

Women Who Defy Social Norms: Female Refugees Who Flee Islamic States and Their Fight to Fit into American Immigration Law

By

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This Note addresses United States Immigration Law 8 U.S.C. § 1101(a)(42)(A) as relates to women who defy the social norms of their Islamic states.

Introduction

[1] Women seeking asylum in the United States face numerous hurdles. Even women facing imprisonment or death by stoning due to their gender are often turned away and returned to their native countries. To many people, denial of refuge in the United States under such circumstances seems unfathomable, but not to the countless women who have applied for refuge in the United States and have been denied because there was no immigration category into which they fit.

Women who suffer under *Sharia* law, a form of Islamic law which persecutes women who commit what most of us would not even consider a crime, and may even face death by stoning, are turned away from the United States and Great Britain. These women are trying to fit into a category of persecution, one that will make them eligible for asylum, based upon their membership in a particular social group.

[2] To be eligible for asylum, one must fear persecution based on race, nationality, political opinion, religion or membership in a particular social group.¹ Time and time again, these women's counsel, the courts, and law commentators try to fit them into the category of "particular social group," yet fail to do so. They try to establish a social group based on gender,

¹ 8 U.S.C. § 1101(a)(42)(A)(2005).

or more specifically women defying the social mores of their country. Courts invariably find that such a group is not one that the immigration laws will recognize or whose treatment does not rise to the level of persecution.

[3] This Note will examine the ways in which the definition of “particular social group” should expand to include gender and explore how women who are persecuted under Islamic laws may fit under persecution based upon religion or political opinion. It begins with a history of immigration laws and how women have tried to apply for refuge/asylum under these laws. Next, it examines alternative categories under which women should be able to bring refuge/asylum claims. This Note then tackles the issue of whether, even if women qualify as suffering on the basis of their particular group, political opinion, or religion, whether that suffering amounts to persecution. Finally, theories and different courses American immigration law can and should take are examined.

I. History

A. Immigration and Nationality Act²

[4] The United States’ primary statutory law that governs refugees and asylum-seekers is the Immigration and Nationality Act (INA), revised in 1980.³ It is modeled after the United Nations’ 1951 Convention Relating to the Status of Refugees⁴, as amended by the 1967

² *Id.*

³ *Id.* A refugee is an overseas person, outside of their country of origin, asking for permission from a third country to travel to its shores and gain refuge. *Id.* An asylum-seeker has already reached the shores of another country and is asking for permission to remain. 8 U.S.C. § 1158(a)(1)(2005). Besides this technical difference in terms, both must prove refugee status under 8 U.S.C. § 1101(a)(42)(A)(2005).

⁴ 189 U.N.T.S. 137 (1951).

Protocol.⁵ The INA has a three-pronged test for proving refugee status.⁶ First, one must have a well-founded fear, which may be based on past persecution, threats, and so forth.⁷ Second, this fear must be of something rising to the level of persecution.⁸ Third, one must be subject to persecution on the basis of: race, religion, nationality, political opinion, or particular social group.⁹

B. “Particular Social Group”

[5] *Matter of Acosta*¹⁰ is the defining case for the term “particular social group.” In *Acosta*, a Salvadoran taxi driver sought asylum in the United States, arguing that taxi drivers were being persecuted by guerrillas who resented them because they would not participate in work stoppages.¹¹ The Board of Immigration Appeals (“BIA”) rejected this argument, saying that taxi drivers are not considered a “particular social group” because they do not have a defining

⁵ 606 U.N.T.S. 267 (1967). The United States was not a party to the 1951 Convention, but became one by default when it acceded to the 1967 Protocol in 1968. *See infra* note 74.

⁶ 8 U.S.C. § 1101(a)(42)(A).

The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Matter of Acosta*, 19 I. & N. Dec. 211 (1985).

¹¹ *Acosta*, 19 I. & N. at 216-17.

characteristic that is immutable.¹² The court found that there must be an immutable characteristic on the basis of the *ejusdem generis* doctrine, or “of the same kind.”¹³ An attribute that can be changed, such as one’s occupation, is not immutable. Besides obvious immutable characteristics, such as sex and color, the BIA also recognizes shared past experiences as immutable characteristics.¹⁴ Since the category of “particular social group” was intentionally left open for interpretation, the BIA acknowledges that one’s membership in a social group can only be determined on a case-by-case basis.¹⁵

II. Trying to fit in: Women and “Particular Social Group”

[6] In *Fatin v. INS*,¹⁶ the United States Court of Appeals for the Third Circuit formulated a test for determining persecution based on membership in a particular social group: “the alien must (1) identify a group that constitutes a particular social group ... (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.”¹⁷ Parastoo Fatin, petitioner, came to the United

¹² *Id.* at 234. “[W]e interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic.” *Id.* at 233.

¹³ *Id.* *Ejusdem generis* dictates that when determining the meaning of more general words, they should be understood so as to be consistent with the more specific words they are attached to. BLACK’S LAW DICTIONARY 535 (7th ed. 1999). So to define “particular social group” one must look to the meaning of the words preceding it, “race, religion, nationality,” which are all immutable characteristics. 8 U.S.C. § 1101(a)(42)(A).

¹⁴ *Acosta*, 19 I. & N. Dec. at 233.

¹⁵ *Id.*

¹⁶ *Fatin v. INS*, 12 F.3d 1233 (1993).

¹⁷ *Id.* at 1240.

States on a student visa, attended high school and college in the U.S., and applied for asylum while in college.¹⁸ She opposed Iranian laws, considered herself a feminist and was active in student groups protesting Ayatollah Khomeini.¹⁹ The court, however, focused on her one act of opposition, refusing to wear a veil, or chador, in conformity with Islamic Sharia law.²⁰ The court focused on this even though she applied for asylum for political reasons, not as part of a social group.²¹

[7] The court in *Fatin* found that the petitioner satisfied the first two prongs of the social group test, but not on the basis of her contention that there existed a social group in Iran consisting of upper class, educated, westernized, and free-thinking women who supported the Shah of Iran, and that she was a member of that group.²² Instead the court found that she satisfied the first two prongs on the basis of her sex, citing *Acosta* in dicta, as recognizing sex as a particular social group.²³ That meant the court would only look at the persecution she faced on the basis of her sex and not on her political or religious beliefs. The persecution was having to wear a veil against her wishes. The Third Circuit relied on testimony in the record of the district

¹⁸ *Id.* at 1235.

¹⁹ *Id.* Ayatollah Khomeini, the deceased religious and political leader in Iran, represented opposition to the Shah of Iran, was exiled from Iran, but returned in 1979 to lead the Islamist revolution and begin a process Islamization, removing all western influences from the country. Tore Kjeilen, *Encyclopedia of the Orient-Ayatollah Khomeini*, available at www.i-cias.com/e.o/khomeini.htm (last visited Mar. 20, 2005).

²⁰ *Fatin*, 12 F.3d at 1241.

²¹ *Fatin*, 12 F.3d at 1235-36.

²² *Id.* at 1237.

²³ *Id.* at 1240.

court. When asked if upon return she would wear a veil, Fatin replied “I would have to, sir.”²⁴ And what if she would not wear a veil? Fatin testified that she would be jailed or punished in public by being whipped or hit with stones.²⁵ When asked if she would still wear the veil in spite of this, she answered “I would try personally to avoid it as much as I could.”²⁶ The court found that she *would* wear the veil if she went back, and therefore could not be part of a social group of women who refuse to conform to gender-specific laws willingly facing lashes, imprisonment, rape and death.²⁷ The court therefore found that Fatin did not satisfy the third prong: that she would face persecution on the basis of this social group.²⁸

[8] In essence, the court in *Fatin* created two new prongs that woman must prove to gain asylum that other social groups do not. First, the petitioner must say they are willing to die rather than just showing that *if* they follow their beliefs they will be persecuted. This contradicts a purpose of asylum law, which is to recognize a person’s right not to have to forgo her beliefs.²⁹ Second, the court quoted the BIA as saying that upon return, the petitioner would be “‘subject to the same restrictions and requirements’ as the rest of the population.”³⁰ A person who applies for asylum, regardless of whether for racial, political, or another reason, must prove

²⁴ *Id.* at 1236.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Fatin*, 12 F.3d at 1241.

²⁸ *Id.* at 1240.

²⁹ *Acosta*, 19 I. & N. Dec. at 233-34.

³⁰ *Fatin*, 12 F.3d at 1237.

a “singling out.”³¹ The applicant must show that it is the fact of their membership in a particular group that they are or will be persecuted.³² But *Fatin* is required to show that not only is she going to be singled out on the basis of her sex, but also that her suffering will be *different* from others within her classification.³³ This is a different requirement than exists for other social groups.³⁴

[9] *Fatin* illustrates the problem of the “particular social group” approach with regards to sex. For unsupported reasons, courts require a woman’s persecution to be different from other women, yet do not require this of persons within other social groups. Women may now be able to utilize a 2001 addition to the federal regulations that provides that persons who can show a “pattern” of persecution in his or her country against persons similarly situated as themselves need not show a “singling out.”³⁵ However, one would still have to convince a court that their treatment rises to the level of persecution.

³¹ *Carvajal-Munoz v INS*, 743 F. 2d 562 (1984).

³² 8 U.S.C. § 1101(a)(42)(A).

³³ *Fatin*, 12 F.3d at 1236-37.

³⁴ For instance, Chinese couples who will be subjected to forced sterilization need not prove they are being singled out from among their social group of those being forcibly sterilized. All they have to prove is that they are a member of that social group that wants to have more than one child, and that they will suffer persecution (being forcibly sterilized) on the basis of that group. They need not prove that they are different from other couples who may be forcibly sterilized. 8 U.S.C. § 1101 (a)(42)(B). This was not always the case, however. In *Matter of Chang*, The BIA rejected the Changs’ claim, stating in dicta that the Changs were not being treated differently from any other Chinese couple. *Matter of Chang*, 20 I. & N. Dec 38, 45 (1989). One month after *Chang*, an amendment to the Immigration and Nationality Act stipulated that any forced abortion or sterilization or fear thereof shall be deemed to be persecution on account of political opinion, without the requirement of proving a “singling out.” 8 U.S.C. § 1101 (a)(42)(B).

³⁵ 8 C.F.R § 208.13(2)(C)(iii)(2005).

[10] The United Nations High Commissioner for Refugees has defined “women who have transgressed social mores” to be a particular social group.³⁶ But so far these women have been denied asylum in the United States, either because the courts do not recognize such a group, or the courts do not recognize the persecution as such. In *Fatin* the court asserted that asylum was not meant to encompass “all treatment that our society regards as unfair, unjust or even unlawful or unconstitutional.”³⁷ But the United States’ application of this view is uneven at best. For instance, in *In re Izatula*, the BIA found that the prosecution that an Afghan would face for his political views, not unlike his fellow countrymen, was enough to establish an asylum claim.³⁸ *Izatula*’s prosecution, the BIA argued, would amount to persecution by the Afghan government.³⁹ Why is this different from a woman who refuses to wear a veil and faces prosecution? The language of *Izatula* suggests that the legitimacy of the government handing down the sentence, and the freedoms, or lack thereof, that citizens of the country enjoy, are determining factors:

[W]e find no basis in the record to conclude . . . that any punishment which the Afghan Government might impose on the applicant on account of his support for the mujahedin would be an example of a legitimate and internationally recognized government taking action to defend itself . . . [The situation is] different from that of countries where citizens have an opportunity to seek change in the political structure of the government via peaceful processes.⁴⁰

³⁶ Conclusion, 39, *Refugees, Women and International Protection*, Executive Committee of UNHCR (1985).

³⁷ *Fatin*, 12 F. 3d at 1240.

³⁸ *In re Izatula*, 20 I. & N. Dec. 149 (1990).

³⁹ *Id.* at 153.

⁴⁰ *Id.*

In effect, *Izatula* has been determined on the basis of “treatment that our society regards as unfair, unjust or even unlawful or unconstitutional,” exactly what *Fatin* said asylum shall not be based on.⁴¹ Since *Izatula* regarded the prosecution of those whose political beliefs clash with their government’s as amounting to persecution, one must wonder why a woman’s persecution on the basis of views different from her government’s does not amount to persecution when she too is in a totalitarian state.

[11] The Board of Immigration Appeals in *Izatula* based its opinion of the Afghan government on Country Reports from the U.S. State Department.⁴² Reports of Iran in 1993, the year that *Fatin* applied for asylum, indicate a similar situation in Iran as there was in Afghanistan when *Izatula* was decided.⁴³ Human Rights Watch described Iran in 1993 as a year of crackdown on political dissent, civil liberties, and women’s rights.⁴⁴ Iran, like Afghanistan, legitimized the quashing of any dissent by arguing it was necessary for self-preservation because the Iranian government was involved in a war against armed opposition groups.⁴⁵ The court in *Izatula* did not accept this same argument from the Afghan government; therefore it should not have accepted it from the Iranian government.⁴⁶ And just as the *Izatula* court said that Afghan citizens did not “have an opportunity to seek change in the political structure of the government

⁴¹ *Fatin*, 12 F.3d at 1240.

⁴² *Izatula*, 20 I. & N. Dec. at 153.

⁴³ Iran: Human Rights Developments, HUMAN RIGHTS WATCH, *available at* www.hrw.org/reports/1994/WR94/Middle-03.htm (1993).

⁴⁴ *Id.*

⁴⁵ *Id.* at ¶ 6.

⁴⁶ *Izatula*, 20 I. & N. Dec. at 153.

via peaceful processes,”⁴⁷ Iranian citizens were arrested for peaceful opposition and clerics, philosophers, and the press were threatened and prosecuted.⁴⁸ As relates to women’s rights in particular, there was no means of changing the way the Iranian government treated women. Dress codes dictated a woman’s dress, even down to the prohibition of sunglasses.⁴⁹ Any deviation from the dress code was met with fines or flogging.⁵⁰ Why are these punishments, ones that women have no “opportunity to . . . change . . . via peaceful processes,”⁵¹ seen as legitimate by U.S. courts?

[12] It is important to understand Sharia law in order to know that what women endure or potentially face is truly persecution. Nothing is inherently wrong with Sharia law, when contained to private religious practice. But when it is the law governing a society, it relegates women to second-class citizenship. Sharia is a religious code for living, literally translated as “the path to a watering hole.”⁵² It governs law in areas such as inheritance, banking, and contracts, but it also dictates societal norms in the way one dresses and conducts oneself.⁵³ In

⁴⁷ *Id.* at 154.

⁴⁸ Human Rights Watch, *supra* note 43, at ¶¶ 8-15.

⁴⁹ *Id.* at ¶ 17.

⁵⁰ *Id.*

⁵¹ *Izatula*, 20 I. & N. Dec. at 154.

⁵² Susan Steiner, *Sharia Law*, Aug. 20, 2001, available at www.guardian.co.uk (last visited Mar. 25, 2005).

⁵³ *Id.*

some countries it is simply a societal norm, not a governing rule, but in others it permeates every facet of society and intertwines itself with state law, either officially or in practice.⁵⁴

Sharia law has a sub-sect of offenses, referred to as *Haad* offenses, which carry particularly harsh punishments.⁵⁵ Saudi Arabia follows pure Sharia law and enforces the harsh penalties for *Haad* offenses, while in other Islamic states such penalties are enforced in varying degrees or not at all.⁵⁶

[13] In Nigeria, Sharia is not national law; rather it is enforced in particular states that have adopted it. Amina Lawal, who lives in the northern part of Nigeria where Sharia law was adopted, was sentenced to death by stoning for adultery.⁵⁷ Death by stoning is in actuality even more gruesome than it sounds. She would be buried in sand up to her head, a bag placed over her head, and rocks thrown at her by local men. The men would be instructed to pick medium sized stones, not too small as to be ineffective, but not so big as to bring death too quickly. Lawal was freed in September of 2003, after almost two years of international press begging that her life be

⁵⁴ *Id.* Turkey, for example, is a liberal state that regards Sharia as a matter of private religious practice. At the other end of the spectrum is Iran, Saudi Arabia, and Afghanistan, which are fundamentalist Islamic States, implementing Sharia as national law.

⁵⁵ The specific penalties were set by the Koran and by the prophet Mohammed. *Id.* at ¶ 9. For stealing, one has his or her hand cut off, and for sex out of wedlock, a woman is stoned to death. In theory, the burden of proof for *Haad* offenses is supposed to be very high, but in practice, it is not. *Id.* at ¶ 10.

⁵⁶ Steiner, *supra* note 52. In Pakistan, penalties have not been enforced. Jordan, Egypt, Lebanon, and Syria have not adopted *Haad* offenses as law. *Id.*

⁵⁷ *Id.* The penalty was ordered delayed until January 2004 when her daughter, conceived from the “crime,” was finished breastfeeding. *Id.*

spared.⁵⁸ The man with whom she had sex only had to deny the charges to receive acquittal. In this way, *Haad* offenses involving sex have a disparate impact on women.⁵⁹

[14] Two women who applied to Great Britain for asylum, fearing persecution for alleged *Haad* offenses, were denied asylum in 1997--even though they faced death by stoning upon return--because they failed to prove membership in a particular social group.⁶⁰ The women were both accused of adultery, and subsequently their husbands violently abused them; if they returned to Pakistan, they could be put to death by stoning.⁶¹ In the initial denials of asylum, the women were told they failed to show that they were members of a particular social group because their unifying characteristic, that created a recognizable social group distinct from the rest of society, did not exist independently of the persecution feared.⁶² Yet even the court recognized that the accusations of adultery were *false*.⁶³ One might wonder how the social group does not exist independently of the persecution, for if any woman, at any time, can be falsely accused of adultery and therefore subject to persecution, then the social group *does* exist independently of the persecution, because the social group, made up of any woman, is gender.

⁵⁸ Kristina Nwazota, "Nigerian Court Frees Woman Sentenced Under Sharia Law," *available at* www.pbs.org/newshour/extra/features/july-dec03/sharia_9-29.html (last updated Sept. 29, 2003).

⁵⁹ In 2002, a teenage girl was given 100 lashes for sex outside of wedlock even though she protested that she was raped by three men. Steiner, *supra* note 52. Another woman recently received 100 lashes for having sex with her fiancé. *Id.* For a discussion of facially neutral laws with disparate impacts, *see infra* text accompanying note 137 and accompanying text.

⁶⁰ *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v Secretary of State for the Home Department*, Court of Appeal (Civil Division), England and Wales, 2 BHRC 590 (1997).

⁶¹ *Id.* at ¶ 1.

⁶² *Id.* at Conclusion, part B, ¶ 2.

⁶³ *Id.* at ¶ 1.

Two years later the House of Lords agreed, in part, allowing the appeals.⁶⁴ The House of Lords determined that the group did exist independent of the persecution, and was based on the gender of the group combined with their suspicion of adultery and the lack of protection they receive in their society.⁶⁵ In regards to the lower court's logic, the House of Lords quoted *A. v Minister for Immigration and Ethnic Affairs*:

[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognisable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.⁶⁶

Following this logic, the House of Lords did not determine that all women in Pakistan are members of a particular social group, but instead determined that there is a narrower sub sect of women of which the petitioner's were members.⁶⁷ But in societies where at any moment, as a member of a certain sex, a danger of being falsely accused of something would exist, and as a result face death, then yes, one's gender exclusively should qualify as a particular social group. This group does not just come into existence when and if something happens, but is always present and subject to persecution, whether subject to persecution from falling on the street and having one's garment slip to reveal part of one's skin, or breaking up a fight between children

⁶⁴ *R. v. Immigration Appeal Tribunal and another, ex parte Shah* (United Nations High Commissioner for Refugees intervening); *Islam and others v. Secretary of State for the Home Department* (United Nations High Commissioner for Refugees intervening), House of Lords, 6 BHRC 356 (1999).

⁶⁵ *Id.*

⁶⁶ *A. v. Minister for Immigration and Ethnic Affairs*, 2 BHRC 143, 173 (1997).

⁶⁷ *R. v. Immigration Appeal* (1999), *supra* note 64.

and subsequently being accused of adultery.⁶⁸ Justice O'Connor, in her report on gender bias in the Ninth Circuit, contends that women as a group may fear persecution because there exists a severe discrimination based on gender.⁶⁹ It is the fact that they are women, and not their persecutory act, that identifies them as a particular social group. If they would not be in danger of persecution but for the fact they are women, then the persecution should be found to be on the basis of gender.⁷⁰

[15] Lord Hoffman, in his concurring opinion, agreed:

[I]t seems to me that women form a social group of the kind contemplated by the convention. Discrimination against women in matters of fundamental human rights on the ground that they are women is plainly in *pari materiae* with discrimination on grounds of race ... [T]he concept of a 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 ... I therefore think women in Pakistan are a social group.⁷¹

This reasoning reflects how the definition of “social group” has changed and its ability to change in the future. When drafted, the 1951 Convention was concerned only with refugees from World

⁶⁸ *R. v. Immigration Appeal Tribunal and another, ex parte Shah* (United Nations High Commissioner for Refugees intervening); *Islam and others v Secretary of State for the Home Department* (United Nations High Commissioner for Refugees intervening), House of Lords, 6 BHRC 356 (1999).

⁶⁹ Sandra Day O'Connor, Comment, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice*, 67 S. CAL. L. REV. 745 (Part II), 880-81 (May 1994). The discrimination leads to a fear of violence, either at the hands of public authorities or by private citizens, from which authorities provide no protection to women. *Id.*

⁷⁰ The court in *R. v Immigration Appeal Tribunal* (1999) rejected this “but for” test. See *R. v. Immigration Appeal Tribunal*, *supra* note 64.

⁷¹ *R. v. Immigration Appeal Tribunal and another, ex parte Shah* (United Nations High Commissioner for Refugees intervening); *Islam and others v Secretary of State for the Home Department* (United Nations High Commissioner for Refugees intervening), House of Lords, 6 BHRC 356 (1999).

War II (“WWII”).⁷² This is evidenced from its language “[a]s a result of events occurring before 1 January 1951.”⁷³ The 1967 Protocol amended this specification to extend the relevance of the Convention past the context of WWII,⁷⁴ and to expand the reaches of the Convention to protect more persons.⁷⁵

[16] In *Fatin*, the court argued such treatment of women did not rise to the level of persecution.⁷⁶ The court relied on a dictionary definition of persecution that included “subjugat[ion of] a people because of their religion, race or beliefs.”⁷⁷ The laws of many countries relegate women to the status of second-class citizens; if we recognize sex as a social group, as did the court in dicta in *Acosta*,⁷⁸ then the subjugation thereof must be of the same level as subjugation based on race or religion, as indeed Lord Hoffman argues.⁷⁹ The court in *Fatin*

⁷² There were four major categories of displaced persons at the end of the war. ROBERT A. DIVINE, *AMERICAN IMMIGRATION POLICY, 1924-1952*, 110-12 (1957). The largest category was the forced laborers Germany brought into its territory from occupied areas. *Id.* at 110. The second category was persons who had fled into Germany from Poland, fearing the Russian advance into their country. *Id.* Third was the population of Holocaust survivors, and the last category was Jews fleeing anti-semitism and then persons of all faiths who fled Communist nations of Eastern Europe. *Id.*

⁷³ Convention Relating to the Status of Refugees, *supra* note 4, at 1 A (2).

⁷⁴ Office of the High Commissioner for Human Rights, Protocol Relating to the Status of Refugees, Article 1, Section 2 (1967) (“[T]he term “refugee” shall ... mean any person within the definition of article I of the Convention as if the words ‘As a result of events occurring before 1 January 1951 and ...’ and the words ‘... as a result of such events’, in article 1 A (2) were omitted.”).

⁷⁵ *Id.*

⁷⁶ *Fatin*, 12 F.3d at 1240.

⁷⁷ *Id.*

⁷⁸ *Acosta*, 19 I. & N. Dec. at 233.

⁷⁹ *R. v. Immigration Appeal* (1999), *supra* note 64.

also points to the UNHCR⁸⁰ to reinforce its view,⁸¹ but the UNHCR has encouraged countries to expand the definition of persecution to women who defy social mores.⁸²

[17] The court in *Fatin* appears hesitant to define the relegation of women to second-class citizens as persecution for fear of opening a floodgate of immigration. Yet, the United States has found such treatment, one that relegates a whole group to second-class citizenry, to qualify as persecution, namely with respect to apartheid. And the United States has allowed for the immigration of citizens based on ideological beliefs that the political/social stance of a country was wrong.⁸³

[18] Recognizing subjugation of women as persecution will not result in a massive tide of immigration. The conditions under which most women live in repressive societies dictates that very few will reach the shores of other countries and be able to apply for asylum. Also, women who apply for asylum on such a basis are those who disagree with their government and/or religion's way of life, as *Fatin* did, and this is only a percentage of the population.⁸⁴ For these reasons, the fear of expanding "particular social group" to include sex, and defining the treatment

⁸⁰ United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979)(hereinafter UNHCR Handbook).

⁸¹ *Fatin*, 12 F.3d at 1240.

⁸² "Refugees, Women and International Protection," *supra* note 36, at Conclusion.

⁸³ For example, in 1965, the United States adopted a quota system, referred to as the "seventh preference," that created a preference for persons fleeing persecution in a Communist or Middle-eastern country. Pub. L.89-236, § 3, 79 Stat. 911, 913 (1965).

⁸⁴ Supporting this position, the court in *Fatin* stated: "[R]equiring some women to wear chadors may be so abhorrent to them that it would be tantamount to persecution, this requirement clearly does not constitute persecution for all women. Presumably, there are devout Shi'ite women in Iran who find this requirement entirely appropriate." *Fatin*, 12 F.3d at 1242.

women face based on their gender as persecution, is unfounded and an uneven application of immigration laws.

III. Alternatives to Particular Social Group

[19] Why doesn't a woman qualify for political asylum or religious asylum when she, for instance, refuses to wear a veil because she opposes the government or the government's religion? Claims that did not qualify for asylum under "particular social group" are here examined under the bases of "political opinion" and "religion."

A. Political Opinion

[20] When Parastoo Fatin applied for asylum, she did not apply for it as a member of a particular social group; she applied as one who would be persecuted on the basis of her political opinion. The court, however, relegated her case to the "particular social group" category and subsequently denied her request for not meeting a prong that is unique to that category.⁸⁵ Fatin regarded her actions, such as refusing to wear a chador, or veil, as political, but the court did not.⁸⁶

[21] Often times, female asylum-seekers apply for asylum based on political opinion, but courts fail to see their activities as political. The public/private dichotomy mirrors other categories of social thought, such as male/female and political affairs/domestic affairs.⁸⁷ When a

⁸⁵ *Id.* at 1240 (finding that the petitioner failed to prove persecution on the basis of membership in a particular social group).

⁸⁶ *Id.* at 1242-43.

⁸⁷ For in depth examinations of the public/private dichotomy, *see generally* HANNAH ARENDT, *THE HUMAN CONDITION* 22-78, 31 (1958) ("What all Greek philosophers, no matter how opposed to polis life, took for granted is that freedom is exclusively located in the political realm, that necessity is primarily a prepolitical phenomenon, characteristic of the private household organization ..."); *see also* FREDRICH ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY,*

woman is required to put on a veil when she enters the public sphere, and refuses to do so, she is, among other things, making a political statement that the law requiring such clothing is unjust. The law requiring such clothing was mandated and now broken in the public/political sphere, making her statement political. Besides viewing this act in light of the public/private dichotomy, one can see how a woman in such a situation has limited avenues to make political statements. However, this should not prevent a woman from qualifying for political asylum.

[22] Moreover, abuse of women often takes place in the private sphere, such as with domestic abuse or female circumcision, where it will likely be tolerated and go unpunished by authorities.⁸⁸ Women, therefore, often have to perform feats of activism within the private sphere, and should not be doubly punished by American courts not recognizing this as political.

[23] The feminist movement in the United States depended not only on women being able to cross over into the public sphere,⁸⁹ but also on the politicization of work done within the private sphere.⁹⁰ One would think that, in a country that has made so much progress in recognizing the political nature of what was once deemed only of a private nature, women asylum-seekers would

AND THE STATE (Eleanor Burke Leacock ed. 1972)(defining “private” as “inside the family,” and analyzing women by their role played therein); CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 35-36 (1989)(defining the home as private confines women’s oppression to the private sphere, subordinate to the male/dominant sphere).

⁸⁸ CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 194 (1989) (“This right to privacy is a right of men ‘to be let alone’ to oppress women one at a time ...[privacy] polices the division between public and private ... that keeps the private beyond public redress and depoliticizes women’s subjection within it”).

⁸⁹ As with the first wave of feminism, which culminated in the Nineteenth Amendment to the U.S. Constitution (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex”). U.S. CONST. amend. XIX, § 1. *See also* ELEANOR CLIFT, FOUNDING SISTERS AND THE NINETEENTH AMENDMENT (2003).

⁹⁰ MACKINNON, *supra* note 88, at 192 (stating that feminism has politicized the private). *See also* BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963)(examining the feeling of despair that women, confined to their homes, faced during the mid-1900’s, spurring the Second Wave of feminism).

not be summarily dismissed on the basis that they are largely confined to the private sphere in their native countries. That confinement is in part what they are seeking asylum from; in an ironic way, it is what is being used against them to justify the denial of their asylum claim.

[24] In cultures where women have so few outlets of expression, a woman's refusal to wear state ordered clothing is a powerful political statement. A 1993 report described Iran as a place where every facet of life was prescribed, both public and private.⁹¹ Therefore the refusal to wear clothing prescribed by the state was a serious, political offense. Parastoo Fatin considered it a political statement, saying in her application for asylum, "I personally belonged to a student group that favored the Shah. We refused to demonstrate with the students who favored Khomeini. I refused to wear a veil which was a sign or badge that I favor Khomeini."⁹² She also considered herself a feminist, and as such was opposed to the way women in Iran were literally second-class citizens.⁹³ The Fatin court hardly examined the applicant's assertion of persecution based on political opinion, stating that "the petitioner's argument regarding political opinion fails for reasons similar to those already discussed in relation to her argument based on group membership."⁹⁴ The court says Fatin's treatment will not rise to the level of persecution because it fails to see the ramifications of such actions by an Iranian woman. A woman who defies

⁹¹ Report on Iran, *supra* at note 43.

⁹² *Fatin*, 12 F.3d at 1235.

⁹³ *Id.* at 1236. According to Fatin:

As a feminist I mean that I believe in equal rights for women. I believe a woman as a human being can do and should be able to do what they want to do. And over there in . . . Iran at the time being a woman is a second class citizen, doesn't have any right to herself

Id. at 1236.

⁹⁴ *Id.* at 1242.

convention in such a country, one where a woman's freedom is determined first by the state and then by her husband's prerogatives, risks everything; she may be shunned, or hurt, by her family, or be banished and have no means of supporting herself, leaving her destitute.⁹⁵

[25] Justice O'Connor describes the particular difficulty women have in claiming political asylum.⁹⁶ Women's political activities often differ from men's, and since they are often conducted in the private sphere, as discussed above, they are not seen as political.⁹⁷ The courts see "public" as a necessary prerequisite to something being "political."⁹⁸

[26] Sometimes, women's treatment is dismissed as sexual, and nothing more. In *Lazo-Majano v. INS*,⁹⁹ the petitioner applied for political asylum. She argued that because a man mistakenly believed that she was a subversive of the Salvadoran government--a government in which he was a military sergeant¹⁰⁰--the man taunted, threatened, raped and beat the petitioner.¹⁰¹ He threatened to kill her and her husband, saying that it was his job to kill subversives.¹⁰²

⁹⁵ A British Immigration Appeal Tribunal characterized the situation for a woman who has been accused of a crime in Pakistan thus: "She cannot return to her husband. She cannot live anywhere in Pakistan without male protection. She cannot seek assistance from the authorities because in Pakistan society women are not believed or they are treated with contempt by the police." *R. v. Immigration Appeal* (1997), *supra* note 60, at ¶ 5.

⁹⁶ O'Connor, *supra* note 69, at 878.

⁹⁷ "Forms of political activity engaged in frequently by women include teaching, medical or nursing care activities, and church-based actions, as well as visiting imprisoned friends and relatives." *Id.* at 878.

⁹⁸ *Id.*

⁹⁹ *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1987).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1433.

¹⁰² *Id.*

Nonetheless, the Board below denied her political asylum claim saying that the actions were “strictly personal.”¹⁰³ The Board, in saying the perpetrator’s actions were “strictly personal,” appears to have ascribed a purely sexual motive to the perpetrator’s actions, and overlooked that the motivation could have been political, on the basis that she was raped. On appeal, the court reversed and acknowledged that her persecution was based on political opinion.¹⁰⁴ The dissent, however, was unpersuaded.¹⁰⁵

[27] The Chinese practice of sterilization parallels the issue of requiring women to wear veils in public in that it was a public law that affected what on its face was a private issue.

Reproduction, just like one’s clothing, is a private issue to most people, but American courts

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1436. The court also found the Board’s denial of her application unsupported by the evidence, and an abuse of discretion. *Lazo-Majano*, 813 F.2d at 1436.

¹⁰⁵ Judge Poole, dissenting, chastises the majority for ascribing a higher level of authority to the perpetrator than may be warranted. The dissent believes he is a low ranking officer of the military who does not hold a high enough position to classify his acts as persecution. Judge Poole cites the record below as stating the perpetrator was a “common police officer.” *Id.* at 1438. Immigration law requires that the perpetrator be a representative of the government, or a person or a group, that the government is unable or unwilling to control. *See* UNHCR Handbook at ¶ 65. The law does not state how high-ranking a government representative must be.

For a discussion on non-state actors and domestic violence, *See* Deborah Anker, *Refugee Status and Violence Against Women in the “Domestic” Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391 (2001)(arguing that lack of police action regarding domestic abuse should qualify as an unwillingness of the government for purposes of asylum claims).

The dissent also has a problem with the applicant testifying that she believed the perpetrator would have committed the same acts had he not been a member of the military. *Lazo-Majano*, 813 F.2d at 1440. However, the fact that the perpetrator would have attributed the same political opinion to the applicant if he were not in the military does not defeat her claim. In this way, the dissent has confused his political role with her’s; a person seeking political asylum must show that *she* is suffering persecution on the basis of *her* political opinion. The court in *INA v. Elias-Zacarias* addressed such confusion by stating: “The ordinary meaning of the phrase “persecution on account of . . . political opinion” in § 1101(a)(42) is persecution on account of the *victim’s* political opinion, not the persecutor’s.” 502 U.S. 478, 482 (1992).

Judge Poole describes the applicant’s suffering saying “the ‘persecution’ inflicted . . . encompasses rape, beatings, and public humiliation . . .” *Lazo-Majano*, 813 F.2d at 1437. The dissent does not believe this treatment amounted to persecution. *Id.* at 1438.

recognized the Chinese laws affecting reproduction as political, and allowed those escaping the laws to qualify for political asylum.¹⁰⁶ In 1996, Congress enacted a regulation that superseded the BIA decision in *Chang*,¹⁰⁷ amending the definition of “refugee” to include forced sterilization, defining sterilization as persecution on account of political opinion.¹⁰⁸

B. Religion

[28] The Immigration and Nationality Act¹⁰⁹ provides asylum to those who have suffered persecution, or fear future persecution, on the basis of religion.¹¹⁰ Most common to religious asylum may be instances where an applicant is of a different religion than the majority of his or her country, and is persecuted on the basis of that difference. But what if the applicant is persecuted on the basis of practicing the same religion differently, such as with different variations of Islamic law, or of not agreeing with the state religion? In some Islamic countries, there is no separation of mosque and state, all laws being infused with religion.

[29] The UNHCR Handbook on Procedures for Determining Refugee Status defines persecution on the basis of religion as when certain rights relating to religious freedom are taken away, for example the right to practice whatever religion one chooses, and the right to exercise that choice in public or in private.¹¹¹ When one’s religion does not include the wearing of a veil,

¹⁰⁶ *Chang*, *supra* note 34.

¹⁰⁷ *Id.*

¹⁰⁸ 8 U.S.C. § 1101(a)(42) (2004).

¹⁰⁹ 8 U.S.C. §§ 1101 et, seq. (2004).

¹¹⁰ 8 U.S.C. § 1101(a)(42)(A) (2004).

¹¹¹ UNHCR Handbook, *supra* note 80, at ¶ 71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right of freedom of thought, conscience and religion, which includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship, or observance. *Id.*

then is abstaining from doing so a religious right? Fatin asserted this proposition by saying that wearing a veil is a law of a religion she does not practice. Unfortunately for Fatin, that religious law was also the law of the state, and for some reason her religious asylum claim was never made independently of her social group and political claims. She testified that if returned to Iran she would be forced to practice the Moslem religion,¹¹² and yet the court did not address a claim of religious persecution. Fatin feared several things regarding religion: (1) that Islam was not her religion and that she did not want to practice it, (2) that she would make a mistake for which she would be punished simply because of her ignorance of the strict Islamic laws imposed on women, and (3) that she did not want to wear a veil which was a symbol of the Moslem faith in which she did not believe.

[30] Even if one does believe in the Islamic faith, one might believe that certain manifestations of that religion are too extreme, such as wearing a veil in public. One might instead not believe in any religion at all. Atheism, and certain other deeply held beliefs, is supposed to be equally protected under United States law. For example, in *Welsh v. United States*,¹¹³ the Court affirmed the petitioner's belief that he qualified for an exemption from military service under the Universal Military Training and Service Act, which entitled him to an exemption from military service because he was "by virtue of religious training and belief" a conscientious objector to war.¹¹⁴ Mr. Welsh's belief, however, was not on the basis of a religion

¹¹² While some areas of life in Iran had improved in recent years, freedom of religion has seen little or no advancement. Iran Report, *supra* note 43, at ¶ 5. The United States Department of State warns that "[f]ormer Muslims who have converted to other religions, as well as persons who encourage Muslims to convert, are subject to arrest and possible execution." United States Department of State, Travel Warning, Iran (May 12, 2003).

¹¹³ *Welsh v. United States*, 398 U.S. 333 (1970).

¹¹⁴ 50 U.S.C. app. § 456(j)(2005).

or belief in God. The Court found that “religious” for exemption purposes did not necessitate an objection based on religious beliefs. The Court followed a test stated as such: “A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.”¹¹⁵

[31] Justice Harlan, in a concurring opinion, conceded that not reading the term “religious” in a broad manner would violate the Establishment Clause of the United States Constitution by favoring theistic religion over other conscientious bases for objecting to war.¹¹⁶ The Establishment Clause forbids any form of public aid or support for religion, requiring neutrality towards religion.¹¹⁷ Perhaps if Fatin had objected to Islamic law *in favor of* another religion, rather than just *objecting to* the Islamic religion, she would have qualified for religious asylum, but maybe not. According to the United States Court of Appeals for the Seventh Circuit, a woman who did not want to wear Islamic dress because she was Christian did not qualify for asylum, even though she believed the dress code was a means by which the government tried to convert non-Muslims to the Muslim faith.¹¹⁸

[32] Refusing to wear a veil is not just a political statement, as argued in the above section on political asylum, but is also a religious statement, since Sharia law dictates that women wear a veil. The United Nations recognized this perplexity:

There is some overlap between the grounds of religion and political opinion in gender-related claims, especially in the realm of imputed political opinion. While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion. For

¹¹⁵ *Welsh*, 398 U.S. at 339 (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

¹¹⁶ *Id.* at 359.

¹¹⁷ U.S. Const. amend. I.

¹¹⁸ *Yadegar-Sargis v. INS*, 297 F.3d 596, 604 (7th Cir. 2002).

example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows. This is particularly true in societies where there is little separation between religious and State institutions, laws and doctrines.¹¹⁹

By refusing to wear a veil, a woman is revealing herself to be a non-Muslim, or to be making a political opinion, whether truly hers or not, and will be subjected to punishment as a result.¹²⁰

IV. Persecution

[33] A prevailing theme underlying the cases concerning women who “defy social norms,” is that even if such women are found to be taking political or religious stances, or while they may be part of a definable social group, their treatment does not amount to “persecution” and therefore they are ineligible for asylum. The definitions of persecution used by the courts, however, appear to be applicable to such women.

[34] The United States Court of Appeals for the Third Circuit in *Fatin* defined persecution as “a program or campaign to exterminate, drive away, or subjugate a people because of their religion, race, or beliefs.”¹²¹ Certainly women who are treated as second-class citizens are “subjugated.” However, this is not on the basis of religion, race, or beliefs, but on the basis of gender. The *Acosta* court acknowledged that gender is a qualifying group for asylum on the basis

¹¹⁹ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR, ¶ 26, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

¹²⁰ See *supra* note 112, Travel Warning, Iran.

¹²¹ *Fatin*, 12 F.3d at 1240.

of membership in a particular social group,¹²² even though not enumerated in the Immigration and Nationality Act.¹²³ If gaining asylum is an equation, made up of being part of a certain group, whether religious, political, or otherwise, plus persecution, how can the qualifications for each part consist of different groups? In other words, if a person is allowed to apply for asylum due to their gender, and then are asked to prove persecution on the basis of that, the law cannot then say that that group is not a group that can ever prove persecution. In effect, that would be like saying the following: both men and women can get a law degree; first you must apply to a school and then you must attend the school; both men and women can apply, but only men can attend. If courts applied this version of persecution, which does not allow for mistreatment on the basis of gender to qualify as persecution, then no court could effectively follow the ruling in *Acosta*, which allowed for gender to be a basis of asylum.

[35] Other definitions of persecution do include that suffered by women. A definition used in a religious asylum case defined persecution as:

The infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.¹²⁴

Women who live in societies where they are regarded as subservient to men, and do not have the same freedoms, if any at all, are being persecuted. In those societies, the whole gender is regarded as offensive and is economically and educationally disadvantaged, as well as deprived

¹²² *Acosta*, 19 I. & N. Dec. at 233.

¹²³ See 8 U.S.C. § 1101(a)(42)(A).

¹²⁴ *Mikhael v. INS*, 115 F.3d 299, 303 (5th Cir. 1997).

of a high quality of life.¹²⁵ Such disadvantages are similar to those resulting from racial inequality. As Lord Hoffman stated: “Discrimination against women in matters of fundamental human rights on the ground that they are women is plainly in pari materiae with discrimination on grounds of race”¹²⁶

[36] The UNHCR Handbook on Refugees addresses discrimination as a possible form of persecution. Not all discrimination amounts to persecution, but where one is restricted in her professional, religious and educational options, discrimination amounts to persecution.¹²⁷ Also, suffering discrimination may produce a fear of persecution because at any moment that discrimination may manifest itself in a very violent way.¹²⁸ The UNHCR regards this anxiety, which deprives women of a certain and enjoyable life, as persecution.¹²⁹ Immigration courts

¹²⁵ Muslim clergy argue women must stay at home and bring up children. Iran Report, *supra* note 43, at ¶ 17-18. A woman might be able to work outside the home and continue her studies, but “her husband ha[s] the right to deny these prerogatives.” *Id.*

¹²⁶ R. v. Immigration Appeal Tribunal (1999), *supra* note 64.

¹²⁷ UNHCR Handbook, *supra* note 80, at ¶ 54.

Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities. *Id.*

¹²⁸ See discussion *supra* Part I., subpart B., “Social Group.” Women must fear becoming pregnant before marriage and must fear “honor killings,” being stoned or burnt to death for not bringing sufficient dowries to a marriage. Even though dowries are outlawed and women have the right under the Universal Declaration of Human Rights to choose their own husband, women are not provided protection under immigration laws. LUCY BONNERJEA, SHAMING THE WORLD-THE NEEDS OF WOMEN REFUGEES 5-6 (World University Service 1985).

¹²⁹ UNHCR Handbook, *supra* note 80, at ¶ 55. “Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of

recognize discrimination as a form of persecution when it pertains to race, but have yet to recognize it as pertains to gender. Justice O'Connor maintains that gender affects decision-making by the courts in several points during the asylum process. One crucial point is when suffering that traditionally afflicts women, such as rape, sexual harassment, domestic violence, and forced marriages, is not recognized as persecution.¹³⁰ In some parts of the world, women's treatment parallels racial discrimination under the system of apartheid in South Africa. The system of apartheid led to many U.S. laws, including immigration laws, designed to pressure the South African government into abolishing their system of discrimination. Similar persecution, such as the restriction of movement and citizenship, is not regarded as persecution when based on gender.¹³¹ Such treatment, treatment that would not be suffered but for one's gender, should be regarded as persecution.

[37] The *Fatin* court held that Fatin's suffering was not persecution because the government was not particularly interested in her, and therefore she had no reason to fear persecution.¹³² But, to Fatin, everyday life in Iran involved persecution, because she was a feminist and could not exercise the same rights as men, because she was not a Moslem and would be made to follow its laws, and so forth. The court focused only on one particular persecutory event, and unfortunately overlooked the way in which everyday living conditions for women *are* the persecution.

persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence." *Id.*

¹³⁰ O'Connor, *supra* note 69, at 878.

¹³¹ Simin Royanian, Women's Rights in Iran, at <http://women4peace.org/women-rights.html> (Jun. 27, 2003). Under Sharia law, the state requires a woman to have written permission from her husband to travel. *Id.* Citizenship is through paternity, so a child born out of wedlock is not eligible for Iranian citizenship. *Id.*

¹³² *Fatin*, 12 F.3d at 1236.

[38] International agreements have begun to recognize such persecution of women. For example, the Convention Against Torture now includes rape as a form of torture,¹³³ which requires an even higher standard of proof than that required in a persecution case, and upon which an applicant may not be removed from the country (unlike the discretionary power given to an asylum offer or immigration judge with regards to an application for asylum based on persecution). The United States ratified the treaty in 1994, which states that “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹³⁴

[39] Besides the Convention Against Torture, the Office of the United Nations High Commissioner for Refugees has published various guidelines to help states understand gender-related persecution and to encourage states to expand their definitions of persecution. First is the hope expressed by the Convention that states will be generous in their immigration laws to extend asylum to those not expressly covered by the terms of the Convention.¹³⁵ Second, in 1985 the UNHCR invited states to include women who have transgressed social mores as a particular social group for purposes of asylum/refuge.¹³⁶ Most recently, in 2002, the UNHCR issued

¹³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹³⁴ *Id.* at art. 3, ¶ 1.

¹³⁵ UNHCR Handbook, *supra* note 80, at ¶ 26.

¹³⁶ UNHCR Executive Committee Conclusions on Refugee Women and International Protection, Oct. 18, 1985.

States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of [the Convention].

Id.

guidelines regarding gender-related persecution to help states interpret the UNHCR Handbook relating to the status of refugees, and adopted a gender-sensitive interpretation of the 1951 Convention that defined a refugee.¹³⁷

[40] The Canadian Council for Refugees just celebrated the tenth anniversary of its Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, which was issued by Canada's Immigration and Refugee Board in 1993.¹³⁸ The guidelines help courts to be sensitive to gender-based claims and provide a way to take women's realities into account.¹³⁹ The Guidelines came about after a woman's asylum claim was denied by a Canadian court, the claim being based on her assertion that as a woman her home country denied her basic human rights and that when she tried to exercise those rights she faced persecution.¹⁴⁰

¹³⁷ *Guidelines on International Protection*, *supra* note 119, at ¶ 12. It reads:

Where the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution. Even if the law is one of general applicability, circumstances of punishment or treatment cannot be so severe as to be disproportionate to the objective of the law. Severe punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution.

Id.

¹³⁸ Canadian Council for Refugees, *CCR Celebrates 10th Anniversary of Canadian Gender Guidelines*, at <http://www.web.net/~ccr/genderreleaseMarch2003.htm> (Mar. 4, 2003).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

[41] The *Fatin* court recognized that women who tried to assert these basic rights and refused to conform to laws that denied them these rights, faced persecution.¹⁴¹ However, the court did not believe that Fatin herself would try to assert these basic human rights.¹⁴²

[42] Perhaps she would not try to assert these basic rights due to fear. There is no requirement that the petitioner die before they can apply for asylum. The fact that Fatin did not assert the rights she believed she was due should not diminish the importance she places on these rights and the fundamental nature of them to her.¹⁴³ The Immigration and Nationality Act uses the language “a well-founded fear of persecution”¹⁴⁴ and “subject to persecution for ... refusal [to comply with laws],”¹⁴⁵ not language indicating a person must have already suffered persecution.¹⁴⁶ The United States Court of Appeals for the Seventh Circuit, in *Yadegar-Sargis v. INS*,¹⁴⁷ questioned *Fatin* and the standard there, saying:

¹⁴¹ *Fatin*, 12 F.3d at 1241 (stating that “‘the routine penalty’ for noncompliance is ‘74 lashes, a year’s imprisonment, and in many cases brutal rapes and death’” and that this amounted to persecution on the basis of a membership in a particular social group).

¹⁴² *Id.* (“[Fatin] stated . . . she would seek to avoid Islamic practices ‘as much as she could’ . . . [but] never testified that she would refuse to comply with the law regarding the chador or any of the gender-specific laws or social norms.”)

¹⁴³ The court in *Acosta* explained the fundamental nature of persecution, saying:

Each of these grounds [particular social group, race, religion, nationality, and political opinion] describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.

Acosta, 19 I. & N. Dec. at 233.

¹⁴⁴ 8 U.S.C. § 1101 (a)(42)(A).

¹⁴⁵ 8 U.S.C. § 1101 (a)(42)(B).

¹⁴⁶ Evidence of prior persecution, however, does establish a presumption that a fear is “well-founded.” UNHCR Handbook, *supra* note 80, at ¶ 45.

The language employed by our colleagues in the other circuits, although perhaps quite appropriate for the fact situations before them, raises a significant ambiguity when taken out of its immediate context. Although it would seem appropriate to require that the government-imposed requirement be one that affects a deeply held belief, it is unclear to us why the victims must be willing to suffer whatever consequence may be visited on them as a prerequisite to claiming persecution. The law does not impose an absolute requirement that one be willing to suffer martyrdom to be eligible for asylum.¹⁴⁸

An additional factor is the difficulty women have in establishing credibility with the Board of Immigration Appeals,¹⁴⁹ which is of crucial import in establishing a “well-founded” fear since the petitioner testifies to his or her own fear.¹⁵⁰

[43] Overall, there appears a need to take forms of persecution that disproportionately impact women, such as rape and restrictions on clothing, work and education, more seriously and to make the courts more sensitive and aware of what is sometimes a disregard for female petitioners.¹⁵¹

V. The Future of Women Refugees in American Immigration Law

[44] In 1845, Margaret Fuller, writing about the contemporary plight of women, stated “I believe that at present women are the best helpers of one another ... We only ask of men to

¹⁴⁷ *Yadegar-Sargis v. INS*, 297 F.3d 596 (7th Cir. 2002).

¹⁴⁸ *Id.* at 604.

¹⁴⁹ O’Connor, *supra* note 69. Justice O’Connor provides one example wherein the petitioner left her children behind in her home country, and this resulted in a finding of non-credibility, “based presumably on an immigration judge’s negative judgment of such an action.” *Id.* at 879.

¹⁵⁰ UNHCR Handbook, *supra* note 80, para. 38 (noting the subjective element of “well-founded”).

¹⁵¹ O’Connor, *supra* note 69, at 880 (“[I]n cases in which a related male and female applied for asylum, precedence was given to the male’s claim”).

remove arbitrary barriers.”¹⁵² Today, women still face many barriers, arbitrary and not.

Immigration law should not be one of them.

[45] On its face, American immigration law does not appear to be a barrier to female refugees. Although the Immigration and Nationality Act does not specify “gender” as a group under which one can apply for asylum, certain courts, as in *Acosta*, have read “particular social group” to encompass claims based upon gender. Additionally, women are not precluded from applying under one of the other grounds of race, religion, nationality, or political opinion. Yet women who “defy social norms” appear to be summarily relegated to the realm of particular social group and then denied asylum. American immigration law also places no quotas on persons admitted under asylum claims as there exists under other categories of immigration. However, underlying the BIA decisions seems to be a fear that granting asylum to certain women would create too broad a standard; too many women would qualify for asylum. So one course of action American immigration law could take is to simply read the existing law differently to be more expansive and inclusive of women’s claims.

[46] The existing law can be read more expansively with the aid of treaties the United States has ratified, such as the Convention Against Torture.¹⁵³ When law is unclear, such as certain parts of the Immigration and Nationality Act, it is generally recognized that courts may rely on supplemental sources for guidance.¹⁵⁴ Many treaties ratified by the United States, such as ones that recognize rights of women more expansively than domestic law, are not codified in U.S. law. In 1988, however, the United States sent then Judge Ruth Bader Ginsburg to a high level

¹⁵² Margaret Fuller, *Woman in the Nineteenth Century* (1845).

¹⁵³ Convention Against Torture, *supra* note 133.

¹⁵⁴ See International Court of Justice art. 38; see also *Bangalore Principles*, *infra* note 155.

judicial colloquium in Bangalore, India. The colloquium set forth principles on the domestic application of international human rights norms, known as the *Bangalore Principles*.¹⁵⁵ Besides stressing the importance that judges and lawyers familiarize themselves with human rights instruments,¹⁵⁶ particularly those signed by their country, *the Bangalore Principles* stress the usefulness of international human rights instruments when domestic law is unclear.¹⁵⁷ In instances of gaps in immigration law, courts may and should look to international agreements for guidance. If the *Fatin* or *Izatula* courts had looked to the UNHCR guidelines that expand “particular social group” to include “women who transgress social mores,”¹⁵⁸ they might have better understood *Fatin* and *Izatula*’s positions as being about more than just having to wear a

¹⁵⁵ Bangalore Principles on the Domestic Application of International Human Rights Norms, 14 Commonwealth L. Bull. 1196, *in* The International Human Rights of Women: Instruments of Change, 324-326 (Carol Elizabeth Lockwood et al. eds., 1998).

¹⁵⁶ *Id.* at ¶ 3 (“There is an impressive body of jurisprudence . . . concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.”)

¹⁵⁷ *Id.* at ¶ 4, 7.

In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law-- whether constitutional, statute or common law--is unclear or incomplete . . . It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes--whether or not they have been incorporated into domestic law--for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

Id.

¹⁵⁸ *See supra* note 136.

veil. If the court would look to the UNHCR's definition of discrimination,¹⁵⁹ and how it can amount to persecution, many more women would have viable asylum claims. And if the *Lazo-Majano* court had looked to the Convention Against Torture's definition of torture, which in 1984, three years prior to the *Lazo-Majano* decision, came to include rape,¹⁶⁰ her persecution might have been recognized.

[47] It is bizarre to think that if a person wishes to move around the earth, she can actually be precluded from doing so. This introduces a more radical theory, one of open movement on earth, one that recognizes, and does not restrict, the right of persons to migrate.¹⁶¹ The theory is that persons historically have been free to migrate when local problems, such as overcrowding, famine, and unemployment, present themselves.¹⁶² This is a right, as Roger Nett says, that is basically recognized as de facto, and yet immigration laws severely inhibit this right.¹⁶³ One must presume that there is a basis for inhibiting this right, and it must be that a government's primary concern is for its own citizens and their welfare, and that depriving non-citizens of their rights, as a result, is a necessary evil.

[48] For the first part of United States history, there was no immigration law. Now, states worldwide recognize a need to control their borders. Asylum is a unique form of immigration; one on which the United States places no quotas. This means that courts and asylum officers

¹⁵⁹ See *supra* note 80.

¹⁶⁰ See *supra* note 133.

¹⁶¹ Roger Nett, *The Civil Right We Are Not Ready for: The Right of Free Movement of People on the Face of the Earth*, 81 *Ethics* 212, 218 (1971).

¹⁶² *Id.* at 219-220. Nett parallels this right with other basic freedoms, such as that of free exercise of religion and free speech. *Id.*

¹⁶³ *Id.* at 222.

should not be concerned as to how many women qualify under asylum claims. In fact, the discretionary nature of asylum¹⁶⁴ is absent in persons who fit within the Convention Against Torture, which creates mandatory nonrefoulement¹⁶⁵ status. If women, such as Lazo-Majano, who have been raped, can meet the standard of the Convention Against Torture, then they shall not be returned.

[49] Ideally, conditions in the world would be such that there were no refugees. The preferred method of handling refugees is to see voluntary repatriation. This, of course, requires a change in the situation that forced the refugee to leave, which might require the assistance of countries such as the United States. Often times, though, the Islamic states' women who are fleeing do not fall into this category. It is not a famine or natural disaster, or even a civil war that these women are most likely to be seeking refuge from; it is a way of life that they feel degrades their worth as human beings. A meddling in the affairs of Iran, for example, is probably undesirable, and it would be easier and less intrusive to simply allow women fleeing such states to gain asylum in the United States than to overhaul world views on women's rights. Of course, recognition of these rights by one state most likely will lead to its eventual recognition on a wider scale.

[50] The 1951 United Nations Convention Relating to the Status of Refugees has been expanded by many countries in the form of additional treaties in which the United States did not participate. First was the 1967 African Convention,¹⁶⁶ an extremely inclusive treaty that

¹⁶⁴ The well-founded nature of fear of persecution for asylum is a fifty-percent and less standard that person would likely face persecution; it does not require proof that persecution is more likely than not to happen. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

¹⁶⁵ Proving torture under the Convention Against Torture is subject to the highest standard of proof in asylum procedures. Once the standard is met, the United States cannot "refouler," or remove, a person unless they are a criminal of a certain magnitude.

¹⁶⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, 1001 U.N.T.S. 45, art. 1 (2) (adding to the 1951 Convention's definition of refugee: "The term

expanded the 1951 Convention to persons fleeing such things as famine. Secondly, in 1984, the “Cartagena Declaration”¹⁶⁷ was signed in response to numerous civil wars in Latin America.¹⁶⁸ The declaration is not binding like the African Convention, but they both illustrate a movement towards inclusiveness of many additional refugees than defined in the 1951 Convention.

Conclusion

[51] Hindsight, of course, is twenty-twenty. One day, the disparity of treatment towards women will be regarded as a blemish on American law; in fact, with respect to many laws, it already is. To change this with regards to immigration law would not be difficult: recognition of women’s suffering in all its forms, recognition of women’s political activity and right to religious freedom, or freedom there from, and equal application of existing immigration laws.

[52] Women should not be required to prove an additional “singling out” when applying for asylum. If there are too many women in the same predicament, facing the same persecution, the solution is not to shut them all out. A simple “but-for” test should be applied to the particular

‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”) *Id.* at art. 1 (2).

¹⁶⁷ Cartagena Declaration on Refugees, Nov. 22, 1984.

¹⁶⁸ *Id.* at § 3.

To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee ... Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

social group of gender. If a woman would not be treated in a certain way but for her sex, then her sex should qualify as her social group.

[53] If anyone should question the seriousness of the various forms of political activity women participate in, one only need look at the punishment women face to see that their acts are indeed political. For instance, the harsh persecution women face for refusing to wear a veil evidences the strong statements that act makes. These women face unjust imprisonment, rape, and death, presenting a constant anxiety and depriving them of enjoyment of life. This treatment is severe, and the courts of the United States should recognize it as persecution, whether on the basis of particular social group, political opinion, or religion.