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# An End to the Violence: Justifying Gender as a "Particular Social Group"

## I. INTRODUCTION

A woman screams out and the sound of her voice reverberates through the air like the voices of thousands of women before. She struggles to free herself and feels the sting of a hand across her cheek, the heat of breath in her ear and the stench of sweat in her nose. As she screams again, she hears him tell her, in a tone she knows she will never forget that she is *his* woman, *his property*, to do with as he pleases.

So goes the story of thousands of women throughout history. As wars rage and peacetime follows, there is an ever-present threat to women that they will be violated in the most opprobrious way—they will lose their dignity, their pride, and their *womanhood* to an act of violence. The men who commit these crimes, like men for generations before them, consider women their property, something less than human.<sup>1</sup> The women, victims of rape, malicious torture, and mutilation,<sup>2</sup> are chosen not because they are of a certain race, religion, nationality, or political belief, but because of their gender.<sup>3</sup> They are women, and that fact alone subjects them to crimes that only they could suffer.<sup>4</sup>

Recently, crimes against women have recently been declared to be human rights violations.<sup>5</sup> Despite the existence of international laws which declare that women should be protected from violent gender-based crimes, the International

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1. See Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1444 (1993).

2. Brook Sari Moshan, Comment, *Women, War, and Words: the Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 FORDHAM INT'L L.J. 154, 160 (1998).

3. See *id.*

4. *Id.*

5. See Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 95 (1999); see also David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 17 (1999) (stating that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of significant magnitude were included [in the Rome Treaty] as crimes against humanity . . . and war crimes . . ."); see also Pang Yin Fong, *No to Violence Against Women*, THE NEW STRAITS TIMES, Apr. 26, 1999, available at 1999 WL 7462706 (noting that the U.N. Secretary-General Kofi Annan, "acknowledged that violence against women 'is perhaps the most shameful human rights violation and is perhaps the most pervasive'").

Criminal Court may not be equipped to handle individual gender-based sexual offense violations.<sup>6</sup>

There are remedies however, and in the United States there are refugee laws in effect, the fundamental purpose of which is "to provide surrogate international protection when there is a fundamental breakdown in state protection . . . resulting in serious human rights violations tied to civil and political status."<sup>7</sup> Women's rights violations have been characterized as serious human rights violations,<sup>8</sup> and gender is arguably a civil status,<sup>9</sup> given the protection afforded domestically on the basis of gender under Title VII discrimination laws.<sup>10</sup> Acknowledging the purpose of refugee law and the domestic and international determinations that gender-based crimes deserve protection under the law, this Comment argues that there is a strong justification for defining women as a "particular social group" for the purpose of granting asylum.

This Comment focuses on gender-based violence, particularly with respect to the act of rape, which is known world-wide as a crime against women.<sup>11</sup> This Comment will discuss the historical, domestic, and international justifications for defining women as a "particular social group" for the purpose of granting asylum in the United States.

Part II covers the historical treatment and protection of women,<sup>12</sup> with

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6. A permanent International Criminal Court ("ICC") has only recently been established, and the debates surrounding gender issues raise the chilling concern that gender-based crimes will be hard to investigate and prosecute if the countries that were not in support of inclusion of protection based on gender refuse to comply with the Treaty. See Moshan, *supra* note 2, at 154-79. Moreover, the ICC is designed to prosecute violations that occur en masse, rather than crimes which occur on an individual basis. See HUMAN RIGHTS WATCH, *Summary of the Key Provisions of the ICC Statute*, (Sept. 1998) <<http://www.hrw.org/campaigns/icc/icc-statute.html>> [hereinafter HR Watch].

7. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*13 (B.I.A. June 11, 1999) (Guendelsberger, dissenting).

8. See Julia Hall, *Violence Against Women and International Law: Rape as a War Crime*, 90 AM. SOC'Y INT'L L. PROC. 605, 605 (1996) (stating that rape is "one of the most egregious violations of human rights law" and that the ad hoc tribunals for Rwanda and Yugoslavia "allow[ed] for the prosecution of sexual assaults, including rape, as a serious violation of international humanitarian law"); see also AMNESTY INTERNATIONAL REPORT-IOR 40/006/98, *United Nations: The International Criminal Court Ensuring Justice for Women*, (Mar. 1998) (stating that women, more often than men, are in double jeopardy of becoming victims of human rights violations because they are subject to discrimination against them as women).

9. See Audrey Macklin, Comment, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 65-66 (1998). The shared social status of women is evidenced by "various affirmative action and equal opportunities policies" and through "the establishment of the United Nations Commission on the Status of Women." *Id.*

10. "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a) (1995). In creating Title VII of the Civil Rights Act of 1964, Congress was aiming to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." 12 A.L.R. FED. 15 § 4, 31-32 (1972).

11. See *infra* notes 95-189 and accompanying text.

12. See *infra* notes 22-189 and accompanying text.

separate emphasis on the history of rape in Part II A,<sup>13</sup> and international legal protection against gender-based crimes in Part II B.<sup>14</sup> Part III covers the qualifications for asylum under the U.S. Immigration and Naturalization Act,<sup>15</sup> emphasizing the requirements of what constitutes a "particular social group" in part (III)(A).<sup>16</sup> Part III also highlights the treatment of rape under asylum law in Part III B.<sup>17</sup> Part IV illustrates the arguments justifying the classification of gender as a "particular social group."<sup>18</sup> Part V discusses in brief the plausibility of an alternative means for providing protection to women who have suffered persecution through gender-based violence.<sup>19</sup> Part VI discusses the potential impact of classifying gender as a "particular social group,"<sup>20</sup> and Part VII concludes the Comment.<sup>21</sup>

## II. HISTORICAL TREATMENT AND PROTECTION OF WOMEN

There is evidence throughout history that women have been raped by men because they are women, and because women are the "property" of men.<sup>22</sup> Whether this was during the Middle Ages when men could rape the women of an enemy village as a showing of victory and a sign that all property of the enemy is now that of the victor,<sup>23</sup> during World Wars I and II,<sup>24</sup> or in more recent individual cases, as in *In re R-A*,<sup>25</sup> the evidence is undeniable.

Even with the creation of rules of war prohibiting rape, such as the Lieber

13. See *infra* notes 95-133 and accompanying text.

14. See *infra* notes 134-189 and accompanying text.

15. See *infra* notes 190-304 and accompanying text.

16. See *infra* notes 227-251 and accompanying text.

17. See *infra* notes 252-304 and accompanying text.

18. See *infra* notes 305-353 and accompanying text.

19. See *infra* notes 354-366 and accompanying text.

20. See *infra* notes 367-380 and accompanying text.

21. See *infra* notes 381-383 and accompanying text.

22. See West, *supra* note 1, at 1444.

23. Robert C. Stacey, *The Age of Chivalry*, in *THE LAWS OF WAR*, 27, 38 (Howard et al. Eds. 1994) (stating that when a town failed to surrender upon request, the town and all things and persons in it would be forfeited and the "[w]omen could be raped, and men killed out of hand").

24. See Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 45, 46 (1997) [hereinafter Sellers] (stating that during World War I, Belgian and French women were routinely raped, and during World War II, policies of rape and forced prostitution were implemented by the Nazi and Japanese forces).

25. *In re R-A*, Int. Dec. 3403, 1999 BIA Lexis 31 (B.I.A. June 11, 1999). This case involved a woman who was subjected to multiple rapes by her husband because he felt that she was "something that belonged to him" and therefore "he could do anything he wanted with her." *Id.* at \*7. This case will be discussed in greater detail in a later section of this Comment. See *infra* notes 264-303, 317-335 and accompanying text.

Code,<sup>26</sup> men have taken to raping women during, before and after wars despite the rules.<sup>27</sup> In patriarchal societies, there seems to be "'institutional biases' . . . 'appear[ing] to stem from a pervasive belief . . . that a man should be able to control a wife or female companion by any means he sees fit: including rape, torture, and beatings.'"<sup>28</sup> In nations that maintain these patriarchal societies, violence against women not only exists, but also is quite prevalent.<sup>29</sup> It has been said that "[v]esting power in the male family head violates all democratic principles proclaimed by governments: the unequal, patriarchal family structure breeds male violence and is responsible for perpetuating arbitrary rule by force . . . ."<sup>30</sup> Arguably, this is one of the main reasons why women have been mistreated. Recently there have been such attacks on women in Yugoslavia.<sup>31</sup> As part of an "ethnic cleansing" effort, women in Yugoslavia were raped, impregnated, and beaten violently in order to contaminate the "'purity' of Muslim blood."<sup>32</sup> Although one could argue that religion rather than gender motivated this behavior, very often the sexual torture endured by women resulted in the prevention of a woman's ability to give birth.<sup>33</sup> No such "sterilizing" actions were taken against men.<sup>34</sup> One could conclude that the particular actions taken against the Muslims were driven in part, if not in whole, by the fact that these victims were women.

More importantly though, it should be understood that despite the fact that rape is a crime utilized for a number of different reasons in warfare, including politics and religion, rape is almost always motivated by gender in some way.<sup>35</sup>

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26. See Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 & n.9 (1993) (citing Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, Art. 44, originally published as U.S. War Department, Adjutant General's Office, General Orders No. 100 (Apr. 24, 1863), reprinted in *The Laws of Armed Conflicts* 3 (Dietrich Schindler & Jiri Toman Eds., 3d rev. ed. 1988)).

27. See *id.* at 425.

28. *In re R-A*, 1999 BIA Lexis 31, at \*56 (Guendelsberger, dissenting).

29. In Mozambique, a country where either the father or brother is considered the head of the household, "domestic violence against women—particularly beating and rape—is widespread." *Women's Human Rights*, WOMEN'S INT'L NETWORK, Apr. 1, 1999, at 15-16, available at 1999 WL 12411391 [hereinafter WIN News]. In Afghanistan, the suppression of women is so pronounced that a woman on the street will be subjected to violence if she is immodestly dressed, if the heels of her shoes click when she walks, if she commits adultery, or if she is not escorted by a male relative when she leaves her home. See *id.* at 46-49. In Bangladesh, a society where "women remain in a subordinate position in society," it is reported that "a 14-year-old girl who had been raped [received] 101 lashes" and died six days later. *Id.* at 49-50.

30. WIN News, *supra* note 29, at 4.

31. Rape was used as a military tactic by the Serbian soldiers against Bosnian and Croatian women. See Moshan, *supra* note 2, at 158.

32. *Id.* at 159.

33. See *id.* at 160 (stating that "[c]ommon forms of sexual torture in Rwanda included attacking and impaling women through their vaginas, slashing breasts, and cutting out pregnant women's uteri").

34. It should be noted however, that there is some evidence that many men were forced "to engage in sexual acts and genital mutilation." See Symposium, *Rape as a Weapon of War in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 69, 71 (1994).

35. See Moshan, *supra* note 2, at 158.

One of the many justifications behind this theory is that the types of atrocities committed by men are atrocities that can only be committed against women.<sup>36</sup> Even though rape has been forbidden from as far back as Roman times, and possibly further, the prohibition often relied upon the woman's relationship with a man<sup>37</sup> and whether some male had "forcibly invaded [another man's possessory] interest" in a woman.<sup>38</sup> It can be argued that this is a particularized form of discrimination that sets women,<sup>39</sup> as a group, aside from others in a way that should permit women special protection from violence against them solely because they are women.

Typically, discrimination against a group has been insufficient to give rise to persecution.<sup>40</sup> The counter-argument to be made is that the crimes against women that occur abroad are more than mere civil discrimination. In the context of protecting women through asylum, the point is to provide equal protection against violence.<sup>41</sup> It would be one thing to say it is not enough to grant a woman asylum where she is claiming she does not have the same employment rights as a man. It is an entirely different matter when what she is seeking is assistance to prevent her own government, a strange man, or even her father or brother from beating her,<sup>42</sup> raping her, and in many cases, subjecting her to what some call "female castration,"<sup>43</sup> an act condemned internationally for the physical and psychological

36. See *id.* at 160.

37. See Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1781 (1992).

38. *Id.* at 1783.

39. "[D]iscriminatory practices and experiences 'can accumulate over time or increase in intensity so that they may rise to the level of persecution.'" Fisher v. INS, 79 F.3d 955, 968 (9th Cir. 1996)(Noonan, J., dissenting) (citing "Considerations for Asylum Officers Adjudicating Asylum Claims From Women," reprinted in 72 Interpreter Releases 781 (June 5, 1995) (quoting U.S. Department of Justice, Immigration and Naturalization Service, Basic Law Manual at [28], reprinted in Charles Gordon and Stanley Mailman, 8 Immigration Law and Procedure (rev. ed. 1995))).

40. "[D]iscrimination on the basis of race or religion, as morally reprehensible as it may be, does not ordinarily amount to 'persecution' . . ." Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998)(quoting Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)); see also Fisher v. INS, 79 F.3d at 962 (noting that persecution "does not include mere discrimination, as offensive as it may be").

41. WIN News, *supra* note 29, at 4 (noting that it is the responsibility of every government to provide equal protection to all of its citizens, and that includes protecting women from the continuing violence from which they suffer).

42. A woman who discusses with anyone the details surrounding her own rape is subject to reprisals from immediate family members, husbands, and their community. See Symposium, *supra* note 34, at 77.

43. A similar act known as female genital mutilation ("FGM") was the issue of concern in *Matter of Kasinga*. See *In re Kasinga*, No. A73A76695, 1996 WL 379826, at \*10-11 (B.I.A. 1996). FGM is a tribal custom to which a young woman is forced to submit prior to marriage. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis, at \*42 (B.I.A. June 11, 1999). FGM generally occurs before the woman reaches the age of fifteen. See *id.*

damage it causes.<sup>44</sup>

Though crimes against women have been forbidden in name in many countries, in practice, women have been given no protection against men, and no means of forcing their attacker to face the law for his crimes.<sup>45</sup> The list of countries participating in such behavior is not a small one. For example, even though a woman in Africa may "have recourse to the police and the courts, societal norms and limited infrastructure inhibit many women from seeking legal redress . . . ."<sup>46</sup> The same holds true in many other areas, including East Asia and the Pacific, Latin America, North Africa, South Asia, the Near East, Europe and the New Independent States.<sup>47</sup>

In Indonesia, rape is a punishable offense, but the social stigma attached to a victim who reports a rape often deters women from reporting these crimes.<sup>48</sup> Furthermore, a witness is required, and a woman who does not go immediately to the hospital to get evidence of the rape through medical examination can not report the rape.<sup>49</sup>

In Haiti, the legal authorities do not adequately enforce provisions criminalizing rape and other violent offenses, and because of the lack of confidence in the judicial system, along with the fear and shame which accompany such crimes, women often do not report such abuse.<sup>50</sup> In Jordan, a woman who is a potential victim of an "honor crime"<sup>51</sup> will be imprisoned rather than the man, and a person found guilty of committing an "honor crime" under the code generally is entitled to leniency.<sup>52</sup> The men guilty of these crimes will be found innocent of murder so long as they can show evidence that they personally witnessed the female victim engaging in the alleged sexual misconduct or acted in a "fit of rage" after hearing of the transgression.<sup>53</sup>

In Nepal, there are laws which impose imprisonment of up to three to five years for rape, but pervading discriminatory attitudes and a general unwillingness among citizens to recognize the problem of violence against women cause many

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44. See WIN News, *supra* note 29, at 6.

45. See Sellers, *supra* note 24, at 47.

46. WIN News, *supra* note 29, at 6. Discrimination against women is pervasive and despite the existence of a framework for improving the status of women, women do not have the same opportunities as men because ingrained cultural attitudes effect a system where laws are implemented unevenly. See *id.* at 9.

47. See generally *id.*

48. See *id.* at 20.

49. *Id.*

50. *Id.* at 29.

51. An "honor crime" is "a euphemism that refers to a violent assault against a female by a male relative for alleged sexual misconduct." *Id.* at 37-38.

52. *Id.* at 38.

53. *Id.* at 39 (referencing an incident where a man shot his sister to death, during what he called "a 'fit of fury,' to 'cleans the family honor' after he heard she had been 'going out to eat with another man, and was receiving gifts and money from him'").

women not to pursue prosecution of the men who rape them.<sup>54</sup> These are but a few examples of countries that maintain violent, discriminatory practices against women.<sup>55</sup>

The International Criminal Tribunals for Yugoslavia and Rwanda provided some of the first charges against men for the atrocities they inflicted on women.<sup>56</sup> Neither the International Military Tribunal for Nuremberg, nor the Tribunals for the Far East enumerated rape as a crime against humanity,<sup>57</sup> despite customary law prohibitions on such conduct.<sup>58</sup> Later Nuremberg proceedings disregarded the recognition of this customary law, and despite being governed by Control Council No. 10,<sup>59</sup> which included rape as an enumerated crime against humanity,<sup>60</sup> rape was excluded as a crime against humanity in the Nuremberg Principles.<sup>61</sup>

Article 5(g) of the statute governing the International Criminal Tribunal for the former Yugoslavia ("ICTY") incorporates rape as a crime against humanity and "is the solitary explicit provision for sexual assault crimes in the ICTY statute."<sup>62</sup> As a result of the prohibition, rather than the criminalization of such conduct, ICTY prosecutors argue that sexual assault conduct, including "[f]orcible sexual penetration, which is conduct virtually synonymous with the crime of rape, and other conduct such as sexual mutilation or forced impregnation," works as the "actus reus for named crimes within the ICTY statute."<sup>63</sup>

Proof of sexual assault crimes under the ICTY statute require proof by the prosecution of all elements of the crime charged, including the mens rea, or the guilty mind, and the actus reus, or the physical aspect of a crime.<sup>64</sup> The various articles of the statute require proof of additional "prerequisite international

54. See *id.* at 52.

55. See generally, WIN News, *supra* note 29.

56. See Hall, *supra* note 8, at 605; see also WIN News, *supra* note 29, at 6.

57. See Hall, *supra* note 8, at 606.

58. "[T]he U.S. Department of State unequivocally stated that rape already was a war crime or a grave breach under customary international law and the Geneva conventions and could be prosecuted as such." Meron, *supra* note 26, at 427.

59. Control Council No. 10 is a charter for the trial of war crimes which was adopted by four powers occupying Germany for trials decided in Germany by the courts of these occupying powers. See *id.* at 426.

60. "Article II(1)(c) defines crimes against humanity as: [a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated." Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 409-10 (1998) (emphasis added).

61. See Hall, *supra* note 8, at 606.

62. *Id.* at 607.

63. *Id.* at 608.

64. See *id.*; see also BLACK'S LAW DICTIONARY 37, 999 (7th ed. 1999) (defining actus reus and mens rea).



elements of each crime."<sup>65</sup> Most relevant to this discussion is the requirement under Article 5 that alleged sexual assault conduct must be committed in conjunction with armed conflict, more specifically defined as "a systematic or widespread attack."<sup>66</sup>

Article 4 of the statute governing the International Criminal Tribunal for the former Rwanda ("ICTR") incorporates "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II."<sup>67</sup> As part of the additional protocol, "prohibition of rape, enforced prostitution and indecent assault" were incorporated, thereby affirming their application to internal conflicts.<sup>68</sup>

A major distinction is to be drawn between the ICTY and ICTR statutes: the ICTR statute does not specify a requirement of armed conflict.<sup>69</sup> The implication to be drawn from this is that under the ICTR statute "rape . . . constitute[s] [a crime] against humanity when committed as part of a widespread or systematic attack regardless of a state of peace or war."<sup>70</sup>

The difficulty that arises with both the ICTY and the ICTR statutes is the requirement of a systematic or widespread attack. Such a requirement begs the question: where a prosecutor seeks to punish a persecutor, which part, if any, is the persecutor of the systematic or widespread attack? In a discussion over this very issue, Patricia Viseur Sellers raised an important point:

[a]s to crimes against humanity and the requirements of systematic attack or widespread violations, there are certain problems that [have been] raised. One is whether the person who is accused of crimes against humanity has to have himself performed the entire, systematic attack or acted in conspiracy with anyone. Perhaps they can still be held accountable if their act was part of this systematic attack or these widespread violations.<sup>71</sup>

Ms. Copelon's comment later addresses this point at least in part, where she states, [t]here's another point about systematic rape. I think that [the Branna Plan]<sup>72</sup> might make prosecution very easy, but it doesn't provide a very good basis for any other accountability, because [rape] is very hard to establish, and that's one of the problems with "systematic" . . . . We must recognize that *allowing* [rape] to happen and *participating* in it as

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65. Hall, *supra* note 8, at 608.

66. *Id.* at 607-8.

67. *Id.* at 609.

68. *Id.*

69. *See id.* at 610.

70. *Id.*

71. *Id.* at 612.

72. The Branna Plan is a Belgrade state policy regarding rape that was written in the summer of 1991 and was apparently designed to facilitate the prosecution of systematic rape. *See id.* at 614.

an aspect of war . . . is enough to make it a crime under humanitarian law.<sup>73</sup>

Domestically, "[t]he fear of violence based on one's sex has created a climate of terror that helps maintain the inequality and disadvantaged status of all women."<sup>74</sup> The Violence Against Women Act ("VAWA")<sup>75</sup> was recently struck down as unconstitutional.<sup>76</sup> However, VAWA was created as a result of the undeniable fact that because of their membership in a group defined by gender, women are the targets of violence: "not individually or at random, but on the basis of sex," because they are women.<sup>77</sup>

The Court specifically noted in *Brzonkala v. Virginia Polytechnic Institute and State University*,<sup>78</sup> that there is ample support for the proposition that "violence against women is a sobering problem," attributable at least in part to gender animus.<sup>79</sup> The court concluded, however, that section 13981 of the VAWA "cannot be reconciled with the principles of limited federal government upon which this Nation is founded."<sup>80</sup> The court reasoned that to do otherwise would be to permit Congress, "through its powers to enforce the Constitution's prohibitions against state deprivations of equal protection and to regulate commerce among the several States, to direct private individuals in their activities wholly local and noneconomic."<sup>81</sup> Despite judicial temptation to affirm this statute, "so decoriously titled," a conveyance of power that would "cede . . . to the Legislature a plenary power over every aspect of human affairs—no matter how private, no matter how local, no matter how remote from commerce," is simply beyond the authority of the Congress.<sup>82</sup>

This is not to say, of course, that there are no laws in effect in the United States through which women are provided civil protection against purely

73. See Hall, *supra* note 8, at 614.

74. W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 582 (1993).

75. 42 U.S.C. § 13981 (1995).

76. See *Brzonkala v. Virginia Polytechnic Inst. & St. U.*, 169 F.3d 820 (4th Cir. 1999) (*en banc*), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999), and *cert. denied in part*, 120 S. Ct. 1578 (2000), and *aff'd*, 120 S. Ct. 1740 (2000) (holding "that section 13981 exceeds Congress' power under both the Commerce Clause of Article I, Section 8, and the Enforcement Clause of Section 5 of the Fourteenth Amendment").

77. Hallock, *supra* note 74, at 577; see also *Brzonkala*, 169 F.3d at 827 (stating that the VAWA is "legislation represent[ing] a multifaceted federal response to the problem of violence against women . . .").

78. 169 F.3d 820 (4th Cir. 1999) (*en banc*), *cert. granted sub nom. United States v. Morrison*, 120 S. Ct. 11 (1999), and *cert. denied in part*, 120 S. Ct. 1578 (2000), and *aff'd*, 120 S. Ct. 1740 (2000).

79. *Id.* at 851.

80. *Id.* at 826.

81. *Id.* at 889.

82. *Id.*

discriminatory acts. The Fourteenth Amendment of the United States Constitution provides in part that no state shall deprive "any person within its jurisdiction the equal protection of the laws."<sup>83</sup> Criminally, any woman who has been raped or sexually assaulted in any manner is free to bring the matter to the attention of authorities for proper handling.<sup>84</sup>

Regardless of what laws may or may not exist in the United States, the fear and reality of gender-based violence has finally mobilized many nations to take note of the growing problems with rape and domestic violence.<sup>85</sup> As a consequence of this realization, many of these nations have finally taken steps towards ameliorating the problem by enacting laws that prohibit gender-motivated crimes.<sup>86</sup> Unfortunately, the pervasive nature of custom and practice in a great majority of these nations, most of which still exist under patriarchal systems,<sup>87</sup> has left these laws unenforced and therefore, virtually useless to women who would seek refuge under them.<sup>88</sup>

What is shocking is the fact that despite what few laws now exist, in many of these countries a man can legally rape his wife,<sup>89</sup> or kill her with impunity if someone else rapes her<sup>90</sup> or if she is caught having an affair.<sup>91</sup> In some countries, even though rape is a crime, the man will not be prosecuted so long as he asks the victim to marry him.<sup>92</sup>

Unsurprisingly, it is the women who "bear the brunt . . . of egregious forms of human rights abuse," by being subjected to multiple or gang rapes, and then

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83. U.S. CONST. amend. XIV. The Constitution, through various amendments, protects many rights for women, including the right to vote and the right to end a pregnancy. *See generally*, U.S. CONST.; *see also, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (dealing with a woman's right to terminate a pregnancy subject to limitations resulting from state interests).

84. The only problem we have in this scenario is the large number of cases where the police "disbelieve" the woman's story and drop the case without any further investigation. *See* Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL., 127-28 & n.6 (1992).

85. *See generally* WIN News, *supra* note 29.

86. *See supra*, notes 45-55 and accompanying text.

87. In Peru, for example, "the traditional relationship between the sexes that encourages a controlling attitude by the husband toward his wife," is believed to perpetuate the chronic problem of physical and sexual abuse. *See* WIN News, *supra* note 29, at 34.

88. *See supra*, notes 45-55 and accompanying text.

89. In Indonesia, it is not criminal for a man to rape his wife, and there has been little success in changing these laws because "[c]ultural norms dictate that problems between husband and wife are private matters." WIN News, *supra* note 29, at 19; *see id.* at 37, 44 (reporting that marital rape is legal in Jordan and in Egypt).

90. *See id.* at 38 (reporting an incident where another member of the family raped a man's sister, so the man shot his sister four times in the chest and killed her because the rape "tarnish[ed] the family honor;" the man served only six months in jail for the shooting).

91. It is reported that in Haiti, "[t]he law excuses a husband if he murders his wife or her lover upon catching them in the act of adultery in the home." *Id.* at 28. The same is true in Jordan. *See id.* at 38.

92. In Latin America, if a rapist offers to marry the victim, he will not be prosecuted. *See id.* at 6, 30, 37.

held apart from their own families in inhumane conditions.<sup>93</sup> Before anything can truly be done to remedy these outrageous violations, there must be a recognition, world-wide, that "rape is a violent assault, not merely a sexual act, which constitutes a crime."<sup>94</sup>

### A. Rape

Rape has been defined as "the unlawful carnal knowledge of a woman by a man, forcibly and against her will, or without her consent."<sup>95</sup> The Romans and the English both declared rape a crime.<sup>96</sup> Within the context of war, the law forbade soldiers from raping women for centuries.<sup>97</sup> Despite the potential for punishment under codes set forth by the likes of Richard II and Henry V,<sup>98</sup> then, and even in more modern times, there is little evidence that rape was mentioned in major war crimes prosecutions<sup>99</sup> or enumerated as a crime in the international sphere.<sup>100</sup> Here in the United States, even though rape is a criminal act, it often goes unreported<sup>101</sup> because of the way rape and the victim are viewed. Consequently, a large number of rapists go unpunished for their crimes while more women continue to be raped.<sup>102</sup>

Domestically and internationally there has been, and still does exist, the idea that the woman is the temptress, and the man the innocent victim of her seductive

93. Susannah Smiley, *Taking the "Force" Out of Enforcement: Giving Effect to International Human Rights Law Using Domestic Immigration Law*, 29 CAL. W. INT'L L.J. 339, 339 (1999) (quoting Sima Wali, *Human Rights For Refugee And Displaced Women*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INT'L FEMINIST PERSPECTIVES 336 (Julie Peters and Andrea Wolper, Eds. 1995)).

94. Stephens, *supra* note 5, at 93.

95. Edwin Silberstang, *Rape*, 65 AM. JUR. 2D *Rape* § 1 (1972) (citations omitted).

96. See Dripps, *supra* note 37, at 1781-82.

97. See Meron, *supra* note 26, at 425.

98. See *id.*

99. See Hall, *supra* note 8, at 606 (stating that most decisions contained neither "distinct findings, dicta nor meaningful jurisprudence in relation to rape" and the Far East Tribunals "egregiously refrained" from prosecuting the crimes of "sexual bondage endured by 100,000-200,000 comfort women" in Japan).

100. See Meron, *supra* note 26, at 425-6 (1993); see also Hall, *supra* note 8, at 607 (noting that the International Law Commission, in preparing "a Draft Code of Offenses against the peace and security of mankind . . . has consistently, from 1953 to 1994 drafted Article 21, Systematic or Mass Violations of Human Rights—an article analogous to crimes against humanity—without an explicit provision concerning rape").

101. "[R]ape still remains the most underreported of all crimes, with only seven percent of victims reporting their assaults." Hallock, *supra* note 74, at 585.

102. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1162-63 (1986) (noting that "victims do not report rapes . . . because the traumas associated with pursuing a complaint and the difficulties of securing a conviction are daunting" and because the idea remains, even if only in "a shadowy corner of our consciousness" that "only bad girls get raped").

nature.<sup>103</sup> Moreover, the man who gives in to the temptation is viewed as the victim, rather than the violator, because he cannot be held to control himself when a woman overpowers him with her seductions.<sup>104</sup> Some argue that a man is entitled to fulfill his sexual desire whenever he feels like it, and therefore the man should not be held responsible for raping a woman.<sup>105</sup> However, this author would argue that it is not sexual gratification that the man is seeking to fulfill, but rather a domination of women.<sup>106</sup> In seeking to fulfill his desire to control, he achieves that goal through sexual "violence"<sup>107</sup> because he knows that it is the one thing that can destroy a woman's body, mind and spirit.<sup>108</sup>

Making the argument that men are born with the biological need for sexual gratification as a method of spreading their seed,<sup>109</sup> does in no way justify or explain the forcible and often violent raping of a woman to fulfill that need.<sup>110</sup> Assuming that the existence of a biological basis for rape makes the act morally correct and justified is "demonstrably false" logic.<sup>111</sup> The relationship between what is true in nature and what ought to be "depends on a person's ideology, politics, morality, and preferences."<sup>112</sup> Therefore, one would hope that even if biology predisposes a man to a small degree towards rape, all other aspects of life should logically outweigh that drive. The reality is that rape is, as noted above,<sup>113</sup> a method of domination "used by men as a conscious, instrumental tool to gain access to power, prestige and community."<sup>114</sup> A combative tool used against women, and other men,<sup>115</sup> rape is also known to be a bonding activity among

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103. See Henderson, *supra* note 84, at 131-37 (discussing the many sources from which the concept of male innocence and female guilt are derived, including the Bible, Aquinas, and Rousseau).

104. See *id.* at 135.

105. See *id.* at 131.

106. "Rape, in contrast [to sex], is about violation and domination . . ." Katharine K. Baker, *What Rape Is and What It Ought Not To Be*, 39 JURIMETRICS J. 233, 236 (1999). Feminists differ as to their beliefs on why men rape, arguing on the one side that it is an act of violence, like aggravated assault, and has little if anything to do with sexual gratification, and on the other side, that it is a crime of sex resulting from violent tendencies or simply an act against women. See Henderson, *supra* note 84, at 131-32.

107. See Christine Alder, *The Convicted Rapist, A Sexual or a Violent Offender?*, 11 CRIM. JUST. & BEHAV. 157, 157-58 (1984) (arguing that clinical studies have shown that rape is a violent expression of hostility often used as a means of expressing dominance or mastery).

108. Rape, whether "violent" or "nonviolent" is an experience that is described as spiritual murder. See West, *supra* note 1, at 1448.

109. See Henderson, *supra* note 84, at 136-37.

110. "Biology does not explain why men rape as a means of retaliating against women with whom they have no prior relationship, and it does not explain why intra-male aggression leads to rape." Baker, *supra* note 106, at 240 (citations omitted). Scientists note that at least half of men, when asked "whether they would rape if they could get away with it," say no. *Id.* at 241 (citations omitted).

111. See Randy Thornhill, *The Biology of Human Rape*, 39 JURIMETRICS J. 137, 139 (1999).

112. *Id.*

113. See *supra* note 106.

114. Baker, *supra* note 106, at 238.

115. "As a military device, rape is a form of aggression used against other men." *Id.* at 239.

men<sup>116</sup> as well as a means of gaining esteem among one's peers.<sup>117</sup>

It has been argued by sociobiologists that the way for a woman to avoid rape is to acquiesce in the man's overtures.<sup>118</sup> Most human beings can see that such a rationalization is neither practical nor acceptable in today's society, and it is questionable if such an attitude could have ever been acceptable.<sup>119</sup> Moreover, this approach to rape is outdated<sup>120</sup> by the notion that rape can be eradicated if we can come to grips with the concept that rape is more than a biological desire to reproduce.<sup>121</sup>

When we speak in terms of rape being a crime of violence, we often confuse the issue and enhance the myth that all rape is "violent" in the same way that other acts are considered violent.<sup>122</sup> Violence is defined as "a use of force so as to injure or damage."<sup>123</sup> The definition does not require that the damage or injury be of the physical kind, visible to the human eye.<sup>124</sup> In fact, very often the result of rape is not physical injury, but mental injury of the most extreme kind.<sup>125</sup> Even when the injury is physical, the victim typically feels it only after the fact,<sup>126</sup> and only a physician who examines the woman sees the damage.<sup>127</sup> That is, of course, assuming that the woman has reported the crime and sought medical assistance for the harm inflicted upon her.

Although the definition of violence requires the use of force, force does not

116. See *id.* (relating a tale of one man who, along with his fellow gang members, raped a woman "despite feeling sorry for [her], because the rape 'marked their real coming together as a gang.'").

117. See Baker, *supra* note 106, at 236 (noting that men are not raping in these circumstances out of a need for domination or a desire for sex, but in an effort to show their prowess to other males).

118. See Henderson, *supra* note 84, at 137.

119. See *id.* at 132-34 (discussing possible historical and religious justifications for rape).

120. The reason we continue to live in a society that defines rape as a natural, prevalent, and universal act is not because society does not recognize the evils of rape, but because society has not worked hard enough to eliminate the perception that sexual conquest is appropriately used as a means of acquiring control, respect or esteem. See Baker, *supra* note 106, at 242.

121. See *id.* at 240-42.

122. See *infra* notes 123-30 and accompanying text.

123. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1628 (Coll. ed. 1962).

124. However, one author argued that "[f]or the purposes of criminal law, violence means something like the threatened infliction of physical injury." See Donald A. Dripps, *More on Distinguishing Sex, Sexual Exploration, and Sexual Assault: A Reply to Professor West*, 93 COLUM. L. REV. 1460, 1463 (1993).

125. See Hallock, *supra* note 74, at 589 (noting that sexual violence against women "not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated").

126. See Henderson, *supra* note 84, at 158 (noting that many women who have been raped "report 'leaving their bodies', 'blacking out,' and other phenomena associated with human coping with extreme pain and extreme situations, although they may experience pain after the event").

127. Even then, there is often no physical damage, because "as a matter of physiology, the muscles of the vagina may relax, and the vaginal walls are not torn or bruised." *Id.* at 157.

necessarily imply an overt, physical action.<sup>128</sup> The definition of force at once includes both physical acts intended to exhibit control and strength, and non-physical acts, which include the "power to control, persuade, [or] influence."<sup>129</sup> Implicit in this language is the inclusion of situations where the man does not use physical force, but instead, coerces the woman into sexual acts against her will through his domineering presence alone.<sup>130</sup>

All this information begs the question: what relevance does it have on asylum law in the United States? The answer to this question is that it effects male and female relationships and supports the proposition that women should be granted protection from gender-based violence.<sup>131</sup> For now, what one should get out of this information is that rape causes not only physical harm, but long term mental anguish as well.<sup>132</sup> Moreover, the act of rape has for centuries been mistakenly justified by societal misconceptions by men, and even by women,<sup>133</sup> who refuse to acknowledge the serious nature and consequences of rape. Thus, rape and domestic violence remain in the realm of "private actions" with which governments opt not to involve themselves.

## *B. International Legal Protection Against Gender-Based Crimes*

In 1998, many nations gathered in Rome to discuss the formation of an International Criminal Court ("ICC").<sup>134</sup> The belief across the world is that an ICC is a necessary component for an effective international legal system.<sup>135</sup>

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128. See *United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998) (stating that force and fear alike "can be inferred from the circumstances"). Rape in many states is a crime defined by lack of consent. See *United States v. Reyes-Castro*, 13 F.3d 377, 379 (10th Cir. 1993). In such cases, the question is whether there was a substantial risk that physical force would be used, and whether physical force was actually used is irrelevant. See *id.* Where such a risk is present, the crime is considered a violent one. See *id.* (noting that rape is considered to be a crime of violence because it is a crime defined by non-consent and therefore necessarily involves a substantial risk of physical force).

129. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 565 (Coll. ed. 1962).

130. "[F]orce can be implied from a disparity in size and coercive power between the [man] and his victim." *United States v. Lucas*, 157 F.3d at 1002.

131. See *infra*, notes 264-303, 317-35 and accompanying text (applying impact of male/female relationship to asylum law).

132. See *Hallock*, *supra* note 74, at 589.

133. The noted advice columnist, Ann Landers, once stated that if a woman makes "a 'mistake' in judgment and [is] raped, it becomes [her] fault, not the rapists." See *Henderson*, *supra* note 84, at 139. More shocking still is the "politically conservative British woman author's 1979 assertion that rape is a very terrible crime - but apparently not so terrible that it differs in kind from 'having one's teeth knocked out' . . ." *Henderson*, *supra* note 84, at 129.

134. See *Moshan*, *supra* note 2, at 154-55, n.4.

135. See *Cara Levy Rodriguez, Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L. L. REV. 805, 807 (1999) (noting that "[p]roponents of the ICC believe that this court . . . will greatly deter human rights violators"); see also Gerard E. O'Connor, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927, 928 (1999) (stating that "[t]he ICC will be an important and vital entity that will help ensure a prompt, reasonable, and just international response to heinous crimes").

Besides the establishment of a permanent ICC,<sup>136</sup> one of the most significant decisions coming out of the Rome Treaty ("Treaty") that resulted from this meeting was the inclusion of gender-based crimes in the Treaty as crimes against humanity and war crimes.<sup>137</sup> As soon as sixty of the one hundred twenty nations who voted in favor of an international court ratify the Treaty, the international community will be able to prosecute individuals for massive human rights violations.<sup>138</sup> Once established, the ICC "will operate through an eighteen judge tribunal based at The Hague."<sup>139</sup> Even though many nations finally have agreed to formally classify rape and other forms of sexual abuse as war crimes and crimes against humanity<sup>140</sup> under the Rome Treaty, the United States has not yet ratified the Treaty.<sup>141</sup> Furthermore, although the Treaty is now officially on route to ratification, the Treaty would not go into effect for many years to come because of the ongoing debates both during and after the Rome Convention, over, among other things, constitutional violations, prosecutorial power, and jurisdictional issues.<sup>142</sup> Moreover, as of January 21, 2000, only six countries had ratified the Treaty.<sup>143</sup>

There are concerns associated with ratification and some scholars disagree on whether the United States should support the Treaty.<sup>144</sup> On one side of the fence is the argument that ratification of the Treaty would violate certain constitutional principles, including subordination of United States federal jurisdiction,<sup>145</sup> and violation of the Bill of Rights.<sup>146</sup> Others argue that the Treaty is "inconsistent with

136. See Rodriguez, *supra* note 135, at 806.

137. See Scheffer, *supra* note 5, at 17.

138. See Rodriguez, *supra* note 135, at 806-7.

139. O'Connor, *supra* note 135, at 930.

140. See generally Moshan, *supra* note 2 (explaining the acceptance of various gender-based acts as "crimes against humanity" by many countries under the Rome Treaty); see also generally Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L. L. 43 (1999) (noting that under the Rome Treaty, the expanded definition of "rape" includes many violent sexual acts, all of which are classified as "crimes against humanity").

141. See Scheffer, *supra* note 5, at 21.

142. See generally Scheffer, *supra* note 5 (explaining governmental concerns at the Rome Convention); see also generally Moshan, *supra* note 2 (analyzing concerns regarding the prosecution of gender-based crimes committed against women).

143. *Rome Statute of the International Criminal Court: Ratification Status*, (visited Jan. 21, 2000) <<http://www.un.org/law/icc/statute/status.htm>>.

144. See generally, Rodriguez, *supra* note 135 (arguing, among other things, that there are constitutional issues implicated by the Rome Treaty); see also, generally, O'Connor, *supra* note 135 (arguing that "[t]he decision of the United States to vote against the statute establishing a permanent ICC was a result of flawed legal analysis" among other things).

145. The issue arises because ratification of the Treaty would give the ICC power to try United States nationals for crimes committed inside United States borders. See Rodriguez, *supra* note 135, at 814.

146. The concern is that the ICC does not provide those who would be charged with crimes the same safeguards that they would be entitled to under United States Constitutional law. See *id.* at 815.



customary international law."<sup>147</sup>

"The 'judicial power' of the United States may not be exercised by a tribunal that is not a court of the United States"<sup>148</sup> because the "Constitution . . . vests sole authority to prosecute and try citizens for offenses committed within the United States to the state and federal governments."<sup>149</sup> Ratification of the Treaty could result in subordination of United States federal jurisdiction because the power granted to the ICC under the statute would permit the ICC to prosecute Americans who commit crimes within the United States. Analogous to the principle set forth in *Ex parte Milligan*<sup>150</sup> in 1866, a grant of such expansive authority to an international court would violate the Constitution because an international court is not an Article III court of the United States.<sup>151</sup>

Of equal concern is that the jurisdiction granted to the ICC under the statute would permit prosecution of individuals who come from countries that have not ratified the Treaty.<sup>152</sup> Some scholars argue that this concept is inconsistent with customary international law because it violates international law principles holding that a state cannot be bound by a treaty without its consent.<sup>153</sup>

Because the Treaty does not grant the right to a trial by jury, or protection against unlawful searches and seizures, there is concern that enforcement of the statute under the Treaty could result in violations of the fundamental rights granted to Americans in the Bill of Rights.<sup>154</sup> There are also problems with the definitions of crimes under the Treaty, in that much of the language does not make

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147. *Id.* at 817.

148. *Id.* at 814.

149. *Id.*; see also U.S. CONST. art. III, § 1 ("The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. amend. X ("The powers not relegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the People.").

150. 71 U.S. (4 Wall.) 2, 122 (1866) (over-turning a verdict against Milligan on the grounds that the military court was not ordained and established by Congress and had no authority where the civil courts were open and their process unobstructed). The Court reasoned that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Id.* at 120. The United States' republican government would be a failure if it permitted martial law to subjugate civil law where the United States is not the location of an actual war, and the civil courts are open to litigate. See *id.* at 124.

151. Article III states that "[t]he judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. CONST. art. III § 1.

152. See Rodriguez, *supra* note 135, at 817-18.

153. See *id.* at 818; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (1987) (stating that "[a]n international agreement does not create either obligations or rights for a third state without its consent").

154. See Rodriguez, *supra* note 135, at 815-16; see also Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Court*, CATO POLICY ANALYSIS NO. 311, at 1 (modified July 16, 1998) <<http://www.cato.org/pubs/pas/pa-311.htm>> [hereinafter Dempsey] (stating that "[e]ndangered constitutional protections include the prohibition against double jeopardy, the right to trial by an impartial jury, and the right of the accused to confront the witnesses against him").

clear the criminality of certain actions, and therefore notice is lacking.<sup>155</sup> This is a direct violation of American constitutional law, which provides that "statutes that fail to give notice are unconstitutional deprivations of due process."<sup>156</sup>

Essentially, if the President of the United States pushes Congress to support the Treaty, he would be asking the United States Senate to ratify an unconstitutional treaty.<sup>157</sup> Ample precedent clearly indicates that such an action in itself would be a violation of American jurisprudence.<sup>158</sup> In fact, as recently as 1988, the Supreme Court held in *Boos v. Barry*,<sup>159</sup> that rules of international law cannot be given effect in violation of the Bill of Rights or of restrictions or requirements of the Constitution.<sup>160</sup>

The argument on the other side of the fence, however, stands firmly on the proposition that abstract notions of sovereignty should not be permitted to shield violators of international criminal law from prosecution.<sup>161</sup> A couple of justifications support this contention.<sup>162</sup> First, because of the nature of the crimes over which the ICC would retain jurisdiction, the concept of "universal jurisdiction"<sup>163</sup> would permit prosecution of anyone who commits war crimes, crimes against humanity or genocide, regardless of their nationality.<sup>164</sup> This is not a novel concept to which the United States is not already accustomed.<sup>165</sup>

Second, it is argued that the concerns the United States has regarding jurisdiction are unfounded because there are ample safeguards to assure that the

155. See Rodriguez, *supra* note 135, at 825.

156. *Id.*; see also *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1951).

157. See Dempsey, *supra* note 154, at 15 (commenting that in negotiating the ICC, the Clinton Administration unconstitutionally conceded "from the beginning the premise of the UN's International Law Commission that an American citizen's constitutionally protected rights are not absolute rights but tentative or conditional rights").

158. "[T]he U.S. federal government cannot enter into treaties that are incompatible with the U.S. Constitution." *Id.* at 13.

It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI [regarding treaties] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.

*Reid v. Covert*, 354 U.S. 1, 17 (1957).

159. 485 U.S. 312, 324 (1988).

160. See Dempsey, *supra* note 154, at 13; see also, *Boos v. Barry*, 485 U.S. at 324.

161. See O'Connor, *supra* note 135, at 928.

162. See *id.*

163. "Universal Jurisdiction is the idea that some crimes are so universally barbaric that those who commit such horrible crimes are 'enemies of all people' – and allows that jurisdiction may be based solely on securing custody of the perpetrator." *Id.* at 958.

164. See *id.*

165. Under the 1949 Geneva Convention, foreign courts were entitled to prosecute criminals in international wars, and "[c]urrent international law allows a state in custody of a suspect to try that person on charges of genocide, crimes against humanity and war crimes." *Id.*

United States retains primary jurisdiction over its citizens.<sup>166</sup> The concept of complementarity<sup>167</sup> exists between the ICC and the individual national court systems and would ensure that United States national courts have primacy over the ICC because the ICC would only have jurisdiction where a home state is "unwilling or unable" to take action.<sup>168</sup> Moreover, even if the United States opted not to prosecute a particular individual, so long as the United States conducted a fair and thorough investigation, the case would not be within the jurisdiction of the ICC.<sup>169</sup>

It logically follows then, that so long as the United States is retaining primary jurisdiction, concerns over the potential for the loss of rights guaranteed by the Bill of Rights would no longer be an issue because the United States court system would assure that the courts preserved defendants' rights.

These arguments, notwithstanding the most significant limitation of the ICC in providing protection to women, is that it is designed to prosecute for crimes committed during war, or on a large scale; rather than for crimes that occur on an individual basis.<sup>170</sup> Therefore, even if the ICC were to go into effect tomorrow, unless the jurisdiction of the ICC is expanded to provide protection for violations of international law and human rights, regardless of when or how committed, the ICC would be useless in providing the protection sought by most of the women who seek asylum.

Consequently, women must seek protection from their nation of origin, if there is any protection provided to them at all. Protection available to women can vary, and quite often is protection in name only.<sup>171</sup> In many Latin American countries, social and legal resources are apparently not available to women.<sup>172</sup> In

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166. *See id.* at 961.

167. Complementarity derives from the principle that penal law and the exercise of police power is a state privilege that takes precedent over the concerns of outside authority. *See id.*

168. "Unwilling and unable" requires that the national courts undertake proceedings in bad faith and the national justice system has totally or substantially collapsed. *See id.* *But see* Dempsey, *supra* note 154, at 4 (arguing that the purpose of the ICC would be defeated if national courts could readily supersede the jurisdiction of the ICC because nations could create laws acquitting their citizens, and war criminals would go unpunished).

169. *See* O'Connor, *supra* note 135, at 961.

170. "The ICC, at its inception, will probably be able to try only egregious violations of human rights-genocide, crimes against humanity, and possibly aggression and war crimes." Lara A. Ballard, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 144 (1997). By definition, the crimes over which the ICC would have jurisdiction to prosecute involve large-scale attacks on women. *See* Amnesty, *supra* note 8, at 3 (describing genocide as having the intent to destroy a group, crimes against humanity as crimes perpetrated against groups on a large scale, and serious violations of international humanitarian law as requiring a nexus with armed conflict).

171. *See supra* notes 45-55 and accompanying text (discussing the failure to enforce written laws in various countries).

172. *In re R-A*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*8-9 (B.I.A. June 11, 1999) (relating the testimony of a medical witness who stated that there were no social or legal resources for battered women in Guatemala and that a woman who leaves an abusive spouse is destined for other problems).

Guatemala and Nicaragua in particular, it is evident that conditions are such that if a woman were to protect herself by leaving her abusive spouse, she would suffer other harms like poverty as a consequence.<sup>173</sup> The inference drawn is that women, in general, are not protected from harms of any kind, on any level.<sup>174</sup>

Theoretically speaking, women should have been guaranteed protection against gender-based crimes long ago. The United States Law of Land Warfare ("Field Manual") specifically states that civilians are to be treated with respect for human rights, particularly as to family honor and rights.<sup>175</sup> Treatment of women, particularly with respect to rape and other gender-based violent acts, has been discussed in the context of honor, both personal and familial.<sup>176</sup> I believe that a blanket prohibition on inhumane treatment could encompass the right of a woman to be free, even in her private life, from gender-based violent crimes.

Some may note that this Field Manual is a United States reference for custom and practice and is neither statutory nor the text of treaties and is not binding on courts and tribunals applying the law of war.<sup>177</sup> However, much of the Field Manual is derived from customary international law.<sup>178</sup> This Field Manual is therefore an excellent example of the sources from which the concept of protection for gender-based crimes may be derived. In any case, the Nuremberg trials, which resulted from the atrocities of the Holocaust, are sufficient to set a standard for crimes against humanity.<sup>179</sup> Crimes under this theory need not occur during an occupation or war, as is required for application of the Field Manual.<sup>180</sup> Unfortunately, crimes against humanity are not recognized where the victim suffers as the result of an isolated, or private incident,<sup>181</sup> and very often those are

173. *Id.*

174. Despite the theory that a man is expected to "honor, respect, and take care of [his wife]," there is an underground culture where spousal abuse is very real, and there are sparse options for women who pick the wrong man to marry. *Id.* at \*9-\*10; *see also supra* notes 45-55 and accompanying text.

175. *See* THE LAW OF LAND WARFARE, ch. 6, § I, pt. 380.

176. *See* Erb, *supra* note 60, at 407 (referencing language from the 1907 Hague Convention Respecting the Laws and Customs of War on Land, which provides that "[f]amily honour and rights . . . must be respected").

177. *See* THE LAW OF LAND WARFARE, ch. 1, § I, pt. 1 (Purpose and Scope).

178. *See id.*, pt. 4 (stating that recognized authorities of international law have firmly established a body of customary, unwritten law from which the U.S. has derived rules incorporated into the Field Manual).

179.

[Even Though] [d]efendants in the Nuremberg war crimes trials were not charged with rape as a war crime under customary international law[,] [t]he Nuremberg Charter, is nonetheless highly significant to a discussion of gender-based crimes in that it introduced to the international community for the first time the concept of crimes against humanity, which have come to encompass the crime of rape.

Erb, *supra* note 60, at 409.

180. There is no armed conflict nexus requirement with regard to crimes against humanity. *See* HR Watch, *supra* note 6.

181. "Crimes against humanity must be committed pursuant to a widespread or systematic attack." *Id.*

the women who are seeking asylum in the United States.

The problem still remains that international concern over women's human rights violations,<sup>182</sup> particularly with regard to violence against women, fails to address the fact that some of the most egregious violations of women's human rights<sup>183</sup> are the result of neither widespread nor wartime acts, but of the pervasive existence of ideologies that place women at a lower status than men.<sup>184</sup> This discriminatory view of women can, and often does escalate to abuse, resulting in violent beatings and rapes.<sup>185</sup> Women need protection. United States asylum law would be one way to remedy the problem, at least in part.<sup>186</sup> By granting women asylum in the United States, women could receive protection for private incidents that occur as a result of individual acts driven by gender animus.<sup>187</sup> The consequence of this would be that women seeking asylum would receive legal protection in the United States when their country of origin is unwilling or unable to provide it to them,<sup>188</sup> much like the ICC would provide protection where a country is unwilling or unable to prosecute individuals for widespread violations.<sup>189</sup>

### III. QUALIFYING FOR ASYLUM UNDER UNITED STATES IMMIGRATION LAW

"[V]ictims of human rights abuses have the means, through the mechanism of asylum, to escape the abuse."<sup>190</sup> An alien, whether in the United States lawfully or unlawfully, has a right to the protections under the Fifth Amendment Due

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182. At the 1993 World Conference on Human Rights there was a political consensus that "various forms of violence against women should be examined within the context of human rights standards and in conjunction with gender discrimination." Donna J. Sullivan, *Women's Human Rights and the 1993 World Conference on Human Rights*, 88 AM. J. INT'L L. 152, 152 (1994). The consequence of this consensus was an acknowledgment that there is a human rights obligation to eliminate violence against women. *See id.* at 155.

183. Included in the category defined as egregious violations is rape, female genital mutilation and other forms of gender violence such as sexual slavery, forced pregnancy or even sterilization. *See id.* at 156.

184. "[V]iolence against women is a consequence of, and in turn perpetuates, the systemic gender inequalities entrenched in the legal, political, economic, social and cultural structures of societies worldwide," and therefore it is urged that violence against women be examined "in light of the interrelationship between violence and women's subordinate status in public and *private* life." *Id.* at 157 (emphasis added).

185. *See id.* (implying that there is a circular relationship between discriminatory views towards women and gender violence; violence against women is itself a form of discrimination but at the same time, discriminatory viewpoints encourage violence against women).

186. *See* Smiley, *supra* note 93, at 339-40.

187. *See id.* at 342-46.

188. *See* 8 C.F.R. § 208.13(b) (1999). A person who is granted asylum cannot be returned or removed to their country of origin, will be authorized to work in the United States, and may, with consent of the Attorney General, travel abroad. *See* I.N.A. § 208(c) (2000); 8 U.S.C. § 1158(c) (1999).

189. *See* O'Connor, *supra* note 135, at 961.

190. Smiley, *supra* note 93, at 339.

Process Clause<sup>191</sup> of the Constitution.<sup>192</sup> This guarantee does not extend to aliens the same rights as a criminal defendant would have under the Constitution,<sup>193</sup> and there is no constitutional entitlement to asylum itself.<sup>194</sup> A person entering the United States who is deemed inadmissible<sup>195</sup> and seeks to apply for asylum, will be referred to an asylum officer ("AO").<sup>196</sup> The AO will evaluate the applicant's credible fear of persecution and refer him or her to an Immigration Judge ("IJ").<sup>197</sup> A determination that the applicant has no credible fear will result in summary removal.<sup>198</sup> This initial determination does, however, entitle the applicant to an expedited appeal before an IJ, which must occur within seven days.<sup>199</sup>

If a person is already in the United States, but has been served with a Notice to Appear at a removal hearing, he or she may file an application for asylum with an IJ only.<sup>200</sup> If deportability has not already been established, the IJ will first make this determination before proceeding to consider the asylum application.<sup>201</sup> The IJ may determine that the applicant is subject to mandatory denial,<sup>202</sup> in which case the proceedings will end.

In order for a person to qualify for asylum under United States Immigration Law, that person must show that "she is unable or unwilling to return to her country because she has suffered past persecution *or* has a well-founded fear of future persecution 'on account of race, religion, nationality, *membership in a particular social group*, or political opinion.'"<sup>203</sup> To be persecuted means to be

191. U.S. CONST. amend. V (stating that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

192. See *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023, 1036 (1982); see also I.N.A. § 208(a) (1) (2000) (declaring a statutory right to all aliens to apply for asylum).

193. See *Maldonado-Perez v. INS*, 865 F.2d 328, 332-33 (1989) (noting that there is no Sixth Amendment right to counsel, and deportation proceedings may proceed *in absentia*, or without the alien's presence).

194. See *Haitian Refugee Ctr.*, 676 F.2d at 1039.

195. The grounds for inadmissibility can be found under I.N.A. § 212, and 8 U.S.C. § 1182.

196. See IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK: A COMPREHENSIVE OUTLINE AND REFERENCE TOOL*, ch.4, at 300 (6th ed. 1998-99) [hereinafter *Kurzban*].

197. See *id.*

198. See *id.*

199. See *id.*

200. See 8 C.F.R. § 3.14 (1999). Aliens may also apply for asylum with the INS if they are in the United States but have not been served with removal papers. See I.N.A. § 208(a)(2) (B) (2000) (stating that aliens applying for asylum must do so within one year of arriving in the United States unless changed circumstances in their country of origin justifies the delay in application).

201. See *Kurzban*, *supra* note 196, at 313.

202. See 8 C.F.R. § 208.13(c) (1999).

203. *Lopez-Galarza v. INS*, 99 F.3d 954, 958 (9th Cir. 1996) (emphasis added); see also I.N.A. § 101(a)(42) (2000) (defining the term "refugee"). I.N.A. § 207 "governs the admission of refugees who seek admission from foreign countries," while section 208 "sets out the process by which refugees currently in

subjected to harm or suffering as punishment for the possession of a characteristic or belief that is offensive to the persecutor.<sup>204</sup> The alien must show that the harm or suffering resulted from actions by the government, or by individuals that the government is unable or unwilling to control.<sup>205</sup>

The term "well founded fear" requires that the alien show that a "reasonable person in her circumstances would fear persecution."<sup>206</sup> Well-founded fear<sup>207</sup> of persecution has both objective and subjective components.<sup>208</sup> Credible testimony from an alien that he or she genuinely fears persecution will satisfy the subjective component of the test.<sup>209</sup> The alien can "satisf[y] the objective component by pointing to credible, direct, and specific evidence in the record . . . that would support a reasonable fear of persecution."<sup>210</sup>

The alien must show that the persecution is on account of a protected ground under the Immigration and Nationality Act ("INA").<sup>211</sup> So long as actions would constitute persecution for an enumerated ground, an applicant for asylum need not show the precise motivation for the persecutor's actions.<sup>212</sup> Furthermore, the burden of providing either direct or circumstantial evidence "from which it is reasonable to conclude that [a] persecutor harmed her *at least in part* because of a protected ground" is borne by the asylum applicant.<sup>213</sup> Failure to prove the 'on account of' relationship between the persecution and the protected ground is fatal to the establishment of an asylum claim.<sup>214</sup>

In showing that an applicant has a well-founded fear of future persecution, an applicant need not prove that he or she was persecuted in the past in order to qualify for asylum.<sup>215</sup> Likewise, if the applicant establishes that he or she has

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the United States may be granted asylum." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 (1987).

204. See *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986); see also *Matter of Acosta*, Int. Dec. 2986 (B.I.A. 1985).

205. See *Arevalo v. INS*, available at 1999 WL 181587, at \*2 (4th Cir. 1999); see also *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996).

206. *Matter of Barrera*, 19 I & N Dec. 837, 845 (B.I.A. 1989).

207. "Fear" is defined as "a genuine apprehension or awareness of danger in another country." *Matter of Acosta*, 19 I & N Dec. 211, 221 (B.I.A. 1985).

208. See *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998) (stating that there must be a "subjectively genuine and objectively reasonable fear," in order to establish well-founded fear).

209. See *id.*

210. *Id.* (citing *Ghaly v. INS*, 58 F.3d 1425, 1428 (9th Cir. 1995) (quoting *Arriaga-Barrientos v. INS*, 925 F.2d 1177, 1178-79 (9th Cir. 1991))).

211. Protected grounds are race, nationality, religion, political opinion, or membership in a particular social group. See I.N.A. § 101 (a)(42)(A) (2000); see also 8 U.S.C. § 1101(a)(42)(A) (1999) (defining the term "refugee").

212. See *In re Kasinga*, No. A73A76695, available at 1996 WL 379826, at \*10-11 (B.I.A. 1996).

213. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis, at \*15 (B.I.A. June 11, 1999) (emphasis added).

214. See *Vera-Valera v. INS*, 147 F.3d 1036 (9th Cir. 1998) (holding that presidential coup is not persecution 'on account of' because there is no proof it was because of political opinion); see also *Fisher v. INS*, 79 F.3d 955, 964 (9th Cir. 1996) (ruling that punishment for certain activities is not sufficient without proof that it is on account of protected grounds).

215. See *In re Mogharrabi*, 19 I & N Dec. 439, 443 (B.I.A. 1987); see also *Del Valle v. INS*, 776 F.2d 1407, 1411 (9th Cir. 1985).

suffered past persecution, the applicant is not required to prove that he or she also has a well-founded fear of future persecution.<sup>216</sup> In fact, if an applicant establishes past persecution, the applicant will be presumed to have a well-founded fear of future persecution.<sup>217</sup>

In evaluating the evidence presented by an alien applying for asylum, an IJ must determine that it is reasonably possible that the alien will be subjected to persecution if returned to the alien's country.<sup>218</sup> Consequent to the broad requirements established under the INA and case precedent, the Court in *Matter of R-O*<sup>219</sup> determined that the applicant's burden includes proof that:

- (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is aware or could become aware that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.<sup>220</sup>

A grant of asylum is within the discretion of the IJ, regardless of whether the alien has established that he or she is a refugee under the INA.<sup>221</sup> If a refugee is granted asylum, the asylum is granted for an indefinite period<sup>222</sup> and he or she would be eligible for permanent residency after one year.<sup>223</sup> However, a grant does not *entitle* the refugee to remain permanently, and an asylum grant could be revoked by an AO, IJ, or in accordance with the INA, under particular circumstances.<sup>224</sup> If an alien fails to meet his or her burden as established by the

216. See 8 C.F.R. § 208.13(b)(1)(i) (2000).

217. See *id.*; see also *Kossov v. INS*, 132 F.3d 405, 409 (7th Cir. 1998). Note that this presumption is subject to whether or not the government presents evidence establishing that the country conditions have changed to the extent that the applicant would no longer have a well-founded fear. See 8 C.F.R. § 208.13(b)(1)(i) (2000).

218. See *Dolores v. INS*, 772 F.2d 223, 226 (6th Cir. 1985) (noting that the more generous well-founded fear requirement can be established by "credible subjective evidence," and requires neither corroboration, nor satisfaction of preponderance of the evidence).

219. 20 I & N Dec. 455, available at 1992 WL 195804 (B.I.A. 1992).

220. *Id.* at 458.

221. 8 C.F.R. § 208.14(a) (2000) (subjecting this discretion to the limits stated under § 208.13(c)).

222. *Id.*

223. See I.N.A. § 209(b) (2000); see also 8 U.S.C. § 1159(b)(1999).

224. See 8 C.F.R. § 208.23(a),(b) (2000).

An asylee may lose his/her status if: (1) there is fraud in the application; (2) the application is filed after April 1, 1997 and the person meets one of the categories specified in INA § 208(a)(2); or (3) the application was filed before April 1, 1998 and the applicant no longer has a well-founded fear because there are changed conditions in the country of origin. See *Kurzban, supra* note 196, at 349.



law, the result is a denial of a request for asylum.<sup>225</sup> Unless an alien qualifies for some other form of relief, the alien will be ordered excluded, removed, or deported immediately.<sup>226</sup>

#### A. "Particular Social Group"

No specific guidelines have been set by the courts for determining exactly what qualifies as a particular social group.<sup>227</sup> The Court in *In re R-A*<sup>228</sup> did note however, that "'particular social group' is to be construed in keeping with the other four statutory characteristics that are the focus of persecution . . . ."<sup>229</sup> Courts have set forth varying guidelines to be used on what seems to be a case-by-case basis, for making this determination.<sup>230</sup> According to the most recent opinion of the Board of Immigration Appeals, decided June 11, 1999, "members of a particular social group share a 'common, immutable characteristic' that they either cannot change, or should not be required to change because such characteristic is fundamental to their individual identities."<sup>231</sup> The Ninth Circuit defines a particular social group as:

a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which impart some common characteristic that is fundamental to their identity as a member of that discrete social group.<sup>232</sup>

For viability as a group under asylum law, an alien must show how a characteristic is understood in his or her society.<sup>233</sup> Such a showing would help to determine whether or not the claimed persecutor "in fact see[s] persons sharing the characteristic as warranting suppression or the infliction of harm."<sup>234</sup> For example, in *Fatin v. INS*,<sup>235</sup> the court held that the alien had not shown that her

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225. "Factual findings, including the determination that an alien has failed to prove his eligibility for asylum, are reviewed under the substantial evidence standard." *Acewicz v. INS*, 984 F.2d 1056, 1061 (9th Cir. 1993).

226. See generally, Bender's 2000 Immigration and Nationality Act.

227. See Smiley, *supra* note 93, at 343-44.

228. Int. Dec. 3403, 1999 BIA Lexis 31 (B.I.A. June 11, 1999).

229. *Id.* at \*29.

230. "The particular kind of group characteristic that will qualify . . . remains to be determined on a case-by-case basis." *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir. 1993)(citing *In re Acosta*, 19 I & N Dec. 211, 233 (B.I.A. 1985)).

231. *In re R-A*-, 1999 BIA Lexis 31, at \*14.

232. *Id.*

233. *Id.* at \*28.

234. *Id.*

235. 12 F.3d 1233 (3rd Cir. 1993).

actions would place her within a group that others view as warranting suppression.<sup>236</sup> The court reasoned that although she had established a potentially viable social group, "Iranian women who *refuse to conform* to the government's gender-specific laws and social norms,"<sup>237</sup> she failed to show that she would "refuse to conform."<sup>238</sup> Absent this showing, she could not be placed within a group that others would view as warranting suppression.<sup>239</sup>

Hence trying to avoid wearing a chador as much as possible and being beaten when she did not,<sup>240</sup> would not constitute persecution on account of membership in a social group because she was not within the group of those who "refuse to conform."<sup>241</sup> In other words, the court argued that an absolute refusal, knowing such action would result in violence,<sup>242</sup> would be required to bring her within the group because it would show her membership in a group that held a belief so fundamental that it ought not be required to be changed.<sup>243</sup>

"Particular social group" has been said to require that a group be "a collection of people closely affiliated with each other, who are actuated by some common impulse or interest."<sup>244</sup> Parallel to the other four enumerated categories, "the attributes of a particular social group must be recognizable and discrete."<sup>245</sup> The court in *Safaie v. INS*,<sup>246</sup> stated that, "a group of women, who refuse to conform and whose opposition is so profound that they would choose to suffer the severe consequences of noncompliance, may well satisfy the definition"<sup>247</sup> of a particular social group. The reason for this is that while "women" itself would be too broad of a characteristic, narrowing the group to those women who held a particular common belief would create a more discrete, recognizable group.<sup>248</sup>

All courts do not necessarily share this viewpoint. The Court in *Gomez v. INS*,<sup>249</sup> specifically held that a group of women who had previously been raped and beaten did not amount to a social group because gender and youth are too broad

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236. *See id.* at 1241.

237. *Id.*

238. *Id.*

239. *See id.* at 1243-44.

240. *See id.* at 1241.

241. *See Fatin v. INS*, 12 F.3d 1233, 1241 (3rd Cir. 1993).

242. The respondent testified that "the routine penalty" for noncompliance is 74 lashes, a year's imprisonment, and in many cases brutal rapes and death." *Id.*

243. *See id.*

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

245. *Gomez v. INS*, 947 F.2d 660, 664 (2nd Cir. 1991).

246. 25 F.3d 636 (8th Cir. 1994).

247. *Id.* at 640.

248. *See id.*

249. 947 F.2d 660 (2nd Cir. 1991).

as characteristics.<sup>250</sup> If the standard is that the group must be recognizable and discrete, it is arguable that "women who have been previously battered and raped" could be considered a particular social group if it could be shown that they would be singled out for further brutalization on this basis.<sup>251</sup>

### *B. The Treatment Of Rape In Asylum Law*

Some courts have acknowledged that the "INS has officially recognized rape and sexual abuse as a form of persecution"<sup>252</sup> and held that past persecution alone could warrant a grant of asylum,<sup>253</sup> so long as the motive is one that is acknowledged as a form of persecution<sup>254</sup> under the Act. In guidelines produced by the INS in 1995, immigration officers were directed to "recognize that female applicants may face unique 'gender persecution,' which includes rape and sexual abuse, and provides that 'rape and other forms of severe sexual violence' are examples of physical harm that constitutes persecution."<sup>255</sup>

In contrast to other countries who use the same language in their refugee laws, the United States takes a more conservative approach in construing the language of the statutes. Despite the use of identical language,<sup>256</sup> while Canada and Australia interpret the statute to include women as a social group,<sup>257</sup> the United States opts to exclude that group as being too broad.<sup>258</sup>

Some American courts have unfortunately concluded that rape and abuse are "strictly personal actions [which] do not constitute persecution within the meaning of the [statute],"<sup>259</sup> and that the possession of a broad based characteristic such as gender is not sufficient to "endow individuals with membership in a particular [social] group."<sup>260</sup>

There is notable disagreement as to whether rape is to be considered a form

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250. *Id.* at 664.

251. *See id.* at 663-64.

252. *Basova v. INS, available at 1999 WL 495640, at \*2 (10th Cir. 1999); see also Grajo v. INS, available at 1997 WL 464095, at \*3 (7th Cir. 1997).*

253. *See Lopez-Galarza v. INS, 99 F.3d 954, 959 (9th Cir. 1996).*

254. *See id.* Persecution must be on account of race, religion, nationality, political opinion or membership in a particular social group. *See I.N.A. § 101(a)(42)(A) (2000); see also 8 U.S.C. § 1101(a)(42)(A) (1999).*

255. *Lopez-Galarza, 99 F.3d at 963.*

256. *See Macklin, supra note 9, at 27.*

257. Australian and Canadian decisionmakers agree that women share the most obvious immutable characteristic of gender, and while this may be a broad category, women have both shared common social characteristics and immutable characteristics that make them a cognisable group capable of attracting persecution. *See id.* at 64.

258. *See Gomez v. INS, 947 F.2d 660, 664 (2nd Cir. 1991).*

259. *Lopez-Galarza, 99 F.3d at 960 (citing Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987); see also Basova v. INS, available at 1999 WL 495640, at \*1, \*3 (10th Cir. 1999) (upholding deportation of rape victim).*

260. *Gomez, 947 F.2d at 664.*

of persecution for asylum purposes.<sup>261</sup> Couple this with the belief in many courts that gender does not qualify as an acknowledged basis of persecution,<sup>262</sup> and there is little room left for relief for those women who seek asylum purely on the basis of gender-based persecution resulting from rape or other sexual and domestic violence.<sup>263</sup>

The most recent precedent for denying women the right to asylum on strictly gender-based persecution is *In re R-A*,<sup>264</sup> decided in June of 1999. The respondent in this case is a native and citizen of Guatemala, who married her husband when she was only sixteen years of age, and he was twenty-one.<sup>265</sup>

Respondent's husband was, from the very beginning of their marriage, a domineering and violent man who often subjected the respondent to physical and sexual abuse.<sup>266</sup> At the beginning, he would yell at her, follow her to work, strike her and tell her stories "of having killed babies and the elderly" in order to scare her.<sup>267</sup> As the relationship progressed, so did the level and frequency of the abuse, and the respondent was repeatedly beaten,<sup>268</sup> raped<sup>269</sup> and threatened with death. When respondent protested, her husband told her that he could do what he wanted

261. See *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (ruling that "harm or threats of harm based solely on sexual attraction do not constitute 'persecution' . . ."); see also *Campos-Guardado v. INS*, 809 F.2d 285, 287-89 (5th Cir. 1987) (ruling that the sister of politically active males who had been gang raped did not suffer persecution but the unlawful expression of sexual desire, a personal harm). Other cases note that sexual violence is a form of persecution, given there is a nexus with a protected ground. See *Angoucheva v. INS*, 106 F.3d 781, 789-90 (7th Cir. 1997) (rejecting lower court's view that sexual attraction produced the sexual abuse of political dissidents and was consequently not persecution); see also *Lopez-Galarzo*, 99 F.3d at 963 (reversing decision to deny asylum because of level of atrocity and past persecution).

262. "[V]arious United States appellate courts have proffered different opinions on whether and how gender may form the basis of social group ascription." Macklin, *supra* note 9, at 60; see also *Gomez*, 947 F.2d at 664 (reasoning that youth and gender are characteristics too broadly based to suggest cognisability as a group that will be singled out for brutalization); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994) (ruling that no reasonable fact-finder could conclude that women could have a well-founded fear of persecution based on a characteristic as broad as gender).

263. America, Australia and Canada all agree that sexual abuse, forced abortion and female genital mutilation are recognized as "forms of persecution [that] may be inflicted exclusively or more commonly on women." Macklin, *supra* note 9, at 39.

264. *In re R-A*, Int. Dec. 3403, 1999 BIA Lexis 31 (B.I.A. June 11, 1999).

265. *Id.* at \*3-4.

266. *Id.* at \*4.

267. *Id.*

268. *Id.* at \*5 (relating how on one occasion the respondent's husband broke her jaw bone when her menstrual period was late, and another occasion when he kicked her in the spine because she refused to have an abortion).

269. *Id.* (reporting that the rapes were accompanied by beatings before and after, occurred "almost daily," caused her severe pain, and resulted in the passing on to her of a sexually transmitted disease he acquired from sexual relations outside the marriage). The respondent was also kicked in her genitalia, and forcefully sodomized. *Id.*

because she was his woman, and she must do as he said.<sup>270</sup>

Respondent made many attempts to flee from her husband, but he would always find her.<sup>271</sup> The violence and threats of violence<sup>272</sup> toward the respondent continued. She testified that she believed that "he would abuse any woman who was his wife,"<sup>273</sup> because "he saw her 'as something that belonged to him and he could do anything he wanted' with her."<sup>274</sup>

Respondent sought help from the Guatemalan police but it was to no avail.<sup>275</sup> The police took no further action when respondent's husband ignored a summons to appear in court, and when respondent appeared before a judge, the judge told her that the court would not interfere in domestic disputes.<sup>276</sup> Respondent's husband warned her that it was futile to call the police because his former military service assured that his familiarity with law enforcement would prevent her from getting help.<sup>277</sup> Respondent testified that there were no shelters or organizations in Guatemala that she was aware of that could protect her.<sup>278</sup> In fact witness testimony documented that it was the intent of the respondent's husband "to hunt her down and kill her if she [came] back to Guatemala."<sup>279</sup>

Despite finding the husband's conduct to have been deplorable, the court in *In re R-A-* held that the group identified by the IJ,<sup>280</sup> did not qualify as "a particular social group" for asylum purposes.<sup>281</sup> The court further held that "the respondent has failed to show that her husband was motivated to harm her, even in part, because of her membership in a particular social group or because of an actual or imputed political opinion."<sup>282</sup>

Before rendering its decision, the court noted that the severe injuries from which the respondent suffered were more than sufficient to constitute "persecution."<sup>283</sup> The court also acknowledged that she had clearly established an

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270. See *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*5 (B.I.A. June 11, 1999).

271. *Id.* at \*6 (noting that the respondent reported that on one occasion when she fled with her children, her husband found her, beat her over the head, and "dragged her by her hair into another room and beat her to unconsciousness").

272. On more than one occasion the respondent's husband took out a machete and threatened her with it, telling her that he could cut her up and leave her in a wheelchair. *Id.* at \*6-\*7. He would also strike her with objects like electrical cords, and would grab her head and thrust it into furniture, mirrors, or whatever else he could find. *Id.*

273. *Id.* at \*7.

274. *Id.*

275. *Id.* at \*7-8.

276. See *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*8 (B.I.A. June 11, 1999).

277. *Id.*

278. *Id.* A doctor who testified that she, too, was "not aware of social or legal resources for battered women" corroborated this statement. *Id.* at \*8-9.

279. *Id.* at \*8.

280. The group was defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." *Id.* at \*11.

281. *Id.* at \*3.

282. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*3 (B.I.A. June 11, 1999).

283. *Id.* at \*18; see also *supra* note 204 and accompanying text (defining persecution).

inability to avail herself of assistance from the Guatemalan government.<sup>284</sup> The question that ultimately faced the court was "whether the harm experienced by the respondent was, or in the future may be, inflicted 'on account of' a statutorily protected ground."<sup>285</sup>

In rendering their opinion in the case, the court first addressed the question of whether the respondent's husband harmed her because of an imputed political opinion.<sup>286</sup> The court observed that the evidence of record indicated neither that the respondent held or evinced a political opinion, nor that her husband "had any understanding of the respondent's perspective or that he even cared what the respondent's perspective may have been."<sup>287</sup> The court concluded on this point that the record did "not indicate that the harm arose in response to any objections made by the respondent to her husband's domination over her."<sup>288</sup>

The court acknowledged that while there may be a possibility that the view of men and women which the respondent's husband held may have played a role in the brutality, there lacked "any meaningful evidence that her husband's behavior was influenced at all by his perception of the respondent's opinion."<sup>289</sup> Therefore, a causal connection between any belief he may have imputed to her and the violence he inflicted upon her simply was not present.<sup>290</sup>

The court then addressed the matter of a "particular social group," and concluded that from the group's makeup was absent "'a voluntary associational relationship' that is of 'central concern in the Ninth Circuit.'"<sup>291</sup> Notwithstanding this law, the court stated that under its own analysis it felt the proposed group was too abstractly defined, and seemed to lack all relation to the way in which subdivisions in Guatemala would be structured, and likewise viewed by others in Guatemalan society.<sup>292</sup>

The court reached the conclusion that the respondent failed to show that the proposed group is one recognized as a "societal faction, or is otherwise a

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284. See *In re R-A*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*18 (June 11, 1999).

285. *Id.* at \*18-19.

286. *Id.* at \*19-27.

287. *Id.* at \*20 (basing this observation on the testimony of the respondent that even though she eventually began to acquiesce in her husband's demands, he would still abuse her, and that he told her "he 'didn't care' what she did to escape because he would find her").

288. *Id.* at \*21.

289. *Id.* at \*23.

290. *Id.* at \*25-26.

291. *Id.* at \*27; see also *supra* note 232 and accompanying text (stating the concern of the Ninth Circuit).

292. *In re R-A*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*28. (B.I.A. June 11, 1999).

recognized segment of the population."<sup>293</sup> Moreover, the respondent failed to show anything more than the mere existence of a shared characteristic.<sup>294</sup> The court argued that there is a great threat that the "social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."<sup>295</sup> The court concluded that absent proof of some distinction drawn in society between her proposed group and others, there was insufficient evidence to support a recognition of the group the respondent proposed.<sup>296</sup>

The court's analysis did not end there.<sup>297</sup> In what seemed to be an effort to further explain the court's opinion, the court noted that the record was void of any evidence that would tend to show the respondent's husband had any interest in harming anyone other than the respondent.<sup>298</sup> The court reasoned that "[i]f group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions toward other members of the same group."<sup>299</sup> In other words, beyond the evidence showing that her husband clearly believed women should be subservient to their husbands, there was scant information to formulate any opinion broader than one which finds his focus to be anything more than on his wife.<sup>300</sup>

The court pointed out that the IJ's opinion relied significantly on the failure of the Guatemalan government to lend support to the respondent.<sup>301</sup> The court argued that the "on account of" requirement in the statute would be forestalled if the court were to construe inadequacy of protection against private acts of violence to qualify as governmental persecution.<sup>302</sup> According to the court, such a change would alter the focus of refugee law altogether.<sup>303</sup>

Distressingly, the opinion in this case presents a substantial roadblock in the road to relief that many women seek. However, there is a light at the end of the tunnel. I would argue that the reasoning in this case is logically flawed in some

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293. *Id.* at \*29-30 (noting that the respondent did not show that "victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group").

294. *Id.* at \*28.

295. *Id.* at \*31.

296. *Id.* at \*30-31.

297. *Id.* at \*33-45 (continuing analysis with a discussion of the IJ's nexus analysis and *In re Matter of Kasinga*, Int. Dec. 3278 (B.I.A. 1996).

298. See *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*33-4 (B.I.A. June 11, 1999).

299. *Id.* at \*34.

300. *Id.* at \*36 (supporting this conclusion even further with the arbitrariness of his attacks, and on the fact that none of his reasons for beating, which changed from moment to moment, appeared to be 'on account of a protected ground).

301. *Id.* at \*37.

302. The court commented that the record showed that there was an awareness in Guatemala of domestic violence, and that although abuse was tolerated at certain levels, there was ample evidence to show that this was not a form of relationship viewed upon admirably. *Id.* at \*38.

303. *Id.* at \*40.

respects and defies legal reasoning and precedent in others. These flaws will be discussed in the next section of this Comment.<sup>304</sup>

#### IV. ARGUMENTS FOR TREATING WOMEN AS A GENDER AS A "PARTICULAR SOCIAL GROUP"

Asylum claims under the Act often arise during deportation proceedings.<sup>305</sup> Historical judicial interpretation of the Act has resulted in an exclusion of women as a "particular social group."<sup>306</sup> The resulting ramification from this interpretation is a wide spread denial to women of protection from violent, gender-related crime.

There is an anomaly. Rape is considered a form of persecution so long as its basis is one of the enumerated categories under the act. Yet, rape and other forms of sexual, gender-based violence are committed predominantly as a result of violent tendencies against women for no reason other than that they are women. "[A woman] has a fundamental right to protection from abuse based on gender";<sup>307</sup> and therefore should be entitled to protection through any means necessary.

"The members of the group generally understand their own affiliation with the grouping, as do other persons in the particular society."<sup>308</sup> There can be no debate that in most societies "women" are a group to which they not only belong, but also from which they could not possibly disaffiliate themselves.<sup>309</sup> Common sense observation tells us that, absent very serious reconstructive surgery, once born a woman, one is so for life.

"If a characteristic is important in a given society, it is more likely that distinctions will be drawn within that society between those who share and those who do not share the characteristic."<sup>310</sup> Clearly there are lines drawn between men

304. *Infra* notes 317-335 and accompanying text.

305. *See, e.g.*, *INS v. Elias-Zacarias*, 502 U.S. 478, 479 (1992); *see also Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1573 (9th Cir. 1986); *Safaie v. INS*, 25 F.3d 636, 638 (8th Cir. 1994); *Gomez v. INS*, 947 F.2d 660, 662 (2nd Cir. 1991); *Fisher v. INS*, 79 F.3d 955, 959 (9th Cir. 1996).

306. "Persecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act." *Fisher*, 79 F.3d at 963; *see also Gomez*, 947 F.2d at 664 (holding that broad characteristics like youth and gender are not sufficient to place an individual in a particular social group under refugee law); *Safaie*, 25 F.3d at 640 (concluding that a group defined primarily upon gender grounds is too broad because "no factfinder could reasonably conclude that all . . . women had a well-founded fear of persecution based solely on their gender") (citation omitted).

307. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*59 (B.I.A. June 11, 1999) (Guendelsberger, J., dissenting).

308. *Id.* at \*29.

309. *See Macklin, supra* note 9, at 65 (quoting Lesley Hunt, who said "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 . . .").

310. *In re R-A-*, 1999 BIA Lexis 31, at \*30.



and women, lines which cannot be ignored.<sup>311</sup> Those lines exist not only as part of our biological nature, but also as a result of attitudes such as those which drive men to rape,<sup>312</sup> and those which drive men to beat a woman for showing her flesh in public.<sup>313</sup>

It has been said that "the mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group."<sup>314</sup> Interestingly, when examining the categories currently acknowledged as statutorily protected groups, race, religion, political group and nationality, at base, seem to share only a descriptive characteristic and are nothing more than specific applications of the criteria for designating a particular social group.<sup>315</sup>

Not surprisingly, the courts have clearly acknowledged that there is little, if any, distinction to be drawn between "particular social group" and the other four enumerated grounds.<sup>316</sup> The difference seems to lie in something deeper, which no court has attempted to determine and clarify. The addition of new "protected groups" has hence eluded the system and left a great many without the protection they need.

This brings us back to the earlier discussion of *In re R-A*,<sup>317</sup> where the court declared that the asserted group lacked anything more than a shared characteristic.<sup>318</sup> If we take into account the fact that particular social group is to be construed along the same lines as the other four enumerated grounds,<sup>319</sup> then little more is needed than a shared characteristic. It is hard to see how race or nationality share anything more with one another than a descriptive quality without further detail as to some common impulse or interest they may also have in common. Likewise, religion and political opinion surely cannot be argued to be immutable because they are clearly amenable to change. Hence, it is unclear as to what standard should in fact be applied for particular social group if it is to conform to the others even though they are not consistent with each other.

Another flaw lies in the court's determination that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe

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311. "[C]haracteristics common to all women, relate to gender and either emanate from, or are generally perceived to emanate from, gender." Macklin, *supra* note 9, at 65 (quoting Lesley Hunt). Included in those characteristics are the "ability to give birth" and the role as primary "child-rearers" and "nurturers." *Id.* (quoting Lesley Hunt).

312. See *supra* notes 95-133 and accompanying text.

313. WIN News, *supra* note 29, at 49.

314. *In re R-A*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*30-31 (B.I.A. June 11, 1999).

315. "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." Macklin, *supra* note 9, at 64.

316. *In re R-A*, 1999 BIA Lexis 31, at \*29.

317. *Supra* notes 264-303 and accompanying text.

318. *In re R-A*, 1999 BIA Lexis 31, at \*28.

319. *Id.* at \*29.

that women are to live under male domination' is not a particular social group."<sup>320</sup> *Matter of Acosta*,<sup>321</sup> the very case upon which this court relies so heavily, clearly states that "membership in a particular social group"<sup>322</sup> refers to persons who hold an "immutable characteristic or common trait such as *sex*, color, [or] kinship . . . ."<sup>323</sup> The category of "women" specifically fits within this definition, and therefore satisfies the court's basic requirement of holding an immutable characteristic.

The court acknowledged that there in fact existed a subset of Guatemalan society that supported and condoned the type of conduct displayed by the respondent's husband,<sup>324</sup> despite the fact that a large portion of Guatemalan society believes "husbands are supposed to honor, respect, and take care of their wives."<sup>325</sup> Hence, men who beat their wives would be a group that is viewed separately from others in Guatemalan society because they are a group that behaves outside the norm.<sup>326</sup> Likewise, the women who are beaten and raped by their husbands could be considered a group because they not only share the immutable characteristic of being women, but they are also all married to abusive men. Consequently, they would be viewed as a societal faction because women in Guatemala are not all abused by their husbands.

A third flaw is found in the court's argument that proof of social group membership requires that the men manifest their abuse towards other women in the group.<sup>327</sup> Men abuse the women in their lives, usually wives or girlfriends, because they view these women as property, and believe this entitles them to beat the women.<sup>328</sup> For that reason, regardless of whether Respondent was his wife, or whether another woman was his wife, *she would have been beaten*.<sup>329</sup>

Refugee law does not require that the persecutor seek to harm all members of

320. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*27 (B.I.A. June 11, 1999).

321. 19 I & N Dec. 211 (B.I.A. 1985).

322. *Id.* at 213.

323. *Hamzei v. INS*, 64 F.3d 1240, 1246 (8th Cir. 1995) (emphasis added).

324. "The record in this case reflects that the views of society and of many governmental institutions in Guatemala can result in the tolerance of spouse abuse . . . ." *In re R-A-*, 1999 BIA Lexis 31, at \*38. The evidence on record also shows that in the "underneath" or "underground" section of the culture, spouse abuse is present as a consequence of the "patriarchal culture" that exists in many Latin American cultures. *Id.* at \*9-10.

325. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*9 (B.I.A. June 11, 1999).

326. *Id.*

327. *Id.* at \*34.

328. See West, *supra* note 1, at 1444; see also *supra* notes 23-25 and accompanying text.

329. The Respondent testified that it was her belief that her husband would beat any woman to whom he was married. *In re R-A-*, 1999 BIA Lexis 31, at \*7 (emphasis added). He viewed her as "his wife" and therefore property that he could do with as he pleased. *Id.* Therefore, it is likely that respondent's husband placed no emphasis on the fact that the Respondent was his property because it was *her*, rather than some other woman.

the group, it only requires that the persecutor be motivated to harm the individual in part because of her membership in that group.<sup>330</sup> In the instant case, respondent's husband beat her *because* she was a woman and *because* she was his wife. Therefore, respondent can be said to be a member of the group, "Guatemalan women who have been involved intimately with male companions, who believe that women are to live under male domination," because not all husbands in Guatemala rape their wives, and because no human would wish to be subjected to such beatings.<sup>331</sup> A fourth flaw exists in the court's argument that the "on account of" requirement would be forestalled if the court were to construe inadequacy of protection against private acts of violence to qualify as governmental persecution.<sup>332</sup> As discussed earlier in this Comment, a necessary element of proof in an alien's asylum claim is evidence that the alien was harmed because of government actions, or because of private actions the government is unable or unwilling to control.<sup>333</sup> A majority of women who suffer from gender-based violence suffer at the hands of private individuals the government is unable or unwilling to control.<sup>334</sup> By deduction then, if the government is unwilling or unable to control private acts that amount to persecution, then the government's inaction could very well be persecution by itself.<sup>335</sup>

The flaws in the opinion set forth in *In re R-A-* are clear support for the proposition that gender should be a permissible ground for protection under the category of particular social group, particularly where the asserted group is defined more narrowly than strictly on gender lines.

Writing in a dissenting opinion in *Fisher v. INS*,<sup>336</sup> Circuit Judge John T. Noonan, Jr., stated that "[t]he evaluation of gender-based claims *must* be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations."<sup>337</sup> He later urges that in light of the instructions given to asylum officers for evaluating claims, there is a strong possibility that women as a group would qualify as a "particular social group" where the relationship among those who make up the

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330. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (stipulating that the asylum applicant bears the burden of proving evidence for which it is reasonable to conclude that her persecutor harmed her at least in part because of a protected ground or group).

331. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*27 (B.I.A. June 11, 1999).

332. *Id.* at \*38.

333. *Arevalo v. INS*, No. 98-2254, available at 1999 WL 181587, at \*2 (4th Cir. 1999); see also *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996).

334. See *supra* notes 45-55 and accompanying text.

335. "[T]he state owes a duty to protect citizens' basic rights, not only from abrogation by the state itself, but from private actors as well." Macklin, *supra* note 9, at 48. Given that "the international community has acknowledged that domestic violence is an appropriate subject of international human rights," taken along with the state's obligation, "it should follow that domestic violence is a form of persecution from which the state is obliged to protect its women nationals." *Id.*

336. 79 F.3d 955 (9th Cir. 1996).

337. *Id.* at 967 (Noonan, J., dissenting) (quoting *Considerations for Asylum Officers Adjudicating Asylum Claims for Women*, reprinted in, 72 INTERPRETER RELEASES 781 (June 5, 1995)).

group is more narrowly circumscribed.<sup>338</sup>

Notwithstanding all the justifications already given, there are alternative reasons for granting gender protection based on domestic law theories. In the United States, "[v]iolent crimes motivated by the victim's status as a member of a particular group are known as bias or hate crimes."<sup>339</sup> A woman is said to be a victim of a hate crime whenever she is made a victim because of her sex.<sup>340</sup> One could deduce that persecution is merely an international hate crime, and therefore women should receive protection on the basis of gender.

Title VII discrimination laws provide protection on gender grounds.<sup>341</sup> Though discrimination does not generally rise to the level of persecution,<sup>342</sup> deliberate persecution may be found where the discrimination is in an extreme form.<sup>343</sup> In fact, the Seventh Circuit held in *Bacur v. INS*,<sup>344</sup> that extraordinary cases may rise discrimination to the level of persecution.<sup>345</sup>

The contention has been made that racial and class-based discrimination intersects with gender discrimination.<sup>346</sup> Furthermore, the World Conference on Human Rights resulted in a unanimous political opinion that "various forms of violence against women should be examined within the context of human rights standards and in conjunction with gender discrimination."<sup>347</sup>

The importance of acknowledging discrimination in the context of asylum law has already surfaced in the United States. In 1996, the court in *Singh v. INS*,<sup>348</sup> held that discrimination against a group to which an alien belongs, by the government or some other persecutor, is *always* relevant to an asylum claim.<sup>349</sup>

It seems that there may be universal acceptance of the proposition that a woman's right to be free from gender violence must be examined in light of other forms of discrimination and violence. The conclusion to this must be that the United States acknowledge gender as a basis for persecution. Otherwise, "particular social group" is not being construed along with race, religion,

338. As an example, Judge Noonan stated that a particular social group could exist where the group is defined as "women . . . who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live . . . ." *Id.* at 968 (Noonan J., dissenting).

339. Hallock, *supra* note 74, at 583.

340. *Id.*

341. See 42 U.S.C. § 2000e-2 (1995).

342. See *supra* note 40.

343. See Robinson, *supra* note 140, at 53.

344. 109 F.3d 399 (7th Cir. 1997).

345. *Id.* at 402-03.

346. See Sullivan, *supra* note 182, at 153.

347. *Id.* at 152.

348. 94 F.3d 1353 (9th Cir. 1996).

349. *Id.* at 1359; see also Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995); Matter of Salama, 11 I & N Dec. 536 (B.I.A. 1966).

nationality and political opinion as is clearly required by law.<sup>350</sup>

There are also concerns associated with the manner in which women would receive protection internationally were it actually available. Those who have created and have been responsible for the enforcement of international humanitarian laws have been men.<sup>351</sup> Likewise, those who investigate crimes against women and are responsible for questioning the victims about the crimes have also been men.<sup>352</sup>

In the United States there are organizations that are trained to assist the courts in bringing this sensitive information out so that prosecutions can occur, or at the least, so that the women can receive the assistance or protection that they need. Furthermore, the repercussions of acts of violence against women are so great that the denial of protection could be considered an act, which is in and of itself, inhumane.<sup>353</sup>

## V. THE "POLITICAL OPINION" ALTERNATIVE

Canada and Australia "link [gender] violence to membership in a particular social group, while in the United States, some decision-makers use the ground of political opinion in addition to or instead of particular social group."<sup>354</sup> The opinion that is generally imputed is a belief that a woman has a right not to be subjected to male domination.<sup>355</sup> By imputing such an opinion to women who defend themselves, we try to create an alternative for providing protection where there otherwise would be none.

There is a defect in this argument. Certainly no victim of violence could be presumed to desire such treatment, and will likely resist in some way.<sup>356</sup> Nevertheless, "it is another matter to presume that the perpetrator of the violence inflicts it because the perpetrator believes the victim opposes either the abuse or the authority of the abuser."<sup>357</sup> It seems more logical to believe that men treat

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350. *In re R-A-*, Int. Dec. 3403, 1999 BIA Lexis 31, at \*29 (B.I.A. June 11, 1999).

351. *See Sellers*, *supra* note 24, at 56-57.

352. *See Amnesty*, *supra* note 8 (discussing the need to have more qualified, *female* investigators, in order to reduce the victims' reluctance to come forward to testify).

353. This is particularly so, given that the courts have acknowledged authority to grant asylum for humanitarian reasons. *Acewicz v. INS*, 984 F.2d 1056, 1062 (9th Cir. 1993) (stating that "[t]he BIA may grant asylum for humanitarian reasons, where an applicant or his family has suffered 'under atrocious forms of persecution' even where there is little likelihood of future persecution") (citing *Matter of Chen*, Int. Dec. 3104, at 5 (B.I.A. 1989)). *But see Basova v. INS*, No. 98-9540, available at 1999 WL 495640, at \*3 (10th Cir. 1999) (stating that "[w]hile we might wish that asylum could be granted for purely humanitarian reasons, we cannot rewrite the law or force the INS to permit asylum under these circumstances").

354. *Macklin*, *supra* note 9, at 56.

355. In *In re R-A-*, the respondent argued that her acts of resistance to her husband's violence caused him to impute to "her the view that she believed women should not be controlled and dominated by men," and punish her for those hostile opinions. *In re R-A-*, 1999 BIA Lexis 31, at \*23-24.

356. *Id.* at \*25.

357. *Id.*

women the way they do because men believe they are entitled to behave that way, rather than because the women believe they are entitled *not* to be treated that way.<sup>358</sup> In effect, to provide protection on these grounds would mean arguing that anytime a woman defends herself there is a presumption that the man has attacked her because she is defending herself.<sup>359</sup> Such a blanket presumption misses the point.<sup>360</sup> The majority of women abroad are not raped or beaten because of a political opinion that they hold.<sup>361</sup> Women are raped and beaten because they are women.<sup>362</sup> Arguing that women are beaten because they believe they should not be entirely disregards the real motivation behind such behavior and implies that establishing "a nexus to political opinion" merely requires one to act on the urge of self-preservation.<sup>363</sup> An applicant must show more than this.<sup>364</sup> "Contorting resistance to [gender] violence into a political opinion is both awkward and unnecessary," because "political opinion refers to the victim's beliefs, and not those of the persecutor."<sup>365</sup> This conclusion leaves us off right where we began, with no protection when a woman cannot show that she was raped because of one of the statutorily protected grounds.<sup>366</sup>

## VI. IMPACT?

From a neutral standpoint, it seems that the concept of permitting women to be classified as a "particular social group" is the most logical means of telling the world that the historical treatment of women is no longer permissible, and that we are not going to continue to allow women to be raped or otherwise sexually violated. There is the potential for the United States to become the escape hatch through which the women of the world come crying for mercy from the country that "persecutes" them. Indeed, for this precise reason, the Court in *Fatin v. INS*<sup>367</sup>

358. See Macklin, *supra* note 9, at 58.

359. This presumption must necessarily mean that if women behaved or changed their attitude, men would no longer abuse them. See *id.* at 58-59.

360. Men beat women because they believe they are entitled to, and they do so in response to jealousy and possessiveness fostered by the "manifestation of [men's] proprietary view of women." *Id.* at 58.

361. "[Gender] violence is not about what a woman believes, but about her gender identity—and the sexist beliefs of the man who abuses her." *Id.* at 59.

362. See *supra* notes 95-133 and accompanying text.

363. Macklin, *supra* note 9, at 58.

364. The alien must establish that the person she alleges persecuted her is likely to accuse her of holding or engaging in political beliefs or acts and that he is likely to harm her because of those accusations. See *Shirazi-Parsa v. INS*, 14 F.3d 1424, 1430 (9th Cir. 1994) (citing *Canas-Segovia v. INS*, 970 F.2d 599, 602 (9th Cir. 1992)), *overruled by* *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996).

365. Macklin, *supra* note 9, at 59.

366. Persecution must be on account of race, religion, nationality, political opinion, or membership in a particular social group. I.N.A. § 101(a)(42)(A) (2000); see also 8 U.S.C. § 1101(a)(42)(A) (1999).

367. 12 F.3d 1233 (3rd Cir. 1993).

concluded that interpreting refugee law to include protection for all behavior we deem unfair, particularly discriminatory-like treatment of women, was not Congress' intention.<sup>368</sup> One scholar argues, quite strongly, that this simply is not a realistic concern.<sup>369</sup> He is not alone.<sup>370</sup> First, the Immigration and Naturalization Service does not believe that there would be a dramatic increase in gender-based asylum claims.<sup>371</sup> Second, refugee women often do not possess the necessary resources to flee their country of origin and come to the United States.<sup>372</sup>

Third, given that proof of qualification for asylum entails an ad hoc inquiry into the facts of each individual case, the elements of the refugee definition would weed out the cases that do not qualify under the law.<sup>373</sup> Of particular difficulty is proof, once a social group is established, that the alleged persecution is on account of membership in that group.<sup>374</sup>

Finally, "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."<sup>375</sup> Given all these things, the theory that permitting gender as a particular social group would open the floodgates, is simply not practical.

A major consequence of denying protection to women as a group is the perpetuation of the myth that rape and other forms of gender violence, are "personal" harms, rather than persecution.<sup>376</sup> By failing to acknowledge women as a particular social group, we disregard the fact that the view of women as property of the men in their lives effects women as a "cognisable group . . . that . . . share common fundamental and social characteristics."<sup>377</sup>

Women hold a disadvantaged status in society because of the way they are

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368. *Id.* at 1240.

369. Canada construes their law to include gender as a basis of protection and this "did not lead to a 'flood' of women seeking asylum . . ." See Macklin, *supra* note 9, at 34. Finding that a woman has a well-founded fear of persecution does not necessarily imply that "all women have a well-founded fear of persecution." See *id.* at 61.

370. "This fear is unfounded." Smiley, *supra* note 93, at 355.

371. See *id.* This belief is supported by the fact that Canada did not experience a flood of gender-based asylum claims when they began permitting gender as a particular social group. See Macklin, *supra* note 9, at 34.

372. Smiley, *supra* note 93, at 355; see also Macklin, *supra* note 9, at 63 (stating that "so few women actually have the resources to flee their country . . . that there is no danger of a massive influx of women refugee claimants").

373. The various elements of proof required under the definition of refugee would act as a filtering mechanism. Macklin, *supra* note 9, at 63.

374. *Id.* at 61. Courts now pay particular attention to whether the 'on account of' requirement has been established. See *INS v. Elias-Zacharias*, 502 U.S. 478, 482-83 (1992).

375. Macklin, *supra* note 9, at 62.

376. The tendency to view the motivation of rape as "sexual desire" results in relegating rape and other sexual violence to private harm rather than persecution committed on the basis of an enumerated ground. *Id.* at 39-40.

377. *Id.* at 65-66.

perceived by men.<sup>378</sup> If women are to be protected from gender violence, then rape and other forms of violence against women "must be understood in the context of gender discrimination that pervades all societies . . . ."<sup>379</sup> By taking violence against women out of the private sphere and placing it in the public eye, women can be assured protection against human rights violations and measures can be implemented "to prevent and redress violence against women."<sup>380</sup>

## VII. CONCLUSION

Refugee law tells us that we are to protect those who have no means to protect themselves. With women having been historically denied access to legal remedies as victims of gender based violence,<sup>381</sup> it is time for someone to step up to the plate. "By granting asylum to women who have suffered persecution based on their gender, asylum countries are sending a strong message that the refugee's home country has violated human rights norms."<sup>382</sup>

Although an international criminal court would be the "preferred means to promote justice and effectiveness of international law,"<sup>383</sup> as a group, the female gender may not last that long. It is time for someone to end the violence against women that has been perpetuated by the subordination of women and the misguided perception that a woman is a man's property, to do with as he pleases.

Were the United States to permit women to be categorized as a "particular social group" for the purpose of receiving asylum, women could be protected from the atrocities that occur throughout the world, privately and publicly. The result would be a fulfillment of the purpose for which this nation created refugee law: to protect those who cannot otherwise protect themselves.

SUZANNE SIDUN<sup>384</sup>

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378. *Id.* at 67 (noting that "the subordinated status of women constitutes them as a particular social group").

379. Sullivan, *supra* note 182, at 167.

380. *Id.* at 166-67.

381. See Amnesty, *supra* note 8.

382. Smiley, *supra* note 93, at 355.

383. Meron, *supra* note 26, at 424.

384. J.D. Candidate, 2001. I would like to give special thanks to my mom, pop, and brother. Without their love, affection and support I could never have made it this far. I would also like to thank the judge who gave me the idea for this article in the first place. Your wisdom and experience are inspiring.



