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ARTICLE: Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution

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BIO:

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SUMMARY:
... There is, arguably, no nation in the global community where gender equality has yet been fully realized. ... The Parts following analyze how gender has (and has not) been reconciled with the "particular social group" category in U.S. refugee law and engages some comparative reference to recent relevant developments in U.K. asylum law. ... Of significance for the purposes of this analysis are the structural problems embedded in the Canadian statutory definitions of refugees, and the difficulties which have been encountered in making women's claims cognizable within these definitions, in particular, claims for asylum based on gender-specific forms of persecution like sexual violence. ... The Canadian *Guidelines* seek to enable adjudicators to grant refugee status to women whose claims are based on past experiences of gender persecution and who can demonstrate first, a well-founded fear of future persecution, and second, that this persecution relates to at least one of the already enumerated grounds of persecution--religion, nationality, race, political opinion, or membership in a particular social group. ...

HIGHLIGHT: The danger of confronting the universality of women's oppression lies in the rejoinder that women are always and never refugees--always, because they cannot confidently rely on state protection wherever they live; and never, because there is no place to which they can flee. n1

Human rights have not been women's rights--not in theory or reality, not legally or socially, not domestically or internationally. n2

That women can now seek asylum from gender-related persecution is perhaps one of the most remarkable achievements in Canadian legal history in this century. n3

TEXT:

[*281] INTRODUCTION

There is, arguably, no nation in the global community where gender equality has yet been fully realized. n4 Put differently, gender inequality, or **[*282]** women's subordination vis-a-vis men, continues to characterize virtually all

known societies, although the degrees, extent and manifestations of the phenomena differ, sometimes profoundly. This is the backdrop against which migrant women's claims for asylum take place--when they flee from one nation and seek refuge in another to escape the particular harms of gender persecution. The claims of refugee women who seek escape from the more specific gender persecution manifested through crimes of sexual and/or domestic violence, and the attempt to create legal spaces in which these claims can be accommodated in Canada, throw into stark relief a complex set of legal, political, and social issues. Among these issues are definitions surrounding human rights, women's rights and legal recognition of what constitutes a rights violation, the public/private split, the state's role in and relationship to gender inequality, and the socio-legal contexts of violence against women. Furthermore, given that the majority of refugees come from nations of the Third World, n5 refugee claims and their reception in the nations of the liberal democratic West inevitably evoke dominant narratives and representations of cultural "others."

In this Article I address two central themes, each of critical importance in the determination of claims for asylum made by women fleeing gender persecution. The first of these is the set of definitional hurdles women face in framing claims that are based on gender persecution, most often revolving around the "most elastic and nebulous" n6 category--"membership in a particular social group." The second is the state's relationship to the persecution being claimed and, most critically, its ability to protect the claimant, a particularly fraught dilemma in cases of violence perpetrated in intimate relationships and in the context of the so-called "private" sphere.

The first Parts of the Article address legal attempts to "fit" the experiences of women refugees who make asylum claims based on experiences of domestic and sexual violence as gender persecution into the existing statutory framework governing the admission of refugees into Canada. The Parts following analyze how gender has (and has not) been reconciled with the "particular social group" category in U.S. refugee law and engages some comparative reference to recent relevant developments in U.K. asylum law. To this end I analyze the Canadian Immigration and Refugee Board's ("IRB") Guidelines issued on Women Refugee Claimants **[*283]** Fearing Gender-Related Persecution n7 ("*Guidelines*"), to assist with adjudicating the claims of refugee women seeking relief from gender persecution. Drawing on the now extensive literature on this topic, n8 I specifically address the extent to which women's refugee claims are best captured through amending the statutory definition of a refugee to include gender as an enumerated ground of persecution. Alternatively, I address leaving the current definition intact and instead judicially expanding the existing definitions--such as the category of "membership in a particular social group"--to recognize the specificities of gender persecution. The tactical merits of these divergent approaches are described by Audrey Macklin as "augmentation versus reinterpretation of existing categories." n9 She argues for adoption of the latter strategy. I argue, however, that these are not mutually exclusive approaches. Adding gender as an articulated ground will not displace the simultaneous need to push and expand the interpretive framework of already existing legal categories that define refugees to accommodate the specificities of women's claims and the social contexts in which they emerge.

The second and related focus of this Article is to critically examine what refugee law and dominant discourses surrounding the claims of migrant/displaced women fleeing the gendered injuries of domestic and sexual violence reveal about the complicated role the state plays in relation to this form of gender persecution. Crucial to this question is attention both to the role of the home state from which the refugee woman has taken flight and of the receiving state in which she seeks asylum. Furthermore, the privatized nature of most violence against women in intimate **[*284]** relationships must be taken into account in any analysis of this expression of gender inequality and the state's role in it because the idea that men's violence against women is a "private" problem and not a public one has obscured the extent to which this violence is socially and politically produced and situated.

In particular, I examine the Canadian state's own record on providing protection to its female citizens whose lives have been harmed by domestic and/or sexual violence. This analysis throws into stark relief the paradoxical nature of the implicit assumption operating in many Western states--that this problem has somehow been remedied at home. I argue that governmental accountability for violence against women implicates a range of complicated issues, and that no state, including the Canadian state, has adequately remedied this problem within its own borders, creating an unacknowledged dilemma for refugee-receiving states like Canada. Part of the way around this dilemma must be found in a recognition that the limitations of state provision of adequate protection from violence are not only found "there" but also exist "here," as an examination of the Canadian record on this issue shows. This suggests that the operating assumption in refugee law should be that most states are *not* able to protect women adequately from "private" violence perpetrated by male intimates, and, as a result, that the evidentiary hurdles facing claimants seeking to show a failure of state protection should be eliminated or at least greatly attenuated.

I. WOMEN, VIOLENCE, AND THE GENDER POLITICS OF REFUGEE FLOWS

Violence against women is pervasive, affecting women around the world. n10 Indeed, men's violence against women is arguably one of the most central, profound, and brutal ways in which gender inequality is produced, expressed, and reproduced. The vast majority of sexual violence perpetrated against women takes places within intimate heterosexual relationships in what has traditionally been viewed as the private sphere. n11 While sexual violence, particularly mass rape, n12 has also historically **[*285]** and contemporarily been used as a tool of war, n13 the focus in this Article is mainly on sexual violence perpetrated against women by their male intimates, that is, by so-called private or non-state perpetrators.

A great deal of research, advocacy, political organizing, and legal reform has taken place over the last two decades in an attempt to tackle the problem of violence against women at the domestic and international levels. n14 Despite a significant amount of state action on this massive social problem in at least some countries, it remains to a great extent effectively beyond the reach of state intervention. This is in part because men's violence against women and children is embedded in and intersects with social relations of hierarchy and inequality that are deeply rooted and resistant to transformation, n15 and in part because state responses have been woefully inadequate in dealing with this social problem. It is also symptomatic of the historical dichotomization of the private and the public, and the severing of state or public responsibility for (or intervention into) what has typically been viewed as the "private" and intimate world of the domestic, the traditional domain of women and the family. n16

In addition to sexual violence, women around the world face a variety of other forms of persecution and human rights violations which are gender specific, including female genital mutilation ("FGM"), dowry deaths, n17 purdah, n18 coerced or forced adherence to religious dress codes **[*286]** and other restrictive customs, and the use of mass rapes as a weapon of war. Other constitutive features of gender inequality that are present in virtually all known societies include women's exclusion from or under-representation in the state and other powerful social institutions, gender segregated employment patterns and unequal pay, inadequate reproductive health care, lesser access to general health services, education, and other social goods and resources, and greater--if not often exclusive--responsibility for the care of children and domestic work. It is important to point out that while some of the forms of women's oppression that are often taken to be the most "extreme"--like FGM and bride burnings--are typically found in the nations of the South, women's inequality is a global, trans-national phenomenon characterizing the polities of both the so-called First and Third worlds.

Not surprisingly, the politics of gender inequality also shape refugee flows. One of the striking characteristics of the world's refugee population is the significant overrepresentation of women and children amongst its ranks. In fact, it is estimated that eighty percent of refugees and displaced persons worldwide are women and children. n19 Refugees are produced as the result of a variety of social, economic, and political upheavals, including--but not limited to--ethnic wars, economic devastation, environmental catastrophes, and wide-scale human rights abuses. As Helene Moussa points out, "the refugee situation today is no longer ad hoc or temporary. It is a continuous phenomenon, and for many refugees a permanent life situation." n20 The protracted crisis in Kosovo, for example, produced a massive outpouring of refugees as many thousands of people fled war-torn areas and sought safety in neighboring territories. n21 The escalating and violent struggle between Palestinians and Israelis has, as one of its central unresolved components, a refugee problem created by the historical displacement of Palestinians who seek a right of return.

In addition to the startling gender asymmetry in the populations of the world's refugees, there is also a pronounced gender asymmetry with regard to the proportion of female refugee claimants admitted into Canada. However, the asymmetry is not in the direction one would imagine. In other words, while it should seem obvious that the greater preponderance of female refugees worldwide would result in a greater proportion of female refugees being admitted into Canada, the reverse is true. Male refugees are significantly over-represented in terms of who is admitted to Canada under the refugee category. Approximately sixty percent of refugees selected and accepted from abroad (as opposed to those making inland **[*287]** claims) have been male adults. Overall, approximately two thirds of all refugees accepted into Canada are male. n22 The under-representation of women refugees admitted into Canada speaks both to the conditions of women's lives around the world--including greater poverty, access to fewer resources, greater (or exclusive) responsibility for children, and more restricted mobility, to name just a few--as well as the structural barriers built into Canada's refugee determination system which make access to it so much more difficult for displaced women. n23 Of significance for the purposes of this analysis are the structural problems embedded in the Canadian statutory definitions of refugees, and the difficulties which have been encountered in making women's claims cognizable within these definitions, in particular, claims for asylum based on gender-specific forms of persecution like sexual violence.

A. The Legal Definition of "Refugee" and the Canadian Guidelines

Drawing directly on the UN Convention Relating to the Status of Refugees drafted in 1951, section 2 of Canada's Immigration Act provides that a Convention Refugee is any person who

> (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is
>
> (i) outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail herself of the protection of that country, or
>
> (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country. n24

While the definition expressly identifies persecution based on factors such as race, religion, nationality, political opinion, or membership in a particular social group, gender is glaringly absent as its own enumerated ground.

The definition of persecution is itself somewhat amorphous. It is not defined in the UN Convention Relating to the Status of Refugees and is a concept which has resisted precise definition. n25 In *Ward v. Canada (Minister* **[*288]** *of Employment and Immigration)* the Supreme Court of Canada defined persecution as "sustained or systemic violation of basic human rights demonstrative of a failure of state protection." n26 According to the *Guidelines*, persecution may, in some circumstances, "be the same as severe discrimination on grounds of gender." n27 For the purposes of refugee law in general, then, persecution contains two elements--the fear, threat, or experience of harm (persecution), and the state's inability or unwillingness to protect the individual from that harm.

Until relatively recently, therefore, those claims for asylum in Canada made by women on the basis of experiences which would now be recognized as gender persecution, were not easily fit into the legal definitions of who qualified as a refugee and were, in many cases, simply denied. In 1993, following significant media attention surrounding a few high profile refugee cases in which women's claims were rejected, the Chair of the IRB issued its *Guidelines*. These *Guidelines* were developed in consultation with refugee and women's advocacy groups and were intended to assist in remedying the problems facing refugee women fleeing gender-specific forms of persecution. The cases which, in part, helped focus public attention on problems within the refugee determination system involved women who were denied refugee status even though they clearly experienced persecution based on gender. One woman was subjected to a deportation order forcing her to return to Trinidad where her violent and abusive husband had also returned so that he could avoid serving a prison sentence in Canada for repeatedly assaulting her. This woman's husband had previously been convicted a staggering *eleven times* within Canada for physical violence perpetrated against her and for his repeated threats to kill her. n28 Another woman's refugee application was denied (although eventually granted by Ministerial discretion) despite the persecution and harassment to which she had been subjected in Saudi Arabia for her refusal to wear a veil, as was required in that country by religious custom and state policy. n29

The traditional inability or refusal of adjudicators to accommodate these kinds of claims within the statutory framework regulating the admission of refugees was the very issue the *Guidelines* sought to address by providing principles of statutory interpretation for recognition of gender-specific persecution, and by providing additional training to the IRB adjudicators in the application of the *Guidelines'* interpretive principles. The purpose of the *Guidelines*, then, is to allow decision-makers in the IRB to define the category of refugee in a way that more fully and sensitively **[*289]** takes into account the particularities of women's gender-specific experiences of persecution. The *Guidelines* are especially important insofar as they instruct the IRB adjudicators in ways to accommodate the claims of women who have been persecuted because they have transgressed the social or religious mores of their nation-states. n30 The *Guidelines* are also important for women who seek asylum based on persecution in the form of domestic violence. In both of these instances, the *Guidelines* incorporate a much needed recognition of the specific forms of persecution to which women are often subjected because of their gender status.

Because the *Guidelines* represent an important move forward in dealing with gender persecution in refugee law, and because Canada took a lead in adopting a more gender sensitive approach to adjudicating these claims, some may have the impression that Canadian refugee law has largely resolved the barriers facing women seeking asylum for gender-related abuses. n31 In fact, Canada is often held up as an example to other countries in this area. But on closer examination, it is clear that the definitional and interpretive problems which have plagued the ways in which legal decision-makers have responded to women's gender persecution claims and the ways in which legal interpretations have resisted accommodating gender as a recognized ground of persecution have yet to be resolved in the Canadian context.

The *Guidelines* do not actually include gender as an independent ground on which a claim of persecution can be made within the statutory definition of a refugee. Instead, they direct the IRB decision-makers to determine "the linkage between gender, the feared persecution and one or more of the already existing definition grounds." n32 In this way, it is important to recognize that the *Guidelines*, while representing significant progress in Canada's accommodation of women's asylum claims based on gender persecution, are also an inherently limited remedy; they are only administrative directives which reflect a policy statement of interpretive possibility, rather than a definitive definitional legal shift. They are, in other words, not "hard law." The *Guidelines* merely serve as an **[*290]** interpretive device, providing what Audrey Macklin describes as "advice on gender-sensitive approaches to statutory interpretation." n33

B. Women as a Social Group

> "The answer, of course, lies . . . in a broader principle, and the exaggerated focus on sub-groups and identifying characteristics . . . [leads] to the essential identifying factor being ignored, namely, women in context, that is, women in social context." n34

The Canadian *Guidelines* seek to enable adjudicators to grant refugee status to women whose claims are based on past experiences of gender persecution and who can demonstrate first, a well-founded fear of future persecution, and second, that this persecution relates to at least one of the already enumerated grounds of persecution--religion, nationality, race, political opinion, or membership in a particular social group. In many cases this has meant attempting to accommodate women's claims within the theoretically and empirically vexing category of "membership in a particular social group."

However, this strategy has created an often mechanistic and reductive classification problem because, in the absence of gender as an express ground of persecution, the *Guidelines* encourage the creation of artificial and ossified sub-categories of women who are recognized as subjected to persecution, a dilemma which has also characterized U.S. and British jurisprudence. Referring to British refugee law on this precise issue, one commentator has described the interpretive challenge as having led to "interminable and unconvincing essays in sub-division." n35 In the United States the same classification phenomenon occurs. American courts, for example, have identified "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" n36 as the relevant social group in a successful asylum claim. Similarly "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," n37 as the relevant social group in a claim which was denied.

Canadian refugee law recognizes the sub-category of "Trinidadean women subject to wife abuse" as the Federal Court of Appeal identified **[*291]** in *Mayers v. Minister of Employment and Immigration*. n38 Although this case was decided shortly before the release of the *Guidelines*, the *Guidelines* nonetheless do not remedy the problem of sub-classification which appeared in *Mayers*. Instead, they underscore it. In other words, because the *Guidelines* do not recognize that gender can itself constitute the social group facing persecution, the same taxonomic problem persists; increasingly narrow sub-groups of women sharing specific characteristics are identified as the relevant and persecuted social groupings.

In her introduction to the *Guidelines*, and addressing the issue of domestic violence, the (then) Chair of the IRB illustrates precisely this problem when she states that women facing such violence "can be found to be members of a particular social group, *unprotected women subject to domestic violence*." n39 Other more recent examples of constructed subdivisions include "single women suffering from abuse at hands of former spouses . . . who have been forced into prostitution," n40 women married according to traditional Yoruba custom, n41 women in Pakistan "in forced marriages," n42 "women in El Salvador abused by a perceived partner, a rebuffed ex-boyfriend," n43 and "a family including two minor children led by a single parent female with serious mental health problems, in a country with serious social and economic problems with a documented negative effect on women and children." n44

As these examples illustrate, in a world characterized by deep and structured gender inequalities, the Canadian *Guidelines* fail to recognize that female gender status itself constitutes membership in a particular social group. Because a statutory amendment exceeds the authority of the IRB Chair and would have to be undertaken legislatively, the next best remedial strategy lies in the creative application of existing categories. In the absence of its enumeration as an independent ground, then, the recognition of gender as the relevant "social group" would be the best way to expand and interpret the existing statutory definition of the refugee category. The *Guidelines*, however, fall short of this interpretive strategy of indirectly finding gender itself to be a ground of persecution by recognizing women as a social group, and by recognizing a specific form of persecution based on membership in that gender group. Instead, the *Guidelines* state that

"what is relevant is evidence that the particular social group suffers or fears to suffer severe discrimination or harsh and inhuman treatment *that is distinguished from the situation of the general* **[*292]** *population, or from other women*." n45 In this way, then, the *Guidelines* mandate the identification of particular groups of women subject to persecution, particular groups of women whose experience is *distinguished* from that of other women. Furthermore, with specific regard to domestic violence the *Guidelines* stipulate that "*a sub-group of women can be identified* by reference to the fact of their exposure or vulnerability . . . to violence, including domestic violence, in an environment that denies them protection." n46

The problem with this approach is that there is no rationale for how the sub-group within gender-as-a-group, is to be defined. In Macklin's words, "the *Guidelines* accept that . . . gender may form the basis for [particular] social group ascription, but they evade the important question of how to circumscribe the group." n47 It is possible, then, that women's refugee claims for asylum from sexual violence will be found to rest on an ever-expanding, yet paradoxically increasingly narrow set of categories of claimants. For example, "Indian women subjected to physical violence from husbands," or "Lebanese women subjected to sexual abuse by uncles," and so on. This endless particularization misses the very crucial point of the analysis--that sexual violence is itself a form of gender persecution and that it is gender which is both the common denominator defining the social group and which makes women the target of this form of persecution in the first place. In fact, the section of the *Guidelines* which stipulates that a sub-group of women can be identified by being distinguished from other women, is immediately followed by the assertion that "these women face violence amounting to persecution, because of their particular vulnerability as women in their societies . . . ." n48 But the *Guidelines* fail to follow through on the radicalism of this very insight. For, if it is their status as women which renders them vulnerable to domestic violence--which is exactly the point that feminist advocates have been making for more than two decades--then gender itself is the basis for membership in a particular social group. Gender *is* the characteristic which delimits the social group. Comparing a sub-group of particularly vulnerable women to women as a whole is superfluous and distracts from the main issue.

C. "Membership in a particular social group" in Ward

Released only a few months after the *Guidelines*, *Ward v. Canada (Minister of Employment and Immigration)*, n49 is the seminal Supreme Court of Canada case on refugee status with respect to identifying fear of **[*293]** persecution, and more specifically, on theorizing the contours of membership in a particular social group. In obiter comments on how membership in a particular social group should be defined, La Forest J. lends credence to the view that gender may in and of itself be an independent ground on which a claim of persecution can be founded. While the facts in *Ward* dealt with a claim for refugee status made by a man threatened with death by the Irish National Liberation Army (INLA), a paramilitary organization from which he defected, La Forest J.'s judgment engages in a wide-ranging consideration of issues highly pertinent to refugee claims, including the state's relationship to persecution, which is analyzed more fully below, and the scope of the category of "social group."

In delineating the correct approach to defining a particular social group, La Forest J. draws on anti-discrimination principles and *Canadian Charter of Rights and Freedoms* jurisprudence, n50 clearly a progressive move for refugee law. Drawing on these frameworks and on previous case law, he identifies three possible categories that may constitute a "particular social group." These are:

> groups defined by an innate or unchangeable characteristic;
>
> 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. n51

According to La Forest J., the first of these, explicitly embraces "individuals fearing persecution on such bases as gender . . . ." n52 Of particular significance is that La Forest J. mentions gender as its own category, not defined in relation to anything else or modified in terms of any other characteristic. This dictum from the Supreme Court of Canada suggests that the IRB can dispense with the need to identify a gender sub-group within the gendered group of women. As Macklin points out, "to the extent that *Ward* contemplates gender as a category, it may be that this aspect of the *Guidelines* has been effectively superseded by the dictum of the Supreme Court of Canada." n53 Certainly it would behoove the IRB decision-makers to move beyond the categorical constraints of the approach of the *Guidelines* and,

emboldened by this Supreme Court of Canada dictum, to stretch membership in a particular social group criterion to include women as a social group.

[*294] *D. Gender and Membership in a "Particular Social Group"--U.S. Legal Approaches*

The U.S. case law on the relationship of gender to the "particular social group" enumerated ground reveals a set of ultimately inchoate interpretive approaches to this category's legal meaning. There has been a potentially significant recognition that gender can form the basis, or, more accurately, *part* of the basis of membership in a "particular social group," evidenced both by the decision in *Matter of Kasinga* n54 and by a new proposed Immigration and Naturalization Service ("INS") rule on Gender and Domestic Violence-Based Asylum claims. n55 However, U.S. asylum law lacks a consistent willingness to recognize that persecution suffered by many women seeking asylum is persecution inflicted precisely on the basis of their gender status. In other words, U.S. refugee law has yet to grapple adequately with the fact that gender can form the basis of a "particular social group," and, as a result, some gender claims have been allowed but only through convoluted legal logic, while others have simply been denied.

In *Matter of Acosta* the U.S. Board of Immigration Appeals n56 ("BIA") found that membership in a "particular social group" was based on a "common immutable characteristic," which might be innate, as "sex, color, or kinship ties," or might be a "shared past experience such as military leadership or land ownership." n57 This significant decision in U.S. refugee law showed a promise of doctrinal progression and expansion with regard to legal definitions of "particular social group," especially in recognizing gender as a potential basis of this category. This promise, however, has remained largely unrealized in asylum jurisprudence in the United States.

Recognizing that the content of the "particular social group" category would necessarily be defined on a "case-by-case basis," the BIA in *Acosta* acknowledged that the constitution of a "particular social group," therefore, could be circumstantially specific, as in a shared experience or voluntary status that unites group members. More significantly, however, the legal reasoning in *Acosta* expressly allowed for recognition that a "particular social group" can be organized around fundamental characteristics essential to a person's identity, which obviously includes such fundamental attributes as gender. However, a review of leading cases reveals **[*295]** the radical potential of this recognition of gender as the basis of a "particular social group" has not been systematically realized or fully implemented in subsequent U.S. case law relating to women's refugee claims arising out of experiences of gender persecution.

While the decision in *Matter of Kasinga* is hailed as a breakthrough insofar as it explicitly recognizes gender as a component of the "particular social group" category, the judicial reasoning underpinning this finding suffers from the same restricted and compartmentalized approach to gender seen in Canadian case law. n58 In that case, Fauziya Kasinga, a young woman from Togo, sought asylum in the United States to protect herself from being forced to submit to her tribe's practice of FGM, a practice imposed upon all female members either in childhood or adolescence. n59 Ms. Kasinga had successfully escaped the practice through the protection of her influential father. Upon his death, she fell under the care of her aunt who forced Kasinga into a polygamous marriage and, in preparation, also made plans to force Kasinga to undergo FGM before the marriage was to be consummated.

The BIA found that the practice of FGM constituted persecution, thereby satisfying the first component required for a grant of asylum. In order to satisfy the second phase of the legal inquiry, the persecution had to be tied to one of the five categories specified in section 101(a)(42)(A) of the *Immigration and Nationality Act*. n60 The BIA found, therefore, that the persecution was "on account of" her membership in the "particular social group" of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." n61

Interestingly, the BIA arrived at the desirable and fair legal result, but only by way of the most restrictive analytic route. Despite the fact that FGM is a gender specific practice imposed upon all girls in the group precisely because they are female, the BIA did not find that the group subject to persecution was comprised of the tribe's female members. Had it done so, it would have foregrounded gender as the most salient characteristic of identity which is the basis upon which FGM was inflicted. This more expansive analysis would have recognized FGM as a gender-specific form of persecution and would have led to a precedent in which gender alone was recognized as the basis of the vulnerable social group. Instead, the BIA focused on the fact that the applicant had escaped the practice, situating her within the far narrower group of women "having intact genitalia" who oppose the imposition of FGM. n62 This is **[*296]** more than a matter of semantics. At risk is the ability to create legal categories which can most appropriately accommodate the facts, one of which is that the persecution (in the form of FGM) from which Kasinga sought escape is a gender-specific practice.

The definition of "particular social group" in *Kasinga*, while representing a positive legal development in U.S. asylum law, nevertheless fails to grapple with gender as a category in its own right. By linking the persecution Kasinga experienced to her opposition to and escape from FGM and by artificially defining membership in a "particular social group" by her tribal membership, her gender, and her "genitally intact" status, the BIA's analysis of the applicant's situation has it backward. The BIA failed to acknowledge that the persecution existed "on account of" Kasinga's gender.

In spite of the restrictive nature of its legal reasoning, by recognizing gender as *a* component of membership in a "particular social group," *Kasinga* is nevertheless part of a gradually opening door in the United States through which women fleeing gender persecution can seek asylum, n63 and contributes to the possibility of more generous interpretations of "particular social group" in U.S. refugee law. Yet in the case law subsequent to *Kasinga*, the "particular social group" category has continued to be subjected to impoverished legal reasoning constructing "particular social groups" on the narrowest of grounds. For example, in *Aguirre-Cervantes v. INS*, a young woman from Mexico was granted relief on the basis that the persecution she suffered (extreme physical abuse perpetrated by her father) was "on account of" her membership in the "particular social group" of her own family of origin, another extremely specific and small social grouping. n64 In *Hernandez-Montiel v. INS*, another petitioner from Mexico was granted asylum on the basis of persecution on account of a very specific sexual identity, that of homosexual men with female identities. n65 More recently still, in *Matter of A-N-*, a woman who fled abuse from her husband in Jordan was granted asylum on the basis that she was part of the "particular social group" comprising "married, educated, career-oriented" Jordanian women, indicating a recognition of the gender-based persecution but with a series of major qualifications attached to narrow the ground significantly. n66

[*297] More problematic than the cases in which "particular social groups" have been constructed extremely narrowly are those cases in which courts have simply refused to recognize gender as forming even part of the group identity, leading to the denial of asylum. For example, in *Matter of R-A-*, n67 the BIA denied asylum to a Guatemalan woman who had been subjected to a decade of extreme physical and sexual abuse by her husband, abuse which the Board had no trouble identifying as constituting persecution. n68 However, the application for asylum was denied because, among other reasons, n69 the BIA found that her persecution was not "on account of" a cognizable ground, rejecting her claim that the relevant social group was "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." n70 This decision generated a storm of protest and academic criticism, n71 was vacated by order of the Attorney General, on January 19, 2001, n72 and has been remanded to the BIA for rehearing after the final publication of new regulations pertaining to gender asylum claims, at which time asylum will hopefully be granted based on the new Department of Justice rules. n73 The BIA's decision in *Matter of R-A-*, however, demonstrates a blatant unwillingness (at least on the majority's part) to recognize gender as the basis of persecution.

Relief has also been granted by U.S. courts to some women fleeing gender persecution by framing their claims in terms of the enumerated grounds of "political opinion" n74 or "religion." n75 These cases have typically **[*298]** involved either women fleeing oppressive gender-based practices ostensibly legitimated by religion (often claimed to be authorized by the Islamic faith as in *Matter of S-A-*) or women fleeing domestic violence whose claims have been understood to be based on their "political opinion" that this violence is unacceptable (a challenge to male authority), as in *Matter of A and Z* n76 and *Lazo-Majano v. INS.* n77

Use of these categories for linking the persecution suffered to an enumerated ground may represent an innovative solution to current frailties plaguing the interpretations of "particular social group" in U.S. refugee law, especially at the micro-level for some women seeking asylum. But deployment of these categories underscores the macro-level difficulties, already evident in *Kasinga*, which focus on the individual's resistance to the oppressive gender practices from which they seek refuge, rather than recognizing that gender is at once the basis of the persecution and the basis of the persecuted "particular social group." Moreover, it suggests that a woman's belief that she should be free from beatings and other forms of violence--"the notion that women are entitled to be treated as human beings" n78 -- represents a political opinion. Audrey Macklin effectively captures the paradoxical nature of the legal reasoning in the following analogy:

> Consider that it would be odd to argue that South African whites oppressed blacks because blacks held the opinion that they were entitled to be treated as human beings (though they presumably did hold that belief). Indeed, apartheid existed because of the racist beliefs of whites--in other words, blacks were persecuted because of their racialized identity, not because of what they believed. By the same token, domestic violence is not about what a woman believes, but about her gender identity--and the sexist

> beliefs of the man who abuses her. This cannot be captured under the rubric of political opinion because . . . political opinion refers to the victim's beliefs, and not those of the perpetrator. n79

While the strategy of fitting gender persecution claims into the category of "political opinion" has succeeded for some individual women seeking asylum in the United States, it has thereby produced contorted legal reasoning **[*299]** to support such claims and has circumvented the fundamental problem with the exclusion of gender from the "particular social group" ground.

It is perhaps no coincidence that the judicial construction of increasingly particular versions of what constitutes a "particular social group" in U.S. refugee law fits neatly with the radically individualized liberal ethos of U.S. law and politics more generally. Recognition of large social groups situated in structured relationships of inequality--and none is larger than that constituted by gender--is antithetical to the liberal political tradition which sees the individual as the fundamental unit of analysis. Moreover, recognizing gender as an enumerated ground of persecution is seen by some as potentially unleashing the spectre of hordes of prospective claimants seeking asylum simply by virtue of their membership in a social category which is feared as being far too large. Some U.S. refugee decisions have been explicit in expressing the concern that gender is an over-broad category on which to define a social group. n80

It should be pointed out that this classic fear of opening the "floodgates" has not prohibited recognition in refugee law of other enumerated grounds--such as race, religion, and nationality--that necessarily encompass huge populations, a fact pointed out in the Canadian *Guidelines*. n81 More fundamentally, however, the "floodgates" concern misses the essential nature of the refugee remedy, which is a case-by-case individual one. Regardless of the fact that large numbers of people in the world suffer oppression and persecution, asylum claims are made one at a time, on an individual basis, and each individual claimant must pass procedural and evidentiary hurdles as well as fit her petition into a well structured legal framework in order to make out her case. Furthermore, claims based on gender, as claims made under other enumerated grounds, only stipulate the reasons for the persecution in any individual case and do not suggest that this renders large segments of the population eligible for asylum. In other words, refugee law provides a necessarily patchwork-like, individualized micro-level solution to complex macro-level social, economic, and political problems in the world. For these reasons, therefore, a more expansive and principled U.S. approach to recognizing the ways in which gender constitutes a particular social group, particularly in cases of gender persecution in the form of sexual or domestic violence, is long overdue.

[*300] *E. Gender and Membership in a "Particular Social Group"--Developments in U.K. Jurisprudence*

Two recent cases in the U.K. n82 decided by the House of Lords are instructive both for the judicial reasoning underlying the interpretation of what constitutes a "social group" and for the implications this interpretation might have for informing future trends in refugee law in Canada, the United States, and broader international contexts. These cases are especially important for their identification of gender as the basis on which the asylum applicants were persecuted. The decisions break new ground insofar as the legal analysis expressly recognizes that the persecution the asylum seekers suffered was perpetrated because they were women in a society in which women's rights are violated. Put differently, the relevant "particular social group" was found by the House of Lords to be grounded on gender.

Both cases, *Islam v. Secretary of State for the Home Department* and *R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah*, involved the claims of Pakistani women who had been subjected to severe violence by their husbands. Specifically, their husbands had accused them of adultery, and having thereby been perceived to have "transgressed Islamic mores" the women were both physically abused and forced to leave their homes. n83 In criminal proceedings under Sharia law, these women would, if found guilty, be subject to "flogging or stoning to death." n84

Both women sought and were initially denied political asylum in Britain. The rejection of these women's claims was based on a finding that as a matter of law, the claimants did not belong to a "particular social group." n85 It was not contested that the women had suffered gender persecution. Nor was there any question about the state's failure to protect these women. n86 Instead, the main issue in the appeals revolved around the pivotal question of their membership in a social group legally recognized and protected by the Convention.

The House of Lords rejected the lower court's finding that the women were not members of a "particular social group" within the meaning of the Convention, which was based upon the conclusion that there was no common uniting attribute that would satisfy the requirement of cohesiveness. n87 **[*301]** Instead, the Law Lords, divided four to one, found that the women did belong to a "particular social group," though they had distinct approaches on how precisely to define that group. n88 Three members of the majority accepted the validity of "women in Pakistan" as constituting the

"particular social group," while one Law Lord found the group to be narrower, constituted by "women in Pakistan accused of adultery." n89

In addition to the broad and purposive approach taken by the House of Lords in interpreting the Convention in *Islam* and *Shah*, the decision is significant for its explicit and sustained analysis of gender as the fundamental basis of the oppression and persecution the claimants in these cases suffered. As Lord Hoffmann stated, "the concept of social group is in my view perfectly adequate to accommodate women as a group in a society that discriminates on grounds of sex, that is to say, that perceives women as not being entitled to the same fundamental rights as men." n90 This kind of legal analysis promises to yield potentially expansive results--namely, that gender discrimination is now foregrounded in refugee law, inevitably leading to a recognition of gender as a distinct, independent, and explicit ground on which claims of persecution may be advanced. This is a development, however, yet to be acknowledged in U.S. refugee law. Furthermore, despite a more liberal approach in Canada, it has yet to be adequately realized in Canadian jurisprudence, though its arrival was arguably portended by La Forest J. in *Ward*.

F. Making Gender an Enumerated Ground: Contested Legal Strategies

In the face of the definitional and interpretive complexities which have plagued refugee law's relationship to gender persecution claims and, specifically, to the "particular social group" ground, many critics of the current Canadian statutory definition of refugees have persuasively argued that gender must be added as an explicitly and independently enumerated ground on which a persecution claim may be based by refugee applicants. n91 As a group of U.S. refugee law experts point out, "the **[*302]** recognition that the particular social group category can be defined by gender is critical for women seeking protection and, more generally, for coherent interpretation of the particular social group ground." n92 As Mattie Stevens forcefully argues, "the addition of 'gender' as a refugee category is a moral and political imperative. It is also a realistic goal, given increased international recognition of the particular dangers women face." n93

Not all writers agree, however, that identifying gender as a separate ground is the best strategy in the Canadian context. Against a chorus of voices arguing in favor of this legal maneuver, Audrey Macklin warns that there are hazards in making gender an independently enumerated ground, hazards which may not attach to the "discursive strategy of reinterpretation" of the current categories, which she prefers. n94

The strategy with the best tactical advantages in this context, in Macklin's view, does not include lobbying for the inclusion of gender as a separately enumerated ground of persecution. Instead, it emphasizes the need to push for an interpretive process that uses the already existing categories within the statute to acknowledge gender persecution. In fact, Macklin warns that if gender *were* added as an independent ground, "decisionmakers elsewhere could easily dismiss the relevance of Canadian case law on gender-related claims on the basis that the refugee definition in Canada is different." n95 She further points out that gender, like race, nationality and religion for example, is socially constructed and that axes of social location other than gender--such as sexual orientation and disability--are also not independently enumerated grounds of persecution within the statute. In her words, "given a choice, I would advocate collapsing race, nationality and religion into the 'social group' designation." n96 This is because Macklin views the potential expansiveness of the "particular social group" category as one which can accommodate the claims of persons belonging to a number of different social groups--constituted and socially constructed on grounds of race, sex, religion, for example--and a multiplicity of overlapping social locations.

While the creativity of Macklin's tactical approach is salutary, her favored strategy does not foreclose the efficacy of adding gender as a free-standing enumerated ground of persecution. Moreover, while her points about the need for creative interpretation of the legal categories defining refugees as they currently exist are well taken, her arguments against making gender an independently enumerated ground are not entirely **[*303]** convincing. Both sexual orientation and disability, along with other statuses around which social relations of inequality are constructed, are distinct from gender inequality. n97 There are, no doubt, good reasons for adding these as enumerated grounds as well, but regardless of the separate arguments which may support such a position, their exclusion from the statutory definition is hardly justification for the continued exclusion of gender as an independent ground. Gender is a fundamental and defining feature of social life and marks a profound social division upon which is built a deep social inequality, often expressed violently. As Heather Potter argues, "women should not be invisible within the immigration system, and dealing with gender-based persecution separately forces a recognition of the particular position of women which otherwise could be too easily overlooked." n98

Macklin herself acknowledges that the risk of not naming what is done to women as gender persecution leads to its trivialization and "perpetuates the invisibility of its victims." n99 But her preference for the use of particular social

group and the persuasive arguments she raises for the elasticity of this category in the interpretive decisionmaking process surrounding refugee claims should not preclude the simultaneous push for recognition of gender as its own enumerated ground.

Adding gender as its own ground does not necessarily mean that all claims for asylum made by all women refugees will be limited to the ground of gender, even when the gender specificity of the refugee woman's experience is salient. Acknowledging this goes a long way towards ameliorating the concerns of those who argue that gender should not always be an aspect of identity which is severed from or highlighted over other often inextricably linked aspects, such as nationality or religion. Macklin provides a sophisticated account of the important analytical distinctions which can and should be maintained in assessing the claims of women refugees and points out that refugee law is one legal arena which easily accommodates an understanding of intersectionality. n100 Macklin argues that not "every case of gender persecution is persecution because of gender," n101 explaining that "women being persecuted *as* women is not the same as women being persecuted *because* they are women." n102 A woman who has been subjected to rape or flogging in the context of a civil war may have been persecuted for reasons not ultimately or exclusively reducible to gender, for example, her membership in an opposing political **[*304]** group or in a subjugated ethnic minority. In this case, while the persecution manifests itself in a gender specific form, such as rape, the ground of political opinion or nationality may better capture the particularities of the context in which the persecution occurs.

Clearly there will be (and have been) cases, however, where what a woman refugee claimant has faced falls squarely within the category of gender persecution. Sexual violence cases within the context of intimate relationships are perhaps the best example of this category of cases. The most straightforward way to deal with these cases is to have a legal recognition built into the statutory definition, which necessitates the addition of gender as an enumerated ground. It must be remembered that administrative tribunals like the IRB are subject to the political context in which they operate and can change in tenor given the election of a new government. This also lends weight to the view that the *Guidelines*, which are not legally authoritative, are simply insufficient to adequately accommodate women's claims for refugee status based on gender persecution. Gender must be made its own ground within the statutory framework governing refugee admissions to Canada. In addition, institutional decision-making at the IRB must be more sensitized to the particularities of women's experiences of gender persecution.

Due to the often static nature of legal categories, making available the widest array of possible choices within the statutory definition can only assist decision-makers in responding adequately and flexibly to the range of women's refugee claims given the diverse contexts and experiences from which these claims might emerge. Establishing relevant legal categories is, at any rate, only a beginning. The crucial phase comes in their interpretation and application with regard to the actual conditions of people's lives. This speaks to the need both for clearly articulated legal definitions and categories which can capture the experiences of refugee women and for adequate and ongoing training for immigration and refugee decision-makers to ensure that a gender-sensitive approach is built into the procedures and decisions surrounding the claims of refugee women fleeing gender persecution, particularly sexual violence. It also means that the other grounds and categories operating within the refugee determination process should be simultaneously subject to expansive and progressive interpretation, along the lines suggested by Macklin, in order to take widest possible account of the various conditions of oppression from which refugees seek asylum.

In cases of domestic and sexual violence, in particular, adding gender as an enumerated ground, taken together with a legal recognition of sexual violence as a central manifestation of gender persecution in which women are violated *as* women, *because* they are women, is clearly necessary if these claims from refugee women are to be made more cognizable to legal categories. Such an addition would represent an acknowledgment in law that violence against women is a form of gender oppression **[*305]** potentially recognized as persecution in the refugee context. Canadian feminists have recently lobbied the Canadian government to include persecution based on gender as a ground for claiming status as a refugee under the Immigration Act. n103 These changes, however, have not been implemented. Arguments for making gender an enumerated ground in the U.S. legal context have also been vigorously advanced by American feminist scholars. n104 Specifically and statutorily recognizing that gender is an independent enumerated ground is, in turn, consonant with a recognition of the pervasiveness and oppressiveness of gender inequality and its particular manifestation in the form of sexual violence. This would be a significant, symbolic, and substantive way in which the state could move towards taking greater responsibility for recognizing and acting upon an obligation to end sex discrimination in refugee law.

II. THE ROLE OF THE STATE: COMPLICITY AND ACCOUNTABILITY

A. An Evaluation of the Accountability for Gender Persecution of the Refugee-Producing State

> The state has an affirmative duty not only to protect against domestic violence but also to prevent its occurrence. n105

Following the assessment of whether the harm experienced and/or feared by the refugee claimant constitutes persecution, the refugee's home state's relationship to the persecution is the next stage of the legal inquiry. This second element of the claim for refugee status revolves around whether or not the refugee's home state is responsible for the persecution, and/or on the state's ability to offer protection from this persecution. It is this stage which has posed significant conceptual and evidentiary hurdles for women refugee claimants.

The issue of the state's role in the persecution suffered has been a vexed problem in asylum law. Traditionally in refugee law, persecution was understood as something emanating from the state or from those acting in their capacity as state agents. The traditional view, therefore, recognized only persecution perpetrated by public authorities and failed **[*306]** to recognize the rights of women to be free from gender persecution perpetrated in the so-called "private" sphere. But given that women the world over are far too often subject to the gendered harms of sexual violence perpetrated most often precisely within the "private" sphere of intimate relationships, this has often allowed the state to refrain from "intruding" into that domain which is not "public" and has allowed for these violations of women's human rights to continue with virtual impunity.

The U.N. High Commissioner for Refugees ("UNHCR") Handbook on Procedures and Criteria for Determining Refugee Status represents an early recognition of persecution perpetrated by non-state actors. n106 It states that persecution is "normally related to an action by the authorities of a country," but that it "may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned." n107 This marked a significant departure from the traditional, restrictive view of persecution. The 1993 *Guidelines* explicitly refer to persecution perpetrated against women by non-state actors by speaking of women who fear persecution resulting from "acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons." n108 This viewpoint was confirmed by the Supreme Court of Canada in *Ward v. Canada* when La Forest J. made it clear that "state complicity in persecution is not a prerequisite to a valid refugee claim." n109 In fact, in *Ward* La Forest J. asserts that the very lynch-pin of the analysis of whether or not the refugee claimant has a well-founded fear of persecution is precisely the question of the state's inability to protect them. n110 This is an extremely important assertion by the Supreme Court. It confers judicial approval from Canada's highest Court of recognition that persecution claims perpetrated by private actors can form the basis of a valid refugee claim. Given that most violence against women is perpetrated by male intimates, this is also a very significant advance for the specific claims of women seeking refugee based on the gendered injuries of sexual violence.

This approach both suggests that the state has a proactive obligation to protect women against violence, and that the state is implicated for its omissions in this area. As Cecilia Romany puts it, "in ensuring women's civil and political rights, the state must be held to an affirmative duty to ensure the eradication of those social and economic conditions that **[*307]** maintain and perpetuate subordination." n111 Given that violence against women is one of the constitutive features of the conditions which maintain and perpetuate gender subordination, states are responsible for their failures to take action to remedy this situation. In other words, "states are responsible for the failure to respect, whether through acts or omissions, women's human rights to life, liberty, and the security of the person." n112 Or, as another commentator more boldly asserts, "when the state fails to take affirmative steps to protect battered women from intra-familial violence, it is complicit in creating the harm." n113

One of the underlying and unexamined assumptions in refugee law in the refugee-receiving nations of the West is that the liberal democratic states of the First World are (relatively if not completely) free of the problems which sometimes plague the refugee-producing states of the Third World, including the state's failure to protect its citizens. La Forest J.'s optimism (or perhaps naivete) idealistically expressed in *Ward* about most national regimes' ability to protect the populace is revealed in his assertion that "nations should be presumed capable of protecting their citizens." n114 As he elaborates, "absent a situation of complete breakdown of state apparatus . . . it should be assumed that the state is capable of protecting a claimant." n115

This claim is problematic on a number of levels. First, there does not need to be a complete breakdown of the state apparatus for there to be a state failure to protect citizens, as even a cursory reference to most states' records on women's human rights violations within their borders attests. n116 The assumption also places a very difficult, in some cases nearly impossible, burden on refugee claimants who must marshal evidence to "prove" that their home states have not afforded them protection. n117 As Macklin points out, "so strong is the notion that only 'they' produce refugees that the

. . . [1993] amendments to Canada's immigration law raise the standard of proof that claimants from designated 'non refugee-producing' countries must satisfy to establish their claim." n118

Furthermore, given the international context and pattern of refugee flows, this assumption plays into dominant cultural and imperialist perceptions **[*308]** that nations of the First World are humanitarian havens to those poor and down-trodden wretches from the Third World who seek asylum in the nations of the West. These tropes play out in gender persecution cases as well, as Sherene Razack's critical analysis of refugee cases demonstrates. In Razack's words, "the case of gender-based persecution appears to go more smoothly when the cultural context can be "anthropologized"--that is, presented as non-Western, inferior, and usually barbaric towards women." n119

An interesting and challenging current case in Canada, *MCI v. Jessica Robyn Dolamore* calls into question this traditional assumption that Western liberal democratic states are immune to the "failure to protect" which often characterizes states of the developing world. n120 A woman who is a citizen of New Zealand and Australia was initially successful in her claim for refugee status in Canada on the basis that she belongs to a persecuted social group--women--and fears harm and possibly death from her abusive former husband, a citizen of Australia. This woman had been subjected to years of physical and sexual abuse at the hands of her former husband. During a period in which they lived together in the United States, he beat her so violently that he was convicted of aggravated assault charges and was deported from the United States back to Australia. She re-married and re-located to New Zealand, where her exhusband persisted in harassing and threatening to kill her and her new family from Australia, including sending menacing letters. n121 The Canadian IRB accepted her refugee claim, but the Minister of Citizenship and Immigration successfully applied for judicial review at the Federal Court. Blais, J., of the Federal Court of Canada found that "the Board erred in not examining the issue of state protection" and sent the case back for a re-hearing by another panel. n122 Of particular interest are the political motivations which might be assumed to underlay the Ministry's decision to appeal this novel and unorthodox case and the way in which an IRB of one liberal democratic First World nation might conduct a legal inquiry into the extent to which another liberal democratic nation, also of the First World is able to extend protection to women from violent male intimates.

As this case shows, with regard to women's experiences of sexual violence the presumption that democratic nations of the North or First World are immune to the failures of states of the South or Third World does not hold up to critical scrutiny. In fact, a review of Canada's own record on protecting women from sexual violence dislodges this easy **[*309]** assertion, and problematizes the neat distinction between the nations of the First World "us" and those of the Third World "them" in this area.

B. Critically Appraising State Accountability for Violence Against Women in Canada

Writing about the evidentiary requirements of refugee hearings dealing with women's claims based on domestic violence as gender persecution, Anjana Bahl states that, "if there are any statistical materials relating to rape, battery, murder, sexual assaults, and the failure of the legal system in the country to respond to such offences, they should be introduced into evidence." n123 What is obviously *not* put into evidence in refugee hearings revolving around gender persecution and violence against women claims, however, is the receiving state's own internal record on these issues. Built into the refugee system is the undisturbed assumption that the "we" of the receiving country have dealt with these problems, and that "they" are very different from us in that regard. The point of turning the gaze onto the Canadian state's internal record in this area is to reveal the implicit hypocrisy of imposing such high evidentiary standards on claimants, and to disrupt the assumption that the Canadian state should impose on other states, standards to which it itself does not or cannot always conform.

To the extent that violence against women and children remains a significant problem both in the United States and in the U.K., these nations share, with Canada, difficulties in protecting their own female citizens from domestic and sexual violence. n124 As in Canada, these failures of protection in the United States and the U.K. are the backdrop against which women's refugee claims for entry into these countries take place.

The fact that no state can claim to be able to offer complete protection to its female citizenry does not erase significant differences in how various nations respond to the problem of violence against women and children and the remedies offered within them. Indeed, the greater the commitment to gender equality the more likely it is that a state will promote policies and laws aimed at eradicating the problem of domestic and sexual violence, including allocating sufficient resources to protect those victimized by it. The dilemma inheres in how it is that women subjected to domestic and/or sexual violence can be offered refugee status when violence against women exists everywhere and no state can truly offer complete protection. On the issue of violence against women and children, therefore, a recognition of this situation in refugee-receiving states can go some distance towards remedying this problem in and of itself, by

[*310] challenging the often implicit assumption that the "we" of the West exist in nations where the "they" of the "other" countries will necessarily find safe refuge. More concretely still, an acknowledgment of the dilemmas of state provision of adequate protection from violence against women in adjudicating asylum claims based on this form of persecution might help subordinate the significance of the question of state protection in the applicant's home country. Concretely, this means that the operating presumption in refugee law should be that most states are not able to protect women adequately from "private" violence perpetrated by male intimates, so that evidentiary hurdles facing claimants seeking to show a failure of state protection can be eliminated or at least attenuated. If this were the case a decision like the recent one *K.K.E. (Re)* n125 would be reversed, for this application for asylum was denied on the grounds that the woman claimant who had been subjected to domestic violence by her estranged spouse was, in fact, able to avail herself of state protection in Argentina (her country of origin). In fact, the decision-makers went so far as to claim that "the [state] protection available to the claimant is not unlike that offered in Canada to victims of domestic violence." n126

However, a review of both the pervasiveness of the problem of violence against women n127 within Canada and the efficacy of the Canadian legal system (including the police) in responding to this violence paints a rather disturbing picture. Findings from various studies on the topic support the view that the Canadian criminal justice system is largely unable to provide an effective remedy to women subject to domestic and sexual violence. Violence against women takes place on a rather massive scale within Canada. Findings from the Women's Safety Project show that fifty-six percent of women interviewed in Toronto had had an experience of rape or attempted rape at some time in their lives, and one in four women (twenty-seven percent) had experienced some kind of physical assault perpetrated in an intimate relationship with a male partner. n128

Using less stringent and broader definitions, a far higher proportion of women reported experiencing sexual intrusion or assault. For example, sixty-seven percent of the women interviewed reported some form of sexual assault and fifty-three percent reported some kind of sexual abuse in childhood. n129 Including sexual harassment, ninety-eight percent of the women interviewed reported at least one experience of sexual assault, **[*311]** sexual abuse in childhood, physical assault in an intimate relationship, sexual harassment, or sexual intrusion at some point in their lives. n130 Findings from a national telephone survey conducted by Statistics Canada on violence against women also reveal high rates of victimization. n131 For example, in the Statistics Canada survey, thirty-nine percent of women reported a sexual assault experience in adulthood n132 and twenty-nine percent of the women interviewed reported an experience of physical violence perpetrated by a male intimate. n133 These findings attest to the very high prevalence and commonality of sexual violence in Canadian women's lives.

A key way in which to assess the efficacy of the Canadian state's response to these crimes is to measure women's attitudes towards and experiences within the criminal justice system with regard to experiences of sexual violence, as well as the extent to which these crimes are reported and adequately processed through it. The criminalization of these acts, previously protected by the rhetoric of "privacy" which insulated them from attracting public intervention, is now the single largest focus of state policy to combat violence against women. The criminal justice system (including the police) is therefore the key institutional framework to examine because it represents the state's most coordinated legal response to this social problem.

Research findings in this area suggest that many Canadian women distrust the legal system in Canada with regard to crimes of violence against women. For example, ninety-one percent (381) of the women interviewed for the Women's Safety Project agreed or strongly agreed with the statement that "the courts and judges in this country are too easy on men who beat their wives," while eighty-eight percent (369) of the women agreed or strongly agreed that "in the courtroom, the woman who has been raped is put on trial." n134 In terms of police response to sexual assault, sixty percent (251) of the women agreed or strongly agreed that "the police do not do a good job of protecting women from rape and sexual assault," while sixty-one percent (or 246) of the women acknowledged racism on the part of the police by agreeing or strongly agreeing that they "do not serve and protect all racial and cultural groups equally **[*312]** and fairly." n135 These attitudes towards the police are hardly surprising given the police's dismal record in dealing with cases of sexual violence.

In a recent groundbreaking case in Canada, however, the Toronto Police Department was found liable both for negligence and for violations of the section 7 security of the person and section 15 equality rights guaranteed under the *Canadian Charter of Rights and Freedoms*, after a woman from whom they had deliberately withheld information about a serial rapist was ultimately sexually attacked her at knifepoint one night while she was sleeping in her own bed. n136 This legal victory does not help the litigant insofar as she was not spared the life-shattering experience of a violent sexual assault. However, it does show an increasing judicial willingness to hold a state institution, like the police,

accountable for failing to protect women from sexual violence, and emphasizes the state's duty owed to women in the form of police protection. n137

This wariness about the police and the criminal justice system is consistent with the well documented reluctance of so many women--a reluctance which is potentially even more pronounced for women of color--to report crimes of sexual violence perpetrated against them, especially when these crimes are committed by male intimates. Not surprisingly, then, the vast majority of cases of sexual violence disclosed during the interviews for the Women's Safety Project were never reported to the police. n138 In ninety-two percent of the (339) cases of sexual abuse before the age of sixteen, the police were not notified, nor were they called upon in ninety-four percent of the cases of sexual assault perpetrated against women at or after sixteen years of age. n139 In seventy-five percent of the (134) cases of physical assault perpetrated in intimate relationships the police were never called upon for intervention. n140 Again, the findings from the Statistics Canada survey were remarkably similar to those generated by the Women's Safety Project. Specifically, the Statistics Canada interviews showed that the police were called in only about twenty-six percent of the cases of physical assault. n141 The Statistics Canada survey also reports that only six percent of sexual assault cases were reported to the police. n142 Interestingly, a more recent Canadian crime survey undertaken by Statistics Canada indicates a significant upward trend **[*313]** in women's reports of assaults in intimate relationships to the police. n143 In the Women's Safety Project survey, women's main reasons given for not reporting crimes of sexual violence, were a fear that police would not believe them, and/or that police would not do anything about it in any event.

Reporting to the police, however, is only one phase of the criminal justice system response. Research has demonstrated that once reported, criminal cases involving violence against women undergo a filtering process at virtually every stage of the process (beginning with underreporting), such that these crimes are those for which there is the lowest likelihood of a conviction. n144 This means that in the great majority of cases of men's violence against women the offenders perpetrate this violence with impunity. For example, in the Statistics Canada survey, of the one quarter of all physical assault cases reported to the police, three quarters of these did not result in the police pressing charges. n145

A journalistic investigation of the processing of domestic violence cases in courts in Toronto revealed that the police and the courts continue to remain largely ineffective in dealing with ongoing violence directed towards women by their male intimates. n146 Tracking 133 cases of "domestic violence" that were reported to police in Metropolitan Toronto over a one week period in July of 1995 (already a significantly smaller representation of the problem as a whole by virtue of the fact that the large majority of cases go unreported) the journalists describe "a justice system failing at every step, with judges, crown attorneys, defense lawyers and police pointing the finger of blame elsewhere." n147 Of the 100 cases which had been "completed" (meaning processed through the system) by the date of the report's publication, only sixty percent resulted in a conviction. In nearly one-half of these cases (forty percent) the perpetrator was not found guilty or penalized in any way for what were typically repeated violent offenses. n148 Of those cases in which a conviction **[*314]** was secured "in most cases the man was allowed to plead guilty to a lesser crime and received no jail time, and often no criminal record . . . despite an Ontario Court of Appeal ruling that calls for jail terms for domestic beatings like these." n149

The women who experience this form of sexual violence and whose cases are processed through the criminal justice system are very often subjected to further humiliation, disempowerment, and frustration. As the reporters documenting domestic violence in Ontario's justice system also observe, "the women interviewed in *The Toronto Star* study left court disillusioned and bitter." n150 Additionally, they note that "most [of the women] were not contacted by victim services people or crown attorneys shortly after the assault, despite government policy," which mandates these procedures to "support" assaulted women. n151 With the recent establishment of the specialized domestic violence courts in Ontario these problems have, potentially at least, begun to be remedied, though research needs to be conducted to measure the efficacy of these courts.

In Ontario a Coroner's Inquest was struck to inquire into the death of Arlene May, a woman killed by her common law husband on March 8, 1996. n152 While many women are killed by male intimates, this case drew public attention because the failure of the state in providing her protection was so blatant, as were the threats made against her life by her violent spouse. Arlene May's killer, Randy Iles, who murdered Arlene May before killing himself, had been repeatedly convicted of physical violence towards Ms. May and had made death threats against her on numerous occasions over a period of years. On the very day he killed her, Randy Iles was allowed free on bail, despite his previous convictions. The judge failed to take seriously the death threat he had issued against Ms. May, notwithstanding police testimony before the judge that they took the perpetrator's threat against her life seriously. The ineffective response of the criminal justice system with regard to the murder of Arlene May clearly demonstrates the state's very

direct role in creating the conditions which facilitated her death by failing to provide the very protections it promised. n153 The jury of this inquest produced 213 recommendations to improve women's and children's safety, many of which have yet to be implemented by the conservative provincial government.

[*315] Another spate of intimate femicides occurred in Ontario in the summer of 2000. These spousal homicides, in which estranged male intimates killed their female ex-partners, generated much media attention n154 and prompted yet another Coroner's inquest into the very same issue as was addressed by the inquest in the murder of Arlene May. n155 What is most striking about these cases--one of which involved a woman being fatally shot after handing her baby over to neighbors who attempted to intervene n156 --is that not only had the women left their abusive spouses, but also that each of the women had called upon a variety of state agencies and services, including the police, for assistance and protection on multiple occasions before being killed.

These findings and institutional inadequacies point to the Canadian state's inability and/or failure to protect its female citizenry in any adequate way from gender persecution perpetrated in the specific form of sexual violence. In a nation in which sexual violence continues to be perpetrated against women on a disturbingly pervasive scale this amounts to a serious scale of human rights violations. While the Canadian state has devoted considerable resources to programs dedicated to ending violence against women and to ameliorating its harmful effects through the provision of "victim" services, these services have been grossly insufficient to address the scope and persistence of the problem. Furthermore, in a climate of neo-conservative economic policies, they have been dramatically cut back. Most of the recommendations issued by the federally appointed Canadian Panel on Violence Against Women, itself a controversial body given the size of its budget and the public perception in some quarters, at least, that it was a public relations exercise without any real clout, remain unimplemented today, about a decade later. n157

Much of the discourse surrounding refugee law, implicitly at least, assumes that the "we" of the liberal democratic Canadian nation state beneficently "save" or "rescue" "them"--those individuals who make it here from the world's refugee populations. This is achieved through what is perceived to be a generous refugee program, based on the state's historic commitment to humanitarianism. I argue, however, that this framework--its historical revisionism aside n158 --can partially, at least, be disrupted **[*316]** by a conceptual shift in emphasis, one which moves attention away from an exclusive focus on the plight of the refugee women fleeing gender persecution who seek entry into Canada's borders, and onto an appraisal of our own state's record on protecting women's human rights with regard to the gendered crimes of sexual violence. An examination of the Canadian state's own (un)willingness, (in)ability, and (in)efficacy in protecting its women citizens from sexual violence is an important part of any adequate grasp of the dynamics at play in Canada's official policy and legal responses to women refugee claimants fleeing sexual violence, and the ways in which these claims are traditionally situated and received. This widened lens also provides a more complete contextual framework within which to grasp the politics of state responses to the conditions of women's lives, conditions which very often are profoundly shaped and limited by experiences of sexual violence.

CONCLUSION

There remain ongoing, systemic, and structural problems of violence against women in Canada, which the Canadian state has faced difficulties in remedying in any meaningful way--particularly within the criminal justice system. Setting forth this observation, however, is not the equivalent of presenting the simplistic argument that refugee-receiving nations such as Canada should not accept refugee women claimants who flee gender-based persecution because of the internal failure of refugee-receiving nations to protect women adequately from this same kind of violence; nor is it to suggest that there are not meaningful and substantial differences in various states' responses to violence against women specifically, and to gender equality more generally. On the contrary, given the increasing displacement of peoples around the world, a more expansive refugee program is in order, one which would make the program more accessible, redress the historic gender imbalance in the over-representation of male refugee claimants (relative to their proportion of refugees worldwide), ease the legal hurdles facing claimants, and significantly increase the numbers of women claimants allowed into the country under this category. n159

The point of this exercise, instead, is to demonstrate the difficulty that all states have in containing, let alone eradicating, the social problem of men's violence against women in intimate relationships, as well as to highlight the difficulty most states have in delivering anything close to adequate protection to its women citizens from the devastating harms of **[*317]** this violence. In addition, drawing attention to the Canadian state's internal record on the very issues it presumes to adjudicate with regard to other states vis-a-vis women's refugee claims (that is, the levels of protection from violence afforded to women within their borders) facilitates a discursive shift away from the failure of the refugee-producing states, and onto the similar failures of a First World refugee-receiving state. It appears that there may be as

many continuities as there are discontinuities between the nations of the South and the North in terms of a state's ability to protect its own women citizens from this particular form of gender persecution. Shifting the gaze closer to home and onto the Canadian state's own record (as well as that of other Western refugee-receiving states), consequently, should also facilitate a breaking down of the "us"/"them" dichotomy which implicitly, and sometimes explicitly, tends to pervade refugee discourse and which is part of what Sherene Razack describes as the necessarily racialized encounters between the First and Third Worlds in refugee hearings. n160

An answer to the dilemma of the inadequacy of state protection in relation to gender persecution refugee claims might lie in recognizing that it is not that Canada should claim to have superior policy and legal responses to violence against women and children. Instead, it is that by granting refuge at the micro-level (the level at which refugee law operates in its response to individual claims and the experiences on which they are based)--and assuming the claim is successfully made out with regard to establishing persecution--a particular woman may stand a significantly better chance of escaping the violence perpetrated by the particular man who has persecuted her, because she has made it to the other side of the world.

A critical assessment of Canada's own record on protecting women from violence, therefore, is not an attempt to argue that we shouldn't take seriously the state's commitment, at least on some level, to work to end violence against women. Nor do I suggest that there may not be quantitative and qualitative differences in state responses which should be exposed and critically analyzed. But in larger terms, no nation yet seems close to eradicating violence against women, and no state yet adequately protects its women from this violence. In light of this empirical reality, therefore, the evidentiary burdens the Canadian state imposes on women refugee claimants fleeing the harms of sexual violence with regard to proving failure of state protection in their home states, should be significantly relaxed. The Canadian state and the IRB must recognize that a state's failure or inability to protect women from the harms of sexual violence should be more often presumed than subjected to rigorous standards of proof. It may be, then, that the moral and legal obligation Canada should adopt towards women asylum claimants seeking refuge from **[*318]** sexual violence is precisely what La Forest J. rejected in *Ward*, that is, allowing a claimant "to seek out better protection than that from which . . . she benefits already." n161 Indeed, given the entrenched nature of sexual and domestic violence perpetrated against women all over the world and the limited and inadequate state responses to it, this may be the best we can currently hope for.

Finally, as Razack emphasizes, it is imperative that an explicit acknowledgment of the role of the Western nations in creating the legacies of colonialism, Third World impoverishment, and upheaval from which so many people seek refuge around the globe be maintained in Canada's responsiveness to refugee claims. n162 This specifically means remembering First World complicity in the creation of international refugee flows and a concomitant sharpening and deepening of Canada's commitment to accepting refugees, even though accepting refugee claims only provides individual remedies to larger, systemic problems. With regard to the claims of women fleeing the harms of sexual violence, the Canadian state must both make gender an enumerated ground of persecution in its statutory definition of refugees. It must simultaneously strive to increase the sensitivity of the IRB adjudicators to the ways in which legal categories can be expanded and interpreted to accommodate an enhanced understanding of the nature of gender persecution in general, and domestic/sexual violence more specifically. A commitment to justice demands no less.

FOOTNOTES:

n1 Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 271-72 (1995).

n2 Catharine A. MacKinnon, *Rape, Genocide and Women's Human Rights, 17 HARV. WOMEN'S L.J. 5, 5 (1994).*

n3 Sherene Razack, *Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender*, 8 CAN. J. WOMEN & L. 45, 47 (1995).

n4 *See, e.g.*, STATE OF WORLD POPULATION 2000 (documenting the global impact of sex discrimination on individual lives and national development), *available at* http://www.unfpa.org/swp/2000/english/index.html. For more information on the international dimensions of gender inequality see UNITED NATIONS POPULATION FUND, *at* http://www.unfpa.org/ (updated daily). For information on the World Bank's work on gender equality since the Beijing conference, see World Bank Group, *GenderNet, at* http://www.worldbank.org/gender/ (last visited Mar. 8, 2002).

n5 In this Article I use the First World/Third World, North/South, and West/East dichotomies interchangeably. The language used to capture these differences between nations of the so-called developed and underdeveloped worlds is necessarily inadequate, but for the purposes of this Article these terms make the necessary point.

n6 Michael J. Parrish, *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection, 22 CARDOZO L. REV. 223, 237 (2000).*

n7 Immigration and Refugee Board, Ottawa, Canada, *Guidelines Issued by the Chairperson, Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution*, 5 INT'L J. REFUGEE L. 278 (1993) [hereinafter *Guidelines]; see also* Nurjehan Mawani, *Introduction to the Immigration and Refugee Board Guidelines on Gender-Related Persecution*, 5 INT'L J. REFUGEE L. 1 (1993).

n8 *See, e.g.*, Gregory A. Kelson, *Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins, 6 TEX. J. WOMEN & L. 181 (1997);* Anjana Bahl, *Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution, 4 CARDOZO WOMEN'S L.J. 32 (1997);* Valerie L. Oosterveld, *The Canadian Guidelines on Gender-Related Persecution*, 8 INT'L J. REFUGEE L. 569 (1996); Kristine M. Fox, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L. & COMP. L. 117 (1994); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law, 7 GEO. IMMIGR. L.J. 511 (1993);* Stephanie Pell, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims, 20 N.C. J. INT'L L. & COM. REG. 655 (1995);* Macklin, *supra* note 1; Heather Potter, *Gender Based Persecution: A Challenge to the Canadian Refugee Determination System*, 3 DALHOUSIE J. LEGAL STUD. 81 (1994); Rebecca M. Wallace, *Making the Refugee Convention Gender Sensitive: The Canadian Guidelines, 45 INT'L & COMP. L.Q. 702 (1996);* Kristin E. Kandt, *United States Asylum Law: Recognizing Persecution Based on Gender Using Canada as a Comparison, 9 GEO. IMMIGR. L.J. 137 (1995);* Andrea E. Bopp Stark, *Posttraumatic Stress Disorder in Refugee Women: How to Address PTSD in Women who Apply for Political Asylum Under Grounds of Gender-Specific Persecution, 11 GEO. IMMIGR. L. J. 167 (1996).*

n9 Macklin, *supra* note 1, at 217.

n10 *See, e.g.*, Amnesty International, *Broken Bodies, Shattered Minds--The Torture of Women Worldwide* (Mar. 6, 2001), *at* http://www.amnesty.org; JANE FRANCES CONNORS, U.N. REPORT ON VIOLENCE AGAINST WOMEN IN THE FAMILY, U.N. Doc. ST/CSDHA/2, U.N. Sales No. E.89.IV.5 (1989); WOMEN AND VIOLENCE: REALITIES AND RESPONSES WORLDWIDE (Miranda Davies ed., 1994); DOROTHY AYERS COUNTS, JUDITH K. BROWN & JACQUELYN C. CAMPBELL, SANCTIONS AND SANCTUARY: CULTURAL PERSPECTIVES ON THE BEATING OF WIVES (Westview Press 1992).

n11 *See* DIANA RUSSELL, RAPE IN MARRIAGE 57-68 (2d ed. 1990); Melanie Randall & Lori Haskell, *Sexual Violence in Women's Lives: Findings from the Women's Safety Project, A Community Based Survey*, 1 VIOLENCE AGAINST WOMEN 6 (1995).

n12 *See, e.g.*, Caroline Kennedy-Pipe & Penny Stanley, *Rape in War: Lessons of the Balkan Conflicts in the 1990s*, 4 INT'L J. HUM. RTS. 67 (2000); Doris E. Buss, *Women at the Borders: Rape and Nationalism in International Law*, 6 FEMINIST LEGAL STUD. 171 (1998).

n13 The recent and groundbreaking finding by the United Nations Tribunal that three Bosnian Serbs were guilty of sexual enslavement and rape of Muslim women during the Bosnian war is an important development in human rights jurisprudence generally, and in international recognition and condemnation of wartime sexual abuse of women. *See* Marlise Simons, *Three Serbs in Wartime Rapes*, N.Y. TIMES, Feb. 23, 2001, at A1.

n14 *See, e.g., Beijing Declaration and Platform for Action: Report of the Fourth World Conference on Women*, U.N. Fourth World Conference on Women P112, U.N. Doc A/CONF.177/20 (1995); *Declaration on the Elimination of Violence Against Women*, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/104 (1993).

n15 *See generally* MacKinnon, *supra* note 2.

n16 For analyses of gender and the public/private divide, especially in law, see, for example, CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY (Susan Boyd ed., 1997), and PUBLIC AND PRIVATE: FEMINIST LEGAL DEBATES (M. Thorton ed., 1995).

n17 Dowry refers to the custom, practiced in some societies, of brides offering money, property, or other forms of wealth to her husband and husband's family. Dowry deaths refer to the practice of killing women who are not seen to have brought sufficient dowry to the families into which they marry. For legal analyses of issues surrounding dowry deaths, see, for example, Namratha S. Ravikant, *Dowry Deaths: Proposing a Standard for Implementation of Domestic Legislation in Accordance with Human Rights Obligations, 6 MICH. J. GENDER & L. 449 (2000);* B. Sitaraman, *Law as Ideology: Women, Courts and 'Dowry Deaths' in India*, 27 INT'L. J. SOC. L. 287 (1999); K.S. Latha & R. Narendra, *Dowry Death: Implications of Law*, 38 MED. SCI. L. 153 (1998); and Laurel Remers Pardee, *The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?*, 13 ARIZ. J. INT'L & COMP. L. 491 (1996).

n18 Purdah refers to the custom, practiced in some societies, mostly Muslim but some Hindu, of screening women from men and strangers. In some cases this practice involves women's complete exclusion from the public world and seclusion in the "private" sphere. *See, e.g.*, LEIGH MINTURN, SITA'S DAUGHTERS: COMING OUT OF PURDAH (1993).

n19 SUSAN FORBES MARTIN, WOMEN REFUGEES 1 (1992).

n20 Helene Moussa, *Violence Against Refugee Women: Gender Oppression, Canadian Policy and the International Struggle for Human Rights*, 26 RESOURCES FOR FEMINIST RES. 79, 85 (1998-1999).

n21 *See, e.g.*, Roger Cohen, *Already Burdened, Western Europe Is Reluctant to Take in Kosovo's Outcasts*, N.Y. TIMES, Apr. 2, 1999, at A9.

n22 Macklin, *supra* note 1, at 219.

n23 One of the most problematic of these structural hurdles is the fact that the *Guidelines* are not applicable to claimants applying from outside the country, only to those who apply from within. Given the obstacles which make women's ability to journey to Canada so much more unlikely, this severely curtails their efficacy and scope.

n24 Immigration Act, R.S.C., ch. I-2, § 2 (1985) (Can.).

n25 Macklin, *supra* note 1, at 222.

n26 Ward v. Canada, [1993] 2 S.C.R. 689, 734 (citing JAMES C. HATHAWAY, LAW OF REFUGEE STATUS 104-05 (1991)).

n27 *Guidelines*, *supra* note 7, at 281.

n28 Macklin, *supra* note 1, at 215. Given how low conviction rates are for domestic violence this is an even more striking situation and illustration of the state's failure to protect.

n29 *Refugee Women*, *supra* note 1, at 214.

n30 This aspect of the *Guidelines* is one of the potentially most radical, insofar as it allows for a legal framing of an individual woman's resistance to patriarchal norms and practices, and the punishment she receives for this resistance, as the basis for a persecution claim. In this way, and in specific contexts meeting all of the definitional requirements, the *Guidelines* potentially legitimate a woman's resistance to gender oppression by conferring refugee status as an escape from that very oppression.

n31 For examples of academic commentary lauding the Canadian example, see Kris Ann Balser Moussette, *Female Genital Mutilation and Refugee Status in the United States--A Step in the Right Direction, 19 B.C. INT'L & COMP. L. REV. 353 (1996);* Kristine Fox, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117 (1994); and Walter C. Long, *Escape from Wonderland: Implementing Canada's Rational Procedures to Evaluate Women's Gender-Related Asylum Claims, 4 UCLA WOMEN'S L.J. 179 (1994).*

n32 *Guidelines*, *supra* note 7, at 279.

n33 Macklin, *supra* note 1, at 221.

n34 Guy S. Goodwin-Gill, *Judicial Reasoning and 'Social Group' after Islam and Shah*, 11 INT'L J. REFUGEE L. 537, 537 (1999).

n35 *Id.*

n36 *In re Fauziya Kasinga, 21 I. & N. Dec. 357, 378 (B.I.A. 1996).*

n37 *In re* R-A-, I. & N. Dec. 3403, 1-3 (B.I.A. 1999).

n38 *Mayers v. Minister of Employment and Immigration, [1992] 97 D.L.R. 4th 729.*

n39 Mawani, *supra* note 7, at 244 (emphasis added).

n40 *In re* D.J.P., [1999] C.R.D.D. No. 155.

n41 *In re* O.E.X., [1999] C.R.D.D. No. 79.

n42 *In re* F.Z.A., [2000] C.R.D.D. No. 139.

n43 *In re* Q.A.E., [2000] C.R.D.D. No. 85.

n44 *In re* K.B.A., [2001] C.R.D.D. No. 56.

n45 *Guidelines*, *supra* note 7, at 284.

n46 *Id.* (emphasis added).

n47 Macklin, *supra* note 1, at 245.

n48 *Guidelines*, *supra* note 7, at 284.

n49 Ward v. Canada, [1993] 2 S.C.R. 689.

n50 Constitution Act, 1982, c. 11, § 1, sched. B to the *Canada Act of 1982* (Eng.).

n51 *Ward*, [1993] 2 S.C.R. at 692.

n52 *Id.* at 739.

n53 Macklin, *supra* note 1, at 247.

n54 *In re Fauziya Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).*

n55 This new proposed rule was published in *65 Fed. Reg. 76588-98* (Dec. 7, 2000) and has yet to be officially adopted. *INS Issues Proposed Rule on Gender and Domestic Violence-Based Asylum Claims,* 77 INTERPRETER RELEASES 1737 (2000).

n56 The Board of Immigration Appeals (BIA) is an administrative tribunal mandated to review the decisions of immigration judges in hearings to determine whether a case for asylum in the U.S. has been successfully established.

n57 *Matter of Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985).*

n58 *Kasinga, 21 I. & N. Dec. 357.*

n59 She was only 19 years old at the time of her application, and 17 years old at the time that the events occurred.

n60 Immigration and Nationality Act, *8 U.S.C. § 1101*(a)(42)(A) (1994).

n61 *Kasinga, 21 I. & N. Dec. at 368.*

n62 *Id. at 366.*

n63 *See Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987)* (identifying the bullying, beating, and raping of women as persecution within the definition of a refugee); Matter of S-A-, I. & N. Dec. 3433 (B.I.A. 2000), 77 INTERPRETER RELEASES 860 (June 30, 2000) (in which a young woman from Morocco was granted asylum based on the severe abuse inflicted upon her by her father because of his "ultra-orthodox Muslim views" and her "liberal Muslim views.").

n64 *Aguirre-Cervantes v. INS, 242 F.3d 1169 (9th Cir. 2001).*

n65 *Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000).*

n66 *See* Kanter & Dadey, *The Right to Asylum for People With Disabilities, 73 TEMPLE L. REV. 1117, 1119 n.20 (2000)* (citing Matter of A-N-, A73603840 (IJ Dec. Dec. 22, 20000 (Philadelphia, Pa.) (Grussendorf, IJ)).

n67 Matter of R-A-, I. & N. Dec. 3403 (B.I.A. 1999).

n68 The decision was based on a split, 10-5 *en banc* decision which included a vigorous dissent critiquing the shortcomings of the majority's analysis and ultimate finding.

n69 The BIA also engaged in an analysis of the perpetrator's motivation for the abuse, arguing that he was inclined to assault and inflict harm only on the applicant, and not on a larger social group of which she claimed to be a member, as if this were somehow relevant to the legitimacy of her asylum application. The BIA also seemed to suggest that the government of Guatemala was capable of protecting the applicant from domestic violence, thereby negating the absence of state protection for this applicant and, as some commentators have argued, ignoring the evidence. *See* Deborah E. Anker, *Defining "Particular Social Group" in Terms of Gender: The Shah Decision and U.S. Law*, 76 INTERPRETER RELEASES 1005, 1006 (1999).

n70 The BIA also rejected the enumerated ground of "political opinion" for this applicant. Matter of R-A-, I. & N. Dec. 3403, 14 (B.I.A. 1999).

n71 *See, e.g.*, Anker, *supra* note 70; Sharon Donovan, *No Where to Run . . . No Where to Hide: Battered Women Seeking Asylum in the United States Find Protection Hard to Come By: Matter of R--A--*, 11 GEO. MASON U. CIV. RTS. L.J. 301 (2001); Fredric N. Tulsky, *Asylum Denied for Abused Girl: Ruling of Appeals Panel is Assailed*, WASH. POST, July 4, 1999, at A3; Karen Musalo, *Matter of R-A: An Analysis of the Decision and its Implications*, 76 INTERPRETER RELEASES 1177 (1999).

n72 Order No. 2379-2001, *at* http://www.uchastings.edu/cgrs/documents/legal/ag_ra_order.pdf (last visited Feb. 25, 2002).

n73 These rules expressly state that gender can form the basis of a particular social group, and are also intended to aid assessments of domestic violence refugee claims, removing the barriers enacted by the *Matter of R-A-* decision.

n74 *Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987); Lopez Galarza v. INS, 99 F.3d 954 (9th Cir. 1996).*

n75 *See, e.g.*, Matter of S-A-, A75 795 806 (B.I.A. 1999), *at* http://www.usdoj.gov/eoir/efoia/bia/Decisions/Revdec/pdfDEC/3433.pdf (last visited Feb. 25, 2002).

n76 Matter of A and Z, Nos. A 72-190-893, A 72-293-219 (I.J. Dec. 1994), *at* http://www.uchastings.edu/cgrs/law/ij/42.pdf.

n77 *Lazo-Majano, 813 F.2d at 1432.*

n78 Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims, 13 GEO. IMMIGR. L.J. 25, 59 (1998).*

n79 *Id.*

n80 *See Safaie v. INS 25 F.3d 636 (8th Cir. 1994); cf. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576-77 (9th Cir. 1987).*

n81 "The fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant--race, religion, nationality and political opinion are also characteristics shared by large numbers of people." *Guidelines, supra* note 7, at 6.

n82 *Islam v. Secretary of State for the Home Department; R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah (Conjoined Appeals),* 11 INT'L J. REFUGEE L. 496 (published decisions and comments) [hereinafter *Islam and Shah Cases*].

n83 *Id.*

n84 *Id.*

n85 *Id.*

n86 *See* AMNESTY INTERNATIONAL, WOMEN IN PAKISTAN: DISADVANTAGED AND DENIED THEIR RIGHTS (1995).

n87 *Islam and Shah Cases, supra* note 82, at 499.

n88 In fact, one commentator notes that one of the fascinating aspects of this judgment is that, their differences aside, the majority based their decision "on a reasoning which was wider than that which the appellants (understandably, given the stance of the Court of Appeal) dared to advance." Sue Kirvan, *Women and Asylum: A Particular Social Group*, 7 FEMINIST LEGAL STUD. 333, 336 (1999).

n89 The dissenting Law Lord agreed with the majority on some of the fundamental issues regarding the interpretation of the Convention but not with their application to the facts of these cases. Instead, Lord Millet argued that in these cases a "particular social group" did not exist independently of the persecution suffered.

n90 *Islam and Shah Cases, supra* note 82, at 512.

n91 *See, e.g.*, Mattie Stevens, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category, 3 CORNELL J.L. & PUB. POL'Y 179 (1993);* Linda Hossie, *For Women, Oppression Is Often a Way of Life*, GLOBE & MAIL, Feb. 5, 1993, at A15; Potter, *supra* note 8, at 81.

n92 Deborah E. Anker, Nancy Kelly & John Willshire-Carrera, *Defining "Particular Social Group" in Terms of Gender: The Shah Decision and U.S. Law*, 76 No. 25 INTERPRETER RELEASES 1005 (1999).

n93 Stevens, *supra* note 91, at 218.

n94 Macklin, *supra* note 1, at 257.

n95 *Id.* at 262.

n96 *Id.* at 262.

n97 *See* ELIZABETH YOUNG-BRUEHL, THE ANATOMY OF PREJUDICES (1996) (arguing for the development of more sophisticated and nuanced analyses of the differences between forms of oppression, and their psychological and social bases).

n98 Potter, *supra* note 8, at 102.

n99 Macklin, *supra* note 1, at 257.

N100 *Id.* at 263.

n101 *Id.* at 258

n102 *Id.* at 259 (emphasis in original).

n103 *See* Chantal Tie, *Sex, Gender, and Refugee Protection in Canada Under Bill C-11: Are Additional Protections Required in Light of In re* R-A-?, 19 INT'L J. REFUGEE L. 54 (2001).

n104 *See, e.g.*, Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention, 10 COLUM. J. GENDER & L. 167 (2001);* Suzanne Sidum, *An End to the Violence: Justifying Gender as a "Particular Social Group*," *28 PEPP. L. REV. 103 (2000).*

n105 G. Kristian Miccio, *With All Due Deliberate Care: Using International Law and the Federal Violence against Women Act to Locate the Contours of State Responsibility for Violence Against Mothers in the Age of* DeShaney, *29 COLUM. HUM. RTS. L. REV. 641, 645 (1998).*

n106 U.N. HIGH COMM'R FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES P51 (1979) [hereinafter UNHCR HANDBOOK].

n107 *Id.*

n108 *Guidelines*, *supra* note 7, at 281.

n109 Ward v. Canada, [1993] 2 S.C.R. 689, 713.

n110 *Id.* at 722.

n111 Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85-115 (Rebecca Cook ed., 1994).

n112 *Id.* at 99.

n113 Miccio, *supra* note 105, at 645.

n114 *Ward*, [1993] 2 S.C.R. at 725.

n115 *Id.*

n116 For example, the 1993 UN Human Development Report concludes, based on an analysis of thirty-three countries, that "no country treats its women as well as its men." U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 16 (1993).

n117 This burden is certainly onerous for claimants from Third World countries, but it is, paradoxically, also complicated for claimants from "developed" countries where the operating assumption tends to be that the state *does* offer protection.

n118 Macklin, *supra* note 1, at 264.

n119 Razack, *supra* note 3, at 84.

n120 *MCI v. Jessica Robyn Dolamore, [2001] F.C. 421.*

n121 *See* Charlie Gillis, *Australian Woman Seeks Refugee Status*, NAT'L POST, May 14, 2001, at A1.

n122 *Dolamore, [2001] F.C. P21.*

n123 Bahl, *supra* note 8, at 72.

n124 In fact there is no country in the world that can reasonably claim to have eradicated this social problem and/or claim to offer its female citizenry complete protection from it.

n125 In re K.K.E., [2001] C.R.D.D. No. 42.

n126 *Id.* P18.

n127 By the term "violence against women," I refer to sexual assault, physical and sexual assault in intimate relationships, and sexual harassment. There are, of course, other forms of sexual violence including the sexual abuse of children, but for the purposes of this discussion the analysis is restricted to violence against adult women.

n128 Melanie Randall & Lori Haskell, *Sexual Violence in Women's Lives: Findings from the Women's Safety Project, A Community Based Survey*, 1 VIOLENCE AGAINST WOMEN 6, 18 (1995).

n129 *Id.*

n130 *Id.*

n131 Statistics Canada, *The Violence Against Women Survey*, DAILY (Can.) (Nov. 18, 1993), *available at* http://stcwww.statcan.ca/english/sdds/3896.htm.

n132 This figure reported by Statistics Canada refers only to experiences women had since the age of sixteen. Moreover, it refers to a less stringent definition than that reported by the Women's Safety Project, as it defines sexual attacks to include unwanted sexual touching.

n133 *Id.*

n134 LORI HASKELL & MELANIE RANDALL, PRIVATE VIOLENCE/PUBLIC FEAR: RETHINKING WOMEN'S SAFETY 190-91 (Ottawa: Solicitor General of Canada 1994).

n135 *Id.*

n136 *Doe v. Metro. Toronto Comm'rs. of Police, [1998] 39 O.R.3d 487, 488.*

n137 *See* Melanie Randall, *Sex Discrimination, Accountability of Public Authorities, and the Public/Private Divide in Tort Law: An Analysis of Doe v. Metropolitan Toronto (Municipality) Commissioners of Police, 26 QUEEN'S L.J. 451 (2001)* (analyzing the tort aspects of this litigation, especially the duty to warn).

n138 *See* LORI HASKELL & MELANIE RANDALL, *supra* note 134, at 190-91.

n139 *Id.*

n140 *Id.*

n141 Karen Rodgers, *Wife Assault: Findings of a National Survey*, JURISTAT SERV. BULL., Mar. 1994, at 1.

n142 Julian Roberts, *Criminal Processing of Sexual Assault Cases*, JURISTAT SERV. BULL., Mar. 1994, at 1.

n143 *See* CAN. CTR. FOR JUSTICE STATISTICS, FAMILY VIOLENCE IN CANADA: A STATISTICAL PROFILE, 27 (June 28, 2001), *available at* http://www.statcan.ca/english/IPS/Data/85-XIE.htm.

n144 *See, e.g.*, Janice Du Mont & Terri L. Myhr, *So Few Convictions: The Role of Client-Related Characteristics in the Legal Processing of Sexual Assaults*, 6 VIOLENCE AGAINST WOMEN 1109 (2000); LORENNE CLARK & DEBRA LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 56 (1982); RITA GUNN & CANDICE MINCH, SEXUAL ASSAULT: THE DILEMMA OF DISCLOSURE 135 (1998).

n145 Rodgers, *supra* note 141, at 2.

n146 This investigation was conducted by three women employed as reporters for the TORONTO STAR (Rita Daly, Jane Armstrong, and Caroline Mallan). The results and analysis were reported in an eight part "investigative series," entitled "Hitting Home," and published between March 9 and March 23, 1996. Lou Clancy, *Exposing a System that Doesn't Work*, TORONTO STAR, Mar. 9, 1996, at A4 (describing content of "Hitting Home" investigative series).

n147 Rita Daly, Jane Armstrong & Carole Mallan, *Hitting Home--Spousal Abuse: The Shocking Truth*, TORONTO STAR, Mar. 9, 1996, at A1.

n148 *Id.*

n149 *Id.*

n150 Rita Daly, Jane Armstrong & Carole Mallan, *Hitting Home--Spousal Abuse: The Accused*, TORONTO STAR, Mar. 10, 1996, at E5.

n151 *Id.*

n152 Chief Coroner, Province of Ontario, Inquest Touching the Deaths of: Arlene May and Randy Joseph Iles, Jury Verdict and Recommendations (1998) (on file with author).

n153 Some have described this as the state's "rhetoric of protection" provided to women survivors of violence. *See, e.g.*, Jalna Hanmer and Elizabeth Stanko, *Stripping Away the Rhetoric of Protection: Violence to Women, Law and the State in Britain and the U.S.A.*, 13 INT'L J. SOC. L. 357 (1985).

n154 *See, e.g.*, Chris Wood, *Why Do Men Do It?*, MACLEAN'S, Aug. 7, 2000, at 34.

n155 *See* Pamela Cross, *No More Inquests!*, ONTARIO WOMEN'S JUSTICE NETWORK, July 10, 2001, *at* http://www.owjn.org/issues/w-abuse/inquests.htm.

n156 *See Inquest into the Death of Gillian and Ralph Hadley Announced*, CANADA NEWS WIRE, Sept. 18, 2001, *at* http://www.newswire.ca/releases/September_2001/18/c8661/html; Hadley Inquest Jury Recommendations (Feb. 20, 2001), *at* http://www.owjn.org/issues/w-abuse/hadley2.htm.

n157 *See* CANADIAN PANEL ON VIOLENCE AGAINST WOMEN, CHANGING THE LANDSCAPE: ENDING VIOLENCE--ACHIEVING EQUALITY 3 (1993).

n158 *See, e.g.*, IRVING M. ABELLA & HAROLD TROPER, NONE IS TOO MANY: CANADA AND THE JEWS OF EUROPE, 1933-1948 (3d ed. 1991) (exploring the refusal to take in Jewish refugees during World War II).

n159 An interesting research study on the adequacy of the Canadian refugee determination process reported the existence of systemic problems which often resulted in apparently or potentially legitimate claims for refugee status being refused. *See* Francois Crepeau et al., *Multidisciplinary Analysis of the IRB Decisionmaking Process, Summary Report* (Oct. 5, 2000), *at* http//www.cedim.uqam.ca/rapportA.htm.

n160 Razack, *supra* note 3, at 46.

n161 *Ward*, [1993] 2 S.C.R. at 726.

n162 *See* Razack, *supra* note 3, at 48-50.