

UNITED STATES ASYLUM LAW: THE FAILURE OF THE UNITED STATES TO ACCOMMODATE WOMEN'S GENDER-BASED ASYLUM CLAIMS

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I. INTRODUCTION

“Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest tossed to me: I lift my lamp beside the golden door.” Those are the words of Emma Lazarus, inscribed on the Statute of Liberty. Unfortunately, the United States has continually interpreted those words to mean men, not women, particularly, women seeking asylum. Women make up a majority of the world’s refugees,¹ yet their particular needs

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1. *Third Circuit Recognizes Potential Asylum Claim Based on Gender*, 71 INTERPRETER RELEASES 164 (Jan. 24, 1994); see also Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 625-26 n.1 (1993).

have been overlooked.²

While the Immigration and Naturalization Service (INS) recently issued new procedural guidelines, recognizing rape and other sexual persecution as a potential justification for asylum claims,³ they are intended to educate asylum officers and immigration judges on the procedural aspects of women's asylum claims and do not acknowledge gender-based persecution alone as a basis for asylum.⁴ A woman must still establish she is persecuted because of her political opinion in order to justify relief.⁵

Gender-based persecution is violence directed at women specifically because they are women.⁶ A woman may be persecuted because of her gender⁷ or a trait related to her gender.⁸ Such abuse includes: dowry related murders⁹ and bride burnings¹⁰ in India; rape;¹¹ forced sterilization in China¹² and Mexico;¹³ genital mutilation in the

2. Pamela Goldberg, *Asylum Law and Gender-Based Persecution Claims*, IMMIGR. BRIEFINGS, Sept. 1994, No. 94-9, at 1.

3. See Ashley Dunn, *Abused Women Can Win Political Asylum*, MIAMI HERALD, May 28, 1995, at 9A (noting that the decision to adopt the guidelines was a result of the mass rape of women in Bosnia).

4. *Id.*

5. *Id.* A refugee may also establish persecution for asylum purposes on account of her race, religion, nationality, or membership in a particular social group. See 8 U.S.C. § 1101(a)(42) (1988).

6. Goldberg, *supra* note 2, at 5.

7. *Id.*

8. *Id.*

9. Pamela Goldberg & Nancy Kelly, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195, 195 (1993) (according to India's statistics there were over eleven-thousand dowry murders between 1990 and 1993).

10. Peter C. Godfrey, *Defining the Social Group in Asylum Proceedings: the Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL'Y 257, (1994) (citing to Jill Lawrence, *Gender Persecution New Reason for Asylum*, L.A. TIMES, Mar. 27, 1994, at 14).

11. Rape by the military, or for military purposes, is a worldwide problem. It is used to punish actual or imputed opposing political views of the victim or her family, as well as to control local populations. It becomes persecution when the government either condones or fails to protect against such abuse. See M. Jane Kronenberger, *Refugee Women: Establishing a Prima Facie Case Under the Refugee Convention*, 15 ILSA J. INT'L L. 61, 66 (1992); see also Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, 7 GEO. IMMIGR. L.J. 173, 173 (1993).

12. Nurjehan Mawani, *Introduction to the Immigration and Refugee Board Guidelines on Gender-Related Persecution*, 5 INT'L J. REFUGEE L. 240, 246 (1993).

13. "Of all Mexican women using birth control today, 45 percent are sterilized, up from 9 percent two decades ago." Nancie L. Katz, *Mexican Women Describe Coerced Sterilization at Government Clinics*, MIAMI HERALD, Aug. 28, 1995, at 8A. The results of a 1987 national

Middle East, Africa,¹⁴ and Asia;¹⁵ and domestic abuse.¹⁶ Gender-based persecution can also take the form of repressive and discriminatory laws and practices meant to oppress and subordinate women. In Haiti, adultery results in a potential three month prison sentence for women while men are fined \$6.50.¹⁷ In Islamic countries, women are required to veil their faces or face flogging and imprisonment by the religious police.¹⁸ In Muslim countries, women living alone face abuse for failing to have a male family member's protection.¹⁹ Each of these acts constitutes gender-based violence directed specifically at women. Such abuse rises to the level of persecution when the government is either unable, or unwilling, to prevent it.²⁰

The United States must recognize gender-based violence and should expand the definition of the "particular social group" classification for asylum claims to meet the needs of women facing such persecution. Courts must recognize the types of violence targeted specifically at women as well as a state's involvement in such action, and follow the decisions in

health survey showed that one out of twenty-five women who are sterilized did not agree to it. *Id.*

14. "An estimated seventy percent to ninety percent of Egyptians are circumcised just before puberty." *Egypt Bans Circumcision of Females at State Hospitals*, MIAMI HERALD, Dec. 30, 1995, at 13A.

15. 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, 193 (1993).

Female genital mutilation includes clitoridotomy, clitoridectomy and infibulation. Clitoridectomy is the removal of the prepuce of the clitoris. Clitorectomy removes the clitoris and the surrounding tissue. An infibulation involves the excision of the clitoris, labia minora and most of the labia majora, followed by the sewing of the sides of the vulva, "leaving a hole the size of a match stick."

Id.

16. Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87, 115 (1993). In Brazil alone, over 400 women were murdered by their spouses or lovers between 1987 and 1989 in the state of Penambuco. The criminal justice system of Brazil recognizes a "defense of honor" and, during the same period above, seventy percent of all reported acts of violence were in private residences and most were committed by husbands or lovers. *Id.*

17. *Haiti's Victimized Women*, MIAMI HERALD, Aug. 28, 1995, at 8A (a man can also claim extenuating circumstances for murdering his adulterous wife).

18. Stevens, *supra* note 15, at 195.

19. Nancy Kelly, *Guidelines for Women's Asylum Claims*, 6 INT'L J. REFUGEE L. 517, 528 n.40 (1994).

20. The United States requires state participation in the persecution either through action or inaction in order for an alien to qualify for asylum. See 8 U.S.C. § 1101(a)(42) (1982).

In re A and Z,²¹ and *In re M.K.*²² Part I reviews the historical background of refugee and asylum law. Part II discusses the history of United States asylum law and how it has been applied to female refugees. Part III looks at recommendations by the United Nations and changes being implemented in Canada and Germany to meet the needs of women seeking asylum under claims of gender-based persecution. Part IV examines the first known cases in the United States where an Immigration Judge granted asylum to two women, one claiming domestic abuse, and another claiming both domestic abuse and abuse as a result of female genital mutilation, finding both members of a "particular social group."

II. HISTORICAL BACKGROUND OF REFUGEE AND ASYLUM LAWS

Asylum is the discretionary grant of haven to an individual who meets the definition of a refugee. The definition of refugee originated in 1946 by the Constitution of the International Refugee Organization, created for the protection and resettlement of displaced victims of World War II.²³ The definition of refugee was developed further by the Convention Relating to the Status of Refugees²⁴ which added "particular social group" as a category²⁵ and was refined by the Protocol Relating to the Status of Refugees.²⁶ The Convention and the Protocol are independent provisions; the United States ratified the Protocol in November 1968, but never signed the Convention.²⁷ Parties to either the Convention, the Protocol, or both comply with their obligations under

21. *In re A and Z*, No. A72-190-893, No. A72-793-219 (U.S. Immigr. Ct. Arlington, Va. Dec. 20, 1994) (unpublished I.J. decision).

22. *In re M.K.*, No. A72-374-558 (U.S. Immigr. Ct. Arlington, Va. Apr. 13, 1995) (unpublished I.J. decision).

23. Kronenberger, *supra* note 11, at 63 n.10 (citing the Constitution of the International Refugee Organization, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3 (entered into force Aug. 20, 1948)).

24. David Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 226 n.128 (1988) (citing the Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, art. 1A(2) 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137, (entered into force Apr. 22, 1954) [hereinafter Convention]).

25. Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 590 (1993). The Swedish delegation added "particular social group" to the grounds for asylum, recognizing the potential failure of the other four categories to include "all the reasons for persecution an imaginative despot could conjure up." *Id.* at 590 n.143.

26. Neal, *supra* note 24, at 227 n.128 (citing the Protocol Relating to the Status of Refugees, *opened for signature*, Jan. 31, 1967, 19 U.S.T. 6233, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (effective Oct. 4, 1967) [hereinafter Protocol]).

27. Kronenberger, *supra* note 11, at 64 n.20.

these instruments by creating domestic refugee laws and policies.²⁸ The Convention defines a refugee as any person who

[a]s a result of events occurring before 1 January 1951, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁹

The Protocol adopted the Convention definition of refugee but removed the geographic and temporal restrictions and added victims of inhumane treatment world-wide.³⁰

This has become the dominant definition of refugee world-wide, with numerous countries implementing the same or a similar definition. France became a party to the Convention in 1952 and enacted the Office of Francais des Protection des Refugees et Apatrides, using the same definition.³¹ The 1971 Immigration Act of Great Britain refers to the Convention definition,³² while the 1982 Asylum Procedure Law of Germany states refugees will at a minimum enjoy the status recognized by the Convention.³³ The Convention definition of refugee is applied by Canada, Switzerland, the Organization of African Unity, with similar definitions implemented by the 1954 Caracas Convention on Territorial Asylum³⁴ and the United States.³⁵

28. *Id.*

29. Neal, *supra* note 24, at 228 n.131.

30. Bower, *supra* note 11, at 177.

31. Kronenberger, *supra* note 11, at 65 n.24 (citing the Office of Francais des Protection des Refugees et patrides, Loi. No. 52-893 of July 25, 1952, art. 2.).

32. *Id.* at 65.

33. *Id.*

34. *Id.*

35. See 8 U.S.C. § 1101(a)(42) (1988).

III. THE REFUGEE ACT OF 1980 ESTABLISHED THE CURRENT LAWS FOR ADMITTING REFUGEES INTO THE UNITED STATES.³⁶

The United States asylum law is modeled after and governed by the Convention and the Protocol.³⁷ It follows the United Nations Handbook³⁸ as a persuasive guide when determining refugee status. The Immigration and Nationality Act (the Act), first enacted in 1952, did not mention the word refugee.³⁹ In 1953, the Refugee Relief Act was passed by Congress to deal with World War II refugees,⁴⁰ but the Act did not include refugees until 1957.⁴¹ It was not until 1965 that Congress, by amending the Act, made refugee a distinct category for admission into the United States, ending the selection of immigrants, mainly Europeans, based on national origin, race, or ancestry.⁴² Section 3 of the 1965 Act stated in part that refugees include those who have fled from any Communist or Communist-dominated country, or area, or from any country within the general area of the Middle East, and are unable or unwilling to return to such country because of persecution or fear of persecution on account of race, religion, or political opinion.⁴³

The Refugee Act of 1980 established the current laws for admitting refugees into the United States.⁴⁴ Under the Act, asylum is granted to those who meet the definition of refugee as stated in 8 U.S.C. § 1101(a)(42) (1982). A refugee is defined 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

36. Refugee Act of 1980, Pub. L. No. 96-212, § 201, § 101(a)(42), 94 Stat. 102, 102-03 (codified at 8 U.S.C. § 1101(a)(42) (1988)).

37. Bower, *supra* note 11, at 176.

38. Kelly, *supra* note 19, at 521 n.15 (citing UNHCR's *Handbook for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (Geneva 1979)).

39. Immigration and Nationality Act § 101.

40. Stevens, *supra* note 15, at 181.

41. *Id.*

42. *Id.* at 181-82 (citing Act of Oct. 3, 1965, §§ 3, 203(1)(7)).

43. *Id.* at 181-82.

44. Refugee Act of 1980, 94 Stat. at 102-03 (codified at 8 U.S.C. § 1101(a)(42) (1988)).

account of race, religion, nationality, membership in a particular social group, or political opinion.⁴⁵

An individual may seek asylum either at designated locations outside of the United States,⁴⁶ or at any time after arrival into the United States by presenting her claim to the INS for review by an asylum officer.⁴⁷ If the claim is denied, the INS begins either exclusion or deportation proceedings⁴⁸ against the individual. The alien may then file a new application for asylum with an immigration judge as a form of relief from either exclusion or deportation.⁴⁹

While persecution has no universally accepted definition,⁵⁰ the Handbook and the Immigration and Naturalization Service Basic Law Manual (Manual) considers serious physical harm, loss of freedom, threat to life, discriminatory treatment which leads to consequences of a substantially prejudicial nature,⁵¹ and a combination of numerous harms, which standing alone may not constitute persecution, but in combination create a well-founded fear of persecution, as forms of persecution.⁵² The Manual also recognizes arbitrary interference with a person's privacy, family, home, or correspondence as forms of persecution. Furthermore, the Bureau of Immigration Appeals (BIA) has characterized persecution as harm or suffering inflicted upon a person to punish that individual for a

45. 8 U.S.C. § 1101(a)(42) (1982).

46. An individual seeking asylum outside the United States is known as an "asylee," while a person who applies for asylum either upon entry into, or once in, the United States is referred to as a "refugee."

47. 8 C.F.R. § 208.4(b) (1988).

48. An individual who is not accepted during inspection upon entry into the United States faces exclusion proceedings and is known as an applicant, while an alien either admitted or paroled into the United States is placed into deportation proceedings and is referred to as a respondent.

49. Administrative immigration judges, sitting in different regions of the country, are under the supervision of the Executive Office for Immigration Review (EOIR). EOIR and the INS are part of the Department of Justice but are independent of one another. Decisions of the immigration judge are appealable to the Bureau of Immigration Appeals (BIA) whose members are appointed by the Attorney General. Once all administrative remedies are exhausted, an alien may file for review with the Court of Appeals for the circuit in which the deportation hearing was heard. Appeals to the United States Supreme Court are possible, but rare.

50. Persecution was not defined by the Convention or the Protocol.

51. Discriminatory treatment such as the denial of the right to earn a living, practice one's religion, or have access to educational facilities are considered forms of persecution. See Kelly, *supra* note 19, at 521.

52. Certain human rights are considered so basic and fundamental as to be nonderogable, and any violation is considered persecution. Included are genocide, slavery, torture, and arbitrary arrest and detention.

belief or characteristic associated with him.⁵³

United States asylum law is further defined by case law. *INS v. Stevic*⁵⁴ established that the burden is on the alien to prove there is a "clear probability" that one's life or freedom would be threatened upon return to a given country on account of race, religion, nationality, membership in a particular social group, or political opinion.⁵⁵ The court in *Cardoza-Fonseca v. INS*⁵⁶ held the threat of persecution may come from the government or from groups the government is "unwilling or unable to control."⁵⁷

The "well-founded fear" of persecution was initially defined by *In re Acosta*,⁵⁸ and *In re Mogharrabi*.⁵⁹ In order to establish a "well-founded fear" of persecution, an alien must show he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; the persecutor is aware, or could become aware, that the alien possesses this belief or characteristic; the persecutor has the capability of punishing the alien; and the persecutor has the inclination to punish the alien.⁶⁰ The term was further defined in *Blanco-Comarribas v. INS*,⁶¹ where the court held the fear of persecution must be both subjectively genuine and objectively reasonable.⁶²

Case law has also refined the definitions for each of the five enumerated categories, but this Comment will focus primarily on the categories of "particular social group" and "political opinion," which are the primary categories used by women seeking asylum for gender-based persecution. The Handbook defines political opinion broadly, stating that

53. *In re Acosta*, 19 I & N Dec. 211 (BIA 1985); see also 8 C.F.R. § 208.13 (1992).

54. *INS v. Stevic*, 467 U.S. 407 (1984).

55. *Id.*

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

57. *Id.*

58. *In re Acosta*, 19 I & N Dec. at 211.

59. *In re Mogharrabi*, 19 I & N Dec. 439, 441 (BIA 1987).

60. *Id.* at 446.

61. *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1042 (9th Cir. 1987).

62. *In re Mogharrabi*, 19 I & N Dec. at 445; the BIA held the objective standard is met if a reasonable person in similar circumstances would fear persecution. A reasonable person may fear persecution even if the likelihood that it may occur is significantly less than a clear probability. *Id.* Moreover, an alien's own testimony, without corroborative evidence, may be sufficient to establish a "well-founded fear" of persecution where testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account for the basis of fear. *Id.* In *In re Chen*, the court ruled asylum relief could be granted for humanitarian reasons, even if there was little likelihood of future persecution. *In re Chen*, 21 I & N Dec. 3104 (BIA 1989).

a person can fear persecution because of a political opinion even if the opinion is not expressed. Further, action or inaction can constitute an expression of political opinion.⁶³ Following this premise, in *INS v. Elias-Zacarias*,⁶⁴ the Supreme Court held a petitioner must actually possess political opinions and the persecutor's motives must be based on those opinions.⁶⁵ Imputed opinions are not to be considered, but a court may interpret resistance or noncompliance as a manifestation of opposition.⁶⁶ The Supreme Court's decision goes against the holding of *Lazo-Majano v. INS*,⁶⁷ where the Circuit Court of Appeals ruled a political opinion imputed to the petitioner is a valid basis for relief.

There are even greater conflicts concerning the category of a "particular social group." No United States court has yet defined the qualifications necessary to establish membership in a particular social group. *Ananeh-Firempong v. INS*⁶⁸ was the first appellate case to consider what constitutes a particular social group. The court stated a particular social group is normally comprised of persons of similar backgrounds, habits, or social status, habits which are essentially beyond the individuals power to change.⁶⁹

While courts have generally agreed that members must share some common characteristic which is fundamental to their identity as a member of a particular social group that is both recognizable and discrete and serves to distinguish them in the eyes of a persecutor,⁷⁰ there are conflicting decisions concerning whether the characteristic must be immutable. The BIA decision in *In re Acosta*⁷¹ established the social group must share a "common immutable characteristic" or that "the common characteristic that defines the group . . . must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their identities or consciences."⁷² This

63. Stevens, *supra* note 15, at 203 (citing Craig A. Fielden, Note, *Persecution on Account of Political Opinion: Refugee Status After INS v. Elias-Zacarias*, 67 WASH. L. REV. 959, 977 (1992)).

64. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

65. *Id.* at 482.

66. *Id.*

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

68. *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir. 1985).

69. *Id.*

70. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *see Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

71. *In re Acosta*, 19 I & N Dec. at 211.

72. *Id.*

decision acknowledged sex as an immutable characteristic.⁷³ However, in *Sanchez-Trujillo v. INS*,⁷⁴ the Ninth Circuit held the phrase particular social group meant a collection of people who are affiliated with each other and have a common impulse or interest, and stated the existence of the associational relationship must be voluntary.⁷⁵ To date, this conflict has not been resolved.⁷⁶

The different court interpretations of political opinion and membership in a particular social group have not borne well for women. There have been few federal court cases addressing women's claims of asylum based on membership in a particular social group or political opinion, but in each case, relief was denied. In *Gomez v. INS*,⁷⁷ the petitioner Carmen Gomez, a native and citizen of El Salvador, sought asylum alleging she had been raped by guerrilla forces at least five times between the ages of twelve and fourteen, and that each time, her life had been threatened and her home vandalized. She based her asylum claim on membership in a "particular social group of women who had been raped by the guerrillas" and claimed because of past persecution she had established a well-founded fear of persecution should she return to El Salvador.⁷⁸ The court denied her request for relief, stating she had failed to demonstrate the guerrillas were inclined, or would seek, to harm her based on her membership in a "particular social group."⁷⁹ The court held the possession of such broadly based characteristics as youth or gender does not create a particular social group, and such characteristics by themselves do not distinguish members in the eyes of the persecutor.⁸⁰ Had the court recognized women fleeing gender-based persecution as members of a particular social group, it is likely that Ms. Gomez would have been granted asylum.

In *Fatin v. INS*,⁸¹ the petitioner Parastoo Fatin applied for asylum under both the political opinion and particular social group categories, and was denied relief under each. Fatin, an Iranian citizen, entered the United

73. *Id.*

74. *Sanchez-Trujillo*, 801 F.2d at 1576.

75. *Id.*

76. BIA decisions are followed by immigration judges except in areas where the circuit court has ruled otherwise.

77. *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

78. *Id.* at 662.

79. *Id.* at 664.

80. *Id.*

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

States in 1978 as a nonimmigrant student.⁸² In 1988 she applied for asylum, claiming she was a member of a “particular social group of educated, Western free-thinking individuals with a deeply rooted belief in feminism” and she would be persecuted if she did not wear the traditional Islamic veil.⁸³ Fatin also requested asylum based on her political opinion, stating in high school she had participated in a political organization which supported the Shah.⁸⁴

The court dismissed her request based on political opinion, reasoning because of the length of time since she participated in political activities, she would not be singled out for persecution based on past action.⁸⁵ While acknowledging Fatin had established a legitimate social group for asylum purposes,⁸⁶ the court denied her request for relief, stating she failed to establish she would not wear a veil, making her subject to persecution.⁸⁷ The court went on to say that just because a state has laws or traditions repugnant to the United States and our concepts of freedom, it does not subject them to persecution.⁸⁸ “If persecution were defined that expansively, a significant percentage of the world’s population would qualify for asylum in this country.”⁸⁹

The reasoning and holding of *Fatin* were followed by the court in *Safie v. INS*.⁹⁰ In *Safie*, the petitioner, an Iranian woman, requested asylum as a member of a “particular social group of Iranian women who advocate women’s rights or oppose Iranian customs relating to dress and behavior,” as well as for her political opinion as a Shah supporter. *Safie*’s claim based on membership in a particular social group was denied because the court found her opposition was not of the “depth and intensity

82. *Id.* at 1235-37.

83. *Id.* The veil is known as the chador, and the Islamic practice requiring the veiling of women is known as the Hejab. See Neal, *supra* note 24, for a detailed discussion of Islamic traditions pertaining to women.

84. *Fatin*, 12 F.3d at 1240.

85. *Id.* Courts have since held that an alien need not prove that they would be “singled out” for persecution in order to establish a valid asylum claim.

86. *Fatin*, 12 F.3d at 1241. The social group was Iranian women who refuse to conform to the government’s gender-specific laws and social norms.

87. *Id.* Fatin stated that she would try not to wear the veil, not that she would not wear one. Nor did she testify that wearing the veil was so abhorrent to her deepest beliefs that it would amount to persecution.

88. *Id.* at 1240.

89. *Id.*

90. *Safie v. INS*, 25 F.3d 636 (8th Cir. 1994).

required."⁹¹ Her political opinion claim was denied because she failed to establish she had or would be singled out and persecuted for her opinion.⁹²

In each of these cases the court correctly held that persecution was not based on the petitioner's political opinion. Each petitioner was persecuted specifically because of their gender, and had the courts acknowledged women fleeing gender-based persecution as members of a particular social group it is likely each would have been granted asylum.⁹³

The United States needs to start implementing substantive immigration laws recognizing the unique circumstances of some women seeking asylum in order to alleviate the discrepancies among the courts and to end the discrimination against women. Such action would be in line with the recommendations of the United Nations and the changes being implemented in Europe and Canada.

IV. UNITED NATIONS RECOMMENDATIONS AND CHANGES IN CANADA AND GERMANY BEING IMPLEMENTED IN RECOGNITION OF THE PARTICULAR NEEDS OF WOMEN SEEKING ASYLUM

Since 1980, the United Nations has focused on the particular needs of women seeking asylum. Following its lead, Canada and many European countries have implemented changes to their respective asylum laws, addressing the special circumstances encompassed in women's asylum claims.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the most prominent international document to recognize the right of women to be free from discrimination.⁹⁴ Ratified by 112 countries, although not the United States,⁹⁵ it specifically acknowledges all forms of discrimination against women.⁹⁶ The CEDAW

91. *Id.* While Safie claimed to have been arrested for smoking and wearing Western clothes and make-up, the court found she did not show proof she had suffered severe consequences because of her nonconformance. *Id.* at 640. The amount of prior persecution needed to establish a valid asylum claim is determined on a case by case basis, because asylum is considered a personal issue.

92. *Id.*; see *Gomez v. INS*, 947 F.2d 660, 664 (2d. Cir. 1991).

93. See also *Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1987) (rape by terrorists based on uncle's political opinion does not constitute persecution on account of political opinion or membership in a particular social group); *Lazo-Majano v. INS*, 813 F.2d 1432 (9th Cir. 1986) (repeated sexual assault by a member of the Salvadoran army not based on imputed political opinion or membership in a particular social group).

94. *Goldberg & Kelly*, *supra* note 9, at 197 n.9 (citing to the *Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/RES/34/46 (1980)) [hereinafter *CEDAW*].

95. *Id.* at 197 n.13.

96. *Id.* at 197 n.12.

prohibits discriminatory state action and demands that governments take action to end both state and private discriminatory practices on any level and in any form against women.⁹⁷ It also considers gender-based violence a form of discrimination, and considers such action a violation of the Convention.⁹⁸

In 1985 the International Seminar on Refugee Women was held.⁹⁹ Its purpose was to examine the situation of refugee women worldwide, and concluded states should acknowledge gender-based persecution and grant asylum to women who have suffered forms of oppression which violate human rights.¹⁰⁰

Later that year, the UNHCR issued its "Conclusions on Refugee Women," declaring that countries might recognize claims of gender-based persecution under the "particular social group" category for purposes of asylum claims.¹⁰¹ It urged states to recognize the social, economic and cultural oppression of women, and that they should interpret asylum laws liberally when granting asylum to women faced with such persecution.¹⁰² It stressed the special needs of women refugees concerning health, education, and employment, and urged states to consider women seeking asylum for having transgressed social mores in their country as members of a "particular social group."¹⁰³

97. *Id.* at 197 n.13.

For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction, made on the basis of sex which has the effect of, or purpose of, impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Id. (citing *CEDAW* pt.1, art.1).

98. Goldberg & Kelly, *supra* note 9, at 198 n.15.

This definition of discrimination includes gender-based violence. That is violence which is directed against women because she is a woman or which affects women disproportionately. It includes acts which inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions mention violence.

Id. (citing to *CEDAW* pt.1, art. 1).

99. Neal, *supra* note 24, at 230.

100. *Id.* (citing *Recommendations, in INTERNATIONAL SEMINAR ON REFUGEE WOMEN* 53 n.148 (Soesterberg, The Netherlands, May 22-24, 1985)).

101. Goldberg, *supra* note 2, at 3, (citing *United Nations High Commissioner for Refugees Executive Committee, Refugee Women and International Protection Report of the 36th Sess., at 38, U.N. Doc. A/AC.96/673 (1985)*).

102. Neal, *supra* note 24, at 231 n.151.

103. *Id.* at 231 nn.153 & 154.

Another document addressing gender-based violence was the 1985 Nairobi Forward-Looking Strategies for the Advancement of Women which was initiated by the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women.¹⁰⁴ It urged states to address the end of violence against women by providing assistance to its victims, increasing public awareness of the problem, and establishing policies and procedures to prevent the continuance of such abuse.¹⁰⁵

In 1991 the UNHCR issued guidelines which specifically recognize the unique circumstances of some women seeking asylum.¹⁰⁶ These guidelines call for states to recognize women who fear severe discrimination or gender-based persecution as members of a particular social group for asylum determination.¹⁰⁷ The 1991 UNHCR Guidelines also state a subgroup of women can be recognized based on their exposure or vulnerability to violence, including domestic violence, when their governments deny them protection from such persecution, particularly when their vulnerability is a result of their gender.¹⁰⁸

In 1993 the United Nations Declaration on the Elimination of Violence Against Women condemned acts of gender-based violence as a per se violation of human rights.¹⁰⁹ Such violence includes physical, sexual, or psychological harm occurring in public or private life, specifically domestic battering and female genital mutilation.¹¹⁰

Following the lead of the United Nations, Germany was one of the first countries to recognize women as a particular social group for asylum purposes. Several Iranian nationals applied for asylum in the Federal Republic of Germany in 1986, one claiming that as a woman she was

104. Goldberg & Kelly, *supra* note 9, at 198 n.18 (referring to *Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace*, U.N. Doc. A/Conf. 116/28/Rev. 1 at 6 (1986)). The Decade for Women ran from January 1976 through December 1986, and urged the equality of men and women. *Id.*

105. Goldberg & Kelly, *supra* note 9, at 199 n.207.

106. Goldberg, *supra* note 2, at 3 (citing UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (Geneva, July 1991)).

107. Goldberg, *supra* note 25, at 596 n.176.

108. *Id.* at 596 n.178. The Vienna Declaration and Programme of Action, June 1993, U.N. Dept. of Public Information DPI/1394-39399-Aug.1993-20M, which emerged as a result of the United Nations World Conference on Human Rights, also recognizes violence against women as a violation of human rights. Goldberg, *supra* note 2, at 5.

109. *In re M.K.*, A-72-374-558 (citing to Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104 (1993)).

110. *Id.*

subject to special persecution.¹¹¹ While all of the applicants were granted asylum on the basis of their political activities, the German Federal Office held the woman was a member of a social group of Iranian women subject to persecution "specific to women."¹¹² The Office stated that "the ideology based power of men over women results in a general political repression of women in defiance of their individual liberties and human rights."¹¹³

Continuing its trend, in 1992 the German Federal Office granted asylum to a Romanian woman who had been abducted and sexually abused by a town mayor.¹¹⁴ The Office found persecution is political when associated with an immutable characteristic, and since gender is an immutable characteristic, any gender-based persecution is "political persecution."¹¹⁵

Canada has also changed its guidelines, acknowledging the increasing international support for the application of the particular social group category to women claiming asylum based on fear of persecution because of their gender.¹¹⁶ The Canadian guidelines, released by the Immigration and Refugee Board in March 1992,¹¹⁷ and enacted into law in 1993, state that women who are unable to obtain government protection from spousal abuse, who are subject to violence by public officials, or who fear persecution for violating discriminatory laws, traditions or customs, will be given special consideration for refugee status.¹¹⁸ These violations can include choosing a spouse rather than accepting an arranged marriage, wearing make-up, or wearing the clothing of her choice.¹¹⁹ The guidelines also recognize the unique persecution of women in the form of infanticide, bride burning, compulsory sterilization, and genital mutilation.¹²⁰

111. Bower, *supra* note 11, at 200 (referring to *Seven Case Abstracts* (IJRL/0222), 1 INT'L J. REFUGEE L. 566(1989)).

112. *Id.*

113. *Id.*

114. Bower, *supra* note 11, at 201 (citing Ref. No. AN17K91.44245 Feb. 19, 1992, UNHCR REFCAS database).

115. *Id.*

116. Goldberg, *supra* note 25, at 596.

117. Stevens, *supra* note 15, at 197.

118. Kristine M. Fox, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 118 n.20 (1994) (citing Alan Thompson, *Canada First in Recognizing Abused Women as Refugees*, TORONTO STAR, Mar. 10, 1993, at A2).

119. Kelly, *supra* note 1, at 662.

120. Stevens, *supra* note 15, at 197.

Unlike the United States,¹²¹ Canada does not require that the social group be "internally cohesive" and states the size of the particular social group is irrelevant.¹²² The Canadian guidelines state that the only relevant consideration is whether the group "suffers or fears to suffer severe discrimination or harsh and inhuman treatment that is distinguished from the situation of the general population, or from other women."¹²³

Canadian case law has dealt with several asylum claims of women seeking refuge from gender-based persecution and, unlike the United States, has granted these women asylum based on their membership in a particular social group. In August 1987, the Canadian Immigration and Refugee Board held that a woman living alone in a Muslim country which requires females to live under the protection of a male family member was subject to persecution and constituted a particular social group.¹²⁴

In *Mayers v. Minister of Employment and Immigration*, the Canadian Federal Court of Appeal reviewed the decision of an administrative panel which found a Trinidadian woman could be considered a refugee.¹²⁵ While the court did not determine if the particular woman qualified for asylum, it held Trinidadian women subject to spousal abuse may constitute a particular social group when the government fails to intercede on their behalf, and that such abuse may constitute persecution.¹²⁶

Also in 1992, the Canadian Immigration and Refugee Board granted asylum to a woman from Zimbabwe who had been forced to marry at age fifteen, and had suffered continual abuse, including rape, at the hands of her husband.¹²⁷ The court found that the applicant had proven "good grounds for fear of persecution" based on her membership in a "particular social group of Zimbabwean women and girls, forced to marry according to the customary laws of Kurzvarira and Lobola."¹²⁸

Canada has also granted asylum to women facing forced

121. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 1576 (9th Cir. 1986).

122. *Goldberg*, *supra* note 25, at 596.

123. *Id.*

124. *Kelly*, *supra* note 19, at 528 (citing to *Incirciyan v. Minister of Employment and Immigration*, Immigration Appeal Board Decision M87-1541X (Aug. 10 1987)).

125. *Goldberg & Kelly*, *supra* note 9, at 208 n.72 (referring to *Ministry of Employment and Immigration v. Marcel Mayers*, Federal Court of Appeals, #A544-92, Toronto (Nov. 8, 1992)).

126. *Id.*

127. *Id.* (citing Canadian Immigration and Refugee Board (Refugee Division), Decision U92-06668, heard Nov. 13, 1992 (Can.)).

128. *Kelly*, *supra* note 19, at 670.

sterilization in China. In *Chung v. M.E.I.*,¹²⁹ the court held that women who bear more than one child and face forced sterilization are members of a particular social group.¹³⁰ The court stated these women are a group of people who share different views from their government, have a similar basic characteristic in common, and are identified by the common purpose of reproduction so fundamental to their human dignity, that they should not be required to forsake it.¹³¹

While there are recognizable problems when addressing gender-based persecution claims,¹³² particularly intimate abuse, these problems can be overcome, as demonstrated by Germany and Canada. Further, while concern for the respect warranted by other societies' traditions and cultures should definitely be a consideration, there are some situations when respect for human life and dignity outweigh diplomatic protocol.¹³³ The main fear in the United States is expanding the definition of the particular social group to include women seeking asylum from gender-based persecution would open the flood-gates for asylum claims.¹³⁴ This fear is unfounded.¹³⁵ Even if a woman can establish membership in a

129. Mawani, *supra* note 12, at 246 (citing *Cheung v. M.E.I.*, No. A-785-91, Linden, Mahony, Stone (Apr. 1, 1993)).

130. *Id.*

131. *Id.*

132. Many women are afraid to testify about intimate sexual abuse. Further, such abuse is often difficult to prove.

133. In *In re Oluloro*, the court found that after reviewing the evidence regarding female genital mutilation, although it attempted to respect the traditions and cultures of other societies, it considered the practice cruel and serving no known medical purpose. No. A72-147-491, (U.S. Immigr. Ct. Seattle, Wash. Mar. 23, 1994) (unpublished I.J. decision). "While it could possibly have had some purpose in ancient cultures, whatever the utility the practice might have ever had, it no longer exists." *Id.*

134. Asylum advocates, as well as its detractors, have raised concerns about expanding the definition of refugee to recognized gender-based persecution. See Deborah Sontag, *Women Asking U.S. Asylum Expand Definition of Abuse*, N.Y. TIMES, Sept. 27, 1993, at C8. This fear is based on a belief that the number of asylum applicants will increase, adding to the current antiimmigrant movement and creating hardships for the refugees and immigrants currently residing in the United States, as well as leading to new restrictions in immigration policies. *Id.*; see also Kelly, *supra* note 19, at 627. Federal Courts have also indicated a fear of expanding the definition of particular social group. In *Sanchez-Trujillo v. INS*, concerning Salvadoran males fleeing to avoid persecution for failing to join the military, the court stated "this class of young working class urban males may be so broad and encompass so many variables that to recognize any person who might conceivably establish that he was a member of this class and is entitled to asylum . . . would render the meaning of refugee meaningless." 801 F.2d 1571, 1577 (1986).

135. "Despite the propaganda about America being overwhelmed with immigrants, the rate of immigration is about one-third what it was at the beginning of the century. . . . [W]ithout immigration, America would not long have existed. Now, without immigration it cannot exist as a world power." A.M. Rosenthal, *Are We 'America the Mingy?' Halting Immigration is Blind Folly*, MIAMI HERALD, Dec. 27, 1995, at 11A.

particular social group she must still demonstrate state involvement in the persecution, through action or inaction. She must also meet both the subjective and objective prongs of a well-founded fear of persecution, as well as establishing the only form of relief available to her is asylum. As demonstrated in Canada and Germany, expanding the definition of a particular social group to include women fleeing gender-based persecution has not opened the flood-gates.

V. TWO GROUND-BREAKING CASES

A. *In re A and Z*

In a potentially ground-breaking case, a United States immigration judge granted asylum to a Jordanian woman fleeing intimate abuse, finding her eligible for asylum under both the political opinion and particular social group categories, noting that the two categories may be interchangeable.¹³⁶

The petitioner was a woman who fled Jordan in 1990 with her child, requesting asylum on the basis of spousal abuse. She presented evidence establishing ongoing abuse at the hands of her husband over a thirty year period of time. Testifying and presenting corroborating witnesses and documents, the petitioner proved that her husband had beaten her in front of others, even during pregnancy. One incident occurred when she attempted to obtain her high school diploma. Also, on several occasions he placed her under house arrest, refusing to let her step out of the house. She was also not permitted to work, or to have friends, or her own bank account. Her husband would not even give her gas money. Further, it was established that the petitioner's husband beat her just to "keep her in line."

In May 1990, the petitioner's husband threatened her with a gun, firing it into a room where she and her child were located. It was then that she decided to leave. Under Jordanian policy, however, the petitioner could not travel without the consent of her husband. He refused to consent and obtained a detention court order to prevent her from leaving. Her husband finally permitted her to come to the United States, where they owned a home, during the summer of 1990. The petitioner's husband followed her to the United States where the abuse continued. When he finally realized that the petitioner would not return to Jordan with him, he stopped giving the petitioner and her child financial support.

The Immigration and Naturalization Service argued the case

136. *In re A and Z*, No. A72-190-893, No. A72-793-219 (U.S. Immigr. Ct. Arlington, Va. Dec. 20, 1994) (unpublished I.J. decision).

concerned personal marital abuse, but the court disagreed.¹³⁷ The petitioner presented evidence establishing not only that she could not receive protection from the Jordanian government, but that such abuse was traditionally accepted and it is a cultural norm not to seek police assistance for domestic abuse.¹³⁸

The court found that the petitioner was a member of a particular social "group of women who are challenging the traditions of the Jordanian government and society."¹³⁹ It found that by fleeing her husband, thus challenging her husband's power to abuse her, she also challenged the system of submission of women in Jordan by espousing her feminist beliefs.¹⁴⁰ Citing *Fatin v. INS*,¹⁴¹ the court also held that feminism qualifies as a political opinion.¹⁴²

The court found the abuse suffered by the petitioner demonstrated that she was willing to suffer the consequences for asserting her beliefs.¹⁴³ Furthermore, she showed she was unwilling to accept any further abuse because her Western feminist beliefs collided with traditional Jordanian values.¹⁴⁴ The court concluded that the petitioner's social group is basic to her political opinion and they are interchangeable.¹⁴⁵ Based on the Department of State's *Country Reports on Human Rights Practices for 1992*, it found that there are few legal avenues for redress of intimate abuse in Jordan, and the actions of the petitioner's husband are traditionally accepted.¹⁴⁶ As such, the court concluded that although the persecution was done on a private level, the government was a collaborator by its inaction in preventing it.¹⁴⁷ Based on the husband's past actions and the government's inaction, the court found a clear probability the petitioner would be subject to persecution if she returned to Jordan.¹⁴⁸ In granting her request for relief from deportation, the court stated the petitioner was eligible for asylum under both the political opinion and

137. *Id.*

138. *Id.*

139. *Id.* at 29.

140. *Id.* at 30.

141. *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993).

142. *In re A and Z*, No. A72-190-893, No. A72-793-219, at 30.

143. *Id.* at 31.

144. *Id.*

145. *Id.* at 29.

146. *Id.* at 30.

147. *In re A and Z*, No. A72-190-893, No. A72-793-219, at 30.

148. *Id.*

particular social group categories.¹⁴⁹

B. In re M.K.

In a more recent decision out of the same immigration court, a twenty-nine year old woman from Sierra Leone was granted asylum on three bases: persecution relating to her resistance to, but forcibly imposed, genital mutilation; persecution through spousal abuse as a result of her attempts to assert her feminine views; and persecution because of her political opinion.¹⁵⁰

The court noted that although it considered the issue of female genital mutilation a case of first impression concerning a claim for asylum, the same issue was addressed in the context of a suspension of deportation hearing by an immigration judge sitting in Seattle, Washington.¹⁵¹

The respondent, M. K., entered the United States in August 1991 on a visitor's visa. She applied for asylum when the INS instituted deportation proceedings against her for remaining in the United States without authorization and she was found to be deportable.¹⁵²

M.K. is twenty-nine, married, and a native and citizen of Sierra Leone. She has a high school level education and is trained and employed as a nursing assistant. At the age of fifteen the respondent's mother began pressing her to submit to female genital mutilation.¹⁵³ She continuously refused, at the risk of becoming an outcast, treated as a nonadult, or shunned,¹⁵⁴ because three of her friends had died as a result of the practice and numerous others suffered pain because of the mutilation. At the age

149. *Id.* at 29.

150. *In re M.K.*, No. A72-374-558. The court's rationale concerning the third category of political opinion will not be discussed in this article.

151. *Id.* at 2 (referring to *Oluloro* and a suspension of deportation proceeding under Immigration & Nationality Act §244). In order to qualify for suspension of deportation, an applicant must have been present in the United States for seven years immediately preceding the application, be a person of good moral character, and that deportation would result in extreme hardship to the alien, her United States citizen or lawful permanent resident spouse, parent or child. Immigration & Nationality Act §244(a)(1). The burden of proof is on the alien to establish eligibility for suspension of deportation. *Kimm v. Rosenberg*, 363 U.S. 405 (1960). In *Oluloro*, the court granted the suspension on the basis of potential hardship to the respondent's two minor female children who would be subject to female genital mutilation if the respondent was deported to Nigeria. *Oluloro* No. A72-147-491 at 17.

152. *In re M.K.*, No. A72-374-558 at 2.

153. Female genital mutilation is a traditional practice in Sierra Leone (with the exception of the Creoles, who make up 20% of the population) and approximately 80% of the female population of that country undergo some form of this mutilation. *Id.* at 5.

154. According to the testimony of Susan Rich, an expert on African family planning, in Bundo Society a social stigma attaches to the woman who refuses to undergo the mutilation. *Id.* at 7.

of twenty-one the respondent ran away from home when her mother told her she would be forced to undergo the procedure, returning only when her mother promised her she would not be forced.

However, in January 1989, after the birth of her child, the respondent was abducted from her parents home, blind folded and bound, and taken against her will to a place in the jungle called the "Bundo Bash." There her "initiation" into the Bundo Society was performed.¹⁵⁵ She was stripped of her clothes and bound while an elder woman, using an unsterilized razor, cut away her clitoris and labia minor. She was not given anything to ease the pain. Six women sang to disguise the screams of the respondent and six other victims.

As a result of the "operation" the respondent bled for five hours and lost consciousness, but the group refused to take her to the hospital for fear the Bundo secret would be revealed.¹⁵⁶ A woman doctor was called in to stop the bleeding. Following the mutilation the respondent received two weeks of instruction on a woman's role in society and was forced by threat of death to take an oath of silence concerning the ritual and her mutilation.

The court accepted testimony that there is no legal recourse regarding female genital mutilation in Sierra Leone, reasoning it is a traditional practice and police would inform the Bundo Society should anyone reveal the "secret" by lodging a complaint.¹⁵⁷ As a result, the court concluded the government was either unable or unwilling to stop the persecution, finding genital mutilation mandated for all non-Creole women in Sierra Leone.¹⁵⁸

Recognizing forced female genital mutilation as a form of persecution,¹⁵⁹ the court held the respondent warranted asylum on the basis of either "persecution on account of political opinion" for her resistance to, and complaints about, female genital mutilation; or "persecution on

155. Expert testimony at the respondent's hearing established that "initiation" into the Bundo Society, of which the respondent's family were members and which all women are required to join, is to inculcate young women on their socially-imposed roles. *In re M.K.*, No. A72-374-558 at 6. Female genital mutilation is part of the initiation and is performed by a Digba, a women elder, using a razor blade or broken glass to perform the surgery. *Id.* While the Digba is permitted to drink intoxicants, the victims are given nothing to relieve the pain. *In re M.K.*, No. A72-374-558 at 6 (referring to the testimony of Susan Rich and Dr. Gary S. Eglinton, an Associate professor and Director of Maternal-Fetal Medicine in the Department of Obstetrics and Gynecology at Georgetown University School of Medicine).

156. The respondent's long term health has also been affected. *Id.* She suffers from discomfort, a chronic rash, and has endured a miscarriage as a result of an infection caused by the mutilation. *Id.*

157. *Id.* at 8.

158. *Id.* at 13.

159. *In re M.K.*, No. A-72-374-558 at 19.

account of membership in the social group that consists of women who are forced to undergo female genital mutilation."¹⁶⁰ The court also granted asylum based on the respondent's "past attempts to assert her individual autonomy, resulting in physical spousal abuse, and because of her fear of future harm, given the threat of her husband to kill her."¹⁶¹

The respondent married her husband in 1985. Since 1988 he abused her both verbally and physically, beating her with his fists and feet approximately every two months because she was mouthy.¹⁶² On three occasions respondent complained to the police about the abuse and on each occasion was told the police could do nothing because it was a domestic matter.¹⁶³ The respondent's husband beat her, even during her two pregnancies, so she refused to bear him any more children, further angering him. The beatings continued until 1990 when the respondent left him.¹⁶⁴ At the time of the hearing the respondent was in the process of divorcing her husband. As a result, he has threatened to kill her because she refuses to bear him more children, refuses to relinquish custody of their two children, and is carrying out her threat to divorce him.¹⁶⁵

On the basis of this testimony, the court also granted the respondent asylum because of spousal abuse stating that such abuse could be "classified as either: 'persecution on account of political opinion' for her resistance to mandated female subservience and complaints about physical spousal abuse; or 'persecution on account of membership in the social group that consists of women who have been punished with physical spousal abuse for attempting to assert their individual autonomy.'"¹⁶⁶

These cases are significant for two reasons. *In re A and Z* is believed to be the first decision by an immigration judge in which a woman was granted asylum based on intimate abuse because such abuse was found to constitute persecution. *In re M.K.* is the first case to hold female genital mutilation is a form of persecution meriting asylum. Second, both cases identify women who have faced and are facing gender-

160. *Id.* at 14. "In addition, Respondent is eligible for asylum on humanitarian grounds because of the horror of being forced to undergo female genital mutilation." *Id.*

161. *Id.*

162. *Id.* at 9.

163. Testimony by Susan Rich confirmed that in Sierra Leone men are considered head of the house and a wife's disrespect or disobedience justifies her punishment. *In re M.K.*, No. A72-374-558, at 9. The court noted, referring to the report, State Department Sierra Leone Human Rights Practices 1994, that wife-beating is common and rarely results in court action because it is not recognized as a societal problem. *Id.* at 10.

164. *Id.*

165. *Id.*

166. *Id.* at 15.

based persecution as members of a particular social group. These cases should be upheld. Furthermore, they should be followed and expanded upon.

The particular social group category was added as a ground for refugee status in recognition of the potential failure of the other categories to include all forms of persecution.¹⁶⁷ Both the definition of refugee and the inclusion of the category for a particular social group indicate that it was meant to cover groups, such as women who face gender-based persecution, that are not covered by the other categories. Furthermore, the United States was a contracting party to the Protocol,¹⁶⁸ and as a member should follow the UNHCR guidelines which call on states to recognize women fleeing gender-based persecution as members of a particular social group.¹⁶⁹

While the petitioners in both the *In re A and Z* and *In re M.K.* were able to establish persecution because of their political opinion as well as because they were members of a particular social group, other women are targeted for persecution specifically because of their gender. The United States needs to establish immigration policies recognizing that fact. The flood-gates will not open. Canada and Germany are proof that fear will not be realized.

VI. CONCLUSION

In an age where women's rights and equality are both recognized and demanded, the United States should amend its immigration policies to reflect the changes occurring world-wide. In a country that prides itself on equality, the discrimination against refugee women should be acknowledged and eliminated. The United States immigration laws and policies were not carved in stone, but the words of Emma Lazarus were. Those are the words that should be followed—and those words were meant to include women.

167. See 8 U.S.C. § 1101 (a)(42) (1982).

168. See *In re M.K.*, No. A72-374-558.

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