CROSS-BORDER SHOPPING FOR IDEAS: A CRITICAL REVIEW OF UNITED STATES, CANADIAN, AND AUSTRALIAN APPROACHES TO GENDER-RELATED ASYLUM CLAIMS

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I. INTRODUCTION

Like migrants themselves, ideas about migration diffuse across national borders. More often than not, these ideas concern how to keep migrants out—witness the European Community's Schengen Agreement[1] and Dublin Convention,[2] and the draft Memorandum of Understanding between Canada and the United States.[3] A refreshing exception to this trend has been occurring of late, however. In March 1993, the Chair of Canada's Immigration and Refugee Board (the "IRB") released the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (the "Canadian Guidelines").[4] In May 1995, the United States Immigration and Naturalization Service (the "INS") issued *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (the "U.S. Considerations").[5] A year

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1. June 14, 1985, reproduced in 30 ILM 68 (1991). *See also* the Convention on the Application of the Schengen Agreement of June 14, 1985 relating the Gradual Suppression of Controls at Common frontiers between the Governments of States Members of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic, 30 ILM 84 (1991) (in force Mar. 1995).

2. *See* the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 30 ILM 425 (1991).

3. The Dublin Convention, in concert with the Schengen Agreement, aims to restrict asylum seekers' ability to claim asylum in the country of their choice within the European Community. Asylum seekers will be required to lodge their claim in the first state of arrival, and will be prohibited from making a claim in any other member state subsequently. On February 24, 1995, the United States and Canada announced negotiations on a Memorandum of Agreement entitled "Canada-U.S. Accord on Our Shared Border," designed to accomplish a similar goal with respect to asylum seekers arriving in Canada and the United States. Progress on the Memorandum was suspended indefinitely. On February 5, 1998, the Canadian Minister of Immigration, Lucienne Robillard, explained that both governments "recognize a precise time frame for the implementation of a Memorandum of Agreement on this matter was not a realistic option for a foreseeable future." *Adjournment of Discussions Between Canada and the United States on Responsibility-Sharing for Asylum Seekers* (Feb. 5, 1998) <http://cicnet.ci.gc.ca/english/press/98/9808-pre.html>.

4. Immigration and Refugee Board of Canada, Guidelines Issued By the Chairperson Pursuant to Section 65(3) of the Immigration Act, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution: Update (last modified Feb. 7, 1997) <http://www.irb.gc.ca/guideline/women/default.htm> [hereinafter Canadian Guidelines].

5. Memorandum from Phyllis Coven, Office of International Affairs, to All INS Asylum Officers and Headquarters Coordinators: Immigration and Naturalization Service Gender Guidelines Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995), *in* 7 INT'L J. REFUGEE L. 700 (1995) [hereinafter U.S. Considerations].

later, in July 1996, the Australian Department of Immigration and Multicultural Affairs (the "DIMA") followed suit with *Guidelines on Gender Issues for Decisionmakers* (the "Australian Guidelines").[6] These directives provide guidance to decisionmakers on how to interpret the refugee definition and adjudicate asylum claims in a gender-sensitive manner.

The Canadian, American, and Australian directives can be usefully compared with one another. Their impact can also be contrasted with the situation in a jurisdiction such as England, where state authorities do not consider guidelines necessary or desirable.[7] Notable differences exist between the legal environment of Canada, the United States, and Australia in matters of process and, to some extent, the substance of refugee determination. My goal is not to compare the merits of each system in the abstract. Rather, I intend to explore how the directives formulated in Canada, the United States, and Australia respond to the issues raised by gender-related claims within their respective legal, political, and administrative milieux. In an earlier piece, I used the Canadian Guidelines to explore theoretical and practical aspects of gender-related persecution as a basis for refugee status.[8] The present article builds on that foundation by incorporating the United States and Australian directives into the analysis.

The first objective of this article is to delineate the common and distinctive features of the various directives. Beyond that, I also wish to identify problematic issues that the directives either expose, create, or ignore. In particular, I query the reluctance of decisionmakers to recognize certain state-sanctioned practices as potentially persecutory. I express concern about the assessment of state protection in the context of domestic violence. I also compare and critically assess the different strategies deployed by the three directives to establish a link between a woman's fear of persecution and a Convention ground.

Part II sets out the background against which Canada, the United States, and Australia issued directives on gender-related persecution. I highlight international and domestic sources of inspiration for the adoption of guidelines, and briefly describe the different administrative regimes within which asylum claims are determined. Part III embarks on an examination of the

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6. *See* DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS (Austl.), REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS, July 1996 [hereinafter Australian Guidelines].

7. Heaven Crawley, *Women and Refugee Status: Beyond the Public/Private Dichotomy in British Asylum Policy, in* ENGENDERING FORCED MIGRATION 308, 323 (Doreen Indra ed., 1999). In July, 1998, the Refugee Women's Legal Group, a British NGO, issued "Gender Guidelines for the Determination of Asylum Claims in the UK." Their purpose is to "enable interviewers and decision-makers to apply the Refugee Convention in a way which embraces the totality of human experience and to assert and affirm the rights of women to effective international protection under UK law." Refugee Women's Legal Group, Gender Guidelines for the Determination of Asylum Claims in the UK (inside cover) (1998). While these guidelines have no formal status, there is in principle no reason why interviewers and decisionmakers should not follow them if they find them persuasive.

8. *See* Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213 (1995).

content of the directives, beginning with procedural and evidentiary considerations that may arise in gender-related claims. Part IV tackles the actual interpretation and application of the refugee definition in a gender context. Salient subtopics include the meaning of persecution, the availability of state protection, the nexus between the persecution feared and a recognized ground of persecution, and the definition of a particular social group. I conclude by returning to the interaction between international law and activism.

II. BACKGROUND

Like the Canadian Guidelines, the U.S. Considerations and Australian Guidelines take the form of administrative directives, not law. They offer decisionmakers a method of interpreting and applying the international refugee definition in a gender sensitive manner, and provide practical instructions on rendering the hearing process less intimidating and more respectful of women. My analysis and hypotheses regarding the impact of directives about gender persecution is informed by my own experience as a member of the IRB for two and one-half years (1994-96).

Canada, Australia and the United States are parties to the United Nations' *Convention Relating to the Status of Refugees* (the "Refugee Convention"),[9] and each country incorporates the international refugee definition into its domestic law. A refugee is defined in the Refugee Convention as, *inter alia,* as a person who:

> (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
> (i) is outside the country of the person's nationality and is unable or, by reason of that fear, unwilling to avail [her]self of the protection of that country. . . .

Since all three countries literally apply the identical definition of a refugee to their determination of refugee status, approaches to its interpretation and application are especially amenable to trans-border migration.

Over the years, policymakers, commentators, and decisionmakers alike have erected various obstacles to recognizing the validity of gender-related refugee claims. It cannot be said that the barriers inhered in the definition; rather, they seemed to arise almost despite the definition. For example, beating a man was obviously a form of persecution; raping a woman was not.[10] Ethnically motivated attacks by thugs in the face of state indifference

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9. Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 28, 1951, 189 U.N.T.S. 2545 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

10. *See* Campos-Guardado v. INS, 814 F.2d 658 (5th Cir. 1987).

constituted persecution; systematic domestic abuse of women in the face of state indifference did not.[11] Torture of political dissidents in the name of social control was not protected *qua* legitimate cultural practice; excising a girl's genitalia in the name of controlling women's sexuality was protected.[12] "Women" was too large and amorphous a group to warrant refugee protection; "Christians," "Sikhs," and "Blacks" were not.[13] One might well contend that it required a special effort of will *not* to apply existing principles to the situation of women.

The Canadian Guidelines, the Australian Guidelines, and the U.S. Considerations offer gender sensitive interpretations of the refugee definition. Their approaches are very similar, though each must abide by the jurisprudence of their respective higher courts. Broadly speaking, both sets of Guidelines and the U.S. Considerations delineate forms of persecution that are unique to women or predominantly inflicted on women (*e.g.*, sexual violence, genital mutilation, forced abortion, domestic violence, etc.). Each addresses the question of whether women (or a sub-group thereof) may constitute a particular social group within the meaning of the Refugee Convention's definition. Finally, each speaks to the question of state protection, noting that a refugee claim may be established where a state persecutes directly or where the persecutor is a private actor, but the state is either unable or unwilling to protect the victim. The recognition that harms inflicted in the so-called "private sphere" may constitute persecution within the meaning of the Refugee Convention is particularly important for women who face domestic violence. In virtually all countries of the world, women are brutalized by their male partners, fathers, and kin in an atmosphere of state indifference, impotence, or even condonation. When challenged, representatives of the state often express the inappropriateness or inefficacy of intervention in a so-called "private" matter.

A. *Sources of Inspiration for Directives*

Well before the IRB issued the Canadian Guidelines, the United Nations High Commission for Refugees (the "UNHCR") acknowledged the specificity of women refugees' experiences and needs. In 1985, the Executive Committee of the UNHCR adopted *Conclusion Number 39* ("Conclusion 39") concerning international protection of refugee women:

> (k) . . . States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a "particular social

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11. *See, e.g.*, Matter of Pierre, 15 I&N Dec. 461 (BIA 1975), cited in Coven, *supra* note 2, at 716.

12. *See, e.g.*, "No Plan to Accept Victims of Sex Bias," TORONTO GLOBE & MAIL , Jan. 16, 1993, at A6 (comments of then-Minister of Immigration Bernard Valcourt in Estznislao Oziewicz).

13. *See, e.g.*, [1992] C.R.D.D. No. 318, No. T92-03227 (Nov. 18, 1992) (Davis, Woloschuk).

group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.[14]

Six years later, in 1991, the UNHCR Executive Committee issued *Guidelines on the Protection of Refugee Women* (the "UNHCR Guidelines").[15] The document discusses various issues of relevance to women refugees, including protection from physical, sexual and other forms of violence in refugee camps, legal aspects of status determination, access to food, shelter and other services, as well as repatriation. The UNHCR Guidelines also elaborate on Conclusion 39 by recommending that women "fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status. Others may be seen as having made a religious or political statement in transgressing the social norms of their society."[16]

The UNHCR is not in a position to dictate to States Party how the Convention definition must be interpreted. As the language of Conclusion 39 indicates, the UNHCR can only hope to encourage states to adopt favorable policies and practices. One should not underestimate the importance of such initiatives. On the other hand, the British Home Office was quick to point out in 1996 that Conclusion 39 imposed no obligation on States Party to recognize women as a social group.[17]

On a more general plane, all three directives refer to international human rights instruments which might assist decisionmakers in determining elements of the refugee definition. These references serve to underscore how advances in the recognition of the human rights of women under humanitarian law, international human rights law, and domestic law create an environment which facilitates the recognition of gender-related persecution in the refugee context. Having said that, the U.S. Considerations' acknowledgment and treatment of international law is very perfunctory.[18]

The Canadian Guidelines, the U.S. Considerations, and the Australian Guidelines acknowledge the precedent set by the Executive Office of the UNHCR in formulating guidelines and recommendations with respect to women refugees, although each national initiative goes much further and is more sophisticated in its substantive analysis. Both the United States and Canada also recognize the contribution of non-governmental organizations ("NGOs"), scholars, and activists in the formulation of the directives; the U.S. Considerations describe the product as a "collaborative effort."[19] In Canada, a Working Group on Women Refugee Claimants had been active

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14. U.N. GAOR, 36th Sess., at 36, U.N. Doc. A/AC.96/673 (1985) ¶ 115(4)(k).

15. *Guidelines on the Protection of Refugee Women*, Office of the U.N. High Commissioner for Refugees, U.N. Doc. ES/SCP/67 (July 22, 1991) [hereinafter UNHCR Guidelines].

16. *Id.* at 40.

17. See Crawley, *supra* note 7, at 14.

18. *See* U.S. Considerations, *supra* note 5, at 701-02.

19. *Id.* at 703.

within the IRB since 1991, building relations with NGOs and gathering documentation relating to women refugees.[20] The U.S. Considerations and the Australian Guidelines bear striking resemblance to the Canadian Guidelines; indeed, the U.S. Considerations explicitly acknowledge the latter's influence, stating that "[m]ore than two years after their release, the Canadian Guidelines remain a model for gender-based asylum adjudications."[21]

All three directives deal with the process by which women's claims are heard, as well as the substance of the refugee definition as it applies to women making gender-related claims. Beyond that, the content of the advice given is also very similar. Obviously, each country has a distinctive administrative and legal context within which refugee decisions are made, and their directives reflect these differences. Moreover, despite the fact that all three countries apply the same refugee definition, the interpretation varies between the jurisdictions, and this also affects the interpretive space available to the drafters of the directives to respond sensitively to gender-related claims.

B. *Structure of the Decisionmaking Bodies*

Although the Refugee Convention obliges states to adopt the same refugee definition, the process of asylum/refugee determination remains within the exclusive purview of each country. It is thus useful at the outset to outline the different administrative and legal contexts in which the Canadian, United States and Australian directives operate.

The Canadian IRB is an administrative tribunal which is disconnected from the federal Department of Citizenship and Immigration.[22] The members of the IRB are appointed by Cabinet, and their formal independence from government is a key feature of the Canadian system. Members hear and determine claims from all refugee claimants who make port of entry or inland claims in Canada, regardless of when or how they arrived.

The Canadian Guidelines were promulgated by the Chair of the IRB,[23] Nurjehan Mawani, and apply only to the members of the IRB. They do not apply to visa officers abroad, with the consequence that women who apply for refugee status outside Canada do not benefit from the protection of the Canadian Guidelines. About half of all refugees admitted into Canada in 1997 were selected from overseas.[24]

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20. *See* Flora Liebich & Judith Ramirez, *A History of Institutional Change: The Immigration and Refugee Board (Toronto) Working Group on Refugee Women, in* DEVELOPMENT AND DIASPORA: GENDER AND THE REFUGEE EXPERIENCE 100 (Wenona Giles et al. eds., 1996).

21. *Id.* at 702.

22. The jurisdiction of the Convention Refugee Determination Division (the "C.R.D.D.") of the IRB and the procedural requirements of hearings before the C.R.D.D. are set out in the Immigration Act, R.S.C., ch. I-2, §§ 67-69.3 (1985) (Can.), and the Convention Refugee Determination Division Rules, SOR/93-45 (1993).

23. Pursuant to authority granted under the Immigration Act § 65(3) (Can.).

24. Citizenship & Immigration Canada, *Canada—A Welcoming Land, 1999 Annual Immigration Plan*, Refugees by Category, 1997 (visited Feb. 1, 1999) <http://cicnet.ci.gc.ca/english/pub/anrep99e.html#plan10>.

The IRB operates as a full administrative tribunal with relatively formal procedural protections. Individual claims are typically heard by a two member Panel of the Convention Refugee Determination Division (the "C.R.D.D.") of the IRB.[25] Claimants are usually represented by counsel, and are entitled to legal aid in most provinces.[26] A Refugee Hearing Officer (the "RHO") assists the Panel by presenting documentary evidence relating to the case, and questioning the claimant. The Panel may also question the claimant. The IRB supplies professional interpreters for the hearing, and proceedings are recorded on tape. Transcripts may be ordered for purposes of seeking leave to apply for judicial review to the Federal Court of Canada (Trial Division).[27]

In the United States, first level asylum adjudication is performed by officers of the INS Asylum Corps, unless the asylum applicant has been arrested by the INS, in which case his or her immigration status (including a possible asylum claim) is determined in the first instance by an Immigration Judge. The Asylum Corps is comprised of civil servants employed by the INS. Immigration Judges are employed by the Department of Justice, and are not answerable to the INS. Applicants who are not granted asylum by an asylum officer will be placed in removal proceedings and their claim will be adjudicated by an Immigration Judge.[28] Applicants at this stage receive a *de novo* hearing with significant procedural protection, including the right to be represented by counsel, present evidence, and cross examine witnesses. Unsuccessful applicants before an Immigration Judge can appeal to the Board of Immigration Affairs (the "BIA"), and have the right to review in a federal court thereafter.

The process before the asylum officer is relatively informal. Legal aid is not universally available, though some legal clinics do serve asylum claimants. Claimants are responsible for supplying their own interpreters, who are frequently relatives or friends. Consequently, the competence of interpreters may vary considerably. The asylum officer conducts an interview and takes notes, which form the only record of the proceedings. Lawyers may make submissions, but their role in the interview is relatively limited. The U.S. Considerations apply explicitly to asylum officers. Immigration Judges and the BIA are not formally subject to the U.S. Considerations, although they may choose to be guided by them. In the recent case of *In re Kasinga*,[29] the

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25. In the event that Panel Members disagree on the outcome, the split decision is treated as a positive decision in virtually all instances. *See* Immigration Act § 69.1(5)(c)(10) (Can.).

26. In Nova Scotia, Prince Edward Island, and New Brunswick, legal aid is denied to refugee claimants and they often appear unrepresented.

27. The following description draws on the following secondary sources: STEPHEN LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 894-95 (2d ed. 1997); DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE 280-93 (1998).

28. The so-called "expedited removal process" provides significantly fewer procedural protections to applicants "determined" by an immigration officer as lacking proper documents or suspected of fraud. *See* LEGOMSKY, *supra* note 27, at 916-17; Philip Schrag & Michelle Pistone, *The New Asylum Rule: Not Yet a Model of Fair Procedure*, 11 GEO. IMMIGR. L.J. 267 (1997).

29. In re Kasinga, Interim Decision 3278 (BIA June 13, 1996).

BIA explicitly took note of the Considerations in rendering a decision in favor of an applicant fleeing female genital mutilation. Like the Canadian Guidelines, the U.S. Considerations do not apply to the overseas selection process.

The Australian Guidelines were developed by DIMA, and apply to the officers employed by the Department who assess refugee claims.[30] Applicants for refugee status who are already in Australia seek a "protection visa." DIMA officers conduct an interview with the aid of an interpreter, if necessary. Counsel may be present, but as with the United States Asylum Corps interview, the role of counsel at this stage is relatively limited. Legal aid is provided on a limited and discretionary basis. The officer must issue written reasons for decisions. Claims that are refused may be appealed to the Refugee Review Tribunal (the "Australian Tribunal"), upon payment of a fee of $1,000. The applicant's appeal may be granted upon a review of written documentation, but it cannot be rejected without an oral hearing. The Australian Tribunal, like the Canadian IRB, is an independent administrative tribunal comprised of government appointees, and the hearing process before it is relatively formal. The Australian Guidelines do not apply to the Australian Tribunal. However, one can reasonably assume that members of the Australian Tribunal would be familiar with them and may find their contents persuasive.

Overseas applicants for refugee status apply under the offshore Humanitarian Program. Applicants may be assessed under the refugee class in accordance with the Refugee Convention definition, or under various non-refugee categories for nationals from designated countries, persons for whom there are compelling humanitarian reasons to admit them to Australia, or persons suffering hardship or disadvantage who also have close links to Australia.

The Australian Guidelines are uniquely broad in their scope—they apply to both the inland and overseas selection process, and even to the non-refugee humanitarian classes. Officers are encouraged to recall that "women may experience not only persecution but also discrimination, disadvantage or hardship in a manner qualitatively different from men as a result of their gender."[31] The drafters recognize that the Australian Guidelines are designed to function in "different operational [decisionmaking] environments," and should be adopted "as far as practicable."[32]

As this brief survey indicates, the three jurisdictions share certain procedural features, but differ in important ways regarding the scope of the

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30. The following description of the Australian refugee determination process is culled from the following sources: J.P. Fonteyne, *Refugee Determination in Australia: An Overview*, 6 INT'L J. REFUGEE L. 253 (1994); Department of Immigration and Multicultural Affairs, *Migration and Settlement Services* (last modified Jan. 20, 1999) <http://www.immi.gov.au/general/inet-ser.htm>; Refugee Review Tribunal, *How to Apply to the RRT* (last modified Jan. 22, 1999) <http://www.austlii.edu.au/au/other/rrt/howapply.html#howdo>.

31. *See* Australian Guidelines, *supra* note 6, ¶ 4.2.

32. *Id.* ¶ 1.6.

directives and the refugee determination scheme. Perhaps the most critical—yet intangible—determinant of how directives are implemented is institutional culture, which is bounded by legal constraints, but also responds to its own internal bureaucratic dynamic.

C. *Institutional Factors*

Neither the Canadian Guidelines, nor their American or Australian counterparts, constitute binding law, although they are drafted in a manner that encourages decisionmakers to apply them. Most members of the Canadian IRB are mindful of their independence, and are particularly sensitive to real or perceived political pressure to decide cases in a particular way. Conversely, the United States Asylum Corps has been roundly criticized in the past for its apparent eagerness to align its decisions with American foreign policy of the day, to the detriment of victims of repression by regimes sponsored by the United States. Like their American counterparts, Australian officers may also be sensitive to government policy to a greater extent than members of the Australian Tribunal who, like members of the IRB, are formally independent from government.

Whether directives are formally binding or otherwise, institutional incentives to abide by them do have an effect. Where the decisionmakers are employees of a government department (*i.e.*, Australian and United States asylum officers), the pressure to conform may be more explicit than with ostensibly independent decisionmakers. This may support an inference that the Australian Guidelines and U.S. Considerations will exert greater influence on the decisionmakers to whom they are directed than will the Canadian Guidelines. Having said that, in my experience few IRB Members explicitly reject the Guidelines in their decisions. Moreover, even an obligation to apply the U.S. Considerations or Australian Guidelines cannot determine outcomes—decisionmakers must still apply these directives to the facts and rule on credibility, the availability of state protection, and a range of other issues. The fact that rape is recognized as a form of persecution does not protect claimants from decisionmakers who are predisposed to disbelieving women who assert that they were raped.[33] One can apply the letter of the U.S. Considerations and the Canadian and Australian Guidelines, without implementing their spirit.

It is probably premature to pronounce the relative impact of the Australian and Canadian Guidelines and the U.S. Considerations on acceptance rates or modes of reasoning in gender-related cases. However, a recent article by three United States academics and practitioners suggests a disappointing

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33. In the United States, it appears that some immigration judges are requiring scientific corroboration of claims based on rape, justifying on grounds that "anyone can come in and claim rape." Deborah Anker et al., *Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States (Part II)*, 2 BENDER'S IMMIGR. BULL. 608, 616 (1997).

trend among the INS lawyers who represent the INS before Immigration Judges and the BIA.[34] Since the U.S. Considerations apply only to asylum officers, some INS lawyers feel free to adopt positions diametrically opposed to the Considerations, apparently on grounds that since they (unlike asylum officers) are not expressly bound by the Considerations, they are entitled to reject them.[35] The irony is that the very agency whom these lawyers ostensibly represent promulgated the Considerations.

In my experience, the Canadian Department of Justice lawyers (who defend IRB decisions on judicial review before the courts) support the Canadian Guidelines in principle and in practice. One disappointing development, however, has been the dismantling of the internal IRB committees on refugee women. IRB management did so in late 1996 in order to maximize members' time in the hearing rooms. A subsidiary rationale was that in light of the Guidelines' apparent success, the committees were superfluous. Following the promulgation of the Guidelines in 1993, these committees focused attention on the application of the Guidelines by Members, as well as ongoing training and sensitization regarding gender issues. The demise of the committees on refugee women will likely mean that less attention will be paid at an institutional level to the operation of the Guidelines, emerging issues, and ongoing sensitization of personnel, owing to the lack of a "designated" body who is specifically devoted to the issue.

It is not feasible at present to measure the impact of the Guidelines and Considerations on the number or proportion of successful gender-related refugee claims. First, the number of women who claim and obtain refugee status in any given year will fluctuate in accordance with many factors, especially country of origin. Any putative correlation between the existence of the directives and number of claimants relying on them is necessarily suspect. Second, in my experience, cynics have suggested that the existence of the Canadian Guidelines simply invites women to concoct gender-related claims. However, it may also be the case that more women disclose gender-related grounds as the basis of their claim now than in the past precisely because the Guidelines have legitimated their experience as falling with the refugee definition.

At a minimum, however, it appears safe to assert that the appearance of the Guidelines in Canada in 1993 did not lead to a "flood" of women seeking asylum in Canada in terms of absolute numbers. The numbers of positive claims decided in accordance with the Canadian Guidelines since they were promulgated in March, 1993 are: 78 in 1993, 204 in 1994, 212 in 1995, 150 in 1996, 104 in 1997, 95 in 1998 (through September). Annual acceptance rates ranged from 59% to 69%.[36] Indeed, this may have allayed the fears of

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34. *Id.*

35. *Id.* at 616.

36. *See* Immigration and Refugee Board, Gender-Related Claims, 1993/94-1997/98 (on file with author).

policy makers in other countries, thus facilitating the issuance of similar directives in the United States and Australia.

III. PROCEDURAL AND EVIDENTIARY ISSUES

Procedural issues define the conduct of asylum hearings, including the personnel present at the hearing or interview and how those people conduct themselves, including methods of questioning. Evidentiary issues involve the evaluation of credibility, and the use of documentary sources. All three sets of directives counsel decisionmakers to be sensitive to the variety of religious, cultural, and personal reasons why women might experience pain, trauma, humiliation, or shame in recounting certain incidents, especially those of a sexual nature. The Canadian Guidelines indicate that decisionmakers should be familiar with the UNHCR Guidelines, which in turn provide practical suggestions on how to conduct interviews in a sensitive manner.[37] Unfortunately, the Canadian Guidelines do not refer to the UNHCR Executive Committee's 1995 publication, *Sexual Violence Against Refugees: Guidelines on Prevention and Response*,[38] which contains more extensive discussion and guidance regarding interviews of women who have been sexually violated. The Canadian Guidelines do not focus on the actual conduct of decisionmakers in the hearing room.[39] The Canadian Guidelines raise the possibility of allowing traumatized claimants to provide testimony by videotape,[40] but to my knowledge this has never actually happened.

Both the U.S. Considerations and the Australian Guidelines devote significant attention to this topic. The former call on asylum officers to remain aware of the fact that most claimants come from countries where they have good reason to distrust people in authority.[41] Asylum officers should try to create a rapport with the claimant, move gradually into sensitive areas of questioning, and confine questioning about sexual assault to confirming whether it happened and the motives of the perpetrator.[42] Like the Canadian Guidelines, the U.S. Considerations advert to the possibility that the claimant may be traumatized.[43] The Considerations, however, describe how this may affect the claimant's testimony and lead to erroneous negative inferences about her credibility.[44] Similar comments are made about culturally specific body language.[45]

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37. UNHCR Guidelines, *supra* note 15, ¶ 72. For instance, the UNHCR Guidelines advise against questioning in detail about sexual abuse, since what matters is simply that it occurred. In my experience as a member, the UNHCR Guidelines were not actually distributed to members.

38. *See* UNHCR, *Sexual Violence Against Refugees: Guidelines on Prevention and Response (Extracts)*, 7 INT'L J. REFUGEE L. 720 (1996).

39. The topic is left to member training sessions.

40. *See* Canadian Guidelines, *supra* note 4, at 11.

41. *See* U.S. Considerations, *supra* note 5, at 705.

42. *See id.*

43. *See id.* at 705-06.

44. *See id.*

45. *See id.* at 706.

The Australian Guidelines also discuss the interview process, but go considerably further than their Canadian or American counterparts in focusing as much on what the interviewer can do to diminish a claimant's discomfort as with the reasons why the claimant may be uncomfortable. In comparison to the other two directives, the use of adjectives such as "sensitive," "sympathetic," "neutral," "supportive," and "compassionate" in the Australian Guidelines conveys a strong message about decisionmakers' responsibilities toward claimants.[46]

The Australian Guidelines discuss arranging the physical environment to put claimants at ease and promote confidentiality, the importance of establishing a rapport with the claimant, and culturally sensitive communication techniques.[47] They also contain practical advice about the interviewer's body language and "active listening" skills to minimize intimidation and reassure the claimant that she is in a safe space to speak.[48] With admirable candor, however, the Australian Guidelines acknowledge that "no matter how supportive the interviewing officer and the environment may be, the interview process (because of the imbalance of power between participants) will impact on how women respond."[49]

The comportment of decisionmakers in the hearing room can have a profound impact on the willingness of women to divulge relevant evidence and the quality of evidence that is disclosed. Unfortunately, not all decisionmakers approach their task with the appropriate degree of sensitivity and respect. In *Yusuf v. Canada*,[50] the Federal Court of Appeal overturned an IRB decision because of the offensive and condescending behavior of the members toward the female claimant. The Federal Court of Appeal remarked that the Panel's "sexist, unwarranted[,] and highly irrelevant observations by a member of the Refugee Division are capable of giving the impression that their originator was biased,"[51] and ordered that the claimant receive another hearing before a differently constituted IRB Panel.[52]

The Canadian Guidelines do not address whether gender-related claims should be conducted with all-female personnel (members, RHO and interpreter).[53] Some counsel representing female claimants before the IRB have

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46. *See* Australian Guidelines, *supra* note 6, ¶¶ 3.11, 3.20.
47. *See id.* ¶¶ 2.11-3.26.
48. *See id.*
49. *Id.* ¶3.21.
50. [1992] F.C. 629.
51. *Id.* at 637-38.
52. *See id.* at 638. The fact that refugee hearings before the IRB are recorded means that transcripts can be produced for purposes of judicial review. In *Yusuf*, the reviewing court was able to refer to the transcript of the Members comments to verify how the claimant was treated. There is no direct remedy in the United States and Australia for inappropriate behavior by first level decisionmakers, but the unsuccessful applicant will be able to appeal on the merits of her case in any event. The Canadian system does not provide for an appeal on the merits from a negative decision by the IRB, and judicial review is limited to errors of procedure or law, which include a reasonable apprehension of bias by a decisionmaker.
53. The Canadian Guidelines raise the possibility of having "members and refugee claims officers specifically trained in dealing with violence against women." *See* Canadian Guidelines, *supra* note 4, at

requested all-women Panels, with the assistance of a female refugee hearing officer and a female interpreter, in the hopes that this will minimize the claimant's reticence and enable her to disclose the full nature of her claim. No consistent policy exists with respect to acceding to these requests, and they are generally dealt with on an *ad hoc* basis in the various regions of the IRB. In my experience, opinion was divided at the IRB regarding a policy of assigning exclusively female personnel to hear claims involving gender-related persecution. Some members and RHOs objected because they believed it would foster the perception that male members or RHOs were inherently less competent and sensitive in dealing with gender-related claims than their female counterparts. Others expressed concern about the burden placed on female personnel in dealing with all such claims, since they may be particularly demanding and draining. The revised Canadian Guidelines are silent on the question, leaving accommodation of requests for all female personnel to the exercise of decisionmakers' discretion.

Both the U.S. Considerations and Australian Guidelines take a more assertive position, and encourage assigning a female officer to cases which might involve particularly sensitive or traumatic evidence.[54] They explicitly recognize that women may be understandably inhibited about disclosing incidents such as sexual abuse in front of men.[55] They also acknowledge the particular reluctance of a woman to speak through a male interpreter.[56] The phenomenon of "blaming the victim" of sexual or domestic violence exists in all cultures, and a claimant may legitimately fear negative repercussions for divulging certain facts in front of a man (or woman) who may not only stigmatize her, but also violate her confidentiality. Only the Australian Guidelines advert to the importance of reassuring the claimant about the confidential nature of the interview process.[57]

It should be noted that the claimant is responsible for providing the interpreter in the United States, unlike Canada and Australia. The interpreter that the claimant brings may be the only person she knows who can or will interpret for her, and not necessarily someone the claimant would otherwise trust. If the interpreter is a family member or friend from the same cultural community, the claimant's reluctance to disclose certain facts may be exacerbated.[58] The U.S. Considerations offer no constructive alternative to proceeding with whomever the claimant has brought, stating that "interviews should *not* generally be canceled and rescheduled because women with

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11. Once again, I am not aware of any cadre of specially trained members, though certain members may, as a result of interest and experience, adjudicate proportionally more gender-related claims than other members.

54. Many States Party which do not have formal directives on gender-related refugee claims, including Denmark, Netherlands, Switzerland and Sweden, have adopted a similar policy with respect to procedure.

55. *See* U.S. Considerations, *supra* note 5, at 704; Australian Guidelines, *supra* note 6, at 10.

56. *See* U.S. Considerations, *supra* note 5, at 704; Australian Guidelines, *supra* note 6, at ¶ 3.17.

57. *See* Australian Guidelines, *supra* note 6, at ¶ 3.17.

58. *See* U.S. Considerations, *supra* note 5, at 704-05.

gender-based asylum claims have brought male interpreters."[59] In light of this limitation, the fact that the U.S. Considerations advert to the inhibitory effect of male interpreters rings rather hollow.

IV. INTERPRETATION OF THE REFUGEE DEFINITION

Despite the fact that Canada, the United States, and Australia employ the identical refugee definition, slight variations in interpretation have emerged through the years. The general approach to the refugee definition taken in each country forms the background against which gender directives are drafted, constraining certain interpretive moves and enabling others.

In general, the elements of any refugee claim (including one involving gender) can be disaggregated into the following elements:

1) Does the treatment feared constitute persecution?
2) Is the fear objectively "well-founded"?[60]
3) If the persecutor is not an agent of the state,[61] is the state able and willing to protect the claimant from the persecution?
4) Is the reason for the claimant's fear connected to one of the listed grounds (race, religion, nationality, membership in a particular social group, or political opinion)?

Although the three directives are organized differently, the frameworks employed in the Australian and United States directives more or less track the questions posed above. In so doing, decisionmakers are implicitly reminded that a gender-sensitive interpretation of the refugee definition does not require a departure from, or exception to, the general principles that apply to all refugee claims. This is an important message to convey, because critics may be inclined to dismiss the Australian Guidelines or U.S. Considerations as some form of "special treatment" for women that represents a capitulation to external political pressure, rather than a sensible and legitimate application of existing principles. In contrast, the Canadian Guidelines commence with a series of questions, each of which randomly incorporates various elements of the refugee definition,[62] and some of which overlap with one another. While the net effect of the questions is to cover the terrain of the refugee definition, this approach gives the Canadian Guidelines the formal appearance of a separate scheme. This is both confusing to decisionmakers, and strategically unwise, in as much as it fosters the mistaken impression that a different more

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59. *See id.* at 704.

60. Factors included under this heading are whether the claimant has an internal flight/relocation alternative in the country of origin and whether cessation has occurred.

61. Canada, the United States, and Australia accept that the state is responsible not only for persecution that it commits, but persecution committed by others where the state cannot or will not protect the target. Other countries, such as France, confine the application of the refugee definition to acts perpetrated by the state.

62. *See* Canadian Guidelines, *supra* note 4, at 1.

lenient standard applies to gender related claims. There is some attempt to dispel this notion at the end of the Canadian Guidelines, where the drafters set out a "Framework of Analysis"[63] which relates the initial series of questions to the elements of the refugee definition.

A. *Persecution*

The Australian and American directives resemble the Canadian Guidelines in their recognition that certain forms of persecution may be inflicted exclusively or more commonly on women. These include sexual abuse, forcible abortion, female genital mutilation, and forced marriage.[64] Only the Canadian Guidelines list compulsory sterilization as a form of persecution.[65] Both the Canadian and American directives explicitly name domestic violence as a possible form of persecution,[66] but the Australian Guidelines do not. The Australian Guidelines explain that rape may be used to punish the victim, to pressure or humiliate others, or as part of a campaign of "ethnic cleansing."[67] The Canadian Guidelines make the point that the pervasiveness of these harms—especially rape or domestic violence—does not detract from their persecutory character.[68]

Recognition of sexual violence as persecution has proved particularly problematic in the United States, in part because of a confusing tendency to conflate the question of whether the harm is serious enough to constitute persecution with the question of whether the persecution is on account of a Refugee Convention reason. The result is that courts rule that sexual violence does not constitute persecution unless committed for a Refugee Convention reason. This analytical short-circuit is encapsulated under the rubric of "personal" or "private" harm. For instance, in *Klawitter v. INS,*[69] a case involving sexual harassment and threats of rape by a colonel in the Polish secret police, the court ruled that "harms or threats of harm based solely on sexual attraction do not constitute persecution."[70] This comment demonstrates an ignorance of the power dynamics of sexual harassment, and the ways in which sex is deliberately used as a weapon of domination, abuse and humiliation. In addition, this mode of analysis fails to keep the question of whether the harassment constituted persecution analytically distinct from whether the harassment was motivated by a Convention reason.

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63. *See id.* at 12-13.

64. *See id.* at 7; U.S. Considerations, *supra* note 5, at 703-04; Australian Guidelines, *supra* note 6, ¶¶ 4.4, 4.6.

65. *See* Canadian Guidelines, *supra* note 4, at 7.

66. *See* U.S. Considerations, *supra* note 5, at 708. *See also* Canadian Guidelines, *supra* note 4, at 7.

67. *See* Australian Guidelines, *supra* note 6, ¶ 4.7. The Canadian Guidelines, *supra* note 4, advert to rape in the context of ethnic cleansing at endnote 3.

68. *See* Canadian Guidelines, *supra* note 4, at 7.

69. Klawitter v. INS, 970 F.2d 149 (6th Cir. 1992).

70. *Id.* at 152. The subtext seems to be that if a perpetrator happens to derive personal pleasure from inflicting harm, the "motive" can be described as sexual gratification and the conduct does not constitute persecution.

In the 1987 decision in *Lazo-Majano v. INS,*[71] a Salvadoran military officer physically and sexually abused and enslaved the claimant. This putative "private harm" took on a public character only because the officer falsely denounced her for alleged political subversion when she resisted his abuse. The Ninth Circuit was then able to characterize the claim as persecution for imputed political opinion. On the other hand, in *Campos-Guardado v. INS,*[72] also decided in 1987, the Fifth Circuit ruled that the gang rape of female kin of politically active males was not evidence of persecution on grounds of [imputed] political opinion, but rather the unlawful expression of sexual desire—a "personal harm." Recently, in *Matter of Krome,*[73] the BIA determined that gang rape and beating in retaliation for political activities constituted persecution. The U.S. Considerations do not reconcile these divergent cases, but do emphasize that the "appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm."[74] One can only hope that the clear recognition in the U.S. Considerations that "severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution"[75] will dispel the tendency among some American decisionmakers to view the motivation for rape as "sexual desire," and therefore not causally connected to any reason stated in the Refugee Convention.

Happily, as Deborah Anker reports,[76] some federal courts of appeal seem to be getting the message, even if Immigration Judges and some members of the BIA are not. In *Angoucheva v. INS*[77] and *Lopez Galarzo v. INS,*[78] the Courts of Appeal for the Ninth and Seventh Circuits respectively rejected the lower tribunals' view that sexual abuse of political dissidents was a product of sexual attraction and did not constitute persecution.[79] In *Lopez Galarzo*, the Seventh Circuit also ruled that the claimant was raped and beaten on account of her political beliefs.[80]

The danger of characterizing harms to women as "personal" or "private" and not persecutory is perhaps most acute in relation to domestic violence. Curiously, the U.S. Considerations designate domestic violence to be both "private action"[81] and a form of persecution.[82] Indeed, the only case cited involving domestic violence is the 1975 case of *Matter of Pierre.*[83] The BIA

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71. Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987).
72. Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987).
73. *See* U.S. Considerations, *supra* note 5, at 708 (citing Matter of Krome, BIA May 25, 1993).
74. *Id.*
75. *Id.*
76. *See* Anker, *supra* note 33, at 612-14.
77. Angoucheva v. INS, 106 F.3d 781 (7th Cir. 1997).
78. Lopez Galarza v. INS, 99 F.3d 954 (9th Cir. 1996).
79. *See Angoucheva*, 106 F.3d at 790, 791, 793; *Lopez Galarza*, 99 F.3d at 963.
80. *See Lopez Galarza*, 99 F.3d at 960.
81. U.S. Considerations, *supra* note 5, at 718.
82. *See id.* at 708.
83. *See id.* at 716 (citing Matter of Pierre, 15 I&N Dec. 461 (BIA 1975)).

ruled that spousal abuse by a Haitian legislator, in circumstances where the state would not restrain the husband, did not constitute persecution. The U.S. Considerations' treatment of domestic violence hardly proceeds beyond this point. A telling sign of the U.S. Considerations' inadequacy regarding domestic violence is the fact that three American scholars published a lengthy article *after* the U.S. Considerations were released, arguing that asylum claims based on domestic violence do fit within the refugee definition as interpreted and applied in the United States.[84]

Though the Australian Guidelines do not explicitly declare domestic violence to be a form of persecution, I suggest below[85] that certain aspects of the Australian Guidelines were drafted with domestic violence in mind.

As if to preempt complaints that labeling as persecutory such practices as forcible sterilization or female genital mutilation amount to cultural imperialism, the Canadian Guidelines provide that "[w]hat constitutes permissible conduct by a state towards women may be determined . . . by reference to international instruments."[86] The Australian Guidelines adopt a similar approach,[87] and illustrate the point with the assertion that rape, forced abortion, and female genital mutilation constitute cruel, inhuman, and degrading treatment contrary to the *Convention Against Torture*.[88] The human rights instruments listed in the Australian Guidelines include: the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *1994 United Nations Declaration on the Elimination of Violence Against Women*.[89] The reliance on international standards is intended to demonstrate that the conduct in question violates "universal" and "fundamental" human rights which apply across cultures.

The U.S. Considerations do not explicitly identify international human rights instruments as aids to defining persecution. Instead, they rely on American caselaw interpreting the term "persecution" to mean, *inter alia*, "threats to life, torture, and economic restrictions so severe that they constitute a threat to life or freedom."[90] This choice not to rely on international sources may indicate that the drafters were not concerned about

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

85. *See* discussion *infra* notes 142, 204-05 and accompanying text.

86. Canadian Guidelines, *supra* note 4, at 7.

87. *See* Australian Guidelines, *supra* note 6, ¶¶ 2.2, 4.4.

88. *See id.* ¶4.6

89. *See id.* ¶ 2.2.

90. *See* U. S. Considerations, *supra* note 5, at 707 (citing Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985)).

allegations of "cultural imperialism," or simply that the United States prefers to look inward in developing legal principles about asylum.[91]

Another set of gender-specific practices which decisionmakers resist labeling as persecutory relate to sexist laws or policies that apply to all women. One of the most common media profiles of women refugee claimants involves an Arab woman from a theocratic Muslim state who rejects the range of proscriptions imposed on her dress, behavior, educational opportunities, ability to marry, divorce, and obtain custody. The popular press often telescopes this resistance into a refusal to wear a headscarf or *chador*.[92] More generally, this scenario illustrates a situation where a woman objects to laws or policies which discriminate against, impose burdens upon, or otherwise disadvantage women. In refugee law, persecution is distinguished from prosecution for breach of a legitimate law. The Canadian Guidelines advise that discriminatory laws may constitute persecution under the following circumstances:

a) the policy or law is inherently persecutory;
b) the policy or law is used as a means of persecution for one of the enumerated reasons;
c) the policy or law, although having legitimate goals, is administered through persecutory means; or
d) the penalty for non-compliance with the policy or law is disproportionately severe.[93]

Arguably, the cumulative effect of the web of discriminatory laws, policies and practices restricting where a woman can travel, what she can wear, her educational and job opportunities, her ability to marry, divorce, and have custody of children could amount to persecution. More often in cases of this nature, decisionmakers will focus on the penalties for non-compliance with the law. Thus, in *Namitabar v. Canada*,[94] the Federal Court found that seventy-five lashes for breach of the Iranian law governing women's dress was disproportionate to the objective of the law, and thus constituted persecution. Such an approach circumvents any implicit judgments about the legitimacy of the law itself, and focuses instead on the penalty as persecutory

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91. *See* Anker et al., *supra* note 33, at 609 (suggesting that "international law does not have the same status of legitimacy in the United States as it does in Canada"). Indeed, the U.S. Considerations tend to focus heavily on selected jurisprudence from the BIA and the federal courts; as such they seem to provide less of an overview of the various issues that could arise in future claims of gender related persecution than a digest of cases that have already been decided. Perhaps one advantage of this retrospective approach is that it makes it easier to claim that the U.S. Considerations are binding upon Asylum officers to the extent that they are a statement of existing law.

92. More commonly, the woman resists the range of proscriptions on dress, lifestyle, educational opportunities, but the media telescopes these into a refusal to wear a scarf.

93. *See* Canadian Guidelines, *supra* note 4, at 8.

94. [1994] F.C. 42, 47.

in relation to its purpose: even if a law requiring a woman to don a veil is [arguably] not persecutory, flogging her seventy-five times to achieve compliance is.

The U.S. Considerations explore this issue through caselaw involving Muslim women claimants who object to the strictures imposed on their dress and behavior in Iran. Quoting *Fatin v. INS*,[95] the Considerations caution that "the concept of persecution does not encompass all treatment that our society regards as unfair, unjust or even unlawful or unconstitutional."[96] Nevertheless, "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs."[97] The evidence in the case also indicated that the penalty for flouting the morality code in Iran would be flogging and imprisonment, leading to possible rape and death; the Court found that these penalties also constitute persecution.[98] Thus, the U.S. Considerations extract from the case law two principles. First, that compelling obedience to a law could constitute persecution if it required a person to renounce or violate deeply held religious or fundamental beliefs. Second, certain penalties for violating discriminatory laws might constitute persecution. Interestingly (but perhaps not surprisingly), the court in *Fatin* ultimately rejected the applicant on grounds that it did not believe that obeying the rules would be "profoundly abhorrent" to her.[99]

A recent post-U.S. Considerations judgment, *Fisher v. INS*,[100] adopts an even harsher stance. In a rehearing *en banc*, the Ninth Circuit ruled that while dress restrictions on Iranian women constituted sex discrimination, they did not amount to persecution. In a passage that may perturb some American women, Judge Wallace declared that "[t]he mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States."[101] The Ninth Circuit did not find it necessary to address the length or conditions of imprisonment, nor did it advert to the possibility of flogging described in *Fatin*. In any event, the majority took the view "there also is no evidence suggesting that if she returned to Iran, Fisher would not conform with the regulations."[102] Finally, even though Fisher testified that, as a Muslim, she opposed the fundamentalist regime in Iran (including its dress laws), "she failed to show that the Iranian government took action against her because of her political or

95. 12 F.3d 1233 (3d Cir. 1993).
96. *Id.* at 1240.
97. *Id.* at 1242.
98. *See id.* at 1241.
99. *Id.*
100. 79 F.3d 955 (9th Cir. 1996).
101. *Id.* at 962.
102. *Id.* at 963.

religious beliefs. Indeed, the record indicates that Fisher received routine punishment for violating generally applicable laws."[103]

Only the dissent in *Fisher* mentions the U.S. Considerations.[104] The case began before the Considerations were promulgated, and this appears to be the reason for not applying them.[105] This is disappointing, insofar as the legal analysis contained in the Considerations do not "change" the law, and thus are applicable anytime to any set of facts by anyone who finds them persuasive.

The Australian Guidelines adopt a rather diffident tone regarding women who violate or object to the discriminatory norms of their society. They advise that restrictions on women's behavior, be it through exclusion from public life, forcible marriage, or abuse of their sexual/reproductive capacities, may "vary from mere inconvenience to oppression."[106] Decisionmakers are advised to consider the severity of the restrictions, along with the penalties for disobedience, in deciding whether they constitute persecution.[107]

In a recent decision by the Australian Tribunal,[108] it affirmed the rejection of an Iranian applicant who objected to the generalized oppression of women in that country and, in particular, feared being subject to a forced marriage and punishment for violating Islamic dress codes. The Tribunal's reasons included the following remarks:

> The treatment of women in Iranian society is, I consider, quite abhorrent and unacceptable. Nevertheless, I feel obliged to say that it falls short of what I could consider to amount to persecution as understood in the Convention. Of course, whipping, stoning, rape, arbitrary execution and imprisonment and other such practices are clear cases of persecution. But it is open to a woman in Iran to avoid such treatment by complying with the requirements of Islamic law. If she is careful in observance of the Islamic dress code and other such regulations, she will not receive persecutory punishment. . . . I understand very well that it is highly irksome for many women to comply with these regulations, which restrict them in their freedom and in their expression of themselves as individuals. However, the regulations do not of themselves infringe any fundamental human rights or otherwise make life utterly unbearable. I agree with what UNHCR has said in evaluating such

103. *Id.* at 964.
104. *See id.* at 967-68.
105. *See id.* at 969.
106. Australian Guidelines, *supra* note 6, ¶4.9.
107. *See id.*
108. RRT Reference: V97/05699 (July 21, 1997) (Hudson).

claims in terms of the Convention (facsimile message of 13 December 1993):

> [A]s a principle, the promulgation and universal application (enforcement) of Islamic dress codes, insensitive, harsh or unduly cumbersome as they may be, are not of themselves persecutory; b) nor is the right to wear non-Islamic dress, including tights, in Islamic Iran so fundamental a human right the violation of which would automatically amount to persecution.
>
> The UNHCR's advice may, in my view, be generalized to apply to other such regulations imposed on women in Iran. It should not be overlooked that these regulations occur in the context of other forms of systematic discrimination against women in Iranian society, such as I have summarized above. Nevertheless, the oppression of women in Iran, though certainly real, does not in my view go so far that it is appropriate to describe it as persecution.[109]

This ruling (and the negative decision by the officer which led to the appeal) was delivered *after* the Australian Guidelines were issued. While the Tribunal was not bound by the Australian Guidelines, the officer who made the original decision was. Moreover, this decision was inconsistent with earlier Tribunal jurisprudence, to the effect that the penalties for refusing to obey the dress code (such as flogging) constitute persecution, quite apart from whether the dress code itself is inherently persecutory.[110] In addition, the notion that one may avoid persecutory penalties by obeying the law in question evades the observation made in the U.S. Considerations, that obedience which requires renunciation of deeply held political or religious beliefs constitutes persecution. The point can be illustrated by comparison to a non-gendered example. If a law mandated Orthodox Jews and Muslims to eat pork, in violation of the dietary rules of each faith, would a decisionmaker find that such a law did not constitute persecution because a Jewish or Muslim individual could simply avoid the penalty for the violation by eating pork? I suspect not. Yet that is effectively what the foregoing decision dictates to women whose political and/or religious beliefs militate against obeying discriminatory laws. Moreover, by extrapolating from the UNHCR position that dress codes are not persecutory to the conclusion that the entire network of norms, policies, laws, and practices constraining Iranian women cannot constitute persecution, the Tribunal ignored the principle (acknowledged in the Australian Guidelines) that policies, laws, or acts which individually fall short of persecution may amount cumulatively to persecution.

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109. *Id.* at 31-32.
110. *See, e.g.*, RRT Reference: N94/03738 (June 5, 1995) (Ransome).

Certainly, no member of the Australian Tribunal is bound by decisions of other members. Nevertheless, in order to explain the discrepancy between this decision and earlier Tribunal cases, I suggest that one must go beyond the apparently divergent opinions on the status of Iranian laws relating to women. It is interesting to note that in an earlier Australian case in which the applicant was accepted, the decisionmaker concluded that the applicant "has strong objections to the Islamicisation of Iranian culture which she sees as subsuming her own religious and cultural practices. The Tribunal considers that the depth of the applicant's beliefs and feelings is such that she would deliberately flout the dress codes thus exposing herself to severe penalties."[111]

Conversely, in the case cited above, the Tribunal asserted that the "applicant has shown no history of willfully flouting Islamic regulations nor any credible reason to believe that she would do so in the future."[112] Evidently, the decisionmaker doubted the sincerity of the claimant's opposition to the strictures imposed on her as a woman. This is similar to the ultimate conclusion drawn by the United States court in *Fatin*. It is worth commenting, however, that a person is not normally required to deliberately court persecution in order to validate her convictions.[113]

Instead of simply resting on its finding of credibility, however, the Australian Tribunal insisted that neither dress codes nor the network of discriminatory laws could ever be construed as persecutory, and that persecutory penalties could be avoided by obeying the laws in question. This finding would presumably defeat the claim of any applicant, regardless of the authenticity of her opposition to the laws in question. I suggest that this case illustrates how some decisionmakers may manipulate doctrine and elevate standards of proof in gender-related cases, especially where credibility is a central issue. I will return to this issue later.

B. *Objective Basis*

It is not enough for a woman to fear persecution. She must also establish that her fear is well-founded. In Canada, the courts require that there be a "reasonable chance" or "real risk" of persecution should the claimant be returned to her country of nationality.[114] In Australia, the applicant must demonstrate a "real chance" of future persecution, unless she proves that she has been persecuted in the past, in which case the burden shifts to the officer to establish a "substantial and material change in circumstances in the country of origin."[115] In the United States, an applicant must demonstrate a

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111. *Id.*

112. RRT Reference: V97/05699.

113. For example, a conscientious objector is not normally required to demonstrate that he has been punished for refusing to serve in order to substantiate his convictions.

114. *See, e.g.*, Adjei v. Canada [1989] F.C. 680.

115. *See* Australian Guidelines, *supra* note 6, ¶¶ 4.17-4.20.

"clear probability of persecution."[116] Evidence regarding the objective basis to a claimant's fear may be located in her experience, or the experience of similarly situated women. Documentary evidence about the human rights situation in the country of origin often furnishes the objective basis to a claimant's subjective fear of persecution.

For example, a devout young Punjabi Sikh male who claims that the Punjabi police have harassed him in the past, and will persecute him in the future on suspicion of being a militant, can buttress his claim with documentation indicating that Punjabi police target people with his profile. This type of information is typically gathered and reported by various NGOs, human rights monitors, media, and governmental bodies, such as Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, and the United States Department of State. Until a few years ago, relatively little attention was paid to gender-specific human rights abuses of women.[117] Part of the explanation surely lies in the evolution of ideas regarding the realm of the public/private dichotomy, and the relationship between that evolution and the production of knowledge. As women activists marshalled the evidence that nudged the international community toward recognizing "women's rights as human rights," the impetus to gather more and better documentation evincing the abuse of those rights accelerated along with it. Today, information about the condition of women globally is gathered not only by feminist organizations, but by the so-called mainstream human rights monitors noted above.

In Canada, most documentation about country conditions used in the hearing rooms is assembled and generated by the IRB Documentation Center. Since the advent of the Canadian Guidelines, the Documentation Center has diligently sought and gathered information about the condition of women in many countries, and has produced various country profiles synthesizing information from a range of sources. In the United States, the INS recently set up a Resource Information Center (the "RIC") modeled after the IRB Documentation Center, and the U.S. Considerations indicate that the "RIC will be working on a number of projects in an attempt to assure that information concerning violations of the rights of women are distributed regularly and systematically."[118] The Australian Guidelines encourage officers to conduct their own research into country of origin conditions, using both departmental resources and UNHCR data.[119]

Despite best efforts, however, it remains the case that physical and sexual violence against women tends to be under-reported at all levels. Moreover,

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116. *See* Ghaly v. INS, 58 F.3d 1425, 1429 (9th Cir. 1995).

117. *See, e.g.*, Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, *in* HUMAN RIGHTS OF WOMEN 326, 327-29 (Rebecca Cook ed., 1994).

118. U.S. Considerations, *supra* note 5, at 706-07.

119. *See* Australian Guidelines, *supra* note 6, ¶¶ 3.3-3.6.

the type of detailed information capable of substantiating an individual claimant's narratives regarding gender related persecution may not be readily available. Decisionmakers in Canada[120] and Australia[121] are cautioned to be sensitive to these limitations.

C. *State Protection*

All three 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. A person is entitled to seek protection in the form of asylum if her government violates her fundamental rights for a reason within the Refugee Convention's scope, or proves unwilling or unable to protect her from the violation of those rights by others.

This principle evolved with no particular attention to gender. However, it resonates with particular force in gender-based claims.[122] Domestic violence is the paradigmatic example of gender-specific abuse committed by "private actors." It has long been consigned to the "private" sphere, and thus allegedly beyond the reach of state intervention. Its invisibility in the arena of international human rights follows almost axiomatically from its characterization as "private" at the local level. And, of course, it is the very inattention and inaction by the state in relation to battering that tacitly condones and sustains it as a systematic practice. In other words, the fact that the state does not adequately protect women from domestic (and sexual) violence is both an institutional manifestation of the degraded social status of women, and a cause of its perpetuation.

In recent years, however, the international community has acknowledged that domestic violence is an appropriate subject of international human rights, as evidenced by the *United Nations Declaration on the Elimination of Violence Against Women.*[123] When taken in tandem with refugee law's recognition that the state may be responsible for its failure to protect individuals from violations committed by non-state actors for a reason described in the Refugee Convention, it should follow that domestic violence is a form of persecution from which the state is obliged to protect its women nationals. After all, the type and extent of abuse inflicted in the home may not differ qualitatively from that inflicted upon victims of police brutality—a beating is a beating is a beating.

Prior to the issuance of the Canadian Guidelines, Canadian decisionmakers could and did dismiss domestic violence as a crime which, though

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120. *See* Canadian Guidelines, *supra* note 4, at 9-10.

121. *See* Australian Guidelines, *supra* note 6, ¶ 3.6.

122. *See generally* Crawley, *supra* note 7.

123. *See Declaration on the Elimination of Violence Against Women*, G.A. Res. 48/104, Supp. No. 49, U.N. Doc. A/48/49 (1993).

deplorable, was not within the purview of refugee law; even if it constituted persecution, the abuse was not connected to a reason described by the Refugee Convention. Indeed, the notion that domestic violence is merely a "private harm" committed by an individual man on an individual woman for personal reasons still figures in Australian and American refugee jurisprudence. Though this rationale has faded from Canadian jurisprudence, significant hurdles remain with respect to the question of state protection in the context of domestic violence.

It would be difficult to speak definitively about the criteria employed by IRB members to determine whether the state is able or willing to protect a woman subjected to domestic violence. The following factors appear to incline decisionmakers toward a finding that the state is able and willing to protect: the country of nationality is a democracy; spousal abuse is punishable under a specific law; services (governmental or non-governmental) are available to assist battered women; and the claimant made no or very few attempts to seek police protection.[124] On the other hand, factors militating in favor of the claimant include: an undemocratic country of nationality; repeated unsuccessful attempts to elicit police response; the assailant holds influential position (through wealth, employment, politics, etc.) that shields him from police intervention; and the claimant belongs to an ethnic group or social class that would lead authorities to ignore or denigrate her requests for assistance.[125]

Certain of the putative indicators of state protection are problematic. For example, the fact that domestic violence is punishable under a specific law does not mean that the law is actually enforced. In addition, a battered woman's failure to resort to police protection should not prejudice her claim if protection would not "reasonably have been forthcoming"[126] anyway. It is not difficult to imagine many situations where an appeal to police protection against an abusive spouse would be futile—and possibly dangerous.

It would overstate the case to suggest that the criteria identified above are reliable predictors of outcome in all cases. Indeed, inconsistent treatment of apparently similar cases is one of the most conspicuous weaknesses of refugee determination in Canada, and features prominently in the jurisprudence around domestic violence and state protection. Two representative cases illustrate the problem.[127] In both cases, the claimant was a Jamaican woman who based her refugee claim on long term, serious abuse at the hands of her intimate partner. In the first case, the abuser was a member of a civilian

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124. Gender Claims in the Toronto Region of the IRB 2-3 (IRB internal document, on file with the author).

125. *See id.*

126. Canada Attorney General v. Ward [1993] S.C.R. 689, 724 (quoting JAMES HATHAWAY, THE LAW OF REFUGEE STATUS 130 (1991)).

127. [1996] C.R.D.D. No. 62, T95-01011/12 (July 30, 1996) (Then, Kelley); [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman).

militia;[128] in the second, a police officer who, *inter alia*, had been convicted in 1989 of beating suspects.[129] In the first case, the claimant made a few unsuccessful attempts to obtain state protection, including two calls to police which resulted in police coming to the home. Once they realized the abuser's connection to the militia, they treated him favorably and left without assisting the claimant[130] The claimant in the second case did not report the abuse to police because "she would be reporting to her husband's colleagues and they would not take action against him."[131] The cases were heard within two months of another,[132] and nothing in the later case suggests that the objective country conditions in Jamaica had changed materially during that interval.

In the first case, the Panel found that the claimant could not avail herself of state protection.[133] In addition to considering the claimant's testimony and her husband's status as militia member, it took into account documentary evidence indicating that domestic violence is not taken seriously by police, restraining orders are frequently ineffective, only two crisis shelters exist in Jamaica, and recent legislation specifically addressing domestic violence had not been implemented.[134]

In the second case, the Panel found that the claimant failed to meet "the onus of providing clear and convincing evidence of the state's inability or unwillingness to protect her should she return to Jamaica."[135] Their reasoning can be summarized as follows: assault is a criminal offense, and Jamaica had passed legislation specifically aimed at domestic violence. The Panel cites documentation noting the effectiveness of the new legislation is "mixed,"[136] adding that "[n]ew legislation whether in Jamaica, Canada, or any other democracies takes some time before it is effectively implemented in all sectors of the population."[137] Later, the Panel asserted, with respect to the government initiative, that "in the absence of evidence to the contrary, it must be presumed that these steps will be effective."[138] The Panel also catalogs services, such as shelters for battered women, legal aid clinics, and crisis centers, which it treats as components of state protection.[139]

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128. [1996] C.R.D.D. No. 62, T95-01011/12 (July 30, 1996) (Then, Kelley), ¶ 15.
129. [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman), ¶ 12.
130. [1996] C.R.D.D. No. 62, T95-01011/12 (July 30, 1996) (Then, Kelley), ¶ 15.
131. [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman), ¶ 21.
132. [1996] C.R.D.D. No. 62, T95-01011/12 (July 30, 1996) (Then, Kelley) was heard June 6, 1996; [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman) was heard August 19, 1996.
133. [1996] C.R.D.D. No. 62, T95-01011/12 (July 30, 1996) (Then, Kelley), ¶ 21.
134. *Id.* ¶¶ 18-22.
135. [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman), ¶ 21.
136. *Id.* ¶ 19.
137. *Id.* It is important to recognize the resort to Canada as a "normative referent" against which other states may be judged: if Canada could do no better, it cannot be a problem. For further elaboration of this point, see Macklin, *supra* note 8, at 271-73.
138. [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman), ¶ 20.
139. [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman), ¶ 18.

The first Panel looked beyond the theoretical availability of state protection and evaluated whether it really exists. The second Panel neither asked, nor answered, the question "does state protection exist in practice, or merely on paper?" Rather, it invoked a presumption that alchemizes legislative enactments into effective protection. Perhaps most ironic is the fact that the decisionmaker who concurred in the first positive decision authored the second negative decision.[140] Why would a decisionmaker agree that Jamaica fails to protect battered women in one case, then come to the opposite conclusion in a case he heard less than two months later? Examination of the two cases reveals that nothing about the particular circumstances of the two women explains this discrepancy.

My experience as a decisionmaker leads me to speculate that two extrinsic factors may have played a role in producing these disparate outcomes. First, when two decisionmakers disagree, the decision of the Panel is positive.[141] Some decisionmakers who are inclined to rule against the claimant may simply "not bother" to formally dissent and will concur with the other decisionmaker, since the decision will be positive in any event. If that same decisionmaker finds herself with another partner who is similarly disposed to make a negative decision, then the Panel can render a negative decision. Thus, while it is true that no two cases are alike, it is equally true that no two decisionmakers are alike either. Given the same set of facts, they may nonetheless make different inferences and reach different conclusions. Second, the credibility assessment of claimants plays a crucial role in determining outcomes. In other words, some decisionmakers may disbelieve (fairly or otherwise) that the claimant was actually in a battering relationship, but lack the ability to articulate the basis for their conclusion in legally defensible reasons. Reliance on other "legal hooks" such as state protection becomes a convenient and relatively easier method of justifying a negative conclusion which is actually driven by disbelief of the claimant's story of abuse. The result, unfortunately, is inconsistent and irreconcilable jurisprudence on the topic of state protection in the context of domestic violence. I believe that these factors figure prominently in domestic violence claims, where resistance by some decisionmakers to the subject matter of the refugee claim and the inherent difficulty of establishing a past pattern of abuse raise challenging issues in relation to credibility determination.

A review of decisions by the Australian Tribunal related to domestic violence indicates variation in the assessment of state protection in situations

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140. Kelley wrote the decision in [1996] C.R.D.D. No. 62, T95-01011/12 (July 30, 1996) (Then, Kelley), and Then concurred; Then wrote the decision in [1996] C.R.D.D. No. 204, T95-04279 (Dec. 30, 1996) (Then, Wolman), and Wolman concurred.

141. *See supra* note 25 and accompanying text.

of spousal abuse.[142] I have been unable to locate any decisions which refer explicitly to the Australian Guidelines on this issue. However, as noted earlier, the Australian Tribunal is not formally subject to the Guidelines and, perhaps more importantly, relatively few cases involving domestic violence have been decided and reported since the issuance of the Guidelines.

The U.S. Considerations say little about state protection that applies to the situation of domestic violence, save the following:

> . . . the persecutor might also be a person or group outside of the government that the government is unable or unwilling to control. If the applicant asserts a threat of harm from a non-government source, the applicant must show that the government is unwilling or unable to protect its citizens. It will be important in this regard, though not conclusive, to determine whether the applicant has actually sought help from government authorities. Evidence that such an effort would be futile would also be relevant.[143]

The Considerations do not address evidentiary issues regarding state protection or the standard of "adequacy" that citizens are entitled to expect.

D. *Nexus Between Persecution and Convention Grounds*

In order to succeed in a refugee claim, a claimant must prove not only that she is persecuted, or that the state is unwilling or unable to provide effective protection. She must also prove that the reason for the persecution relates to one of the enumerated grounds of persecution—race, religion, nationality, particular social group, or political opinion. The list does not include gender, and neither of the Guidelines nor the U.S. Considerations add it. Instead, they encourage decisionmakers to let gender inform their assessment under race, religion, nationality, or political opinion if possible. In the final resort, "women" (or a subcategory thereof) might qualify under the residual category of "particular social group."

1. *Enumerated Grounds*

The Australian and Canadian Guidelines attempt to illustrate the interaction between gender and each of the enumerated grounds (*i.e.*, race, religion, nationality, and political opinion). With respect to race, the Australian Guidelines refer to "ethnic cleansing" and state that a "persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by

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142. *See, e.g.*, the negative decisions rendered in RRT Reference: N94/06342 (June 28, 1995) (Layton) (refugee from Fiji); RRT Reference: N96/11892 (Oct. 16, 1996) (Smidt) (refugee from Ghana). For positive decisions, see RRT Reference: N94/06730 (Oct. 14, 1996) (refugee from the Philippines) (Tsamenyi); RRT Reference: V96/04260 (May 30, 1996) (refugee from Lebanon) (Borsody).

143. U.S. Considerations, *supra* note 5, at 717.

killing, maiming or incarcerating the men whilst the women may be viewed as capable of propagating the ethnic identity and persecuted in a different way, such as through sexual violence."[144] The Canadian Guidelines remark that "a woman from a minority race in her country may be persecuted not only for her race, but also for her gender."[145] The U.S. Considerations are silent on the intersection of race and gender.

With respect to nationality, the Australian and Canadian Guidelines mention that a woman who marries a foreign national may lose her citizenship. They both caution, however, that it is not loss of citizenship *per se* that constitutes persecution, but the consequences that flow from loss of citizenship (such as loss of residence rights) that may amount to persecution.[146] The U.S. Considerations do not discuss nationality as a ground of persecution in a gender context.

With respect to religion, the Canadian Guidelines propose that freedom of religion encompasses the right to practice, or not practice, a prescribed religion (or a prescribed version of a religion). Thus, in a patriarchal theocracy where "the religion assigns certain roles to women," a woman who "does not [fulfill] her assigned role and is punished for that . . . may have a well-founded fear of persecution for reasons of religion."[147] An obvious example is the case of a woman who refuses to follow dress codes imposed by the state in the name of a particular version of Islam. The claimant may reject the interpretation of Islam imposed upon her by the state and others, or she may reject Islam outright. In either case, her fear of persecution may be linked to religion.

Strangely, the U.S. Considerations do not articulate religion as a ground of persecution in such cases, but rather incorporate it into the definition of persecution. The U.S. Considerations quote *Fisher v. INS*,[148] a case dealing with a woman who objected to, *inter alia*, Iranian dress codes, for the proposition that "when a person with religious views different from those espoused by a religious regime is required to conform to, or is punished for failing to comply with laws that fundamentally are abhorrent to that person's deeply held religious convictions, the resulting anguish should be considered in determining whether the authorities have engaged in extreme conduct that is tantamount to persecution."[149] The Considerations do not mention that this persecution may be on grounds of religion.

All three directives do indicate that the same type of situation—persecution caused by women's resistance to institutionalized discrimination, as manifested by her speech or conduct—may also be framed as persecution

144. Australian Guidelines, *supra* note 6, ¶ 4.29.
145. Canadian Guidelines, *supra* note 4, at 3.
146. *See id. See also* Australian Guidelines, *supra* note 6, ¶ 4.31.
147. *See* Canadian Guidelines, *supra* note 4, at 3.
148. 37 F.3d 1371 (9th Cir. 1994).
149. 37 F.3d at 1379.

on grounds of political opinion.[150] That political opinion may be labeled feminist. Certainly, political opinion would be the preferred choice where the laws or practices in question are putatively justified not by "religion," but by "culture."

The Canadian Guidelines go somewhat further than their counterparts and alert decisionmakers that "where women are 'assigned' a *subordinate status* and the authority exercised by men over women results in a general oppression of women,"[151] the political protest and activism engaged in by women may manifest differently from the familiar modes expressed by men. For instance, a refusal to wear the veil in a fundamentalist Islamic state, setting up communal kitchens and cooperative nurseries under the fascist Pinochet regime, or providing food, shelter and sustenance to those engaged in "public" forms of politics, could all be seen as brands of political resistance carried out within the cultural confines of the "private sphere" roles assigned to women.[152] They should not be discounted by decisionmakers just because they do not conform to the standard male-centered spectrum of political activism; indeed, those who persecute women because of these types of activities evidently understand (or impute) a political dimension to them.[153]

The United States takes a far more expansive view of political opinion than Canada or Australia. For example, in *Lazo-Majano v. INS*,[154] the Ninth Circuit ruled that a Salvadoran domestic worker who was beaten, raped, and enslaved by her military employer was persecuted on account of political opinion in the sense that her persecutor was "asserting the political opinion that a man has a political opinion that a man has a right to dominate."[155] He persecuted her allegedly to "to force her to accept his opinion without rebellion."[156] Her employer threatened to denounce her as a political subversive if she resisted him, though the record seems to indicate that he did not genuinely believe her to hold subversive political opinions. Rather, he appears to have used the threat of denunciation to intimidate her into silence. The court's analysis was designed to overcome the assertion that the harm inflicted on the applicant was merely "personal," and thus it strained to find that she had a political opinion in relation to the Salvadoran government. It would not suffice to suggest that the nexus to the Convention ground was the

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150. See Australian Guidelines, *supra* note 6, ¶¶ 4.25-4.28; Canadian Guidelines, *supra* note 4, at 4; U.S. Considerations, *supra* note 5, at 710-11.

151. Canadian Guidelines, *supra* note 4, at 4.

152. *See* Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT'L J REFUGEE L. 518 (1989).

153. The Canadian Guidelines thus attempt to respond to the concern expressed by Thomas Spijkerboer that the women's activities in the so-called "private sphere" may not be recognized as political. *See generally* THOMAS SPIJKERBOER, EMANCIPATION COUNSEL, WOMEN AND REFUGEE STATUS: BEYOND THE PUBLIC/PRIVATE DISTINCTION (1994).

154. 813 F.2d 1432 (9th Cir. 1987).

155. *Id.* at 1435.

156. *Id.*

persecutor's political opinion regarding the role of women because, as the United States Supreme Court stated in *INS v. Elias-Zacarias*,[157] the persecution must be "on account of the victim's political opinion, not the persecutor's."[158] The U.S. Considerations do not elaborate on the potential scope of political opinion in relation to gender claims. However, on September 30, 1996, just over a year after the INS issued the Considerations, American immigration legislation was amended to compel recognition of forcible abortion and sterilization as persecution on account of political opinion.[159] Curiously, the legislation did not actually articulate what the political opinion consisted of.

It is interesting to note that Australian and Canadian jurisprudence tend not to link fear of forcible sterilization to political opinion. Instead, Canadian decisionmakers usually characterize forcible sterilization as persecution on account of membership in a particular social group, such as "Chinese parents with more than one child who face forcible sterilization."[160] In Australia, the High Court has rejected a variety of social groups constructed around parents who resist China's one child policy, and has ruled that there is no particular social group to which the targets of forcible sterilization belong.[161] The High Court has not yet considered political opinion as an alternative ground. (As an aside, it is worth noting that only in the United States have politicians intervened to legislate a particular interpretation of the refugee definition which for all intents and purposes only applies to a specific fact situation arising in a single country. This fact alone speaks to the varying levels of politicization and influence of foreign policy on refugee determination in different States Party to the Refugee Convention.)

In theory, women ought to be the main beneficiaries of refugee protection for violations of reproductive rights, because it is women who typically

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157. 112 S. Ct. 812 (1991).

158. U.S. Considerations, *supra* note 5, at 710.

159. Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the refugee definition by adding the following sentence:

> For the purposes of determinations under [the Immigration and Nationality] Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to prosecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, sec. 601, § 101(a)(42), 110 Stat. 3009-546, 3009-689.

160. *See, e.g.*, Chan v. Canada [1993] F.C. 675; Cheung v. Canada [1993] F.C. 314. *See also* note 119 *supra*.

161. *See* Anor v. Minister for Immigration and Ethnic Affairs (1997) 190 C.L.R. 225. For a very thorough and thoughtful analysis of the case, *see* Penelope Mathew, *The High Court and 'Particular Social Groups': Lessons for the Future*, 21 MELB. U. L. REV. 277 (1997). Professor Mathew not only provides an excellent comment on the case and relates it to international responses to China's one child policy, she also usefully compares United States, Canadian, and Australian precedents and discusses the broader implications of the decision on the definition of particular social group, using gender and sexual orientation as vehicles for discussion.

suffer the forcible sterilizations as well as the abortions. This is not because the Chinese state prefers to sterilize women over men, but because the "choice" of which spouse will be sterilized is made by the couple, with the unsurprising result that it is the woman who almost always ends up being sterilized.[162] Ironically, the leading cases from the highest courts of Canada,[163] the United States,[164] and Australia[165] all involve male claimants allegedly fleeing forcible sterilization, perhaps because men are more likely than women to have the resources to flee. One cannot but remark how sex inequality in the "private sphere" informs not only who is more likely to undergo coercive violation of reproductive capacities, but also who has the opportunity to claim refugee protection on that account.

The phenomenon of domestic violence is perhaps the paradigmatic manifestation of women's relative powerlessness in the "private sphere." As with forcible sterilization, a divergence appears to be emerging with respect to the treatment of domestic violence in the United States, on the one hand, and Canada and Australia on the other. The latter link domestic violence to membership in a particular social group, while in the United States, some decisionmakers use the ground of political opinion in addition to or instead of particular social group. In order to appreciate the implications of these competing approaches, I describe and compare them together in the next section.

2. *Particular Social Group*

In many, if not most, cases involving women claimants, decisionmakers can link the persecution to race, religion, nationality or political opinion. Where individual women are persecuted because of their male relatives' activities or political opinions, tribunals have recognized the "family" as a particular social group, and accepted that women may be targeted for persecution because of their kinship. The Canadian Guidelines and the U.S. Considerations endorse this approach,[166] while the Australian Guidelines address the same scenario as persecution on account of imputed political opinion. This is based on the assumption that persecutors impute to women the political opinions of their male kin and persecute them for that reason.[167]

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162. *See, e.g.*, my decision in [1994] C.R.D.D. No. 368, A93-81751/52/53, Aug. 16, 1994 (Macklin, Noseworthy).

163. Chan v. Canada [1995] S.C.R. 593. The majority of the Supreme Court of Canada refused to rule on whether forcible sterilization constitutes persecution and based its decision on other grounds. The dissent did rule that it constitutes persecution. *See id.* In Cheung v. Canada, 19 IMMIGR. L. REP. (2D.) 181, a unanimous Federal Court of Appeal ruled that forcible sterilization did constitute persecution. The refugee claimant in *Cheung* was a woman.

164. *See* Matter of Chang, Interim Decision 3107 (BIA May 12, 1989).

165. *See* Anor v. Minister for Immigration and Ethnic Affairs, (1997) 190 C.L.R. 225.

166. *See* Canadian Guidelines, *supra* note 4, at 5; U.S. Considerations, *supra* note 5, at 714-15.

167. *See* Australian Guidelines, *supra* note 6, ¶¶ 4.24, 4.26.

Despite the possibility of defining a particular social group by reference to gender, decisionmakers have generally demonstrated a preference for using the enumerated grounds wherever possible. I suggest that it is not always appropriate to do so. The following case illustrates some of the problematic messages conveyed by the reasoning employed by a United States Immigration Judge who accepted a woman asylum seeker fleeing domestic violence.[168] The applicant was a Jordanian woman married to a prominent businessman with connections to the Jordanian Royal family.[169] He beat her over the course of thirty years. His power and influence insulated him from legal intervention.[170]

In accepting the applicant, the judge ruled that the claimant was persecuted because of her belief in Western values as expressed through her actions.[171] The claimant's actions consisted in the main of attempting to obtain her high school equivalency[172] and resisting the abuse inflicted on her (over the course of thirty years). The following passage is illustrative:

> The respondent has continued to express her belief in Western values through her actions. The respondent has been punished because her actions collide with the societal and religious norms in Jordan. The respondent's actions have challenged the system. . . . The respondent, by challenging her husband's power to beat her, has challenged the system of submission by women in Jordan.[173]

Thus, the woman was targeted for abuse because "she seeks to have her own identity, who believes in the 'dangerous' Western values of integrity and worth of the individual."[174] The purpose of the beatings was ostensibly "to achieve her submission into the society's mores."[175]

It is curious and not a little ethnocentric to presume that a belief that one should not be beaten is a distinctively "Western value." On the one hand, it patronizes and essentializes Jordanian society. On the other hand, if a belief that women should not be abused by their male partners really was a so-called "Western value," one would expect domestic violence to be rare (or non-existent) in the West. It is, of course, a pervasive and pernicious phenomenon in the United States, Canada, and other "refugee receiving" countries, and I doubt that any informed person would contend that these states do a particularly adequate job of protecting women from domestic violence. Indeed, the Immigration Judge describes an episode where the

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168. In the matter of A and Z, Nos. A 72-190-893, A 72-793-219 (Executive Office for Immigration Review, Office of the Immigration Judge, Dec. 20, 1994).
169. *See id.* at 2.
170. *See id.* at 3-6.
171. *See id.* at 16.
172. *See id.* at 17.
173. *Id.* at 16.
174. *Id.* at 14.
175. *Id.* at 15.

applicant and her husband were living together in the United States (he subsequently returned to Jordan), and the applicant's husband "was terrorizing his wife and sons."[176] The husband called police to attempt to have the applicant and her children thrown out of their residence.[177] The police arrived, tried to "calm the situation down" whereupon the husband offered the police a bottle of vodka (the record does not indicate whether they accepted), and police left.[178] The abuse resumed.[179] This hardly speaks favorably of the "Western" attitude toward domestic violence.

Apart from the ethnocentrism of the Immigration Judge's analysis, it seems bizarre to characterize a man's reason for beating his spouse as *her* real or imputed political opinion about her role and status in society. Among other things, it begets potentially invidious and artificial distinctions regarding men's motivation for beating their intimate partners. For example, in the course of his decision, the Immigration Judge remarks that if a man beats his partner because he believed she was having an extramarital affair, "her claim would not, by itself, qualify as a ground for granting asylum."[180] In fact, many abusive men are very jealous and possessive, and frequently accuse their intimate partners of infidelity. Surely, the issue is not the proximate reason for the violence, but the underlying assumption that men are entitled to beat women. This attitude is merely another manifestation of their proprietary view of women. The Immigration Judge's analysis appears predicated on the idea that there are "political" reasons for beating wives, and there are "personal" reasons for beating wives. Merely to state this proposition is to reveal its anti-feminist implications.

On a more optimistic (if unrealistic) note, that the main evidence presented of the Jordanian woman's alleged adherence to so-called "Western values" was her objection to being beaten. If acting on the urge to self-preservation is all that is required to manifest a political opinion regarding women's role in society, then one might hope that almost every women who flees domestic violence should be able to establish a nexus to political opinion by virtue of having fled.

As the court implied in *Lazo-Majano*, it is the *man's* political opinion regarding the role, status and value of women that explains why he abuses women.[181] I find it more plausible to suggest that men who beat women do so because of what men believe about women, not what women believe about themselves. Indeed, to suggest that men beat women because of what women believe (or are imputed to believe) on the basis of their actions might support an inference that the abuse would stop if women only "behaved" and

176. *Id.* at 8.
177. *See id.*
178. *See id.*
179. *See id.*
180. *Id.* at 18.
181. *See supra* notes 155-56 and accompanying text.

"changed their attitude," a proposition which is both offensive and dangerous to women.

It appears that the political opinion at stake in the Jordanian case is more or less the notion that women are entitled to be treated as human beings. In the case of an abused woman from Sierra Leone,[182] the Immigration Judge described her political opinion as the assertion of "individual autonomy" and "resistance to mandated female subservience."[183] Consider that it would be odd to argue that South African whites oppressed blacks because blacks held the political opinion that they were entitled to be treated as human beings (though they presumably did hold that belief). Indeed, apartheid existed because of the racist beliefs of whites—in other words, blacks were persecuted because of their racialized identity, not because of what they believed. By the same token, domestic violence is not about what a woman believes, but about her gender identity—and the sexist beliefs of the man who abuses her. This cannot be captured under the rubric of political opinion because, as noted earlier, political opinion refers to the victim's beliefs, and not those of the persecutor. Contorting resistance to domestic violence into a political opinion is both awkward and unnecessary. It avoids dealing with a gender-based particular social group, but at too high a cost.

Most Canadian and Australian decisionmakers concede that the reason for domestic violence is linked in some meaningful way to gender. Since gender (or sex) is not listed as a ground of persecution, this has led to consideration of "women," or "women subject to domestic violence," as a particular social group in all three jurisdictions. In *Ward*, the Supreme Court of Canada recognized that a particular social group may be defined by:

1) an innate or unchangeable characteristic;
2) voluntary association for reasons so fundamental to human dignity that members should not be forced to forsake the association;
3) past membership in a voluntary association, unalterable due to its historical permanence.[184]

The Court listed gender as an example of such a characteristic.[185] The revised Canadian Guidelines incorporate this aspect of *Ward* into the text,[186] but contain no further practical guidance on whether or how to circumscribe a gender-based particular social group.

The Australian Federal Court has not explicitly considered whether gender may define a particular social group. It has, however, confirmed that a

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182. Deborah Anker et al., *The BIA's New Asylum Jurisprudence and Its Relevance for Women's Claims*, 73 INTERPRETER RELEASES 1173, 1180 (1993) (citing Matter of M-K-, A72 374 558 (Executive Office for Immigration Review, Office of the Immigration Judge, Aug. 9, 1995)).

183. *Id.*

184. *See* Canada Attorney General v. Ward [1993] S.C.R. 689, 739.

185. *See id.*

186. Canadian Guidelines, *supra* note 4, at 4.

particular social group cannot be constituted by a common fear of a particular form of persecution.[187] In *Matter of Acosta,*[188] the BIA remarked that sex could be the type of shared characteristic relevant to constituting a particular social group. Like Canada, however, this observation has not yielded further specification and, as the Considerations note, various United States appellate courts have proffered different opinions on whether and how gender may form the basis of social group ascription.[189]

The U.S. Considerations discuss gender and "particular social group" in the context of women who resist the norms of fundamentalist Islamic regimes because those are the fact patterns contained in the jurisprudence.[190] The U.S. Considerations do not examine the particular social group category in the context of domestic violence. Neither the Australian or Canadian Guidelines address "particular social group" in reference to domestic violence. This is unfortunate, because in my experience domestic violence is probably the most common and challenging context wherein decisionmakers must articulate a "particular social group."

Upon examination of case law, the actual choices made by Australian and Canadian decisionmakers usually range from "women from country X," to "women from country X who are victims of domestic violence."[191] In the United States, some attempt has been made to construct a particular social group along the lines of "women who fail to conform to the subservient role assigned to women."[192] This approach derives from Conclusion 39, stating that "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention."[193] To the extent that their transgression of social mores consists of resistance to being beaten, this particular social group is more or less a restatement of the political opinion rationale, and is problematic for the same reasons.

Another popular technique utilized by decisionmakers in all three jurisdictions is to string together virtually all qualities, circumstances, and features of the claimant that account for her exposure to persecution. A particularly egregious Canadian example related to gender consists of

> new citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israeli society, despite the generous support offered by the Israeli government,

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187. *See* Anor v. Minister for Immigration and Ethnic Affairs (1997) 190 C.L.R. 225.
188. 19 I&N Dec. 211 (BIA 1985).
189. *See* U.S. Considerations, *supra* note 5, at 712-14.
190. *See id.*
191. On occasion, one also sees "women who are victims of domestic violence and cannot obtain state protection."
192. *See* Anker et al., *supra* note 182, at 1180.
193. *See supra* note 14 and accompanying text.

> who are lured into prostitution and threatened and exploited by individuals not connected to government, and who can demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection.[194]

In effect, the decisionmaker accretes the circumstances that arguably make the fear of persecution objectively well-founded, the events which give rise to the subjective fear, and the personal attributes of the claimant into a particular social group that likely contains one member—the claimant. Obviously, this approach is both conceptually muddled and practically unwieldy.

With respect to the choices of "women" or "women who are victims of domestic violence," none of the three directives offers explicit advice that would assist decisionmakers in selecting definitively from among the options, although they do contain general comments that may be somewhat useful.

The U.S. Considerations indicate that some appellate courts reject "women" as a potential particular social group because it is "overbroad": if a woman has a well-founded fear of persecution because she is a woman, the necessary implication is that all women have a well-founded fear of persecution simply because they are women, and this simply cannot be. Moreover, where courts have endorsed in principle a particular social group comprised of women or a sub-category of women, the applicants for asylum ultimately failed because they could not prove to the court's satisfaction the persecution was "on account of" membership in the group. Understandably, the U.S. Considerations emphasize the general principles that emerge from these cases, rather than the rather dispiriting outcomes on the facts.

Meanwhile, various Canadian and Australian decisionmakers, including the Australian High Court,[195] have ruled that it is tautological to define a particular social group by reference to the form of persecution feared. In other words, it is circular to assert that a woman has a well-founded fear of persecution in the form of domestic violence because she belongs to a particular social group defined as "women who are victims of domestic violence."[196] The cumulative effect of the critiques is that "women" is too broad a category to form a particular social group, and "women who are victims of domestic violence" is too narrow. The bottom line is that women lose no matter what.

As noted earlier, the revised Canadian Guidelines incorporate *Ward* and advise that women may form a particular social group. While they add that a

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194. Litvinov v. Canada [1994] F.T.R. 60.

195. Anor v. Minister for Immigration and Ethnic Affairs, (1997) 190 C.L.R. 225, 263.

196. One may as well dispense with the requirement that persecution be linked to a reason, if the reason is that one belongs to a group defined as persecuted people. Presumably, this same logic would also disqualify "women who are victims of domestic violence who cannot obtain state protection" as a particular social group.

sub-group of women may be identified by reference to other innate or unchangeable characteristics (such as age, race, marital status, economic status, etc.), they do not expressly exclude the form of persecution feared as an appropriate factor.[197] In effect, the Canadian Guidelines are permissive and inclusive, with the unfortunate result that they provide little direction and invite inconsistency.

To the extent that positive decisions are rarely challenged, decisionmakers can construct the particular social group however they see fit and ignore the criticisms; the problem becomes more acute where decisionmakers adopt one or both of the objections to a gender-based particular social group and reject claimants on grounds that their fear of persecution cannot be linked to a *Convention* ground. This conclusion may be misstated as a finding that the claimant fears "personal harm" rather than persecution.

In my view, the critique of "women who are victims of domestic violence" as a particular social group is cogent. In the context of the refugee definition, it is circular to incorporate the particular persecution feared into the definition of a particular social group. Conversely, the contention that "women" cannot constitute a particular social group without making all women refugees is not, I submit, a valid criticism.

The impetus to reject a particular social group defined as "women" *simpliciter* emanates, I suggest, from two related anxieties. First, some believe that sex alone is not an attribute sufficient to "bind" such a large population as women into a particular social group. Second, some subscribe to a "floodgates" fear that recognizing women as a particular social group somehow means that all women are automatically entitled to refugee status upon proof of their sex.

Partial responses to these objections can be found in jurisprudence and the Canadian Guidelines. In *Chan v. Canada*,[198] the dissent emphatically rejected the floodgates argument as a relevant factor, stating that "I am mindful that the possibility of a flood of refugees might be a legitimate political concern, but it is not an appropriate legal consideration."[199] With respect to the concern that the category "women" is simply too large and diffuse to constitute a particular social group, the Guidelines state as follows:

> The fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.[200]

The notion that calling women a particular social group leads inexorably to

197. *See* Canadian Guidelines, *supra* note 4, at 5.
198. Chan v. Canada [1995] S.C.R. 593.
199. *Id.* ¶ 57.
200. Canadian Guidelines, *supra* note 4, at 5.

designating all women as refugees is implicitly refuted in the following passage in the Guidelines:

> Because refugee status is an *individual remedy*, the fact that a claim is based on social group membership may not be sufficient in and of itself to give rise to refugee status. The woman will need to show that she has a genuine fear of harm, that one of the grounds of the definition is the reason for the feared harm, that the harm is sufficiently serious to amount to persecution, that there is a reasonable possibility that the feared persecution would occur if she was to return to her country of origin and that she has no reasonable expectation of adequate national protection.[201]

In other words, being a woman is not likely to ever be enough to earn one refugee status, anymore than being a family member (another commonly used "particular social group"), or a member of a particular ethnic/racial minority, automatically makes one a refugee. Yet it remains that some people are persecuted because of their kinship, or on account of their "race"/ ethnicity, just as some women are persecuted because they are women. The harm that a woman fears may be domestic violence—which is sufficiently serious to constitute persecution. Her fear may be genuine based on past experience of battering. Though her persecutor was not a state actor, a woman can substantiate the objective basis for her fear by demonstrating that the state was unwilling or unable to protect her. A woman who has never been abused and cannot furnish any specific reason to fear that she will be battered in the future will almost certainly be unable to establish that her subjective fear is valid. A woman who was battered in the past, but successfully left the relationship and lived openly and safely since then may have difficulty establishing an objective basis to her present fear. Put simply, elements of the refugee definition, quite apart from the presentation element, perform a filtering function. Of course, one may as well add to this the practical reality that so few women actually have the resources to flee their country of origin that there is no danger of a massive influx of women refugee claimants.

Perhaps the easiest way to approach the issue is to understand the "particular social group" in the context of the other grounds of persecution and the anti-discrimination principles animating the refugee definition. The exact wording of the refugee definition requires that persecution be linked to race, religion, nationality, membership in a particular social group, or political opinion. The anti-discrimination orientation of the refugee definition implies that like other grounds of persecution, a particular social group is also characterized by a marginalized or disadvantaged status in society which makes members vulnerable to oppression, including (but not limited to) the actual persecution feared by the claimant.

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201. *See id.* at 6.

As noted above, *Ward* described the criteria for particular social group as innate or unchangeable characteristic, voluntary association for reasons fundamental to human dignity, or past association for the same reasons. Close examination of the grounds of persecution which precede the "particular social group"—race, religion, nationality, and political opinion—reveal that they are merely specific applications of the criteria for designating a particular social group. Thus, race and nationality (depending on the nationality laws) could be described as unchangeable characteristics. Religion and nationality (again, depending on the nationality laws in question) may be considered a voluntary associations for reasons so fundamental to human dignity that the individual should not be required to renounce them. While religion and nationality are (usually) alterable, persecutors may sometimes target individuals because of their former nationality or religion. Finally, political opinion may often overlap with particular social group, inasmuch as many politically active people associate with other like-minded people in political parties or organizations.

If it is correct to describe race, religion, nationality and (to some extent) political opinion as embodiments of the particular social group criteria, then it follows that the mode of describing other particular social groups should resemble the enumerated grounds. Thus, for example, refugee discourse refers to a claimant who fears persecution because she is Tamil, not because she is "a Tamil who had been subject to anti-Tamil harassment and discrimination amounting to persecution." A finding that a claimant was persecuted because of her ethnicity (Tamil) is not tantamount to a finding that all Tamil people are refugees. So too with a finding that a woman has been violated because of her membership in a particular social group (women).

In my opinion, the following reasoning by Lesley Hunt, a member of the Australian Tribunal, articulates the correct approach.[202] The case concerned a Filipina claimant who was systematically physically and sexually abused by her husband over the course of their twenty-seven year marriage. She could not obtain state protection. Although other Australian and Canadian decision-makers (including the author) have arrived at the same conclusion regarding women as a particular social group, Hunt's analysis is so thoroughly superb that it warrants quotation at length:

> It is the Tribunal's view that "women", . . . whilst being a broad category, nonetheless have both immutable characteristics and shared common social characteristics which make them cognisable as a group and which may attract persecution. The obvious immutable characteris-

202. *See generally* RRT Reference: N93/00656 (Aug. 3, 1994) (Hunt)

tic is that of gender. It simply cannot be argued that gender is a characteristic which can be, or should be required to be changed. It is a characteristic fundamental to individual identity. . . .

The shared social characteristics common to all women, relate to gender and either emanate from, or are generally perceived to emanate from, gender. They include the ability to give birth, the role of principal child-rearers, nurturers, keepers of the family home, supportive partners in a relationship. And, as in the present case, it is commonly expected throughout most societies that it is characteristic of women to remain loyal to their husbands, to keep marriages together, regardless of their treatment within that marriage. It is the Tribunal's view therefore that women form a cognisable group. . . .

That women share a common social status is evident from the fact that women generally earn less than men and that few women hold positions of power in both government and non-government institutions. These characteristics, specifically shared by women, defined by their social status, are addressed through the various affirmative action and equal opportunities policies, and through Commonwealth anti-discrimination legislation.

Another element binding all women, regardless of culture or class, is that of the fear of being subjected to male violence. Whether that fear relates to violence in the form of rape, domestic violence, incest, sexual harassment, sexual exploitation, or female genital mutilation, it is all located within the context of male violence. That such fear is a common characteristic amongst women is evidenced by reports, books and articles too numerous to list . . . and by laws aimed specifically at addressing the issue of violence against women. That such fear is well-founded is evidenced by the high incidence of violence against women. Whilst definite figures are difficult to obtain from any country, it is estimated that in Australia domestic violence, perpetrated by men against women, occurs in between one in three and one in ten. . . .

In the Philippines, the country presently in question, [the United States] Department of State, Country Reports on Human Rights Practices report that "violence against women, particularly domestic violence, is a serious problem in the Philippines." Another report states that in one community surveyed in the Philippines domestic violence occurs in one in two households.

That domestic violence or "wife bashing" is regarded in many countries as a private problem rather than a public crime, can be directly attributed to women's social status; to the fact that historically, in many societies, women have been, and in many instances still are, regarded as being the private property of firstly their fathers then their husbands. That women face differential treatment within the legal system, arising from their social status, is evident from the focus given to women and

> violence against women, in for example, the [United States] Department of State Country Reports. . . .
>
> Thus, in the Tribunal's view, it is women's social status and their subsequent differential treatment which results in the lack of police intervention and therefore the failure of state protection, in many countries today particularly in relation to violence perpetrated against women by their husbands.
>
> That women share a common social status is further evidenced by the establishment of the United Nations Commission on the Status of Women and other formal mechanisms for the advancement of women's status including the [United Nations] Decade for Women from 1975 to 1985.
>
> Women as a group have been specifically highlighted in the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Political Rights of Women, and the Convention on the Nationality of Married Women.
>
> It is the Tribunal's view that there is ample evidence indicating that "women" are a particular social group as, in spite of being a broad group, they are a cognisable group in that they share common fundamental and social characteristics. Whilst there does exist separation in lifestyles, values, political leanings etc., women share a defined social status and as such are differentially dealt with by society as a group. Furthermore the Tribunal finds that women can face harm based on who they are as women, and therefore for their membership of this particular social group. It is women's social status that often leads to the failure of state protection, and this is particularly so with regard to domestic violence.[203]

It is noteworthy that this decision was rendered two years before the release of the Australian Guidelines. The Australian Guidelines paraphrase an excerpt and state that the Tribunal "has found that whilst being a broad category, women nonetheless have both immutable characteristics and shared common social characteristics why may make them cognisable as a group and which may attract persecution."[204] Unfortunately, the Australian Guidelines do not actually cite Hunt's decision or describe the factual context; this limits its potential impact. Moreover, other Australian members of the Tribunal have rejected the contention that women constitute particular social group,[205] so one cannot assume a consistent gender-sensitive analysis from

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203. *See id.* at 13-17 (citations omitted).

204. *See* Australian Guidelines, *supra* note 6, ¶ 4.33.

205. In a recent case, a member of the Tribunal accepted that women may, in principle, constitute a particular social group on account of shared marginalization, but found that Mauritian women were not marginalized: "the attitude of the government of Mauritius and Mauritian society as a whole is not indicative of the systemic marginalization of women at all levels, which, in my view, is a necessary precondition to the acceptance of "women in Mauritius" as a particular social group." RRT Reference: N96/12294 (June 18, 1997) (Mathlin).

Australian officers on this issue. This would seem to commend the utility of providing more detail in the Australian Guidelines about precisely how and why women might constitute a particular social group in the context of domestic violence.

One can also appreciate the virtues of Hunt's analysis by contrasting it with the United States decision wherein the Jordanian woman was accepted on the basis of political opinion.[206] Hunt's decision does not rely on racist or orientalist stereotypes of other cultures, does not implicitly (and falsely) exaggerate the remedies available to battered women in the West, does not depend on the status or occupation of the abuser,[207] does not speculate on the "personal" motives of individual men that systematically beat their wives, or strain the facts in order to project onto survivors a political opinion that "motivates" the abuse. Hunt's analysis also elaborates on why the subordinated social status of women constitutes them as a particular social group, and links both domestic violence and inadequate state protection in response to it to that status. I suggest that for all these reasons, conceptualizing domestic violence as persecution on account of membership in a particular social group (women) is superior in principle and practice to addressing it as persecution on account of political opinion.

VI. CONCLUSION: FUTURE CHALLENGES

The Australian and Canadian Guidelines and the U.S. Considerations represent bold and courageous initiatives by national agencies to address the specificity of women's experiences of persecution within the context of the definition of "refugee" promulgated at the Refugee Convention. The UNHCR certainly took the lead in promoting gender awareness in various aspects of the refugee phenomenon (from the refugee camp to the hearing room). The normative influence of the UNHCR could not translate directly into action at the national level by States Party to the Refugee Convention, because the UNHCR exerts no formal authority regarding the interpretation of the refugee definition by States Party, but its impact on opening up space to reevaluate existing principles and approaches should not be underestimated. In the end, a constellation of forces within Canada precipitated the Canadian Guidelines, which in turn helped catalyze similar action in the United States and eventually Australia.

It is thus interesting to observe how the spark from the international arena can ignite the local policy of one state, who in turn passes the flame on to other states. In effect, the transmission of ideas regarding the interpretation of an international legal obligations proceeds both horizontally and vertically.

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206. *See* In the matter of A and Z, Nos. A 72-190-893, A 72-793-219 (Executive Office for Immigration Review, Office of the Immigration Judge, Dec. 20, 1994).

207. This factor may be relevant to the willingness of the state to provide protection, but should not enter into the analysis of whether the persecution is linked to a Convention reason.

The international movement for recognition of women's rights as human rights engendered (pun intended) particular attention to refugee women by the UNHCR, which the UNCHR in turn diffused to States Party. Canada, by demonstrating what could be achieved—politically and legally—in one jurisdiction, made it politically feasible for the United States and Australia to follow suit. Ultimately, this may give the UNHCR additional leverage in encouraging other States Party to adopt their own gender Guidelines. This mutually reinforcing cycle of activity is captured by the 1995 General Conclusion on International Protection, wherein the Executive Committee of the UNHCR:

> Call[ed] upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women, by sharing information on States' initiatives to develop such criteria and guidelines, and by monitoring to ensure their fair and consistent application. In accordance with the principle that women's rights are human rights, these guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or other gender-related persecution.[208]

This passage illustrates the impact both of evolving international human rights norms and the action of individual States Party on the UNHCR's stance toward other States Party.

Ultimately, however, it is probably the perceived success (or failure) of the Guidelines and the Considerations, as seen through the lens of domestic political concerns, that will have the greatest impact on the direction taken by other States Party. Having said that, it is a testimony to the catalytic effect of international and local initiatives that in February 1996, the UNHCR hosted the Symposium on Gender-Based Persecution in Geneva. The Symposium was attended by sixteen States Party who described, discussed and debated approaches to gender-related refugee claims. The proceedings were reported in a special issue of the *International Journal of Refugee Law*.[209]

The Canadian and Australian Guidelines and the U.S. Considerations may appear as final resolutions to the problems surrounding the application of the Refugee Convention to the particular circumstances of women and girls. They are not. This is not intended as a criticism. Identifying an issue of concern and formulating a response rarely "solves" a problem with finality. Instead, some responses do not work and/or generate unwanted "side

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208. Wairumu Karago, *Overview of UNHCR and International Developments*, 9 INT'L J. REFUGEE L. 7, 8 (1997) (quoting Conclusion No. 77, para. (g) (1995), U.N. Doc. A/AC.96/878, III A. 1.(o)).

209. *See* Symposium, *UNHCR Symposium on Gender Based Persecution, Geneva, February 22-23, 1996*, 9 INT'L J. REFUGEE L. 1 (1997).

effects." Sometimes, the response is not comprehensive, leaving various "loose ends" or "gray areas" unaddressed.[210] Also, higher authorities (such as courts or politicians) will exercise their power to interpret or alter the law, necessitating amendment or revision by subordinate bodies such as tribunals and government agencies. Other times, resolving problems at one level exposes a deeper set of issues that might not have come to the fore but for the fact that the initial response cleared enough conceptual space to problematize those deeper issues. Finally, without ongoing training and sensitization of those who apply them, the best laid guidelines will lead nowhere.

The treatment (or lack thereof) of domestic violence in the directives furnishes one example of these limitations. Each of the directives was drafted at a fairly high degree of generality, and in language that is always equivocal enough to avoid the appearance of fettering the discretion of decisionmakers. To the extent that the U.S. Considerations rely heavily on restating existing jurisprudence from American sources, issues that have sparsely considered by the courts (such as domestic violence) receive relatively little attention. The Australian Guidelines do not even name domestic violence, though significant components of the Guidelines seem directly applicable. The Canadian Guidelines deal more explicitly with the phenomenon, but the advice offered is so equivocal (and confusing at times) so as to provide little by way of concrete guidance.

While these patterns may be understandable, key questions—what is the nexus to the definition in cases of domestic violence? What are the criteria for assessing the ability or willingness of the state to protect? What constitutes adequate protection?—remain unacknowledged and unaddressed.

Thus, while I have disagreed strongly with the use of political opinion in domestic violence cases, it is understandable that counsel will employ whatever strategy is most likely to succeed. The Considerations, through their retrospective focus on existing jurisprudence, miss the opportunity to suggest new alternatives that may be preferable both in theory and practice. This means that political opinion (or its particular social group proxy) is likely to become more entrenched as the vehicle of choice in the United States.

I harbor similar concerns about the directives' treatment of state protection. In fairness, each of the directives does attempt to acknowledge the issue, and it may well be too complex to address meaningfully in administrative guidelines. In the context of domestic violence, one of the thorniest problems is the absence of any standard against which to assess the ability or willingness of the state to protect women. One might well adopt the requirement that the state exercise "due diligence," as set out in the

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210. As noted by Wairimu Karago, Deputy Director, Division of International Protection, UNHCR, in Julie Bissland & Kathleen Lawand, *Report of the UNHCR Symposium on Gender-Based Persecution*, 9 INT'L J. REFUGEE L. 13, 22 (1997).

Convention for the Elimination of All Forms of Discrimination Against Women,[211] but this only begs the question.

As Hunt points out in her reasons, one of the symptoms of women's marginalization is the failure of the state to take seriously harms inflicted on women of a so-called "private nature" (be they sexual or physical).[212] If one accepts that women occupy a subordinated and vulnerable status to a greater or lesser degree all over the world,[213] there is no extant standard against one might measure the adequacy of protection in a particular state unless one resorts to the fiction that Canada, the United States, or Australia adequately protect women from domestic violence. Having said that, it may be useful to compare how effectively the state protects women as compared to other groups in society. This may assist in distinguishing between the inevitable imperfection in state protection against crime versus the predictable, systemic failure of state protection where neither will nor resources are allocated to the problem.

At this juncture, it might be useful for domestic decisionmakers to turn their search for guidance back to the international arena. Early in 1996, Radhika Coomaraswamy, United Nations Special Rapporteur on violence against women, issued a report on violence against women in the family.[214] The report describes domestic violence as a violation of human rights, described its various manifestations all over the world, compares existing legal mechanisms for addressing it in various countries,[215] and issued recommendations for action at the national and international level. An addendum to the report contains a framework for model legislation on domestic violence,[216] but the Report is clear in insisting that effective protection must take the form of action, not words. Strategies to confront domestic violence must include not only law, but education (of state personnel and the public), health/social services, and the campaigns to eradicate female poverty.[217] Among other things, the Report also appears to take a cue from Canada and the United States[218] in recommending that states broaden their refugee and asylum laws "to include gender-based claims of persecution, including domestic violence."[219] In January 1998, the Special Rapporteur considered the issue of women refugees at greater length, citing Canadian, United States, and Australian policy and jurisprudence among her

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211. G.A.Res. 34/180, U.N. GAOR, 34th Sess., at 36, U.N. Doc. A/34/830 and A/34/L.61 (1980).

212. *See supra* note 203 and accompanying text.

213. I do not dispute, of course, that other factors (race, economic status, nationality, sexual orientation, etc.) may all affect a particular woman's vulnerability.

214. U.N. ESCOR, Hum. Rts. Comm., Report of the Special Rapporteur on Violence Against Women, E/CN.4/1996/53, Feb. 5, 1996.

215. These include mandatory arrest, protection orders, tort, divorce, specific domestic violence legislation, and community services. *Id.* at 34-38.

216. *Id.* at Add. 2.

217. *Id.* at 38-40.

218. Australia had not issued its Guidelines at the time the Report was written.

219. U.N. ESCOR, Hum. Rts. Comm. at 40.

sources.[220] In her recommendations, she stated that "States parties [sic] to the 1951 Refugee Convention are urged to adopt guidelines with respect to gender-related asylum claims."[221]

The work of the Special Rapporteur illustrates yet again the symbiotic relationship between the international and domestic fora. The existence of the Canadian Guidelines and U.S. Considerations provides the Special Rapporteur with concrete examples she can use to exhort other countries to follow, while her research and recommendations regarding the eradication of domestic violence can help local refugee decisionmakers articulate a standard of adequate state protection in the context of domestic violence. In this way, national and international human rights regimes can reinforce and nurture one another.

Ultimately, an idealized process might be depicted as dialogic. International actors, including the UNHCR and the Special Rapporteur on women, communicate with national actors regarding the interpretation of the Refugee Convention in a gender-sensitive manner. Different states learn from one another's example about the options. National bureaucracies listen to non-governmental actors, academics, activists, and their own internal sources about the need for change and how to go about it. Bureaucracies then engage their decisionmakers in the critical process of listening to women tell their stories. Because whatever else happens, however well intentioned the UNHCR, however committed the activists and however good or bad the directives, nothing counts unless actual decisionmakers open their hearts and minds to the women who have risked all to flee their home and seek refuge in a new country. The success of the directives should be judged solely by the extent to which they enhance decisionmakers' ability to genuinely listen to the stories of women who are persecuted as or because they are women and hear them as the stories of refugees.

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220. *See* Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, E/CN.4/1998/54, Jan. 26, 1998, Section IIIB.

221. *See id.* at section IIIF.