Reorganizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category

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RECOGNIZING GENDER-SPECIFIC PERSECUTION: A PROPOSAL TO ADD GENDER AS A SIXTH REFUGEE CATEGORY

INTRODUCTION

United States law currently defines a "refugee" as a person who is unable or unwilling to return to his or her home country because of persecution or a well-founded fear of persecution on the basis of one or more of five grounds: race, religion, nationality, membership in a particular social group, or political opinion.\(^1\) Although it is a "valuable starting point for developing a more coherent policy to deal with this worldwide problem,"\(^2\) the current definition is merely a beginning. It fails to acknowledge the violence and discrimination aimed specifically at women.

This Article suggests that the United States now needs a sixth refugee category — gender. Only a new category can ensure that the refugee definition will cover harms specific to women — like female genital mutilation, rape, and gender-based discrimination — and will recognize these harms as persecution. Moreover, adding gender as a sixth category is consistent with both the evolution of the definition and the United States' historic concern for refugees.

Part I of this Article examines the current United States refugee definition by first considering its history and then discussing its elements. Part II discusses the treatment of gender-specific persecution\(^3\) claims both in the United States and abroad. Part III exposes the shortcomings of the current United States refugee definition by examining attempts to apply the definition to gender-specific persecution. Part IV advocates adding gender as a sixth category, because it is the only viable remedy to the inequities in the United States' current refugee definition.


\(^3\) Gender-specific persecution denotes persecution based on the sex of the victim, or persecution visited upon women because of their sex and/or physiological vulnerability to a specific type of harm.
I. THE CURRENT UNITED STATES REFUGEE DEFINITION AND ITS ORIGINS

An analysis of current refugee law should begin with the history of the United States' attitudes towards immigration. The United States is a country of immigrants, most of whom historically have been European. The United States traditionally has shown sympathy for independence movements and political refugees, reflecting the revolutionary genesis of the nation itself. Yet, there is also a history of patriarchy and gender-based ideals concerning the definition of refugees. These historic conceptions affect current refugee law in the United States by creating formal, legal, and procedural hurdles as well as informal perceptions and assumptions.

A. HISTORY OF THE REFUGEE DEFINITION

The Immigration and Nationality Act ("INA"), when first enacted in 1952, neither provided for, nor even mentioned,
refugees. However, in 1953, Congress passed the Refugee Relief Act to deal specifically with the problem of European refugees.\(^7\)

The INA itself did not address the global problem of refugees at all until 1957. Section 7 of the 1957 amendment to the INA provided that an alien who otherwise could be deported for having obtained or attempted to obtain an immigration visa by fraud or misrepresentation, or having misrepresented personal information on a visa application, could still remain in the United States if he or she could show that\(^9\)

the misrepresentation was predicated upon the alien's fear of persecution because of race, religion, or political opinion if repatriated to his former home or residence, and was not committed for the purpose of evading the quota restrictions . . . or an investigation of the alien at the place of his former home, or residence or elsewhere.\(^10\)

However, Congress did not explicitly make refugees a separate category for admission to the United States until 1965.

The Act of October 3, 1965, amended the INA to make refugees part of a new category for admission. Section three of the 1965 Act stated that refugees included those who

because of persecution or fear of persecution on account of race, religion or political opinion . . . have fled from any Communist or Communist-dominated country or

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\(^8\) "The conference draft as enacted provided 205,000 special nonquota visas for eligible refugees and their spouses and unmarried children under twenty-one years of age, including stepchildren and adopted children. The visas were to be apportioned as specified to fourteen classes of eligibles, of which the largest were 55,000 for German expellees residing in West Germany, West Berlin and Austria, 45,000 to refugees of Italian ethnic origin, and 35,000 to escapees in West Germany, West Berlin, and Austria. There were in addition 4,000 nonquota visas provided for eligible orphans under ten years of age and adopted or to be adopted by citizens." HUTCHINSON, supra note 4, at 319.

\(^9\) Id. at 524.

area, or from any country within the general area of the Middle East, and are unable or unwilling to return to such country or area on account of race, religion, or political opinion.\(^{11}\)

Congress also specified that the refugee category should not represent more than 6 percent of the total quota for aliens.\(^{12}\) This act ended the overt selection of immigrants based on national origin, race, or ancestry; previously, immigration law explicitly preferred Europeans.\(^{13}\)

The Refugee Act of 1980 established the current framework for admission of refugees, defining a refugee as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.\(^{14}\)

According to the legislative history, the Refugee Act was not meant to solve the refugee problem. It was intended to create "a solid foundation for our refugee policy for many years to come."\(^{15}\) This is in keeping with the history of American immigration law, which has evolved to cope with changing circumstances and changing attitudes toward refugees.

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\(^{12}\) Id.

\(^{13}\) HUTCHINSON, supra note 4, at 377.

\(^{14}\) Refugee Act of 1980, Pub. L. No. 96-212, sec. 201, § 101(a)(42), 94 Stat. 102, 102-03 (codified at 8 U.S.C. § 1101(a)(42) (1988)). The original version, proposed in 1979, did not use gender-neutral language: "The term 'refugee' means any person who is outside any country of his nationality or . . . is outside any country in which he last habitually resided, and who is unable or unwilling to return to, and is unwilling to avail himself of the protection of, that country . . . ." H.R. 2816, 96th Cong., 1st Sess. § 101(a)(42) (1979) (emphasis added).

\(^{15}\) Hearings on the Refugee Act of 1979, supra note 2, at 20 (statement of Griffin B. Bell, Attorney General).
B. INTERNATIONAL ORIGINS OF THE REFUGEE DEFINITION

The American definition of "refugee" originated in language created by the United Nations.\(^\text{16}\) Congress based its definition on Article I of the UN Convention Relating to the Status of Refugees ("the Convention"),\(^\text{17}\) as modified by Article I of the 1967 Protocol relating to the Status of Refugees ("the Protocol").\(^\text{18}\) These documents entered into force with respect to

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\(^{16}\) The Conference Committee Report states that the definition was accepted with the "understanding that it is based directly upon the language of the Protocol [relating to the Status of Refugees] and it is intended that the provision be construed consistent with the Protocol." S. REP. No. 590, 96th Cong., 2d Sess. 20 (1980).


General Provisions, Art. I states:

For purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfill the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.


The States Parties to the present Protocol,

\(\text{Considering}\) that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

\(\text{Considering}\) that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

\(\text{Considering}\) that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,
the United States on November 1, 1968, when the United States ratified the Protocol.

Congress did not draft the language of the refugee definition, choose to alter it substantially, or even debate the particular wording of the Protocol's definition. Congress adopted the Protocol language "less to fix a particular vision of the refugee into law than to guarantee United States fulfillment of extant international obligations." In construing the definition, our courts routinely look to UN interpretations and intent for guidance.

In the aftermath of World War II, the newly-created United Nations formed both the International Refugee Organization ("IRO") and an Ad Hoc Committee to prepare a convention on refugees. The lack of a comprehensive system to deal with the large numbers of European refugees motivated these actions.

A conference later convened in Geneva to complete the drafting so that non-members of the UN could participate in the

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Have agreed as follows:

Article I

GENERAL PROVISION

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and ...", the words "... as a result of such events", in article I A (2) were omitted.

Id. (footnotes omitted).


20 Id. at 926.


22 As Nehemiah Robinson explains, With the end of World War II the problem of refugees assumed far greater dimensions than ever before, but the only international agreement to be signed in their behalf was the London Agreement of October 15, 1946, concerning the issuance of travel documents to refugees from Germany and Austria, Spanish refugees and some smaller groups . . . [A]s of [1953,] it has been accepted by 18 states; an additional number of states are implementing it informally.

NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 3 (1953).
process. The UN General Assembly recommended that the participating governments take the draft convention into consideration. While the Ad Hoc Committee had consisted of representatives from only thirteen governments, delegates at the conference represented twenty-six states. However, the states represented were Western and Eastern European, with the majority of states being Western.

To create the refugee definition, the delegates looked to earlier texts, including the 1946 constitution of the IRO, which entered into force in the United States on August 20, 1948. The IRO defined a "refugee" as a person who had a "valid objection" to returning to his or her country of nationality or former habitual residence. "Valid objections' included persecution or a reasonable fear of persecution because of race, religion, nationality or political opinions.

The IRO used language from the 1938 mandate of the Inter-Governmental Committee on Refugees ("IGCR"). "The IGCR aided Germans and Austrians who had either fled their countries or who had not already fled but had to emigrate on account of their political opinions, religious beliefs, or racial origin.

Representatives at the Geneva conference introduced another category — membership in a social group — "as an afterthought." This category was not defined as clearly as the others, because it did not share the same historical background. The drafting committee, which incorporated these terms into the Convention in 1951, stated that the expression "well-founded
fear of being the victim of persecution" meant that "a person has either been actually a victim of persecution or can show good reason why he fears persecution." In 1967, the "well-founded fear" language was incorporated into the Protocol without modification.

C. ELEMENTS OF THE UNITED STATES REFUGEE DEFINITION

To achieve refugee status in the United States, the petitioner must show a well-founded fear of persecution on the basis of at least one of five characteristics — race, religion, nationality, membership in a particular social group, or political opinion. Tools for interpreting the refugee definition include immigration regulations, the courts, the Office of the UN High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook"), and administrative decisions of the Board of Immigration Appeals ("BIA"). This Article will describe each element of the definition, including the current categories. It

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30 ROBINSON, supra note 22, at 48 (citations omitted).


An applicant shall be found to have a well-founded fear of persecution if he can establish, first, that he has a fear of persecution in his country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, second, that there is a reasonable possibility of actually suffering such persecution if he were to return to that country, and third, that he is unable or unwilling to return to or avail himself of the protection of that country because of such fear.


33 As one commentator noted, The Handbook offers guidance in determining refugee status to governments that signed the Convention or Protocol. The Handbook bases its analysis of the Protocol refugee definition on the experience of the UNHCR, which includes knowledge of current national practices and literature about refugees. In acceding to the Protocol, the United States agreed to cooperate with the UNHCR. United States Courts accept the Handbook as a persuasive guide, though not binding authority, in determining refugee status.

Bevis, supra note 26, at 399.
will then focus on the categories under which women commonly bring claims — social group and political opinion.

As stated above, an applicant for refugee status must show (1) a "well-founded fear of persecution," that is (2) on the basis of at least one of the five categories. The "well-founded fear" element encompasses both subjective and objective factors. The refugee "must show he has a subjective fear of persecution, and that the fear is grounded in objective facts."\(^3\)\(^4\) To satisfy the objective factor, it is enough to show that there would be a reasonable possibility of persecution if the petitioner were to return to his or her country.\(^3\)\(^5\)

To prove persecution, the petitioner must present some evidence, direct or circumstantial, of the persecutor's motive.\(^3\)\(^6\) Persecution, as interpreted by the courts, occurs only when a difference between the persecutor's views or status and that of the victim causes the victim's harm or fear of harm. According to the Ninth Circuit, persecution is oppression "inflicted on groups or individuals because of a difference that the persecutor will not tolerate."\(^3\)\(^7\)

The term persecution has no universally accepted definition, but under the Convention, "it may be inferred that a threat to life or freedom . . . [and] other serious violations of human rights . . . on account of [any one of the five categories] . . . is always persecution."\(^3\)\(^8\) The threat of persecution may come from the government itself or from groups which the government is

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\(^3\) Saleh v. United States Dep't of Justice, 962 F.2d 234, 239 (2d Cir. 1992) (citing Gomez v. INS, 947 F.2d 660, 663 (2d Cir. 1991)); see also Melendez v. United States Dep't of Justice, 926 F.2d 211, 215 (2d Cir. 1991); Carcamo-Flores v. INS, 805 F.2d 60, 64 (2d Cir. 1986).

\(^3\)\(^5\) 8 C.F.R. § 208.13 (1993). "[A] moderate interpretation of the 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in prosecution, but it is enough that prosecution is a reasonable possibility.'" INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (citing INS v. Stevic, 467 U.S. 407, 424-25 (1984)).

\(^3\)\(^6\) In Elias-Zacarias, "the Court made clear that a petitioner alleging persecution must present some evidence, direct or circumstantial, of the persecutor's motive. 112 S. Ct. at 816-17. This motive requirement stems from section 1101's 'persecution on account of language.'" Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992) (citing INS v. Elias-Zacarias, 112 S. Ct. 812 (1992)).

\(^3\)\(^7\) Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985).

\(^3\)\(^8\) UNHCR HANDBOOK, supra note 32, ¶ 51.
"unwilling or unable to control," and the threat must be on account of race, religion, nationality, membership in a particular social group, or political opinion.

The UNHCR Handbook defines race and nationality largely by common usage. Religion encompasses both beliefs and practices. Persecution for religious reasons may assume various forms, including prohibiting membership in a particular religion, worship in private or in public, or religious instruction. It may also consist of serious discriminatory measures imposed on groups because of their religion or membership in a particular religious community. The political opinion and social group categories are more troublesome

1. Political Opinion

Under the Supreme Court's reasoning in INS v. Elias-Zacarias, petitioners seeking to prove refugee status on the basis of political opinion must establish that they actually possess political opinions. The Court held that "[a] mere act, such as resisting forced conscription, is insufficient to establish the existence of this 'political opinion.' Such opinions can, however, be shown by proving that the applicants' motives for acting were political." Refusal to take sides in a political

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39 Arteaga v. INS, 836 F.2d 1227, 1231 (9th Cir. 1988) (citing McMullen v. INS, 658 F.2d 1312, 1315 n.2 (9th Cir. 1981)).

40 See Arteaga, 836 F.2d at 1231 (citing Cardoza-Fonseca v. INS, 767 F.2d 1448, 1452 (9th Cir. 1985), aff'd, 480 U.S. 421 (1987); Canas-Segovia, 970 F.2d at 601 ("In Elias-Zacarias[,] the Court explained that... the victim must tie the persecution to a protected cause. To do this, the victim needs to show the persecutor had a protected basis (such as the victim's political opinion) in mind in undertaking the persecution.").

41 Race "has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage." UNHCR HANDBOOK, supra note 32, ¶ 68. "The term 'nationality'... is not to be understood only as 'citizenship.' It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term 'race.'" Id. ¶ 74.

42 Canas-Segovia v. INS, 970 F.2d 599, 601 (9th Cir. 1992).

43 UNHCR HANDBOOK, supra note 32, ¶ 72.

44 Id.


46 Id. at 816.

dispute, according to the Court, does not satisfy the political opinion requirement.® Petitioners must also show that the persecutor's acts were motivated by the petitioner's opinions.® However, whether the persecutor's motives were political is irrelevant.

Before Elias-Zacarias, the Ninth Circuit interpreted the political opinion category more broadly.® According to the earlier Ninth Circuit view, the political opinion category focuses largely on the petitioner's beliefs.® Accordingly, political opinion imputed to the petitioner by the persecutor is a valid basis for relief under United States refugee law. However, as imputed political opinion by definition includes an element of motive, there is really no difference in standards.® The Ninth Circuit found that "it is not crucial whether the individual actually espoused the views . . . what is determinative is what the persecutors thought."® This broader view conforms better with UN descriptions of this category than the Supreme Court's interpretation.

2. Particular Social Group

The particular social group category "encompass[es] 'a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.' . . . Like the traits which distinguish the other four enumerated categories, the attributes of a particular social group must be recognizable and discrete."® The individuals in that group must share a "common immutable characteristic" or "the common

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48 112 S. Ct. at 815-16.
49 Id.
50 Id. at 816.
51 The Ninth Circuit's analysis of "political opinion" strengthens women's claims for refugee status due to gender-specific persecution. Under this broader analysis, a woman's imputed opposition to domination by a man was held to be a political opinion. See Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987).
52 Id.
53 Canas-Segovia v. INS, 970 F.2d 599, 601-02 (9th Cir. 1992).
54 Aguilera-Cota v. INS, 914 F.2d 1375, 1379 (9th Cir. 1990).
55 Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (citing Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986)).
characteristic that defines the group . . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.\textsuperscript{56}

Some commentators have construed the "particular social group" category more broadly.\textsuperscript{57} For example, Maryellen Fullerton describes the arguments of Arthur Helton,

[who] argues that it is significant that the refugee definition refers to social group rather than to ethnic group, minority group, or cultural group. He points out that social group is broader than the other terms . . . . [T]he term social group can encompass all of these sets . . . . Accordingly, he concludes that the choice of the term social group demonstrates an intent to formulate a broad, inclusive refugee definition.\textsuperscript{58}

This is similar to the construction provided by the UNHCR Handbook, which states, "A 'particular social group' normally comprises persons of similar backgrounds, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality."\textsuperscript{59}

The Ninth Circuit also recognizes that "the 'social group' category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the

\textsuperscript{56} In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

\textsuperscript{57} "Many cases falling under this term are also covered by the terms [race, religion and nationality], but the notion of 'social group' is of broader application than the combined notions of racial, ethnic and religious groups, and in order to stop a possible gap, the Conference felt that it would be as well to mention this reason for persecution explicitly." GRAHL-MADSEN, supra note 29, at 219. \textit{See also} Maureen Graves, \textit{From Definition to Exploration: Social Groups and Political Asylum Eligibility}, 26 SAN DIEGO L. REV. 739 (1989); Arthur C. Helton, \textit{Persecution on Account of Membership in a Social Group as a Basis for Refugee Status}, 15 COLUM. HUM. RTS. L. REV. 39 (1983).

\textsuperscript{58} Maryellen Fullerton, \textit{A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group}, 26 CORNELL INT'L L.J. (forthcoming 1993) (manuscript at 17, on file with \textit{The Cornell Journal of Law and Public Policy}) (citing Helton, supra note 57, at 43-44).

\textsuperscript{59} UNHCR HANDBOOK, supra note 32, ¶ 77.
other categories of race, nationality, religion, or political opinion." At the same time,

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

The case law consistently suggests two criteria: distinguishable group dimensions and persecution visibly targeting the social group. 

II. TREATMENT OF GENDER-SPECIFIC PERSECUTION CLAIMS IN THE UNITED STATES AND ABROAD

A government or an individual can subject women to many types of persecution. Some are similar to persecution suffered by men, but others are unique to women. Women refugees' claims fall under four different categories. The first category is women who fear persecution on the same grounds and in the same circumstances as men. Second, there are women who fear persecution because of kinship ties, such as persecution due to the status, activities, or views of their spouses, fathers, or other family members. Third, there are women who fear persecution resulting from severe sexual discrimination, either by public authorities or at the hands of private citizens whose actions the state is unwilling or unable to control. Finally, there are women who fear persecution for transgressing sexually

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

61 Id.


discriminatory religious or customary norms or practices in their country of origin. This Article focuses only on the last two types of gender-specific persecution — severe sexual discrimination and persecution for transgressing religious or customary norms — because the current system largely fails to recognize them as grounds for granting refugee status.64

Some opponents of granting refugee status to victims of gender-specific persecution may argue that even practices as harmful as female genital mutilation are part of established cultural traditions; thus, outsiders should not judge or interfere with these traditions. In cases involving refugees, the potential victim has chosen to flee instead of participating in this tradition. When a woman disagrees and opposes an established system or tradition, and expresses her disagreement by fleeing, we should respect her beliefs, rather than forcing the tradition upon her. Unfortunately, under current law the legal issue is not the victim's right to disagree with tradition, but whether the intended victim has a "well-founded fear of persecution" based on one of the existing categories of the refugee definition. Therein lies the problem for many women fleeing female genital mutilation and other forms of gender-specific oppression.

A. EXAMPLES OF GENDER-SPECIFIC PERSECUTION

1. Female Genital Mutilation

Aminata Diop left her home in Mali to avoid genital mutilation. The night before she was to undergo the procedure, Diop walked out of her home in southern Mali. She ended up in France, where she applied for asylum. French refugee law, like United States refugee law, originated with the Protocol and the Convention. Her lawyer argued that Diop had a well-founded fear of persecution based on her political opinion. The French government allowed her to stay, but did not give a reason.65

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64 For an example of a broader conception of gender-based persecution, see Article I of the Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 19 I.L.M. 33, which provides a right to asylum and defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Id. at 36.

65 Toni Y. Joseph & Mark McDonald, Woman Rallies World Against
Women who are subjected to genital mutilation, which includes clitoridotomy, clitoridectomy, and infibulation clearly fall into the latter two categories of gender-specific persecution discussed above. Clitoridotomy or "female circumcision" involves an incision in or removal of the prepuce of the clitoris. Clitoridectomy or clitorectomy involves excision of the clitoris and usually the surrounding tissue. Infibulation is the most mutilating of these procedures. In an infibulation, the practitioner removes the clitoris, labia minora, and most of the labia majora. After the organ is scraped off, the practitioner sews up the sides of the vulva leaving a hole the size of a match stick.

Clitoridotomy, clitoridectomy, and infibulation are performed largely in the Middle East, Africa, and Asia, although the practices occur worldwide. The mutilation is most prevalent among animists and Moslems, although it is sometimes found among Jews, Copts and other Christian sects.

Circumcision, CALGARY HERALD, Mar. 5, 1992, at C6. Diop was given a "carte de sejour" and a "carte de travail," which are the equivalents of a green card. She has been denied asylum twice, but these documents give her permission to remain in France indefinitely. Id.


Although they are actually different procedures, both clitoridotomy and clitoridectomy are often collectively referred to as clitoridectomy.


DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, supra note 68, at 346.

The term infibulation "is derived from the clasp which the Romans used to fasten their togas and sometimes the genitals of their male slaves." Andrea Singer, Female Circumcision; Because It's Always Been Done, ECONOMIST, Sept. 18, 1982, at 42.


MOEN, supra note 68, at 2. "Women walk around in a characteristic shuffle . . . because they have been sewn so tightly, they are barely able to lift their legs." Moses Manoharan, REUTER LIBR. REP., Feb. 5, 1991.

FEMALE CIRCUMCISION, supra note 71, at 6.

It is known to pre-date Islam. Singer, supra note 70.

Id.
A term for infibulation, "pharaonic circumcision," indicates origins in ancient Egypt. World Health Organization officials estimate that between seventy-five and eighty-five million women worldwide have undergone the procedures.

Societies practice genital mutilation for traditional and cultural reasons: to ensure female chastity and because of a mistaken belief that the procedures are hygienic. Depending on the region, practitioners perform genital mutilation on girls from infancy to puberty. It is often done without anesthetic and under unsanitary conditions. It often results in infection, psychological trauma, infertility because of constant inflammation of the vaginal area, and severe scarring.

The mutilation often makes it physically impossible for a woman to enjoy sexual intercourse. Before an infibulated woman's wedding or on her wedding night, the scar tissue must be opened to allow penetration. Often, the husband, his relatives, or ceremonial women create the opening with a dagger. The cutting may result in severe complications if the dagger cuts internal organs. Even the "mildest" female genital mutilation, clitoridotomy, may eliminate a woman's physical enjoyment of sexual intercourse. Because the glans clitoridis is the area in which orgasms in women originate, its mutilation

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76 The Egyptians, in turn, called infibulation "Sudanese circumcision." *Id.*

77 Joseph & McDonald, *supra* note 65.

78 *FEMALE CIRCUMCISION, supra* note 71, at 7-8 ("Infibulation clearly has the opposite effect to that of promoting hygiene; urine and menstrual blood which cannot escape naturally, secrete and result in discomfort, odour and infection."); Robyn C. Smith, Note, *Female Circumcision: Bringing Women's Perspectives into the International Debate*, 65 S. CAL. L. REV. 2449, 2481-86 (1992) (describing the multiple motives behind the practice of female circumcision).

79 Often the girl is held down and the operation is performed by a midwife, other older women, or even the girl's mother. "Slivers of wood or match sticks are used to stop the vagina from sealing fully. Kitchen knives, razor blades or pieces of glass are used in the operation and stitching is with silk, catgut or thorns. Girls may have their legs bound for 40 days to allow scar tissue to form." David Nicholson-Lord, *Fears That 10,000 Girls Face Threat of Circumcision*, INDEPENDENT, July 7, 1992, at 4.

80 MOEN, supra note 68, at 2-3.

81 *Id.* at 2; *FEMALE CIRCUMCISION, supra* note 71, at 5.

82 MOEN, *supra* note 68, at 3.
lessens or eliminates the ability of a woman to have an orgasm.\textsuperscript{83}

Genital mutilation can also lead to complications in childbirth because of the inelasticity of scar tissue; this can cause the death of the mother, the fetus, or both.\textsuperscript{84} The resulting deaths often go unreported due to the traditional silence that surrounds the practice.\textsuperscript{85}

2. \textit{Pervasive Discrimination}

Pervasive discrimination is another example of gender-specific persecution. For example, religious laws in Saudi Arabia require women to veil their faces or be flogged with bamboo sticks by the religious police for dressing or acting immodestly. According to Alex Neve, Amnesty International's acting refugee coordinator, women who refuse to wear the veil also face imprisonment.\textsuperscript{86} Similar to clitoridectomy, forcing women to wear veils in Saudi Arabia fits into both of the classifications of gender-specific persecution discussed in this Article.

The Canadian government recently granted a Saudi Arabian woman special dispensation to remain in Canada.\textsuperscript{87} The woman said that she would be in grave danger if she returned to her home country because of her views on the status of women there.\textsuperscript{88} The woman, known simply as Nada because of fear of reprisals against her family still in Saudi Arabia, had refused to wear the veil.\textsuperscript{89} Nada's lawyer argued that she was persecuted because of her feminist political beliefs and her

\textsuperscript{83} \textit{Id.}; \textit{FEMALE CIRCUMCISION}, \textit{supra} note 71, at 5.

\textsuperscript{84} Singer, \textit{supra} note 70.

\textsuperscript{85} \textit{MOEN}, \textit{supra} note 68, at 2.


\textsuperscript{88} Miller, \textit{supra} note 86, at A1.

\textsuperscript{89} \textit{Id.}
membership in a social group, and therefore was a refugee under Canadian law which had adopted the Protocol definition.

Nada told the immigration panel that when walking down the streets of her hometown without a veil, she was jeered at and had rocks thrown at her. She could not study at the best universities, and some occupations were closed to her. She could not drive or travel without the permission of a male relative. But Nada had decided that she wanted to go to school and become a physical education teacher.

The Canadian refugee board members who decided Nada's case said she did not prove she was or would be the victim of cruel or unusual punishment. The two male panelists told her to go home, observe her country's laws, and "show consideration for the feelings of her father." In a reversal of the Canadian refugee board, Canadian Immigration Minister Bernard Valcourt gave Nada special dispensation to stay in Canada, citing "humanitarian and compassionate grounds." However, Nada's victory was incomplete. She "still isn't classified as a refugee, and her case sets no precedent for other women."

Largely in response to Nada's case, Valcourt said that the government would study "the issue of how refugee law can be used to protect women fleeing persecution or abuse based on their sex." New guidelines released by the Immigration and Refugee Board in March of 1993 "provide advice on how to deal

90 "Nada's lawyer argued that Nada was persecuted in Saudi Arabia because of her political beliefs — feminism — and her social group — women . . . ." Jacquie Miller, A Saudi Arabian Woman, Seeking to Escape Her Country's Restrictive Laws, Has Been Denied Asylum in Canada. Now in Hiding, She Says She's a "Feminist Refugee.", OTTAWA CITIZEN, Sept. 4, 1992, at A1.

91 Miller, supra note 86.

92 Id.

93 Id.

94 Id.

95 Miller, supra note 90.

96 Walsh, supra note 87.


98 Walsh, supra note 87.

with women who fear everything from spousal abuse to rape. They include persecution unique to female claimants, such as infanticide, forced marriages, bride burnings, compulsory sterilization and genital mutilation."100 Some commentators, however, say that the guidelines are "moot because they do not have the force of law behind them."101

The new guidelines broaden the United Nations' definition of a refugee by including women persecuted because of their gender in the social group category.102 Nada reacted to the new guidelines by saying, "I was happy to see the guidelines, but at the same time I think adding gender to the refugee definition would be better. But at least they are going to look at cases of gender persecution and take them seriously. It's a first step."103

3. Rape

Rape is a third example of gender-specific persecution. Depending on the surrounding circumstances, rape can be classified under any combination of the four categories of women claiming refugee status. The case of Muslim women in Bosnia provides a good example. Although these women fear persecution due to kinship ties, the persecution they fear is largely gender-specific and at the hands of private citizens who the government is unable to control.

A European Community team of investigators found that during a nine month period, over 20,000 Slavic Muslim, Croat, and Serbian women and girls in Bosnia were raped.104 Muslim women formed the vast majority of rape victims.105 Rape was

100 Lunman, supra note 97.

101 Id.


103 Nada, A Serious Step Toward Accepting Female Refugees, OTTAWA CITIZEN, Mar. 11, 1993, at A13.

104 Juan Gasparini, Bosnia-Hercegovina: EC Report Defines Rape as a War Crime, INTER PRESS SERVICE, Jan. 26, 1993, available in LEXIS, Nexis Library, INPRES File. See generally Stephanie Nebehay, EC Group Says 20,000 Moslem Women Raped by Serbs, REUTER EUR. COMMUNITY REP., Jan. 8, 1993 , available in LEXIS, Nexis Library, ECRPT File (discussing the general view of the EC report that a "horrifying number of Moslem women had suffered rape and that this was continuing").

105 William Drozdialk, Serbs Raped 20,000, EC Team Says; Assaults on
part of a systematic policy of terror designed to intimidate, demoralize, and drive certain groups of people from their homes.\textsuperscript{106} The EC report stated that "viewed in this way, rape cannot be seen as incidental to the main purpose of the aggression, but as serving a strategic purpose in itself."\textsuperscript{107} Rape, or the threat of rape, was used "as a weapon of war."\textsuperscript{108} The report also noted that the Serbs carried out the rapes "in particularly sadistic ways to inflict maximum humiliation on the victims."\textsuperscript{109} Many women and children may have died during or after these rapes.\textsuperscript{110}

Bosnian Muslim women fit the historic international refugee paradigm, because even though their persecution is gender-specific, it is on account of their religion, race, or nationality.\textsuperscript{111} However, because the claims of these women are based on persecution in the form of sexual assault, it is very difficult for them to successfully establish their claims.\textsuperscript{112}

\begin{flushright}
\textit{Bosnia Part of 'Cleansing',} WASH. POST, Jan. 9, 1993, at A12.
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\textsuperscript{106} Gasparini, \textit{supra} note 104.

\textsuperscript{107} Drozdiak, \textit{supra} note 105.

\textsuperscript{108} "Women who are political activists, community organizers, or human rights workers have been targeted because they are strong. Soldiers and policemen use rape or sexual abuse to humiliate these women and sometimes to punish them for their political or social independence." AMNESTY INT'L, 1992 \textbf{RAPE AND SEXUAL ABUSE: TORTURE AND ILL TREATMENT OF WOMEN IN DETENTION} 3.


\textsuperscript{110} \textit{Id}.

\textsuperscript{111} \textit{See supra} text accompanying notes 40-41.

\textsuperscript{112} This form of persecution is difficult to prove:
Few women are able to talk about such experiences to a male interviewer and very few countries have female staff involved in their refugee determination procedures. Even where a woman has been persecuted (that is, subjected to such cruel, inhuman and degrading treatment as sexual assault), she thus finds it more difficult to establish her claim than a man.

B. JUDICIAL TREATMENT OF FEMALE REFUGEES IN THE UNITED STATES

In El Salvador, a country that is also racked by civil war, the politicized rape and abuse of women is widespread.\textsuperscript{113} As in Bosnia, when the case does not exactly fit the paradigm, women often have no recourse. As the cases of Sofia Campos-Guardado and Olimpia Lazo-Majano illustrate, women's claims under current domestic law must either be forced into the existing categories or disregarded.

In 1984, Sofia Campos-Guardado petitioned for refugee status in the United States. Earlier that year, while still in El Salvador, she went to visit her uncle. As the chairman of the local agricultural cooperative, which had been formed as the result of a controversial agrarian land reform movement, he held the cooperative's money. The day before Campos-Guardado's visit, two men demanded that her uncle turn over the money. During Campos-Guardado's visit, an older woman and two young men with rifles arrived and knocked down the door. They dragged Campos-Guardado, her uncle, one male cousin, and three female cousins outside. They forced the women to watch as they hacked the flesh from the men's bodies with machetes. Then they raped the women, including Campos-Guardado, while the older woman who accompanied the attackers shouted political slogans. After suffering a nervous breakdown, Campos-Guardado returned to work at a factory in San Salvador. On her first visit home, she was introduced to two of her cousins. She recognized one of the cousins as one of her attackers. On several occasions, the cousin threatened to kill her and her family if she revealed his identity. When the factory was burned down by guerrillas, she fled to the United States.\textsuperscript{114}

\textsuperscript{113} See Adrianne Aron et al., Gender Specific Terror of El Salvador and Guatemalans: Post-traumatic Stress Disorder in Central American Refugee Women, 14 WOMEN'S STUD. INT'L F. 37 (1991). "Not uncommonly, women are also subjected to ordeals such as forced nudity (sometimes including photographs), electroshock to the nipples and vagina, squeezing or tying of the breasts, hanging by the breasts, vaginal or anal rape with objects, mutilation of the body, and forcible witnessing of any of the above, or hearing the screams of women going through those experiences." Id. at 39.

\textsuperscript{114} Campos-Guardado v. INS, 809 F.2d 285, 287 (5th Cir.), cert. denied, 484 U.S. 826 (1987).
Campos-Guardado based her claim on two grounds, "political opinion" and "membership in a particular social group." She asserted that she was persecuted for political opinions attributed to her by her assailants "on account of her family membership, and because of the concomitant association of the family with the agrarian land reform movement." The BIA denied her claim. On appeal, Campos-Guardado argued: (1) that the INA contemplated persecution on the basis of political opinions imputed to the petitioner, whether rightly or wrongly, by the persecutor; and (2) that the BIA, by imposing a prerequisite that the alien personally hold the political opinion, misconstrued the INA.

The Fifth Circuit upheld the BIA's decision that Ms. Campos-Guardado had failed to show that the harm she feared was on account of "political opinion" or "membership in a social group" as those terms are used in the INA. Campos-Guardado did not establish that she was persecuted on account of political opinions that "she herself possessed or was believed by the attackers to have possessed," group membership, or a combination of both.

In a second case brought by a woman from El Salvador the appellant did successfully achieve refugee status, but only after the court fit her situation into an existing category. In 1983, Olimpia Lazo-Majano applied for refugee status. A year after her husband had left El Salvador for political reasons, Rene Zuniga, a sergeant in the Salvadoran military whom she had known since childhood, asked her to work for him. Six weeks after she began working in his house, he began to rape and beat her. Zuniga told her that if she defied him, he would denounce her as a subversive, and would "have her tongue cut off, her nails removed one by one, her eyes pulled out" and would kill her. Lazo-Majano feared that because of his membership in the military, Zuniga would carry out these threats. Thus, Lazo-Majano fled to the United States.

The Board of Immigration Appeals dismissed her appeal for asylum stating that "the fact remains that such strictly personal actions do not constitute persecution within the meaning of the

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115 Id. at 288.
116 Id.
117 Id. at 289.
118 Id.
119 Lazo-Majano v. INS, 813 F.2d 1432, 1433 (9th Cir. 1987).
GENDER PERSECUTION & REFUGEE STATUS

The Ninth Circuit reversed, citing Lazo-Majano's imputed political opinion. The court first looked to the social context, and found that:

Zuniga is asserting the political opinion that a man has a right to dominate and he has persecuted Olimpia to force her to accept this opinion without rebellion. Zuniga told Olimpia that in his treatment of her he was seeking revenge. But Olimpia knew of no injury she had ever done Zuniga. His statement reflects a more generalized animosity to the opposite sex, an assertion of a political aspiration and the desire to suppress opposition to it. . . . Olimpia has suffered persecution because of one specific political opinion Zuniga attributed to her.  

The Ninth Circuit went on to say that "[e]ven if she had no political opinion and was innocent of a single reflection on the government of her country, the cynical imputation of political opinion to her is what counts [because] if the persecutor thinks the person guilty of a political opinion, then the person is at risk." Thus, in denying Lazo-Majano's application for withholding of deportation, the BIA had abused its discretion.

In both of the above cases the petitioners could have argued that political opinions could be imputed to the petitioners based on familial relationships, that the persecutor was someone who the government was unwilling or unable to control, and that the petitioners' fear of continued persecution upon their return was based on the fact that the persecutors knew their families and where they lived.

The BIA found the petitioners' testimony credible in both cases, but based its decision on the finding that the women had not proven that their persecution was based on one of the five categories. In the case of Lazo-Majano, on appeal the Ninth

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120 Id.
121 Id. at 1435.
122 Id.
123 Id. at 1436.
124 These cases were decided prior to INS v. Elias-Zacarias, 112 S. Ct. 812 (1992) (holding that imputed political opinion is not a cognizable legal ground for a grant of asylum).
125 Neither Immigration Judge Nail nor the Board doubted Olimpia's
Circuit imputed a political opinion to the petitioner, even though she was not shown to harbor one, and the petitioner herself testified that her persecutor would have made the same threats and committed the same violent acts had he not been a member of the military. Further, according to the immigration judge, Lazo-Majano described Zuniga as a common police officer, not a person of rank or authority. She did not complain to his superior officers about his treatment of her, and she admitted that she would not have sought the assistance of authorities even if Zuniga had not been an army officer.

The dissent argued that Zuniga acted, not in his official capacity, but as an individual "motivated by nothing more than his own 'exaggerated machismo,' the rampaging lust-hate of the common rapist," and that it was unclear that the government would have refrained from attempting to control him. In fact, the dissent questioned whether the petitioner's relationship with her persecutor was involuntary, given that she did not complain to the authorities or attempt to leave. Under this possible interpretation, it is uncertain that Zuniga's acts amount to the statutory equivalent of political persecution, any more than the acts of the cousin/assailant in Campos-Guardado's case. One must question why these cases reached opposite outcomes. The two cases further illustrate that attempting to fit a claim based on gender-specific persecution within an existing category is a difficult means through which to apply for refugee status.

story. It must be assumed that they found her testimony credible. They reached their unfavorable decision on the basis that Olimpia had not met the legal requirements of the applicable statutes. Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987).

Although the Board assumed the veracity of Ms. Campos's account of the events at her uncle's house, and that the attack resulted from her uncle's political view, it nevertheless concluded that Ms. Campos "had not shown that the attackers harmed her in order to overcome any of her own political opinions." Campos-Guardado v. INS, 809 F.2d 285, 288 (5th Cir.), cert. denied, 484 U.S. 826 (1987).

126 Lazo-Majano, 813 F.2d at 1438 (Poole, J., dissenting).
127 Id.
128 Id. at 1440.
III. SHORTCOMINGS OF THE CURRENT REFUGEE DEFINITION

A. THE DEFINITION AS APPLIED BY UNITED STATES COURTS

Whether a woman fleeing persecution in her country will be admitted as a refugee to the United States depends on how well her situation fits into one of the five categories enumerated in the current Refugee Act. Achieving this fit is problematic for women, given the history and practical application of the refugee definition.

Although the current refugee definition is broader than the pre-World War II definition, it does not contemplate gender-specific persecution. The current definition is based on an outdated model that is designed to address refugee flows from white, Western countries during the Cold War. The aims of the current refugee policy, preserving sovereignty and other domestic interests by "managing' or preventing refugee flows," seem to have "surpassed both the goal of stopping the violence that forces people to flee and of assisting and protecting those who have managed to escape." Thus, the refugee definition does not focus on the practical needs of the refugee population.

The key criterion for determining refugee status under the current Act is persecution. Persecution usually requires a specific act against the individual. By requiring a specific act, the definition of persecution excludes generalized conditions of insecurity and oppression. Similarly, the definition also

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[129] "This refugee definition is broader than prior practice in two ways. It links refugee status to those who have a basis for fearing persecution rather than to a specific crisis or a specific nationality group. Moreover, it expands the reasons that warrant refugee status." Fullerton, supra note 58, at 3.

[130] The United Nations formulated the current international definitions "in the immediate post-World War II period, largely in response to European refugee flows. Contemporary movements, by contrast, originate primarily in the Third World. This has raised questions about the relevance of conventional concepts to current realities." Astri Suhrke, Global Refugee Movements and Strategies of Response, in U.S. IMMIGRATION AND REFUGEE POLICY 157, 157 (Mary M. Kritz ed., 1983).


[133] See supra text accompanying notes 34-39.

[134] In discussing the concept of a refugee embodied in the Refugee Act,
excludes general exploitation or an atmosphere of oppression from the scope of persecution. Thus, it disproportionately burdens women, who, due to their lower social status, are more likely to suffer from general exploitation and denial of many general rights and opportunities afforded to men.

Moreover, it is not sufficient for the petitioner to simply demonstrate the existence of persecution. She must also show that she has experienced or that she fears such persecution on account of one of the five existing categories. This "limited set of cognizable grounds of persecution adversely affects international refugee policy by preventing recognition of certain types of persecution." Specifically, this restriction has impeded the development of doctrines which incorporate the claims of women refugees and has inhibited women's ability to tell their own stories.

Additionally, even the process of applying for refugee status provides an almost insurmountable obstacle for women applicants. As Nancy Kelly states:

Because advocates have learned to present cases within a largely male-oriented body of law, women's cases are often formulated in ways which reflect the advocate's understanding of the law rather than the reality of the applicant's experiences. Additionally, the manner of eliciting information from women applicants concerning their experiences often leads to inaccurate characterizations of their claims. . . . Often a woman is expected to repeat her story before a male interviewer or immigration judge with the assistance of a male

Senator Alan K. Simpson explained:
The statute says "persecution on account of race, religion, nationality, membership in a particular social group or political opinion." That is all it says. So a country can be exceedingly dangerous and perilous for human beings and in no case would that qualify the people leaving that country as refugees under U.S. law. . . . [I]t really does not say that you can include a person in the definition of refugee who is just scared to death of his country.
Parish, supra note 19, at 931.


136 "For example, the claims of women are often presented as derivative of the claims of their male partners or are based on the experiences of other family members." Kelly, supra note 63, at 8.
interpreter. She is subject to cross examination on the
details of her experience, and any discrepancy becomes
a ground to find that she is not credible and to deny
her claim. This difficulty is exacerbated for women
who, for cultural or religious reasons, will be ostracized
by their families or communities if the assault becomes
known. Thus the current system places a heavier burden on women
seeking refugee status than on their male counterparts.

Additionally, despite the fact that modern legal theory is
"essentially and irrevocably masculine," international
jurisprudence assumes that international law norms apply to
individuals universally and neutrally. It does not recognize that
international legal principles may affect women differently than
they affect men. Due to this lack of recognition, "women's experiences of the operation of these laws tend to be silenced or
discounted." The limitations in the UN definition also reflect the
political climate at the time it was adopted and the Western liberal views of those who participated in its creation. The focus of the United Nations at that time was on political, civic, and legal rights, and negative freedoms valued by Western cultures run by elite white males.

"The normative structure of international law has [also] allowed issues of particular concern to women to be either ignored or undermined," as exemplified by its replication of the public/private dichotomy on two levels. On one level, matters of international concern are "public," while other matters are "private" to individual states. If private, the state considers the matters within its domestic jurisdiction, "in which the international community has no recognized legal interest." On a second level, a dichotomy is drawn in terms of gender between the public sphere and the private, domestic sphere.

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137 Id. at 8-10.
139 Charlesworth et al., supra note 6, at 625.
140 Id.
141 Id.
142 Id.; see also U.N. CHARTER art. 2, ¶ 7.
143 Charlesworth et al., supra note 6, at 626.
"The public realm of the work place, the law, economics, politics and intellectual and cultural life, where power and authority are exercised, is regarded as the natural province of men; while the private world of the home, the hearth and children is seen as the appropriate domain of women."

Feminist scholars have used this dichotomy to explain male dominance in western society, since the two spheres have historically been accorded asymmetrical value: greater significance is attached to the public world than the private one. "The distinction drawn between the public and the private thus vindicates and makes natural the division of labor and allocation of rewards between the sexes. Its reproduction and acceptance in all areas of knowledge have conferred primacy on the male world and supported the dominance of men." Refugee law, created under these circumstances, "is based on, for the most part, the experiences of male claimants and thus overlooks 'female-specific experiences such as . . . circumcision,'" even though the majority of the world's refugees are female. Moreover, of these women, the majority are from "Third World" nations. This further disadvantages them in a legal system that implicitly and explicitly privileges people of European descent. Under these circumstances, it is

144 Id.
145 Id.
146 Id.; see also HESTER EISENSTEIN, CONTEMPORARY FEMINIST THOUGHT 15-26 (1983); Carole Pateman, Feminist Critiques of the Public/Private Dichotomy, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281 (Stanley I. Benn & Gerald F. Gaus eds., 1983).
not surprising that United States refugee law has "largely failed to recognize the political nature of seemingly private acts of and harm to" many women seeking refugee status.\textsuperscript{151}

B. ACADEMIC ATTEMPTS TO APPLY THE CURRENT CATEGORIES TO GENDER-SPECIFIC PERSECUTION

This section will examine academic attempts to apply the existing refugee categories to women fleeing gender-specific persecution. These efforts focus on the two categories under which women currently bring claims: political opinion and membership in a social group. The failure of these efforts rests at least partly on the conscious and unconscious discriminatory attitudes discussed in the section above.

1. Political Opinion

Congress adopted the current definition of refugee, including the political opinion category, to bring United States law in line with UN guidelines.\textsuperscript{152} Our courts often turn to UN documents to clarify the elements of the refugee definition.\textsuperscript{153} The UNHCR Handbook defines "political opinion" broadly. "First, the Handbook states that a person may fear persecution because of a political opinion even if that opinion has not yet been expressed. Second, a mere act or refusal to act can constitute the expression of a political opinion."\textsuperscript{154} One IGCR representative indicated that:

"political opinion" applied to people fleeing a range of situations with political overtones, including people who "weren't acceptable any more to the prevailing race or creed or political school." This member believed that

\textsuperscript{151} See Kelly, supra note 63, at 7. "For example, rape, even when committed by a government official or in a political context, is often viewed as a private matter." \textit{Id.}

\textsuperscript{152} See supra text accompanying notes 17-19.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} Fielden, supra note 47, at 977.
refugees who feared persecution on account of political opinion included not only persons persecuted by the government, but also those who disagreed with the government's policy of persecution, even though the persecution was not aimed at them.

This broad definition of "political opinion" is especially important to women, since their political protests are not always manifested in the same way as those of men.

The political opinion category should be broad enough to accommodate all reasonable applications. For instance, "[a]n adjudicator could appropriately explore whether the victim's actual or imputed opinion is 'political' within both the context of the country of origin and the perceptions of the persecutor." Thus, women in a male-dominated country who implicitly or explicitly expressed the belief that men should not dominate women would more easily qualify as refugees. There would also be greater recognition of the government's role and whether or not it failed to control the abuse and degradation of women. The political nature of women's oppression in the context of religious laws and ritualization could also be recognized. One commentator, Maureen Mulligan, even argues that "there is sufficient statutory and case law support for rape in particular circumstances to be considered fear of persecution on account of political opinion." Yet, this approach leaves many claims unheard and many women without protection, as it only recognizes rape in cases where the prosecutorial system is ineffective or where bringing a rape claim to authorities would endanger the woman's life.

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155 Bevis, supra note 26, at 405.

156 See supra notes 138-151 and accompanying text.

157 See Bevis, supra note 26, at 412-13. "While 'politics' and 'political' are sometimes exclusively used to describe civil government, these words are also generally recognized to describe patterns of human relationships that involve control, influence, or power over allocations of spiritual values or material goods." Id.; see also ROBERT A. DAHL, MODERN POLITICAL ANALYSIS 3 (3d ed. 1976).

158 Bevis, supra note 26, at 412.


160 See id. at 380.
Mulligan crafts a definition of "political opinion" that permits political opinions imputed to the petitioner by others to justify a grant of refugee status. She looks to Ninth and Fifth Circuit opinions to show that the category has been construed broadly. Specifically, she argues that case law establishes that a victim of persecution need not be "politically active" to suffer persecution on account of political opinion.

Yet, this view is contrary to the Supreme Court's narrow interpretation of the political opinion category. In Elias-Zacarias, the Court interpreted "political opinion" to mean that one must affirmatively endorse a particular view to hold a political opinion. Imputed opinions are not considered, although practically a court could interpret resistance or noncompliance as a manifestation of opposition. The Court affirmed the arbitrary distinction between politically motivated harm and harm to overcome a petitioner's political opinion. The distinction is arbitrary because in practice the results are the same; the goal of the persecutor is to crush the manifestation (or what he perceives to be a manifestation) of opposition by the petitioner.

Although the Court's interpretation of the political opinion category is inconsistent with Congressional goals and the Protocol's definition of refugee, it cannot be ignored. Mulligan's version of "political opinion," although reasonable given the broad interpretation intended by the UNHCR, cannot survive Elias-Zacarias. Her note, published before the Elias-Zacarias decision, proposes no way to avoid that decision.

Mulligan also suggests that the BIA is insensitive to women's claims. "The BIA fails to adequately recognize the

161 "The Hernandez-Ortiz [v. INS, 777 F.2d 509 (9th Cir. 1985)] court stressed that a government does not persecute those who share in its ideologies, and that 'it is irrelevant whether a victim actually possesses any of these opinions as long as the government believes that he does.' Thus, the determination of what is 'political' need not focus solely on the actions of the applicant." Mulligan, supra note 159, at 365.

Mulligan also states that Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977), "is evidence that the Fifth Circuit also has established precedent entitling refugees to political asylum as the result of actions against them by their government. The holding does not state, and actually denies, the need for overt political action by the refugee." Mulligan, supra note 159, at 368-69.

162 Mulligan, supra note 159, at 372.


164 See Fielden, supra note 47, at 974-77.
humanitarian foundation underlying the Refugee Act of 1980. . . . There is severe discrimination among applicants, many more applicants are accepted from communist countries, and less so from countries whose governments are supported by the United States." Mulligan concludes that "[t]he Immigration Judges and BIA as a group, are not objective bodies of adjudication." Furthermore, "the INS does what it can to discourage certain classes of people from applying for asylum, and takes measures to see that particular nationals are kept ignorant of asylum possibilities and availability of counsel to help obtain those rights." 

The fact that only certain acts have been historically recognized as "political" exacerbates judges' insensitivity to women's claims. Most of the acts recognized as "political" take place in the public sphere. This narrow definition of what is "political" excludes many gender-specific claims of women, which arise from acts that take place largely in the more private spheres of home and neighborhood. This reifies the public/private distinction by creating an insular sphere within which there is little or no governmental protection from possible abuse. Given the practical application of the political opinion category, women's claims of gender-specific persecution falling solely within the two classifications articulated above will

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165 Mulligan, supra note 159, at 374.
166 Id. at 376.
167 Id. at 375.
168 "Most asylum adjudicators have accepted as 'political' such activities as membership in a political organization, or expression of a political opinion through party membership, political demonstrations, and propaganda distribution." Bevis, supra note 26, at 401-02.
169 See supra text accompanying notes 141-151.
171 The first consists of women who fear persecution resulting from certain circumstances of severe sexual discrimination on grounds of gender, either by public authorities or at the hands of private citizens whose actions the state is unwilling or unable to control. The second consists of women who fear persecution for failing to conform to, or for transgressing, certain sex-discriminating religious or customary laws and practices in their country of origin. See supra p. 14.
probably not be recognized as persecution on account of political opinion.

2. Membership in a Social Group

Women fleeing sex-based persecution clearly share a common background and social status for which they are persecuted; thus, they fall well within the social group definition as articulated in the UNHCR Handbook. The UNHCR has recommended that women fleeing sex-based persecution be eligible for asylum under the social group classification and has asserted that such claims are within the ambit of Article I of the Refugee Convention. There is also increasing international pressure to apply the particular social group classification to the claims of women who allege a fear of persecution solely because of their gender.

Proponents argue that gender is an innate and immutable characteristic that is beyond a person's power to change, and therefore gender constitutes a distinguishable social group. Enforced female genital mutilation constitutes persecution that targets women as a particular group. The group's definition is provided by the persecutor, not the persecuted group. Where there is identifiable persecution of a particular group, such as female genital mutilation, and the group's definition is provided by the persecutor, the social group is distinctly defined.

Although the Board of Immigration Appeals has previously recognized sex as an immutable characteristic, the Second Circuit more recently held that gender possesses characteristics that are too "broadly-based" to identify a particular social

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172 Neal, supra note 62, at 230.

173 Id. at 232; Statement by Canadian Cabinet Minister Bernard Valcourt (Jan. 29, 1993) (on file with the Cornell Journal of Law and Public Policy) (In 1985, the UNHCR passed resolution that women seeking asylum should be considered part of the "particular social group" category.).

174 See Neal, supra note 62, at 239.

175 The Board noted in an opinion that [W]e interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color or kinship ties . . . .

group. In *Sanchez-Trujillo v. INS*, the Ninth Circuit explained that the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by a common impulse or interest. The court maintained that the existence of a voluntary associational relationship, which imparts a common characteristic fundamental to their identity as a member of that discrete social group, is of central concern.

The *Sanchez-Trujillo" voluntary association" requirement contradicts the BIA's "immutable characteristic" requirement. The "voluntary association" requirement has also been criticized as having no basis in the Convention. However, neither the BIA criteria nor the Ninth Circuit criteria define "social group" for most courts. In fact, no United States court has yet defined clear-cut and adequate criteria for determining social group status. While *Sanchez-Trujillo* proffers a solution to the problem, its definition has not been adopted outside the Ninth Circuit. Other circuits have remained silent on the issue or have reached conclusions as to the cognizability of a particular social group without revealing the criteria upon which the conclusions are based.

Commentators including Karen Bower and Nancy Kelly advocate interpretations of the "social group" category that would encompass claims of gender-specific persecution. Like Maureen Mulligan, they believe that it is possible to recognize claims of gender-specific persecution under the current refugee definition if one category were simply construed a little more broadly by United States courts.

Bower recognizes all serious violations of human rights as persecution. She argues that gender-based violations are

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176 Gomez v. INS, 949 F.2d 660, 664 (2d Cir. 1991).
177 801 F.2d 1571 (9th Cir. 1986).
178 Id. at 1576; Kelly, supra note 63, at 52.
179 Kelly, supra note 63, at 53-54.
180 Parish, supra note 19, at 944.
181 Id.
183 Kelly, supra note 63.
184 Mulligan, supra note 159.
human rights violations and therefore ought to constitute persecution for purposes of the refugee definition. Although Bower's argument makes sense, the courts are unlikely to broaden the refugee definition to include gender-based violations. Ordinarily, the courts do not consider gender-based violence — such as sexual assault, domestic violence, genital mutilation, and coerced prostitution — as either human rights violations or persecution under the current refugee definition.

Kelly, however, proposes reworking the "membership in a social group" category. She also calls on "advocates and adjudicators [to] re-evaluate the manner in which the claims of women are investigated and presented to insure that these claims become a more accurate reflection of women's reality." Kelly's approach resembles Canada's approach which, under its new guidelines for conduct of refugee hearings, provides advice on how to deal with women who fear situations ranging from spousal abuse to rape, including gender-specific persecution such as female genital mutilation. However, as stated above, these guidelines are non-binding.

In attempting to create a framework that will recognize women's claims to refugee status on their own merit, the choice of methodology is important. Methodology can either empower women or simply reshuffle the status quo:

Method "organizes the apprehension of truth; it determines what counts as evidence and defines what is taken as verification." Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that have defined what counts within those structures, they may instead "recreate the illegitimate power structures [that they are] trying to identify and undermine."

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185 Bower, supra note 182, at 180-81.
186 Id. at 181.
187 Kelly, supra note 63, at 105.
188 Id.
190 See supra text accompanying notes 100-101.
In spite of current efforts to rework the existing categories of the refugee definition, courts will continue to fail to recognize women's claims. Laws and their interpretations are consistently seen through a male lens.\textsuperscript{192} As long as the legal system continues to be "objective" with regard to gender differences, women's claims will continue to go unrecognized because "[t]he male epistemological stance is objectivity, and sexual objectivity is the 'primary process of the subjection of women.'\textsuperscript{193}

The proposed approaches to recognizing women's refugee claims rely on methods that place a great deal of discretion in the hands of judges who are largely white, male, conservative, and unelected. These approaches do not openly challenge the biases against women inherent in the process of petitioning for refugee status. As Kelly states:

\begin{quote}
[B]ecause of the absence of the explicit recognition of gender-based persecution, and because of the social and political context in which the claims of women are adjudicated, women are much less likely than men to be found to meet the eligibility criteria for refugee status. This problem is twofold. First, the definition of refugee contained in the Convention does not specifically name gender as one of the bases upon which asylum can be granted. Second, in applying the refugee definition, adjudicators have traditionally neglected to incorporate the gender-specific claims of women in the interpretation of the other grounds recognized under the Convention.\textsuperscript{194}
\end{quote}

Thus, merely incorporating gender-based violations into the already existing categories is an insufficient approach to removing the inherent biases women currently must overcome in order to obtain refugee status.

IV. THE NEW CATEGORY — GENDER

The current categories of the refugee definition do not accommodate gender-specific persecution. Nor does the existing immigration adjudicatory structure see and understand the

\begin{footnotes}
\item \textsuperscript{192} Mulligan, supra note 159, at 377.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Kelly, supra note 63, at 4-5 (citations omitted).
\end{footnotes}
situation of women. No cohesive framework exists within which to evaluate gender-specific claims. United States law could attempt to incorporate the claims of women into the Protocol's categories, but that would not recognize the fact that the type of persecution women face is different from that of men. Nor would it compensate for the decidedly white, male slant of the current definition, or the biases of the immigration judges and the BIA. Thus, legislators must create a separate category.

The addition of gender as a sixth category under the refugee definition would be consistent with the evolutionary history of United States immigration law and general humanitarian goals. It would also recognize the unique problems that women face, as opposed to trying to fit them into pre-existing categories that do not consider women's needs and often work against them.

Only this additional category will allow women to receive the full benefits of refugee law, as the current system fails to recognize gender-specific oppression. It would clearly require both judicial recognition of the claims of women fleeing gender-specific persecution and careful consideration of such claims. It would also obviate the necessity for judicial or administrative intervention in cases where persecution is shown, but is not based on one of the existing categories. Explicit recognition of gender-specific oppression would ensure that claims to refugee status accurately reflect women's reality by allowing them to tell their story as opposed to attempting to tailor it to the current categories. This new category would also be consistent with humanitarian goals, such as assisting refugee women in their quest for freedom and dignity.

Some might argue that the addition of a category specifically for women could present problems for the refugee system overall. One possible argument against the inclusion of an additional category in the refugee definition is that the United States will be flooded with refugees. The recognition of gender as a specific category may cause women to flock to the United States in the belief that the country is a haven from all forms of gender-specific oppression. Yet, even women in the United States are not necessarily free from oppression.

195 Mulligan, supra note 159, at 376.
197 See generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR
Arguably, it is hypocritical of the United States to present itself as a refuge for women fleeing gender-specific oppression, when it has not dealt forcefully with such oppression within its own borders.\(^{198}\)

Theoretically, refugee floods could be a problem, but on a practical level, women often lack the financial resources to flee their home countries. The addition of a refugee category will not change that.\(^{199}\) Also, arrival in the United States does not guarantee refugee status. Even with the creation of a separate category, women still must jump the procedural hurdles to achieving refugee status.\(^{200}\) This is one reason overall refugee numbers are currently so small.\(^{201}\) Also, refugee status is an individual, not class, remedy, so the argument that there will be too many refugees should not be dispositive of individual claims.\(^{202}\)

If a fair interpretation of the additional category produced onerous results, it is within the province of Congress to act. Limits in place from the early stages of the Refugee Act of 1980\(^{203}\) could be implemented if this situation arose.

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\(^{199}\) For example, "although the American Medical Association is opposed to the procedures [clitoridectomy and infibulation], they are legal in the United States." Jacqueline Thorpe, Ontario Doctors Ban Female Circumcision, Reuters, Jan. 27, 1992, available in LEXIS, Nexis Library, REUTERS File.

\(^{200}\) In the words of one Canadian refugee advocate, "[t]he notion that women around the world are waiting with sneakers on to come to Canada is ridiculous." David Scanlon, Abused Women: Pressure Rises to Admit Them as Refugees, Calgary Herald, Jan. 23, 1993, at A5.

\(^{202}\) The applicant still must prove that she meets the other elements of the refugee definition. She must demonstrate that she has been persecuted in the past or that she fears future persecution that her fear of future persecution is well-founded, and that the feared persecution is by the government or by someone who the government is unable or unwilling to control. See supra Part I.

\(^{201}\) "[I]ndividuals who seek refugee status comprise probably the smallest group of potential immigrants." Neal, supra note 62, at 243.

\(^{202}\) "By pegging the United States definition of refugee to that generated by the United Nations in the Protocol and Convention, individual claims can be and are to be entertained more fairly. Therefore, "slippery slope" or "floodgate" arguments which are ultimately dispositive of individual claims are incongruous with the concept and purpose of asylum." Id. at 203.

\(^{203}\) "In order to implement the Protocol's inclusive refugee definition
Additionally, Congress would be at even greater liberty to implement guidelines for the use of the sixth category, as it is not currently part of the Protocol definition. Unlike the categories currently in the Refugee Act, which are defined and limited largely by the UN Convention and Protocol, the United States would define the contours of the new category. By adopting the new definition, the United States would take a step beyond Canada's new guidelines and take the lead in offering refuge to victims of gender-specific persecution.

The promulgation of laws in the United States to aid those who would choose to come to this country is not cultural imperialism. This is not an act of forcing our views on another; it is simply opening another path. We should provide these women with an alternative to remaining in a country that forces them into roles that they do not choose.

By conforming the United States refugee definition to the Protocol, Congress agreed to cooperate with the UNHCR. The UN, through the UNHCR, recognized the specific dangers that women face, and paved the way for member states to act by passing a non-binding motion to include women in the category of social group. This action recognizes that gender-specific persecution is an international refugee problem and that interpretations of the current definition have not helped the victims. Adding gender to the current refugee definition comports with the spirit of the UN's motion, and would be the next step in the evolution of United States refugee law. The United States would be among the first to implement a definition and attempt to create a cohesive framework, but it would not be the first to recognize gender-specific persecution.

without unacceptably expanding U.S. commitments, Congress coupled the new expansive definition with an overall cap [of 50,000] on the number of refugees to be admitted each year." Parish, supra note 19, at 935.

204 See supra notes 16-30 and accompanying text.

205 See supra notes 97-103 and accompanying text.

206 Bevis, supra note 26, at 399.

207 Scanlon, supra note 199, at A5.

208 In 1984, the European Parliament adopted a resolution calling upon states to accord refugee status within the "particular social group" category of the refugee definition to women who suffer cruel and inhuman treatment because they have violated the moral and ethical rules of their society. In 1985, the Executive Committee of the [UNHCR] considered a similar resolution, ultimately adopting a conclusion which recognized:

that states, in the exercise of their sovereignty, are free to adopt the
The addition of "gender" as a refugee category is a moral and political imperative. It is also a realistic goal, given increased international recognition of the particular dangers women refugees face.

[A] change is afoot. Even though many countries have grown less tolerant of refugees in general, international sympathy has grown for the traumas of women fleeing persecution.209

CONCLUSION

The current refugee framework does a disservice to women fleeing gender-specific persecution. Women fleeing severe and systemic discrimination who hope to gain refugee status must fit their claims into a framework that is ill-suited to recognizing gender-specific harms. Based on norms developed by the male-dominated system of post-World War II Europe, the five current categories of the United States refugee definition are insufficient to address the exigent refugee situation.

For a member of the international community, sitting by and allowing the systematic abuse of women to continue is tantamount to aiding and abetting it.210 Such an abdication of moral responsibility is anathema to everything that the United States is supposed to represent. As a country valuing freedom and individuality, the United States should not countenance oppression simply because the victims are women.

As a nation that has historically responded to the needs of the refugee population, the United States must take corrective interpretation that women asylum-seekers who face harsh and inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social group" within the meaning of Article 1A(2) of the United Nations Refugee Convention.

Kelly, supra note 63, at 71-72 (citations omitted). Other countries have granted asylum to Iranian women who refused to conform to gender-specific dress codes and other limitations. Id. at 78.


210 Cf. No Target Too Young, TIME, Apr. 26, 1993, at 10 ("The West, by not doing more, has been a little like an accomplice to a massacre." — Margaret Thatcher").
measures: the definition of refugee must be expanded to include gender. Recognizing gender as a refugee category would be consistent with "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands," and would create a legally cognizable ground for granting refugee status that is in line with domestic law and its recognition of gender-specific oppression. Moreover, it would place the United States at the forefront of global humanitarian efforts.

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest tossed, to me:
I lift my lamp beside the golden door.\(^{212}\)

\textit{Mattie L. Stevens}\(^{\dagger}\)


\(^{212}\) Emma Lazarus, Inscription on the Statue of Liberty.

\(^{\dagger}\) Candidate for J.D., 1994. I would like to thank the staff of the \textit{Cornell Journal of Law and Public Policy} for their assistance, and Gram, Gran, Granny, Mary, Uncle James, and my homies for their continuing moral support.