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Yadegar-Sargis v. INS – Unveiling the Discriminatory World of U.S. Asylum Laws: the Necessity to Recognize a Gender Category

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YADEGAR-SARGIS V. INS: UNVEILING THE DISCRIMINATORY WORLD OF U.S. ASYLUM LAWS: THE NECESSITY TO RECOGNIZE A GENDER CATEGORY

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I. INTRODUCTION

"How different is the requirement that women wear veils from laws dictating that Jews wear yellow stars? In broad societal terms, both laws create badges of inferiority. Yet, we immediately recognize the latter to be persecution, not merely because of the consequences attached, but because it is fundamentally cruel. Why do we not respond to the former the same way?"1

The typical image of a human rights victim is a male, tortured for his religious or political beliefs or his race or nationality.2 The torture that this man faces — beating, burning, rape and mental abuse, are all perceived as forms of persecution.3 Worldwide, governments have recognized that no one should be persecuted for these reasons and have extended asylum protection to these victims.4 Yet, throughout the world when a woman is beaten, burnt,

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3. In re D-V-, Interim Dec. 3252 (B.I.A. 1993). See also Lazo-Majano v. INS, 813 F.2d 1432, 1437 (9th Cir. 1987). Beatings and rape are acknowledged as forms of persecution and acts of violence.
4. United Nations High Commissioner for Refugees, Global Appeal – Facts and Figures, 12 UNHCR, Geneva (2001). Governments work together with UNHCR to grant asylum to refugees by permitting them to remain in their national country. Countries do so by providing naturalization, land and permitting their legal employment or providing financial aid.
mentally abused or genitally mutilated, by her government or by another citizen, it is called a private matter or a cultural anomaly.\textsuperscript{5} Despite the fact that over half of the 19 million refuges in the world are women, almost all nations extend asylum protection in a manner that discriminates against women.\textsuperscript{6}

This case comment examines the recent decision of the United States Court of Appeals for the Seventh Circuit in \textit{Yadegar-Sargis v. INS}.\textsuperscript{7} This comment argues that gender specific abuses against women should clearly be considered violations of fundamental human rights warranting a grant of asylum protection.\textsuperscript{8}

Part II provides a background in U.S. and international asylum laws. This section reviews the current status of refugee law, including relevant definitions and criteria. Part III provides a factual and procedural history of the United States Court of Appeals for the Seventh Circuit decision in \textit{Yadegar-Sargis}. Part IV analyzes the Court's decision in \textit{Yadegar-Sargis}. In addition, this section explores the inadequate protection of current U.S. asylum law for those women who face gender specific persecutions. Furthermore, this section analyzes current trends in both U.S. and international asylum law. Part V calls for an amendment to U.S. asylum law to include a gender-category. This section explores the current

\textsuperscript{5} Gayle Binion, \textit{Human Rights, A Feminist Perspective}, 519, 521 \textit{HUMAN RIGHTS QUARERLY} 17:3 (1995). See also Stephanie Kaye Pell, \textit{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, 657 (1995). The public/private dichotomy of gender oppression results in the general denial of asylum status to persecuted women. However, it is well recognized that the principle of noninterference with family autonomy is nowhere a fully accepted concept. Rather persecutions that occur within the home are no different from other forms of persecution just because a family member carries them out.

\textsuperscript{6} United Nations High Commissioner for Refugees, \textit{Women, Children, and Older Refugees: The Sex and Age Distribution of Refugee Populations with a Special Emphasis of UNHCR Policy Priorities}, UNHCR, Geneva (2001). As of July 2002, there were more than 19 million refugees worldwide. It has been estimated that 51 percent of these refugees are women. Almost every nation is plagued with thousands of refugees who are women. Despite the already high number of refugees who are women, the numbers continue to grow.

\textsuperscript{7} \textit{Yadegar-Sargis v. INS}, 297 F.3d 596 (7th Cir. 2002).

\textsuperscript{8} James D. Wilets, \textit{Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective}, 60 ALB. L. REV. 989, 1045 (1997). There is evidence of progress by international law and some countries in recognizing the right to asylum based on gender specific abuses.
techniques and methods being used to evaluate gender specific claims. In addition, this section explores international solutions to the problems of gender-specific abuse. This comment concludes in Part VI that U.S. asylum law fails to protect women who are victims of gender-specific abuses and thus the law should be amended. In addition, this section concludes that the United States Court of Appeals for the Seventh Circuit decision in *Yadegar-Sargis* should be overruled.

II. HISTORY OF ASYLUM LAWS

A. Establishing Asylum in the United States

1. United Nations Charter (1945)

Modern international concepts of human rights were formulated in the United Nations Charter (U.N. Charter) in 1945. The purpose of the U.N. Charter is to create international cooperation among nations and to identify, clarify and secure the common interests of its citizens with "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."  

2. Universal Declaration of Human Rights (1948)

The United States, like most nations, derives its modern asylum law from international principals. Also, in order to ensure the

9. See U.N. Charter, Office of the High Commissioner for Human Rights, opened for signature October 24, 1945, *An American History of Human Rights Movements*, National Center for Human Rights Education. The United Nations Charter was the first document in post-World War II era that asserted the importance of international human rights, on a truly international level. The words "human rights" date back to as early as 1858 when Frederick Douglass protested the lynching of a Black man as a human rights violation. However, human rights movements can be dated back to the late 1400's during the colonization of North America that led to a Native American Rights Movement against dispossession and genocide. Furthermore, the word "humanity" dates back to many early religions such as Islam and Christianity. For example, the Koran explicitly lays out the foremost basic rights of life such as the right to life, the right to safety, the respect for the chastity of women, the right to justice, and the equality of human beings.


11. U.N. Charter, *supra* note 9, at art. 4, para. 3.

12. Fredric N. Tulsky, *Asylum Denied for Abused Girl; Ruling of Appeals Panel is Assailed*, *Washington Post*, July 4, 1999, at A03. See also Deborah Anker et al., *Women
common interests of human rights, the United States has adopted the Universal Declaration of Human Rights (UDHR). The UDHR declares that everyone has the right to life, liberty and security of person. Slavery and servitude are also prohibited and "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Declaration recognizes that "everyone is entitled to all the rights and freedoms set forth without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."


Additionally, the United States has adopted the 1951 United Nations Convention Relating to the Status of Refugees (UNCR) and the ensuing 1967 Protocol Relating to the Status of Refugees (UNPR). The Convention and the Protocol outline the generally accepted principles of asylum law, which were later codified in the


14. Id. at art. 3.
15. Id. at art. 4.
16. Id. at art. 5.
17. Id. at art. 2.
19. PROTOCOL RELATING TO THE STATUS OF REFUGEES, JAN. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Both the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees outline the generally accepted formulations of asylum law. None of these documents have expressly defined the terms "persecution" or "well-founded fear of persecution" which are fundamental to the definition of a refugee, but judicial and statutory interpretations of these concepts exist within countries that have adopted the UNPR and UNCR definitions.
Immigration and Nationality Act of 1952\textsuperscript{20} and the Refugee Act of 1980.\textsuperscript{21}

\section*{B. Criteria}

Both the Immigration and Nationality Act of 1952 and the Refugee Act of 1980 adopted the five criteria for which a refugee may apply for asylum enumerated in the 1951 Convention and the 1967 Protocol. The five criteria are (1) race, (2) religion, (3) nationality, (4) political opinion, or (5) membership in a particular social group.\textsuperscript{22}

1. Definition of a Refugee

The acts adopt the international definition of a refugee as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution" on account of the one of the five enumerated categories of a refugee.\textsuperscript{23}

a. Persecution

An asylum officer must first assess whether the fear an applicant faces amounts to persecution.\textsuperscript{24} In order to constitute persecution, an alien must have faced persecution or have a fear of being persecuted by his or her national government or an agent of that national government.\textsuperscript{25} Persecution may also be inflicted by a group or an individual citizen in which the national government

\textsuperscript{20} \textit{Immigration and Nationality Act of 1952}, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) The Immigration and Nationality Act of 1952 was the first successful attempt to coordinate all of the existing immigration laws into one single statute.


\textsuperscript{22} Convention Relating to the Status of Refugees, supra note 18.


\textsuperscript{24} See id. at § 1225 (b)(1)(B). The applicant must understand that there is a "significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."

\textsuperscript{25} Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971).
refuses or is unwilling to control.\textsuperscript{26} Persecution "encompasses more than threats to life or freedom."\textsuperscript{27} Rather, the persecution must "rise above the level of mere harassment to constitute persecution."\textsuperscript{28}

Furthermore, asylum applicants must establish that they have endured past persecution.\textsuperscript{29} Additionally, asylum applicants may come forward with evidence that they will endure persecution if returned to their country of origin.\textsuperscript{30}

\textbf{b. Well Founded Fear}

The Supreme Court has defined "well-founded fear" as the existence of a well-founded fear of persecution with a "clear probability" that an asylum applicant may suffer from a likelihood of persecution in her homeland.\textsuperscript{31}

The definition of a "well founded fear of persecution" contains both a subjective and objective component.\textsuperscript{32} The fear must be both genuine [subjective] and have "some basis in the reality of the circumstances and is not mere irrational apprehension" [objective].\textsuperscript{33} To satisfy both the subjective and objective components, an asylum applicant must show that his or her fear is genuine and that a reasonable person in the same circumstances would fear persecution if returned to the applicant's native country.\textsuperscript{34} The asylum applicant bears the burden of proof for both components.\textsuperscript{35} The applicant must present detailed facts that would show good reason

\textsuperscript{26} McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981).
\textsuperscript{27} Tamas-Mercea v. Reno, 222 F.3d 417, 424 (7th Cir. 2000).
\textsuperscript{28} Sofinet v. INS, 196 F.3d 742, 746 (7th Cir. 1999).
\textsuperscript{29} Marquez v. INS, 105 F.3d 374, 379 (7th Cir. 1997).
\textsuperscript{30} \textit{Id.} at 379.
\textsuperscript{32} Safaie v. INS, 25 F.3d 636, 639 (8th Cir. 1994).
\textsuperscript{33} Guevara-Flores, 786 F.2d 1242, 1249 (1986).
\textsuperscript{35} Stroguiludis, \textit{supra} note 34, at 1012. Federal courts insist that the applicant present facts to establish that he or she has been a victim of persecution. Facts supporting either a past persecution or a risk of future persecution would satisfy the requirements.
of a "well founded fear of persecution," after which the Attorney General has the discretion to grant asylum.

C. The Five Enumerated Categories of Asylum

1. Race

There is no universally accepted definition of the term "race," but for the purposes of a refugee, race has been defined to include all kinds of ethnic groups that are otherwise referred to as "races." Additionally, the implication of race, for the purposes of defining a refugee, will often be identified with a membership of a particular social group of common descent that forms a minority within the larger population.

2. Religion

Similarly, religion lacks a clear definition in international law. However, most organizations interpret "religion" to have a broad meaning and to include theistic, non-theistic and atheistic beliefs.

Both the UDHR and the Human Rights Convention claim a right to freedom of thought, conscience and religion. It is well known that persons may face harm for their particular religious beliefs or practices. Such harms or persecutions include a person's refusal to hold particular religious beliefs or a refusal to practice a

36. Carvajal-Munoz, 743 F.2d at 567-68. See also 8 C.F.R. § 208.5; Sivaainkaran v. INS, 972 F.2d 161, 163 (7th Cir. 1992).
37. 8 U.S.C. § 1158(a).
41. See supra note 13, at art. 4.
42. 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, at ¶ 25, HCR/GIP/02/01 (May 7, 2002).
prescribed religion. Persecution on religious grounds may also occur where a person does not wish to profess any religion or does not wish to comply with all or part of the rites and customs relating to a particular religion.

3. Nationality

The Universal Declaration of Human Rights declares that, “no one shall be arbitrarily deprived of his nationality.” Nationality has both an important bearing upon a person’s legal status and his ability to exercise the freedom of fundamental human and political rights. The right to a nationality must be considered an inherent human right.

In relation to the refugee problem, nationality is of great consequence in situations where there is an arbitrary loss of nationality. Like most international jurisprudence, there is no clear rule under what conditions expatriation, or loss of nationality, is considered arbitrary. However, it is recognized that discriminatory individual expatriation constitutes a violation of public international law.

Overall, nationality should be understood in its broadest sense to include membership of an ethnic or linguistic group. The term “nationality” should not be confined exclusively to the idea of citizenship. Rather, it should include membership of a group determined by its cultural or linguistic identity, traditions or customs, common roots or its relationship with the population of another state. Stateless persons within a state may also be considered a

43. See supra note 13.
45. See supra note 13, at art. 15 (2).
46. Dr. Kay Hailbronner, Nationality, Conference on International Legal Norms and Migration (2002).
47. CHEN, supra note 10.
48. Id.
49. HAILBRONNER, supra note 46.
50. Id.
52. See supra note 38, at ¶ 74.
53. Id.
minority group. Additionally, the refugee status based upon nationality may overlap with the other enumerated categories, such as "race," "religion" and "political opinion."

4. Political Opinion

Persecution based on political opinion has been described as a government's infliction of harm or suffering to trump a citizen's political opinion. To gain asylum based on one's political opinion, applicants must be able to show a connection between the persecution they suffer and their political opinion. Political opinion should be interpreted in the broadest sense and is generally thought of as persecution of persons on the ground that they hold contrary opinions to that of their government or ruling party.

5. Membership in a Particular Social Group

To qualify for asylum based on a particular social group, an alien must identify with the particular social group, establish that she is a member of that group, and establish that her well-founded fear of persecution is based on her membership in that group. "Membership in a particular social group" is to be interpreted broadly. There is no requirement that all members of a group know each other or associate with one another. Additionally,
there is no requirement that the particular group be cohesive.\textsuperscript{62} However, a particular social group will share at least one common characteristic that is innate and unchangeable\textsuperscript{63} because it is fundamental to their individual identities or consciences.\textsuperscript{64} A person applying for asylum on the basis of membership in a particular social group need not establish that every member within that group suffers from a well-founded fear of persecution.\textsuperscript{65}

III. BACKGROUND OF YADEGAR-SARGIS

A. Factual Background

Nazani Yadegar-Sargis, a seventy-one year old citizen of Iran, sought asylum in the United States.\textsuperscript{66} As a woman and an Armenian Christian, she began to experience difficulties in Iran when the Ayatollah Khomeini\textsuperscript{67} came to power in 1979.\textsuperscript{68} With the establishment of the Khomeini regime came a government-sanctioned hierarchy of punishment for failing to adhere to the Islamic dress code.\textsuperscript{69}

Ms. Sargis was forced to wear the Islamic dress, the hijab (head veil).\textsuperscript{70} After police approached her twice for not following the Islamic dress code, Ms. Sargis complied out of fear for her safety.\textsuperscript{71}

\begin{itemize}
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} 8 U.S.C. § 1101(a)(42)(A) (1988).
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} Yadegar-Sargis v. INS, 297 F.3d 596, 599 (7th Cir. 2002).
  \item \textsuperscript{67} Ali Banuazizi, Islamic State and Civil Society in Iran, 17th Annual Joseph (Buddy) Strelitz Lecture (April 18, 1999). In 1979 in Iran the Ayatollah Khomeini established a theocratic republic with fundamentalist Islamic law and broad supervisory powers.
  \item \textsuperscript{68} Yadegar-Sargis, 297 F.3d at 599.
  \item \textsuperscript{69} Id.; see also Keith Hodkinson, Muslim Family Law: A Sourcebook (London, Canberra: Croom Helm 1984). The Shar'ia, a religious code of conduct, governs all aspects of a Muslim's life. The Shar'ia is based primarily upon the Qur'an as well as traditions of the prophet. To some extent, the resurgence of radical Islamic fundamentalism in many countries during recent decades has been driven by an insistence upon the adoption of the Shar'ia as the governing law of the land. The new law under the Ayatollah Khomeini repealed most laws that had aided in the advancement of women in the former regime. Due to the vagueness of both the Qur'an and the Iranian Constitution there are many misinterpretations and misunderstandings of the law. Because of such misinterpretations, the rights of all people, especially that of women, have been infringed upon.
  \item \textsuperscript{70} Yadegar-Sargis, 297 F.3d at 599.
  \item \textsuperscript{71} Id. at 600.
\end{itemize}
She was aware of the fact that severe punishment ensued for offenders of the law, such as being spray painted or sprayed with acid. Additionally, women who went out without covering their faces and who wore lipstick would have their lips rubbed with pieces of glass. Furthermore, government agents, who would be stationed outside the churches, hassled young girls and women as they entered.

After overstaying her visitor's visa to the United States, the INS instituted deportation proceedings against Ms. Sargis. Ms. Sargis claimed asylum on the basis of having a well-founded fear of persecution based on her membership in the group of Christian women who oppose wearing the Islamic garb. She asserted that if she were to return to Iran she would suffer persecution on the basis of that membership.

B. Procedural Background

Ms. Sargis faced deportation proceedings before an Immigration Judge (IJ) on July 2, 1993. She asserted that if she returned to Iran, she would suffer persecution on the basis of her membership in a particular social group, that being Christian women who oppose wearing the Islamic garb. The IJ denied asylum under the Immigration and Nationality Act and refused to withhold deportation.

The IJ characterized Ms. Sargis' claims as based on her religion and gender. The IJ understood her contention to be a gender-based claim, namely that she felt compelled to wear an Islamic dress, the hijab. Ms. Sargis claimed that she feared that if she did not wear the hijab she would suffer the consequences.
The IJ concluded that because Ms. Sargis did in fact wear the dress and was never harmed, arrested or imprisoned, her experiences did not rise to the level of persecution.\textsuperscript{84} Thus the IJ concluded that Ms. Sargis should not be granted asylum status.\textsuperscript{85}

The Board of Immigration Appeals (BIA) affirmed the Immigration Judge’s decision in its entirety.\textsuperscript{86} The BIA first assessed Ms. Sargis’ claims of past persecution.\textsuperscript{87} The BIA characterized persecution as an “extreme concept” and stated that Ms. Sargis’ experiences did not rise to this level.\textsuperscript{88} The BIA held that although Ms. Sargis was forced to wear the Muslim garb for fear of being attacked and was “deplorable,” the act only constituted harassment, and not persecution.\textsuperscript{89}

Additionally, the BIA found that Ms. Sargis’ claim did not amount to a well-founded fear of persecution.\textsuperscript{90} The BIA recognized that women, who share in the plight of fearing the threat of persecution for failing to conform to the dress code imposed by Iranian Islamic law, may qualify as a particular social group for the purposes of asylum law.\textsuperscript{91} The BIA stated that it “would find the members of the group [those who oppose wearing the Islamic dress] should not be required to change their opposition because it is fundamental to their individual identities or consciences.”\textsuperscript{92} The BIA recognized that Ms. Sargis’ opposition to Iranian Islamic law is fundamental to her individual identity or conscience.\textsuperscript{93}

Nevertheless, the BIA rejected Ms. Sargis’ argument that she would suffer persecution because of her membership in this group.\textsuperscript{94} The Court noted that, if returned to Iran, Ms. Sargis would continue to conform to the dress code and practice her Christian religion.\textsuperscript{95}

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 600.
\textsuperscript{91} Id. at 601.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 601.
After being denied asylum status by the BIA, Ms. Sargis sought further review in the United States Courts of Appeals for the Seventh Circuit. The Court of Appeals affirmed the decisions of the IJ and BIA. The Court denied Ms. Sargis asylum on the basis that she had failed to establish that she had suffered past persecution, as required to establish fear of future persecution. Additionally, the Court held that Ms. Sargis did not have a well-founded fear of persecution based on her membership in a particular social group, i.e. Christian women of Iran opposed to wearing the Islamic garb.

The Court of Appeals held that Ms. Sargis would not fall within the narrower category of women who refuse to wear the Islamic garb because she has complied with the requirements of Iranian Islamic law and has indicated that she will continue to comply if returned to Iran.

The Court did not find that complying with the Islamic dress requirements would constitute persecution. The Court held that the dress requirements are not "abhorrent to [Ms. Sargis'] deepest beliefs." The Court determined that because Ms. Sargis' compliance with the dress code did not implicate a fundamental belief and because she had complied with the dress code in the past, compliance did not rise to the level of a well-founded fear of persecution.

IV. THE PROBLEMS WITH YADEGAR-SARGIS AND CURRENT ASYLUM LAW

A. Current Standards in the Law and its Problems

The holding in Yadegar-Sargis best exemplifies the U.S. Courts' inability to provide adequate protection for women who face perse-
The Court held that Ms. Sargis did not suffer from a well-founded fear of persecution based upon any one of the five enumerated conditions that constitute asylum in the United States. In effect, because the Court used current standards in asylum law, it was not able to grant the proper asylum status which Ms. Sargis was entitled to receive.

Because current asylum law lacks a clear definition of well-founded fear of persecution, women who seek refugee status on the basis of gender-related persecutions receive inadequate protection. Additionally, because asylum may only be sought under the five enumerated categories of a refugee, a woman seeking refuge on the basis of gender-specific crimes has no proper outlet to seek such sanctity. There are several reasons why women continue to receive inadequate protection.

First, women seeking asylum in the United States based upon gender-related persecutions are forced to argue persecution based on their membership in a particular social group or political opinion, for lack of a gender option. In the absence of a separate and distinct gender category, the courts are encouraged to accommo-
date women’s claims of persecution with the theoretically and empirically vexing category of membership in a particular social group.\textsuperscript{110} This raises difficulties for women claiming refugee status since their grouping is defined by their experience of persecution.\textsuperscript{111} The shared experience of women who have suffered violence is not enough to make them a “social group,” unless the fact of their violation will, in the future, make them a target of persecution.\textsuperscript{112}

This strategy has created an often mechanistic and reductive classification problem by creating artificial sub-categories that are arbitrarily either denied or granted asylum.\textsuperscript{113} For example, American courts 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”\textsuperscript{114} as a relevant social group in a successful asylum claim. Yet, “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,”\textsuperscript{115} were classified as a relevant social group in a claim that was denied.

Second, courts have been hesitant to accept female asylum applicants as a member of one of the five enumerated classes.\textsuperscript{116} For example, the Second Circuit upheld the Board of Immigration Appeals denial of political asylum for an El Salvadoran woman who sought refuge as a member of a particular social group.\textsuperscript{117} The woman sought asylum as a member of a particular group of women whom El Salvadoran guerilla forces had previously battered and raped.\textsuperscript{118} The Court denied the applicant political asylum finding

\begin{itemize}
  \item[\textsuperscript{111}] \textit{Id.}
  \item[\textsuperscript{112}] \textit{Id.}
  \item[\textsuperscript{113}] \textit{Id.}
  \item[\textsuperscript{115}] \textit{In re R-A-}, 2001 BIA LEXIS 1.
  \item[\textsuperscript{116}] Nancy Ann Root and Sharyn A. Tejani, \textit{Undocumented: The Roles of Women in Immigration Law}, 83 Geo. L. J. 605, 616-617 (1994). Asylum claims of women often involve rape and domestic violence, however judges tend to view such matters as personal disputes and are hesitant to view women as a social group for fear of encouraging a new waive of immigrants to the United States.
  \item[\textsuperscript{117}] Gomez v. I.N.S., 947 F.2d 660 (2d Cir. 1991).
  \item[\textsuperscript{118}] \textit{Id} at 663.
\end{itemize}
that the harm she experienced was not the result of her membership in a particular social group or any other basis in the refugee definition.\textsuperscript{119} In denying her asylum, the court noted that she failed to produce evidence that women who have previously been abused by the guerrillas possess common characteristics, other than gender, such that would-be prosecutors could identify them as members of the purported group.\textsuperscript{120} By stating so, the court overtly omitted that the members of a "purported group" may be of a specific gender. However, because gender is not yet a category in U.S. asylum law, this woman was denied refugee status. Had gender been a legitimate category of persecution, there is no doubt she would have been granted asylum.\textsuperscript{121}

Third, the claims of women asylum seekers often differ from those of men seeking asylum.\textsuperscript{122} The INS Gender Guidelines recognize that women often experience types of persecution different from those faced by men, persecution that is "particular to their gender."\textsuperscript{123}

The claims of women are different from those of men for several reasons. First, women suffer harms which are either unique to their gender, or are more commonly inflicted upon women than men.\textsuperscript{124} These are harms that, for biological reasons, can only be inflicted on women.\textsuperscript{125} Second, women suffer social harms exclu-

\begin{itemize}
\item \textsuperscript{119} Id. at 664.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Kristin E. Kandt, \textit{United States Asylum Law; Recognizing Persecution Based on Gender Using Canada as a Comparison}, 9 GEO. IMMIGR. L.J. 137, 147 (1995).
\item \textsuperscript{122} European Council on Refugees and Exiles, \textit{Position on Asylum Seeking and Refugee Women} (Dec. 1997). Women are frequently persecuted for reasons similar to their male counterpart, however the persecution women face differs in terms of form and motivation. Women are targeted for various reasons. Some women suffer persecution because they are leaders within their community who persist in demanding that their rights be respected. Others suffer because they are vulnerable young women who can easily be abused. See also, Ganderton, \textit{supra} note 109.
\item \textsuperscript{123} Anker et al., \textit{supra} note 12, at 713. The INS Guidelines cite domestic violence as one type of abuse that is gender-specific. \textit{Id.} at 713.
\item \textsuperscript{125} Kelson, at 184, 189. Female genital mutilation and forcible abortion are forms of persecution, which are exclusive to women. Rape and domestic violence are harms, which are more commonly inflicted on women. Until 1980, a husband was able to kill
sively because they are women. The policies of the former Taliban regime in Afghanistan, and moral codes in Iran are examples of policies that are directed exclusively towards women. Under the Taliban, Afghan women and girls were subjected to rape, forced marriage and forced prostitution and were punished by stoning, hanging, floggings and amputation of limbs. Additionally, the Taliban edicts enforced strict dress codes, prohibited women from working outside the home or attending school, all to ensure complete dependence of women. In one circumstance, a woman was beaten with a car antenna because her face covering slipped while struggling to carry her two small children and groceries.

Third, once these women who face gender-related persecution reach the courts, they face further impediments. First, the substantive law applied in evaluating whether an individual is eligible for refugee status is generally narrowly construed.

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127. Human Rights Watch, *Human Rights Watch Briefing Paper, Taking Cover: Women in Post-Taliban Afghanistan*, at http://www.hrw.org/backgrounder/wrd/afghan-women-2k2.htm (last visited Sept. 7, 2003). Even after the toppling of the Taliban in November 2001, Afghan women continue to face serious threats to their physical safety, which denies them the opportunity to exercise their basic human rights. The lack of security in Afghanistan has affected women in gender-specific ways, making them especially vulnerable to rape and other sexual abuse. The danger of physical assault is evident. Young females live under constant fear of physical assault and are compelled to limit their movement, expression and dress to avoid becoming targets of such violence.


130. *Id.* at 559.


tive problems facing women seeking asylum arise from the failure of decision makers to incorporate the gender-related claims into their interpretation of the established five enumerated categories. Second, it is usually male adjudicators who evaluate asylum applicants and often dismiss gender-related persecution as private and personal. Failure to recognize a gender-related claim can be attributed to a society that privileges the male-dominated public sphere over the activities of a woman, which take place largely in the private sector. Because it is mostly male adjudicators who evaluate asylum claims, asylum law is centered on the male applicant, the male situation, and the male experience. Naturally, the result is one of a male-dominated evaluation that results in a denial of a claim that is dismissed as private, instead of being recognized as the socially significant phenomenon that it is.

Last, women should not be obligated to seek asylum under the same conditions as men because, generally, courts use different standards for female and male applicants. In Klawitter v. INS, the Sixth Circuit denied political asylum to a Polish woman who had been blacklisted for her refusal to join the Communist Party, and in turn was sexually assaulted by the Chief of Security in the Polish government. The court found that the officer’s actions were committed because the official had a “personal” interest in the claimant, rather than “any interest on his part to ‘persecute’ her.” The threats against her were not found to constitute persecution.

Nevertheless, men who have differing political opinions from the establishment in their country of origin are often granted asylum. The Ninth Circuit granted asylum to a male refugee from Haiti because he feared persecution based on his failure to pay

134. See supra note 38.
135. Id. Decision makers in both U.S. Courts and International Courts have failed to recognize the political nature of seemingly “private” acts of harm to women.
138. See supra note 38.
139. Kandt, supra note 121, at 149.
140. Klawitter v. INS, 970 F.2d 149 (6th Cir. 1992).
141. Id. at 152.
142. Kandt, supra 121, at 150.
bribes to the Haitian government. The Ninth Circuit remanded the case with instructions that resistance to official government extortion may constitute expression of political opinion. While this resistance to extortion would appear to be a reasonable classification of persecution, the courts held that sexual abuse did not. "It is ironic that American courts recognize asylum for men who belong to underground groups, yet fail to do the same for a woman who was openly blacklisted and sexually assaulted." This dichotomy represents the schism in the private / public sphere where sexual offenses are not seen as persecution, but where male activists that cause punishment are seen as such. Thus, given the different standards of persecution applied to refugee claims depending on the gender of the applicant, the United States needs to alleviate the inherent sexism presently embedded in the law.

Despite the apparent need to transform current asylum law, the claims of women asylum seekers continue to meet denials due to erroneous interpretations of the standards applicable to refugees. There is also a significant lack of understanding of the applicable human rights norms and the relevant country conditions.

In Gomez v. INS, the Court of Appeals for the Second Circuit held that persecution based on gender alone does not constitute persecution on account of a particular social group. In Matter of

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143. Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988).
144. Id. at 724.
145. Id. at 730.
146. Kandt, supra note 121, at 150. The applicant's case in Desir was remanded, while the applicant's case in Klawitter was denied outright.
147. Id. at 151.
148. Id. at 151 (citing Hilary Charlesworth & Christine Chinkin, The Gender of Jus Cogens, 15 Hum. Rts. Q. 69 (1993)).
150. Long, supra note 1, at 202. The absence of any structure with which to evaluate gender-related claims has crippled decision making in some cases, resulting either in distortion of the established categories or denial of claims due to misapplication of the element of gender.
151. See supra note 106. In Fisher v. INS the court refused to consider US Department of State Country Reports on the conditions of gender abuse.
152. Gomez, 947 F.2d 660.
153. Id. at 660.
The court decided that the practice of female genital mutilation (FGM) could justify a grant of asylum.\textsuperscript{155} The court's decision seemed to open up the way for an asylum category based on gender.\textsuperscript{156} However, any expansion was terminated when the appellate court overruled the immigration judge's decision.\textsuperscript{157} Since the Kasinga\textsuperscript{158} decision, the BIA has granted asylum to only one woman based on the fear of FGM in the case of Abankwah v. INS, decided in July 1999.\textsuperscript{159} Despite the fact that the BIA ruled that gender is included in the meaning of social group, inconsistent immigration court rulings in recent cases of sex and gender-related persecution demonstrate that women seeking asylum based on these grounds fight a new battle with each case.\textsuperscript{160}

In 1999, the BIA published the decision of Matter of S-A.\textsuperscript{161} In that case, the court granted asylum to a Moroccan woman who suffered physical and emotional abuse by her father who beat her because she did not conform to his idea of a Muslim woman.\textsuperscript{162} The court stated that although S-A did not seek police protection, the evidence convinced the court that even if S-A had turned to the government for help, Moroccan authorities would have been unable or unwilling to control her father's conduct.\textsuperscript{163} The court concluded that the woman was eligible for asylum.\textsuperscript{164} This decision

\textsuperscript{155} Id. at 357.
\textsuperscript{156} Kathy M. Salamat, In Re Fauziya Kasinga: Expanding the Judicial Interpretation of “Persecution,” “Well-Founded Fear,” and “Social Group” to Include Anyone Feeling “General Civil Violence?” 40 How. L. J. 255, 256-57 (1996). Although the Fauziya Kasinga opinion does not overtly advocate either of these alternatives, it formulates a workable precedent for dealing with gender-based claims. The Fauziya Kasinga decision sheds light on a gender category in asylum law.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999).
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
took place shortly after the denial of asylum to a woman in Matter of R-A.\textsuperscript{165}

In that case, the BIA reversed an immigration judge's grant of asylum because the petitioner had failed to show that she was persecuted on account of her membership in a particular social group or for her political opinion.\textsuperscript{166} Although the BIA was convinced that her husband abused her and would abuse her again and that she was unable to gain protection from Guatemalan authorities, the court denied her asylum status.\textsuperscript{167} The court stated that the severe injuries sustained rise to the level of harm sufficient enough to constitute persecution.\textsuperscript{168} However the court concluded that she was not eligible for protection under asylum laws, as she failed to fall under the definition of one of the five enumerated classes.\textsuperscript{169}

The previous examples illustrate the problems women face when trying to seek asylum based on gender-specific abuse. As apparent as some of the persecutions may seem in any given application, without a clear definition to guide administrative agencies and the judiciary, personal prejudices and cultural ethnocentricities will continue to be the basis for asylum opinions. Reform in asylum law is needed to ameliorate this pervasive discrepancy and discrimination.\textsuperscript{170} Gender persecution should not veil itself behind the classification of a "social group."\textsuperscript{171} Rather gender should and can be a category in its own right.\textsuperscript{172}

As exemplified above, certain courts have begun to recognize the need for changes to the current standards in the law. There have been suggestions, perhaps nominal in substance, but yet significant in nature, that may enable the proposal for a gender-specific category in asylum law to become an actuality.\textsuperscript{173}

\textsuperscript{165} In re R-A, 2001 BIA LEXIS 1.
\textsuperscript{166} Id.
\textsuperscript{168} Id. at 1181.
\textsuperscript{169} Id. at 1177.
\textsuperscript{170} Kandt, supra note 121, at 151.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Mattie L. Stevens, Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category, 3 CORNELL J.L. & PUB. POL'Y 179 (1993) (proposing that the U.S. include gender as a refugee category, encompassing female genital mutilation). See
B. Trends in the Making: Modernizing Asylum Law

Reform efforts in international and national asylum laws recognize a greater need for a clear definition of persecution and an exclusive category for those who face gender-related crimes.\footnote{Marquez v. I.N.S., 105 F.3d 374, 381 (7th Cir. 1997). The Supreme Court attempted to clarify the requirements for asylum and deportation withholding. The court held that there must exist a “clear probability” of fear, making the standard stricter than the established “well-founded fear” required for asylum.} Scholars in the United States and abroad have been calling for the addition of gender as one of the criteria under which an asylum seeker may claim persecution.\footnote{Schenk, supra note 2, at 338-341; Bret Thiele, Persecution on Account of Gender: A Need for Refugee Law Reform, 11 Hastings Women’s L.J. 221, 221 (2000); Shannon Nichols, American Mutilation: The Effects of Gender-Biased Asylum Laws on the World’s Women, 6 Fall Kan. J.L. & Pub. Pol’y 42, 45 (1997).}

1. Trends in U.S. Asylum Law

In 1993 the Third Circuit expanded the type of conduct that constitutes “persecution.”\footnote{Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. 1993).} The court determined that the concept of persecution may be interpreted broadly to include governmental measures that compel an individual to participate in conduct that is not physically painful or harmful but is contrary to that person’s deepest beliefs.\footnote{Id. at 1242.}

The court held that Iranian women might constitute a particular class when they find their country’s gender specific laws offensive and do not wish to comply.\footnote{Id. at 1239.} The court found that the definition of a particular social group was open-ended because there was no specific definition within the legislative history.\footnote{Id.} The court applied the test from Matter of Acosta to define a social group as one with a common characteristic that “members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”\footnote{Matter of Acosta, 1985 B.I.A. Lexis 2, 55 (1985).}

Despite the court’s liberal approach to asylum law, the applicant was denied asylum because the court did not believe that a
woman, who was prevented from living in accordance with her ideologies, and forced (by fear of physical punishment) to conform to the social norm, constitutes persecution.\textsuperscript{181}

Although the court found that the applicant did not risk "persecution" because she had not shown that she would disobey the rules or that to disobey the rules would be so "profoundly abhorrent" as to amount to persecution, the court found that the punishments, if implemented, would rise to the level of persecution.\textsuperscript{182}

2. Trends in International Asylum Law

Other nations have participated in the growing concern for providing adequate protection for women who suffer persecution based on their gender.\textsuperscript{183} International law has supported the special treatment of women facing gender-related persecution and gender-based discrimination.\textsuperscript{184} U.S. asylum law can now be measured against international standards.

The United Nations has passed several binding and non-binding resolutions concerning women and refugees, such as the United Nations Declaration for Elimination of Violence Against Women in December 1993.\textsuperscript{185} Article 1 of the Declaration defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering of women. . . whether occurring in public or private life."\textsuperscript{186} Article 2 gives examples of violence against women as physical, sexual and psychological violence and abuse occurring in the family, in the general community, or perpetrated and con-

\textsuperscript{181} Fatin, 12 F.3d 1233 at 1241. The applicant feared being jailed, punished in public, whipped, or stoned if she refused to comply with the strict Iranian rules. The applicant asserted that the routine penalty for women who break the moral code in Iran is "74 lashes, a year's imprisonment, and in many cases brutal rapes and deaths."

\textsuperscript{182} Id. at 1241.

\textsuperscript{183} Amnesty International, United States Senate Foreign Relations Committee, \textit{Convention on the Elimination of All Forms of Discrimination Against Women} (June 13, 2002).

\textsuperscript{184} Goldberg, \textit{supra} note 133.


\textsuperscript{186} Id. at art. 1.
ducted by the State.\textsuperscript{187} Although not binding, the Declaration may serve as an important guideline to U.S. immigration law.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is binding and declares that all signatories to the Convention shall "modify the social and cultural patterns of conduct... which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotype roles for men and women."\textsuperscript{188}

Dealing specifically with refugees, the United Nations High Commissioner for Refugees issued Guidelines for the Protection of Refugee Women.\textsuperscript{189} The Guidelines recognize the special need for protection of women to adequate social and economic rights, access to basic items such as "food, shelter, clothing and medical care, [and] security against armed attacks and other forms of violence."\textsuperscript{190}

In December of 1984, the United Nations General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) requiring that no state shall "expel, return or extradite [any] person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."\textsuperscript{191} CAT extends

\begin{thebibliography}{99}
\bibitem{187} Id. at art. 2.
\bibitem{188} United Nations Convention on the Elimination of all Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., 107th plen. mtg., Annex, pt. 1, art.5, at 193, U.N. Doc. A/34/46 (1981). The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) is the only comprehensive international treaty guaranteeing women’s human rights. CEDAW provides a universal international standard for women’s human rights and a framework for governmental policy to combat gender inequality. Although the U.S. signed the treaty in 1980, the U.S. Senate never ratified it. On July 30, 2002 in a 12-7 vote, the Senate committee sent CEDAW to the full Senate. Senate approval requires a two-thirds vote, or 67 senators. All 10 of the committee’s Democrats voted to approve the treaty, as did two republicans. In the meantime, 170 other countries have ratified CEDAW.
\bibitem{190} Id.
\end{thebibliography}
yet another avenue of relief for those applicants who do not meet the criteria of state asylum.\textsuperscript{192}

At the Standing Committee’s 16th meeting, the United Nations High Commissioner for Refugees (UNHCR) discussed the plight of refugee women and encouraged countries to “recognize gender-based persecution as a ground for claiming asylum, and to ensure that asylum procedures are sufficiently gender sensitive.”\textsuperscript{193}

In 1999 the UNHCR offered a legal opinion before the United Kingdom’s House of Lords stating that women who believe in or are perceived to believe in “standards at odds with the social mores of the society in which they live constitute a particular social group.”\textsuperscript{194}

The UNHCR has since passed several resolutions dealing with gender-related persecution. At the UN World Women’s Conference in Beijing in 1995 it was urged that states recognize women as refugees when they have been exposed to gender-related persecution. With the adoption of CEDAW there has been discussion regarding the idea of membership in a particular social group and political opinion as possible bases for refugee recognition for women who defy gender-based social norms.\textsuperscript{195}

The Convention seeks to eliminate gender discrimination by having signatory states assure that women have status equal to men in political representation, education, health care, and family life.\textsuperscript{196} A systematic denial of equal protection affecting women’s standing in courts of law serves as important evidence that the harm or suffering the claimant faces arises not out of a personal dispute, but out of an implicit policy of discrimination in which the “agent” of persecution is seeking to en-


\textsuperscript{193} Executive Committee of the High Commissioner’s Programme, Standing Comm. 16th Meeting EC/49/SC/CRP.22 (1999).

\textsuperscript{194} \textit{Id.}

\textsuperscript{195} \textit{Id.}

\textsuperscript{196} Nora O’Connell & Ritu Sharma, \textit{Treaty for the Rights of Women Deserves Full U.S. Support}, \textit{Foreign Policy in Focus}, August 29, 2002. Nations such as Turkey, Tanzania, and Columbia have used CEDAW to improve the quality of women’s lives such as providing legal recourse to female victims of domestic violence.
force gender-based norms toward women as a group. Therefore the political opinion category could move away from its usual use to accommodate "elements of the claimant's persona that cause her to clash with powerful social and cultural elements."\textsuperscript{197}

Furthermore, the European Parliament has called on its states to grant refugee status "to women who suffer cruel and inhuman treatment because they have violated the moral or ethical rules of their society."\textsuperscript{198}

Additionally, the Special Rapporteur on violence against women of the United Nations Commission on Human Rights, Ms. Radhika Coomaraswamy, was mandated to study violence against women.\textsuperscript{199} Ms. Coomaraswamy has suggested that governments should broaden the definition of a refugee to recognize gender-based claims of persecution, and that these governments should develop guidelines for gender-specific claims.\textsuperscript{200} The suggestion goes even further by recognizing that those persecutions suffered by men and women may differ,\textsuperscript{201} thus warranting an even greater need for a gender-specific category.

V. Developing a Gender Category in U.S. Asylum Law

The United States Court of Appeals for the Seventh Circuit decision in \textit{Yadegar-Sargis} should be overruled. The United States must begin to take responsibility for those women who have a well-founded fear of persecution and cannot be properly categorized within one of the five enumerated classes of a refugee.\textsuperscript{202} These enumerated categories provide inadequate protection because the abuses that these women encounter are not on account of their race, nationality, religion, membership in a social group, or polit-
Rather, these women suffer abuses solely on the basis of their gender. The United States should amend the current standards of asylum law to afford these women broader protection.

The United States should amend its current asylum laws in order to formally recognize a category for gender specific crimes. The only way to remedy the oppressive conditions caused by current asylum laws is either to add a sixth “gender” category for gender-specific crimes or to transform the law altogether to better address crimes against women. In addition to existing definitions and standards, an amended version of current refugee law should add gender as a new category.

A refugee applying for asylum on the basis of gender would have to fulfill all requirements of the asylum laws. An applicant would have to prove that the harm she faces rises to the level of persecution “encompass[ing] more than threats to life or freedom.” Additionally, an applicant would have to prove that the persecution she faces is one that is well-founded, by fulfilling both the subjective and objective components.

When amending U.S. asylum law, the United States should go further than simply amending established definitions of a refugee. To ensure the protection of women who face gender specific abuses the U.S. should implement new methods of interpretation and analysis in determining the asylum status of women, such as using gender sensitive techniques to analyze an applicant’s claim. Because the abuses these women face are unique and specific to their

203. Gray, supra note 104, at 573, see also Nichols, supra note 173. Without a clear “gender” category or a complete transformation of the law, women fleeing their countries due to gender-specific crimes have no protection.

204. Id. at 574.
205. Schenk, supra note 2, at 337.
207. Nichols, supra note 173.
208. This amendment simply adds the gender category to the already existing definition of a refugee.

210. Guevara-Flores, 786 F.2d 1242.
211. Gray, supra note 104, at 572. American, Australian and Canadian directives address state responsibility for persecutory acts committed by non-state actors. All proceed from the basic premise that the state owes a duty to protect citizens’ basic rights, not only from abrogation by the state itself but from private actors as well.
gender, their application process for asylum status should also be unique and specific.

A. Gender Sensitive Techniques

In addition to amending the definition of a refugee, the United States should enhance the availability of a gender category by providing female interpreters and interviewers to those women who face persecution based on their gender.\textsuperscript{212} Many of the current interpreters and reviewers of asylum claims are men who do not comprehend the grave consequences women suffer from gender specific crimes.\textsuperscript{213} Reluctance on the part of women to discuss their experiences is often due to the presence of a male official or interpreter.\textsuperscript{214} For example, when the applicant is a woman from a society where "the preservation of one's virginity or marital dignity is the cultural norm," this norm may cause her to be reluctant to discuss her experiences of sexual violence.\textsuperscript{215} She may believe to do so would be to openly admit her "shame" and to dishonor her family.\textsuperscript{216}

By providing a number of gender-sensitive techniques to interview asylum applicants, women will begin to describe their fears and past experiences of persecution. At certain points, it may be necessary to provide these women with counselors or cultural experts in order to fully comprehend their grounds for asylum and the seriousness of their claims.\textsuperscript{217}

The interview process should instill confidence within the applicant so that all information gathered is truthful and depicted to the fullest potential. The interviewer and interpreter should be well

\begin{itemize}
  \item \textsuperscript{212} See supra note 122.
  \item \textsuperscript{213} Diana Saso, \textit{The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines}, 8 \textit{Hastings Women's L.J.} 263, 276-277 (1997). Poor interview techniques, cross-cultural skills and an ignorance of issues specifically related to gender-based asylum claims, may produce faulty negative credibility findings which can ultimately result in sending women straight back to the hands of their prosecutors.
  \item \textsuperscript{214} Nahla Valji & Lee Anne De La Hunt, \textit{Gender Guidelines for Asylum Determination}, \textsc{Nat'l Consortium on Refugee Affairs} (1999). In many cultures, rape and sexual assault are still perceived as failure by a woman to protect her body and sexual integrity. Women face shame and anxiety about the loss of virginity, even in cases of rape and may cause a woman's unwillingness to discuss the matter.
  \item \textsuperscript{215} Pell, \textit{supra} note 5 at 669.
  \item \textsuperscript{216} \textit{Id}.
  \item \textsuperscript{217} Valji & De La Hunt, \textit{supra} note 214, at 10.
\end{itemize}
trained in the area of gender-sensitivity and should also have a good understanding of the fear of these women. All officials should be made aware of cultural and gender differences that exist between male and female applicants within both, the application and communication processes.\textsuperscript{218}

\section*{B. International Solutions: Canadian Guidelines}

In 1993, the Canadian Immigration and Refugee Board issued Guidelines ("Canadian Guidelines") on Women Refugee Claimants Fearing Gender-Related Persecutions.\textsuperscript{219} The Canadian Guidelines are perhaps one of the most remarkable achievements in Canadian legal history in this century.\textsuperscript{220} "By including gender-related persecution within the refugee definition, Canada has broken down [the] discriminatory hierarchies of persecution."\textsuperscript{221} The Canadian Guidelines can provide assistance to U.S. decision makers in interpreting the definition of a refugee and adjudicating asylum claims based on gender specific persecutions.\textsuperscript{222}

The Canadian Guidelines have recognized "gender-based violence as a legitimate form of persecution for the purpose of granting refugee status."\textsuperscript{223} The Canadian Guidelines have interpreted the 1951 Convention definition of a refugee to include gender-related issues and approach gender-related claims more sensitively.\textsuperscript{224}

The Canadian Guidelines recognize that, although gender is not specifically enumerated as one of the grounds established in the 1951 Convention, "the 1951 Convention can be interpreted to provide protection to women making gender-based claims on any one or a combination of the five enumerated grounds."\textsuperscript{225} When such a claim is presented, the central issue is to determine the

\begin{itemize}
\item \textsuperscript{218} \textit{See id.}, at 12.
\item \textsuperscript{219} \textit{Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act} (Immigration and Refugee Board, Ottawa, Canada), Nov. 13, 1996, [hereinafter Canadian Guidelines].
\item \textsuperscript{220} Sherene Razack, \textit{Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender}, 8 \textit{Can. J. Women \& L.} 45, 47 (1995).
\item \textsuperscript{221} Pell, \textit{supra} note 5, at 684.
\item \textsuperscript{222} Macklin, \textit{supra} note 202, at 26.
\item \textsuperscript{223} Pell, \textit{supra} note 5, at 658.
\item \textsuperscript{224} Nurjehan Mawani, \textit{Violations of the Rights of Women in the Refugee Context}, 5 \textit{N.J.C.L.} 61, 66 (1995).
\item \textsuperscript{225} Pell, \textit{supra} note 5, at 666.
\end{itemize}
"linkage between gender, the feared persecution, and one or more of the [five] definition grounds." 226

First, the decision maker must identify the nature of the persecution feared by the claimant. Recognizing that women can suffer different forms of persecution from men, the Canadian Guidelines identify four broad, nonexclusive categories of persecution that women encounter.

A woman can fear persecution under "the same 1951 Convention grounds, and in similar circumstances, as men." 227 Second, women can fear persecution because of kinship. 228 In addition, women can fear persecution resulting from "circumstances of severe discrimination on the grounds of gender," or resulting from violent acts by public authorities or private citizens against which the state is either unwilling or unable to offer protection. 229 Finally, women can fear persecution "as a consequence for failing to conform to, or for transgressing, religious or customary laws and practices in their country of origin." 230

"Once the nature of the persecution that a claimant faces has been identified, the decision maker will then determine if the basis of the persecution falls within one of the five enumerated 1951 Convention grounds." 231 First, the Canadian Guidelines reveal that women refugees may fear persecution both because of their race and gender. 232 The Canadian Guidelines use the example of an Asian woman living in Tanzania. 233 Two men who claimed that they worked for the Department of Home Affairs sexually and physically abused the applicant at her workplace. 234 When "the applicant reported the incident to her father, she was told to remain quiet because of [her] Muslim customs." 235 Despite the fact that the two men continued to harass her, she did not report the abuse because

226. CANADA GUIDELINES, supra note 219.
227. Id.
228. Id.
229. Id.
230. Id.
231. Pell, supra note 5, at 665.
232. CANADA GUIDELINES, supra note 219.
233. Pell, supra note 5 at 682 (citing CRDD T93 – 05072, Howson, Cheeseman, at 1, 4 (Oct. 18 1993)).
234. Id. (citing CRDD T93 – 05072, Howson, Cheeseman, at 2 (Oct. 18 1993)).
235. Id.
she was "convinced that the Tanzanian government turns a blind eye to the physical abuse of women." After continued abuse, the applicant fled to Canada claiming a "well-founded fear of persecution for three reasons: on the basis of her race, Asian; on the basis of her religion, Muslim; and on the basis of her gender, female." Although sympathizing with the applicant, the Immigration and Refuge Board (IRB) panel held that it was unlikely that the applicant would face persecution on account of her gender. The court held that "the applicant did not establish that her persecution was the result of either her racial background or her gender." This case clearly illustrates that a woman who suffers persecution does not automatically receive refugee status. Rather, "she must show that her claim is based upon a 1951 Convention ground, and [that her] country of origin is unwilling or unable to protect her." Similarly, the Canadian Guidelines recognize that a woman may experience gender-related persecution based on her choice not to hold a particular religious belief. According to the Canadian Guidelines, "the notion of religion may encompass [both] the freedom to hold a belief system of one’s choice or not to hold a particular belief system [as well as] the freedom to practice a religion of one’s [own] choice or not to practice a prescribed system." The Canadians Guidelines provide as an example, a woman living in an Islamic society who refuses to subscribe to the precepts of the established state religion. Because "her father decided that she was too 'westernized' he imposed a Muslim way of life upon her." The woman "was unable to leave the house alone, her phone calls were censored and her books were taken away from her." In ad-

236. Id. (citing CRDD T93 – 05072, Howson, Cheeseman, at 3 (Oct. 18 1993)).
237. Id. (citing CRDD T93 – 05072, Howson, Cheeseman, at 4 (Oct. 18 1993)).
238. Pell, supra note 5, at 682 (citing CRDD T93 – 05072, Howson, Cheeseman, at 6 (Oct. 18 1993)).
239. Id. (citing CRDD T93 – 05072, Howson, Cheeseman, at 7 (Oct. 18 1993)).
240. Id. (citing CRDD T93 – 05072, Howson, Cheeseman, at 10 (Oct. 18 1993)).
241. CANADA GUIDELINES, supra note 219.
242. Id.
243. Pell, supra note 5, at 679 (citing CRDD M92- 06719, de Liarnchin, Vo, at 1-2 (May 11, 1993)).
244. Id. (citing CRDD M92- 06719, de Liarnchin, Vo, at 2-3 (May 11, 1993)).
245. Id.
dition, she was forced to marry an older man, in which her presence at the marriage ceremony was not even required.\textsuperscript{246} She later left her native country of Algeria in fear that, if she returned, her father would kill her for not following the Islamic way of life.\textsuperscript{247} The woman testified that because she came from a prominent and well-known family in Algeria, "she could not have obtained police protection anywhere in the country."\textsuperscript{248} Thus, the IRB panel granted her asylum on the basis that her father's physical and emotional force was a violation of the applicant's security, which amounted to "cruel, inhuman and degrading treatment."\textsuperscript{249}

In addition, the Canadian Guidelines recognize that a woman may experience gender-related persecution based on her political opinion and membership in a particular social group. When returning from a meeting of a student political group, a Pakistani female student was attacked, beaten and raped by a member of a rival student political group.\textsuperscript{250} Because of strict social mores concerning rape law in Pakistan, the applicant did not report the rape.\textsuperscript{251} She feared that if her family knew about the rape, she would be killed in order to protect the family honor.\textsuperscript{252} As a result of the rape, the applicant became pregnant and could not receive an abortion.\textsuperscript{253} She explained that under Pakistan law and the law of the Koran, abortions are illegal, and persons who have relations outside of marriage could face a death sentence.\textsuperscript{254} When pleading for asylum, she claimed refugee status based on political opinion and her membership in a particular social group - a single, raped Pakistani female with a child born out of wedlock.\textsuperscript{255} The IRB panel granted her asylum because she was able to distinguish herself as a member of a particular social group. The IRB found that the Pakistani crimi-
nal justice system had created an extremely adverse and precarious situation for women, and in particular for women victims of rape.\textsuperscript{256} Citing the Canadian Guidelines, the IRB panel found that the applicant was a member of a particular social group on the basis of her gender.\textsuperscript{257}

Since the creation of the Canadian Guidelines, there has been no increase in either the number of women making asylum claims or the number of asylum claims granted to women.\textsuperscript{258} The Canadian Guidelines control any increase in the number of applicants through procedural and substantive requirements that would prevent judiciaries from granting asylum to vast populations of women suffering from similar abuses.\textsuperscript{259} By assessing the applicant’s credibility, determining the possibility of state protection and separating gender-related fears of persecution from mere dislike of a country’s law or policy, the Canadian Guidelines ensure that those asylum claims based on gender are appropriate and accurate.\textsuperscript{260}

Many women who have been denied asylum in the United States would most likely have been granted asylum in Canada under the new guidelines.\textsuperscript{261} By refusing to recognize gender as a category, the United States continues to deny refugee status to those females who truly deserve protection.\textsuperscript{262} The United States should use the Canadian Guidelines as a model for a first step in formulating its own domestic policy on asylum law.\textsuperscript{263} If these, or similar guidelines, are adopted by the United States, women like Ms. Sargis will finally gain equal access to eligibility for asylum in the United States.\textsuperscript{264}

\textbf{C. Dismissing the Arguments Against Adding a Gender Category}

The principal argument made against the addition of a gender category in asylum law is based on the fear that such inclusion

\textsuperscript{256} Id.
\textsuperscript{257} Id.
\textsuperscript{258} Pell, supra note 5, at 658.
\textsuperscript{259} Id. at 684.
\textsuperscript{260} Id. at 670.
\textsuperscript{261} Kandt, supra note 121, at 163.
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Pell, supra note 5, at 684.
would overwhelm nations with applicants claiming persecution based upon gender. However, it has been argued that this fear has no foundation. Governments are concerned that an addition of a gender category is too large and ambiguous. Nations fear that by adding a gender category millions of women will seek asylum on the basis of violence against them. The most important concern is that there will exist no apparent standard to determine whether the "fear" one claims constitutes a legitimate "well founded fear" of a gender specific persecution, thus opening the floodgates to asylum law.

Despite these concerns, it is well recognized that the floodgate argument is not a relevant one. Women seeking refugee status still must conquer numerous procedural and substantive requirements, and thus, nations may prevent holdings that would allow large populations of women suffering a particular abuse to seek asylum. Thus, a woman who has suffered spousal abuse must show that no state protection exists to stop the abuse. A woman who was forced into marriage by her father must show that the political power of her father made it impossible for her to receive police protection. And a woman who fears persecution because of her identification with a political group must prove her credibility by showing that she knew of the particular beliefs of this political group, and she must explain why she did not seek refugee status in any other country.

265. See Patricia A. Seith, Book Note, Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women, 97 COLUM. L. REV. 1804, 1838 (1997). Not only is the fear of floodgates unfounded, but it is also highly unlikely. The floodgates argument is unfounded in the view of the fact that Canada and France have recognized female genital mutilation as a basis for refugee status and neither country has had an influx of women seeking refugee status. See also, Arthur C. Helton & Alison Nicoll, Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In Re Fauziya Kasinga and Prospects for more Gender Sensitive Approaches, 28 COLUM. HUM. RTS. L. REV. 375, 387 (1997).

266. Seith, supra note 265.
267. Nichols, supra note 173.
268. Pell, supra note 5, at 683.
269. Id. at 683-84.
270. Id.
271. Id.
Thus, the floodgate argument is not a legitimate one when concerning human rights and refugee law.\textsuperscript{272} When applying a balancing test (if permitted to do so on a human life) in face of the floodgate argument, it is apparent that it is clearly more crucial to save the life of one human being, of one woman persecuted because of her gender, than it is to fear that a second may apply.

VI. CONCLUSION

The holding in \textit{Yadegar-Sargis} fails to provide adequate protection for women who face persecutions based specifically on their gender.\textsuperscript{273} According to \textit{Yadegar-Sargis}, women may continue to face gender specific persecutions without being provided any means of defense. By using the current categories of asylum law the court is unable to provide the applicant with adequate protection. The holding in \textit{Yadegar-Sargis} effectively allows persecutors to continue burning, beating, and raping women because of the fact that they are women. Thus, the decision of the United States Court of Appeals for the Seventh Circuit in \textit{Yadegar-Sargis v. INS} must be overruled.

In addition, the United States should amend its asylum law to include gender within the refugee definition.\textsuperscript{274} Because of the lack of a gender category, advocates representing the immediate interests of persecuted women have had no other option but to frame their asylum cases within one of the current categories.\textsuperscript{275} Until a fundamental change is made to the asylum framework, inconsistencies in U.S. asylum law will likely continue.\textsuperscript{276} We must begin to send a definitive message to asylum adjudicators that they must treat gender-based persecution as they do other forms of persecution.\textsuperscript{277} Gender-related asylum claims should be subject to the same legal standards and burdens of proof as any other asylum claim.\textsuperscript{278}

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\textsuperscript{273} See supra note 106. The court failed to make any express reference to guidelines on gender.
\textsuperscript{274} Kandt, supra note 121, at 143.
\textsuperscript{276} \textit{Id.} at 255.
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} Anker et al., \textit{supra} note 12, at 745.
\end{flushright}
By adopting guidelines similar to those of Canada, the United States can begin to assist women, persecuted based on their gender, such as Ms. Sargis, to gain equal access to eligibility for asylum in the United States.\textsuperscript{279} The addition of a sixth category to current asylum law is necessary to eliminate the gender bias that exists in asylum law and provide heightened, long-term protection for the human rights of women.\textsuperscript{280}

\textsuperscript{279} Pell, supra note 5, at 684.

\textsuperscript{280} Schenk, supra note 2, at 344.