

Gender-Related Persecution: Assessing the Asylum Claims of Women

Nancy Kelly

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Kelly, Nancy (1993) "Gender-Related Persecution: Assessing the Asylum Claims of Women," *Cornell International Law Journal*: Vol. 26: Iss. 3, Article 5.
Available at: <http://scholarship.law.cornell.edu/cilj/vol26/iss3/5>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Gender-Related Persecution: Assessing the Asylum Claims of Women

Introduction

This article examines the existing law regarding gender-related persecution and proposes a framework for evaluating the cases of women asylum applicants under United States law. The introduction presents an analysis of problems which have historically hindered the full presentation of women's claims and reviews current activities of human rights groups, advocates and adjudicators to address the particular asylum needs of women. Parts I and II review United States asylum law and existing United States case law regarding gender-related persecution of women. Part III sets out a framework for the evaluation of gender-related cases under U.S. law, dividing cases into those involving gender-specific persecution, in which the type of persecution is tied to the applicant's gender, and gender-based persecution, in which the persecution is inflicted because of a basis which is rooted in the applicant's gender. Finally, part IV addresses the need for the implementation of procedures in the asylum adjudication process as part of a multi-faceted approach to improve access to asylum protection for women.

The majority of the world's refugees are female.¹ Women as a

* Clinical Instructor in Immigration Law, Harvard Law School; Attorney for the Women Refugees Project of Cambridge and Somerville Legal Services and Harvard Immigration and Refugee Program. J.D., Northeastern School of Law, M.Ed., Antioch College; B.A., University of Massachusetts. This article was completed while the author was a visiting fellow at the Harvard Law School Human Rights Program.

The author wishes to thank the following people for their invaluable assistance and support: Deborah Anker, Robert Bach, Rhonda Berkower, Wendy Brown, Hope Frye, Iris Gomez, Jennifer Green, James Hathaway, Sarah Ignatius, Makau Wa Matua, Rosalind Pollan, Henry Steiner, John Willshire-Carrera, Chin-Chin Yeh, and the many others in Canada and the United States who are working to develop this area of law.

1. Because the United Nations High Commissioner for Refugees (UNHCR), the principal agency within the United Nations concerned with refugees, does not disaggregate refugee figures by gender, the precise number of women refugees worldwide is not known. However, authoritative sources estimate that well over half of all refu-

group are often the first victims of political, economic and social repression.² This is in part because of laws and social mores which dictate gender-specific behavior and treatment. In addition, in societies facing economic, social and political upheaval, women are often left alone to care for children or elderly family members, and thus become the most exposed to violent attack during wars or ethnic crises. Women forced to flee their countries as refugees face continuing gender-related abuse including sexual harassment, rape, and torture by pirates, smugglers, border guards, camp administrators, and employers.³ Until recently, however, the asylum claims of women refugees have largely gone unad-

gees are female. See *Refugee and Displaced Women and Children*, The Division for the Advancement of Women/United Nations Office at Vienna, U.N. Doc. EGM/RDWC/1990/WP.2 (1990) [hereinafter *Refugee and Displaced Women and Children*]; see also Susan Forbes Martin, *Issues in Refugee and Displaced Women and Children*, Division for the Advancement of Women/UNOV, at 1, U.N. Doc. EGM/RDWC/1990/WP.1 (1990) (estimating that 75 percent of refugees and displaced persons are women and young children); Juliette C. McLennan, *The Resource Crisis and the Well-being of Refugee Women and Children*, at 1, U.N. Doc. EGM/RDWC/1990/CS.11 (1990) (estimating that eight out of every ten refugees are women and children); Ann Brazeau, *Gender Sensitive Development Planning in the Refugee Context*, United Nations High Commissioner for Refugees, at 2, U.N. Doc. EGM/RDWC/1990/CS.7 (1990) (stating that the "majority of refugees are women and their dependent children, often with large proportions of female heads of households"); UNICEF, *Refugee and Displaced Children: A UNICEF Discussion Paper*, submitted to an Expert Group Meeting on "Refugee and Displaced Women and Children, organized by the Division for the Advancement of Women/UNOV in cooperation with the Office of the United Nations High Commissioner for Refugees, in Vienna (July 2-6, 1990) (stating that children comprise 30 percent or more of the refugee and displaced population and that women make up the second largest category, constituting approximately eight to ten million refugees and displaced persons).

In 1985, it was estimated that two-thirds of the world's refugees were women and girls. *The Activities and Programmes of the United Nations High Commissioner for Refugees on Behalf of Refugee Women*, World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, Nairobi, Kenya, 15-26 July 1985, at 5, para. 14, U.N. Doc. A/Conf.116/11 (1985).

2. Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J. REFUGEE L. 518, 526 (1989).

3. See Anders B. Johnsson, *International Protection of Women Refugees: A Summary of Principle Problems and Issues*, 1 INT'L J. REFUGEE L. 221 (1989) (noting the particular vulnerability of women who are separated from their family and community to rape, abduction, sexual harassment and obligation to grant "sexual favors" in return for documentation and/or relief goods along escape routes and border areas, camps, settlements and urban areas); *Refugee and Displaced Women and Children*, *supra* note 1, at 7; Martin, *supra* note 1, at 4-8:

During flight, refugee and displaced women and girls have been victimized by pirates, border guards, army and resistance units and others with whom they come in contact. Abduction and rape may be the consequence of seeking asylum for those lucky enough to survive the trip. When women are separated from husbands and brothers in the chaos of flight or they are widowed during war, they are especially susceptible to physical abuse and rape. Piracy attacks in Southeast Asia have been of particular concern, with increases in severity and number in recent years, but problems of flight exist in all continents.

See also Marcia A. Gillespie, *No Woman's Land: The Refugee Crisis*, Ms., Nov.-Dec. 1992, at 18 (recounting rape and abuse of woman crossing Mexican border into the United States).

dressed under both the 1951 Convention Relating to the Status of Refugees⁴ and United States Immigration and Nationality Act.⁵ The definition of "refugee" incorporated into the Convention is gender-neutral, making no distinction between male and female applicants. However, women are much less likely than men to be found to meet the eligibility criteria for refugee status because of the absence of explicit recognition of gender-based persecution, and because of the social and political context in which the claims of women are adjudicated.⁶ The problem is twofold. First, the definition of "refugee" contained in the Convention does not specifically name gender as one of the bases upon which protection can be granted.⁷ Second, in applying the refugee definition, adjudicators have traditionally neglected to incorporate the gender-related claims of women in the interpretation of the grounds already enumerated in the Convention.⁸

In many respects, this failure to incorporate the gender-related claims of women refugees is a product of the general failure of refugee and asylum law to recognize social and economic rights and its emphasis on individual targeting and specific deprivation of civil and political rights.⁹ It is also related to a larger criticism of human rights law and

4. *Opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (1954).

5. 8 U.S.C. § 1101 (1988). The definition of "refugee" incorporated into the Immigration and Nationality Act [hereinafter INA] is derived from the U.N. Refugee Convention. *See infra* note 42.

6. *See* Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39 (1992); *Refugee and Displaced Women and Children*, *supra* note 1, at 5-6.

7. Many advocates have called for amendment of the refugee definition to include gender. *See, e.g.*, INTERNATIONAL WOMEN'S TRIBUNE CENTRE ET AL., INTEGRATING WOMEN'S HUMAN RIGHTS INTO DELIBERATIONS OF THE 1993 UNITED NATIONS WORLD CONFERENCE ON HUMAN RIGHTS AND INTO THE ON-GOING WORK OF THE UNITED NATIONS 8 (1993) (recommending that the 1993 World Conference on Human Rights give consideration to the gender-specific needs of women refugees, including "modification of the definition of refugee under the 1951 Convention on the Status Relating to Refugees (sic) and the 1967 Protocol"). The question of whether the inclusion of gender specific claims requires an amendment to the Convention's refugee definition, or whether those claims can be accommodated at least to some extent through interpretation of the Convention's existing categories, raises important theoretical issues as well as strategic considerations. *See* Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287 (1987). Strategically, it should be noted that recent restrictions in the asylum practices of western nations in particular make the immediate expansion of Convention refugee categories unlikely. *See generally* DAVID A. MARTIN, THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s (1988); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990). *See also* Expedited Exclusion and Alien Smuggling Act of 1993, S.1333, H.R. 2836 (1993); Tim Werner, *Pleas for Asylum Inundate System for Immigration*, N.Y. TIMES, Apr. 25, 1993, at A1.

8. *See* Greatbatch, *supra* note 2, at 518; Johnsson, *supra* note 3, at 223; David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988); Doreen Indra, *Gender: A Key Dimension of the Refugee Experience*, 6 REFUGEE 3 (1987).

9. Many view the refugee definition as inherently inhospitable to claims of Third World refugees who may flee social violence or broad-based policies that affect a large segment of the population, rather than the loss of individual rights. *See, e.g.*,

discourse—that it privileges male-dominated public activities over the activities of women which take place largely in the private sphere:¹⁰

The key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men. With regard to private sphere activities where women's presence is more strongly felt, there is primarily silence—silence compounded by an unconscious calculus that assigns the critical quality "political" to many public activities but few private ones. Thus, state oppression of a religious minority is political, while gender oppression at home is not.¹¹

As interpreted, the Convention and the United States Immigration and Nationality Act have largely failed to recognize the political nature of seemingly private acts of and harm to women. For example, rape is often viewed as a private matter even when committed by a government official or in a political context.¹² Refusal of Iranian women to wear the chador, though a significant form of political protest, is often characterized as a simple preference for style of dress.¹³

Alternatively noting that the political nature of oppression rests upon its relation to the state, some have cautioned against overemphasizing the public/private distinction and have called instead for an approach which focuses on the interconnectedness of the public and private spheres and the relationship of women to the state:

The bifurcated version of society itself ignores the realm of women's lives outside domesticity, and creates a rhetorical and theoretical wall between domestic and social culture. It roots women's oppression in sexuality and

Astri Suhrke, *Global Refugee Movements and Strategies of Response*, in U.S. IMMIGRATION AND REFUGEE POLICY: GLOBAL AND DOMESTIC ISSUES 157 (Mary Kritz ed., 1983); ARISTIDE R. ZOLBERG ET AL., *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* (1989).

Hathaway has suggested that, given the inadequacy of the current system of protection to encompass the vast majority of involuntary migrants, refugee law should be restructured and aligned with human rights law in a way which would afford protection to a broader class. See James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991).

10. For example, overt expression of political opinion through traditional means such as involvement in political parties and organizations or participation in military actions may be considered a basis for political asylum, while less traditional means of political expression such as refusal to abide by discriminatory laws or to follow prescribed rules of conduct are often categorized as personal preference. Feminists have argued that the public/private distinction is one of the major obstacles to the achievement of women's rights. See, e.g., Noreen Burrows, *International Law and Human Rights: The Case of Women's Rights*, in HUMAN RIGHTS: FROM RHETORIC TO REALITY 80, 86-96 (Tom Campbell et al. eds., 1986); Eisler, *supra* note 7, at 287; Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-vision of Human Rights*, 12 HUM. RTS. Q. (1990); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

11. Doreen Indra, *A Key Dimension of the Refugee Experience*, 6 REFUGE 3 (1987), quoted in Greatbatch, *supra* note 2.

12. See, e.g., *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987), *cert. denied*, 484 U.S. 826 (1987).

13. See Greatbatch, *supra* note 2, at 520-21. See also *M.M.G. v. Secretary of State for the Home Department*, TH/9515/85 (5216) (Immigration Appeals Tribunal of the United Kingdom) (Feb. 25, 1987).

private life, thereby disregarding oppression experienced in non-domestic circumstances, and the interconnections of the public and private spheres.¹⁴

Problems in the presentation of cases have also hampered the development of doctrines and theories which incorporate the claims of women refugees.¹⁵ These problems arise in the development of a claim as well as during the adjudication process in which the claim is decided. For example, because advocates have learned to present cases within a largely male-oriented body of law,¹⁶ women's cases are often formulated in ways which reflect the advocate's understanding of the law rather than the reality of the applicant's experiences. The claims of women are often presented as derivative of the claims of their male partners.¹⁷ In

14. Greatbatch, *supra* note 2, at 520. Greatbatch argues for a multi-faceted approach which adopts a human rights based definition of persecution, the recognition of women as a particular social group, research into and documentation of gender-specific oppression, and adoption of practices which will afford women full and fair adjudication of their claims.

15. Of course, many claims of women which are not based on gender-specific persecution may meet the requirements of the refugee definition even under traditional interpretations. See Greatbatch, *supra* note 2.

16. A review of forty-eight published decisions of the Board of Immigration Appeals in which asylum issues were raised reveals that, in forty-one cases, the applicants were male. See Matter of R, Int. Dec. 3195 (BIA 1992); Matter of H, Int. Dec. 3193 (BIA 1992); Matter of T, Int. Dec. 3187 (BIA 1992); Matter of L, Int. Dec. 3183 (BIA 1992); Matter of RR, Int. Dec. 3182 (BIA 1992); Matter of C, Int. Dec. 3180 (BIA 1992); Matter of AA, Int. Dec. 3176 (BIA 1992); Matter of RO, Int. Dec. 3170 (BIA 1992); Matter of B, Int. Dec. 3164 (BIA 1991); Matter of K, Int. Dec. 3163 (BIA 1991); Matter of UM, Int. Dec. 3152 (BIA 1991); Matter of Villata, Int. Dec. 3126 (BIA 1990); Matter of Izatula, Int. Dec. 3127 (BIA 1990); Matter of Dass, Int. Dec. 3122 (BIA 1989); Matter of Fefe, Int. Dec. 3121 (BIA 1989); Matter of Ruiz, Int. Dec. 3116 (BIA 1989); Matter of Chen, Int. Dec. 3104 (BIA 1989); Matter of Barrera, 19 I. & N. Dec. 837 (BIA 1989); Matter of Rodriguez-Majano, 19 I. & N. Dec. 811 (BIA 1988); Matter of Canas, 19 I. & N. Dec. 697 (BIA 1988); Matter of Gonzalez, 19 I. & N. Dec. 682 (BIA 1988); Matter of Juarez, 19 I. & N. Dec. 664 (BIA 1988); Matter of Rosales, 19 I. & N. Dec. 655 (BIA 1988); Matter of Fuentes, 19 I. & N. Dec. 658 (BIA 1988); Matter of Balibundi, 19 I. & N. Dec. 606 (BIA 1988); Matter of Vigil, 19 I. & N. Dec. 572 (BIA 1988); Matter of Maldonado-Cruz, 19 I. & N. Dec. 509 (BIA 1988); Matter of AG, 19 I. & N. Dec. 502 (BIA 1987); Matter of Pula, 19 I. & N. Dec. 467 (BIA 1987); Matter of Nafi, 19 I. & N. Dec. 430 (BIA 1987); Matter of Garcia-Garrocho, 19 I. & N. Dec. 423 (BIA 1986); Matter of Carballe, 19 I. & N. Dec. 357 (BIA 1986); Matter of Linnas, 19 I. & N. Dec. 302 (BIA 1985); Matter of Sanchez and Escobar, 19 I. & N. Dec. 276 (BIA 1985); Matter of Acosta, 19 I. & N. Dec. 211 (BIA 1985); Matter of Rodriguez-Coto, 19 I. & N. Dec. 208 (BIA 1985); Matter of Waldei, 19 I. & N. Dec. 189 (BIA 1984); Matter of Leon-Orosco and Rodriguez-Colas, 19 I. & N. Dec. 136 (BIA 1983); Matter of McMullen, 19 I. & N. Dec. 90 (BIA 1984); Matter of Shirdel, 19 I. & N. Dec. 33 (BIA 1984); and in four cases, the principal applicant was male, accompanied by a female derivative applicant. See Matter of DL and AM, Int. Dec. 3162 (BIA 1991); Matter of Chang, Int. Dec. 3107 (BIA 1989); Matter of Tomas, 19 I. & N. Dec. 464 (BIA 1987); Matter of Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987). In only three cases, the principal applicant was female. See Matter of Peugnet, Int. Dec. 3142 (BIA 1991); Matter of Soleimani, Int. Dec. 3118 (BIA 1989); Matter of Medina, 19 I. & N. Dec. 734 (BIA 1988).

17. *Refugee and Displaced Women and Children*, *supra* note 1, at 6; *Guidelines on the Protection of Refugee Women*, Office of the United Nations High Commissioner on Refugees, at 37, para. 57, U.N. Doc. ES/SCP/67, (1991) [hereinafter *UNHCR Guidelines*].

such cases, the woman is rendered entirely dependent upon her partner for her status. She risks expulsion if the application of her family member is denied or if he unilaterally decides to renounce his claim even though she may have a valid claim to protection in her own right.¹⁸ She also risks expulsion if her relationship fails.¹⁹ Additionally, the procedures employed in interviewing women applicants concerning their experiences frequently lead to inaccurate characterizations of their claims:

Persecution of a woman will often take the form of sexual assault which the victim may be reluctant to divulge, or which may be difficult to prove, even if she is willing to talk about it. Few women are able to talk about such experiences to a male interviewer and very few countries have female staff involved in their refugee determination procedures. Even where a woman has been persecuted (that is, subjected to such cruel, inhuman and degrading treatment as sexual assault), she thus finds it more difficult to establish her claim than a man.²⁰

Often a woman must repeat her story before a male interviewer or immigration judge with the assistance of a male interpreter.²¹ She is subject to cross examination on the details of her experience, and any discrepancy becomes a ground to deny her claim for lack of credibility.²² This difficulty is exacerbated for women who, for cultural or religious reasons, will be ostracized by their families or communities if the sexual assault becomes known.²³

Despite the relative neglect of gender-related claims in the interpretation of refugee law, there are many encouraging recent developments legitimizing the factual basis for women's claims and the necessity for gender-specific protocols in asylum law. Increasingly, human rights groups and others have focused their attention on gender-specific

See also Progress Report on Implementation of the UNHCR Guidelines on the Protection of Refugee Women, Executive Committee of the High Commissioner's Programs, Sub-Committee of the Whole on International Protection, 43d Sess., at 1,7, U.N. Doc. EC/SCP/74 (1992) [hereinafter *Progress Report*] (despite distribution of the *UNHCR Guidelines* to all UNHCR field offices with the instruction that they are to be fully implemented, refugee wives are "still being overwhelmingly treated as dependents of their husbands rather than as refugees in their own right. Their refugee claims therefore tend to be overlooked or ignored by interviewers and often they are not informed of their right to be interviewed on their own.").

18. *See Progress Report*, *supra* note 17, at 7. While similar problems would arise in a case in which the woman is the principal applicant, far more frequently the woman's case is subsumed into the case of her partner. *Id.*

19. The result of this practice is that, fearful of losing their immigration status, many women are effectively forced to remain in abusive relationships. *Id.*

20. Johnsson, *supra* note 3, at 223; *see also UNHCR Guidelines*, *supra* note 17, at 41-42, para. 72.

21. For example, in the United States, there is no provision, under the statute, regulations or operating instructions that an applicant for asylum be provided with a female interpreter or adjudicator in appropriate circumstances. *See INA*, *supra* note 5; ASYLUM BRANCH, IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM: PROCEDURES MANUAL AND OPERATIONS INSTRUCTIONS 15, 17 (1993).

22. *See* 8 C.F.R. §§ 242.16-17 (1993).

23. *See* Castel, *supra* note 6, at 55; *UNHCR Guidelines*, *supra* note 17, at 37, para. 60.

human rights abuses²⁴ and human rights abuses imposed on women because of their gender. While they have directed much of this effort toward documenting conditions experienced by women during their flight and in the country of first asylum,²⁵ attention is lately being directed toward abuses inflicted upon women in the home country.²⁶

24. For example, systematic individual or mass rape, forced pregnancy, abortion, prostitution, genital surgery, beating women while pregnant, or dowry burning.

25. Studies document rape, abduction, sexual harassment, physical violence, and coercion to provide sexual favors in return for a favorable review of women's cases, documentation, or relief goods. Johnsson, *supra* note 3, at 226. See also Geneviève Camus-Jacques, *Refugee Women: The Forgotten Majority*, in REFUGEES AND INTERNATIONAL RELATIONS 141 (Gil Loescher & Laila Monahan eds., 1989); Martin, *supra* note 1, at 4-8; L. Bonnerjea, *Shaming the World: The Needs of Women Refugees* (CHANGE and World University Service, June 1985).

26. See SHANA SWISS, LIBERIA: WOMEN AND CHILDREN GRAVELY MISTREATED (1991) (documenting widespread rape and torture of Liberian women and girls as a result of the conflict); AMNESTY INT'L, WOMEN ON THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN (1991) (detailing a pervasive pattern of human rights violations against women by government officials which includes rape and other sexual abuse inflicted as a means of torture to extract information, to discourage political activity or as a means of punishing or discouraging the activities of family members in a number of countries, including China, Colombia, Iraq, Mauritania, Mozambique, Peru, the Philippines, Somalia, and the United Kingdom); AMNESTY INT'L, RAPE AND SEXUAL ABUSE: TORTURE AND ILL TREATMENT OF WOMEN IN DETENTION (1992) (second report further detailing gender-specific abuse of women in detention as a means of suppressing political activity and social independence: "Women who are political activists, community organizers, or human rights workers have been targeted because they are strong. Soldiers and policemen use rape or sexual abuse to humiliate these women and sometimes to punish them for their political or social independence." *Id.* at 3. This report notes that the "the official failure to condemn or punish rape gives it an overt political sanction, which allows rape and other forms of torture and ill-treatment to become tools of military strategy."); LAWYERS FOR HUMAN RIGHTS AND LEGAL AID, THE FLESH TRADE: THE TRAFFICKING OF WOMEN AND CHILDREN IN PAKISTAN (1993) (documents abduction of women and children in Bangladesh for forced prostitution and slavery in Pakistan and prosecution of victims by authorities in Pakistan); WOMEN'S RIGHTS PROJECT & ASIA WATCH, HUMAN RIGHTS WATCH, DOUBLE JEOPARDY: POLICE ABUSE OF WOMEN IN PAKISTAN (1992) [hereinafter DOUBLE JEOPARDY] (examining the gender-specific human rights abuses suffered by women in police custody in Pakistan and the systematic failure of the government to prosecute those who are responsible); Adrienne Aron et al., *The Gender-Specific Terror of El Salvador and Guatemala: Post-traumatic Stress Disorder in Central American Refugee Women*, 14 WOMEN'S STUD. INT'L F. 37 (1991) (summarizing findings regarding abuses against women in Central America obtained through treatment of victims in the United States for post traumatic stress disorder:

Not uncommonly, women are also subjected to ordeals such as forced nudity (sometimes including photographs), electroshock to the nipples and vagina, squeezing or tying of the breasts, hanging by the breasts, vaginal or anal rape with objects, mutilation of the body, and forcible witnessing any of the above, or hearing the screams of women going through those experiences.

Id. at 39). See also OCISAM, EL SALVADOR, THE EFFECTS OF TORTURE (1985) (a study of 142 prisoners conducted at Mariona and Illopango prisons in El Salvador); SHANA SWISS, LIBERIA: ANGUISH IN A DIVIDED LAND (1992) (documenting torture and rape of Liberian women by soldiers during the conflict and an increase in HIV infection and teenage pregnancy as a result); THE FUND FOR PEACE, HUMAN RIGHTS VIOLATIONS OF SUDANESE WOMEN (1992) (documenting persecution of women in the Sudan, including humiliation, detention, and in some instances torture of female students, professionals, wives of political prisoners, and others); AMNESTY INT'L, BOSNIA-HER-

Human Rights groups have documented widespread sexual abuse of women in detention for numerous reasons, including as punishment for political activity, community organizing and simple social independence.²⁷ They have also documented the systematic failure of governments to protect women from non-governmental actors such as family members and employers.²⁸ The most graphic example of gender-based persecution being brought to international attention at this time is the systematic rape and sexual abuse of Muslim and Croat women by Serbian soldiers in Bosnia-Herzegovina.²⁹ Significantly, both the popular

ZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES, Doc. No. EUR 63/01/93 (1993) [hereinafter BOSNIA-HERZEGOVINA] (documenting widespread rape of women in Bosnia-Herzegovina, primarily by Serbian armed forces but also by Muslim and Croatian military, and detailing a number of individual cases of abuse); *Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Economic and Social Council, Commission on Human Rights, 49th Sess., Agenda item 27, at 19-20, U.N. Doc. E/CN.4/1993/50, (1993) (detailing systematic rape of women and girls in Bosnia-Herzegovina).

27. See AMNESTY INT'L, *WOMEN ON THE FRONT LINE*, *supra* note 26; AMNESTY INT'L, *RAPE, AND SEXUAL ABUSE: TORTURE AND ILL TREATMENT OF WOMEN IN DETENTION*, *supra* note 26; *DOUBLE JEOPARDY*, *supra* note 26.

28. See WOMEN'S RIGHTS PROJECT AND AMERICAS WATCH, HUMAN RIGHTS WATCH, *CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL* (1991) (specifically addressing domestic violence and state responsibility in Brazil, the problem of impunity as reflected in the acceptance of the "honor" defense by men accused of killing their wives, and the failure of the government to systematically prosecute crimes of domestic violence in a non-discriminatory manner); WOMEN'S RIGHTS PROJECT AND MIDDLE EAST WATCH, HUMAN RIGHTS WATCH, *PUNISHING THE VICTIM: RAPE AND MISTREATMENT OF ASIAN MAIDS IN KUWAIT* (1992) (documenting a pattern of rape, physical assault and other mistreatment of Asian maids by their Kuwaiti employers with no effort by the government to provide them protection under the civil, criminal or labor laws of Kuwait); WOMEN'S RIGHTS PROJECT AND HELSINKI WATCH, HUMAN RIGHTS WATCH *HIDDEN VICTIMS: WOMEN IN POST-COMMUNIST POLAND*, (1992) (examining the increasing discrimination against women in post-communist Poland with reference to their legal situation, health care, the right to association, violence and unemployment). See also Angelica Broman, Commission for the Defense of Human Rights in Central America (CODEHUCA), *The Ongoing Struggle for Women's Rights, Los Derechos de las Humanas, Women's Rights Section*, BRECHA, Jan.-Feb. 1992 (interview with Laura Guzman, the Director of the Women's Human Rights Programme at the Inter-American Human Rights Institute, citing the failure of traditional human rights jurisprudence to include violations occurring in the private sphere as human rights abuses protected under international law, and calling for a reconceptualization of gender-based violence, including domestic violence, as a violation of international human rights); Kanan Makiya, *Rape in Service of the State*, NATION, May 10, 1993, at 627 (adapted from KANAN MAKIYA, *CRUELTY AND SILENCE: WAR, TYRANNY, UPRISING AND THE ARAB WORLD* (1993) (documenting the manipulation of "honor and shame" traditions by the government of Iraq as a means of punishment and control and the murder of young women by family members for violating family honor)); LAWYERS FOR HUMAN RIGHTS AND LEGAL AID, *THE FLESH TRADE: THE TRAFFICKING OF WOMEN AND CHILDREN IN PAKISTAN* (1993) (documenting abduction of women and children in Bangladesh for slavery in Pakistan with no recourse to government protection).

29. Investigators have documented a widespread pattern of commanders encouraging and even ordering men under their command to rape women and girls as young as seven years old. This is further explained as part of a scheme of "ethnic cleansing" to eliminate the Muslim populations from the area through intimidation, expulsion, murder, and the impregnation of Muslim women to give birth to Serbian

media and human rights groups have recognized that the treatment of women in Bosnia-Herzegovina occurs within a political context.³⁰ The rape of women there has been characterized not simply as the actions of renegade soldiers, but as a weapon of war—a calculated move that is part of a larger scheme of “ethnic cleansing” of Muslims and other non-Serbs from Bosnia.³¹

Advocates and adjudicators are also increasingly attempting to address the particular nature of gender-related claims.³² In 1991, the UNHCR issued its *Guidelines on the Protection of Refugee Women*³³ which recognize the particular circumstances of women refugees which may form the basis of a persecution claim,³⁴ and set out procedures to conduct meaningful evaluations of women’s claims.³⁵ The Canadian Immigration and Refugee Board has also recently developed guidelines for the evaluation of gender-related persecution claims.³⁶ In addition, courts and administrative bodies in a number of countries have granted protection to women fleeing gender-related persecution.³⁷ Although

babies. Tom Post, *A Pattern of Rape: A Torrent of Wrenching First-Person Testimonies Tells of a New Serb Atrocity: Systematic Sexual Abuse*, NEWSWEEK, Jan. 4, 1993, at 32. See also BOSNIA-HERZEGOVINA, *supra* note 26 (documenting widespread rape of women in Bosnia-Herzegovina, primarily by Serbian armed forces, but also by Muslim and Croatian military, and detailing a number of individual cases of abuse); U.N. Economic and Social Council, Commission on Human Rights, *supra* note 26.

30. See, e.g., Jeffords, *From Bosnia to the U.S., Women’s Bodies Have Always Been a Battleground*, VILLAGE VOICE, July 13, 1993, at 22; Somini Sengupta, *Marchers Call for Prosecuting Bosnia Rapes as War Crimes*, L.A. TIMES, Mar. 9, 1993, at B4; Dianna Marder, *Once Again, Rape Becomes a Weapon of War*, ATLANTA CONST., Feb. 17, 1993, at A11; Anna Quindlen, *Cynocide*, N.Y. TIMES, Mar. 10, 1993, at A19.

31. See *Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 26, at 19-20, para. 85 (finding that rape is being used in Bosnia-Herzegovina as a method of ethnic cleansing, intended to “humiliate, shame, degrade and terrify the entire ethnic group,” and “designed to terrorize the population and force ethnic groups to flee.”).

32. This includes an examination of situations in which the harm to the woman is of a type which is specifically based on her gender, as well as cases in which the reason for the infliction of the persecution she fears is her gender.

33. See *UNHCR Guidelines*, *supra* note 17.

34. For example, the *UNHCR Guidelines* recognize that a woman’s claim to refugee status may be based on severe sexual discrimination that rises to the level of persecution, *id.* at para. 55, victimization because of the political activities of a male relative, *id.* at para. 56, or persecution for transgressing social mores, *id.* at para. 54. Additionally, the *UNHCR Guidelines* urge recognition of sexual violence against women as a form of persecution “when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or punish.” *Id.* at para. 71.

35. The *UNHCR Guidelines* recommend, inter alia, adoption of gender-sensitive techniques for conducting interview of women applicants, *id.* at para. 72, education of adjudicators regarding country conditions affecting women, *id.* at para. 73, hiring women as interviewers and interpreters for the refugee status determination process, and gender-sensitive training of interviewers and interpreters. *Id.* at para. 75.

36. See IMMIGRATION AND REFUGEE BOARD, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (Ottawa, Canada, Mar. 9, 1993) [hereinafter CANADIAN GUIDELINES].

37. See, e.g., *Incirciyan v. Minister of Employment and Immigration*, Immigration Appeal Board Decision M87-1541, Aug. 10, 1987 (Can.); *Immigration and Refugee*

the United States has no regulations or guidelines specifically addressing the needs of female asylum seekers and there is little published United States case law in this area, advocates are increasingly presenting the cases of their female clients with an emphasis on gender. A number of cases are pending before the United States courts, the Immigration and Naturalization Service, and the Executive Office for Immigration Review.³⁸

This article presents an evaluation of the current status of U.S. asylum law with regard to the gender-related claims of women. It proposes a framework, informed by developments in other countries and by the United Nations, for assessing the cases of women seeking the protection of political asylum and withholding of deportation. This framework recognizes asylum claims when the type of persecution is tied to the applicant's gender and when the persecution is imposed for a reason related to the applicant's gender. Under this framework, the gender-related claims of women will largely be formulated within the particular social group category of the refugee definition.

I. United States Political Asylum Law: General Principles

In 1968, the United States acceded to the 1967 Protocol Relating to the Status of Refugees³⁹ which incorporates Articles 2 through 34 of the 1951 Convention Relating to the Status of Refugees.⁴⁰ Congress ultimately incorporated many of the United States' obligations under the Protocol through the Refugee Act of 1980.⁴¹ Among other provisions, Congress adopted the Protocol's definition of "refugee" without substantial alteration.⁴² Under the Refugee Act, codified within the Immi-

Board, Decision M89-01213, June 1989 (Can.); Immigration and Refugee Board, Decisions T89-00587, T89-00588, T89-00589, June 16, 1989 (Can.); Decision of the Federal Office for the Recognition of Foreign Refugees 439-26428-86, Nov. 24, 1988 (F.R.G.); Minister of Employment and Immigration v. Mayers, 97 D.L.R. 4th 729 (1992); Immigration and Refugee Board (Refugee Division), Decision U92-06668, Feb. 19, 1993 (Can.); Cheung v. Minister of Employment and Immigration, 102 D.L.R.4th 214 (1993).

38. See, e.g., *Fatin v. INS*, No. 92-3346 (pending before the 3d Cir.) (raising, *inter alia*, the issue of membership in the particular social group of Iranian feminists who refuse to submit to Iranian law and social mores regarding women); *Matter of A.R.A.*, (A# withheld) (pending before Board of Immigration Appeals) (Guatemalan woman subjected to domestic abuse); *Matter of M.T.* (A# withheld) (Iranian feminist); *Matter of E.B.* (pending before Asylum Office of the Immigration and Naturalization Service) (A# withheld) (Haitian woman threatened by abusive common law husband as a result of political activities); *Matter of M.C.* (pending before the Board of Immigration Appeals) (A# withheld) (Haitian woman raped by Tontons Macoutes); *Matter of T.A.* (pending before Asylum Office of the Immigration and Naturalization Service) (Ethiopian feminist organizer); see also *Matter of M.M.* (A# withheld) (asylum granted by I.N.S. Asylum Office in claim raising, *inter alia*, membership in the particular social groups of Iranian feminists and Iranian feminist artists).

39. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

40. *Opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (1954).

41. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified in 8 U.S.C. § 1101 (1988)).

42. The only substantive difference between the refugee definition contained in the Convention and that adopted by the United States through the Refugee Act was

gration and Nationality Act, the Attorney General has the authority to grant political asylum to any person who meets the statutory definition of "refugee":⁴³

any person who is outside of 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 or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁴⁴

Accordingly, to establish refugee status, a woman must demonstrate that she has been persecuted in the past or has a fear of future persecution,⁴⁵ that her fear is well-founded, that the feared persecution will be by the government or by someone whom the government is unwilling or unable to control,⁴⁶ and that the feared persecution is on account of one

the inclusion in the Refugee Act of past persecution as a basis for determination of refugee status. The Supreme Court has recognized that Congress' major purpose in enacting the Refugee Act was to bring United States law into conformance with its international obligations.

If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . . Indeed, the definition of "refugee" that Congress adopted . . . is virtually identical to the one prescribed by Article 1(2) of the Convention . . .

INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987).

43. See INA § 208(a), 8 U.S.C. § 1158(a) (1988):

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

44. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988).

45. An applicant can establish eligibility for political asylum based on past persecution even when she does not have a well-founded fear of future persecution. See *Matter of Chen*, Int. Dec. 3104 (BIA 1989). See also INA § 101(a)(42)(A), 8 U.S.C. § 1101 (a)(42)(A) (1988). The regulations provide that establishing past persecution creates a rebuttable presumption that the applicant also has a well-founded fear of future persecution. See 8 C.F.R. § 208.13(b)(1) (1993). If conditions have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted in her country of nationality or the last habitual residence, her asylum application can nonetheless be granted if she demonstrates compelling reasons for being unwilling to return. 8 C.F.R. § 208.13(b)(1)(ii) (1993).

46. While the persecutor will ordinarily be the government, persecution by non-governmental actors may also be found when there is a failure of state protection. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 104 (1991); ASYLUM BRANCH, IMMIGRATION AND NATURALIZATION SERVICE, *BASIC LAW MANUAL: ASYLUM SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW* 25 (1991) [hereinafter *INS MANUAL*]; OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *UNHCR HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS*, at para. 65, U.N. Doc. HCR/IP/4/Eng. Rev. (1988) [hereinafter *UNHCR HANDBOOK*]; *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981); *Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir. 1988); *Matter of Villalta*, Int. Dec. 3126 (BIA 1990).

of five bases: race, religion, nationality, political opinion or membership in a particular social group. In a case based on political opinion, the persecution need not be on account of the applicant's actual opinion, but may be based on an opinion imputed to her by the persecutor.⁴⁷

An applicant for political asylum is also considered an applicant for withholding of deportation under Section 243(h) of the Immigration and Nationality Act (INA).⁴⁸ Section 243(h) of the INA prohibits the Attorney General from returning an alien to a country "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."⁴⁹

The standards of proof for establishing eligibility for asylum and withholding of deportation differ. To establish eligibility for political asylum, the applicant must demonstrate that she has been persecuted in the past or that there is a reasonable possibility that she will be persecuted in the future.⁵⁰ To establish eligibility for the mandatory status of withholding of deportation, an applicant must meet the higher burden of proving that the persecution in the future is more probable than not.⁵¹

II. Gender-Related Persecution Under United States Law

Within the United States, there is little case law dealing specifically with the gender-related persecution claims of women. For the most part, asylum law has developed through the adjudication of the cases of male applicants and has therefore involved an examination of traditionally male-dominated activities.⁵² There have been no published Board of

47. See *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985). See also Grover J. Rees III, General Counsel, Immigration and Naturalization Service, *Legal Opinion: Continued Viability of the Doctrine of Imputed Political Opinion* (Jan. 19, 1993) (addressing the viability of the political asylum claims based on imputed political opinion in light of the Supreme Court's decision in *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992), and stating that "persecution inflicted because the persecutor erroneously imputes to the victim one of the protected characteristics set forth in Section 101(a)(42) can constitute persecution 'on account of' that characteristic for the purpose of asylum or refugee analysis.").

48. 8 U.S.C. § 1253(h) (1988). While political asylum is a discretionary form of relief, withholding of deportation is mandatory for those who meet the eligibility requirements.

49. *Id.* An applicant who is granted political asylum becomes eligible to apply for lawful permanent resident status after one year. See 8 U.S.C. § 1159(b) (1988). A grant of withholding of deportation does not carry this benefit. See 8 U.S.C. § 1253(h) (1988).

50. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407 (1989).

51. *Cardoza-Fonseca*, 480 U.S. at 430-31.

52. See, e.g., *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987) (detention, interrogation, and physical abuse based on suspected involvement with minority opposition group can constitute persecution based on political opinion); *Matter of Izatula*, Int. Dec. 3127 (BIA 1990) (punishment for attempting coup may constitute persecution for political opinion when there is no legitimate means of governmental reform); *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D. N.Y. 1988) (coup plotting can be an expres-

Immigration Appeals⁵³ decisions and few federal court decisions which directly address the relationship of gender to a claim of persecution under the Refugee Act.⁵⁴ The majority of these cases have been brought under a political opinion or imputed political opinion theory. The holdings of these cases vary widely, however, and provide little guidance to those seeking to present gender-related claims.

In the most far-reaching U.S. case addressing gender-related persecution, the Ninth Circuit granted asylum to a Salvadoran woman who had been sexually abused over a prolonged period by an army officer.⁵⁵ The applicant in that case, Olympia Lazo-Majano, had been subjected to repeated rape, threats and beatings by Sergeant Zuniga, a member of the Salvadoran armed forces for whom she performed domestic work.⁵⁶ When the applicant resisted the actions of Zuniga, he threatened to denounce her to the military as a subversive. On at least one occasion, he publicly accused her of subversive activities in the presence of a member of the Salvadoran police. After several weeks of such treatment, Ms. Lazo-Majano fled the country and sought asylum in the United States. An Immigration Judge initially denied her claim. The Board of Immigration Appeals upheld the decision of the Immigration Judge, finding that the harm she feared was strictly personal and did not constitute persecution within the Act.⁵⁷ The Ninth Circuit reversed the decision of the Board, finding that Ms. Lazo-Majano was eligible for political asylum and for withholding of deportation based on her actual political opinion and on the political opinion which would be imputed to

sion of political opinion); *Maldonado-Cruz v. INS*, 883 F.2d 788 (9th Cir. 1989) (punishment for desertion from the guerrillas can constitute persecution on account of political opinion in some instances); *Matter of Salim*, 18 I. & N. Dec. 311 (BIA 1982) (punishment for evasion of mandatory military service can constitute persecution in some instances).

53. The Board of Immigration Appeals, part of the Executive Office for Immigration Review, is an administrative tribunal created by regulation. *See, e.g.*, 8 C.F.R. § 3.1(a)(1) (1990). Only a small number of the BIA decisions are published. Published decisions serve as precedent, binding on immigration judges throughout the country except in jurisdictions where there is a federal court ruling to the contrary. DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES* 14 (2d ed. 1991).

54. *But see Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975) (pre-Refugee Act decision in which the Board of Immigration Appeals denied protection under § 243(h) to a woman whose claim was based on fear of harm by her husband, a prominent official in the Haitian government, from whom the government would not provide protection. The Board noted that the respondent did not claim that she would be persecuted by virtue of her race, religion, nationality, political opinion, or membership in a particular social group and classified the harm she feared as "strictly personal.") *Id.* at 461, 462.

55. *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

56. Among the abuses to which Lazo-Majano had been subjected were rape at gunpoint, having a hand grenade held to her head, threats to have her tongue cut out, her fingernails removed and her eyes pulled out, and threats that she and her children would be killed. Lazo-Majano's husband, who had belonged to a right-wing paramilitary organization, had left the country several years earlier for political reasons. *Id.* at 1433.

57. *Id.* at 1439.

her, albeit cynically, by Zuniga.⁵⁸ Significantly, the Court also found that Sergeant Zuniga expressed an opinion regarding the nature of power between men and women in his treatment of Ms. Lazo-Majano. Through her flight, Ms. Lazo-Majano expressed the political opinion that men do not have the right to dominate women.⁵⁹

The Ninth Circuit's expansive interpretation of the meaning of political opinion stands in contrast to the decisions of the Fifth and Sixth Circuits in which applicants have raised claims based on gender-specific persecution. In 1989, the Fifth Circuit⁶⁰ upheld a denial of asylum to Sofia Campos-Guardado, a Salvadoran woman who sought protection based primarily on a theory of imputed political opinion⁶¹ after having been raped while witnessing the brutal politically motivated murder of family members. While Ms. Campos-Guardado was visiting her uncle and cousins who were active in a local agricultural cooperative, the family was attacked by two armed men and a woman. The applicant and her female cousins were bound and forced to watch while her uncle and male cousins were hacked with machetes and shot to death. Ms. Campos-Guardado and her female cousins were then raped by the two men while the woman shouted political slogans. The rapist later threatened

58. The court found:

Olimpia has suffered persecution because of one specific political opinion Zuniga attributed to her. She is, she has been told by Zuniga, a subversive The opinion, it may be said, is not Olimpia's. It is only imputed to her by Zuniga. And it is imputed by Zuniga cynically. Zuniga knows that Olimpia is only a poor domestic and washerwoman. She does not participate in politics.

Olimpia, however, does have a political opinion, camouflage it though she does. She believes that the Armed Force is responsible for lawlessness, rape, torture, and murder. Such views constitute a political opinion. And she has been persecuted for possessing it. Because she believes that no political control exists to restrain a brutal sergeant in the Armed Force she has been subjected to his brutality

Even if she had no political opinion and was innocent of a single reflection on the government of her country, the cynical imputation of political opinion to her is what counts under both statutes.

Id. at 1435.

59. The court stated:

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

Id.

60. *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987).

61. The applicant also raised the claim that she was a member of a social group comprised of her family. The Court dismissed this claim, however, with little discussion. *Id.* at 288.

the applicant on numerous occasions.⁶² Believing that she could find no protection in El Salvador, she fled to the United States. She sought political asylum, arguing that the political opinion of her family members who were active in the agrarian land reform movement had been imputed to her and that her rape and the threats she received were on account of that imputed opinion. The Immigration Judge denied her application for asylum. The Board of Immigration Appeals upheld the decision of the Immigration Judge, finding that Ms. Campos-Guardado failed to establish that the rape was motivated by a desire to harm her because of a political opinion that she possessed or was believed to possess,⁶³ and that subsequent threats by her rapist were personal rather than political.⁶⁴ The Fifth Circuit upheld the decision of the Board, finding that the harm she suffered was motivated by a purpose different than the harm imposed on her family members who were tortured and murdered.⁶⁵

In a recent case,⁶⁶ the Sixth Circuit denied political asylum and withholding of deportation to a Polish woman who had been blacklisted for her refusal to join the Communist Party and sexually abused by a colonel who was the chief of security and internal affairs for the Polish government.⁶⁷ Both the Immigration Judge and the Board of Immigration Appeals found that the actions she described did not constitute persecution within the meaning of the Act.⁶⁸ The Board found that the colonel's actions were motivated by his personal interest in the applicant rather than "any interest on his part to 'persecute' her."⁶⁹ The court upheld the decision of the Board, finding that the described treatment, which the court characterized as "sexual harassment,"⁷⁰ did not rise to

62. After the attack, while visiting her mother, she was introduced to a cousin, and she was told that he had recently escaped from the guerrillas. The cousin was her rapist. After this meeting, he followed the applicant, stole her money, and threatened to kill her and her family if she revealed that he had raped her. *Id.* at 287.

63. While the Board concluded that the attack on her family resulted from her uncle's political views, it found that Ms. Campos-Guardado had not shown that she had been harmed in order to overcome any of her own political opinions. *Id.* at 288.

64. *Id.* Concerning Ms. Campos's fear of her assailant should she return to El Salvador, the Board concluded that these threats of reprisal were personally motivated—to prevent her from exposing his identity—and that there was "no indication he maintained an interest in her because of her political opinion or any other grounds specified in the Act."

65. *Id.* at 289.

66. *Klawitter v. INS*, 970 F.2d 149 (6th Cir. 1992).

67. The facts of this case were largely undeveloped. The applicant asserted that the colonel had "forced himself on her and used violence against her while threatening to destroy her career," and that other members of the secret police had detained her for twenty-four hours and physically abused her. *Id.* at 151.

68. In addition, the immigration judge initially found that the applicant's testimony lacked credibility. Both the BIA and the circuit court stated, however, that they were disregarding the negative credibility finding. *Id.*

69. *Id.* at 152.

70. The court stated:

It is clear that the basis of petitioner's asylum claim is her fear of continued pressure by a government official in Poland to succumb to his sexual

the level of persecution,⁷¹ and that the harm was not on account of any of the five bases enumerated in the asylum statute.

These cases reflect the lack of a cohesive framework within which to evaluate the gender-related claims of women. Each case raised a claim based on political opinion or imputed opinion in which the harm was gender-specific. However, while arriving at contradictory results,⁷² neither the *Campos-Guardado* court nor the *Klawitter* court attempted to reconcile their decisions with the *Lazo-Majano* decision or to elaborate principles for determining when gender-specific persecution will be considered politically-motivated.⁷³ The disparity in outcomes can be explained to some extent by the particular facts and circumstances of the individual cases.⁷⁴ Nonetheless, the cases also reflect two pervasive problems in evaluating the asylum cases of women: difficulty accepting

advances. We agree with the Board that although petitioner's testimony recounts an unfortunate situation, harm or threats of harm based solely on sexual attraction do not constitute "persecution" under the Act. Even if petitioner's allegations are true, they do not come within the scope of the statute. Congress did not contemplate that a claim of *sexual harassment* would constitute the type of persecution for which political asylum would be granted (emphasis added).

Id. at 152.

71. Although the court noted that it was disregarding the original negative credibility finding and assuming the facts as presented to be true, it dismissed important assertions by the applicant because they were not fully developed. For example, the court noted that, although the petitioner asserted that she has been questioned, detained for twenty four hours, and physically abused by other members of the secret police, the only testimony considered detailing these events was the applicant's statement that the colonel's friends had accompanied him to her home when they were drunk. *Id.* at 153. Additionally, the circumstances surrounding the colonel's abuse of the petitioner were not clarified. While the applicant stated that the colonel had forced himself on her and used violence against her, the record contained no elaboration of the specific nature of the physical abuse she suffered. *Id.* at 153-54.

The court's decision also seems to have been influenced to some extent by its finding that the "Ministry of Internal Affairs, which oversees the security apparatus of the Polish government, recently underwent profound reform, including the 1990 abolition of the secret police force." *Id.* at 153.

72. For example, while Ms. Lazo-Majano had a personal relationship with her persecutor extending back to childhood, the court examined the political nature of the relationship and the political situation in which he acted against her with impunity. See *Campos-Guardado*, 809 F.2d at 287-89. In contrast, despite the fact that the harm to both Ms. Campos-Guardado and Ms. Klawitter arose in an overtly political context, neither court examined that context.

73. Nor did the *Klawitter* court attempt to reconcile its decision with the Ninth Circuit's finding that physical violence imposed by a government agent against an individual is presumed to be suspect under the Act. See *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985):

When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government's actions are politically motivated.

74. For example, the *Klawitter* court was heavily influenced by the fact that the applicant did not provide a detailed account of the harm to which she had been subjected. See *Klawitter*, 970 F.2d at 153. On the other hand, the decision in *Campos-Guardado*, to a large extent, reflects a general failure to recognize imputed political

rape and other forms of sexual abuse as violence, and the tendency to ascribe personal motivations to persecutors when the harm is sexual.⁷⁵

In 1991, the Second Circuit for the first time addressed the issue of a gender-based particular social group.⁷⁶ In that case, the court upheld a denial of political asylum by the BIA to a Salvadoran woman who sought asylum as a member of the particular social group of women who had been previously battered or raped by Salvadoran guerrilla forces. Ms. Gomez had been attacked by guerilla members on five occasions while she was between the ages of twelve and fourteen. On each occasion, she was either beaten or raped, her life was threatened and her home was vandalized. She left El Salvador at the age of eighteen. In her asylum claim, Ms. Gomez argued that, by virtue of her prior attacks, she became a member of the particular social group of women who had been previously battered and raped by Salvadoran guerrillas. The BIA denied her case, finding that she had failed to demonstrate that the guerrillas would seek to harm her based on her association with a particular social group or any other basis in the refugee definition. The Second Circuit upheld the Board's decision, finding that she had failed to offer evidence that the group for which she sought recognition possessed any common characteristics—other than gender and youth—which would identify them as a group in the eyes of the persecutor,⁷⁷ and that there was no indication on the record that the applicant would be singled out for further brutalization based on her membership in the purported group. By way of analysis, the Court found only that the traits which distinguished members of a particular social group must be recognizable and discrete.⁷⁸ In dicta, the Court indicated that a particular social group based exclusively on gender would not stand. However, the court did so with virtually no analysis of relevant law and left the door open for future presentation of gender-related social group

opinion or to apply the "similarly situated" standard later incorporated into the Regulations. See 8 C.F.R. § 208.13(b)(2)(i) (1993).

75. See generally Maureen Mulligan, Note, *Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion*, 10 B.C. THIRD WORLD L.J. 355 (1990); see also *UNHCR Guidelines*, *supra* note 17, at 36, para. 56.

In all three cases, the Board of Immigration Appeals found that the harm was personally motivated. See *Lazo-Majano*, 813 F.2d at 1434 (Board found that "such strictly personal actions do not constitute persecution within the meaning of the Act"); *Campes-Guardado*, 809 F.2d at 288 (Board found that attackers were not motivated to harm applicant because of a political opinion she possessed and that threats of reprisals were personally motivated); *Klawitter*, 970 F.2d at 152 (Board found that when colonel threatened and harmed the applicant, he was "simply reacting to her repeated refusals to become intimate with him"). In *Klawitter*, when the court determined that the colonel was sexually interested in the applicant, it dismissed the relationship as personal without further inquiry or analysis. *Id.*

76. See *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

77. *Id.* at 664.

78. "Possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group." *Id.* at 664. For a discussion of the relevance of the size of the particular social group, see *infra* part III.B.2.a.

claims.⁷⁹

III. Proposed Framework for the Evaluation of Gender-related Asylum Claims

The existing refugee definition contained in the Convention and the Immigration and Nationality Act can accommodate the majority of gender-related cases of women, formulated as persecution based on membership in a particular social group, political opinion or imputed political opinion. To do so, however, requires a reconceptualization of the presentation of women's cases, including an examination of the political nature of seemingly private acts and the ways in which many states fail to accord protection to their female populations.

The majority of the cases of women eligible for political asylum can be formulated within six categories:

1. Women who face gender-neutral forms of persecution on the same grounds as their male counterparts;
2. Women who face gender-specific types of persecution on account of one of the grounds enumerated in the refugee definition;
3. Women who face persecution for having transgressed the religious or social mores of the societies from which they come;
4. Women who face severe discrimination, either by law or by custom within their countries;
5. Women who face persecution because of their relationship to family members whom the persecutor seeks to harm; and
6. Women who face battering or other abuse by non-governmental actors and who are unable to obtain the protection of their governments.

Persecution within the first category, "women who face gender-neutral forms of persecution on the same grounds as their male counterparts," is not specifically gender-related and protection can be pursued for the most part under traditional theories of asylum law.⁸⁰ This category is not specifically discussed below.

The following section addresses each of the five remaining categories and suggests a framework for evaluating and presenting the claims of women falling within them. The first of these, "women who face gen-

79. The court indicated that such a claim would be granted under appropriate circumstances: "Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution." *Gomez*, 947 F.2d at 664.

80. Even when the applicant's gender is not central to her persecution claim, however, there may be gender-related aspects to her case. For example, a woman may be persecuted on account of her political opinion regarding the treatment or status of women in her country. Similarly, a woman may face persecution based on religion if she refuses to hold a particular religion or to conform her behavior in accordance with the teachings of a prescribed religion. In assessing a woman's claim, therefore, it is always important to consider the status and experiences of women in the country from which the applicant has fled, including the position of women before the law, the political rights of women, the social and economic rights of women, the incidence of violence against women and the protection available to women facing such violence. See *UNHCR Guidelines*, *supra* note 17, at para. 73.

der-specific types of persecution," involves an evaluation of the *type of treatment* considered persecutory. The remaining four categories address situations in which the persecution is *on account of* a basis rooted in the applicant's gender. Cases falling into these four categories can be presented primarily under the particular social group basis of the refugee definition.⁸¹

A. Gender-Specific Types of Persecution

Women throughout the world are subjected to rape and other sexual violence⁸² or the threat of such violence for numerous reasons. These reasons include punishment for race, religion, political opinion, nationality and membership in a particular social group.⁸³ When presented in an asylum context, questions arise concerning both whether the sexual violence fits within the meaning of the word "persecution" and whether the abuse is on account of one of the enumerated bases in the refugee definition.

There is no universally accepted definition of persecution,⁸⁴ although most acts of bodily violence have been recognized as such.⁸⁵ Rape and other severe sexual abuse has been recognized as persecution under United States law and international interpretations of the Con-

81. In many instances they will also be compatible with an analysis under a political opinion or imputed political opinion theory.

82. *UNHCR Guidelines*, *supra* note 17, at 37 (detail the many forms of sexual assault against women which may constitute persecution:

The methods of torture can consist of rape, the use of electrical currents upon sexual organs; mechanical stimulation of the erogenous zones; manual stimulation of the erogenous zones; the insertion of objects into the body-openings (with objects made of metal or other materials to which an electrical current is later connected); the forced witnessing of unnatural sexual relations; forced masturbation or to be masturbated by others; fellatio and oral coitus; and finally, a general atmosphere of sexual aggression and threats of the loss of ability to reproduce and enjoyment of sexual relations in the future.)

See also Convention Relating to the Status of Refugees, *supra* note 4.

83. Information recently coming to light concerning the systematic approach to rape in Bosnia is focusing attention on the fact that rape is often used as a political strategy. *See Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 26.

84. *See* UNHCR HANDBOOK, *supra* note 46, para. 51

(There is no universally accepted definition of "persecution," and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership in a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.)

While the *UNHCR Handbook* is not binding on the adjudicators in the United States, it has been widely recognized as an important source of instruction regarding the obligations of the United States under the United Nations 1967 Protocol Relating to the Status of Refugees. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *see also* INS MANUAL, *supra* note 46, at 13.

85. *See, e.g.,* *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986) ("Persecution" includes confinement and torture).

vention.⁸⁶ The Board of Immigration Appeals has defined persecution as a "threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."⁸⁷ It is also widely accepted that other serious violations of human rights constitute persecution within the meaning of the Act and the Convention.⁸⁸

Rape and other sexual abuse involves the infliction of both physical and psychological suffering upon the victim. Rape has been recognized as a "profound interference with physical integrity"⁸⁹ and "an abuse of power and control in which the rapist seeks to humiliate, shame, degrade, and terrify the victim."⁹⁰ As imposed in Bosnia-Herzegovina, it has been found to be a war crime in violation of the Geneva Convention of 1949. In addition, rape implicates many international human rights instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, many international standards relating to the treatment of detainees, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Draft Declaration on Violence Against Women.⁹¹ In many instances, when inflicted as a means of intimidation or coercion,

86. See *Lazo-Majano*, 813 F.2d at 1434 (While the Ninth Circuit did not specifically find rape to be persecution, it listed Zuniga's rapes of the applicant among the harms which cumulatively constituted her persecution: "Persecution is stamped on every page of this record. Olimpia has been singled out to be bullied, beaten, injured, raped and enslaved."). See also *UNHCR Guidelines*, *supra* note 17, at 37, paras. 58, 60; *CANADIAN GUIDELINES*, *supra* note 36, at 15, n.11; *Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 26.

87. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985); see also *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (persecution is found "when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."); *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986).

88. These violations need not involve physical violence. See *UNHCR HANDBOOK*, *supra* note 46, para. 51. See also *infra* part III.B.2.d. for a discussion of human rights violations as persecution.

89. See *Castel*, *supra* note 6, at 40. See also *Felicite Stairs & Lori Pope, No Place Like Home: Assaulted Migrant Women's Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds*, 6 J. L. & Soc. POL'Y, 148, 153 (1990).

90. *Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 26, para. 85. The Commission also noted that, in the context of ethnic cleansing as imposed in the former Yugoslavia, rape has been used "not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group." *Id.* See also *Shana Swiss & Joan E. Giller, Rape as a Crime of War: A Medical Perspective*, 270 JAMA 612, 612-13 (1993).

91. See *Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 26, at 74. See also *UNHCR HANDBOOK*, *supra* note 46, para. 51; see also *infra* part III.B.2.d. for a discussion of human rights violations as persecution.

An important aspect of the development of asylum protection for women is the development of human rights instruments specific to women and the explicit inclusion of women within existing human rights instruments. See *Pamela Goldberg & Nancy Kelly, International Human Rights and Violence Against Women: Recent Developments*, 6 HARV. HUM. RTS. J. 195 (1993). While the United States is not a signatory to several of the existing international human rights instruments, their use as a framework for acceptable treatment of women is nonetheless useful. See *UNHCR Guidelines*, *supra* note 17, at 8, para. 6.

rape and sexual abuse of women fits squarely within the definition of torture.⁹²

Persecution is not limited to physical abuse, however. Sexual intimidation and threats of abuse or other lesser harms can also constitute persecution within the meaning of the Convention and the Act.⁹³ For example, the *UNHCR Guidelines* include in their discussion of sexual assault amounting to torture, "a general atmosphere of sexual aggression and threats of the loss of the ability to reproduce and enjoyment of sexual relations in the future."⁹⁴ Similarly, the *UNHCR Handbook* indicates that threats may amount to persecution depending on the circumstances of each case, including the "opinions and feeling of the person concerned."⁹⁵ In addition, the cumulative effect of numerous lesser harms, none of which in and of itself would be considered persecutory, can amount to persecution.⁹⁶ The persecutory nature of particular treatment should, therefore, be evaluated in light of all the circumstances of the case, including the applicant's subjective psychological make-up and the effect on her of the particular harm to which she has been subjected or which she anticipates.

In addition to establishing that the treatment she fears constitutes persecution, the applicant must also demonstrate that the harm was or will be imposed on account of one of the five bases enumerated in the

92. Torture is defined as:

[A]ny act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted Dec. 10, 1984, entered into force June 26, 1987, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/46 (1984) [hereinafter *U.N. Convention Against Torture*].

Rape has been recognized as torture by both the UNHCR, (see *UNHCR Guidelines*, *supra* note 17, at 37, paras. 59, 60) and the Immigration and Refugee Board of Canada (see *CANADIAN GUIDELINES*, *supra* note 36, at 7, 12; see also Immigration and Refugee Board (Refugee Division), Decision U92-06668 (Feb. 13, 1992) (Can.) at 8 ("[C]ontinued physical, sexual and emotional abuse constitutes a violation of the claimant's security of the person and amounts to cruel, inhuman and degrading treatment.")).

93. The INS has recognized as forms of persecution from which applicants will be protected many harms that do not involve direct physical violence. Among these are slavery; prolonged detention without notice and opportunity to contest the grounds for detention; arbitrary interference with a person's privacy, family, home or correspondence; relegation to substandard dwellings; exclusion from institutions of higher learning; enforced social or civil inactivity; passport denial; constant surveillance; pressure to become an informer. See *INS MANUAL*, *supra* note 46, at 20-21.

94. *UNHCR Guidelines*, *supra* note 17, at 37, para. 59.

95. *UNHCR HANDBOOK*, *supra* note 46, para. 52.

96. *Id.* para. 53.

definition. The sexual nature of the harm often serves to personalize the event in the eyes of the adjudicator. Because rape is frequently viewed as a sexual act rather than an act of violence, the rapist, even when a government official or a member of an anti-government fighting force, is perceived as acting from personal motivation.⁹⁷ In some cases, an applicant's failure to seek protection in her country from the rapist is used to support a finding that the rape was not a political matter:

We live in a world where sexuality organizes culture, and sexuality is a form of power. In a world where speaking out against a rapist can mean death, women are left with little choice but to endure the persecution of the rapist. This acquiescence leads the Immigration Judge to label the incident a personal relationship. Rejecting the definition of women as a thing to be objectified through sexual torture, is rejecting a theory of the state that allows that power and control.⁹⁸

Even when the rape occurs while the applicant is in government custody, it is often dismissed as the aberrant act of an individual which is to be expected in times of war rather than behavior which is condoned or encouraged by the government.

Women who are attacked by military personnel may find difficulty in showing that they are victims of persecution rather than random violence. Even victims of rape by military forces face difficulties in obtaining refugee status when the adjudicators of their refugee claim view such attacks as *normal* part of warfare.⁹⁹

However, information recently coming to light indicates that rape and other sexual abuse is all too often used as a political strategy.¹⁰⁰ To overcome the personalization of sexual abuse, education regarding the nature of sexual abuse and its use as form of intimidation and coercion as a general political strategy and in particular political situations must be pursued.¹⁰¹ While men are often killed or tortured in other ways,

97. See Mulligan, *supra* note 75, at 376-80.

98. *Id.* at 377-78.

99. *UNHCR Guidelines*, *supra* note 17, at 36-37, para. 56. In contrast, other kinds of violence, such as torture, which arguably are also a normal part of warfare are not rendered non-persecutory simply because they are common.

100. See *UNHCR Guidelines*, *supra* note 17, at 36-37, para. 56; 40, para. 71; see generally *Situation of Human Rights in the Territory of the Former Yugoslavia*, *supra* note 26; AMNESTY INT'L, *WOMEN ON THE FRONT LINE*, *supra* note 26; Swiss & Giller, *supra* note 90, at 612.

101. The collection and dissemination of information concerning the treatment of women in individual countries is extremely important in this regard. Amnesty International, The Women's Rights Project of Human Rights Watch, and other organizations have recently published a number of reports regarding the treatment of women in various countries. See *supra* notes 26-29. However, information concerning sexual abuse of women is not routinely collected and published in an organized way. For example, the U.S. State Department publishes yearly reports on the human rights situations in countries throughout the world. While the State Department devotes a section of this report to discrimination based on race, sex, religion, language, or social status, it does not systematically include information regarding sexual abuse of women in these countries, or access to protection from such abuse. Additionally, information concerning the sexual abuse of women generally is extremely difficult to

women are often raped or tortured sexually. Proper adjudication of these cases requires that adjudicators recognize that rape and other sexual abuse are not sexual acts but acts of violence often used to coerce or punish women because of their race, religion, nationality, particular social group or political opinions similar to other violent acts.¹⁰²

B. Persecution on Account of Gender

The remaining four categories of gender-related persecution claims address situations in which the persecution is *on account of* the applicant's gender. These cases are compatible with the particular social group category of the refugee definition. In some cases the defining characteristic of the group will be simply "gender,"¹⁰³ while in other cases it will be gender combined with other factors. In many instances the particular social group category will overlap with the other bases included in the refugee definition, for example, political opinion or imputed political opinion. This occurs when the persecutor seeks to punish the members of the group because they possess or, by virtue of their membership in the group, they are perceived to possess an opinion in contradiction to the opinion of the persecutor.¹⁰⁴

1. *The Particular Social Group Category Under U.S. Law*

Neither the Act nor the regulations¹⁰⁵ provide a specific definition of the phrase "particular social group."¹⁰⁶ Some commentators have argued for an expansive reading of the phrase requiring only some recognizable similarity of background among group members:

The intent of the framers of the Refugee Convention was not to redress prior persecution of social groups, but rather to save individuals from

obtain, for a number of reasons, including the failure of governments to maintain statistics concerning gender-related crimes and widespread under-reporting of sexual abuse.

102. The UNHCR recommends education of adjudicators to accept the notion that "sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or punish." *UNHCR Guidelines, supra* note 17, at 40, para. 71.

103. *See infra* part III.B.2.a. regarding the significance of the size of the particular social group.

104. A gender-related claim may overlap with a claim based on nationality when a woman loses her nationality based on marriage. A gender-related claim may overlap with a claim based on religion when a woman fears persecution based on her refusal to hold a particular religious belief or to conform to the requirements of a particular religion.

105. *See generally* 8 U.S.C. § 1101 (1988); 8 C.F.R. § 1.1.

106. However, in a closely related issue, the regulations do provide guidance concerning the granting of political asylum based on mistreatment of persons similarly situated. *See* 8 C.F.R. 208.13(b)(2)(i). An applicant for political asylum has sustained her burden of proving a well-founded fear of persecution without demonstrating she would be singled out for persecution if she can establish: 1) a pattern or practice of persecution of groups of persons similarly situated based on race, religion, nationality, political opinion, or membership in a particular social group, and 2) her own inclusion in and identity with such group of persons such that her fear of persecution upon return is reasonable. *Id.*

future injustice. The "social group" category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up.¹⁰⁷

This argument finds some support in the definition provided by the *UNHCR Handbook*¹⁰⁸ which requires only "similarity of background, habits or social status" and in the travaux préparatoires of the Convention:

A study of the travaux préparatoires of the 1951 Convention, where the term "particular social group" first was injected into the definition of 'refugee', shows that the category was meant to protect groups and individuals that did not fall within the categories of race, religion, and political opinion. Social group classification was meant to have flexible boundaries that would enable it to perform this function.¹⁰⁹

In *Matter of Acosta*,¹¹⁰ the Board of Immigration Appeals offered a somewhat more restrictive analysis of the particular social group category of the refugee definition. Focusing on internally-defined group characteristics, the Board interpreted the phrase "particular social group" to mean a group of persons all of whom share a common, immutable characteristic.¹¹¹ In analyzing the meaning of the phrase "particular social group," the Board examined the nature of the protection afforded by the other four bases enumerated in the refugee definition

107. Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 41-42, 45 (1983). See also A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 20 (1966) ("[I]t seems appropriate to give the phrase a liberal interpretation. Whenever a person is likely to suffer persecution merely because of his background, he should get the benefit of the present provision.").

108. A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality. UNHCR HANDBOOK, *supra* note 46, para. 77.

The UNHCR Handbook has been recognized by the Immigration and Naturalization Service, the Board of Immigration Appeals, and the courts as providing guidance in the application of United States Asylum Law. See *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Matter of Acosta*, 19 I. & N. Dec. at 220 (BIA 1985); INS MANUAL, *supra* note 46, at 13, part II(C)(3).

109. ANKER, *supra* note 53, at 147-48. See also Neal, *supra* note 8, at 203, 229 ("The drafters recognized that groups worthy of refugee status would inevitably appear whose persecution they could not foresee. Accordingly, they inserted the social group category and left it to posterity to flesh out its meaning."); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of Refugee*, 92 COLUM. L. REV. 923, 928-29 (1992).

110. *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985); see also *Matter of Vigil*, 19 I. & N. Dec. 572 (BIA 1988).

111. The respondent in *Acosta* sought asylum based on his membership in COTAXI, a taxi driver cooperative in El Salvador. He argued that, as a member of the cooperative, he had a well-founded fear of the Salvadoran guerrillas who, because of the cooperative's refusal to participate in work stoppages against the government, seized and burned taxis belonging to the cooperative and had killed five cooperative members. The respondent had personally been beaten by the guerrillas and received three threatening letters. *Matter of Acosta*, 19 I. & N. Dec. at 216-17.

and, applying the principle of *ejusdem generis*,¹¹² reasoned that the general words "particular social group" should be read in a manner consistent with the more specific words contained in the definition (*i.e.* race, religion, nationality and political opinion).¹¹³ Observing that each of the four specific grounds concerned an immutable characteristic that individuals are "unable by their own actions, or as a matter of conscience should not be required" to change, the Board established a similar "immutable characteristic" test to guide interpretation of the particular social group category.¹¹⁴

Thus, the Board in *Acosta* articulated two alternative criteria for the social group category. The common characteristic defining the group must be one that the members of the group cannot change, or it must be one that the members should not be required to change because it is so fundamental to the members' individual identity or conscience.¹¹⁵ The Board also listed specific examples of groups identifiable by such immutable characteristics. Significantly, sex was among those listed.¹¹⁶ The shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as land ownership.¹¹⁷

Few Circuit Courts have addressed the question of what constitutes a particular social group.¹¹⁸ The Ninth Circuit in *Sanchez-Trujillo v.*

112. "Of the same kind, class, or nature." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

113. *Matter of Acosta*, 19 I. & N. Dec. at 233.

114. *Id.*

115. *Id.* at 226. The Board found that, once membership in the group is established, to demonstrate a well-founded fear of persecution, the applicant must establish that she possesses a belief or characteristic the persecutor seeks to overcome in others by means of punishment of some sort; the persecutor is aware, or could easily become aware that the applicant possesses the belief or characteristic; and that the persecutor has both the ability and the inclination to punish the applicant. In *Matter of Mogharrabi*, the Board removed the word "easily" from the second requirement of the definition. *Matter of Mogharrabi*, 19 I. & N. Dec. at 446.

116. The Board rejected *Acosta's* claim, finding that his membership in the group and his refusal to participate in work stoppages were not immutable—he could have avoided the threats by either changing jobs or cooperating in the work stoppages. *Matter of Acosta*, 19 I. & N. Dec. at 234.

117. *Id.* at 233. See also INS MANUAL, *supra* note 46, at 39. In a recent decision setting the standard to be applied in evaluating the existence of particular social groups, the Supreme Court of Canada relied heavily on the test articulated by the BIA in *Acosta*. See *Ward v. Attorney General*, 103 D.L.R.4th 1 (1993). The test adopted by the Canadian Supreme Court incorporated the requirement that a particular social group be defined by an immutable characteristic. Under *Ward*, particular social groups include: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence. *Id.*

118. In many cases where the issue has been raised, the courts have based their decisions on other factors, declining to resolve the social group issue. See *Parish*, *supra* note 109, (citing *Adebisi v. INS*, 952 F.2d 910 (5th Cir. 1992) (family); *Gatchalian v. INS*, No 90-70204, 1991 U.S. App. (9th Cir. May 31, 1991) (Philippine landowners); *Alvarez-Florez v. INS*, 909 F.2d 1 (1st Cir. 1990) (former *campesino*

INS¹¹⁹ carved out four criteria for the determination of the existence of a particular social group within the refugee definition: 1) a close affiliation between members of the group, 2) a common impulse or interest upon which the affiliation is based, 3) a voluntary association, and 4) the existence of a common trait by which group members are distinguishable from the general population.¹²⁰

Under the standard articulated by the Ninth Circuit, a particular social group defined solely by gender would have little chance of success because of the "voluntariness" requirement.¹²¹ The Ninth Circuit stan-

cheesemakers from El Salvador); *Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988) (poor urban workers in El Salvador); *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987) (family); *Damaize-Job v. INS*, 787 F.2d 1332 (9th Cir. 1986) (Miskito Indians in Nicaragua); *Fernandez-Roque v. Smith*, 599 F. Supp. 1103 (N.D. Ga. 1984), *rev'd sub nom. Garcia-Mir v. Smith*, 766 F.2d 1478 (11th Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986) (Cubans who left Cuba during the Mariél boatlift)).

119. 801 F.2d 1571, 1576 (9th Cir. 1986). In that case, the Ninth Circuit upheld the BIA's denial of asylum and withholding of deportation to applicants who sought protection as part of a social group comprised of young, Salvadoran, urban, working class males of military age who had maintained political neutrality.

120. Under the *Sanchez-Trujillo* standard, once a cognizable social group has been established, three additional criteria must be evaluated to determine whether the applicant will qualify for relief within the social group category: 1) whether the applicant has demonstrated that she is a member of the group; 2) whether she has demonstrated that the group has, in fact, been targeted for persecution; and 3) if the applicant is seeking protection based on mere membership in the particular social group, whether special circumstances exist to warrant a finding of *per se* eligibility on the basis. *See id.* at 1574-75.

The "special circumstances" requirement articulated by the Ninth Circuit is derived from the *UNHCR Handbook*, which provides: "Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution." *UNHCR HANDBOOK*, *supra* note 46, para. 79. The *UNHCR Handbook* contains a similar requirement for claims arising under the categories of race ("particular circumstances"), *id.* para. 70; and religion ("special circumstances"), *id.* para. 73. The special circumstances requirement has not been explained. Some advocates have argued that it applies when a particular social group claim is not coupled with a claim under another basis in the refugee definition. *See C. P. Blum, Refugee Status Based on Membership in a Particular Social Group: A North American Perspective*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS* 81, 87 (J. Coll & J. Bhabha eds., 1992). The plain language of the provision, however, supports an interpretation that the special circumstances provision applies when the applicant offers only her *membership* in the particular social group as substantiation that her fear is well-founded. *See id.* at 88 n.39. For example, ordinarily an applicant will offer facts, such as past persecution or threats, based on her membership, to demonstrate that her fear is well-founded. There may, however, be special circumstances, such as a change in government or policy toward the particular social group, which would support a finding that the applicant's fear is well-founded even though she previously lived in her country without incident. An example of such a situation would be the case of an Iranian feminist who refuses to wear the chador and who left Iran prior to the fundamentalist revolution. Although she may not have experienced problems in her country prior to her departure, her fear of persecution upon return as a member of the particular social group of women who violate societal or religious norms will be well-founded.

121. *But see* *In re: Tenorio*, No. A72 093 558 (Imm. Court July 26, 1993) (Immigration Judge decision in the Ninth Circuit granting asylum to a gay Brazilian male as a member of the particular social group of homosexuals). The court acknowledged

dard has been widely criticized, however, for being overly restrictive and for drawing arbitrary distinctions which have no basis in either the Convention or U.S. law.¹²² For example, the Court offered no explanation for the requirement that the association be voluntary, which appears to contradict the BIA's requirement that members of a social group possess an immutable characteristic. In addition, despite its reliance on a voluntary association, the Ninth Circuit offered "the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people as the prototypical example of a particular social group."¹²³ The voluntariness requirement has also been criticized as arbitrary because it provides protection from persecution resulting from a choice made by the individual, but inexplicably does not provide protection for persecution resulting from a characteristic over which the individual has no control. No other court has applied this requirement.¹²⁴ In some cases the right to relief because of involuntary group membership has been recognized.¹²⁵

Other courts have emphasized the perspective of the persecutor in defining a particular social group. For example, in a case involving a Ghanaian woman who faced persecution because of her membership in the Ashanti tribe and a family of highly educated professionals associated with the former government of Ghana, the First Circuit¹²⁶ examined the government's view of the groups to which the applicant belonged. Referring to the *UNHCR Handbook* for guidance, the Court noted that the threat of persecution arose because of characteristics

the "voluntariness" requirement articulated by the Ninth Circuit. In analyzing the facts, however, the court focused on the immutable nature of sexual orientation. *Id.* at 14. Application of the "voluntariness" requirement would not however preclude a finding of a particular social group consisting of a subset of women sharing a voluntary association.

122. See Anker, *supra* note 53, at 147; D. Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar*, 62 WASH. L. REV. 913 (1987); Parish, *supra* note 109, at 941; see generally M. Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 740, 771 (1989); Blum, *supra* note 120, at 88.

123. *Sanchez-Trujillo*, 801 F.2d at 1576. *But see* *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (finding that the extended family was not a cognizable social group).

124. *But see* *Ravindran v. INS*, 976 F.2d 754 (1st Cir. 1992) (citing *Sanchez-Trujillo* *in dicta*, a case where the court did not consider the petitioner's argument that he was a member of the particular social group of Tamil males between 15 and 45 because the petitioner had not raised the issue below and therefore failed to exhaust his administrative remedies).

125. See, e.g., *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985) (classes of society, family, tribe); *Matter of Toboso*, No. A23 220 664 (BIA Mar. 12, 1990) (unpublished decision) (sexual preference); *In re Tenorio*, No. A72 093 558 (Imm. Court July 26, 1993) (sexual preference).

126. See *Ananeh-Firempong*, 766 F.2d at 623. The court, however, provided very little analysis of the term "particular social group." While granting the applicant's motion to reopen on a finding that she had established *prima facie* eligibility for withholding of deportation, the court failed even to indicate which of the particular social group categories raised was the basis of its decision.

which the applicant was unable to change, and that the group might face persecution because there is no confidence in the group's loyalty to the government or because the political outlook, antecedents, or economic activities of its members, or the very existence of the social group as such, is viewed as an obstacle to the Government's policies.¹²⁷

Similarly, the Second Circuit in *Gomez v. INS*,¹²⁸ emphasized the view of the potential persecutor in determining the existence of a particular social group. The Court found that members of a group must possess "some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general."¹²⁹

The cases and commentary reflect two competing interests: 1) that the particular social group category be given a liberal reading which is broad enough to offer protection to groups whose social origins put them at risk and flexible enough to evolve in response to changing circumstances;¹³⁰ and 2) that the definition not be so broad as to encompass all persons who may be facing harm as a result of war or generalized violence, or persons who can escape persecution by reasonably acceptable alterations of their behavior.¹³¹

A useful test for assessing the existence of a particular social group which acknowledges these competing interests is one which combines

127. *Id.* at 626; UNHCR HANDBOOK, *supra* note 46, para. 78, provides:

Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

See also GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 30 (1984).

128. 947 F.2d 660 (2nd Cir. 1991).

129. *Id.* at 664. The court reiterated the "close affiliation" test from *Sanchez-Trujillo* and found that the appellant had not demonstrated that members of the group possessed any characteristics which would identify them in the eyes of the persecutor. Blum has criticized the Court's approach in this case as "fundamentally misconceived," arguing that, as in *Sanchez-Trujillo*, "while the court acknowledges that the perceptions of the persecutor help shape the social group, it fails to apply that criteria to the case before it. Thus, the court fails to grasp that it is the applicant's prior brutal victimization that places her in a situation of continuing vulnerability, based not just on her gender and age but also on her experience as a victim." Blum, *supra* note 120, at 90-91.

130. Hathaway suggests that the Board's interpretation of the meaning of social group in *Acosta* is appropriate in that it respects:

both the specific situation known to the drafters—concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories—and the more general commitment of grounding refugee claims in civil or political status. More importantly, the standard is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for a claim to international protection.

HATHAWAY, *supra* note 46, at 161.

131. See *Acosta*, 19 I. & N. Dec. at 234 (finding that the respondent could avoid harm by changing his employment or cooperating in guerrilla-sponsored work stoppages).

the immutable characteristics requirement with the requirement that the group be identifiable by the persecutor. Under this analysis, members of a particular social group are defined by a characteristic: 1) which they cannot change or which is so fundamental to their identity that they should not be required to change; and 2) which marks them as members of the group in the eyes of the persecutor.¹³² The group must be socially meaningful—that is, it must be viewed as a group by the government or by other sectors of society. The members of the group should be seen by the persecutor as “other,”¹³³ and it is this “otherness” which is at the root of the persecution.¹³⁴

This test allows for the inclusion of a broad category of applicants whose social origins place them at risk:

This formulation includes within the notion of social group: 1) groups defined by an innate, unalterable characteristic; 2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and 3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not be required to abandon it.¹³⁵

At the same time, it limits the group by linking membership in the group to the persecutor’s ability to target individuals as members of the group, thus distinguishing particular social group members from members of the general population, statistical groupings or displaced persons.¹³⁶

2. *Women as a Particular Social Group*

In some instances, when presenting gender-related persecution claims under a particular social group theory, the immutable characteristic of

132. The view that an essential criterion for social group eligibility is the perception of the group by the persecutor is widely accepted by commentators:

[A]ttention should be given to the presence of uniting factors such as . . . shared values, outlook and aspirations. Also relevant are the attitude to the putative social group of other groups in the same society, and in particular the treatment accorded to it by state authorities. The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others, particularly the authorities of the state.

GOODWIN-GILL, *supra* note 127, at 30; *see also* Blum, *supra* note 120.

133. *See* Parish, *supra* note 109, at 946.

134. This analysis will often overlap with political persecution on account of political opinion or imputed political opinion. The social group will often be marked for persecution because of a particular political opinion which members of the group share or which the persecutor believes that they share. *See* UNHCR HANDBOOK, *supra* note 46, para. 78.

135. HATHAWAY, *supra* note 46, at 161, addressing the immutable characteristics requirement set forth by the BIA in *Acosta*. *See also* *Ward v. Attorney General*, 103 D.L.R.4th 1 (1993).

136. *See* Parish, *supra* note 109. Parish distinguishes refugees from displaced persons, noting that the “factual breach of the bond between a refugee and his country of origin” is the distinctive element which identifies a refugee. *Id.* at 990, (quoting A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, *supra* note 107). Parish notes that persecution within a social group context occurs only when the state denies protection to particular citizens due to their common social identity.

the particular social group will simply be the applicant's gender.¹³⁷ The definition of a particular social group on this basis is consistent with the Convention refugee definition.¹³⁸ The use of gender alone as the defining characteristic of the group raises at least two important considerations: 1) the significance of the size of the group to the group definition, and 2) the appropriateness of incorporating the persecution feared into the definition of the group.

a. Size of the Particular Social Group

While some courts have declined to accept certain particular social groups because they have found them to be too broad,¹³⁹ there is no support under the Convention for an argument that size alone should be the determinative factor: "[O]nce a person is subjected to a measure of such gravity that we consider it 'persecution,' that person is 'persecuted' in the sense of the Convention, irrespective of how many others are subjected to the same or similar measures."¹⁴⁰

When a group of persons is identified for persecution on account of one of the grounds covered in the refugee definition, the size of the pool of people potentially eligible for protection should not limit the extension of that protection.¹⁴¹ To the contrary, the fact that a large number of people in an applicant's situation fear harm at the hands of the government or other persecutor often lends credibility to the asylum

137. Because asylum concerns the ability of the applicant to obtain protection in her country, the definition of the group will also necessarily include the applicant's citizenship or nationality (i.e. Zimbabwean women).

138. The UNHCR has recognized, in the context of severe discrimination, that gender alone can define a particular social group. See UNHCR Executive Committee, *Note on Refugee Women and International Protection*, at 5, U.N. Doc. EC/SCP/59 (1990); see also *UNHCR Guidelines*, *supra* note 17, at 40, para. 71.

139. See, e.g., *Sanchez-Trujillo*, 801 F.2d at 1577:

[S]uch an all-encompassing group as the petitioners identify simply is not the type of cohesive, homogenous group to which we believe the term "particular social group" was intended to apply. Major segments of the population of an embattled nation even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct "social group" for the purpose of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.

See also *Lopez v. INS*, 775 F.2d 1015, 1017 (9th Cir. 1985); *Chavez v. INS*, 723 F.2d 1431, 1434 (9th Cir. 1984).

140. 1 A. GRAHL-MADSEN, *THE REFUGEE IN INTERNATIONAL LAW* 213 (1966), quoted in *Stairs & Pope*, *supra* note 89, at 171.

141. See *CANADIAN GUIDELINES*, *supra* note 36, at 6 ("The fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people."); see also *Sanchez-Trujillo*, 801 F.2d at 1577 ("Few could doubt, for example, that any Jew fleeing Nazi Germany in the 1930's or 1940's would by virtue of his or her religious status alone have established a clear probability of persecution.") (quoting *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985)).

claim.¹⁴²

In contrast, a statistical grouping will not constitute a particular social group¹⁴³ within the meaning of the Convention or the Act.¹⁴⁴ For example, in a situation of random violence, the fact that a greater percentage of victims coincidentally share a particular characteristic does not indicate that they are a socially meaningful group and have been targeted for persecution on a proscribed ground. However, if a group is recognized by a persecutor and threatened or persecuted based on an immutable group characteristic, it makes no difference whether the targeted group comprises a very large segment of the population of the country.¹⁴⁵ It is only relevant that the group, as defined, comports with the requirements of a particular social group. Applying the analysis proposed above, the particular social group must have a social identity within the specific cultural context based on an immutable and identifiable characteristic, and the group members must be targeted for persecution based on group membership.¹⁴⁶

When women are singled out within a particular society as a group and subjected to persecutory treatment, or denied protection from such treatment merely on the basis of their gender, the group of "women" constitutes a particular social group within the refugee definition.

Women constitute a social group both because they share certain 'immutable' characteristics and because they are frequently treated differently from men. To a greater extent than most social groups, women are an easily identifiable 'group'. . . Women share immutable characteristics. They are an easily identifiable group, possessing a combination of biological and socially attributed characteristics.¹⁴⁷

142. See 8 CFR § 208.13(b)(2)(i) (providing that an applicant can meet her burden of proof in establishing eligibility for political asylum by demonstrating persecution of similarly situated persons).

143. The inclusion of the word "particular" within the phrase "particular social group" has been raised as an indication of an intent to limit the scope of protected groups. See *Sanchez-Trujillo*, 801 F.2d at 1576; see also *M.E.I. v. Marcel Mayers*, 97 D.L.R.4th 729, 736 (1992). Parish correctly points out that "the word 'particular' is, however, necessitated by the grammatical construction of the sentence in which it falls; to omit it would have the Refugee Act literally protecting only those persecuted for their membership in the class of people consisting of all those who are members of any social group." Parish, *supra* note 109, at 925.

144. See *Sanchez-Trujillo*, 801 F.2d at 1576 ("[A] statistical group of males taller than six feet would not constitute a "particular social group" under any reasonable construction of the statutory term, even if individuals with such characteristics could be shown to be at greater risk of persecution than the general population.").

145. See, e.g., INS MANUAL, *supra* note 46, at 36 (offering "Apartheid in South Africa" as an example of a situation in which the mere fact of membership in a certain racial group will be sufficient to substantiate a claim to refugee/asylee status based on racial discrimination amounting to persecution.) See also UNHCR HANDBOOK, *supra* note 46, para. 76 (noting that in some cases of persecution based on nationality, persons belonging to a majority group may fear persecution by a dominant minority).

146. See generally Parish, *supra* note 109, at 937.

147. Stairs & Pope, *supra* note 89, at 167.

Because asylum is an individual remedy, despite membership in the particular social group, the individual applicant will nonetheless be required to establish her eligibility under the refugee definition.¹⁴⁸ The size of the group ultimately eligible for protection will necessarily be limited by other factors. For example, even though an applicant can establish that she is a member of the particular social group, possessing the defining characteristic of the group, she will still be required to demonstrate that she meets the other elements of the refugee definition. She must demonstrate that she has been persecuted in the past¹⁴⁹ or that she fears future persecution, that her fear of future persecution is well-founded, and that the feared persecution is by the government or by someone whom the government is unable or unwilling to control.¹⁵⁰ Thus, while the initial particular social group could be large, the group which is ultimately eligible for asylum protection will be much smaller.

b. Incorporation of Feared Persecution into the Definition of the Group

An issue related to the potential size of the particular social group is the question of whether it is appropriate to define the group by the persecution feared.¹⁵¹ In recent cases, both the Federal Court of Canada and the Canadian Immigration and Refugee Board have articulated particular social groups to include the persecution the claimant is seeking to avoid.¹⁵² In granting relief to a woman from China fleeing forced steril-

148. See CANADIAN GUIDELINES, *supra* note 36, at 6:

[R]efugee status being an individual remedy, whether or not it is based on social group membership, the woman will need to show that she has a genuine fear of harm, that her gender is the reason for the feared harm, that the harm is sufficiently serious to amount to persecution, that there is a reasonable possibility for the feared persecution to occur if she is to return to her country of origin and she has no reasonable expectation of adequate national protection.

149. The regulations set out a particular test to be applied when an applicant seeks asylum based on past persecution. See 8 C.F.R. § 208(13)(b)(1).

150. In a rare circumstance where the applicant seeks asylum based on mere membership in a particular social group, she will be required to demonstrate special circumstances which establish that her fear of persecution is well-founded. See *supra* note 106.

151. See *M.E.I. v. Mayers*, 97 D.L.R. 4th 729, 739 (1992) (in evaluating whether the credible basis panel appropriately found that "Trinidadian women subject to wife abuse" could constitute a particular social group, the court stated,

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

152. See *Cheung v. M.E.I.*, 102 D.L.R.4th 214 (1993); see also Immigration and Refugee Board (Refugee Division), Decision U92-06668, Feb. 19, 1993 (Can.) (finding that "unprotected Zimbabwean women or girls subject to wife abuse" and "Zimbabwean women or girls forced to marry according to customary laws of 'Kuzvavura' and 'Lobola'" constitute particular social groups within the Convention refugee definition.); Immigration and Refugee Board, Decision U92-08714, June 4, 1993 (Can.) (finding that Ecuadoran women subject to wife abuse constitute a particular social group).

ization on the basis of her membership in a particular social group, the Federal Court of Canada found that "women in China who have more than one child and who are faced with forced sterilization" are identified by a purpose which is "so fundamental to their human dignity that they should not be required to alter it."¹⁵³ By incorporating the feared harm into the definition of the group, the court limited the size of the particular social group, thus alleviating concerns that a group identified solely by gender was too broad.¹⁵⁴

It is unlikely, however, that the Board of Immigration Appeals or U.S. courts will formulate a standard for evaluating gender-related particular social groups which incorporates the persecution into the definition of the group. The Supreme Court's holding in *INS v. Zacarias*¹⁵⁵ and subsequent decisions of the Board of Immigration Appeals have placed great emphasis on the "on account of" language of the refugee definition.¹⁵⁶ Similarly, the Fifth Circuit's holding in *Gomez v. INS*¹⁵⁷ stressed the importance of defining the group by characteristics which mark that group for persecution in the eyes of the persecutor. To identify a group by the ultimate harm the group seeks to avoid runs counter to these decisions.

An analysis which is consistent with United States case law is one which distinguishes between the particular social group and the refugee group.¹⁵⁸ While the refugee group must be defined in terms of the persecution, the particular social group should be viewed in other terms.

153. *Cheung v. M.E.I.*, 102 D.L.R.4th 214 (1993).

154. *See M.E.I. v. Mayers*, 97 D.L.R.4th 729 (1992). The court in *Cheung* did not offer a rationale for the incorporation of the feared harm into the definition of the group. One analysis is that, in many cases, the vulnerability of the woman and the failure of the state to protect is directly tied to the type of harm. For example, a woman may be protected from violence generally but may be denied protection from spousal abuse. *See Pamela Goldberg, Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565 (1993).

155. *INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992) (finding, in a case involving a Guatemalan applicant who feared persecution by the guerrillas as a result of his refusal of conscription, that the applicant must establish that the harm he feared was on account of his political opinion rather than the persecutors' political opinion or their desire to increase their membership.)

156. *See Matter of R.O.*, Int. Dec. 3170 (BIA 1992) (finding that victim of forced recruitment by Salvadoran guerrillas had not established that threats made against him were "on account of" his political opinion and not the result of the guerrillas' aim to increase their military ranks); *see also Matter of R.*, Int. Dec. 3195 (BIA 1992) (finding that brutal treatment of a Sikh by Indian police in the course of an investigation did not establish eligibility for asylum where the purpose of the mistreatment was to obtain information about militants rather than to punish him because of his political opinions).

157. 947 F.2d at 664.

158. To some degree the court in *Chueng* merged the two groups. The court stated:

I find, therefore, that women in China who have more than one child, and are faced with forced sterilization because of this, form a particular social group so as to some within the meaning of a Convention refugee. This does not mean, of course, that all women in China who have more than one child may automatically claim Convention refugee status. It is only those women who

The definitive characteristics of a particular social group are those which mark the group for persecution and not the actual persecution itself. While the persecution suffered by an applicant in the past is relevant to the whether her fear of future persecution is well-founded and may, in some instances, make her identifiable to the persecutor as a member of the group, the characteristic which defines the group is generally separate and distinct from the persecution. For example, in the case of a woman who is subject to battering by her spouse and to whom the government has denied protection, it is not the fact that she has been battered in the past which marks her for future battering or upon which basis the state has denied its protection. The fact that she has been battered in the past is evidence that her fear of future battering is well-founded. However, the characteristic which identifies her for battering is her gender—not her past battering.¹⁵⁹

Under the particular social group analysis proposed above,¹⁶⁰ the particular social group is defined by: 1) group characteristics which members cannot change or which are so fundamental to their identity that they should not be required to change, and 2) group characteristics mark them as a group in the eyes of the persecutor. The refugee group is a smaller one comprised of that collection of women from the particular social group who also meet the other criteria of the refugee definition.

Applying this analysis, the remaining four categories of gender-related cases are compatible with a particular social group theory.¹⁶¹

c. Women Who Face Persecution for Having Transgressed the Religious or Social Mores of Their Societies

The use of the particular social group basis of the refugee definition to extend protection to women who face persecution for having transgressed religious or social mores of their societies finds strong support in pronouncements of the UNHCR and governmental bodies and the administrative decisions of several countries.¹⁶² In 1984, the European

also have a well-founded fear of persecution as a result of that who can claim such status.

Cheung v. M.E.I., 102 D.L.R.4th 214.

Similarly, while identifying the particular social groups as "women in China who have more than one child and who are faced with forced sterilization," the Immigration and Refugee Board named "gender" as the "innate and unalterable characteristic which defined the group." Immigration and Refugee Board (Refugee Division), Dec. U92-06668, at 16.

159. See *Stairs & Pope*, *supra* note 89, at 171 ("Because battering is not the only form of persecution women experience, it makes sense to define the group as 'women' and consider the battering under the category of persecution, that being the form persecution takes in these cases."). *But see Goldberg*, *supra* note 154.

160. See *supra* part III.B.1.

161. These categories are intended to represent the refugee group rather than the particular social group.

162. Several cases in which gender-related issues have been raised are presently pending before the courts, the Board of Immigration Appeals, and the INS Asylum Office. See *supra* note 38. A case was recently granted by the INS Asylum Office in

Parliament adopted a resolution calling upon states to accord refugee status within the particular social group category of the refugee definition to women who suffer cruel and inhuman treatment because they have violated the moral or ethical rules of their society.¹⁶³ In 1985, the Executive Committee of the United Nations High Commissioner for Refugees¹⁶⁴ considered a similar resolution, ultimately adopting a conclusion which recognized "that states, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh and inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1A(2) of the United Nations Refugee Convention."¹⁶⁵

Throughout the late 1980's, the UNHCR, in an increasing awareness of the particular circumstances of refugee women, adopted a series of Executive Committee Conclusions aimed at affording more meaningful protection to women fleeing persecution in their home countries.¹⁶⁶

which an Iranian woman based her claim in large part on her membership in the social groups of Iranian feminists and Iranian feminist artists. However, because the agency does not provide reasoned decisions when granting applications, the basis of the grant was not explained. See Matter of M.M. (A# withheld).

163. Johnsson, *supra* note 3, at 224. A similar resolution was adopted by the Soesterburg Conference on Refugee Women in 1985. *Id.*

164. The function of the Executive Committee, established in 1957, is to advise the High Commissioner "in the exercise of the statutory functions; and advising on the appropriateness of providing international assistance through UNHCR in order to solve such specific refugee problems as may arise." GOODWIN-GILL, *supra* note 127, at 7.

165. *Report of the Thirty-Sixth Session of the Executive Committee of the High Commissioner's Programme, Geneva*, U.N. Doc. A/AC.96/673 (1985), para. 115(4)(k) [hereinafter *Thirty-Sixth Session*]. The conclusion adopted was a compromise from that initially proposed, which would have been identical to the European Parliament Resolution. The compromise was reached as a result of fears that a stronger conclusion would have been viewed as a criticism of certain religious beliefs or cultural practices. See Johnsson, *supra* note 3, at 221.

166. See, e.g., *Thirty-Sixth Session*, *supra* note 165 (noting the need to give particular attention to the international protection of refugee women); *General Conclusions on International Protection, Report of the Thirty-Eighth Session of the Executive Committee of the High Commissioner's Programme, Geneva*, U.N. Doc. A/AC.96/702 (1987) (calling on all states and concerned agencies to support the efforts of the Office of the UNHCR to recognize the need for improvement of the protection and assistance programs with regard to women refugees); *Refugee Women, Report of the Thirty-Ninth Session of the Executive Committee of the High Commissioner's Programme, Geneva*, U.N. Doc. A/AC.96/721 (1988) (noting, among other things, the need for public information on the issue of refugee women and the need for the development of training modules on the subject, in order to increase awareness of the specific needs of refugee women and the practical means of addressing their needs).

The attention to the problems facing refugee women was prompted in part by the World Conference of the United Nations Decade for Women: Equality, Development and Peace, held at Copenhagen in 1980, which adopted three resolutions devoted to action by the UNHCR concerning refugee women. See *Refugee and Displaced Women and Children*, *supra* note 1, at 2, para. 2. The *Forward-Looking Strategies for the Advancement of Women*, U.N. GAOR 40/108, which grew out of the 1985 World Conference to Review and Appraise the Achievements of the United Nations Decade for Women, also highlighted the situation of refugee and displaced women. *Id.*

In July, 1991, the UNHCR adopted its *Guidelines on the Protection of Refugee Women*,¹⁶⁷ which note that women in a number of countries who face violence as severe as death for violating social mores should be ensured legal protection.¹⁶⁸ The *UNHCR Guidelines* encourage states to address their claims under the particular social group category.¹⁶⁹

The Canadian government has applied the UNHCR's interpretation of the Convention in extending protection to women fleeing gender-related persecution.¹⁷⁰ In 1987, the Immigration Appeals Board of Canada granted asylum to a woman seeking to avoid deportation to Turkey.¹⁷¹ Although the claimant based her application on her religion and nationality,¹⁷² the Board expanded her claim to include membership in the particular social group of "single women living in a Moslem country without the protection of a male relative."¹⁷³ A widow and mother, Ms. Incirciyan was subject to harassment on a daily basis by young Moslem men. When she sought the protection of the police, she was refused. Her daughter was also sexually assaulted. The Board granted refugee status to the claimant and her daughter, recounting their mistreatment and finding that ". . . the (Turkish) State does not wish to protect the

167. *UNHCR Guidelines*, *supra* note 17, at 36, para. 54.

168. This violence is not only at the hands of government authorities, but also from private actors from whom the government fails to provide protection. *Id.* at 40-41, para. 71.

169. *Id.* at 36, para. 54. The *Guidelines*, however, also note that it is left to the discretion of individual states whether to follow the recommendation of the UNHCR Executive Committee.:

The claim to refugee status by women fearing harsh or inhumane treatment because of having transgressed their society's laws or customs regarding the role of women presents difficulties under this definition. As a UNHCR legal adviser has noted, "transgressing social mores is not reflected in the universal refugee definition." Yet, examples can be found of violence against women who are accused of violating social mores in a number of countries. The offense can range from adultery to wearing of lipstick. The penalty can be death. the Executive Committee of the UNHCR has encouraged States to consider women so persecuted as a "social group" to ensure their coverage, but it is left to the discretion of countries to follow this recommendation.

Id.

170. It is appropriate for United States courts to consider such foreign interpretations in evaluating the application of treaties within the United States. See ARTHUR HELTON, *The Use of Comparative Law and Practice under the International Refugee Treaties*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA* 9, 11 (1992); see also *Air France v. Saks*, 470 U.S. 392, 396 (1991) (In examining the terms of the Warsaw Convention, the Court stated that, because "treaties are construed more liberally than private agreements," it is necessary to "look beyond the written words to . . . the practical construction adopted by the parties," in order to "ascertain" the meaning of the treaty.); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-432 (1934); *Reed v. Wise*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) (In interpreting the Warsaw Convention, the Court considered foreign case law, noting that the Convention "must be read in the context of the national legal systems of all its members.").

171. *Incirciyan v. Minister of Employment and Immigration*, Immigration Appeal Board Decision M87-1541X, Aug. 10, 1987 (Can.).

172. *Id.* at 1.

173. *Id.*

applicant and her daughter, two Armenian women who were Christians and who lived alone in a Moslem country where, according to Islamic tradition, they should have had the protection of a male relative."¹⁷⁴ The Board offered no instruction on the standard to be applied in evaluating a social group claim. However, certain principles are evident in its characterization of the case. First, the claimant belonged to a social group comprised of women who had violated the social mores of their society—by living alone when they were expected to have the protection of a male relative. Second, since the persecution she feared did not directly emanate from the government, it was necessary to address the power or willingness of the government to provide protection to the applicant. To obtain protection as a refugee, the applicant was required to establish that the harm she feared was from the government or from someone whom the government was unwilling or unable to control. The Board noted that the government refused to grant protection to the applicant.

The Immigration and Refugee Board of Canada reaffirmed gender-related social group classifications in later cases involving Lebanese Moslem women,¹⁷⁵ and Sri Lankan Tamil women.¹⁷⁶

The Immigration Appeals Tribunal of the United Kingdom and the Refugee Status Appeals Authority of New Zealand have also recognized the social group category of women who face persecution for violating social or religious mores.¹⁷⁷ Additionally, a number of countries have

174. *Id.* at 3.

175. See Immigration and Refugee Board, Decision T89-00260, July 1989 (Can.) (endorsing the "particular social group" theory presented in *Inciirciyan*, but finding that the claimant had not established that the harm she faced was a result of her membership in a particular social group).

176. See Immigration and Refugee Board, Decisions T89-00587, T-89-0058, T89-0089, June 1989 (Can.) (finding the applicant had a well founded fear of persecution on account of her perceived political opinion and her membership in the particular social group of "young Tamil women." The applicant and her family had been subjected to sustained persecution by the Sri Lankan military and the Indian Peace-Keeping Force. On one occasion, she had been taken from her home and stripped by soldiers. Her aunt had been raped and killed by the Indian Peace-Keeping Forces. The Board did not discuss the requirements for establishing eligibility through membership in a particular group but noted in its decision the particular vulnerability of young Tamil women in Sri Lanka.); see also Immigration and Refugee Board, Decision M89-01213, June 1989 (Can.) (finding, with no analysis of the social group standard, applicant was part of the group of young Tamil females and also part of a family perceived to be opposed to the government of Sri Lanka).

177. See *M.M.G. v. The Secretary of State for the Home Department*, Immigration Appeal Tribunal, Case No. Th/9515/85 (5216), Feb. 25, 1987 (U.K.) (finding that penalties imposed upon women for transgressing the mores of dress and behavior in Iran can amount to persecution, but declining to grant protection to the applicant, in large part because of doubt regarding whether the applicant would refuse to comply with the rules once in Iran); Refugee Appeal No. 80/91 re: NS, (Refugee Status Appeals Authority) Feb. 20, 1992 (N.Z.) (granting protection to a woman based on membership in a particular social group consisting of Moslem women living separate from their husbands in a Moslem community with no accommodation and no male family or financial support available to them and with a reputation for having transgressed the mores of their community).

granted protection to Iranian women, based on their refusal to conform to dress codes and other behavioral requirements established for women.¹⁷⁸ Most recently, the Canadian Immigration and Refugee Board¹⁷⁹ has recognized the eligibility of women who fall into this category through the issuance of guidelines specifically including this group of women as a protected social group.¹⁸⁰

Included in this category are women, such as the applicant in *Inciroyan*, who, through circumstances over which they have no control, are not able to comply with the expectations of their religion, culture or society as well as women who make conscious ideological choices that they cannot conform to the requirements of that religion, culture or society. The particular social group will be identified by the characteristic which puts them at odds with their society. An example of women who fall into this category is the group of women who, because of deeply held beliefs, cannot conform to fundamentalist Islamic codes enforced in countries such as Iran or Saudi Arabia.¹⁸¹ A second example is women who are perceived as no longer conforming to the strict moral

178. For the most part, these cases have been framed within or joined with a "political opinion" theory. See Case No. AN 5 K 87.38024, Administrative Court at Anbach, Dec. 14, 1989 (F.R.G.) (granting asylum under the Convention and Art. 16(2) of the Constitution of the Federal Republic of Germany to an Iranian woman who lost her job as a kindergarten teacher because she had refused to apply the Islamic dress code to her students, and because she knowingly hired a B'hai teacher); Case No. 439-26428-86, (Federal Office for the Recognition of Foreign Refugees), Nov. 24, 1988 (F.R.G.) (granting asylum under the Convention and Art. 16(2) of the Constitution of the Federal Republic of Germany to politically active Iranian woman granted based on expression of political opinion and social group of "Iranian women." The office held: "[T]he ideologically based power of men over women results in a general political repression of women in defiance of their individual liberties and human rights"; Case No. 60025 (Refugee Appeals Board), Dec. 19, 1989 (FRA) (granting asylum to an Iranian woman who was a Christian of Armenian descent and who had refused to wear the chador). See also Matter of M. M., (A# withheld).

179. The Immigration Refugee Board (IRB), created in 1989, is an administrative tribunal with quasi-judicial functions conferred by statute. The function of the Refugee Division of the IRB is to make determinations of refugee claims. Nurjehan Mawani, *Women Refugee Claimants Fearing Gender-Related Persecution: The Canadian Experience*, Address Before the United Nations Conference on Human Rights (June 18, 1993) (transcript on file with the author).

180. The CANADIAN GUIDELINES include:

Women who fear persecution as the consequence for failing to conform to, or for transgressing, certain gender-discriminating religious or customary laws and practices in their country of origin. Such laws and practices, by singling out women and placing them in a more vulnerable position than men, may create conditions precedent to a *gender-defined social group*. The religious precepts, social traditions or cultural norms which women may be accused of violating can range from choosing their own spouses instead of accepting an arranged marriage to such matters as the wearing of make-up, the visibility or length of hair, or the type of clothing a woman chooses to wear.

CANADIAN GUIDELINES, *supra* note 36, at 3.

181. For example, in Iran a woman who fails to conform to the *hejab*, the requirement that women wear garments covering every part of their bodies but their faces and hands, can be subject to a penalty of at least 74 lashes. See Neal, *supra* note 8, at 219.

codes imposed upon them in their societies because they were raped or sexually abused.¹⁸²

To establish eligibility under a social group theory, a woman in this situation must demonstrate that the characteristic by which the group is identified is one which is fundamental to her identity. It may be a characteristic which is beyond her ability to change, such as her status as a widow, single mother or woman who has been raped or sexual abused; or it may be a characteristic or belief which is so fundamental to her identity that she should not be required to change, such as deeply held and demonstrated feminist beliefs, or beliefs against particular practices or laws of her society.¹⁸³ The fundamental nature of her belief is a question of fact, which the adjudicator must determine according to the individual circumstances of the case.

In addition, the persecutor should be able to distinguish members of the particular social group from the general population. If the persecution is "on account of" the applicant's membership in the group, it follows that the persecutor must be able to identify the applicant as a member of the group. The distinguishing characteristic is the characteristic by which the applicant is identified and which persecutor seeks to punish. The perception of the persecutor is, therefore, a key element in defining the group.

d. Women Who Face Severe Discrimination, Either By Law or By Custom, Within Their Countries

In many countries, women are subjected to discriminatory treatment either through law or through the imposition of cultural or religious norms which restrict the rights and opportunities of women.¹⁸⁴ In some situations, however, the discriminatory treatment can be so severe that it rises to the level of persecution. Discrimination in and of itself can amount to persecution when the discriminatory measures deprive the woman of fundamental human rights or lead to consequences of a substantially prejudicial nature. Such consequences include serious restrictions on her right to earn her livelihood, her right to practice her religion or her access to normally available educational facilities.¹⁸⁵ Even when individual acts of discrimination are not of a substantially serious character, and therefore do not, standing alone, amount to persecution, they may nevertheless form the basis for an asylum claim if the cumulative effect leads to a seriously prejudicial situation for the applicant or "if they produce, in the mind of the person concerned, a feeling

182. In addition to the actual sexual abuse, women in many countries are often rejected or harmed by their families or communities as a result of the abuse. *See WOMEN ON THE FRONT LINE*, *supra* note 26, at 18; *see also* Makiya, *supra* note 28, at 627.

183. For example, genital surgery or the veiling of women.

184. *See generally* UNITED NATIONS DEVELOPMENT PROGRAMME TEAM, HUMAN DEVELOPMENT REPORT 1993 (1993).

185. UNHCR HANDBOOK, *supra* note 46, para. 54; *see also* CANADIAN GUIDELINES, *supra* note 36, at 3.

of apprehension and insecurity as regards (her) future existence."¹⁸⁶

Neither the Board of Immigration Appeals nor the United States judicial system has addressed the question of whether gender-related discrimination can constitute persecution under the Act. However, the UNHCR has recognized that severe discrimination against women based on gender can form the basis for a claim to refugee status.¹⁸⁷ While acknowledging the universal right of women to be free from discrimination on the basis of gender, the UNHCR has noted that the line between discrimination and persecution is not a clear one.¹⁸⁸ In evaluating a claim based on discriminatory treatment, the adjudicator must evaluate all of the circumstances,¹⁸⁹ including the type of right or freedom denied,¹⁹⁰ the manner in which the right is denied, the seriousness of the harm to the applicant, and any non-persecutory justification for the discriminatory treatment.¹⁹¹ Fundamental human rights, such as the right to be free from arbitrary deprivation of life or the right to be free from torture can never be abrogated.¹⁹² Therefore, any policy or practice which allows for the violation of such a right based on membership

186. UNHCR HANDBOOK, *supra* note 46, para. 55; *see also* INS MANUAL, *supra* note 46, at 24.

187. *See Note on Refugee Women and International Protection*, at 5, U.N. Doc. EC/SCP/59 (1990); *see also* UNHCR Guidelines, *supra* note 17, at 40, para. 71 (recommending promotion of acceptance in the asylum adjudication process of the principle that "women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status").

188. *See UNHCR Guidelines*, *supra* note 17, para. 55:

Women may also flee their country because of severe sexual discrimination either by official bodies or in local communities. Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognized, and discrimination can constitute persecution under certain circumstances, the dividing line between discrimination and persecution is not a clear one.

189. UNHCR HANDBOOK, *supra* note 46, para. 55.

190. Rights can be divided into four categories: 1) basic non-derogable rights such as the right to be protected against arbitrary deprivation of life, from slavery, and from torture and cruel and inhuman or degrading treatment; 2) basic derogable rights such as the right to equal protection and freedom from arbitrary arrest and detention, which may be abrogated only during times of public emergency; 3) realizable or obtainable rights, such as the right to employment and housing; and 4) rights which may be beyond the states's duty to protect. *See HATHAWAY*, *supra* note 46, at 108-12; *see also* Immigration and Refugee Board Decision T92-06668, Feb. 1993 (Can.) at 10. All of these rights are derived from the Universal Declaration of Human Rights. In addition, the enforcement of first and second level rights was made binding on states parties through their incorporation into the International Convention on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess. (1966), 999 U.N.T.S. 171 (entered into force March 23, 1976). *See HATHAWAY*, *supra* note 46, at 108-10. Incorporation of Third Level Rights into the International Convention on Economic, Social and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess. (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), created a duty on member states to work toward progressive realization of those rights in a non-discriminatory manner. *See HATHAWAY*, *supra* note 46, at 110-11.

191. *See* James Hathaway, *Framework of Analysis*, Special Issue I, 12-13 (Sept. 1992).

192. *See supra* note 190.

in a particular social group must be considered persecution.¹⁹³ A harm to a lesser right may be persecutory if the harm is systematic or cumulative and “seriously affect(s) the integrity and human dignity of the applicant.”¹⁹⁴

Cases arising within this category are similar to those falling within the previous category, “women who face persecution for transgressing social or religious mores.” However, in this situation, the persecution is not the punishment that the woman endures for having violated the norm, but rather the imposition of the law or norm in and of itself. When the discriminatory practice is applied specifically to women as women, the treatment is “on account of” membership in the particular social group of women of the applicant’s nationality. When the practice is applied to only a certain group of women, the particular social group is defined by those characteristics which distinguish that group of women from the general population.

The applicant must also establish that the government is the source of the persecutory measures or that the government is unable or unwilling to protect her from the persecution. When the treatment is through discriminatory statutes enforced by the government, government involvement is clear. When the discriminatory practice is not applied by the government, but through cultural norms which discriminate against women, the applicant must demonstrate both the existence of the norm and the failure or inability of the government to protect her from its imposition.¹⁹⁵ This is a factual question which the adjudicator must determine on a case-by-case basis. The adjudicator should give consideration to relevant human rights instruments including the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁹⁶

193. See Hathaway, *supra* note 191, at 12. See also, e.g., Immigration and Refugee Board (Refugee Division), Decision U92-06668, Feb. 1993 (Can.) at 12 (finding that a pattern of physical abuse, rape and killings of Zimbabwean women by males constitutes serious discrimination at the hands of Zimbabwean male society, and thus, persecution).

194. Hathaway, *supra* note 191, at 13. See, e.g., Cheung v. Minister of Employment and Immigration, 102 D.L.R.4th 214 (1993) (finding that a second child in China facing severe discrimination for her membership in the particular social group of “second children,” including deprivation of medical care, education, employment opportunities and food had a well-founded fear of persecution within the meaning of the Convention).

195. See, e.g., Immigration and Refugee Board (Refugee Division), Decision U92-06668, Feb. 19, 1993 (Can.) at 12 (finding, in addition to the persecution of the claimant at the hands of her husband, that the authorities were “not yet able to provide adequate safeguards to control the situation; and that the government [was] not above monitoring reports of human rights abuses from private citizens, or soliciting the support of the state agencies to repress activities of human rights organizations”).

196. G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/RES/34/46 (1980) [hereinafter CEDAW]. Article 1 of CEDAW defines discrimination as

[a]ny 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, irrespective of their marital status, on a basis of equality

which defines the duties of states to eliminate discriminatory treatment of women¹⁹⁷ and provides meaningful guidelines for evaluating the state's failure or inability to protect women. Consideration should also be given to the circumstances faced by the individual applicant, including her efforts to seek protection from the discriminatory treatment, and to documentation of conditions within the particular country.¹⁹⁸

e. Women who face persecution because of their relationships to family members whom the persecutor seeks to harm

Women also face persecution because of their relationships to family members.¹⁹⁹ This can be the case when the government or other persecutor seeks to obtain information concerning relatives who are perceived to hold views or to be engaged in activities in opposition to the persecutor²⁰⁰ or when the persecutor seeks to intimidate or punish politically active family members to discourage further involvement in political activity.²⁰¹ This type of persecution is closely related to and will often overlap with persecution based on imputed political opinion. The persecution the applicant fears is not based on any opinion she

of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The United States has not yet ratified CEDAW, and a number of ratifying countries have made substantive reservations. See Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L. L. 643, 644 (1990).

In addition to CEDAW, the UNHCR has recognized the importance of a number of other instruments in providing a framework for international standards for the treatment of women, including: the Universal Declaration of Human Rights; the 1949 Geneva Convention and two Additional Protocols of 1977; the 1966 Human Rights Covenants; the Declaration on the Protection of Women and Children in Emergency and Armed Conflict; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages; the Convention on the Nationality of Married Women; and the Convention on the Rights of the Child. *UNHCR Guidelines, supra* note 17, at 8.

Although individual states are not parties to many of the instruments, their usefulness in defining norms should be recognized. *Id.*

197. See CEDAW, *supra* note 196, pt. 1, art. 1.

198. See, e.g., Immigration and Refugee Board (Refugee Division), Decision U92-06668, Feb. 19, 1993 (Can.) at 11 (examining documentation indicating that, although legal prohibitions against discriminatory practices exist in Zimbabwe, women remain "vulnerable to entrenched discriminatory practices that operate against their personal rights."). One possible source of such documentation is the collection of periodic reports filed by states parties to CEDAW regarding their progress in implementing the provisions of CEDAW. See CEDAW, *supra* note 196, art. 21. Other sources are the reports of human rights organizations. See, e.g., WOMEN'S RIGHTS PROJECT & AMERICAS WATCH, HUMAN RIGHTS WATCH, CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL, *supra* note 28.

199. See *UNHCR Guidelines, supra* note 17, at 36-37, para. 56 ("[w]omen victimized because of the political activities of a male relative have particular difficulty demonstrating their claim to refugee status. Yet, in many conflicts, attacks on women relatives are a planned part of a terror campaign.").

200. See Johnsson, *supra* note 3, at 223; AMNESTY INT'L, WOMEN ON THE FRONT LINE, *supra* note 26, at 13-15.

201. See AMNESTY INT'L, WOMEN ON THE FRONT LINE, *supra* note 26, at 27-28.

actually holds. Rather, her feared harm is the result of her relationship to someone else, whether because the opinion of the family member is imputed to her, because the persecutor seeks to obtain information concerning the family member, or because the persecutor seeks to punish the family member by harming the applicant. While neither the Board of Immigration Appeals nor United States courts have yet recognized as a particular social group "women who are family members of individuals a persecutor seeks to harm," a number of courts and administrative bodies have recognized that families can constitute particular social groups.²⁰² Additionally, the principle of imputed political opinion is widely recognized.²⁰³

To establish eligibility for asylum under this category, the applicant must establish a family relationship with someone the government or other persecutor seeks to harm. She must demonstrate either that her particular family constitutes a particular social group²⁰⁴ within the meaning of the refugee definition or that "women who are family members of individuals the government or other persecutor seeks to harm" in her country constitute a particular social group. She must further prove that her fear of persecution on that basis is well-founded.

The applicant's family membership is an immutable characteristic, as it is beyond her ability to change.²⁰⁵ In addition, the applicant must demonstrate that the government seeks to harm her particular family member and that she is identifiable as a family member of that individual. These are all questions of fact which the adjudicator must determine according to the individual circumstances of each case.²⁰⁶

202. See, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (citing immediate family members as the prototypical example of a particular social group); *Ananeh-Firempong v. INS*, 766 F.2d 621, 623 (1st Cir. 1985) (granting asylum to applicant who raised particular social group claim based on membership in a family associated with the former government, the Ashanti tribe, and the educated professional class). *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985) (citing kinship ties as one of a number of examples of immutable characteristics which may define a particular social group); see also *Case no. 16A 10001/88* (Higher Administrative Court), *Nordrhein-Westfalen*, May 3, 1988 (F.R.G.) (granting protection under Art. 16(II)(2) of the Constitution to Iranian citizen based on persecution of kin); see also CANADIAN GUIDELINES, *supra* note 36, at 3 (recognizing "persecution of kin" involving "violence or harassment against women, who are not themselves accused of any antagonistic views or political convictions, in order to pressure them into revealing information about the whereabouts or the political activities of their family members"). *But see Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991).

203. See *Desir v. Ilchert*, 840 F.2d 723 (9th Cir. 1988); *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435 (9th Cir. 1987); *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 517 (9th Cir. 1985). See also *Rees*, *supra* note 47.

204. The family relationship will generally be limited to members of an immediate family. See, e.g., *Sanchez-Trujillo*, 801 F.2d at 1576. However, depending on the cultural and political context of the applicant's country, members of an extended family may qualify as a particular social group.

205. See *supra* part III.B.1.

206. For example, members of an immediate family will usually be identifiable as such, while members of an extended family who may have little contact with each other or live in different areas and may not share a family name may not be identifi-

Once the existence of a particular social group has been established, the applicant must prove that she has been persecuted in the past or that she has a well-founded fear that she will be persecuted in the future based on her group membership. She can do this by presenting facts specific to her case which demonstrate that her particular fear is well-founded,²⁰⁷ or by establishing that in her country, the government or other persecutors engage in a pattern or practice of persecuting family members of persons they seek to harm.²⁰⁸

f. Women who face battering or other abuse by non-governmental actors and who are unable to obtain the protection of their government

There is no published United States decision which addresses the question of whether women who face battering or other abuse by non-governmental actors can obtain protection under the Act;²⁰⁹ nor does the *UNHCR Handbook* specifically address this issue. The Canadian Immigration and Refugee Board (IRB), however, has recently recognized that the particular social group category of the Convention refugee definition protects women subject to domestic abuse who cannot obtain the protection of their governments.²¹⁰ In February 1993, in a landmark

able as a family. Compare *Aneneh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985) with *Estrada-Posadas v. INS*, 924 F.2d 916 (9th Cir. 1991).

207. For example, when the claim is based on membership in the applicant's particular family, she may be able to show that she or other close family members may have been persecuted or threatened with persecution based on their family membership.

208. See 8 CFR 208.13(b)(2)(A).

209. See *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("[W]e do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution"). But see *Alcantara v. INS*, No. 92-70286 (9th Cir. Feb. 11, 1993); 1993 WL 43869 (unpublished decision upholding denial of political asylum and withholding of deportation to citizen of the Philippines based on abuse extending over a period of nineteen years by her husband, who was connected to the National People's Army, finding that she had failed to demonstrate the harm she feared was motivated by other than personal reasons). Cases are currently pending before the EOIR and the BIA where this issue has been raised. See *Matter of A.R.A.*, (A# withheld); *Matter of E.B.*, (A# withheld). See also *Goldberg & Kelly*, *supra* note 91.

210. See *Immigration and Refugee Board (Refugee Division)*, Decision No. U92-06668, Feb. 19, 1993 (Can.); see also *Minister of Employment & Immigration v. Marcel Mayers*, 97 D.L.R.4th 729 (1992) (finding that "Trinidadian women subject to wife abuse" could constitute a particular social group within the Convention refugee definition). See also *CANADIAN GUIDELINES*, *supra* note 36, at 7.

In some cases the claims of battered women have also been formulated under a political opinion or imputed political opinion theory. This is particularly appropriate when the batterer has a connection to the government and uses or threatens to use that connection to harm the victim. See, e.g., *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987); see also *Matter of N.P.F.*, A71-796-050 (case pending before immigration judge in which battered woman raised asylum claims based on membership in a gender-based particular social group. The INS conceded that the respondent was eligible for political asylum based on an imputed political opinion because her spouse accused her of subversive beliefs and activities and reported her to the government). In addition, some have argued that, by refusing to submit to domination by the bat-

decision, the Immigration and Refugee Board granted protection to a woman from Zimbabwe who sought refugee status based on a history of abuse by her husband and her inability to obtain protection against that abuse from the government of Zimbabwe. The claimant, a Christian, had been forced into a traditional polygamous marriage at the age of fourteen to a man many years her senior.²¹¹ Throughout the marriage, the claimant's husband, a wealthy businessman affiliated with the government, subjected his wife to repeated abuse, including beatings and rapes. The claimant unsuccessfully sought protection from both her parents and the police. The Immigration and Refugee Board first evaluated the extent of the harm to which the applicant was subjected in light of relevant human rights instruments²¹² and found that the harm rose to the level of persecution as defined in the *UNHCR Handbook*.²¹³ The Board then found that the claimant qualified as a member of two particular social groups within the Convention refugee definition:²¹⁴ unprotected Zimbabwean women or girls subject to wife abuse, and Zimbabwean women or girls forced to marry according to customary laws of "Kuzvararia" and "Lobola."²¹⁵ The defining characteristic of the first group was found to be gender: "In considering the first group, the panel identifies the innate and unalterable characteristic which defines this group as that of their gender which the group cannot repudiate and which the evidence presented at this hearing suggests, places them at risk in Zimbabwe."²¹⁶

The evidence presented included the claimant's own testimony and substantial documentary evidence of extensive domestic abuse in

terer, the victim expresses a political opinion regarding the relationship between men and women and that the victim is punished by the batterer for expressing that opinion. *See* Goldberg, *supra* note 154. This view is supported by the Ninth Circuit's decision in *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

211. The marriage was conducted according to customary laws of "Kuzvarira" and "Lobola." The IRB defined "Kuzvarira" as "the giving of young girls for marriage without their permission" and defined "Lubola" as "the custom of giving 'bride money' for the purchase of a bride to the parents of the would-be wife." Immigration and Refugee Board (Refugee Division) Decision No. U92-06668 at 11 (Can.).

212. Specifically, the IRB found that the treatment to which she was subjected was in violation of Articles 3, 5 and 16 of the Universal Declaration of Human Rights, and Articles 7, 9, and 23 of the International Covenant on Civil and Political Rights. *Id.* at 7-9.

213. *See* UNHCR HANDBOOK, *supra* note 46, para. 51.

214. In defining the groups, the IRB incorporated the persecution into the articulation of the social group.

215. In addition to finding that the claimant's persecution was on account of her membership in these particular social groups, the IRB found that her forced marriage under non-Christian rights constituted persecution on account of her Christian religion. *See* Immigration and Refugee Board (Refugee Division) Decision No. U92-06668 at 14.

216. *Id.* at 16. There is an apparent inconsistency in the position of the Immigration and Refugee Board. While stating that the defining characteristic is simply gender, the actual social group is defined in terms of the persecution. *See also* Cheung v. M.E.I., 102 D.L.R.4th 214 (1993). For a discussion of this issue, see *supra* part III.B.2.b.; *see also* Stairs & Pope, *supra* note 89, at 171.

Zimbabwe and the failure of the state to protect women from such abuse. Based on this evidence, the IRB found that

women, particularly those from rural areas, generally experience serious discrimination at the hands of Zimbabwean male society; that physical abuse, rape and killings are an integral part of their abuse; that the authorities are not yet able to provide adequate safeguards to control the situation; and that the government is not above monitoring the support of the state agencies to repress activities of human rights organizations.²¹⁷

In a similar case decided in June 1993, the IRB granted protection to a woman from Ecuador who fled her country seeking protection from an abusive spouse.²¹⁸ The claimant in that case had been beaten and raped repeatedly over a ten-year period.²¹⁹ She unsuccessfully sought police protection. On one occasion, the police "laughed at her and said she must have done something wrong to be beaten."²²⁰ The claimant obtained a divorce from her husband but continued to receive threats from him. After her divorce, she was assaulted by him on the street. Her brother reported the assault to the police, but the police took no action. The claimant fled Ecuador and entered Canada on a false passport. In support of her refugee claim, she testified that domestic violence is prevalent in Ecuador and gave personal examples of such abuse among her family and friends. In addition to her testimony, the IRB considered documentary evidence of a pervasive pattern of domestic violence in Ecuador, and the fact that a woman cannot obtain protection from domestic abuse in Ecuador.²²¹ In evaluating the persecutory nature of the harm suffered by the claimant, the IRB stated:

There is a vast difference between a matrimonial home and a torture chamber. If a wife is subjected to violence repeatedly, then in our assessment, she stands in no different situation than a person who has been arrested, detained and beaten on a number of occasions because of his political opinion. As a matter of fact, such a person suffers to a lesser degree over a period of time, because after each detention he is released and enjoys his freedom. The wife on the other hand has no respite from her agony of torture and grief. She must endure these misfortunes continuously.²²²

The IRB found that "Ecuadoran women subject to wife abuse" constitute a particular social group within the convention "refugee" defini-

217. Immigration and Refugee Board (Refugee Division), Decision No. U92-06668 at 12 (Can.).

218. Immigration and Refugee Board (Refugee Division), Decision No. U92-08714, June 4, 1993 (Can.).

219. As a result of one beating, she suffered a miscarriage.

220. Immigration and Refugee Board (Refugee Division), Decision No. U92-08714, at 2-3 (Can.).

221. The IRB noted that "violence against wives in Ecuador is a normative phenomenon which is the outcome of the patriarchal structure of society." *Id.* at 4. Domestic violence is not a crime in Ecuador and the law prevents married women from testifying against their husbands. *Id.* at 5.

222. *Id.* at 7.

tion and that, because of the severity of the harm, the abuse of the claimant, and the unwillingness of the state to provide protection constituted persecution.

Applying the principles set forth in these cases, a woman seeking protection from severe abuse can obtain protection within a particular social group category if she can establish that the abuse to which she was subjected was a result of her gender and that she was unable to obtain protection against the abuse from her government. The applicant must establish that she has a fear of persecution, that the fear is well-founded, that the fear is on account of her membership in a particular social group, and that the government is unable or unwilling to protect her from the persecution. First, she must establish that the treatment that she fears rises to the level of persecution. The adjudicator should determine this issue on a case-by-case basis, evaluating the individual circumstances in light of the case law, Handbook definition, relevant human rights instruments²²³ and available documentation relating specifically to the effects of prolonged battering and other domestic abuse.²²⁴

Next, the applicant must demonstrate that the persecution is on account of her membership in a particular social group. Unless the evidence establishes that only particular groups of women are singled out for extensive abuse or that protection is denied only to certain groups of women, the particular social group will often be simply "women"²²⁵ of the applicant's nationality.²²⁶ Other elements of the refugee definition limit the ultimate size of the group eligible for protection. For example, while the social group may be defined as all women, to establish eligibil-

223. See *supra* parts III.A., III.B.2.d.

224. The treatment of women subjected to severe battering over an extended period of time has been compared to that of torture victims. See *Stairs & Pope, supra* note 89, at 176 (comparing the treatment of battered women to the treatment of torture victims through use of Biderman's Chart of Coercion); see also DIANA E. H. RUSSEL, *RAPE IN MARRIAGE* (rev. ed. 1990) (comparing information from Amnesty Int'l, *Report on Torture* regarding methods of brainwashing of prisoners to treatment of women in abusive relationships); JUDITH L. HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1992).

225. This analysis is slightly different from that applied by the Immigration and Refugee Board in the Zimbabwean case, as the definition of the group is determined solely by gender. Applying the analysis recently adopted by the IRB and the Canadian Appeals Court, the group could be defined as "battered women" or "women subject to battering by their spouses or other non-governmental actors." A definition of a social group which relies on the persecution is not consistent with domestic jurisprudence, however. See *supra* part III.B.2.b. In addition, the IRB has recognized that gender alone can be the defining characteristic of a particular social group. See CANADIAN GUIDELINES, *supra* note 36, at 5. In an attempt to limit the size of the particular social group, some advocates have formulated the group by linking the abuse to the victim's refusal to submit to the domination of the persecutor. See, e.g., Goldberg & Kelly, *supra* note 91 (discussing pending case in which particular social group was articulated as "women whose refusal to submit to the domination of a legal or common-union husband has resulted in repeated life-threatening assaults despite efforts to obtain protection from state authorities").

226. Because the vulnerability of the applicant is always defined in relation to the country to which she seeks to avoid return, the group will virtually always also be defined by the applicant's nationality or country of last habitual residence.

ity for protection, the applicant will also be required to establish that the group is subject to that persecution, that she has a well-founded fear of that persecution, and that the feared persecution is from the government or from someone whom the government is unable or unwilling to control. Not all women will meet this standard; and not all women who have been battered in the past will meet the standard. Ordinarily, the applicant must establish a well-founded fear that she will be battered in the future, based on severe battering in the past or on some other condition that indicates that her fear of future battering is well-founded.²²⁷ In addition, she must establish that the government is unwilling or unable to protect her, either by demonstrating that she sought, unsuccessfully, to obtain protection in the past, or that conditions in her country are such that it would be futile for her to seek protection from the government. The applicant can demonstrate this through expert testimony or through the presentation of documentary evidence, if available, regarding the incidence of violence against women and domestic abuse in her country and the response of the authorities to such abuse.

Three major problems arise in the context of presenting an asylum claim based on domestic abuse. First, presenting a claim on this basis requires an examination of the home and family—an area which the government has traditionally considered the most private and subject to the least regulation. The court may, therefore, easily characterize the problem as a mere personal dispute unless the applicant can demonstrate a consistent pattern on the part of the government of inability or refusal to protect women from such abuse.²²⁸ Second, the challenge of addressing domestic abuse in the United States may cause adjudicators to feel reluctant to pass judgment on another country's failure to provide adequate protection to its female citizens. Third, there is little documentary evidence concerning the particular treatment of women in this area. In many countries, statistics regarding reports of domestic abuse are not available.²²⁹ Additionally, when maintained, statistics are generally not an accurate reflection of the extent problems in this area because women are often reluctant to report such crimes.²³⁰ However, there is a growing recognition that, in many cases, governments systematically refuse to protect women subject to repeated and severe abuse and that it is women's particular vulnerability within certain societies that allows them, as women, to be subjected to this abuse with no

227. In some cases in which the applicant was subjected to extreme battering in the past, she may be able to establish eligibility for political asylum based on past persecution alone. *See supra* note 45.

228. *See* for example, *Matter of A.R.A.*, *supra* note 38 (in which the Bureau of Human Rights and Humanitarian Affairs of the U.S. State Department wrote an opinion letter suggesting that the domestic abuse which was the basis of the applicant's asylum claim may be a "personal security concern.").

229. *See, e.g.*, WOMEN'S RIGHTS PROJECT AND AMERICAS WATCH, CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL, *supra* note 28.

230. *Id.*

recourse.²³¹

IV. Improved Procedures for Adjudicating Women's Cases

The evaluation of gender-related persecution claims also requires a rethinking of the *procedures* followed by advocates and adjudicators in developing and presenting the cases of refugee women. The United States asylum adjudication system contains no provisions which acknowledge the particular needs of women asylum applicants.²³² As a result, numerous problems inherent in the system, which go unaddressed, combine to deny women access to protection.²³³ The UNHCR has recommended a number of measures to improve access to protection for women.²³⁴ These measures include: providing women access to independent adjudication of their cases; instituting gender-sensitive procedures for interviewing women applicants;²³⁵ providing specific training regarding interviewing women who have been sexually abused;²³⁶ providing women with the opportunity to be interviewed without the presence of family members;²³⁷ providing training regarding the nature of relationships between female and male family members within the applicant's culture;²³⁸ and familiarizing adjudicators with status and experiences of women in the country from which the applicant has fled.²³⁹ While these guidelines do not address all of the problems faced by women asylum applicants, incorporation of these rec-

231. *See id.*, (one of the first comprehensive country conditions evaluations to address domestic violence as a violation of international human rights. The report found serious inadequacies in the legal standards applied in cases of wife-murder, battery of women and rape, discriminatory practices in investigating and prosecuting cases of violence against women, and a social context in which women are discouraged from seeking protection. The report noted that because of this combination of factors, perpetrators of domestic violence are allowed to act with virtual impunity, and criticized the government of Brazil for failing to meet its international obligations under the International Covenant on civil and Political Rights and the Convention to Eliminate All Forms of Discrimination Against Women. Unfortunately this kind of comprehensive documentation is the exception.)

232. This is true for proceedings before the Asylum Unit of the INS as well as those before the Immigration Court of the Executive Office for Immigration Review.

233. *See* Introduction, *supra*, for a discussion regarding procedural problems.

234. *See UNHCR Guidelines, supra* note 17, at 26-28, paras. 71-76. These guidelines have been cited with approval within the *Canadian Guidelines*. *See* CANADIAN GUIDELINES, *supra* note 36, at 9.

235. These procedures include employing women as interpreters and interviewers whenever possible, *UNHCR Guidelines, supra* note 17, para. 72, and providing training regarding interviewing and assessment of claims of women applicants. *Id.*

236. *Id.*, paras. 72, 75.

237. The presence of family members often inhibits a woman's ability to discuss traumatic events, particularly sexual abuse. *Id.*, para. 72.

238. The purpose of this training is to avoid misinterpretation of information provided within an interview or hearing. For example, in societies where women are unlikely to be aware of the specific activities of male family members, inability to corroborate information provided by male family members should not be interpreted as a lack of credibility. *Id.*

239. This training should include information regarding the political, economic and social rights of women, reported incidents of gender-specific violence, protection

ommendations into domestic asylum adjudication procedures would greatly help in opening the process to women applicants.

Conclusion

While the refugee definition incorporated into the Convention and the INA is gender-neutral, the law has developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the particular protection needs of women. A multifaceted approach²⁴⁰ presents the most effective means of addressing the claims of women asylum applicants. This approach includes a recognition of both gender-specific persecution and gender-based persecution, which can, for the most part, be incorporated into particular social group category of the existing Convention refugee definition.

Fundamentally, it includes a legal recognition of the harm women experience and the illegitimacy of governmental indifference to women's suffering. In addition, advocates and adjudicators must re-evaluate the manner in which the claims of women are investigated and presented to insure that these claims become a more accurate reflection of women's reality. This includes the institution of procedures to insure that women have a meaningful opportunity to present their cases and education of advocates and adjudicators regarding the nature of persecution of women, both with regard to the overall political and social framework in which it occurs and in relation to the specific factual situations of particular countries.

available to women and the "consequences that may befall a woman on her return in light of the circumstances described in her claim." *Id.*

240. See generally Greatbatch, *supra* note 2.