

# Gender-Based Persecution: Does United States Law Provide Women Refugees with a Fair Chance?

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## I. INTRODUCTION

The United States has been slow to recognize defects in its asylum law and procedure pertaining to women refugees. Throughout history, women have suffered domestic violence, rape, female genital mutilation, infanticide, sexual abuse, incapacitating social mores, and other extreme forms of mistreatment. However, when such victims have made the difficult, and often dangerous, journey to the United States to seek refuge, they commonly have been turned away as asserting a personal grievance, an issue not within the public scope of asylum law. Recently, efforts have been made to ameliorate this situation, both nationally and internationally. For example, in 1995, the Immigration and Naturalization Service (INS) provided guidelines for asylum officers to use in adjudicating asylum claims involving women.<sup>1</sup> This U.S. effort followed the lead of Canada, which was the first nation to issue guidelines for women refugee claimants.<sup>2</sup> In addition, the United Nations has adopted the Declaration on the Elimination of Violence Against Women, which recognizes violence against women "as a per se violation of human rights and as an impediment to the enjoyment by women of other human rights."<sup>3</sup> Furthermore, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women, which "prohibits actions by States which are discriminatory, and requires States to take affirmative steps to eradicate discriminatory treatment of women."<sup>4</sup> These United Nations resolutions are human rights instruments to which the United

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1. See Memorandum from Phyllis Coven, Office of International Affairs, U.S. Department of Justice, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995), reprinted in Deborah E. Anker, *Women Refugees: Forgotten No Longer*, 32 SAN DIEGO L. REV. 771, 794-816 (1995) [hereinafter INS Guidelines].

2. See *id.* (citing IMMIGRATION & REFUGEE BD. OF CANADA, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO § 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (Mar. 9, 1993) [hereinafter CANADA GUIDELINES]).

3. Declaration on the Elimination of Violence Against Women, Feb. 23, 1994, 33 I.L.M. 1049 [hereinafter U.N. Declaration].

4. Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature March 1, 1980, 19 I.L.M. 33 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

States is a party, and the INS Guidelines are a persuasive, but not binding, tool for asylum adjudicators. What this really means is that the United States has finally begun to take the claims of women refugees seriously.

II. IN ORDER TO UNDERSTAND WHY THE CLAIMS OF WOMEN REFUGEES HAVE TRADITIONALLY BEEN NEGLECTED, IT IS NECESSARY TO COMPREHEND SOME OF THE UNIQUE KINDS OF TREATMENT AND HARM THAT WOMEN REFUGEES EXPERIENCE

A. *Domestic Violence*

In many cultures, male dominance is a way of life.<sup>5</sup> In this respect, wives are often treated as the property of their husbands. However, being treated this way does not mean that the wife is well taken care of or put on a pedestal. In fact, this relationship often turns wives into punching bags, cutting boards, and “blow-up” dolls.<sup>6</sup> Domestic violence of this sort is an every day occurrence for many women.<sup>7</sup> The marital relationship does not ensure that a wife will get the opportunity to explain why she spoke out of turn, receive mercy while being beaten, or even the chance to live.<sup>8</sup> In general, the wife has few options following abusive treatment; most local police or officials do not care to get involved in these “private” disputes, because they view the husband’s behavior as his natural right.<sup>9</sup> Thus, under such circumstances, a woman’s home can easily become her prison.

Leaving such a situation is dangerous because if caught by her husband, the wife risks severe retribution for her “disrespectful” act.<sup>10</sup> The decision to leave can become especially harrowing where there are children involved: A battered wife must choose between the risk of fleeing with her children or leaving them with her batterer.

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5. See Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1810, 1813-15 (1997).

6. *Id.* at 1809.

7. See Karen Bower, *Recognizing Violence Against Women As Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 182 (1993).

8. See Seith, *supra* note 5, at 1813-15.

9. See *id.* at 1809.

10. See *id.* at 1815 n.65.

### B. *Female Genital Mutilation*

In many cultures, it is expected that women will undergo a procedure known as female genital mutilation (FGM).<sup>11</sup> FGM is the practice of female circumcision which involves the removal of the clitoris.<sup>12</sup> This procedure is performed “to ensure female chastity.”<sup>13</sup> In actuality, FGM “is often done without anesthetic and under unsanitary conditions,” and “often results in infection, psychological trauma, infertility because of constant inflammation of the vaginal area, and severe scarring.”<sup>14</sup> FGM usually “makes it impossible for a woman to enjoy sexual intercourse.”<sup>15</sup> Genital mutilation can complicate childbirth, kill a fetus, or even result in death for the woman upon whom the procedure is done.<sup>16</sup> However, deaths that result from FGM are commonly unreported due to “the traditional silence that surrounds the practice.”<sup>17</sup>

### C. *Restrictions on Life and Liberty*

Physical and psychological harm can result from the imposition of stringent rules and regulations on women’s day-to-day activities. For example, the government in Iran adopted a law in 1983 that called for “one year’s imprisonment for any woman caught in public without the traditional Islamic veil, the Chador.”<sup>18</sup> This type of law is common in countries in the Middle East.<sup>19</sup> Other restrictions imposed on women may include prohibition of wearing makeup, inability to travel without a man or a man’s permission, or the banning of educational pursuits.<sup>20</sup> These laws clearly illustrate the lack of women’s political rights. However, enforcement of these laws is worse than the laws themselves. For instance, in Iran, it has been reported that “revolutionary guards take the law into their own hands and abuse the transgressing women.”<sup>21</sup> In other words, local

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11. See Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate For Equality Begins*, 6 TEX. J. WOMEN & L. 181, 185 (1997).

12. See *id.*

13. See Mattie L. Stevens, Student Article, *Recognizing Gender Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL’Y 179, 193 (1993).

14. *Id.* at 194.

15. *Id.*

16. See *id.* at 195.

17. *Id.*

18. *Fatin v. INS*, 12 F.3d 1233, 1237 (3d Cir. 1993).

19. See Kelson, *supra* note 11, at 188 & n.38.

20. See *id.* at 187-88.

21. *Id.*

enforcement agents have been known to punish any woman who disobeys these restrictive laws, even if the infraction is inadvertent, such as when a few hairs slip out from behind the Chador.<sup>22</sup>

#### D. Asylum Interviews

The interview process conducted by asylum officers once a refugee reaches the U.S. can be psychologically harmful to female refugees.<sup>23</sup> For example, women who come to the United States to claim asylum eligibility based on beatings or sexual abuse they have suffered are required to relate their story to an authority figure, often male.<sup>24</sup> Meanwhile, their reason for coming to the United States may be because they were unable to get assistance from male authority figures in their country of origin.<sup>25</sup> The INS Guidelines alert asylum officers to this problem and suggest that the officers try to build rapport with the applicant.<sup>26</sup> However, relating their experiences, feeling the pressure of the extreme importance of the interview, and dealing with an authority figure, all at the same time, may still leave the applicant, at the very least, uneasy.<sup>27</sup> Asylum officers are instructed to gauge mannerisms, body language, and consistency in conducting asylum eligibility interviews, but such factors differ from person to person, country to country, and men to women.<sup>28</sup> Thus, an applicant's story may potentially be discredited due to the applicant's discomfort with the interviewer or interview process, even though every word of it might be true.<sup>29</sup> One other potential burden for women refugees rests in the fact that a family member might be used as an interpreter during the interview.<sup>30</sup> This is problematic for women who have family members present with them who are from cultures that consider losing virginity (in any manner), not having FGM performed, or disobeying a husband, a disgrace.<sup>31</sup> In this scenario, the applicant may not be forthcoming with her entire story

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22. See *Fisher v. INS*, 61 F.3d 1366, 1369 (9th Cir. 1995) (noting that applicant had been detained at gunpoint when a few hairs escaped from her Chador).

23. See Stevens, *supra* note 13, at 204-05.

24. See *id.* (quoting Nancy Kelly, *Gender-Based Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625 (1993)).

25. See Seith, *supra* note 5, at 1810-11, 1813-15.

26. See INS Guidelines, *supra* note 1, at 800.

27. See *id.* at 800-01.

28. See *id.* at 801-02.

29. See *id.* at 802.

30. See *id.* at 799.

31. See *id.* at 800.

in order to save face with her family, or even for the sake of her family.<sup>32</sup>

### III. ANOTHER IMPORTANT FACTOR IN EVALUATING THE DIFFICULTIES CONFRONTED BY WOMEN REFUGEES LIES IN AN ANALYSIS OF CURRENT ASYLUM LAW

#### A. *Historical Overview*

U.S. asylum law originated from the United Nations Convention Relating to the Status of Refugees (1951 Convention),<sup>33</sup> and the United Nations Protocol Relating to the Status of Refugees (1967 Protocol).<sup>34</sup> In fact, the 1951 Convention and its successor, the 1967 Protocol, are the framework for asylum law in most nations of the world.<sup>35</sup> The 1951 Convention was essentially a reaction to the massive displacement of people in Europe after World War II.<sup>36</sup> Its goal was to establish the respective rights of people seeking refuge and nations confronted with these numerous refugees.<sup>37</sup> In the 1951 Convention, the following definition of “refugees” was promulgated:

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. . . .<sup>38</sup>

The 1967 Protocol maintained this definition of “refugee,” except for its reference to January 1, 1951.<sup>39</sup>

Today, the Immigration and Nationality Act defines “refugee” in section 101(a)(42) 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

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32. *See id.*

33. *See* Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, *reprinted in* IMMIGRATION & NATIONALITY LAWS OF THE UNITED STATES 633 (T. Alexander Aleinikoff et al. eds., 1997) [hereinafter 1951 Convention].

34. *See* United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, *reprinted in* IMMIGRATION & NATIONALITY LAWS OF THE UNITED STATES 648 (T. Alexander Aleinikoff et al. eds., 1997) [hereinafter 1967 Protocol].

35. *See* Teresa L. Peters, Note, *International Refugee Law the Treatment of Gender-Based Persecution: International Initiatives as a Model and Mandate for National Reform*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 225, 231 (1996).

36. *See id.* at 230.

37. *See id.*

38. 1951 Convention, *supra* note 33, art. 1A(2).

39. *See* 1967 Protocol, *supra* note 34, at 648.

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.<sup>40</sup>

Clearly, the United States definition is based upon the 1951 Convention and 1967 Protocol understanding of the term.

*B. Close Analysis of the Definition of a “Refugee”*

1. Persecution

What conduct will constitute “persecution” is an essential inquiry in determining if an applicant will qualify as a refugee; yet Congress has not defined this term.<sup>41</sup> In fact, neither the 1951 Convention nor the 1967 Protocol make any mention of what acts constitute persecution.<sup>42</sup> However, a manual distributed by the INS defines persecution as “a serious threat to life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>43</sup> The INS Manual states further that “[s]erious violations of basic human rights can constitute acts of persecution.”<sup>44</sup> To determine what constitutes a basic human right, it is necessary to examine which rights are protected under international law.<sup>45</sup> Analysis of international instruments reveals that the following acts are considered violations of basic human rights: genocide, slavery, assassination, torture, and arbitrary arrest and detention;<sup>46</sup> the following conduct qualifies as less egregious violations of human rights: cruel, inhuman, and degrading treatment, arbitrary or unlawful interference with privacy, family, and the home, and interference with the right to hold opinions, the right to freedom of thought, the right to freedom of association, enforced social or civil inactivity, and constant surveillance.<sup>47</sup>

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40. Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(42) (1988).

41. *See generally id.*

42. *See generally* 1951 Convention, *supra* note 33; 1967 Protocol, *supra* note 34.

43. ASYLUM BRANCH, OFFICE OF GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERV., BASIC LAW MANUAL: ASYLUM 20 (1991) [hereinafter INS MANUAL]. This manual was drafted for the INS asylum officers to use in interpreting asylum law; it is not binding. *See id.*

44. *Id.*

45. *See id.*

46. *See id.* at 20-21.

47. *See id.* at 21; *see also* Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 99 U.N.T.S. 171, arts. 7, 9, 17, 18, 19, 22, 26.

In application, the courts have formulated their own theories of what will qualify as persecution. For example, the Ninth Circuit in *Fisher v. Immigration & Naturalization Service*<sup>48</sup> defined persecution as “suffering or harm upon those who . . . differ in a way regarded as offensive.”<sup>49</sup> In that decision, the court held that the Board of Immigration Appeals (BIA) erred in finding that the applicant, a woman from Iran, could not be subject to future persecution with respect to violations of moral codes.<sup>50</sup> The court found that enforcement of the codes served as the potential persecutory acts, such that “threats to life or liberty . . . clearly can rise to the level of persecution.”<sup>51</sup> In other words, it is important to look to the future as well as to past acts of persecution to determine whether those acts will constitute “persecution” under the U.S. definition of “refugee.”<sup>52</sup>

The Third Circuit, in *Fatin v. Immigration and Naturalization Service*,<sup>53</sup> defined persecution as “extreme conduct.”<sup>54</sup> The court also defined “persecution” through negative inferences such that it “does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional.”<sup>55</sup> In this decision, the court found that unless the applicant was certainly going to violate Iran’s moral codes, there would be no persecution since she would be “subjected to the same restrictions and regulations applicable to the Iranian population in general.”<sup>56</sup> Thus, persecution could not be found unless the applicant stated that she would definitely act in such a way in the future so that she would be the victim of “extreme conduct.”<sup>57</sup>

The BIA’s decision in *In re Kasinga*<sup>58</sup> gave persecution yet another definition: “[I]nfliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim.”<sup>59</sup> Additionally, the BIA found that “subjective punitive or malignant intent is not

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48. 61 F.3d 1366 (9th Cir. 1994).

49. *Id.* at 1375-76.

50. *See id.* at 1371.

51. *Id.* at 1373.

52. *See id.* at 1372.

53. 12 F.3d 1233 (3d Cir. 1993).

54. *Id.* at 1243.

55. *Id.* at 1240.

56. *Id.* at 1243 n.12 (internal quotations omitted).

57. *See id.* at 1243.

58. *In re Kasinga*, Interim Decision 3248 (BIA 1996), reprinted in 35 I.L.M. 1145 (1996).

59. *Id.* at 9.



required” for acts to constitute persecution.<sup>60</sup> The holding here allowed FGM to constitute persecution.<sup>61</sup>

The INS Guidelines explicitly state that “rape, sexual abuse and domestic violence, infanticide and genital mutilation are forms of mistreatment . . . that may serve as evidence of past persecution.”<sup>62</sup> The Guidelines go on to state that “persecution” can also include violative conduct that is “abhorrent to that individual’s deepest beliefs.”<sup>63</sup> However, these partial definitions thrown out to asylum adjudicators are only the limited holdings of several different cases. In fact, the Guidelines merely serve to restate the uncertain position of the “persecution” definition that exists in the law today.<sup>64</sup> Consequently, the Guidelines illustrate the limitations of the definitions produced by these cases. In other words, the Guidelines do not help clear up the ambiguous and indefinite definition of “persecution.” Even though a bright-line test in this area would be too restrictive due to the different ways asylees are persecuted, there seems to be a desperate need for some clarity.

Another issue arises in determining who are agents of persecution. Specifically, if the conduct in question is not perpetrated by a government official, can it constitute persecution at all? The answer to that question generally has been that the persecutor does not have to be a government official, but the actor must be someone that the government is unable or unwilling to control.<sup>65</sup> However, how can a person who acts within the private sphere be distinguished from a person who the government is unable or unwilling to control? This unresolved issue often is determinative in gender-based claims, particularly for victims of domestic violence.<sup>66</sup> For instance, if a husband beats his wife, and the government refuses to act in protection of the wife, has the husband acted in the private sphere, unreachable under the definition of “persecutor,” or has he succeeded in becoming a person the government is unwilling to control? Many

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60. *Id.* at 10 (internal quotations omitted).

61. *See id.*

62. INS Guidelines, *supra* note 1, at 798.

63. *Id.* at 805 (quoting *Fatin*, 12 F.3d at 1242).

64. *See id.* at 8034.

65. *See* Matter of Acosta, 19 I. & N. Dec. 211, 221 (1985).

66. *See* Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law*, 11 GEO. IMMIG. L.J. 709, 713 (1997).

gender-based claims have been dismissed due to the uncertainty of this aspect of asylum law.<sup>67</sup>

In light of this, it is easy to see how women refugees do not get a fair chance at asylum eligibility. Asylum adjudicators must determine whether these women have been persecuted; yet they are not given a clear meaning of what acts rise to the level of persecution. Further, there is no guidance on when a nongovernmental actor in the domestic setting is acting in the private sphere or committing a public act. Although the INS Guidelines are designed to help women gain asylum eligibility, they unfortunately fail to clarify the legal definition of persecution.

## 2. Well-Founded Fear

Another difficult aspect in determining the eligibility of applicants for asylum is an evaluation of whether they have a well-founded fear of persecution. The Second Circuit in *Gomez v. Immigration and Naturalization Service*<sup>68</sup> set forth the requirements for establishing this element of asylum:

Well-founded fear consists of both a subjective and an objective component. An alien may satisfy the subjective prong by showing that events in the country to which he or she will be deported have personally or directly affected him or her. To satisfy the objective component, the applicant for asylum must submit documentary evidence or testimony alleging specific facts from which it can be inferred that he or she may be singled out for persecution on the basis of his or her race, religion, nationality, political opinion or membership in a particular social group.<sup>69</sup>

Therefore, to exhibit a well-founded fear, an individual must subjectively fear persecution and that fear must be “grounded in objective reality.”<sup>70</sup>

Proving a subjective fear of persecution would seem to be fairly easy for an asylum applicant. Asylum applicants can describe fears of what has happened and what could happen in the country of origin, and if the facts allege persecution, asylum adjudicators can find that a subjective fear of persecution exists as long as the applicant appears credible. It is possible that what the applicant fears might not seem

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67. See Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN'S L.J. 133, 146-148 (1994).

68. 947 F.2d 660 (2d Cir. 1991).

69. *Id.* at 663.

70. See *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1452 (9th Cir. 1985).

worthy of fear to the adjudicator, but the subjective component does not contemplate that type of analysis.<sup>71</sup>

Where the adjudicator's observations about the situation described by the applicant make a difference is in the objective component of the "well-founded fear" test. The BIA has concluded that the burden is on the applicant to establish that a reasonable person in the applicant's circumstances would fear persecution upon return to the country of origin.<sup>72</sup> Often, the only available method for the applicant to prove objective fear is through his or her own testimony.<sup>73</sup> However, the applicant's statements about conditions in the country of origin may be uncorroborated by Department of State country reports if none are on file or if they are incomplete.<sup>74</sup> Moreover, a country report may fail to accurately reflect the state of human rights conditions at the point in time referred to by the applicant.

The courts and the BIA had traditionally imposed strict requirements of objective evidence to corroborate the applicant's statements about fears of persecution.<sup>75</sup> However, the BIA has become increasingly empathetic toward applicants who have little objective evidence beyond their own testimony.<sup>76</sup> The testimony of applicants is no longer presumed to be self-serving. In fact, a favorable ruling can be justified where "the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent basis for [the applicant's] fear."<sup>77</sup>

This trend towards allowing the applicant to prove that he or she has a well-founded fear based on his or her own account of what he or she has experienced is fair for three reasons. First, no one knows what happened in the applicant's country of origin better than the applicant, who has experienced it firsthand. Second, it is reasonable to assume that the applicant is unaware, or at least unsure, of what is needed to achieve asylum eligibility; thus, it is unlikely that the applicant would lie about a significant aspect of his or her experience since he or she would not know if the lie would work better than the truth. Finally, country reports from the State Department that may not

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71. Cf. INS Manual, *supra* note 43, at 26.

72. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (1987).

73. See *Cardoza-Fonseca*, 767 F.2d at 1453.

74. See INS Manual, *supra* note 43, at 31.

75. See *Dally v. INS*, 744 F.2d 1191, 1194 (6th Cir. 1984); *Matter of Sibrun*, 18 I. & N. Dec. 354, 359 (1983).

76. See *Matter of Acosta*, 19 I. & N. Dec. at 212; *Matter of Mogharrabi*, 19 I. & N. Dec. at 445.

77. *Matter of Mogharrabi*, 19 I. & N. Dec. at 445.

have captured the entire picture of the situation in the country of origin should not outweigh the applicant's testimony in importance or veracity.

In *Matter of Acosta*, the BIA established a four-part test for determining, based on an applicant's testimony and other evidence, whether the objective component of the "well-founded fear" test has been satisfied:

- (1) The applicant possesses a belief or characteristic that a persecutor seeks to overcome in others by means of punishment of some sort;
- (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic;
- (3) the persecutor has the capability of punishing the applicant; and
- (4) the persecutor has the inclination to punish the applicant.<sup>78</sup>

At first glance, this test adequately addresses the issue of well-founded fear by assessing whether the applicant reasonably fears returning to the country of origin: If the persecutor does not have the capability or the inclination to act out against the applicant, then no well-founded fear of persecution can arise. However, the second prong of the test, which refers to whether the persecutor is, or easily could become, aware of the characteristic to be persecuted in the applicant does not bear upon whether the applicant has an objective well-founded fear. In other words, this prong does not require a finding that the persecutor is unable to find out about the characteristic of the applicant subject to persecution, or that the persecutor will not seek out, even if it would be difficult to do so, whether the alien possesses the characteristic in question. Thus, if too much emphasis is placed on the second prong, the overall test slants unfavorably against the applicant.

Therefore, an applicant asserting asylum eligibility based on a form of gender-based persecution has a lot hinging upon her testimony. As previously mentioned, explaining episodes of abuse to an asylum adjudicator is often an arduous task for these applicants because of the disgrace often felt by victims.<sup>79</sup> This embarrassment may lead to facts being hidden from the adjudicator that would provide consistency or give the appearance that the applicant is lying.<sup>80</sup> Additionally, experiencing atrocities can cause a woman refugee to lose memory of events; her subconscious may not let her remember the horrible and violent acts she has suffered.<sup>81</sup> The INS

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78. *Matter of Acosta*, 19 I. & N. Dec. at 226.

79. See discussion *supra* Part II.D.

80. See INS Guidelines, *supra* note 1, at 800-803.

81. See *id.* at 801.

Guidelines recommend having a female asylum officer conduct interviews with applicants asserting gender-based claims in order to put the applicant at ease.<sup>82</sup> However, even where this is possible, these applicants will still be reliving their stories, possibly through family interpreters with traditional values from the applicant's country of origin, to a figure of authority. Thus, reliance on the interview process or testimony of an applicant with a gender-based claim may prove disadvantageous for the applicant. Consequently, proving a well-founded fear of persecution is not as easy for women refugees with gender-based claims as it is for other types of asylum applicants.

### 3. "On Account Of" an Enumerated Ground

#### a. "On Account Of"

In order to be granted asylum, it is necessary that the applicant have a well-founded fear of persecution on account of one of the five enumerated grounds. "On account of" refers to the fact that the persecution must be committed based upon one of the following characteristics: race, religion, nationality, political opinion, or membership in a particular social group.<sup>83</sup> In other words, if the acts committed rise to the level of persecution, and the applicant has a well-founded fear of those acts being committed upon him or her when he or she returns to his or her country of origin, he or she will still not be eligible for asylum unless the acts are "threatened or inflicted in order to punish the victim for having one or more of the characteristics protected under the statute."<sup>84</sup> In point of fact, the "on account of" requirement is "a critical part of the analysis under U.S. law."<sup>85</sup> Without demonstrating a nexus between the persecution and one of the enumerated characteristics, there is no chance for an asylum applicant to be granted relief.

#### b. Political Opinion

As with several of the factors that make up the definition of a "refugee," the term "political opinion" was left undefined by Congress.<sup>86</sup> This has led courts to develop their own understanding of the term. In the Third Circuit, an applicant must satisfy a three-part test to determine if asylum can be granted on this basis:

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82. See INS Guidelines, *supra* note 1, at 798.

83. See Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(42).

84. *Matter of Acosta*, 19 I. & N. Dec. at 226.

85. INS Guidelines, *supra* note 1, at 806.

86. See generally 8 U.S.C. § 1101(a)(42).

In order to prevail on . . . an asylum claim based on political opinion, an alien must (1) specify the political opinion on which he or she relies, (2) show that he or she holds that opinion, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that opinion.<sup>87</sup>

In *Fatin*, the Third Circuit held that feminism qualified as a political opinion.<sup>88</sup> In addition, the court found that an applicant's beliefs about the role and status of women in society could give the applicant a basis for asylum.<sup>89</sup> Even with this seemingly ground-breaking decision, the court did not grant asylum to the applicant because, as an Iranian feminist, she would generally not be subjected to persecution.<sup>90</sup> Further, the evidence did not demonstrate that the applicant believed that Iran's "gender-specific laws and repressive social norms must be disobeyed on grounds of conscience."<sup>91</sup>

Therefore, it seems that this circuit is willing to manipulate the breadth of "political opinion" as long as it also can adjust the scope of what will be deemed "persecution." In fact, the courts in every circuit are left to manipulate these definitions because the scope of what each term means is to be determined from ambiguous, non-binding rulings in other courts. Even though the INS Guidelines offer a section on "political opinion," it merely reiterates a group of diverse holdings of different courts, and thus offers little guidance.<sup>92</sup>

Significantly, the Ninth Circuit, in *Lazo-Majano v. Immigration and Naturalization Service*,<sup>93</sup> noted that a woman resisting violence perpetuated against her by an intimate companion is expressing a political opinion.<sup>94</sup> In this case, a Salvadoran woman was harassed, forced to perform unpaid labor, and raped by a sergeant in the Salvadoran military.<sup>95</sup> The sergeant was said to have been asserting the political opinion that a man had the right to dominate a woman and, thus, the applicant.<sup>96</sup> Accordingly, by fleeing, the applicant was asserting a political opinion to the contrary and, as a result, was granted asylum.<sup>97</sup>

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87. *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993).

88. *See id.*

89. *See id.* at 1243.

90. *See id.*

91. *Id.*

92. *See* INS Guidelines, *supra* note 1, at 806-07.

93. 813 F.2d 1432 (9th Cir. 1987).

94. *See id.* at 1435.

95. *See id.* at 1433.

96. *See id.*

97. *See id.* at 1436.

This analysis illustrates the Ninth Circuit's acceptance of the doctrine of imputed political opinion. In fact, the court wholeheartedly embraced this doctrine, as evidenced by its statement that "one must continue to look at the person from the perspective of the persecutor. If the persecutor thinks the person is guilty of a political opinion, then the person is at risk."<sup>98</sup> This doctrine is vital to the area of political opinion because such opinions are comprised of characteristics that cannot be detected by just looking at a person. Often, persecutors decide whom to persecute based on who they presume holds the political opinions that they hope to overcome.<sup>99</sup> In fact, one may be labeled as favoring a political view simply by frequenting certain establishments or talking to certain people.<sup>100</sup> The doctrine of imputed political opinion guards against persecution that will be committed against a person who is not permitted to explain or argue his case to his persecutor. Furthermore, where the acts of persecution could involve murder, an applicant would clearly have a well-founded fear of persecution for an imputed political opinion.

However, the United States Supreme Court has disallowed reliance on imputed political opinion in the context of forced military recruitment.<sup>101</sup> The Court has held that "[t]he ordinary meaning of the phrase 'persecution on account of . . . political opinion' in 101(a)(42) [sic] is persecution on account of the victim's political opinion, not the persecutor's."<sup>102</sup> With this decision, the Court injected a formalistic requirement for granting asylum based on political opinion where even Congress has not imposed such a limitation or restriction: As long as an applicant has a well-founded fear of being persecuted based on an enumerated ground, why should the right to asylum be denied because the applicant does not herself hold the political views which lead to persecution?

The question becomes how to balance the humanitarian intent behind refugee law against the need for standards that clarify the granting of asylum. Although clarification of terms is needed in this and many other aspects of the definition of "refugee," the scope should not be arbitrarily narrowed at the expense of cutting off eligible asylum applicants. For instance, if a woman refugee who is the victim of domestic violence is found to have a well-founded fear of future persecution based on the political opinion that she is

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98. *Id.*

99. *See Love, infra* note 139, at 145-148.

100. *See id.*

101. *See INS v. Elias-Zacarias*, 112 S. Ct. 812 (1992).

102. *Id.* at 816.

opposed to male dominance in her country of origin, then why should she be denied asylum if that is only an opinion imputed to her as a result of her fleeing her battering husband?

What is ironic about applying the “political opinion” criterion to women refugees is that women so rarely have a political voice in many of the countries from which they flee.<sup>103</sup> Additionally, political opinions attributed to women may come from their family association where the men often do not even involve the women in political discussion.<sup>104</sup> Therefore, the doctrine of imputed political opinion is essential as an enumerated ground for women refugees.

In one recent case, a woman refugee who had been subjected to FGM and on-going domestic abuse, was granted asylum based on political opinion.<sup>105</sup> The immigration judge who heard this case found that domestic violence and FGM each constituted separate acts of persecution.<sup>106</sup> In addition, political opinion was found to exist because of the domestic violence.<sup>107</sup> The judge stated that the applicant could be granted asylum based on political opinion for her resistance to mandated female subservience and complaints about physical spousal abuse.<sup>108</sup> Therefore, it appears that the judge was willing to impute this opinion to the applicant even though the only way she ever asserted such an opinion was by fleeing her country of origin. Without the use of the imputed opinion doctrine, it is reasonable to assume that the applicant would have been denied asylum.

### c. Membership in a Particular Social Group

When the definition of “refugee” was being considered for the 1951 Convention, this category of enumerated grounds for asylum was “added to the definition as an afterthought.”<sup>109</sup> A Swedish representative introduced the language “explaining only that it was needed because ‘experience had shown that certain refugees had been persecuted because they belonged to particular social groups.’”<sup>110</sup>

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103. See *Fatin* at 1237.

104. See *Fisher v. INS*, 61 F.3d 1366, 1377-1378.

105. See *IJ Grants Asylum on the Basis of Persecution Relating to Female Genital Mutilation*, INTERPRETER RELEASES, Sept. 1, 1995, at 1189 (citing *Matter of M--K--*, A72 374 558 (IJ Arlington, Va., Aug. 9, 1995)).

106. See *id.* at 1188.

107. See *id.* at 1190.

108. See *id.* at 1188.

109. 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966).

110. *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993).



Ever since then, the “particular social group” category has been used as a catch-all.

In *Fatin*, the Third Circuit formally adopted the definition of “social group” as offered by the BIA in *Matter of Acosta*.<sup>111</sup> The BIA described a “particular social group” as:

... “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, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it 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.<sup>112</sup>

This definition, or some slight variation, has been used by several courts.<sup>113</sup>

The social group category has become the basis of choice for most gender-based persecution claims.<sup>114</sup> However, the circuits are in conflict regarding whether gender, alone or with other characteristics, may constitute a “particular social group.”<sup>115</sup> For example, in *Fatin*, the Third Circuit suggested that “Iranian women who refuse to conform to the government’s gender-specific laws and social norms” could constitute a particular social group.<sup>116</sup> Yet, as previously noted, this case demonstrates the difficulty in satisfying the court that an applicant has the characteristic of the particular group. The applicant in *Fatin* was denied asylum because she did not offer evidence that she actually would refuse to conform to the laws and norms at issue. The applicant’s testimony provided the basis for most of her evidence; she testified that she would only “try to avoid compliance.”<sup>117</sup> In

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111. See *id.* at 1239-40.

112. *Id.* (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (1985)).

113. See *In re Kasinga*, Interim Decision 3278, at 10 (BIA 1996) (citing *Matter of Acosta*, 19 I. & N. Dec. 211 (1985)) (defining “particular social group” as a group of people with “common characteristics that members of the group either cannot change or should not be required to change because such characteristics are fundamental to their individual identities”); see also *Sanchez-Trujillo v. INS*, 801 F.2d 1572 (9th Cir. 1986) (defining “social group” as a collection of people affiliated with each other who are actuated by some common impulse or interest; 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).

114. See INS Guidelines, *supra* note 1, at 809.

115. See *id.*

116. *Fatin*, 12 F.3d at 1241.

117. *Id.*

other words, after establishing almost every part of the definition of a refugee, the applicant's eligibility for asylum hinged upon whether she would exaggerate her case and testify that she would rather risk beatings, imprisonment, and rape rather than wear a Chador, or instead, whether she would admit that she would conform rather than be abused, but that the persecution would still be a hardship.

The court was correct in its application of the formulated definition because membership in a particular social group requires that an applicant share with that group a characteristic that she is not willing to change. However, in application, the result of this case illustrates why the accepted definition is too narrow to provide a dependable category for gender-based claims. The judiciary is aware of the problems faced by women refugees. In fact, the INS Guidelines have been referred to in cases in order to demonstrate the reasoning of an opinion.<sup>118</sup> Yet, the judiciary will not act on its own initiative to resolve nonrecognition of gender-based asylum claims. By definition, the judiciary is not a legislative body, and, therefore, will await statutory direction before giving women refugees a sure thing. The courts fear "opening the floodgates" for women refugees from all over the world to seek asylum in the United States.<sup>119</sup> The basis for this fear is that the United States knows that women refugees would often meet the definition of a refugee because persecution of them is so wide-spread.<sup>120</sup> No court wants to be responsible for having started the ball rolling in this direction.

On the other hand, the Second Circuit in *Gomez* held that gender alone cannot constitute a particular social group.<sup>121</sup> In fact, the court found that "possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."<sup>122</sup> How many other broadly-based groups could the court be referring to besides women? Blacks and Asians would be allowed asylum based on race. Jews and Moslems would be granted asylum based on the category of religion. Croats and Serbs could base their claims on nationality. Although many broad-based groups

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118. See *In re Kasinga*, Interim Decision 3278, at 6.

119. See Peter Godfrey, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, 280-81 (1994).

120. See *Fatin*, 12 F.3d at 1240 ("If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country . . . and it seems unlikely that Congress intended such a result.").

121. See *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

122. *Id.*

have the possibility of coming in under the social group category, under *Gomez* women do not.<sup>123</sup>

The INS Guidelines offer little support to women confronted by the adjustable definition of the “particular social group.” The Guidelines recount the divergent holdings in *Fatin*, *Gomez*, *Matter of Acosta*, and other specific-to-the-facts holdings.<sup>124</sup> Although it is helpful to make asylum adjudicators aware of what is happening in the field of gender-based asylum claims, it seems that the INS Guidelines will lead to further confusion for those who try to follow this stream of random cases.

#### IV. THE POSSIBILITY OF INTERNAL FLIGHT ALTERNATIVES CAN HAVE A SIGNIFICANT AFFECT ON THE ASYLUM ELIGIBILITY OF WOMEN REFUGEES

To successfully claim asylum in the United States, an applicant must show that the persecution being asserted is country-wide.<sup>125</sup> Where the persecutor is the State, there is a presumption of country-wide persecution.<sup>126</sup> For example, a claim of domestic violence that goes unprotected by the State allows the State to be deemed the persecutor, and, therefore, this factor presumptively is satisfied.

The reason for requiring country-wide persecution rests in the definition of “refugee.” The definition states that a refugee is a person who is outside the country of which he or she is a national, or in which he or she 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.”<sup>127</sup> In other words, if the applicant is able to avoid the persecution against him or her by moving to another part of the country, or by seeking the help of a State official, then there is no need for the applicant to be granted asylum in the United States since the persecution will come to an end on its own.

The question of whether the persecution being suffered by the applicant exists country-wide is not cut and dry. The internal flight alternative must be reasonable for the applicant.<sup>128</sup> For instance, an asylum adjudicator should take into account whether the applicant will be able to travel safely. In addition, an adjudicator must consider

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123. *See id.*

124. *See* INS Guidelines, *supra* note 1, at 809-11.

125. *See Matter of Acosta*, 19 I. & N. Dec. 211, 235 (1985).

126. *See id.*

127. 8 U.S.C. § 1101(a)(42).

128. *See* INS Guidelines, *supra* note 1, at 815-816.

the applicant's status in society, and whether or not the applicant is responsible for children.<sup>129</sup> Usually, the applicant's detailed and credible testimony will suffice.<sup>130</sup> Other objective evidence may be examined, but an adjudicator must remember that the internal flight alternative must be a reasonable option for the *applicant*, not the reasonable person.

Some of the factors used in Canada to assess the reasonableness of an internal flight alternative are as follows:

the availability and effectiveness of shelters and other assistance programs, the availability in practice of police protection, the meaningfulness of enforcement of existing laws in other areas of the country should her abuser follow the victim of domestic violence or attempt to have her returned, and the cultural or societal traditions adversely affecting "battered women."<sup>131</sup>

As previously discussed, if a woman refugee flees a country due to gender-based persecution and she could not have received protection from the State, then the State is the persecutor, and this issue is moot. However, if the State has offered her protection, then the applicant would have to prove that no matter where she went in the country, she would be located by her persecutor, or that it would be unreasonable for her to flee anywhere else within the country. However, where her persecutor is not the State, a woman refugee will have a problem proving that she has been persecuted in the first place, since an asylum adjudicator might see such circumstances as within the private sphere and not applicable to claims for asylum.

*In re Kasinga* illustrates how internal flight alternatives are handled in the United States.<sup>132</sup> In this decision, the BIA held that the applicant suffered from persecution due to the practice of FGM, to which she would be subjected if returned to Togo, her country of origin.<sup>133</sup> The BIA was aware that FGM was widely practiced in Togo and that there was no state intervention to prevent the practice.<sup>134</sup> In addition, the BIA knew that the police in that area tolerated acts of violence and abuse against women.<sup>135</sup> The BIA also noted that Togo had a poor human rights record and that there was little governmental

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129. See Anker, *supra* note 66, at 739.

130. See *id.* at 740.

131. Anker, *supra* note 66, at 739.

132. *In re Kasinga Interim Decision 3278*, at 11-12 (BIA 1996), reprinted in 35 I.L.M. 1145 (1996).

133. See *id.* at 12.

134. See *id.*

135. See *id.*

protection in this area.<sup>136</sup> Furthermore, Togo is a small country; there is not far to run.<sup>137</sup> Finally, the BIA considered the fact that none of this evidence had been refuted.<sup>138</sup>

This case demonstrates an objective look at internal flight alternatives as opposed to the subjective view of the applicant. Thus, even though most courts hold that this is a subjective determination from the viewpoint of the asylum applicant, *Kasinga* illustrates the reality that courts use more of an objective test.

The danger in allowing the courts to determine when an internal flight alternative is reasonable is evident. First, this element of the “refugee” definition can be manipulated to “close the floodgates” whenever an asylum adjudicator feels that gender-based claims are becoming “too” available to women refugees. Second, adjudicators may have incorrect or incomplete data on which to rely in making this determination. Finally, what may seem reasonable to an asylum adjudicator in the United States may not seem so to a young, persecuted woman in Togo. In fact, credible and direct evidence presented by the applicant can best show the reasonableness of an internal flight alternative.

V. RECOMMENDATIONS FOR ENABLING WOMEN REFUGEES TO HAVE A BETTER CHANCE AT GETTING THEIR ASYLUM APPLICATIONS APPROVED

A. *The Sixth Enumerated Ground: Gender*

The best method for giving women refugees a fair chance in asylum proceedings is for congressional legislation to provide a separate enumerated ground for asylum based on gender. The majority of the world’s refugees are women.<sup>139</sup> In addition, there is a desperate need for controlling law in this area. Such legislation would codify the portions of the INS Guidelines that state actual principles and recommended procedures. In over three years since the INS Guidelines were adopted, the only tangible improvements for women refugees are the few model cases where women refugees have been granted asylum based on gender-based claims.

Utilizing the other enumerated grounds in deciding claims of gender-based persecution is like trying to fit a square peg into a round

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136. *See id.*

137. *See id.* at 12.

138. *See id.*

139. *See* Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN’S L.J. 133 (1994).

hole: It simply does not fit, and it never will. These claims are unique. They are not random acts of persecution. Victims of gender-based persecution are not selected for persecution for any reason other than the fact that they are women. Forcing some gender-based claims into the “political opinion” category, and the rest in the “catch-all” category of “membership in a particular social group,” effectively results in the denial of these claims.

The present system that exists in the United States is a shining example of institutionalized discrimination. The United States is a party to several conventions that speak to the prevention of discriminatory practices against women; yet, its asylum laws perpetuate discriminatory treatment towards women whose lives are at stake. Asylum law has historically been intended as a promotion of international human rights.<sup>140</sup> The fact that numerous women who suffer from violations of such rights is no reason to turn them away. There is an urgent need for recognition of these refugees.

*B. Expand the Definition of “Social Group” to Encompass Gender-Based Claims*

If binding legislation is too much of a commitment to women refugees, at least give them solid footing by including their claims within the definition of social group in a definitive manner. Women refugees will still need to satisfy the other aspects of the refugee definition like other asylum applicants, but their claims would be on par with the other claims, instead of at a disadvantage. For example, if a man is beaten, cut, or bashed in the head by someone in his family, he has a much better chance of fitting into the “social group” category than a woman in the same situation. The reason is that asylum adjudicators are afraid to regularly approve women refugee applications due to a fear of opening “the floodgates” for women refugees throughout the world.<sup>141</sup> This fear is simply unsubstantiated. Canada has precedential decisions that give women a fair chance at being granted asylum, and empirical evidence shows that claims in that country have hardly risen.<sup>142</sup> In any case, if a mass migration of women refugees were to arrive at U.S. borders, then that would be the time to begin restricting gender-based persecution claims. However,

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140. See INS Manual, *supra* note 43, at 2 (“The United States’s interest in asylum and refugee resettlement is based on our inherent belief in human rights, which lead us to strive to end the persecution of individuals and to offer refugee and legal protection . . .”).

141. See Godfrey, *supra* note 119, at 280.

142. See Anker, *supra* note 66, at 716.

right now, the United States must remedy its years of neglectful treatment of women refugees.

*C. Define "Persecution"*

A final way to put women refugees on equal footing with other asylum applicants would be for Congress to define the term "persecution." The term could be defined by a nonexhaustive list of acts, behavior, or conduct that constitutes persecution. In the alternative, factors that describe treatment rising to the level of persecution would suffice. With the latter method, courts would feel free to grant asylum to women refugees as often as the gender-based persecution claim fell within the wording of the definition.

VI. CONCLUSION

The bottom line for developing a workable solution to the problem of neglecting women refugee claims and gender-based persecution is clarification. Once the United States breathes meaning into the principle of equal treatment, it can take the lead in promoting equality for women throughout the world. The United States has been at the forefront of so many eras that have put fundamental human rights before anything else. It is time for the United States to put its best foot forward and set the pace for a new era of equality for women in all respects.

By allowing gender-based persecution to stand shoulder-to-shoulder with persecution based on account of race, religion, nationality, political opinion, and membership in a social group, the United States will be showing the world that it is not hypocritical in its stance against human rights violations. It is impossible to stand for principles of democracy and equal treatment while maintaining the current system that the United States has in place to deal with these gender-based claims. If the United States wants to cut back on the number of immigrants, then let it start with those that are approved to enter the United States in order to work before it closes the door to the people who pick up their entire lives, leave family and friends behind, and use all the resources they possess to get to the United States: the refugees.

By enacting legislation, the United States is powerful enough to set trends in this area. If other nations followed its lead, then the United States would really have no reason to worry that all women refugees would come barreling toward the U.S. border because there

would be other places for them to go. Therefore, U.S. initiative is imperative to the plight of the woman refugee.