

PROVIDING A PATHWAY TO ASYLUM: RE-INTERPRETING “SOCIAL GROUP” TO INCLUDE GENDER

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“The United States may soon stand alone among industrialized nations in its refusal to fully acknowledge that women who suffer serious gender-based violations of their fundamental human rights are entitled to protection as refugees.”¹

“[B]eing a woman is a sufficiently political statement in itself, so far as violence against women, domestic, sexual or public, is part of the process of oppression.”²

RODY’S STORY

Rody Alvarado’s husband told her, “If you want to die, go ahead. But from here, you are not going to leave.”³ Rody Alvarado, a Guatemalan woman, was married at the age of sixteen to her then twenty-one year-old husband.⁴ “From the beginning of the marriage, her husband engaged in acts of physical and sexual abuse against [Rody].”⁵ Rody’s husband repeatedly raped and beat her before, during, and after unwanted sex.⁶ When Rody attempted to leave her husband, he came after her.⁷ When she went to the Guatemalan police, they refused to help.⁸ It was not until Rody came to the United States that she was able to escape,⁹ but this is more than many women in Rody’s situation in Guatemala can hope.¹⁰ She sought

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1. T.S. Twibell, *The Development of Gender as a Basis for Asylum in United States Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers from Cameroon, Eritrea, Iraq and Somalia*, 24 GEO. IMMIGR. L.J. 189 (2010) (quoting Karen Musalo & Stephen Knight, *Unequal Protection: When Women Are Persecuted, It’s Often Described as a Cultural Norm Rather Than a Reason to Grant Asylum*, 58 BULL. ATOMIC SCI., 56-57 (2002)).

2. *Id.* at 212 (quoting Guy S. Goodwin-Gill, *THE REFUGEE IN INTERNATIONAL LAW* (1983)).

3. *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 2001)

4. *Id.* at 908.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 909.

9. *Id.*

10. Karen Musalo, et al., *Crimes Without Punishment: Violence Against Women in Guatemala*, 21 HASTINGS WOMEN’S L. J. 161, 162 (2010), [hereinafter Musalo, *Crimes*

asylum on the basis of her membership in the social group comprised of women who are victims of extreme domestic violence.¹¹ The Board of Immigration Appeals (BIA), the “highest administrative body for interpreting and applying immigration laws,”¹² denied her petition for asylum, finding that she did not meet the requirements for a “social group” for asylum purposes.¹³ In 2009, Rody was eventually granted asylum after spending approximately fifteen years away from her two children waiting for the decision.¹⁴

I. INTRODUCTION

As Rody Alvarado’s case demonstrates, meeting the standard for asylum is often an extremely difficult, if not impossible, task.¹⁵ Asylum seekers must establish that they cannot or will not return to their native country because they have been persecuted or fear they will be persecuted if they return.¹⁶ However, the requirement does not end there. More importantly, asylum seekers must link the established persecution to one of the enumerated categories found within the definition of refugee—race, nationality, religion, political opinion, or-- as was the basis for Rody and the focal point of this Note-- membership in a particular social group.¹⁷ Establishing persecution alone is insufficient if the nexus to one of the enumerated categories is not met.¹⁸

What qualifies as a “social group” is a contested issue and is viewed differently by the United Nations High Commissioner for Refugees (UNHCR) and the United States’ Immigration and Nationality Act (INA).¹⁹

Without Punishment] available at <http://cgrs.uchastings.edu/law/articles.php>.

11. *Id.*

12. *Board of Immigration Appeals*, U.S. DEP’T OF JUST., <http://www.justice.gov/eoir/biainfo.htm> (last updated Nov. 2011).

13. *R-A-*, 22 I. & N. Dec. at 927.

14. Musalo, *Crimes Without Punishment*, *supra* note 10. Rody was entitled to asylum only after two remands to the BIA. This decision was decided around the same time as *Matter of L-R-*, found in Brief of Dep’t of Homeland Security (Apr. 13, 2009) (redacted) [hereinafter DHS Brief], available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>, which required that an amicus brief be filed by the Attorney General on behalf of the female asylum seeker. She, too, sought asylum on the possibility of domestic abuse. The matter of *L-R-* opened the asylum door to “Mexican women in domestic relationships. . .” Blake, *infra* note 61 at 73.

15. The Obama Administration recently began to allow claims for asylum based on extreme cases of domestic violence, provided that the applicant meets all parts of the asylum definition. See Karen Musalo, *Toward Full Recognition of Domestic Violence as a Basis for Asylum*, AMERICAN CONSTITUTION SOCIETY BLOG (Aug. 20, 2010), <http://www.acslaw.org/acsblog/toward-full-recognition-of-domestic-violence-as-a-basis-for-asylum>.

16. 8 U.S.C. § 1101(a)(42)(A)(2012).

17. *Id.*

18. *Id.*

19. See Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s*

In fact, the “evolution of the definition of ‘particular social group’ is one of the primary issues in both US asylum law and comparative international asylum law under the United Nations Convention Related to Refugees.”²⁰

In the United States, the category of “social group” has been very narrowly construed. While the “membership in a particular social group” category was originally created to provide a basis for relief for groups which did not fit into the other categories, it has been internationally interpreted to exclude large numbers of persecuted individuals because they do not neatly fit into a “social group.”²¹ Its limitations create an under-inclusive effect denying status for individuals seeking to escape persecution on account of many factors, especially on the basis of gender. However, persecution based on gender is a widespread problem throughout the world. Problems of forced marriages, rape, female genital mutilation, honor killings, and forced abortions are just a few examples of this type of persecution.

This Note proposes that the gaps in existing US asylum law have created a need for the re-interpretation and re-structuring of the meaning of “membership in a particular social group” to provide a uniform pathway to asylum for victims of gender-based persecution. This re-interpretation should be based on criteria outlined in existing international conventions, other countries’ domestic laws, and a widening of the idea of “immutable characteristic” as seen in earlier immigration opinions.

Specifically, Part I of this Note provides a brief introduction to the scope and purposes of this work. Part II provides background information on the widespread phenomenon of gender-based violence as it occurs throughout the world and how restrictive US asylum policies are unable to remedy or alleviate this problem. Part III explains how the international community defines and interprets “membership in a particular social group.” This section focuses on the United Nations’ approach, as well as approaches used in Canada, Great Britain, and Australia. Part IV of this Note explains the United States’ standard for “membership in a social group” and its various inconsistencies and inadequacies. Principally, this section focuses on the “social visibility” test, the current standard used by Immigration Officers, Immigration Courts, the Board of Immigration Appeals (BIA), and the majority of United States Circuit Courts of Appeals. Part IV also focuses on new positive trends in social group interpretation and why they, too, are still inadequate to combat gender-based persecution.

Part V of this Note will advocate a new means for interpreting and accessing US asylum claims for gender-based persecution. This section will explain the proposed re-interpretation of the United States’ definition of “social group,” relying on international standards, approaches from other

Claims, 29:2 REFUGEE SURV. Q. 46, 62-63 (2010).

20. Twibell, *supra* note 1, at 199.

21. *See id.*

countries, and ideas of self-identification, immutability, and equal protection. Additionally, this section will address the reasons why the current administration has failed to include gender-based persecution within the definition of social group and explain why the uniform pathway approach is the best. Finally, Part VI of the Note will explain how expanding the idea of “membership in a particular social group” to include gender will allow for greater protection to women.²²

II. BACKGROUND: GENDER-BASED VIOLENCE

A. *Gender-Based Violence Is an International Problem*

Violence against women is a pervasive problem throughout the world.²³ It “cuts across lines of income, class and culture.”²⁴ “While rates of women exposed to violence vary from one region to the other, statistics indicate that violence against women is a universal phenomenon and women are subjected to different forms of violence – physical, sexual, psychological and economic – both within and outside of their homes.”²⁵ This presents an almost insurmountable obstacle to achieving gender equality, economic and social development, and peace.

Gender-based violence was not universally recognized as a human rights violation until very recently. “It was only in June 2008, that the United Nations Security Council voted unanimously ‘that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide.’”²⁶ The Security Council went on to note that women and girls are particularly targeted in military tactics, in which sexual violence is used as a means “to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members

22. This Note will be limited to a small portion of the asylum definition, “membership in a particular social group.” It will not address, at least directly, asylum claims based on race, nationality, religion, or political opinion. Furthermore, the Note will not address the entire standard required to qualify as a refugee: past persecution and/or well-founded fear of future persecution based on one of the enumerated reasons. While meeting the entire standard is necessary to apply for asylum or refugee status in the United States, the scope of this Note is limited to meeting and expanding the preexisting standard for membership in a particular social group. This Note will not address the other hurdles asylum seekers must jump, such as meeting the persecution requirement and the credibility requirement.

23. U.N. DEP'T OF ECON. & SOC. AFFAIRS, *THE WORLD'S WOMEN 2010 TRENDS AND STATISTICS*, (2010) [hereinafter U.N. *WORLD'S WOMEN 2010 TRENDS*].

24. *Id.* at 127.

25. *Id.* at x.

26. U.N. High Comm'n for Refugees, *Age, Gender and Diversity Policy: Working with People and Communities for Equality and Protection*, at 194 (June 2011), available at <http://www.unhcr.org/4e7757449.html> (citing S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008)) [hereinafter U.N. *Age, Gender, and Diversity Policy*].

of a community or ethnic group.”²⁷

As both a cause and consequence to this gender-based violence, “[women] often have fewer opportunities and resources, lower socio-economic status, [and] less power and influence” than their male counterparts.²⁸ Women who suffer from gender-based violence “face enormous challenges providing for their families and themselves.”²⁹ This gender disparity is further amplified by displacement, which leads to exposure, “exploitation, enslavement, rape and other forms of abuse and Sexual and Gender Based Violence (SGBV).”³⁰

According to the UNHCR, among the “approximately 50 million uprooted people around the world,” including refugees and displaced peoples, “[b]etween 75-80 percent of them are women and children.”³¹ Furthermore, the United States General Accounting Office (GAO) has found that female refugees are “among the world’s most vulnerable populations.”³² Despite comprising such a large segment of the displaced persons globally, and despite the vulnerability women face at home and as refugees, women represent a disproportionately low percentage of asylum seekers, and an even lower percentage of those women gain relief through residency.³³

B. Inability to Escape Gender-Based Persecution Through Asylum

This dire reality of females’ inability to qualify for asylum “is constituent of continued female oppression.”³⁴ Particularly in the United States, the difficulty in meeting the standard for asylum perpetuates continued oppression on the basis of gender. This problem is exemplified through the notable cases of Rody Alvarado, Aruna Vallabhaneni, and Elizabeth Ngengwe.³⁵

In *In re R-A-*, the BIA held that Rody Alvarado, a victim of extreme

27. S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008).

28. U.N. *Age, Gender, and Diversity Policy*, *supra* note 26, at 17.

29. *Id.*

30. *Id.*

31. Twibell, *supra* note 1, at 194 (quoting *The World of Refugee Women at a Glance*, REFUGEE MAGAZINE, Issue 126, available at <http://www.unhcr.org/publ/PUBL/3cb6ea290.html>).

32. *Id.* (quoting U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE RANKING MINORITY MEMBER, COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE, HUMANITARIAN ASSISTANCE: PROTECTING REFUGEE WOMEN AND GIRLS REMAINS A SIGNIFICANT CHALLENGE 1 (2003), available at <http://www.gao.gov/new.items/d03663.pdf>).

33. See UNHCR, DIVISION OF OPERATIONAL SERVICES, FIELD INFORMATION AND COORDINATION SUPPORT SECTION, 2006 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 9 (July 16, 2007), available at <http://unhcr.org/statistics/STATISTICS/4676a71d4.pdf>.

34. S.C. Res. 1820, *supra* note 27, ¶ 4.

35. *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008).

and brutal domestic violence, failed to qualify for asylum due to the lack of "membership in a particular social group."³⁶ Rody did not "introduce meaningful evidence that her husband's behavior was influenced by his perception of her opinion,"³⁷ that she should not be subjected to rudimentary beatings by her husband, and that she should be able to leave the marriage. The BIA went on to note that simply because the applicant "shared descriptive characteristics" with other women who were victims of domestic violence in Guatemala, the evidence was insufficient to qualify the applicant as a member of a particular social group under the Immigration and Nationality Act (INA).³⁸ Despite the Court's acknowledgment of the horrific instances of abuse Rody suffered, the Court was bound by precedent and Rody was barred from immigration relief because she could not meet the narrow definition promulgated by Congress.³⁹

In the case of Aruna Vallabhaneni, Aruna was a young woman who fled India to escape her abusive husband.⁴⁰ She came to the United States seeking asylum.⁴¹ Through an arranged marriage, Aruna married her husband at the young age of seventeen.⁴² Her husband regularly beat her if she refused to give him money for his gambling problem.⁴³ On one occasion, Aruna lost her sense of smell as a result of a particularly unforgiving beating.⁴⁴ On another occasion, she was hospitalized for two days.⁴⁵ Neither complaint to the police nor to her family offered her any respite from these abuses.⁴⁶ Aruna came to the United States with the hope of gaining asylum for herself and a safe home for her children. Aruna's claim for asylum was denied.⁴⁷ She has been awaiting a final decision for over ten years while her children wait without their mother in India.⁴⁸

In the third case, Elizabeth Ngengwe was a Cameroonian woman who sought asylum on the basis of membership in the social group of Cameroonian widows.⁴⁹ When her husband passed away in 2000, her

36. R-A-, 22 I & N Dec. at 927.

37. *Id.* at 906.

38. *Id.* at 919 (citing 8 U.S.C. § 1101 (a)(42)(A) (1994)).

39. *Id.* at 927.

40. Alex Kotlowitz, *Asylum for the World's Battered Women*, N.Y. TIMES (Feb. 11, 2007), <http://www.nytimes.com/2007/02/11/magazine/11wwlnidealab.t.html>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Kotlowitz, *supra* note 40.

46. *Id.*

47. *Id.*

48. *Id.*

49. Twibell, *supra* note 1, at 213-16.

husband's parents inexplicably blamed her for his death.⁵⁰ Elizabeth's in-laws came into her home following her husband's death and took all of her and her husband's material possessions.⁵¹ As part of an "exaggerated mourning period," Elizabeth was forced to sleep on the floor and to have her head shaved with a broken bottle; she was not allowed to bathe or greet people with her hands; and her children were not allowed to leave the home.⁵² Facing threats of being forced to marry her deceased husband's uncle or never seeing her children again, Elizabeth fled Cameroon and made her way to the United States.⁵³

When Elizabeth arrived in United States in 2001, she filed for asylum on the basis of being a part of a protected social group, defined as "widowed Cameroonian females of the Bamileki tribe ...who are falsely accused of causing her husband's death" or more generally, "Cameroonian widows."⁵⁴ Elizabeth's claim for asylum was denied by both the Immigration Judge and the BIA, each court finding that Elizabeth had not met the standard for a recognizable social group.⁵⁵ While both courts agreed that Elizabeth's plight was tragic, she had not established a social group based on an immutable characteristic.⁵⁶ The Eighth Circuit granted Elizabeth's petition for appeal in 2008 and remanded the case to the BIA;⁵⁷ however, Elizabeth is still awaiting a decision on her asylum claim.⁵⁸

The previous examples suggest that it is often difficult to articulate the precise grounds on which a woman faced with persecution qualifies for asylum purposes. In fact, defining the social group by a specific and recognized characteristic, whether it is immutability or social perception, is not an easy task. While the United States has recognized a few limited exceptions to this rule, i.e., women who refuse to undergo the procedure of female genital mutilation⁵⁹ and certain victims of domestic violence

50. *Id.* at 213 (citing Opening Brief at 3, Appeal of the Decision of the Immigration Judge, In the Matter of Elizabeth Ngengwe (July 26, 2003)). Elizabeth's parents thought that her race and family history brought bad luck to the family, eventually causing her husband's death.

51. *Id.* at 214.

52. *Id.* The typical mourning period in Cameroon at the time was two weeks. However, Elizabeth's in-laws forced her to endure two month of physical and emotional turmoil. *Id.*

53. *Id.* at 214-15.

54. *Id.* at 216.

55. *Id.* at 221.

56. *Id.* at 221.

57. *Id.* at 225. See also *Ngengwe v. Mukasey*, 543 F.3d 1029, 1031 (8th Cir. 2008).

58. *Twibell*, *supra* note 1, at 225. At the time *Twibell's* work was published in 2010, Elizabeth's claim was still pending before the BIA.

59. *In re Kasinga*, (B.I.A. 1996) ("Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a 'particular social group' within the definition of the term "refugee" under section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994)."

inflicted by immediate relatives,⁶⁰ there are still large gaps that can only be remediated by broadening the definition of social group to include gender.

III. EXISTING STANDARDS FOR "SOCIAL GROUP" IN INTERNATIONAL LAW

In order to address how the United States views "membership in a particular social group," it is appropriate to first look to the original and existing standard for refugee status and its application in international law. The United States relied heavily on preexisting international law, principally international laws articulated by the United Nations General Assembly and the United Nations High Commissioner on Refugees (UNHCR), in drafting its current immigration laws and standards.⁶¹

Established in 1951, the UNHCR was created primarily for the "international protection" of refugees.⁶² The UNHCR seeks to meet this goal by assisting governments in reaching permanent and lasting solutions to remedy problems faced by refugees and by promoting the "ratification of international conventions for the protection of refugees."⁶³ The powers and purposes of the UNHCR are outlined in the United Nations Convention Relating to the Status of Refugees (Refugee Convention),⁶⁴ one of the most widely used refugee conventions in the world.⁶⁵ Under this Convention, the UNHCR continues to provide international protection for refugees and guidance for states.

A. UNHCR's Standard for Refugee and Social Group

Membership in a particular social group is only one factor to meeting the UNHCR's definition of refugee,⁶⁶ which in itself is constantly changing and nearly always in dispute under international and domestic laws. The Refugee Convention, Article 1, defines who qualifies as a "refugee."⁶⁷ The

Id.)

60. Twibell, *supra* note 2, at 213-21.

61. Jillian Blake, Commentary, *Welcoming Women: Recent Changes in U.S. Asylum Law*, 108 MICH. L. REV. FIRST IMPRESSIONS 71, 72 (2010).

62. United Nations Convention Relating to the Status of Refugees, Geneva, July 28, 1951, UNITED NATIONS [hereinafter U.N. REFUGEE CONVENTION], available at <http://www.unhcr.org/3b66c2aa10.html>; see also ENABLING UN RESOL. 428(V) (1950).

63. Statute of the Office of the United Nations High Comm. for Refugees, G.A. res. 428 (V), annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950).

64. See generally U.N. REFUGEE CONVENTION, *supra* note 62.

65. *Id.*

66. *E.g.*, Twibell, *supra* note 2, at 246; U.N. REFUGEE CONVENTION, *supra* note 62. Under international and national immigration law, refugees and asylees are subject to the same standard. The only practical difference between the two categories is that refugees petition for asylum while they are outside of the country from which they are seeking asylum and asylees apply once they are already within the country from which they are seeking asylum.

67. U.N. REFUGEE CONVENTION, *supra* note 62, at 14.

Refugee Convention's definition and applications operate as model standards for states' asylum laws; the Convention is not binding on a state unless it is ratified by a state who is party to the Convention. Nevertheless, it has been ratified by 145 countries.⁶⁸ The United States, however, has not acceded to the Convention.⁶⁹

1. *United Nations' Definition of Refugee*

In 1951, the United Nations set out the standard for defining a refugee under international law during the Refugee Convention.⁷⁰ Pursuant to Article 1 of the Convention:

The term "refugee" shall apply to any person who ... [a]s 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;
⁷¹

In summary, a refugee is a person who fears returning to their native country because of persecution, past or future, on the basis of race, religion, nationality, social group, or political opinion. However, the ambiguity of the definition has led to countless interpretations of "refugee" under the Convention. Indeed, this section of the Refugee Convention is viewed as one of the most controversial Articles in international asylum law.⁷²

2. *United Nations' Definition of Social Group*

The Refugee Convention further defines what it means to be a member of a "particular social group." According to the UNHCR, a social group is "a group of persons who share a *common characteristic* other than the risk of being persecuted, or who are perceived as a group by society."⁷³

68. U.N. TREATY COLLECTION, CONVENTION RELATING TO THE STATUS OF REFUGEES, UNITED NATIONS, *Treaty Series*, vol. 189, p. 137, available at http://treaties.un.org/pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en.

69. *Id.*

70. U.N. REFUGEE CONVENTION, *supra* note 62, at 14.

71. *Id.*

72. See e.g., U.N. High Comm. for Refugees, Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees (Apr. 2001), available at <http://www.unhcr.org/refworld/docid/3b20a3914.html>.

73. Blake, *supra* note 61, at 72 (quoting United Nations High Commissioner for Refugees, Guidelines on International Protection, "Membership of a particular social group,"

This common “characteristic will often be one that is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.”⁷⁴

3. *United Nations' Interpretation of Social Group*

More importantly, the concept of social group under the Refugee Convention maintains two essential “characterizations of a particular social group: immutability - members of the group share a trait that is innate; and social perception - society views members of the group as such.”⁷⁵

In addition to the definition found in the Convention, the UNHCR has provided several subsequent guidelines offering further insight on how “social group” should be interpreted by states.⁷⁶ In 2002, the UNHCR issued guidelines that further define the “protected characteristic” and “social perception” approaches as alternative ways of establishing a particular social group, instructing ratifying states to determine first if there is a protected characteristic. Then, only if no such characteristic exists, a state can determine whether the group is recognized by society.⁷⁷

These two characterizations of membership in a particular social group are widely incorporated into domestic laws.⁷⁸ In fact, “among the major common law countries ... Canada, New Zealand, and the United Kingdom follow the principled ‘protected characteristic’ approach.”⁷⁹ Australia has emphasized the “social perceptions” approach, “while also taking immutable characteristics into account.”⁸⁰ The United States in the past followed the social perception approach, but now is following the “social visibility”⁸¹ approach, representing a “significant departure” from international precedent.⁸²

HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/3d58de2da.html>).

74. *Id.*

75. *Id.*

76. Heaven Crawley, *Gender-Related Persecution and Women's Claims to Asylum*, FAHAMU REFUGEE LEGAL AID, <http://www.frlan.org/content/gender-related-persecution-and-women%E2%80%99s-claims-asylum> (last visited Apr. 11, 2013); See e.g., UNHCR, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 6, U.N. DOC. HCR/GIP/02/01 (May 7, 2002) [hereinafter *UNHCR Guidelines*].

77. Fatma Marouf, *The Emerging Importance of "Social Visibility" in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 *Yale L. & Pol'y Rev.* 47 (2008), available at <http://scholars.law.unlv.edu/facpub/419>.

78. See generally, *id.*

79. *Id.* at 48-49.

80. *Id.*

81. The social visibility approach is the current, *de facto* standard for social group characterizations in the United States. While the States also rely on the concept of immutability, social visibility works in conjunction with the aforementioned social perception approach.

82. See e.g., Marouf, *supra* note 77, at 49.

4. *Gender Is Treated as a “Social Group”*

Under the Refugee Convention’s definition of refugee, gender is not included as an enumerated ground used to meet the persecution nexus requirement.⁸³ However, the two-step process provided in the UNHCR guidelines can and has been interpreted to apply to gender-based asylum petitions.⁸⁴ First, under these guidelines, gender, as interpreted within its social or political context, is designated as a protected social group. Second, gender is arguably socially perceptible—female and male gender identities are perceived by the greater society.⁸⁵ Under either of these interpretations of the international definition, gender can be treated as an underlying basis for a social group. Accordingly, the asylum seeker would need to prove that she was persecuted on account of her social group of “female.”

As one scholar suggests, “[i]t is important to understand that women’s claims for asylum can, more often than not, be properly recognised within the meaning of the [Refugee] Convention if their experiences are properly understood within the social and political context within which they occur.”⁸⁶

In addition, the UNHCR guidelines have been proactive in the move toward including gender as either an individual enumerated class or under the social group category.⁸⁷ Specifically, in relation to gender-based persecution claims for asylum, the UNHCR guidelines state that while gender is “not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment.”⁸⁸ Therefore, the guidelines can be properly interpreted to include “gender-related claims.”⁸⁹ “As such, there is no need to add an additional ground to the 1951 Convention definition.”⁹⁰ The UNHCR has made clear that “women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.”⁹¹ Therefore, the UNHCR does not need to amend the rules.⁹²

Despite this argument, critics contend that the Refugee Convention’s definition of refugee is ineffective and requires modification.⁹³ While

83. *Id.* at 70; *see also* Blake, *supra* note 61, at 71.

84. *Id.* at 49.

85. *Id.* at 74.

86. Crawley, *supra* note 76.

87. *Id.*

88. *Id.*

89. *Id.*

90. UNHCR, *GUIDELINES*, *supra* note 73, at ¶ 6.

91. *Perdomo v. Holder*, 611 F.3d 662, 667 (9th Cir. 2010).

92. Additional practical considerations lay at the heart of this decision.

93. *Definition of a Refugee Needs Updating, Report Tells United Nations*, University of

substantial guidelines offer additional protection to gender-based persecution in interpreting the Refugee Convention's definition of refugee, "the definition is more of an issue for individual asylees seeking to qualify as a 'refugee' under the more detailed asylum laws of the respective state in which they find themselves."⁹⁴ Therefore, the domestic laws of the nation in which the asylee is seeking safety offers the definition in which the asylee must meet.

B. Other Domestic Standards Utilizing the UNHCR Approach

Specifically, the UNHCR Committee has urged "states to develop and implement domestic criteria and guidelines regarding protection for women who claim refugee status based on a well-founded fear of gender-related persecution."⁹⁵ In fact, the approach has a basis in the UN Refugee Convention, subsequent UNHCR guidelines, and other countries' definitions of refugee.⁹⁶ Countries such as Australia,⁹⁷ Canada,⁹⁸ and Great Britain⁹⁹ now recognize "social groups defined by gender," but the "United States has been reluctant to follow suit."¹⁰⁰ The remainder of this section will focus on how Canada, Great Britain, and Australia articulate their standards for asylum and include gender-based persecution as a means to asylum for a particular social group.

1. Canada – A Precedent

Canada was the first country to "recognize that women suffer from gender-specific forms of persecution that should be recognized" under the UN Refugee Convention.¹⁰¹ The core body of law that governs Canada's

Oxford, June 25, 2009, available at http://www.ox.ac.uk/media/news_releases_for_journalists/090625_2.html.

94. Twibell *supra* note 1, at 207.

95. *Gender Guidelines*. CENTER FOR GENDER & REFUGEE STUDIES, http://cgrs.uchastings.edu/law/gender_guidelines.php#_ednref3 (last visited Apr. 11, 2013) (citing UNHCR Exec. Comm., Conclusion No. 73 Refugee Protection and Sexual Violence, ¶ e., (1993), reprinted in UNHCR, *A Thematic Compilation of Executive Committee Conclusions on International Protection* 430-32 (2nd ed. 2005), available at <http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf>; UNHCR Exec. Comm., Conclusion No. 77 (1995)) [hereinafter *Gender Guidelines*].

96. Marouf, *supra* note 77, at 49.

97. See *Minister for Immigration & Multicultural Affairs v. Khawar* [2002] HCA 14, 210 CLR 1, 13-14 (Austl.).

98. See *Ward v. Att'y Gen. of Can.*, [1993] 2 S.C.R. 689, 739. (Can.), available at: <http://www.unhcr.org/refworld/docid/3ae6b673c.html> (last visited Apr. 11, 2013).

99. See *Islam v. Sec'y of State for the Home Dep't*, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.) (U.K.).

100. Marouf, *supra* note 77, at 90.

101. Twibell *supra* note 1, at 197 n. 23. "There is increasing international support for the application of the particular social group ground to the claims of women who allege a fear of persecution solely by reason of their gender, within the meaning of Article 1 A(2) of the

immigration and refugee programs is found in the Immigration and Refugee Protection Act.¹⁰² While this Act does not refer to gender-based persecution itself, Canada issued national guidelines “regarding gender-based persecution in 1993.”¹⁰³ In 1993 and again in 2003, Canada updated the guidelines to include gender-based persecution claims, allowing gender as a social group.¹⁰⁴

Canadian Guideline Four—Women Refugee Claimants Fearing Gender-Related Persecution (Guideline Four), issued in 2003, states that persecution resulting from certain circumstances of severe discrimination based on gender could be seen as reasonable grounds for persecution.¹⁰⁵ Guideline Four went on to note that a “gender-defined particular social group” may be a solid basis for asylum when two necessary considerations are met.¹⁰⁶ First, the idea that most “gender-specific claims involving fear of persecution for transgressing religious or social norms may be determined on the grounds of religion or political opinion.”¹⁰⁷ Second, the consideration is that women may establish a well-founded fear of persecution “by reason of her membership in a gender-defined particular social group,” a group “defined by an innate or unchangeable characteristic.”¹⁰⁸ Guideline Four went on to note that the fact that a social group is comprised of a large number of people is irrelevant because “race, religion, nationality and political opinion are also characteristics that are shared by a large number of people.”¹⁰⁹ Rather, “[t]he relevant assessment is whether the claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group.”¹¹⁰

While these guidelines are not binding on Canadian Courts, “the Federal Court of Canada determined that Canadian courts should follow the guidelines unless circumstances are such that a different analysis is appropriate.”¹¹¹

1951 United Nations Refugee Convention.” Immigration and Refugee Board of Canada, *Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)* 13, (Feb. 2003), available at <http://www.unhcr.org/refworld/docid/4713831e2.html>.

102. *Gender Guidelines*, *supra* note 95 (citing Immigration and Refugee Board of Canada website, <http://www.irb-cisr.gc.ca/Eng/Pages/index.aspx>).

103. *Id.*

104. *Id.*

105. Immigration and Refugee Board of Canada, *Compendium of Decisions: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution (Update)*, (Feb. 2003), available at: <http://www.unhcr.org/refworld/docid/4713831e2.html>, at 14. [hereinafter Canadian Immigration Guideline 4].

106. *Id.* at 12.

107. *Id.*

108. *Id.* at 15.

109. *Id.*

110. *Id.*

111. *Gender Guidelines*, *supra* note 95 (citing Amy K. Arnett, *One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human*

i. Attorney General of Canada v. Ward

Canada's approach to gender-based persecution claims began in 1993 with the case *Attorney General of Canada v. Ward*.¹¹² *Ward* was an unlikely case to be the basis for gender-based claims of asylum in Canada because the asylum seeker, Patrick Ward, sought asylum on the basis of political opinion.¹¹³ Patrick was a member of the Irish National Liberation Army (INLA).¹¹⁴ He was assigned to guard, and then ordered to kill, a group of hostages, but he allowed them to escape.¹¹⁵ When his deeds were discovered, he was tortured and sentenced to death.¹¹⁶ He eventually escaped, but was later caught and sent to jail because of his initial involvement with the kidnapping.¹¹⁷ Patrick eventually escaped to Canada and claimed refugee status. He was denied asylum by both lower courts and appealed to the Supreme Court of Canada.¹¹⁸

The Supreme Court of Canada, drawing on the preamble to the United Nations' Refugee Convention, which states that "human beings shall enjoy fundamental rights and freedoms without discrimination,"¹¹⁹ found there to be an inherent limit to cases under the United Nations' Refugee Convention.¹²⁰ "Accordingly, '[t]he manner in which groups are distinguished for the purposes of discrimination law can . . . appropriately be imported into this area of refugee law.'"¹²¹ Following this reasoning, the Court found three possible avenues for establishing a particular social group, the first being "groups defined by an innate or unchangeable characteristic."¹²² Under this first avenue, the *Ward* court explained that a social group would include, "individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists."¹²³ Thus, in dicta, the Supreme Court of Canada recognized explicitly, for the first time, that

Rights Under the Safe Third Country Agreement, 9 LEWIS & CLARK L. REV. 951, 969 (2005) (citing *Narvaez v. Canada*, [1995] 2 F.C. 55, 62 (Can.)).

112. *Ward v. Att'y Gen. of Can.*, [1993] 2 S.C.R. 689, 736 (Can.) (recognizing non-State persecution for the purpose of refugee status).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Ward*, S.C.R. 689 (Can.).

119. *Id.*

120. *Id.*; Marouf, *supra* note 77, at 54.

121. Marouf, *supra* note 77, at 55 (citing *Ward*, S.C.R. 689 (Can.)).

122. *Id.*; see *Ward*, S.C.R. 689 (Can.) (the second two possibilities are "groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and...groups associated by a former voluntary status, unalterable due to its historical permanence.") *Id.*

123. *Ward*, S.C.R. 689.

gender-related persecution could be an acceptable basis for asylum.¹²⁴

ii. Narvaez v. Canada

Canada went beyond the scope of *Ward* to specifically include gender-based persecution as a basis for “social group” within the asylum definition in *Narvaez v. Canada*.¹²⁵ In *Narvaez*, an Ecuadorian woman sought asylum in Canada because she feared violence at the hands of her ex-husband.¹²⁶ She had suffered seven years of abuse, and the police in Ecuador failed to offer her protection.¹²⁷ Basing its reasoning on the Canadian Guidelines and the *Ward* decision, the Court found that “women in Ecuador subject to domestic violence belong to a particular social group.”¹²⁸ “The past experience of the claimant and the experiences of similarly-situated women were evidence of the lack of protection available.”¹²⁹ Thus, Ms. Narvaez was granted asylum on the basis of her membership in a particular social group, one of gender.

2. Great Britain

Canada was not alone in pioneering the expanding concept of social group to include gender as an acceptable basis for asylum. “On March 25, 1999, the House of Lords of the United Kingdom issued an historic decision granting asylum protection to two Pakistani women fleeing violence by their husbands and related retaliatory abuse tolerated, and to some extent sanctioned, under Pakistani law.”¹³⁰

In *Islam (AP) v. Secretary of State for the Home Department; R. v. Immigration Appeal Tribunal ex parte Shah (AP)*, [“*ex parte Shah*”], the majority of the House of Lords found that “gender can define a ‘particular social group,’ one of the five grounds of persecution in the definitional criteria for refugee status or asylum eligibility.”¹³¹ In this case, two married Pakistani women sought asylum in Great Britain after they were victims of domestic violence and forced to leave their homes.¹³² Each woman was at risk of being falsely accused of committing adultery,¹³³ a crime under

124. *Id.*

125. *Narvaez v. Canada* (Minister of Citizenship and Immigration), [1995] 2 F.C. 55 (T.D.).

126. *Id.*

127. *Id.*

128. *Id.*

129. Canadian Immigration Guideline 4, *supra* note 105.

130. Twibell, *supra* note 1, at 208 n.112.

131. Deborah E. Anker, et al., *Defining “Particular Social Group” in Terms of Gender: The Shah Decision and U.S. Law*, 76 IR 1005 (1999).

132. *Islam v. Sec’y of State for the Home Dep’t*, [1999] 2 A.C. 629 (H.L.).

133. *Id.*

Islamic law.¹³⁴ The Pakistani women claimed that if they were forced to return to Pakistan, they could be criminally punished for sexual immorality, a crime punishable by flogging or stoning to death.¹³⁵ Both women sought refugee status as members of a particular social group under the United Nation's definition, claiming a well-founded fear of being persecuted for such membership.¹³⁶ The principal issue faced by the court was "whether the appellants [were] members of a particular social group within the meaning of article 1A(2) of the [United Nations' Refugee] Convention."¹³⁷

In reaching the ultimate conclusion to grant the appellants' asylum, the *ex parte Shah* court made several findings of fact. The Court found that domestic violence and abuse of women was prevalent in Pakistan, but that the "distinctive feature in these cases [was] that discrimination against women in Pakistan is partly tolerated and partly sanctioned by the state."¹³⁸ The Court accepted that each appellant had a well-founded fear of persecution, but found the case turned on whether they qualified as members of a particular social group.¹³⁹ The court found the reasoning behind the persecution covered Pakistani women because "they are discriminated against and as a group they are unprotected by the state."¹⁴⁰ Ultimately the House of Lords granted both the women's appeals, finding that "it would be contrary to the United Kingdom's obligations" to force the appellants to leave the country.¹⁴¹

What is interesting about the *ex parte Shah* case is that the House of Lords could have chosen, much like the United States' courts have done,¹⁴² a more limited definition of "social group;" it could have limited its opinion to Pakistani women fleeing domestic violence and being accused of adultery. However, the House of Lords specifically mentioned that the women were persecuted because they were women, thus qualifying gender as a social group.

134. SAINT GROUP, PSO LANGUAGE & CULTURE, ISLAMIC LAW: SHARIA AND FIQH, <http://www.saint-claire.org/resources/Islamic%20Law%20-%20SHARIA%20AND%20FIQH.pdf> (last visited Apr. 11, 2013).

135. *Islam*, 2 A.C. 629 (H.L.).

136. U.N. REFUGEE CONVENTION, *supra* note 62, Art. 1 A(2) (articulating the definition of refugee). *Islam*, 2 A.C. 629 (H.L.).

137. *Islam*, 2 A.C. 629 (H.L.).

138. *Id.*

139. *Id.*

140. *Id.* at 9. The Court went on to note that even if the women in the case did not qualify under a particular social group, the women were "members of a more narrowly circumscribed group" based on "[t]he unifying characteristics of gender, suspicion of adultery and lack of state protection . . ." *Id.* at 10.

141. *Id.* at 12.

142. *See e.g., In re R-A-*, 22 I. & N. Dec. 906 (BIA 2001).

3. Australia

As early as 1994, Australia recognized the unique characteristics of gender-based persecution in relation to the United Nations' Refugee Convention.¹⁴³ Specifically, in the 1994 case of a Filipina woman who was "systematically and sexually abused over the course of a 27-year marriage,"¹⁴⁴ the Australian Refugee Review Tribunal (RRT) found that women share both immutable and social characteristics which make them a recognizable social group and consequently subjects them to persecution.¹⁴⁵ The RRT went on to mention the social characteristics that bind women together into a social group of gender: "ability to give birth," "role of principal child-rearers," inability to make the same wages as men, and "fear of being subjected to male violence . . ."¹⁴⁶ Thus, the RRT saw no reason not to recognize the particular social group of "women" as defined and conceptualized by their gender.

Australia's interpretation of gender-based social groups is articulated in *Minister for Immigration & Multicultural Affairs v. Khawar*, where a Pakistani woman came to Australia with her three daughters after being a victim to repeated violence at the hands of her husband and his family.¹⁴⁷ In *Khawar*, Ms. Khawar claimed asylum on the basis that the Pakistani police had systematically discriminated against her by failing to provide her protection and that this was tolerated and sanctioned by the state.¹⁴⁸ Accordingly, the applicant argued that her persecution was based on the state's failure to protect a particular social group—"women in Pakistan."¹⁴⁹

Ms. Khawar's petition for asylum was initially denied by Australia's Department of Immigration, Multiculturalism and Ethnic Affairs¹⁵⁰ and Australia's appellate body, the Refugee Review Tribunal. Both courts found that Ms. Khawar could not establish the needed nexus between the persecution she faced and the United Nations' Refugee Convention's

143. The Committee on Immigration and Nationality Law Assoc. of the Bar of City of New York, *Gender-Related Asylum Claims and the Social Group Calculus: Recognizing Women as a "Particular Social Group"* Per Se, 5 (Mar. 27, 2003) available at <http://www.nycbar.org/pdf/report/FINAL%20%20Gender%20Related%20Asylum%20Claims.pdf>.

144. *Id.* at 11.

145. *Id.* (citing N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994) (Hunt) (emphasis added)).

146. *Id.*

147. *A Compilation of Australian Refugee Law Jurisprudence*, AUSTRALIAN REFUGEE L. JURIS. COMPILATION, 141 (Feb. 2006), available at <http://www.unhcr.org/refworld/docid/3f5c5ff2.html> (last visited Apr. 11, 2013).

148. *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1, 5-6 (Austl), available at <http://www.unhcr.org/refworld/pdfid/3deb326b8.pdf>.

149. *Id.*

150. Australia's equivalent to United States' Citizenship and Immigration Services ("USCIS").

standard for asylum. Specifically, the RRT found that Ms. Khawar “was harmed for personal reasons” in relationship to her marriage and that the Refugee Convention was “not intended to provide protection to people involved in personal disputes.”¹⁵¹

On appeal to Australia’s Federal Court, the Court considered two issues. The first was “whether the failure of a country of nationality to provide protection against domestic violence to women, in circumstances where the motivation of the perpetrators of the violence is private, can result in persecution of the kind referred to in Art 1A(2) of the [Refugee] Convention.” The second was whether “women or, for the present purposes, women in Pakistan may constitute a particular social group within the meaning of the Convention.”¹⁵² The Court answered both questions in the affirmative.

Specifically, the Australia Federal Court found that the RRT erred in not making any findings “in relation to any particular social group of which Ms. Khawar might be a member.”¹⁵³ As a result, the RRT had also erred in failing to make a finding in relation to the lack of police protection for Mr. Khawar’s social group, women in Pakistan.¹⁵⁴

As illustrated in the cases highlighted from Canada, Great Britain, and Australia, it is not a new or novel idea to include “gender” as an acceptable basis for defining a social group. In fact, women are commonly grouped together based on their need for protection under international law.¹⁵⁵

IV. UNITED STATES’ DEFINITIONS OF REFUGEE, SOCIAL GROUP, AND THEIR CONSTRUCTIONS

The United States is not alone in failing to include gender as an acceptable “social group” under the definition of refugee. From a policy standpoint, “gender-based asylum faces many obstacles against its implementation.”¹⁵⁶ First, countries such as the United States are “seeking more restrictions on the ability to obtain asylum generally.”¹⁵⁷ In other words, immigration is viewed as a problem of scope, and countries feel the need to heighten restrictions to limit the number of people coming into that particular country. Expanding the definition to include gender is seen as

151. *Khawar* (2002), 210 CLR at 5-6.

152. *Id.*

153. *Id.*

154. *Family Violence in Refugee Law*, AUSTRALIAN LAW REFORM COMMISSION (Mar. 11, 2011), available at <http://www.alrc.gov.au/publications/family-violence-and-commonwealth-laws%E2%80%94immigration-law/family-violence-refugee-law>.

155. See United Nations Convention of the Elimination of All Forms of Violence Against Women [CEDAW], New York, December 18 1979, available at <http://www2.ohchr.org/english/law/cedaw.htm>.

156. Twibell, *supra* note 1, at 279.

157. *Id.* at 284.

“opening the floodgates” to countless complaints.¹⁵⁸ Furthermore, “the [United Nations’] Refugee Convention does not directly address female protection because of immigration and asylum restrictionists and those who believe females do not deserve asylum protection on the basis of gender.”¹⁵⁹ These obstacles “can be observed to converge and interact with individual cases in published appellate decisions.”¹⁶⁰ Overall, the obstacles hinder the international acceptance of gender-based asylum in some countries, particularly in the United States.¹⁶¹

A. *The United States’ Standard for Refugee*

Immigration law in the United States is highly complex. In 1952, the Immigration and Nationality Act (INA) was created as a means to collect and codify preexisting statutes and provisions governing immigration law, and thus “reorganized the structure of immigration law” in the United States.¹⁶² In immigration practice, the INA is cited as, and stands alone as, a body of law, but it is also “contained within the United States Code (U.S.C.)”¹⁶³ Citations can be made directly to the INA or its U.S.C. equivalent.¹⁶⁴

The term “refugee” in the INA is defined, at least in the text of the Act, in substantially the same manner as its United Nations’ counterpart in the Refugee Convention.¹⁶⁵ Section 101(a)(42)¹⁶⁶ of the INA defines 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

158. *Id.* at 279.

159. *Id.*

160. *Id.*

161. *Id.*

162. See U.S. CITIZEN AND IMMIGRATION SERVICES, IMMIGRATION AND NATIONALITY ACT, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543ff6d1a/?vgnnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Apr. 11, 2013). The INA was created by the McCarran-Walter bill of 1952, Public Law No. 82-414. The Act has been amended many times over the years but is still the basic body of immigration law. *Id.*

163. *Id.*

164. For the purposes of this Note, the INA and the USC provisions will be used interchangeably. However, their overall format and section breakdown tend to mimic each other. Either provision generally includes a reference to the corresponding provision in the other.

165. See U.N. REFUGEE CONVENTION, *supra* note 62, at 14.

166. 8 U.S.C. § 1101(a)(42) (2012).

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....¹⁶⁷

While this definition does not specifically mention gender in the guise of social group or as one of the enumerated categories, it goes on to include a few specific gender related categories:

For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.¹⁶⁸

From this definition, subsequent Immigration Court and Board of Immigration Appeals (BIA) decisions have noted that¹⁶⁹ persecution against females in certain contexts will be allowed, i.e. in the case of forced abortion, forced sterilization, and forced female genital mutilation.¹⁷⁰

While these allowances work to the advantage of female asylum seekers, they are limited in their applicability because they are based on a woman's sex as opposed to a gender determination. "Sex" as a concept is defined biologically.¹⁷¹ Yet, "[g]ender" is a concept which is used to refer to those characteristics of men and women which are *socially rather [than] biologically determined*.¹⁷² The concept of gender is not a static concept but "can and does change over time and according to changing and varied political, economic, social, and cultural factors."¹⁷³ These exceptions are based on a woman's sexual functions, to offer protection to the type of persecution that women face as determined by their socially defined gender

167. *Id.* (also cited as INA § (a)(42) (2012)).

168. *Id.*

169. See In re L-R-, Brief of Dep't of Homeland Security, 8 (Apr. 13, 2009) (redacted) [hereinafter DHS Brief], available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>.

170. *Id.*

171. Crawley, *supra* note 76.

172. *Id.*

173. *Id.*

role. Thus, these few exceptions, although good, are not enough.

B. The United States' Approach – "Social Visibility"

The definition of refugee under the INA is nearly identical to that in the United Nations' Refugee Convention. Until recently, the United States' approach mimicked that of the international community.¹⁷⁴ Even the *Acosta*¹⁷⁵ standard focused on the existence of an immutable characteristic: "one that an individual either cannot change or should not be required to change because it is fundamental to their identities or consciences."¹⁷⁶ However, the United States' approach has subsequently changed, and it now focuses on whether the social group is distinguishable and visible in the community.¹⁷⁷ It emphasizes external rather than internal attributes. This characterization has accordingly been named the "social visibility" approach.¹⁷⁸

The "social visibility test" is most clearly articulated in the 2006 BIA decision of *In re C-A*.¹⁷⁹ In this case, the BIA "diverged from the international community's understanding of 'social perception'" and instead focused on whether the group members were visible in their community.¹⁸⁰ The BIA stressed a very "subjective standard rather than an objective standard."¹⁸¹

In *C-A*, the respondents sought asylum on the basis of "membership in a particular social group composed of noncriminal informants" who had been government informants against the Cali drug cartel.¹⁸² The BIA took this case on remand from the Eleventh Circuit Court of Appeals to determine if this classification met the standard for social group.¹⁸³ The Court began with *Acosta*'s formulation: persecution "that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."¹⁸⁴

However, the BIA went on to state that the "social visibility of the members of a claimed social group is an important consideration in identifying the existence of a 'particular social group' for the purposes of

174. Marouf, *supra* note 77, at 48-49.

175. *In re Acosta*, 19 I & N Dec. 211 (B.I.A. 1985). For purposes of this Note, the *Acosta* case stands for the immutable characteristic approach to membership in a particular case.

176. Marouf, *supra* note 77, at 48; *See Acosta*, 19 I. & N. Dec. at 233.

177. *See generally* Marouf, *supra* note 77.

178. *Id.*

179. *In re C-A*, 23 I. & N. Dec. 951 (BIA 2006).

180. Marouf, *supra* note 77, at 49.

181. *Id.*

182. *C-A*, 23 I & N Dec 951.

183. *Id.*

184. *Id.* at 951 (citing *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)).

determining whether a person qualifies as a refugee.”¹⁸⁵ The BIA argued that inherent in the immutable characteristic standard is high visibility and social recognition as a member of the given group.¹⁸⁶ Finally, the BIA determined that, given the “voluntary nature” of the decision to be a government informant and “the lack of social visibility of the members of the purported social group,” the respondents failed to demonstrate that “noncriminal drug informants” could constitute a particular social group “as the term is used in the definition of a ‘refugee’ in section 101(a)(42)(A) of the [INA].”¹⁸⁷

This opinion represents a significant departure from both the international “social perception” test and the “immutable characteristics” approach.¹⁸⁸ The “social visibility” test suggests that a social group has to be visually recognizable by the general public.¹⁸⁹ This approach implies that a complete stranger would have to recognize an individual as a member of the social group based on visual impression alone.¹⁹⁰ It is no longer enough that a group itself is recognized in the general sense. Moreover, the *C-A*-court’s decision “seems to indicate that the visibility of some group members is not sufficient to satisfy the ‘social visibility’ test.”¹⁹¹ Rather, the majority of the group needs to be subjectively perceivable by a majority of the public, begging the question of whether many of the already accepted classifications of social group would cease to exist under this new standard.¹⁹²

While not all Circuits have officially adopted this standard – indeed, Judge Posner on the Seventh Circuit Court of Appeals has adamantly refused to follow this approach¹⁹³ – the social visibility test is generally

185. *Id.*

186. *Id.* at 960.

187. *Id.* at 961.

188. Marouf, *supra* note 77, at 64.

189. *Id.*

190. See *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

191. Marouf, *supra* note 77, at 64.

192. *Id.*

193. *Benitez Ramos*, 589 F.3d at 430. In this case, Judge Posner highlights what he believes to be the ridiculousness in the social visibility approach. To him, the social visibility approach means “you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernible characteristic.” *Id.* Posner continues:

If society recognizes a set of people having certain characteristics as a group, this is an indication that being in the set might expose one to special treatment, whether friendly or unfriendly. *In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be.* “Visibility” in the literal sense in which the Board has sometimes used the term might be relevant to the likelihood of persecution, but it is irrelevant to whether if there is persecution

accepted as the current United States' approach to membership in a particular social group.¹⁹⁴

1. "Social Visibility" Approach Is Inadequate to Account for Gender-Based Persecution

The "social visibility" test does not provide a workable standard under current US immigration law. Based on this approach, it is unclear whether "social visibility" means something based on external criteria, such as hair color, or whether it means social visibility in a more literal sense, such as being accepted as a group within society.¹⁹⁵

Furthermore, the "social visibility" test effectively gives decision-makers total discretion to decide whether or not a particular social group exists. Because the test is not law-based and social perceptions are so fluid, adjudicators will be able to freely deny the existence of a particular social group, despite the existence of a protected characteristic, based on a finding that the group is not socially visible.¹⁹⁶ Since the BIA has not adequately defined social visibility, the amount of discretion remains virtually unlimited. "Embracing the BIA's new approach not only will lead to chaotic case law" but could also "cause the legal community to reject the refugee status determination as a serious, principled process."¹⁹⁷

This social visibility approach is unworkable for a wide variety of groups. However, when viewing it under the auspices of gender-based persecution, the effects of this approach are staggering. In *Kante v. Holder*, a native of Guinea sought asylum in the United States on the basis of membership in a particular social group.¹⁹⁸ The Guinean woman had been subjected to rape at the hands of government soldiers.¹⁹⁹ The applicant sought to distinguish the social group as "women subjected to rape as a method of government control."²⁰⁰ Despite acknowledging that the applicant had suffered greatly, the Court found that this group was not a particular social group warranting relief under the INA.²⁰¹ The Court found that the group had been "circularly defined by the fact that it suffer[ed] persecution and the group [did] not share any narrowing characteristic other

it will be on the ground of group membership. Often it is unclear whether the Board is using the term "social visibility" in the literal sense or in the "external criterion" sense, or even whether it understands the difference.

Id. (emphasis added).

194. Marouf, *supra* note 77, at 63.

195. *Benitez Ramos*, 589 F.3d at 430.

196. Marouf, *supra* note 77, at 106.

197. *Id.*

198. *Kante v. Holder*, 634 F.3d 321, 324 (6th Cir. 2011).

199. *Id.* at 322.

200. *Id.* at 326.

201. *Id.* at 327.

than the risk of being persecuted.”²⁰² Furthermore, the applicant did not demonstrate that the overall “Guinean society viewed females as a group specifically targeted for mistreatment.”²⁰³

In *Kante*, the persecution that the woman faced was real, and she was not offered protection from her government because they allowed and even sanctioned the sexual abuse and misconduct. Accordingly, the applicant was in need of protection through asylum. Nevertheless, due in part to the fact that women were not socially viewed as being “targeted for mistreatment,”²⁰⁴ she was denied protection. The “socially visibility” test prevented relief to a person so entitled.

2. “Social Visibility” Approach Is Inadequate in Other Contexts:
Sexual Orientation-Based Persecution

Not only does the “social visibility” test create a nearly insurmountable hurdle for gender-based asylum claims, it also acts as a bar to asylum for other less visible social groups. To demonstrate, consider sexual orientation-based persecution. The United States has historically treated sexual orientation as socially unidentifiable or non-distinct, and, in many cases, as a not readily-identifiable trait. “Unlike some characteristics or traits, sexual orientation is not externally visible, and sexual minorities often feel compelled to hide their orientation for various reasons.”²⁰⁵

Nevertheless, persecution based on sexual orientation is a global phenomenon. Lesbian, Gay, Bisexual, and Transgendered (LGBT) individuals are often exposed to discrimination and abuse linked to their sexual orientation and gender identity.²⁰⁶ This risk of abuse is compounded by situations of displacement, profound isolation from family and community, and strong and often violent abuse.²⁰⁷ While immigration courts have started to accept the asylum claims of LGBT individuals, the “social visibility” approach makes it “difficult to prevail in asylum claims based on sexual orientation, particularly where the claimants are women.”²⁰⁸

Thus, the “social visibility” approach harms not only women, but also disproportionately affects groups that are not easily identifiable or visible in a community. Instead of focusing on why the persecution is occurring, the

202. *Id.*

203. *Id.*

204. *Id.*

205. Marouf, *supra* note 77, at 79.

206. U.N. High Comm’r for Refugees Prot. Policy and Legal Advice Section, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity 4*. (Nov. 21, 2008), available at <http://www.unhcr.org/refworld/docid/48abd5660.html>.

207. *Id.* at 9.

208. Marouf, *supra* note 77, at 79.

“social visibility” approach unfairly limits asylum to subjective and external criteria. Such a standard cannot and should not be where the United States rests its hat on at the end of the day.

C. Recent Trends Toward the International Standard of Social Group

Based on recent case law in the United States, it appears that a new, more internationally accepted framework allowing for gender-based claims may be possible in the United States. In fact, international “[w]omen's rights advocates have reason to be hopeful” because immigration courts across the United States have been “more open to accepting asylum claims from battered women.”²⁰⁹ While these petitions have not considered “women” or “gender” to be a social group *per se*, they have begun to recognize the unique vulnerability that women face in the domestic violence context.

1. Perdomo v. Holder

In *Perdomo v. Holder*, the Ninth Circuit Court of Appeals remanded a BIA decision denying a Guatemalan woman's claim for asylum based on membership in a particular social group.²¹⁰ Lesly Yajayra Perdomo “sought asylum based on her fear of persecution as a young woman in Guatemala.”²¹¹ The Immigration Judge denied Perdomo's application, and the BIA affirmed, “finding that a social group consisting of ‘all women in Guatemala’ is over-broad and ‘a mere demographic division of the population rather than a particular social group.’”²¹²

In remanding the case, the Ninth Circuit Court of Appeals went through a detailed analysis of the evolving notion of social group under US asylum law, citing both the immutable characteristics and social visibility tests.²¹³ The Ninth Circuit noted that it had not “held expressly that females, without other defining characteristics, constitute a particular social group,” but it concluded that “females, or young girls of a particular clan” have met the “definition of a particular social group.”²¹⁴ The Court went on cite the Third Circuit's decision from *Fatin v. INS*,²¹⁵ the USCIS “Gender Guidelines,” and the UNHCR Guidelines as a basis for determining that

209. Blake, *supra* note 61, at 75.

210. Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010).

211. *Id.* at 663.

212. *Id.*

213. *Id.* at 665-67.

214. *Id.* at 667 (citing Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir.2005)).

215. See *Fatin v. INS*, 12 F.3d 1233, 1239 (3rd Cir.1993) (recognizing gender as a basis for social group under the *Acosta* standard).

gender alone can be a basis for asylum.²¹⁶ While the court implicated gender as an acceptable basis for social group, it limited its decision to remanding the decision to the BIA.²¹⁷

2. Guidelines and Recommendations

In addition to cases such as *Perdomo*, *Fatin*, and *Acosta*, the Immigration and Naturalization Service (INS) has issued recommendations and guidelines that specifically consider female asylum seekers. For example, INS issued "Considerations for Asylum Officers Adjudicating Asylum Claims for Women" in 1995.²¹⁸ This internal document seeks to give immigration officers a summary of gender-based asylum issues and international developments regarding gender-based claims,²¹⁹ and provides guidelines for adjudicating these types of claims.²²⁰ In particular, the memorandum identifies forms of persecution that are common to women, including domestic violence, rape, and sexual abuse.²²¹ While the guidelines do not state that gender could be a basis for asylum, they do provide specific recommendations for providing greater protection and allowances for women.²²² Nevertheless, they do not recognize gender as an acceptable basis for asylum.²²³

3. Trend Is Insufficient to Meet Growing Problems

While *Perdomo* and the various INS guidelines mark a beginning to accepting gender as an appropriate basis for asylum, an approach similar to what this Note proposes, it is not enough to remedy the under-inclusive effect US asylum policies have against women or to change the standard as it is today. First, the Immigration Judge's opinion and, subsequently, the BIA's ruling are appealable to the federal circuit which has "jurisdiction over the geographical area where the case was originally brought."²²⁴ Yet, because the federal circuit is limited to its respective geographic region, it

216. *Perdomo v. Holder*, 611 F.3d at 667.

217. *Id.*

218. Memorandum from Phyllis Coven, OFFICE OF INT'L AFFAIRS, U.S. Dept. of Justice to All INS Asylum Officers RE Considerations for Asylum Officers Adjudicating Asylum Claims for Women, (May 26, 1995).

219. *Id.* at 1.

220. *Id.*

221. *Id.* at 4.

222. *Id.*

223. *Id.* at 13.

224. Jesse Imbriano, Note, *Opening the Floodgates or Filling the Gap?: Perdomo v. Holder Advances the Ninth Circuit One Step Closer to Recognizing Gender-Based Asylum Claims*, 56 VILL. L. REV. 327, 331-32 (2011).

will only have precedential effect within the circuit.²²⁵ The Supreme Court has the ultimate jurisdiction, and the parties are free to appeal to the United States' highest judicial organ. However, in practice the Supreme Court rarely grants certiorari to hear immigration cases.²²⁶ It chooses, for the most part, to defer to the decisions of the Executive Branch. Trends in immigration law are established by the BIA and a majority of circuits and, in turn, become *de facto* standards.

Furthermore, the statements and guidelines issued by INS and the Department of Homeland Security ("DHS"), while drawing specific attention to gender-based claims, are not legally binding to Immigration Judges or Asylum Officers.²²⁷ The considerations may be persuasive, but judges are still free to make decisions that diverge from the recommendations, which "results in judges making ad hoc decisions which are not uniform across the country."²²⁸ Without "clear and binding guidance" the result will be "inconsistent and incoherent decision-making across the country."²²⁹ Therefore, binding legal standards defining "social group" need to be re-interpreted to maintain and provide equal protection for women suffering from gender-based persecution.

V. PROPOSAL – A NEW STANDARD FOR "MEMBERSHIP IN A SOCIAL GROUP"

A. An Innovative Standard

Generally speaking, the international community accepts two characterizations for a particular social group: "immutability—members of the group share a trait that is innate; and social perception—society views members of the group as such."²³⁰ The former view is based in part on the concept of *ejusdem generis*.²³¹ *Ejusdem generis*, meaning "of the same kind, class, or nature," is a basic principle of statutory construction.²³² *Ejusdem generis* stands for the proposition that general words in a statute should be interpreted in accordance with the specific words in the statute or that the general terms should be viewed in a manner consistent with the specific

225. *Id.* (citing 8 U.S.C. § 1252 (2012)).

226. *Id.* at 332.

227. Leonard Birdsong, *Recognizing Gender-Based Persecution as a Grounds for Asylum*, Birdsong's Law Blog (Oct. 6, 2010) <http://birdsongslaw.com/2010/10/06/recognizing-genderbased-persecution-grounds-asylum/>.

228. *Id.*

229. *Id.*

230. Blake, *supra* note 61, at 72.

231. *Id.*

232. *What Is Ejusdem Generis?*, THE LAW DICTIONARY, <http://thelawdictionary.org/ejusdem-generis/> (last visited Apr. 11, 2013).

terms.²³³

The designation of "social group" is placed in the same category as race, nationality, religion, and political opinion in both the United Nations' Refugee Convention and the INA, Section 101(a)(42). The other designations outside of social group are based on either immutability or on "traits so fundamental that a person should not be required to change them."²³⁴ Utilizing the principle of *ejusdem generis*, the designation of social group should also be seen under at least one of these views. Viewing social group under the principle of *ejusdem generis* shows the justification for a specific characterization of membership in a particular social group based on a quasi-immutability concept, an aspect so close to a particular social group that it cannot or should not be changed.

Thus, one cannot change his or her membership in a quasi-immutable social group because the social group is comprised of members of the same gender. Persecution for being a member of a social group under this interpretation, much like one would view race or nationality, would undoubtedly meet the requirements of the INA. Indeed, a preliminary basis for this interpretation of social group has already been demonstrated in immigration opinions.²³⁵

This Note advocates a new standard that begins with the rationale set forth in *Acosta* and *Mohammad* and expands the refugee definition to include "gender" as a set classification of a particular social group. Gender is already a social group identified in society because it is based on a distinct characteristic that cannot and should not be changed. A re-interpretation of social group to include gender would not focus on the individual woman or man, or even small designated groups, but would instead focus "on the system which determines gender roles and responsibilities[;]" a system that provides "access to and control over resources[;]" and a system that allows for decision-making potentials."²³⁶

This Note's proposed re-interpretation would reflect the social reality women face in their home country, and therefore cover women most in need of international protection. It would create a uniform and fair approach to asylum claims, remedy current problems, and create a standardized framework to prevent the so-called "Refugee Roulette."²³⁷ While the

233. *Id.* For more information on the evolution of *ejusdem generis* as a means of statutory construction, see Glanville Williams, *The Origins and Logical Implications of the Ejusdem Generis Rule*, 7 Conv. (NS) 119.

234. Blake, *supra* note 61, at 72.

235. See generally *Matter of Acosta* in Deportation Proceedings, 19 I & N Dec. 211 (BIA 1985); *Mohammed v. Gonzalez*, 400 F.3d 785, 797 (9th Cir.2005) (deciding the gender issue within the context of sexual orientation and gender identity). This decision is only applicable to the Ninth Circuit and not to general immigration law in the United States.

236. Crawley, *supra* note 76, at 1.

237. Jaya Ramji-Nogales, et. al, *Refugee Roulette: Disparities in Asylum Adjudication*.

current standard for asylum appears to be gender-neutral, applying to both women and men in the same manner, “the refugee definition has been applied more liberally to persecution commonly affecting men to persecution unique to, or concentrated against, women.”²³⁸ This Note’s approach would eliminate the social hierarchy of asylum claims between men and women, and perpetuate a fair, inclusive system for asylum.²³⁹

B. Criticisms to Expanding the Concept of Social Group to Include Gender

Including gender-based claims for asylum is an uphill battle. According to the Central Intelligence Agency’s World Factbook, there are an estimated 15.1 million refugees in the world.²⁴⁰ Of those refugees seeking asylum, women make up roughly fifty percent.²⁴¹ Due to the large number of potential applicants, critics claim that including gender as an acceptable *per se* classification would overload or destroy the already struggling immigration system in the United States.²⁴²

Immigration courts in the United States are already “inundated with a very large caseload of complex cases.”²⁴³ The courts already struggle “to properly assess the credibility of asylum applications” with limited resources and large lines of applicants waiting for hearings.²⁴⁴ Critics claim that the immigration system would further deteriorate if gender is accepted as a basis for asylum.²⁴⁵ This would, in effect, take attention away from protecting United States’ citizens from potential criminals or terrorists.²⁴⁶

Furthermore, other critics maintain that gender-based asylum claims demonstrate a system “structured by ethnocentric and racialized gendered

60 STAN. L. REV. 295, 378 (2007).

Whether an asylum applicant is able to live safely in the United States or is deported to a country in which he claims to fear persecution is very seriously influenced by a *spin of the wheel of chance*; that is, by a clerk’s random assignment of an applicant’s case to one asylum officer rather than another, or one immigration judge rather than another.

Id. (emphasis added).

238. Imbriano, *supra* note 224, at 352 (“Adjudicators have been unwilling to recognize rape and other sexual assaults as persecution even when used explicitly to subjugate women, instead referring to them as personal attacks.”).

239. See generally, Imbriano, *supra* note 224, at 352.

240. CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/fields/2194.html#xx> (last visited Apr. 11, 2013).

241. *Refugee Women*, UNHCR, THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c1d9.html> (last visited Apr. 11, 2013).

242. Twibell, *supra* note 1, at 197.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 197-98.

ideals” rooted in Western ideologies.²⁴⁷ The argument suggests that the underlying premise of granting asylum puts asylum-seekers in a position of valuing “the United States as being a ‘more enlightened’ place (whether they believe it or not) than their country of origin.”²⁴⁸ Thus, gender-based asylum claims could perpetuate the idea of the United States’ superiority.²⁴⁹

C. *Response to Criticism*

While critics highlight problems that consistently plague the US immigration system, a re-interpretation of social group to include gender would *not* automatically lead to an overflow of asylum claims. In addition to meeting one of the enumerated bases of the INA “refugee” definition, asylum seekers must still present a credible claim and must establish a well-founded fear of returning to their native country on account of one of those enumerated classifications. A woman will not automatically be granted asylum because she is a woman. She must establish that she and other members of her gender-based social group are persecuted on account of their membership in that group.

Even if gender-based persecution would increase the amount of asylum claims due to the large number of people found in a gender-based social group, the size of the group is no different from the size of groups listed in the other sections of the INA definition. The fact that a social group is comprised of a large number of people is irrelevant because “race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.”²⁵⁰

Rather, “[t]he relevant assessment is whether the claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group.”²⁵¹ “[The] size and breadth of a group alone does not preclude a group from qualifying as a social group.”²⁵² The nature of the problem is not changed by the potential number of people that are affected and should not be considered when determining an acceptable social group.

Furthermore, almost any system of asylum can be viewed in an ethnocentric manner; asylum is, for the most part, a scheme to provide

247. Midori Takagi, *Orientalists Need Apply: Gender-based Asylum in the U.S.*, ETHNIC STUD. REV., Vol. 33, No. 1, June 2010, available at <http://www.thefreelibrary.com/Orientalists+need+apply%3A+gender-based+asylum+in+the+U.S.-a0271665071> (last visited Apr. 11, 2013).

248. *Id.*

249. *Id.*

250. Canadian Immigration Guideline 4, *supra* note 105, at 15.

251. *Id.*

252. *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010).

persecuted individuals with protection that they cannot receive in their native countries. More often than not, the countries granting asylum are more developed than the countries the asylum seekers emigrate from. However, asylum is not the “West” imposing its societal standards and beliefs on other cultures. It is a means by which countries open their doors to individuals who desire to but cannot escape from violence in their respective countries. Casting asylum in a negative light does not change the problem that there are millions of refugee women seeking asylum. If more developed countries shut their doors due to a fear of ethnocentrism, where will these women go? Asylum relief is needed internationally, and this relief should be available to women who seek it.

VI. CONCLUSION

Re-structuring the current standard of “social group” to include gender-based persecution claims for asylum will not only give women additional protection, but it may also lead to protection for other groups excluded from the current refugee definition. Re-structuring the social group definition could provide additional protection to groups persecuted on the basis of sexual orientation or other less socially visible grounds.

A new approach to membership in a particular social group would bring US asylum law closer to the international standard and closer to the more inclusive and uniform approaches seen in Canada, Great Britain, and Australia. The United States should not continue to delay re-interpretation of social group based on bureaucratic pressures. While positive strides have been made in the way of recommendations, memoranda, and judicial opinions, the re-interpretation of “social group” is necessary to remedy the existing dichotomy between men and women in asylum law. Legislative action must be taken to ensure greater protection for women persecuted worldwide.

In the wake of global social movements aimed toward democracy and equality, now is the time to change the image of the refugee—the image of a male figure fleeing persecution for holding a different political opinion or religious belief. It is time to remember that women, too, need to be adequately represented in immigration law. By re-structuring membership in a particular social group to include gender, women can, and indeed will, find their rightful place in US asylum proceedings.

