregious examples of non-compliance. RIGGS & PLANO, *supra* note 26, at 241. Note, however, that the U.N. has little punitive power. This impotence often leads to situations of identified and condemned, but ongoing, human rights abuses.

For example, in June of 1993, delegates from 170 nations met in Vienna for the United Nations Global Conference on Human Rights, to focus upon the worldwide abuse of women. The Conference's findings insisted that violations of women's rights are violations of human rights. This position was met with resistance from many countries who maintained that the U.N. cannot question their social and cultural practices. *Violence Against Women One Focus at U.N. Conference,* (Nat'l Public Radio Broadcast June 20, 1993), transcript *available in* LEXIS, News Library, NPR File. *See generally* Marshall, *Paradoxes of Change: Culture Crisis, Islamic Revival, and the Reactivation of Patriarchy,* 19 J. AS. & AFR. STUD. 1 (1984) (fearing western encroachment into and domination and destruction of Islamic culture, the nation of Islam views women's rights movements with xenophobic suspicion).

29. U.N. CHARTER art. 1, ¶ 3 (emphasis added). This language is repeated in article 55(c), obligating the United Nations to encourage international respect for non-discrimination, and is referred to in article 56, expressly obligating U.N. members to act in furtherance of article 55.

### *B. The Universal Declaration of Human Rights (1948)*

The Universal Declaration of Human Rights (UDHR),[30] ratified by the United Nations in 1948, has grown into the primary accepted definition of human rights.[31] The UDHR, in article two, maintains: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, *sex,* language, religion, political or other opinion, national or social origin, property, birth or other status."[32] It further proclaims that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law."[33] The most powerful language in the UDHR is found in article fourteen. It sets forth the expectation that all member countries will protect against human rights violations and provide the remedy of asylum to those who cannot gain protection from human rights violations in their countries of origin. Specifically, it declares that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[34]

The UDHR is the linchpin in the generally accepted human rights definition. Although the UDHR is not directly binding upon non-signatory countries,[35] it does embody the international consensus regarding the definition of human rights.[36]

The UDHR proves extremely useful in the analysis of physical violence against women and its treatment in the law of asylum. For example, articles three and five identify bodily integrity and safety as basic human rights.[37] Therefore, rape, torture, assault, and other physical abuses committed against women necessarily constitute human rights violations.[38]

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30. Universal Declaration of Human Rights, G.A. Res. 217(III), Dec. 10, 1948.

31. "The Universal Declaration of Human Rights has become the accepted general articulation of recognized human rights." FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 701, introductory note at 143 (Tentative Draft No. 3 1982).

32. Universal Declaration of Human Rights, *supra* note 30, art. 2 (emphasis added).

33. *Id.* art. 7.

34. *Id.* art. 14.

35. The UDHR is a guide, goal, and aspiration—not an obligation. Its terms "reflect the differing aspirations and values that had to be reconciled in order to secure wide agreement for its adoption." RIGGS & PLANO, *supra* note 26, at 242.

36. FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 701, introductory note at 138-39 (Tenative Draft No. 3 1982).

37. "Everyone has the right to life, liberty, and the security of person." UDHR, *supra* note 30, art. 3. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *Id.* art 5.

38. Unfortunately, this straightforward, logical approach seems to escape most modern human

### C. *U.N. Convention Relating to the Status of Refugees (1951)*

Asylum is intended to serve as a global remedy for human rights violations. The United Nations Convention Relating to the Status of Refugees (UNCR)[39] and the ensuing United Nations Protocol Relating to the Status of Refugees (UNPR)[40] outline the generally accepted formulations of asylum law. A refugee is one eligible for asylum in any country. The UNPR defines refugee as any person who:

> [a]s a result of . . . and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[41]

None of the U.N. human rights or refugee documents has expressly defined the terms "persecution" or "well-founded fear of persecution," but judicial and statutory interpretations of these concepts exist within countries that have adopted the UNPR definition of refugee.[42] The United Nations High Commissioner for Refugees (UNHCR) has also issued numerous documents relating to the interpretation of these terms.[43]

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rights groups. Sexual crimes are usually dismissed as cultural traits that do not involve the violation of any protected human rights. Rosen, *supra* note 2, at B5.

39. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter UNCR].

40. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter UNPR]. The UNPR eliminated both geographic and temporal restrictions contained in the original UNCR definition of refugee.

41. UNCR, *supra* note 39, art. 1A(2), 19 U.S.T. at 6261, 189 U.N.T.S. at 152. Although an asylum applicant may fully qualify under the UNPR definition of refugee, all signatory countries continue to retain their traditional sovereign power to exclude any individual from entering their borders. *See* DEBORAH E. ANKER, THE LAW OF ASYLUM IN THE UNITED STATES: A MANUAL FOR PRACTITIONERS AND ADJUDICATORS 5 (1989).

42. See infra part V.A.1. for a discussion of U.S. judicial and administrative interpretation of the concepts of "persecution" and "well-founded fear of persecution."

43. The UNHCR is an "intergovernmental organization established by the [United Nations] General Assembly to be responsible for supervising the implementation of the Convention and Protocol." Arthur C. Helton, *What is Refugee Protection?*, 2 INT'L J. REFUGEE L. 119, 121 (1990).

Not every type of illegitimate distinction listed in the UDHR appears in the UNPR. While race, religion, nationality, and political opinion appear in both documents, persecution on the basis of gender and well-founded fear of persecution on the basis of gender are not included as express categories in the UNPR definition of refugee. The initial omission of such categories is understood by many as a reflection of post-World War II thinking.[44] Their continued omission today is anachronistic at best, offensive and intolerable at worst.

### *D. The Declaration on the Elimination of Discrimination Against Women (1967)*

The Declaration on the Elimination of Discrimination Against Women (DEDAW)[45] was the first major instrument to focus exclusively on the issues of sex discrimination and women's rights. DEDAW calls for all U.N. Member Nations to "abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women."[46] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[47] was subsequently enacted to put into effect the recommendations of DEDAW and create legally binding obligations upon signatory nations.[48]

Unfortunately, some western States have made several reservations to the CEDAW;[49] many of these reservations appear to be based upon the

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The UNHCR has promulgated a handbook designed to "offer guidance to governments . . . relating to procedures and criteria for determining refugee status." OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1980).

44. *See infra* text accompanying notes 171-72.

45. *Declaration on the Elimination of Discrimination Against Women*, G.A. Res. 2263, U.N. GAOR, 22nd Sess., Agenda Item 53, U.N. Doc. A/RES/2263 (1967) [hereinafter DEDAW].

46. *Id.* art. 2.

47. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33 (1980) [hereinafter CEDAW].

CEDAW defines sex discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field of public life." *Id.* art. 1.

48. NATALIE K. HEVENER, INTERNATIONAL LAW AND THE STATUS OF WOMEN 215 (1983).

49. HUMAN RIGHTS IN A CHANGING EAST-WEST PERSPECTIVE 350 (Allan Rosas & Jan Hegleson eds., 1990); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L. L. 613, 633 (1991).

concept of a patriarchal relationship between men and women.[50] Hilary Charlesworth has noted that CEDAW establishes much weaker implementation procedures than other U.N. human rights conventions, such as those related to racial discrimination and political and civil rights, and CEDAW has been subject to many more reservations than comparable human rights documents.[51] The continued existence of reservations to CEDAW most certainly deteriorates the protection of the human rights of women globally.[52]

## IV. ASYLUM LAW OF THE UNITED STATES

### *A. Use of the United States as an Exemplar*

The United States has adopted and codified the U.N. framework of asylum law, as have most other western nations. The problems the United States currently faces with respect to its asylum law, including interpretation and application of the statutory language drafted by the United Nations, are common to most western nations. Therefore, the United States is used as a model for this paper. Any problems identified in the current scheme of U.S. asylum law probably have their counterparts in the laws of other nations.

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50. HUMAN RIGHTS IN A CHANGING EAST-WEST PERSPECTIVE, *supra* note 49, at 350. The editors argue that all such reservations to the CEDAW should be immediately withdrawn. *Id.* at 356; Charlesworth et al., *supra* note 49, at 633.

51. Charlesworth et al., *supra* note 49, at 632.

> The pattern of reservations to [CEDAW] underlines the inadequacy of the present normative structure of international law. The international community is prepared to formally acknowledge the considerable problems of inequality faced by women, but only, it seems, if individual States are not required as a result to alter patriarchal practices that subordinate women.

*Id.* at 633.

52. *See* Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811 (1990). The author points out that domestic governments "love" international law, despite the intuitive belief that international law places restraints upon the power of domestic government. Actually, international law confirms, legitimizes, and reinforces more domestic power than it denies. Similarly, reservations to the CEDAW constitute an implicit recognition by the international community that the reserving countries have the authority to continue to mistreat their female citizens. *Id.*

### *B. The Historical Background of U.S. Asylum Law*

The traditional concept of national sovereignty includes the government's right to control the flow of non-citizens into the country.[53] Sovereign nations have the right to prohibit all non-citizens from entering their borders and to establish any conditions to or limitations upon their admission.[54]

Throughout most of the nineteenth century, the United States maintained an "open door" policy towards immigration. Indeed, for the first hundred years of its existence, the United States freely encouraged foreign immigration as it sought to populate and exploit the resources of a vast continent.[55] In comparison, the various acts of Congress since 1916 evince a policy of progressively restricting immigration, largely a result of political pressure to protect the U.S. labor force from increased competition.[56]

The law of asylum, a subset of immigration law, is similarly influenced by political pressures.[57] Until relatively recently the law of asylum in the United States was aimed strictly at protecting refugees fleeing Communist and Marxist regimes.[58] This Cold War ideology persisted until Congress enacted the Refugee Act of 1980, adopting the non-ideological UNPR definition of refugee.[59] Unfortunately, regional bias still persists in the

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53. Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

54. *Id.* It is "an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty . . . to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." *Id.*

55. VERNON M. BRIGGS, IMMIGRATION POLICY AND THE AMERICAN LABOR FORCE 23-27 (1984).

56. Karnuth v. United States *ex rel.* Albro, 279 U.S. 231, 243 (1929). *See generally* BRIGGS, *supra* note 55. Briggs argues that organized labor has pushed through Congress many of the U.S. immigration law's qualitative and quantitative restrictions in order to protect job supply. He cites rigorous union lobbying for immigration changes that restrict the inflow of aliens. *Id. See also* BARBARA M. YARNOLD, UNITED STATES REFUGEE AND ASYLUM POLICY 40 (1988) (nativist groups, who have adopted a "mentality of exclusion" towards immigrants, have influenced immigration policy through lobbying).

57. Roy Petty, *Asylum: The Faces Behind the Figures,* CHI. TRIB., Aug. 7, 1993, (Perspectives) at 15. Restrictive new changes for asylum law are being pushed by a "publicity juggernaut [of] anti-immigrant groups, feeding on Americans' economic woes . . . ." *Id.*

58. GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 85 (1986) (noting that the "ideological bias [protecting those fleeing Communist regimes] which was built into the [law of asylum] . . . made no provision for those fleeing other sorts of tyranny").

59. The definition of "refugee" appears at 8 U.S.C. § 1101(a)(42)(A) (1988).

Congressional hearings and reports on the Refugee Act of 1980 show that Congress intended to bring U.S. immigration law application into conformity with the UNPR definition of refugee (a non-

adjudicative stages of the process.[60] Country of origin is still the most predictive factor in the success of an asylum claim in the United States.[61] Apparently, with respect to asylum law, administrative adjudicators cannot rid themselves of their Cold War mentality, even though Congress did so in 1980.

### C. *The Attorney General and the INS*

The remedy of asylum is committed by Congress to the discretion of the Attorney General and to the Immigration and Naturalization Service (INS) as her agent.[62] The rules and regulations of the INS are accorded great deference by the courts,[63] as are its interpretations of the immigration laws.[64] Even those who qualify as refugees under the U.S. definition, which is now identical to the UNPR definition, may be denied asylum. "[T]he Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee."[65]

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ideological standard). JAMES SILK, U.S. COMM. FOR REFUGEES: DESPITE A GENEROUS SPIRIT, DENYING ASYLUM IN THE UNITED STATES 4, 7 (Virginia Hamilton ed., 1986).

Courts have also taken notice of the Congressional intent to make U.S. asylum law consistent with the U.S. tradition of aiding those fleeing persecution. "Consistent with this country's long-standing policy of providing refuge to aliens fleeing their homelands because of persecution, Congress, in § 208(a) of the Refugee Act of 1980, 8 U.S.C. § 1158(a) (1982), directed the Attorney General to promulgate regulations under which an alien may apply for asylum." Ramos v. Thornburgh, 732 F. Supp. 696, 697 n.1 (E.D. Tex. 1989), *citing* Diaz v. INS, 648 F. Supp. 638, 646 (E.D. Cal. 1986).

Additionally, when passing the 1980 amendments, Congress wanted to "insure a fair and workable asylum policy which [was] consistent with this country's tradition of welcoming the oppressed of other nations." H.R. REP. NO. 608, 96th Cong., 1st Sess. 17 (1979).

60. *See infra* text accompanying notes 117-21.

61. *See infra* text accompanying notes 119-20.

62. 8 U.S.C. § 1103 (1988); INS v. Elias-Zacharias, 112 S.Ct. 812, 815 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987); Campos-Guardado v. INS, 809 F.2d 285, 288 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987).

63. Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972). Rules and regulations must be upheld if founded on considerations rationally related to the statute. *Id.* at 748.

64. Ramos v. Thornburgh, 732 F. Supp. 696, 701 (E.D. Texas 1989) (narrow judicial review and deference to INS decisions of statutory interpretation are appropriate because the INS "must excercise especially sensitive political functions that implicate questions of foreign relations"); Campos-Guardado v. INS, 809 F.2d at 288 (5th Cir. 1987) (courts accord deference to interpretation of immigration statutes unless there is a "compelling indication" that the INS is wrong).

65. Cardoza-Fonseca, 480 U.S. at 428 n.5.

## *D. The Statutory Law of the United States*

### *1. The Many Types of Immigration*

In the United States, immigration law includes "all laws, conventions, and treaties of the U.S. relating to the immigration, exclusion, deportation, or expulsion of aliens."[66] The immigration laws of the United States allocate visas to aliens based upon three broad preference categories, as established by the Immigration Act of 1990.[67] The three preference categories of immigration are family-sponsored, employment-based, and diversity.[68] Each preference category is statutorily allotted a specified number of visas to be awarded in any fiscal year.[69] Applications for visas within each category are considered in the order in which they are filed with the Attorney General.[70] The preference categories serve to promote the family unit,[71] to benefit the U.S. economy, culture, and social welfare,[72] and to fairly distribute visas across the many regions of the global community.

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66. 8 U.S.C. § 1101(17) (1988).

67. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4798 (codified as amended in scattered sections of 8 U.S.C.).

68. *Id.*

69. The family-sponsored category is allotted 465,000 visas annually for fiscal years 1992-1994 and 480,000 visas annually beginning in fiscal year 1995. This cap can be increased by the number of visas not used in the previous fiscal year from the employment-based allotment and can be increased in the event of unusually high demand for visas. Family-sponsored immigrants include immediate relatives of U.S. citizens, unmarried sons and daughters of U.S. citizens (who are not immediate relatives because they are over 21 years of age), spouses and unmarried sons and daughters of permanent residents, married sons and daughters of citizens, and brothers and sisters of adult U.S. citizens. 8 U.S.C. §§ 1151(b)(2), 1153(a) (Supp. V 1993).

The employment-based category is allotted 140,000 visas annually. This cap can be increased by the number of visas not used in the previous fiscal year from the family-sponsored allotment. This category includes priority workers (those with "extraordinary ability"), aliens with advanced degrees, those with offers of permanent employment, special immigrants, and aliens with substantial investments in new commercial enterprises within the United States. 8 U.S.C. §§ 1151(d), 1153(b) (Supp. V 1993).

The diversity category is allotted 55,000 visas annually, beginning in fiscal year 1995. This category targets those with at least a high school education or two years of job training who come from countries that previously received a disparately low percentage of U.S. visas. This category is remedial in effect. 8 U.S.C. §§ 1151(a)(3), 1153(c) (Supp. V 1993).

70. 8 U.S.C. § 1153(e)(1) (Supp. V 1993). "Immigrant visas made available under subsection (a) or (b) of this section shall be issued to eligible immigrants in the order in which a petition on behalf of each such immigrant is filed with the Attorney General . . . as provided in section 1154(a) of this title." *Id.*

71. Ramirez v. INS, 338 F. Supp. 398, 401 (N.D. Ill. 1972).

72. Yau v. Dist. Director INS, 293 F. Supp. 717, 722 (C.D. Cal. 1968).

Refugees and asylees are specifically exempted from this preference system. "Refugee" applicants are those aliens who apply for entry to the United States while still in a country other than the United States.[73] Refugee applicants must establish that they meet the U.S. definition of "refugee."[74] Alternatively, aliens already within the borders of the United States can apply for the remedy of "asylum."[75] Asylum applicants, like refugee applicants, must establish that they meet the U.S. definition of "refugee." The refugee and asylum categories within U.S. asylum law fulfill the United States' duty under the International Refugee Organization of the United Nations to provide a remedy for human rights violations occurring in other countries.[76]

The President, with the "appropriate consultation" of Congress, designates the number of refugees to be admitted each fiscal year.[77] In contrast, there is no numerical limit on the number of persons who can receive asylum status.[78] Refugee applications are processed in INS overseas offices or designated U.S. consulates. An application for asylum is usually filed in the context of a deportation and exclusion proceeding held before an immigration judge, but may be administratively filed with the INS.[79] While the number of people who can receive refugee status is limited by the statutory cap set by the President, there is no similar numerical limit placed on the number of asylees. All grants of asylum status are left to the discretion of the judicial or administrative decisionmaker.[80]

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73. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 6-8 (1992).

74. *See infra* text accompanying notes 81-82 for a discussion of the U.S. definition of refugee.

75. FRAGOMEN & BELL, *supra* note 73, at 6-7.

76. Rosenberg v. Yee Chien Woo, 402 U.S. 49, 52 (1971); Chen Fan Kwok v. INS, 392 U.S. 206, 207 n.5 (1968).

77. 8 U.S.C. § 1157(a)(2) (1988). "Appropriate consultation" requires Cabinet-level representatives of the President to appear before the Judiciary Committees of the House and Senate to review refugee issues. 8 U.S.C. § 1157(e) (1988).

78. There are numerical limits, however, imposed on the number of persons granted asylum who can adjust to permanent resident status after one year of asylum. Currently, only 10,000 asylees can adjust each year and any application can be denied as a matter of discretion. 8 U.S.C. § 1159(b) (1988). In contrast, there is no limitation on the number of refugees who can adjust annually and their application cannot be denied as a matter of discretion. 8 U.S.C. § 1159(a)(1) (1988).

79. 8 U.S.C. § 1158(a) (1988); 8 C.F.R. § 208.2 (1994).

80. Note, however, that in the context of a judicial deportation and exclusion proceeding, the alien's application for asylum is also treated as an application for the alternative remedy of "withholding deportation." 8 C.F.R. § 208.3(b) (1994); *see also* 8 U.S.C. § 1153(h) (Supp. V 1993). To win a grant withholding deportation, applicants must show a "clear probability" that they will be persecuted if

*2. The U.S. Definition of Refugee*

The U.S. definition of refugee no longer contains ideological or geographic bias and is substantially similar to the definition recommended by the UNPR. A refugee is one who is eligible for the asylum remedy and is defined as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[81]

Note that this definition, like the UNPR definition, does not expressly include categories for persecution or well-founded fear of persecution on the basis of gender.[82]

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returned to their country of origin. INS v. Stevic, 467 U.S. 407, 430 (1984). Upon making such a showing, the grant is mandatory, as opposed to the discretionary grant of asylum. *See* Cardoza-Fonseca, 480 U.S. at 443. But, the grant of withholding deportation only relates to the country in which the alien would face a "clear probability" of persecution; deportation to any other country is not barred.

The difference in the amount of discretion given to judges in the withholding of deportation and the asylum remedies seems to make sense. The applicant for asylum need only show a "reasonable probability" of facing persecution if returned to her home country. Therefore, the asylum applicant who can establish a "reasonable probability" of facing persecution if returned to her country of origin does not face as much danger as the withholding deportation applicant who can establish a "clear probability" of facing persecution. In the former, the immigration judge should be, and is allowed to, consider outside factors, such as foreign policy concerns and the manner in which the applicant arrived in the United States. *See, e.g.*, In re Shirdel, 19 I. & N. 33, 38 (1984). In the latter, the grant of protection should be and is mandatory.

81. 8 U.S.C. § 1101(a)(42)(A) (1988).

82. See *supra* text accompanying notes 40-41 for a discussion of the UNPR definition of "refugee."

## V. PROBLEMS ENCOUNTERED BY WOMEN APPLYING FOR ASYLUM IN THE UNITED STATES

### *A. The Difficulties of Proving Persecution or Well-Founded Fear of Persecution*[83]

#### *1. Defining Persecution and Well-Founded Fear*

##### *a. Persecution*

In order to bring a successful claim for asylum, an applicant must show that she has left her country of origin or fears returning to her country of origin due to "persecution" or a "well-founded fear" of persecution on account of one or more of the specific reasons set forth in the statute. A problem common to all asylum applicants is the lack of an accepted and authoritative definition of these concepts.[84] No definitions are included in the UNCR or UNPR. Thus, there are no definitions included in the U.S. statute, which simply reproduces the UNPR. Although scholars, practitioners, and the U.S. courts have provided some instruction on this subject, their efforts often result in the exclusion of legitimately persecuted females from access to the asylum remedy.

The UNHCR has stated that persecution, as used in asylum law, is generally considered a "threat to life or freedom . . . [or any] other serious violations of human rights."[85] Usually, a governmental agent must issue the threat or cause the violation to qualify the action as persecution. But in some circumstances, actions by the local populace may also constitute grounds for asylum.[86]

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83. Proving the existence of persecution or a well-founded fear of persecution is only half the battle in winning a claim for asylum. The applicant must connect her persecution or well-founded fear of persecution to one of the five identified grounds for persecution—race, nationality, religion, political opinion, or membership in a social group. The lack of a separate category for gender often proves fatal to an asylum claim based upon sexual abuse committed due to the applicant's gender (as opposed to her political opinion, religion, etc.).

In the United States, gender is not a category. Typically, women are admitted on the traditional basis of persecution for their political views. Clyde Farnsworth, *Anti-Woman Bias May Bring Asylum*, N.Y. TIMES, Feb. 2, 1993, at A8.

84. YARNOLD, *supra* note 56, at 33.

85. OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 43, at 14.

86. *See supra* text accompanying notes 23-25.

In the United States, courts have articulated many definitions of persecution. For example, the Supreme Court has held that the term persecution includes more than just State-sponsored restrictions on or threats to life, liberty, or freedom.[87] In 1991, the Seventh Circuit held that persecution is "punishment for political, religious or other reasons that this country does not recognize as legitimate."[88] One expert in the field, T. Alexander Aleinikoff, proposes a human rights approach for defining persecution. He maintains that persecution exists whenever there is a violation of fundamental human rights or serious harm inflicted as retribution for the exercise of a fundamental human right.[89]

*b. Well-Founded Fear*

The concept of "well-founded fear" is important in the law of asylum because it may allow the grant of asylum to an applicant who has not yet suffered from persecution, but fears she is at risk.[90] The now-accepted definition appears in *INS v. Stevic*.[91] There, the Supreme Court equated the existence of a well-founded fear of persecution with a "reasonable probability" that an asylum applicant may suffer from persecution in her homeland.[92] This definition now appears in the Code of Federal Regulations:

> An applicant shall be found to have a well-founded fear of persecution if he can establish first, that he has fear of persecution in his country of nationality or last habitual residence . . . second, that there is a reasonable possibility of actually suffering such persecution if he were to return to that country, and third, that he is

87. INS v. Stevic, 467 U.S. 407, 428 n.22 (1984).

88. Osaghae v. INS, 942 F.2d 1160, 1163 (7th Cir. 1991) (citing Zalega v. INS, 916 F.2d 1257, 1260 (7th Cir. 1990)).

89. T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 21-22 (1991).

90. The use of the well-founded fear category applies only to fears of persecution and not to fears of ongoing general conditions of unrest. Limsico v. INS, 951 F.2d 210, 212 (9th Cir. 1991).

91. *Stevic*, 467 U.S. at 418.

92. *Id.* at 424-25. Also, the Ninth Circuit has held that a one in ten chance of being killed because of political opinion meets the statutory test of eligibility for asylum due to a well-founded fear of persecution due to political opinion. Montecino v. INS., 915 F.2d 518, 520 (9th Cir. 1990) (fear of ex-soldier that he would be killed by guerrillas that the government could not control).

> unable or unwilling to return to or avail himself of the protection of that country because of such fear.[93]

This definition contains both subjective and objective components. To satisfy the subjective component, the applicant must show that she genuinely suffers from a fear of persecution in her country of origin. To satisfy the objective component, she must establish that her fear is well-founded. The finders of fact in an asylum proceeding, in determining this latter component, look to the objective circumstances that give rise to the fear, judging whether the applicant is reacting rationally and reasonably.[94] The applicant bears the burden of proof for both components. She must present sufficiently detailed evidence to establish that she is suffering from a well-founded fear of persecution.[95]

### 2. *Physical Abuses of Women as Persecution*

The forms of physical abuse experienced by women, such as rape, sexual assault, coerced prostitution, domestic violence, and genital mutilation,[96] fall safely within the limits of the definition of persecution, using any of the formulations listed above. When the State is actively involved in the commission of such an abuse, there is little doubt the victim endures harm or suffering from a governmental restriction on life, liberty, and fundamental human rights. Further, the reason for the infliction of harm upon the victim—the victim's sex—must be recognized by the United States

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93. 8 C.F.R. § 208.13(b)(2) (1994).

94. *See, e.g.*, Montecino, 915 F.2d at 521.

In the case In Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (1987), the court outlined a four-prong test for determining the objective component for a well-founded fear of persecution:

> 1. the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
> 2. the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic;
> 3. the persecutor has the capability of punishing the alien; and
> 4. the persecutor has the inclination to punish the alien.

*Id.*

95. *See, e.g.*, Sivaainkaran v. INS, 972 F.2d 161, 163 (7th Cir. 1992) (applicant must present specific, detailed facts that would show a good reason to fear being singled out); Castaneda-Hernandez v. INS, 826 F.2d 1526, 1528-31 (6th Cir. 1987) (petitioner for asylum need not produce evidence of particular, individual threats by authorities—must only prove that similar members of society are routinely subject to persecution, giving rise to a well-founded fear).

96. *See supra* text accompanying notes 8-25.

as illegitimate. Finally, as discussed above, physical acts of violence against women constitute human rights violations.

Even if the subject actions are not committed by government representatives, there may still be grounds for proving persecution. Any action which, if committed by the government, would constitute persecution, can sometimes serve as grounds for persecution when committed by the local populace. This is true when the government tolerates or cannot or will not provide protection from the action; the government, in its approval or apathy, is deemed an accomplice to the offensive action.[97]

*3. Physical Abuses of Women Leading to Well-Founded Fears*

The existence of widespread physical abuse of women committed or permitted by the government in any country should provide sufficient evidence that any woman fleeing that country suffers a well-founded fear of persecution. The commission of actual human rights violations against an asylum applicant is not a prerequisite to the existence of a well-founded fear.[98] For example, anyone of Jewish descent fleeing Nazi Germany during World War II and applying for asylum would unquestionably have held a well-founded fear of persecution even if the applicant had not yet suffered in a concentration camp. Likewise, a female asylum applicant need not actually have suffered from physical abuse at the hands of the government before bringing a claim for asylum in the United States. The use of the well-founded fear category provides a powerful tool for the prevention of human rights abuses; female asylum applicants suffering from gender-based persecution should receive the benefits of this protection.

*4. Difficulties in Convincing the Finder of Fact*

Although physical abuses suffered by women at the hands of government seem to fit neatly into any of the established definitions of persecution, female asylum applicants encounter sometimes insurmountable hurdles when bringing claims for asylum in the United States based upon

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97. ARTHUR C. HELTON, MANUAL ON REPRESENTING ASYLUM APPLICANTS 9 (1984); OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, *supra* note 43, at 14.

98. See *supra* text accompanying notes 90-95 for a discussion of the definition of "well-founded fear."

gender-specific acts of violence. Similarly, although an applicant would seem to suffer from a well-founded fear of persecution when fleeing a country in which the government permits widespread physical abuse of women, in practice she is often effectively denied relief due to the procedural demands of the U.S. adjudicative system.

When an applicant for asylum presents her case, she must convince the finder of fact that she indeed suffered from persecution or that she has a well-founded fear of suffering from persecution sometime in the future. Documentary evidence of rape, domestic abuse, or sexual torture is often difficult to produce.[99] Official documentary evidence may not even exist if the government has participated in the persecution or attempted to cover it up.[100] Alternatively, persecution of females may be deemed a cultural norm and not subject to State action. Under any of these circumstances, the applicant is forced to rely only upon her own testimony, which often proves insufficient.

Female victims of sexual torture or abuse may be reluctant to speak about their experiences, especially to a male interviewer.[101] This reluctance is exacerbated by the cultural stigma and embarrassment that attach to sexual crimes in many countries where women are shunned for "failure" to protect their virginity or marital dignity.[102] A distrust of authorities, created by the applicant's persecution in her home country, may also prevent openness in the asylum application process. Finally, most applicants do not speak English and are unfamiliar with the laws and customs of the United States.[103] All the foregoing factors lead to one

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99. MARTIN *supra* note 4, at 19. The lack of documentary evidence is sometimes the result of a conspiracy in which the government participates to protect the persecutors from punishment in their home countries and sometimes the result of the victim's fear of testifying as to her experience.

> Prosecuting those who attack or exploit women has proved to be difficult in many situations. The women are often reluctant to talk about the attacks and to go through the emotional and sometimes threatening process of identifying and testifying against the culprits. The perpetrators may be individuals in positions of authority, and those representing the interests of the women are unable or unwilling to bring them to account.

*Id.*

100. *Id.*

101. *Id.* at 26 (arguing for specially-trained female officials in the asylum-screening process to assist female applicants who have suffered sexual abuses).

102. *Id.*; *cf.* Stephen R. Couch, *Research on Wife Abuse: A Scan of Literature*, *in* ABUSE OF WOMEN: LEGISLATION, REPORTING, AND PREVENTION 1 (Joseph J. Costa ed., 1983).

103. Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950).

result: the female applying for asylum due to actual gender-based violence is not a very credible or persuasive witness.

Many of the same problems are encountered, and possibly exacerbated, when an applicant is testifying to her well-founded fear of persecution. To satisfy the objective test of a well-founded fear of persecution, there must be "a showing, by credible, direct, and specific evidence in the record, of facts that would support a reasonable fear of persecution."[104] Documentary evidence of persecution generally occurring throughout the applicant's country of origin may be more accessible than evidence of a specific act of persecution against the applicant. But if documentary evidence is not available the applicant's testimony alone is the basis of any determination. Again, problems arise regarding an applicant's willingness to speak openly, fear of speaking to authorities, and ability to effectively operate within the U.S. adjudicatory framework.[105]

President Clinton has proposed restrictive amendments to the immigration laws of the United States, which may be an aggravation to the problems faced by an applicant as discussed. These include an expedited exclusion process of screening applicants at the borders with minimal procedural safeguards.[106] One court has addressed this type of reform before. An administrative practice of informally screening asylum applications for merit was the subject of *Ramos v. Thornburgh*.[107] The court struck down the practice because it might "deter the assertion of novel claims to political asylum, thereby ossifying the field of asylum law, . . . an area where the law is admittedly unsettled . . . [and] penalizes asylum applicants whose persecution may be different, but no less compelling than that endured by the average refugee."[108]

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104. Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986).

105. Estrada-Posadas v. INS, 924 F.2d 916, 918-19 (9th Cir. 1991) (applicant's testimony alone can suffice to establish a well-founded fear of persecution, but only if it is "credible, persuasive, and specific").

106. Deborah Sontag, *Asking for Asylum in U.S., Women Tread New Territory*, N.Y. TIMES, Sept. 27, 1993, at A1, A13.

107. Ramos v. Thornburgh, 732 F. Supp. 696, 703 (E.D. Tex. 1989).

108. *Id.* at 703-04.

### *B. The Interpretation of Politically Motivated Sexual Abuse as Random Acts of Violence*

When a woman is persecuted "on account of" her political opinion, she has a legitimate claim to asylum under the current U.S. law. Her persecution is based upon one of the five categories of UNPR definition of refugee, that of "political opinion." Unfortunately, courts have consistently characterized rape and sexual torture of women as mere random acts of violence, not entitled to the remedy of asylum, even when committed by government representatives.[109] Although U.S. courts are not hesitant to infer that torture of a male dissident by the government is politically motivated, they are not willing to make the same inferences when the persecution for a political opinion takes the form of rape or sexual abuse of a female dissident by the government. "As it works now, immigration law only recognizes rape as persecution for political views if the rapist says, 'I'm raping you because of your political views.'"[110]

An example of the mischaracterization of sexual crimes that commonly occurs in U.S. asylum law was documented by Amnesty International.[111] In 1983, Catalina Mejia was raped by an El Salvadoran soldier and accused of being a guerrilla. Her home was searched and ransacked. Subsequently, she was detained two more times by soldiers. She fled to the United States in 1985 and requested asylum due to persecution on the grounds of political opinion. The immigration judge denied her petition in August 1988, holding that the act of rape was not persecution as defined in U.S. law, but simply an act of random violence committed against a convenient female by a soldier seeking to fulfill his own self-interest.[112]

The asylum claims of women are disadvantaged by this line of reasoning. The participation in the rape by a soldier, a representative of the government, is indisputable proof of government involvement. The

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109. AMNESTY INT'L, *supra* note 14, at 49.

110. Sontag, *supra* note 106, at A13. *But see* Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987). Here, the court construed the rape and beating of a woman by a military sergeant as the rapist's assertion that she held the "political opinion" that men should not dominate women. *Id.* Her flight after the rape demonstrated the existence of her political opinion. *Id.* at 1435.

The court, in granting the petition for asylum, did reach the correct result, but it was forced to resort to a legal fiction. The most likely reason the sergeant was raping the victim was *simply because she was a woman*, not because she held any legitimate political opinion.

111. AMNESTY INT'L, *supra* note 14, at 49.

112. *Id.*

purposes of the rape, search, ransack, and detentions were to intimidate a suspected, but unconvicted, government subversive; there was an identifiable government purpose for the action. Nonetheless, the court insisted upon characterizing the events as random acts of violence.[113]

### C. *The Impact of Discrimination on Asylum Law*

#### *1. The Effects of Gender Discrimination on the Law*

The substance and application of the asylum laws suffer the effects of gender discrimination. As a result, female asylum applicants are denied fair and effective relief from the persecution which the asylum remedy is intended to provide. The following discussion details some possible causes of gender discrimination in the law in general and in the asylum laws in particular.

Most western theories of law subscribe to the belief that law is an "autonomous entity," independent of societal influences, and capable of achieving both neutrality and objectivity.[114] Critical theorists frequently challenge this "Rule of Law" assumption, arguing that law is inseparable from its political, cultural, economic, and historical context, and "that the law functions as a system of beliefs that make social, political and economic inequalities appear natural."[115] Many scholars have pointed out that U.S. immigration policy and its application are influenced by both racial and national discrimination, which is so prevalent in U.S. society.[116] The rules and judicial determinations in the asylum process are made within a social context of racial animus and ethnocentric fears. Thus, it should come as no surprise to learn that the products of this social context are discriminatory along racial and ethnic lines.

U.S. asylum law is a creation of Congress and, as a result, "humanitarian motives have been almost always overwhelmed by political calculation. Thus it is not accidental that over 95 percent of all [asylees

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113. Would the court have reached the same result if a male applicant based his asylum claim upon sexual assault by soldiers accusing him of government subversion?

114. *See generally* NEAL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); J.W. HARRIS, LEGAL PHILOSOPHIES (1980).

115. Charlesworth et al., *supra* note 49, at 613.

116. *See, e.g.*, BARBARA M. YARNOLD, REFUGEES WITHOUT REFUGE: FORMATION AND FAILED IMPLEMENTATION OF U.S. POLITICAL ASYLUM POLICY IN THE 1980'S, at 24 (1990).

admitted between 1948 and 1986] . . . involved individuals fleeing Marxist regimes."[117] Although the Refugee Act of 1980 claimed to do away with the statutory discrimination favoring asylum applicants fleeing communist countries and to bring U.S. asylum law into line with the 1967 UNPR, the ideological bias still persists.[118] Indeed, country of origin is still the most important predictor of outcome in asylum applications.[119] Fully thirty-three percent of all applications for asylum are approved when the applicant originates from a country hostile to the United States, compared to only four percent for applicants who have fled non-hostile countries.[120] Continuing racial and ethnic biases clearly have affected the application and administration of U.S. asylum law.[121]

Similarly, U.S. asylum law reflects the pervasive gender discrimination and paternalistic stereotypes present in U.S. society and politics.[122] Susan Forbes Martin, referring to the administrative framework of asylum law, has noted that "Western agencies sometimes imposed their concept of what traditional women's roles were or should be, even romanticizing the dependency of women."[123] The characterization of politically motivated

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117. LOESCHER & SCANLAN, *supra* note 58, at 213.

118. *See* DAVID P. FORSYTHE, HUMAN RIGHTS AND U.S. FOREIGN POLICY: CONGRESS RECONSIDERED 68-72 (1988).

119. YARNOLD, *supra* note 116, at 92-93.

In order to avoid potential embarrassment, the U.S. government sometimes characterizes political asylum-seekers as economic refugees, unqualified for asylum, when the applicant comes from a country whose government the United States officially supports. ROBIN LORENTZEN, WOMEN IN THE SANCTUARY MOVEMENT 12 (1991).

120. YARNOLD, *supra* note 116, at 93.

121. However, the effects of ideological bias may be lessening. Congress has recognized the need to combat continuing Cold War ideology and has started to take some remedial action. For example, the Immigration Act of 1990 provides for the institution of an immigration preference category of "diversity," which allocates visas to those countries that in the past were deprived of their proportional share of visas due to ideological bias. *See supra* text accompanying notes 67-72.

122. *See generally* Michael P. Brady, *Asylum Adjudication: No Place for the INS*, 20 COLUM. HUM. RTS. L. REV. 129 (1988) (noting numerous criticisms of the ideological biases affecting U.S. asylum law.) See also *infra* text accompanying notes 129-33 for a discussion of the influences of the public-private distinction on international law.

123. MARTIN, *supra* note 4, at 13. The failure to effectively implement U.S. asylum policy is consistent with the history of other human rights legislation in the United States. Although Congress has passed considerable human rights legislation, Congress has been unable to persuade the executive branch to comply in the implementation and execution stages. FORSYTHE, *supra* note 118, at 51. "During the 1980s, Congress has been neither attentive enough nor unified enough to see that general legislation on human rights was implemented." *Id.*

In addition to the recalcitrance of the executive branch, its insistence upon promoting gender stereotypes is worsened by the lack of substantial judicial review. "The danger of arbitrary adjudication is exacerbated by the limited availability of judicial review of INS decisions." David Moyce, Note,

sexual abuse as random acts of violence, discussed above, is possibly one result of the discriminatory application and administration of U.S. asylum law. The tendency of U.S. asylum law to foster gender discrimination directly competes with the struggle of refugee women to improve conditions and become independent in their own countries.[124]

### 2. *The Public-Private Distinction and Its Influence on Asylum Law*

The discriminatory substantive provisions in the asylum laws and the discriminatory application of those laws are arguably typical of the legal system in general. Feminist scholars often attempt to explain the existence of widespread gender discrimination in the legal system through an analysis utilizing the public-private distinction.

"One explanation feminist scholars offer for the dominance of men and the male voice in all areas of power and authority in the western liberal tradition is that a dichotomy is drawn between the public sphere and the private or domestic one." [125] The public sphere, where power and authority are exercised, is considered the natural province of men, under male control, and serving male interests. It encompasses career, politics, law, economics, intellectual and cultural life. In contrast, the private sphere, considered the exclusive and appropriate domain of females, includes home, hearth, and children.[126] The two spheres accord asymmetrical value to their respective participants: "greater significance is attached to the public, male world than to the private, female one."[127] The public-private distinction, and its perpetuation and acceptance as somehow naturally occurring, has supported men's continued dominance of women in all areas.[128]

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*Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CALIF. L. REV. 1747, 1753 (1986).

124. MARTIN, *supra* note 4, at 13.

125. Charlesworth et al., *supra* note 49, at 626.

126. *Id.* Society has attached greater value to the public sphere and, therefore, the law usually operates there. *Id.*

There is little overlap between the two spheres. Any woman who attempts to enter the public sphere risks losing her "womanliness." *See* B. HARRISON, SEPARATE SPHERES: THE OPPOSITION TO WOMEN'S SUFFRAGE IN BRITAIN 70-71 (1978) (arguing the dangers of women participating in politics).

127. Charlesworth et al., *supra* note 49, at 626.

128. *Id.*

The law, both domestic and global, has always operated primarily in the public domain.[129] Accordingly, global law-making and policy-making organizations include very few women in positions of power.[130] The international legal regime therefore represents a male perspective and, when combined with similar patterns occurring domestically, ensures the continuation of male domination globally.[131] Leading scholars have observed that "both the structures of international lawmaking and the content of the rules of international law privilege men; if women's interests are acknowledged at all, they are marginalized. International law is a thoroughly gendered system."[132] Further, "the definition of certain principles of international law rests on and reproduces the public-private distinction. It thus privileges the male world view and supports male dominance in the international legal order."[133]

One manifestation of the gendered system of international law is visible in the impoverished human rights protection afforded to women, relative to men. One commentator has noted that sex-specific violence and discrimination has "never been treated with the same seriousness as other human rights abuses . . . . If a person is murdered because of his or her politics, the world justifiably responds with outrage. But if a person is beaten or allowed to die because she is female, the world dismisses it as 'cultural tradition.'"[134]

When considering questions of human rights protection, the categorization of an action as public or private is analytically helpful and may, in some instances, even prove determinative. For example, national governments often fail to adequately protect women from domestic abuse;[135] no law proscribing domestic abuse exists, or else existing

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129. *Id.* at 627.

130. *Id.* at 622-23.

131. *Id.* at 621.

132. *Id.* at 614-15. "By challenging the nature and operation of international law and its context, feminist legal theory can contribute to the progressive development of international law." *Id.*

133. *Id.* at 627.

134. Lori Heise, *Crimes of Gender*, WORLD WATCH, Mar./Apr. 1989, at 13..

135. *See* WILLIAM A. STACEY AND ANSON SHUPE, THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA 153 (1983); Margaret Martin, *Battered Women*, *in* THE VIOLENT FAMILY: VICTIMIZATION OF WOMEN, CHILDREN AND ELDERS 63, 82 (Nancy Hutchings ed., 1988).

Likewise, in the United States, protection from the crime of rape suffered from the debilitating effects of the public-private distinction. Until scholars and activists successfully characterized rape as an act of violence, as opposed to an act of sexual passion, U.S. courts afforded little effective protection from rape. Acts of sexual passion take place in the private realm, while acts of violence take place in

proscriptive laws are not actively enforced. Analysis using the public-private distinction offers some insight into this phenomenon. If a man who is accused of domestic abuse "can successfully characterize [his] activity as 'private' [he may] . . . be able to discourage State action that would inhibit [his] use of power, on the basis that domestic life *should* remain more free of government regulation than other aspects of life."[136] Thus, the public-private dichotomy not only precludes female participation in lawmaking but also provides rationalizations for gender discrimination in the substantive content of law and in its enforcement.

The law of asylum is not immune from this mode of analysis.[137] The United Nations, the global organization responsible for initially designing the modern asylum law framework, was predominantly male, reflecting the fact that lawmaking is part of the public sphere. Therefore, the laws produced by the U.N. reflect primarily male concerns and function to maintain male dominance in both the global and domestic realms. Viewed from such a feminist perspective, gender-based discrimination in asylum law is not surprising. It is nearly unavoidable.

Although this view of asylum law may oversimplify the complex issues involved in the formation of internationally acceptable standards for refugee status, it does offer a useful perspective from which to begin an analysis of gender bias in the creation and enforcement of asylum law and highlights some causes of that bias. It is also necessary to recognize the dynamics of these issues before making any type of proposal for positive change.[138] Even if the public-private distinction does not fully, or even minimally,

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the public realm. Importantly, the law operates almost exclusively in the public realm. *See* Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 651 (1983); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 14-15 (1976).

136. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 321 (1993).

137. Charlesworth et al., *supra* note 49, at 626.

138. Women's studies is still seen by some scholars as an artificial separation of one segment of society from the rest, or an exercise in building self-esteem. While women's studies, like other fields, may include some of these elements, it is aimed primarily at shedding a clear analytical light on that half of humanity whose mode of life, contributions, and very existence have too often been neglected by the most serious of scholars (and legislators). Tamizul Haque, *Islam and Emancipation of Women*, *in* BERLIN CONFERENCE ON THE LAW OF THE WORLD 13 (1985).

"At bottom, feminism is a mode of analysis, a method of approaching life and politics, a way of asking questions and searching for answers, rather than a set of political conclusions about the oppression of women." Nancy Hartsock, *Feminist Theory and the Development of Revolutionary Strategy*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 56, 58 (Zillah R. Eisenstein ed., 1979).

explain the existence of gender bias in the international law of asylum,[139] the very existence of gender bias is clear. A remedy for this defect in the law is needed.

## VI. ATTEMPTS TO USE THE PARTICULAR SOCIAL GROUP CATEGORY TO ESTABLISH GROUNDS FOR ASYLUM FOR WOMEN

### *A. Introduction*

Recently, scholars and practitioners of immigration law have sought a remedy for the gender discrimination that exists within the framework of U.S. asylum law. One proposed solution has led numerous female asylum applicants to bring before the U.S. immigration courts novel claims for asylum that arguably fit within established U.S. asylum law. These claims, discussed below, maintain that women constitute a "particular social group" within the UNPR and U.S. definitions of refugee and suffer persecution due to their membership in that particular social group.[140] For the most part, this type of claim has encountered extreme resistance by U.S. courts and has usually been rejected.

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139. For a summary of criticisms of the public-private distinctions see Olsen, *supra* note 136. Olsen first notes that all actions, and not just those actions clearly related to gender, can be categorized as either public or private, depending upon the frame of reference. She argues also that the public and private categories are not valid analytic categories at all, since no actions are distinctly public or private. Finally, she claims that the private realm is dominated by those with power in the public realm, resulting in a hierarchical system of male dominance and female subservience in all areas. This challenges the idea that women control the private realm. *See also* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1107 (1985); Joyce McConnell, *Incest As Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143, 144-45 (1992); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 631-32 (1990) (criticizing the public-private distinction on both descriptive and prescriptive grounds). *See generally* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985).

140. *See, e.g.*, Karen Bower, *Recognizing Violence Against Women As Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIG. L.J. 173 (1993) (arguing to accept women as a particular social group subject to gender persecution in order to remedy gender discrimination in asylum law); *see also* David C. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 204 (1988).

### *B. The U.S. Framework of the Particular Social Group Category*

The most authoritative treatment of the particular social group category was given by the Ninth Circuit in *Sanchez-Trujillo v. INS.*[141] The court formulated a four-prong test to determine eligibility for relief under the particular social group heading, requiring the petitioner to establish: 1) the cognizability of a particular social group; 2) the petitioner's membership in the particular social group; 3) that the particular social group is targeted for persecution that is aimed at one of the group's unifying characteristics; and 4) that special circumstances exist that warrant the court to award asylum based upon particular social group grounds alone.[142] Specifically, the court stated that a particular social group is:

> a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern [to social group membership] 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.[143]

The concept of particular social group is most often defined in terms of "voluntariness," as in *Sanchez-Trujillo*. Scholars equate voluntariness with "internal cohesion."[144] Other commentators and courts have argued that particular social groups are also capable of definition in terms of "involuntary" characteristics or "external cohesion."[145] This latter view is promoted as more consistent with approaches taken elsewhere in the law of asylum,[146] allowing for the intended flexibility of the category.[147]

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141. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986).

142. *Id.* at 1574-75.

143. *Id.* at 1576.

144. *See generally* Arthur Helton, *Persecution on Account of Membership in a Social Group As a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39 (1983).

145. Matter of Acosta, 19 I. & N. Dec. 211, 233-34 (1985) (the court defined particular social group as "a group of persons all of whom share a common, immutable characteristic . . . beyond the power of the individual members to change."). *See generally* Helton, *supra* note 144.

146. In particular, courts focus on the persecutor's perceptions of what political opinions an applicant holds and not on whether the applicant actually holds certain political opinions. If the persecutor attributes certain political opinions to an individual, she is in danger regardless of her true sentiments. *See, e.g.*, Desir v. INS, 840 F.2d 723, 726-27 (9th Cir. 1988).

Arguably, since courts routinely look to the persecutor's perceptions regarding the applicant in political opinion claims, the same treatment is appropriate under the particular social group heading. If

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

The concept of external cohesion, as opposed to internal cohesion, would allow persecuted women to bring claims for asylum based upon their membership in a particular social group. Several scholars support this position.[148] The relevant particular social group is definable in many ways: "women," "women who transgress government-sanctioned religious or social mores," or "women who are targets for persecution."

None of these formulations involves a voluntary associational relationship among its members. Thus, there is no internal cohesion. There is, however, external cohesion. In each case, the persecutor has the perception that the individuals make up a particular social group. It is this perception upon which the persecutor bases the persecution. Unfortunately, the U.S. immigration courts have resisted this theory.

### D. *European and Canadian Developments Regarding Women as a Particular Social Group*

Unlike the United States, Europe and Canada appear to have accepted the assertion that women constitute a particular social group for purposes of asylum law. On April 13, 1984, the European Parliament passed a resolution stating that the concept of a particular social group can apply to groups of women who transgress moral and ethical principles in their society and, as a result, are victims of cruel and degrading treatment.[149] In 1990, the UNHCR recommended that the U.N. Executive Committee on Refugees adopt this view.[150] Decisions extending or clarifying this resolution do not yet exist in Europe.[151]

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a persecutor attributes particular social group status to an individual and intends to persecute her due to that status, she is in danger regardless of her own voluntary, self-identification with the particular social group. Therefore, courts should consider the persecutor's perceptions of a particular social group. ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS 92-93 (Jaqueline Bhabha & Geoffrey Coll eds., 1992).

147. HELTON, *supra* note 97, at 10; Helton, *supra* note 144, at 139.

148. *See, e.g.*, Neal, *supra* note 140, at 204; *cf.* Bower, *supra* note 140, at 197 (arguing for a definition of social group including both internal and external cohesion).

149. ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS, *supra* note 146, at 78; MARTIN, *supra* note 4, at 24.

150. U.N. High Commissioner for Refugees, *Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme* (1990).

151. ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS

Canadian interpretation of the particular social group category has historically been more broad than that of the United States. Internal cohesion and voluntary associational relationships are not required in the Canadian definition of a particular social group.[152] Recognized particular social groups have included voluntary associations, social classes or castes, and sexual orientation.[153] Since 1985, Canada has endorsed the view that women who face harsh or inhumane treatment for transgressing the social mores of their society may be considered a particular social group within the UNPR meaning of refugee.[154] Canadian officials even suggest considering women who protest sex-based persecution as constituting a particular social group.[155]

Recently, Canada has announced it will consider granting particular social group status to women who are persecuted solely because of their gender. Canada's Immigration and Refugee Board has issued draft guidelines on the subject which note that existing refugee caselaw is based mainly upon the experiences of male claimants.[156] The guidelines note that female-specific experiences, such as bride-burning in India, genital

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BY LEADING EXPERTS, *supra* note 146, at 78.

152. Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39, 51 (1992). Canada frequently looks to the perceptions of the persecutor when defining a particular social group. ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS, *supra* note 146, at 93. This is consistent with the Canadian approach to the political opinion category, where the persecutor's perceptions of the applicant's political opinions are crucial to any determination. *Id.* at 92. Scholars have praised the Canadian approach.

> Nevertheless, unlike the United States' approach, the Canadian courts and administrative review agencies consistently do examine the perspective of the persecutor in defining social groups and analyzing social group claims .... This approach is both more internally coherent and more adaptable to the variety of situations that arise in refugee determinations.

*Id.* at 99.

153. ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS, *supra* note 146, at 96-98. For example, Canada granted social group status to all young Salvadoran men who are targeted by both the military and guerrillas. *Id.* at 97. Additionally, Canada has recognized "single women living in a Moslem country, without the protection of a male relative" as a particular social group. *Id.* at 96; Castel, *supra* note 152, at 51. Also, Canada recognized the refugee status of a homosexual male Argentinean applicant because the law in Argentina allows the police to arrest homosexuals. ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS, *supra* note 146, at 97.

154. Peggy Curran, *Is Sexual Equality a Universal Value? Debate Rages Over Giving Refugee Status to Abused Women*, THE GAZETTE (Montreal), Feb. 15, 1993, at C1.

155. Farnsworth, *supra* note 83, at A8.

156. Mary Williams Walsh, *Battered Women as Refugees: Female Asylum-Seekers in Canada Say They're Being Persecuted in Their Homelands on the Basis of Their Sex*, L.A. TIMES, Feb. 23, 1993, at A1.

mutilation of young girls in Sudan, and stoning and decapitation of Islamic women who deviate from Islamic fundamentalist tenets, have been routinely ignored in asylum laws.[157]

Dorothy Q. Thomas, director of the Women's Rights Project of Human Rights Watch in Washington, D.C., has said of the recent Canadian developments that "Canada may be leading the world in finally realizing that women suffer violations on the basis of their sex and that the well-founded fear of those violations constitutes grounds for asylum."[158] Considering the applications of refugee women under the particular social group heading is consistent with Canada's recent approach concerning sexual orientation.[159]

### *E. Problems Encountered By Women Using the Particular Social Group Category in Claims for U.S. Asylum*

#### *1. The Insistence of U.S. Courts Upon Internal Cohesion*

U.S. courts tend to deny application of the particular social group category to broadly-based segments of society. The decision in *Sanchez-Trujillo* is typical of the U.S. approach to particular social group claims. There, the court rejected the assertion that a demographic or statistical group can qualify as a particular social group; it held that the existence of group cohesiveness, member-homogeneity, and a voluntary associational relationship is essential to any particular social group.[160]

Using an extreme example, the court said that a group defined as "young, working class, urban males of military age" would not qualify as a particular social group because "individuals falling within the parameters of this sweeping, demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings."[161] Although the court did concede that a "family" would

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157. Peggy Curran, *Ottawa Eases Way for Women Seeking Refugee Status*, THE GAZETTE (Montreal), Mar. 10, 1993, at A1.

158. Farnsworth, *supra* note 83, at A8.

159. *Id.* Canada, in 1992, recognized homosexuals as a social group when it granted asylum to an Argentinean male. *Id.*; ASYLUM LAW & PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS, *supra*, note 146, at 97.

160. *See* Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).

161. *Id.* at 1566-77. The court held that "particular social group" does not encompass every segment of society of statistical relevance, limiting its application only to the "cohesive, homogeneous

qualify as a particular social group (even though a family is an involuntary associational relationship), it defended this exception with the assertion that family members are usually closely connected, homogeneous, and cohesive, "the family being a focus of fundamental affiliational concerns and common interests."[162]

An example of the U.S. judicial treatment of claims that women comprise a particular social group within the U.S. definition of refugee is found in *Gomez v. INS.*[163] There, the Second Circuit denied asylum to a woman who had been beaten and raped by guerrillas. The court declined to recognize "women" or "women who have been previously battered" as a particular social group, finding that common characteristics such as gender do not establish membership in a particular social group.[164] Typically, the lack of internal cohesion and voluntariness proves fatal to this type of claim of refugee status.[165]

### 2. *Circularity of the Argument*

Although relaxing the internal cohesion requirement would expand the particular social group category to include women persecuted due to their gender, the reluctance of U.S. courts to do so may be attributable to an identifiable and inherent circularity in many of the claims for particular social group status. In the context of applications for asylum based upon gender persecution, the circularity problem arises when an applicant bases

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group to which we believe the term 'particular social group' was intended to apply." *Id.* at 1577.

162. *Id.* at 1576; *see also* IMMIGRATION AND NATURALIZATION SERVICE, BASIC MANUAL FOR ASYLUM OFFICERS 39-40 (1991) (listing "family" as one of the recognized particular social groups).

163. Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).

164. *Id.* at 663-64 (The applicant "has failed to demonstrate that the guerrillas are inclined or will seek to harm her based on her association with a particular social group or on account of any other ground enumerated in the Act. . . . [T]he 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 social group.").

165. It is worthy to note that the UNPR and U.S. definitions of "refugee" contain both voluntary (religion, political opinion) and clearly involuntary (race, nationality) categories. This suggests that the drafters of the refugee definition did not have in mind the protection only of voluntary groupings of people. Indeed, immigration law as a whole routinely takes into account both internal and external criteria. The wording of the refugee definition also suggests a choice to be made between internal and external criteria when attempting to define a particular social group. Therefore, the decision to require external cohesion in the particular social group category cannot be defended solely by referring to the wording of the refugee definition or to the drafters' express intent.

her claim for asylum on membership in a particular social group defined as "persecuted women" or "women previously battered."

Grounds for asylum are established when an applicant proves persecution and connects that persecution to one of the five categories contained in the definition of refugee. This is a two-step approach. If a claimant attempts to define the particular social group of which she is a member in terms of persecution, as is the case when the particular social group is defined "persecuted women," the argument takes on a circular characteristic. The claimant effectively argues that she is persecuted due to membership in a persecuted social group. What was initially a two-step approach is now a one-step approach.

In contrast, for example, the particular social group of "local trade unionists" does not contain the circular flaw discussed above and is susceptible to definition without reference to the concept of persecution. The separate concepts of persecution and particular social group remain theoretically compartmentalized, as intended by both the UNPR and U.S. definition of refugee; the two-step approach is preserved. This result is logically sound and reflects the intended application of the particular social group category.

U.S. courts attempt to prevent circular approaches to the particular social group category by requiring internal cohesion. If a group has internal cohesion, the group members have more in common than simply their persecution. Thus, whenever a factor exists to create internal cohesion, U.S. courts have available to them an objective criterion for determining membership in the particular social group under consideration. They are not forced to rely on persecution as the determinative factor of membership.[166]

Note that the problem of circularity does not arise in asylum claims that assert membership in a particular social group defined as "women." The group of "women" is susceptible to definition without reference to the term persecution; reference need only be made to gender. Nonetheless, U.S. courts continue to apply the internal cohesion requirement to claimed particular social groups of "women," which usually proves fatal to requests for asylum. This pattern in the U.S. asylum system may be a product of gender discrimination and traceable to the public-private distinction

166. The European and Canadian external cohesion approaches do not give their courts this benefit.

discussed above.[167] It is equally likely that this pattern reflects, at least in part, the desire of U.S. courts to maintain a discrete definition of the particular social group category, as discussed in the next section.

*3. Delimitation of the Particular Social Group Category*

The lack of a statutory definition of the particular social group category implicates concerns regarding the number of claims that are assumed under its heading.[168] Thus, the burden is placed upon the U.S. courts to establish and maintain a precise definition of particular social groups. Removal of the internal cohesion requirement would destroy the definitional limits of the category. Without identifiable boundaries the particular social group category may lose its identity as a separate and distinct heading.

Defining membership in a particular social group by means of external cohesion is delimiting. For example, the external cohesion approach would allow the assertion of claims that persecution is due to membership in the particular social group of "Somalis" or "Christians" or "Marxists." Although none of these aggregations of people necessarily maintain voluntary associational relationships, they are treated as a particular social group under the external cohesion rubric because their persecutors perceive them as a group.

If the requirements of internal cohesion and voluntariness are relaxed, the particular social group category could, thus, subsume the entire framework of the asylum law. The above example makes this apparent: persecution on account of nationality, religion, and political opinion would all be grounds for asylum based upon persecution on account of membership in the particular social groups of "Somalis," "Christians," and "Marxists," respectively. Looking to the wording of the refugee definition makes it clear that the particular social group category was not intended to subsume all applicants for asylum in this way. The drafters of the refugee definition clearly laid out the separate categories of race, religion, nationality, political opinion, and particular social group. If they had intended to bring all claims for asylum under the one heading of particular social group, as the external cohesion approach allows, they would not have developed the other four categories.

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167. *See supra* text accompanying notes 125-39.

168. *See* ANKER, *supra* note 41, at 67-72.

Scholars arguing for an external cohesion approach with respect to women's asylum claims in the United States have sometimes recognized the delimitation flaw of their position, but attempt to summarily dismiss it as a necessary evil, balancing it with the benefits of heightened protection of women. One writer stated: "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. . . . Such a finding is both reasonable and necessary."[169]

Although the external cohesion approach does lead to the heightened protection of women from gender persecution, its adoption is not reasonable or necessary. It is not reasonable because it creates the problems of circularity and delimitation discussed above. Even if the circularity and delimitation problems are not so great as to make the external cohesion approach unreasonable, it is not necessary, at least in the long run, because there are superior alternatives for the prevention of gender persecution, one of which is proposed in this paper immediately below.[170]

## VII. PROPOSAL TO ADD "GENDER" AS A SIXTH CATEGORY IN THE U.S. DEFINITION OF REFUGEE

### *A. The U.N. Definition of Refugee is Flawed*

One writer correctly frames the issue: "Is the 1951 U.N. definition of a bona fide refugee flawed because it fails to recognize that women can be persecuted simply by virtue of their gender?"[171] The definition of refugee was drafted in post-World War II Europe. It necessarily reflects the pressing concerns of that time period and represents an attempt "to protect

169. Bower, *supra* note 140, at 198. The author argues that evaluating gender-based discriminations "under the 'social group' category as 'women subjected to gender persecution' would have rendered more accurate and appropriate results." *Id.* at 192. Here, the author reveals the delimiting effect of her approach. The same logic would allow groups of individuals who suffer from persecution due to political opinion to bring claims under the particular social group category of "people subjected to political persecution."

170. In the short run, the use of the particular social group category, within the discretion of the U.S. courts, would provide needed relief from the gender persecution that women face globally. In the long run, however, a sixth category of gender must be added to the U.S. definition of refugee.

171. Walsh, *supra*, note 156, at A1.

all persons (and groups) then existing in Europe who had been or were likely to be the victims of persecution."[172]

Since 1951, the U.S. and the international community have grown increasingly cognizant of the general inequities and injustices suffered by women globally.[173] Numerous scholars have long recognized the anachronistic texture of the concept of refugee.[174] Further, the UNHCR has urged recognition of the inadequacy of the UNPR definition of refugee to meet the needs of modern society.[175] Unfortunately, the refugee definition has not changed either in the United States or at the United Nations. This paper urges the addition of a sixth category of "gender" to the U.S. and UNPR definitions of "refugee."

### *B. Creating a Remedy that Does Not Foster Gender Discrimination*

Creating a standard for the equal protection of women under the law of asylum implicates feminist concerns over the perpetuation of gender discrimination. If legal reformers attempt to provide "special" protective measures tailored to the unique needs of women, and to create a standard that treats men and women differently, the standard itself may legitimize gender discrimination by recognizing the existence of innate gender differences.

Catharine MacKinnon has noted such an effect and argues that sex equality cannot be achieved merely through sufficiently thoughtful enforcement of antidiscrimination laws since those laws recognize gender as a "difference."[176] MacKinnon maintains that gender is really a "hierarchy" and gender discrimination is best understood as a matter of domination and

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172. Aleinikoff, *supra* note 89, at 11.

173. *International Instruments and National Standards Relating to the Status of Women: Study of Provisions in Existing Conventions That Relate to the Status of Women*, U.N. Commission of the Status of Women, Agenda Item 3(d), at 24, U.N. Doc. E/CN.6/552 (1972); DEDAW, *supra* note 45; CEDAW, *supra* note 47; A. GLEN MOWER, JR., THE UNITED STATES AND HUMAN RIGHTS: THE ELEANOR ROOSEVELT AND JIMMY CARTER ERAS 95-96 (1979).

174. *See, e.g.*, U.S. COMM. FOR REFUGEES, THE ASYLUM CHALLENGE TO WESTERN NATIONS 7 (1984).

175. "The new U.N. High Commissioner for Refugees, Jean-Pierre Hocke, has urged recognition that today's complex world has made the definitions of the early 1950s inadequate to meet the needs of all refugees." SILK, *supra* note 59, at 13.

176. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED 32-45 (1987).

subordination.[177] Treating gender as a difference tends to cover up disparities in power.[178] Gender is the result, not the cause of sex inequality.

The proposal to add a sixth category of "gender" seeks the protection of "human rights," as defined in both international and U.S. law; there is no suggestion of the protection of "women's rights," a term that implies a difference between humans and women. Further, it does not require any radical reconstruction of the definitions of "persecution" or "human rights" in light of women's unique experiences. It simply asks for the even and consistent application of the law with respect to all types of persecution, including gender persecution. Equal treatment of all types of persecution in the asylum framework would provide improved protection for women without acknowledging the existence of gender differences.[179]

### *C. According the Issue of Physical Violence Against Women Due Respect and Providing Adequate Protection*

The willingness of the United States to allow the anachronistic historical perspective of the refugee definition to continue to impair the protection of women's human rights is morally unacceptable in modern society.[180] Attempts to provide a remedy within the existing framework of asylum law do not adequately address "the core issue of discrimination on grounds of sex as a violation of fundamental [human] rights."[181] The particular social group proposal, although it may produce socially desirable results, does not recognize the true importance of the issue of persecution on account of gender.

The addition of gender as a sixth category in the U.S. refugee definition is the preferable solution. Gender is analogous to race, ethnicity, and religious conviction, in that it is not easily or willingly renounced and, thus,

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177. *Id.* at 3.

178. *Id.* at 8.

179. But, MacKinnon would also take issue with this approach, claiming that demands for equal treatment ignore the core issue of gender hierarchy. She takes a more activist "dominance" approach, attempting to dismantle the hierarchy and end male domination. *Id.* at 40.

180. The U.S. courts have recognized that the area of the law of immigration and citizenship is not beyond the considerations of morals and justice. Gestuvo v. District Director of INS, 337 F. Supp. 1093, 1100 (C.D. Cal. 1971).

181. Anders B. Johnsson, Abstract, *The International Protection of Women Refugees: A Summary of Principal Problems and Issues*, 1 INT'L J. REFUGEE L. 221 (1989).

is difficult to escape.[182] The treatment of all such immutable characteristics should be identical under the law. Gender as a social category might be an appropriate remedy if the persecution of women were isolated or temporary, but that approach does not afford women enough protection within the context of society's recognized, widespread, and institutional persecution of women worldwide.

### *D. The Need to Change U.N. Documents*

The first step in protecting women under asylum law is for the United States to change its own definition of refugee to include gender as a sixth category.[183] The United States can apply foreign policy pressure for other countries to follow suit.

A comparably more ambitious task, with more productive long-run results, is to seek an amendment to the U.N. refugee documents to include a category for gender. Article 2 of the UDHR calls for all necessary changes to be made in the law to end discrimination against women;[184] amending the U.N. refugee documents is one necessary change. The benefit of altering the U.N. definition of refugee is achieved through the persuasive authority wielded by U.N. determinations in the field of human rights and refugee law globally.[185]

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182. *Cf.* McDougal et al., *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497, 500 (1975) (comparing sex discrimination to racial discrimination).

183. Garnering adequate consensus to change the U.S. asylum law might prove difficult. "With some 160 countries in the world, all with human rights problems, it is unrealistic to expect Congress, in its modern state of disarray, to approach the issue systematically." FORSYTHE, *supra* note 118, at 159. But this should not deter active academic discourse. "The positive side of the situation is that if politics is the art of the possible, then one might as well plunge ahead and do what can be done." *Id.*

184. Universal Declaration of Human Rights, *supra* note 30, art. 2.

185. International law and U.N. declarations depend "less on the prospect of formal enforcement and sanctions and more on a belief by decisionmakers in the rule of law and on the sense that the law is legitimate." Trimble, *supra* note 52, at 838.

> "Such declarations . . . have unquestionably influenced the way governments talk about human rights. They are frequently cited by governments as a standard of behavior, most often when criticizing other governments, and lip service is paid both in and out of the United Nations . . . . The Universal Declaration, in particular, has been cited in numerous decisions of domestic courts, has served as a model and inspiration for domestic legislation, and is mentioned or partially incorporated into some fifty extant national constitutions."

RIGGS & PLANO, *supra* note 26, at 242-43.

### *E. Implementing a New Category is Relatively Simple*

The current administrative and adjudicative frameworks in the United States are ready to meet the challenges of implementing the sixth category of gender. There is a well established body of case law interpreting most of the concepts relating to asylum law and the administrative regime is as suited for handling those applying for asylum under a gender category as for handling those applying under a race, nationality, or political opinion category.[186]

## VIII. CONCLUSION

### *A. Keeping the Floodgates Closed*

Opponents of expansive changes in U.S. asylum law often argue that such changes threaten to open the "floodgates"; and draw upon images of uncontrollable waves of immigrants storming the U.S. borders and destroying the employment market. The floodgates argument does not comport with the current reality of the asylum remedy. Of all potential immigrant groups, those seeking refugee status comprise the smallest percentage.[187] More specifically, there will be a predicted 50,000 applications filed for asylum this year in the United States and, assuming the typical twenty-five to thirty percent approval rate, around 13,000 people will be granted asylum.[188] Thirteen thousand people per year entering the United States to escape persecution is hardly a flood.

Another problem with the floodgates argument, as applied to the addition of a sixth category of gender, is that it confuses the issues. The proposed change would not impinge upon the right of the U.S. government to control its borders. It would simply allow all victims of persecution to

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186. One procedural practice that would prove helpful in implementing a sixth category of gender in asylum law is that of judicial notice. In order to avoid duplicative evidentiary showings and to assist applicants in meeting their burdens of proof regarding the probability of persecution in their home countries, immigration judges should take judicial notice of the well-known persecutory practices documented in many countries. Such a rule is efficient and remedies some of the problems of proof discussed in *supra* text accompanying notes 99-105.

187. U.S. COMM. FOR REFUGEES, *supra* note 174, at 11.

188. Petty, *supra* note 57, at 15; *Central American Asylum-Seekers, Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 70 (1989).

compete equally for asylum status. The floodgates argument "represents confusion . . . between the nation's sovereign right to control immigration and its humanitarian and legal duty to provide refuge to those fleeing persecution."[189] An addition of a sixth category of gender would not necessarily force an increase in the number of people granted asylum each year. The President would maintain the power to set annual quotas for asylum, as is now done for refugee status, if the level of asylees in the United States were to become problematic. On the other hand, one probable effect of a sixth category would be a redistribution of visas granted each year, shifting some grants of asylum from male to female asylum applicants.

The strategy of limiting the number of asylees entering the United States through "gendered definitions of persecution . . . is inappropriate and amounts to discriminatory application of asylum laws."[190] The appropriate method for limiting the number of asylees in the United States is to mandate numerical limits on the number of asylees granted visas annually, not to effectively ban certain persecuted classes from bringing successful asylum claims. The floodgates argument wholly fails to recognize that, conceptually, asylum is a purely individual, not a class, remedy.[191]

Finally, the floodgates argument ignores the fact that any woman who attempts to bring an asylum claim under the proposed sixth category of gender would still have to prove actual persecution or her well-founded fear of persecution and connect it to her gender. The administrative and judicial branches are more than capable of distinguishing frivolous from valid claims. As a further limiting factor, the grant of asylum to any particular applicant under the proposed sixth category of gender would remain within the sound discretion of the Attorney General.[192]

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189. SILK, *supra* note 59, at 11.

190. Bower, *supra* note 140, at 205.

191. SILK, *supra* note 59, at 10-11. *See generally* G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW (1983).

192. *See supra* text accompanying notes 62-65. If Congress decides to implement the sixth category, and assuming Congress does not impose numerical limits upon the number of asylees, there would might be an increase in the number of grants of asylum, since the definition of refugee would encompass more individuals. The judiciary could not legally counteract this trend by arbitrarily denying clearly valid claims; this practice would amount to a reversible abuse of discretion. Therefore, the addition of a sixth category of gender may lead to an increase in immigration through the asylum mechanism and the floodgates argument thus may be partially accurate. Nonetheless, any resulting increase in immigration is more than acceptable in return for heightened protection of women's human rights globally and elimination of gender bias in the refugee definition. Perhaps, if the number of applicants gaining asylum under the proposed sixth category of gender grew too burdensome or

### *B. The Distinction Between Foreign Policy and Asylum*

The use of foreign policy, foreign aid, and diplomatic and economic measures is best suited for dealing with widespread poverty, civil war, and economic crisis.[193] Alternatively, protection from individual human rights abuses is the distinct domain of the law of asylum.[194] Unfortunately, the law of asylum is often affected by foreign policy concerns.[195]

The United Nations is composed of sovereign States and most member nations are reluctant to criticize the manner in which other countries treat their citizens.[196] Likewise, each grant of asylum is an official condemnation of the government of the applicant's home country. Such measures are not taken lightly by any government because foreign policy considerations abound. Granting asylum may anger a hostile government and invite accusations that the country of asylum is supporting an exile movement. If admission standards are not rigorous enough, granting asylum may reduce overall sympathy for those seeking asylum. Finally, western countries often come under attack because their asylum policies are perceived as imposing western ideas of morality, society, and culture on less powerful nations.[197]

While the above foreign policy concerns are legitimate, they are not determinative here. In the asylum law realm, human rights—and more specifically, freedom from gender-based persecution—outweigh foreign policy concerns. In addition, foreign policy and human rights are not utterly distinct concepts. The foreign policy of the United States and other

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threatening to legitimate U.S. interests, numerical quotas, similar to those used in the refugee status context, would be necessary.

In contrast, refugee status in the United States is not discretionary, but its level is limited by statutory caps, set by the President, on the advice of Congress. *See supra* text accompanying note 77. Thus, no increase in the number of refugees would occur.

193. *See generally* Laura J. Dietrich, *United States Asylum Policy*, *in* THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980'S, at 67-68 (David A. Martin ed., International Studies in Human Rights vol. 10, 1988).

194. *Id.* at 67-68.

195. The President allots refugee admissions among groups of refugees on the basis of the groups' strong cultural or historical ties to the United States and on other foreign policy concerns. H.R. REP. NO. 608, 96th Cong., 1st Sess. 13 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

196. RIGGS & PLANO, *supra* note 26, at 246.

197. But note that "[t]his is not simply a matter of imposing Western standards on other countries. It is a matter of respecting internationally accepted human-rights standards." Curran, *supra* note 157, at A1 (reporting the opinion of Nurjehan Meurani, head of the Immigration and Refugee Board of Canada).

civilized nations should, and frequently does, take account of human rights dimensions.[198] The United States often exports its concept of human rights by designing its foreign policy with a humanitarian motive in mind. For example, the award of U.S. foreign aid or trade is often conditioned upon improving human rights conditions in the country under consideration.[199] Clearly, U.S. foreign policy is not formulated simply to appease other countries or comport with their beliefs regarding human rights, no matter how intolerable. The United States, as a purported world leader in human rights protection, must define its foreign policy to include the protection of women from persecution on account of gender, even at the risk of angering some foreign governments.

The shocking inadequacy of existing U.S. asylum law in the protection of women from acts of physical and sexual violence has forced the demand for a remedial change. The addition of a sixth category of "persecution due to gender" to the U.S. and international definitions of "refugee" is necessary to eliminate the statutory gender bias that exists in asylum law and provide heightened, long-run protection for the human rights of women. Until such a modification is made, the human rights of women will continue to suffer globally.

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198. *See generally United States Policy Toward Iraq: Human Rights, Weapons Proliferation, and International Law: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong., 2d Sess (1990); FORSYTHE, *supra* note 118; LAWYERS COMM. FOR HUMAN RIGHTS & U.S. FOREIGN POLICY: 1992 REPORT AND RECOMMENDATIONS (1992); CATHAL J. NOLAN, PRINCIPLED DIPLOMACY: SECURITY AND RIGHTS IN U.S. FOREIGN POLICY (1993); Edward Perkins, *New Dimensions in U.S. Foreign Policy*, *in* CURRENT POLICY (1990).

199. *See, e.g., Chinese Forced Labor Exports to the United States: Hearing Before the Subcomm. on Human Rights and International Organizations and Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 102d Cong., 1st Sess., 2, 10-12 (1991).