

Orientalism Revisited in Asylum and Refugee Claims

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Abstract

This article examines the stereotyping of Islam both by advocates and academics in refugee rights advocacy. The article looks at a particular aspect of this stereotyping, which can be seen as 'neo-Orientalism' occurring in the asylum and refugee context, particularly affecting women, and the damage that it does to refugee rights both in and outside the Arab and Muslim world. The article points out the dangers of neo-orientalism in framing refugee law issues, and asks for a more thoughtful and analytical approach by Western refugee advocates and academics on the panoply of Muslim attitudes and Islamic thought affecting applicants for asylum and refugee status in the West.

1. The new Orientalism

Edward Said, in his classic book, *Orientalism*,¹ describes the Western attitude that 'Orientals', persons from Middle Eastern or Islamic cultures, are somehow fundamentally different from Westerners:

There are still such things as *an* Islamic society, *an* Arab mind, *an* Oriental psyche. Even the ones whose specialty is the modern Islamic world anachronistically use texts like the Koran to read into every facet of contemporary Egyptian or Algerian society. Islam, or a seventh-century ideal of it constituted by the Orientalist, is assumed to possess the unity that eludes the more recent and important influences of colonialism, imperialism, and even ordinary politics. Cliches about how Muslims (or Mohammedans, as they are still sometimes called) behave are bandied about with a nonchalance no one would risk in

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¹ Edward Said's *Orientalism* remains the foremost work on Western stereotyping of the Arab and Muslim world. Edward W. Said, *Orientalism* (New York: Pantheon Books, 1978). Said has updated his work to explain the phenomenon of Western stereotyping of Islam in the context of creating a new post-communist political peril. See also Edward Said, 'The Phony Islamic Threat': *New York Times Magazine*, 21 Nov. 1993, 62.

talking about blacks or Jews. At best, the Muslim is a 'native informant' for the Orientalist.²

Orientalism has many aspects. One aspect is the Western attitude that there is a profound difference between the very mindset of people from Middle Eastern/Islamic cultures and those from the West. Some Orientalists portray this difference in a romanticized, simplified version of the Eastern mind. Some portray it as much more sinister, describing Muslims as warmongers and Arabs as 'terrorists.' The aspect of Orientalism Edward Said attacks in the main is the acute tendency of Westerners to explain every facet of Eastern/Muslim societies in light of the Muslim religion — as if there were no other reality or influence on these societies but Islam, and as if there were no complexity or diversity in the philosophies or practices of Muslim societies. He strongly disparages such attitudes as endemic of Western neocolonialism.³ Other observers identify an aspect of Orientalism embedded in the philosophy of cultural relativity — calling it a form of cultural imperialism.⁴

Orientalism is also reflected in current trends to simplify the experiences of well over a billion people into a supposedly monolithic and rigid way of thinking called 'Islam'. The absurdity of such a proposition should be obvious to anyone who realizes that Islam is practised in such diversity of culture and context as China, Indonesia, Pakistan, Tunisia, Somalia, and even the United States — where six million people now profess Islam. This author uses the term 'neo-Orientalism' to refer to the phenomenon so scathingly attacked by Said, but as promoted by more recent movements such as modern feminists and human rights promoters including universalists and cultural relativists.⁵

There are several very destructive outcomes of such stereotyping — aside from dehumanizing and trivializing the beliefs of such a large

² See generally Said, *Orientalism*, at 31–49.

³ Said's Orientalism construct has also been criticized by Easterners such as Professor Sadiq al-'Azm, who points out that Easterners themselves frequently exaggerate the influence of Islam as a guiding force in their lives and societies, calling this tendency 'Orientalism in reverse.' Sadiq Jahal al-'Azm, *Naqd al-Fikr al-Dini* (Beirut: Dar al-tali'a, 1972) in Ann Elizabeth Mayer, *Islam and Human Rights, Tradition and Politics* (Westview Press, Colorado, 1995), 46, note 26.

⁴ Cultural relativism advocates that culture determines rules of conduct and theory, and that since cultures differ widely from each other, culturally-bound rules that are valid in one are not necessarily valid in another. Cultural relativism promotes extreme tolerance in assessing others' values, disparaging the concept of universality in human rights as necessarily involving 'judging' another culture. See Douglas Lee Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards,' 27 *Stan. J. Int'l L.* 345, 353 (1991); also, Jack Donnelly, *Universal Human Rights in Theory and Practice* (1989). On cultural relativity as cultural imperialism, see Alison Dundes Renteln, *International Human Rights: Universalism versus Relativism* (1990), 47, 77, 86, 139–40.

⁵ My concern is both with universalists who, in their efforts to ensure a single standard of human rights uniformly applied, misunderstand and misconstrue Islamic concepts, and with cultural relativists who similarly stereotype Islam as a set of 'cultural values' that cannot, or should not be changed in any positive 'Western-oriented' way. I do not suggest that the motivation of promoters of these philosophies are identical, merely that the result is the same.

segment of humankind — a few of which I will discuss here in the refugee context introduced above. First, neo-orientalist stereotyping actually supports and promotes the most repressive and extreme versions of Islamic interpretation, currently being manipulated by fundamentalist regressive regimes. This further strengthens and entrenches such regimes' efforts to distance 'Islam' from universal human rights. Second, such stereotyping divides Western human rights promoters from their counterparts in the Muslim world. Human rights promoters within the Islamic world are repelled by Western stereotyping, and are alienated in their own societies for apparently identifying with outsiders promoting such stereotypes. Moreover, Muslim human rights promoters are also discouraged by these Western attitudes from advocating alternative interpretations of Islam which are compatible with universal human rights. This inevitably undermines East-West partnerships on important rights issues.⁶ Third, in the specific context of human rights advocacy in asylum and refugee law, stereotyping which values a Western or Western feminist interpretation over a more accurate interpretation of the type of persecution occurring in a Muslim milieu may deny many individuals, especially women, human rights protections to which they are legitimately entitled. Particularly detrimental to human rights in the refugee context is the demonizing of Islam by Western politicians and policy-makers to justify militaristic intervention or to support repressive regimes or discriminatory policies against Arabs and Muslims;⁷ and academic polemicists who promote concepts such as an 'Islamic peril' or 'Green Peril', or an insurmountable 'clash of civilizations'.⁸ Discussion of these forces and their impact on refugee claims is beyond the scope of this article, but has been made elsewhere.⁹

Aside from the impact neo-Orientalism has on the way governments, policy-makers and academics approach asylum and refugee issues, there are other forces of neo-Orientalism bearing on the asylum and refugee

⁶ I am grateful to Ann Elizabeth Mayer for these points, which she illustrates so convincingly both in her book *Islam and Human Rights*, and her article, 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' 15 *Mich. J. Int'l L.* 307 (Winter, 1994).

⁷ See Said, 'A Devil Theory of Islam,' *The Nation*, Aug. 1996; Edward W. Said, 'The Phony Islamic Threat,' *New York Times Magazine*, 21 Nov. 1993; Ahmed Yusuf & Caroline F. Keeble, *The Agent: The Truth Behind the Anti-Muslim Campaign in America* (1999); Ahmed Yusuf, 'Islamic Revivalism, Western Extremism, and Israeli Deception: The Clash of Truth and Perception,' and Graham Fuller, 'Political Islam and U.S. Policy,' both in *Middle East Affairs Journal* (1999).

⁸ Samuel P. Huntington, 'The Clash of Civilizations?' *Foreign Aff.* (Summer, 1993). Huntington's thesis that religion dominates Muslim culture and that 'Islamic' civilization is fundamentally opposed to Western civilization has been criticized on many fronts. See 'Responses to Samuel P. Huntington's The Clash of Civilizations?' *Foreign Aff.* 2 (Sept–Oct. 1993); also, Huntington's rebuttals and expansion on his theory in 'If Not Civilizations, What? Paradigms of the Post-Cold War World,' *Foreign Aff.* 186 (Nov–Dec. 1993); and 'The Islamic-Confucian Connection,' *New Persp. Q.* 19 (Summer, 1993). On the 'Islamic Peril,' or 'Green Peril' discourse and its consequences, see sources cited above n.7.

⁹ See Susan M. Akram, 'Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion,' 14 *Geo.Imm. L.J.* 51 (Fall, 1999).

context. Neo-Orientalism has an impact on the presentation and outcome of asylum and refugee claims made by individuals from the Muslim world in the West. This article focuses on the ‘neo-Orientalism’ of purported defenders of human rights. Neo-Orientalist portrayals of Islam doom asylum and refugee applicants’ cases from the very start, in two major ways. First, the distorted view of ‘Islam’ put forward by these refugee advocates can be disproved by government research and expert testimony, thus undermining the credibility of the refugee’s account. Second, not only are these monolithic portrayals of Islam simply incorrect and open to government rebuttal, but they silence the voice of the refugee herself, with a number of destructive consequences, as illustrated in the cases below.

2. Fallacies about Islam and their negative impact on asylum claims

Certain stereotypes about Islam appear repeatedly in the presentation and defence of asylum/refugee claims. The fundamental misperceptions and distortions of the Islamic religion in its great variety and complexity that reappear time and again in this context are best exposed by juxtaposing the Islamic source and its interpretations against the neo-Orientalist stereotype promoted in their stead.

Westerners’ perception that Islam somehow lacks the ethical and humanitarian roots of the other two faiths, and that the Muslim ‘Allah’ is a different — and warmongering — God from the Jewish-Christian God, is a reflection of the fundamental ignorance of Western beliefs concerning Islam. Although Westerners routinely omit Islam in their references to the ethical principles or belief systems of the Christian-Jewish ‘traditions’, the three religions of Islam, Christianity and Judaism all belong to the ‘Abrahamic’ faiths. Critical to understanding Islam is to recognize that its cardinal principle is belief in one God — the same God of Judaism and Christianity — and that the great prophets reiterated the word of God, with Mohammad being the last of God’s messengers. For Muslims, the word of God is contained in the Qur’an, which was revealed to Prophet Mohammad, and written down exactly as revealed to him. Muslims believe in all Christian and Jewish prophets, from Abraham to Jesus, but their view of the purpose and mission of the prophets differs from that of Jews and Christians.¹⁰ Thus, when Westerners

¹⁰ Islam does not incorporate the concept of divine incarnation: that God actually appeared in the form of Jesus Christ on earth. However, the ethical principles of the Old and New Testament are embodied in the Qur’an, along with the later revelations made to Prophet Mohammad. Neither is the Prophet Mohammad seen as ‘the son of God,’ as Christians regard Jesus Christ, but a mortal of great piety through whom God sought to deliver His message. Hence, for anyone to call Islam ‘Mohammadenism’ falsifies Muslims’ belief that God is the only divine being.

insist on coupling the Jewish and Christian religions as having the same roots, or Jewish and Christian ethics as having the same basic principles, Muslims are, rightly, puzzled by the omission of Islam.

Islam, in its most basic requirements, is extraordinarily simple to understand. It has five 'pillars', or precepts, for every Muslim to follow.¹¹ Contrary to the Western myth that Islam totalizes and stifles all individual thought, one of the premises of the religion is that every Muslim is free to select the religious principles that make the most sense to him or her.¹² There are a number of important corollaries to this principle that are the reverse of Western myths: first, that every Muslim should read and understand the Qur'an for him- or herself, because each individual Muslim makes his or her own individual reckoning with God;¹³ second, Islam has no church or priesthood, and thus there are no 'clerics' or 'clergy' with power, for example, to excommunicate or absolve Muslims of their sins,¹⁴ much less to tell them which religious interpretation they must follow; and third, Muslim jurisprudence legitimizes a huge range of

¹¹ The five pillars require the Muslim to believe in one God and in his prophet Mohammad's message; to pray daily facing Mecca; to give zakat, or charity, to the needy; to perform the pilgrimage to Mecca, if possible, once in an individual's lifetime; and to fast one month a year (during the lunar month of Ramadan). Although the precepts are simple, there is a complex philosophy underpinning each of these requirements, such as the concept of 'zakat,' which really means 'wealth-sharing,' based on the notion that all wealth belongs to God and thus there is an obligation to distribute it amongst those in need.

¹² In one of the most important passages on this point, as well as the Qur'anic position of freedom of religion, the Qur'an states, in 2:256: 'Let there be no compulsion in religion.' References in this article to Qur'anic verses will follow the system of *surah* citation, followed by a colon, then the specific *ayah* citation. All translations, unless otherwise noted, are from Abdullah Yusuf Ali's Text, Translation and Commentary of the Glorious Qur'an (3rd ed, Cairo, 1938).

¹³ There are many Qur'anic passages emphasizing the individual's free choice in matters of belief, based on the precept that God judges each person individually on the basis of his or her belief and righteous conduct, see, for example, 18:29 ('*al-Khaf*'); 6:107 ('*Al-An'am*'); 10:99 ('*Yunus*'); 16:82 ('*An-Nahl*'); 42:48 ('*Ash-Shura*'). The Prophet Mohammad was entrusted with communicating God's message, but not compelling anyone to believe: 'The Truth is from your Lord: Let him who will, Believe, and let him who will, reject (it).' 18:29. See Riffat Hassan, 'Rights of Women Within Islamic Communities,' *Religious Human Rights in Global Perspective* (John Witte and Johan D. van der Vyver, eds.) (Martinus Nijhoff, 1996), 375; see also John L. Esposito, *Islam: The Straight Path* (New York: Oxford University Press, 1991), 28; and Azizah Al-Hibri, 'Islamic Constitutionalism and the Concept of Democracy,' 24 *Case W. Res. J. Int'l. L.* 1, 5 (Winter, 1992).

¹⁴ See Ignaz Goldziher, *Introduction to Islamic Theology and Law* (Andras and Ruth Hamori trans., Princeton Univ. Press, 1981). This has important implications, as Westerners insist on calling Muslim scholars or leaders 'clerics,' and on distorting both the importance and the influence of so-called 'religious fatwas' issued by such 'clerics.' For additional support on this point, see Al-Hibri, 'Islamic Constitutionalism,' at 5; see also Hassan Al-Turabi, 'The Islamic State,' in *Voices of Resurgent Islam* (J. Esposito ed.) (New York: Oxford University Press, 1983) 241, 244. See also, Abd Al-Razzaq Al-Sanhuri, *Fiqh Al-Khilafah Wa Tatawvuruha* 230 (1926, N. Sanhuri & T. Shawi trans., Cairo, 1989), 71-72 and 191-92. However, among the *Shi'a* sects, particularly the *Twelver Shi'a* and the *Ismaili's*, belief in their Imams has acquired a messianic quality, elevating the Imams' pronouncements, or *fatwa*, to near-scriptural status. (The exact translation of the Arabic word *fatwa* is 'legal opinion'.)

varying interpretations of religious precepts, as long as it is based on good faith and pious interpretation.¹⁵

Another basic source of Western mythmaking is the belief that there is a single 'Islamic tradition'. The 'Islamic tradition' comprises the Qur'an, the *sunnah* and *hadith*, the *fiqh*, the *madahib* and the *shari'a*. There are enormous inconsistencies and disagreements in the interpretations of the content of these sources, and the interpretations comparing the sources between and among themselves. As some scholars point out, it is thus inaccurate to talk about 'Islam' or the 'Islamic tradition' as a monolith.¹⁶ The primary source of Islamic religion and Islamic law is the Qur'an.¹⁷ Thus, the Qur'an, as the revealed word of God is the first and final source of all Muslim religious truth: other sources that comprise the 'traditions' of Islam are secondary and inferior to what is embodied in the Qur'an. Any interpretation of religion or religious law that conflicts with the Qur'an must accede to the Qur'anic principle. A secondary source of religious law is the *sunnah*, which are the ways or traditions of the Prophet, as well as the *hadith*, the sayings of the Prophet as recorded by the Prophet's followers or others who obtained the information on

¹⁵ Al-Hibri, 'Islamic Constitutionalism,' at 6; see also 2 Wihbah Al-Zuhayli, *Usul al-Fiqh al-Islami* (2 vols.) (Damascus, Dar al-Fikr, 1986), 1043–51, 1066, 1092–93. See also Subhi Mahmassani, *Muqaddimah fi Ihya' 'Ulum al-Shari'ah* (Beirut, Dar al-'Ilm li al-Malayin, 1962), 30; Abdel Qader Abu al-'Ila, *Buhuth fi al-Ijtihad* (Egypt, Matba'at al-Amanah, 1987), 71–75. It should be made clear that there were initially three major sources of Islamic law: pre-Islamic custom; other legal systems; and the interpretations of local judges according to their acknowledged right to exercise discretion. David Pearl, *A Textbook on Muslim Law* (Cambridge, 1979), 8. Scholars agree that there was a major schism in the development of Islamic law from the 10th century onwards, when Islamic religious jurists formed schools of interpretation, created normative rules for the *Sunnah*, and discouraged new or individual interpretations of the Qur'an or *hadith*. Pearl, at 8; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964). Thereafter, the freedom to engage in open discourse based on the principles of independent reasoning — *r'ay* — and of individual logical interpretation — *ijtihad* — was suppressed by the religious jurists. Some commentators refer to the early 10th century as the date of closing the door on *ijtihad*. Jamal J. Nasir, *The Islamic Law of Personal Status* (Graham & Trotman, London, 2nd ed., 1990); Pearl, at 15. Modern writers blame the patriarchal interpretations of the Qur'an both on the incorporation of pre-Islamic custom, the patriarchy of the early scholars, and on the suppression of individual *ijtihad*. Azizah Al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights,' 12 *Am. J. Int'l L. & Pol.* 1, 6–8 (1997); Mayer, 'Universal versus Islamic Human Rights,' at 323 (citing Fatima Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Mary Jo Lakeland trans., 1991)).

¹⁶ See, for example, Hassan, 'Rights of Women Within Islamic Communities,' 370.

¹⁷ The Qur'an is organized into *surahs* (chapters) and *ayahs* (verses). There are 6,236 *ayahs* distributed over 114 *surahs*. The Qur'an was revealed to Prophet Mohammad over 22 years, which explains the principle of gradualism — meaning that certain issues were clarified over time during the course of revelation. Muslims believe the word of God as embodied in the Qur'an is immutable, and thus not a word of the original Arabic text has ever been changed. See Fazlur Rahman, *Islam* (Chicago: University of Chicago Press, 2nd ed., 1979); Esposito, *Islam: The Straight Path*.

more or less sound authority.¹⁸ However, the *hadith* and *sunnah* may only be consulted to clarify or supplement a Qur'anic passage, and cannot be used to contradict it.¹⁹ *Fiqh* is Islamic jurisprudence, which includes the historical development of Islamic principles by many different interpreters and jurists based on all the recognized sources. Islamic jurisprudence developed historically through many different legal schools, or *madahib*. The final source of 'Islamic tradition' is the *shari'a*, or body of legal rules. Specifically with regard to the *shari'a*, it is important to note that the Qur'an is not a code of law. Only approximately eighty verses refer to legal issues, and even these verses are subject to many interpretations, beginning with whether they are mandatory or permissive, and whether they address public or purely private sanctions.²⁰ Islamic law is, thus, better referred to as consisting of the application by different jurists of Qur'anic principles, as interpreted by them to a particular legal situation, incorporating in their interpretations much of the customary law of the Arabs.²¹

The Western myth of monolithic 'Islamic law' is also contrary to the historical and current reality of what might be better termed as 'Islamic laws and traditions'. Muslim scholars resorted to the Qur'anic requirement that a Muslim should apply *ijtihad*, the science of interpretation, to clarify or explain the meaning of Qur'anic verses. There were many schools

¹⁸ Literally thousands of *hadith* were recorded after the Prophet's death. Because there was great debate concerning the authenticity of any particular *hadith*, the science of *hadith* criticism developed to ascertain their validity. *Hadith* are thus divided into the actual saying (*matn*) and the chain of attribution (*isnad*). *Hadith* are further interpreted according to the historical context of the *sunnah* itself. In the 13th century, Muslim theologians recognized six collections of *hadith* as authentic, and accorded them canonical status. Goldziher, *Introduction to Islamic Theology and Law*, at 39.

¹⁹ The Qur'anic verses themselves are subject to many differing interpretations. It is the Qur'an, interpreted by collectors of *hadith* and jurists which have become the core of the Islamic traditions. There continues to be enormous debate concerning the authority and authenticity of any particular *hadith*. In fact, a number of academics on Islamic interpretation have disputed whether the Prophet Mohammad intended his sayings or practices to be memorialized or followed. One of the *hadiths* states that the Prophet said: 'do not record my sayings and anyone who has recorded any of my statements other than Qur'an[ic revelations] should erase them.' 8 Muslim Ibn Al-Hajjaj, *Al-Jami' Al-Sahih* 229 (9th Century, reprint, Beirut n.d.) in Al-Hibri, 'Islamic Constitutionalism,' note 12 at 4.

²⁰ See Pearl, above n.15, at 1.

²¹ A number of commentators seriously question whether the Qur'an was ever intended to provide guidance on political or legal matters, arguing that it is more legitimate to interpret it as providing specific rules for only religious matters. There is a further debate about whether Islam establishes rules for a political state, and if so, what form of government is required under Islamic law. See, for example, Leonard Binder, *Islamic Liberalism: A Critique of Development Ideologies* (Chicago: University of Chicago Press, 1988); Hamid Enayat, *Modern Islamic Political Thought* (Austin: University of Texas Press, 1982); John L. Esposito, *Islam and Politics* (Syracuse, N.Y.: Syracuse University Press, 1991); *Islam, Politics and the State: The Pakistan Experience* (Mohammad Asghar Khan ed.) (London: Zed Books, 1985); Edward Mortimer, *Faith and Power: The Politics of Islam* (New York: Random House, 1982); Abderrahim Lamchichi, *Islam et Contestation au Maghreb* (1988); Sami Zubaida, *Islam, the People and the State* (1989); Shahrough Akhavi, 'Islam, Politics and Society in the Thought of Ayatullah Khumayni, Ayatullah Taliqani and Ali Sharyati,' 24 *Middle E. Stud.* 403 (1988); Al-Hibri, 'Islamic Constitutionalism.'

(*madahib*) of *ijtihad* following the work of prominent Muslim scholars. Four Sunni schools survive: the *Hanafi*, *Maliki*, *Shafi'i*, and *Hanbali*.²² The main *Shi'a* sect, the *Twelvers*, follow a fifth school.²³ Needless to say, the interpretations of these schools on any particular Qur'anic principle may differ widely from each other.²⁴ Most countries basing their family law on Muslim law have adopted the *ijtihad* of one or other of these schools. Few States adopting any form of Muslim law have adopted Muslim *shari'a* principles in criminal law, with some exceptions including Iran, Saudi Arabia, Afghanistan and Pakistan. To the extent that *shari'a* is incorporated in the legal system of Muslim states, it exists primarily in the laws of personal status.²⁵

The roots of Islamic sectarianism are also misunderstood in the West. In addition to the many schools of interpretation of religious law, Islamic practice has subdivided into a number of different sects, based primarily on claims to rights of political/religious succession to the Prophet. The *Shi'a* and *Sunni* are only two of the Muslim sects, although they represent the majority following the Muslim faith.²⁶ This is important in understanding both the religious and political complexity in which Islam is practised: the insular and minority interpretation currently practised

²² The Hanafi school, following the teachings of Abu Hanifa Al-Numan, is currently followed by Muslims in Turkey, Central Asia, China, Iraq and the Indo-Pakistan Subcontinent. The Maliki school, following the Medina Imam Malik ibn Anas has influenced Egypt, North Africa and parts of West Africa. The Shafi'i school of the Imam Muhammad ibn Idris Ash-Shafi'i has influenced the Levantine countries: Jordan, Palestine, Syria, Lebanon, as well as Yemen, Egypt, the southeast Asian countries of Malaysia, Thailand, Singapore and Sri Lanka. Ahmad ibn Hanbal's teachings have had the least influence over Islamic legal theories. However, it is the official doctrine of the Saudi Arabian Kingdom, as revived by Muhammad Ibn Abdul Wahhab in the nineteenth century. Interestingly, the Hanbali school teaches the most rigid adherence to the *sunnah* of all the schools of jurisprudence. Nasir, *The Islamic Law of Personal Status*, at 15–18; Goldziher, *Introduction to Islamic Theology and Law*, at 49.

²³ The J'afari school of the *Twelver Shi'a* is based on the teachings of Imam Jafar Sadiq. Other *Shi'a* groups, such as the Ismailis, have their own schools of interpretation.

²⁴ In general, however, these five schools of thought agree on some basic principles to guide interpretation: (1) that Islamic laws change with time, place and circumstance, Subhi Mahmassani, 478–79; Yusuf Hamid Al-'Alim, Al-Makassid Al-'Ammah (Herndon, Virginia, International Institute of Islamic Thought, 1991), 44–45; (2) that Islamic laws are meant to avoid doing harm, Al-'Alim, at 89; Mahmassani, at 480; (3) that laws may be set aside if they are based on a reason which has disappeared, Al-'Alim, at 123–25; Mahmassani, at 479; and (4) that laws must be interpreted in the public interest, Mahmassani, at 480; Al-'Alim, at 124–25; 2 Al-Zuhayli, at 1017–29.

²⁵ For a complete review of which Arab/Muslim state adopts which Shari'a school in its personal status laws, see Nasir, *The Islamic Law of Personal Status*, at 31–37.

²⁶ The dispute between *Sunni* and *Shi'a* began after the death of the Prophet. The *Sunnis* chose Abu Bakr as their first Caliph, successor to the Prophet, and the *Shi'a* chose Ali bin Abi Taleb. The *Shi'a* rejected Abu Bakr, Umar and Uthman, the three Caliphs after the Prophet, as usurpers, and civil strife arose between the two communities. There is debate about whether the Qur'an or the Prophet claimed to lay down rules concerning a political entity; some scholars argue that the Qur'an is intended to be law in the religious realm only, not to create or authorize any particular political authority or state. See generally Al-Hibri, 'Islamic Constitutionalism'; Al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights,' 6–7; Esposito, *Islam and Politics*, at 17–18.

by post-Revolutionary Iran's *Twelver Shi'ism*²⁷ is as far removed from Saudi Arabia's Sunni *Wahhabism* as Roman Catholicism is from Protestant Christianity. In both religious schisms, each sect accuses the other of heresy. The two Muslim religious/political entities do not even recognize each other's interpretations as having any authenticity in the faith.²⁸

Finally, again contrary to Western stereotypes, and particularly those promoted by many Western feminists, Islam does not necessarily sanction inequality between man and woman, or suppress women's rights or freedoms, or require women to be subordinate to man in any way, including dress.²⁹ As so many Muslim writers and thinkers have attested, the ideas supporting the current unequal and oppressive treatment of women in much of the Muslim world is not based on the Qur'an or Qur'anic framework, but on misinterpretations of the Qur'an by a succession of male patriarchal interpreters working in male-dominated systems for whom such religious interpretations serve political ends.³⁰

Despite the historical suppression of independent, individual reasoning by early Islamic jurists and the current reliance on male patriarchal interpretations of the sources of Islamic traditions, the basic principles of Islam emphasize independent, individual knowledge, thought and reasoning.³¹ These principles negate the common perception that Islam requires rigid conformity to principles set down in the Dark Ages that permit no deviation. That perception could not be farther from the

²⁷ *Shi'ism* places belief in its *Imams*, or spiritual leaders, as 'spiritual instructors of Islam, the heir to the Prophet's office.' Goldziher, *Introduction to Islamic Theology and Law*, at 183. The *Twelver Shi'a* are a sect that believe that the rightful succession of the office of Imam passed from Ali through his direct descendants to an eleventh *Imam*, whose son, Muhammad Abul-Qasim was taken from earth as a child. This twelfth *Imam*, according to them, will reappear at the end of time as the Imam Mahdi, or the saviour of the world. Goldziher, *Introduction to Islamic Theology and Law*, at 192.

²⁸ Yet most Westerners criticize both these regimes as representing 'Islamic ideology.' In doing so, these outsiders ignore the serious human rights ramifications of political manipulation of Islam for a particular regime's own repressive ends. See Mayer, 'Universal versus Islamic Human Rights,' at 321.

²⁹ See, for example, the arguments of Riffat Hassan, reinterpreting the Qur'anic sources underlying the current accepted status quo of inequality and suppression of Muslim women's rights, including: 'The Issue of Woman-Man Equality in the Islamic Tradition,' in *Women's and Men's Liberation — Testimonies of Spirit* (Leonard Grob, Riffat Hassan and Haim Gordon, eds, Greenwood Press, 1991); 'An Islamic Perspective,' in *Women, Religion and Sexuality: Studies on the Impact of Religious Teachings on Women* (Jeanne Becher, ed.) (WCC Publications, Geneva, 1991); 'Muslim Women and Post-Patriarchal Islam,' in *After Patriarchy, Feminist Transformations of The World Religions* (Paula Cooley, William Eakin and Jay McDaniel, eds.) (New York: Orbis Books, 1991).

³⁰ See, for example, Fatima Mernissi, *Dreams of Trespass: Tales of a Harem Girlhood* (Reading, Mass.: Addison-Wesley Pub. Co., 1994); Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*; Riffat Hassan in sources cited in note 29; and the writings of Abdullahi An-Nai'm; Subhi Mahmassani; and Farida Bennani.

³¹ See the writings of prominent Muslim thinker Muhammad Iqbal, in particular *The Reconstruction of Religious Thought in Islam*, Shaikh Muhammad Ashraf (Lahore, 1971), 168.

principles of mutability recognized by every school of Islamic interpretation. Actual application of these principles is, of course, an entirely different proposition, as the images of Islamic interpretation in the refugee cases demonstrate.

Asylum and refugee claims relating to Islam or Islamic law in a particular country have arisen most frequently in claims made by women. Under the almost universally accepted definition of refugee of the 1951 Refugee Convention³² and the 1967 Protocol,³³ an applicant for refugee status must establish persecution or a well-founded fear of persecution based on a particular Convention-recognized ground: race, religion, nationality, political opinion or social group. Although there are substantial variations in the manner in which each of these terms is interpreted and applied, the selfsame definition of refugee has been adopted almost verbatim in the domestic law of all States party.³⁴ Because the majority of refugee claims based on some aspect of Islamic mores or laws as persecution are women's claims, there is a high corollary between gender-related claims and claims based on the other substantive grounds in the Convention. The United Nations High Commissioner for Refugees (UNHCR), which is responsible under its mandate for the protection of refugees worldwide and with supervising the application of the Convention, has defined four broad categories of gender-related claims, which are relevant to the type of persecution claimed by persons fleeing Muslim countries:

First, where the method of persecution is gender-related. Second, where the issue is one of punishment for having transgressed social mores³⁵ and

³² Convention Relating to the Status of Refugees, 28 Jul. 1951: 189 *UNTS* 137.

³³ Protocol Relating to the Status of Refugees, 31 Jan. 1967: 606 *UNTS* 267.

³⁴ The precise definition of refugee under the Convention is one who 'owing to a 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.' Art. 1(A)(2) CSR51. There are variations in the way this language has been incorporated into domestic law, some insignificant, but some significant. For example, under the U.S. Refugee Act of 1980, the Convention language 'for reasons of' in the definition has been changed to 'on account of' — a change which has resulted in substantially tightening the so-called 'nexus' between the persecution and the recognized grounds of persecution, and hence less broad protections for refugees. See *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812 (1992); Goodwin-Gill, G. S., *The Refugee in International Law*, Oxford: Clarendon Press, 2nd ed., 1996, 50–2.

³⁵ The type of persecution recognized in any particular jurisdiction also relates to the agents of persecution. In some countries, notably Germany and France, refugee status is only granted to persons who are victimized directly by state authorities or by actors encouraged or tolerated by the State. This position does not recognize 'private' violence as persecution — that is, violence neither condoned nor tolerated by the State, but which continues because the State is unable to offer adequate protection. See UNHCR, *An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR*, European Series, Vol. 1, No. 3, Sept. 1995, 27–30. In contrast, the United Kingdom Court of Appeal has expressly found that this interpretation of the Convention is

more generally of laws which restrict the exercise of fundamental human rights. Third, measures used in carrying out a law or policy even if the latter has legitimate goals. Finally, the law, policy or practice may in itself be persecutory.³⁶

These are extremely useful categories in assessing the claims of women fleeing repressive applications of Islamic 'law', and have been incorporated in a number of countries' official guidelines to refugee/asylum adjudicators in assessing gender-related claims.³⁷

The most important aspect of the UNHCR's position towards examining such claims is to assess the type of persecution claimed against the relevant international law instruments which provide the framework

legally incorrect, such that neither France nor Germany should be considered 'safe third countries' to which asylum seekers may be returned: *R. v. Secretary of State for the Home Department, ex parte Adan et al.* [1999] 4 All E.R. 774; text in 11 *IJRL* 702 (1999), with comment at 730. See also the account of New Zealand jurisprudence in Haines, R. P. G., 'Gender-Based Persecution: New Zealand Jurisprudence,' *IJRL* 138 (Special Issue — Autumn 1997).

³⁶ UNHCR Division of International Protection, 'Gender-Related Persecution: An Analysis of Recent Trends,' *IJRL* (Special Issue — Autumn 1997), 80 at 84. Refugee lawyers distinguish between gender-related claims and gender-based claims of persecution, the former referring to persecution which particularly affects women, or has a disproportionate impact on women, and the latter referring to persecution of women precisely because they are women. Diana Saso, 'The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines,' 8 *Hastings Women's L.J.* 263, 277–8 (1997), citing Phyllis Coven, INS Office of International Affairs, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* 8 (26 May 1995).

³⁷ 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution' ('*Canadian Guidelines*') issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Canadian Immigration and Refugee Board, Ottawa, Canada, 9 Mar. 1993, as in 5 *IJRL* 278 (1993); updated Nov. 1996; US Immigration and Naturalization Service, 'Considerations for Asylum Officers adjudicating Asylum Claims From Women', 26 May 1995; Australian Department of Immigration and Multi-Cultural Affairs, 'Guidelines on Gender Issues for Decision-Makers,' July 1996. Both the Canadian and Australian *Guidelines* have incorporated helpful language that presages change in the way religious-related claims from the Muslim world are to be examined. The *Canadian Guidelines* — passed after *Nada's Case*, discussed below, recognize the relationship between the oppressive use of religion and political motives. 'The political nature of oppression of women in the context of religious laws and ritualization should be recognized. Where tenets of the governing religion in a given country require certain kinds of behaviour exclusively from women, contrary behaviour may be perceived by the authorities as evidence of an unacceptable political opinion that threatens the basic structure from which their political power flows.' *Canadian Guidelines*, at 5, 5 *IJRL* at 282. The Australian *Guidelines* state: 'in certain societies, the role ascribed to women may be attributable to the requirements of the state or official religion. The authorities or other agents of persecution may perceive the failure of women to conform to this role or model of behaviour as the failure to practice or to hold certain religious beliefs and as such an attempt to corrupt the society or even as a threat to the religion's continued power. This may be the case even though the woman actually holds the official religious faith but it is not evidenced by her outward behaviour.' Australian *Guidelines*, para. 4:30.

for human rights protections.³⁸ When refugees claim they have fled their countries based on forced marriage; severely enforced highly restrictive dress codes; severe restrictions on movement, the right to work or study or enter a vocation of choice; excessive punishment for violating moral codes; or punishment for exercising religious choice or choices of individual conscience, the harm should be seen as persecution under the relevant international law standards. The universal application of these standards is undisputed. But the relevant issue from the neo-Orientalist critique is *what is the source of persecution?* In most such cases, the sources of persecution are portrayed as 'Islamic law' and 'Muslim mores'. This author takes issue with such a characterization. More accurately, the sources of persecution in these cases are the singular interpretations of Islam enforced by patriarchal, male-dominated societies in a way that reinforces male power structures and the political hegemony of the dominant political/religious elite. Because it is not just the threat to male dominance but also to the dominance of the particular regime in power that is at issue, claims related to Islam are not confined to women refugees alone.

The monolithic portrayals of Islam in refugee and asylum claims are not simply incorrect and open to empirical rebuttal, as in the cases of *Bastanipour* and *Elnager*, described below, but more critically, they silence the voice of the refugee him- or herself. This has several destructive consequences. First, they repeat in the country of intended refuge the very denial of self-expression that women in particular are fleeing; *Nada's Case* is an excellent example of this. Second, by asserting that the government position the applicant opposes is 'Islam', the advocates close off any opportunity for the applicant to express a dissenting belief of her own except the categorical rejection of Islam altogether, or acceptance of 'Islam' but with some trivial personal objection to details of how it is practised. In other words, the advocates make it impossible for the applicant to express her own religious beliefs. The former aspect, forcing the refugee to reject her religion entirely, comes at an enormous personal cost to the refugee herself. The second aspect, turning the claim into a trivial attack on mores, highlights the practical result that it is almost impossible for the woman to make out a claim based on religion or political opinion. Therefore, she is left only with a social group claim,

³⁸ UNHCR, 'Guidelines on the Protection of Refugee Women', UN doc. EC/SCP/67 July 1991. In drafting the Guidelines, UNHCR drew on several international instruments including the Universal Declaration of Human Rights: UNGA res. 217A(III); International Covenant on Civil and Political Rights: UNGA res. 2200 A (XXI); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984: UNGA res 39/46, UNGAOR, 39th Sess., Supp. No. 51, at 197; UN doc. A/RES/39/708 (1984), reprinted in 23 *ILM* 1027 (1984); and by the Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979: UNGA res. 34/180, UNGAOR, 34th Sess., Supp. No. 46, at 193; UN doc. A/34/46 (1980), reprinted in 19 *ILM* 33 (1980); and the 1989 United Nations Convention on the Rights of the Child, art. 18(1): UN doc. A/44/736 (1989).

most commonly expressed as the social group of women, which, although allowed for in the law, is doomed as a matter of practice. Practically speaking, no one really knows what the social group category really means,³⁹ and courts and immigration authorities are hesitant to grant asylum on such an ambiguous ground. Moreover, the social group in such cases is defined so broadly — Muslim women — as to raise floodgate concerns. The dangers of the ‘women as social group’, or ‘gender-based persecution’ theory in the Muslim context is best illustrated in a well-known series of U.S. asylum cases: *Fatin v. INS*,⁴⁰ *Safaie v. INS*,⁴¹ and *Fisher v. INS*.⁴²

The movement to present women’s asylum claims as gender-based persecution is implicitly orientalist.⁴³ In a nutshell, with regard to cases of women fleeing the Muslim world, the position of this movement effectively claims that all women seeking asylum from the Muslim world are refugees, in that Islam persecutes women because they are women.⁴⁴ Besides dooming the asylum claim itself, this position falsifies, stereotypes and diminishes the real claims of persecution of Muslim women. Moreover, it does real harm to the Muslim feminist movement in all its complexity and diversity — both within Muslim cultures and without.

³⁹ Refugee commentators disagree about the definition and parameters of the social group category as well as the intention of the drafters of the Refugee Convention in incorporating social group as a ground for asylum. See Atle Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff, 1966), 219; James Hathaway, *The Law of Refugee Status* (1991), 159–60. But cf. Goodwin-Gill, G. S., *The Refugee in International Law*, (Oxford: Clarendon Press, 2nd ed., 1996), 255–7, 359–66. Some commentators consider that defining gender as a social group is also legally incorrect. See Thomas Spijkerboer, *Women and Refugee Status: Beyond The Public/Private Distinction*, Emancipation Council (The Hague, 1994), at 35–40, and sources cited therein.

⁴⁰ 12 F.3d 1233 (3d Cir. 1993).

⁴¹ 25 F.3d 636 (8th Cir. 1994).

⁴² 37 F.3d 1371 (9th Cir. 1994).

⁴³ Such efforts are promulgated, for example, by the Women Refugees Project of the Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, which was a primary motivator in the passage of the U.S. INS Guidelines on assessing women’s asylum claims. See Phyllis Coven, Memorandum, Considerations for Asylum Officers Adjudicating Asylum Claims for Women (Office of International Affairs, 26 May 1995). For examples of the literature arguing that social group should be expanded to include ‘gender,’ and discussion of the women-as-social-group concept, see Pamela Goldberg, ‘Anyplace But Whom: Asylum in the United States for Women Fleeing Intimate Violence,’ 26 *Cornell Int’l L.J.* 565 (1993); Nancy Kelly, ‘Gender-related Persecution: Assessing the Asylum Claims of Women,’ 26 *Cornell Int’l L.J.* 625 (1993); Felicite Stairs and Lori Pope, ‘No Place Like Home: Assaulted Migrant Women’s Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds,’ 6 *J.L. & Soc. Pol’y* 148 (1990); Goodwin-Gill, *The Refugee in International Law*, above n.39.

⁴⁴ An exception to this simplistic portrayal of Islam is David Neal’s discussion in ‘Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum,’ 20 *Colum.HR L.Rev.* 203 (1988). He makes three excellent points to caution against generalizing about Islam as oppressive to women: first, that almost every religious tradition has tendencies to oppress women; second, that Islam is not monolithic, and it is important to recognize the many schools of thought and religious precepts within the Islamic faith; third, that there are rich traditions to draw on within the Muslim world to support international human rights concepts: *ibid.*, 208–9, n. 26.

2.1 Presentation of asylum claims in the Islamic context that are factually incorrect

2.1.1 'Apostasy from Islam is a capital offense under [Islamic] law'⁴⁵

In *Bastanipour v. INS*,⁴⁶ the Seventh Circuit remanded a case in which the BIA denied asylum to an Iranian man who claimed to have converted from Islam to Christianity. Bastanipour argued through his lawyers⁴⁷ to the BIA and the Seventh Circuit that, 'if he is deported to Iran he may be summarily executed for having converted from Islam to Christianity, a capital offense under Islamic religious law.'⁴⁸ The Seventh Circuit severely criticized the BIA's poorly-reasoned denial on discretionary grounds, reviewed the evidence, and then remanded for further proceedings based on the issues the Circuit Court raised as presenting a claim for asylum on religious grounds. Although the Seventh Circuit variously refers to Bastanipour's claim of apostasy as a claim 'under Iranian law' and 'Muslim religious law', making no distinction between the two, the case is uniformly cited as standing for the proposition that the asylum claim was based on a well-founded fear of persecution for the crime of apostasy under Islamic law.⁴⁹

Although the Circuit Court was correct in interpreting Iranian law as requiring death for apostasy, its error, made in reliance on representations from Bastanipour's counsel, was in claiming that such punishment was mandated under Islamic law. It is extremely interesting to see the weak support cited in the case for the broader proposition that it is Islam that mandates severe punishment for conversion. There are exactly two quoted materials for support: Thomas Patrick Hughes' chapter 'Apostasy from Islam' in his *A Dictionary of Islam* (1895) at 16; and a single law review article, 'Criminal Law and the Legal System in Revolutionary Iran', 8 *B.C. Third World L.J.* 91, 97 (1988). For the Court to rely on a single text, an 1895 text at that and written by a Westerner, makes one wonder whether the judges knew that Islam was a religion at all.⁵⁰ As for the law review article, the Court paraphrased the article's interpretation of the complicated issue as: 'the Iranian penal code codifies the prohibitions of Islamic religious law, expressly including the prohibition against

⁴⁵ *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992).

⁴⁶ 980 F.2d 1129 (7th Cir. 1992).

⁴⁷ Mohammed Ali Bastanipour was represented on appeal by David Rubman and Susan Schreiber, Travelers & Immigrants Aid of Chicago.

⁴⁸ 980 F.2d at 1131.

⁴⁹ See, for example, *Najafi v. INS*, 104 F.3d 943, 946 (7th Cir. 1997); *Fisher v. INS*, 79 F.3d 955, 970 (9th Cir. 1996); *Chang v. INS*, 119 F.3d 1055, 1062 (3rd Cir. 1997); *Okonmah v. INS*, 7 F.3d 225, 225 (4th Cir. 1993); and *Bejna v. INS*, 98 F.3d 1344 (7th Cir. 1996).

⁵⁰ One also must wonder whether, if a Biblical verse had to be interpreted, these judges would resolve its meaning with a single quote of editorial comment from a Muslim writer's view of the Bible.

apostasy.⁵¹ Nowhere in the case is there a citation to original authority, whether the Qur'anic verses or *hadith*, or to various schools of interpretation on this question.

The Court compounded the fallacy by disagreeing with the BIA's reading of the Iranian penal code, saying: 'The important thing is not what is written in the penal code but the fact that in Iran people receive temporal punishment, including death, for violating the tenets of Islamic law; and apostasy from Islam is indeed a capital offense under that law.'⁵² Of course, the Court quite correctly criticized the BIA for failing to examine the actual consequences for conversion from Islam to Christianity in Iran, both under its law and under actual practice. But it was simply wrong in its bald statement that 'apostasy from Islam is a capital offense under tenets of Islamic law.' The hundreds of Muslim jurists, writers and activists knowledgeable about the subject who fundamentally disagree with such a conclusion are thus summarily dismissed without mention, and *Bastanipour* further entrenches Orientalists' belief about the barbarism of Islam.

In Bastanipour's case, the weaknesses of the citations to and analysis of 'Islamic' versus Iranian law could well have been its Achilles Heel. Although the distortion of Islam appeared actually to help Bastanipour in prevailing in his case, the risks of such an approach based on false or exaggerated claims of 'Islamic law' are highlighted in the very similar case of *Elnager v. INS*.

*2.1.2 'Conversion to another religion is an act condemned by the Koran and is punishable by death'*⁵³

One of many such representations appears in a case in which an Egyptian man sought political asylum on the basis that he would be persecuted by radical Muslims for having converted to Christianity. The statement that the 'Koran' requires death as punishment for apostasy was presumably made by Mr. Elnager's counsel, and quoted without question by the Ninth Circuit panel.⁵⁴ The entire thrust of Mr. Elnager's application for relief was based on this premise, but the fallacy lost him his case.

⁵¹ 980 F.2d at 1133.

⁵² Citing Thomas Patrick Hughes' chapter 'Apostasy from Islam' in his *A Dictionary of Islam* (1895), at 16.

⁵³ *Elnager v. INS*, 930 F.2d 784, 785 (9th Cir. 1990). Opinion by Judge Wiggins, joined by Circuit Court judges Hug and Canby.

⁵⁴ Although the Court appears to accept the premise, it then appropriately looks at whether Egypt itself adopts the death penalty for conversion. In finding no evidence that Egypt's domestic law or policy applies such a penalty, the Court relies on an opinion by the Bureau of Human Rights and Humanitarian Affairs (BHRHA), which reads: 'There is no penalty in Egypt for conversion from Islam to Christianity. This is not now the law in Egypt and we see little prospect that it will become law in the foreseeable future. Converts to Christianity do not face government inspired or tolerated threats to their life or freedom. There is no tradition in Egypt under Islamic or any other law that converts to Christianity may be put to death, physically beaten, or otherwise denied "life opportunities."' Indeed, there is a substantial tradition of tolerance for religious minorities and for religious conversion.

The first aspect of the fallacy is the absolute notion that Islamic law requires the death penalty for apostasy. There is no unequivocal injunction in the Qur'an that mandates death as punishment for apostasy.⁵⁵ Critics doubting there is any Islamic requirement of death for apostasy point out the substantial body of Qur'anic verses as well as sources in the *hadith* that require honouring religious freedom, ban compulsion in religion,⁵⁶

The Mubarak Government has succeeded in greatly reducing sectarian tension which flared up in 1981. We are aware of no reports of attacks on Christians or converts having occurred since late 1981. Full judicial and administrative remedies exist in Egypt and the Government goes to considerable effort to ensure that violence or the threat of violence against Christians — converts or otherwise — does not occur.' *Ibid.*, 789.

⁵⁵ Several *ayahs* from *Surat Al-Nisaa*, are most-often cited as implying such a requirement. They state: 'why are ye two parties on the subject of the hypocrites . . . If they turn back, then seize them, and slay them wherever ye find them . . .' (4:88–91). This has both been interpreted as requiring death for apostasy and for death to those who oppose Islam [with force, as in a state of war], not reversion from the Islamic religion. See Majid Khadduri, *The Islamic Law of Nations, Shaybani's Siyar* (Johns Hopkins Press, 1966), 196, n. 4. Khadduri's translation of Shaybani contains the editorial comment that the Prophet Mohammad's practice was to permit any among his followers who wished to do so to return to Makka and rejoin the polytheists without prohibition, citing Ibn Hisham, *Kutab Surat Rasul Allah*, Vol. II, 747–748. However, he also cites contrary authority to this *hadith*, Ali b. Abi Talib, Abd-Allah v. Masud, and Mu'adh b. Jabal, in Abu Yusuf, *Itab al-Kharaj*, 179. The most painstaking assessment of authority for the proposition that Islam mandates death for conversion is S. A. Rahman's *Punishment of Apostasy in Islam* (Institute of Islamic Culture, Lahore, Pakistan) (1972). In this monograph exhausting the subject, the author reviews and analyses every Qur'anic passage and every authoritative *hadith* on the issue, comparing the various schools of interpretation. Among his conclusions are: 'Our study of the relevant Qur'anic verses establishes that the punishment for apostasy is postponed to the Hereafter, in the same way as that for original disbelief. There is absolutely no mention in the Qur'an of mundane punishment for defection from the faith by a believer, except in the shape of deprivation of the spiritual benefits of Islam or of the civil status and advantages that accrue to an individual . . . Not only is there no specific provision in the Qur'an, prescribing punishment for an apostate in the phenomenal world, but several verses of the Holy Book envisage the natural death of the apostate in his condition of disbelief and even contemplate repeated apostasies and reversions to the true faith': *ibid.*, 131. 'The Fuqha' (jurists) acknowledge generally that no punishment for apostasy is prescribed in the Qur'an. Their principal reliance for the view that apostasy must be punished with death is on certain *quali* (verbal) *hadith*, but as has been brought out in the discussion of those sayings, the relevant occasion or the circumstances to which they might have reference are not fully explained[and] the orthodox dictum [has] questionable logic and reasoning': *ibid.*, 135. 'At best, punishment for apostasy can be adopted by way of *Ta'zir* (discretionary punishments depending on time or circumstance) and not as a *Hadd* (mandatory punishment for high crimes such as murder) specified in the Qur'an. The position would be analogous to breaking a prohibition, for example, with regard to drinking, for which the Qur'an does not prescribe a definite punishment': *ibid.* The author draws the distinction between private obligations, which are a matter between the individual and God (*Huquq Allah*), and public obligations, which are governed by the State (*Huquq al-Ibad*). The Qur'an clearly places matters of conscience in the first category: *ibid.* and sources cited. The author notes the Qur'anic requirement and variations that require 'civil death' to the person converting from Islam: termination of marriage and inheritance rights, and historical reasons for that. Current legislation in most Muslim countries does away with even such consequences. See Mayer, *Islam and Human Rights*; Rahman Doi, *Non-Muslims under Shari'ah* (London, 1983).

⁵⁶ The clearest verses on freedom of religion are found in *Surah al-Baqarah*: 'Let there be no compulsion in religion: Truth stands out clear from error.' Qur'an, 2:256; 'If it had been thy Lord's will, they would all have believed, all who are on earth. Will you then compel mankind against their will to believe?' Qur'an, 10:99; 'Say: O you that reject Faith! I worship not that you worship. Nor will you worship that which I worship. And I will not worship that which you have been wont to worship. Nor will you worship that which I worship. To you be your way and to me mine.' Qur'an, 109:1–6.

and particularly view Jews and Christians as 'followers of the Book'.⁵⁷ That there is clearly no agreement on such an injunction in the Muslim world is underscored by a number of factors.

First, there is no accepted universal body of *shari'a* criminal law. Since *shari'a* law did not have a well-developed corpus concerning criminal practice or procedure, until fairly recently, most Islamic-influenced countries did not adopt *shari'a* criminal legal principles at all. From the nineteenth century onwards, Muslim countries borrowed and adapted European criminal codes in varying fashion.⁵⁸ The '*hadd*' penalties that are either express or implied in the Qur'an, such as flogging, amputation, stoning and crucifixion, and the '*qisas*' penalties of mutilation and execution had, until the so-called 'Islamisation' of the 1970s and 1980s, long-since been abandoned in almost all Muslim countries in favour of modern codes of criminal procedure.⁵⁹ The issues of when, why and under what circumstances '*hadd*' or '*qisas*' penalties were required were simply too disputed to support any agreed-upon legal principles.⁶⁰ It is thus extremely difficult to find agreement that any particular principle of criminal law is required by *shari'a*.

Second, there is not even agreement about what constitutes 'apostasy'. A careful examination of the application of the principle of punishment for apostasy reflects not religious but political interpretations. In Saudi Arabia, for example, members of the large *Shi'a* minority are condemned as apostates by the orthodox *Sunni Wahhabis* who hold power.⁶¹ In Iran, the ruling *Twelver Shi'a* theocrats persecute the *Sunni* minority in southeastern Iran as apostates.⁶² Their persecution of Baha'is as people

⁵⁷ The Qur'an states: 'And they say: Be Jews or Christians, then you will be on the right course. Say: Nay, rather the religion of Ibrahim, the upright one, and he was not one of the polytheists. Say, we believe in Allah, and in that which has been revealed to us and in that which was revealed to Ibrahim and Ismael and Ishaq and Yaqub and the tribes and in that which was given to Musa and Issa, and in that which was given to all the prophets from the Lord. We do not make any distinction between any of them and to Him do we submit.' Qur'an, 2:136. For an excellent review of the Qur'anic precepts banning compulsion in religion, and exhibiting tolerance of other faiths, see Riffat Hassan, 'Are Human Rights Compatible with Islam?' in her monograph *Women's Rights and Islam: From the ICPD to Beijing*, submitted to the Fourth United Nations Conference on Women in Beijing, China, 21–3.

⁵⁸ See Noel Coulson, *A History of Islamic Law* (1964), 151–8.

⁵⁹ Mayer, 'Universal versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?' at 340–1.

⁶⁰ Ibid.

⁶¹ Amnesty International, 'Saudi Arabia: Religious Intolerance: The Arrest, Detention and Torture of Christian Worshipers and Shi'a Muslims' (1993).

⁶² Amnesty International, 'Iran: Violations of Human Rights: Documents Sent by Amnesty International of the Islamic Republic of Iran' (1987), 45–46, 63–65. The rubric of 'religious offense' or apostasy is frequently used to repress political opposition in some Islamic countries. For example, a prominent *Sunni* leader was executed in Iran in 1992 on charges of the religious offenses of adultery and 'homosexuality,' as well as for spying for the US and Iraq. Amnesty Report, at 162.

who have strayed from Islam is well-documented.⁶³ In Pakistan, members of the *Ahmediyya*, or *Qadiyani*, sect, have in recent years been subjected to severe discrimination on the basis of apostasy, and have left the country in large numbers because of their mistreatment.⁶⁴ In all these countries, the ruling elites have appeared quite ready to label as apostates any Muslims who criticize their peculiar brand of the religion or challenge their fundamentalist doctrine.⁶⁵

In *Elnager's* case, a more accurate presentation of the likely persecution he faced should have included the following evidence. Strong fundamentalist forces in Egypt advocate death to those who express ideas and opinions they find offensive, including those who convert from Islam.⁶⁶ The Egyptian government does not agree with these interpretations, and does not have or enforce such laws. However, the Egyptian government is unable to control these fundamentalist groups from carrying out their threats based on their particular interpretation of Islam. Elnager would then have had to show what the risk was that his conversion would readily become known to these fundamentalists, and that they were quite capable of punishing him with death. Presenting the case in this way, rather than the simplistic and erroneous 'Islam requires the death penalty for apostasy', is both accurate, and legally and empirically provable. A more analytical interpretation of the effect of 'Islamic law' on his claim of persecution may have won the case.

⁶³ Amnesty International, *Amnesty International Report 1999: Iran* at <http://www.amnesty.org/ailib/aireport/ar99/mde13.htm> (visited 4/2/2000); Amnesty International, *Amnesty International Report 1998: Iran* at <http://www.amnesty.org/ailib/aireport/ar98/mde13.htm> (visited 4/2/2000); Human Rights Watch, *Human Rights Development: Iran* at <http://www.hrw.org/wr2k/Mena-04.htm> (visited 4/2/2000); Human Rights Watch, 1998 *Human Rights Development: Iran* http://www.hrw.org/hrw/worldreport/Mideast-04.htm#P595_103600 (visited 4/4/2000); U.S. Department of State, *1999 Country Reports on Human Rights Practices*, February 25, 2000, http://www.state.gov/www/global/human_rights/1999_hrp_report/iran.html (visited 4/4/2000); U.S. Department of State, *1998 Country Reports on Human Rights Practices*, February 26, 1999, http://www.state.gov/www/global/human_rights/1998_hrp_report/iran.html (visited 4/4/2000).

⁶⁴ Ordinance XX of the *Pakistan Penal Code* proclaims members of the Ahmediyya, or Qadiyani, sect, to be non-Muslims, and prohibits them to engage in many of the religious practices of Islam. For cases of members of the Ahmediyya sect seeking asylum in Canada based on Pakistan's Ordinance, see CRDD No. T90-04196, Sultan, Dualah, 1 May 1991; CRDD No. T90-04893, Aulach, Griffith, 18 June 1991.

⁶⁵ See Ann Elizabeth Mayer, 'The Fundamentalist Impact in Iran, Pakistan, and the Sudan,' in *Fundamentalisms and the State: Remaking Politics, Economies, and Militance* (Martin Marty & Scott Appleby eds., 1993), 110, 117, 125, 137; 'Persecuted Minorities and Writers in Pakistan,' *Asia Watch*, Sept. 19, 1993, at 11-21.

⁶⁶ For example, the secular Egyptian intellectual Farag Fuda was assassinated by fundamentalist terrorists in 1992; Nasr Hamid Abu Zayd, a University of Cairo professor, was declared an atheist in 1993 based on his linguistic research and had to go into hiding due to fundamentalist death threats. Youssef Ibrahim, 'Egypt Fights Militant Islam With More of the Same': *New York Times*, 18 Aug. 1993, at A3. See also, 'Silencing is at the Heart of my Case': Ayman Bar and Elliott Colla, 'Talk with Nasr Hamid Abu Zayd about Ideology, Interpretation and Political Authority,' *Middle E. Rep.*, Nov.-Dec. 1993, at 27-9. See also Mayer, 'Universal Versus Islamic Human Rights,' at 336.

2.2 Accounts of women's persecution that silence women refugees from expressing religious or political beliefs

In Muslim women's refugee cases, Western advocates frequently assist in silencing the women's voices themselves in a number of ways. One way this occurs is by repeating in the country of intended refuge the very denial of self-expression that the women are fleeing. By forcing the woman refugee to denounce Islam as the source of her persecution, the advocate silences her true characterization of the form of persecution she has suffered. A classic illustration of this phenomenon is *Nada's Case*.

*2.2.1 'Presumably, there are other women in Iran who find [being forced to wear the veil] either inconvenient, irritating, mildly objectionable, or highly offensive, but for whom it falls short of constituting persecution'*⁶⁷

In a 1991 asylum case in Canada, Nada,⁶⁸ a young Saudi woman, claimed she had been persecuted in her country for refusing to wear the veil and for protesting the regime's enforcement of sexist laws. She claimed that when she went outside without covering her face, even though she covered the rest of her body with the *abayah*, she was stoned, spat on, and subjected to obscenities and hissing. She listed the repressive laws applying to her: she was prohibited from driving, she could not study in any field she wanted, she could not travel without a male relative's consent, and her freedom was circumscribed as she had to fear the *mutawwa'in* (the religious police),⁶⁹ who would beat her with sticks or jail her for not being modestly dressed.

Nada's lawyer argued her case on the basis that her political beliefs of feminism, and her membership in a particular social group, women, subjected her to persecution from the Saudi authorities. Her lawyer also made the claim that Nada would be persecuted because of her minority religion, presumably *Sh'ism*, because *Shi'a* are a discriminated minority in the Saudi Kingdom.⁷⁰ Nada's claim was rejected by the Canadian Immigration and Refugee Board on the grounds that it was not credible that an Arab Muslim woman would disagree with the authorities of a Muslim state. The Refugee Board found that her feminism was not a 'political opinion' for purposes of refugee status, and that she should 'comply with the laws of general application she criticizes'.⁷¹ The Canadian Minister of Employment and Immigration voiced his opinion about the

⁶⁷ *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993).

⁶⁸ A fictitious name used by her counsel to protect her identity. See Julie Wheelwright, 'One Giant Step for Women in Search of Asylum': *Guardian*, 22 Mar. 1993, at 11.

⁶⁹ The *mutawwa'in* are members of the semi-official Saudi agency known as the Committee for the Promotion of Virtue and Prevention of Vice.

⁷⁰ See Jacqui Miller, 'A Saudi Arabian Woman, Seeking to Escape her Country's Restrictive Laws, has been Denied Asylum in Canada': *Ottawa Citizen*, 4 Sept. 1992, at A1.

⁷¹ Wheelwright, above n.68.

case that he did not think Canada should 'try to impose its values on the rest of the world'.⁷²

After Nada was denied asylum, she went into hiding. The case was taken up by a number of human rights organizations and women's groups, engendering a fair amount of negative publicity and pressure against the Canadian immigration authorities. Finally, she was granted the right to remain in Canada on humanitarian grounds.⁷³ Nada publicly stated her own view of the Orientalist attitudes she confronted in Canada:

The discrimination and repression I lived with in Saudi Arabia had political and not cultural roots. When governments impose a certain set of beliefs on individuals, through propaganda, violence or torture, we are dealing not with culture but rather with political expediency. The claim that such practices are cultural is dangerous, if not racist. When a woman walks down the street in Saudi Arabia without a veil and the *Mutaww'ain* (religious police) flog her, this is not cultural, its political. Who gave permission to the *Mutaww'ain*? The government. They fear that women will try to change things, and they'll lose their political power . . . The status of women in the Middle East is deteriorating, not because of Islam as some claim, but because of political oppression. Islam is being manipulated. In the Middle East, as everywhere else, men would do anything to preserve their power and authority. In Saudi Arabia, the veil is just a form of oppression, a way for men to say they have power over women . . . In the Middle East, men have chosen to exploit Islam for their own interests, not out of piety or fear of Allah. But elsewhere men have used other religions or ideologies to achieve personal political gains . . . Women are repressed everywhere around the world, no matter what the religions, no matter what the culture.⁷⁴

The Canadian Immigration Board refused to recognize the claims of social group, religion, or political opinion, as a basis for Nada's persecution. However, in fashioning the claim in a way that made it ludicrous for Nada to maintain her feminism and still profess herself a Muslim, her advocates also fell into the trap of Orientalizing her. Nada stated her own case more effectively: 'women's oppression has less to do with Islam than with men's power.'⁷⁵

Another way in which neo-Orientalism silences refugee women is by falsely characterizing Muslim women's claims as gender-based persecution. Refugee advocates actually stifle women refugees from making asylum claims based on religion or political opinion. This is so for two reasons: first, because the applicant is given a choice of either denouncing 'Islam' altogether or foregoing her claim, her ability to express a different set of Islamic beliefs than is practised by the government she

⁷² Judy Steed, 'Refugee Board Chief Knows Racism First Hand': *Toronto Star*, 28 Feb. 1993, at B5.

⁷³ Miller, above n.70.

⁷⁴ 'A Serious Step Toward Accepting Female Refugees': *Ottawa Citizen*, 11 Mar. 1993, at A13.

⁷⁵ Wheelwright, above n.68.

flees is silenced; second, because the government's actions are portrayed as being legitimately required by the religion itself, the applicant's opposition to such actions can never be seen as political, and the political nature of her opposition is stultified. The first reason is illustrated in such cases as *Fatin*, *Safaie* and *Fisher*; and the second is illustrated by *Nada's Case* and contrasted by the New Zealand Arab-Iranian case described below.

In *Fatin v. INS*,⁷⁶ Parastoo Fatin claimed asylum based on her membership in a particular social group and on her political opinion. She defined the social group in her brief to the BIA, as 'the social group of upper class of Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals'.⁷⁷ Alternatively, Fatin seemed to suggest that she would be persecuted solely because she was a woman.⁷⁸ The Court rejected this contention by saying that, based on the record, there was insufficient evidence that Fatin would be persecuted based simply on her gender.⁷⁹ However, the Court considered the evidence of the narrower social group Fatin described more carefully. In her brief, Fatin contended that she would be forced to practise 'the Moslem religion' if she were returned to Iran, and that she would 'try to avoid practising a religion as much as she could'.⁸⁰ In her brief she also stated that she feared that if she returned 'through religious ignorance or inexperience she would be unable to play the role of a religious Shi'ite woman'.⁸¹ She further objected to the laws requiring women in Iran to wear the veil, or chador: 'In April 1983, the government adopted a law imposing one year's imprisonment on any women caught in public without the traditional Islamic veil, the Chador. However, from reports, it is clear that in many instances the revolutionary guards . . . take the law into their own hands and abuse the transgressing women . . .'.⁸²

The Court found that Fatin's claim based on the social group of Iranian women who find the laws towards women 'so abhorrent that they "refuse to conform" . . . may well satisfy the BIA's definition of [social group]'.⁸³ However, according to the Court, Fatin did not establish that she was a member of such a group, because her testimony did not reflect that her

⁷⁶ 12 F.3d 1233 (3d Cir. 1993).

⁷⁷ *Ibid.*, at 1237, BIA Brief at 8.

⁷⁸ This was indicated in the Brief of the *amici curiae*, at 40–1. American Immigration Lawyers Association, National Immigration Project of the National Lawyers Guild, Women's Asylum Project of Cambridge and Somerville Legal Services, Inc, written by Nancy Kelly, John Willshire-Carrera, Chin-Chin Yeh, Deborah E. Anker, and Gail Pendelton. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1992) (No. 92–3346).

⁷⁹ *Fatin*, above n.76, at 1241.

⁸⁰ *Ibid.*, 1237, BIA Brief at 8.

⁸¹ *Ibid.*

⁸² *Ibid.*, BIA Brief at 3–4.

⁸³ *Ibid.*, 1241.

opposition to the Iranian laws met the test set out in *Matter of Acosta*,⁸⁴ that is, that her beliefs were so ‘fundamental to [her] identity or conscience that [they] ought not to be required to be changed.’⁸⁵ Instead, according to the Court, her testimony brought her within a larger social group of Iranian women who find the laws in Iran specifically targeted towards women offensive and who do not wish to comply with them. Concerning the social group so defined, the Court found that her claim failed because she failed to show that the consequences to her would amount to persecution.⁸⁶ Here, the Court distinguished between women who had such profound abhorrence to wearing the veil that forcing them to do so would be persecutory, and women, including Fatin, for whom wearing the veil was merely ‘inconvenient, irritating, mildly objectionable, or highly offensive’, but could not be considered persecution.⁸⁷

As for her claim based on political opinion, she presented two kinds of evidence: her past political activities as a pro-Shah, anti-Khomeini student in Iran six years earlier, and her current political opinion, which she characterized as ‘deep-rooted beliefs in freedom of choice, freedom of expression [and] equality of opportunity for both sexes.’⁸⁸ The Court dismissed the evidence of political opinion as grounds for asylum by saying ‘her brief treats this argument as essentially the same as her argument regarding membership in a social group.’⁸⁹ The Court found that the political opinion argument failed for the same reasons as the social group argument, in that the record simply did not establish that she had a well-founded fear of persecution on that ground.

Had Fatin’s lawyers attempted to present the claim in a more sophisticated and non-Muslim-stereotyping manner, the Court’s reasons for denial may well have been overcome. On Fatin’s first claim, the Court might have been justified in finding the evidence weak and unconvincing that Fatin belonged to the social group of Iranian women who refuse to conform to the laws targeting women. The Court was also probably correct in finding that Fatin had not shown that her objections were of such importance that it would be persecution for her to be forced to

⁸⁴ 19 I & N Dec. 211 (BIA 1985). The *Acosta* test for social group relied on by the Third Circuit required a finding of ‘a group of persons all of whom share a common, immutable characteristic . . . The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences’: *ibid.*, 233.

⁸⁵ *Fatin*, above n.76, 1241, citing *Acosta*, at 234.

⁸⁶ *Fatin*, above n. 76, 1241–2.

⁸⁷ *Ibid.*, 1242.

⁸⁸ *Ibid.*, 1237, BIA Brief, at 9.

⁸⁹ *Ibid.*, 1242.

comply with the laws. Fatin's claim that she was a 'Westernized free-thinking individual'⁹⁰, that she had a 'deep-rooted' belief in freedom and equality for women, and that she 'would avoid practising a religion' did not convince the court that the basis for her beliefs were fundamental to her conscience. Fatin nowhere claimed she did not believe in Islam. This is at the heart of the dilemma Western feminist advocates find themselves in representing Muslim refugee women: few are prepared to articulate their objections to the particular 'Islamic' regime in question as a fundamental rejection of the faith itself. Instead of putting Fatin in the position of claiming that she would be unable to play the role of a religious *Shi'a* woman, her advocates should have focused on developing the testimony concerning Fatin's own belief in religious freedom based on her own and her family's interpretation of Islam. Only two such statements appear in the Ninth Circuit decision, but are particularly revealing of the testimony that Fatin was not encouraged to give: '[I] was raised in a way that you don't have to practice if you don't want to . . . [I would be required] to do things that [I] never had to do [such as wear a veil]'.⁹¹

An applicant such as Fatin could have been allowed to explore how she felt that Islam was being fundamentally misinterpreted and misused by the Iranian regime to exploit women. She could have testified that during the Shah's time her family and others like them who expressed many different interpretations of *Shi'a* Islam were free to practise their religion in as liberal a manner as they wished. Since the overthrow of the Shah and the Islamic Revolution in Iran, persons like her who fundamentally disagreed with the regime's interpretation of Islamic requirements would be persecuted, either because they would refuse to conform, or because to be forced to conform would repudiate their own fundamental religious beliefs. Women who belonged to either group would be most likely to be persecuted because women as a whole were particularly targeted by many of the new laws. In support of her position she could have presented expert testimony concerning the huge range of interpretation of the laws concerning women in the Islamic world, the lack of consensus, and the enormous debate about the validity of any application of Qur'anic precepts to oppress women.⁹² Further, she could have presented evidence of the use of such precepts to solidify political power by the Iranian theocracy. Fatin could then have convincingly

⁹⁰ This phrase illustrates another damaging stereotype by Orientalists: that to be 'free-thinking,' one must be 'Westernized.'

⁹¹ *Fatin*, above n.76, at 1236, Written App. For Asylum, at 49.

⁹² For some of the growing literature disputing the validity of any Qur'anic requirement of 'veiling,' see Riffat Hassan, 'Muslim Women and the Issue of Segregation and "Veiling" In Islam,' in *Women's Rights and Islam*; Azizah Al-Hibri, 'Islam, Law and Custom: Reinterpreting Muslim Women's Rights,' 12 *Am. U. J. Int'l L. & Pol'y*, 1 (1997); Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam*.

defined the social group to which she belonged, and which faced a well-founded fear of persecution in Iran as 'Muslim women who fundamentally disagree with the interpretation of Islam imposed by the *Twelver Shi'a* theocracy through gender-specific laws'. Defining the social group in this way addresses the Court's quite accurate observation that: 'Presumably, there are devout *Shiite* women in Iran who find this requirement entirely appropriate. Presumably, there are other women in Iran who find it either inconvenient, irritating, mildly objectionable, or highly offensive, but for whom it falls short of constituting persecution.'⁹³

Contrasting this social group definition with those made in *Fatin*, the weaknesses of making a social group claim standing alone, particularly when the social group is defined only by gender, is clear. There is tremendous confusion about how to define 'social group', and it is no surprise that broadly-defined social groups have not been persuasive grounds to asylum adjudicators. Defining the social group as suggested here makes the link between the social group and the political opinion/imputed political opinion grounds clear. On evidence concerning political opinion/imputed political opinion, *Fatin* could have shown that the Iranian regime does not tolerate opposition, whether to its political or its religious positions. She could have presented some of the plethora of documentation available concerning the harsh treatment of political *and* religious opponents by the regime, and the inordinate impact these harsh punishments have on women in Iran.⁹⁴

In *Safaie v. INS*, the Eighth Circuit relied on the *Fisher* case, discussed below, to find that an Iranian woman who refused to conform to

⁹³ *Fatin*, above n.76, at 1242. The 'veil', like other issues addressed in this article, cannot so simply be vilified as yet another symbol of the oppressive nature of Islam. Contrary to the assertions of some feminist writers, that refusal to wear the 'veil' is a 'significant form of political protest'; see, for example, Nancy Kelly, 'Gender-Related Persecution: Assessing the Asylum Claims of Women,' 26 *Colum. Int'l. L.J.* 625, 626 (1993), wearing the 'veil' is probably just as frequently a significant form of political protest. Examples of situations in which wearing the 'veil' was the quintessential symbol of political protest include Iranian women wearing the 'veil' during the Shah's regime, or schoolgirls in France insisting on the right to wear the 'veil' despite government policy.

⁹⁴ Amnesty International, *Amnesty International Report 1999: Iran* at <http://www.amnesty.org/ailib/aireport/ar99/mde13.htm> (visited 4/2/2000); Amnesty International, *Amnesty International Report 1998: Iran* at <http://www.amnesty.org/ailib/aireport/ar98/mde13.htm> (visited 4/2/2000); Human Rights Watch, *Human Rights Development: Iran* at <http://www.hrw.org/wr2k/Mena-04.htm> (visited 4/2/2000); Human Rights Watch, 1999 *Human Rights Development: Iran* at <http://www.hrw.org/hrw/worldreport99/mideast/iran.html> (visited 4/4/2000); Human Rights Watch, 1998 *Human Rights Development: Iran* at <http://www.hrw.org/hrw/worldreport/Mideast-04.htm#P595-103600> (visited 4/4/2000); U.S. Department of State, 1999 *Country Reports on Human Rights Practices*, February 25, 2000, http://www.state.gov/www/global/human_rights/1999_hrp_report/iran.html (visited 4/4/2000); U.S. Department of State, 1998 *Country Reports on Human Rights Practices*, February 26, 1999, http://www.state.gov/www/global/human_rights/1998_hrp_report/iran.html (visited 4/4/2000).

gender-specific laws did not have a well-founded fear of persecution.⁹⁵ In describing Safaie's claim and evidence, the Court asserts: 'Safaie stated that she began wearing Islamic dress⁹⁶ when it became mandatory in 1982, but she did not have the mentality of a Moslem . . .'⁹⁷ Safaie had specifically claimed asylum on the basis of her gender. The Court's characterization of the first of her social group claims was that: 'Safaie asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group.'⁹⁸ About this aspect of her claim, the *Safaie* Court took the same view as the *Fatin* Court: '[N]o factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.'⁹⁹

Safaie's second social group claim placed her in the group of 'Iranian

⁹⁵ 25 F.3d 636, 640 (8th Cir. 1994). In this case, as in *Fisher*, the Court ignored probative evidence of mistreatment by the Iranian authorities that necessarily would heighten the risk the applicant faced that she would be more seriously mistreated if she were to return. In Safaie's case, the Court inappropriately dismissed the significance of her dismissal from her job; her confrontations with the Revolutionary Guard over their objections to her smoking and Western dress; the threat by a Hezbollah member; her detention and eight-hour interrogation; the extensive questioning of her at the University about her political views; and her ultimate expulsion from the University and arrest 'for not accepting Islamic rules': *ibid.*, at 638–9. The Court's conclusion was simply that brief confinements for political opposition are not necessarily persecution, and that other factors such as her ability to get a visa belied the seriousness of the risks she faced: *ibid.*, at 640. If the courts are so inclined to set aside probative evidence of serious mistreatment, then even if the social group and religious/political dissident grounds are refashioned as suggested in this article, there is no guarantee they will assess the likelihood of the risk faced by the applicants much more favourably to the refugee.

⁹⁶ There is no explanation of what the Court means by 'Islamic dress.' As a matter of fact, there is no such thing as 'Islamic dress.' The clothing worn in the countries where Islam is practised reflect the same diversity as in the rest of the world. The 'chador,' the large tent-like garment imposed by the Iranian regime on women, derives from pre-Islamic Turkish custom which became widespread under the Ottoman Empire, but is not native to Iran. The 'abayah' in Saudi Arabia is similar to the chador, and has identical roots, but was an import to the Arab countries under the Ottomans. The 'burqah' in Pakistan, Afghanistan and parts of India has the same roots, but again is not native dress in those countries, either pre- or post-Islam. What Westerners call the 'veil' may be the 'dupattah' in Pakistan and India — the loose transparent scarf thrown across the head or shoulders; it may be the 'hejab' in the Levantine countries — a white, colored or black scarf tied in any of a dozen ways over the head or around the face; or it may be the 'chador/abayah/burqah,' which can be white, black, coloured and either cover or not cover the face, arms, or lower legs, depending on the country in which it is worn. (Based on personal experiences of the author living in these countries.) Nor are these descriptive of the dress worn by Muslims in Indonesia, Somalia, Ethiopia, China, Malaysia or any of the Balkan States. Judy Steed, 'Refugee Board Chief Knows Racism First Hand': *Toronto Star*, 28 Feb. 1993 (tracing the Saudi Arabia proscription that women must wear the veil to cultural practice). Mahmoud Mohamed Taha, *The Second Message of Islam* 143–5 (Abdullahi Ahmed An-Na'im trans., 1987); Fatima Mernissi, *Beyond the Veil* (rev. ed., 1987).

⁹⁷ *Safaie*, 25 F.3d 636, 639 (8th Cir. 1994). It is unclear whether this language is quoting Safaie herself, her asylum application, or her brief — the latter two presumably prepared by counsel. There is no clarification of what is meant by 'the mentality of a Moslem,' but it presumably is meant to indicate that a Moslem would have no objections to being forced to wear the chador, to being lashed or jailed for wearing makeup or Western dress, or to any of the punishments inflicted on women who disagree that Islam requires women to be subject to unequal treatment or repression.

⁹⁸ *Safaie*, above n. 97, 640.

⁹⁹ *Ibid.*

women who advocate women's rights or who oppose Iranian customs relating to dress and behaviour.¹⁰⁰ Although a much more accurate and provable claim than Fatin's, it failed for the same reason Fatin's did. The Court simply did not believe there was sufficient evidence to indicate that her 'opposition was of the depth and intensity required'.¹⁰¹ Once again, as in *Fatin*, Safaie's claim could have been refashioned to reflect her dissidence as a Muslim woman, with expert testimony to support the very fundamental disagreements raging in the Muslim world to the Iranian interpretations of the requirements of the faith, and the serious political implications of such disagreements.

In other cases, women's claims have also been brought as religion-based or political-based claims. These, however, have not been any more successful than the 'gender-as-social-group' claims, nor have they been more accurate of Islamic complexity from a non-Orientalist point of view.¹⁰² This is because the refugee advocates have failed to distinguish between the 'Islam' that is practised by the government the applicant is fleeing and the Islamic beliefs the applicant herself holds and practises. It also silences the woman refugee's voice from articulating her opposition to the actions of the government she fears as political opinion.

In *Fisher v. INS*,¹⁰³ Saideh Hassib-Tehrani¹⁰⁴ based her asylum claim on the assertion that the government of Iran would persecute her because of her religious or political beliefs. Concerning her beliefs, Hassib-Tehrani stated in testimony: '[T]he way [the Khomeini government] treats people,

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² See, for example, Michael Polk's article, 'Women Persecuted Under Islamic Law: The Zina Ordinance in Pakistan as a Basis for Asylum Claims in the United States,' 12 *Geo. Imm. L.J.* 379 (Winter, 1998). The fallacies on which his premise that 'asylum claims [for women persecuted under the tenants — sic — of Islamic Law] should always include assertions of persecution on account of religion' (at 379) appear throughout his article, and include: 'The Shariah does not recognize the separation of "Church" and state as is largely advocated in the West, it imposes on every aspect of a Muslim's life' (citations omitted) (at 380); 'parallels can be drawn from other decisions involving asylum claims and the enforcement of Islamic Law' [referring to *Fisher II*, in which the applicant was fleeing Iranian penal codes, not Pakistani zina ordinances] (at 391). The present author disputes that such broad and false conclusions of what a particular religious law requires would be given legal credence if, for example, the religion in question were Judaism or Christianity.

¹⁰³ 79 F.3d 955 (9th Cir. 1996). *Fisher v. INS* was a trilogy of cases, first decided in 1994, amended a year later, and then reheard and decided *en banc* in 1996 at the Ninth Circuit. *Fisher v. INS*, 37 F.3d 1371 (9th Cir. 1994), amended 61 F.3d 1366 (9th Cir. 1995); *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*Fisher II*).

¹⁰⁴ Saideh Fisher was the name every court, including the Ninth Circuit Court of Appeals, insisted on using, even though the applicant identified herself as Saideh Hassib-Tehrani in her application and pleadings. Saideh Fisher changed her married name back to her maiden name of Hassib-Tehrani after her marriage disintegrated. Here, Fisher will only be used in referring to the case name, not in referring to the individual applicant, Saideh Hassib-Tehrani. In his dissent, Judge Noonan pointed out: 'Despite the fact that the INS and this court have continued to identify her as "Fisher," that appellation seems cruelly ironic when the majority denies that she was ever validly married to Fisher.' *Fisher v. INS*, 79 F.3d at 976. The Court's insistence on using the Western name is another example of Westerners' common failure even correctly to learn Eastern names.

the covering of the face, and the way of life' imposed by the government of Iran was contrary to her personal religious and political beliefs.¹⁰⁵ About her testimony, and the two incidents Hassib-Tehrani related that caused her to fear persecution at the hands of forces in power,¹⁰⁶ the Ninth Circuit Court majority said: 'Fisher's assertion that the government will prosecute her for violating the dress and conduct rules does not alone amount to persecution on account of religious or political beliefs. She 'merely has established that [she] faces a possibility of prosecution for an act deemed criminal in Iranian society, which is made applicable to all [women] in that country' [citations omitted].¹⁰⁷ The majority found: 'The mere existence of a law permitting the detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States . . .'¹⁰⁸ The Court concluded: 'Fisher failed to show that Iran punished her because of her religious or political beliefs, or that, if she returned to Iran, she would violate the regulations because of the beliefs, thereby triggering government action.'¹⁰⁹ The Court's assumption was clearly that the failure to wear the chador was not in itself necessarily an expression of religious belief: it may be nothing more than non-conformity.

Saideh Hassib-Tehrani was denied asylum. It is possible to re-evaluate the type and presentation of evidence in a way more accurately to reflect Hassib-Tehrani's concerns as a Muslim woman and to overcome the bases of the denial in that case. First, on the grounds for which she seeks asylum, Hassib-Tehrani would not base her claim on being a woman against whom repressive Islamic laws are particularly targeted. More accurately, she would be persecuted because of religion in this way: she completely disagrees with the *Twelver Shi'a* interpretation of those aspects of Islam which those in power in Iran use to repress women, and based on Muslim principles she has a right to a fundamentally different interpretation. Her persecution would be that in forcing her to conform to interpretations of Islamic practices with which she intrinsically disagrees, the government is violating her fundamental human right of freedom of conscience and religious belief. She would be persecuted because of actual and imputed political opinion in this way: her fundamentally different religious interpretation is perceived by the ruling religious establishment

¹⁰⁵ *Fisher II*, above n. 103, at 960.

¹⁰⁶ The two incidents which caused her fear involved her being detained and questioned for several hours at a police station by government officials because she attended a party at a male friend's house where she saw him in his bathing suit; and her being stopped by government officials and forced into her car at gunpoint because some of her hair was hanging out of her veil by mistake: *ibid.* at 959.

¹⁰⁷ *Fisher II*, above n. 103, at 962.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

as a threat to their power; hence, anyone who appears to disagree with their peculiar Muslim theocratic principles is both a religious and political opponent. She would be persecuted because of social group in this way: women whose actions indicate they fundamentally disagree with the religious interpretation imposed on them have been particularly targeted by the Iranian regime for persecution. Not all Iranian women are part of this social group. Contrary to the Western feminist philosophy promoted by neo-orientalists, many women in the Muslim world do not object to wearing a veil, many adopt the veil voluntarily on the basis of custom, and many who wear it do not perceive a law requiring it to be persecutory. Women in these categories would be unable to make the essential showing that they would in some way be singled out because of, or on account of, a political, religious, or social group ground. Just as women around the world are subjected to individualized forms of oppression depending on their personal, religious, social conditions and matters of conscience, so Muslim women have individualized circumstances of persecution.

Second, on the assessment of the risk she faced, there are two aspects to this analysis: (1) the seriousness of the type of persecution, and (2) the likelihood that she would be subjected to the persecution. On the seriousness issue, the Court indicated that she would be subjected to 'mere harassment'.¹¹⁰ On the likelihood she would be persecuted, it was already clear from the record that the Iranian authorities knew about her nonconformity to their imposition of *Twelver Shi'a* Islamic 'norms'. Hassib-Tehrani had already had two serious confrontations with the religious police, and, although the Court refused adequately to consider this evidence, she had also been fired from her job as a teacher for unknown reasons.¹¹¹ When she was detained and interrogated for several hours at the local *Comite*, she was forced to give her name and other identifying information to the authorities. The record was unclear about the basis of one of the confrontations mentioned by the Court in which

¹¹⁰ Ibid., at 963. This was, of course, completely disingenuous by the Court, since it had already described and accepted that she had been detained, taken to the 'Comite' and questioned for several hours for the swimsuit incident; she had been stopped on the street and forced into her car at gunpoint because her hair was loose from her veil; government officials had come to search her father's home shortly after that incident looking for 'political dissidents;' and she had been fired from her teaching job for inexplicable reasons. See above n.94 for Amnesty International Reports for Iran, Human Rights Watch Report for Iran, U.S. Department of State Country Reports on Human Rights Practices for Iran.

¹¹¹ The Court's comments about this evidence includes the statement: 'In rejecting Fisher's argument that she was fired from her teaching position in Iran solely because she is a woman, the IJ stated that the 1986 Country Report provides no evidence that the government routinely fires women from teaching jobs.' *Fisher II*, above n.103, at 964. Because the evidence about her losing her job was undeveloped, it is difficult to know whether she was really making the argument that she was fired because she was a woman who had expressed, or was expressing a different interpretation of the laws repressing women which the Iranian theocracy claimed were Islamic laws. But see U.S. Department of State, 'Iran,' *1986 Country Report on Human Rights Practices* (Washington, D.C.: U.S. G.P.O., 1987), 1165.

government officials searched her family's house, but it came close on the heels of another incident in which she was forced into her car at gunpoint by officials. In light of these two incidents, one might have obtained expert testimony about the government's registration of families as 'dissidents'. And the evidence concerning her being fired might more appropriately have focused on the firing of political dissidents from their jobs, not solely on the incidents of women being fired.

The dissent by Circuit Court judges Noonan and Fletcher intuitively recognized the distinctions in the two approaches. Although urging reconsideration of the case on the basis of the Gender Guidelines,¹¹² the dissent laid out a very thoughtful analysis that recognized Hassib-Tehrani's dilemma as a Muslim dissident and a woman. 'In this case Saideh Hassib-Tehrani has testified that she is a Muslim but that she does not believe that the government is truly a Muslim regime. She is opposed to the regime's fundamentalist beliefs and so invites persecution.'¹¹³ In a far more accurate reading of the evidence and testimony presented concerning the likelihood of persecution, the dissent reviewed how the three incidents Hassib-Tehrani described in Iran brought her to the attention of the authorities, and based on the record she already clearly had with them, would make her highly likely to be persecuted in future. The Court noted specifically that when she was arrested in yet another incident for attending a party in which a man was present dressed in a bathing suit, she was handcuffed, held for four hours, interrogated and forced to give her name and address.¹¹⁴ The Court summed up the importance of what the record showed about the incidents: 'They indicate to her that the authorities know about her, know that she has been a nonconformist on points of great importance to the authorities and foretell that she will suffer more serious harm if she is returned to the country.'¹¹⁵ The dissent did not conclude that Saideh Hassib-Tehrani was persecuted solely for being a woman because women are persecuted as such under Islamic law.¹¹⁶

Nada's case also exemplifies the last way in which women refugee voices are silenced by the neo-Orientalists' approach, by refusing to recognize women's opposition to their government's particular repressive use of Islam as religious opposition or political opinion. A more sophisticated approach to the relevance of Islam in Nada's claim might

¹¹² Considerations for Asylum Officers Adjudicating Asylum Claims from Women, *reprinted at* 72 *Interpreter Releases* 781 (5 Jun. 1995).

¹¹³ *Fisher II*, above n.103, at 970.

¹¹⁴ *Ibid.*, 969.

¹¹⁵ *Ibid.*, 970.

¹¹⁶ The dissent refrained from endorsing the theory that women may be persecuted only on the basis of their gender. It cites with approval the Considerations, which state: '[G]ender might be one characteristic that combines with others to define the particular social group.' *Fisher II*, above n.103, Dissent at 968, citing Considerations at 12.

have re-fashioned the claims of religious and political persecution based on the following expert and documentary evidence:

The current official law in Saudi Arabia derives from a particular school of Islamic jurisprudence set down by medieval jurists.¹¹⁷ The country is ruled by the royal Saudi family (House of *Ibn Saud*), originally allied with Muhammad Ibn ‘Abd al-Wahhab, ‘an exponent of a rigid, intolerant, puritanical version of Islam that became known as *Wahhabism*’.¹¹⁸ The Saudi *Wahhabis* are traditionally opposed to *Shi’a* Islam, barely tolerating the significant *Shi’a* population in the country. The Saudi monarchs do not derive their legitimacy from any claim to religious succession, but have secured their power through allying themselves with Islamic jurists insisting on rigid application of ‘Muslim laws’. The Islamic jurists, in turn, have faithfully issued rulings legitimizing the Saudi monarchy.¹¹⁹ The regime maintains its hold, despite a wide range of dissenting forces in the country through severe religious and political repression — both through laws and through less-formalized policies of the religious police (*mutawwa’in*). Repression of critics of both the political and religious policies of the state is severe.¹²⁰

Specifically, on her claim of religious persecution, Nada could have provided expert testimony concerning the Saudi interpretation of Islamic precepts concerning women, shown the differing views about these precepts within Islam, and that Nada *as a Muslim*, legitimately disagrees with the interpretation of the Saudi rulers and the *mutawwa’in* they support. For example, she could have provided expert testimony that there is no clear injunction in the Qur’an that a woman must be veiled.¹²¹ She could show that there is heated debate about whether the requirement that a

¹¹⁷ See Farouk Sankari, ‘Islam and Politics in Saudi Arabia,’ in *The Islamic Resurgence in the Arab World* (Ali Dessouki ed., 1982), 181–2.

¹¹⁸ Mayer, ‘Universal versus Islamic Human Rights,’ above n.6, at 351.

¹¹⁹ Ibid.

¹²⁰ See above n.94 for Amnesty International Reports for Iran, Human Rights Watch Report for Iran, U.S. Department of State Country Reports on Human Rights Practices for Iran.

¹²¹ The most oft-quoted Qur’anic passage to support the claim that Islam requires women to be veiled appears in 24:31: ‘Say to the believing women, that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands . . .’ Critics of the interpretation that this verse requires women to veil themselves point out that in pre-Islamic Arabia, women wore the *jilbab*, or *hejab*, loose covering that never concealed their faces, and that this verse requires women to be modest, referring to the clothing of the time. Moreover, it does not require women to cover their faces or any part of their body besides ‘their bosoms.’ Al-Hibri, ‘Islamic Constitutionalism and the concept of Democracy’; Al-Hibri, ‘Islam, Law and Custom: Redefining Muslim Women’s Rights,’ Mernissi, *Beyond the Veil*; Mernissi, *Dreams of Trespass: Tales of a Harem Girlhood*; Mernissi, *The Veil and the Male Elite: A Feminist Interpretation of Women’s Rights in Islam*. Riffat Hassan rests her analysis of the Islamic references to dress by beginning with the premise reiterated throughout the Qur’an which require both men and women to be modest. In her review of the major Qur’anic verses concerning dress, she finds no support for the requirement that women wear a ‘veil’, or for any of the strictures on women’s freedom of action, movement, or relationships. See Hassan, ‘Rights of Women Within Islamic

woman obey her husband, and with all the implied consequences of such a requirement, is a Qur'anic principle at all.¹²² She could convincingly have shown that there is severe discrimination against *Shi'a* in general in Saudi Arabia, and persecution of *Shi'a* who are perceived to be a threat to the regime, whether for political views or for opposing the state-version of Islam.¹²³ Finally, she could show that because she is a woman and because of her opposing viewpoint which is considered offensive both religiously and politically to the ruling elite, she is at grave risk of persecution. Such an interpretation allows Nada to retain her identity as a *Muslim feminist*, and yet disagree with the Saudi government's use of Islam to oppress her.

Such an approach has been taken in cases assessing the impact of Islam on refugee claims in other countries. New Zealand has developed a relatively sophisticated jurisprudence on the issue, with predictably accurate and generous results for refugees. These cases are a marked contrast to the neo-Orientalist approach in the US, Canadian, and other

Communities,' and sources cited, including the Qur'an 24:30–31; 33:59; 4:15. See also Mayer, *Islam and Human Rights*, at 113. Nevertheless, the conservative interpretation puts no specific restrictions on men, and there appears to be no uniform understanding of even the restrictions on women. Many women in the Muslim world wear colourful shoes, scarves and vibrant makeup not concealed by whichever headdress or long loose clothing they might wear.

¹²² As Azizah al-Hibri has carefully detailed, the requirement that a woman obey her husband appears to directly contradict Qur'anic injunctions on the status of women. The Qur'an states that all people are equal on earth, as they were created from the same soul. Qur'an 4:1, 6:98, 7:189. *Surat al-Nisa'* (the primary, but not the only, chapter on women), states: 'O people! Reverence God who created you from one soul and created from her (the soul) her mate and spread from them many men and women; and reverence God, through whom you demand your mutual rights, and the wombs (that bore you), (for) God watches you. 4:1. In *Surat-al-Rum*, it states that God created from the one soul our mates so that we may find tranquility with them, and God put affection and mercy between us. Al-Hibri calls this verse the Equality Principle. Al-Hibri, 'Islam, Law and Custom: Redefining Muslim Women's Rights,' at 27. In addition, she refutes the traditional interpretation of *Surat al-Nisa'*, *ayah* 34, which is currently translated as: 'Men are the protectors and maintainers of women, because God has given the one more strength than the other, and because they support them from their means.' Based on an alternative, but straightforward, translation of the key words, and in a way more consistent with otherwise contradictory verses in the Qur'an such as the Equality Principle, Al-Hibri believes the more accurate interpretation is: 'Men are [advisors/providers of guidance] to women [because/in circumstances where/in that which] God made some of them different from some others [because/in circumstances where/in that which] they spend of their own money . . .' In other words, according to Al-Hibri, this *ayah* informs us that only in the circumstances where a woman is financially dependent on a man, God gave the man supporting her the responsibility of offering her guidance and advice in those areas in which he happens to be more qualified or experienced: *ibid.*, at 31. In support of this interpretation, see Farida Bennani, *Tawsim Al'Amal Bayn Al-Zawjain* 27–8 (Marrakesh, Silsilat Manshurat Kuliyat al-'Ulum al-Qanuniyah wa al-Iqtisadiyah wa al-Ijtima'iyah, Jani'at al-Qadhi 'Iyadh, 1992). Bennani provides evidence from the Qur'an and *Hadith* that men and women are considered in Islam to be equal intellectually as well as physically.

¹²³ See Amnesty International, *Saudi Arabia: Religious Intolerance: The Arrest, Detention and Torture of Christian Worshipers and Shi'a Muslims* (1993).

cases of this ilk.¹²⁴ In *Refugee Appeal No. 2039/93 Re MN* (12 February 1996), the RSAA decided a case of an Iranian woman of Arab ethnicity. She claimed asylum on two grounds: first, that she opposed the male-dominated society of her Arab family; and second, that she opposed the male domination of Iranian society. The RSAA found that she established a well-founded fear of persecution based on her political opinion on both grounds.

On the first ground, the evidence reflected that families in Iranian and Arab society applied tribal social values as well as Islamic ideology as a way of controlling women. The Appeals Authority found that familial codes of honour and shame were very strong. The applicant provided evidence that two female family members had been murdered by male relatives for violating the codes of sexual conduct. The applicant herself, after arriving in New Zealand, had become involved in a relationship, became pregnant, and had an abortion. She feared that her family members would kill her for this. She also believed that she had the right to make choices about her own future and freedom herself, and vehemently opposed forced marriage and marriage within the family.

On the second ground, the applicant described the constant harassment she faced by the Komiteh at her work because of her outspoken views on the oppression of women in Iran. There was no evidence presented that the applicant herself had ever been arrested, detained, or physically ill-treated by the authorities. Nevertheless, the RSAA found in her favour on both counts:

The appellant is as opposed to the oppression of women in Iranian society as she is to the oppression of women within her own family or tribal group . . . It is sufficient to note that the appellant is an intelligent and perceptive woman whose experiences and mature years have led her to an awareness of the value of human rights . . . the inherent worth of the individual, and the pressing need in her own life to be free of the dictates of others and to be able to make her own choices on fundamental aspects of existence such as marriage, child rearing, education, employment and personal expression, including her dress, appearance and relationships with others.¹²⁵

The RSAA further found that the rules that oppress women in Iran are disguised under a facade of religion, but are put in place to acquire and maintain the power structure exclusively for men. In both aspects of her life, the applicant would be persecuted for her political opposition to the

¹²⁴ New Zealand handles a small proportion of asylum applicants compared to other developed States. Explanations for this include New Zealand's geographical isolation, its highly restrictive immigration and visa policies which effectively exclude entry of large numbers of asylum seekers, and carrier sanctions for transporting visa violators. See Haines, 'Gender-Based Persecution: New Zealand Jurisprudence,' 129.

¹²⁵ *Refugee Appeal No. 2039/93 Re MN* (12 Feb. 1996), at 12.

governing rules and mores.¹²⁶ Nowhere in the case is there evidence that either the reviewing tribunal or counsel relied on arguments that Islamic law requires the oppressive rules against which the applicant complained; nor did the applicant herself state she did not consider herself a Muslim.¹²⁷ Most important is the recognition that if the woman's belief is not seen purely as opposition to 'Islam', then her repudiation of the type of government repression she faced can be articulated as political opinion. This permits her to give voice to the full expression of her own experience of persecution, and does not require her to denounce her religion to do so.

3. Conclusion

Orientalist perspectives have grave consequences in the human rights context. The new Orientalism, emerging from feminist perspectives on human rights advocacy in the asylum and refugee context threatens accurate presentations of human rights violations and victimization. Rodger Haines, Deputy Chairperson of the New Zealand Refugee Status Appeals Authority places the issue of women's claims from the Muslim world in a highly appropriate framework:

It is a common feature of these claims [refugee applications from Iranian women] that they are inarticulate in the sense that the claimant (or more accurately, her lawyer or immigration consultant) will focus on the superficial, for example, her objection to the so-called dress code.

This is unfortunately compounded too often by a failure by decision makers to examine the facts in terms of a human rights framework and this, in turn, often leads to a failure to appreciate the true significance of a particular woman's objection to compliance with a so-called Islamist requirement as to dress.

Put simply, beyond an objection to the wearing of a chador may perhaps lie a deeply held but previously unarticulated belief by the woman as to her own worth, her claim to a right to an individual existence as a human being, her claim for respect of her right to freedom of thought and conscience, her right to an individual spiritual and moral existence. In short, the freedom to live and

¹²⁶ The RSAA did not have before it a social group claim in this case, but it did render an opinion that the applicant may have established such a claim on a social group of 'women who, as a result of their deeply held valued, beliefs, and convictions, reject or oppose the way in which they are treated in Iran, and the attendant power structure which perpetuates and reinforces the so-called "Islamist" justification for this state of affairs': *ibid.*, 52. Among the sources considered and discussed by the RSAA in this case was Reza Afshari's 'An Essay on Islam, Cultural Relativism and the Discourse of Human Rights,' 16 *Hum. Rts. Q.* 235 (1994), quoting: 'Under Islamist dictatorship in Iran, the drive for Islamisation of culture has become a considerable smokescreen for the exclusionary (political and economic) strategy of the state': *ibid.*, at 249.

¹²⁷ Additional New Zealand decisions granting women asylum who fled so-called 'Islamic laws' or 'Muslim' persecutors on the basis of political opinion or social group without vilifying Islam per se as the persecuting 'agent' are *Refugee Appeal No. In 1039/93 Re HBS and LBY* (13 Feb. 1995); *Refugee Appeal No. 915/92 Re SY* (29 Aug. 1994); *Refugee Appeal No. 2078/93 Re DC* (4 Apr. 1994); *Refugee Appeal No. 790/92 Re B* (9 Aug. 1994); and *Refugee Appeal No. 445/92 Re FB* (4 Nov. 1992).

act in harmony with her conscience. These claims are of no less significance than a claim by a male asylum seeker to the right to respect for his conventionally defined political opinions.¹²⁸

Neo-Orientalism in the claims of refugees not only denies refugees protection because the stereotypes are fundamentally unprovable, but it also diminishes the voices and dignity of the refugees themselves. Simplifying the experience of persecution of Muslim women — and Muslim men — as being due to ‘Islamic law’, and forcing refugees suffering such persecution to be ‘Islamic-rejectionist’ is false. For the many reasons discussed in this article, such an approach dooms the refugee’s claim, and equally important, continues their oppression by forcing them to falsify the bases of their fear. In the refugee context these fallacies reflect a failure to understand the complexity of the Muslim world and Muslim reality — a failure of sophistication that would not be tolerated if the stereotype were of a religion other than Islam.

¹²⁸ Haines, ‘Gender-Based Persecution: New Zealand Jurisprudence,’ at 143.