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THE CULTURE OF RIGHTS PROTECTION IN CANADIAN REFUGEE LAW: EXAMINING THE DOMESTIC VIOLENCE CASES

*Efrat Arbel**

This article examines Canadian refugee law cases involving domestic violence, analyzed through a comparison with cases involving forced sterilization and genital cutting. Surveying 645 reported decisions, it suggests that Canadian adjudicators generally adopted different methods of analysis in refugee cases involving domestic violence, as compared with these other claims. The article argues that Canadian adjudicators rarely recognized domestic violence as a rights violation in itself but, instead, demonstrated a general predisposition toward finding domestic violence persecution in cultural difference. That is, adjudicators tended to recognize domestic violence claimants not as victims of persecutory *practices* but rather as victims of persecutory *cultures*. The article suggests that this approach establishes incorrect criteria by which to evaluate domestic violence claims, for two main reasons. First, this approach does not accord due weight to complex factors besides culture that make women vulnerable to persecution in domestic settings. Second, this approach erects legal and conceptual barriers for women who cannot authentically narrate their experience through the script of cultural vulnerability or who cannot present as "victims of culture". The article posits that characterizing the violence suffered by refugee women as a product of culture does more than erect barriers for refugee claimants; it also operates as a protective device that suppresses the commonality of domestic violence across cultures and elides its domestic prevalence. The article concludes by suggesting that this approach replicates problematic assumptions about gender violence and gender difference that make it harder to address domestic violence both abroad and at home.

Cet article examine les cas canadiens de droit des réfugiés impliquant de la violence familiale, analysés par le biais d'une comparaison avec les cas de stérilisation forcée et de mutilations génitales. Parcourant 645 décisions publiées, il suggère que les arbitres canadiens ont en général adopté différentes méthodes d'analyse dans le cas des réfugiés de violence familiale, par rapport aux autres affaires. L'article soutient que les arbitres canadiens reconnaissent rarement la violence domestique comme une violation des droits en soi, mais au contraire, ont montré une prédisposition générale à reconnaître des situations violence domestique dans la différence culturelle. Autrement dit, les arbitres ont tendance à reconnaître les demandeurs subissant de la violence conjugale non pas comme des victimes de pratiques de persécution, mais plutôt comme des victimes de cultures persécutrices. L'article suggère que cette approche établit des critères erronés d'évaluation des allégations de violence conjugale pour deux raisons principales. Tout d'abord, cette approche n'a pas accordé assez d'importance aux facteurs complexes, qui s'additionnent à la question la culture et qui rendent les femmes vulnérables à la persécution dans leur milieu familial. Ensuite, cette approche érige des barrières juridiques et conceptuelles pour les femmes qui ne peuvent pas authentiquement raconter leur expérience à travers le script de vulnérabilité culturelle ou qui ne peuvent pas se présenter comme des « victimes de leur culture ». L'article avance que la caractérisation de la violence subie par les femmes réfugiées comme un produit de la culture fait plus que d'ériger des barrières pour les demandeurs d'asile; il fonctionne également comme un dispositif de protection qui supprime le caractère commun de la violence domestique à travers les cultures et élude sa prévalence locale. L'article conclut en suggérant que cette approche reproduit des hypothèses problématiques de la violence entre les sexes et de la différence des sexes qui rendent difficile la lutte contre la violence domestique à l'étranger et à la maison.

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Introduction

The international refugee definition in the United Nations *Convention Relating to the Status of Refugees* does not enumerate "gender" as a recognized ground of persecution.[1] The definition requires claimants to demonstrate a well-founded fear of persecution against which their home state is unable or unwilling to protect, and which is linked to one of five enumerated grounds: "race, religion, nationality, membership of a particular social group or political opinion."[2] Canada became the first state signatory to the *Refugee Convention* to address this omission when, in 1993, the Immigration and Refugee Board (IRB) released guidelines on *Women Refugee Claimants Fearing Gender-Related Persecution*.[3] While the *Guidelines* do not add "gender" to the definition, they outline a framework for analysis, complete with substantive and procedural directives, for interpreting the definition in a gender-sensitive manner. One of the *Guidelines*' most profound contributions was the recognition that domestic violence perpetrated by non-state actors can amount to persecution and form the basis for a refugee claim. This recognition marked a sea change in Canada's approach to refugee protection and extended refugee status to countless women previously denied protection. It has been hailed as one of the "most remarkable achievements in Canadian legal history."[4]

In this article, in anticipation of the *Guidelines*' twentieth anniversary, I examine how Canadian adjudicators have approached refugee cases involving domestic violence over the last two decades. My aim is to evaluate whether the *Guidelines*' goal of encouraging a gender-sensitive refugee-determination process has been meaningfully realized in cases involving domestic violence. I survey the publicly available refugee-determination decisions involving domestic violence issued subsequent to the *Guidelines*' release, and examine these through a comparison with cases involving forced sterilization and genital cutting. Examining 645 cases, I argue that over the last two decades, adjudicators have adopted distinctly different methods of analysis in cases involving domestic violence as compared with these other gender-based claims. Most notably, in cases involving forced sterilization and genital cutting, in keeping with

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1 28 July 1951, 189 UNTS 137, art 1(A)(2), Can TS 1969 No 6 (entered into force 22 April 1954, accession by Canada 4 June 1967) [*Refugee Convention*].

2 *Ibid.*

3 *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa: Immigration and Refugee Board, 1996), online: IRB <http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/GuideDir4.aspx> [*Guidelines*] (an update of the 1993 version).

4 Sherene Razack, "Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender" (1995) 8:1 CJWL 45 at 47.

the *Guidelines*' directives, adjudicators consistently identified these practices as rights violations. In these cases, they generally recognized the claimant as a refugee because she was victim of a persecutory practice. In contrast, adjudicators rarely identified domestic violence as a rights violation in itself and demonstrated a general predisposition to finding persecution in cultural difference. That is, adjudicators generally recognized domestic violence claimants as refugees not because they were victims of persecutory *practices* but because they were victims of persecutory *cultures*.

While this approach has proven successful in securing protection for certain refugee women, it establishes incorrect criteria by which to evaluate domestic violence claims. I develop my analysis in four parts. In Part I, I chart an overview of the principles governing gender-related refugee claims, to provide context for discussion. In Part II, I detail the results of my study and explain the different patterns of analysis emerging from the domestic violence cases as compared with other gender claims. Based on these findings, in Part III, I examine the domestic violence cases in more detail. Through a close reading of select decisions, I identify two key problems with the adjudicative tendency to locate domestic violence persecution in cultural difference. First, I argue that by selectively blaming "culture" for refugee women's persecution, the cases do not accord due weight to factors other than culture that make women vulnerable to domestic violence, such as material disparities, gender hierarchies, and existing power arrangements. Second, I argue that this approach constructs non-Western culture as a place where domestic violence occurs because of the so-called "inherent" vulnerability of the women located in that cultural milieu. As a result, women who cannot authentically narrate their experience of violence through the script of vulnerability face legal and conceptual barriers in proving their refugee claims. In these two key respects, the domestic violence cases promote an incorrect understanding of gender violence and gender difference. They establish unduly narrow criteria by which to evaluate women's vulnerability to domestic violence persecution and thus risk excluding genuine refugees from protection.

Building on these critiques, in Part IV, I argue that the adjudicative tendency to locate domestic violence persecution in cultural difference both stems from and reflects a defensive anxiety. Unlike forced sterilization and genital cutting—"exotic" practices perceived to occur only in foreign countries—domestic violence is also common within Canada. Domestic violence claims thus cut along familiar lines of difference and cannot easily be identified as rights violations in the Canadian legal lexicon. Viewed in this light, the tendency to locate persecution in cultural difference can be seen as a protective device that distinguishes the violence suffered by refugee women from the violence suffered by Canadian women. The reluctance to inquire into broad power arrangements that make

women vulnerable to domestic violence abroad makes it easier to ignore the prevalence of these same structures in Canada. In this key respect, the approach adopted in the domestic violence cases operates to replicate problematic assumptions about gender violence and gender difference, while also making it harder to challenge these assumptions in the Canadian legal discourse.

I conclude by arguing in favour of a discursive shift in the adjudicative approach to domestic violence cases. I suggest that a re-examination of the assumptions at play in these cases will allow Canadian legal actors to view domestic violence in a more accurate light and will create a more sophisticated body of law that can better address gender violence claims. Such an approach would better comply not only with the spirit of the *Guidelines* but also with Canadian standards of equality and rights protection.

I. The Legal Framework

A. The Refugee Definition: An Overview

To advance a gender-related refugee claim, a claimant must first demonstrate compliance with the refugee definition set out in article 1(A)(2) of the *Refugee Convention*, as amended by the 1967 *Protocol Relating to the Status of Refugees*.[5] Article 1(A)(2) defines a refugee as a person who

> 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.

This definition is incorporated into domestic law, almost verbatim, via section 96 of the *Immigration and Refugee Protection Act* (*IRPA*).[6] The

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5 31 January 1967, 606 UNTS 267, art 1, Can TS 1969 No 29 (entered into force 4 October 1967, accession by Canada 4 June 1969) (which eliminates the temporal and geographical limitations originally set out in the *Refugee Convention* and incorporates the convention by reference).

6 SC 2001, c 27 [*IRPA*]. The *IRPA* definition differs from that set out in the *Refugee Convention* as a result of some minor—but significant—variations in wording. Whereas the *Refugee Convention* requires a claimant to demonstrate that she is a refugee "*owing to* well-founded fear of *being* persecuted" (*supra* note 1, art 1(A)(2) [emphasis added]), the *IRPA* standard is "*by reason of* a well-founded fear *of* persecution" (*supra* note 6, s 96 [emphasis added]). The locution "owing to", versus "by reason of", enforces different

definition involves a range of considerations but can be parsed into three central components. Simplified, it requires proof of (i) a well-founded fear of persecution (ii) demonstrative of a failure of state protection (iii) that is causally connected to one of the grounds enumerated in the definition: race, religion, nationality, political opinion, or membership of a particular social group.[7] As noted above, the ground "gender" remains conspicuously absent.

Canada was the first state signatory to the *Refugee Convention* to formally recognize that gender can ground a claim for refugee status in 1993, when the Immigration and Refugee Board released the *Guidelines*.[8] The *Guidelines* do not incorporate "gender" into the refugee definition but instead instruct adjudicators that the definition "may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds."[9] While the *Guidelines* lack legislative force,

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standards for assessment. The *Refugee Convention*'s deliberate use of the passive voice, for example, imposes a less onerous burden on refugee claimants than the *IRPA*, which requires a more direct causal link between the fear and the persecution. Further, the differences between the standard requiring a well-founded fear *of* persecution (as in the *IRPA*) versus the standard requiring a well-founded fear *of being persecuted* (as in the *Convention*) shifts the *IRPA* inquiry toward experiences of past persecution rather than the fear of future persecution, therefore decreasing a claimant's likelihood of success. See also James C Hathaway et al, "The Michigan Guidelines on Nexus to a Convention Ground" (2002) 23:2 Mich J Int'l L 210 at 211.

7 In addition to these three components, the refugee definition also requires proof that the claimant is outside her country of origin, has no internal flight alternative, and can substantiate her claim on both an objective and a subjective evidentiary standard.

8 Notably as well, the United Nations High Commissioner for Refugees (UNHCR) released gender guidelines as early as 1985, when its executive committee adopted a conclusion entitled "Refugee Women and International Protection" (UNHCR, Executive Committee of the High Commissioner's Programme, *Report of the Sub-committee of the Whole on International Protection*, UNGAOR, 40th Sess, Supp 12A, UN Doc A/40/12A/Add.1(1985) annex II), which stipulates that "[s]tates, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group'" (*ibid* at para 19(k)).

9 *Supra* note 3, part A.I [emphasis omitted]. Notably, merely adding "gender" to the refugee definition is not sufficient to guarantee a substantive assessment of gender-related persecution claims: see Deborah E Anker, "Refugee Law, Gender, and the Human Rights Paradigm" (2002) 15 Harv Hum Rts J 133 ("[t]he bars to women's eligibility for refugee status lie not in the legal categories per se (i.e., the non-inclusion of gender or sex as one of the five grounds) but in the incomplete and gendered interpretation of refugee law, the failure of decision-makers to 'acknowledge and respond to the gendering of politics and of women's relationship to the state.' Simply adding gender or sex to the enumerated grounds of persecution would not solve this problem" at 139 [footnote omit-

the IRB gives members bureaucratic incentive to apply them seriously by requiring that written reasons be provided for any decision that rejects the principles set out in the *Guidelines*.[10] The central claim—and operating rationale—that underpins the *Guidelines* is that the "existing bank of jurisprudence on the meaning of persecution is based, for the most part, on the experiences of male claimants."[11] The *Guidelines* explain that since the "circumstances which give rise to women's fear of persecution are often unique to women," gender claims necessitate a different method of analysis.[12] They also explicitly recognize that women may be targets of persecution "at the hands of non-state agents of persecution, where the state is either unwilling or unable to protect."[13]

Several months after the introduction of the *Guidelines*, the Supreme Court of Canada released its decision in *Canada (Attorney General) v. Ward*, in which it confirmed the possibility of naming "gender" as a ground of persecution.[14] While the case did not directly involve a gender claim, the Court held that "gender" can constitute a "particular social group" within the meaning of the refugee definition.[15] Importantly, the Court in *Ward* also recognized that persecution can be perpetrated either directly by the state or by non-state agents.[16] This finding has proven crucially important in substantiating many gender claims, particularly claims involving domestic violence.

The Court in *Ward* further explained that state protection need not be perfect to satisfy the refugee definition.[17] States that have functioning

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ted], citing Heaven Crawley, *Refugees and Gender: Law and Process* (Bristol: Jordans, 2001) at 6-9).

10 See Nurjehan Mawani, "Introduction to the Immigration and Refugee Board Guidelines on Gender-Related Persecution" (1993) 5:2 Int'l J Refugee L 240 at 243.

11 *Guidelines*, *supra* note 3, part B.

12 *Ibid* [emphasis omitted].

13 *Ibid*, part C.2. The *Guidelines* further explain that if the claimant can demonstrate that it was "objectively unreasonable for her to seek the protection of her state," her failure to approach the state for protection will not defeat her claim (*ibid*).

14 [1993] 2 SCR 689, 103 DLR (4th) 1 [*Ward* cited to SCR].

15 *Ibid* at 739.

16 *Ibid* at 713-17 ("persecution under the Convention includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens" at 717).

17 *Ibid* at 717ff. See also *Milev v Canada (Minister of Citizenship and Immigration)*, 1996 CarswellNat 1060 (WL Can), [1996] FCJ No 907 (QL) (TD). As the Federal Court of Appeal explained in *Canada (Minister of Citizenship and Immigration) v. Villafranca*, "[n]o government that makes any claim to democratic values or protection of human rights can *guarantee* the protection of all of its citizens at all times" ((1992), 99 DLR (4th) 334 at 337, 150 NR 232, leave to appeal to SCC refused, [1993] 2 SCR xi). The

democratic governments, the Court held, can be presumed capable of protecting their citizens. In such cases, the claimant must demonstrate "clear and convincing" evidence of her home state's inability or unwillingness to protect her from harm.[18] Recognizing that this evidentiary standard may establish difficult hurdles for women facing gender violence, the IRB revised the *Guidelines* after *Ward*'s release. In their current form, the *Guidelines* instruct that "where the claimant cannot rely on the more standard or typical forms of evidence as 'clear and convincing proof' of failure of state protection, reference may need to be made to alternative forms of evidence to meet the 'clear and convincing' test."[19] Elsewhere, the *Guidelines* also encourage adjudicators to "consider, among other relevant factors, the social, cultural, religious, and economic context in which the claimant finds herself."[20] Before examining the gender cases in detail, I first chart an overview of the basic principles governing the adjudication of these claims, following the refugee definition's three central components.

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court further explained that "where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens," the mere fact that it is not always successful at providing protection will not be enough to prove a failure of state protection (*ibid*).

18 *Ward*, *supra* note 14 at 724-25.

19 *Supra* note 3, part C.2 [emphasis omitted]. The *Guidelines* instruct as follows:

> In determining whether the state is willing or able to provide protection to a woman fearing gender-related persecution, decision-makers should consider the fact that the forms of evidence which the claimant might normally provide as "clear and convincing proof" of state inability to protect, will not always be either available or useful in cases of gender-related persecution.
>
> For example, where a gender-related claim involves threats of or actual sexual violence at the hands of government authorities (or at the hands of non-state agents of persecution, where the state is either unwilling or unable to protect), the claimant may have difficulty in substantiating her claim with any "statistical data" on the incidence of sexual violence in her country.
>
> In cases where the claimant cannot rely on the more standard or typical forms of evidence as "clear and convincing proof" of failure of state protection, reference may need to be made to alternative forms of evidence to meet the "clear and convincing" test. Such alternative forms of evidence might include the testimony of women in similar situations where there was a failure of state protection, or the testimony of the claimant herself regarding past personal incidents where state protection did not materialize (*ibid* [emphasis omitted]).

20 *Ibid* [emphasis omitted].

B. Finding a Human Rights Violation

The persecution requirement lies at the heart of the refugee definition and obliges claimants to demonstrate a subjective fear of persecution related to an objective risk of harm.[21] In *Ward,* the Supreme Court of Canada defined persecution as the "sustained or systematic violation of basic human rights demonstrative of a failure of state protection."[22] *Ward* thus requires adjudicators to make two distinct but interrelated findings: that the claimant faces a violation of basic human rights and that her state is unable or unwilling to protect her from this violation. The centrality of human rights to this analysis is notable and signals a clear decision on the part of the Court to establish human rights as the yardstick against which refugee claims will be measured.[23] This approach, the Court explained, both complies with and reflects the underlying purpose of the United Nations *Refugee Convention,* namely "the international community's commitment to the assurance of basic human rights without discrimination."[24] The requirement that these violations be sustained or systemic further signals that minor harms—or instances of "mere discrimination", as these are dubbed in the case law—will not amount to persecution.[25]

Like *Ward,* the *Guidelines* interpret the persecution requirement by reference to human rights principles and instruct that claimants facing gender persecution must show evidence of "serious ... harm which detracts

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21 See *Ward, supra* note 14 at 723. As the Court explained, the subjective component "relates to the existence of the fear of persecution in the mind of the refugee" and is assessed with reference to the claimant's subjective condition. The objective component, in contrast, "requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear" (*ibid,* citing *Rajudeen v Canada (Minister of Employment and Immigration)* (1984), 55 NR 129 at 134 (available on WL Can) (FCA)).

22 *Supra* note 14 at 734, citing James C Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 104-105 [Hathaway, *Refugee Status*].

23 See *Ward, supra* note 14 (the Court emphasized that refugee law "ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard" at 733, citing Hathaway, *Refugee Status, supra* note 22 at 108).

24 *Ward, supra* note 14 at 733.

25 Following the direction set out by the UNHCR, the Canadian cases distinguish between persecution and "mere discrimination", which in itself is insufficient to trigger refugee protection: see Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* revised ed (Geneva: United Nations High Commissioner for Refugees, 1992), online: UNHCR <http://www.unhcr.org/3d58e13b4.html> ("[i]t is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood ... or his access to normally available educational facilities" at para 54).

from the claimant's fundamental human rights."[26] Recognizing that violence is often experienced in uniquely gendered ways, the *Guidelines* identify several "female-specific experiences"[27] that amount to persecution, listing rape, infanticide, genital cutting, bride burning, forced marriage, domestic violence, forced abortion, and compulsory sterilization as examples. The *Guidelines* further pre-empt and counter the argument that the apparent universality of gender violence might preclude its recognition as persecution: "The fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes[,] constitute forms of persecution."[28] Instead, they explain, "The real issues are whether the violence -- experienced or feared -- is a serious violation of a fundamental human right for a Convention ground and in what circumstances can the risk of that violence be said to result from a failure of state protection."[29]

The fact that both *Ward* and the *Guidelines* anchor the refugee analysis in human rights principles is significant. First and foremost, it expanded refugee law's substantive eligibility grounds and extended refugee status to countless claimants previously denied protection, many of them women. The significance of these outcomes cannot be underestimated. Second, the emphasis on human rights signalled a shift from what Matthew Price has termed the "political model" of asylum toward the "humanitarian model of asylum."[30] As originally conceived, international refugee law was devised as a political instrument, a vehicle for protecting persecuted people while also advancing Western political values.[31] While this

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26 *Guidelines*, *supra* note 3, framework of analysis.

27 *Ibid*, part B.

28 *Ibid* [emphasis omitted].

29 *Ibid* [emphasis omitted, footnotes omitted].

30 For a more complete discussion, see Matthew E Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge, UK: Cambridge University Press, 2009) at 4ff. [Price, *Rethinking Asylum*].

31 See *ibid.* See also Hathaway, *Refugee Status*, *supra* note 22 at 6-10. As Hathaway's analysis shows, the terms of the refugee definition were reverse engineered from the political ideologies of dominant Western states and were strategically designed to bring only certain experiences of displacement within the reach of international protection. Hathaway explains: "By mandating protection for those whose (Western inspired) civil and political rights are jeopardized, without at the same time protecting persons whose (socialist inspired) socio-economic rights are at risk, the Convention adopted an incomplete and politically partisan human rights rationale" (*ibid* at 8). Hathaway demonstrates that the debates leading to the *Refugee Convention*'s enactment were largely stratified along ideological lines and fuelled by political antagonism between the Western states and the Soviet bloc. The Soviet representatives sought to base refugee status on grounds of statelessness and objected vigorously to the premise of grounding refugee status in social or ideological incompatibility. The Western states, which eventually

approach was prominent throughout the Cold War era, as the global political climate changed, so did the international community's approach to refugee law.[32] With the growing momentum of the international human rights movement, signatory states increasingly turned to human rights principles in their interpretation of refugee law. This shift sought to distance refugee law from its political roots and anchor it in a universally accepted and ostensibly "neutral" rights-based model of assessment.[33] Because human rights principles are thought to transcend the particular—or, in the words of the Supreme Court of Canada, "transcend subjective and parochial perspectives and extend beyond national boundaries"[34]—

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prevailed, decided instead to enact a highly politicized and individualistic regime with persecution as the key factor in the refugee definition. This served the dual goals of enacting a definition that was tailor-made to respond to European displacement in the aftermath of the Holocaust and the Second World War while also facilitating the condemnation of Soviet politics through international law: see *ibid* at 6-10.

32 See e.g. Price, *Rethinking Asylum*, *supra* note 30 at 4:

> The persecution requirement seemed natural in a Cold War world in which those who sought refuge in the West typically fled from strong, oppressive states. Today, many of those who seek asylum ... flee violence committed by groups as varied as guerrilla armies, death squads, criminal gangs, family members, and clans, as well as government security forces. ... These realities have put pressure on the traditional focus of asylum. Limiting asylum to persecuted people may seem too narrow: those fleeing from the violence that accompanies state breakdown and civil war, or from famine or extreme poverty, need protection from harm just as much as do persecuted people.

33 Ultimately arguing in favour of reconnecting asylum with its political roots, Price aptly summarizes the contrast between these two approaches:

> During the Cold War, asylum was viewed in *political* terms: intertwined with foreign policy, asylum was a vehicle for expressing Western political values. Asylum seekers were seen as "ballots for freedom," symbols of liberal democracy's ideological superiority over Communism. By labeling those who fled the Eastern Bloc as "persecuted" – a word that reflects a value judgment – the West expressed its condemnation of Communist regimes. ...
>
> In a post-Cold War world, one less defined by grand ideological struggle, a political conception of asylum – according to which asylum expresses political values and communicates condemnation of persecuting regimes – is in disfavor. The same impulse driving humanitarianism also suggests that asylum should be politically neutral. What matters from the humanitarian point of view is whether asylum seekers need protection. From that perspective, identifying and calling to task the party responsible for an asylum seeker's insecurity is not only beside the point, but can interfere with the purpose of asylum to protect. ... From a humanitarian standpoint, asylum has a "palliative" purpose (*ibid* at 6-7 [footnotes omitted]).

See also Matthew E Price, "Persecution Complex: Justifying Asylum Law's Preference for Persecuted People" (2006) 47:2 Harv Int'l LJ 413 at 419.

34 *Chan v Canada (Minister of Employment and Immigration)*, [1995] 3 SCR 593 at 635, 128 DLR (4th) 213 [*Chan* cited to SCR].

they are perceived to form the basis of universal protection standards not subject to the political preferences of receiving states.[35] Anchoring refugee law in the human rights paradigm allows state actors to refrain from expressing overt value judgments about the conduct of persecuting states.[36]

In the Canadian context, *Ward* has been credited with shifting refugee law away from politically motivated considerations and anchoring it firmly in the human rights paradigm.[37] Critics praised the decision for steering "a course away from the days when refugee law was used to condemn publicly enemy states for their misbehaviour."[38] They further hailed the decision as a powerful affirmation that the "protection of those at risk of serious human rights violations is the lens through which refugee law must be focused."39 Since *Ward*, the primary goal of human rights protection has been formally inscribed in the *IRPA*, which provides that Canada's refugee protection regime "is in the first instance about saving lives and offering protection to the displaced and the persecuted," as an expression of "Canada's respect for the human rights and fundamental freedoms of all human beings."[40]

Indeed, both *Ward* and the *Guidelines* have been credited with shifting the refugee analysis toward a rights-based model of assessment, which serves to channel the language of international human rights and thereby sidestep accusations of cultural imperialism. The drafters' decision to incorporate human rights principles into the *Guidelines* was devised to do just that.[41] As Nurjehan Mawani, former chair of the Immigra-

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35 According to this approach, refugee law "does not attempt to set a corrective agenda, tell another country how to act, or propose plans for eradicating particular practices" (Anker, *supra* note 9 at 146). Rather, it extends protection to those in need as "an act of assistance, of compassion, of charity to a fellow man" (Gilbert Jaeger, "A Comment on the Distortion of the Palliative Role of Refugee Protection", Comment, (1995) 8:3 Journal of Refugee Studies 300 at 300).

36 See Price, *Rethinking Asylum*, *supra* note 30 at 7.

37 See Anker, *supra* note 9 ("the Supreme Court of Canada signaled in *Ward* [that] ... refugee law increasingly refers to, and more explicitly acknowledges its foundation in, an international human rights paradigm" at 133).

38 Linda E Tranter, "A Step Forward in Protecting Human Rights: *Canada v. Ward*" (1993) 13:4 Refuge 16 at 16.

39 *Ibid.*

40 *Supra* note 6, ss 3(2)(a), (e).

41 For a complete analysis, see Audrey Macklin, "Refugee Women and the Imperative of Categories" (1995) 17:2 Hum Rts Q 213. For example, the minister of employment and immigration at the time, Bernard Valcourt, noted that recognizing gender as a basis for asylum would be to "unilaterally try to impose [Canada's] ... values on other countries regarding laws of general application" and cautioned against Canada's "act[ing] as an imperialist country" in this regard (*ibid* at 252-53, citing Estanislao Oziewicz, "Canada

tion and Refugee Board, has explained, the *Guidelines*' application "is not simply a matter of imposing western standards on other countries" but rather a "matter of respecting internationally accepted human rights standards."[42] As Audrey Macklin has shown, this approach was intended to "bolster the proposition that characterizing certain forms of sex-based discrimination and oppression as persecution represents not only Canada's view, but also that of the international community."[43] To this end, the *Guidelines* incorporate eight international human rights instruments to "assist decision-makers in determining what kinds of treatment are considered persecution."[44] They further assert that these instruments establish an "objective standard" for evaluating women's persecution claims.[45]

The human rights approach to refugee law has successfully expanded its substantive eligibility grounds but has done little to move the refugee analysis away from politically motivated considerations and toward a politically neutral model of assessment. Human rights principles do not embody an objective morality, and nor does Canadian refugee law simply by

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Not Planning to Widen Refugee Rules to Cover Sex Bias", *The Globe and Mail* (16 January 1993) A9).

42 Immigration and Refugee Board, News Release (9 March 1993), cited in Macklin, *supra* note 41 at 253. But see Macklin, *supra* note 41 at 253, n 159:

> The use of international standards is problematic however, in that not all countries have ratified them (especially the "problem countries") but also because they represent at best a consensus among powerful people (usually men) about what constitutes a violation of a fundamental human right, and may ignore the experience of oppression of those with no voice to express themselves or make themselves heard.

43 *Ibid* at 252-53.

44 *Supra* note 3, part B, framework of analysis. These instruments are the *Universal Declaration of Human Rights* (GA Res 217(III), UNGAOR, 3d Sess, UN Doc A/810 (1948) 71 [*Universal Declaration*]), *the International Covenant on Civil and Political Rights* (16 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976)), the *International Covenant on Economic, Social and Cultural Rights* (16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976)), the *Convention on the Elimination of All Forms of Discrimination Against Women* (18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (entered into force 3 September 1981, ratification by Canada 10 December 1981) [*Discrimination Against Women Convention*]), the *Convention on the Political Rights of* Women (31 March 1953, 193 UNTS 135, Can TS 1957 No 3 (entered into force 7 July 1954, accession by Canada 30 January 1957)), the *Convention on the Nationality of Married Women* (20 February 1957, 309 UNTS 65, Can TS 1960 No 2 (entered into force 11 August 1958, ratification by Canada 21 October 1959)), the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984, 1465 UNTS 85, Can TS 1987 No 36 (entered into force 26 June 1987, ratification by Canada 24 June 1987) [*Convention Against Torture*]), and the *Declaration on the Elimination of Violence Against Women* (GA Res 48/104, UNGAOR, 48th Sess, UN Doc A/RES/48/104 (1993)).

45 *Guidelines*, *supra* note 3, part D.1.2.

incorporating these principles. In fact, it is the other way around. The Canadian national identity—our understanding of ourselves, our national values, and the ideals that we privilege in our laws—informs what we see as good or bad, prescribes our political choices, and determines which practices we designate as rights violations. Put another way, the Canadian national identity does not merely *reflect* some external or universal morality but in fact *precedes* it. The pretense that Canadian refugee law somehow ceases to be value laden because it references human rights principles obscures the extent to which refugee determinations, even when grounded in human rights principles, are always *already* informed by national ideologies and political choices. In fact, Canada's stated commitment to rights protection itself operates as an expressive vehicle through which to assert and define the Canadian national identity. By asserting a commitment to human rights—which, as Peter Fitzpatrick argues, represent the "pervasive criteria" by which global standards of civilization and progress are judged—Canada claims its status as "universal exemplar" in refugee protection.[46] Viewed in this light, far from distancing the refugee analysis from Canadian political ideologies, the incorporation of human rights principles instead operates to reinscribe them. Throughout the refugee cases, the commitment to rights protection itself serves as a means through which to assert Canada's claimed identity as human rights protector and refugee acceptor. This becomes clear in the context of the state-protection analysis, to which I now turn.

C. Finding a Failure of State Protection

In order to constitute persecution, a practice must be shown not only to violate human rights but also to do so in ways that demonstrate a failure of state protection. This aspect of the definition—described in *Ward* as the "lynch-pin of the analysis"[47]—requires claimants to demonstrate "clear and convincing confirmation of [the] ... state's inability to protect."[48] This requirement reflects the underlying premise of international refugee law. As stated in *Ward*, since refugee law "was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national"[49] it comes "into play where no alternative remains to the claimant."[50] This is because refugee claims "were never meant to allow a claim-

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[46] *Modernism and the Grounds of Law* (Cambridge, UK: Cambridge University Press, 2001) at 120-21.

[47] *Supra* note 14 at 722.

[48] *Ibid* at 724.

[49] *Ibid* at 709.

[50] *Ibid* at 726.

ant to seek out better protection than that from which he or she benefits already."[51] This "surrogate or substitute protection," the Court explained, can be activated *only* upon demonstrated proof that the claimant's home state is unable to protect her from harm.[52]

Such formulations, as Price explains, prescribe that when states fail to protect their nationals, sovereignty can no longer "serve as a shield of immunity behind which unjustified harm can be inflicted with impunity."[53] In the Court's analysis, a state's inability to protect its nationals is reflective of a failure of state sovereignty. States "should be presumed capable of protecting their citizens [since s]ecurity of nationals is, after all, the *essence* of sovereignty."[54] By this logic, *Ward* effectively asks adjudicators to counteract a finding of a foreign state's *inability* to protect with a finding of Canada's ability to protect. The ability to protect—the "essence" of sovereignty—thus becomes the test not only of a subject's status as a *refugee* but also of Canada's status as provider of *refuge*. It is mobilized as an expression of the Canadian identity, a reflection and embodiment of Canadian national values and rights-protecting norms. In this way, the *Ward* analysis operates to subtly reinforce Canada's claimed identity as rights protector: with every refugee admission, the nation is repeatedly affirmed as a place that protects. In granting a claimant refugee status, Canada both guarantees her protection and offers her provisional membership in a national identity constructed, in part, by the ability to protect.

Proof of Canada's ability to protect thus also operates to position Canada as "refugee acceptor" in the division between "refugee-accepting" and "refugee-producing" states. By now thoroughly considered in the scholarly literature, this division replicates the familiar divide between us and them, self and other, West and rest; it also depicts refugee-receiving states as civilized, superior, and law-abiding, in opposition to the backward, rights-violating, refugee-producing states of the global East and South. As Catherine Dauvergne and Jenni Millbank explain, refugee law is "erected on a foundation of 'othering'," which is "sustained by a recurrent division between 'us' and 'them'."[55] Within this framework, as Macklin argues, Western states like Canada assert their identities as refugee

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51 *Ibid.* The Court further held that "Canada's obligation to offer a haven to those fleeing their homelands is not unlimited" (*ibid* at 738).

52 *Ibid* at 709, citing Hathaway, *Refugee Status*, *supra* note 22 at 135. See *Ward*, *supra* note 14 at 716.

53 *Rethinking Asylum*, *supra* note 30 at 76-77.

54 *Ward*, *supra* note 14 at 725 [emphasis added].

55 "Forced Marriage as a Harm in Domestic and International Law" (2010) 73:1 Mod L Rev 57 at 58 [Dauvergne & Millbank, "Forced Marriage"].

acceptors by distinguishing themselves from "what they are *not*, namely, the kind of governments that do the kinds of things to people that propel them to claim refugee status."[56]

D. Grounds of Admission

To satisfy the refugee definition, after having demonstrated the state's failure to protect from persecution, a claimant must next establish a nexus between the feared persecution and at least one of the definition's enumerated grounds: race, religion, nationality, political opinion, or membership of a particular social group. While the *Guidelines* encourage claimants to advance gender claims under all five grounds, the most common (and, arguably, most effective) method shows the claimant's membership in a gender-defined "particular social group".[57] According to *Ward,* commonality and immutability are the two requirements necessary for defining a social group: group members must "share a common, immutable characteristic" that "either is beyond the power of the individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed."[58] Further emphasizing the significance of human rights to the interpretation of the refugee definition, *Ward* instructs that particular social group designations should "take into account the general underlying themes of the defence of human rights

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[56] *Supra* note 41 at 263-64. The relationship between national identity and rights in Canadian refugee law is well canvassed in the scholarly literature. For a comprehensive treatment, see Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws of Australia and Canada* (Vancouver: University of British Columbia Press, 2005). As Dauvergne argues, because it forces a confrontation with a quintessential representation of the "other", refugee law offers a rich site in which to search for the representations of the "self", "a site for assembling a picture of national identity and as the effective boundary of the nation" (*ibid* at 81). See also Audrey Kobayashi, "Challenging the National Dream: Gender Persecution and Canadian Immigration Law" in Peter Fitzpatrick, ed, *Nationalism, Racism and the Rule of Law* (Aldershot, UK: Dartmouth, 1995) 61. Kobayashi argues that refugee women are confined by the victimization they must portray to attain status and that this victimization narrative is influenced by national identity narratives (*ibid* at 70-71).

[57] *Guidelines, supra* note 3. See also *Report of the Thirty-Sixth Session of the Executive Committee of the High Commissioner's Programme,* UNGAOR, 36th Sess, UN Doc A/AC.96/673 (1985) [*UNHCR Conclusions*] (notably as well, in 1985 the UNHCR Executive Committee recognized the use of the "particular social group" ground in cases involving "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live" at para 115(4)(k)).

[58] *Supra* note 14 at 737, citing *Matter of Acosta,* 1985 WL 56042 (US Department of Justice Board of Immigration Appeals).

and anti-discrimination that form the basis for the international refugee protection initiative."[59]

Subsequently to *Ward's* release, the "membership of a particular social group" ground has evolved into a catch-all category that encompasses a range of ascriptive characteristics not specifically enumerated in the definition, such as gender, sexual orientation, disability, or lineage, to list a few.[60] Canadian adjudicators have adopted two distinct methods by which to define gender-specific social groups. Some have recognized groups defined as "women" or by the shared attribute "gender", following the *Guidelines*' directive that gender "is an innate characteristic and, therefore, women may form a particular social group."[61] Others have recognized more particularized formulations, defining the social group by reference to gender in addition to other criteria. The *Guidelines* also endorse this latter approach and instruct as follows:

> Particular social groups comprised of sub-groups of women may also be an appropriate finding in a case involving gender-related persecution. These particular social groups can be identified by reference to factors, in addition to gender, which may also be innate or unchangeable characteristics. Examples of other such characteristics are age, race, marital status and economic status. Thus, for example, there may be sub-groups of women identified as old women, indigenous women, single women or poor women. In determining whether these factors are unchangeable, consideration should be given to the cultural and social context in which the woman lives, as well as to the perception of the agents of persecution and those responsible for providing state protection.[62]

It is worth noting that signatory states like the United Kingdom[63] and Australia[64] have rejected this approach, making these highly particularized formulations distinctly Canadian.[65]

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59 *Ward*, *supra* note 14 at 739.

60 For a more complete discussion, see Price, *Rethinking Asylum*, *supra* note 30.

61 *Supra* note 3, part A.III [emphasis omitted, footnote omitted].

62 *Ibid* [emphasis omitted].

63 See *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal; Ex Parte Shah*, [1999] UKHL 20, [1999] 2 AC 629.

64 See *Minister for Immigration and Multicultural Affairs v Khawar*, [2002] HCA 14, 210 CLR 1.

65 See Michelle Foster, *The "Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments Relating to "Membership of a Particular Social Group"* (Geneva: UNHCR, 2012), online: UNHCR <http://www.unhcr.org/refworld/docid/4f7d94722.html> (a comparative assessment of how the "particular social group" ground is applied and interpreted in a variety of domestic-law settings).

II. The Domestic Violence Cases: An Overview

A. Methodology

Using the three central components as a framework for analysis, my study examines how adjudicators approach refugee-determination cases involving claims of domestic violence. The domestic violence cases comprise the largest category of reported cases, numbering 528 in total.[66] This figure includes claims of spousal or familial physical violence, sexual violence, and spousal or familial rape. It does not include claims involving rape or assault by state actors or non-spousal or non-familial third parties. Of the cases in the category, 107 resulted in positive outcomes (either refugee admissions or successful appeals) and 421 resulted in negative outcomes (denials of status requests or appeal requests). Most of the unsuccessful cases were rejected on the grounds that the claimant could not prove a failure of state protection, did not advance sufficiently credible evidence, or lacked credibility.[67] These figures show an acceptance rate of roughly 20 per cent. Since the IRB publishes only a small fraction of its decisions, these figures do not accurately reflect the acceptance rate in the domestic violence cases. Indeed, partial statistics obtained from the IRB report a different rate. Between 1 January 2002 and 31 December 2006, the IRB recorded an acceptance rate of 43.9 per cent in cases involving principal claimants who alleged domestic violence persecution.[68] Between 1 January 2008 and 30 June 2012, the IRB recorded an acceptance rate of

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66 My examination builds on a previous study conducted by Constance MacIntosh, which examined 135 domestic violence cases released between 2004 and 2009: "Domestic Violence and Gender-Based Persecution: How Refugee Adjudicators Judge Women Seeking Refuge from Spousal Violence—and Why Reform Is Needed" (2009) 26:2 Refuge 147. My study expands the analysis to a larger data set and arrives at different results.

67 While the grounds of rejection frequently overlapped, when assessed solely on the basis of the principal reason cited for rejection, the cases divided as follows: Of the negative cases surveyed, 269 (64 per cent of the rejected cases) were dismissed principally on the grounds that the claimant either could not prove a failure of state protection or was able to access an internal flight alternative. A further 114 claims (27 per cent of the rejected cases) were principally dismissed on the grounds that the claimant either was not credible herself or failed to advance credible evidence. In addition, 26 claims (6 per cent of the rejected cases) were dismissed on the ground that the claimant was unable to adduce sufficient evidence to substantiate her claim. The remaining 12 cases (3 per cent of the rejected cases) were dismissed on other grounds—for example, a change in country conditions or an inability to link the feared persecution with a ground listed in the *Refugee Convention*.

68 These figures were obtained pursuant to request # A-2012-00056 /1-d filed under the *Access to Information Act* (RSC 1985, c A-1). The full record reads as follows: "Between January 1 2002 and December 31 2006, there were 6,185 *Principal* claimants referred who alleged domestic violence persecution. All have been finalized. 2,714 were accepted & 2,734 were rejected. 737 were withdrawn or abandoned" [emphasis in original].

48.7 per cent in cases involving principal claimants who alleged domestic violence persecution.[69] Because the IRB has not electronically tracked data outside of these specific periods, it is difficult to estimate the acceptance rate for the twenty-year period here examined. With this in mind, my study does not purport to analyze the domestic cases quantitatively but rather reflects on broad patterns of adjudication based on the best available data.

My study analyzed the domestic violence cases through a comparison with the second- and third-largest categories of reported gender cases. Respectively, these categories involve cases of forced abortion or compulsory sterilization, and cases of genital cutting. I examined 60 reported cases involving forced abortion or compulsory sterilization, which I refer to below under the broad heading "forced sterilization". Of these, 15 resulted in positive outcomes and 45 in negative outcomes, amounting to an acceptance rate of 25 per cent. I also examined 57 reported cases involving genital cutting, of which 23 resulted in positive outcomes and 34 in negative outcomes, amounting to an acceptance rate of 40 per cent. As noted above, since the IRB publishes only a small fraction of its decisions, it is difficult to ascertain whether this data set accurately reflects actual patterns and trends.

I thus examined a total of 645 decisions,[70] restricting my analysis to female claimants only, on the basis that the *Guidelines* do not apply to male claimants. I did not examine cases involving the remaining "gender-specific" forms of persecution listed in the *Guidelines*, as these cases were either too few in number or have been well canvassed elsewhere.[71] I also

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69 These figures were also obtained pursuant to request # A-2012-00056 /1-d filed under the *Access to Information Act* (*supra* note 68). The full record reads as follows: "Between January 1 2008 and June 30 2012, there were 4,744 *Principal* claimants referred who alleged domestic violence persecution. Of these, 3,654 have been finalized. 1,779 were accepted & 1,444 were rejected. 431 were withdrawn or abandoned" [emphasis in original].

70 The study is limited to decisions reported by the LexisNexis Quicklaw database. This database was selected because it includes a pool of decisions that is significantly larger than the pool of decisions posted by the IRB on its RefLex database. The search terms used were "refugee", "domestic violence", "intimate violence", and "domestic abuse". The results of this initial search were vetted on a case-by-case basis following the criteria set out above.

71 The largest category of the remaining "female-specific" cases involved claims of forced marriage, which have been thoroughly examined in Dauvergne & Millbank, "Forced Marriage", *supra* note 55. My study also identified one case involving a claim of infanticide: *Re T (YA)* ([1991] CRDD No 944 (QL)); several other cases involved tangential allegations of infanticide that were dismissed entirely by the adjudicator and not given any weight. In addition, my study identified two cases involving allegations of "bride burning": In *Re OCD* ([1999] CRDD No 303 (QL)), the board referenced "bride-burning" in passing (*ibid* at para 15) but focused primarily on the claimant's fear of abuse at the

did not examine cases involving persecution on grounds of sexual orientation or sexual identity since the IRB assesses these cases differently and often without referencing the *Guidelines*.[72] I classified the decisions based on the nature of the claim alleged, following the central components of the refugee definition: the persecution analysis (divided into the human rights–violation assessment and the state-protection assessment) and the grounds-of-admission analysis.

My research suggests that cases involving forced sterilization and genital cutting were characterized by three general tendencies: adjudicators consistently identified forced sterilization and genital cutting as rights violations; they directed comparatively little attention to the state-protection analysis; and they generally admitted claimants on the ground of their membership in broad "particular social groups" defined as "women" or by the common attribute "gender". In contrast, cases involving domestic violence were characterized by three different tendencies: adjudicators rarely identified domestic violence as a rights violation in itself; they based their determinations on the availability of state protection

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hands of her family members. Similarly, in *Re HVV* ([1998] CRDD No 217 (QL)), the board referred to "dowry deaths" (*ibid* at para 13), but its assessment of the practice was not determinative of the case. Since these cases were too few in number to reveal any significant pattern of adjudication, they did not factor into my analysis.

My study also identified an additional forty gender cases that involved claims of persecution not specifically recognized in the *Guidelines*. Of these, the largest proportion involved claims relating to the "transgression of social mores," a category recognized in the *UNHCR Conclusions* (*supra* note 57 at para 115(4)(k)), which has since been incorporated into Canadian law. These cases primarily involved claimants persecuted for their participation in activities that promote women's rights (see *Re CHD*, [2006] RPDD No 16 (QL), (15 February 2006), VA5-00531, online: RefLex Issue 294 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=12098&l=e>; *Re UHQ*, [2000] CRDD No 90 (QL), (24 May 2000), T99-10229, online: RefLex Issue 143 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=912&l=e>) or for their adoption of a "Westernized" lifestyle (see *Re CSE*, [2001] CRDD No 29 (QL) at para 48, (9 March 2001), VA0-00566, online: RefLex Issue 163 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=8561&l=e>). The case of *Re BGI* ([1997] CRDD No 266 (QL)) also involved allegations of forced marriage, but these were discussed only minimally. Finally, a growing number of cases involved "honour-killing" claims advanced by both male and female claimants. As with the infanticide and bride-burning cases, these were too few in number to demonstrate any real pattern of adjudication and thus were not taken into account in my analysis.

72 For an analysis of claims involving sexual orientation, see e.g. Erik D Ramanathan, "Queer Cases: A Comparative Analysis of Global Sexual Orientation-Based Asylum Jurisprudence" (1996) 11:1 Geo Immig LJ 1; Kristen Walker, "New Uses of the Refugees Convention: Sexuality and Refugee Status" in Susan Kneebone, ed, *The Refugees Convention 50 Years On: Globalisation and International Law* (Aldershot, UK: Ashgate, 2003) 251; Catherine Dauvergne & Jenni Millbank, "Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers" (2003) 31:2 Federal Law Review 299.

(and frequently located the source of persecution in cultural difference); and they generally admitted claimants on the ground of their membership in a highly specific "particular social group". I chart an overview of these findings below, using the three central components of the refugee definition as a framework for analysis.

B. Finding a Human Rights Violation

1. Forced-Sterilization and Genital-Cutting Cases

In cases involving forced sterilization, adjudicators frequently referenced human rights principles in assessing whether the practice amounted to persecution. Most of the reported IRB cases followed the Federal Court of Appeal's findings in *Cheung v. Canada (Minister of Employment and Immigration) (C.A.)* that forced sterilization "is a fundamental violation of basic human rights," a "serious and totally unacceptable violation of ... security of the person" that subjects women to "cruel, inhuman and degrading treatment."[73] In *Zheng v. Canada (Minister of Citizenship and Immigration)*, the Federal Court similarly held that forced sterilization is a violation of basic rights "ranking high on our scale of values" and amounting to persecution.[74] Following these decisions, at the IRB level, adjudicators consistently held that forced sterilization is a violation of the human right[75] variously identified as the right to security of person,[76] the

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[73] [1993] 2 FC 314 at 324, 102 DLR (4th) 214. Notably as well, the court explicitly rejected the argument that forced sterilization is exempt from scrutiny as a law of general application, on grounds that such a finding "ignore[s] the severity of the intrusiveness of sterilization to a person's mental and physical integrity" (*ibid* at 319).

[74] 2009 FC 327 at para 14, 343 FTR 247 [*Zheng*], citing *E (Mrs) v Eve*, [1986] 2 SCR 388 at para 92, 31 DLR (4th) 1. Similarly, in *Chan*, a Supreme Court of Canada decision involving a male claimant, the dissent notably concluded that it was "utterly beyond dispute that forced sterilization is in essence an inhuman and degrading treatment involving bodily mutilation, and constitutes the very type of fundamental violation of basic human rights that is the concern of refugee law" (*supra* note 34 at 636). The Court, sitting as a panel of seven, was split four to three, with Justices Sopinka, Cory, Iacobucci, and Major in the majority, and Justices La Forest, L'Heureux-Dubé, and Gonthier dissenting. The majority rejected the claimant's application for refugee status not based on the finding that sterilization did not amount to persecution but rather based on the finding that the evidentiary threshold had not been met (*ibid* at 673). The dissent would have allowed the claim following the reasoning set out above.

[75] See *Re BAJ*, [2000] CRDD No 33 (QL), (15 February 2006), V99-03499, online: RefLex Issue 136 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=2908&l=e> [cited to QL] ("the forced sterilization of women is a fundamental violation of basic human rights. ... [E]ven the threat of forced sterilization can ... ground a fear of persecution" at para 8).

[76] See *Re B (KA)*, [1994] CRDD No 308 (QL) ("[t]he claimant is a Chinese woman who wishes to exercise her fundamental right to reproductive control and security of the

right to reproductive choice,[77] or the right to bear a child,[78] and that it thus amounts to persecution.[79] The emphasis on human rights was also

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person. There is more than a mere possibility that she would not be permitted to do so for persecutory reasons in China").

77 See *Re FET*, [1996] CRDD No 141 (QL). See also *Re B (KA)*, *supra* note 76; *Zheng*, *supra* note 74 ("interference with a woman's reproductive liberty is [interference with] a basic right" at para 14); *Chi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 126 (available on CanLII) [*Chi*] ("[t]he punishment that the applicant fears is the state-enforced suppression of her reproductive capacity" at para 48).

78 See *Re B (KA)*, *supra* note 76; *Re X (EL)*, [1995] CRDD No 1 (QL) ("the claimant was caught between two potential agents prepared to violate her fundamental human rights with respect to the control over her reproductive capacity and her integrity and dignity as a 'female' person"); *Re T (ZB)*, [1993] CRDD No 429 (QL) ("the right to bear a child is a fundamental human right").

79 This approach is typical only of cases issued after the release of the *Guidelines*. Most of the forced-sterilization cases issued prior to 1993 were dismissed on the rationale that, as a law of general application, China's one-child policy could not amount to persecution: see e.g. *Re A (OO)*, [1990] CRDD No 631 (QL) ("[w]hile we may find the policy abhorrent, we do not have the right to find it unjustified in the circumstances which prevail in the P.R.C."); *Re Y (WR)*, [1989] CRDD No 37 (QL) ("the policy is not applied to a specific person or group of persons by reason of their race, religion, political opinion or membership in a particular social group. The policy cannot, therefore, constitute a basis for a well-founded fear of persecution"); *Re Z (JH)*, [1991] CRDD No 361 (QL) ("[w]e do not consider the Chinese government's attitude toward birth control to constitute persecution per se. This policy is essentially designed to ensure the well-being of the population and has received the support of many international organizations, including the United Nations"). See also *Re E (HB)*, [1990] CRDD No 644 (QL); *Re B (LV)*, [1991] CRDD No 548 (QL); *Re T (MO)*, [1992] CRDD No 53 (QL); *Re X (QH)*, [1991] CRDD No 859 (QL); *Re T (XA)*, [1990] CRDD No 427 (QL); *Re L (YR)*, [1992] CRDD No 599 (QL); *Re L (AF)*, [1991] CRDD No 196 (QL). Adjudicators generally agreed it would be "presumptuous of the Refugee Division to consider itself in a better position than the government of the P.R.C. to determine what family planning policies are necessary or desirable in the P.R.C. at the present time" (*Re N (JW)*, [1991] CRDD No 5 (QL) at para 8.8).

The shift from the pre-*Guidelines* concern for respecting China's sovereign entitlement to manage its population as it saw fit toward the post-*Guidelines* concern for Canada's obligation to condemn forced sterilization as a human rights violation is notable. It suggests that the contemporary cases are not constrained by deference to China's sovereign prerogatives; rather, they are driven by a desire to return "the focus of a refugee hearing to the essential question of whether the claimant's basic human rights are in fundamental jeopardy" (*Chan*, *supra* note 34 at 634, La Forest J, dissenting). While these statements characterize the majority of the early decisions, a small handful of these early cases explicitly recognizes forced sterilization as a persecutory act, and almost all rely on an explicit citation of human rights principles to justify their holdings: see e.g. *Re X (DK)*, [1989] CRDD No 293 (QL); *Re I (RR)*, [1992] CRDD No 87 (QL); *Re A (WR)*, [1989] CRDD No 98 (QL); *Re N (UR)*, [1989] CRDD No 41 (QL). It is also notable that the citation of human rights principles in the pre-*Guidelines* cases did not always support a positive finding of admission. At least one decision noted with express regret that "all human rights violations do not constitute persecution" (*Re L (AF)*, *surpa* note 79 at para 7.1).

prominent in a series of cases that excluded claimants from protection pursuant to section 98 of the *IRPA* because of their role in enforcing China's one-child policy.[80] While these cases were comparatively few in number, their results were consistent: adjudicators not only recognized forced sterilization as a rights violation but also identified it as a crime against humanity.[81] It is also notable that, in many of these cases, adjudicators used strong language to condemn forced sterilization as an "inhuman" practice,[82] an act of "barbarous cruelty",[83] and an act "contrary to human dignity."[84]

Cases involving genital cutting largely followed a similar pattern. In its 1995 decision in *Annan v. Canada (Minister of Citizenship and Immigration) (T.D.)*, the Federal Court identified genital cutting as a "cruel and barbaric practice" that constitutes persecution.[85] IRB adjudicators have arrived at similar determinations: adjudicators have held that it is "well established" that genital cutting "is a persecutory act,"[86] which "*must* be characterized as a form of persecution."[87] IRB adjudicators have further

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80 *IRPA*, *supra* note 6, s 98 (excluding from refugee status persons who have committed war crimes, crimes against peace, or crimes against humanity).

81 See e.g. *Re P (UO)*, [1995] CRDD No 62 (QL); *Re YFI*, [1998] CRDD No 42 (QL); *Re USS*, [1999] CRDD No 290 (QL); *Re MKC*, [2004] RPDD No 19 (QL), (9 February 2004), VA2-00206, online: RefLex Issue 235 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=10940&l=e> [cited to QL]; *Re MON*, [2004] RPDD No 23 (QL), MA3-09245, online: RefLex Issue 238 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=11024&l=e>.

82 *Re FET*, *supra* note 77 at para 16, citing *Chan*, *supra* note 34 at 636, La Forest J, dissenting.

83 *Re MKC*, *supra* note 81 at para 25.

84 *Ibid.* See also *Yang v Canada (Minister of Citizenship and Immigration)* (1999), 164 FTR 147 (available on CanLII); *Lai v Canada (Minister of Citizenship and Immigration)*, 2005 FC 179 (available on CanLII) (both holding that forced sterilization offends the conscience of right-thinking persons).

85 [1995] 3 FC 25 at 28 (available on CanLII) [*Annan*].

86 *Re IFL*, [1999] CRDD No 214 (QL) ("[t]hat the performance of FGM [female genital mutilation] is a persecutory act is well established in the case law" at para 13).

87 *Re RSF*, [1997] CRDD No 78 (QL) at para 33 [emphasis added]. See also *Re FOH*, [2003] RPDD No 4 (QL) ("according to the Canadian jurisprudence, ... FGM is considered in Canadian and international law as a form of persecution" at para 15); *Re MTF*, [2003] RPDD No 7 (QL), (3 January 2003), MA2-04725, online: RefLex Issue 206 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=10252&l=e> [cited to QL] ("[f]orced FGM is considered as persecution by the Canadian jurisprudence" at para 17); *Re XJV*, [1996] CRDD No 15 (QL) ("[f]emale circumcision has been recognized as constituting persecution by the Federal Court of Canada. At the international level, the Declaration on the Elimination of Violence against Women states that genital mutilation is included in the definition of violence against women and that it constitutes a vio-

held that genital cutting is a "sustained and systemic violation of several of the most fundamental [human] rights,"[88] including the right to life, liberty, and security of person; the right to health; the right against cruel or inhuman treatment; the right not to be married against one's consent; and the right to "special protection for motherhood."[89] The rationale underpinning these findings is that genital cutting is a practice "so severe" that its "characterization [as] ... persecution [is] beyond dispute."[90] In keeping with the *Guidelines*' instructions, adjudicators frequently cited human rights instruments in these decisions.[91] As with the forced-sterilization cases, many adjudicators depicted genital cutting as "cruel and barbaric",[92] a "horrendous" custom,[93] a "torturous custom",[94] a "horrific torture",[95] and an "atrocious mutilation".[96]

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lation of the rights of women and children" at para 15 [footnote omitted]); *Re DVH*, [1998] CRDD No 102 (QL) at paras 34-35:

> [T]he three minor claimants ... have a well-founded fear of persecution in Somalia and ... are Convention refugees.
>
> Since FGM is a widespread practice in Somalia, IFA [internal flight alternative] is not an issue for these claimants.

88 *Re RSF*, *supra* note 87 at para 33.

89 *Ibid* at paras 20-26.

90 See *Re WQC*, [2001] CRDD No 167 (QL) at para 34.

91 See e.g. *Re G (LD)*, [1994] CRDD No 412 (QL) (referring to the *Universal Declaration* (*supra* note 44) and the *Convention on the Rights of the Child* (20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 (entered into force 2 September 1990, ratification by Canada 13 December 1991))); *Re XJV*, *supra* note 87 at para 15 (referring to the *Declaration on the Elimination of Violence Against Women* (*supra* note 44)); *Re RSF*, *supra* note 87 at para 21 (referring to the *Constitution of the World Health Organization* (22 July 1946, 14 UNTS 185, Can TS 1946 No 32 (entered into force 7 April 1948, acceptance by Canada 29 August 1946), online: World Health Organization <http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf>)); *Re SCK*, [2001] CRDD No 401 (QL) at para 26, (18 December 2001), MA1-00356, online: RefLex Issue 192 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=8858&l=e> (referring to the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*])).

92 *Annan*, *supra* note 85 at 28. See also *Re EKD*, [2001] CRDD No 174 (QL) ("[a]s for the genital mutilation that is the basis of the minor female claimant's fears, ... this is a barbaric practice, which deprives a human being of part of her body" at para 8).

93 *Re G (LD)*, *supra* note 91 (Evidence of the head of obstetrics and gynaecology at Wellesley Hospital in Toronto).

94 *Re B (PV)*, [1994] CRDD No 12 (QL), citing Berhane Ras-Work, "Female Genital Mutilation" (Paper delivered at the Conference on Gender Issues and Refugees: Development Implications, York University, 9-11 May 1993) at 1, 5, *Conference Papers on Gender Issues and Refugees: Development Implications* (North York: York University Centre for Refugee Studies, 1993) (quoting women's rights advocates in Africa).

95 *Annan*, *supra* note 85 at 30.

2. Domestic Violence Cases

The cases examined in this data set confirm one very positive trend: adjudicators consistently recognized domestic violence as persecution for the purposes of the refugee analysis. This finding is consistent with those of Constance MacIntosh, who examined 135 domestic violence decisions released between 2004 and 2009.[97] Two distinct patterns further distinguish adjudicators' approach to the first branch of the persecution analysis, the human rights–violation assessment. First, despite *Ward*'s instruction that persecution is defined as a sustained and systemic violation of human rights, adjudicators rarely identified domestic violence as a rights violation *in itself*. Second, despite the *Guidelines*' instructions that adjudicators should consider human rights instruments and norms, adjudicators rarely referenced human rights in the domestic violence cases. My study identified only fifteen reported decisions over the twenty-year period examined in which adjudicators either explicitly identified domestic violence as a human rights violation or relied on human rights instruments.[98] All

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96 *Ibid.*

97 *Supra* note 66 at 152.

98 These cases are as follows: *Re G (AU)*, [1993] CRDD No 350 (QL) (referring to the *Guidelines* (*supra* note 3) and the *Convention Against Torture* (*supra* note 44) for the conclusion that the "claimant has an internationally protected right to protection from domestic violence and failure to give that protection is a form of gender-based discrimination"); *Re S (KL)*, [1993] CRDD No 185 (QL) (referring to the *Universal Declaration* (*supra* note 44), the *Convention Against Torture* (*supra* note 44), the *International Covenant on Civil and Political Rights* (*supra* note 44), the *Discrimination Against Women Convention* (*supra* note 44), and the *Convention on the Political Rights of Women* (*supra* note 44) in relation to the finding that "violence against women ... contravenes internationally recognized standards" and the conclusion that the claimant "fears abuses of her basic human rights not to be subjected to cruel and unusual treatment as prohibited by the U.N. Convention Against Torture"); *Re D (RG)*, [1993] CRDD No 261 (QL) (referring to a report of the United Nations Committee on the Elimination of Discrimination Against Women and, notably, admitting the claimant on grounds of nationality and religion rather than gender); *Re C (IJ)*, [1995] CRDD No 30 (QL) (referring to the *Universal Declaration* (*supra* note 44) and the *International Covenant on Civil and Political Rights* (*supra* note 44), and concluding that the "continued physical, sexual and emotional abuse which the claimant experienced constitutes a violation of the security of person and amounts to cruel, inhuman and degrading treatment"); *Re Q (TP)*, [1995] CRDD No 107 (QL) (referring to a 1992 report of the United Nations Committee on the Elimination of Discrimination Against Women); *Re B (TD)*, [1994] CRDD No 391 (QL) (citing the *Discrimination Against Women Convention* (*supra* note 44) and finding that the claimant "has an internationally protected right to protection from domestic violence"); *Re C (UY)*, [1994] CRDD No 389 (QL) (referring to the *Universal Declaration* (*supra* note 44) and the *Guidelines* (*supra* note 3) in finding that the "claimant's internationally protected right to personal security was routinely violated by the pattern of domestic violence in her common-law marriage"); *Re M (XK)*, [1994] CRDD No 78 (QL) (referring to the *Universal Declaration* (*supra* note 44) and finding that "the continued physical, sexual and emotional abuse which the claimant experienced constitutes a vio-

of these decision resulted in positive admissions. I did not identify a single negative decision in which adjudicators cited human rights principles. The lack of references to human rights instruments and principles in the domestic violence cases is notable.

C. Finding a Failure of State Protection

1. Forced-Sterilization and Genital-Cutting Cases

At the state-protection stage of the analysis, my study also identified key differences between the domestic violence cases and the forced-sterilization and genital-cutting cases. In the forced-sterilization and genital-cutting cases examined, adjudicators by and large engaged in the state-protection analysis only minimally, often because the state was directly responsible for the persecution at issue. In the cases of forced sterilization, adjudicators generally agreed that, since forced sterilization is a "state-enforced suppression of ... [a woman's] reproductive capacity,"[99] it would be "objectively unreasonable to expect the claimant ... to enlist the protection of the state, which was acting as an agent of her persecution."[100] In most of the genital-cutting cases, adjudicators either did not

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lation of the security of person and amounts to cruel, inhuman and degrading treatment"); *Re O (KY)*, [1994] CRDD No 169 (QL) (referring to the *Guidelines* (*supra* note 3), the *Convention Against Torture* (*supra* note 44), and the *Discrimination Against Women Convention* (*supra* note 44), and finding that the claimant suffered a human rights violation as well as a violation of her internationally protected rights as a parent, given that her husband deprived her of custody of and access to her children); *Re HGK*, [1996] CRDD No 207 (QL) (finding that "[d]omestic violence exists in every society" and that "[i]t is a serious human rights violation that affects not only the victims but their children" at para 25); *Re IMV*, [1996] CRDD No 98 (QL) ("sexual assault is a breach of the most basic human rights, from which no exceptions are permitted under the Universal Declaration of Human Rights, and is also an offence against the right of security of the person" at para 14); *Re Y (OE)*, [1994] CRDD No 269 (QL) (referring to the *Universal Declaration* (*supra* note 44) and section 15(1) of the *Charter* (*supra* note 91)); *Re HTO*, [1997] CRDD No 141 (QL) (finding that women subjected to domestic violence have had their human rights denied); *Re CAK*, [1997] CRDD No 333 (QL) (finding that a woman's right to leave an abusive relationship is a basic human right). See also *Re I (GF)*, [1993] CRDD No 114 (QL) (concluding that the "claimant has suffered, for years, cruel, inhuman, degrading treatment inflicted on her by her former husband," the IRB used language typically associated with human rights, and while not citing human rights instruments directly, nonetheless referenced human rights principles by citing the *Guidelines* (*supra* note 3) as follows: "The Guidelines suggest that, in assessing the feared harm, the evidence should establish whether or not the violence experienced or feared is a serious violation of a fundamental human right for Convention grounds, and in what circumstances may the risk of that violence be said to result from a failure of the state's protection").

99 *Chi*, *supra* note 77 at para 48.

100 *Re RZQ*, [1997] CRDD No 102 (QL) at para 23.

comment on the availability of state protection,[101] presumed state protection would be lacking,[102] or engaged in the state-protection analysis only minimally.[103] This pattern suggests that, in cases involving practices identified as rights violations, the state-protection analysis is less determinative to the refugee assessment.

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[101] See e.g. *Re GIA*, [1998] CRDD No 274 (QL); *Re IFL*, *supra* note 86; *Re QQX*, [1996] CRDD No 52 (QL).

[102] See e.g. *Re DVH*, *supra* note 87 (the IRB does not engage in the state-protection analysis but notes that "[s]ince [FGM] is a widespread practice in Somalia, IFA is not an issue for these claimants" at para 35); *Re FOH*, *supra* note 87 (the IRB does not engage in the state-protection analysis but grounds its finding in documentary evidence indicating that "98 percent of women in Somalia undergo FGM, and 80 percent of women suffered infibulation, which is the most radical form of FGM" at para 14); *Re N (ID)*, [1994] CRDD No 311 (QL) (the IRB does not engage in the state-protection analysis but grounds its finding in documentary evidence indicating high rates of FGM in Somalia, as above); *Re G (LD)*, *supra* note 91 (the IRB does not engage in the state-protection analysis but relies on previous cases involving women fearing genital cutting in Somalia); *King v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1120, 240 FTR 8 (the Federal Court does not engage in the state-protection analysis but relies on evidence that FGM is widespread in certain regions of Liberia, and that "there is no law against FGM in Liberia and there appears to be little support to curb the practice from community leaders, elders, chiefs, and government officials" at para 17); *Re MTF*, *supra* note 87 (in finding that the claimant was "not persecuted by the state" and had no internal flight options, the IRB engages in a minimal degree of state-protection analysis and relies on evidence that "the Ugandan government and international organisations operating in Uganda deploy important educational efforts in order to discourage the practice of FGM. However, while being discouraged, the practice of FGM in Uganda is not outlawed and can still be performed legally" at paras 16, 20); *Re RPX*, [2003] RPDD No 84 (QL), (12 June 2003) MA2-10373, online: RefLex Issue 220 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=10636&l=e> (in finding that the claimant had no internal flight alternative and that, while the issue of state protection "was not really argued at the hearing," the IRB relied on documentary evidence indicating that "women subject to a risk of excision have no recourse, not only because it involves a tradition to which they cannot object, but also because no action is taken against those who contravene the Act even though genital mutilation is illegal" at paras 16-17).

[103] See e.g. *Re RSF*, *supra* note 87 (the IRB held that state protection would be lacking based on evidence that the Ghanaian government "decided to abandon the claimant and her young female friends to their fate and then refused to enforce its own legislation concerning the banning of FGM" at para 47). Moreover, in two different cases involving claimants from Guinea, and another involving a claimant from Nigeria, the IRB found state protection was lacking given evidence that genital cutting was a deeply entrenched cultural ritual that was itself "discriminatory, dangerous and unacceptable," and harmed the rights of women: see *Re SCK*, *supra* note 91 at para 30; *Re XJV*, *supra* note 87 (noting that genital cutting is a significant part of the local culture, and that the "government tolerates if not supports the practice" at paras 14, 17); *Re WRI*, [2000] CRDD No 43 (QL), (14 February 2000), T99-00663, online: RefLex Issue 137 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=979&l=e> [cited to QL] (noting the state's "inability to protect victims of sexual violence and harmful customary rituals in Nigeria" at para 16).

2. Domestic Violence Cases

In contrast, in the domestic violence cases, adjudicators' determinations generally hinged on the state-protection analysis. In cases resulting in negative decisions, adjudicators rarely engaged in a contextual analysis when evaluating the availability of state protection, a fact that suggests the standard for demonstrating meaningful enforcement is relatively low.[104] For example, many adjudicators identified the existence of anti–domestic violence legislation, women's shelters, or other protective services as sufficient to show the availability of state protection, with few referring to documentary material on the adequacy or accessibility of these measures. Adjudicators usually found state protection was available in cases where the state made good-faith efforts to take the problem of violence against women seriously[105] by enacting legislation,[106] training specialized police units,[107] providing legal-aid services,[108] or establishing shel-

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[104] In this respect, my study arrives at similar conclusions as the study conducted by MacIntosh (*supra* note 66). MacIntosh's study concludes that adjudicators often failed to engage in a substantive, contextual understanding of the evidence before them in evaluating the availability of state protection, and that in a vast majority of the negative decisions, adjudicators drew on social or cultural factors at a very low rate. My study further shows that in many of the successful cases, adjudicators drew on social and cultural factors quite extensively and in fact frequently based their determinations on an assessment of these factors.

[105] See e.g. *Re UFQ*, [2005] RPDD No 78 (QL), (2 September 2005), TA5-02334, online: RefLex Issue 272 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=11688&l=e> (state protection available in Israel given evidence that the "Israeli authorities are conscious of the problems and have instituted laws as well as state and social agencies to deal with domestic abuse" at para 27); *Re BWZ*, [2004] RPDD No 13 (QL) at paras 8, 10-13, (3 February 2004), TA3-04991, online: RefLex Issue 234 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=10918&l=e> (state protection available in the Philippines given evidence that the government was "making serious efforts to address the problem of violence against women" and that various measures had been taken).

[106] See e.g. *Re ATZ*, [2003] RPDD No 47 (QL), (12 March 2003), TA2-03858, online: RefLex Issue 213 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=10490&l=e> (state protection available in St. Vincent given evidence that legislation aimed at domestic violence was passed in 1995 and is being implemented); *Re EUS*, [2003] RPDD No 63 (QL), (12 June 2003), AA2-01089, online: RefLex Issue 218 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=10598&l=e> (state protection available in El Salvador given evidence of legislation designed to address domestic violence); *Re QLG*, [1996] CRDD No 172 (QL) (state protection available in Ecuador given evidence of a new law concerning violence against women and families that "changes the position of abused women in Ecuador" at para 40).

[107] See e.g. *Re KHF*, [2003] RPDD No 96 (QL) at para 2, (2 June 2003), VA2-02218, online: RefLex Issue 217 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=10566&l=e> (state protection available in Spain given evidence that although domestic abuse is a problem in Spain, the state "is and has been making serious efforts to control

ters or other forms of recourse[109] and support.[110] As MacIntosh argues, this approach casts doubt on whether adjudicators substantively engaged with the evidence before them or merely "conflate[d] the fact that states have enacted protective legislation with the finding that there *is* protection for the claimant."[111]

In many of the cases resulting in positive admissions, adjudicators found state protection was unavailable to the claimant given evidence of cultural norms. For example, in *Re L.T.D.*, the IRB reasoned that while "wife battering is a criminal offence" in Ghana, it was still "condoned in traditional society" and "culturally" accepted, with the result that state protection was not available to the claimant.[112] In *Re L. (C.B.)*, the IRB concluded that state protection was unavailable in Argentina because of its "machismo" and because of the prevalence of gendered "misconceptions ... deeply rooted in the Argentinean culture."[113] In *Re G. (D.M.)*, the IRB cited evidence that "culture and tradition inhibit the achievement of full equality for women" and that, as a result, state protection was not available.[114] In *Re H.T.O.*, the IRB found state protection was absent given the "cultural ethos" in Bangladesh.[115] Similarly, in *Re O.E.X.*, the IRB found that state protection was lacking in Nigeria given evidence that "[c]ultural norms endorse wife assault among the Yoruba."[116] There are numerous examples of similar findings in the reported decisions.[117] Such findings

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and fight [it]," for instance by establishing information centers, shelters, specialized police units, legal-aid offices, and local clinics (*ibid* at para 26)).

108 See e.g. *Re ZNY*, [2000] CRDD No 84 (QL) at para 7, (26 April 2000), T99-09072, online: RefLex Issue 141 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=1040&l=e> (state protection available in Costa Rica, given evidence that women have access to legal assistance and representation).

109 See e.g. *Re O (ZT)*, [1993] CRDD No 145 (QL).

110 See e.g. *Re SBH*, [2001] CRDD No 266 (QL), (3 December 2001), TA0-06665, online: RefLex Issue 182 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=8748&l=e> (state protection available in St. Kitts given evidence of counselling and medical-assistance programs, efforts to raise awareness, and specific training provided to police officers and school guidance counselors); *Re GLX*, [1998] CRDD No 9 (QL) (state protection available in Jamaica given evidence that domestic violence is addressed by legislation and services).

111 *Supra* note 66 at 162.

112 [1996] CRDD No 267 (QL) at para 23.

113 [1993] CRDD No 307 (QL) (Evidence of Maria Rose Pinedo).

114 [1994] CRDD No 184 (QL) (Evidence of the Ecuadorian women's movement).

115 *Supra* note 98 at para 16.

116 [1999] CRDD No 79 (QL) at para 6.

117 See e.g. *Re D (RG)*, *supra* note 98 (state protection lacking in Ghana given evidence that violence against women was "condoned by that society"); *Re WEB*, [2009] RPDD No 35

were comparatively absent in the forced-sterilization and genital-cutting cases.

My concern with these cases is not with the finding that the claimant's culture was violent, patriarchal, or oppressive. Indeed, cultural norms and traditions can often be oppressive and can often give rise to or reinforce women's persecution in both domestic and nondomestic settings. My concern is rather with the *unintended* consequences that stem from locating persecution so narrowly in cultural difference. I return to this point below, but first, I examine how adjudicators approached the grounds-of-admission stage of the refugee analysis.

D. Grounds of Admission

1. Forced-Sterilization and Genital-Cutting Cases

At the grounds-of-admission stage of the analysis, the cases involving forced sterilization or genital cutting also followed a distinctly different adjudicative pattern as compared with those involving domestic violence. As noted above, the *Guidelines* contemplate two ways through which to designate a gender-specific social group. The first is through the broad designation "women", while the second is through more particularized formulations specific to a subgroup of women. In most of the reported de-

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(QL), (23 October 2009), VA7-02451, online: RefLex Issue 373 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=13122&l=e> [cited to QL] (state protection lacking in Nigeria as a result of "custom" and evidence that the "police do not normally intervene in domestic disputes" at paras 19-20); *Re DSL*, [1996] CRDD No 68 (QL) (holding that women in Tanzania were unable to access state protection because "cultural, social and family pressures often prevent women from reporting abuses to authorities" at para 14 (Evidence of Response to Information Request #TZA17622.E)); *Re DNH*, [1996] CRDD No 258 (QL) at para 36 (finding that "wife-battery is a common feature of family life in Nigeria" and is not prohibited under Nigerian customary law or traditional culture); *Re Y (ZV)*, [1995] CRDD No 42 (QL) (noting that "violence and discrimination against women are common features of Bangladeshi society" and that "Bangladeshi women are valued less than both children and property"); *Re X (WL)*, [1995] CRDD No 104 (QL) (noting that "violence against women in Ecuador is without either geographic or social boundaries" and that "[w]hile the phenomenon of domestic violence is increasingly denounced today, it was traditionally ignored because of social and cultural attitudes"); *Re V (FF)*, [1994] CRDD No 34 (QL) (noting that "sexual abuse is a common feature of Salvadoran women's lives" given the "cultural sanctioning of violence against women" (*ibid* (Evidence of a 1991 article on Salvadorian women)) and "culturally sanctioned" attitudes that view women as property (*Re V(FF)*, *supra* note 117)); *Re OQC*, [1996] CRDD No 42 (QL) (accepting evidence stating that "the situation of battered women in Nigeria is an acceptable form of interaction between husband and wife under our customary law" at para 31 (Evidence of Nigeria's Legal Research and Resource Development Centre)); *Orsovai v Canada (Minister of Citizenship and Immigration)*, [2003] RPDD No 621 (QL).

cisions involving forced sterilization or genital cutting, adjudicators adopted the former approach. In the forced-sterilization cases, for example, most adjudicators either did not define the social group,[118] or defined it as "women".[119] A small number of adjudicators identified more particularized formulations[120] or admitted claimants under the "political opinion" ground.[121] Similarly, in the genital-cutting cases, adjudicators generally recognized social groups defined either as "women"[122] or as "women facing genital mutilation."[123] Only a few cases recognized more particularized formulations.[124]

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[118] See e.g. *Zheng*, *supra* note 74; *Chi*, *supra* note 77; *Re BAJ*, *supra* note 75; *Re X (EL)*, *supra* note 78; *Re B (KA)*, *supra* note 76; *Re X (GC)*, [1993] CRDD No 64 (QL); *Re W (HT)*, [1992] CRDD No 514 (QL).

[119] *Re VCT*, [2000] CRDD No 132 (QL), (21 June 2000) VA0-00592, online: RefLex Issue 146 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=1120&l=e>. See also *Re XPR*, [2000] CRDD No 322 (QL) (social group defined as "gender").

[120] For exceptions to this trend, see *Re PQP*, [1997] CRDD No 42 (QL) (social group defined as "[u]nwed mothers in China [who have] ... two children" at para 18); *Re FET*, *supra* note 77 (joint grounds of political opinion and membership in a particular social group, the latter defined as "persons wishing to exercise reproductive choice who are at risk of forcible sterilization" at para 24); *Re L (LL)*, [1994] CRDD No 368 (QL) (social group defined as "parents"); *Re RZQ*, *supra* note 100 (social group defined as "Women in China Who Fear Forced Sterilization Because They Have Violated the Chinese Birth Control Policy of Having Only One Child" at para 1).

[121] See e.g. *Re DEP*, [2000] CRDD No 204 (QL), (10 October 2000) T99-11413, online: RefLex Issue 154 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=1329&l=e>; *Re SBF*, [1999] CRDD No 264 (QL), (22 November 1999) V99-02637, online: RefLex Issue 132 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=2685&l=e>; *Re RZQ*, *supra* note 100; *Re FET*, *supra* note 77; *Re W (AF)*, [1994] CRDD No 124 (QL); *Re F (NM)*, [1993] CRDD No 254 (QL).

[122] See *Re RPX*, *supra* note 102; *Re SCK*, *supra* note 91; *Re EKD*, *supra* note 92; *Re DVH*, *supra* note 87 at para 33 (social group defined as "female children"); *Re XJV*, *supra* note 87 (social group defined as "gender"); *Re N (ID)*, *supra* note 102 (social group defined as "young women"); *Re G (LD)*, *supra* note 91 (social groups defined as women and minors).

[123] See e.g. *Re MTF*, *supra* note 87 (social group defined as "women in danger of Female Genital Mutilation" at para 1); *Re IFL*, *supra* note 86 (social group defined as "minor females at risk of clitoridectomy or genital mutilation" at para 1); *Re RSF*, *supra* note 87 (social group defined as "females who are subjected to Female Genital Mutilation" at para 1).

[124] See e.g. *Re IIJ*, [1997] CRDD No 176 (QL) (social group defined as "Nigerian [women] ... of the Ika tribe opposed to the group's social norms" at para 6); *Re FOH*, *supra* note 87 (social group defined as "women facing Female Genital Mutilation (FGM) and women in danger of being put into a forced marriage" at para 1); *Re QQX*, *supra* note 101 (social group defined as "young Somali female[s] who would be subjected to female genital mutilation" at para 8). See also *Re WRI*, *supra* note 103 (where allegations of genital cutting were incidental to allegations of rape, and the IRB designated the social group as

2. Domestic Violence Cases

In contrast, in the domestic violence cases adjudicators frequently identified highly particularized social groups defined by a combination of gender, nationality, and personal circumstance. Examples of such particularized formulations include: "women in Hungary who are subject to domestic violence,"[125] "women in China subject to spousal abuse,"[126] "Trinidadian women subject to domestic violence,"[127] "Mexican women subject to domestic violence,"[128] and "Ghanaian women subject to spousal and family abuse,"[129] to list just a few.[130] Adjudicators also identified more particularized social groups, such as "women in Turkey who are victims in abusive relationships or victims of abuse at the hand of rejected suitors, in circumstances where agents of the state, including the police, are unable or unwilling to provide protection,"[131] "Bulgarian women vulnerable to wife abuse by men with government influence,"[132] "Westernized Tajik woman in a society moving towards Islamic orthodoxy, with no male protection,"[133] "[wives] of ... 'Machismo' [men] ... targeted for domestic violence,"[134] and "elderly single women in Pakistan subject to abuse due to kinship."[135] Perhaps most explicitly, one Federal Court case defined the social group as

> new citizens of Israel who are women recently arrived from elements of the former Soviet Union and who are not yet well integrated into Israeli society, despite the generous support offered by the Israeli government, who are lured into prostitution and threatened and exploited by individuals not connected to government, and who can

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"persons who are perceived to have contravened societal taboos in Nigeria, that is to say rape victims and their children" at para 1).

125 *Re WGO*, [2000] CRDD No 17 (QL) at para 1, (10 January 2000), V98-02797, online: RefLex Issue 134 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=2805&l=e>.

126 *Re NGQ*, [2000] CRDD No 52 (QL) at para 1, (9 March 2000), T98-07538, online: RefLex Issue 138 <http://www.irb-cisr.gc.ca:8080/ReFlex/Reflex_Article_FC.aspx?id=813&l=e>.

127 *Re LNH*, [1999] CRDD No 15 (QL) at para 1.

128 *Re MNN*, [1998] CRDD No 286 (QL) at para 1.

129 *Re D (RG)*, *supra* note 98.

130 See also *Re ZEK*, [1998] CRDD No 225 (QL) ("abused women in Jamaica who are unable to avail themselves of the strict provisions of the law, which on the face of it might appear to provide some measure of protection" at para 10); *Re C (XN)*, [1993] CRDD No 27 (QL) ("Ecuadorian women subject to wife abuse").

131 *Re UEK*, [2003] RPDD No 442 (QL) at para 1.

132 *Re I (GF)*, *supra* note 98.

133 *Re J (GX)*, [1993] CRDD No 301 (QL).

134 *Re L (CB)*, *supra* note 113.

135 *Re KXK*, [1996] CRDD No 103 (QL) at para 27.

> demonstrate indifference to their plight by front-line authorities to whom they would normally be expected to turn for protection.[136]

While these formulations seem attractive in their capacity to recognize that gender persecution is experienced in highly particularized ways, this potential is never realized in the cases.

III. The Limits of Protection

The above analysis suggests adjudicators approach domestic violence claims in distinctly different ways than they do other gender-persecution claims. In cases involving forced sterilization and genital cutting, adjudicators identified these practices both as acts of persecution and as fundamental rights violations. Adjudicators frequently cited human rights instruments and principles in these decisions and also deployed descriptors such as "morally shocking", "inhuman", "degrading", and "barbaric". The relative paucity of the state-protection analysis, combined with the designation of broad social groups defined as "women", further suggests that adjudicators view the practices concerned as universal rights violations that target women *as* women. In contrast, in the domestic violence cases, adjudicators identified domestic violence as a problem of "culture" rather than as a human rights violation per se and adopted highly particularized social-group formulations. The effects of these formulations is clear: when legal actors portray domestic violence as the product of a foreign culture to which only Bulgarian, Pakistani, or Westernized Tajik women are subjected—as opposed to "women" writ large—they construct domestic violence as an "othered" harm perpetrated against only certain subcategories of (non-Western) women.

Viewed together, these cases generate what Kwame Anthony Appiah has identified as a "script", a dominant narrative according to which the refugee woman's experience is evaluated and understood.[137] As Appiah explains, demanding rights for people *as* members of identity groups—in Appiah's analysis, African Americans or homosexuals—demands that there be a "script" for what it means to be black or gay. The problem with this approach is that it ascribes various attributes and characteristics to members of identity groups that often have little to do with their lived experiences or, in the case of refugee claimants, with their protection needs. In the domestic violence cases, the deployment of this script effectively re-

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[136] *Litvinov v Canada (Secretary of State)* (1994), 83 FTR 60 at para 11 (available on WL Can).

[137] *The Ethics of Identity* (Princeton: Princeton University Press, 2005) at 21-22.

quires claimants to perform the refugee identity by presenting as "victims of culture".[138]

In the analysis that follows, I focus on two reasons why I view this approach to be problematic. First, I argue that, by depicting domestic violence so narrowly as a product of culture, the cases fail to recognize factors besides culture that make women vulnerable to domestic violence. This approach to domestic violence establishes unduly restrictive standards by which to evaluate women's protection needs. Second, I argue that this approach constructs non-Western culture as a place where domestic violence occurs because of the so-called "inherent" vulnerability of women located in that cultural milieu. In so doing, it erects both legal and conceptual barriers for women who cannot authentically narrate their experience of violence through the script of cultural vulnerability. In these key respects, the adjudicators of domestic violence cases remain insufficiently attentive to the complex factors that make women vulnerable to persecution in domestic settings and risk denying protection to genuine refugees facing real threats of persecution. I address each of these points in turn.

A. Obscuring Factors Besides "Culture"

In many of the cases surveyed, adjudicators not only located persecution in cultural difference but also depicted the claimant's culture as made up almost entirely of gender-subordinating values and thus as fundamentally oppressive of women. For example, in *Re Z.D.M.*, the IRB held that state protection was lacking in Egypt because "Egyptian patriarchal culture and traditions" were fundamentally repressive and hostile toward women and "[w]omen's experiences of beating, battering and sexual or psychological abuse have been accepted and normalized in Egyptian traditions."[139] Similarly, in *Re R.Z.B.*, the IRB held that state protection was lacking in Barbados because "Barbados, as other Anglophone Caribbean societies[,] has a strong patriarchal culture and prevailing gender ideolo-

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[138] It is important to recognize that these "scripts" often serve as valuable advocacy tools and can prove effective in securing protection for certain claimants. This notwithstanding, I suggest excessive reliance on these scripts establishes incorrect criteria by which to evaluate refugee claims.

[139] [1997] CRDD No 315 (QL) at para 6 (Evidence, statutory declaration by Amani el Jack, Ph.D. candidate in women's studies). See also *Re G (ST)*, [1994] CRDD No 115 (QL) (the IRB held that state protection was lacking given evidence that Pakistani society "is a male dominated one where women are expected to endure the violence and abuse of their husbands" and given that "Pakistan is an agricultural economy with patriarchy still preserving itself through feudal principles of unconditional supremacy of men over women" (*ibid* (Evidence, "Wife Assault: Pakistan; An Overview")), and further noted that the "social ethos in Pakistan militates against a wife seeking the protection of the state if she has been physically abused by her husband" (*Re G (ST)*, *supra* note 139)).

gies place women's interest as secondary to that of men."[140] In *Re C. (X.N.)*, the IRB held that state protection was lacking in Ecuador since Ecuador's patriarchal "culture and tradition" rendered the state "unwilling to protect the rights of women who are subject to domestic abuse."[141] Perhaps most explicitly, in *Re B. (P.V.)*, the IRB held that state protection was lacking in Somaliland, given evidence presented at the hearing that described Somali culture as so "overwhelmingly restrictive and patriarchal" that Somali women had no protection from domestic violence.[142] Based on this evidence, the board concluded that "Somaliland *means* oppressed women."[143] In this totalizing formulation, the board presented Somaliland as being synonymous with the oppression of women, suggesting that to be a woman from Somaliland *is to be a victim of oppression.*

These formulations are striking because they incorrectly present foreign cultures as internally homogenous and comprised primarily (at times, exclusively) of gender-subordinating values. By presenting foreign cultures as fundamentally oppositional to women's rights, the cases convey the impression that culture is the root cause of the claimants' persecution. They further convey the impression that the oppression of non-Western women (and the violence they suffer as a result) is integral to these cultures and produced by quintessentially foreign, barbaric, and misogynistic cultural norms. This approach fails to recognize that domestic violence is never created *solely* by culture, and it leaves unexamined the broader societal arrangements that make women vulnerable to persecution in domestic settings. It also risks obscuring, in potentially harmful ways, the factors besides culture that make women vulnerable to persecution. The sheer number of cases that come before the IRB, advanced by diversely situated women from various countries, should itself demonstrate that the problem of domestic violence cannot be attributed to culture alone. Narrowly depicting domestic violence as a product of culture incorrectly attributes responsibility to a static, insular, and fundamentally foreign constructed entity, and not, for example, to systemic gender hierarchies, uneven power distributions, and economic factors that transcend culture and permeate other aspects of women's lives.

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[140] [1997] CRDD No 185 (QL) at para 55 (Evidence, letter of V. Eudine Barriteau, head of the Centre for Gender and Development Studies at the University of the West Indies). The tribunal further concluded that the persecution the claimant suffered is grounded in her spouse's "perception of women as objects which can be controlled and abused at will" (*Re RZB*, *supra* note 140 at para 39).

[141] *Supra* note 130. See also *Re G (DM)*, *supra* note 114 (relying on similar evidence).

[142] *Supra* note 94, citing US, Department of State, *Overview of Country Reports on Human Rights Practices for 1993* (Washington, DC: Department of State, 1993) at 263.

[143] *Re B (PV)*, *supra* note 94 (Evidence of Zimzim Abdi, a women's rights advocate) [emphasis added].

No less significantly, this approach fails to recognize that culture is always contested within communities and constantly subjected to change and transformation. As Bonnie Honig writes, "culture is something rather more complicated than patriarchal permission for powerful men to subordinate vulnerable women."[144] She further explains:

> [It] is a way of life, a rich and timeworn grammar of human activity, a set of diverse and often conflicting narratives whereby communal (mis)understandings, roles, and responsibilities are negotiated. As such, "culture" is a living, breathing system for the distribution and enactment of agency, power, and privilege among its members and beyond. Rarely are those privileges distributed along a single axis of difference such that, for example, all men are more powerful than all women.[145]

Homi Bhabha similarly cautions against totalizing formulations. The constructed opposition between (foreign) cultures and women's rights, he argues, mistakenly constructs non-Western societies as patriarchal and oppressive, and identifies non-Western *cultures* as the root of these problems.[146] These formulations fail to recognize that cultural patriarchy and oppression are always constructed through, and informed by, a myriad of other factors, such as history, race, or socio-economic status. They erroneously depict minority women as "abject 'subjects'" of their cultures, "huddled in the gazebo of group rights, preserving the orthodoxy of their distinctive cultures in the midst of the great storm of Western progress."[147] In so doing, they also construct non-Western women as being deprived of meaningful choice and forced to endure the violence of their cultures.

Leti Volpp's analysis of the role played by discourses of culture in gender-violence claims in the United States aptly summarizes the problems with such formulations. Analyzing disparities in US approaches to domestic violence in immigrant and "white" communities, Volpp explains:

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[144] "'My Culture Made Me Do It'" in Joshua Cohen, Matthew Howard & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999) 35 at 36.

[145] *Ibid* at 39. See also Leti Volpp, "Feminism Versus Multiculturalism" (2001) 101:5 Colum L Rev 1181 at 1192 [Volpp, "Feminism"].

[146] Homi K Bhabha, "Liberalism's Sacred Cow" in Cohen, Howard & Nussbaum, *supra* note 144, 79 at 81-82. As Bhabha further argues, these "[s]tereotypes disavow the complex, often contradictory contexts and codes—social or discursive—within which the signs and symbols of a culture develop their meanings and values as part of an ongoing, transformative process" (*ibid* at 81). Such formulations not only ignore the complex ways in which patriarchy and culture intersect and inform one another but also construct "the norms of Western liberalism ... as both the measure and mentor of minority cultures ... a salvage operation, if not salvation itself" (*ibid* at 83).

[147] *Ibid* at 80.

> Part of the reason many believe the cultures of the Third World or immigrant communities are so much more sexist than Western ones is that incidents of sexual violence in the West are frequently thought to reflect the behavior of a few deviants—rather than as part of our culture. In contrast, incidents of violence in the Third World or immigrant communities are thought to characterize the cultures of entire nations.
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> ...
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> ... The philosopher Uma Narayan has calculated that death by domestic violence in the United States is numerically as significant a social problem as dowry murders in India. But only one is used as a signifier of cultural backwardness: "They burn their women there." As opposed to: "We shoot our women here." Yet domestic violence murders in the U.S. are just as much a part of American culture as dowry death is a part of Indian culture. In the words of Narayan, when "cultural explanations" are given for fatal forms of violence only in the Third World, the effect is to suggest that Third World women suffer "death by culture."[148]

Such an approach, Volpp argues, suggests that "only minority cultures are ... traditional, and made up of unchanging and longstanding practices that warrant submission to cultural dictates."[149] "In hasty expressions of distaste for other cultures perceived as primitive and backward," she cautions, "we miss the complex ways in which power actually functions in particular communities."[150] This discursive practice overlooks the various relations of power that inform violence, both in "other" cultures and in our own cultures. It mistakenly conveys the impression that incidents of domestic violence that occur in Western settings are products of individual aberrations or deviances rather than cultural suppositions, entrenched inequalities, material disparities, or systemic failures.

B. Constructing Refugee Women as "Victims of Culture"

Indeed, by depicting foreign cultures as oppositional to women's rights, the domestic violence cases construct non-Western culture as a

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148 "Feminism", *supra* note 145 at 1186-87 [footnotes omitted].

149 *Ibid* at 1191. These assumptions also problematically view foreign cultures as clearly bounded, self-generated entities; they also preclude recognition of foreign cultures as themselves contested and negotiated within communities and of cultural identities as products of resistance or transformation: see generally Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (Cambridge, UK: Cambridge University Press, 2007). As Song argues, these assumptions "overlook ... the polyvocal nature of all cultures and the ways in which gender practices in both minority and majority cultures have evolved through cross-cultural interactions" (*ibid* at 4).

150 Leti Volpp, "Blaming Culture for Bad Behavior" (2000) 12:1 Yale JL & Human 89 at 113 [Volpp, "Blaming Culture"].

place where domestic violence occurs because of the perceived vulnerability of women situated in that cultural milieu. These formulations seem to presume that women brought up in non-Western societies are less likely to be able to resist or struggle against domestic violence *because* of their culture. For example, in a case involving a claimant from Trinidad, the IRB concluded that state protection would be lacking because the "cultural tradition of the claimant's nationality ... *produced* the dependency described."[151] The board held that the violence suffered by the claimant "created a paralysing dependency which she has been unable to overcome," which was "reinforced by her cultural tradition" and prevented her from seeking state protection.[152] Similarly, in *Re Y. (O.E.)*, the board allowed the claim, in part, on grounds that the claimant "was under constant pressure to perform the role of an obedient, submissive, good wife, a role which prevails in the traditions of Indian culture."[153] In a case involving a claimant from Venezuela, the board relied on evidence offering a "cultural interpretation" of the gendered attitudes of Venezuelan society to conclude that "Latin women typically feel helpless to confront their spouses directly," and that "[f]ear of eliciting violence, including the threat of death, frequently inhibits women from proactively defending themselves."[154]

As above, it is worth emphasizing that my concern with these cases is not with the finding that cultural norms and traditions can be paralyzing or oppressive, and thus trap certain women in cycles of violence. My concern with these cases is rather with the *unintended* consequences that stem from locating persecution so narrowly in cultural difference. My study pointed to a small number of cases in which claimants were denied refugee status because they did not present as "victims of culture". In a case involving a Brazilian claimant fearing domestic violence, for example, the IRB cited the claimant's perceived capacity for independence as a reason for denying her claim.[155] It held the claimant was unable to satisfy the refugee definition because "her adjustment in Canada demonstrate[d] her capabilities for independence" and suggested she would be able to live safely in Brazil.[156] In another case involving a claimant from St. Vincent, the board similarly determined that the claimant's perceived capacity for

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[151] *Re U (BQ)*, [1993] CRDD No 236 (QL) [emphasis added].

[152] *Ibid.*

[153] *Supra* note 98.

[154] *Re QBA*, [1996] CRDD No 211 (QL) (Evidence, report of an anonymous expert).

[155] See *Re Y (PD)*, [1993] CRDD No 315 (QL).

[156] *Ibid.*

independence militated against a finding of persecution.[157] While the board found that the "claimant's story clearly show[ed] that she was a victim of domestic assault and death threats by her former boyfriend,"[158] it held that the claimant "did not exhaust all the avenues of protection available to her before leaving St. Vincent"[159] and thus could not demonstrate a failure of state protection. Noting that the claimant was "an astute, intelligent, young woman who ha[d] demonstrated that she [was] ... capable of seeking out information and support, if need be,"[160] the board concluded that

> the claimant will be able to seek out the protection if and when she needs and that the protection available to her will be adequate, if not perfect. *She will not be one of those victims of domestic violence who will be either reluctant to press charges or not seek out support from the existing facilities like the National Council of Women.* The panel is satisfied that the rationale for the claimant not to have utilised all the resources available to her in seeking protection--namely, her lack of knowledge due to her age and inexperience--is no longer valid now.[161]

The board denied the claim based on the additional findings that the claimant's former boyfriend did not have sufficient influence to interfere with law authorities as she had alleged, that his abusive behaviour stemmed from his drinking habits and was thus not necessarily directed only at her, and that she could procure financial assistance from relatives abroad to secure legal help.

The case of *Re T.D.D.* offers another example in which refugee status was denied to a claimant who did not fit the mould of a "victim of culture".[162] It involved a claimant from India who alleged a well-founded fear of persecution on the grounds of her political opinion as well as her membership in the particular social group "women without male support."[163] As in the cases above, the claimant was denied refugee status because her perceived capacity for independence militated against a finding of persecution.[164] The IRB reasoned that, as a "well-educated career woman, a witness who appeared articulate and self-possessed at her hearing ... [and] a wife who was unapologetically outspoken in her objections to her

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157 See *Re DYS*, [1995] CRDD No 168 (QL).

158 *Ibid* at para 7.

159 *Ibid* at para 20.

160 *Ibid* at para 8.

161 *Ibid* at para 20 [emphasis added].

162 [1998] CRDD No 103 (QL).

163 *Ibid* at para 1.

164 *Ibid* at paras 15-21.

husband's smoking and drinking," it was unlikely that the claimant would be "completely passive and subordinate" as she had alleged.[165] It further found that the *Guidelines* were "of no assistance" in the case since the claimant, having a master's degree, teaching experience, and supportive male family members, was unlike the traditional stereotype of an Indian woman and was well qualified to live without her husband and support her children.[166] Here, the claimant's educational background prevented her from satisfying acknowledged cultural stereotypes and precluded her recognition as a refugee.[167]

These cases show the problems of linking a finding of persecution to a script of inherent cultural vulnerability. Such an approach effectively requires women to narrate their experience of persecution in terms of that vulnerability; but for some women, this is not their story. This approach has consequences that are potentially quite damaging: it perpetuates the faulty assumption that educated or self-sufficient women who do not appear to be "victims of culture" are less likely to be persecuted by domestic violence. By adopting this approach, the domestic violence cases establish incorrect criteria by which to assess women's refugee claims. They risk excluding from protection women who face real threats of persecution but cannot authentically narrate their experience of violence through the script of cultural vulnerability.[168] The above analysis thus shows that while women persecuted by domestic violence are still being admitted as refugees, the criteria established for their admission are more limiting than they should be. The domestic violence cases remain insufficiently attentive to the conditions that make women vulnerable to persecution in domestic settings.[169]

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[165] *Ibid* at paras 13-14.

[166] *Ibid* at paras 11, 39.

[167] For an interesting discussion of how discourse on gender and culture often presumes that Western women, because of their educational background and independence, are defined by their abilities to make choices, whereas Third World women are defined by their submission to cultural dictates, see Volpp, "Feminism", *supra* note 145 at 1191-93. Volpp's analysis does not precisely map onto the above-noted scenario, but it offers an interesting point of comparison.

[168] My study also identified one case that had such an outcome and involved harms arising outside of the domestic context: *Re IJI*, [2001] CRDD No 389 (QL) (denying status for a claimant from Cameroon fearing genital cutting on the grounds that the claimant did not "fit" the image typically associated with victims of genital cutting. The board reasoned that the claimant "is 21 years old and holds a diploma" and that, as a result, there was "nothing about her of the uneducated young girl [typically] ... at risk" at para 12).

[169] It is important to emphasize that some reported decisions do offer nuanced assessments of the relationship between domestic violence and culture, for example, in *Re C (XN)* (*supra* note 130). The IRB engaged in a nuanced analysis of how culture informs do-

Conclusion

The fact is that, over almost two decades and in a large numbers, adjudicators adopted such different methods of analysis in domestic violence cases as compared with other gender cases. These differences can be attributed to a range of factors, such as evidentiary hurdles and varying grant rates between IRB adjudicators,[170] to list just a few. But in addition to these factors, the differences can also be attributed to the perceived distinction between the *types* of claims at issue. Forced sterilization and genital cutting are generally regarded as *exotic* harms that can easily be labelled as rights violations in the Canadian legal lexicon and are thus broadly imagined as the proper subjects of refugee law. Because forced sterilization and genital cutting are perceived to occur only in foreign countries, Canada can assert its ability to protect women from these harms with unambiguous certainty. In contrast, domestic violence, rape, and sexual assault are *familiar* harms that are also clearly prevalent within Canada. These claims cut along familiar lines of difference and cannot be labelled as persecutory rights violations with quite the same rhetorical ease. Since protecting women from domestic violence poses a challenge to even the most well-intentioned of states, as Melanie Randall argues, domestic violence cases create "an unacknowledged dilemma for refugee-receiving states like Canada."[171] Indeed, despite the availability of state protection in Canada, many Canadian women—particularly Aboriginal women—suffer severe violence in domestic settings.[172] Given the

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mestic violence persecution and concluded that violence "is the result of structural relations of power, dominance and privilege established among men and women in society" (*ibid* (Evidence, notes from a workshop by The Ecuadorian Centre for Action and Advancement of Women (CEPAM))); the board further held that the Ecuadorian government's reluctance to intervene in domestic violence disputes results in a "culture of tolerance [that] has been built up over the years and forms part of the ethic of Ecuadorian society"(*Re C (XN), supra* note 130). See also *Re WGY*, [1997] CRDD No 291 (QL); *Re XNG*, [1998] CRDD No 21 (QL); *Re ZHY*, [1997] CRDD No 136 (QL).

170 As Sean Rehaag has shown, refugee grant rates vary significantly between IRB adjudicators, with some according refugee status in virtually all cases and others granting refugee status on only rare occasions: see "Troubling Patterns in Canadian Refugee Adjudication" (2007-2008) 39:2 Ottawa L Rev 335.

171 "Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution" (2002) 25 Harv Women's LJ 281 at 284.

172 The problem of domestic violence is acutely felt in Aboriginal communities. Statistics Canada indicates that the rate of domestic violence against Aboriginal women is more than three times that experienced by non-Aboriginal women and, further, that Aboriginal women are eight times more likely than non-Aboriginal women to die of domestic violence: see Statistics Canada, *Measuring Violence Against Women: Statistical Trends, 2006* (Ottawa: Minister of Industry, 2006) at 64-65, 67, online: Statistics Canada <http://www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf>. See also Jodi-Anne

prevalence of domestic violence within Canada, can Canada conclusively assert its ability to protect victims of domestic violence from harm? If the ability to protect is indeed the test not only of a subject's status as a *refugee* but also of Canada's status as provider of *refuge*, what happens in cases where Canada's ability to protect may not be clear? Can Canada still assert its value—and "essence"—as a place that protects if it cannot fully protect women from domestic violence?

Audrey Macklin's analysis of this dynamic correctly summarizes its complexity. As Macklin argues, cases involving familiar harms and familiar scenarios require adjudicators to veer "perilously close to confronting the fact that the same country that has won deserved praise for enacting the *Guidelines* is also implicated in practices that amount to gender persecution."[173] The adjudicative response to this is a defensive one: the careful exercise of characterizing the violence suffered by refugee women as a product of culture operates as a protective device that distinguishes it from the violence suffered by Canadian women. By locating persecution in cultural difference, adjudicators subtly sidestep the possibility that, despite Canada's clear commitment to gender equality and rights protection, women in Canada still suffer persecution. Locating persecution in cultural difference allows Canadian legal actors to avoid the uncomfortable conclusion that the violence suffered by refugee women echoes, in Martha Minow's words, "something familiar, in reality or metaphor, in the practices of the dominant Western nations" and in "gender hierarchies only too familiar in their own world."[174] The assumption that domestic violence is a product of foreign cultures—rather than a combination of power structures, material disparities, *and* cultural arrangements—subtly colours how Canadian legal actors think about, adjudicate, and evaluate domestic violence claims. This assumption makes it harder to recognize domestic violence as a rights violation in the absence of "culture", not just within but also beyond the confines of refugee law. In this key respect, the adjudicative tendency to locate domestic violence persecution in cultural dif-

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Brzozowski, Andrea Taylor-Butts & Sara Johnson, "Victimization and Offending Among the Aboriginal Population in Canada" (2006) 26:3 Juristat 1, online: Statistics Canada <http://dsp-psd.tpsgc.gc.ca/Collection-R/Statcan/85-002-XIE/85-002-XIE2006003.pdf>; Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada* (London, UK: Amnesty International, 2009) at 1, online: Amnesty International <http://www.amnesty.org/en/library/info/AMR20/012/2009/en>.

173 *Supra* note 41 at 266.

174 "About Women, About Culture: About Them, About Us" in Richard A Shweder, Martha Minow & Hazel Rose Markus, eds, *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies* (New York: Russell Sage Foundation, 2002) 252 at 254.

ference operates to suppress the commonality of domestic violence across cultures and to elide its domestic prevalence.[175]

Beyond establishing incorrect criteria by which to understand domestic violence, the IRB's domestic violence cases also suggest that the decisions made in this field of law do not merely reflect universally accepted human rights standards. Adjudicators do not assess refugee claims based solely on rights criteria or universally accepted norms. Rather, they filter these criteria through national ideologies, ideals, and anxieties. This pattern calls into question the claim that, by incorporating human rights principles into the refugee analysis, Canadian refugee law has moved away from politically motivated considerations. Instead, it implies that the process is deeply intertwined with Canadian national values and Canada's national self-understanding.

Recognizing the choices made in the domestic violence cases as informed by a myriad of unstated assumptions, political ideologies, and defensive anxieties offers a more accurate account of the complex dynamics of refugee protection. It makes clear that the findings in these cases do not always reflect universally accepted or "objective" criteria. This realization makes it easier to deconstruct and reconstruct these findings to reflect more accurate understandings of gender violence and gender difference. It allows us to recognize "persecution" as an open-ended category that acquires content and meaning not through some external morality but through our own perceptions, positionings, and beliefs. It allows us to recognize that "culture" is not static, innate, or immutable, but fluid and discursively produced. It allows us to recognize domestic violence as a complex and globally pervasive phenomenon that stems from cultural dynamics—as well as extant power dynamics, material disparities, and gender imbalances that challenge even rights-protecting states like Canada. A more accurate understanding of the dynamics of domestic violence persecution makes it possible to advocate for a shift in the discourse, for an approach that moves beyond its current limits.

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[175] As Volpp argues, "The consequences of selectively blaming culture in this way are striking: These discursive practices cause us to overlook specific relations of power, both in 'other' cultures and in our own society" ("Blaming Culture", *supra* note 150 at 113).

BOOK REVIEW

RECENSION CRITIQUE