

DOMESTIC SILENCE: HOW THE U.S.–CANADA-SAFE-THIRD-COUNTRY AGREEMENT BRINGS NEW URGENCY TO THE NEED FOR GENDER-BASED-ASYLUM REGULATIONS

INTRODUCTION

On a bitterly cold morning in late December 2004, hundreds of refugee claimants lined up to cross the border from the United States into Canada.¹ Hailing from dozens of countries, including Colombia, the Democratic Republic of Congo, Angola, and Peru, the refugee claimants all shared the same goal: to reach Canadian soil before midnight on December 28th.² On that evening, both the United States and Canada would see significant changes to their asylum laws. Regulations implementing the Safe-Third-Country Agreement between the United States and Canada (Agreement) had been finalized in late November 2004 and were scheduled to take effect on December 29, 2004.³ Once in force, the Agreement would keep many asylum applicants from crossing the land border between the two nations.⁴ Racing to beat the clock, refugees took their place in lines among hundreds of other applicants in towns along the U.S.–Canada border, hoping to have their claims processed during the eleventh hour.⁵ Border officials at all major land crossings between the United States and Canada witnessed this dramatic surge in the number of applicants seeking asylum in Canada during the weeks leading up to December 29, 2004.⁶

1. See, e.g., Natalie Alcoba, *Refugees Race to Canada*, HAMILTON SPECTATOR, Dec. 29, 2004, at A1 (describing the surge of immigrants at the Fort Erie land-border crossing in Ontario, Canada).

2. *Id.*

3. Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, U.S.-Can., Dec. 5, 2002 [hereinafter Safe-Third-Country Agreement]; Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 69,480, 69,480 (Nov. 29, 2004) (codified at 8 C.F.R. pts. 208, 212, and 235) [hereinafter Final Safe-Third-Country Regulations]; Regulations Amending the Immigration and Refugee Protection Regulations, 138 C. GAZ. 1618 (Nov. 3, 2004), available at <http://digbig.com/4rxnc>. The Agreement was entered into force on December 29, 2004. News Release, Citizenship and Immigration Canada, Safe Third Country Agreement Comes into Force Today (Dec. 29, 2004), available at <http://digbig.com/4rxnd>.

4. Safe-Third-Country Agreement, *supra* note 3.

5. See *At Last, a Refugee Family Breathes Easy*, HAMILTON SPECTATOR, Feb. 18, 2005, at A9 (reporting that an estimated 1500 refugees “flooded the border . . . in December to get into Canada before more restrictive refugee legislation took effect”).

6. See, e.g., Alcoba, *supra* note 1 (“VIVE, Inc., a Buffalo refugee centre registering claims to Canada, processed 1,100 applicants compared to about 100 in the [previous] week.”); Tara Brautigam, *Refugee Claims Surge as Rule Changes Loom*, LONDON FREE PRESS (Ontario), Dec. 29, 2004, at A8 (reporting surges in the number of refugee claimants processed in New York and Quebec, and noting

In December 2002, the United States and Canada entered into the Agreement to allocate responsibility for processing the asylum claims of refugees crossing the land border between the two countries.⁷ This bilateral agreement established a formal management policy for determining which nation processes an asylum claim for individuals at the U.S.–Canadian border. Under the Agreement, individuals entering Canada from the United States are to be returned to the United States to apply for asylum; likewise, individuals entering the United States from Canada are to be returned to Canada for asylum proceedings.⁸ The Agreement is intended to provide clear guidelines for asylum management at land-border crossings, while continuing to give aliens access to an asylum system in a country where they will be safe from persecution.⁹ The Agreement currently represents the first and only formal bar to an asylum claim by an individual physically present in the United States or at a land-border port-of-entry.¹⁰

Proponents of the Agreement suggest that it has merely altered managerial practices in the United States and Canada.¹¹ By removing a refugee's freedom to choose the country in which she applies for asylum,

that the VIVE refugee center in Buffalo, New York, experienced its “busiest week in history”).

7. Safe-Third-Country Agreement, *supra* note 3.

8. *Id.* The general rule prohibiting asylum-seekers from crossing the land border between the United States and Canada is subject to a number of exceptions. 8 C.F.R. § 208.30(e)(6) (2005); Regulations Amending the Immigration and Refugee Protection Regulations, *supra* note 3, at 1623–24. The safe-third-country concept is premised on the notion that the asylum applicant is being returned to a country in which the applicant will not be persecuted. See Rosemary Byrne & Andrew Shacknove, *The Safe Country Notion in European Asylum Law*, 9 HARV. HUM. RTS. J. 185, 186 (1996) (describing the “safe country” policy as “an asylum-seeker . . . coming from a country in which he or she was safe from persecution and to which safe return is possible”).

9. Safe-Third-Country Agreement, *supra* note 3; see Sonia Akibo-Betts, Note, *The Canada-U.S. Safe Third Country Agreement: Why the U.S. Is Not a Safe Haven for Refugee Women Asserting Gender-Based Asylum Claims*, 19 WINDSOR REV. LEGAL & SOC. ISSUES 105, 107 (2005) (noting that the Agreement is intended to “reduce the misuse of the respective asylum systems, restore public confidence, and reduce backlogs and improve the efficiency of Canada’s refugee determination system”).

10. Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry, 69 Fed. Reg. 10,620, 10,620 (Mar. 8, 2004) (codified at 8 C.F.R. pts. 208 and 212) [hereinafter Proposed Safe-Third-Country Regulations]. “[The] Safe Third Country Agreement between the United States and Canada currently constitutes the only agreement, for purposes of section 208(a)(2)(A) of the [Immigration and Nationality] Act, that would bar an individual in or arriving at the United States from applying for asylum.” *Id.*; see 8 U.S.C. § 1158(a)(2)(A) (2000) (providing for removal of asylum applicants “if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country . . . [if the] alien’s life or freedom would not be threatened”).

11. See Nicholas Keung, *New Policy Slashes Refugee Claims*, TORONTO STAR, Aug. 5, 2005, at A1 (“‘It’s been a success,’ noted Immigration Canada spokesperson Greg Scott from Ottawa. ‘We looked at the increase in abuse of the (refugee) systems, and we needed to have a more co-ordinated, co-operative and harmonized system to ensure these claims are processed efficiently and fairly.’”).

however, the Agreement has two main negative consequences for refugees. First, it may in practice deprive some persecuted individuals of successfully obtaining the solace of asylum.¹² Critics contend that the Agreement forces many Canada-bound aliens back into the United States, where asylum rights are considered less friendly to refugees.¹³ As one critic suggests, “asylum-seekers tend to prefer Canada because Canada has higher refugee recognition rates and more favorable reception conditions, including fewer detentions, more liberal access to government assistance, and fewer restrictions on employment.”¹⁴ Canada’s body of asylum law differs markedly from that of the United States in terms of its organic statutes, regulations, and caselaw.¹⁵ Asylum proceedings in the United States can include lengthy and arbitrary detention throughout the application process, summary process, and expedited removal resulting in inconsistent determination of asylum claims.¹⁶ Prison stays for aliens under U.S. detention policies, for example, may extend into months and frequently into years.¹⁷ Second, refugees in the United States may be deprived of the opportunity to connect with and settle in a culturally appropriate community. “For French-speakers . . . Canada is also linguistically more

12. See 8 C.F.R. § 208.30(e) (indicating that asylum officers have the discretion to deny asylum to those without a credible fear of persecution or torture); see also *infra* Part II; cf. Press Release, U.S. Citizenship and Immigration Services, United States and Canada to Implement Safe Third Country Agreement on Asylum (Nov. 24, 2004) (“The Agreement highlights U.S.-Canadian cooperation to develop mutually beneficial approaches to our common security goals while simultaneously continuing to provide access to one of our two nations’ asylum systems . . .”).

13. See *United States and Canada Safe Third Country Agreement: Hearing Before the H. Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 107th Cong. 11–12 (2002) [hereinafter *Hearings*] (testimony of Mark Krikorian, Executive Director, Center for Immigration Studies) (“[T]he United States is easier to get to, but Canada has much more generous asylum rules.”); see also Tonda MacCharles, ‘Safe Third Country’: Canada to Turn Back Refugee Claimants Who Arrive from United States, *HAMILTON SPECTATOR*, Oct. 15, 2004, at A12 (quoting Janet Dench, executive director of the Canadian Council for Refugees: “[The Agreement] means Canada will be sending people to the U.S. when the U.S. is adopting laws that are trampling on the rights of refugees to protection in the U.S.”).

14. Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection*, 15 *INT’L J. REFUGEE L.* 567, 582–83 (2003).

15. See *infra* notes 26–30 and accompanying text; see also Akibo-Betts, *supra* note 9, at 121–25 (describing the United States’s expedited removal process and one-year filing deadline, and the absence of these procedural mechanisms in Canada).

16. See ELEANOR ACER, *LAWYERS COMM. FOR HUMAN RIGHTS, REFUGEE WOMEN AT RISK: UNFAIR U.S. LAWS HURT ASYLUM SEEKERS* 4–13 (2002) (detailing traumatic proceedings that include expedited removal and lengthy detentions faced by individual women seeking asylum on gender-based grounds).

17. See ACER, *supra* note 16, at 2, 12–13 (documenting prison stays between one and two years for three women seeking asylum); Karen Musalo & Stephen Knight, *Gender-Based Asylum: An Analysis of Recent Trends*, 77 *INTERPRETER RELEASES* 1533, 1535–36 (2000) (noting a situation in which a refugee woman seeking asylum for domestic and sexual abuse remained in detention for almost two-and-a-half years).

hospitable.”¹⁸

Immigrant refugees faced with these possibilities may view Canada as a much more attractive venue in which to file an asylum application. For some applicants, differences in the potential outcome of their application may leave Canada as the only feasible option for a successful asylum claim. This becomes particularly clear where an applicant is basing an asylum claim on grounds that have been adjudicated inconsistently in U.S. caselaw. If the applicant is a woman basing her claim on gender-based grounds, where the application is filed may prove critical.¹⁹ Ultimately, depriving a refugee of the choice of *where* an asylum claim can be brought can lead to the deprivation of basic human rights—namely, the provision of asylum for those who are truly persecuted.

Critics of the Agreement suggest that if persecuted women seeking asylum based on gender are denied access to the Canadian system, they may be denied their only feasible option for a successful asylum claim.²⁰ Women seeking asylum under a claim of gender-based persecution face a difficult task. Admittedly, all refugees must meet stringent evidentiary guidelines to be granted asylum in either country.²¹ For women asylum-seekers, however, cultural and procedural barriers create unique challenges. To begin with, cultural barriers for women create seemingly insurmountable obstacles blocking the development of a successful gender-based claim.²² One critic describes these obstacles:

It is extremely difficult for women to discuss, in the detail necessary to prove their case, some of the physical, mental and emotional harms inflicted upon them. This is true particularly when they must do so in a foreign country and in a foreign culture before male interpreters, male INS officers, male lawyers and male family members, often in the cold setting of an administrative courtroom.²³

18. Legomsky, *supra* note 14, at 583.

19. *See infra* Part II.

20. *See* MacCharles, *supra* note 13 (noting that the United States does not recognize some types of asylum claims, such as women facing gender-based persecution, as readily as Canada).

21. *See infra* note 55 and accompanying text.

22. ACER, *supra* note 16, at 6–7; *see also* Lindsay A. Franke, *Not Meeting the Standard: U.S. Asylum Law & Gender-Related Claims*, 17 ARIZ. J. INT’L & COMP. L. 605, 611–12 (2000) (listing cultural barriers to a successful gender-based-asylum claim in the U.S., including difficulties in describing sexual abuse to male interviewers, cultural stigmas associated with rape, dilution of testimony given through male interpreters, and psychological manifestations of abuse that impede credibility).

23. John Linarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 984 (1997) (citation omitted).

Even before a woman asylum-seeker has the opportunity to be heard in an administrative courtroom, she must avoid the expedited removal process.²⁴ This process creates barriers of its own, as it fails to account for the emotional manifestations of abuse:

For instance, female applicants may have difficulty in describing past . . . abuse to a male interviewer. . . . [T]he [applicant] may also appear numb or show emotional passivity when speaking of abuse. These manifestations may cause a victim's testimony of her abuse to seem unreliable, and may ultimately result in a denial of her claim.²⁵

In addition to these inherent difficulties, analysts have proposed that the legal and administrative climate in the United States is more inhospitable for gender-based-asylum claimants compared to the climate in Canada.²⁶ By statute, Canada has established that victims of domestic violence constitute a particular social group within the meaning of the United Nations' definition of "refugee."²⁷ The United States has no such established rule. On the contrary, the United States has only recently hinted that domestic violence may constitute grounds for a successful asylum

24. In an expedited removal proceeding, asylum officers can deport asylum applicants that fail to demonstrate "credible fear." 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2000); ACER, *supra* note 16, at 5.

25. Franke, *supra* note 22, at 612 (citation omitted).

26. *See id.* at 612 ("[M]any of the harms that women suffer are inflicted on them exclusively because of their gender. Under current [U.S.] asylum law, a woman who is persecuted solely on account of her gender must frame her claim for refugee status under one of the enumerated five categories . . .") (citation omitted). Franke also points out that "current U.S. asylum law does not adequately address women's claims because women often suffer persecution at the hands of private individuals, and not by the government." *Id.* at 613; *see also* Legomsky, *supra* note 14, at 582–83 ("[A]sylum-seekers tend to prefer Canada because Canada has higher refugee recognition rates . . ."); Linarelli, *supra* note 23, at 984–85 (observing that Canada appears to provide a more hospitable forum than the U.S. for gender-based-asylum claims). The United Nations High Commissioner for Refugees commissioned Legomsky's paper as part of its "Agenda for Protection." Legomsky, *supra* note 14, at 567.

27. Immigration and Refugee Protection Act, 2001 S.C., ch. 27 (Can.). *See* Letter from Members of the United States Senate, to John Ashcroft, Att'y Gen., U.S. Dep't of Justice (June 16, 2004), available at <http://digbig.com/4rxne> ("Canada . . . has recognized violence against women as a basis for granting asylum since 1993 . . ."). The United Nations has defined a refugee as an individual who:

[O]wing 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.

Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

claim.²⁸ More recently, the United States declined to formally recognize that domestic violence constitutes a valid basis for an asylum claim.²⁹ Proposed guidelines address the problem of domestic violence in the context of the U.S. asylum system, but they fail to incorporate victims of domestic violence into the meaning of “a particular social group.”³⁰ By forcing persecuted women to bring their asylum claims in the United States if it happens to be their first country of entry, the Agreement will prevent some women—particularly those seeking asylum from domestic violence—from ever successfully obtaining asylum.

Regardless of its professed purpose, the Agreement represents a profound step backward in the movement to recognize and condemn grievous human rights violations. Against the backdrop of two markedly different asylum systems, the United States seeks to disallow choice between those two systems for those who seek relief from persecution. Further, the Agreement’s impacts on refugees seeking asylum on gender-

28. See *In re R-A-*, 22 I. & N. Dec. 906, 918–20, 927–28 (B.I.A. 2001) (requiring an asylum applicant to demonstrate that she was targeted because of membership in a specific social group). Attorney General Janet Reno vacated the decision of the Board of Immigration Appeals and remanded Rodi Alvarado’s case for reconsideration following proposed regulations by the INS. *Id.* at 906. Though the regulations were never finalized, Attorney General John Ashcroft selected to review Rodi Alvarado’s case in March 2003. Human Rights First, *AG Ashcroft Sends Domestic Violence Case Back to Appeals Board*, ASYLUM PROTECTION NEWS 35, Jan. 24, 2005, <http://digbig.com/4rxnf>. Many human rights groups urged Attorney General Ashcroft to grant Rodi Alvarado asylum and to promulgate regulations allowing domestic violence to form the basis of asylum claims. See *id.* (recognizing the following groups as supporting the position of Rodi Alvarado during Attorney General Ashcroft’s review of the case: Human Rights First, Amnesty International, Human Rights Watch, the International Rescue Committee, the United States Conference of Catholic Bishops, the Hebrew Immigrant Aid Society, the Presbyterian Church USA, and World Relief (the human service arm of the National Association of Evangelicals)); Letter from Members of the United States Senate, *supra* note 27 (noting Ms. Alvarado’s case and urging the issuance of positive regulations to govern gender-based-asylum claims); see also Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,595 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (proposing regulations that would address issues similar to those involved in Ms. Alvarado’s case). It is unlikely that these regulations will explicitly establish “victims of domestic violence” as a particular social group.

The Department has elected at this point to propose that the relationship of *In re R-A-* and domestic violence claims to the definition of “refugee” be addressed by articulating broadly applicable principles to guide adjudicators in applying the refugee definition The Department has tentatively concluded that this approach would be more useful than simply announcing a categorical rule that a victim of domestic violence is or can be a refugee on account of that experience or fear Asylum and withholding cases are typically highly fact specific. A case-by-case approach would reflect that reality, and would also leave the refinement of applicable principles open to further development.

Id. Notably, these regulations have been pending for more than five years with no indication that they will be finalized in the immediate future.

29. Attorney General Ashcroft remanded Rodi Alvarado’s case to Board of Immigration Appeals on January 19, 2005. Human Rights First, *supra* note 28.

30. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,595.

based grounds could hinder the development of equitable relief for persecuted women. Specifically, the Agreement's disparate impacts on women seeking asylum from domestic violence will perpetuate the United States's continued reluctance to formally recognize the unique persecutions women face. Without formalized policies and procedures that address the specific concerns of gender-based-asylum claimants, the Agreement will only widen the divide between U.S. asylum law and a fair, equitable system that provides true relief for the persecuted. To close this gap, the United States should interpret the Agreement with published policies and regulations that recognize and address the unique challenges women face in applying for asylum.

This Note addresses the Agreement and describes where difficulties may emerge under the implementation of the Agreement, particularly in the context of gender-based-asylum claims. Specifically, this Note analyzes potential impacts on women applying for asylum from domestic violence. Part I provides background information on the origin of the "safe third country" policy and examines gender-based-asylum law generally—both in the United States and Canada. Part II analyzes the potential impacts of the Agreement on women seeking asylum based on gender-related claims of domestic violence. Part III provides a number of alternative approaches for addressing refugee-related concerns in the context of border security and, alternatively, suggests a mode for interpreting the regulations that would provide greater protection for women within the existing framework of the Agreement. Though the primary purpose of this Note is to decipher the potential practical implications of the Agreement, it is nevertheless appropriate to be aware of the underlying international political climate that undoubtedly shaped the face of these and similar regulations. Finally, this Note reviews the preliminary perceptions of how the Agreement has already shifted the administration of asylum applications in both countries.

I. GENDER-BASED-ASYLUM POLICY IN THE UNITED STATES AND CANADA

A. *A Checkered History: Moving Toward Formal Recognition of Gender-Based Claims in the United States*

“Asylum is an imperfect tool by which to improve one’s living condition when life is threatened by various types of persecution.”³¹ In the United States, refugees must meet a series of stringent requirements to receive a grant of asylum. First, to avoid being deported through an expedited removal process, a refugee must demonstrate a “credible fear” to an asylum officer.³² To establish a credible fear, the refugee must convince an asylum officer that the refugee has a “significant possibility” of proving eligibility for asylum.³³ Unless the refugee can do this, the refugee will not receive a hearing on the asylum claim before an immigration judge.³⁴ Instead, the refugee will be deported through expedited removal.³⁵

31. E. Dana Neacsu, *Gender-Based Persecution as a Basis for Asylum: An Annotated Bibliography, 1993–2002*, 95 LAW LIBR. J. 191, 191 (2003).

32. 8 U.S.C. § 1225(b)(1)(B)(ii) (2000). Procedural mechanisms for asylum law received much clarification with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.); see 1 U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 1 (2005), available at <http://digbig.com/4rxng> (summarizing the process under IIRIRA). Under IIRIRA, aliens claiming asylum may be subject to expedited removal proceedings. 8 U.S.C. § 1225(b)(1)(B)(iii)(I). Prior to the enactment of IIRIRA, border officials could not compel aliens to leave the country. 1 U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra*, at 1. IIRIRA “was intended to strengthen the security of America’s borders, without closing them to those fleeing persecution.” *Id.* The guidelines used for processing asylum applicants at the border since IIRIRA can be summarized as follows:

Under IIRIRA [sic], immigration inspectors were authorized to summarily remove aliens who lacked appropriate travel documents, or who obtained their travel documents through fraud or misrepresentation. Concerned, however, that *bona fide* asylum seekers not be removed to countries where they may be persecuted, Congress also included provisions to prevent the Expedited Removal of refugees fleeing persecution. Specifically, an alien who indicates an intention to apply for asylum or a fear of return is entitled to a “credible fear interview” by an asylum officer. If the asylum officer determines that an alien has a “significant possibility” of establishing eligibility for asylum, he is entitled to ask the immigration judge for relief from removal. If credible fear is not found, the asylum officer orders the alien removed

Id. at 1–2 (citation omitted); 8 U.S.C. § 1225; 8 C.F.R. § 208.30 (2005).

33. 8 C.F.R. § 208.30(e)(2).

34. 1 U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 32, at 1. However, the removal decision is subject to review by an immigration judge. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

35. 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

The expedited removal order can be executed immediately While asylum seekers are not supposed to be deported at this stage (they are supposed to be referred for further examination to determine if they have a “credible fear of persecution”), asylum seekers find the process utterly bewildering, and mistakes have been made. Mistakes are in fact inevitable given the summary nature of expedited removal and its lack of procedural safeguards.³⁶

If the refugee establishes a credible fear, the refugee must then demonstrate a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”³⁷

For women seeking relief from gender-related persecution, the category that has been most often applied to their claims in the United States is membership in a particular social group.³⁸ In *In re Acosta*, the Board of Immigration Appeals (BIA) made a landmark decision and determined that an individual could successfully base an asylum claim on the social-group theory when that individual was “a member of a group of persons all of whom share a common, immutable characteristic.”³⁹ The *Acosta* decision established that these shared characteristics would be determined on a case-by-case basis and that innate characteristics like “sex, color, or kinship ties, or in some circumstances . . . shared past experience” can be included in the category.⁴⁰ The social-group category is thought to

36. ACER, *supra* note 16, at 5.

37. 8 U.S.C. § 1101(a)(42). The statute also requires that the alien be outside the country of her nationality and unable or unwilling to return to that country due to the persecution. *Id.* The United Nations Protocol Relating to the Status of Refugees and the United Nations Convention Relating to the Status of Refugees (UN Convention) have been incorporated into the United States’s body of immigration law through an amendment to the Immigration and Nationality Act. U.N. High Comm’r for Refugees, Convention and Protocol Relating to the Status of Refugees [UNHCR], U.N. Doc. UNHCR/P1/CONV-uk1.pm5 (Mar. 1996); Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended at 8 U.S.C. § 1101). This amendment established legal requirements for determining when an individual could be granted asylum. *Id.*

38. *See, e.g.*, Ctr. for Gender and Refugee Studies, Summaries of Gender Asylum Cases, <http://cgrs.uchastings.edu/law> (search “Gender Asylum Decisions” by category) (last visited Feb. 25, 2007) (citing over 250 gender-based-asylum cases based on membership in a social group, compared to 14 based on race, 15 based on religion, 6 based on nationality, and 165 based on political opinion). Center for Gender and Refugee Studies (CGRS) maintains a searchable database providing access to summaries of asylum claim cases. As of publication, CGRS’s database indicates that the majority of gender-based-asylum claims were based on membership to a particular social group. *Id.*

39. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *see also* Mahsa Aliaskari, Note, *U.S. Asylum Law Applied to Battered Women Fleeing Islamic Countries*, 8 AM. U. J. GENDER SOC. POL’Y & L. 231, 246 (2000) (describing the “membership in a particular social group” category).

40. *Acosta*, 19 I. & N. Dec. at 233 (emphasis added).

be the most “fluid” of the persecution categories because “it has not been clearly defined by statute.”⁴¹ There is thus no clear mandate as to how the category must be applied in all cases. However, women asylum-seekers have applied the *Acosta* test with some success. The social-group category represents one of the most promising routes women asylum-seekers can take.⁴²

Although women asylum-seekers have found limited success through the use of the social-group category, gender-related persecution has only recently received recognition as a valid basis for an asylum claim in U.S. courts of law and other governing bodies. In 1995, the (then) Immigration and Nationality Service (INS) adopted guidelines suggesting when asylum claims could be granted on gender-based grounds.⁴³ Prior to adoption of these guidelines, gender-based-asylum claims went largely unrecognized in the United States.⁴⁴ Five years later, the INS proposed rules that explicitly included sex as a characteristic that would satisfy the statutory condition of being a member of “a particular social group.”⁴⁵ Unfortunately, the United States remains ambiguous in its commitment to recognizing gender-based claims. The proposed rules including sex as a social-group characteristic were never finalized and gender-based claims continue to be adjudicated inconsistently.⁴⁶ Nevertheless, while guidelines and proposed rules are not binding on asylum adjudicators, they do provide an opportunity—albeit limited—for gender-based claimants to obtain asylum.

41. Franke, *supra* note 22, at 609. Franke asserts that the social group category “may have been intended as a broad, catchall type of category. Case law serves mostly to explain what will *not* constitute a social group for purposes of gaining asylum.” *Id.* (citation omitted).

42. See Musalo & Knight, *supra* note 17, at 1534 (“The . . . *Acosta* test ha[s] been widely influential, including being cited by the highest courts of Canada . . .”). *But see id.* (“The majority in *In re R-A-* stated that the *Acosta* test was only a threshold, and that an asylum applicant must also demonstrate that . . . the members of the social group ‘understand their own affiliation with the grouping, as do other persons within the particular society,’ and . . . the harm suffered ‘is itself an important social attribute.’”) (quoting *In re R-A-*, 22 I. & N. Dec. 906, 918–19 (B.I.A. 2001)).

43. Memorandum from Phyllis Coven, U.S. Dep’t of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995), reprinted in IRS Publishes Gender Persecution Guidelines, 72 INTERPRETER RELEASES 771, 781 app. (1995).

44. Deborah E. Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 775–76 (1995).

45. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,598 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). As of February 25, 2007, these regulations have not been finalized. The Department of Homeland Security has indicated that it intends to take final action on the proposed rules. Unified Agenda of Federal Regulatory and Deregulatory Actions, 70 Fed. Reg. 64,629, 64,658 (Oct. 31, 2005).

46. See Neacsu, *supra* note 31, at 195 (“[T]he ongoing delay in finalizing the social group regulations—despite the publication of the draft regulations more than [six] years ago—indicates resistance to recognizing gender-based human rights violations as a basis for asylum.”).

Part of the reason for this “late-bloomer” remedy for gender-based-asylum guidelines is simply that the relevant law was written under a male paradigm during the political climate of the Cold War.⁴⁷ To successfully claim asylum under the standing law, as established by the United Nations Convention Relating to the Status of Refugees (U.N. Convention), women suffering gender-based persecution had to fit their claims within one of the existing statutory categories.⁴⁸ In recent years, however, “as Western values have extended across the non-Western world, certain types of previously tolerated violence have become less acceptable, and gender-based treatment . . . has begun to be viewed as persecution justifying the granting of asylum.”⁴⁹ The willingness of asylum adjudicators to recognize gender-based claims as a basis for asylum is supported by decisions such as *In re Kasinga*.⁵⁰ In *Kasinga*, the BIA held that a woman from a culture practicing female genital mutilation who did not agree with the practice was a member of a particular social group and could reasonably fear country-wide persecution for purposes of establishing an asylum claim.⁵¹

While courts have made some progress addressing gender-based-asylum jurisprudence appropriately in recent years,⁵² reviewing authorities have been reluctant to either apply relief consistently for gender-based claims or establish broad rules to govern gender-based claims.⁵³ The traditional reluctance to embrace gender-based claims in U.S. asylum policy may be due to a misapprehension that the country’s borders would become a “floodgate” for women refugees.⁵⁴ However, the stringent requirements of a successful asylum claim make this type of floodgate response highly

47. See Karen Musalo & Stephen Knight, *Unequal Protection*, BULL. ATOMIC SCIENTISTS, Nov.–Dec. 2002, at 56 (noting that asylum laws “came of age during the Cold War and [have] been interpreted within an overwhelmingly male paradigm”); Neacsu, *supra* note 31, at 192 (“Asylum cases have developed on the basis of the male experience and perception.”).

48. Convention Relating to the Status of Refugees, *supra* note 27.

49. Neacsu, *supra* note 31, at 191.

50. *In re Kasinga*, 21 I. & N. Dec. 357, 368 (B.I.A. 1996).

51. *Id.*

52. See Stephen M. Knight, *Seeking Asylum from Gender Persecution: Progress amid Uncertainty*, 79 INTERPRETER RELEASES 689, 689 (2002) (discussing recent progress in asylum claims based on gender persecution in the United States).

53. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) (“The Service believes these issues require further examination after the Board of Immigration Appeals (Board) decision in *In re R- A-*.”); Pamela Goldberg, *Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law Context*, 66 BROOK. L. REV. 309, 311 (2000) (discussing inconsistencies in Second Circuit decisions adjudicating gender-based-asylum claims). The time lag following these proposed rules seems particularly severe in light of the numerous human rights groups advocating for formal recognition of gender-based violence as grounds for asylum. *E.g.*, Human Rights First, *supra* note 28.

54. Linarelli, *supra* note 23, at 984.

unlikely.⁵⁵ Recent policy choices suggest that border-security issues, stemming in large part from fears of terrorist infiltration, may have substantial influence over decisions to restrict access to asylum, regardless of gender. One example of a recent policy choice restricting access to asylum is the congressional bill known as the Real ID Act.⁵⁶ Human Rights First, along with a multitude of other human rights and professional organizations, oppose the Real ID Act because they fear that refugees will be denied asylum unjustly.⁵⁷

While the United States has long been recognized for its commitment to refugee protection, recent legal and policy choices—such as the Real ID Act—indicate that the intent to continue this commitment is questionable. Although the 1995 gender-based guidelines and landmark cases such as *Kasinga* have led to an overall improvement in the asylum system for refugee women, the United States has yet to establish consistent formalized guidelines that provide protection for them. Until such formalized guidelines exist, refugee women will continue to face an unpredictable system that may continue to shut its doors to them.

B. Safe-Third-Country Policy: Moving Away from Formal Acceptance of Gender-Based Claims

The “safe third country” concept is an immigration-policy response to the substantial number of asylum-seekers who travel through one or more countries before formally applying for refugee status.⁵⁸ Under the safe-third-country model, an alien flees from the first country and claims asylum in the second country. Many asylum-seekers pass through other “third countries” on their way to the country in which they file their application. If an asylum claimant arrives in the second country from a third country

55. *Id.* at 985–86 (“The requirements of United States asylum law are stringent Asylees must prove, among other things, a well-founded fear of persecution, or severe past persecution, due to membership in a particular social group, or because of political opinion, race, nationality or religion. The INS has reviewed women’s cases rigorously.”); see Letter from Members of the United States Senate, *supra* note 27 (“Canadian government data reveals that [gender-based] claims consistently constitute only a tiny fraction of overall asylum claims, never more than two percent of the total.”).

56. Real ID Act of 2005, H.R. 418, 109th Cong. § 1 (2005).

57. See, e.g., Human Rights First, *Real ID Endangers People Fleeing Persecution*, http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp (last visited Feb. 25, 2007) (explaining potential difficulties asylum-seekers face under the Real ID legislation). Human Rights First has expressed concern regarding the discretionary denial of asylum based on an immigration judge’s interpretation of a refugee’s demeanor or inability to discuss sexual violence. *Id.*

58. See Legomsky, *supra* note 14, at 568 (“[T]he shortest distance between a persecutor and a permanent safe haven is seldom a straight line.”). “There are almost as many refugee travel permutations as there are permutations of countries of origin, third countries, and destination countries in the world.” *Id.* at 589.

where that claimant did not face persecution, the model proposes that the claimant should be returned to that previous “safe country.”⁵⁹ The concept is based on the simple notion that if someone were fleeing true persecution, that person would claim asylum in the first safe country she reached. Advocates of safe-country agreements contend that if aliens travel from one safe country to another, they are not fleeing persecution. Instead, safe-country proponents contend, these aliens are “forum-shopping”—searching for the friendliest forum in which to have their asylum claims adjudicated.⁶⁰

The safe-country concept can be viewed as contrary to the basic principles found in international asylum treaties.⁶¹ Substantial problems exist in safe-country systems, and those problems primarily impact asylum-seekers. Any genuine refugees fleeing persecution are automatically exposed to the fresh trauma of being “shuttled consecutively from one country to another.”⁶² A number of other problems exist as well. The third country may have an atmosphere of discrimination or persecution.⁶³ Detention practices in the third country might restrict the basic freedom of movement for asylum applicants.⁶⁴ Additionally, third-country agreements frequently result in the return of refugees to third countries where they have no community links or connections.⁶⁵ Finally, “[t]here might be serious deficiencies in the procedures by which the *destination country* itself

59. See Byrne & Shacknove, *supra* note 8, at 203 (noting the EU Immigration Ministers’ intent to return asylum-seekers to the first country where the individual has safe asylum). As of 1996, Byrne and Shacknove chose to refer to the “safe country” concept as a “notion” because it was not an agreed upon principle or law. *Id.* at 185 n.3. However, more recently, the European community has taken a more official approach embracing the concept. *Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, at 46, COM (2002) 326 final/2 (July 3, 2002) (permitting classification of a safe third country when it meets international human rights standards); see also Legomsky, *supra* note 14, at 570 (defining the “safe third country” concept as one in which “the state rejects asylum applications filed by individuals who have traveled through countries that are generally thought to be safe and where, it is felt, the person *should have requested* protection”). Legomsky provides an insightful description of practical reasons why aliens do not request protection in the countries they travel through prior to applying for asylum. *Id.* at 568–69.

60. See, e.g., Legomsky, *supra* note 14, at 606 (“Refugees who discern . . . patterns might tend to seek temporary asylum in whichever countries appear to offer the best hope. . . . The result can be so-called ‘forum-shopping’ for the most promising first countries of asylum, either during the primary movement or by means of secondary movement.”).

61. Byrne & Shacknove, *supra* note 8, at 186. *But see* 8 U.S.C. § 1158(a)(2)(A) (2000) (allowing for a safe-country exception to the general rule allowing aliens physically present in the United States to apply for asylum); Convention Relating to the Status of Refugees, *supra* note 27 (relieving aliens from responsibility for illegal presence in a country when coming directly from a territory where their lives or freedom were threatened).

62. Legomsky, *supra* note 14, at 572.

63. *Id.*

64. *Id.*

65. *Id.*

decides whether return is appropriate in a particular case.”⁶⁶

Refoulement represents another potentially devastating problem for genuine refugees. Refoulement occurs when a refugee passes through several states before seeking asylum, and the refugee is subsequently removed to the last safe state the refugee was in.⁶⁷ As this process is repeated by each country, the refugee may be removed again and again until the refugee is returned to the state in which the refugee faced persecution in the first place.⁶⁸ This chain refoulement does not necessarily have to involve a conscious decision or established policy by the countries involved.⁶⁹ An alien can be refouled to the refugee’s country of origin whenever asylum-determination procedures are inadequate and fail to recognize a genuine refugee.⁷⁰ All of these problems are inherent to safe-third-country systems, as evidenced in the implementation of the European Union’s safe-country agreement; they represent fertile ground for the growth of human rights violations.⁷¹

1. The European Union: A Model for Understanding Safe-Third-Country Policy

In spite of the human rights risks associated with the “safe third country” concept, it has been used increasingly by states internationally and has been firmly embedded in European asylum policy for some time.⁷² The safe-country agreement in the European Union, known as the Dublin Convention, was implemented in 1990.⁷³ An amended proposal from 2002 allows EU countries to send an asylum-seeker back to a third country when that country “consistently observes’ international law standards for the protection of refugees” and when there are reasonable grounds that the third country will admit that applicant to its territory.⁷⁴ If the EU nation decides

66. *Id.*

67. *Id.*

68. *Id.* at 583–84 (defining this risk as “chain refoulement to the country of origin”).

69. *Id.* at 583–86.

70. *Id.*; see Convention Relating to the Status of Refugees, *supra* note 27, at 6577 (defining the term “refugee”).

71. See, e.g., *Hearings*, *supra* note 13, at 4–5 (testimony of Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State) (discussing the complexities associated with determining the appropriate country for asylum adjudications since the determination depends on the details of an asylum-seeker’s travel itinerary).

72. Legomsky, *supra* note 14, at 575.

73. Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 1997 O.J. (C 254) 1 (EC); Agnès Hurwitz, *The 1990 Dublin Convention: A Comprehensive Assessment*, 11 INT’L J. REFUGEE L. 646, 647 (1999).

74. Legomsky, *supra* note 14, at 575 n.15.

that a third country meets these conditions, it may choose not to adjudicate the asylum claimant's application and instead send the applicant back to that third country.⁷⁵

While the Dublin Convention provides for the management of asylum applications, it remains riddled with problems that negatively affect the rights and safety of refugees. Stephen Legomsky, a scholar of international and comparative law at Washington University, has summarized and illustrated these problems with much clarity.⁷⁶ First, refoulement has been a major problem in the European Union, where Eastern and Central European states with inadequate asylum procedures did not provide assurance that each claim would be heard on its merits.⁷⁷ Second, third countries have reportedly revealed private information regarding asylum applicants' identities and whereabouts to their countries of origin, resulting in serious threats to their safety.⁷⁸ Third, detention policies in some third countries may not meet the detention standards as established by the United Nations High Commissioner for Refugees.⁷⁹ Fourth, the European Union's safe-country policy tends to ignore the cultural ties that an applicant may have with the country of destination.⁸⁰ Fifth, inadequate procedures for determining when an applicant must be returned to a third country are a potential problem, and in the European Union, appeals against that determination have no "suspensive effect."⁸¹ Finally, the European Union safe-country policy "yield[s] disproportionate responsibilities for the states closest to regions of origin."⁸²

Many of these problems are rooted in the simple fact that asylum laws are not the same in every member country of the European Union. In response, the European Union has pursued a policy of "harmonization."⁸³ This policy strives to bring asylum laws among nations within a particular region into harmony; in other words, the policy encourages change among existing laws to make them more similar to those in neighboring countries. "[The] UNHCR has endorsed the concept of harmonization as a way to

75. *Id.*

76. *Id.* at 583–88.

77. *Id.* at 585.

78. *Id.* at 586. "The dangers to the applicant and his or her family—particularly if protection is ultimately denied and the applicant is returned to the country of origin—are obvious." *Id.*

79. *Id.* The mandatory and indefinite detention policies of the United States have significance in the context of the Agreement. *Id.* at 587.

80. *Id.*

81. *Id.* at 587–88. "UNHCR has objected to that provision both on efficiency grounds and on the ground that it results in an unnecessary hardship when the appeal is meritorious." *Id.* at 588.

82. *Id.*

83. *Id.* at 603–06.

strengthen refugee protection.”⁸⁴ Assuming that some refugees move to a third country because that country’s laws offer more or better protections, harmonization would be an effective policy to respond to and discourage this kind of secondary movement.⁸⁵ As the European Union moves toward harmonizing asylum laws among member nations,⁸⁶ immigrant movements may ultimately stabilize.

2. Safe-Third-Country Policy in the United States and Canada

The United States and Canada looked to the safe-country concept in Europe, at least in part, as a model for their 2002 Agreement.⁸⁷ The Agreement allows U.S. border officials to return asylum-seekers at land-border ports-of-entry to Canada and, likewise, allows Canada to return aliens to the United States.⁸⁸ The authority to promulgate safe-third-country regulations in the United States can be found in the text of the Immigration and Nationality Act.⁸⁹ The Act’s safe-third-country exception reads as follows:

[Aliens physically present in the United States may not apply for asylum] if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien’s nationality or, in the case of an alien having no nationality, the country of the alien’s last habitual residence) in which the alien’s life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.⁹⁰

84. *Id.* at 604.

85. *See id.* (“The more elements of a region’s asylum laws are harmonized, the more likely it is that the harmonization will discourage irregular secondary movements and the less impact a return will have on the outcome of the asylum determination.”).

86. Patrick Wintour, *Quitting UN Agreement on Refugees ‘Not Feasible’*, THE GUARDIAN (London), Jan. 26, 2005, available at <http://digbig.com/4sbaq>.

87. *Hearings*, *supra* note 13, at 4–5 (testimony of Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State).

88. Safe-Third-Country Agreement, *supra* note 3.

89. Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(A) (2000).

90. *Id.*

The U.S. regulations implementing the Agreement authorize U.S. Citizenship and Immigration Services⁹¹ (USCIS) asylum officers to make “threshold determinations concerning applicability of the Agreement” in the expedited removal context.⁹² This “threshold screening interview” allows the USCIS officer to determine whether the alien is eligible for any of the exceptions under the Agreement.⁹³

Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border . . . has a credible fear of persecution . . . the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant . . . [to] the Agreement. . . . The asylum officer shall advise the alien of the . . . exceptions and question the alien as to applicability of any of these exceptions to the alien’s case.⁹⁴

Note that under these regulations, a USCIS officer makes a threshold determination of whether the alien will be allowed to bring her asylum claim in Canada or the United States. This determination, made at the border port-of-entry, is reviewed by a supervisor but is not subject to further administrative review.⁹⁵ If the officer determines that the alien has shown by a preponderance of the evidence that the alien falls into one of the Agreement’s exceptions,⁹⁶ then the officer proceeds directly to the standard expedited removal proceeding. Here, the officer determines whether the alien has “a credible fear of persecution or torture,” as provided under existing law.⁹⁷

Comments received by the Department of Homeland Security (DHS) before the promulgation of the final regulations objected, in part, to the perceived unfairness of the threshold interview.⁹⁸ The DHS defends the threshold interview as a tool of administrative efficiency and suggests that “the narrow legal and factual issues present in the threshold screening

91. On March 1, 2003, the U.S. transferred responsibility for all immigration proceedings from the Immigration and Naturalization Service (INS) to U.S. Citizenship and Immigration Services (USCIS), a bureau of the Department of Homeland Security (DHS). Mae Cheng, *Post-INS Services Unchanged / Homeland Dept. Assumes Duties*, NEWSDAY, Mar. 2, 2003, at A3.

92. Final Safe-Third-Country Regulations, 69 Fed. Reg. 69,488 (codified at 8 C.F.R. § 208.30).

93. *Id.*

94. 8 C.F.R. § 208.3(e)(6) (2005).

95. *Id.* § 208.30(e)(6)(i).

96. *Id.* § 208.30(e)(6)(ii).

97. *Id.* Under preexisting law, asylum officers had the authority to make credible fear determinations. *See supra* note 32.

98. Final Safe-Third-Country Regulations, 69 Fed. Reg. 69,480, 69,482 (Nov. 29, 2004).

process” can be effectively determined by asylum officers at land-border ports-of-entry.⁹⁹ In response to the comments and concerns, the DHS expressly added a requirement that a supervisory officer concur with the asylum officer’s findings.¹⁰⁰

Many commenters also expressed concern that procedural safeguards within the threshold screening-interview process did not appear in the proposed regulations.¹⁰¹ The regulations, while acknowledging the difficulties faced by asylum-seekers in securing evidence to substantiate their claims, fail to expressly provide for assistance in securing such evidence. The use of a telephone is provided, but where an asylum-seeker requires further assistance (such as a fax machine to obtain copies of necessary documents), the regulations only provide that an officer “*may* be able to facilitate such access.”¹⁰² The DHS maintains that this type of decision is “operational” in nature and finds that incorporating these details into operational field guides will sufficiently address the concerns of commenters.¹⁰³

The stated policy of the final regulations promulgated to implement the Agreement is managerial in nature.¹⁰⁴ In its implementing regulations, the DHS assessed both the costs and benefits of the regulations and determined that the benefits outweighed the costs. An estimated two hundred aliens annually try to enter the United States from Canada, and the United States, through these regulations, could save the monetary and logistical costs of

99. *Id.* at 69,481. “The Department . . . believes that the threshold screening process is the most efficient mechanism for implementing the Agreement . . . The threshold screening process . . . will be a streamlined determination, and can be transitioned seamlessly to the credible fear process if an exception to the Agreement is found.” *Id.*

100. 8 C.F.R. § 208.30(e)(6)(i). “If the asylum officer, with the concurrence from a supervisory asylum officer, determines that an alien does not qualify . . . the alien is ineligible to apply for asylum . . .” *Id.* (emphasis added).

101. Final Safe-Third-Country Regulations, 69 Fed. Reg. at 69,481. In the final rule, the DHS clarified that the same safeguards available to asylum claimants receiving a credible fear determination would be available to aliens in the threshold screening-interview process. *Id.* at 69,482.

102. Final Safe-Third-Country Regulations, 69 Fed. Reg. at 69,482 (emphasis added).

103. *Id.* Many details about how the regulations will operate in a practical sense are left out of the published rules. “The Department plans to . . . resolve matters like these at the local level through operational guidance.” *Id.* (discussing how the DHS would resolve claims where new evidence becomes available following a removal decision). “The Department believes that the Agreement’s public interest exception is best administered through operational guidance and on an individualized, case-by-case basis . . .” *Id.* at 69,483 (responding to comments urging the DHS to incorporate a “humanitarian concern” into the public-interest exception to the Safe-Third-Country Agreement).

104. *Id.* at 69,480. “This rule . . . permits the [United States and Canada] to manage which government decides certain aliens’ requests for protection from persecution or torture . . .” *Id.* *But see Hearings, supra* note 13, at 3–4 (testimony of Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State) (establishing that the Agreement is also a matter of border security as part of the thirty-point Smart Border Declaration between the United States and Canada).

adjudicating their claims and detaining them throughout the asylum process.¹⁰⁵ However, the DHS (while expressly stating that the regulations will save the United States these costs) also acknowledged that the majority of asylum claimants affected by the Agreement and its associated regulations would be asylum-seekers trying to enter Canada via the United States.¹⁰⁶ In fact, estimates suggested that the number of aliens attempting to cross from the United States to Canada was seventy-five times the number of aliens crossing in the other direction.¹⁰⁷ Critics argued that the costs to the United States in terms of adjudicating asylum claims and detaining asylum-seekers would increase as a result of these new regulations because a higher number of claims would need to be processed.¹⁰⁸ Critics fear that additional asylum claims resulting from the Agreement could potentially add to the existing 60,000 applicants per year and a backlog of over 250,000 asylum cases.¹⁰⁹ It seems unlikely, then, that an influx of a larger number of asylum claimants will result in reduced costs for the United States. Instead, the Agreement and its implementing regulations likely represent part of a larger policy plan to secure the borders of the United States.¹¹⁰

In spite of the current policy emphasis on border security, immigrant movement between Canada and the United States has occurred for some time.¹¹¹ Historically, immigrants elected to move between Canada and the United States for a variety of reasons. Proponents of the Agreement suggest that some asylum applicants move to Canada to take advantage of social-welfare benefits or to seek a second application after having an affirmative claim rejected in the United States.¹¹² Proponents also

105. Final Safe-Third-Country Regulations, 69 Fed. Reg. at 69,487.

106. *Id.* at 69,484; see *Hearings, supra* note 13, at 4 (testimony of Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State) (“Approximately one-third of the persons who apply for asylum in Canada pass through the U.S. first.”).

107. See *Hearings, supra* note 13, at 16 (testimony of Bill Frelick, Director, Refugee Program, Amnesty International USA) (estimating that two hundred people seek asylum from Canada to the United States, compared to fifteen thousand seeking asylum in Canada from the United States).

108. See *id.* at 12 (statement of Mark Krikorian, Executive Director, Center for Immigration Studies) (“[A]t least in the short run the United States will face a somewhat larger number of asylum claimants as a result of this agreement, however narrowly crafted the agreement may be.”). In the long run, Krikorian suggests that costs will decrease with future institutional changes that will bring Europe and Mexico within the scope of the Agreement. *Id.* at 13. *But see id.* at 6 (statement of Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State) (“[T]he U.S. has no intention to expand this bilateral agreement to include a third country.”).

109. *Id.* at 16 (statement of Bill Frelick, Director, Refugee Program, Amnesty International USA).

110. See *supra* notes 56–57 and accompanying text.

111. See generally *Hearings, supra* note 13.

112. *Id.* (testimony of Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, Department of State).

acknowledge, however, that a large number of asylum applicants “have strong family, community, kinship or linguistic ties to Canada.”¹¹³ Bill Frelick, Director of Amnesty International’s U.S. Refugee Program, has described some examples of why a refugee may want or need to enter Canada from the United States:

[A refugee] may be a Haitian, for example, who speaks French and wants to go to Quebec. It may be a Tamil from Sri Lanka, and there is a large Tamil community in Toronto, but they may not have been able to get directly to Canada. For example, from Latin America there are virtually no flights that go directly from any Latin American country to Canada. They all pass through the United States.¹¹⁴

Additionally, refugees may be aware of the rates of acceptance for asylum applications in the United States, and thus intend, from the time of their arrival, to only pass through that country on their way to Canada.¹¹⁵

II. POTENTIAL PRACTICAL IMPLICATIONS OF SAFE-THIRD-COUNTRY POLICY IN THE UNITED STATES AND CANADA

The new regulations implementing the Agreement may have very real and severe consequences for women claiming asylum on gender-based theories. As noted above, gender-based claims can be difficult to establish, particularly in the United States. First, cultural and social barriers particular to women impede effective communication with asylum officers, and second, legal barriers—in particular, the lack of formal recognition of gender-based claims in U.S. regulations or statutes—stand to keep many claims from holding up under the law.¹¹⁶ Additionally, the inconsistent adjudication of gender-based claims adds fuel to the fire by reducing the predictability of the asylum system in the gender-based context. To demonstrate the possible implications of the Agreement and its associated regulations, I will follow the progress of two hypothetical refugees with

113. *Id.* Ryan recognizes as well that many applicants with these family, community, kinship, or linguistic ties to Canada may be separated from those ties and forced instead to have their claims processed in the United States. *Id.*

114. *Id.* at 24 (statement of Bill Frelick, Director, Refugee Program, Amnesty International USA). This geographic limitation is significant for women seeking asylum based on a claim of domestic violence since “[t]he largest number of domestic violence cases . . . come from Central America, Mexico, and the Caribbean.” Musalo & Knight, *supra* note 17, at 1540.

115. See Legomsky, *supra* note 14, at 568 (noting that “[i]t might have been obvious that the other country would not grant protection . . . [or] might not have been hospitable or even acceptable”).

116. *Supra* notes 20–30 and accompanying text.

similar situations seeking asylum in the United States and Canada to illustrate how similar cases can be disposed of quite differently in the two countries, particularly where the claimant seeks relief from domestic violence. Where a woman claims asylum as a member of a particular social group, namely “victims of domestic violence,” her chances of success are higher in Canada, where this category has been formally codified and recognized for more than ten years.¹¹⁷ In spite of the similarities of their cases, then, the stories of these two women will have dissimilar endings.

Clearly, the impacts of the regulatory differences between the United States and Canada would be best demonstrated through real-life examples. Unfortunately, the United States has no formal reporting system tracking unpublished asylum decisions.¹¹⁸ Prior to the implementation of the Agreement, Canada conducted a study to assess its potential impact on gender-based-asylum claimants in light of criticisms received from nongovernmental organizations related to the United States’s inconsistent adjudication of asylum claims based on domestic violence grounds.¹¹⁹ The study relied on information from the Center for Gender and Refugee Studies (Center) at Hastings College and expressly noted that the information represented the most complete database of gender-based-asylum claims:

Although the website does not provide an explanation of its source-gathering techniques, our best understanding is that the database depends primarily upon attorneys to submit information on cases they know about or have been involved in. This technique necessarily leaves gaps in coverage, and it is possible that the database is somewhat skewed, unintentionally, toward the inclusion of cases that granted protection.¹²⁰

While there are some examples of gender-based adjudication available, the examples do not represent reality. As the Canadian Government has noted,

117. *Supra* note 27 and accompanying text.

118. See David A. Martin & Yvonne Lamoureux, Memorandum Prepared for the Attorney General of Canada, Citizenship and Immigration Services, Treatment of Gender-Based Asylum Claims in the United States (Mar. 31, 2003), available at <http://digbig.com/4rxnj> (stating that “the most complete source available on gender-related asylum cases” is the website of the Center for Gender and Refugee Studies at Hastings College).

119. *Id.*

120. *Id.* In spite of the potential skew toward granting protection to gender-based-asylum claimants, the Center voiced opposition to the Agreement. *Id.* The study concluded that gender-based claimants fleeing domestic violence are granted asylum at high rates. *Id.* This conclusion is based on a sample size of twenty-four immigration judge decisions, three BIA unpublished decisions, and thirteen asylum officer decisions. *Id.*

the available information is skewed toward cases resulting in asylum grants.¹²¹ Refugees that have been deported or removed in expedited removal proceedings to the country they sought to flee seem unlikely candidates to self-report the results of their claim to Hastings.¹²² In recognition of this and in consternation at the lack of a formal reporting system for gender-based claims, I will use two hypothetical asylum claims to demonstrate potential impacts on women seeking asylum from domestic violence.

A. *Hypothetically Speaking: The Situations of Silvia and Simone*

Consider the case of a hypothetical asylum-seeker whom I will call Silvia. Silvia, a young woman from Mexico, received regular and severe beatings from her husband for more than ten years. Sometimes he used his fists to beat her, and on those occasions Silvia was grateful. She was grateful because on other occasions her husband used a baseball bat. At times he resorted to kicking her repeatedly as she lay on the floor crying. Silvia had been hospitalized for her injuries several times. Her repeated efforts to get help from local police failed, so she decided to leave Mexico to try and obtain asylum in Canada. She had close family friends there who promised to help her find employment so she could make a life for herself. However, Silvia could only find transportation from Mexico to the United States. She was frightened of what her husband would do next; the beatings had grown more and more brutal over time. Silvia was afraid for her life, and though she had no contacts in the United States, she took the first available transport out of Mexico. She entered the United States, and at the earliest chance she had, she left to cross the border into Canada. She reached a Canadian land-border port-of-entry on December 28, 2004.

Next, consider the hypothetical case of a woman I will call Simone. Simone was from Chad, but her situation was very similar to Silvia's. Simone received regular and severe beatings from her husband, and her injuries sent her to the hospital a number of times. Simone sought assistance from local police, but they refused to help, considering domestic violence to be a private matter. Simone wished to apply for asylum in Canada, where her cousins had lived for many years. Simone's first language was French, and her cousins lived in a French-speaking community. Simone was afraid for her life, but she could not get a direct flight to Canada. She took the first available opportunity to get away from

121. *Id.*

122. *See id.* (noting that Hastings "depends primarily upon attorneys to submit information on cases they know about or have been involved in").

her husband and flew to the United States. She arrived in the United States on January 1, 2005, and arrived at a Canadian land-border port-of-entry the following day.

B. Procedural Impacts on Hypothetical Applicants: The Exceptions to the Agreement

Silvia's claim automatically fell under Canadian jurisdiction because she filed her asylum application before the Agreement came into effect. Simone, however, faced a threshold screening process wherein her eligibility to apply for asylum in Canada was determined. The Canadian regulations implementing the Agreement comport with U.S. regulations,¹²³ so upon an asylum officer's finding that Simone had arrived from the United States, she was promptly returned to have her claim heard there. Simone tried to convince the asylum officer that her claim fell under one of the Agreement's exceptions, but she could not.¹²⁴ The Agreement does provide exceptions that allow asylum-seekers to avoid return to a safe third country. The exceptions apply if the asylum-seeker has family members in the country where they are claiming asylum, if the asylum-seeker is a minor, or if the asylum officer makes a determination that allowing the alien to claim asylum is in the country's public interest.¹²⁵ Simone's cousins lived in Canada, and she wished to live with them. Cousins, however, are not among those relatives listed among the "family members" designated by the Agreement's regulations in the United States or Canada.¹²⁶ Commenters in the United States urged the DHS to consider an expanded definition of "family" under the U.S. regulations to provide a culturally sensitive reflection of the reality of refugee status,¹²⁷ but the DHS refused to do so. Instead, the DHS asserted that if it changed the definition of family member it would unilaterally amend the Agreement between the

123. See Regulations Amending the Immigration and Refugee Protection Regulations, *supra* note 3 ("The Regulations flow from core principles established in the [IIRIRA].").

124. The Agreement includes exceptions for family-based reasons, unaccompanied minors, and public-interest determinations. 8 C.F.R. § 208.30(e)(6)(iii) (2005); *cf.* Akibo-Betts, *supra* note 9, at 109 (noting Canada's exception to the Agreement for claimants charged with a criminal offense that is death eligible in the United States or another country). Details regarding the implementation of the Agreement's exceptions in the United States have largely been left to operational and discretionary guidelines. See *infra* note 160 and accompanying text.

125. 8 C.F.R. § 208.30(e)(6)(iii).

126. Final Safe-Third-Country Regulations, 69 Fed. Reg. 69,482 (Nov. 29, 2004) (to be codified at 8 C.F.R. § 208.30(e)(6)(iii)); Regulations Amending the Immigration and Refugee Protection Regulations, *supra* note 3, amend. 2, § 159.1.

127. The additional individuals suggested by commenters included "de facto" family members, "cousins," and "common-law partners." 69 Fed. Reg. at 69,482.

United States and Canada; it expressly refused to do so.¹²⁸

Simone next tried to show that her claim fell under the public-interest exception to the Agreement's general rule so she could stay in Canada. The DHS's comments accompanying the U.S. regulations suggest that "humanitarian concerns" are important factors to consider in determining whether a claim fits within the public-interest exception.¹²⁹ Additionally, factors such as minor anchor relatives, past torture, and health needs "*may be* considered under the Agreement's public interest exception . . . on a case-by-case basis."¹³⁰ The DHS points out that the public-interest exception was intended to grant substantial discretion in both Canada and the United States, allowing the governments to make these determinations on a case-by-case basis. "Had the parties' intent been to [always] include the broad categories of individuals listed above, the categories would have been spelled out in the Agreement in the same manner as the other exceptions."¹³¹ Thus, the regulations purposefully avoid explicitly defining what constitutes a "public interest" and instead provide only vague guidelines.

The rules provide that public-interest determinations are made by the Director of USCIS rather than by an asylum officer. "An alien qualifies for an exception to the Agreement if . . . [t]he Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection"¹³² Certainly, this provision provides a procedural safeguard that is absent in a threshold screening. In providing this specific procedure to determine which cases fall under the public-interest exception, the DHS responded to commenters seeking to limit the absolute discretion of the exception.¹³³ The discretion of the USCIS Director (or the Director's designee), however, is not

128. *Id.* "Given the specificity of the Agreement's enumerated relationships in its 'family member' definition, the Department will not now, in effect, unilaterally amend the Agreement's definition by means of this rule to include additional individuals." *Id.* Interestingly, the Canadian regulations will include common-law partnerships under the definition of "family member" and the United States will not. *Id.* The DHS argued that the parties to the Agreement were to apply the exceptions consistent with their own laws, and in the United States language precludes the use of the word "marriage" to refer to any relationship besides "a legal union between one man and one woman as husband and wife." Defense of Marriage Act, Pub. L. No. 104-199, §§ 2-3, 110 Stat. 2419 (1996) (codified in scattered sections of 1 U.S.C. and 28 U.S.C.). This argument is urged in spite of the Department's recognition that U.S. immigration law generally recognized valid foreign marriages, including common law marriages. Final Safe-Third-Country Regulations, 69 Fed. Reg. at 69,482.

129. *Id.* at 69,483.

130. *Id.* (emphasis added).

131. *Id.* at 69,484.

132. 8 C.F.R. § 208.30(e)(6)(iii) (2005).

133. Final Safe-Third-Country Regulations, 69 Fed. Reg. at 69,484.

reviewable. While the discretion is thus limited to a particular office, the discretion remains broad to determine which claims can be adjudicated in the United States as a matter of public interest. Thus, while Simone may assert that her claim falls within the public-interest exception, whether her particular type of claim will fit within this exception remains unclear.¹³⁴ In Canada, the public-interest exception is similarly vague.¹³⁵ Simone's case did not fall under the Minister's public-interest exceptions in Canada and she quickly found herself back in the United States.

C. Back in the United States: Proving Persecution

Once back in the United States, Simone faced a barrage of difficulties associated with successfully proving her gender-based-asylum claim.¹³⁶ Simone was immediately subjected to a credible-fear interview by an asylum officer.¹³⁷ She was still traumatized by her experiences with her husband and relayed her experiences with very little emotion. She had trouble looking the officer in the eye and she did not feel comfortable speaking openly to him about the problems with her husband. The officer did not find that Simone had a credible fear of persecution and he began expedited removal proceedings. Luckily, Simone knew she needed to ask for a hearing before an immigration judge, and she did so; she was thus not immediately deported. Simone's case was eventually heard by an immigration judge after eleven months of detention.

I leave Simone at this point in her story, because whether her asylum application was granted depends largely on which judge presided over her hearing. Asylum courts throughout the United States, while following the same set of legal guidelines, accept asylum applications at significantly different rates. The United States Commission on International Religious Freedom, established in 1998, published a congressionally authorized study

134. 8 C.F.R. § 208.30(e)(6)(iii). In the United States, asylum-seekers would have to provide relevant case information to the Director or his designee to present her case for consideration under the public-interest exception. Final Safe-Third-Country Regulations, 69 Fed. Reg. at 69,484.

135. Citizenship and Immigration Canada, Government Response to the Report of the Standing Committee on Citizenship and Immigration (May 2003), available at <http://digbig.com/4rxnk>.

The Government agrees that the public interest exception provided for in the Agreement is important. While the regulations codify specific examples of where the public-interest exception should be exercised, it is not possible to exhaustively describe in sufficiently objective criteria all the situations where the public interest exception should be exercised. Accordingly, the regulations are intended to be supplemented by guidelines outlining further situations where the Minister may exercise his discretion in the public interest.

Id.

136. See *supra* notes 20–30 and accompanying text.

137. 8 C.F.R. § 208.30.

in February 2005 examining differences in asylum-application-acceptance rates among immigration courts and judges.¹³⁸ The Commission analyzed the results of more than twenty-thousand asylum decisions in fourteen different immigration courts throughout the United States.¹³⁹ The Commission found “significant differences in the acceptance rates of asylum applications from court to court.”¹⁴⁰ While the results of the Commission’s analysis indicated an average national asylum application acceptance rate of 21.89%, the acceptance rates at individual courts ranged from 5.6% to 47.1%.¹⁴¹ Further, the Commission found that the acceptance rates varied among immigration judges at five of the fourteen courts examined.¹⁴² Within immigration courts in the United States, then, the adjudication of asylum cases appears inconsistent at best. This inconsistency is particularly palpable where asylum-seekers are victims of domestic violence.¹⁴³ Simone’s fate thus remains unknown.

D. Under the Wire: Asylum in Canada

Now recall the case of Silvia. Silvia reached Canada before the Agreement came into effect and she was thus able to bring her case within the Canadian asylum system. Acknowledging that the prediction of potential outcomes of asylum claims in Canada is at best an academic exercise, the Canadian system has formally recognized domestic violence as grounds for asylum for more than ten years.¹⁴⁴ While Silvia was still required to bring forth sufficient evidence to prove that she had a reasonable fear of persecution, she did not need to link the domestic violence she suffered to one of the United Nations’s categories; instead, Canadian law had already linked domestic violence to the particular social-group category.¹⁴⁵ Silvia was granted asylum and moved to her friends’ neighborhood in Canada. Victims of domestic violence specifically seeking

138. Patrick Baier, Study on Asylum Seekers in Expedited Removal: Selected Statistical Analyses of Immigration Judge Rulings on Asylum Applications, FY 2000-2003, at 674 (Feb. 2005), available at <http://digbig.com/4rxnm>. “[The Commission on International Religious Freedom] is an independent and bipartisan federal agency created to monitor religious freedom in other countries and advise the President, the Secretary of State and Congress on how best to promote it.” U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, *supra* note 32, at 1.

139. Baier, *supra* note 138, at 678, 680.

140. *Id.* at 678.

141. *Id.* at 681–82.

142. *Id.* at 694–95. The results indicated that judges affected asylum-application-acceptance rates at the Atlanta, Elizabeth, Krome, Miami, and New York City courts. *Id.*

143. See *supra* notes 26–30 and accompanying text.

144. See *supra* note 27 and accompanying text.

145. *Id.*

the solace of the Canadian asylum process—just like Silvia—may no longer be able to do so under the Agreement.¹⁴⁶ Instead, they may be forced to bring their claims in the United States where the endings to their stories are unpredictable and where their fates are unknown.

The Agreement's implementation regulations appear to have points that may prove problematic for individual gender-asylum applicants, at least in the context of a claimant without a valid visa or unaccompanied-minor status seeking to join family members not enumerated by the rules. While the regulations may indeed, as the DHS suggests, provide an efficient and streamlined solution to the administration of the Agreement, in practice the regulations may deprive women of the opportunity to claim asylum in the most appropriate country. While this may not be a cognizable shortcoming from a ministerial perspective, the problem becomes a humanitarian blunder in light of the realities of refugee living. If a woman seeking relief from persecution cannot select the most appropriate forum for her claim (and the country in which she will live), true solace may exist—if at all—only on paper.

III. ALTERNATIVE SOLUTIONS

A. *Shaping the Agreement and Its Implementing Regulations*

“The problems [with safe-country agreements] are serious. Strategies for attacking the root causes of both primary and secondary movements are therefore essential.”¹⁴⁷ A number of scholars have proposed solutions to the difficulties encountered with the implementation of safe-country agreements. Ample material exists addressing the problems of refugee movements to third countries generally¹⁴⁸ and potential improvements for regulations in the United States and Canada specifically.¹⁴⁹ These

146. This may affect South American women disproportionately. First, the geographic reality of the Americas dictates that the most direct route to Canada from South America passes through the United States. Second, South American women may disproportionately seek to have their claims heard in Canada since many asylum claimants from South America are escaping domestic violence. See Musalo & Knight, *supra* note 17, at 1540 (summarizing recent trends in gender-based-asylum claims and noting that more than half of the domestic violence cases come from Central America, Mexico, and the Caribbean).

147. Legomsky, *supra* note 14, at 676.

148. See, e.g., *id.* at 598 (proposing solutions that could “reduce the number of cases in which the issue of return even arises and minimize the adverse effects of those returns when they do occur”).

149. See, e.g., *Hearings*, *supra* note 13, at 20 (statement of Bill Frelick, Director, Refugee Program, Amnesty International USA) (proposing a “simple and fair solution” to border security problems by allowing asylum-seekers to apply in their country of choice, disallowing applications once an asylum-seeker has received fair processing, and addressing the particular problems under the existing

proposals suggest reasonable—even laudable—solutions, but I will not repeat them here. These proposals highlight asylum difficulties overall, and while it is essential to address these difficulties, I will aim my own suggestions toward solving the particular difficulties faced by women within the confines of the Agreement.

Karen Musalo and Stephen Knight of the Center for Gender and Refugee Studies at Hastings College of Law in California have labeled U.S.-gender-based-asylum law as “bewildering and often contradictory.”¹⁵⁰ They have described the plight of women asylum-seekers with precision:

As any review of human rights reports makes abundantly clear, women asylum seekers continue to suffer violations of their fundamental human rights . . . [A] small number of these women seek protection from these violations in the U.S. Over the years, the record of the U.S. in providing protection has been a mixed one. That record is now worsening . . .¹⁵¹

While Musalo and Knight made this assertion in light of the BIA’s decision to deny asylum to Rodi Alvaredo in 2001, their assertion remains true. The Agreement places additional restrictions on asylum-seekers in a legal climate already fraught with the dangers of detention, expedited removal, and cultural insensitivity. The Agreement prevents asylum-seekers from entering Canada from the United States, regardless of why they entered the United States first.¹⁵² Once locked into the United States’s system of asylum adjudication, asylum-seekers may fail to satisfy asylum officers of their credible fear of persecution. Women will find this task disproportionately burdensome, particularly in consideration of cultural norms restricting a woman’s ability to speak openly with strange men.¹⁵³ In light of these limitations, and in recognition that the Agreement fails to directly assume or recognize significant differences between Canadian and U.S. law,¹⁵⁴ the United States should implement formal, published guidelines for asylum officers in the context of the Agreement. Formalized

Agreement).

150. Musalo & Knight, *supra* note 17, at 1542.

151. *Id.* at 1543. Musalo and Knight assessed the status of United States gender-based-asylum law following the BIA’s decision to deny asylum to Rodi Alvaredo. *Id.*; *In re R–A–*, 22 I. & N. Dec. 906, 907 (B.I.A. 2001).

152. *See generally* Safe-Third-Country Agreement, *supra* note 3.

153. This problem is, as discussed, exacerbated in situations where a woman has survived a culturally condemned event such as rape or other abuse. *Supra* notes 20–24 and accompanying text.

154. *See* Safe-Third-Country Agreement, *supra* note 3 (reading, in relevant part, “*emphasizing* that the United States and Canada offer generous systems of refugee protection, recalling both countries’ traditions of assistance to refugees and displaced persons abroad).

guidelines would help promote consistency and equity in the determination of gender-based-asylum claims and asylum claims generally. Further, published guidelines would demonstrate a commitment to human rights protection in the face of enhanced border security needs.

The final regulations implementing the Agreement fall short of assuring that women claiming asylum on gender-based claims will be fully protected. In particular, where U.S. and Canadian laws differ,¹⁵⁵ women may find that their difficulty in successfully obtaining asylum is increased. Canada's formal recognition of "domestic violence victims" as a particular social group, for example, provides a "friendlier" atmosphere for domestic violence claims, but women seeking to enter Canada from the United States will, under the Agreement, be barred entirely from raising their claims in Canada unless their claim falls under one of the enumerated exceptions.¹⁵⁶ In the United States, such claims may be barred if a woman's domestic violence claim does not fit easily into existing precedent. U.S. precedent for domestic violence victims' asylum claims remains highly ambiguous.¹⁵⁷ In Canada, domestic violence victims may more easily bring successful asylum claims.¹⁵⁸ Under the Agreement, the freedom of asylum claimants in North America to select which country will hear their claim is substantially limited. Thus, to sufficiently protect the rights of refugee women in North America, the regulations should be interpreted by asylum officers and the DHS with appropriate awareness and sensitivity to issues specific to gender-based-asylum claims. The following suggestions consider these needs.

First, the DHS should establish operational guidelines that provide for a number of protective mechanisms and limit the discretion of asylum officers. The Final Safe-Third-Country Regulations provide asylum officers with a great deal of discretion in the determination of asylum claims.¹⁵⁹ Asylum officers should be given more guidance. For example, the DHS has not specifically provided asylum-seekers with assistance in obtaining evidence during detention. Instead, the DHS has suggested that this type of guideline is appropriately left to "field guidance" because it is "operational" in nature.¹⁶⁰ The DHS should establish system-wide operational guidelines that explicitly require assistance in obtaining evidence to support asylum claims, including (but not limited to) the use of

155. See, e.g., *supra* notes 26–30 and accompanying text.

156. 8 C.F.R. § 208.30 (2005).

157. *Supra* notes 26–28 and accompanying text.

158. See *supra* notes 26–30 and accompanying text.

159. 8 C.F.R. § 208.30 (outlining the procedures to be followed and the discretionary decisions to be made by asylum officers in conducting credible-fear interviews at the border).

160. Final Safe-Third-Country Regulations, 69 Fed. Reg. 69,480, 69,482 (Nov. 29, 2004).

telephones, fax machines, and computers. If the DHS limits the time that an asylum claimant has to demonstrate that a claim falls within one of the Agreement's exceptions,¹⁶¹ the DHS should provide that claimant with the means to gather evidence in support of those claims quickly. Additionally, efforts should be made to provide gender-based claimants with a culturally sensitive setting for interviews. For example, if an asylum officer recognizes that an alien is going to assert a gender-based claim, he should—where possible—allow a female asylum officer to conduct the threshold interview and credible-fear interview.

Second, the DHS should publish operational guidelines to the USCIS Director as to what types of claims will fall under the public-interest exception in the new regulations. The regulations as written leave this determination to the unreviewable discretion of the Director or the Director's designee.¹⁶² Unless basic guidelines are provided, claimants and advocates will have no framework in which to cage their arguments asserting that adjudicating a particular claim in the United States is in the public interest. Of particular importance is the inclusion of a category allowing adjudication in the United States where the laws of Canada sufficiently differ enough to preclude effective protection for asylum claimants.¹⁶³

Third, the DHS should publish regulations that categorically allow victims of domestic violence to be members of a particular social group for purposes of establishing persecution. Recognizing that formalized guidelines specifically addressing the Agreement may not be forthcoming,¹⁶⁴ the United States should expend whatever time and energy is necessary to finalize the asylum and withholding definitions proposed in 2000 that would formally and explicitly establish gender as grounds for membership in a particular social group. Where domestic violence victims cannot obtain assistance from the governments of their home countries, the suffering they endure should be categorically and formally recognized by the United States as persecution. This recognition is particularly important in light of the Agreement. Unless the United States shapes its asylum

161. *Id.* at 69,481–82 (rejecting commenters' recommendations that safeguards such as "sufficient time to contact a consultant . . . ; sufficient time to prepare for the eligibility interview; an assurance that the interview would not occur sooner than 48 hours after the asylum seeker's arrival at a detention facility . . . ; [and] the ability to request that the threshold screening interview be postponed").

162. 8 C.F.R. § 208.30(e)(6)(iii)(F).

163. *See id.* at 69,483 (outlining commenters' suggestions that the final regulations explicitly include "[c]ases where effective protection cannot be guaranteed in Canada because of that country's asylum laws; and, similarly, cases where U.S. law and practice are not consistent with Canadian law and practice" within the Agreement's public-interest exception).

164. *See supra* notes 28, 45, and 53.

regulations to comport with Canada's, the Agreement remains fundamentally unfair to the refugee women who are, by chance or happenstance, trapped within an asylum system that fails to recognize their plight.

These changes could have a larger policy impact as well. Existing differences between the asylum systems in the United States and Canada will lead to increased alien smuggling and trafficking. As women desperate for safety take drastic measures to reach the country in which they wish to claim asylum, they will be susceptible to traffickers seeking easy targets.¹⁶⁵

As a final recommendation, the United States should develop a comprehensive and accurate reporting system for asylum applications at all procedural levels. Whether applications are granted or denied, information about applications is critical to understanding how asylum proceedings impact aliens and refugees. Asylum officer decisions, BIA decisions, and immigration judge decisions all impact the lives of asylum-seekers profoundly. To protect their rights (and to fully understand the costs and benefits of the asylum procedures in place), a comprehensive and accurate reporting system is essential. Until such a reporting system is in place, the asylum system's true effects can never be fully understood.

B. Safe Country, Less Bureaucracy

As an alternative to fine-tuning the regulations associated with the Agreement, another possible solution to its many problems is to continue to improve the U.S. asylum system in its absence. Colloquially put, if the asylum system "ain't broke, don't fix it."¹⁶⁶ The number of aliens seeking asylum has fallen steadily over the past several years.¹⁶⁷ In fact, the United Nations's refugee agency has reported that the number of asylum applications has fallen by forty percent since 2001.¹⁶⁸ Raymond Hall, head of the refugee agency's Europe bureau stated that "[i]n most industrialised countries, it should simply not be possible to claim there is a huge asylum crisis any more."¹⁶⁹ One alternative approach to the current problems with the Agreement is to recognize this recent shift in the movements of asylum-seekers and disband it entirely. With the number of refugee applications

165. See, e.g., CBC NEWS, 'Safe Third Country' Pact Puts Refugees at Risk, *Say Critics*, Dec. 17, 2002, <http://digbig.com/4rxnq> (predicting an increase in organized human smuggling into Canada via the United States).

166. *Hearings*, *supra* note 13, at 23 (statement of Bill Frelick, Director, Refugee Program, Amnesty International USA).

167. BBC NEWS, *Asylum Falling Around the World*, Mar. 1, 2005, <http://digbig.com/4rxnr>.

168. *Id.*

169. *Id.*

falling, there is no need to expend substantial administrative funds to manage the asylum-seekers that cross the U.S.–Canadian border. In other words, the Agreement is not necessary now and never was necessary before. If the Agreement is eliminated, all border points of entry could be governed under the same set of regulations, reducing overall administrative costs. While the current political climate makes this solution unlikely, it might be considered in the near future as the practical problems resulting from the Agreement come to light.

IV. ONE YEAR LATER: WHERE HAS THE AGREEMENT TAKEN US?

As of January 2006, Canada has reported a staggering decline in the number of asylum-seekers handled by its immigration administration.¹⁷⁰ Asylum advocates in the United States have noted a similar reduction in the number of asylum-seekers attempting to enter Canada as well, with devastating consequences. “On a daily basis we witness a tragedy unfold as we inform vulnerable individuals and families that they will be denied access to protection in Canada.”¹⁷¹ Anecdotal stories suggest that these numbers are somewhat deceptive with respect to actual refugee movement; asylum-seekers may be looking at trafficking as a last-hope option for crossing the border.¹⁷² While the true extent of the economic and social impacts of the Agreement will not be precisely determinable for some time, these preliminary observations suggest that the reduced costs and minimal impacts on the lives of refugees projected by DHS do not reflect reality. Indeed, the negative impacts faced by refugees may escape notice altogether, as trafficking and illegal border crossing replace what was once a transparent and safe process of cross-border movement.

170. See Keung, *supra* note 11 (“More than seven months into the implementation of the Safe Third Country Agreement, the number of refugee claims made in Canada to date in 2005 has hit its lowest point since the mid-1980s, according to a report released yesterday by the Canadian Council for Refugees.”); Gloria Nafziger, Op-Ed., *Refugees Worse Off a Year After Pact with U.S.*, TORONTO STAR, Dec. 29, 2005, at A25 (“While the agreement is said to ‘enhance the international protection of refugees,’ a recent report by the Canadian Council for Refugees calls this into question. The report projects that 2005 will have the lowest number of refugee claims in Canada since 1989.”).

171. Keung, *supra* note 11 (quoting Patrick Giantonio, Executive Director of Vermont Refugee Assistance).

172. *Id.* (quoting Patrick Giantonio: “The impact of this agreement on the lives of threatened refugees is devastating. We’ve already heard anecdotal stories of people considering crossing the border irregularly to file a claim in Canada”).

CONCLUSION

The Agreement has received substantial criticism from human rights advocates because it forces asylum-seekers physically present in the United States to have their claims adjudicated within the U.S. asylum system. Within the U.S. system, lengthy detention policies arbitrarily deprive asylum applicants of their freedom. Women refugees, having escaped persecution, such as domestic violence or rape, are forced to face a system that requires them to disclose their most private traumas to strangers, in violation of their cultural norms. If their stories are credible, they are detained until their hearing. If their stories are not credible, they are immediately removed to the country from which they came. The Agreement, intended—at least on paper—to merely alter managerial practices at U.S.–Canadian land-border ports-of-entry, provides a great deal for women asylum-seekers to fear.

Current U.S. asylum law has substantial shortcomings in the human rights context,¹⁷³ and it lags far behind Canada's commitment to expanding the accessibility and fairness of its asylum system to women refugee applicants. On the contrary, the United States appears to be restricting accessibility to the system for all applicants,¹⁷⁴ with profound implications for female refugees. It is high time for the United States to step up and address the human rights violations that plague women asylum-seekers, and to work toward alleviating those violations. The Agreement may thus represent an opportunity for the United States to effect positive change in its asylum system.

The United States may look to Canada's asylum laws and regulations as a model as it strives to raise the bar in adjudicating gender-based-asylum claims, particularly in the context of domestic violence. The Agreement, while officially altering only the assignment of responsibility for processing claims, could strengthen the relationship between these two North American countries and enhance the influence of Canadian law and policy in the development of future U.S. statutes and regulations. Bringing U.S. and Canadian law into harmony prior to the implementation of the Agreement would have been a more desirable course of action, and this lesson should receive attention in future negotiations of bilateral or multilateral agreements. Within the context of the Agreement as it stands, however, formal recognition of domestic violence and other unique difficulties faced by women seeking asylum will allow the United States to take a long overdue and significant step toward alleviating human rights

173. ACER, *supra* note 16, at 17.

174. *See supra* notes 56–57 and accompanying text.

violations and providing true solace to the persecuted.

Lynn S. Hodgens

POSTSCRIPT

As this document goes to press, it seems prudent to inform readers of two noteworthy developments. First, refugee advocacy groups have filed a lawsuit challenging the constitutionality of the Agreement in Canadian court.¹⁷⁵ The outcome of this case will have significant impact on the future of the Agreement and thus should be followed by refugee and immigrant advocates with watchful eyes. Second, I recommend the excellent Note by Amy K. Arnett.¹⁷⁶ Ms. Arnett similarly condemns the current status of the Agreement with respect to gender-based-domestic-violence cases and points to the Canadian approach as a desirable model. Additionally, she provides a useful and extensive analytical history of gender-based-asylum cases in both the United States and Canada in the context of international law.

175. Lauren La Rose, *Refugee Groups Challenge U.S. Status as Safe Third Country for Asylum Seekers*, GAZETTE (Canada), Feb. 5, 2007, available at <http://www.cerium.ca/article4043.html>.

176. Amy K. Arnett, Note, *One Step Forward, Two Steps Back: Women Asylum-Seekers in the United States and Canada Stand to Lose Human Rights Under the Safe Third Country Agreement*, 9 LEWIS & CLARK L. REV. 951 (2005).