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ESCAPE FROM WONDERLAND: IMPLEMENTING CANADA'S RATIONAL PROCEDURES TO EVALUATE WOMEN'S GENDER-RELATED ASYLUM CLAIMS

Walter C. Long*

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At this moment the King . . . called out "Silence!" and read out from his book, . . . "All persons more than a mile high to leave the court." Everybody looked at Alice. "I'm not a mile high," said Alice. "You are," said the King. . . . "Well, I shan't go at any rate," said Alice; "besides, that's not a regular rule: you invented it just now." "It's the oldest rule in the book," said the King.

Lewis Carroll, *Alice's Adventures in Wonderland*.¹

INTRODUCTION: ENFORCEMENT OF WOMEN'S HUMAN RIGHTS IN THE INTERNATIONAL ARENA AND ASYLUM

The United Nations World Conference on Human Rights, which met in Vienna, Austria, in June 1993, marked a milestone for women's advocates who are attempting to bring gender-related human rights abuses² to the attention of the world. Dele-

1. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 147 (1928).

2. "Gender-related human rights abuses" include, inter alia, sexual assault, domestic violence, genital mutilation, forced sterilization, and coerced prostitution. See Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 181 (1993).

For purposes of this Article, "gender-related persecution is: (1) persecution on the grounds of gender; (2) sexual assault as a form of persecution; or (3) a combination of the two." See Ninette Kelley, *Report on the International Consultation on*

gates to the conference presented petitions that contained over 500,000 signatures from 124 countries and a message demanding that gender violence be recognized as a violation of human rights.³ A tribunal heard thirty-three women from nations around the globe testify to harrowing gender-related abuses. Four judges from the tribunal drew up recommendations which included the establishment of an international criminal court for women to protect and enforce their rights and the creation of a special office in the United Nations to investigate violations of women's rights.⁴ One hundred and seventy-one United Nations member states signed a declaration produced by the conference that urged the "full and equal enjoyment by women of all human rights and that this be a priority for Governments and for the United Nations."⁵ The document stressed the importance of eliminating violence against women in public and private life, ending all forms of sexual harassment, and stopping exploitation of and trafficking in women.⁶ It called on all states at the conference to adopt the United Nations Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)⁷ by the year 2000.⁸

Iran was one of the signatories to the Declaration.⁹ During the week of the conference, anti-vice squads in Iran detained hundreds of women for wearing lipstick or allowing their hair to be seen in public.¹⁰ Iran was undoubtedly not alone among the nations adhering to the Declaration in expressing respect for women's human rights while abridging them at home. Despite the

Refugee Women, Geneva, 15-19 November 1988, with Particular Reference to Protection Problems, 1 INT'L J. REFUGEE L. 233, 235 (1989) ("[W]omen who have suffered persecution on the grounds of their sex, and women who have been sexually assaulted as a form of persecution, are at a distinct disadvantage. Persecution on the basis of sex is not recognized in any international refugee definition . . .").

3. Ellen Goodman, *Exposing Gender Violence*, BOSTON GLOBE, June 20, 1993, at 73.

4. Dianne Rinehart, *Women Fight Against Abuse*, CALGARY HERALD, June 18, 1993, at A3.

5. UNITED NATIONS, WORLD CONFERENCE ON HUMAN RIGHTS: THE VIENNA DECLARATION AND PROGRAMME OF ACTION at II (B)(3)(36), U.N. Doc. DPI/1394-39399 (1993) [hereinafter VIENNA DECLARATION].

6. *Id.* at II (B)(3)(38).

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

8. VIENNA DECLARATION, *supra* note 5, at II (B)(3)(39).

9. Iran has not signed CEDAW. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, at 1189 (1993).

10. Anne Reifenberg, *U.N. Adopts Wide-Ranging Human Rights Declaration*, DALLAS MORNING NEWS, June 26, 1993, at 1A.

existence of a number of widely-ratified United Nations Conventions protecting the human rights of women,¹¹ and activity by non-governmental organizations and the United Nations over the last two decades¹² focused on stemming discrimination and gender-related violence against women, many countries still maintain laws and practices that are harshly biased against women. State-sanctioned and "private" violence against women is pandemic.¹³

11. See CEDAW, *supra* note 7; Convention Against Discrimination in Education, *opened for signature* Dec. 14, 1960, 429 U.N.T.S. 93; Convention Concerning Discrimination in Respect of Employment and Occupation, *opened for signature* June 25, 1958, 362 U.N.T.S. 31; Convention on the Nationality of Married Women, *done Feb. 20, 1957*, 309 U.N.T.S. 65 (entered into force Aug. 11, 1958); Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909; Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, *opened for signature* June 29, 1951, 165 U.N.T.S. 303; see also *Universal Declaration of Human Rights*, G.A. Res. 217(III), U.N. GAOR 3d Sess., pt. 1, 183d plen. mtg. at art. 2, U.N. Doc. A/811 (1948) [hereinafter Declaration]; *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR 21st Sess., Supp. No. 6, art. 2 (1976) [hereinafter ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR 21st Sess., Supp. No. 6, art. 3 (1976) [hereinafter ICESCR].

12. The years 1976-1985 were denominated the "United Nations Decade for Women, Equality, Development and Peace." A Mexico City world conference inaugurated the decade and what was termed "International Women's Year" in 1975. Halfway through the decade, another conference was held in Copenhagen. *World Conference on the U.N. Decade for Women held in Copenhagen*, U.S. DEP'T OF STATE BULL., Nov. 1980, at 62.

In the 1980s, the United Nations stepped up pressure for reform. Several of its bodies, including the Commission on the Status of Women, the Economic and Social Council, and the Committee on Crime Prevention and Control, passed resolutions on sexist violence. In December 1986, the U.N. hosted a meeting of experts from 24 countries that issued recommendations for action against wife abuse. Lori Heise, *Crimes of Gender*, WORLD WATCH, Mar.-Apr. 1989, at 21.

In 1979, CEDAW created a Committee on the Elimination of Discrimination Against Women to monitor the progress made by state signatories in giving effect to the convention through legislative, judicial, and administrative action. CEDAW, *supra* note 7, arts. 17-22, 19 I.L.M. at 43-44.

13. A publication of the Dutch Refugee Association relates the story of an Iranian woman who fled to the Netherlands after being brutally punished in her country for allowing too much of her hair to show from underneath her veil. Her veil had been fixed to her head with drawing pins, she had been whipped, and she had been warned that if she were again found "unsuitably dressed" she would be raped and then shot. Iranian law prohibits the execution of virgins. DUTCH REFUGEE ASSOCIATION, PROCEEDINGS OF THE INTERNATIONAL SEMINAR ON REFUGEE WOMEN, SOESTERBERG, THE NETHERLANDS, MAY 22-24, 1985, at 30 (1985).

A woman is battered in the United States every 15 seconds, and 78 women are raped every hour. In May 1993, the U.S. Centers for Disease Control and Prevention (CDCP) labeled violence against women in the United States an "epidemic." Anne Reifenberg, *Crimes Against Women*, DET. FREE PRESS, June 13, 1993, at 1F. The CDCP reported that more U.S. women are injured in beatings by men they

The intransigence of this situation is due, in part, to the fact that customary abuses against women have a genealogy much older than the modern state. Only in the relatively recent history of Western democracies have women begun to receive the full civil and political rights men obtained in the municipal constitutions that gave birth to the modern era.¹⁴ Countries outside the Western democratic tradition and emerging democratic countries have less adaptive political and juridical structures on which to graft protection of women's human rights.¹⁵ Human rights, per

know than in car wrecks, rapes, and muggings combined. Cynthia Tucker, *Women Have a Right to Be Free from Abuse*, DET. FREE PRESS, June 21, 1993, at 11A.

In Peru, women comprise 70% of the victims in crimes reported to police. In India, 80% of married women are victimized by violence, domestic abuse, dowry abuse, or murder. In Austria, domestic violence against wives was cited as grounds for divorce in 59% of 1500 cases in 1985. In Australia, 20% of the men who answered a recent survey believed it acceptable to beat their wives. Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 71-72 (1993).

In 1991, the highest court in Brazil struck down the "honor defense," upon which men could prevail, premised on the notion that they killed their wives or lovers because the women had "shamed" them. The defense, however, remains alive and well, because lower courts in Brazil are not necessarily bound by high-court rulings. Tucker, *supra*, at 11A.

See AMNESTY INTERNATIONAL, *WOMEN IN THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN* (1991), for documentation of violations of the human rights of women that fall within the refugee grounds as traditionally interpreted, i.e., primarily for political reasons. Sections on the persecution of women's rights activists, *id.* at 12-13, and custodial rape by police and military, *id.* at 18-22, detail abuses that are gender-related.

14. U.S. CONST. amends. I-X; *Declaration des droits de l'homme et du citoyen* (1789) (Fr.).

15. Some non-Western nations have protested that their being held accountable for certain human rights violations against women amounts to cultural imperialism and intervention in domestic jurisdiction. See U.N. CHARTER art. 2, ¶ 7 (stating that the U.N. is not authorized to intervene in matters of domestic jurisdiction); see also Richard W. Wilson, *Rights in the People's Republic of China*, in *HUMAN RIGHTS IN EAST ASIA: A CULTURAL PERSPECTIVE* 109, 114-15 (James C. Hsiung ed., 1985) (noting that a Chinese response to Western criticism of human rights violations against individuals has been to point out broad socioeconomic betterment of women in Chinese society). Whereas it is true that international law defers to cultural distinctiveness and sovereign autonomy, the position of this Article is that customary international law now provides a standard of protection for the human rights of women superior to national constitutions and applicable to states' conduct.

Relativist criticism that the issue of women's human rights amounts to "Western" ideological colonialism has been characterized as "specious" for ignoring the "historical and cross-cultural nature of women's oppression." Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism*, 25 COLUM. HUM. RTS. L. REV. 49, 92 (1993). Protests of colonialism also ignore the significance of indigenous women's movements against gender-related oppression. *Id.* at 94; see also MARIA TERESA TULA, *HEAR MY TESTIMONY: MARIA TERESA TULA, HUMAN RIGHTS ACTIVIST OF EL SALVADOR*

se, have only recently become recognized in international law. Thus, it may be said that the protection of women's equal rights in the international arena is as young as the U.N. Charter.¹⁶ In light of this history, and in spite of the behavior of Iran and other countries, it is impressive that such a great number of the world's states signed the Vienna Declaration. Nations are recognizing that the "oldest rule in the book" — the denial to women of equal protection of the laws — is fundamentally arbitrary and in need of reversal.

The meeting in Vienna and the participation of the women there did not go unnoticed by Congress.¹⁷ Members of Congress have recently sponsored bills and introduced resolutions aimed at alleviating human rights abuses against women in domestic¹⁸

201-21 (Lynn Stephen trans. & ed., 1994) (describing the development of grassroots women's organizations in El Salvador).

16. The Preamble to the U.N. Charter declares that the state signatories "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." U.N. CHARTER pmbl. The U.N. Charter also affirms that one of the purposes of the United Nations is "achievement of international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to . . . sex." U.N. CHARTER art. 1, ¶ 3; see also U.N. CHARTER arts. 13:1(b), 55(c), 76(c) (repeating the language of art. 1, ¶ 3). The U.N. Charter was "the first international treaty to spell out the principle of equality [between men and women] in specific terms." Laura Reanda, *Human Rights and Women's Rights: The United Nations Approach*, 3 HUM. RTS. Q. 11, 11 (1981).

17. See, e.g., 139 CONG. REC. S8171-72 (daily ed. June 29, 1993) (statement of Sen. Pell).

18.]139 CONG. REC. at S17,095-103 (1993) (Senate amendment of H.R. 3355, entitled "Violent Crime Control and Enforcement Act"). Section 3213 of the Senate version of the omnibus crime bill would enact mandatory restitution for federal sex crimes. 139 CONG. REC. at S17,157-58. Title III of "The Violence Against Women Act of 1993" would allow victims of gender-based violence to make civil rights claims and to receive compensatory and punitive damages. S. REP. NO. 138, 103d Cong., 1st Sess. (1993). The Senate version of the bill defines "crime of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender; and due at least in part, to an animus based on the victim's gender." *Id.* at § 302(d)(1). Congressional testimony indicates that the civil rights legislation would send a "powerful message: that violence motivated by gender is not merely an individual crime or a personal injury, but is a form of discrimination, and assault on a publicly shared ideal of equality." 139 CONG. REC. H10364 (1993) (Remarks by Sally Goldfarb, Senior Staff Attorney for NOW Legal Defense and Education Fund).

On October 7, 1993, Rep. Patricia Schroeder introduced H.R. 3247 in the House of Representatives. The bill, which is based on the United States' treaty obligations under the International Covenant on Civil and Political Rights, forbids operations to mutilate female genitalia. H.R. 3247, 103d Cong., 1st Sess. (1993).

One form of the operation is removal of the clitoris and labia minora. Another form is "infibulation," "the removal of the external genitalia, the stitching up of the two sides of the vulva, sometimes with thorns, and the insertion of a sliver to keep

and international¹⁹ contexts. Interest in United States ratification of CEDAW has been renewed. Significantly, language in resolutions and floor discussion indicates that the treaty is interpreted to provide protection not only from discriminatory practices, but also gender-related violence.²⁰ A bill has also been introduced in the House that would create a position for a special assistant to the Assistant Secretary of State to promote international women's human rights and integrate those issues into United States human rights policy.²¹ The bill argues for the ne-

only a small opening for the passage of urine and menstrual blood — all done without anesthetic while the child is held down." A.M. Rosenthal, *Female Genital Torture*, N.Y. TIMES, Nov. 12, 1993, at A33. Schroeder's bill is aimed at curbing the practice among immigrants to the United States. It is estimated that 80 million women, now living, have suffered this form of abuse. *Id.* Victims are located in more than 25 countries, including states across the central belt of Africa, and Yemen, Oman, Malaysia, and Indonesia. Marlise Simons, *Prosecutor Fighting Girl-Mutilation*, N.Y. TIMES, Nov. 23, 1993, at A4. Reasons for the centuries-old practice include "the erroneous belief that the Koran commands it, that it is more hygienic, that it keeps a girl chaste, [and] that without the ritual [a girl] cannot get a husband and therefore the family cannot get a dowry." *Id.*

France recently became the first country to bring criminal charges against persons who performed genital mutilation. Great Britain, Sweden, and Switzerland have also passed laws against the practice, but have not carried out any prosecutions against it. *Id.*

19. Many statements and resolutions have been made in support of the ratification of CEDAW, *supra* note 7. *See, e.g.*, H.R. Res. 38, 103d Cong., 1st Sess. (1993); 139 CONG. REC. E2195 (daily ed. Sept. 21, 1993) (statement of Rep. John LaFalce in support of ratification of various treaties including CEDAW); 137 CONG. REC. S17,726 (daily ed. Nov. 22, 1991) (statement by Sen. Christopher Dodd); 137 CONG. REC. H8112-15 (daily ed. Oct. 21, 1991) (statement by several Representatives); *see also* Alexander G. Higgins, *Clinton Wants U.S. to Ratify Rights Treaties, Senate Will be Urged to OK Human-Rights Accords Approved by Carter, But Ignored by Successors*, ROCKY MOUNTAIN NEWS, June 15, 1993, at 21A. CEDAW was signed by President Jimmy Carter on July 17, 1980, but it has not been ratified by the Senate. CONGRESSIONAL INDEX (CCH) 7053-54 (1993).

20. *See, e.g.*, H.R. RES. 116, 102d Cong., 1st Sess. (1991) ("Whereas there is a high degree of official and social tolerance of violence against women, and family violence is the most prevalent form of violence against women . . . CEDAW should be ratified."). Also see floor comments by Rep. Patricia Schroeder: "Most of the abuse [women] suffer is not as easily categorized as human rights abuses as . . . disappearances, and torture in detention . . . However, sexual harassment, rape, bride burnings, infanticide, genital mutilation, trafficking in women, and domestic violence are as serious . . . as any human rights abuse." 137 CONG. REC. H8114 (daily ed. Oct 21, 1991) (statement of Rep. Schroeder).

Opposition to the ratification of CEDAW is in part based on the perception that the document supports liberal abortion laws. *See, e.g.*, 137 CONG. REC. E3548 (daily ed. Oct. 25, 1991) (statement of Rep. Christopher H. Smith advocating a strong reservation on treaty ratification that the U.S. does not thereby advocate enactment of laws legalizing abortion).

21. H.R. 2231, 103d Cong., 1st Sess. (1993) (designated "Women's Human Rights Protection Act of 1993").

cessity of the new office because "the issues of gender-based discrimination and violence against women have long been ignored or made invisible."²²

An adjacent bill would require adoption of the 1991 U.N. *Guidelines on the Protection of Refugee Women* as applied to U.S. assistance to refugees overseas.²³ The *Guidelines*, issued by the High Commissioner for Refugees in 1991,²⁴ "promote acceptance of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member [sic] of a social group for the purposes of determining refugee status."²⁵ Mirroring the language of the U.N. Torture Convention, the *Guidelines* recommend that sexual violence against women be found to be "persecution" when "used by or with the consent or acquiescence of those acting in an official capacity to intimidate or to punish."²⁶ They also add that women

In 1989, the U.S. Department of State began reporting on human rights violations against women in its *Country Reports on Human Rights*. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990: REPORT SUBMITTED TO THE COMM. ON FOREIGN RELATIONS U.S. SENATE AND THE COMM. ON FOREIGN AFFAIRS U.S. HOUSE OF REPRESENTATIVES, 102d Cong., 1st Sess. xi, 1692 (1991).

22. H.R. 2231, 103d Cong., 1st Sess. § 2 (1993).

23. H.R. 2232, 103d Cong., 1st Sess. (1993) (no direct application to asylum); see also 139 CONG. REC. H3666 (daily ed. June 16, 1993) (State Department authorization act adopting measures from the U.N. *Guidelines* for overseas assistance to women refugees).

24. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR], GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (1991) [hereinafter UNHCR GUIDELINES]. The *Guidelines* are recommendations by the High Commissioner that are nonbinding on member states.

As early as 1985, the High Commissioner recognized the need to consider, under the "particular social group" refugee definition ground, the claims of women asylum-seekers who faced harsh or inhuman treatment for having transgressed social mores of their society. UNHCR *Executive Committee Report on Refugee Women and International Protection*, 36th Sess., ¶ 115(4), U.N. Doc. A/AC.96/673 (1985).

25. UNHCR GUIDELINES, *supra* note 24, ¶ 71.

26. *Id.* See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, art. 1(1), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS, at 38-39 (Ian Brownlie ed., 1992) [hereinafter Torture Convention]:

For the purposes of this Convention, the term "torture" means any 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

subject to abuse for transgressing social standards should be granted refugee status when a government cannot or will not protect them, regardless of whether the government instigated the abuse.²⁷

The U.S. Immigration and Naturalization Service is presently considering whether to establish specific guidelines for the adjudication of gender-related claims to asylum.²⁸ This Article advocates the promulgation of an administrative regulation that provides for women's gender-related claims to be considered under the statutory "particular social group" category.²⁹ The position taken here is that the United States' treaty obligations and duties under customary international law require such recognition of gender-based claims of persecution. It is also needed, with some irony, because of the relative failure of international instruments to stem the tide of abuse against women. Acceptance of gender-related asylum claims by the United States and

does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

27. UNHCR GUIDELINES, *supra* note 24, ¶ 71.

28. Deborah Sontag, *Women Asking U.S. Asylum Expand Definition of Abuse*, N.Y. TIMES, Sept. 27, 1993, at A1, C8. See also Editorial, *Women Seeking Asylum*, N.Y. TIMES, Oct. 6, 1993, at A20. In U.S. practice, refugee claims are made within an overseas adjudication process, whereas asylum claims are made in a separate process by persons who are physically present in the United States. To qualify for relief, both claimants must meet the definition of "refugee" found in the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol. This Article focuses on the asylum process. See 8 U.S.C.A. § 1158(a) (West Supp. 1994) (mandating that the Attorney General maintain a discretionary procedure to grant asylum to persons qualifying as refugees under 8 U.S.C.A. § 1101(a)(42)(A)).

29. A "refugee" is defined by the U.S. Immigration and Nationality Act, as amended by the Refugee Act of 1980, as:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a *particular social group*, or political opinion, or (B) in such special circumstances as the President after appropriate consultation . . . may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a *particular social group*, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C.A. § 1101(a)(42) (West 1993) (emphasis added).

other nations, viewed in this context, will begin to provide what the international instruments and structures have lacked: specific legal means to protect individual victims³⁰ and (even minimally) punish states for violations of gender-specific human rights.³¹

30. The consensual basis of international law weakens treaty protections. CEDAW has been signed by 103 states; however, many of the states joined the treaty with a reservation as to Article 29(1), which provides for arbitration of disputes and International Court of Justice jurisdiction to hear claims between states. States that expressed a reservation regarding Article 29 include: Argentina; Brazil; Bulgaria; China; Cuba; Czechoslovakia; Democratic Yemen; Egypt; El Salvador; Ethiopia; France; German Democratic Republic; Hungary; India; Indonesia; Iraq; Jamaica; Mauritius; Mongolia; Poland; Romania; Thailand; Tunisia; Turkey; Union of Soviet Socialist Republics; Venezuela; and Vietnam. UNITED NATIONS, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS 142-74 (1987).

The Bangladesh government acceded only on the basis that it would not be bound by Articles 2, 13(a), and 16(1)(c) and (f), because these articles were perceived to conflict with "Shariah law based on Holy Koran and Sunna." *Id.* at 143. This reservation essentially gutted the treaty document as it applied to practices in Bangladesh. Other states entered reservations like Malawi's, which stated that it did not consider itself bound to eradicate traditional customs and practices. *Id.* at 154.

CEDAW provides no enforcement mechanism nor means for redress of individual claims.

The Bosnian War Crimes Tribunal provides another example of the weak enforcement of women's claims, in this instance due to the necessity of consent from the accused party. In January 1993, a respected team of European investigators reported that some 20,000 women had been raped by Serbian soldiers as part of their "ethnic cleansing" campaign in the recent war in Bosnia-Herzegovina. Paul Lewis, *Rape Was Weapon of Serbs*, *U.N. Says*, N.Y. TIMES, Oct. 20, 1993, at A1. In response to this and reports of other atrocities, the U.N. Security Council set up a commission to gather evidence of war crimes in the former territory of Yugoslavia. The commission found, on the basis of its preliminary investigation, that the Serbs had used rape as a weapon of war to drive Muslims from their homes and to seize their lands. The Commission then sent special teams of women into the former Yugoslavia to interview the rape survivors in order to obtain material for the War Crimes Tribunal that now has been set up in The Hague. However, the tribunal has no power to arrest and bring those accused of war crimes to trial, if they are not willing to appear voluntarily. *Id.*; see also 139 CONG. REC. S2258-301 (daily ed. Mar. 3, 1993) (statement of Sen. Frank Lautenberg advocating prosecution of rapes in former Yugoslavia by War Crimes Tribunal, referring to S. Res. 35); 139 CONG. REC. S3071-106 (daily ed. Mar. 17, 1993) (similar statement by Sen. Lautenberg).

The U.S. Refugee Act of 1980, unlike the international treaties, expands the definition of "refugee" to include persecuted persons who have remained within their country of nationality. Under "special circumstances" such persons can receive relief through "in country" adjudication of their persecution claims. 8 U.S.C.A. § 1101(a)(42) (West 1993). Canada, Sweden, and Australia are a few countries that have similar procedures. Most recently, the United States has processed the claims of Haitians this way, in lieu of allowing Haitians to travel via boat to the United States in order to apply for asylum.

31. The United States Court of Appeals for the Fourth Circuit commented in 1990 that "[t]o accept the claim of someone to qualify for refugee status is publicly to accuse some other state of engaging in persecution." *M.A. A26851062 v. I.N.S.*,

Through its case law and regulations, Canada has taken the lead in providing refugee protection to women with gender-related claims. Canadian courts have also made general advances in developing frameworks for social group and non-state actor refugee cases. Because the United States and Canada have ratified the U.N. Charter and adopted the 1967 Protocol³² to the Refugee Convention, as U.S. case law makes clear,³³ Canadian interpretation of those treaties may be examined by U.S. decisionmakers to elucidate the significance of the documents for practice in the United States.³⁴

899 F.2d 304, 313 (4th Cir. 1990) (citing Frederick G. Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 479-80 (1983)).

32. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 436-37, 438 n.21 (1987) (holding that one of the primary purposes of the 1980 Refugee Act was to bring U.S. practice into conformity with the 1967 U.N. Protocol, to which the U.S. acceded in 1968, and which incorporates the 1951 U.N. Convention definition of "refugee"); *Canada v. Ward*, [1993] 103 D.L.R. (4th) 1, at 26-34 (S.C.C.) (looking to the intent of the framers of the 1951 Refugee Convention in order to interpret "particular social group" in the Canadian Immigration Act). See Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 622 [hereinafter Protocol]; United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259 [hereinafter Refugee Convention].

33. The U.S. Supreme Court and lower federal courts consider foreign decisions when interpreting treaties. See *Air France v. Saks*, 470 U.S. 392, 396 (1985) (stating that because "[t]reaties are construed more liberally than private agreements," the interpreter must "look beyond the written words to . . . the practical construction adopted by the parties" so as to "ascertain" the meaning, in this instance, of the Warsaw Convention); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943) (stating that treaties may be construed along the lines of the practical construction adopted by parties); *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 (1933) (stating that courts may look to the parties' practical construction in order to ascertain the meaning of a treaty); *Reed v. Wise*, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922 (1977) (noting that the Warsaw Convention "must be read in the context of the national legal systems of all its members"); see also Arthur Helton, *The Use of Comparative Law and Practice Under the International Refugee Treaties*, in *ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA* 11 (Geoffrey Coll & Jacqueline Bhabha eds., 1992); Brief of Amici Curiae, Lawyers Committee for Human Rights, et. al., I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) (No. 85-782).

Scrutiny of the subsequent practice of parties to a treaty has been recognized as an established canon of treaty interpretation. See, e.g., Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* Mar. 20, 1986, art. 31(3)(b), 25 I.L.M. 543 (stating treaty interpretation includes consideration of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

34. For example, in a non-precedential decision, a U.S. Immigration Judge recently relied, in part, on a Canadian case — Refugee Division Decision T91-04459, Slip Opinion at 5 (April 9, 1992) — in determining that a Brazilian man merited asylum based on gender-orientation as a "particular social group." The U.S. judge remarked that in the Canadian decision:

This Article endeavors to lay the groundwork for a human rights-based U.S. asylum practice that embraces claims of gender-related persecution, by examining its basis in international law and comparing U.S. and Canadian case law and procedures. Unfortunately, the U.S. case law demonstrates that women who have been persecuted on the basis of their gender currently have little clear recourse to asylum in the United States. Part I shows how United States' treaty law obligates the United States to create workable gender-related asylum standards. Part II demonstrates that U.S. regulations and case law contain structures needed to recognize women's gender-related claims, and also how and why U.S. practice has, to date, fallen short of fair treatment of those claims. Part III shows how Canada — in contrast to the United States — has developed clear standards for adjudicating women's gender-related claims, culminating last year in the issuance of administrative guidelines now undergirded by Canadian Supreme Court "particular social group" jurisprudence. The Article concludes that Canada's model for adjudicating "particular social group" claims made by women with gender-related claims should be adopted by the U.S. so that like asylum seekers in the U.S. might have access to relief to which they are entitled and which, to date, they have been denied. Finally, the Article closes with an appraisal of the value of the Canadian model as applied to the United States' most illustrative gender-related case.

I. GENDER-RELATED ASYLUM RIGHTS GROUNDED IN THE U.N. CHARTER

"All treaties made . . . under the authority of the United States" are, according to Article VI of the Constitution, the "supreme law of the land," on a par with domestic legislation. The United States presently bases its refugee practice, including

it was determined that the claimant was persecuted because of his homosexuality and could be considered a Convention refugee within the meaning provided in the Immigration Act of Canada.

The claimant argued that the reason he was persecuted is because he is a homosexual, and, as such, is a member of a particular social group. The Immigration and Refugee Board of Canada further determined that homosexuality is an immutable characteristic, and that even if homosexuality were a voluntary condition, it is one so fundamental to a person's identity that a claimant ought not to be compelled to change it.

In re Tenorio, No. A72-093-558 (IJ July 26, 1993), quoted in *IJ Grants Asylum to Brazilian Homosexual*, 70 INTERPRETER RELEASES 1100, 1100-01 (Aug. 23, 1993).

statutory asylum and withholding of deportation, on obligations created by its accession to international human rights treaties, principally the United Nations Protocol Relating to the Status of Refugees and the U.N. Charter.

Two important consequences flow from the treaty basis of U.S. asylum law. First, the United States must create and maintain — through legislation, administrative regulation, or case law — standards sufficient to realize its affirmative treaty obligations. Secondly, the United States may not maintain practices that contravene those obligations. Although the U.S. has not ratified some significant international treaties recognizing the equal rights of women — notably CEDAW — the following discussion shows that the United States is obligated by its current treaty commitments to recognize gender-related claims of persecution and to establish the procedures necessary for their proper adjudication.

A. *The U.N. Refugee Protocol and Convention Protect U.N. Charter Rights*

The United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees in 1968.³⁵ The Protocol adopts, with some modification,³⁶ the definition of “refugee” in Article 1 and directly incorporates Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees.³⁷ Thus, through the Protocol, the United States is required to observe those articles of the Convention.

It is a well-established principle of treaty interpretation that the preamble of a convention may be used to determine that document’s purpose.³⁸ The Refugee Convention’s Preamble³⁹ states that the document is designed to protect the “fundamental rights and freedoms” set forth in the U.N. Charter and the Universal

35. H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 19 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160; H.R. REP. NO. 608, 96th Cong., 1st Sess. 9 (1979); S. REP. NO. 256, 96th Cong., 1st Sess. 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141.

36. The time restriction (“events occurring before 1 January 1951”) is removed. The Protocol is also declared applicable “without any geographic limitation.” Protocol, *supra* note 32, art. I(2)–(3).

37. Refugee Convention, *supra* note 32.

38. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 107 n.54 (1991).

39. “Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy *fundamental rights and freedoms without discrimination . . .*” Refugee Convention, *supra* note 32, pmb. (emphasis added).

Declaration of Human Rights. The Preamble stresses that those rights are to be protected "without discrimination." Article 1 (which defines "refugee" on the basis of persecution of groups victimized by discriminatory animus), Article 33 (which protects persons from forced return to places where their lives or freedom would be threatened due to the presence of discriminatory animus),⁴⁰ and Article 34 (which encourages states to develop discretionary protections of "refugees" such as asylum)⁴¹ are based on equal protection of the rights set out in the U.N. founding documents. Articles 1 and 33 extend protection to persons deprived of human rights on the basis of race, religion, nationality, membership in a particular social group, and political opinion. Although these articles do not explicitly include "gender" in the list of protected categories, the protection of persons based on gender must necessarily be implicit, because of the emphasis the Charter⁴² and Declaration⁴³ place on the equal protection of rights for women.

40. "No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his *life or freedom* would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, *supra* note 32, art. 33, ¶ 1 (emphasis added).

41. According to the U.S. Supreme Court, the U.S. practice of "withholding of deportation" is based on Article 33, and the U.S. practice of "asylum" is based on Article 34, which "provides that the contracting [s]tates 'shall as far as possible facilitate the assimilation and naturalization of refugees.'" *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987).

42. "We the peoples of the united nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . ." U.N. CHARTER pmbl. "The Purposes of the United Nations are: . . . 3. To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to . . . sex . . ." *Id.* art. 1. "[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . sex . . ." *Id.* art. 55. "All Members pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55." *Id.* art. 56.

43. "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women . . ." Declaration, *supra* note 11, pmbl. "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . sex . . ." *Id.* art. 2. "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.* art. 7. "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *Id.* art. 8. Many of the articles of the Declaration are directed toward alleviating abusive practices specific to or common in the experience of women: arts. 4 (slavery), 5 (physical abuse), 6 (legal nonexistence), 7 (discriminatory

B. *The U.N. Charter and Universal Declaration of Human Rights Require State Protection from Gender-Related Persecution*

The Protocol and Convention turn the duty to provide equal protection of the laws, which the Charter and Declaration impose on states, into the basis for a refugee claim when that duty is egregiously breached. Thus, the U.N. General Assembly has declared that states should handle “new refugee situations in accordance with the principles and spirit of . . . the Universal Declaration.”⁴⁴ Due to the very explicit language in the Charter and Declaration concerning the “equal rights of men and women,”⁴⁵ there can be no doubt that the Refugee Convention — founded on those documents and providing relief to members of groups victimized by discriminatory animus — affords protection to individual women fleeing regimes where they would be persecuted because of their gender. States Parties to the Refugee Convention or the Protocol therefore have an obligation to create legal mechanisms that protect women refugees with gender-related claims from *refoulement*.⁴⁶

laws), 8 (lack of legal protection), 12 (abuse of privacy), 16 (lack of marital rights), 17 (lack of right to own property), 19 (lack of freedom of opinion or expression), 20 (restrictions on association), 21 (disfranchisement), 23 (lack of right to work, unequal pay), 25 (lack of maternal support, lack of protection as children), 26 (lack of right to education).

44. G.A. Res. 2399, U.N. GAOR 3d Comm., 23d Sess., 1735th plen. mtg. at 42, U.N. Doc. A/7369 (1968).

45. See *supra* notes 42, 43; see also CEDAW, *supra* note 7. “Noting that the Charter of the United Nations reaffirms faith . . . in the equal rights of men and women . . . [n]oting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination . . . [n]oting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil, and political rights . . .” *Id.* pmb1.

46. Refugee Convention, *supra* note 32, art. 33, ¶ 1. The language of Article 33 of the Refugee Convention requires the United States to withhold the *refoulement*, or forced return to place of origin, of any person whose “life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.” *Id.* The U.S. Supreme Court has interpreted this provision to apply directly to the U.S. practice of Withholding of Deportation. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 441 (1987). Asylum is understood to be a discretionary procedure in compliance with Article 34 of the treaty. *Id.* The United States is bound, however, to apply the same treaty refugee definition in Withholding of Deportation and asylum. Asylum as a discretionary means to “assimilate” refugees, when practiced, must be practiced in accord with the treaty definition. See *id.* The position of this Article is that the U.N. founding documents require gender to be an element of that definition.

The obligation to protect women refugees is reinforced by today's strong trend toward recognizing the standards "of achievement" set out in the Declaration as binding norms of customary international law.⁴⁷ As such, observance of these norms would be obligatory for all states, including states that are not members of the U.N.⁴⁸ It is argued that the Declaration has become a law-making instrument because it was drafted by the General Assembly in order to spell out in detail the substance of the "human rights and fundamental freedoms" protected, but left undefined, in Article 55 of the Charter. This "interconnected document" argument for customary law status is well-supported by the practice of nations.⁴⁹ Even if the Declaration were not yet considered binding as customary law, it at least enumerates the rights that Article 56 of the Charter requires member states to respect.⁵⁰

The International Court of Justice (I.C.J.) has also linked Charter and Declaration rights, suggesting that Declaration rights are binding on member states.⁵¹ Although the I.C.J. has

47. THOMAS BUEGENTHAL, *INTERNATIONAL HUMAN RIGHTS* 32-33 (1988); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 *AM. U. L. REV.* 1, 16-17 (1982). *But see* H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 4 (1950). A few commentators contend that, because of the language in the Preamble to the Declaration ("This universal declaration of human rights as a common standard of achievement . . ."), it can neither be considered a law-making instrument, nor ever come to be considered as expressing customary norms of international law. *Id.*

48. Sohn, *supra* note 47, at 17. "The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only on members of the United Nations." *Id.*

49. "Innumerable governments" have cited the Declaration for positions they have taken in international affairs, and not one government has officially challenged it or any of its contents. Many new sovereign states have incorporated all or some of it in their constitutions. Additionally, the Proclamation of Tehran, which was written at the United Nations International Conference on Human Rights that met in Iran in 1968, declared that the Declaration "constitute[d] an obligation for the members of the international community." Paul Sieghart, *International Human Rights Law: Some Current Problems*, in *HUMAN RIGHTS FOR THE 1990S: LEGAL, POLITICAL AND ETHICAL ISSUES* 24, 29 (Robert Blackburn & John Taylor eds., 1991).

50. *Id.* at 30.

[T]he two instruments must be read together: in the first, which is a binding treaty, the member states pledge themselves to respect and observe X, and if you want to know what X is you will find it fully described in the second — with a reference back to the first, to make it clear that this is precisely what you are intended to do.

Id.

51. In the Iranian Hostage Case, for example, the court found that the conditions of detention forced on the American hostages were "manifestly incompatible

not adjudicated a case involving systematic sex discrimination, one of the court's findings in a 1971 case clearly expresses the seriousness with which the court treats a breach of the non-discrimination, equal protection provisions of the Charter and Declaration.⁵² "Under the Charter," said the court, the

Mandatory had pledged itself to observe and respect . . . human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race . . . which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.⁵³

Failure by the United States to provide standards for accepting gender-related asylum claims would only send a message to offending countries that, whereas deprivation of fundamental human rights is unacceptable on the basis of the enumerated Refugee Convention categories, it is permissible to discriminate with regard to the protection of women's fundamental human rights.⁵⁴ The United States is bound by the U.N. Charter to "fulfill in good faith" its Charter obligations.⁵⁵ One of those obligations is to "take joint and separate action" to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . sex."⁵⁶ Arguably, if the United States does not consider claims of persecution based

with the principles of the Charter . . . as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." *Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 42 (May 24).

In 1971, the court cited the General Assembly as "convinced" that South Africa's behavior in Namibia contravened the "international instruments directly imposing obligations upon South Africa, the Mandate [for German South West Africa] and the Charter . . . as well as . . . the Universal Declaration of Human Rights." *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971 I.C.J. 16, 46, ¶ 92 (June 21).

52. *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971 I.C.J. 16, 57, ¶ 131 (June 21).

53. *Id.*

54. Which is, of course, to say that human rights, as applied to women, are not rights at all, because rights necessarily entail state duties.

See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens & General Principles*, 12 *AUSTL. Y.B. INT'L. L.* 82, 95 (1992), quoted in Charlesworth & Chinkin, *supra* note 13, at 68 n.27. "It must be asked whether any theory of human rights law which singles out race but not gender discrimination . . . is not flawed in terms both of the theory of human rights and of United Nations doctrine." *Id.*

55. U.N. CHARTER art. 2, ¶ 2.

56. *Id.* arts. 55, 56.

on gender, it will not only fall short of the Protocol's implicit requirements, but will also simultaneously fail to uphold its duties under the Charter.

The issue, then, is not whether gender-related refugee claims should be cognizable under international law and within our own asylum jurisprudence, but simply how relief for such claims should be implemented. Canada's decision to consider pure gender-related claims under the "particular social group" category of the refugee definition supports the idea that gender is implicitly protected by the Refugee Convention. The addition of a sixth statutory category⁵⁷ of "gender" to the U.S. asylum provision might imply the contrary: that the framers of the Refugee Convention would have excluded "gender" from their list of bases for persecution.⁵⁸ Moreover, unilateral adoption of "gender" as a protected category not derived from the Charter, Declaration,

57. See Sontag, *supra* note 28, at C8 ("Many lawyers push for a more radical approach by adding persecution because of sex as a sixth ground for asylum."); David Scanlon, *Abused Women: Pressure Mounts to Admit Them as Refugees*, CALGARY HERALD, Jan. 23, 1993, at A5 (Refugee groups "want the federal government to fight at the international level to make persecution based on gender a basis for refugee status.").

But see Editorial, *Opening the Doors to Women: New Refugee Guidelines are on the Right Track*, MONTREAL GAZETTE, Mar. 11, 1993, at B2 ("Feminist critics are wrong to scold the government for putting this reform in the form of guidelines, which have only the power of suggestion, and not law."); Sontag, *supra*, at C8 ("The current refugee definition can work, but if and only if we rethink the way women's cases are handled, taking a new look at the political nature of many seemingly private acts and understanding that many countries simply fail to protect their women" (quoting Nancy Kelley, Clinical Instructor in Immigration Law at Harvard Law School and attorney at the Women's Refugee Project in Cambridge, Massachusetts)).

58. *But cf.* Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 539, 542-43 (1993) (recognizing U.N. Charter obligations to protect women refugees, yet advocating amendment of the Refugee Convention to include gender as a sixth category because of difficulties states have had in applying the "particular social group" category). Cipriani relies on *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986), to support her argument that states have inconsistently applied the "particular social group" category. *Id.* at 537. This Article takes the position that the Canadian model of adjudicating gender-related "particular social group" claims has overcome the difficulties created by *Sanchez-Trujillo*. There are drawbacks to Cipriani's approach: (1) Cipriani does not explain how the Refugee Convention can be realistically amended with a sixth category prior to reform in the practices of asylum-granting states that are parties to the Convention. That reform, in turn, will most likely take place only if it is based on the Convention's present obligations and structures for asylum relief. (2) Amending the treaty to include "gender" will not do away with the task of defining the size and characteristics of the protected group for societies where not all women are subject to persecution on the basis of gender. *Contra id.* at 538. "Particular social group" analysis would allow a society-wide protected class when appro-

and Refugee Convention would do little to encourage other nations to provide similar protection. On the other hand, the sufficiently widespread practice of states utilizing the “particular social group” category to extend asylum to women with gender-related claims, if not sufficient in itself to protect women, might create an environment conducive to amending the Convention and Protocol to include the explicit category of gender.

II. UNITED STATES ASYLUM PRACTICE AND THE PROTECTION OF THE HUMAN RIGHTS OF WOMEN

The United States Supreme Court stressed in *I.N.S. v. Cardoza-Fonseca* that one of Congress’ primary purposes in enacting the 1980 Refugee Act was to bring U.S. refugee law in line with the 1967 U.N. Protocol.⁵⁹ It stated that Congress clearly intended the definition of “refugee” to be based directly on the language of the Protocol and to be interpreted “consistent with the Protocol.”⁶⁰ The U.S. Immigration and Naturalization Service (I.N.S.) has followed congressional intent by defining statutory “persecution” to include “serious violations of basic human rights.”⁶¹ United States decisionmakers have demonstrated receptivity to claims of persecution by non-state actors in contexts not exclusively gender-related. Based on treaty obligations and the current general status of domestic doctrine, all indicators suggest that U.S. asylum jurisprudence ought to have a place for purely gender-related claims. Only the weight of history — the persistence of the “oldest rule in the book” — prevents it.

United States case law to date has almost uniformly barred gender-related claims by bestowing on assaultive sexual or spousal relations a kind of per se “personal” status. The following section lays out the requirements for asylum in the United States. It suggests that the most consistent way to apply the Protocol would be to evaluate persecution claims on the basis of the hierarchy of human rights created by the U.N. founding docu-

priate. Under either approach the calculation of size and characteristics should come out about the same.

59. 480 U.S. 421, 436–37 (1987).

60. *Id.* at 437.

61. ASYLUM BRANCH, OFFICE OF GENERAL COUNSEL, U.S. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, BASIC LAW MANUAL: ASYLUM SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW 20–22 (1991) [hereinafter BASIC LAW MANUAL]. The manual states that determination of whether conduct is persecution depends on whether the conduct “violates a basic human right, *protected under international law.*” *Id.* (emphasis in original).

ments and later covenants. The subsequent examination of U.S. case law reveals how the treatment of gender-related claims in the U.S. has been an unfortunate exercise in irrationality and denial. The section analyzes U.S. treatment of cases involving sexual assault and "particular social group" claims, and culminates with a look at the most recent U.S. appellate-level gender-related "social group" case, *Fatin v. I.N.S.*⁶² In *Fatin*, the Third Circuit applies a definition of "particular social group" that is hospitable to gender-related claims. The case possibly augurs a positive shift in approach toward such claims. However, as will be shown, it is quite limited as precedent. The recognized treaty obligations, history of bias, and inconsistent social group jurisprudence between the circuits all point to the need for the I.N.S. to issue for the courts and adjudicators a road map for gender-related claims.

A. *U.S. Asylum Standards are Amenable to Gender-Related Claims*

Asylum is now awarded in the United States at the discretion of the Attorney General, once she determines that the alien petitioner is a "refugee" as defined by the Refugee Act.⁶³ The Act, following the language of the Protocol almost verbatim, defines a refugee as someone outside the country of her nationality who is unable or unwilling to return to, and is unwilling or unable to avail herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁶⁴ Besides more severe forms of mis-

62. 12 F.3d 1233 (3d Cir. 1993).

63. "[T]he 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 [8 U.S.C.A. § 1101(a)(42)(A)]." 8 U.S.C.A. § 1158(a) (West Supp. 1994).

Withholding of Deportation is another means of relief based on the refugee definition and provided for in the Immigration and Nationality Act: "The Attorney General shall not deport or return any 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." 8 U.S.C.A. § 1253(h) (West Supp. 1994). The burden of proof on the petitioner is higher for withholding than for asylum. The Board of Immigration Appeals has held since the 1950s that to merit withholding the petitioner must show a "clear probability of persecution" if she is deported to the country she is fleeing. The impact of this high standard was mitigated somewhat in *I.N.S. v. Stevic*, which interpreted it to mean that "it is more likely than not" that the petitioner will be "subject to persecution." 467 U.S. 407, 424 (1984).

64. 8 U.S.C.A. § 1101(a)(42) (West Supp. 1994).

treatment, such as torture and prolonged detention, the I.N.S. holds that human rights violations that amount to persecution include, inter alia, "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 and pressure to become an informer."⁶⁵ Although mere economic disadvantage may not be the basis for a refugee claim, persecution may be found when a state deliberately and seriously impairs a victim's "ability to earn a livelihood" on the basis of the five statutory grounds.⁶⁶ Even facially-neutral governmental policies and sanctions can be persecutory when they have a discriminatory impact,⁶⁷ or when they result in actions that abridge basic human rights.⁶⁸

The I.N.S.'s analysis of the content of persecution is consistent with the hierarchy of rights created by the U.N. Covenants that convert the rights of the Declaration into treaty law — the International Covenant on Civil and Political Rights [ICCPR] and the International Covenant on Economic, Social, and Cultural Rights [ICESCR].⁶⁹ Essentially all of the situations listed by the I.N.S., from the severe to the less severe, demonstrate sustained harassment and failure of state protection. The International Bill of Rights — the Charter, Declaration, and two Covenants — gives content to the minimum duties against which the misfeasance or nonfeasance of a state is measured in a finding of persecution. A state's failure to ensure those rights designated non-derogative⁷⁰ by the ICCPR will result in persecution.

65. BASIC LAW MANUAL, *supra* note 61, at 21. The Basic Law Manual stresses that this list is not exhaustive and states that the cumulative weight from the presence of several of these factors may constitute persecution. *Id.*

66. *Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988).

67. *In re Chang*, Interim Decision 3107 (BIA 1989). Although the Board of Immigration Appeals found here that China's involuntary sterilization policy was not inherently persecutory, it stated that, as applied, it could be persecutory if it were carried out selectively or severely against persons on the basis of any of the five statutory grounds, or if no government redress were available. *Id.* at 5.

68. For example, the General Counsel of the I.N.S. has instructed trial attorneys for the agency to create a "presumptive eligibility" for asylum for victims, or persons who fear being victims, of governmental policies of forced abortion and coerced sterilization. *INS General Counsel Instructs on Asylum Claims Based on Coercive Family Planning Policies*, 69 INTERPRETER RELEASES 297, 297-98 (Mar. 9, 1992).

69. ICCPR and ICESCR, *supra* note 11.

70. ICCPR, *supra* note 11, art. 4(2). These rights include: freedom from arbitrary deprivation of life; protection against torture or cruel, inhuman, or degrading punishment or treatment; freedom from slavery; prohibition of criminal prosecution

Failure to ensure the ICCPR rights from which a state may derogate will generally constitute persecution, unless the state can show that its derogation was required by a real emergency, was not inconsistent with international law, and was not applied in a discriminatory manner.⁷¹ ICESCR, the other covenant, does not impose "binding standards of immediate attainment" for the rights it adopts from the Declaration. However, a state may be found to have breached its obligations, for the purposes of a persecution analysis, if it ignores these socioeconomic rights when it has the fiscal ability to attend to them, or if it excludes a minority in its population from being able to attain them.⁷² Deprivation of food, shelter, or health care at an extreme level would amount to "deprivation of life or cruel, inhuman or degrading treatment" — and would undoubtedly constitute persecution.⁷³

The asylum claimant bears the burden of demonstrating that she is a "refugee." However, she is not required to show that, if she were returned to the country she is fleeing, it is "more likely than not" that she would be persecuted.⁷⁴ The 1990 I.N.S. regulations require only that she show a "reasonable possibility" of suffering persecution.⁷⁵ Furthermore, the regulations do not require her to demonstrate that she "would be singled out individually for persecution" if she can establish a "pattern and practice" in the country she is fleeing of persecution of "persons similarly situated" to her on account of at least one of the five categories

for *ex post facto* offenses; right to be recognized as a person under the law; and freedom of thought, conscience, and religion. See HATHAWAY, *supra* note 38, at 108.

71. These rights include: freedom from arbitrary arrest or detention, right to equal protection, criminal procedure rights, personal and family privacy and integrity rights, internal movement and choice of residence, freedom to leave and return to one's home state, freedom of speech and association rights, right to form and participate in trade unions, and rights to participation in government. See HATHAWAY, *supra* note 38, at 109–10.

72. *Id.* at 111.

73. *Id.*

74. *Cardoza-Fonseca*, 480 U.S. at 431. The Supreme Court notes that the U.S. statute follows Article 34 of the 1951 United Nations Refugee Convention in the respect that "an alien must only show that he or she is a 'refugee' to establish eligibility for relief." *Id.* at 441.

75. 8 C.F.R. § 208.13(b)(2) (1993). See *Guevara-Flores v. I.N.S.*, 786 F.2d 1242, 1249 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987) (holding that an "alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country"); *Carcamo-Flores v. I.N.S.*, 805 F.2d 60, 68 (2d Cir. 1986) (adopting the "reasonable person" standard for well-founded fear of persecution).

in the refugee definition.⁷⁶ However, she is required to demonstrate her "own inclusion in and identification with such group of persons such that [her] fear of persecution upon return is reasonable."⁷⁷ Once she has demonstrated her refugee status, it remains within the Attorney General's discretion whether to grant her asylum.⁷⁸

Persecution is not limited to actions taken by government agents. It may be found where private actors perpetrate abuse and the government does not intervene and, thereby, does not comply with its basic duty to protect its citizens. The agent of persecution, according to U.S. case precedent and I.N.S. guidelines, may be a nongovernmental entity which the government is unwilling or unable to control.⁷⁹ Since the I.N.S. already recognizes that human rights standards (which include equal protection for women) define duties breached by persecutory acts and also recognizes non-state actor claims, when the agency creates a structure for considering gender-related claims, it will not need to make any basic doctrinal changes to entertain those claims related to women's "private sphere" experiences.⁸⁰

76. 8 C.F.R. § 208.13(b)(2) (1993) (The five categories are: "[r]ace, religion, nationality, membership in a particular social group, or political opinion.>").

77. *Id.*

78. *Cardoza-Fonseca*, 480 U.S. at 441. The Supreme Court emphasizes that the U.N. Refugee Convention does not require "implementing authority actually to grant asylum to all those who are eligible." Article 34 of the Convention requires contracting states to "as far as possible facilitate the assimilation and naturalization of refugees . . ." *Id.* (quoting the 1951 Refugee Convention).

79. *Arteaga v. I.N.S.*, 836 F.2d 1227, 1231 (9th Cir. 1988); *McMullen v. I.N.S.*, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981). The INS defines a person to be a refugee if she "has a well-founded fear of persecution (as a result of one of the five factors in the definition) because . . . she is not adequately protected by . . . her government." BASIC LAW MANUAL, *supra* note 61, at 25.

See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES ¶ 65 (1988) [hereinafter HANDBOOK].

80. *See* Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L. J. REFUGEE L. 518, 519 (1989) (commenting on the opinion of Indra that the addition of gender as a ground for an asylum claim would not improve the situation of refugee women without a concomitant redefinition of "persecution" to give credibility to women's "private sphere" experiences) (citing D. Indra, *Gender, A Key Dimension of the Refugee Experience*, REFUGEE, Feb. 1987, at 3).

B. *U.S. Case Law: A Legacy of Denial of Women's Gender-Related Claims*

Women's experiences of gender-related persecution span the distance from state-sponsored terrorism based on gender, as in Iran, to "private" spousal abuse in countries that afford no protection against it.⁸¹ U.S. precedents show that many gender-related claims can be adequately adjudicated under the established categories of religion, political opinion, imputed political opinion, and (non-gender) social group. However, the absence of any structure with which to specifically evaluate gender-related claims has also crippled decisionmaking in some cases, resulting either in distortion of the established categories (in the case of acceptance of a claim) or denial of claims due to misapplication of the element of gender. For cases that do not fall clearly into established categories, gender paradoxically works against women's claims, because of the very prejudice that has historically barred women from the civil and political world.

1. *Lazo-Majano*: The Ninth Circuit Outdoes Lewis Carroll

To date, there is only one recorded U.S. decision in which a woman was granted asylum based on a purely gender-related claim. The evidence of persecution in the case was so painfully well established that the Ninth Circuit distorted its imputed political opinion doctrine⁸² to hold in favor of the applicant, a victim

81. It might be helpful to conceive of women's experiences of gender-related persecution as falling into at least six categories: (1) violent state-sponsored persecution, (2) discriminatory (not rising to the physically violent) state-sponsored persecution, (3) violent persecution by state actors which the state is unwilling or unable to restrain, (4) discriminatory persecution by state actors which the state is unwilling or unable to restrain, (5) violent persecution by non-state actors which the state is unwilling or unable to restrain, and (6) discriminatory persecution by non-state actors which the state is unwilling or unable to restrain. Each of these categories contains three elements: the character of the persecutory act, the agent of the act, and the relation of the state to the act.

82. The Ninth Circuit started a line of "imputed political opinion" decisions with *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509 (9th Cir. 1985). In that case, the court defined persecution as occurring "only 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." *Id.* at 516-17 (emphasis added). The court maintained that it was irrelevant whether the victim or potential victim of persecution actually held opinions perceived to differ from the government's ideology, so long as the government believed that she did. *Id.* The court partially rested this concept of imputed political opinion on the United Nations Refugee Handbook. *Id.* (citing HANDBOOK, *supra* note 79, ¶¶ 80-83, which states that persecution of persons to whom a government attributes

of repeated sexual abuse by a Salvadoran Army sergeant.⁸³ The court's recognition that the factual pattern in the case constituted persecution, coupled with the court's inability to articulate a coherent legal basis for its grant of asylum, demonstrates like no other U.S. case the need for procedural guidelines to evaluate gender-related claims.

Olimpia Lazo-Majano was the mother of three children. Her husband, an ex-member of O.R.D.E.N., a right-wing Salvadoran paramilitary organization, had fled to the United States in 1981 when she was twenty-nine years old. In April 1982, she began working as a household laborer for Sergeant Rene Zuniga. After pointing out to Lazo-Majano that her husband was out of the country, Zuniga raped her. "With a gun in his hand," she later dramatically related, "he made me be his."⁸⁴ Zuniga dominated Lazo-Majano throughout the following months. He sexually abused her, beat her, tore her identity card in pieces and made her eat them, and dragged her by the hair around a public restaurant. At one point he "pummeled her face" so hard that a blood clot formed in one eye, leading Lazo-Majano to think that she had lost the eye.⁸⁵

In relating the facts, the Ninth Circuit emphasized Zuniga's position in the Salvadoran Armed Forces and his threats to have Lazo-Majano slowly tortured and killed if she ever revealed his abuse of her. Significantly, he threatened to denounce her as a "subversive." On one occasion in a restaurant, he told a police friend "in front of all the other people in the restaurant" that she was a subversive, and that her husband had left "because she was a subversive."⁸⁶ Lazo-Majano gave in to the sexual abuse because she believed that no one in El Salvador could stop the Armed Forces from doing what they wished. She knew of the rape of "young college girls" by the Army and of similar atroci-

political opinions amounts to persecution on account of political opinion). The court held that:

[w]hen 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.

Id.

83. *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1436 (9th Cir. 1987).

84. *Id.* at 1433.

85. *Id.*

86. *Id.*

ties, and she perceived the lack of response by restaurant patrons when Zuniga dragged her about by the hair as emblematic of her predicament.⁸⁷ She ultimately escaped from the sergeant and El Salvador, and applied for political asylum after arriving in the United States.

The Ninth Circuit found that "persecution [was] stamped on every page of [the] record" and that the sergeant had his hold over Lazo-Majano "because he was a member of [a] powerful military group" that "exercise[d] domination over much of El Salvador despite the staunchest efforts of the . . . government to restrain it."⁸⁸ The court found that Lazo-Majano would be in danger from the sergeant anywhere in the country if she returned to El Salvador.⁸⁹ However, the court then stumbled over what grounds to assert for its finding of persecution. Was the relationship between Lazo-Majano and Zuniga political or personal? And if it was political, whose political beliefs mattered for the sake of the refugee determination? The court found that Zuniga held the political opinion that "a man has a right to dominate" and that he persecuted Lazo-Majano in order to force her to accept that opinion. The court also found that Zuniga's threats to denounce Lazo-Majano as a "subversive" amounted to attribution of a political belief to her.⁹⁰ The court admitted that the belief was cynically imputed, because Zuniga knew that "Olimpia was only a poor domestic and washerwoman." In other words, the court realized there was no hook upon which to hang the attribution of subversion.⁹¹ Zuniga observed no such subversive

87. *Id.*

88. *Id.* at 1434.

89. *Id.* at 1435.

90. *Id.* Apparently aware of its weak analysis, the court went on to state rather gratuitously "one cannot have a more compelling example of a political opinion generating political persecution than the opinion that is held by a subversive in opposition to the government." *Id.*

91. Indeed, Lazo-Majano may have sympathized with far-right political elements in El Salvador, since her husband was an ex-member of a paramilitary group that was responsible for rightist human rights atrocities and despised by the guerrillas on the left. See *I.N.S. v. Elias-Zacarias*, in which Justice Scalia parses "persecution on account of . . . political opinion" to mean "persecution on account of the victim's political opinion, not the persecutor's." 112 S. Ct. 812, 816 (1992). Scalia goes on to elaborate: "If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion." *Id.* The holding of the case seems to be that an asylum petitioner basing her claim on political opinion is required to submit some evidence, direct or circumstantial, that the persecutor's motive is related to a reasonably per-

belief in Lazo-Majano and no association between her and others that might have led him to suspect she held subversive beliefs.

The court lacked the means to recognize a gender-related claim, and thus, it could not proceed from its own findings — i.e., violent persecution, gender-discriminatory animus, and the claimant's perception that her government offered her no protection — to a coherent decision in the claimant's favor. Instead, the court labored illogically toward the ultimate holding that Lazo-Majano was persecuted “[b]ecause she believe[d] that no political control exist[ed] to restrain a brutal sergeant in the Armed Forces.”⁹² The hook upon which the court rested Zuniga's attribution of subversion was the mere conception by the victim that there was no governmental institution that would protect her. The court decided that on the basis of this imputed political opinion — subversion consisting of nothing more than generalized lack of faith in the government — Lazo-Majano had suffered persecution as a matter of law.⁹³

Judge Poole argued correctly in a strongly-worded dissent that the majority's holding on imputed political opinion was “a construct of pure fiction.” The court, he said, “ha[d] outdone Lewis Carroll in its application of the term ‘political opinion.’”⁹⁴ The dissenting judge reasonably found that Zuniga did not subject Lazo-Majano to “repeated humiliations” because he saw her as subversive, and that she was in no danger from the government of El Salvador for any attributed belief.⁹⁵ He added, however, that the majority was also mistaken “in finding that male domination in such a personal relationship constitute[d] political persecution.”⁹⁶ Lazo-Majano was simply the victim of a man with “unrestrained carnal appetites” whose “total conception of her” was “as an available sexual object.”⁹⁷ The sergeant, furthermore, had been unduly enlarged in role and rank by the majority. He was, in reality, a “common, low-grade non-commissioned sergeant,” who had relatively no political power or status.⁹⁸ His actions toward the victim were not in line with any government

ceived politically-relevant attribute of the victim. *Id.* at 816–17. *See also infra* note 136.

92. *Lazo-Majano*, 813 F.2d at 1435.

93. *Id.* at 1436.

94. *Id.* at 1437.

95. *Id.* at 1439.

96. *Id.* at 1437.

97. *Id.* at 1439.

98. *Id.* at 1438.

policy. He was not an agent of the state; rather, he was an individual motivated by nothing more than "‘exaggerated machismo,’ the rampaging lust-hate of the common rapist."⁹⁹ Judge Poole emphasized that there was nothing in the record "on which to conclude that official intervention would not have been at hand" if Lazo-Majano had complained of the sergeant's behavior to authorities.¹⁰⁰

The basis upon which the *Lazo-Majano* majority rested its holding — the victim's perception that no governmental institution would save her — is the cornerstone of a gender-related claim, indeed of any kind of refugee claim. But that perception has to be rationally based, and Judge Poole was right to require some showing by the claimant that "intervention would not have been at hand." Such proof likely would have been available.¹⁰¹ However, his other conclusions — that male domination in a "personal relationship" cannot be persecution and that the persecutor has to be an agent of the state — are more dubious.

By way of contrast, the same Ninth Circuit court had reasonably held in the previous year¹⁰² that in order to distinguish personal disputes from political persecution it would merely "analyze[] the basis of the threat, including the motivation of both the persecutor and the alien."¹⁰³ Apparently following that procedure, the *Lazo-Majano* majority found Zuniga was motivated by a gender-related discriminatory animus, evidenced by his words and actions over a long period of time. Such a finding — though not of *political* motive — nevertheless would have been adequate to meet the Refugee Convention (and Protocol)

99. *Id.*

100. *Id.* at 1440. This is not to say evidence of the futility of such complaints could not have been found to be placed in the record. The significance of such evidence was probably not apparent to the respondent's attorney at the time, due to the infancy of the notion of persecution based on gender. Such evidence will be critical once the doctrine is better developed.

101. See *infra* notes 323–26 and accompanying text.

102. *Zayas-Marini v. I.N.S.*, 785 F.2d 801, 806 (9th Cir. 1986).

103. *Id.* The court found that Zayas-Marini's problems with two men in the Paraguayan government were entirely personal. One man had threatened him for refusing to become involved in a smuggling scheme. The other had gotten in a fight with him at the Kennedy Center over his public accusation of the other's corruption. During the time Zayas-Marini was out of the country, he represented Paraguay in a variety of functions and was in contact with government leaders. The court affirmed the Board of Immigration Appeals finding that, "[i]nsofar as these men may wish [Marini] harm . . . they do so as the result of personal disputes, which will not qualify him for asylum based on political activities or any other listed reason." *Id.* at 805–06.

requirements for *persecutory* motive.¹⁰⁴ However, the majority, shackled like the dissent to the traditional bias that women's gender-related experiences are *de naturalis* "personal," found itself obligated to hold on other, rationally unsatisfactory grounds.

2. The Per Se Bar Based on the "Personal" Nature of the Relationship

Lazo-Majano provides the only exception to the unstated rule, established very early in U.S. refugee jurisprudence, that erects a *per se* bar to women's gender-related claims by treating all women's relationships with sexual aspects as "personal," and thereby irrelevant to refugee protection. Spousal relationships, no matter how abusive, are "personal." Sexual assault like that found in *Lazo-Majano* is "personal." The Board of Immigration Appeals concluded in a 1975 withholding of deportation case, *In re Pierre*, that a woman whose husband had tried to kill her would not be eligible for relief, *even if* she were able to prove that her government was "unable or unwilling to restrain her husband."¹⁰⁵ In spite of evidence that the husband had tried to kill Mme. Pierre by burning down her house and that he could use his high political position as a deputy in the Haitian government¹⁰⁶ to prevent her from getting sufficient legal or physical protection from him, the court erected an apparent *per se* bar to her claim based on the "personal" nature of their relationship.¹⁰⁷ Since this inauspicious debut, the kind of analysis of claims offered by Judge Poole's *Lazo* dissent has carried the day.

A recent Sixth Circuit case, *Klawitter v. I.N.S.*,¹⁰⁸ for example, displayed a fact pattern similar to *Lazo-Majano*, and an analysis of the facts much like Judge Poole's. Elzbieta Klawitter based her asylum claim on fear of Josef Niedzwiecki, a colonel in

104. See *supra* text accompanying notes 35–56 regarding implicit Refugee Convention protection of women's equal rights under the law.

105. 15 I. & N. Dec. 461, 463 (BIA 1975).

106. *Id.* at 461–62. The position of deputy was analogous at the time to that of a U.S. senator.

107. Interestingly, the B.I.A. recognized that there could be situations in which temporary withholding of deportation would be appropriate to protect persons who might suffer abuse from non-governmental agents. *Id.* However, it pointed out that in all the previous cases which recognized in dicta that such situations were persecution, the victim was perceived by the non-governmental agent to be in a class embraced by § 243(h). *Id.* at 462–63. Section 243(h) entertains the same classes as the asylum clause: race, religion, nationality, political opinion, and social group. 8 U.S.C.A. § 1253(h)(1) (West Supp. 1994).

108. 970 F.2d 149 (6th Cir. 1992).

the Polish secret police who "forced himself on her and used violence against her while threatening to destroy her career."¹⁰⁹ The court found that the essence of her claim was "her fear of continued pressure by a government official in Poland to succumb to his sexual advances,"¹¹⁰ and, echoing Judge Poole, held that, unfortunate as the situation was, harm based solely on sexual attraction did not constitute persecution under the Immigration and Nationality Act.¹¹¹ The court held that, absent the presence of persecutory intent, a "personal dispute of this nature," even "with an individual in a high governmental position," was not grounds for asylum.¹¹² "Congress," stated the court rather boldly, "did not contemplate that a claim of sexual harassment would constitute the type of persecution for which political asylum would be granted."¹¹³ Being unwilling to consider that gender could form the basis of persecutory intent, the court did not investigate whether it could characterize the abuser's motivation in the way the *Lazo-Majano* majority did, as a presumed "right to dominate." The court obviated the need to ask the question of primary relevance for a refugee claim — adequacy of state protection — by defining away the persecutor's motivation as instinct. The court finished its analysis before it started.

Campos-Guardado v. I.N.S.,¹¹⁴ a 1987 Fifth Circuit case, shows that the gender bias runs so deep in U.S. asylum jurisprudence as to warp even the most solid "political opinion" case into a denial of relief. In a case that involved a rape inextricably wed to the persecutors' political purposes, the decisionmakers — the Immigration Judge, the B.I.A., and a Fifth Circuit panel — declined to hold that the sexual assault was persecution. Sofia Campos-Guardado was raped by Salvadoran guerrillas after they forced her to watch them hack chunks of flesh with machetes off

109. *Id.* at 150–51. Klawitter made other assertions, e.g., that she was a member of Solidarity, that she had been questioned, detained, physically abused by other members of the Polish Secret Police, and that she was blacklisted for her refusal to join the Communist party. *Id.* at 150, 152–53. The court found the details of and reasons for these other claims unclear. *Id.* at 153. "[W]hen asked at the hearing to explain what exactly she had been subjected to by members of the secret police (other than Mr. Niedzwiecki), the respondent replied that friends of Mr. Niedzwiecki would accompany him to her house drunk." *Id.*

110. *Id.* at 152.

111. *Id.*

112. *Id.*

113. *Id.*

114. 809 F.2d 285 (5th Cir.), *cert. denied*, 484 U.S. 826 (1987).

of her uncle and male cousin before killing them.¹¹⁵ Campos-Guardado's uncle was a leader in an agrarian reform movement the guerrillas opposed. She argued before the appellate court that the record contained ample evidence that family members of peasant leaders in the reform movement had been singled out by guerrillas for persecution.¹¹⁶ Campos-Guardado maintained that, once the guerrillas found her in her uncle's house, they treated her as favoring her uncle's political views.¹¹⁷ It was unreasonable, she urged, for the B.I.A. to assume that the guerrillas' motives for raping her diverged from their reasons for torturing, killing, and raping her family members. The court reduced the issue to "whether the political implications underlying [the] alien's fear of harm r[o]se to the level of 'political opinion' within the meaning of the statute or whether those conditions constitute[d] the type of civil strife outside the reach of the statute."¹¹⁸ The court deferred to the B.I.A.'s evaluation of Salvadoran political conditions, and held it could not conclude as a matter of law that the Board erred in finding that there was insufficient evidence to show Campos-Guardado was persecuted for actual or imputed political opinion.¹¹⁹

The Fifth Circuit ignored the painfully obvious "political implications" of Campos-Guardado's case, and unreasonably deferred to the B.I.A. The guerrillas had used Campos-Guardado's eyes, ears, and body to make a political statement. If that were not so, they might have left her dead — an unfortunate witness whom they needed to silence. But they wanted her to speak, in order to testify as an eyewitness to the retribution meted out to their opponents. Regardless of what political opinion they might have imputed to her, they committed a violent political act

115. *Id.* at 287.

116. *Id.* at 288.

117. *Id.* at 289. A female guerrilla accompanying the men shouted political slogans while the men raped Sofia and three female cousins. *Id.* at 287.

118. *Id.* at 290.

119. *Id.* at 289-90. The court noted that because the decision to grant asylum is expressly at the discretion of the Attorney General, it could not overrule the B.I.A.'s denial of asylum "'absent a showing that such action was arbitrary, capricious, or an abuse of discretion.'" *Id.* at 289 (quoting *Young v. I.N.S.*, 759 F.2d 450, 456 n.6 (5th Cir.), *cert. denied*, 474 U.S. 996 (1985)). See *I.N.S. v. Stevic*, 467 U.S. 407, 429 n.22 (1984) (noting that the Attorney General has considerable discretion interpreting and implementing immigration statutes); *Guevara Flores v. I.N.S.*, 786 F.2d 1242, 1250 n.8 (5th Cir. 1986) (requiring deference to B.I.A. interpretation of immigration statutes unless there are "compelling indications that [the Board's interpretation] is wrong" (quoting *Red Lion Broadcasting Co. v. Fed. Communications Comm'n*, 395 U.S. 367, 381 (1969), *cert. denied*, 480 U.S. 930 (1987))).

against her. She was persecuted, plain and simple. It is hard to avoid the implication that the sexual aspect of the crime led the asylum decisionmakers to regard the crime as personal rather than political.¹²⁰ The several tiers of decisionmakers somehow believed the persecutors were overcome by a moment of "private" sexual instinct in the midst of their manifestly political crime. If Campos-Guardado had been a man, and nothing about the persecutory event were changed, she would have surely been granted asylum.

3. "Particular Social Group": The Vehicle for Gender-Related Claims

Certainly gender and fundamental attitudes about gender properly belong in the "particular social group" category. The U.N. Handbook defines a social group as "normally compris[ing] persons of similar background, habits or social status."¹²¹ The Handbook refines that point by suggesting that "mere membership" in a social group, absent "special circumstances," will not usually be sufficient to substantiate a refugee claim. The government's bearing toward the group is an important factor, as is the relationship between the group and the other grounds: race, religion, nationality, and political opinion.¹²² The B.I.A. has found that the "common characteristic that defines the [social] group . . . must be one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."¹²³

Unlike Canada, the United States has recorded few decisions of gender-related claims based on social group. That is probably due in part to the systemic gender bias and in part to confusion among the circuits about the definition of "particular social group." In 1991, however, the Second Circuit did find in *Gomez v. I.N.S.*¹²⁴ that "women who have been repeatedly and systematically brutalized by particular attackers" might be able

120. A strong inference can be drawn from the pattern of decisionmaking in the case that the adjudicators thought of rape as a sexual, rather than a violent crime; and they concluded that the sexual nature of the crime created a presumption that it was merely a crime against the person, devoid of political significance.

121. HANDBOOK, *supra* note 79, ¶¶ 77-79.

122. *Id.*

123. *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

124. 947 F.2d 660 (2d Cir. 1991). The petitioner had been raped and beaten by Salvadoran guerrillas on five separate occasions between the ages of 12 and 14. *Id.* at 662.

to assert a well-founded fear of persecution, and took note of the “physical and emotional pain that [had] been wantonly inflicted” on women abused by the Salvadoran guerrillas. However, following the B.I.A., the court declined to recognize “women who have previously been abused by the [Salvadoran] guerrillas” as a cognizable “particular social group.”¹²⁵ The court’s reflections indicate concern over the size of the purported group, as well as an unwillingness, again, to consider gender alone as the basis for the persecutor’s discriminatory animus.¹²⁶

In *Sanchez-Trujillo v. I.N.S.*,¹²⁷ a similar preoccupation with size led the Ninth Circuit to adopt an overly-restrictive social group standard by blending political opinion and social group categories in a weakly supported argument. Considering “Salvadoran urban males of military age” as a possible “social group” subject to official suspicion of subversion, the court stated that it was concerned with avoiding overbreadth. The “scope of the term” could not “be without some outer limit.”¹²⁸ The court settled on the concept that a “*particular* social group” implied “people closely affiliated with each other, who are actuated by some common impulse or interest.”¹²⁹ Of fundamental importance was “the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”¹³⁰ The court held up the family as a model because it was seen as a “focus of fundamental affiliational concerns and common interests.”¹³¹ The court then drew a negative contrast between the family as a social group and the group posited in the claim before it, which it described as a

125. *Id.* at 664.

126. *Id.* The appellate court agreed with the B.I.A.’s finding that Carmen Gomez had not demonstrated that women of that group “possess[ed] common characteristics — other than gender or youth — such that would-be persecutors could identify them as members of the purported group.” *Id.*

127. 801 F.2d 1571, 1576 (9th Cir. 1986). See *In re Chang*, Interim Decision 3107 (BIA 1989) (holding that Chinese persons who actually oppose the Chinese government policy of “one child per family,” and may be punished with sterilization, do not compose a social group). “If a law or policy is not inherently persecutive . . . one cannot demonstrate that it is a persecutive measure simply with evidence that it is applied to all persons, including those who do not agree with it.” *Id.* at 12.

128. 801 F.2d at 1576.

129. *Id.*

130. *Id.*

131. *Id.*

"sweeping demographic division" containing a "plethora" of different lifestyles, interests, cultures, and political opinions.¹³²

Ironically, the family, being formed by accident of birth, is perhaps the least voluntary of associations. Out of concern for overbreadth, the Ninth Circuit once again¹³³ failed to consider the relevance of the persecutor's motivation, and also failed to recognize that social groups may be extrinsically as well as intrinsically delineated. *Sanchez-Trujillo* has been widely criticized for this inadequacy. If it were to become the standard for consideration of women's gender-related claims, cognizable claims would apparently be limited to petitions by claimants who could classify themselves as belonging to groups of women allied in some way against repressive social norms. Women like Olimpia Lazo-Majano, subjected to long-term brutal, "degrading treatment,"¹³⁴ with no hope of assistance from authorities, would be left without relief, due to a lack of voluntary associational relationship. This would be so even though, extrinsically viewed, such women could be described as forming a clearly defined social group, e.g., "women systematically abused because of their gender by members of a military the government will not and cannot control."

By confining social groups to voluntary associations, the Ninth Circuit merely placed the "particular social group" category within the confines of "political opinion" analysis, stripping the category of any real independent validity. With the persecutor's motivation excised, to the extent that it is relevant to the definition of the group, the analysis is so impoverished that it cannot compare favorably with the Ninth Circuit's own "imputed political opinion" line of cases. Nevertheless, the "voluntary association" strand can still be useful, given an understanding that it does not exhaust the meaning of "particular social group." For

132. *Id.* at 1577; see also *In re Sanchez and Escobar*, Interim Decision 2996, 1985 WL 56048 (BIA 1985). The B.I.A. determined that "young (18- to 30-year-old), urban, working-class [Salvadoran] males of military age who have not served in the military or otherwise affirmatively demonstrated their support for the government of El Salvador" did not qualify as a "particular social group." *Id.* at *8-*9. Noting that the Salvadoran army and guerrillas vigorously sought support from members of the entire population, and that rural populations were also at risk, the Board found that the petitioners had failed to sufficiently nail down the group's identifying characteristics. *Id.* Perhaps tipping its hat to U.S. equal protection jurisprudence, the Board noted that a "purely statistical showing" such as that offered by the petitioners also was not in itself sufficient to prove the existence of the social group. *Id.*

133. See *supra* text accompanying notes 103 and 113.

134. Declaration, *supra* note 11, art. 5; ICCPR, *supra* note 11, art. 7 (non-derogative).

example, women who can show that they have a reasonable fear of persecution based on membership in a particular subgroup opposed to gender-discriminatory social conditions and laws may benefit from draft-resister precedents. Such women are more vulnerable than draft resisters in many countries, because the unjust cultural practices or laws often demand a public obsequiousness that they are unwilling to perform.

So far, there is no recorded case of a woman having won asylum in the United States on such a claim. An Iranian feminist recently presented a claim before the Third Circuit based, in part, on the draft resister model.¹³⁵ Citing *Canas-Segovia v. I.N.S.*,¹³⁶ Parastoo Fatin maintained that women who opposed unjust gender-related laws in Iran were comparable to men who opposed service in the military on the basis of genuine reasons of conscience. She asserted that these Iranian women who refused to conform to the “extremist expectations” of the Muslim fundamentalist government were a “particular social group” targeted for persecution. Fatin argued that, parallel to the conscientious draft resister model, the government’s treatment of non-con-

135. *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993).

136. Brief for Petitioner at 14, *Fatin v. I.N.S.*, 12 F.3d 1233 (3d Cir. 1993) (No. 92-3346) (citing *Canas-Segovia v. I.N.S.*, 902 F.2d 717 (9th Cir. 1990), *vacated and remanded*, 112 S. Ct. 1152 (1992)) (holding that military service may be persecution in rare instances where a disproportionately severe punishment would result on account of the five enumerated grounds in the Act). On certiorari, the Supreme Court required the Ninth Circuit to review their decision in *Canas* in light of intervening precedent, *I.N.S. v. Elias Zacarias*, 112 S. Ct. 812 (1992).

The Supreme Court found in *Elias* that the statutory language “persecution on account of . . . political opinion” referred to the *victim’s* opinion and, thus, held that the petitioner must be required to show some direct or circumstantial evidence of the persecutor’s motives. 112 S. Ct. at 816-17. In the case at hand, the court stated that the petitioner, a Guatemalan youth, had not shown that the Guatemalan guerrillas would persecute him for resisting service *because* he did not want the government to retaliate against him. *Id.* at 816. The guerrillas could punish him merely for refusing to serve. The burden was on the petitioner to show they were motivated in response to his political opinion.

On remand, the Ninth Circuit decided that *Elias* did not disturb its previous holding for the petitioning brothers, Jehovah’s Witnesses who resisted the draft in El Salvador. The court recognized that *Elias* required the petitioners to “tie the persecution to a protected cause,” but held that the Supreme Court’s decision did not touch the doctrine of imputed political opinion. 970 F.2d at 601-02. The petitioners, observed the court, should not be required to “tell their persecutors that they were refusing to serve for religious rather than political reasons.” Such an analysis would presume, the court added, that “the persecutors would believe them and that the *Canas-Segovias* could communicate the information before any harm befell them.” *Id.* at 602.

formist women in Iran would be "disproportionately severe" in comparison to its general treatment of women.¹³⁷

Within weeks of coming to power in Iran in 1979, the Ayatollah Khomeini commenced the process of overturning gains in social status that had been hard-won by Iranian women throughout this century.¹³⁸ Khomeini immediately ordered women to wear Islamic headdress and reversed past gains in family law. The minimum age of marriage for girls was reduced to fifteen, and courts began to allow marriages of girls as young as ten years old. Polygamy was legalized. Abortion was outlawed. Day-care centers were shut down. The Islamic law of retribution, passed in 1981, made adultery punishable by stoning.¹³⁹ On May 14, 1988, the Islamic republic passed a law that "'women who appear[ed] unveiled on the streets and in public places [would] be sentenced to 74 lashes.'"¹⁴⁰ The law has been enforced by a government organization called Mobile Units of God's Vengeance and by the *hezbollah*, the Party of God. Women have been jailed as prostitutes for negligently allowing a bit of hair to escape from underneath their scarves. And the public prosecutor's office in Tehran announced in the mid-1980s that *hezbollah* thugs who assaulted women for such tiny infractions were immune from prosecution, because they were doing the will of God.¹⁴¹ Finally, the practice of the *muta*, which allows a man to marry a woman for a fixed time period, has been reinvigorated.

137. Brief for Petitioner at 15, *Fatin* (No. 92-3346).

138. Haleh E. Bakhsh, *Veil of Fears*, NEW REPUBLIC, Oct. 28, 1985, at 15-16 (cited by the petitioner) (Appendix to Petition for Review). The chador was abolished in 1936, and women were admitted then on the same basis as men to the university in Iran. *Id.* at 15. Women gained suffrage in 1963. *Id.* Legislation was passed prior to the revolution that strengthened women's rights in marriage, divorce, and child custody, and facilitated their employment. Polygamy was greatly restricted, and women could sue for divorce on the same grounds as men. On the eve of the revolution women were employed as Cabinet ministers, senators, members of Parliament, army personnel, and police officers. *Id.*

139. *Id.* at 16.

140. Jack Anderson & Dale Van Atta, *Fearful Khomeini Turns on Own*, WASH. POST, Dec. 19, 1988, at B15.

141. Bakhsh, *supra* note 138, at 16. See Reifenberg, *supra* note 13, at 1F. The Iranian "Law of Retribution and Punishment" obliges a man who has murdered a woman to pay her family half the amount of "blood money" which a female murderer of a man is obliged to pay his family. Also, the Iranian penal code gives the testimony of a woman only half the value of a man's testimony. *Id.* For an extensive survey of Iranian discriminatory laws and practices against women see David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 210-22 (1988).

Often the time period is reduced to a matter of hours, and is thus merely a legally sanctioned form of prostitution.¹⁴²

Fatin appealed to these facts as a baseline description of the oppression of Iranian women, and then argued that her situation could be distinguished from that of the rest of the female population because she would be persecuted for conscientiously and openly opposing the government practices as a feminist. Her claim was essentially based on the political opinions that would be imputed to her because of her membership in a particular social group: "Iranian women who refuse to conform to the government's gender-specific laws and repressive social norms."¹⁴³ Citing *Acosta*, Fatin argued that her feminist beliefs were an "immutable characteristic" that "ought not be required to be changed."¹⁴⁴ On appeal, she contested the Immigration Judge's description of the group as "all Iranian women" and, likewise, the B.I.A.'s characterization of the group as "upper class Iranian women who were raised in the Western tradition."¹⁴⁵

The Third Circuit agreed that — under the standard set out in *Chevron v. N.R.D.C.*¹⁴⁶ — the B.I.A.'s interpretation of "particular social group" in *Acosta* controlled. The court added that *Acosta* actually identified sex as the kind of "innate characteristic" that could define a social group. Interpreting *Acosta* in the broadest possible manner, the court remarkably suggested that a petitioner could make out a cognizable asylum claim based on fear of being persecuted in Iran "simply because she is a wo-

142. Russell Watson, *Iran's Crusade Falls Far Short*, NEWSWEEK, Aug. 22, 1988, at 32.

143. Brief for Petitioner at 12, *Fatin* (No. 92-3346). Only after passing through the District Director and Immigration Court levels did Fatin identify herself, in her petition to the B.I.A., as a member of a "particular social group": "the upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals." *Fatin*, 12 F.3d at 1237. Her brief to the B.I.A. also stated that she had a "deep[ly] rooted belief in feminism." *Id.* Her characterization of social group membership appears to have evolved with an increasing ability to articulate her claim in a way commensurate with case law.

144. Brief for Petitioner at 12, *Fatin* (No. 92-3346) (citing *In re Acosta*, 19 I. & N. 211, 233 (BIA 1985)).

145. *Id.* The B.I.A. had followed Fatin's own characterization of her social group. See *supra* note 143.

146. *Fatin*, 12 F.3d at 1239 (citing *Chevron v. N.R.D.C.*, 467 U.S. 837 (1984), which holds that where Congress has not spoken directly on the interpretation of an issue in a statute, the interpretation of that issue by the agency charged with administration of the statute is to be given deference by the courts when it is based on a permissible construction of the statute).

man."¹⁴⁷ However, the court found Fatin's own characterization of her social group — "Iranian women who 'refuse to conform'" — more persuasively in conformance with the B.I.A.'s definition, because of its limiting effect. As applied to persecution in response to noncompliance with Iran's laws, the definition was narrowly drawn in such a way as to exclude Iranian women who found the laws objectionable but did not protest to the extent that they might receive the "'routine penalty.'"¹⁴⁸ As applied to the severity of the laws themselves — enforced wearing of the chador — the court found that the definition would exclude those Shi'ite Iranian women who found the laws "entirely appropriate" and those women who did not experience the laws as sufficiently burdensome to be characterized as persecutory.¹⁴⁹

The Third Circuit concluded that if a woman's opposition to Iran's laws was "so profound that she would choose to suffer the severe consequences of noncompliance," her beliefs could be described in the language of *Acosta* as "so fundamental to [her] identity or conscience that [they] ought not be required to be changed."¹⁵⁰ Nevertheless, the court denied Fatin's petition because — despite the information in the petitioner's and amici's briefs on the treatment of women in Iran — the court found such evidence in the administrative record (before the Immigration Judge) to be "sparse,"¹⁵¹ and her own testimony in the record to be inadequate to place her within the subgroup to which she claimed membership.¹⁵²

147. *Id.* at 1240. The Third Circuit laid out three elements that a claimant must establish in order to qualify for asylum as a member of a "particular social group": (1) identification of a social group that meets the *Acosta* definition; (2) membership in that social group; and (3) a showing that she would be persecuted or has a well-founded fear of being persecuted based on membership in that social group. *Id.*

148. *Id.* at 1241. The court cited the petitioner's brief for a description of the "'routine penalty'" for non-compliance with Iran's gender-discriminatory laws: "'74 lashes, a year's imprisonment, and in many cases brutal rapes and death.'" *Id.*

149. *Id.* at 1242.

150. *Id.* at 1241 (quoting *Acosta*, 19 I. & N. Dec. at 234).

151. *Id.* The court argued that it was bound by the nature of the petition to consider only the information in the administrative record. *Id.* (citing *Tovar v. I.N.S.*, 612 F.2d 794, 797 (3d Cir. 1980); *Scalzo v. Hurney*, 338 F.2d 339, 340 (3d Cir. 1964), *cert. denied*, 382 U.S. 849 (1965)).

152. *Id.* ("The petitioner's difficulty . . . is that the administrative record does not establish that she is a member of this tightly defined group and there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required."). According to the court, the "most" that Fatin's testimony showed was that she would find the requirement that she wear a veil "objectionable and would seek to avoid compliance if possible." *Id.*

Fatin had invited the court to focus on her beliefs as an Iranian feminist more than her status as an Iranian woman, and on the severity of her potential punishment rather than on the origin of that punishment in a discriminatory animus condemned by international human rights norms. This emphasis on the severity of persecution, derived from *Canas-Segovia*, caused the court to evaluate Fatin's claim in a gender-neutral way, focusing on pre-Refugee Act standards that defined persecution as limited to threats to life, confinement, torture, and severe economic restrictions.¹⁵³ As a result, although the court did reasonably comment that persecution could not "encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional,"¹⁵⁴ it did not really address the question of whether enforced wearing of veils was inherently degrading treatment of *women*, especially where men were not required by law to behave in some comparable manner. How different is the requirement that women wear veils from laws dictating that Jews wear yellow stars? In broad societal terms, both laws create badges of inferiority. We immediately recognize the latter law to be persecution, not merely because of the consequences attached to disobedience, but because it is fundamentally cruel. Why do we not respond to the former the same way? Viewed from the perspective of human rights, how is it even relevant, as the Third Circuit found it to be, that there are women who do not openly object to the practice?

If enforced wearing of veils is seriously discriminatory and contrary to international human rights standards, then conscientiously-objecting women should be protected from having to comply with such laws in the same way that conscientious draft resisters are protected by asylum law from legally-compelled participation in the military. Fatin could have strengthened her argument by relying on *M.A. A26851062 v. I.N.S.*,¹⁵⁵ a 1988 Fourth Circuit draft-resister decision distinguishable from *Sanchez-Trujillo* and *Canas-Segovia* for its emphasis on human rights violations committed by the Salvadoran army. In *M.A.*, the Fourth Circuit observed that as a general rule draft resistance is not grounds for asylum, because the military draft is considered lawful.¹⁵⁶ However, appealing to the U.N. Refugee Handbook,¹⁵⁷

153. *Id.* at 1240 (citing *Acosta* discussion of persecution).

154. *Id.*

155. 858 F.2d 210 (4th Cir. 1988).

156. *Id.* at 215.

the court found an exception when the potential draftee would be forced to participate in military acts against his political, religious, or moral convictions, or, more specifically, when he wished to avoid participation in activities deemed unlawful on an international scale. The court created a presumption in favor of a claim when the military is known to perpetrate human rights offenses: "Where the military engages in internationally condemned acts of violence . . . in light of the UNHCR, the only relevant factor is the likelihood that the alien will be punished."¹⁵⁸ Factors to consider in determining that likelihood are: (1) "genuineness of the alien's conviction," and (2) "the type of treatment which the alien fears on return to [her] country, the reasons for such treatment, and the reasonableness of the fear."¹⁵⁹

The record of widespread, serious human rights abuses against women in Iran should create a similar presumption in favor of claims raised by feminist petitioners that they might be persecuted for conscientiously resisting the Iranian laws which perpetuate degrading treatment. A court could reasonably conclude that, when a government engages in internationally condemned persecutory acts against women on a large scale, the only thing left for the feminist petitioner from that country to show is the likelihood that she will be punished.

III. CANADIAN SOCIAL GROUP JURISPRUDENCE AND THE REFUGEE CLAIMS OF WOMEN

Canada, as a signatory of the Refugee Convention, has codified, like the United States, the Convention refugee definition.¹⁶⁰ The Canadian and U.S. systems for adjudication of "Convention refugee" [Canada] and "asylum" [United States] claims are very

157. HANDBOOK, *supra* note 79, ¶¶ 170-71. *But see* Canas-Segovia v. I.N.S., 902 F.2d 717 (9th Cir. 1990). The Immigration Judge dismissed the use of the Handbook in a draft resister case, arguing that it was produced before the Refugee Act of 1980 (a rather strange point), and that "39 other nations fail to provide for conscientious objector exemptions." *Id.* at 721. The judge argued that mandatory prescription could not be persecution, because it applied equally to all Salvadorans without regard to the religious beliefs set out by the petitioners as the basis for their claim. *Id.* Similar arguments are made by decisionmakers denying women's claims: oppressive practices are society-wide and, thus, affect all women in the society. The applicant is precluded by such analysis from basing her claim on membership in a discrete group of women in the society who conscientiously object to the practices.

158. 858 F.2d at 216.

159. *Id.*

160. Immigration Act, R.S.C., ch. I-2, § 2(1) (1976-77) (Can.).

similar. In both systems, initial presentation of claims is made before administrative agencies¹⁶¹ with some expertise in evaluating such claims. Both systems allow discretionary appeals.¹⁶²

Two developments in Canadian jurisprudence laid down a foundation more hospitable to gender-related claims than related structures in U.S. case law, at least prior to *Fatin*. In the first place, from the outset of Canadian "particular social group" jurisprudence, social groups have been defined extrinsically as well as intrinsically. In Canadian law, not only can membership in the "particular social group" be "imputed," but the case law freely recognizes that the contours and basis of the group itself can be defined by the adjudicators of the claim. United States case law, particularly *In re Acosta*, also recognizes "externally cohesive" social groups. However, the progress of U.S. social group jurisprudence has been weighed down by the Ninth Circuit's precedent in *Sanchez-Trujillo*. Unencumbered by case law restricting social groups to voluntary associations, Canada has been able to treat externally and internally cohesive social groups as complementary rather than in tension. Secondly, Canada has developed a strong line of non-state actor¹⁶³ "particular social group" cases

161. LORNE WALDMAN, IMMIGRATION LAW AND PRACTICE §§ 9.16-9.18 (1992). Initial presentation of a refugee claim in Canada is made before a "quasi-judicial administrative tribunal," the Convention Refugee Determination Division of the Canadian Immigration and Refugee Board. *Id.*

162. *Id.* §§ 9.19-9.20. In Canada, denials by the Immigration and Refugee Board, Convention Refugee Determination Division, may be appealed to the Federal Court Trial Division, and subsequently to the Federal Court of Appeal, and Supreme Court. In the United States, denials by asylum officers may be appealed to an Immigration Judge, the Board of Immigration Appeals, a federal circuit court, and ultimately the Supreme Court. Unlike U.S. courts, the Canadian federal courts do not currently have jurisdiction to decide on the merits of claims; thus, once they have ruled on the law, the case is remanded to the Immigration and Refugee Board for a final decision. Canada has radically restructured its refugee claims process three times in the last five years. Interview with Rod Catford, Canadian Immigration Attorney (Mar. 10, 1994).

163. The refugee jurisprudence of several countries has long recognized persecution by non-state actors, which is essential to many gender-related claims. *United States: McMullen v. I.N.S.*, 658 F.2d 1312, 1315 (9th Cir. 1981) (defining agents of persecution to include "forces the government cannot or will not control"); *Rosa v. I.N.S.*, 440 F.2d 100, 102 (1st Cir. 1971) ("Nothing in the ordinary definition of persecution suggests that the term applies only to the acts of formally established governments."); *In re Tan*, 12 I. & N. Dec. 564, 568 (BIA 1967) (allowing a finding of persecution when the government was unwilling or unable to control anti-Chinese rioting by ethnic Indonesians). *Canada: Canada v. Ward*, [1993] 103 D.L.R. (4th) 1 (S.C.C.) (setting guidelines for non-state actor claims). *The Netherlands: Council of State, Judicial Division*, 18 Aug. 1978 (Turkish Christians case I), *Rechtspraak Vreemdelingenrecht* 1978 No. 30 and AB 1979 No. 159 (arguing that the seriousness

that does not devalue "private" acts of persecution, because it subsumes analysis of the character of the persecution under the logically prior question of the state's compliance with its basic duty to respect and protect the human rights of its citizens.

These two historical trends in Canadian case law culminated in last year's Canadian Supreme Court case, *Canada v. Ward*, which articulated authoritative standards for future decisionmaking along these lines.¹⁶⁴ Remarkably, many of the cases that led to *Ward* were based on the claims of men. *Ward*, in turn, drew on developments in two significant Canadian Federal Court of Appeal cases brought by women in order to render a decision favorable to a man fleeing non-state actor persecutors. *Ward*, in effect, bestowed the Canadian Supreme Court's imprimatur on the legal developments that led to the release in March 1993 of the Guidelines for Women Refugee Claimants by the Canada Immigration and Refugee Board.¹⁶⁵

A. *Recognition of External Cohesiveness in Canadian Social Group Jurisprudence*

The Canadian Federal Court of Appeal established the importance of external cohesiveness to social group claims by correlating the social group and imputed political opinion aspects of its first "particular social group" case.¹⁶⁶ In *Astudillo v. M.E.I.*, the applicant described himself as having had no political involvement in Chile, yet the court found that "while this may have been [his] own view of his activities in Chile, it was not the view of the governing authorities in Chile."¹⁶⁷ On several occasions in

of violent acts perpetrated by Islamic "fellow-citizens" against a Turkish Christian — "and the fact that the Turkish Government was unable to protect the appellant from them" — made it possible to define the situation as persecution). *Germany*: Case IV ZB 58/65 (Bundesgerichtshof, Judgment of Mar. 17, 1965) (Fed. Sup. Ct.) (roughly translated: "The measures of persecution emerge from the state authorities of the home countries or, at the very least to be valid, if it can be made out that the state power of the home country is not willing or is not in the position to effectively protect against persecution."). See Job van der Veen, *Does Persecution by Fellow-Citizens in Certain Regions of a State Fall Within the Definition of "Persecution" in the Convention Relating to the Status of Refugees of 1951? Some Comments Based on Dutch Judicial Decisions*, 11 NETH. Y.B. INT'L L. 167, 170 (1980).

164. *Canada v. Ward*, [1993] 103 D.L.R. (4th) 1, at 25.

165. 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 5 (1993) [hereinafter CANADA GUIDELINES].

166. *Astudillo v. M.E.I.*, [1979] 31 N.R. 121 (C.A.).

167. *Id.* at 122.

1974 Astudillo was detained and abused by Chilean authorities who accused him of supporting "Socialism," because of his brothers' political activities and because he was president of a sports club that the authorities insisted was a political association.¹⁶⁸ The Federal Court of Appeal held that, while there was some question as to whether the immediate family¹⁶⁹ could be considered a social group, there was no doubt that the "sports club" so qualified.¹⁷⁰ Also, the "crucial test" in interpreting the claimant's political activities, according to the court, was "whether the ruling government of the country from which he claim[ed] to be a refugee[] consider[ed] his conduct to be political activity."¹⁷¹ Another Federal Court recently made a similar ruling in the case of a Somali woman who based her refugee claim on the perception of persecutors that she belonged to the Somalian Darod clan.¹⁷² The court averred that instead of asking whether or not she was a member of the Darod clan, the Refugee Division should have inquired whether she would have been *perceived* to

168. *Id.*

169. Just as in U.S. jurisprudence, the family has played a prominent role in the development of Canadian "particular social group" theory. *See, e.g., Al-Busaidy v. M.E.I.*, Federal Court of Appeal, no. A-46-91, Jan. 17, 1992, at 3 (holding reviewable error not to give effect to family as membership in social group); *Gonzalez v. M.E.I.*, [1991] 129 N.R. 396 (C.A.); *Astudillo v. M.E.I.*, [1979] 31 N.R. 121 (C.A.); *Immigration Appeal Board decisions: Zarketa v. M.E.I.*, IAB M81-9776 (Feb. 6, 1985); *Barra-Velasquez v. M.E.I.*, IAB 80-6330 (Apr. 29, 1981), *cited in CANADA GUIDELINES, supra* note 165, at 12 n.5; *Refugee Division decisions: CRDD C90-00299, C90-00300* (Dec. 18, 1990) (finding "her husband's family" to be social group for Salvadoran claimant), *cited in CANADA GUIDELINES, supra*; *CRDD T89-02313, T89-02314, T89-02315* (Oct. 17, 1990) (finding "targeted family" to be social group for Guatemalan), *cited in CANADA GUIDELINES, supra*; *CRDD T89-03943* (July 25, 1990) (political opinion imputed to Somali woman due to actions of brothers), *cited in CANADA GUIDELINES, supra*; *CRDD M89-01098* (June 14, 1989) (granting refugee status to Sri Lankan woman because she is a "young Tamil in a Tamil family"), *cited in CANADA GUIDELINES, supra*; *CRDD M89-00971* (June 13, 1989) (finding Peruvian woman's family to be social group), *cited in CANADA GUIDELINES, supra*; *CRDD M89-00057* (Feb. 16, 1989) (finding "a pro-Shah family" to be social group for Iranian claimant), *cited in CANADA GUIDELINES, supra*; *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986) (citing family as example of "particular social group"); *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509 (9th Cir. 1985) (permitting asylum applicant to reopen case based on persecution of members of her family); *see also Re Araya*, IAB M76-1126 (Jan. 6, 1977) (ruling that harassment of wife because she knew of husband's political activities and movements was political persecution), *cited in FRANK N. MARROCCO & HENRY M. GOSLETT, THE ANNOTATED IMMIGRATION ACT OF CANADA* 11 (1991).

170. *Astudillo*, 31 N.R. at 123-24.

171. *Id.* at 122.

172. *Ali v. Canada*, [1993] 41 A.C.W.S. (3d) 860 (F.).

be a member of the clan by those from whom she feared persecution.¹⁷³

This recognition by Canadian adjudicators of the extrinsic definition of social groups may be the reason why Canada never grafted such a stunted growth onto its social group jurisprudence as *Sanchez-Trujillo*. Instead, it has allowed for the creation of a broad, diverse body of acceptable "particular social group" claims, as well as flexibility in decisionmaking. Indeed, the Federal Court of Appeal has defined "particular social groups" as broadly as "persons with capitalist backgrounds"¹⁷⁴ and as narrowly as "the family of Juan Ramon Arrechea."¹⁷⁵ Over the years, in second level hearings the Canadian Refugee Division found applicants to be members of "particular social groups" composed of: young Lebanese men targeted to join a militia that was not the official army of the state,¹⁷⁶ "the only professional body without an Islamic word or symbol in its nomenclature,"¹⁷⁷ Cuban Freemasons,¹⁷⁸ and "people in rural areas [of El Salvador] who find themselves caught between the two opposing forces and victimized and suspected by each."¹⁷⁹ Unlike U.S. decisionmakers,¹⁸⁰ the Canadians did not hesitate to consider young Central American men of draft age as members of a "particular social group," finding "young [Salvadoran] men of military age"¹⁸¹ and "young [Honduran] men of eligible age for military duty, who were subject to mistreatment after indiscriminate recruitment"¹⁸² to be so defined. Using the social group category, the Canadians thus gave young male Central Americans broader protection than they could have achieved under an imputed

173. *Id.*

174. *Lai v. Canada*, [1989] 8 Imm. L.R. (2d) 245, 17 A.C.W.S. (3d) 695 (C.A.) (considering that "persons with capitalist backgrounds" were claimed to be a particular social group subject to persecution in China).

175. *Gonzalez v. M.E.I.*, [1991] 129 N.R. 396 (C.A.) (setting aside decision by member of Immigration and Refugee Board on the basis that applicant stated a "particular social group" claim as member of family claiming persecution).

176. File T89-01960, Jan. 4, 1990, cited in *Mayers v. Canada*, [1992] 97 D.L.R. (4th) 729, at 733 (C.A.).

177. File M89-00244, Mar. 1990 (country of nationality not disclosed), quoted in 97 D.L.R. (4th) at 733-34.

178. File T89-03344, Feb. 5, 1990, cited in 97 D.L.R. (4th) at 734.

179. File T89-02579, Dec. 8, 1989, quoted in 97 D.L.R. (4th) at 734.

180. See, e.g., *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986).

181. File V83-6807, June 26, 1986, quoted in 97 D.L.R. (4th) at 734.

182. File T87-9024X, July 29, 1987, quoted in 97 D.L.R. (4th) at 734.

political belief draft resister analysis.¹⁸³ Also, in a remarkable opinion, the Federal Court of Appeal held that an Immigration Appeal Board panel erred when it dismissed the argument that "all Haitians outside Haiti" had a credible basis for claiming to be refugees.¹⁸⁴ This pronouncement contrasts rather sharply with the attitude conveyed by the recent U.S. Supreme Court holding that Haitian asylum seekers "outside Haiti," when found and interdicted between Haiti and the U.S. coast, are not protected by the principle of *non-refoulement*.¹⁸⁵

B. *Doctrinal Development of Canadian Social Group Jurisprudence for Non-State Actor Claims*

Equally important for gender-related claims is a line of Canadian precedent that recognizes as a valid refugee claim alleged mistreatment by non-state actors where the claimant is unable or unwilling to avail herself of the protection of the state. Whether persecuted by government or non-governmental actors, every refugee suffers from a failure by the home state to comply with its basic duty to protect its citizens. Refugee law is "substitute protection" in that "it is a response to disfranchisement from the usual benefits of nationality."¹⁸⁶ The international community steps in to protect persons at risk of deprivation of core human rights because their own states will not, or cannot protect them. The very foundation of the modern, liberal state is the police powers that protect those core human rights.¹⁸⁷ Thus, in princi-

183. See HATHAWAY, *supra* note 38, at 163 (noting that in cases of young draft-age males, *men* benefit from gender-specific interpretation of the social group ground).

184. *Orelien v. Canada*, [1991] 15 Imm. L.R. (2d) 1, 30 A.C.W.S. (3d) 890 (C.A.).

185. *Sale v. Haitian Centers Council Inc.*, 113 S. Ct. 2549 (1993); see *Haitian Centers Council v. McNary*, 969 F.2d 1350 (2d Cir. 1992).

186. HATHAWAY, *supra* note 38, at 124 (citing Memorandum from the Secretary-General, U.N. Doc. E/AC.32/2, at 13, Jan. 3, 1950). The language of "disfranchisement" suggests, as Hathaway argues, that the particular human rights protected by international refugee law are in essence "civil and political." If a refugee claimant cannot demonstrate a nexus between the danger she faces and her "socio-political situation and resultant marginalization" in her country, her claim must fail. *Id.* at 136-37. This principle therefore excludes from consideration for refugee status persons fleeing natural disasters, civil strife, or war. *Id.*

187. The liberal state was created by seventeenth and eighteenth century thinkers and constitution makers. Though these commentators disagreed on nuances, they all concurred that the state was justified as an institution only when it fulfilled its social contract with its citizens, who gave up some liberties to it in order to be protected from internal and external aggressors. Thomas Hobbes, for example, stated that a "political commonwealth" was formed "when men agree[d] amongst themselves, to submit to some man, or assembly of men, voluntarily, on confidence

ple, it is only a minimal intrusion on sovereignty for one state to protect another's female citizens from non-state actors when the other state is unwilling or unable to do so.¹⁸⁸

Extension of non-state actor jurisprudence to gender-related asylum claims is needed to eliminate bias in the application of human rights norms. Feminist scholars argue that, although human rights law has radically challenged the "traditional public/private dichotomy between states and individuals, it has retained the deeper, gendered, public/private distinction," which has led to rights being "defined according to what men fear will happen to them."¹⁸⁹ For example, the American Law Institute recog-

to be protected by him against all others." THOMAS HOBBS, *LEVIATHAN*, excerpted in PERSPECTIVES IN SOCIAL PHILOSOPHY: READINGS IN PHILOSOPHIC SOURCES OF SOCIAL THOUGHT 80, 86 (Robert N. Beck ed., 1967).

See also THE DECLARATION OF INDEPENDENCE (U.S. 1776). According to the U.S. Declaration of Independence, governments are created by the consent of the governed to protect certain "unalienable rights," and when a government becomes destructive of those ends it no longer exists with justification and may be abolished. *Id.* Modern international law human rights protections spring from this notion of the state and from the U.S. and French Constitutions. One commentator has remarked that they are, in fact, "American constitutional rights projected around the world." Louis Henkin, *International Human Rights and Rights in the United States*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 39 (Theodor Meron ed., 1984).

188. Recently the concept of state responsibility itself has shown some signs of expansion to include acts perpetrated by low-level state or non-state actors. Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 HUM. RTS. Q. 36, 41-42 (1993). Thomas and Beasley cite three recent cases in the Inter-American Court on Human Rights in 1988-1989, in which the state did not commit the primary abuse, but was found complicitous for failure to prosecute the abuse. In *Velasquez, Godinez and Fairen*, and *Solis*, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988), Honduras was held responsible for a series of disappearances perpetrated by persons in the Honduran military acting as private individuals. *Id.*

The authors also report a case which suggests an international affirmative obligation of states to criminalize domestic violence. In *X and Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) (1985), the European Court on Human Rights found that although Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was primarily designed to protect individuals from arbitrary interference by state actors, it might also impose an affirmative obligation on contracting states to insure respect for private and family life. *Id.* at 49-50.

189. Charlesworth & Chinkin, *supra* note 13, at 69. See Thomas & Beasley, *supra* note 188, at 39 ("Although international law is gender neutral in theory, in practice it interacts with gender-biased domestic laws and social structures that relegate women and men to separate spheres of existence: private and public."); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983) (arguing that the private sphere is the site of gender oppression). *But see* Greatbatch, *supra* note 80, at 520 ("The bifurcated version of society itself ignores the realm of women's lives outside domesticity, and . . . roots women's oppression in sexuality and private life, thereby disregarding . . . interconnections of the public and private spheres.").

nizes as violations of *jus cogens* the practicing or condoning of genocide, slave trade, murder and disappearances, torture, prolonged arbitrary detention, and systematic racial discrimination.¹⁹⁰ Rape and systematic gender discrimination are notably missing. Moreover, CEDAW, which is a strong anti-discrimination statement, does not expressly prohibit gender-related violence. The U.N. Torture Convention, too, has been criticized for only prohibiting torture which occurs in the "public" realm.¹⁹¹ Undoubtedly, many women suffer torture in a "public" sense. However, a vast amount of similarly intense and coercive violence against women occurs in what traditionally has been considered the "private," nongovernmental sphere. Women who suffer under such conditions in nations indifferent to their plight should not be abandoned by refugee law.

In Canada's first Federal Court of Appeal non-state actor case, *Rajudeen v. M.E.I.*,¹⁹² a Muslim Tamil applicant from Sri Lanka claimed to have been threatened and beaten by Buddhist Sinhalese "thugs" on several occasions. After one last altercation in which his accusers falsely accused him of joining the Tamil Tiger political movement and threatened to "eliminate" him, Rajudeen fled Sri Lanka.¹⁹³ He ultimately arrived in Canada, where he applied for refugee status. The Federal Court of Appeal found that the applicant was mistreated in Sri Lanka because he was a Tamil and Muslim.¹⁹⁴ The court then found more than ample evidence in the record to hold that Rajudeen met the statutory (and treaty) language: "being unwilling to avail himself of the protection of" Sri Lanka.¹⁹⁵ Rajudeen believed the police took no steps to quell violence against Tamils in each instance he described partly because the police were members of the

190. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

191. See Torture Convention, *supra* note 26, art. 1(1). Charlesworth and Chinkin argue that "[a] central feature of the international legal definition of torture is that it takes place in the public realm." Charlesworth & Chinkin, *supra* note 13, at 72. Certainly, a component of "torture" is official acquiescence. However, arguably, if acquiescence may be construed as unwillingness or inability on the part of public officials to stop "private" acts of violence of the kind described in the Convention, those "private" acts may also be deemed "torture."

192. [1984] 55 N.R. 129 (C.A.). One previous case treated the question in passing. In *Ovakimoglu v. M.E.I.*, [1983] 52 N.R. 67, 69 (C.A.), the Federal Court of Appeal referred the claim back to the Immigration Appeal Board, in part because the Board had not considered the lack of protection by Turkish authorities available to the claimant and other Armenian Christians from harassment by Muslim Turks.

193. *Rajudeen*, 55 N.R. at 132-33.

194. *Id.* at 134.

195. *Id.*

Sinhalese majority.¹⁹⁶ The court concluded that the "police were either unable or, worse still, unwilling to effectively protect the applicant against the attacks made upon him."¹⁹⁷ One year later, the same court followed *Rajudeen* in a very similar fact situation, setting aside an Appeal Board decision against a Guyanan opposition party member who complained of police apathy toward his persecution by workers belonging to the party in power.¹⁹⁸

In 1991, the Federal Court of Appeal issued a definitive statement regarding the validity of non-state actor refugee claims.¹⁹⁹ In *Zalzali v. M.E.I.*, the court detailed the treaty and statutory bases for allowing such claims when the claimant is unable to avail herself of the protection of her state. Zalzali, a Lebanese national, was accused by two militia, Amal and Hezbollah, of being a member of their rival group. On the basis of the documentary evidence and Zalzali's testimony, the court concluded that if Zalzali were returned to Lebanon he would be regarded as a traitor by both militias and "probably executed by one or the other."²⁰⁰ It also found that, at the time the claimant fled Lebanon, the Lebanese government did not exercise effective control over any part of the country.²⁰¹ Zalzali was faced with the "brutal" reality that there was, in fact, no government from which to seek protection. The question presented by the case, as articulated by the court, was: "[C]an there be persecution within the meaning of the Convention and the [Canadian] Immigration Act where there is no form of guilt, complicity or participation by the State?"²⁰² After careful analysis of treaty and statutory construction, consideration of Canadian precedents,²⁰³ consultation of the U.N. Handbook,²⁰⁴ and a look at the arguments of publicists, the court decided in the affirmative.

196. *Id.*

197. *Id.* at 135.

198. *Surujpal v. M.E.I.*, [1985] 60 N.R. 73, at 76 (C.A.).

199. *Zalzali v. M.E.I.*, [1991] 126 N.R. 126 (C.A.).

200. *Id.* at 128-29.

201. *Id.* at 128.

202. *Id.* at 132.

203. *Id.* at 132-33 (citing *Canada v. Ward*, [1990] 67 D.L.R. (4th) 1 (C.A.), *rev'd*, [1993] 103 D.L.R. (4th) 1 (S.C.C.); *Rajudeen v. M.E.I.*, [1984] 55 N.R. 129 (C.A.); *Ovakimoglu v. M.E.I.*, [1983] 52 N.R. 67 (C.A.)).

204. *Id.* at 134:

Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecu-

The Court of Appeal first established the possibility of persecution by someone other than the government, where the government is unable to offer protection, on the basis of the “natural meaning of the words” in the Convention and statutory refugee definition. The phrase “is unable” presupposes, argued the court, “an objective inability on the part of the claimant.”²⁰⁵ In contrast to “is unwilling,” the phrase “is unable” is not modified by the phrase “by reason of that fear,” suggesting that the inability in question is based on “objective criteria which can be verified independently of the fear experienced, and so independently of the acts which prompted that fear and their perpetrators.”²⁰⁶ The court decided that “[s]eeing a connection of any kind between ‘is unable’ and complicity by the government would be to misread the provision.”²⁰⁷

The Court of Appeal concluded that a valid “fear of persecution” — whether its objective source is in a state or non-state actor — is characterized by a breach of the social contract. When a state breaches its most basic duty to protect, either by ignoring or being unable to respond to legitimate expectations of protection, the “surrogate” protection of that state’s citizens by other nations is needed.²⁰⁸ The court accepted a “general international trend” toward the concept that “[i]ntention to harm on the part of the state is irrelevant: whether as the result of commission, omission, or incapacity, it remains that people are denied access to basic guarantees of human dignity, and therefore merit protection through refugee law.”²⁰⁹ The independent duty of Canadian law was “to assess the sufficiency of state protection on the basis of the de facto viability of effective recourse to national authorities, rather than looking to specific forms of active culpability.”²¹⁰

Two years after *Zalzali*, in *Canada v. Ward*,²¹¹ the Canadian Supreme Court expanded the appellate court’s conclusions to

tion if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.

HANDBOOK, *supra* note 79, ¶ 65. The court also referred to U.N. Handbook ¶ 98 (citing civil war as an example in which a government might be unable to extend protection, or provide only ineffective protection).

205. *Zalzali*, 126 N.R. at 132.

206. *Id.*

207. *Id.*

208. *Id.* at 136 (quoting HATHAWAY, *supra* note 38, at 127–28).

209. *Id.*

210. *Id.*

211. *Canada v. Ward*, [1993] 103 D.L.R. (4th) 1 (S.C.C.).

clearly embrace the "is unwilling" clause in the refugee definition when applied in a non-state actor case.

C. *Extension of Social Group Jurisprudence to Gender-Related Claims in Canadian Case Law*

The Canadian Immigration Appeal Board delivered the first Canadian acceptance of a gender-related claim in the 1988 case, *Incirciyan v. M.E.I.*,²¹² which granted refugee status to a mother and daughter from Turkey. The short record of the decision does not include an account of the Board's reasoning. However, the Board reported three²¹³ grounds for relief, one being that the "harassment" the women suffered was "nothing less than persecution," and another, that they belonged "to a particular social group composed of single women living in a Muslim country without the protection of a male relative."²¹⁴ Prior²¹⁵ to the issuance of the Guidelines in March 1993, Canadian nonjudicial decisionmakers granted at least three other women refugee status on gender-related social group claims. In 1990, a Refugee Division

212. *Incirciyan v. M.E.I.*, I.A.B.D. M87-1541X/M87-1248 (1987), in 113 IMMIGRATION APPEAL BOARD, NOTES OF RECENT DECISIONS 11 (1988).

213. Religion and nationality probably played into an unrecorded "third" ground. The claimants were Christians of Armenian origin. *Id.*

214. *Id.* See HATHAWAY, *supra* note 38, at 162 (arguing that "single women living in a Moslem country without the protection of a male relative" fits the "social group" category because "gender and the absence of male relatives are not within the control of group members, and choice of marital status is a freedom guaranteed under core norms of international human rights law" as represented in the Universal Declaration of Human Rights, art. 16, and the International Covenant on Civil and Political Rights, art. 23).

215. See Immigration and Refugee Board, News Release: First Anniversary of Guidelines on Women Refugee Claimants, Mar. 9, 1994. "Since the release of the Guidelines, the Board has identified approximately 350 gender-related claims. Of the 150 claims finalized, 70 percent have resulted in the granting of refugee status." *Id.*

See also *Rodionova v. Canada*, [1993] 41 A.C.W.S. (3d) 867 (F.); Kim Lunman, *Russian Woman Wins Bid to Stay in Canada*, CALGARY HERALD, July 13, 1993, at B1. Svetlana Rodionova claimed that an ex-common law husband, who belonged to the Dagistan Mafia in Moscow, Russia, frequently beat and threatened her, and that police refused to bring charges against him when she complained of the abuse. On July 7, 1993, Federal Court Trial Division Judge Barry Strayer granted her a rehearing before the Refugee Division on the ground that the Division had failed to determine whether a member of a group defined as "Russian women subject to wife abuse" could be said to belong to a "peculiar social group." The Judge held that, if she met that test, she would still have to show that "she fears persecution . . . approved, permitted, or not effectively combatted, by the state in her country of origin." *Rodionova*, 41 A.C.W.S. (3d) at 867.

decision recognized "Sri Lankan women facing sexual abuse"²¹⁶ as a valid social group category. In February 1993, another Refugee Division decision held that a Zimbabwean woman had a well-founded fear of persecution based on her membership in alternative social groups: "unprotected Zimbabwean women or girls subject to wife abuse" and "Zimbabwean women or girls forced to marry according to customary laws."²¹⁷ In the same month, Immigration Minister Bernard Valcourt exercised his humanitarian prerogative to allow a Saudi woman to stay in Canada because she feared persecution for having broken discriminatory laws.²¹⁸

Mayers v. Canada raised the issue of gender-related social group claims to the level of the Federal Court of Appeal.²¹⁹ The claimant, a national of Trinidad and Tobago, based her claim solely on membership in a social group variously defined as "women," "Trinidadian women," or "Trinidadian women subject to

216. File T89-01891/2, Jan. 23, 1990, cited in *Mayers v. Canada*, [1992] 97 D.L.R. (4th) 729, at 733 (C.A.).

217. CRDD U92-06668, E. R. Smith, Daya, Feb. 19, 1993, cited in CANADA GUIDELINES, *supra* note 165, at 14 n.8. Cf. *Kaur v. M.E.I.*, [1993] 40 A.C.W.S. (3d) 960 (F.) (dismissing application for judicial review of denial of social group claim by Indian woman who had been granted a rehearing of her claim because her ex-husband's severe abuse prevented her from obtaining counsel and led her to withdraw claim previously). *But see* CRDD T92-03227, Davis, Woloschuk, Nov. 18, 1992 (finding Ecuadorian woman ineligible for refugee status, because "'battered women who do not receive state protection' does not constitute a social group").

218. David Scanlon, *Women's Groups Say Abuse Is Ground for Refugee Status*, MONTREAL GAZETTE, Feb. 3, 1993, at B1. Until this time, the Immigration Minister had refused to intervene on her behalf. *See* Scanlon, *supra* note 57, at A5.

The young Saudi woman, "Nada," feared arrest and torture by religious police if she were returned to Saudi Arabia due to having protested Saudi practices that discriminate against women. She claimed that rocks had been thrown at her and that she had been jeered at by strangers when she walked the streets of her hometown without wearing a veil. Saudi Muslim women are required to wear a veil and a "tent-like garment called an abaaya that covers them from head to toe." They are not allowed to study in the best universities, participate in many occupations, drive an automobile, or travel without a male relative's permission. Jacquie Miller, *Ottawa Won't Stop Deportation of Saudi Who Refuses Veil*, MONTREAL GAZETTE, Sept. 9, 1992, at B8.

219. *Mayers v. Canada*, [1992] 97 D.L.R. (4th) 729 (C.A.). *Mayers* was the first case brought before the Federal Court of Appeal based solely on a gender-related social group claim. Earlier in the year, the court had dismissed without comment an application to set aside another credible basis determination in favor of a woman from Trinidad. The credible basis tribunal in that case, however, had found several grounds for relief: race, East Indian background, and "a woman who is unprotected in Trinidad by a male or family members." *Mahabir v. Canada*, [1992] 85 D.L.R. (4th) 110 (C.A.).

wife abuse.”²²⁰ Mayers had been abused by her husband in Trinidad from the time of her marriage in 1971 until she left her country in 1986.²²¹ He sexually assaulted her and also mistreated their children. Her complaints and entreaties by her mother, sister, and step-daughter to the police were all ignored. Mayers became convinced that appeal to authorities only exacerbated the abuse. No law against spousal rape existed in Trinidad and she knew of no shelters for women on the island. Ultimately, she fled to Canada. Mayers’s claim split the two-member credible basis review panel. The refugee adjudicator found Mayers’s testimony credible, and declared that there was a basis for the Refugee Division to determine she was a Convention refugee. The Refugee Board member held, on the other hand, that Mayers’s “persecution” claim bore no relation to the refugee definition. Since Mayers received a favorable response from one member of the tribunal, she was admitted to Canada. The Immigration Minister subsequently brought the case to the Federal Appeal Court for clarification, maintaining that “Trinidadian women subject to wife abuse” was not a cognizable “particular social group” under the refugee definition.²²²

The appellate judges ruled that the adjudicator in Mayers’s case committed no legal error by implicitly finding that “Trinidadian women subject to wife abuse” might be considered a “particular social group” and that fear of that abuse might be fear of persecution.²²³ Judge Mahoney found — and it appears the other two judges would have concurred — that if the abuse were deemed persecution, the case would then be considered, due to the repeated indifference of the Trinidadian authorities, on the model of *Rajudeen*.²²⁴ Mahoney then undertook, in dicta, to provide an example of the kind of “exercise” needed to construe the statutory meaning of “particular social group” in light of “foreign jurisprudence” and “learned commentary.”²²⁵ He

220. *Mayers*, 97 D.L.R. (4th) at 732.

221. *Id.* at 731.

222. *Id.* at 731–32.

223. *Id.* at 731 (Isaac, J., announcing judgment and concurring). Note that the manner of describing fear and persecution differs somewhat between the Judges Isaac and Mahoney. Mahoney’s rendering at 732 makes more sense, i.e., that fear of abuse equates with fear of persecution, rather than that fear of abuse is persecution. *Id.* at 731 (Isaac) & 732, 740 (Mahoney).

224. *Id.* at 732.

225. *Id.* at 739. Judge Mahoney listed the following authorities: (1) *Canada v. Ward*, [1990] 67 D.L.R. (4th) 1 (C.A.) (distinguished by Mahoney as not proposing any workable test for the recognition of social group claims); (2) HANDBOOK, *supra*

produced, in the end, an interesting laundry list of authorities, and articulated two social group identification tests from which the Canadian Supreme Court later drafted its standard. The first standard was from Canadian professor James Hathaway:

Include[d] within the notion of social group [are] (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 to be required to abandon it. Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights. . . . [A] “particular social group” must be definable by reference to a shared characteristic of its members which “is fundamental to their identity.”²²⁶

The second standard was from the Immigration Minister, who had sought review of the case by the appellate court:

Within the terms of the [Canadian] *Immigration Act*, a particular social group means: (1) a natural or non-natural group of persons with (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and (3) sharing basic, innate, unalterable characteristics, consciousness and solidarity, or (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it.²²⁷

Interestingly, Mahoney also quoted *Sanchez-Trujillo v. I.N.S.* at length, missing, it seems, for want of focus in his own analysis, the case’s real ambiguities. Mahoney himself ultimately provided a contradictory response to the Immigration Minister’s somewhat absurd assertion that “Trinidadian women subject to wife abuse” was the kind of “sweeping demographic division” — comparable to “young Salvadoran males” — ruled out by the U.S. case.²²⁸ Because Judge Mahoney mistakenly relied on *Sanchez-Trujillo* and developed no definite standards, *Mayers* was a somewhat muddled exercise.

note 79, ¶¶ 77–79; (3) HATHAWAY, *supra* note 38; (4) United States Refugee Act of 1980 (laying out a refugee definition “for all practical purposes identical to our definition of ‘Convention refugee’”); (5) *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986); and even (6) counsel for the Immigration Minister. *Id.* at 734–37.

226. *Mayers*, 97 D.L.R. (4th) at 735 (quoting HATHAWAY, *supra* note 38, at 161).

227. *Id.* at 737 (citing “counsel for the applicant”). *Mayers* was the respondent.

228. *Id.* at 734, 737, 739.

The court's approach in *Cheung v. Canada*,²²⁹ in contrast, is strong and decisive. The Federal Court of Appeals was able to decide on the law, because of the posture of the case, and it rendered a forceful opinion based on international norms of human rights. The court's reasoning, however, once again lacked some precision.

The court styled the main question presented by the case as "whether a well-founded fear of forced sterilization under China's one-child policy constitutes a well-founded fear of persecution for reasons of membership in a particular social group."²³⁰ Ting Ting Cheung violated China's one-child policy by having a second child in 1986. Although she attempted to hide the child's existence from the local authorities in Guangzhou province, they found her out, and the Family Planning Bureau took her to a doctor to be sterilized. The doctor was unable to operate because she had an infection, and she was told to return to have it done in six months. She fled Guangzhou for Pun Yu, where she found shelter in her in-laws' home. She stayed there for the next three years before she left China. Over the course of five years, from the time of her first child's birth in 1984 until she left China in 1989, Cheung also underwent four abortions.²³¹

The unanimous court held that Chinese women who had more than one child and faced forced sterilization were a social group within the Convention definition of refugee, because they had "characteristics in common" and were "united or identified by a purpose which [was] so fundamental to their human dignity that they should not be required to alter it."²³² As is readily apparent, the court based its analysis on the test devised by the counsel for the Immigration Minister in *Mayers*,²³³ stressing his fourth point, which is derived from Hathaway, and ultimately from *In re Acosta*.²³⁴

229. *Cheung v. Canada*, [1993] 2 F.C. 314, 102 D.L.R. (4th) 214 (C.A.).

230. *Cheung*, 2 F.C. at 320.

231. *Id.* at 317-18.

232. *Id.* at 322.

233. *Id.* at 321 (citing the Immigration Minister's test in *Mayers*). Point (4) of the Immigration Minister's test, as quoted by the court in *Cheung*, is that the members of a "particular social group" might share "a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it." *Id.*

234. *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985) (The "common characteristic that defines the [social] group . . . must be one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.").

As a matter of semantics, however, it is interesting to note that the court deleted from its holding²³⁵ the phrase “of . . . association,” which is found in both the Minister’s and Hathaway’s versions. The plain language in both versions would indicate that “association” refers to a voluntary act of joining by the person whose membership in a group is in question. “Purpose” would then be the basis, or reason for associating (as, for example, among gays, who come together because of sexual orientation,²³⁶ or among women who unite to support each other in development of feminist values²³⁷ they consider fundamental). In the case at hand, however, the court construed “purpose” to refer to the choice in childbearing that belonged as a right to discrete Chinese women threatened with sterilization.²³⁸ Hathaway’s version might be more amenable to this interpretation because, in contrast to the Minister’s “*their* association,” he uses “*the* association,” and use of the simple article might be seen to imply that “association” refers to the perception by an extrinsic observer of a group of persons united by the same purpose.

Three months later, in *Canada v. Ward*, the Canadian Supreme Court relied in part on *Cheung* to create its own “working rule” for divining social groups. Without noting any ambiguity, the court subjected the language of point four to a last permutation. Now, the phrase was made to read: “groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association.”²³⁹ The high court adopted the above “plain language” interpretation of the Minister’s and Hathaway’s models. However, in doing so, it created a standard that clearly would not

235. *Id.* at 322 (“[W]omen in China who have one child and are faced with forced sterilization . . . are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it . . .”).

236. Of course, it may also be argued that sexual orientation is an “unalterable characteristic,” and the social group can be established on that basis. See Suzanne B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT’L L.J. 605, 612 (1993).

237. Feminist values are considered here as not equating with organized feminist (political) opposition.

238. *Cheung*, 2 F.C. at 322 (“All of the people coming within this group are . . . identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a woman’s reproductive liberty is a basic right ranking high in our scale of values.”) (quoting *Re Eve*, [1986] 31 D.L.R. (4th) 1 (S.C.C.)).

239. *Canada v. Ward*, [1993] 103 D.L.R. (4th) 1, 34 (S.C.C.).

support Ting Ting Cheung's claim, were she to have to bring it again.

In *Cheung*, the Federal Court of Appeal produced an opinion noteworthy for its evaluation of the distinction between lawful punishments and persecution. The lower Review Board had found that Chinese coercive sterilization was not persecution, because it was tied to a "law of general application" that was unrelated to the five grounds in the refugee definition. The court replied, on the one hand, that the practice was not a law of general application, because it was not universally applied throughout China, being limited to certain provinces such as Guangzhou. Citing *Zalzali*, it observed that, even though a practice is carried out locally and may not be the official policy of the overarching state, and even though the larger state may not directly participate in the mistreatment, such an act may yet qualify as persecution under the refugee definition.²⁴⁰

The court argued in the alternative that, even if the practice were considered a "law of general application" based on legitimate government policy concerns, the operation of that law could still constitute persecution if the punishment or treatment under the law were so draconian as to be completely disproportionate to the objective of the law.²⁴¹ The court held, "there is a point at which cruel treatment becomes persecution regardless of whether it is sanctioned by law; the forced sterilization of women is so intrusive as to be beyond that point."²⁴² Domestic law in the area of women's reproductive liberty is a clear subtext of the opinion. There is no other way to explain the result that the same court (with a different panel) a month later denied refugee status to a Chinese man in the same situation.²⁴³ That result

240. *Cheung*, 2 F.C. at 323.

241. *Id.* Certainly the court must have had the U.N. Handbook in mind here. It cited *Padilla v. Canada*, [1991] 13 Imm. L.R. (2d) 1, 25 A.C.W.S. (3d) 704 (C.A.), in which the Federal Court of Appeal ruled that an immigration review board must consider extra-judicial penalties in making a persecution determination. *Id.*

242. *Cheung*, 2 F.C. at 324-25.

243. *Chan v. Canada*, [1993] 42 A.C.W.S. (3d) 259 (C.A.) (holding that forced sterilization of a man as a means of population control was not persecution). Judge Mahoney wrote a "stinging dissent" arguing that "whatever view may be taken of the other sanctions by which the population control policy is enforced, involuntary sterilization — physical abuse that is an irreversible and serious intrusion on the basic rights of the individual — is persecution." Stephen Bindman, *Appeal Court Contradicts Own Ruling*, CALGARY HERALD, July 28, 1993, at A3 (quoting Judge Mahoney's dissent in *Chan v. Canada*).

See also *In re Chang*, Interim Decision 3107 (BIA 1989). In *Chang*, the U.S. Board of Immigration Appeals found that in order to prove that sanctions for viola-

could have been prevented, perhaps, had the *Cheung* court advanced the argument that China's practice of involuntary sterilization was not only harsh, but also violated China's own treaty obligations and the internationally recognized rights to procreative liberty²⁴⁴ and bodily integrity.

D. *Canadian Supreme Court Analysis of Non-State Actor, Social Group Claims in Canada v. Ward*

The Canadian Supreme Court issued *Canada v. Ward*²⁴⁵ on June 30, 1993. It was immediately hailed by Canadian human rights activists as an authoritative, cogent treatment of the important issues for gender-related claims. The high court developed the themes from *Rajudeen*, *Zalzali*, *Mayers*, and *Cheung* in laying down authoritative standards for non-state actor, social group claims. In so doing, it reversed the one Federal Court of Appeal holding that deviated from the trend toward acceptance of such claims.

In *Canada v. Ward*,²⁴⁶ the Federal Court of Appeal had found in 1990 that an ex-member of the Irish National Liberation Army (INLA) was not eligible for asylum, in part because he feared reprisal by his own illegal paramilitary organization rather than by the state and in part because there was no state complicity in his persecution. Shortly after Patrick Francis Ward had

tion of China's one-child policy were persecution, a claimant would have to show that the governmental action arose for some other reason than population control, or that there was evidence of more severe treatment of persons who were publicly opposed to the policy. In essence, the B.I.A. argued that the claimant had to prove invidious purpose on the part of the government, before the governmental policy could be considered persecutory.

In response to the claimant's argument that involuntary sterilization was a violation of fundamental human rights, the Board stated that even if it were, that would not establish that an individual subjected to such an act was a victim of persecution on the basis of one of the five statutory grounds. *Id.* at 15. That ground was provided in *Cheung: gender* within the social group category.

244. CEDAW, *supra* note 7, art. 16, 1(e): "States parties shall . . . ensure, on a basis of equality of men and women . . . the same rights to decide *freely* and responsibly on the number and spacing of their children . . ." (emphasis added). China acceded to CEDAW on November 4, 1980. UNITED NATIONS, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS 139 (1987). The Convention presumes the existence of procreative freedom in order to create an equal protection requirement. China's one-child policy violates its treaty duty. China made no reservation as to article 16. LARS A. REHOF, GUIDE TO THE *Travaux Préparatoires* OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN 255 (1993).

245. [1993] 103 D.L.R. (4th) 1 (S.C.C.).

246. [1990] 67 D.L.R. (4th) 1 (C.A.).

joined the INLA, which he later described as a "ruthless paramilitary organization more violent than the Irish Republican Army," he was ordered to assist in guarding two hostages at a farmhouse in the Irish Republic. A day later, the INLA ordered the hostages executed. Because this troubled his conscience, Ward secretly arranged for them to escape. The INLA later suspected his participation in the escape and tortured him. He was tried before an INLA "kangaroo court" and sentenced to death. Ward managed to get away and seek police protection; however, the police charged him for his part in the former hostage situation. He pleaded guilty to the offense of "forcible confinement" and was sentenced to three years in jail. Just before his release from jail, the police and a chaplain obtained an Irish Republic passport and airplane tickets to Canada for Ward. About six months after he arrived in Canada, Ward submitted a Convention refugee claim, based on his fear of reprisal by the INLA.²⁴⁷ The first level adjudicators found that Ward was not a Convention Refugee.²⁴⁸

Upon his application for redetermination, the Immigration Appeal Board held that Ward was a Convention refugee, based on what it viewed as the central question: whether the state could provide protection. "Fear of persecution and lack of protection," the Board said, were "interrelated elements."²⁴⁹ The "well-founded fear" test had to be considered in light of the state's ability to protect adequately. "The reason," said the Board, "for the state's inability to provide adequate protection from persecution seems irrelevant."²⁵⁰ The Board determined that, although Irish police had offered Ward protection, it would not be effective against the INLA.

At the Federal Court of Appeal level, the Attorney General argued, *inter alia*,²⁵¹ that the Board had failed to consider "whether the INLA was a particular social group," and that the Board erred in finding there was no requirement for state com-

247. The facts are drawn from 103 D.L.R. (4th) at 5-6.

248. 103 D.L.R. (4th) at 6.

249. *Id.*

250. *Id.* at 7.

251. The other major issue was whether Ward was only a citizen of the Republic of Ireland and Northern Ireland, and not also of the United Kingdom. The Board failed to make a finding as to whether Britain could be considered a "country of nationality" for the refugee determination. The Canadian Supreme Court ultimately remitted the case to the Board to decide if Ward could obtain protection from Britain. *Id.* at 45.

plicity in persecution.²⁵² In response to the first point, two of the three appellate judges responded that social group membership was relevant to the refugee definition only when the group's activities were considered a possible danger to the government. The claimant was found to fear the group itself. He had acted contrary to the interests of the group, not against the state. On the second point, two judges held, in agreement with the Attorney General, that state complicity was a prerequisite for a finding of persecution, at least in regard to the "unwilling" aspect of the definition: "The involvement of the state [perpetrating, assisting, or intentionally ignoring] is a sine qua non where unwillingness to avail himself of the protection is the fact." The dissenting judge responded that the literal text of the statute and international authority supported the Board's interpretation. "No doubt," he said, this interpretation would admit claimants to Canada from countries whose problems arose from warring factions, not from the nominal governments. However, Canada's international law obligations required their admission.²⁵³

The Supreme Court overturned the lower court on both of the points critical to non-state actor gender-related claims: the holdings that social group activities had to be viewed as a danger to the state, and that state complicity had to be present in persecution.²⁵⁴ Prior to beginning its interpretative exercise, the Court noted that the parties to the case had unanimously agreed that the lower court had been wrong to suggest that fear of persecution had to "emanate from the state."²⁵⁵ The Court then looked to the statutory definition of "refugee" and parsed the phrase "is outside the country of his nationality and is unable or, by reason of such fear, is unwilling to avail himself of the protection of that country."²⁵⁶ It criticized the lower court for putting too much

252. *Id.* at 8.

253. *Id.* at 10.

254. *Id.* at 41-42. Justice La Forest, writing for the majority, noted that one intervener, the Canadian Council for Refugees, raised the argument that the lower court's requirements — that social group activities be viewed as a danger to the state, and that state complicity be present in persecution — would have a discriminatory impact on women refugee claimants, presumably because they would be less likely to meet those criteria. The justice stated that he did not find that argument convincing, but that he did not need to address it, because the lower court was being overruled on those points anyway for other reasons. *Id.*

255. *Id.* at 14.

256. *Id.* (quoting Immigration Act, R.S.C., ch. I-2, § 2(1) (1976-77) (Can.), definition of "Convention refugee").

emphasis on the difference between "unable" and "unwilling."²⁵⁷ The Supreme Court held that, in either case, the focus of consideration should be on whether the fear is "well-founded," and it found that the state's inability to protect is an integral part of that question. If the state is able to protect the claimant, the claimant's fear is not "well-founded." Beyond that, held the court, "nothing in the text . . . requires the state to be complicit in, or be the source of, the persecution in question."²⁵⁸

The court grounded this holding on a wide variety of international and domestic authorities, including several U.S. Ninth Circuit decisions.²⁵⁹ The court noted that the draft version of the 1951 Refugee Convention definition did distinguish the terms, connecting "unwilling" with claimants who were entitled but refused to seek protection from their state, and "unable" with stateless claimants, or claimants who were denied passports or other protection by their government.²⁶⁰ This was taken by later commentators to create a distinction between refugees with a nationality and stateless refugees.²⁶¹ The court pointed out, however, that when the drafters revised the definition to its present form, "'unable' was connected to both nationals and stateless persons." The court agreed with the Appeal Board that since "unable" could now apply to those with a nationality, the distinc-

257. *Id.*

258. *Id.*

259. *Id.* at 15-17. The court cited the following sources: Estrada-Posadas v. I.N.S., 924 F.2d 916, 919 (9th Cir. 1991); Arteaga v. I.N.S., 836 F.2d 1227, 1231 (9th Cir. 1988); Artiga-Turcios v. I.N.S., 829 F.2d 720, 723 (9th Cir. 1987); McMullen v. I.N.S., 658 F.2d 1312, 1315 (9th Cir. 1981) (finding that "persecution" includes "persecution by the government or by a group the government is unable to control"); Zalzali v. Canada, [1991] 126 N.R. 126 (C.A.); Surujpal v. M.E.I., [1985] 60 N.R. 73 (C.A.); Rajudeen v. M.E.I., [1984] 55 N.R. 129 (C.A.); HANDBOOK, *supra* note 79, ¶ 65 ("Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."); GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 42 (1983); ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 191 (1966); HATHAWAY, *supra* note 38, at 127; Douglas Gross, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1139 (1980); Patricia Hyndman, *The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants*, 9 HUM. RTS. Q. 49, 67 (1987); Job van der Veen, *supra* note 163, at 172.

260. Ward, 103 D.L.R. (4th) at 18 (citing *The Report of the First Ad Hoc Committee on Statelessness and Related Problems* at 415, U.N. Doc. E/1618 and Corr. 1 (1950)).

261. *Id.* (citing GOODWIN-GILL, *supra* note 259, at 25).

tion between “unable” and “unwilling” was blurred,²⁶² and it held the real import of the terms to:

reside in the party's [sic] precluding resort to state protection: in the case of ‘inability,’ protection is denied to the claimant, whereas when the claimant is ‘unwilling,’ he or she opts not to approach the state by reason of his or her fear on an enumerated basis. In either case, the state's involvement in the persecution is not a necessary consideration. This factor is relevant, rather, in the determination of whether a fear of persecution exists.²⁶³

To establish fear of persecution, the court held that the claimant would have to pass the “bipartite” test advanced in *Rajudeen*: (1) the claimant must subjectively fear persecution, and (2) this fear must be well-founded in an objective sense.²⁶⁴ The claimant passes the first requirement if his or her testimony is credible. Ward was found to be credible. The question remained whether his fear was “objectively justifiable.” The court found that the burden of proof rests on the claimant to show that the state is unable to offer adequate protection from non-state persecutors. The burden is also on the claimant to show that, in relevant instances, it was reasonable for the claimant not to seek state protection. The claimant is not required to show in all cases that protection was actually sought from the state. However, “in situations in which the state protection ‘might reasonably have been forthcoming,’” failure to approach the state would defeat a claim.²⁶⁵

The court held that in a non-state actor case where there is no direct admission²⁶⁶ on the part of the state that it is unable to protect the claimant, the claimant must show inability to protect by “clear and convincing” evidence.²⁶⁷ States are presumed to be able to protect their citizens, because such is the “essence of sovereignty.”²⁶⁸ The claimant must show *failure* of protection by the state, not merely that she might receive better protection from one state than another. The court argued that this heavy burden of proof as to the state's inability to protect would prevent non-

262. The court found support for this analysis in the U.N. HANDBOOK, ¶¶ 98–100. *Id.* at 18–19.

263. *Id.* at 20.

264. *Id.* at 22 (citing *Rajudeen v. M.E.I.*, [1984] 55 N.R. 129, at 134 (C.A.)).

265. *Id.* at 23 (citing HATHAWAY, *supra* note 38).

266. The Republic of Ireland had admitted that it would be unable to protect Ward. *Id.* at 23.

267. *Id.* at 24.

268. *Id.* at 23.

state actor claims from being too broadly applied. The presumption shift that occurs in favor of the claimant if she proves both a credible subjective fear and objective evidence that the state is unable to protect her is seen by the court as not too easily achieved.²⁶⁹

Having described the claimant's burden to establish the state's inability to protect as part of the "well-founded fear" prong, the court moved to the problem of defining a "particular social group." Just as "well-founded fear" cannot be found where the state is able to protect, "persecution" cannot be found where the feared mistreatment is not related to one of the enumerated grounds. The court rejected the argument made by some scholars that the intent of the framers of the Refugee Convention was to make "particular social group" a "catch-all" of associations not included in the other four enumerated categories.²⁷⁰ The court reasonably responded that the international community, in establishing a requirement of "persecution," did not intend to offer refuge to all suffering individuals.²⁷¹ The enumeration of bases for persecution would have been "superfluous" had those who set the standard believed that "any association bound by some common thread" was within the "social group" category.²⁷²

The enumerated bases qualify what persecution — otherwise undefined — is. Leaving "social group" open-ended would, in effect, undermine the entire definition. The court found that the doctrine of *ejusdem generis*, as developed in the U.S. B.I.A.'s decision *In re Acosta*,²⁷³ applied: "general words used in an enumeration with specific words should be construed in a manner consistent with the specific words." According to the Board

269. *Id.* at 24.

270. *Id.* at 26-27. The court cited GOODWIN-GILL, *supra* note 259, at 30; GRAHL-MADSEN, *supra* note 259, at 219; Daniel Compton, *Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar—Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986), 62 WASH. L. REV. 913, 923, 925-26 (1987); Maureen Graves, *From Definition to Exploration: Social Groups and Political Asylum Eligibility*, 26 SAN DIEGO L. REV. 739, 747-49 (1989); 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, 45 (1983). See Bower, *supra* note 2, at 193-94.

271. *Ward*, 103 D.L.R. (4th) at 28. The court pointed out that the refugee definition unquestionably provides no relief for economic immigrants and natural disaster victims, even though such persons might not be able to avail themselves of the protection of their states. *Id.*

272. *Id.*

273. *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

in *Acosta*, each of the other enumerated grounds described persecution aimed at an “immutable characteristic.” Thus, the Board held that “particular social group” should also be delimited as “a group of persons all of whom share a common, immutable characteristic . . . one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”²⁷⁴ Adopting this method of analysis, the Canadian court concluded that what would be excluded by such a concept of “social group” would be “‘groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights.’”²⁷⁵

The court seized upon international and domestic sources of anti-discrimination doctrine to elaborate on the concern represented in *Acosta* for the protection of “immutable characteristics.” It found immediate support in the Preamble of the U.N. Refugee Convention, which affirms “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination” — based on the U.N. Charter and the Universal Declaration of Human Rights.²⁷⁶ Noting that early refugee law concerned itself with groups that were marginalized and lacked “a meaningful stake in the governance of their own society,”²⁷⁷ the court held that “the manner in which groups are distinguished for the purposes of discrimination law” could be “imported” into refugee law for the sake of determining the scope of the term “particular social group.”²⁷⁸ The court then recognized the development of this approach, inaugurated by *Acosta*, in the Canadian Federal Court of Appeal cases *Mayers* and *Cheung*.²⁷⁹ From those three sources it extrapolated a “working rule” for classifying social groups as:

- (1) groups defined by an innate or unchangeable characteristic;

274. *Id.*

275. *Ward*, 103 D.L.R. (4th) at 32 (quoting HATHAWAY, *supra* note 38, at 161).

276. *Id.* at 29 (quoting the Preamble to the U.N. Refugee Convention). The emphasis on discrimination in the language of the treaty was seen by the court to suggest that refugee law ought to primarily concern itself with the “sustained or systemic denial of core human rights.” *Id.* (quoting HATHAWAY, *supra* note 38, at 108).

277. For example, anti-communist Russians, Turkish Armenians, Jews from Germany. *Id.* at 30 (quoting HATHAWAY, *supra* note 38, at 135–36).

278. *Id.*

279. *Id.* at 33–34.

- (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.²⁸⁰

The court determined that the first group would include individuals fearing persecution based on, for example, gender, linguistic background, and sexual orientation; the second group, human rights activists; the third group, persons who could not free themselves from association with groups in the past.²⁸¹

The great lacuna in the court's description is the category of persons, not otherwise defined by a significant common characteristic, who lay hold of a widely recognized human right without voluntarily associating with others so moved. Ting Ting Cheung, for example, clung to her right to procreative choice throughout her experience of its long-term suppression and despite the threat of its extinction. Yet, she did not voluntarily associate with like-minded women. The state, by persecuting her and others, defined her social group. Because the state, or elements of the state, also carried out involuntary sterilization of men — and, thus, the practice was equally applied to both sexes — the discrimination ground seems to fall away in Cheung's claim. It remains that involuntary sterilization, as a form of punishment, arguably violates basic international norms of human rights. The amount of support which can be mustered from international covenants, customary law, and domestic practices world over is the key to determining whether the practice, indiscriminately applied here, is persecutory. Torture is persecution.²⁸² The argument should proceed along the lines that involuntary sterilization as punishment is torture. Such a case illustrates the importance of maintaining a dual perspective in elucidating a persecution claim: a focus on the internationally-recognized weight of the human right alleged to have been abused, as well as on the discriminatory motive behind the persecutor's practice.

280. *Id.*

281. *Id.* at 34.

282. See HATHAWAY, *supra* note 38, at 108-09. Freedom from torture is one of the rights in the International Covenant on Civil and Political Rights "from which no derogation whatsoever is permitted, even in times of compelling national emergency." *Id.* at 109 (citing ICCPR, art. 4(1)-(2)). "The failure to ensure [this right] is thus appropriately considered to be tantamount to persecution." *Id.*

E. *Canadian Guidelines for Women Refugee Claimants*

The Canadian Supreme Court's analysis and conclusions in *Ward* affirm the approach taken by the Canadian Guidelines for Women Refugee Claimants toward non-state actor, social group, and gender-based claims. Consistent with *Ward*, the new Guidelines,²⁸³ issued on March 9, 1993 by the Canadian Immigration and Refugee Board, assert that the "real issues" in determining whether women's experiences of rape and other gender-specific crimes constitute persecution are "whether the violence — experienced or feared — is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection."²⁸⁴ It is suggested, for example, that the definition of "torture" in the U.N. Torture Convention be examined in cases of sexual or domestic violence to decide if the mistreatment suffered amounts to persecution.²⁸⁵ The Guidelines also note that severe discrimination prohibited by CEDAW has been recognized by the UNHCR Executive Committee as a basis for granting refugee status.²⁸⁶

The Guidelines begin with the "general proposition" that, although gender is not one of the enumerated grounds in the refugee definition, the definition "may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds."²⁸⁷ The Board notes

283. CANADA GUIDELINES, *supra* note 165.

284. *Id.* at 7 (endnote omitted).

285. *Id.* at 15 n.11. The Board also cited the following documents as providing "a framework of international standards for recognizing the protection needs of women": the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Political Rights of Women, and the Convention on the Nationality of Married Women. *Id.* at 7.

286. *Id.* at 16 n.13.

287. *Id.* at 2. The Guidelines describe female refugee claimants as falling into four categories that "are not mutually exclusive or exhaustive": (1) Women who "fear persecution on the same Convention grounds, and in similar circumstances, as men"; (2) "Women who fear persecution for reasons solely pertaining to kinship"; they are assaulted or harassed in order that they might divulge information about the activities of family members, or political opinions are imputed to them because of the activities of family members; (3) "Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned per-

that most "gender-specific" claims involving fear of persecution for transgressing religious or social norms can be considered under the categories of religion or political opinion.²⁸⁸ Some situations in which women are exposed to violence in an environment affording them no protection will inevitably resist categorization under any ground other than social group. Domestic violence is an example of such a situation.

The Guidelines recognize persecution where a subgroup of women can be identified that "suffers or fears to suffer severe discrimination or harsh and inhuman treatment that is distinguished from the situation of the general population, or from other women."²⁸⁹ The violence involved amounts to persecution because of the claimants' "particular vulnerability as women in their societies, and because they are so unprotected."²⁹⁰ The Guidelines hold the fact that violence against women is "universal" to be "irrelevant" in deciding whether "gender-specific" crimes are persecution. "The real issues are whether the violence — experienced or feared — is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection."²⁹¹

The Guidelines address concerns about the overbreadth of social group claims based on gender by favorably analogizing such claims to those based on the other grounds, and by emphasizing that refugee status is always an individual remedy, despite the size of any social group. First, then, it is pointed out that the

sons"; (4) "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." *Id.* at 2-3.

288. *Id.* at 5.

289. *Id.* at 6.

290. *Id.* The Guidelines explicitly note gender-bias in the prevailing notions of what constitutes persecution. "Aside from a few cases of rape, the definition has not been widely applied to female-specific experiences, such as infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion, or compulsory sterilization." *Id.* at 7 (endnote omitted). *But see Nigerian, Daughters Can Stay in U.S.*, CHI. TRIB., Mar. 24, 1994, § 1, at 17. This year, a U.S. immigration judge granted suspension of deportation to a Nigerian woman after finding that her 5- and 6-year old U.S. citizen daughters would be at risk of genital mutilation if they were deported with her to Nigeria. *Id.* The judge rejected the government attorney's "argument that customs were changing in Nigeria," and relied instead on a United Nations report indicating that "nearly all the women in some parts of Nigeria were subjected to genital manipulation." *Id.* The I.N.S. did not appeal the decision. *Id.*

291. CANADA GUIDELINES, *supra* note 165, at 7 (endnote omitted).

characteristics of race, religion, nationality, and political opinion are, like gender, "shared by large numbers of people."²⁹² It would follow that the numerical size of "particular social groups" should only be limited by the size of the population at risk of persecution. Worries about managing the load of refugee claims do not reasonably apply.²⁹³ Secondly, refugee status is always determined individually, on the basis of any one of the five categories, and the burden on the claimant is not light. She will have to show that (1) she has a genuine fear of harm, (2) gender is the reason for the fear of harm, (3) the harm is sufficiently serious to amount to persecution, (4) there is a reasonable possibility the persecution may occur if she returns to her country of origin, and, perhaps most importantly, (5) she has no reasonable expectation of adequate protection by the authorities in her country.²⁹⁴

CONCLUSION: THE UNITED STATES MUST CREATE GUIDELINES
FOR GENDER-RELATED ASYLUM CLAIMS
FOLLOWING THE CANADIAN EXAMPLE

The U.S. Third Circuit's adoption of the *Acosta* definition of "particular social group" in its evaluation of a gender-related claim in *Fatin v. I.N.S.* represents a very encouraging development for presentation of gender-related claims in the United States, especially in light of the impact that *Canada v. Ward*, as a Canadian Supreme Court decision, may also have on U.S. jurisprudence. Hopefully, the production by other circuit courts of more "particular social group" decisions following the examples of these courts will ameliorate the confusing impact of Ninth Circuit jurisprudence on the issue of social group definition. Though helpful, the Third Circuit's decision in *Fatin* is of limited value in a couple of significant ways. Of principal importance is the fact that the court's comments about the definition of "particular social group" are dicta, since the court decided against the petitioner on the basis of insufficiency of the record to support her claim. Additionally, the facts in the case may also be construed to restrict its relevance to cases involving only state-sponsored persecutory activity. *Fatin* offers an almost purely

292. *Id.* at 6.

293. Sontag, *supra* note 28, at C8 (quoting Gregg A. Beyer, asylum director for the I.N.S.: "There's always a fear that . . . a new category like women or gay people[] will open up the floodgates." [But that is not so.] "It's case by case, individual by individual.").

294. CANADA GUIDELINES, *supra* note 165, at 6.

“political opinion” analysis of potential persecution based upon animus directed against a woman’s expression of gender-political views. Although the Third Circuit unequivocally recognizes sex as an appropriate social group category, its opinion goes little further toward healing the deep bias in U.S. jurisprudence that results in treating women’s relational and sexual problems as merely “personal” for asylum purposes.

The drawbacks to *Fatin* do not minimize the fact that the case represents an advance in circuit court “particular social group” analysis and a generally positive statement regarding gender-related social group claims. The next step should be for one of the U.S. government entities charged with administration of asylum law — the I.N.S. or the B.I.A. — to establish, through regulation or decision respectively, guidelines that apply *Acosta* to gender-related claims, following the analysis approached in *Fatin* and accomplished in depth in *Ward* and the Canadian Guidelines. As the Third Circuit points out, the agency’s analysis of the law will be given deference by the courts. Furthermore, if drafted well, it could provide a stable fulcrum to facilitate consistency in treatment by various jurisdictions of women’s gender-related claims.

The model represented by the Canadian case law and Guidelines should be liberally applied to the development of U.S. guidelines because Canada’s courts and agencies have accomplished the gestalt shift needed to adequately embrace women’s asylum claims that have been rejected in the past by U.S. decisionmakers as belonging to the “private sphere.” The heart of that shift is in the new Canadian emphasis on the “social contract” as the basis for refugee law. The unambiguous recognition by Canada of externally cohesive social groups also helps to lay the requisite groundwork for such claims. Beyond that, Canadian techniques developed in *Ward* and presented in the Canadian Guidelines for limiting the contours and size of social groups may also be adopted to allay fears about the size of gender-related social groups and to provide consistency in adjudication.

Consistent with the intention of the framers of the Refugee Convention,²⁹⁵ Canada has recently shifted its focus to the question of the “breakdown of national protection” implicit in the

295. HATHAWAY, *supra* note 38, at 103–04. The intention of the drafters of the Convention was “to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection

“unable or unwilling” clauses of the Convention definition.²⁹⁶ Traditional Canadian jurisprudence, like that of the U.S., had previously focused on the Convention’s element of “persecution,” defined as the “existence of persistent harassment by or with the knowledge of the authorities of the state of origin.”²⁹⁷ The essence of the new perspective is that a “well-founded fear of persecution” begins not necessarily with the complicity of the state, but with the objective failure (willful or not) of the state to provide protection. The “knowledge of the authorities” no longer can be construed as limited to complicity, nor may it be held a necessary component of some instances of persecution.

The Canadian gender-related social group cases highlight another important facet of the new focus on the state’s duty to protect the basic human rights of its citizens. The composition of a protected “particular social group” is a product of “objective” analysis. Advocates, government attorneys, government decisionmakers, and courts play an active role in *creating* social groups from the raw material: the motives and status of the victims, and the motives and status of the persecutors. “Women who have previously been abused by the guerrillas,” “upper class Iranian women who were raised in the Western tradition,” “single women living in a Muslim country without the protection of a male relative,” “Trinidadian women subject to wife abuse,” and “women fearing forced sterilization under China’s one-child policy” are all such constructs. *Mayers* and *Fatin* demonstrate that group classifications may be argued in the alternative by the claimant,²⁹⁸ or by the government.²⁹⁹

The cohesiveness of the group, as constructed by decisionmakers, may reside in the perceptions of the group members

owed by a state to its own population.” *Id.* at 103, 104 & n.34 (citing early drafts of the refugee definition by Great Britain and France).

296. The failure of state protection emphasis is more suited to the acceptance of refugees from allied states, such as, for example, in the case of *Ward*, or in the acceptance of Salvadoran refugees by the United States. It is consistent with the preamble to the Refugee Convention: “Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States . . .” Preamble to Refugee Convention, *supra* note 32, *quoted in* HATHAWAY, *supra* note 38, at 101 n.16.

297. HATHAWAY, *supra* note 38, at 101 (footnote omitted).

298. Women, Trinidadian women, or Trinidadian women subject to wife abuse.

299. All Iranian women, upper class Iranian women who were raised in the Western tradition, and Iranian women who refuse to conform to the government’s gender-specific laws and repressive social norms.

themselves, or in the viewpoint of the whole society or a part of the society (government, for example) to which the group relates.³⁰⁰ In fact, it may lie in the decisionmaker's own perspective, as in the case of *Cheung*. The group may thus be determined as internally or externally cohesive.³⁰¹ The U.N. High Commissioner has remarked that external cohesiveness is the more important concern in asylum claims.³⁰² The *Acosta* standard for "particular social group," which has been adopted by the First Circuit,³⁰³ is flexible enough to embrace externally cohesive groups, whereas, as we have seen, the *Sanchez-Trujillo* standard, with its emphasis on voluntary association,³⁰⁴ is not. No Canadian case better illustrates the importance of attending to external cohesiveness than *Cheung*. There is no question that Ting Ting Cheung was persecuted for her exercise of volition to maintain her right to procreative liberty. She was not, however, persecuted for an immutable characteristic (such as gender), nor for a volitional association. Her mere desire to maintain her bodily integrity is not a political opinion that could be seen as threatening by the government. Yet that desire is for the respect of a fundamental human right. Cheung wins refugee status only through membership in a social group constructed on the basis of external cohesion.

Finally, the Canadian precedents have painstakingly devised methods to narrow the breadth of classes shielded by refugee law against the failure of state protection. The narrowing strategies suggested by the Canadian cases and Guidelines should quell fears that U.S. adoption of a similar "particular social group" procedure for women applicants would lead to instability or a flood of unmeritorious claims. Asylum is always limited by the

300. Memorandum from United Nations High Commissioner for Refugees to Mr. I. Jackson, Division of Refugee Law and Doctrine (Dec. 29, 1986), *quoted in* Bower, *supra* note 2, at 199.

301. Bower, *supra* note 2, at 199-200. The terms "voluntary" and "involuntary" approach the same interpretative phenomenon, if "voluntary" is taken to mean "voluntary association." See Neal, *supra* note 141, at 248.

302. Memorandum from United Nations High Commissioner for Refugees to Mr. I. Jackson, Division of Refugee Law and Doctrine (Dec. 29, 1986), *quoted in* Bower, *supra* note 2, at 199: "The integrity of the group must exist in the perceptions of the group members [internally cohesive] and/or from the viewpoint of the particular society, or segments therein [externally cohesive] External perception of the group is likely to be particularly important in asylum claims."

303. *Ananeh-Firemong v. I.N.S.*, 766 F.2d 621, 626 (1st Cir. 1985).

304. The choice by a claimant to exercise a fundamental human right — apart from any self-perception of association with a group — which leads to persecution by authorities is not protected by *Sanchez-Trujillo*.

discretion accorded the decisionmaker who stands in for the Attorney General.³⁰⁵ Also, as the Canadian Supreme Court stressed in *Ward*, all asylum petitioners must overcome the basic presumption that their state is able and willing to protect its citizens.³⁰⁶ This lays the basis for an additional procedural check, or “burden,” on the petitioner at the objective level³⁰⁷ of the asylum claim.

For Canada and the United States, the primary burden on the petitioner at the objective level is to demonstrate a “reasonable possibility”³⁰⁸ that she would suffer persecution if she were returned to her country of origin. The petitioner, thus, is not required to show that it is “probable” she would be persecuted. The Canadian Supreme Court in *Ward*, however, has placed a higher burden of proof on the petitioner who claims a well-founded fear of non-state actor persecution as regards the element of the claim pertaining to the state’s ability to provide protection.³⁰⁹ The claimant is required to show by “clear and convincing proof” the state’s inability to protect and/or the reasonable nature of her refusal to seek out the state’s protection. In Canada, like the United States, “clear and convincing proof” requires more than a “preponderance of the evidence” but less than the criminal burden of “beyond a reasonable doubt.”³¹⁰ Following *Ward*, for non-state actor gender-related claims, Cana-

305. 8 U.S.C.A. § 1158(a) (West 1993).

306. *Canada v. Ward*, [1993] 103 D.L.R. (4th) 1, 23 (S.C.C.).

307. *Id.* at 22; see *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (Blackmun, J., concurring) (“The very language of the term ‘well-founded fear’ demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear.”); HANDBOOK, *supra* note 79, ¶¶ 37, 38.

308. 8 C.F.R. § 208.13(b)(2) (1993); *Cardoza-Fonseca*, 480 U.S. at 449 (holding that to show a “well-founded fear of persecution” an alien need not prove it is probable that he or she will be persecuted on return to the home country).

309. It is perhaps plausible that the Canadian Supreme Court meant to lay a heavier burden of proof on the petitioner in *all* refugee claims with respect to the state protection element of the claim. Consideration is given here to the context of the court’s statements within a non-state actor claim. Undoubtedly, later cases will clarify this point. It seems, though, that if a state presents itself as hostile to a claimant, the presumption in favor of the state behind the higher burden of proof should fall away.

310. See *In re Estate of Lobe*, 348 N.W.2d 413, 414 (Minn. Ct. App. 1984); *Farm Credit Corp. v. Lacombe Nurseries*, [1992] 89 D.L.R. (4th) 732 (Alta.C.A.) (stating that “no fair or reasonable doubt” is a more stringent test than “convincing proof”); *Bryndon Ventures Inc. v. Bragg*, [1991] 82 D.L.R. (4th) 383 (B.C.C.A.) (stating that “convincing proof” is a “stringent” standard, but not so high as the criminal onus of “proof beyond a reasonable doubt.”).

dian decisionmakers are directed to look at evidence that "governing institutions and/or their agents in the claimant's country of origin may have condoned the instances of sexual violence if they had been aware of them or did nothing to prevent them."³¹¹ The claimant is required to show she actually sought the protection of her state "only in situations in which state protection might reasonably have been forthcoming."³¹² A woman's claim, however, should not be defeated merely because she has "difficulties in substantiating [it] with any 'statistical data' on the incidence of sexual violence in her country of origin."³¹³ Her proof

311. CANADA GUIDELINES, *supra* note 165, at 8.

312. *Ward*, 103 D.L.R. (4th) at 23. *Ward* satisfied this requirement partially by appealing to the Republic of Ireland for aid. The Republic admitted that it could not protect him. An issue before the Supreme Court was whether he should have also appealed to Great Britain, since he might be deemed to have multiple citizenship. That issue was sent back to the Immigration and Refugee Board to decide on remand. *Id.* at 45.

The Canadian Supreme Court used the case of a U.S. Native American chief applying for asylum in Canada as an example of the objective unreasonableness of a claim in relation to the presumption of a state's ability to protect. The chief's fear of risk to his life if he were incarcerated in a U.S. prison was held by the Federal Court of Appeal not to meet the objective component of the "well-founded fear" standard. The Supreme Court commented, "[I]t must be presumed that the United States judicial system is effective in affording a citizen just treatment." *Id.* at 23.

Recently, however, a U.S. woman was allowed by Canadian immigration officials to argue her case for refugee status. After escaping from a Wisconsin prison, she fled to Canada, where she made a refugee claim based on the argument that she had been framed for murder by former colleagues in the Milwaukee Police Department who opposed her advocacy of women's rights and investigation of discriminatory practices in the force. The presumption of the state's ability to protect probably was a factor in her ultimate extradition to the United States, where, due to the accumulation of evidence in her favor, she was allowed to plead "nolo contendere" to a lesser offense, and was released for time served. See Jack Lakey, *Bambi Toasts Freedom with Bubble Bath, Candy*, TORONTO STAR, Dec. 11, 1992, at A21; Rogers Worthington, *U.S. Prison Escapee Waits in Toronto Jail to Prove Innocence*, CHI. TRIB., May 19, 1991, at 8C.

313. CANADA GUIDELINES, *supra* note 165, at 8. See also UNHCR Executive Committee, *Note on Refugee Women and International Protection*, EC/SCP/59 (Aug. 28, 1990) at 5. Adequate statistical information to prove systemic abuses in a state is rarely available. Note:

Analysis of domestic violence as a human rights abuse depends not only on proving a pattern of violence, but also on demonstrating a systematic failure by the state to afford women equal protection of the law against that violence. Without detailed statistical information concerning both the incidence of wife-murder, battery, and rape, and the criminal justice system's response to those crimes, it can be difficult to make a solid case against a government for its failure to guarantee equal protection of the law. And inadequate documentation of human rights abuses against women is common to countries throughout the world . . . [I]n Brazil, although anecdotal evidence of an overwhelm-

may be anecdotal. She can submit testimony of "similarly situated individuals let down by the state protection arrangement" or her "own testimony of past personal incidents in which state protection did not materialize."³¹⁴ The Guidelines assert that the "central factor" in the assessment of a gender-related claim is "the claimant's particular circumstances in relation to both the general human rights record of her country of origin and the experiences of other similarly situated women."³¹⁵

Echoing the "pattern and practice" provision in the U.S. regulations,³¹⁶ the Guidelines stress that a gender-related claim cannot be rejected merely because the claimant comes from a country where there is generalized oppression and her "fear of persecution is not identifiable to her on the basis of an individualized set of facts."³¹⁷ Even so, a claimant must demonstrate membership in a discrete social group. As the Canadian Federal Court of Appeal stressed in *Mayers*³¹⁸ and the U.S. Ninth Circuit held in *Sanchez-Trujillo*,³¹⁹ the term "particular social group" cannot be construed to include "every broadly defined segment of a population." The Canadian court commented that women, "constituting as they do about half of humanity," might not be considered a "particular social group." Neither, perhaps, said the court, could "Trinidadian women" be so counted. The court concluded that the language of the statute itself precluded each of these,³²⁰ yet it did find that "Trinidadian women subject to wife abuse" crossed the prima facie threshold.³²¹

The new U.S. guidelines must uphold the basic principle that, where state-wide systemic, violent, or discriminatory practices are found that deny the fundamental human rights of women, an asylum claim cannot be defeated merely on the argument that the relation between the parties was "personal," even when the persons are spouses. Conversely, where there is

ing incidence of domestic violence exists, hard facts or large scale surveys . . . have often been hard to obtain, or altogether unavailable.

Thomas & Beasley, *supra* note 188, at 57.

314. *Ward*, 103 D.L.R. (4th) at 23.

315. CANADA GUIDELINES, *supra* note 165, at 8.

316. 8 C.F.R. § 208.13(b)(2)(i)(A) (1993).

317. CANADA GUIDELINES, *supra* note 165, at 8 (noting that the "particularized evidence rule" was rejected by the Federal Court of Appeal in *Salibian v. M.E.I.*, [1990] 3 F.C. 250 (C.A.), and other decisions).

318. *Mayers v. Canada*, [1992] 97 D.L.R. (4th) 729, 736 (C.A.).

319. *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1577 (9th Cir. 1986).

320. *Mayers*, 97 D.L.R. (4th) at 739.

321. *Id.*

less systemic violence and discrimination, but the persecutor occupies such a status vis-à-vis the victim that the government cannot control his abuse, this relation, too, may not be dismissed as "personal." In both situations, the government might be both unwilling and unable to protect the claimant and, in both situations, it is conceivable that a claimant could reasonably be unwilling to avail herself of the "protection" of her government.

Arguments that Olimpia Lazo-Majano and Sofia Campos-Guardado suffered "personal" attacks ignore gender-based oppression in El Salvador. Both were victims of systemic, violent abuse of women in a country that offers little protection to women in their predicament. Similarly, arguments applied to the claims of Mme. Pierre and Elzbieta Klawitter that their situations were merely "personal" miss the significance of the governmental-civil status differential between the parties. In each case, the perpetrator's high governmental rank might be found to make him immune to state intervention on behalf of the claimant. Certainly, the high social status of these women should not preempt their claims in these circumstances when it might be argued that they were powerless in their societal milieux relative to the men involved. Decisionmakers should keep in mind that class, governmental-civil, and gender hierarchies are distinct phenomena.

EPILOGUE: RATIONAL PROCEDURES FOR ESCAPE FROM WONDERLAND

If the United States were now to adopt Guidelines similar to those of Canada, and Olimpia Lazo-Majano were to apply under the new Guidelines, she would clearly have a valid asylum claim as a member of the social group "Salvadoran women abused by members of the Salvadoran military." The Ninth Circuit's first finding in her case — that the sergeant abused her because he believed "a man has a right to dominate" and wanted to impress that belief on her — would support her claim, because it clearly demarcates gender as an issue. The sergeant's attitudes and actions corroborate ample testamentary and documentary evidence showing that rape of women has been an institutionalized practice within the Salvadoran and Guatemalan armed forces.³²² The Inter-Church Committee on Human Rights in Latin America re-

322. See, e.g., 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 STUDIES INT'L FORUM 37 (1991); Tom Gibb, *Rise in Rape and Torture by Salvador Army Reported*, S.F. CHRON., Sept. 30, 1989, at A11; Carol Mo-

ported in 1989 that “the [Guatemalan] army’s pattern of raping young women ha[d] made it difficult in some communities to find women between the ages of 11 and 15 who ha[d] not been sexually abused by the army.”³²³ Women reportedly are regarded by armies in these countries as military property, available for plunder when protective males are not around.³²⁴ Within this context, the sergeant’s observation to Lazo-Majano that her husband was not there could only have been understood by her as notice that title held in her by the absentee husband had been usurped by eminent domain. Further documentation would show that rape prosecutions³²⁵ are rare in El Salvador and that, in fact, the society is imbued with systematic discrimination against women.

What Judge Poole styled in dissent as a bizarre³²⁶ interpretative strategy by the Ninth Circuit majority — endowing Olimpia Lazo-Majano with the “subversive” opinion that no governmental institution would protect her — is, within the context of a gender-related social group analysis, the right reasoning of the case. Under a new social group approach, her perception that

rello, *Salvadoran Women on a Deadly Quest*, PHILA. INQUIRER, Apr. 11, 1989, at A1.

323. Inter-Church Committee on Human Rights in Latin America, *Newsletter*, Nos. 1 & 2, at 46 (1989), *quoted in* Aron et al., *supra* note 322, at 38.

324. Aron reports the grisly case of a Guatemalan colonel who arranged to have a woman’s husband killed and brother “disappear” so that he could possess her outright. He approached her, arguing that with no man around, she needed protection, and reminded her that women in Quiche province had their breasts and fingers sliced off for resisting the advances of members of the military. Aron et al., *supra* note 322, at 40 (citing clinical case file in possession of Dr. Aron).

325. In El Salvador, “few women accuse their rapists and there are virtually no prosecutions unless the victim is a young girl or a member of a wealthy family. And even if the victims were willing to press charges, only one hospital in the entire country conducts the extensive gynecological exam needed to collect evidence of rape.” Morello, *supra* note 322, at A1. Sexism is “open and unapologetic” in El Salvador. *Id.* In 1989, the first women’s center to treat rape victims and shelter battered women opened in El Salvador. One week after the opening, Maria Cristina Gomez, the 40-year-old emcee at the occasion, was found dead — having been shot four times in the head and chest — with acid poured on her face to disfigure her and prevent identification. *Id.*

See U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990: REPORT SUBMITTED TO THE COMM. ON FOREIGN RELATIONS U.S. SENATE AND THE COMM. ON FOREIGN AFFAIRS U.S. HOUSE OF REPRESENTATIVES, 102d Cong., 1st Sess. 620 (1991) (There are “credible reports” that in El Salvador “judges often dismiss rape charges on the pretext that the victim provoked the crime.”).

El Salvador acceded to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on August 19, 1981. UNITED NATIONS, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS 140 (1987).

326. Indeed, it was, for an imputed political opinion case.

“no political control exist[ed] to restrain a brutal sergeant in the armed forces” would be the linchpin of her claim. Contrary to the dissent’s assessment, the Salvadoran government’s inability to control the military is directly relevant to the “bullying” by Lazo-Majano’s persecutor. It may be that there was, as Judge Poole said, nothing in the record to show that Lazo-Majano had no realistic recourse to government protection, but the record could have easily been augmented to establish that fact.

The strained reasoning by the majority in *Lazo-Majano* is that of a sympathetic and honorable court trying to wriggle its way out of the political/private dilemma it found presented by the facts with no adequate tools to do so. It was not lunacy for the court to assert that the case reeked of persecution. Application of a gender-related social group standard to the case shows that what seemed unreasonable was reasonable, and that it was the reasonable dissenter who actually dwelt in Wonderland.

The realities that women around the world face should drive our construction of asylum standards. The Canadians have made sensible adjustments to those realities. We should imitate them.