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Article

"Willful Blindness" to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture

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INFORMATION

In the Democratic Republic of the Congo (D.R.C.), D—K— found herself trapped in an abusive marriage and subjected to escalating violence.1 She was too fearful to go to the police because of her husband's governmental ties, as well as her knowledge that the police would not intervene in domestic matters.2 She could not flee to a battered women's shelter because not a single shelter existed, despite the pervasive domestic violence in her country.3 D—K—'s status as a married woman further diminished her options. Married women are

2. Id. at 5.
3. Id. at 6.
subordinated by law in the D.R.C., and are prohibited from owning property or engaging in employment without their husbands' consent. Although D—— K—— fled to her brother's house in search of safety on numerous occasions, her husband always found her and forced her to return home. Finally, D—— K—— fled to the United States to seek asylum after an extremely violent incident: her husband beat her until she lost consciousness and then raped her in front of their children.

The immigration judge who heard D—— K——'s case denied her asylum claim. The judge characterized the acts of domestic violence as "atrocities," but, nevertheless, held that D—— K—— failed to show that her husband persecuted her on account of her membership in a "particular social group." The Board of Immigration Appeals (Board) similarly affirmed the judge's decision and D—— K—— was scheduled for immediate removal to the D.R.C. At the eleventh hour, the Federal Circuit Court of Appeals stayed D—— K——'s removal, allowing her to pursue a newly available form of protection based on Ar-

4. Id. at 5.
5. Id.
6. Id. at 6.
7. Id. at 7. Pursuant to the Immigration and Nationality Act § 208, 8 U.S.C. § 1158 (2004), a person seeking asylum in the United States must have been persecuted or have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. Interpretation of "membership in a particular social group" has fluctuated substantially, particularly with regard to gender-based claims to asylum. At the time the immigration judge issued her decision in In re D—— K——, the seminal Board of Immigration Appeals case interpreting social groups was In re Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), which held that a social group must be composed of members who share a characteristic that either is immutable or is so fundamental to their identities that they should not be required to change it. See discussion infra note 102 and accompanying text. Once a person demonstrates statutory eligibility, the grant of asylum is at the discretion of the Attorney General. Immigration and Nationality Act § 208(b)(1), 8 U.S.C. § 1158(b)(1) (1999).
8. In re D—— K——, slip op. at 1 (B.I.A. filed Jan. 20, 2001), available at http://www.uchastings.edu/cgrs/law/bia/117-bia.pdf. A sharply divided three-member panel dismissed the appeal. The author of the majority opinion based it on a recently decided precedential case that made it nearly impossible for women fleeing domestic violence to qualify for asylum protection in the United States. Id. at 3–5; see also In re R—— A——, 22 I. & N. Dec. 906 (B.I.A. 1999), vacated, (Att'y Gen. 2001) (characterizing the long-standing "immutability" test set forth in In re Acosta as merely a threshold requirement, and holding that once the test has been met, the applicant must also demonstrate that group members understand their own affiliation within the group, that they are recognized as a societal faction, and that the form of persecution is "an important societal attribute"), infra notes 132–63 and accompanying text.
Ultimately, the same immigration judge who had denied asylum and ordered D—— K—— to be returned to her abuser found that the domestic violence at issue constituted "torture." Moreover, she held that the Congolese government maintained a policy of "willful blindness" because it was aware of the prevalence of domestic violence in its country, yet did not act upon that knowledge. Although U.S. asylum laws had failed to protect D—— K——, the immigration judge's grant of relief under the Torture Convention freed her after two and a half years of detention and, more importantly, prohibited U.S. immigration authorities from returning her to her abuser in the D.R.C.


11. Id. at 5–6.

12. See id. at 1–2, 6. However, unlike asylum protection, a grant of Torture Convention protection, as implemented in the United States, does not lead to permanent legal status or allow for family reunification. See infra notes 49, 333 and accompanying text. Thus, D—— K—— found herself in the untenable situation of having to choose between her safety and the chance to reunite with her five children. D—— K—— pursued her asylum appeal to the
Many advocates hailed *In re D— K—* for its recognition of domestic violence as torture, and the decision reflects the potential that Article 3 holds for refugees asserting gender-based claims for protection.\(^{13}\) Its interpretation of Article 3 of the Torture Convention is consistent with the Torture Convention's underlying premise: torture is morally unacceptable, regardless of its perpetrator's underlying motivations. Unlike asylum law's requirement that a nexus exist between the persecution and the asylum seeker's political or religious beliefs, race, nationality, or social group membership,\(^{14}\) the Torture Convention does not contain a nexus requirement. The Torture Convention therefore holds particularly strong hope for women fleeing domestic violence and other forms of gender-based torture who have been denied asylum protection.

The promise of the Torture Convention offered by *In re D— K—*, however, proved to be short-lived. Indeed, instead of charting a more broadly remedial course, subsequent interpretations of the Torture Convention by both the Board and the Attorney General have fallen into many of the same rigid patterns of U.S. asylum law—patterns that disregard trends in the international community, that impose overly formalistic legal thresholds upon claimants, and that are heavily driven by domestic political considerations. These interpretive limits have

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14. *See* supra note 7 for the statutory requirements for asylum.
deprived women of important protections from state-condoned, gender-based violence abroad and suggest the need for a gender-sensitive interpretation or passage of gender-specific legislation.

Asylum law, as it has developed in the United States, has largely failed to appreciate or accommodate the unique circumstances faced by female refugees. Both textual and interpretive shortcomings account for this insensitivity to the different ways in which women experience persecution. The text of the Refugee Convention, from which U.S. asylum law is derived, omits gender from the enumerated protected categories. Many countries, however, ameliorate the disparate impact on women by interpreting the social group category broadly to include gender-based groups. In contrast, the United States excludes social groups based solely on sex and requires strong evidence that the claimant's membership in a "gender-plus" protected group served as the primary motivation for the persecutor's conduct.15

Thus, the failure to enumerate gender as a protected ground under the Refugee Convention, combined with the United States' interpretation of the law through the lens of the more public male experience, too often leaves refugee women unpro-

15. See, e.g., In re R—A—, 22 I. & N. Dec. 906 (B.I.A. 1999), vacated, (Att'y Gen. 2001) (holding that Guatemalan women who are abused by their partners are not a cognizable social group, and establishing a new set of requirements for social group membership once immutability has been established). As discussed infra notes 132-63 and accompanying text, the decision in In re R—A— has been highly criticized. In December 2000, the INS proposed regulations for adjudicating domestic violence-based asylum claims. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec 7, 2000). In anticipation of the finalized regulations, Attorney General Janet Reno vacated and remanded the In re R—A— decision to the Board in January 2001 so that it could reconsider the matter after the regulations were finalized. See In re R—A—, 22 I. & N. Dec. at 906. However, the new Administration never finalized the regulations, and the In re R—A— case has been pending for over three years. In the meantime, Attorney General Ashcroft recertified the In re R—A— case and stated his intention to issue a new decision. See In re R—A—, No. A-73-753-922 (Att'y Gen. Feb. 21, 2003) (Order No. 2661-2003). After intense public pressure following Ashcroft's refusal to allow the parties to submit briefing on the issues, Ashcroft set a briefing schedule. In its brief, the Department of Homeland Security (DHS) revealed that it has changed its position and now supports asylum for R—A—. Department of Homeland Security's Position on Respondent's Eligibility for Relief at 2, In re R—A—, 22 I. & N. Dec. 906 (B.I.A. 1999), vacated, (Att'y Gen. 2001) (No. A-73-753-922) (on file with author) [hereinafter DHS's Position]. The DHS also stated that it plans to issue regulations soon to clarify that, in limited circumstances, domestic violence can be the basis for an asylum claim. Id. As of this writing, Ashcroft has yet to rule in the In re R—A— case.
ected from less public harms such as domestic violence.¹⁶

In contrast, Article 3 of the Torture Convention mandates protection from torture inflicted by the government, or with its consent or "acquiescence," for any discriminatory purpose.¹⁷ The Torture Convention further requires that the infliction of torture be intentional, excluding inadvertent or negligent conduct as grounds for relief.¹⁸ Notwithstanding the inherent gender bias accompanying the limitation of torture to that committed in the public realm, In re D—K— construed "acquiescence" in a gender-sensitive manner by focusing on the state's inaction in the face of prevalent domestic violence.

The In re D—K— decision now lies at the crossroads of what has become sharply divided interpretations of Article 3 between the Board and Attorney General on the one hand, and the courts of appeals on the other.¹⁹ The Board and Attorney General have moved toward a stringent interpretation of governmental "acquiescence" that is analogous to the nexus requirement in asylum law. The Attorney General now requires that the home government "willfully accept" the torturous activity, seemingly excluding "willful blindness" to pervasive so-

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¹⁶ See infra notes 132–63 and accompanying text.
¹⁷ Torture Convention, supra note 9. See infra note 76 and accompanying text for the definition of torture under the Torture Convention.
¹⁸ Torture Convention, supra note 9. See also infra notes 224–57 and accompanying text (discussing the intent requirement).
¹⁹ See infra notes 206–13, 217–57 and accompanying text. Compare In re J—E—, 23 I. & N. Dec. 291 (B.I.A. 2002) (interpreting narrowly the Torture Convention to require a "specific intent" to inflict torture), and In re M—B—A—, 23 I. & N. Dec. 474 (B.I.A. 2002) (en banc) (ignoring the gender-based aspect of the claim and elevating the "more likely than not" standard of proof the United States utilizes for Torture Convention claims to something more akin to the criminal "beyond a reasonable doubt" standard), and In re Y—L—, 23 I. & N. Dec. 270 (B.I.A. 2002) (interpreting "acquiescence" under the Torture Convention to require "willful acceptance" rather than "willful blindness"), with Zubeda v. Ashcroft, 333 F.3d 463, 473, 474 n.8 (3d Cir. 2003) (citing In re D—K— as an example of the Board's recognition that domestic violence can constitute torture under the Torture Convention and rejecting the Board's "specific intent" requirement as contrary to both the Torture Convention and congressional intent as expressed in the implementing legislation), and Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (rejecting the Board's and Attorney General's interpretations of "acquiescence" as requiring "willful acceptance" and stating that awareness or "willful blindness" is the standard that is consistent with the Torture Convention and congressional intent). Most recently, the Second Circuit weighed in as well, rejecting the Board's and Attorney General's "willful acceptance" interpretation of "acquiescence" under the Torture Convention. See Khouram v. Ashcroft, 361 F.3d 161 (2d Cir. 2004); infra notes 217–23 and accompanying text.
gival problems such as domestic violence. The Board has also interpreted the Torture Convention to require a “specific intent” to inflict torture. For women fleeing intentionally inflicted “private” torture (such as domestic violence or female genital cutting), the United States’ interpretation bars relief absent a showing that the abuser’s intent was to inflict torture. Even in situations in which the state imprisons women with full knowledge that torture, such as rape, is prevalent under such circumstances, this interpretation forecloses relief unless the state imprisons such women with the specific intent that they be raped.

In addition, implementation of both the Refugee Convention and the Torture Convention in the United States has been limited by domestic policy considerations. With respect to the Refugee Convention, the United States has, as described, interpreted gender-based violence claims grudgingly (and, unlike international counterparts, has refused to explicitly recognize gender alone as an appropriate characteristic for defining a social group), largely because of a claimed commitment to deterrence. Specifically, the United States has been guided by its concern that a more liberal approach to gender-based asylum claims would trigger an unwanted influx of women seeking asylum.

Article 3 jurisprudence, on the other hand, is largely silent as to the gendered aspects of torture. This invisibility of women results from both Article 3’s requirement of state action that insulates “private” harm and the United States’ efforts to construe the law narrowly in order to exclude “criminal aliens” from protection. Unlike asylum law, the Torture Convention contains no specific provision excluding from relief “criminal aliens” who can otherwise prove they will suffer torture in their home country. As a result, a large proportion of claims under the Torture Convention involve such “criminal aliens.” The United States has narrowly interpreted the substantive requirements of Article 3 as part of a multifaceted effort to remove “criminal aliens” from the country, consequently undermining the possibility for the broad, flexible application of

22. See infra notes 105–25 and accompanying text.
23. See infra notes 258–82 and accompanying text.
Article 3 that is necessary to protect against gender-based violence.

This Article examines asylum law's uneven history in protecting women from gender-based harm and uses this history as a basis for understanding how the United States is interpreting Article 3 of the Torture Convention to the detriment of women fleeing gender-based violence. Although there is a substantial body of scholarship exploring the intersection of gender and refugee status, little attention has been paid to the gender consequences resulting from the United States' narrow interpretation of Article 3. Because interpretation of Article 3 by the Board and the courts is still evolving, the opportunity exists to prevent Article 3 from falling victim to the same formalistic approach that has undermined the more robust protections for women under U.S. asylum law.

Part I provides a historical overview of the international refugee protection regime and compares three forms of protection currently available to refugees under U.S. law: withholding of removal, asylum, and Article 3 of the Torture Convention.

Part II focuses more narrowly on the application of asylum law in the United States to women fleeing gender-based violence. Specifically, this Part examines the inconsistent results of the Board in adjudicating gender-based asylum cases. The Board's jurisprudence is analyzed through the lens of the growing international recognition that refugee and human rights laws need to protect women from gender-based harm. Such a framework shows that the Board's decisions are marked by a


25. For an example of one of the few recent articles to touch upon the gender consequences of the state action requirement under the Torture Convention, see Dawn J. Miller, Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action, 17 GEO. IMMIGR. L.J. 299 (2003) (arguing that the Torture Convention's emphasis on the severity of the harm can serve to deprivatize gender-based violence under human rights law). See infra note 333 for a Note assessing the applicability of Article 3 of the Torture Convention to gender-based violence claims.
restrictive and gender-biased approach that is altered only when sufficient political pressure exists to bring its interpretation of the law into conformance with international human rights norms.

Part III examines implementation of Article 3 by the United States, arguing that Article 3 can provide an additional layer of protection for women who thus far have fallen through the cracks of asylum law. An analysis of both the text and the intent of the Torture Convention—within the broader context of the male-focused human rights regime existing at the time of its origin—shows how the Torture Convention's focus on state action in the public realm fails to take into account the different ways in which women experience torture. For Article 3 to be inclusive of women's claims based on gender-specific violence, "acquiescence" must be interpreted in a gender-sensitive manner. By analyzing the United States' narrow interpretation of the Torture Convention in the context of a broader domestic concern with criminality and so-called "criminal aliens," as well as entrenched notions of the private nature of domestic violence, this Part explores why (noncriminal) women with gender-based torture claims are at risk of remaining outside of the realm of Torture Convention protection.

Part IV focuses more sharply on the issue of "acquiescence" and argues that, in order to provide meaningful protection from gender-based torture, this term must be interpreted to include a state's failure to prosecute or to protect against torture by nonstate actors. An approach that encompasses such "willful blindness" is consistent with the dramatically altered international human rights framework since the drafting of the Torture Convention, as well as recent circuit court decisions, and is also consistent with the Canadian approach to interpreting the Torture Convention.

Part V examines alternate methods for protecting women fleeing gender-based harm and makes recommendations for restructuring the United States Refugee Protection Regime to protect women. This Part further discusses how gender-specific legislation or gender-sensitive regulatory language can serve to protect women, drawing upon the Violence Against Women Acts\textsuperscript{26} and country-specific immigration legislation and regula-

\textsuperscript{26} The immigration provisions of the Violence Against Women Acts of 1994 and 2000 amended the immigration laws to allow battered spouses to self-petition for permanent residency without reliance on the abusive spouse, created new waivers for victims of domestic violence who had failed to comply
tions aimed at ameliorating the harshness caused by politically motivated application of "neutral" immigration laws.27

I. STATUTORY FRAMEWORK: A HISTORICAL PERSPECTIVE AND AN OVERVIEW OF THE REFUGEE PROTECTION REGIME IN THE UNITED STATES

From its inception, the refugee protection regime has embodied a mix of humanitarian and political goals woven into an existing immigration regulation scheme aimed largely at protecting against a mass influx of particular immigrants.28 The "refusal to embrace internal refugees, an unwillingness to make legally binding commitments to refugee relief, the provision to refugee immigrants of less than full rights, and discrimination in refugee definition" all combined "to limit the scope of the altruistic humanitarian exception to existing immigration norms."29 As noted by James C. Hathaway, even during the most humanitarian phase of refugee law, starting with the first international legal standards governing the protection of refugees post-World War I through 1938, the overarching goal was to protect European refugees.30


27. See infra notes 52-53 and accompanying text for a discussion of statutory amendments that offer asylum to those fleeing China's one-couple-one-child policies as well as special provisions for Cubans and Nicaraguans.

28. As articulated by James C. Hathaway:
If conceived of in humanitarian terms, refugee law would be a politically neutral response to the needs of suffering persons who have in some way been forced to leave their homes. The law would not focus on the 'how' or 'why' of the need for protection, but rather would inquire only into the extent of the denial of physical security or liberty leading to and consequent upon departure.


29. Id. at 139.

30. Id. at 134. Because the belief was that national sovereignty could best be assured through cultural and political similarities, states used immigration control as a means of excluding those whose backgrounds differentiated them from the national norm and who, therefore, might threaten the unity of the nation-state. Id. at 135. Furthermore, immigration law became increasingly
In 1938, the Intergovernmental Committee on Refugees assumed international responsibility for refugees and the criteria for refugee status shifted from statelessness or displacement to particularized motive for flight. Only those refugees whose flight was caused by their political opinions, religion, or race were assisted. This new human rights framework for refugee law reflected the need to prioritize among the massive number of refugees fleeing their home countries as a result of World War II, as well as the broader international realization that citizens needed protection from the abuse of national authority to avoid Nazi-type atrocities in the future. According to James C. Hathaway, the two primary trends in the refugee protection regime before 1950 were the rejection of a humanitarian basis for refugee law in favor of a narrower human rights focus and the acceptance of a human rights definition in terms familiar to the political ideologies of the more powerful nations.

The Refugee Protection Regime that exists today is based upon the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention), as amended by the 1967 United Nations Protocol on Refugees (U.N. Protocol). linked with promoting economic stability in the receiving state rather than with addressing the needs of refugees. Id. at 132-34.

31. Id. at 141 (noting that refugee law has also suffered from the same “conceptual narrowness of human rights” during this period). According to Hathaway, refugee law during this period embodied a preoccupation with protecting those whose political or civil rights were endangered while excluding others whose human dignity was compromised in a different way. Id. at 141-42. Another commentator, Daniel J. Steinbock, has also noted the tremendous impact of the World War II Nazi experience on the genesis of the Refugee Convention. Daniel J. Steinbock, Interpreting the Refugee Definition, 45 UCLA L. REV. 733, 766 (1998). According to Steinbock, the drafters of the Refugee Convention were “to a great extent legislating about the past.” Id.

32. Hathaway, supra note 28, at 143.


Pursuant to Article 33 of the Refugee Convention, a refugee was defined universally for the first time as any person who,

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.35

The U.N. Protocol broadened the refugee definition by removing restrictions as to the timing and location of the persecution.36 The U.N. Protocol left intact, however, the substantive definition of refugee that advantaged Europeans fleeing communist regimes.37 While clearly utilizing a human rights

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35. Convention Relating to the Status of Refugees, supra note 33, 189 U.N.T.S. at 152. The resounding silence in the legislative history provides little guidance in determining the drafters' intent in adding "membership in a particular social group" to the pre-existing categories defined by race, religion or political opinion. As documented by Maryellen Fullerton, the social group addition was introduced by the Swedish representative. Maryellen Fullerton, A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group, 26 CORNELL INT'L L.J. 505, 509 (1993) (citing U.N. Doc. A/CONF.2/SR.3, at 14 (1951)). The representative stated that "experience [a]s shown that certain refugees [a]ve been persecuted because they belonged to particular social groups. The draft [c]onvention [makes] no provision for such cases, and one designed to cover them should be accordingly included." Id. Without further discussion, the conference adopted the amendment by a vote of fourteen to zero with eight abstentions. Id. at 509-10. Some scholars have characterized the addition as an afterthought intended to protect against persecution based on unforeseen reasons. See, e.g., ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 219 (1966). Others have rejected such an interpretation, concluding that the drafters were focused on historical harm, and therefore, intended the refugee definition to encompass only known types of harm. See, e.g., Steinbock, supra note 31, at 767.

36. In addition to limiting the term "refugee" to include only those fleeing events that occurred prior to January 1, 1951, the Refugee Convention allowed states to choose between two methods of defining "events occurring before 1 January 1951." See Fullerton, supra note 35, at 508-09 n.16 (citation omitted). The term was "to mean either (a) 'events occurring in Europe before 1 January 1951'; or (b) 'events occurring in Europe or elsewhere before 1 January 1951.'" Id. (citation omitted).

37. See Hathaway, supra note 28, at 162 (noting that "most Third World refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war, or broadly-based political and economic turmoil than by 'persecution,' at least as that term is understood in the European context"). However, the focus on individual rather than social conception of refugee similarly excludes those fleeing widespread violence in the West. See KAREN
framework, what emerged from the Refugee Convention and the U.N. Protocol was a highly politicized definition of refugee.38

A. WITHHOLDING OF REMOVAL

In 1967, the United States ratified the U.N. Protocol, thereby agreeing to adhere to the international refugee protection standards. Congress, however, did not formally implement its obligations pursuant to the U.N. Protocol until 1980 when it enacted the Refugee Act.39 At that time, Congress set forth two

MUSALO ET AL., REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 47 (2d ed. 2002) (citing conflicts in Bosnia, the Chechnya region of Russia, and the former Soviet republics of Armenia and Azerbaijan as examples).

38. Id. at 145–51 (noting that the refugee definition includes only those who have been disenfranchised by their government because of their race, religion, nationality, membership in a particular social group, or political opinion). These grounds all represent areas in which the Eastern Bloc countries were vulnerable. Id. at 150. In contrast, denial of basic socioeconomic rights—an area in which the Western countries were weaker—was excluded from the refugee definition. See Patrick Matlou, Upsetting the Cart: Forced Migration and Gender Issues, the African Experience, in ENGENDERING FORCED MIGRATION 128, 139 (Doreen Indra ed., 1999) (noting that almost all African refugees before 1980 remained in Africa as Western countries were reluctant to accept them). Even after quotas for African refugees were set by the United States starting in 1980 (with Canada and Australia following suit during the following four years), racism and spurious stereotypes of African refugees as rural, uneducated, and unskilled have “conspire[d] to keep Western resettlement miniscule.” Id.

39. Prior to 1980, the United States admitted certain refugees and others in need of protection on an ad hoc basis, through either special legislation or discretionary parole power. See generally Deborah E. Anker & Michael J. Posner, The Forty Year Crisis: A Legislative History of the Refugee Act of 1980, 19 SAN DIEGO L. REV. 9 (1981) (outlining the history of American refugee law from the post-World War II period until the passage of the Refugee Act of 1980). The United States utilized this ad hoc admission practice because American immigration law contained a “national origins” quota system and lacked any permanent refugee admission system until 1965, undermining its ability to provide refuge to persons of certain nationalities. Id. The Displaced Persons Act of 1948, Congress’s first post-World War II refugee legislation, protected only certain displaced, forced laborers from states conquered by Germany and certain individuals who qualified under United Nations refugee standards, particularly those who fled Nazi, Fascist, or Soviet persecution. Id. at 13. At other times, such as in response to the 1956 Hungarian Revolution, the Attorney General utilized his parole authority pursuant to Immigration and Nationality Act § 212(d)(5) to admit refugee groups. See id. at 13–16; Fullerton, supra note 35, at 512–13 n.40. The Refugee Act of 1980 created, for the first time, a legal framework for the admission of refugees to the United States that was hailed as being “coherent, comprehensive and practical.” Anker & Posner, supra, at 11.
different forms of relief for refugees at or within the borders of the United States: withholding of removal and asylum. To qualify for withholding of removal, a person must show that, if removed from the United States, her life or freedom would be threatened on account of her race, religion, nationality, membership in a particular social group, or political opinion. The U.S. Supreme Court has interpreted the applicable standard of proof to be "more likely than not," meaning the risk of persecution must exceed fifty percent. In keeping with the U.N. Protocol, Congress excluded various groups from protection, including criminals, those dangerous to national security, and those who have either persecuted others, engaged in genocide, or assisted in Nazi persecution.

B. ASYLUM

Congress's enactment of the Refugee Act of 1980 also created a more beneficial discretionary form of relief entitled "asylum." To qualify for asylum, a person must show that she is a refugee. Congress defined "refugee" as a person who has been persecuted in the past or who has a "well-founded fear of persecution" on account of race, religion, nationality, membership in a particular social group, or political opinion. In addition, a refugee must be outside of her country of nationality and be either unwilling or unable to return to that country. In sharp contrast with the mandatory nature of withholding of removal, however, asylum is discretionary. Thus, once a person demonstrates statutory eligibility, she must further show that asylum is warranted as a matter of discretion. Significantly, a grant

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43. See Immigration and Nationality Act § 237(a). Over the years since enactment of the Refugee Act, Congress has broadened the criminal exclusionary grounds, and the Attorney General has interpreted the exclusion grounds to cover a growing number of crimes. See infra notes 258–82 and accompanying text.
44. See Immigration and Nationality Act § 208.
45. Id. § 208(b).
46. See id. § 101(a)(42).
47. See id. § 208(b)(1).
48. Id. There are many more bars to attaining asylum than withholding of removal. For example, in addition to incorporating all of the statutory bars that apply to withholding of removal, the statutory asylum provision contains
of asylum leads to familial reunification and the possibility for permanency in the United States.\textsuperscript{49}

Asylum law has been aptly characterized as "intended to act as a 'bridge between morality and law'... the process that keeps migration exclusion morally defensible while protecting the global gatekeeping operation as a whole."\textsuperscript{50} Asylum law in the United States has proven to be governed by extremely political processes, with deterrence and other domestic concerns playing an increasingly strong role.\textsuperscript{51} Indeed, the history of asylum policy in the United States is replete with examples of differing interpretations that advance broader political or foreign policy goals. For example, following the massacre at Tianan-

exceptions for persons who have engaged in, are suspected of engaging in, or planning to engage in terrorist activities (including espousing terrorist views). \textit{id.} § 208(b)(2). There is also a one-year time limit in which a person must seek asylum, \textit{id.} § 208(a)(2)(B); a bar against anyone who has firmly resettled in another country prior to arrival in the United States, \textit{id.} § 208(b)(2)(A)(vi); a bar against anyone who can be returned to a safe third country, \textit{id.} § 208(a)(2)(A); and a bar against anyone who has previously sought asylum and been denied, \textit{id.} § 208(a)(2)(C). Finally, for asylum purposes, any aggravated felony is automatically considered a particularly serious crime and therefore, a bar to asylum. \textit{id.} § 208(b)(2)(B)(i).

\textsuperscript{49} See \textit{id.} § 208(b)(3) (allowing for the asylee's spouse and children under twenty-one years old to be afforded derivative asylum status); see also \textit{id.} § 209(b) (allowing for asylees to "adjust their status" to that of permanent residents after one year). However, Congress has capped the number of asylees that can become lawful permanent residents per year, resulting in huge backlogs and waits of up to ten years for permanent residency. In a recent ruling in a class action litigation brought by 150,000 such asylees, a federal court characterized the INS's handling of pending asylee permanent residency applications as "nothing short of a national embarrassment" and ordered the government to adjust the status of nearly 22,000 waiting asylees. Ngwanyia v. Ashcroft, 302 F. Supp. 2d 1076, 1087 (D. Minn. 2004).

\textsuperscript{50} Jacqueline Bhabha, \textit{Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights}, 15 HARV. HUM. RTS. J. 155, 161 (2002) (citation omitted). According to Jacqueline Bhabha, by participating in a polarized global migration regime, asylum advocates produce benefits for a "somewhat arbitrarily selected minority of forced migrants" while at the same time "accord[ing] a critical legitimacy to the filtering system" that sifts out "worth[ing] from unworthy forced migrants." \textit{id.} at 160–62.

\textsuperscript{51} See Steinbock, supra note 31, at 739–41 (noting that increasing hostility towards refugees has led governments to adopt a broad spectrum of procedural devices and substantive doctrines aimed at restricting refugee admissions). According to Steinbock, "[o]ne obvious and appealing option for countries seeking to limit the number of asylees ... is to contract the scope of the substantive law, especially that of the refugee definition itself." \textit{id.} at 740. In the absence of supranational harmonization, Steinbock also notes the risk that individual countries may engage in a race to the bottom in order to avoid luring would-be asylum seekers through a perception that one country employs a more generous refugee definition than others. \textit{id.} at 741.
men Square, Congress amended the definition of “refugee” within immigration law to include those fleeing forced sterilization in China.\textsuperscript{52} Similarly, Congress has amended immigration law to offer special protections to Cubans, Nicaraguans, and Eastern Europeans.\textsuperscript{53} While U.S. immigration policy has historically discriminated against Haitians,\textsuperscript{54} Congress passed legislation allowing permanent residency for Haitians who had awaited asylum protection in the United States for many years.\textsuperscript{55}

Perhaps counter-intuitively, the standard of proof for asylum is significantly lower than that which is required for withholding of removal. In determining whether an individual is eligible for withholding of removal, adjudicators use a “more likely than not” standard, whereas a grant of asylum requires past persecution or a “well founded fear” of persecution. The U.S. Supreme Court has clarified that a “well founded fear” of persecution can exist if there is a one in ten chance that the feared event will happen.\textsuperscript{56} Stated differently, if a reasonable person in the applicant’s situation would fear persecution, that

52. Immigration and Nationality Act § 101(a)(42). The Immigration and Nationality Act specifies that

a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

Id.


fear is well-founded. Finally, the persecution suffered or feared must exist nationwide and be inflicted either directly by the government, or by forces that the government is unwilling or unable to control.

As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the United States overhauled its refugee protection regime. Before 1996, detention of asylum seekers was the exception rather than the norm. Pursuant to the IIRIRA, however, any arriving alien who does not possess valid immigration documents is subjected to a new procedure entitled “expedited removal.” Expedited removal results in the immediate return of an “arriving alien” to her home country, unless she expresses a fear of persecution. Upon expression of such a fear, the arriving alien is then arrested and transferred to a detention facility to await a “credible fear” interview by an asylum officer. If the officer finds a credible fear of persecution, the arriving alien is permitted to seek asy-

57. Id. The U.S. Supreme Court clarified further that the standard encompasses both objective and subjective components: the person must be subjectively fearful and that fear must be objectively reasonable. Id. at 440.


59. The United States has long recognized that the persecution may be inflicted by nonstate agents in situations where the state has shown that it is “unwilling or unable to control” those actions. For example, in In re O—Z, the Board granted asylum based on persecution by anti-Semitic nationalist groups where the Ukrainian government refused to respond to the applicant’s complaints, notwithstanding the government’s official policy condemning anti-Semitism. Interim Dec. No. 3346, at 5 (B.I.A. 1998); see also In re Villalta, 20 I. & N. Dec. 142, 147 (B.I.A. 1990) (granting asylum based on persecution by Salvadoran death squads). The INS has also acknowledged that persecution may be inflicted by a nonstate actor for purposes of asylum law. 8 IMMIGRATION AND NATURALIZATION SERV., U.S. DEP’T OF JUSTICE, IMMIGRATION LAW AND PROCEDURE BASIC LAW MANUAL: U.S. LAW AND INS REFUGEE ASYLUM ADJUDICATIONS 27 (Supp. 1995) [hereinafter BASIC LAW MANUAL].


61. Immigration and Nationality Act § 208; 8 C.F.R. § 235.3(b).

62. 8 C.F.R. § 235.3(b).

63. Id. § 235.3(b)(4).

64. Id. § 235.3(b)(4), (c). In order to establish a “credible fear” of persecution, a substantially lower threshold is required than for the “well founded fear” standard required for asylum protection. See Immigration and Nationality Act § 235(b)(1)(B)(v), 8 U.S.C. § 1225(b)(1)(B)(v) (1999). A “credible fear of persecution” is defined as “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.” Id.
lum before an immigration judge during removal proceedings.\textsuperscript{65} While not mandated by law, the vast majority of arriving aliens that pursue asylum remain in detention throughout the proceedings.\textsuperscript{66}

Because most refugees that flee their countries in search of safety do not arrive in the United States with valid immigration documents, expedited removal has a direct impact on them. If an asylum officer does not find a credible fear of persecution, an arriving alien may request review by an immigration judge, but these reviews are limited to the record of the initial interview. If the judge agrees with the officer, the person is removed quickly from the United States.\textsuperscript{67} Significantly, those who are subject to expedited removal and do not express a fear of persecution or torture are immediately removed from the United States.\textsuperscript{68} Thus, the IIRIRA created a system in which

\begin{itemize}
\item\textsuperscript{65} 8 C.F.R. § 235.3(b)(4)(ii).
\item\textsuperscript{66} Once an applicant establishes a credible fear of persecution and is referred to an immigration judge, she is no longer in expedited removal proceedings and is eligible to apply for parole from detention. Karen Musalo et al., The Expedited Removal Study Releases It's Third Report, 77 INTERPRETER RELEASES 1189, 1190 (2000). However, the reality is that parole is now the exception and detention is the rule. See Refugees Behind Bars: The Imprisonment of Asylum Seekers in the Wake of the 1996 Immigration Act, HUM. RTS. FIRST, Aug. 1999 (noting that immigration detention costs would exceed $550 million annually by 2001). The report criticizes the INS for implementing its parole guidelines in an "ineffective and inconsistent manner" and notes the great disparity in reported figures as to the national parole rate. Id. (citing Patrick J. McDonnell, Asylum-Seekers Held Long Periods Despite Clean Records, L.A. TIMES, Sept. 9, 1998, at B1 ("The INS only grants temporary release to about 10% of the asylum applicants, a spokesman said."); Elizabeth Llorente, Immigration Detention: A Rapidly Growing Business, THE BERGEN REC., Apr. 11, 1999, at A11 (referring to nation's 40% parole rate). In addition, statistics received from the INS by Arthur Helton indicated that between January 1997 and January 1998, only 57, or 26.5%, of the 215 asylum seekers who met the credible fear standard were granted parole. Arthur C. Helton, A Rational Release Policy for Refugees: Reinvigorating the APSO Program, 75 INTERPRETER RELEASES 685, 689 (1998).
\item\textsuperscript{67} The expedited removal system has been widely criticized. See, e.g., Musalo et al., supra note 66, at 1189; Karen Musalo et al., The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal (May 2000), 15 NOTRE DAME J.L. ETHICS & PUB. POLY 1 (Special Issue 2001) [hereinafter The Expedited Removal Study]; HUMAN RIGHTS FIRST, IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN AMERICA, at http://www.humanrightsfirst.org/refugees/reports/due_process/due_process.htm (2000).
\item\textsuperscript{68} Aside from being physically ejected from the country, the order of removal gives rise to significant legal hurdles if the noncitizen seeks to return to the United States. For example, an order of removal automatically bars one from returning to the United States for five years. Immigration and National-
low-level officers at the ports of entry are given great discretion while courts have very circumscribed powers of review.\textsuperscript{69}

C. CONVENTION AGAINST TORTURE

Until 1994, asylum and withholding of removal were the only forms of relief available in the United States for those fearing persecution in their home countries.\textsuperscript{70} In 1994, however, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{71} The drafting of the Torture Convention occurred from 1977 through 1984.\textsuperscript{72} The Torture Con-

\textsuperscript{69}Pursuant to expedited removal, immigration inspectors at the borders and airports "are authorized to issue removal orders that can be finalized after cursory review by a supervisor."\textsuperscript{68} LAWYERS COMM. FOR HUMAN RIGHTS, REFUGEE WOMEN AT RISK: UNFAIR U.S. LAWS HURT ASYLUM SEEKERS 4 (2002). This expedited removal order can then be executed immediately, with no appeal to an immigration judge or any court review. See id.

\textsuperscript{70}The focus here is on refugee law as incorporated into U.S. domestic law. Outside of the refugee context, the immigration laws contain additional forms of humanitarian relief for those with extensive ties to the United States. For example, the Attorney General may cancel removal of an alien who has resided in the United States for at least ten years and who can demonstrate, among other things, that their removal would result in exceptional and extremely unusual hardship to a spouse, child, or parent who is a United States citizen or lawful permanent resident. Immigration and Nationality Act § 240A(b)(1)(A)–(D), 8 U.S.C. § 1229(b)(1)(A)–(D) (2000).

\textsuperscript{71}See supra note 9.

\textsuperscript{72}J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 31 (1988). From 1977 to 1984, several bodies within the United Nations were involved in the drafting process: the General Assembly, the Commission on Human Rights, and a number of working groups convened by the Commission on Human Rights. Id. Sweden played a pivotal role in the drafting process and authored the first draft of the Torture Convention in January 1978. Id. The Swedish draft was then redrafted many times by the "Working Group," an assemblage open to active participation by all state members of the Commission on Human Rights as well as observation by non-member states and nongovernmental organizations. Id. at 32. In actuality, about half of the states that attended the Working Group meetings were from the West (Sweden, Australia, France, the United Kingdom and the United States being the most frequent participants). Id. The most involved non-Western states included Argentina, Brazil, and the Soviet Union. Id. India, Senegal, Uruguay, Yugoslavia, Byelorussia, the German Democratic Republic, and the Ukraine were also active in several sessions. Id. Switzerland, a non-member of the United Nations, participated through its observer delegation.
vention drew in large part upon a number of other human rights agreements that prohibit torture, and followed the earlier Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on December 9, 1975. The Torture Convention, however, contained one entirely new provision: Article 3 required signatory states to agree not to expel, to return (refouler), or to extradite a person to another state where there are substantial grounds for believing that she would be in danger of being tortured. Under the Torture Convention, torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

Id. Nongovernmental organizations, such as Amnesty International and the International Commission of Jurists, participated in the process as well. Id. Decisions by the group could only be made by consensus. Id.

73. Id. at 114 (discussing “the Universal Declaration of Human Rights of 1948, the four Geneva Conventions of 1949 on the humanitarian rules which apply to armed conflicts and the two Additional Protocols thereto of 1977, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [(ECHR)], the International Covenant on Civil and Political Rights of 1966 [(ICCPR)], the American Convention on Human Rights of 1969 and the African Charter on Human and Peoples' Rights of 1981”). Most of the above-referenced instruments also prohibit cruel, inhuman, or degrading treatment or punishment. Id. In contrast with the Torture Convention, both the ECHR and the ICCPR forbid all torture, without regard to the role of the state. CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT 291 (2001). Compare the explicit reference to the state in the Torture Convention's Article 1 torture definition with the Human Rights Committee general comment 20a interpretation of ICCPR Article 7:

The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State Party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.

Id. at 225 (quoting U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994)).

74. BURGERS & DANELIUS, supra note 72, at 33.

75. Torture Convention, supra note 9; BURGERS & DANELIUS, supra note 72, at 125 (noting that Article 3 is "generally seen as providing significant additional protection in comparison with previous human rights instruments").
capacity. It does not include pain or suffering arising only from, inherent in or incident to lawful sanctions.\textsuperscript{76}

The United States' implementation of Article 3 offers protection that is at once broader and narrower than that afforded by its implementation of the Refugee Convention provisions. Most significantly, although Article 3 of the Torture Convention was based in part on Article 33 of the Refugee Convention,\textsuperscript{77} the Torture Convention-based relief is broader because it does not require that torture be inflicted on account of any specified protected ground.\textsuperscript{78} The Refugee Convention however, as interpreted in the United States and in many other signatory states, protects against persecution inflicted by either the government or "forces the government is unwilling or unable to control."\textsuperscript{79} In contrast, the text of the Torture Convention requires that the government inflict the torture, or that it be inflicted with governmental "acquiescence."\textsuperscript{80} Finally, in compari-

\textsuperscript{76} Torture Convention, \textit{supra} note 9.

\textsuperscript{77} In addition to Article 33 of the Refugee Convention, the case law of the European Commission of Human Rights interpreting Article 3 of the ECHR provided inspiration for Article 3 of the Torture Convention. \textsc{Burgers} \& \textsc{Danelius, supra} note 72, at 125. While the actual language of Article 3 of the ECHR prohibits torture and is silent as to refoulement or extradition, the commission has interpreted the bar on torture to include a bar on returning a person to a country where she might face torture. \textit{Id.; see also infra} notes 325–32 and accompanying text.

\textsuperscript{78} The lack of either a "nexus" or "statutorily-protected ground" requirement under the Torture Convention is particularly significant in gender-based claims because of the difficulty that these requirements have posed for women in U.S. asylum adjudication. \textit{See infra} notes 101–63 and accompanying text for a discussion of these requirements.

\textsuperscript{79} \textit{See supra} note 59. The United Nations High Commissioner on Refugees (UNHCR) also recognizes that persecution could be inflicted by nonstate actors if persecutory acts are "knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer protection." \textsc{Office of the United Nations High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ¶ 65} (rev. ed. 1992). Other state signatories to the Refugee Convention that interpret it to include persecution by nonstate actors include: Canada, Australia, New Zealand, the United Kingdom, Belgium, and Denmark. \textit{See Volker Türk, Non-State Agents of Persecution, in Switzerland and the International Protection of Refugees 95, 98 n.8} (Vincent Chetail \& Vera Gowlland-Debbas eds., 2002). A number of other signatory states—including the Netherlands, Norway, and Sweden—have changed their jurisprudence to extend refugee protection to those persecuted by nonstate actors. \textit{Id.} Protection from persecution by nonstate actors is also explicitly provided for in the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees. \textit{Id.}

\textsuperscript{80} The Board and Attorney General John Ashcroft have interpreted "government acquiescence" as requiring knowledge and consent. \textit{See infra} notes
son with the Refugee Convention's "well-founded fear" requirement, the standard of proof as set forth in the Torture Convention requires "substantial grounds for believing that one would be in danger of torture." As implemented in the United States, however, the standard of proof under the Torture Convention has been elevated to the "more likely than not" standard.

Although the United States ratified the Torture Convention in 1994, it did so with a declaration that Article 3 (among others) was not self-executing. It was not until 1998 that the Senate enacted implementing legislation. In codifying the United States' obligations under Article 3, Congress deviated

333-52 and accompanying text (discussing how "governmental acquiescence" has been interpreted by the Committee Against Torture and other signatory states). This stringent interpretation has greatly limited protection in cases involving gender-based violence or other torture inflicted by nongovernmental actors.

81. See supra notes 56-59 and accompanying text (discussing how the U.S. Supreme Court has interpreted the "well-founded fear" standard as being substantially lower than the "more likely than not" standard). According to the U.S. Supreme Court, while the "more likely than not" standard requires a greater than 50% likelihood, an applicant can have a "well-founded fear" of an event occurring if there is a one in ten possibility. INS v. Cardoza-Fonseca, 480 U.S: 421, 431 (1987).

82. See Torture Convention, supra note 9.

83. The United States' equation of the Torture Convention's "substantial likelihood of torture" standard with the statutory "more likely than not" standard utilized for Refugee Convention-based withholding claims has been widely criticized and is out of sync with other signatory states and the Committee against Torture. See infra notes 258-60 and accompanying text.

84. The United States takes this position with regard to all human rights instruments that it signs. See Kenneth Roth, The Charade of US Ratification of International Human Rights Treaties, 1 CHI. J. INT'L L. 347 (2000) (asserting that "[o]n the few occasions when the US government has ratified a human rights treaty, it has done so in a way designed to preclude the treaty from having any domestic effect"). While beyond the scope of this Article, scholars have widely criticized the United States' position. See, e.g., DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 466 n.11 (3d ed. 1999) (surveying applicable scholarship and treatises and clarifying that, "[t]he question of whether the United States is bound by the treaty is distinct from that of whether the treaty is self-executing or requires implementation to create specific remedies in domestic fora"); Kristen Rosati, The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal, 26 DENV. J. INT'L L. & POLY 533 (1998).

from the text of the Torture Convention. Perhaps most significantly, notwithstanding the Convention's absolute prohibition against torture under any circumstances, Congress excluded persons with criminal histories from obtaining full protection under Article 3. For those with criminal records, Congress created a lesser form of relief entitled "deferral of removal." This two-tiered approach to relief from removal when torture is at issue allows the United States to afford greater or lesser protection to torture victims it deems more or less desirable.

While the standard of proof is identical for both withholding and deferral under the Torture Convention-based statutory provisions, the United States can easily withdraw "deferral of removal" protections if conditions or circumstances improve in the home country. Finally, as implemented in the United States, neither Torture Convention-based withholding nor deferral of removal allow for the torture victim to reunite with family or obtain permanent safety.

86. Foreign Affairs Reform and Restructuring Act of 1998 § 2242(c).
87. 8 C.F.R. §§ 208.16–18, .22 (2004).
88. The United States is not alone in undermining the intent of the Torture Convention with regard to "criminal aliens." For example, pursuant to Canada's Immigration and Refugee Protection Act of 2002, those convicted of a "serious crime" or involved in "organized crime" or those who pose a threat to national security are entirely ineligible for Torture Convention protection. Immigration and Refugee Protection Act, ch. 27, 2001 S.C. 16-20 (Can.); see also HUMAN RIGHTS PROGRAM, DEPT OF CAN. HERITAGE, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 2 (2002) (noting that the Canadian Centre for Victims of Torture expressed serious concerns regarding Canada's compliance with Article 3 of the Torture Convention, "since a person recognized as a Convention refugee, but who poses a danger to public security or national security, could be deported to a country where he/she will likely be subjected to torture or death"), available at http://www.pch.gc.ca/progs/pdp-hrp/docs/cat/2002/cat2000e.pdf.
89. 8 C.F.R. § 208.17(d).
90. While an in-depth discussion of the need for family reunification for victims of torture is beyond the scope of this Article, this type of protection hierarchy arbitrarily denies fundamental rights to those in need of safety in contravention of both international human rights norms and the family reunification policy goals underlying United States immigration policy. While acknowledging that it would be premature to argue "that a general norm against family separation" has reached the level of "customary international law," commentators have argued that "such a norm is beginning to evolve in fragmentary ways." Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International Law, 21 BERKELEY J. INT'L L. 213, 230 (2003) (finding that "[s]ufficient consensus exists against particular types of family separation . . . to constitute customary international law"). For examples of provisions of the Immigration and Nationality Act stressing the importance of family unity in guiding U.S. immigration policy, see Immigration and Nationality
II. WOMEN FLEEING GENDER-BASED VIOLENCE: INTERNATIONAL RECOGNITION OF A WOMEN'S HUMAN RIGHTS ISSUE

“Refugeeness” has been described as “an experience characterized by flight, force, fear, struggle for control over basic life issues, and especially ambiguity.” This ambiguity is compounded for women seeking asylum protection in the United States. While the disassociative nature of the refugee experience is not unique to women, cultural norms may make it even more difficult for women to comply with the rigid standards of proof and causation all too often employed in the refugee adjudication context. Women and children constitute 80% of the estimated twelve million refugees, but the majority of applicants for asylum in the United States are men. The disproportionately small number of women seeking safety in the United States is attributable, in large part, to their severe poverty and lack of mobility.

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Act § 201(b)(2), 8 U.S.C. § 1151 (2004), which exempts from quotas “immediate relatives” and children born to lawful permanent residents temporarily abroad; Immigration and Nationality Act § 203(a), 8 U.S.C. § 1153(a)(3) (2000), which gives preferences to certain immigrants with slightly less compelling family relationships to U.S. citizens or to lawful permanent residents; and Immigration and Nationality Act § 203(d), 8 U.S.C. § 1153(d) (2000), which gives preference to spouses and children accompanying or following to join most classes of immigrants. See also LEGOMSKY, supra note 28, at 147 (“One central value that United States immigration laws have long promoted, albeit to varying degrees, is family unity.”); U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES: A DOCUMENTARY HISTORY (Michael Le-May & Elliott Robert Barkan eds., 1999).

91. Lucia Ann McSpadden, Negotiating Masculinity in the Reconstruction of Social Place, in ENGENDERING FORCED MIGRATION, supra note 38, at 242, 244.

92. For this reason, standards of causation in the refugee context should instead take into account “the complex combinations of circumstances which may give rise to the risk of being persecuted, the prevalence of evidentiary gaps, and the difficulty of eliciting evidence across linguistic and cultural divides.” Rodger Haines, Gender-Related Persecution 19, at http://www.unhcr.org (Aug. 10, 2001) (draft).


95. See Anker et al., supra note 24, at 716–17. In remarks addressing the differential migration patterns of women and children, Jacqueline Bhabha attributed the under-representation of women asylum seekers to a combination of factors including: reduced access to formal and informal structures that fa-
The combination of "refugeeness" and gender may also account for the finding in recent studies that the expedited removal system that Congress implemented in 1996 has had a disparate impact on women asylum seekers.\textsuperscript{96} Women are more frequently removed pursuant to expedited removal (as opposed to regular immigration removal procedures) than men.\textsuperscript{97} The expedited removal process also presents particular obstacles to women fleeing persecution or torture and places them in grave danger of being returned to their persecutors. For example, women who have fled gender-based harm such as rape, domestic violence, honor killings, forced sterilization, female genital mutilation, or forced marriage may feel a great sense of shame and be hesitant to disclose their experiences to an immigration officer.\textsuperscript{98} In addition, neither women nor immigration officers may know that gender-based harm can be a basis for protection.\textsuperscript{99}

Indeed, based on the tumultuous history of U.S. asylum jurisprudence involving gender-based persecution, it remains unclear to what extent women fleeing gender-based harm will be protected through asylum law.\textsuperscript{100} Although the Refugee Con-

\begin{itemize}
  \item \textsuperscript{96} For explanation of expedited removal, see supra notes 61–69 and accompanying text.
  \item \textsuperscript{97} Musalo et al., supra note 66, at 1192. Explanations for this disparity include: (1) women are more likely to present themselves at ports of entry without proper travel documents; (2) a high proportion of male asylum applicants may already be present in the United States and thus exempt from the expedited removal system for arriving aliens; and (3) officials may apply expedited removal in a manner that disfavors women. The Expedited Removal Study, supra note 67, at 50–51.
  \item \textsuperscript{98} LAWYERS COMM. FOR HUMAN RIGHTS, supra note 69, at 6. In practice, many asylum-seekers are also subjected to shackling and strip searches (including body cavity searches) as part of expedited removal. \textit{Id.} at 7. For women who have been raped, this is particularly traumatic. \textit{Id.} INS policy and written guidelines specify that handcuffing and shackling are not required, and specify that restraints should not normally be used on women. \textit{Id.}
  \item \textsuperscript{99} \textit{Id.} at 8.
  \item \textsuperscript{100} The treatment of gender asylum claims in the United States has recently been described as being "in flux, with developments tending toward recognition of these claims being followed by those which seem to limit or even eliminate such recognition." Karen Musalo & Stephen Knight, \textit{Asylum for Victims of Gender Violence: An Overview of the Law, and an Analysis of 45 Unpublished Decisions}, IMMIGRATION BRIEFINGS, Dec. 2003, at 1.
\end{itemize}
vention does not set forth gender as a statutorily protected ground, the Board and the courts have developed a substantial body of jurisprudence interpreting "persecution,"101 "membership in a particular social group,"102 and the "nexus"103 requirement within the context of gender-based claims to asylum. While the Board and at least one circuit court have stated that a social group could be defined based upon the shared sex of its members, there have been no precedential decisions granting asylum protection to a woman who feared persecution based solely on her gender. Rather, the Board and the courts have charted an uneven path in gender-based asylum claims, often requiring women to articulate exceedingly narrow social groups consisting of gender in addition to other shared characteris-

101. "Persecution" was intentionally not defined by the drafters of the Refugee Convention so that it could be interpreted in accordance with evolving standards. ANKER, supra note 84, at 171. At a minimum, it has been defined to include "threat[s] to life or freedom" and should embrace other serious violations of human rights. Id. According to the INS Basic Law Manual, "[o]ne must determine whether the conduct alleged to be persecution violates a basic human right, protected under international law." IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT OF JUSTICE, THE BASIC LAW MANUAL: U.S. LAW AND INS REFUGEE/ASYLUM ADJUDICATIONS 24 (rev. ed. 1994) (emphasis omitted). Prior to the issuance of the U.S. Gender Guidelines in 1995, sexual violence and other forms of gender-based harm were often characterized as personal rather than persecutory. See infra note 105 and accompanying text (discussing cases distinguishing persecution and "private" harm). As discussed below, the U.S. Gender Guidelines recognized that "women's rights are human rights" and urged adjudicators not to mischaracterize claims as "purely personal" based solely on the appearance of sexual violence. Memorandum from Phyllis Coven, Office of Int'l Affairs, Dep't of Justice, to INS Asylum Office/rs & HQASM Coordinators 2, 9 (May 26, 1995) [hereinafter U.S. Gender Guidelines], available at http://www.uchastings.edu/cgrs/law/guidelines/us.pdf; see also infra notes 116-17 and accompanying text.

102. Because gender is not a protected category under the refugee definition, gender-based asylum claims are most frequently presented as involving persecution on account of membership in a particular social group. As discussed above, the social group category is the most open-ended of the protected groupings set forth under the Refugee Convention. See supra note 35. In the United States, the Board has utilized an "immutability" test to determine the cognizability of proposed social groups: the members must be joined by a shared characteristic that is either immutable or so fundamental to their identities that they should not be required to change it. See In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

103. Even in instances in which social groups based in part on gender are recognized, the applicant must still show that she was persecuted on account of her membership in that social group. As illustrated in the discussion of In re R—— A——, 22 I. & N. Dec. 906 (B.I.A. 1999), vacated, (Att'y Gen. 2001), this nexus requirement has often been interpreted in such a way as to be insurmountable in gender-based claims. See infra notes 132–63 and accompanying text.
For many years, women were denied asylum based on perceptions of gender-based harm as "personal" and outside of the realm of refugee protection. However, the international reconceptualization of human rights and refugee law as inclusive of women's human rights issues impacted the development
of gender-based asylum jurisprudence in the United States.\footnote{106} For example, in 1993, the World Conference on Human Rights led to the adoption of the Vienna Declaration and Programme of Action (Declaration) by the United Nations General Assembly. The Declaration explicitly recognized women's human rights as "an inalienable, integral, and indivisible part of universal human rights."\footnote{107} Specifically, the Declaration identified gender-specific abuses that constitute human rights violations and that must be eliminated, "including those resulting from cultural prejudice, such as violence, sexual harassment, and sexual exploitation."\footnote{108} A few months later, in December 1993, the United Nations General Assembly adopted a Declaration on the Elimination of Violence Against Women and recognized violence against women as an important human rights issue.\footnote{109}

In 1993, Canada broke ground by becoming the first state party to the Refugee Convention to issue gender guidelines for interpreting gender-based asylum claims (Canadian Guidelines).\footnote{110} The Canadian Guidelines address both substantive and procedural hurdles to assessing gender-based claims to

\footnotesize{106. There were discreet efforts to recognize gender-based harm as early as 1984. For example, in that year, the European Parliament and the Dutch Refugee Council passed resolutions that suggested that sex-based persecution fits under the particular social group category. Lisa Gilad, \textit{The Problem of Gender-Related Persecution: A Challenge of International Protection}, in \textit{Engendering Forced Migration}, \textit{supra} note 38, at 334, 335. In 1985, the UNHCR recommended that women might be considered members of a social group if they violate their country's social mores. \textit{Id.} In 1987, the Canadian Immigrant Appeals Board recognized a gender-based claim and found that sexual assault constituted persecution. \textit{Id.} In 1989, Canada's Immigrant and Refugee Board was created and incorporated many women members interested in establishing protection mechanisms for women refugees. \textit{Id.}


108. \textit{Id.}


persecution. While the United States’ reluctance to recognize women as a social group has often been premised on the broad-based nature and size of such a group, the Canadian Guidelines explicitly state that “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.”

As a result of the criminal prosecutions based on the widespread use of rape as a tool of war during ethnic cleansing in Bosnia, rape became more widely viewed as a crime against humanity, as well as a violation of basic human rights. Similarly, in 1995, Amnesty International formally recognized rape as persecution. With the cross-fertilization between human rights and refugee law, that same year the Board issued its first precedential decision granting asylum in a case involving politically motivated rape.

In 1995, the United States followed Canada and adopted

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111. CANADIAN GUIDELINES, supra note 110. The Canadian Guidelines specify that

[a]lthough gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds. Id. at 280. Specifically with regards to gender-based particular social groups, the Canadian Guidelines incorporate the UNHCR position that “[s]tates... are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of the [Refugee Convention].” Id. at 283.

112. Id. at 283.


115. In re D—— V——, Interim Dec. No. 3252 (B.I.A. 1993) (granting asylum to a Haitian woman who was raped by military personnel after a coup on account of her support for the former government). While In re D—— V—— had been decided two years earlier, it was not until 1995 that the Board designated the decision as precedential. See In re D—— V——, 21 I. & N. Dec. 77 (B.I.A. 1995). In order for a decision of the Board to be precedential, all Board members must unanimously vote to so designate it.
Considerations for Asylum Officers Adjudicating Women's Asylum Claims (U.S. Gender Guidelines).\textsuperscript{116} While the U.S. Gender Guidelines are not binding, they are required reading for asylum officers and were widely hailed as a major step forward in bringing the United States into conformity with the growing international consensus on gender-based refugee issues. The U.S. Gender Guidelines critique various gender-based asylum decisions by the Board and the circuit courts and offer guidance ranging from the need for heightened sensitivity during interviews to the preference for female interpreters in gender-based cases to greater understanding of why women may be reluctant to disclose gender-based violence such as rape.\textsuperscript{117}

By early 1996, the United Nations Special Rapporteur on violence against women issued a report on intrafamilial violence against women.\textsuperscript{118} The report characterized domestic violence as a violation of human rights and recommended that states extend their refugee and asylum laws "to include gender-based claims of persecution, including domestic violence."\textsuperscript{119} International tribunals already had a history of granting asylum or refugee status to women based on membership in particular gender-based social groups.\textsuperscript{120}

Finally, in 1996, after an intensive public advocacy and media campaign that put pressure on the Board, it ruled in a precedential decision, \textit{In re Kasinga}, that female genital cutting

\textsuperscript{116} U.S. Gender Guidelines, \textit{supra} note 101.
\textsuperscript{117} In addition, the U.S. Gender Guidelines cite the Third Circuit's analysis in \textit{Fatin v. INS}, 12 F.3d 1233 (3d Cir. 1993), recognizing that women can constitute a particular social group for asylum purposes. U.S. Gender Guidelines, \textit{supra} note 101, at 10.
\textsuperscript{118} Audrey Macklin, \textit{A Comparative Analysis of the Canadian, US and Australian Directives on Gender Persecution and Refugee Status}, in \textit{ENGENDERING FORCED MIGRATION}, \textit{supra} note 38, at 272, 304.
\textsuperscript{119} \textit{Id.} (quoting United Nations Economic and Social Council 1996: 40).
could constitute persecution for asylum purposes.\textsuperscript{121} The Board further recognized a cognizable social group defined by youth, tribal identity, and opposition to female genital cutting.\textsuperscript{122} The female genital cutting at issue was practiced on young women of the tribe against their will to overcome their sexual characteristics, thereby enabling a woman to successfully demonstrate the required nexus between the persecution and the cognizable social group.\textsuperscript{123} By applying a traditional asylum law analysis to Kasinga's claim, the Board also sent a strong message that gender-based claims fell squarely within the parameters of the Refugee Convention.\textsuperscript{124} Interestingly, while opponents feared that the decision would lead to an influx of women seeking asylum based on female genital mutilation, this has not occurred.\textsuperscript{125}

The \textit{In re Kasinga} decision was widely praised and is often referred to as the high point for gender-based asylum jurisprudence in the United States.\textsuperscript{126} The Board's willingness in \textit{In re Kasinga} to establish precedent affording protection against a form of gender-specific harm reflected the substantial inroads that had been made by that point in both human rights and refugee laws to address violations of women's human rights. The decision, however, has also been criticized for failing to go far enough. Specifically, critics noted that the Board framed the social group in an unnecessarily narrow fashion, with opposi-

\begin{itemize}
\item \textsuperscript{121} \textit{In re Kasinga}, Interim Dec. No. 3278, at 12 (B.I.A. 1996). In reaching this conclusion, the Board clarified that punitive intent is not required for an act to constitute persecution. \textit{Id.}

\item \textsuperscript{122} The social group recognized in the \textit{In re Kasinga} case was "young women of the Tchamba-Kunsuntu tribe who have not yet had [female genital mutilation], as practiced by that tribe, and who oppose the practice." \textit{Id.} at 2–3.

\item \textsuperscript{123} \textit{See id.}

\item \textsuperscript{124} Because the INS greatly feared opening a floodgate of claims from women who risked being subjected to female genital mutilation, it argued, unsuccessfully, for the Board's adoption of an entirely new "shock the conscience standard" to be applied in cases involving female genital mutilation. \textit{See id.} at 21 (Filppu, Bd. Mem., concurring).

\item \textsuperscript{125} Chase, \textit{supra} note 94, at 134.

\item \textsuperscript{126} \textit{See, e.g.,} Isabelle R. Gunning, \textit{Global Feminism at the Local Level: Criminal and Asylum Laws Regarding Female Genital Surgeries}, 3 J. GENDER RACE & JUST. 45, 55 (1999) (describing \textit{In re Kasinga} as a "landmark case in terms of progress in American asylum law towards the recognition of gender-based asylum claims"); Karen Musalo, \textit{Ruminations on In re Kasinga: The Decision's Legacy}, 7 S. CAL. REV. L. & WOMEN'S STUD. 357, 360 (1997) (describing the \textit{In re Kasinga} decision as groundbreaking within gender-based asylum jurisprudence). 
\end{itemize}
tion to female genital cutting being superfluous and creating a risk that asylum jurisprudence involving gender-based claims would continue to be inconsistent. Commentators also warned that, absent regulatory guidance, it remained unclear the extent to which In re Kasinga would affect adjudication of asylum claims based on other forms of gender-specific persecution.

Indeed, the Board trails behind its international counterparts in that it has been much less willing to protect against less "foreign" forms of gender-based persecution such as domestic violence. As explained by Professor Joan Fitzpatrick, "in the realm of U.S. refugee law one expects a high level of consciousness of international obligation and a close congruence between domestic law and international norms." These international norms are especially relevant in assessing asylum law because, unlike other areas of domestic law, asylum law is an area in which the United States has historically looked to and relied upon international law. Unfortunately, notwith-

127. See, e.g., Jacqueline Bhabha, Embodied Rights: Gender Persecution, State Sovereignty, and Refugees, 9 PUB. CULTURE 3, 30 (1996) (characterizing the Board's decision in In re Kasinga as a "narrow ruling"); Arthur C. Helton & Alison Nicoll, Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches, 28 COLUM. HUM. RTS L. REV. 375, 375, 378 (1997) (arguing that U.S. asylum laws "fail to offer women the same level of protection it offers male asylum seekers" and, while commending the specific result in In re Kasinga, criticizing the lack of guidance for future cases); Linda Kelly, Republican Mothers, Bastards' Fathers and Good Victims: Discarding Citizens and Equal Protection Through the Failures of Legal Images, 51 HASTINGS L.J. 557, 591 (2000). Linda Kelly notes that

[t]here seems to be no acceptable explanation for the [Board's] failure to simply define Kasinga's social group as "women." Kasinga had already established the prong of "well-founded fear" by choosing to flee rather than undergo [female genital mutilation]. To require her to show an opposition to the practice within the social group criteria was unnecessary.

Kelly, supra, at 591.

128. Helton & Nicoll, supra note 127, at 378; Randall, supra note 24, at 295 (hailing the In re Kasinga decision as a breakthrough in explicitly recognizing gender as a component of a social group but criticizing the reasoning as "suffer[ing] from the same restricted and compartmentalized approach to gender seen in Canadian case law").

129. See infra notes 283–98 and accompanying text for a comparative discussion of female genital cutting and domestic violence claims and the greater protection offered against "foreign" harms.


131. According to noted refugee scholar Deborah Anker, "[o]ne of the most
standing the growing international movement toward recognizing domestic violence as a human rights abuse, the protracted battle surrounding one Guatemalan woman's claim to asylum based on atrocious domestic violence has cast doubt on whether the gender neutral definition of "refugee" will be interpreted in the United States in such a way as to protect women.

A. **In re R—A—and Asylum Law's Swinging Pendulum of Protection for Women Fleeing Gender-Based Violence**

In *In re R—A—*, the Board was confronted with a Guatemalan woman who sought asylum in the United States after fleeing a long history of horrific domestic violence inflicted by her husband in a country where the government had failed to offer protection. The immigration judge granted asylum in 1996, finding that the domestic violence constituted persecution and that it occurred on account of her membership in a particular social group, which was made up of Guatemalan women who were intimately involved with male Guatemalan partners who believed that women should live under male domination.

In a precedential decision in 1999, a divided Board reversed the immigration judge and held as an initial matter that *R—A—* had failed to show membership in a cognizable social group. Rather than relying upon its past jurisprudence re-

noteworthy developments in U.S. asylum law has been the weight given by U.S. authorities—including the INS, the Board, and the federal courts—to the United Nations High Commissioner for Refugees interpretation of the refugee definition contained in its *Handbook on Procedures and Criteria for Determining Refugee Status.* ANKER, supra note 84, at 10. According to the INS *Basic Law Manual*, “where the Board has not addressed specific issues . . . reference to international law may assist in determining whether an alien meets the . . . definition of refugee.” *Id.* at 10 (citation omitted).

132. *In re R—A—*, 22 I. & N. Dec. 906 (B.I.A. 1999), vacated, (Att'y Gen. 2001). The domestic violence at issue included serious abuse on almost a daily basis for over a decade. DHS's Position, supra note 15, at 7, 8. The physical abuse included: near daily rape and sodomy, dislocating her jawbone, dragging by her hair, almost pushing out one of her eyes, using her head to break windows and mirrors, kicking her in the genitals and whipping her with pistols and electrical cords. *Id.* at 9–10, 17. In addition to the severe physical abuse, *R—A—*’s husband also routinely threatened to find her and kill or severely mutilate her if she attempted to leave him. *Id.* at 10–11. In fact, on each of the several occasions that she ran away from her husband, he found her and forced her to return home. *Id.* at 10–11, 42. On five separate occasions, she reported the abuse to the police, who failed to take any protective actions. *Id.* at 12.


134. *Id.* at 920.
quiring that members of a particular social group be united by a fundamental or immutable characteristic, the Board elevated the social group requirement to include analysis of additional factors, including how members of the group are perceived by the potential persecutor, by the asylum seeker, and by the larger society. Applying this new standard to R— A—’s social group claim, the Board held that she failed to show that being an abused woman is an important societal attribute in Guatemala or that Guatemalan society perceives abused women as a social group.

The Board’s refusal to recognize the gender-based social group asserted in In re R— A— was clearly at odds with the substantial inroads that had been made in addressing the gender bias inherent in international and refugee law. For example, there has been increasing recognition that, “[a]lthough international law is gender neutral in theory, in practice it interacts with gender-based domestic laws and social structures that partially relegate women and men to separate spheres of existence.” For this reason, “the process of becoming, and being recognized, as a refugee is gendered.” The gendered nature of refugee law has sparked calls to amend the Refugee Convention to add gender as a sixth protected ground. In much the same way that Title VII of the Civil Rights Act prohibits discrimination on account of specified grounds including sex, it has been argued that the Refugee Convention should prohibit persecution based on sex. Others, however, have

135. In re Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985). Because the case arose in the Ninth Circuit, the Board had the option to look at whether the proposed social group was homogeneous or whether members of the group were united by a voluntary associational relationship. Sanchez-Trujillo v. INS, 801 F.2d. 1571, 1576–77 (9th Cir. 1986).
137. Heaven Crawley, Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy, in ENGENDERING FORCED MIGRATION, supra note 38, at 308, 310.
138. Id. at 309 (emphasis omitted).
140. See Randall, supra note 24, at 301–05 (marshalling the arguments for
warned that amending the Refugee Convention is both highly unrealistic and potentially more damaging to the state of women's human rights. These commentators fear that separating gender may reinforce the notion that gender-based claims cannot be adjudicated through the traditional analytical framework of asylum law, thereby reinforcing notions of difference that have historically harmed women.

In lieu of amending the Refugee Convention itself, a growing number of countries have attempted to compensate for the gender bias that stems from the male-based interpretation of asylum law. These countries have either amended their domestic immigration legislation or promulgated guidelines to ensure that gender alone can be a defining characteristic for social group membership. Rather than follow the international de-

141. See, e.g., Macklin, supra note 24, at 256–63 (favoring a reinterpretation of existing refugee law to include gender-based claims rather than legislative efforts to amend the law to include gender as a sixth protected ground). Audrey Macklin persuasively articulates the inherent risks in re-opening the refugee definition as well as the advantage to analyzing the social construction of the apparently natural category of "woman." See id.

142. See, e.g., Refugee Act, 1996 (June 26, 1996) (Ir.), available at http://www.irishstatutebook.ie/front.html. The Refugee Act specifies that membership of a social group includes, "membership of a group of persons whose defining characteristic is their belonging to the female or the male sex." Id. § 1(1). Under section 5 of the Act, a person's freedom shall be regarded as threatened if, inter alia, "the person is likely to be subject to serious assault (including that of a sexual nature)." Id. § 5(2). Norway's guidelines, implemented in 1998, recognize gender-based persecution as a valid basis for seeking asylum. According to Rune Steen of the Norwegian Organisation for Asylum Seekers, the guidelines specifically delineate gender-based persecution, exemplified as situations in which women through their actions, omissions and statements violate written and unwritten social rules that affect women particularly, regarding dressing, the right to employment, etc. If violations of these rules are punished with sanctions that can be seen as persecution in accordance with the 1951 Convention, asylum should be granted.


Australia's Guidelines on Gender Issues for Decision Makers states that "[w]hile 'gender' of itself is not a Convention ground, it may be a significant factor in recognising a particular social group or an identifying characteristic of such a group." DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS, GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS, at 22 (July 1996) (Austl.), available at http://www.uchastings.edu/cgrs/law/guidelines/
velopments in this area, the Board in In re R—A—- retreated from the promise of In re Kasinga and erected new barriers for women with gender-based asylum claims.

In addition to its refusal to recognize a social group made up of battered Guatemalan women, the Board also held that R—A—- had not established the required nexus between the domestic violence inflicted upon her and her membership in the gender-based social group. According to the majority, the fact that her husband did not abuse other women undermined her claim that he abused her because of her sex. The Board's refusal to recognize the connection between gender and domestic violence is again inconsistent with international recognition that gender-based harm is typically the result of cultural or customary practices at times inflicted by family or community. It is also at odds with the growing understanding that traditionally "private" harms, such as rape and domestic vio-

aust.pdf. It continues, "[t]he Refugee Review Tribunal has found that whilst being a broad category, women nonetheless have both immutable characteristics and shared common characteristics which make them cognisable as a group and which may attract persecution." Id.

Similarly, the United Kingdom's Asylum Gender Guidelines state that "[p]artial social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change. Examples of such characteristics are gender, age, race, marital status, family and kinship ties, sexual orientation, economic status and tribal or clan affiliation." Immigration Appellate Authority, Asylum Gender Guidelines, at 39 (Nov. 2000) (U.K.), available at http://www.iaa.gov.uk/gender.pdf.


144. Id. at 920.

145. See ANKER, supra note 84, at 388–94 (explaining that an increasing number of states have recognized a link between certain varieties of abuse and a gender-based motive); Anker et al., supra note 24 (stating that international law recognizes domestic violence as gender-specific abuse, which is most often committed by "non-state actors"); Pamela Goldberg, Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence, 26 CORNELL INT'L L.J. 565 (1993) (asserting that U.S. law must catch up to international law in recognizing that human rights violations can take place when committed by private individuals); Jacqueline Greatbatch, The Gender Difference: Feminist Critiques of Refugee Discourse, 1 INT'L J. REFUGEE L. 518 (1989) (arguing that more research is needed into laws and customs relating to oppression based on gender); Kelly, supra note 139, at 625–26 (contending that "[w]omen as a group are often the first victims of political, economic and social repression... in part because of laws and social mores").
lence, must be viewed as human rights abuses worthy of protection under international human rights and refugee law.¹⁴⁶

Not surprisingly, the decision in In re R—A— was widely criticized both in the United States and internationally, ultimately leading former Attorney General Janet Reno to vacate it.¹⁴⁷ Because of the need for coherent guidance in adjudicating gender-based asylum claims, including those based upon domestic violence, the Department of Justice issued proposed regulations for domestic violence-based asylum claims and social group analysis.¹⁴⁸ However, in the more than three years since the Bush administration was installed, the proposed regulations have not been finalized, leaving In re R—A— in a state of limbo and creating a dangerous vacuum with respect to all gender-based asylum claims.

Although never promulgated as a final rule, the proposed rule and, to a greater extent, the accompanying INS commentary, blunted the harshness of In re R—A— by making it clear that gender-based asylum claims are appropriately analyzed through the existing legal framework without additional requirements.¹⁴⁹ To the extent that the proposed regulations reflect the DHS's interpretation of how claims alleging persecu-

¹⁴⁶. See supra notes 129–32 and accompanying text.
¹⁴⁸. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (proposed Dec 7, 2000). Attorney General Reno specified that the In re R—A— case was to be redecided by the Board after promulgation of the final domestic violence asylum regulations. See id. at 79,596.
¹⁴⁹. For example, whereas the Board in In re R—A— stated that the abusive spouse's failure to abuse other women undercut the required nexus to a protected ground, the proposed rules clarify that "[e]vidence that the persecutor seeks to act against other individuals who share the applicant's protected characteristic is relevant and may be considered but shall not be required." Id. at 76,598. Furthermore, the proposed regulations clarify that the additional factors set forth in In re R—A—, such as demonstrating that membership reflects an important societal attribute, are factors to be considered but are not required to establish a social group. See section 208.15(c)(3) of the proposed rule for a list of factors that may be considered but are not necessarily determinative including whether:

(i) The members of the group are closely affiliated with each other; (ii) The members are driven by a common motive or interest; (iii) A voluntary associational relationship exists among the members; (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question; (v) Members view themselves as members of the group; and (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

Id.
tion on account of membership in a particular social group should be analyzed, they provide important guidance. However, the proposed rule was also widely criticized for not going far enough. Specifically, the very inclusion of the "R—A—factors" in the proposed rule drew widespread criticism and concern. As scholars and commentators noted, rather than simply seizing the opportunity to state that gender alone could be the shared characteristic that defines a social group, the proposed rule codified additional factors for consideration. The result of this may be to perpetuate the long-standing confusion surrounding adjudication of gender-based asylum claims. Moreover, rather than recognizing gender as a basis for persecution, the proposed rule reinforces the notion that women's claims should be squeezed into the social group category.

The UNHCR has also released guidelines for interpreting membership in a particular social group in the context of the Refugee Convention. As stressed by the UNHCR, members-

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150. Commentators note that affiliation, common motive, and voluntary association are factors derived solely from the Ninth Circuit's decision in Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986). These "cohesion" factors are inconsistent with the Board's longstanding application of an "immutability" test to determine the viability of a proposed social group. See In re Acosta, I. & N. Dec. 211 (B.I.A. 1985). Furthermore, in Hernandez-Montiel, the Ninth Circuit revised its approach to social group claims by rejecting the "cohesion" requirement in favor of the Board's "immutability" approach. Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000). In light of the disfavored status of the "cohesion" test, its resurrection in the proposed regulations were widely criticized. See Musalo & Knight, supra note 100, at 6; see also Condon, supra note 139, at 212 (commenting that, "rather than refining the interpretation of 'social group,' the rule confounds its meaning by providing discretionary factors for judges to consider even when women establish persecution on account of the immutable trait of gender").

151. See, e.g., Condon, supra note 139, at 246 (stating that the rule's incorporation of the In re R—A—factors would allow an adjudicator to go beyond the well-established "immutability" test and reach the same result as the Board did in In re R—A—); Christina Glezakos, Domestic Violence and Asylum: Is the Department of Justice Providing Adequate Guidance for Adjudicators?, 43 SANTA CLARA L. REV. 539, 564 (2003) (noting that "[s]ome commentators have expressed fear that the inclusion of the list of factors . . . might lead adjudicators to rely exclusively on the factors enumerated as determinative"); Musalo & Knight, supra note 100, at 6.

152. Melanie Randall has argued that attempting to fit women's claims into the particular social group category "has created an often mechanistic and reductive classification problem because, in the absence of gender as an express ground of persecution[,] . . . [gender] Guidelines encourage the creation of artificial and ossified sub-categories of women who are recognized as subjected to persecution." Randall, supra note 24, at 290.

153. UNHCR, Guidelines on International Protection: "Membership of a
ship of a particular social group "should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms." In an attempt to reconcile conflicting interpretations of what is meant by membership in a particular social group, the UNHCR set forth that

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.

Furthermore, in what has been characterized as a "bifurcated approach" to nexus under asylum law, the UNHCR advised that nexus can be established through a showing of either serious harm or failure of state protection. For example, in the context of domestic violence, a woman would need to show either that her husband abused her on account of a Refugee Convention-protected ground, or that the state failed to protect her on account of a Refugee Convention-protected ground, but not both.

Recent events suggest that political pressure to bring the United States into conformity with international human rights and refugee law norms may once again push the door open, to an uncertain extent, for women fleeing gender-based violence. In February 2003, Attorney General John Ashcroft announced his intent to recertify the In re R— A— decision to himself, leading to widespread fear that he would reinstate the original decision and revamp the proposed rule to the detriment of women fleeing gender-based harm. After another massive public awareness and advocacy campaign designed to put pressure on the DHS and the Attorney General's office (including a letter signed by forty-eight Congresspeople urging protection


154. Id. at 2.
155. Id. at 3–4.
156. Id. at 5–6.
157. Karen Musalo, Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence, 52 DEPAUL L. REV. 777, 778 (2003). Karen Musalo has argued that this bifurcated approach to nexus in asylum law has the potential to bring the United States into conformity with the United Kingdom, Australia and New Zealand. Id.
from gender-based violence by nonstate actors), the DHS dramatically revised its position, now calling on Ashcroft to grant asylum to R—A—. The DHS has indicated its willingness to recognize domestic violence as persecution and to categorize women who are victims of such violence, in limited circumstances, as a particular social group. The DHS has also stated its intent to engage in rulemaking to establish guidelines for such gender-based claims to asylum.

While the DHS's position in In re R—A— appears to represent a step forward in the adjudication of gender-based claims of persecution under U.S. asylum law, the ultimate resolution of In re R—A— and its impact remain uncertain. The fact that the door to a previously denied or restricted category of relief may be opened does not address or diminish the need for relief under the Torture Convention for women fleeing torture. To the contrary, the fluctuations in interpretation of asylum law, its discretionary and malleable nature, and the caution with which the United States approaches gender-based social groups, all illustrate the need to safeguard a gender-inclusive interpretation of Article 3 of the Torture Convention.

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160. See DHS's Position, supra note 15, at 18-31. DHS urges the Attorney General to remand the case to the Board with instructions to summarily grant asylum to the respondent, without issuing an opinion. Id. at 3. DHS states that it will finalize the gender asylum regulations promptly to provide guidance for domestic-violence based asylum adjudication. Id. In the event that the Attorney General issues a substantive decision in the pending matter, DHS urges that asylum be based on a social group defined as "married women in Guatemala who are unable to leave the relationship." Id. at 15.
162. While the specific nature of those regulations is as yet unknown, it is reasonable to believe that it may be similar to the proposed gender asylum regulations issued by the Reno administration. See supra notes 147-52 and accompanying text.
163. For example, "[t]he... [DHS] argues that, under some limited circumstances, a victim of domestic violence can establish eligibility for asylum on this basis, and that the applicant in this case has established such eligibility." DHS's Position, supra note 15, at 2 (emphasis added). The DHS cautions that such a decision be narrowly tailored and limited as much as possible to the particular facts of this case... A decision which permits too expansive a reading of the term "particular social group" could have a significant adverse operational impact. ... It is essential that the compelling factors present in this case not hinder the law interpreting the term "particular social group" from developing in a coherent and controlled manner.

Id. at 4. In addition, the ultimate disposition in In re R—A— rests with the Attorney General.
III. THE TORTURE CONVENTION: A FRAYING SAFETY NET FOR WOMEN WHO HAVE FALLEN THROUGH THE CRACKS OF THE REFUGEE CONVENTION

At the outset, practitioners and scholars embraced the potential increased protection offered by Article 3 of the Torture Convention. Because of the Board’s historical reluctance to recognize gender-based social groups and the difficulty in establishing a nexus between gender-based violence and a protected ground under asylum law, Article 3 held potential to provide alternative protection to women fleeing gender-based violence. Indeed, this optimism appeared warranted based on initial decisions interpreting Torture Convention-based statutory provisions. As in In re D—K——, judges confronted with credible accounts of women fleeing domestic violence were able to offer protection under the Torture Convention and sidestep altogether the thorny issues of social group membership and nexus.

Unfortunately, the opportunity presented by Article 3 to protect women has already been diminished. While the Torture Convention itself suffers from restrictive language, the ways in which the United States has ratified and implemented its obligations under Article 3 have undermined the intent of the Torture Convention and failed to broaden domestic protection for women fleeing gender-based violence. Moreover, Attorney General Ashcroft and the Board have interpreted the implementing legislation in an unduly narrow fashion.

While asylum law has all too often been interpreted explicitly to exclude protection against more “private” types of gender-based harm, interpretations of the Torture Convention have curtailed protection for women by placing its protections largely outside of their reach and failing to take into account the nature of their experiences. This “invisibility” for women is due, in part, to the United States’ decision to expel “criminal

164. See, e.g., Morton Sklar, New Convention Against Torture Procedures and Standards, IMMIGRATION BRIEFINGS, July 1999, at 10 (concluding that notwithstanding the unduly narrow interpretation of various aspects of the Torture Convention and the potential problems with adjudication by immigration judges, the Torture Convention “offers an important new remedy with significant potential for broadening the availability of withholding of removal protections, particularly for those ineligible for asylum”).

165. See infra Parts III.B.1—2, III.C.1 and accompanying text. Although three U.S. circuit courts of appeals have recently issued rulings criticizing the restrictive interpretation of Article 3 of the Torture Convention, the Board and Attorney General interpretations remain binding in the rest of the nation.
aliens" regardless of their fear of persecution or torture in their homelands. The United States has implemented this policy on two interrelated fronts. First, it has broadened the existing criminal exclusionary grounds under the Refugee Convention to such an extent that "criminal aliens" are barred from its coverage.166 Second, because the Torture Convention contains no exclusions, the United States has interpreted the standards of proof and terms of the Convention narrowly to avoid protecting "criminal aliens" who turn to the Torture Convention for relief.167 For women who have been denied asylum protection because of restrictive interpretations of the nexus requirement and social group membership, the Torture Convention appeared to be their last resort at finding safety. However, because the great majority of Torture Convention cases arise in the context of "criminal aliens," women may find that their experiences of gender-based harm also fall outside the scope of what have become the narrowly-defined terms and standards of the Torture Convention.

A. TEXT, TIMING, AND INTENT: DEFINING "TORTURE" IN AN ERA WHEN WOMEN'S HUMAN RIGHTS ISSUES WERE LARGELY INVISIBLE

The text of the Torture Convention itself has been criticized for its reliance on the public/private dichotomy and its

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166. See Convention Relating to the Status of Refugees, supra note 33, 189 U.N.T.S. at 176; see also infra note 258 and accompanying text.

167. In fact, these concerns were specifically voiced with regards to whether the United States should ratify the Torture Convention. For example, during the ratification debate on the United Nations Torture Convention, Senator Jesse Helms (R-N.C.), Member of the Senate Foreign Relations Committee, stated that

"[t]his Convention's Committee on Torture is a farce, and it may be a dangerous farce. One could well say in this case that the lunatics are indeed running the asylum. I do not want those folks poking their noses into the operation of the U.S. legal system. They have plenty to do with the notorious injustice exemplified by the two countries I have just mentioned [Soviet Union and Bulgaria]. . . . However, since this Convention is primarily symbolic, it is not necessary to engage in a superfluous debate.

136 CONG. REC. S17,487–88 (daily ed. Oct. 27, 1990) (statement of Sen. Helms). Staunch opponents of the Torture Convention ultimately agreed to it only because they viewed it as nothing more than a symbolic act. Senator Helms referred to the Torture Convention as "by and large a rhetorical gesture, expressing the revulsion which every decent nation has against torture." Id. at 17,489. The thought of the Torture Convention as anything more than a gesture was viewed as having the potential to present a "clear and present danger to U.S. sovereignty and to the people of the United States." Id.
narrow definition of torture to include only torture perpetrated by the government in the public sphere dominated by men. Given that the Torture Convention was drafted between 1977 and 1984, it is not surprising that it fails to account for the different ways in which women experience torture. During that era, the predominant belief was that there needed to be recourse for state-inflicted torture; acts by private individuals would be dealt with through the state’s criminal justice system. Furthermore, the movement to recognize “women’s human rights” as human rights was embryonic during the years in which the Torture Convention was drafted. Therefore, the text and intent of the Torture Convention must first be understood within the context of the male-focused international human rights regime that existed at the time of drafting. The larger question is to what extent the invisibility of women’s human rights issues at the time the Torture Convention was drafted should limit the potential for a broader and more inclusive interpretation of “torture” today.

Feminist scholars have long claimed that international law is a “thoroughly gendered system” with both the structures of international lawmaking and the content of the rules of international law advantaging men. Celina Romany has remarked that “[w]omen are the paradigmatic alien subjects of international law. To be an alien is to be an other, an outsider. Women are aliens within their states and aliens within an exclusive international club of states which constitutes international society.” Because men dominate all bodies of international political power, issues traditionally of concern to men are viewed as human rights issues, while “women’s issues” are relegated to a special, limited category. Harms such as do-

168. As explained by Andrew Byrnes, “[t]he period during which the Convention was being drafted also saw the beginnings of an increased feminist engagement with the international human rights regime, a development that flourished especially in the late 1980’s and 1990’s.” Andrew Byrnes, The Convention Against Torture, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 183 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

169. See, e.g., Hilary Charlesworth et al., Feminist Approaches to International Law, 85 AM. J. INT’L L. 613, 621–25 (1991) (noting that women are vastly underrepresented on United Nations Human Rights bodies and that “all the major institutions of the international legal order are peopled by men”).


171. See Charlotte Bunch, Feminist Visions of Human Rights in the
mestic violence, sex discrimination, and sexual exploitation are traditionally directed at women, and thus relegated to a separate sphere where they are largely ignored.\textsuperscript{172} The normative structure of international law focuses on the "public" sphere, traditionally dominated by men.\textsuperscript{173} Therefore, the "traditional canon of human rights law does not deal in categories that fit the experiences of women."\textsuperscript{174}

The women's human rights movement was in its early stages at the time the Torture Convention was drafted. Just five years before the Torture Convention was finalized, the General Assembly of the United Nations adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).\textsuperscript{175} The CEDAW has been widely recognized as the first human rights instrument to encompass the principle that "discrimination against women is incompatible with human dignity and is detrimental to the welfare of society."\textsuperscript{176} There can be no doubt that the CEDAW symbolized an essential leap forward in acknowledging the human rights issues affecting women. However, because it separately addressed women's issues outside of and apart from the existing human rights treaties and conventions, the traditional male-oriented structure of the human rights regime remained intact.\textsuperscript{177}

Because the mainstream human rights regime continued to

\textsuperscript{172} Charlesworth et al., supra note 169, at 625.

\textsuperscript{173} Id. at 626 (arguing that the public and private spheres are accorded asymmetrical value, with greater significance attached to the male-associated public sphere than the female-based private sphere).

\textsuperscript{174} Id. at 628.


\textsuperscript{176} See, e.g., Elizabeth F. Defeis, Equity and Equality for Women—Ratification of International Covenants as a First Step, 3 SETON HALL CONST. L.J. 363, 400 (1993).

\textsuperscript{177} See Bunch, supra note 171, at 975 (stating that "[w]hile the [CEDAW] addresses many issues of sex discrimination, one of its shortcomings is failure to directly address the question of violence against women"). The CEDAW has also been criticized for its weak enforcement methods as compared with other human rights instruments as well as the extraordinary number of reservations and understandings that states have employed to dilute its true spirit. See id.
focus on the public realm, women's issues remained relegated to the private sphere. Even as late as 1993, the United Nations General Assembly's adoption of the Declaration on the Elimination of Violence Against Women symbolized the way in which women's human rights issues have remained outside of the traditional human rights framework. As Hilary Charlesworth has noted, the Declaration recognized violence against women as an issue of international concern, but it stopped short of categorizing the violence as a human rights issue in its operative provisions for fear of diluting the "traditional" notion of human rights.

The Torture Convention's reliance on traditional international law paradigms of state responsibility to exclude private harms is evident from its definition of torture. The Torture Convention defines torture as harm "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The incorporation of the public/private dichotomy into this definition has been widely criticized from a gender perspective. As has been stated, "the description of the prohibited conduct relies on a distinction between public and private actions that obscures injuries to their dignity typically sustained by women." Because the Torture Convention and other human rights documents existing at that time focused on discrete violations of rights, they offer little redress in cases involving the pervasive and structural denial of rights.


179. Hilary Charlesworth, Feminist Methods in International Law, 93 AM. J. INT'L L. 379, 382–83 (1999) (stating that the prevailing belief was that human rights abuses required direct state involvement and that "extending the concept to cover private behavior would reduce the status of the human rights canon as a whole").

180. Torture Convention, supra note 9 (emphasis added).

181. See, e.g., Byrnes, supra note 168, at 190 (stating that “even when construed reasonably broadly, [the Torture Convention] does not reach much of the violence that is inflicted on women in society..... By largely excluding from its scope these forms of violence..... the Convention demonstrates that those threats of particular importance to women are not a priority of the international community."); see also Charlesworth, supra note 179, at 382 (noting that since “the definition of torture in the Convention against Torture requires the involvement of a public (governmental) official..... sexual violence against women constitutes an abuse of human rights only if it can be connected with the public realm").

182. Charlesworth et al., supra note 169, at 628.

183. Id.; see also Dorothy Q. Thomas & Michele E. Beasley, Domestic Vio-
Given the general lack of recognition of women's human rights issues at the time of drafting—combined with a focus on state action—a purely textual analysis of the Torture Convention suggests that its goal was not to advance women's human rights. However, the silence surrounding women's human rights issues permeated international law until the late 1980s and early 1990s, and reliance on a purely textual analysis is therefore inadequate to assess contemporary interpretations of the Torture Convention—and more specifically, whether it should be interpreted to protect against violations of women's human rights today. Indeed, a purely textual approach would be similarly inadequate in interpreting the applicability of the Refugee Convention to types of persecution not envisioned by the drafters. In the context of race, the same arguments have been advanced with regards to the framers' intent when drafting the U.S. Constitution.

In keeping with the relative invisibility of women's human rights issues at the time of drafting, some surmise that the drafters of the Torture Convention were likely unaware of the consequences that would flow from such a narrow definition of torture that limited accountability. The drafters focused on

_licence as a Human Rights Issue_, 58 ALB. L. REV. 1119, 1123 (1995) (noting that “[i]n a very real sense, gender specific abuses—even those directly attributable to states—have until recently been ‘privatized’ internationally and either go unchallenged or are left out of human rights practice altogether”).

184. Andrew Byrnes does not mince words in stating that “[t]he Torture Convention is not, and was never intended to be, a Convention on violence against women in all its forms . . . .” Byrnes, _supra_ note 168, at 207.

185. See _supra_ notes 28–38 and accompanying text (discussing the political nature of the Refugee Convention and the intent to protect those from Eastern Europe while excluding most refugees from Third World countries); see also Steinbock, _supra_ note 31, at 763 (rejecting an exclusively textual approach to interpreting the Refugee Convention as “simply inadequate to respond to the myriad circumstances that cause asylum seekers to invoke refugee status”). According to Steinbock, “an exclusively plain meaning interpretation runs the risk of undermining the important normative concerns embodied in the refugee definition.” _Id._ at 770. Rather, Steinbock argues that an examination of the Refugee Convention's purposes is necessary in order to adapt it to harms such as those directed at women that are not explicitly addressed in its text or legislative history. _Id._ at 771.

186. As Reva Siegel has stated, “[t]hat which we retrospectively judge evil was once justified as reasonable. If we reconstruct the grounds on which our predecessors justified subordinating practices of the past, we may be in a better position to evaluate contested practices in the present.” Reva Siegel, _Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action_, 49 STAN. L. REV. 1111, 1113 (1997).

187. INGELSE, _supra_ note 73, at 291.
eliminating torture carried out, or at least tolerated, by the state, reflecting the belief that the state's legal system would handle torture by private individuals.\textsuperscript{188} France had proposed that the definition of torture focus on the intrinsic nature of the torture without regard for who inflicts it, but its position did not gain substantial support.\textsuperscript{189} However, most states agreed that the Torture Convention should go beyond acts committed by public officials and also cover acts for which the state could be considered to have some responsibility.\textsuperscript{190}

Notwithstanding the limitations of the text, the drafters' decision to include torturous acts committed by private actors with governmental acquiescence is important. If interpreted broadly, the term "acquiescence" has the potential to protect against gender-based harm. As discussed earlier,\textsuperscript{191} advancements in the women's human rights movement since 1984 and the recognition of the ways in which gender-neutral human rights documents have historically excluded women support the need for a broad and more inclusive interpretation. The following sections explore why the United States has yet to interpret "acquiescence" and other key terms under the Torture Convention broadly, and also argue that a change of course is due if women are to be protected.

B. THE ATTORNEY GENERAL'S AND BOARD OF IMMIGRATION APPEALS' GRUDGING INTERPRETATIONS OF "ACQUIESCENCE" AND "INTENT" UNDER THE TORTURE CONVENTION

Despite its textual limitations, the United States initially appeared to interpret the Torture Convention to protect women applicants who had been denied asylum for failure to establish a nexus to one of the grounds required under the Refugee Convention. For example, the Board granted Torture Convention protection to an abused wife in \textit{In re D— K—}.\textsuperscript{192} Even though D— K— had not reported the domestic abuse to the police, the Board took a broad view of what constituted governmental "acquiescence."\textsuperscript{193} Rather than focus on whether the

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\item \textsuperscript{188} \textit{Id.} at 225; see also \textsc{Burgers & Danelius, supra note} 72, at 45.
\item \textsuperscript{189} \textsc{Burgers & Danelius, supra note} 72, at 45.
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{See supra} notes 104–19 and accompanying text.
\item \textsuperscript{192} In an unpublished opinion, the Board affirmed the immigration judge's Torture Convention decision. \textit{In re D— K—}, slip op. at 3 (B.I.A. July 12, 2001).
\item \textsuperscript{193} \textit{See id.} at 2–3.
\end{itemize}
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government knew of her abuse, the Board relied on the prevalence of domestic violence in Congo, its government's knowledge of domestic violence as a societal problem, and the subsequent failure to remediate domestic violence in the country.\textsuperscript{194} Similarly, the Board did not analyze whether D— K—'s husband had a specific intent to torture when he brutally beat and raped her.\textsuperscript{195} The Board accepted that the harm was inflicted intentionally and was so severe as to rise to the level of torture.\textsuperscript{196}

Unfortunately, subsequent interpretations of the Torture Convention by the Board and Attorney General have resulted in a substantially narrower interpretation of both “acquiescence” and intent. The resulting decisions have effectively limited protection to women fleeing gender-based torture. Yet, recent decisions by three different circuit courts critical of these restrictive interpretations of “acquiescence” and intent have potentially recast the safety net for women applicants in those jurisdictions.\textsuperscript{197}

1. Ratcheting Up the Standard for Governmental Acquiescence: From “Willful Blindness” to “Willful Acceptance”

Perhaps more than any other term contained in the Torture Convention, the way in which “acquiescence” is interpreted is critical to protecting against gender-based violence because it arises so often in cases involving nonstate actors. To date, the Board’s interpretations of “acquiescence” have been uneven. In the three years since the Board’s decision in \textit{In re D--- K---}, it has taken an increasingly formalistic and rigid approach to “acquiescence,” reminiscent of the approach to nexus under asylum law.\textsuperscript{198}

The Board first interpreted “acquiescence” under the Torture Convention in \textit{In re S--- V---}. This case concerned a

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\item \textsuperscript{194} \textit{Id.}
\item \textsuperscript{195} \textsuperscript{See id.}
\item \textsuperscript{196} \textsuperscript{See id.}
\item \textsuperscript{197} \textsuperscript{See infra} notes 214--27, 252--57 and accompanying text for discussions of \textit{Zubeda v. Ashcroft}, 333 F.3d 463 (3d Cir. 2003) (criticizing the Board’s interpretation of intent), \textit{Zheng v. Ashcroft}, 332 F.3d 1186 (9th Cir. 2003) (criticizing the Board’s interpretation of “acquiescence”), and \textit{Khouzam v. Ashcroft}, 361 F.3d 161 (2d Cir. 2004) (disagreeing with the Attorney General’s interpretation of “acquiescence”).
\item \textsuperscript{198} The Board’s interpretation of “acquiescence” in cases involving torture by nonstate actors requires that the government officials “willfully accept[] the torture.” \textit{In re S--- V---}, 22 I. & N. Dec. 1306, 1312 (B.I.A. 2000).
\end{itemize}
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Colombian "criminal alien" who, after nearly twenty years in the United States, feared that his inability to speak Spanish combined with his family ties in America would put him at risk of being kidnapped and harmed by nongovernmental guerilla, narcotrafficking, and paramilitary groups if returned to Colombia. S— V— argued that the Colombian government's awareness of the torturous activity, combined with its inability to stop it, satisfied the Torture Convention's requirement that the torture be inflicted with governmental "acquiescence." The Board, however, held that a greater showing was required.

In interpreting "acquiescence" under Article 3 for the first time, the Board claimed to be guided by the way in which the U.S. Senate had modified the Torture Convention's use of the term during the ratification process. As recounted by the Board, the Senate had explicitly clarified that "acquiescence" required "awareness" rather than "knowledge." According to the Senate, prior governmental awareness of the torturous activity and a subsequent breach of the legal responsibility to intervene and prevent it were required to demonstrate "acquiescence." The Board further cited to the Senate Committee on Foreign Relations for the proposition that "both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence.'" While the Senate's substitution of "awareness" for "knowledge," coupled with its reference to "willful blindness," suggests that it intended to broaden the meaning of "acquiescence," the Board ultimately interpreted the term to require "willful[] accept[ance]" of the torture.

In subsequent decisions by both the Board and the Attorney General, this "willful acceptance" language has been utilized to constrict Torture Convention relief in cases involving nonstate actors. For example, in In re Y— L—, the At-

199. Id. at 1310.
200. Id. at 1313-14.
201. Id. at 1311-12 (citing 136 CONG. REC. S17,486, 17,491-92 (daily ed. Oct. 27, 1990)).
202. Id. (citing 8 C.F.R. § 208.18(a)(7) (2000)).
203. Id. (citing S. EXEC. REP. NO. 101-30, at 9 (1990)).
204. See Board Member Rosenberg's dissenting opinion in In re S— V—, stating that the U.S. interpretation of "acquiescence" is "arguably a more broad and liberal one than that provided in the Convention Against Torture itself." Id. at 1318 (Rosenberg, Bd. Mem., dissenting) (internal citations omitted).
205. Id. at 1312.
torney General certified and reversed three of the Board’s Torture Convention decisions. All three cases involved applicants who were barred from asylum and withholding protection due to their criminal histories.

*In re A—G*—involved a drug dealer-turned-informant who feared death in his native Jamaica at the hands of the drug dealer he implicated. The immigration judge found governmental acquiescence based on known corruption in Jamaica, routine police abuse, and the impunity enjoyed by the major drug traffickers. According to the judge, this combination of factors made it likely that, if returned to Jamaica, A—G—would either be tortured by drug traders or arrested and abused at the behest of the drug traders. The Board sustained the Torture Convention grant, finding the judge’s reasoning to be thorough and correct. Attorney General Ashcroft, however, reversed the ruling, characterizing the Board’s “liberal” reading of “acquiescence” as “empty[ing] the Convention’s volitional requirement of all rational meaning.”

According to Attorney General Ashcroft, “acquiescence” required the government’s “willful acceptance” of torturous activity.

Similarly, *In re R—S—R*—involved a Dominican drug dealer who testified against his co-traffickers and feared torture in the Dominican Republic at the behest of his co-defendant by corrupt law enforcement agents. Reversing the Board’s grant of deferral of removal under Article 3, Ashcroft again found that any torture that might occur would be done by rogue law enforcement agents, and not “with the consent or approval of authoritative government officials acting in an official capacity.”

However, in *Zheng v. Ashcroft*, the Ninth Circuit rejected

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207. *Id.* at 281.
208. *Id.* at 282.
209. *See id.*
210. *Id.*
211. *Id.* at 283.
212. *Id.* at 283–84.
213. *Id.* at 285 (emphasis removed). The final consolidated case was *In re Y—L*—, in which the Board had not addressed the applicant’s Torture Convention claim because it granted Refugee Convention-based withholding of removal. *Id.* at 279. Nevertheless, Ashcroft reversed the Board’s grant of withholding and proceeded to deny protection under the Torture Convention, finding that even if Y—L—would be tortured in Haiti, it would not be with the approval of the Haitian government. *Id.* at 280–81.
the Board's and the Attorney General's "willful acceptance" standard as inconsistent with the intent of both the Torture Convention and the Senate.\footnote{214} In Zheng, the Board had relied upon its prior holding in \textit{In re S---V---} to reverse the immigration judge's grant of Torture Convention protection to a victim of human trafficking who feared retribution for his testimony against his smugglers if returned to his native China. Although the record established that the Chinese government was aware of the smuggling operations and "condone[d] or at least [was] not willing to interfere" with the smugglers' conduct, the Board held that Zheng failed to prove that the Chinese government was "willfully accepting of" the smugglers' torturous activities.\footnote{215} Relying on the Senate's clarification that "awareness," including "willful blindness," rather than "knowledge," should suffice to demonstrate a public official's acquiescence, the Ninth Circuit held that the Board's insistence on "willful acceptance" impermissibly undermined the Senate's intent.\footnote{216}

The conflict over interpreting "acquiescence" has recently widened as the Second Circuit joined the Ninth Circuit in strongly rejecting the Board and Attorney General's utilization of a "willful acceptance" standard. In \textit{Khouzam v. Ashcroft}, the Second Circuit expressly disapproved such a standard.\footnote{217} In keeping with the Ninth Circuit's interpretation in Zheng, the Second Circuit relied on the language of the Torture Convention and clear congressional intent as expressed in both the ratification and implementation processes.\footnote{218} The court held that "torture" required "only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it."\footnote{219}

\footnote{214} Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003). Interpreting "acquiescence" to require "willful acceptance" is also inconsistent with the term's plain meaning. As the Ninth Circuit pointed out, "acquiescence suggests passive assent because of inability or unwillingness to oppose." \textit{Id.} at 1195 (citing \textit{AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE} (4th ed. 2000)).

\footnote{215} \textit{Id.} at 1191--92.

\footnote{216} \textit{Id.} at 1196 (stating that, "[t]o the extent that decisions such as \textit{Matter of S---V---} and \textit{In re Y---L---}, \textit{A---G---}, \textit{R---S---R---}, require actual knowledge and 'willful acceptance'-contrary to clear congressional intent to require only awareness—we disapprove of those decisions") (alterations omitted).

\footnote{217} Khouzam v. Ashcroft, 361 F.3d 161, 170 (2d Cir. 2004).

\footnote{218} \textit{Id.} at 170--71.

\footnote{219} \textit{Id.} at 171. In issuing its ruling, the circuit court rebuked the government for attempting to avoid its ruling on an issue of public importance by
The Second and Ninth Circuits' repudiation of the Board's and Attorney General's restrictive interpretation of "acquiescence" may restore protection for women fleeing gender-based violence within those jurisdictions. For women seeking protection in the rest of the United States, however, the Board's and Attorney General's interpretations are still binding.\textsuperscript{220} As discussed below, the unduly harsh position adopted by the Board and Attorney General appears to be part of a larger domestic policy agenda aimed at removing "criminal aliens."\textsuperscript{221} However, it is already becoming clear that such a narrow interpretation of "acquiescence" can serve to insulate many forms of gender-based torture from the reach of Article 3 of the Torture Convention. For example, particularly in the context of gender-based violence, many states officially outlaw acts such as rape, bride burning, and female genital cutting that are nevertheless widely tolerated.\textsuperscript{222} If "acquiescence" is construed to require "willful acceptance," a state can immunize itself from the reach of the Torture Convention merely by passing laws that prohibit gender-based violence without any further inquiry into the prevalence of the practices or meaningful enforcement of the

\textsuperscript{220} For example, the Eleventh Circuit recently ruled that it was bound under 	extit{Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.}, 467 U.S. 837 (1984), to defer to the Board's decision in 	extit{In re J- E-}, 23'I. & N. Dec. 291 (B.I.A. 2002), characterizing Haiti's police brutality as cruel and inhuman treatment rather than torture prohibited by Article 3 of the Torture Convention. Cadet v. Bulger, No. 03-14565 (11th Cir. July 20, 2004); see also Elien v. Ashcroft, 364 F.3d 392, 399 (1st Cir. 2004) (concluding that "the rationale of In re J——E—— precludes this appeal").

\textsuperscript{221} See infra Part III.C.1. In addition to broadening criminal exclusions under the Refugee Act and constricting relief under the Torture Convention, congressional legislation has dramatically broadened the categories of removable "criminal aliens," curtailed discretionary relief when there has been criminal conduct, mandated detention, and eviscerated judicial review.

\textsuperscript{222} For example, India prohibits "bride burning" but it continues to be a problem because in practice, the state has "shown selective indifference to the cultural practice." Joan Fitzpatrick, \textit{The Use of International Human Rights Norms to Combat Violence Against Women}, in \textit{HUMAN RIGHTS OF WOMEN, NATIONAL AND INTERNATIONAL PERSPECTIVES} 532, 538 (Rebecca J. Cook ed., 1994). India has also formally abolished the institution of dowry, but the tradition continues and is being exacerbated by prospective husbands and mothers-in-law who kill or maim brides whose families do not meet their escalating demands. \textit{Id.} Regardless of the severity of the situation, the state undertakes few prosecutions. \textit{Id.}
2. Equating “Intentional Infliction” With “Specific Intent”

The aim of the Torture Convention’s requirement that the torture be “intentionally inflicted” was to exclude negligence or accidental harm from the definition of torture. The Board, however, has distorted the textual language and unduly heightened the burden of proof by utilizing the “specific intent” standard found in domestic criminal law statutes. For women fleeing gender-based violence inflicted by a private actor, the exact motivation behind the torture may be difficult to establish. As the Third Circuit recently held, “requiring an alien to establish the specific intent of his/her persecutors could impose insurmountable obstacles to affording the very protections the community of nations sought to guarantee under the Convention Against Torture.” The Third Circuit’s rejection of a “specific intent” requirement is consistent with the underlying policy of the Torture Convention and should be followed by the Board, rather than its narrow ruling in In re J—— E——.

In In re J—— E——, the applicant sought Torture Convention protection, arguing that the Haitian government had a policy of imprisoning Haitians returned from the United States on criminal grounds. Coupled with the known deplorable prison conditions and police mistreatment, J—— E—— argued that he would be at risk of government-sanctioned torture if returned to Haiti. The majority of the Board denied protection under the Torture Convention, holding that the feared harm did not

223. Indeed, in a recent nonprecedential decision by the Third Circuit, the Ghanaian government’s prohibition against female genital cutting insulated it from a finding that it acquiesced to torture, notwithstanding the prevalence of the practice, the widespread violence against women, or the government’s failure to intervene in domestic disputes. Moshud v. Blackmun, 68 Fed. Appx. 328 (3d Cir. 2003) (denying Ghanaian woman’s motion to reopen proceedings to assert Torture Convention claim based on fear of female genital cutting).

224. See BURGERS & DANIELIUS, supra note 72, at 114.

225. See Karen Musalo, Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms, 15 Mich. J. Int’l L. 1179, 1202 (1994) (discussing that “the motivation and state of mind . . . are difficult to ascertain . . . and prove” because “the victim may not know the exact motivation of his or her persecutor”).


228. Id. at 293.

229. Id.
constitute "torture." According to the majority, Haiti's policy of mandatory indefinite detention is a lawful sanction aimed at containing criminal activity; therefore, it is not "torture" as defined by the Torture Convention. Turning to the requirement that the torture be "intentionally inflicted," the majority found no evidence that the Haitian government detained criminal deportees with the "specific intent" to inflict severe physical or mental pain or suffering. Similarly, the court found no evidence that Haiti's detention policy was inflicted on criminal deportees for a prohibited purpose.

The majority also rejected the applicant's claim that the detention policy, in conjunction with deplorable prison conditions and police abuse, constituted torture. Despite evidence that the Haitian government intentionally detained criminal deportees with full knowledge of the brutal prison conditions, the majority held that this did not demonstrate the "specific intent" required under the Torture Convention. Based on the

230. Id. at 304.
231. Id. at 299–300 (stating that 8 C.F.R. § 208.18(a)(3) incorporates Article 1's language that "torture 'does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions'"). "Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture." Id. (quoting 8 C.F.R. § 208.18(a)(3)). However, as pointed out by the dissent, the characterization of the detention policy as a lawful sanction is disingenuous, given that the deportees have served prison time in the United States and committed no other crimes in Haiti for which to be sanctioned. Id. at 308 (Schmidt, Bd. Mem., dissenting). As noted by two Board members in a separate dissent, "[t]he majority opinion construes the Senate Reservations that were issued in the course of ratification of the Convention, and the subsequent regulations governing our implementation of the provisions of the Convention Against Torture, to restrict, rather than extend, protection to such potential victims." Id. at 310 (Rosenberg & Espenoza, Bd. Mem., dissenting).
232. Id. at 300. However, as explained by J. Herman Burgers and Hans Danelius, the Torture Convention's list of "prohibited purposes" is non-exhaustive as it is intended to cover any action that can be connected, even remotely, with the interests or policies of the state and its organs. BURGERS & DANELIUS, supra note 72, at 118–19.
234. As discussed above, the Torture Convention requires only that the torture be intentional, as opposed to accidental or due to negligence. See supra note 224 and accompanying text. However, in one of the Senate's Understandings at the time of ratification, it stated that, "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering." 136 CONG. REC. S17,486–01 (daily ed. Oct. 27, 1990). The Board subsequently interpreted this language to incorporate the concept of "specific
majority's interpretation of intent under the Torture Convention, it appears that J—E— would have had to demonstrate that the Haitian authorities were intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture.

The Board's requirement of specific intent in In re J—E— is contrary to both the intent of the Torture Convention and its implementing regulations. The holding is also inconsistent with the way in which intent is construed in analogous civil rights statutes and contrary to the definition of intent in both criminal and tort law. With respect to gender-based violence, the requirement of a "specific intent" to inflict torture charts a course that fails to protect women in the same way as the emphasis on "motive" under asylum law has diminished protection.

The Board's interpretation of the intent requirement is inconsistent with the text of the Torture Convention. Scholars and historians of the drafting process that led up to the Torture Convention agree that the intent requirement was meant merely to exclude negligent or accidental torture. As J. Herman Burgers and Hans Danelius explain, "[i]t follows that where pain or suffering is the result of an accident or of mere negligence, the criteria for regarding the act as torture are not fulfilled." According to Deborah Anker, "the requirement of intentionality ensures that an accidental or negligent act cannot constitute torture and is presumably designed to protect those who might unknowingly cause suffering and to exclude those acts intended to benefit the recipient (such as medical treatment)." The intent requirement of the Torture Convention has been specifically described as "the general intent to do the act which clearly or forseeably causes terrible suffering."

Because the text of the Torture Convention does not lend support to the Board's heightened "specific intent" analysis, the Board has relied instead upon one sentence in the U.S. regulations interpreting Article 3. Pursuant to the U.S. regulatory
language, "[i]n order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering." Based on the ratification documents, the Board concluded that this was a "specific intent" requirement rather than a "general intent" requirement. According to the Board, specific intent under the Torture Convention requires the same standard as domestic criminal law: the "intent to accomplish the precise criminal act that one is later charged with." However, even the regulations make clear that the specific intent language is aimed at targeting deliberate torture and not that which results from negligence.

The Board's decision in In re J—— E—— failed to apply this intent requirement properly. In that case, the Haitian government was deliberately continuing a policy that was known to lead to torturous acts. According to the U.S. State Department Report on Haiti contained within the record:

Police mistreatment of suspects at both the time of arrest and during detention remains pervasive in all parts of the country. Beating with the fists, sticks and belts is by far the most common form of abuse. However, international organizations documented other forms of mistreatment, such as burning with cigarettes, choking, hooping, and ka-lot marassa (severe boxing of the ears, which can result in eardrum damage). Those who reported such abuse often had visible injuries consistent with the alleged maltreatment. There were also isolated allegations of torture by electric shock. Mistreatment also takes the form of withholding medical treatment from injured jail inmates. Police almost never are prosecuted for the abuse of detainees.

The record also contained numerous articles and reports

238. 8 C.F.R. § 208.18(a)(5) (2002).
240. Id. at 301 (citing BLACK'S LAW DICTIONARY 813-14 (7th ed. 1999)).
241. 8 C.F.R. § 208.18(a)(5) ("An act that results in unanticipated or unintended severity of pain and suffering is not torture.").
242. In re J—— E——, 23 I. & N. Dec. at 307 (Schmidt, Bd. Mem., dissenting). Relying upon Karen Musalo's writings analyzing intent in the asylum context, Board Member Rosenberg concluded that it would be nearly impossible for an applicant to prove specific intent of a governmental actor as to prospective torture. Id. at 316 (Rosenberg, Bd. Mem., dissenting) (noting that the modification or softening of the requirement for proof of intent in criminal, tort, and statutory civil rights law, "demonstrates judicial flexibility in the accommodation of jurisprudential objectives" (quoting Karen Musalo, Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms, 15 MICH. J. INT'L L. 1179, 1210, 1228 (1994))).
documenting known torture in Haitian prisons including an admission by a warden that inmates are beaten, and conclusions that “corruption, not just malnutrition, is killing inmates” and that inmates receive “insufficient calories to sustain life.” The fact that J—E— was to be confined under conditions where torture was known to occur satisfies the general intent requirement of the Torture Convention.

Such an interpretation of intent is also consistent with the definition of intent utilized in other areas of law, including tort law. For example, a draft of the Restatement (Third) of Torts provides that intent is satisfied by a showing that either: (1) the person intends to produce the consequences of that person’s action; or (2) the person knows to a substantial certainty that the consequence will ensue from that person’s conduct. Incorporating such a definition of intent when analyzing the facts of In re J—E—, results in a finding, at minimum, that the Haitian authorities knew to a “substantial certainty” that torture would ensue from the government’s conduct in indefinitely detaining returned criminal deportees in prisons where acts of torture are commonplace.

The Board’s reliance on criminal law statutes for its heightened “specific intent” requirement was misplaced, both because of “the erosion of an intent requirement in criminal law” and the new found “elasticity of the concept of intent and its adaptation to serve societal interests.” “Specific intent” is also not required in the domestic civil rights statutes that are more analogous to the remedial nature of Article 3. For example, in litigation brought pursuant to 42 U.S.C. § 1983, there is no requirement of a “specific intent” to violate constitutional rights. As articulated by the Sixth Circuit, “[w]hile it is true,
of course, that mere negligence is not sufficient to impose liability, ‘the intent in question is the intent to commit the act, not the intent that a certain result be achieved.’”248 Rather, the courts appear to use interchangeably the tests of recklessness, deliberate indifference, or callous indifference.249

By misconstruing the intent of the Torture Convention and utilizing an intent standard that is both disfavored in criminal and tort law and inapplicable to analogous remedial civil rights statutes, the Board unnecessarily limits the potential for protection under the Torture Convention. This misinterpretation of intent under the Torture Convention could have a dramatic impact on gender-based claims. For example, it is not clear whether practices such as female genital cutting would constitute torture under the specific intent analysis in In re J—E—. If a village elder, with the acquiescence of the government, performs female genital cutting on a young woman with full knowledge of the inherent danger of the procedure but with the intent to purify the woman, rather than to inflict torture, is the action no longer torture? While such an analysis sounds implausible, it is consistent with the lengths to which the Board has gone to restrict the terms of the Torture Convention.250 The Board’s reasoning for requiring specific intent under the Torture Convention mirrors the difficulties that have plagued the Board’s narrow interpretation of intent and motive

Hudson v. New York City, 271 F.3d 62, 68 (2d Cir. 2001) (rejecting assertion that an intent to deprive a citizen of federal rights during a police search of a home is required for a Fourth Amendment violation).

248. Williams, supra note 247, at 192 (quoting Fisher v. City of Memphis, 234 F.3d 312, 317 (6th Cir. 2000)).

249. Id. at 191.

250. For example, in In re J—E—, the Board looked to President Aristide’s promise to make judicial reform a top priority to justify its holding that the torturous acts were not intentional, notwithstanding the government’s known policy of imprisoning returned criminal deportees in conditions in which they are known to be starved, beaten, and subject to torturous acts. 23 I. & N. Dec. 474, 299–301 (2002). Moreover, in the highly publicized U.S. Department of Justice memo to the President’s counsel regarding the use of torture during interrogations, the Department of Justice made it clear that, in its view, the Torture Convention only prohibits torture if the infliction of such pain was “the defendant’s precise objective.” Memorandum from the Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President 3 (Aug. 1, 2002) [hereinafter Torture Memo]. According to the Torture Memo, “even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.” Id. at 4.
under asylum law.\textsuperscript{251}

In \textit{Zubeda v. Ashcroft}, a recent case involving a gender-based Torture Convention claim, the Third Circuit reversed the Board's denial of Torture Convention relief to a rape victim who feared imprisonment and rape if returned to a country in which rape was "systematic."\textsuperscript{252} The immigration judge had relied upon uncontested country reports to conclude that the rampant brutality and widespread use of rape by soldiers, particularly in the applicant's region, put Zubeda at risk of being raped if detained upon return to the Democratic Republic of the Congo.\textsuperscript{253} However, in analysis characterized by the circuit court as "terse," the Board relied on \textit{In re J— E—} to hold that Zubeda failed to show that she would be tortured or detained upon return.\textsuperscript{254} In criticizing the Board's analysis, the court explained that the intent requirement "distinguishes between suffering that is the accidental result of an intended act, and suffering that is purposefully inflicted or the foreseeable consequence of deliberate conduct."\textsuperscript{255} The court continued, "the Convention does not require that the persecutor actually intend to cause the threatened result."\textsuperscript{256}

The Board's broad application of \textit{In re J— E—} to dismiss Zubeda's gender-based claim highlights the risk that gender-specific violence will be overlooked as the Board pursues...
narrow interpretations of the Torture Convention to further domestic policy goals, as discussed below. As noted by the Third Circuit, the record in Zubeda was "replete with reports from government agencies and human rights organizations that detail what appear to be country wide [sic], systematic incidents of gang rape, mutilation, and mass murder." The Board's willingness to ignore gender-based violence and its characterization of the claim as one involving generally harsh prison conditions discounts the gender-specific torture at issue in that case. To understand why women's claims are overshadowed, the following section explores the broader context in which these Torture Convention claims are being decided.

C. THE BROADER POLICY CONCERNS SURROUNDING UNITED STATES' INTERPRETATION OF ACQUIESCENCE AND INTENT: WHEN DEEPLY HELD VIEWS ON CRIMINALITY AND GENDER-BASED VIOLENCE INTERSECT

The United States' narrow interpretation of the Torture Convention is greatly influenced by its domestic policy goal of targeting and removing "criminal aliens." However, (noncriminal) women who seek Torture Convention protection under such narrowly-defined terms must also confront the deeply-held notions that have permeated asylum jurisprudence and privatized gender-based violence. Although Torture Convention adjudication does not require a nexus, the conceptualization of gender-based harm as private has the potential to seep into analyses of state action under the Torture Convention. Apart from the extreme types of gender-based violence that are "foreign" to the United States, it may be difficult for women to pierce the "privacy" notions that are at odds with the state action requirement under the Torture Convention.

1. Criminality and an Elevated Burden of Proof

The concern with removing "criminal aliens" has not infected the doctrinal development of asylum law because the United States has broadly interpreted the exclusion grounds in the Refugee Convention to apply to an ever-widening class of "criminal aliens." Pursuant to Article 33 of the Refugee Convention, any refugee "who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country" is excluded from protec-

257. Zubeda, 333 F.3d at 477.
tion.\textsuperscript{258} The majority of the international community employs a two-part analysis, determining first whether the conviction was for a particularly serious crime, and second, whether the crime poses a danger to the community.\textsuperscript{259} The United States, how-

\textsuperscript{258} Convention Relating to the Status of Refugees, \textit{supra} note 33, 189 U.N.T.S. at 176. While the exclusionary clause in the Refugee Convention was intended to apply only to dangerous criminals who pose a particularly serious threat to the protecting state, recent legislative amendments to the immigration law, coupled with an expanding group of crimes characterized as "dangerous," have greatly eroded the intended base of protection. For example, in 1990, Congress created a new class of "aggravated felonies" that were by statute, deemed to be "particularly serious crimes." Immigration Act of 1990, Pub. L. No. 101-649, §§ 501, 513, 104 Stat. 4978, 5048, 5052 (codified at 8 U.S.C. §§ 1101, 1253 (1990)). Although Congress was silent as to the interaction between the new "particularly serious crime" language and the "danger to the community" language, the federal courts have interpreted the aggravated felony list as establishing per se dangerousness. \textit{See, e.g.}, \textit{In re} Carballo, 19 I. & N. Dec. 357, 360 (B.I.A. 1986). By 1996, Congress enacted the IIRIRA, changing the definition of a "particularly serious crime" to include aggravated felonies that resulted in an aggregate term of imprisonment of at least five years. \textit{See} Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 546 Stat. 627, 628 (1996). In addition, Congress dramatically expanded the list of aggravated felonies that triggered the statutory mandatory bars. \textit{Id.} In light of the 1996 IIRIRA legislation, the Attorney General retains discretion only to determine whether crimes with aggregate sentences of less than five years are "particularly serious crimes," which serves to disqualify an applicant from withholding of removal protection. H.R. CONF. REP. NO. 104-828, at 216 (1996). An example of the impact of this change in the law can be seen in the way cases involving drug trafficking are now adjudicated. While the Board had been utilizing a case-by-case analysis, including drug trafficking cases, the Attorney General recently rejected the Board's approach. Instead, the Attorney General established a rebuttable presumption that aggravated felonies involving drug trafficking with less than a five-year sentence are nevertheless particularly serious crimes. \textit{See In re} Y— — L——, 23 I. & N. Dec. 270, 274 (B.I.A. 2002). Moreover, this presumption can only be rebutted under the most extenuating circumstances "that are both extraordinary and compelling." \textit{Id.} at 274.

\textsuperscript{259} \textit{See} Kathleen M. Keller, \textit{Note, A Comparative and International Law Perspective on the United States (Non)Compliance with its Duty of Non-refoulement,} 2 YALE HUM. RTS. & DEV. L.J. 183, 188 (1999) (referencing the UNHCR guidelines as well as the German approach which requires the government "to establish that the alien is in danger of relapsing into crime and thereby constitutes a serious threat to the community before refoulement is allowed"). In addressing whether a crime is particularly serious, the international community most often employs a balancing test to weigh the seriousness of the crime against the likely consequences for the refugee upon return. \textit{See} \textit{id.} at 188. For example, Sweden and Canada are countries that utilize a contextual approach. \textit{Id.} at 189–90. Similarly, a review of earlier drafts of the Refugee Convention shows that the drafters intended that the exception be narrow. \textit{Id.} at 189 (emphasizing that "the Conference wished to point out that continuous criminality in itself should not motivate return to a country of persecution") (citation omitted). The UNHCR similarly advocates a contextual
ever, eliminates this second step, instead inferring danger to the community once there is a determination that the crime is particularly serious.260 Furthermore, Congress’s actions in categorizing an increasingly broad group of crimes as “particularly serious crimes” serves as a per se exclusion of most “criminal aliens” from asylum eligibility.261

In contrast with the criminal exclusionary grounds set forth in the Refugee Convention, Article 3 of the Torture Convention contains no exclusionary grounds and was intended to provide an absolute prohibition on returning a person to a country in which there is a substantial danger of torture.262 Whereas other articles of the Torture Convention apply to a broader category of harms in addition to torture, including degrading and inhumane punishment or treatment, Article 3’s prohibition on return applies solely to torture. Therefore, under Article 3, the nature of the claimant’s activities in the territory of the state in which she seeks protection may not be considered.263 Similarly, the previous activities of the claimant are irrelevant to the assessment of whether a person at risk of tor-

approach:

Repatriation must only be applied as a last resort where no other measures appear possible to prevent the person from endangering the community . . . . What constitutes an offence permitting forcible repatriation in one case may not be such an offense in another case because of the circumstances of the crime and the character of the criminal. Only where one or several convictions are symptomatic of the basically criminal, incorrigible nature of the person and where any other measure (detention, assigned residence, resettlement in another country) are [sic] not practical to prevent him from endangering the community may repatriation be resorted to.

Id. at 189 (citations omitted).

260. The Board initially utilized a contextual approach. See, e.g., In re Frentescu, 18 I. & N. Dec. 244, 247 (B.I.A. 1982) (explaining that the Board looks to “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the [refugee] will be a danger to the community”). However, the Board changed course following a split among the U.S. circuit courts of appeals and followed the Eleventh Circuit’s lead, rejecting a balancing approach and implying that the severity of the persecution the refugee faced upon return was irrelevant. See In re Carballe, 19 I. & N. Dec. at 360 (citing Crespo-Gomez v. Richard, 780 F.2d 932 (11th Cir. 1986); Zardui-Quintana v. Richard, 768 F.2d 1213 (11th Cir. 1985) (Vance, J., concurring)). The Board held that once a refugee’s crime was determined to be “particularly serious,” it automatically followed that the refugee was a “danger to the community.” Id.

261. See supra note 258.

262. ANKER, supra note 84, at 518.

263. INGELSE, supra note 73, at 305.
ture can be returned. 264 This absolute protection when potential torture is at issue is also consistent with the many international human rights documents that prohibit torture. 265

However, in enacting legislation to implement the U.S. obligations under the Torture Convention, Congress immediately grafted the criminal exclusionary grounds applicable to Refugee Convention-based withholding of removal onto the statutory Torture Convention-based withholding of removal provision. Because excluding criminal noncitizens entirely from protection under Article 3 would clearly violate the intention and language of the Torture Convention, the United States created a separate, lesser form of relief ("deferral of removal") for this class in an attempt to comply with the terms of the Torture Convention. 266 By devising a procedural method that ferrets out disfavored "criminal alien" claims but leaves the doctrinal interpretation the same for all applicants—particularly with respect to the definition of "intent" and "acquiescence"—the United States has diminished the possibility for protection across the board. Therefore, (noncriminal) women seeking protection under the Torture Convention encounter a doctrinal interpretation of Article 3 clouded by the overarching policy goal of removing "criminal aliens."

This same tension between restrictionist and humanitarian policy goals has also influenced the United States' adoption of an unduly high burden of proof under the Torture Convention. Article 3 requires a showing of "substantial grounds for believing that [the person] would be in danger of being subjected to torture." 267 In ratifying the Torture Convention, how-

264. As Chris Ingelse states, "[t]he consequence of establishing a danger of torture does not leave any room for balancing interests, but is absolute: the person cannot be returned." Id.


266. For a discussion of the two-tiered relief available under the Torture Convention in the United States, see the discussion of withholding and deferral of relief, supra notes 86–90 and accompanying text.

267. Torture Convention, supra note 9, at Art. 3(1). While the original Swedish draft of the Torture Convention referred to "reasonable grounds" for
ever, the Senate expressed an understanding that equated this "substantial grounds" standard with the "more likely than not" standard used for Refugee Convention-based withholding of removal. By conflating the standards of relief under the Refugee and Torture Conventions, Congress unnecessarily raised the standard of proof under the Torture Convention and created a protection regime in which the standard of proof for protection under either Convention is much higher than that required for asylum relief.

Moreover, in applying the burden of proof in cases arising under the U.S. legislation implementing Article 3, the Board has been so exacting in terms of the quantum of proof that it has, in effect, elevated the standard of proof even beyond the unduly high "more likely than not" standard. For example, in believing that a person "might" be in danger of torture, the language was changed in hopes of achieving greater clarity. See Anker, supra note 84, at 510; Burgers & Danelius, supra note 72, at 50, 204, 209.


269. See supra notes 70–83 and accompanying text. The heightened standard of proof applied in U.S. Torture Convention adjudication is contrary to the practices of other signatory states. For example, the United Kingdom and Canada have implemented Article 3 of the Torture Convention in ways that provide greater protection and predictability. In an effort to avoid confusion and inconsistent results, the United Kingdom has chosen to utilize the same standards of proof for asylum and torture claims. Immigration & Nationality Directorate Home Office, Asylum Policy Instructions: Humanitarian Protection § 2.1, at http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/humanitarian_protection.html (last visited Sept. 9, 2004). The Asylum Policy Instructions also state that the standard of proof for determining "whether a person would face a serious risk to life or person" is "a reasonable degree of likelihood or a real risk." Id. In contrast, Canada's standard of proof for Article 3 Torture Convention claims has been articulated as requiring "less than a clear probability, or even a balance of probabilities, but greater than a mere possibility." Immigration and Refugee Bd., Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection Danger of Torture 20 (2002) (citation omitted). The Canadian Federal Court of Appeals has stated that "[t]he risk of torture must be assessed on grounds that go beyond 'mere theory' or 'suspicion' but something less than 'highly probable'. The risk or danger of torture must be 'personal and present.'" Id. at 21 (citations omitted). Rejecting the "mere possibility" standard on the one extreme and the "highly probable" standard as the other extreme, the court adopted a "balance of probabilities" standard requiring a showing that refoulement would expose the applicant to a "serious" risk of torture. Id. The Committee Against Torture and the European Court of Human Rights have also adopted the same standard as Canada. Id. at 19–21. Similarly, the approach advanced by the Canadian Immigrant and Refugee Board Legal Services is to utilize a single standard of proof for all types of protection—namely the "reasonable chance" or "serious possibility" standard. Id. at 22.
In re M—B—A—, a noncitizen who had already completed her sentence for a drug offense committed in the United States argued that she would be subjected to a five-year re-imprisonment in Nigeria in violation of Article 3. 270 To support her claim, M—B—A— provided unrefuted evidence establishing that Nigerian citizens convicted of a narcotic drug offense in a foreign country “shall be liable to imprisonment for a term of five years without an option of fine.” 271 In addition to the statutorily mandated re-imprisonment, M—B—A— articulated specific individualized reasons that her life would be in danger while in prison. Specifically, she named her status as a woman, her medical conditions, and her former fiancé’s ability to enlist prison guards in his quest for retribution because of her cooperation with drug authorities in the United States. 272

Notwithstanding the mandatory terms of the Nigerian drug law, the Board’s characterization of Nigerian prison conditions as “harsh and life-threatening,” 273 and its finding that “Nigeria . . . has been a country with a poor human rights record and endemic corruption in its judicial system,” 274 the Board held that M—B—A— failed to demonstrate that her torture would be “more likely than not.” 275 This conclusion is difficult to reconcile with the preponderance of the evidence in the case, and reflects the application of an even higher burden of proof than the already elevated “more likely than not” standard chosen by Congress. 276

271. Id. at 477-78 n.1 (quoting Decree 33 of the Nigerian National Drug Law Enforcement Agency).
272. M—B—A— testified and provided supporting medical evidence that she suffers from depression, an ulcer and asthma. Id. at 476. Rather than relying upon generally harsh prison conditions, M—B—A— claimed that there would be no one to provide medicine to her if imprisoned in Nigeria, and that she feared being beaten and raped by prison guards. Id. According to M—B—A—, most women are raped while in prison, and the government lacks the ability to protect them. Id.
273. Id. at 479.
274. Id.
275. Id. (emphasis omitted). According to the Board, M—B—A— failed to provide sufficient evidence regarding the manner of enforcement of the provisions of Decree 33 on similarly situated individuals. Id.
276. In fact, in a concurring and dissenting opinion, Board Member Rosenberg characterizes the standard of proof applied in the majority opinion as “beyond a reasonable doubt.” Id. at 485 (Rosenberg, Bd. Mem., concurring and dissenting) (emphasis omitted).
The majority opinion in *In re M—B—A* exemplifies the type of rigid, formalistic application of the law that has too often failed to protect women in the context of asylum. Given the specificity of the claim, combined with Nigeria's abysmal prison conditions[277] and poor human rights record of protecting women from harm,[278] the Board had the opportunity to take a firm stand against torture and offer surrogate protection consistent with the intent of the Torture Convention. Instead, the Board effectively carved out an exception where drug trafficking is involved, undercutting both the international consensus that torture can never be justified and the mandate of the Torture Convention. Further, rather than explore the gendered component of the claim—that the applicant feared rape while imprisoned in a country where violence against women is prevalent and the government fails to take action—the Board focused on Nigeria's sovereign right to combat drug trafficking. Because the Board achieved the end result of removing the drug trafficker by its finding that she failed to satisfy her burden of proof, the decision not only applies the incorrect standard of proof but also reinforces the invisibility of gender-based harm under the Torture Convention and severely undercuts protection for women.[279]

Viewed together, the extension of the "criminal alien" exclusionary grounds under the Refugee Convention and the creation of a subclass under the Torture Convention for "crimi-

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277. As noted by one of the Board members, "the Department of State country report for Nigeria estimates that reputable human rights organizations have reported that inmates in Nigerian prison custody die daily due to harsh conditions and the denial of medical treatment." *Id.* at 483 (Rosenberg, Bd. Mem., concurring and dissenting).

278. According to a dissenting Board member, the U.S. Department of State's Nigeria Country Reports on Human Rights Practices—2000 establishes that "Nigeria follows traditional Islamic law and that discrimination and violence against women is an endemic problem." *Id.* at 489 (Schmidt, Bd. Mem., dissenting). Women are often imprisoned with men. *Id.*

279. This example of women's invisibility under international law has deep roots. Professor Hilary Charlesworth has observed:

> An obvious sign of power differentials between women and men is the absence of women in international legal institutions. Beneath this is the vocabulary of international law, which generally makes women invisible. Digging further down, many apparently neutral principles and rules of international law can be seen as operating differently with respect to women and men. Another, deeper, layer of the excavation reveals the gendered and sexed nature of the basic concepts of international law; for example, "states," "security," "order" and "conflict."

Charlesworth, *supra* note 179, at 381.
nal aliens” have served to undercut the development of Torture Convention jurisprudence in the United States with respect to gender-based harms. The combination of an elevated burden of proof and unduly narrow definitions of the “intent” and “acquiescence” requirements of the Torture Convention may serve to create an insurmountable barrier for women fleeing torture inflicted by nonstate actors and deprive them of a final chance for safety.

280. Commentators have noted the prominence of “criminal alien” claims under the Torture Convention. See, e.g., Andrea Montavon-McKillip, Note, CAT Among Pigeons: The Convention Against Torture, a Precarious Intersection Between International Human Rights Law and U.S. Immigration Law, 44 ARIZ. L. REV. 247, 265 (2002) (citing Interview with Morton Sklar, Director of World Organization Against Torture, USA (May 22, 2001)). Moreover, during a recent hearing on the Torture Convention, Representative John N. Hostettler, the Chairman of the House Judiciary Committee’s Subcommittee on Immigration, Border Security and Claims, testified regarding the need to change the Torture Convention’s implementing legislation. House Immigration Subcommittee Holds Hearing on the CAT, 80 INTERPRETER RELEASES 1109, 1109 (2003). Chairman Hostettler “characterized the application for Torture Convention benefits by criminals in removal proceedings as a ‘disturbing and dangerous’ loophole.” Id. Criticizing the Department of Justice’s regulations implementing the nonrefoulement provisions of the Torture Convention, Chairman Hostettler remarked that the regulations “disobeyed” the Senate’s instructions because they ‘protect[] bad actors.’” Id. at 1110. Chairman Hostettler further testified that the Department of Justice has adjudicated 53,471 applications for Torture Convention relief since the regulations took effect in March 1999. Id. Of those applications, the Department of Justice has granted 1741 claims, 683 of which involved “criminal aliens.” Id.; see also Rachel L. Swarns, Lawmakers Attack Immigrants’ Use of Antitorture Law to Block Deportation, N.Y. TIMES, July 12, 2003, at A8. Most strikingly, the EOIR Statistical Yearbook states that the grant for Torture Convention claims was approximately 2% for the fiscal year 2003. Office of Planning and Analysis, Executive Office for Immigration Review, FY 2003 Statistical Year Book M1 (2004), at http://www.usdoj.gov/eoir/statspub/fy03sbypdf [hereinafter EOIR Statistical Yearbook]. In contrast, 37% of asylum claims that were decided on the merits were granted before the Executive Office for Immigration Review. Id. at K1 fig. 16.

281. Perhaps nowhere is that “criminal taint” more clear than in In re J—E—, 23 I. & N. Dec. 291 (B.I.A. 2002), and the consolidated decisions in In re Y—L—, 23 I. & N. Dec. 270 (B.I.A. 2002), issued by the Board and Attorney General, respectively. See supra notes 206-16, 227–32 and accompanying text. J—E— was convicted of selling cocaine approximately ten years after unlawfully entering the United States from Haiti. In re J—E—, 23 I. & N. Dec. at 292–93. J—E— claimed that Haiti’s policy of indefinitely incarcerating those returned from the United States on criminal grounds, combined with known inhumane prison conditions and abuse of prisoners, would subject him to torture in contravention of Article 3 of the Torture Convention. See id. at 293. In rejecting his claim, the Board remarked that “Haiti has a legitimate national interest in protecting its citizens from increased criminal activity.” Id. at 300. Similarly, in In re Y—L—, the At-
While the Board has yet to issue a precedential decision analyzing gender-based harm under the Torture Convention, its narrow interpretation of key terms in the context of largely "criminal alien" cases has resulted in a regime in which only 3% of Torture Convention claims are granted. Because of shortcomings in the Torture Convention itself, a broad and flexible interpretation of the "intent" and "acquiescence" requirements is necessary for Article 3 to have any meaning for women fleeing the gender-based harm that is often inflicted by intimate partners, family members, or communities.

2. Between "Us" and "Them": The Familiarity of Domestic Violence

The fear of "opening the floodgates" to destitute immigrants seeking a better life in the United States permeates and influences all aspects of immigration law. However, debate as to whether gender-based violence should be recognized as a ground for protection in the United States raises this concern with particular passion. The United States' experience in protecting those fleeing gender-based violence reflects a continuum, with female genital cutting at one end, domestic violence at the other end, and a large gray area in between. American tribunals are less likely to protect against "foreign" harms that are equally prevalent in the United States. Therefore, to the extent that the feared persecution involves a foreign practice such as female genital cutting, the Board and the courts seem more inclined to offer protection.

Female genital cutting can be characterized as savage, barbaric, and "other": it is associated with tribes, it is widely
practiced in African countries, and it is alien to the United States. In contrast, domestic violence-based protection claims do not fare as well, perhaps in part because no norm exists against which to judge them. Shrouded in entrenched notions of "privacy," domestic violence continues to be a pervasive problem in the United States. As opposed to tribal practices, confronting domestic violence conjures up images of the "private" realm of familiar "nuclear families." The U.S. government has been largely ineffective in protecting its female citizens from domestic violence. Because of the discomfort in

and perpetuating simplistic stereotypes." Id. According to Bhabha, "This reductive and stereotypical portrayal of non-western forms of oppression is problematic and short sighted. It exploits the relative ignorance among western decision-makers of the context in which 'distant wrongs' arise, to promote what may end up being short-lived access to 'local rights.'" Id. at 163.

285. For further discussion of this proposition, see Sinha, supra note 283, at 1562 (analyzing three recent gender-based asylum claims adjudicated in the United States and concluding that the outcomes "turned on whether the gender-related violence [could] be linked to practices attributable to non-Western, 'foreign' cultures").

286. Leading up to the enactment of the Violence Against Women Act of 1994, Congress held hearings, compiled evidence, and issued reports examining the impact of domestic violence on women in the United States. Sally F. Goldfarb, The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism, 71 FORDHAM L. REV. 57, 66 (2002). Statistics assembled by Congress demonstrated that rape and domestic violence were occurring at "epidemic levels." Id. According to the congressional hearings, domestic violence is a principal cause of injury and death to women. Id. As Anita Sinha points out, as compared to female genital cutting, "[d]omestic violence cannot be coined a 'practice' or 'custom' attributable to a particular nonwhite race because it frequently happens within the United States' own borders." Sinha, supra note 283, at 1589.

287. For example, in the recent debate as to whether domestic violence should serve as a basis for asylum protection, Ira Mehlman, a spokesman for the Federation for American Immigration Reform, remarked, "You cannot have an asylum policy that allows everybody to claim asylum based on private relationships people have with their spouses or other members of their community. . . . It makes the United States somehow responsible for everybody's marriage in the world." Emily Bazar, Asylum-Seekers Make Gender an Issue, SACRAMENTO BEE, Feb. 9, 2004.

labeling as "torture" that which is familiar and prevalent within the United States, an effort is often made to highlight the "otherness" associated with different races, cultures, or religions. As articulated by Audrey Macklin:

What this means in the refugee context is that we suppress the commonality of gender oppression across cultures to ensure that what is done to Other women looks so utterly different from (or unspeakably worse than) what is done to women here, that no one would notice a contradiction in admitting them as refugees.\(^{289}\)

As illustrated by the U.S. Supreme Court's decision in *United States v. Morrison*,\(^{290}\) congressional attempts to deprivatize domestic violence and focus national attention on it as a civil rights-type violation have been thwarted by (mis)conceptions about the nature of domestic violence.\(^{291}\) The Court's invalidation of the civil rights remedy for gender-based violence created by the Violence Against Women Act of 1994 (VAWA) has been characterized as a "stinging defeat for women's rights that graphically demonstrate[s] the continued resistance to treating violence against women as a serious problem worthy of the attention and remedial powers of Congress."\(^{292}\) As noted by Martha Chamallas:

Because violence against women is largely committed by persons who are "not public officials or acting with what is recognized as state authority," it is branded as "private" and "local" and unreachable by the

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289. Macklin, *supra* note 24, at 273; see also Sinha, *supra* note 283, at 1589–90 (commenting that U.S. asylum case law suggests that claimants may fare better if the domestic violence is associated with religious fundamentalism—"another stereotype of 'primitive cultures'").


291. In *United States v. Morrison*, a five-member majority held that Congress lacked the authority under the Commerce Clause to prohibit gender-motivated crimes of violence because such crimes were neither economic in nature nor national in scope. *Id.* Moreover, the Court determined that the Act was directed at private conduct rather than state action, and therefore, was not consistent with Congress's power to enact legislation under the Equal Protection Clause of the Fourteenth Amendment. *Id.* The *Morrison* decision reinforced the public/private dichotomy that has served to insulate gender-based violence and de-emphasize the role of the state in its perpetuation.

292. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 268 (2d ed. 2003).
national legislature. However, perpetrators of gender violence know that they "act with virtual total assurance that, as statistics confirm, their acts will be officially tolerated, they themselves will be officially invisible, and their victims will be officially silenced."293

In the international arena, the focus on state action in international human rights instruments has historically served to insulate and de-politicize gender-based violence.294 Focusing specifically on persecution by nonstate actors under the Refugee Convention, Deborah Anker has noted the particular complexity posed by domestic violence-based claims "due to different levels of interweaving responsibility and enabling of the 'private' harm by the state."295 According to her:

In many countries where protection is not available, "it is the very inattention and inaction by the state in relation to battering that tacitly condones and sustains it as a systematic practice. In other words, the fact that [a] state does not adequately protect women from domestic and sexual violence is both an institutional manifestation of the degraded social status of women and a cause of its perpetuation."296

Rather than viewing the relegation of women to the private sphere as a function of discriminatory state action and itself a violation of women's human rights for which the state should be held accountable, violence against women is too often viewed as a cultural norm beyond the realm of the state's responsibility.297 In arguing for the recognition of domestic violence as tor-

294. Catharine A. MacKinnon, On Torture: A Feminist Perspective on Human Rights, in HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE, supra note 171, at 21, 26–27. According to MacKinnon, [a] reason often given ... in considering atrocities to women not human rights violations, politically or legally, is that they do not involve acts by states. They happen between non-state actors, in civil society ... . But the state is not all there is to power. To act as if it is produces an exceptionally inadequate definition for human rights when so much of the second class status of women, from sexual objectification to murder, is done by men to women prior to express state involvement.

Id. at 26–27.
297. Thomas & Beasley, supra note 183, at 1122. Dorothy Thomas and Michele Beasley identify four interrelated factors that have contributed to the exclusion of domestic violence from international human rights practice:
ture ten years ago, Rhonda Copelon noted that

[the insistence on state involvement ignores the role and function of male violence—and especially intimate violence—in women's lives. It can no longer be justified as simply a reflection of a neutral or traditional state-centered ordering of international law; rather, it is rooted in and perpetuates the culture as well as the structure of the patriarchal state.]

IV. A PROTECTION-BASED APPROACH TO "ACQUIESCENCE" UNDER THE TORTURE CONVENTION

For the Torture Convention to provide meaningful relief to women fleeing gender-based violence, "acquiescence" must be interpreted broadly to encompass either a state's failure to prosecute or its encouragement of torture by nonstate actors, including its awareness of an environment in which torture occurs. This is essential because most forms of gender-based violence are inflicted by nonstate actors in countries that condone or fail to punish in such situations. Much like the U.S. Supreme Court's narrow interpretation of the state's constitutional duty to protect against domestic violence has both im-

(1) traditional concepts of state responsibility under international law and practice, (2) misconceptions about the nature and extent of domestic violence and states' responses to it, (3) the neglect of equality before and equal protection of the law without regard to sex as a governing human rights principle, and (4) the failure of states to recognize their affirmative obligation to provide remedies for domestic violence.
munized states from culpability for nonfeasance and left women without adequate protection, a restrictive interpretation of "acquiescence" leaves the nation state unaccountable for harm that it effectively tolerates by private actors within its borders.

A state's "willful blindness" to torture inflicted "privately" within its borders should be sufficient to establish state action under the Torture Convention. This broader, more gender-inclusive interpretation of "acquiescence" is also consistent with the international community's evolving norms concerning women's human rights. Such an interpretation would also be consistent with recent decisions by both the Second and Ninth Circuits, the Canadian model for implementing the Torture Convention, and the interpretation of "torture" under the European Convention on Human Rights.

In effect, the domestic efforts to expand the state's constitutional duty to take affirmative steps to protect women from domestic violence would hold the state as an "accomplice" when its failure to protect against domestic violence results in torture. The U.S. Supreme Court held in DeShaney v. Winnebago County Department of Social Services, that the state has no duty under the Due Process Clause to protect against known danger when returning an abused boy to his father's custody.

Critiquing DeShaney, G. Kristian Miccio has noted that "the public/private dichotomy attempts to legitimate a public policy that places the safety of abused mothers and children outside the ambit of state concern—requiring neither affirmative action nor proactive methodologies." In lieu of relying on the public/private dichotomy to determine whether state action is present under the Fourteenth Amendment, G. Kristian Miccio has argued that the state's failure to take affirmative steps to protect battered women from intrafamilial violence signifies its

301. See supra notes 290-93 and accompanying text.
302. See Khouzam v. Ashcroft, 361 F.3d 161, 170 (2d Cir. 2004); Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003).
303. See supra note 269.
304. See supra notes 73, 77.
complicity in creating the harm, giving rise to state action.\textsuperscript{306}

The two major theoretical approaches to assessing responsibility in situations involving a nonstate agent of persecution are "accountability" and "protection."\textsuperscript{309} The accountability approach subscribed to by the minority of states requires a strong link between persecution and the state, while the protection approach focuses instead on the absence of state protection.\textsuperscript{310} To protect women fleeing gender-based violence, the absence of state protection must be applied to an Article 3 analysis. Such an absence of protection could be analyzed by comparing the effectiveness of the state's protection of women with that of other groups in society.\textsuperscript{311}

A broader interpretation of "acquiescence" is also consistent with the Second and Ninth Circuits' rulings that the heightened "willful acceptance" standard for "acquiescence" violates both the Torture Convention and congressional intent.\textsuperscript{312} In sharp disagreement with the Board's interpretation in \textit{In re S—V}, the Zheng court stated that

to interpret the term acquiescence as the [Board] did... misconstrues and ignores the clear Congressional intent... the [Board] ignored the Senate's clear intent and constructed its own interpretation of acquiescence, an interpretation that requires more than awareness, includes "willfully accepting of," and seemingly excludes "willful blindness."\textsuperscript{313}

In \textit{Khouzam}, the court similarly stated, "in terms of state action, torture requires only that government officials know of

\begin{itemize}
  \item \textsuperscript{308} \textit{Id.} at 645.
  \item \textsuperscript{309} Türk, \textit{supra} note 79, at 98.
  \item \textsuperscript{310} \textit{Id.}
  \item \textsuperscript{311} \textit{See} Macklin, \textit{supra} note 118, at 303–04; \textit{see also} Randall, \textit{supra} note 24 (arguing that the reality that most states are unable to protect women from male-inflicted violence should give rise to a presumption that the home country has failed to protect against gender-based violence).
  \item \textsuperscript{312} \textit{See} \textit{supra} notes 214–16 and accompanying text for a discussion of Zheng and notes 217–23 and accompanying text for a discussion of Khouzam. In Zheng, the Ninth Circuit characterized the Board's interpretation of "acquiescence" to require that government officials "willfully accept" torture to their citizens by a third party as contrary to the clearly expressed congressional intent to require only "awareness," and not to require "actual knowledge" or "willful acceptance" in the definition of "acquiescence." Zheng v. Ashcroft, 332 F.3d 1186, 1196 (9th Cir. 2003). The Senate, in one of its Understandings prior to the ratification of the Torture Convention, expressly stated that the term "acquiescence" requires that, prior to the torturous activity, the public official be aware of the torturous activity and thereafter breach its legal responsibility to intervene. \textit{Id.}
  \item \textsuperscript{313} \textit{Id.}
\end{itemize}
or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it."\(^{314}\)

A broad reading of "acquiescence" would also be consistent with the Canadian interpretation—a model method of utilizing the Torture Convention’s "acquiescence" language to protect against torture. As interpreted by the Canadian immigration authorities, "state involvement exists when a state official acts in such a way that state approval of acts of torture may be inferred."\(^{315}\) Among the circumstances that give rise to such an inference are a state’s failure to: "(i) intervene when there are reasonable grounds to believe that an act of torture will be, or is being, committed; (ii) investigate when there are reasonable grounds to believe that an act of torture has been committed; or (iii) prosecute those responsible for such acts."\(^{316}\) Canadian authorities note that "the [United Nations] Special Rapporteur for questions of torture [recently] equate[d] the state’s failure to respond to violence with encouragement of further acts of violence, implying state responsibility."\(^{317}\) In assessing police inaction in the face of private racial violence, the Special Rapporteur concluded, "[t]his lack of reaction from public officials further encourages such private violence."\(^{318}\)

In the case of gender-based violence, police inaction and failure to prosecute are often documented by the U.S. Department of State. In the Democratic Republic of the Congo, for example, the State Department reports that domestic violence is pervasive.\(^{319}\) There are no shelters for battered women and domestic violence is not a crime under the penal code.\(^{320}\) Similarly, India has no law that addresses domestic violence in its entirety,\(^{321}\) as even those parts of its penal code that arguably

\(^{314}\) Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004); see supra notes 217–23 and accompanying text (discussing Khouzam).


\(^{316}\) Id.

\(^{317}\) Id. at 45.


\(^{319}\) In re D—— K——, slip op. at 5 (EOIR Immigr. Ct. Aug. 1, 2000).

\(^{320}\) Id.

\(^{321}\) See REFUGEE WOMEN’S RES. PROJECT, REFUGEE WOMEN AND DOMESTIC VIOLENCE: COUNTRY STUDIES 23 (4th ed. 2003) (asserting that while the Penal Code provisions "may cover some areas of domestic violence
prohibit domestic violence have been criticized as being ambiguous. Moreover, in India, marital rape is explicitly excluded from the definition of rape. Thus, in those countries whose laws fail to protect adequately against domestic violence, (either because such laws do not exist or are not enforced) state nonaction can be interpreted as encouragement sufficient to satisfy a more liberal protection-based interpretation of “acquiescence” under the Torture Convention.

Because, as discussed previously, the legal landscape has changed considerably with regard to women’s human rights since the drafting of the Torture Convention, the Torture Convention must be interpreted in keeping with current human rights norms. Just as international law holds nonstate actors of torture or persecution liable for their acts, victims of torture must also be entitled to protection, regardless of the status of the torturer. In interpreting torture under the analogous

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they are lacking in a number of respects”). “The everyday or less immediately life-threatening regular violence is not recognized and the standard clauses on assault tend not to be used by women against their husbands.” Id.

322. Id. at 23–24 (describing the conclusions of a study carried out by the International Center for Research on Women). According to the study:

While section 498A of the Indian Penal Code makes “cruelty” a punishable, cognizable offense in the Indian Penal Code, “cruelty” is a vague term and courts are often reluctant to define it. The judicial system’s definition of mental cruelty and trauma is especially unclear and even judges who are sensitized to the issue of domestic violence may find themselves constrained in the types of rulings they can make. The lack of clarity leaves room for inconsistency among judgments, particularly as a large segment of the judiciary is not yet fully sensitized to the dynamics and dimensions of domestic violence. Thus in some cases, psychological abuse and mental “torture” may be recognized and punished, while, in others, it is ignored.

Id.

323. Id. at 25 (citing India’s Penal Code, Article 375 exemption: “Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”).

324. See Khouzam v. Ashcroft, 361 F.3d 161, 161 (2d Cir. 2004). A similar position has been advanced by Professor Rhonda Copelon, who states that [i]f the purpose of the “consent or acquiescence” language was to cover situations where the state machinery does not work, then gender-based violence is a case in point…. Where domestic violence is a matter of common knowledge and law enforcement and affirmative prevention measures are inadequate, or where complaints are made and not properly responded to, the state should be held to have “acquiesced” in the continued infliction of violence.

Copelon, supra note 237, at 355–56.

325. See supra notes 126–31 and accompanying text.

326. Türk, supra note 79, at 107 (discussing protection for victims of non-state persecution under the Refugee Convention). Volker Türk argues that the
European Convention on Human Rights, the European Court has called for the same type of “living” interpretation “in light of present-day conditions.”

In fact, Article 3’s prohibition on returning a person to a country in which there is a danger of torture was inspired by the case law of the European Commission on Human Rights interpreting Article 3 of the European Convention on Human Rights. According to the Commission, the prohibition on torture and inhuman or degrading treatment contained in Article 3 of the European Convention does more than obligate a state to prevent torture within its jurisdiction. Though not explicitly stated in the European Convention, the Commission has

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328. BURGERS & DANELIUS, supra note 72, at 125.

329. Id.
interpreted it to also prohibit a state from handing a person over to another country in which she might be subject to such treatment.\footnote{330}{Id. According to the Commission: [E]xtradition may under certain exceptional circumstances constitute treatment prohibited by Article 3 of the Convention. This is the case, for example, where the person concerned is in danger of being subjected in the State to which he is to be extradited, to torture or any treatment contrary to Article 3. Id. (quoting 36 Eur. Comm’n H.R. Dec. & Rep. 231–32). Similarly, in \textit{Ahmed v. Austria}, the European Court of Human Rights (ECHR) concluded that deporting the applicant to Somalia would breach Article 3 of the ECHR for as long as he risked being subjected to torture or degrading or inhuman treatment there. Türk, supra note 79, at 106.}

Despite the fact that only the Torture Convention contains an explicit ban on returning a person to a country in which she is at risk of being subjected to torture, the Human Rights Committee has also interpreted the International Covenant on Civil and Political Rights to authorize a ban on non-refoulement in certain circumstances.\footnote{331}{\textit{INGELSE, supra note 73, at 308 ("In the view of the Committee, States Parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or \textit{refoulement}." (quoting General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994))).}} Also, it has been noted that in all likelihood, the Human Rights Committee considers the return of a person to a state in which there is a risk of torture by nonstate actors to be in violation of the International Covenant on Civil and Political Rights.\footnote{332}{\textit{Id. The inter-relationship between the European Convention on Human Rights and the Torture Convention was first articulated by the drafters of the Torture Convention. The Torture Convention’s admonition in Article 17(2) that members of the Human Rights Committee should also serve on the Committee Against Torture suggests that the drafters of the Torture Convention intended for the Committee Against Torture to draw upon the jurisprudence of the Human Rights Committee. Anne Bayefsky et al., \textit{Protection Under the Complaint Procedures of the United Nations Treaty Bodies, in HUMAN RIGHTS PROTECTION FOR REFUGEES, ASYLUM-SEEKERS, AND INTERNALLY DISPLACED PERSONS} 23, 75 n.194 (2002) (citing Siân Lewis-Anthony, \textit{Treaty-Based Procedures for Making Human Rights Complaints Within the U.S. System, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE} 53 (Hurst Hannum ed., 3d ed. 1999)).}}

\textbf{V. ALTERNATIVES AND REMEDIES: BETWEEN THE PRACTICAL AND THE ELUSIVE}

By ratifying and implementing the Torture Convention, the United States has taken an important step toward joining the international community’s condemnation of torture. Spec-
cifically, with regard to Article 3, the United States has agreed not to return a person to a country in which there is a threat of torture. With regard to women fleeing torture, the United States has shown a willingness to recognize gender-based harm as torture. However, by elevating the standard of proof and narrowly interpreting the intent and "acquiescence" requirements, the United States has undermined the protection possible for women fleeing torture by nonstate actors. 333

A. THE UNITED NATIONS COMMITTEE AGAINST TORTURE: UNREALIZED POTENTIAL

Given the influence of domestic policy issues on the interpretation of the Torture Convention, particularly the focus on "criminal aliens," are there alternatives that would allow the law to develop outside of these concerns? One existing alternative is the United Nations Committee Against Torture (Committee). While the United States is unlikely to agree to the jurisdiction of an international monitoring committee, the Committee provides a comparative model with distinct advantages and disadvantages. 334 Furthermore, comparing the ex-

333. Even for those women lucky enough to be afforded protection under the Torture Convention, the United States policy of denying family reunification or permanent status results in severance of family ties for persons that by definition cannot rejoin families in their home country. See supra note 90 and accompanying text. While this Article focuses on the way in which the United States interpretation of "torture" fails to protect against gender-based violence, others have focused on the need for legislative change to allow for adjustment of status and family reunification for women who are afforded protection under the Torture Convention. See, e.g., Montavon-McKillip, supra note 280, at 279 (proposing a legislative amendment to allow permanent residency for those granted withholding of removal under Article 3 of the Torture Convention after concluding that Torture Convention relief, despite its limitations, can be a life-saving alternative if no other options exist); Barbara Cochrane Alexander, Note, Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims, 15 AM. U. INT'L L. REV. 895, 938-39 (2000) (arguing that Congress should amend the Immigration and Nationality Act to allow adjustment of status for Torture Convention domestic violence victims modeled on VAWA's battered spouse adjustment provisions). Modeling legislation on VAWA has also been suggested to remedy other inequities in the law, including those facing undocumented workers. See, e.g., Lori A. Nessel, Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform, 36 HARV. C.R.-C.L. L. REV. 345, 388-90 (2001) (utilizing VAWA as a model for promoting justice, Lori A. Nessel argues for deferred action status for undocumented workers who wish to pursue guaranteed labor rights).

334. The United States could submit to the jurisdiction of the Committee pursuant to Article 22 of the Torture Convention. See Torture Convention, supra note 9 (noting that under Article 22, a state party to the Torture Conven-
perience of the Committee in adjudicating Article 3 claims with that of the United States provides broader insight into whether the gender-neutral language of the Torture Convention can


The United States is not alone in its refusal to be bound by an independent international monitoring body. See Torture Convention Declarations, supra (listing the countries that have agreed to submit to the Committee’s jurisdiction). Of the 136 countries that have ratified the Torture Convention, only fifty countries have accepted either Article 21 or 22. See Torture Convention Declarations, supra (listing parties that have accepted Article 21 or 22); Office of the High Comm’r for Human Rights, Status of Ratification of the Convention Against Torture (2004), at http://www.ohchr.org/english/law/cat-ratify.htm (listing parties to the Torture Convention). That so few states have agreed to the jurisdiction of the Committee Against Torture is itself problematic. Canada, however, has agreed to Article 22 jurisdiction in addition to adjudication by domestic immigration tribunals and Australia vests sole jurisdiction over Article 3 Torture Convention claims with the Committee. See Torture Convention Declarations, supra. In countries such as Australia which have agreed to the jurisdiction of the Committee Against Torture pursuant to Article 22, the claimant must first exhaust all domestic remedies. Savitri Taylor, Australia’s Implementation of Its Non-Refoulement Obligations Under the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, 17 U. NEW S. WALES L.J. 432, 470 (1994). Therefore, the Committee plays a role similar to a de facto merits review body. Id. Sweden effectively takes a middle ground by fully incorporating Article 3 Torture Convention protection into its domestic immigration law. See for example, Chapter 8, section 1 of the Swedish Aliens Act which incorporates Article 3 of the Torture Convention and provides that an alien who has been refused entry or who shall be expelled may never be sent to a country where there are reasonable grounds to believe that he or she would be in danger of suffering capital or corporal punishment, or of being subjected to torture or other inhuman or degrading treatment. Aliens Act, 1989:529, ch. 8, § 1 (1997) (Swed.), available at http://www.unhchr.ch/cgi-bin/texis/vtx/rsd/rsddocview.htm?CATEGORY=RSDLegal&id=3ae6b50a1c&page=research:.
adequately protect against gender-based harm.

If the goal is to interpret the Torture Convention independent of domestic policy concerns, the Committee presents clear advantages. It is an international human rights committee composed of persons independent of the state in which protection is being sought who are intimately familiar with applying Article 3 of the Torture Convention.\textsuperscript{335} Notably, the Committee is composed of ten experts, making it the smallest of all the treaty bodies.\textsuperscript{336} Although members are nominated and selected by state parties for four-year terms, they are not meant to be deputies or representatives of their native states.\textsuperscript{337} Rather, all members are to act in a personal capacity and are prohibited from receiving instructions from states.\textsuperscript{338}

The Committee is positioned to interpret the terms of the Torture Convention more broadly, as both the European Court of Human Rights and the Human Rights Committee have done in interpreting similar human rights instruments.\textsuperscript{339} Proceeding before the Committee would offer distinct advantages from a human rights perspective. First, the applicant would proceed under the actual terms of the Torture Convention rather than the United States' implementing legislation. Significantly, this would affect the standard of proof (the Committee's standard being significantly lower than that of the United States).\textsuperscript{340} Second, free from domestic concerns, the Committee should be able to interpret the terms from a protection-oriented, rather than restrictionist, viewpoint.

\textsuperscript{335} See Taylor, supra note 334, at 471. In fact, this independence has led to threats from Australia that it will withdraw from Article 22 because of concerns over sovereignty. See Peter Burns, The United Nations Committee Against Torture and Its Role in Refugee Protection, 15 GEO. IMMIGR. L.J. 403, 407 (2001).

\textsuperscript{336} See INGELSE, supra note 73, at 93.

\textsuperscript{337} Id.

\textsuperscript{338} Id. However, the fact that members can be re-elected raises concerns about compromised impartiality, as members may be less critical of states during election years. Id. Additionally, a finding by the Committee that Article 3 has been violated is similar to that of a declaratory judgment with the state deciding whether to abide by the recommendation of the Committee. Id. at 305. While this declaratory judgment does not necessarily lead to any particular immigration status in the state of protection, the state of protection must take measures that are in agreement with Article 3. Id.

\textsuperscript{339} See supra notes 329–32 and accompanying text.

\textsuperscript{340} See supra notes 267–69 and accompanying text for discussion of the varying interpretations of the standard of proof required by the Torture Convention.
Notwithstanding the notable advantages to adjudications before the Committee, the small body of case law that has emerged is not as favorable as might be expected. 341 However, the Committee's grant rate is striking when compared with rates under U.S. domestic adjudication. Whereas the Committee recommended protection in nearly 20% of the cases decided on the merits, the United States has granted approximately 3% of the Torture Convention claims filed in the past four years. 342

Turning specifically to the Committee's experience in interpreting the Torture Convention's requirement of state action, it appears that "the Committee is struggling between functional and formal conceptions of the definition of torture and states parties' obligations under Article 3." 343 Initially, the

341. In the ninety-nine decisions that were available in English, the Committee found in only fourteen instances that the applicant would be tortured if returned to his or her homeland. See UNIV. OF MINN. HUMAN RIGHTS LIBRARY, DECISIONS AND VIEWS OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION, at http://www.umn.edu/humanrts/cat/decisions/cat-decisions.html (last visited Sept. 1, 2004) (listing decisions of the Committee under Article 22). However, of the ninety-nine decisions, only sixty-eight were issued on the merits, with the others dismissed because of a failure to exhaust administrative remedies. See id. Of the sixty-eight individual complaints considered on the merits by the Committee between 1994 and 2002, sixty-two involved asylum seekers and others facing deportation, and in fourteen of those instances, the Committee found that Article 3 protection was appropriate. See id.

342. See supra note 282 and accompanying text. Perhaps the most striking difference in the adjudication of Torture Convention claims before the Committee is that the applicant is afforded the benefit of the doubt in credibility determinations. See, e.g., Seid Mortesa Aemei v. Switzerland, Communication No. 34/1995, Committee Against Torture, 18th Sess., para. 9.6, U.N. Doc. CAT/C/18/D/34/1995 (1997) (stating that in the interest of the author's security, "it is not necessary that all the facts invoked by the author should be proved; [rather,] it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable"); Alan v. Switzerland, Communication No. 21/1995, Committee Against Torture, 16th Sess., para. 11.3, U.N. Doc. CAT/C/16/D/21/1995 (1996) (finding that "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material"); Mutombo v. Switzerland, Communication No. 13/1993, Report of the Committee Against Torture, U.N. GOAR, 49th Sess., Supp. No. 44, Annex 5, at 51, U.N. Doc. A/49/44 (1994) (stating that "even if there are doubts about the facts adduced by the author, it must ensure that his security is not endangered"); see also INGELSE, supra note 73, at 297 (stating that "even if there were [... ]lingering doubts as to the truthfulness of the facts presented [...] or the complainant had originally lied to the national authorities about his identity and nationality and given an inconsistent account, the complainant should be given the benefit of the doubt" (quoting H—— D—— v. Switzerland, complaint 112/1998, U.N. Doc. A/54/44 (1999))) (footnote omitted).

343. David, supra note 300, at 777.
Committee adhered to a literal interpretation of the state actor requirement under Article 3, dismissing, without analysis, the fear of torture by the guerrilla forces in Peru as relating to a nongovernmental entity operating without the government's consent or "acquiescence" and thus, "outside the scope of article 3 of the Convention."\footnote{344. See G—— R—— B—— v. Sweden, Communication No. 83/1997, Committee Against Torture, 20th Sess., para. 6.5, U.N. Doc. CAT/C/20/D/83/1997 (1998); David, supra note 300, at 774–75 (discussing G—— R—— B—— v. Sweden).} In a later decision involving the fear of torture in a country without any centralized government in place, the Committee appeared to take a step away from its prior rigid adherence to the state actor doctrine. Recognizing that Somalia had been without a centralized government for years and that the international community negotiated with the warring factions, some of which had set up quasi-governmental institutions, the Committee held that members of those factions constituted "public officials or other persons acting in an official capacity" as required by Article 3.\footnote{345. See Sadiq Shek Elmi v. Australia, Communicaton No. 120/1998, Committee Against Torture, 22nd Sess., para. 6.5, U.N. Doc. CAT/C/22/D/120/1998 (1999); David, supra note 300, at 775–78 (discussing Sadiq Shek Elmi v. Australia and its implications for determining nonstate actors).} Reconciling its decisions interpreting torture by nonstate actors, the Committee later held that the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a nongovernmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercises quasi-governmental authority over the territory to which the complainant would be returned.\footnote{346. S—— S—— v. The Netherlands, Communication No. 191/2001, Committee Against Torture, 30th Sess., para. 6.4, U.N. Doc. CAT/C/30/D/191/2001 (2003).}

Digging deeper into the Committee's experiences with addressing gender-based claims uncovers little. In fact, the Committee's work to date in addressing the torture of women, even that committed by state actors, has been described as "myopic."\footnote{347. See, e.g., Andrew Byrnes, Toward More Effective Enforcement of Women's Human Rights Through the Use of International Human Rights Law and Procedures, in HUMAN RIGHTS OF WOMEN, NATIONAL AND INTERNATIONAL PERSPECTIVES, supra note 222, at 214. However, Byrnes also expresses hope that "in the course of time the Committee will be persuaded to take an expansive view of the definition of torture in the Convention and apply..."} In the two gender-based torture claims in which the
Committee recommended protection, there was no analysis particular to gender other than the Committee’s finding in one of these two cases that a rape victim would not necessarily initially recount that she had been raped.348

Perhaps more disheartening than the paucity of gender-specific analysis with regard to complaints of torture under Article 3 is the Committee’s silence on gender issues in the context of its reporting requirements.349 According to Andrew Byrnes, the Committee fails to systematically “ask the woman question” and elicit gender-specific information.350 By failing to do so, the Committee is unable to identify patterns of gender-specific mistreatment and therefore lacks the empirical data necessary for formulating appropriate recommendations to address violations of the Torture Convention.351

The failing of the Committee to interpret the terms of the Torture Convention in such a way as to realize its true spirit is particularly disappointing given that it should be less influenced by the domestic immigration policy concerns that influence adjudication by the United States. However, adjudication by the Committee is limited in significant ways. First, as discussed below, the text of the Torture Convention itself is unnecessarily narrow. By conditioning the very definition of torture on the existence of state action or “acquiescence,” the drafters were less inclusive of the more “private” ways in which women experience torture. Second, while the Committee could interpret “acquiescence” broadly, as with most other convention-monitoring committees, almost all the members are

the Convention to private violence against women in which the state acquiesces.” Id.


349. As reported by Andrew Byrnes, “gender issues have attracted little systemic attention.” Byrnes, supra note 168, at 206.

350. Id. at 207 (stating that “[o]verall, the Committee has paid little attention to the question of whether women may be subjected to torture or other ill treatment in a manner or under circumstances that differ from the experiences of men”). Specifically, Andrew Byrnes notes that the Committee fails to inquire into the following: (1) the number of women held in pretrial custody or on remand, even though these are time periods that pose particular hazards for women; (2) the rape of female detainees; and (3) the patterns of “female criminality” which may lead to women being imprisoned for discriminatory reasons or as the result of discriminatory legal processes. Id. at 206.

351. Id. at 207.
male. As has been seen in other areas of the law, gender-neutral laws interpreted solely by men tend to have a disparate impact on women. Compounding this problem, gender-neutral laws that require state action fail to protect against the less public ways in which women are harmed. The Committee's restrictive interpretations of state action and "acquiescence" suggest that the problem is not only analytical but also foundational.

B. GENDER-BASED LEGISLATIVE OR REGULATORY CHANGE

Both the Refugee and Torture Conventions intend to offer surrogate protection only when the state has failed to do so. However, under the Refugee Convention, the failure of the state to protect against persecution is analyzed from the refugee's perspective. To fall within the definition "refugee," a woman must be unwilling or unable to avail herself of her state's protection because of persecution on account of an enumerated ground. The United States has interpreted this definition to apply to persecution committed either by the government or by forces that the government is "unwilling or unable to control." The focus on the empirical reality—the failure of state protection rather than intentionality by the state—is correct and offers the potential to encompass a broad range of harms, including those arising within the home. Historically, however, the gender bias that has plagued the Refugee Convention has been reflected in the absence of gender from the enumerated grounds for protection. Women have been left in the precarious position of connecting gender-based harm with their membership in a "particular social group." Because of the restrictive definition of "particular social group" under U.S. jurisprudence, statutory or regulatory guidance is needed to explicitly recognize women as a "particular social group" for asylum purposes.

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352. INGELSE, supra note 73, at 95 (noting that only four of the twenty-one members who have served on the Committee have been women). Ingelse notes that the only treaty bodies with a majority female membership are the Committee on the Elimination of Discrimination Against Women and the Committee on the Rights of the Child. Id. at 95 n.22.


354. See supra note 59.

355. The recognition of women as a cognizable social group for asylum purposes in the United States has been advocated by many commentators. See supra notes 159–61 and accompanying text. As discussed above, the DHS's
Such a change would bring the United States into conformity with the growing international recognition of women as a social group. It would also be consistent with the interpretation of the UNHCR. Gender-specific legislation would also appropriately acknowledge that gender-neutral human rights instruments have failed to adequately protect women's human rights.

Viewed within the broader context of the immigration regime, there is precedent for enacting specific legislation that targets a particular group that has been adversely affected by discriminatory application of an otherwise neutral law. For example, Congress has passed legislation that specifically allows conferral of asylum status for Chinese applicants who fear the forced sterilization that results from China's "one-couple-one-child" birth control policy. Similarly, the Nicaraguan Adjustment and Central American Relief Act (NACARA) was aimed at ameliorating the discriminatory application of asylum law that resulted in the denial of asylum to El Salvadoran and Guatemalan applicants during the late 1980s. Both of the Violence Against Women Acts contained immigration provisions that specifically targeted women in abusive situations. In addition to creating an avenue for abused women within the United States to obtain status without the assistance of their spouses, VAWA created a new form of relief from removal with much more lenient statutory requirements than normally required.

recognition of married women as a particular social group under certain circumstances in In re R—— A—— holds promise for greater relief for women fleeing domestic violence under the Refugee Convention. See supra notes 159–61 and accompanying text.

356. See supra notes 106–11, 153.

357. See supra note 106.

358. For example, recognition that the gender-neutral United Nations Declaration on Human Rights has not adequately protected women's human rights resulted in the creation of the Covenant on the Elimination of Discrimination Against Women (CEDAW). See supra notes 175–78 and accompanying text.

359. See supra note 52 and accompanying text.

360. See supra note 53 and accompanying text.

361. See supra note 26.

362. Normally, cancellation of removal requires the applicant to have resided in the United States continuously for ten years and to demonstrate that her removal would cause "exceptional and extremely unusual" hardship to a U.S. citizen or lawful permanent resident immediate family member. Immigration and Nationality Act, 8 U.S.C. § 1229(b)(1) (2000). However, in the case of battered spouses, the requirements are relaxed, and the applicant need only
One way to address the gendered consequences that flow from a narrow interpretation of the Refugee and Torture Convention provisions would be through complementary gender-specific legislation. An example of this approach is the recently proposed Widows and Orphans Act of 2003 (Widows and Orphans Act) aimed at protecting women and children who are particularly at risk of harm in their home countries due to their age, gender, or status as a widow or orphan. Without altering the statutory refugee framework, the Widows and Orphans Act would provide refugee-like benefits to a newly created class of “special immigrants” who would be identified and processed prior to entering the United States. These “special immigrants” would be required to demonstrate a credible fear of harm and lack of adequate protection related to sex or being under ten years of age.

Although unlikely to be enacted given the current trends toward restricting immigration categories, the proposed Widows and Orphans Act is an approach that explicitly recognizes the different ways in which women are persecuted because of their gender. It also acknowledges the systematic exclusion of “women at risk” from the existing U.S. refugee protection regime. However, because it aims to create a new “special immigrant” category for admission rather than amend the refugee or asylum provisions, it fails to address the gender-bias in asylum and refugee law. Protection under the Refugee or Torture Conventions would still remain the only hope for women seeking protection at or within our borders.

In addition, treating women as “special immigrants,” show three years of continuous residence and “extreme hardship” to herself or a U.S. citizen or lawful permanent resident immediate family member. Id. § 1229(b)(2).


364. See id.

365. See Posting of Wendy Young, Women’s Commission for Refugee Women and Children & Christopher Nugent, Holland & Knight LLP, christopher.nugent@hklaw.com, to childimmigration@lists.lirs.org, detention watchnetwork@lists.lirs.org, aclu-detention@lists.aclu.org, sept11arrests@lists.aila.org (July 28, 2003) (copy on file with author) (stating that “[w]omen such as widows and girls face severe forms of gender-based violence including rape, molestation, sexual slavery, forced prostitution, and forced marriages”).

366. Id. “Despite the victimization of these vulnerable women and children, they are not currently prioritized for refugee resettlement to the United States since they cannot necessarily meet the stringent statutory definition of ‘refugee[]’ . . . .” Id. Of the 27,100 refugees admitted in fiscal year 2002, only 500 women at risk were processed. Id.
rather than refugees, creates the dual risk that: (1) the protection afforded will be less robust; and (2) human rights law will continue to develop in the context of the more public male experiences rather than incorporating women's experiences. First, the proposed legislation only allows for women granted special immigrant status to be accompanied or reunited with children less than ten years of age. In contrast, refugee status allows for derivative children under the age of twenty-one. As has happened in the countries that provide multitiered hierarchies of protection, there is the danger that women will be afforded the least beneficial form of relief. Second, the nonre-

367. In countries with multitiered protection regimes, women's claims tend to be depoliticized and, while protected, women often receive the least beneficial relief. See Conference, Discussion, in WOMEN IMMIGRANTS IN THE UNITED STATES, supra note 94, at 153–54 (noting that some countries already have a second-class asylum category). Germany, for example, has "big asylum" and "little asylum," with little asylum often granted in gender claims and providing fewer benefits. Id. at 154. In the United Kingdom, for those applicants who can establish a well-founded fear of persecution based on a non-Convention ground, there is "humanitarian protection" or "discretionary leave" (formerly known as "exceptional leave"). See IMMIGRATION & NATIONALITY DIRECTORATE HOME OFFICE, ASYLUM POLICY INSTRUCTIONS: HUMANITARIAN PROTECTION AND DISCRETIONARY LEAVE APU NOTICE 1/2003, at http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/humanitarian_protection0.html. Significantly however, both humanitarian protection and discretionary leave are temporary protections. Id. While the United Kingdom's regime's inclusion of temporary protection for those who cannot qualify for Refugee Convention-based relief is preferable to the United States' model, female applicants for asylum in the United Kingdom are more likely than men to be granted either "humanitarian protection" or "discretionary leave" on compassionate or humanitarian grounds. Crawley, supra note 137, at 322. Significantly, "[n]ot only does [exceptional leave to remain] provide substantially fewer rights and privileges than Convention refugee status, but it also reflects a particular conceptualization of women as 'victims' and depoliticizes their experiences of persecution." Id. Women granted humanitarian protection are not normally entitled to family reunification. See IMMIGRATION & NATIONALITY DIRECTORATE HOME OFFICE, ASYLUM POLICY INSTRUCTIONS: FAMILY REUNION, at http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/family_reunion.html. Only after maintaining humanitarian protection status for three years can the applicant seek indefinite leave to remain, thus qualifying her for family reunification. Id. For those granted discretionary leave, there is no automatic right to family reunification until after six years, at which point the person can seek indefinite leave to remain. Id. For those who fall within exclusionary grounds, ten years of discretionary leave must be completed before one can apply for indefinite leave to remain. Immigration and Nationality Act, 8 U.S.C. § 1229(b)(1) (2000).

Similarly, in Switzerland, women were historically relegated to the "provisional admission" category. Walter Kälin, Gender-Related Persecution, in SWITZERLAND AND THE INTERNATIONAL PROTECTION OF REFUGEES, supra note 79, at 111. In those instances in which gender-based persecution led to a need
foulment obligation under both the Refugee and Torture Conventions represents a clear intersection between human rights and refugee law. As stated by Deborah E. Anker, "In many respects, refugee law crosses the threshold of justiciability and enforceability past which human rights law has found it difficult to proceed. Refugee law provides an enforceable remedy—available under specified circumstances—for an individual facing human rights abuses." Internationally, refugee law has certainly played a crucial role in the development of women's rights. Anker explains that "[b]y interpreting forms of violence against women within mainstream human rights norms and definitions of persecution, refugee law avoids some of the problems of marginalizing women's rights in international law." Removing women's claims from the traditional refugee context may then interfere with the cross-fertilization occurring between human rights and immigration law.

Therefore, in addition to proposed special legislation such as the Widows and Orphans Act, complementary changes need to be made to the Refugee and Torture Convention forms of relief. Because of the discretionary nature of asylum and the many bars to relief, even if social groups based solely on gender were ultimately recognized, many women would still need to avail themselves of protection under the Torture Convention. Moreover, all human rights instruments need to be accessible to women and must reflect the different ways in which women are harmed.

In terms of the Torture Convention, corrective measures must be taken to ensure that the intersection of gender-neutral language and state action does not result in exclusion for women fleeing gender-based harm. For example, on the crucial issue of acquiescence, the state's role could be defined through

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for protection, the woman was "provisionally admitted." Id. It was not until 1997 that the Swiss asylum law was changed to explicitly incorporate gender-based persecution. Id. at 112–13 (citing to Article 3 Asylum Act 1998 amending the Article 3(2) definition of persecution to reflect gender by adding: "Motives of flight specific to women shall be taken into account."). Even with the changes to the Swiss asylum law, Walter Kālin notes that there is no information available about cases in which the asylum seeker claimed that the denial of state protection from domestic violence constituted persecution, in part because those female claimants may be granted provisional admission. Id. at 121 (noting that provisional admission is the first instance in the asylum procedure).

368. Anker, supra note 13, at 149.
369. Id. at 138.
370. Id. at 139.
statutory or regulatory language setting forth a balancing test with factors to apply in determining whether the state has acquiesced to gender-based violence. Such factors should include the following: (1) the status of women in society; (2) the existence of laws that discriminate against women; (3) the existence of laws that criminalize gender-based violence; (4) the state’s history of prosecuting gender-based violence; (5) the prevalence of gender-based violence; and (6) the support structure for women attempting to flee gender-based violence.\(^{371}\)

Explicitly articulating the ways in which the state fails to protect against gender-based torture would be consistent with the expressed congressional intent in enacting gender-specific legislation to target gender-based crimes and discrimination.\(^{372}\)

Based on a voluminous record of hearings, testimony, and reports attesting to the prevalence of domestic violence and the inability of the states to control it, Congress created a federal civil rights remedy for gender-based crimes.\(^{373}\)

CONCLUSION

We are in the early stages of the very difficult and thankless task of construing the Convention. Only time will tell whether the... narrow reading of the torture definition and its... highly technical approach to the standard of proof will be the long-term benchmarks for our country's implementation of this international treaty.\(^{374}\)

Twenty-four years after enactment of the Refugee Act in the United States, it is clear that the gender-neutral asylum law has been interpreted unevenly in protecting women fleeing gender-based harm. Because jurisprudence under Article 3 of the Torture Convention is still at a relatively formulative stage in the United States, the potential to chart a different course

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371. Other scholars have advocated alternate factors for determining “acquiescence.” See, e.g., Weissbrodt & Höttreiter, supra note 265, at 70. David Weissbrodt & Isabel Höttreiter propose that “acquiescence” be determined based upon the following:

(a) whether the applicant sought and was denied protection by the government; (b) whether the government institutions where [sic] aware of the danger of torture and did nothing to protect that person; and © [sic] whether the individual has other reason to believe that it would be futile to seek protection of the government from torture.

Id.

372. See supra notes 26, 292–94 and accompanying text for a discussion of VAWA.

373. See supra note 26.

exists—a course which is more consistent with the intent of the Torture Convention to protect victims of torture abroad. However, in order to protect Article 3 of the Torture Convention from falling victim to the same exclusionary pattern of gender-biased interpretation, the way in which women experience torture and the state's failure to protect—or its willful blindness to the violence suffered—must, as demonstrated in In re D——K——, be the standard for granting Article 3 relief. This interpretation is consistent with the international community's growing recognition that women's human rights include the right to be free from state-condoned domestic violence. Failing a correct, protection-based, interpretive approach, there is a need for specific statutory or regulatory language to alter the existing formalistic, male-biased way in which the law is interpreted, which excludes from "public" protection the more "private" harms suffered by women.