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SINGLE, YOUNG FEMALE—SEEKING ASYLUM: THE STRUGGLES VICTIMS OF SEX TRAFFICKING FACE UNDER CURRENT UNITED STATES REFUGEE LAW

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INTRODUCTION

A few years ago, Ariana, a young Albanian woman, and her cousin were walking through the streets of their small village, when suddenly two masked men abducted them.¹ The men dragged them into a van and raped them at gunpoint.² Later, the women were brought to a vacant building with five other women, where the abductors repeatedly raped, beat, and deprived them of food and water.³ Finally, as the women were being placed on a boat to Italy to be sold into prostitution, the Albanian authorities found and freed the two girls.⁴ Ariana filed a police report, but was not contacted by the local authorities.⁵ She and her parents received incessant telephone threats from unknown men who knew Ariana by name.⁶ Eventually, Ariana's cousin was kidnapped again; Ariana, however, was able to live in hiding until she could escape.⁷ She fled to the United States and applied for asylum, hoping to finally be free and safe from her

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¹ Stephen Knight, *Asylum from Trafficking: A Failure of Protection*, IMMIGR. BRIEFINGS, July 2007, at 7, available at http://cgrs.uchastings.edu/sites/default/files/Asylum_from_Trafficking_Knight_Immigration_Briefings_7_07.pdf.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

captors.⁸ However, much to her dismay, she was denied refugee status and forced to return to her home, where a life of terror most likely awaited her.⁹

Heartbreaking stories like Ariana's are an all too common occurrence in the world today. The international community is currently facing one of the "great human rights causes of our time,"¹⁰ essentially amounting to a modern day slave trade.¹¹ Sex trafficking creates "a special evil"¹² which exploits innocent and vulnerable victims, predominantly consisting of females.¹³ A trafficking victim's experience includes severe exploitation, such as abduction, rape, sexual enslavement, forced prostitution, beatings, and starvation.¹⁴ Subjected to "an underworld of brutality and lonely fear,"¹⁵ many victims lose hope of freedom; however, those that do manage to escape to other countries, like the United States, and seek asylum from their abusers may be turned away.¹⁶ This fact is a shocking discovery given the heightened level of global concern regarding sex trafficking, as well as the efforts to respond to the problem.¹⁷ Essentially, despite the proclaimed commitment of the United States to

⁸ *Id.*

⁹ *Id.*

¹⁰ Press Release, Office of the Press Sec'y, The White House, Fact Sheet: The Obama Administration Announces Efforts To Combat Human Trafficking at Home and Abroad (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/fact-sheet-obama-administration-announces-efforts-combat-human-trafficki> [hereinafter Obama Fact Sheet].

¹¹ *Id.*

¹² President George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003), available at <http://edition.cnn.com/2003/US/09/23/sprj.irq.bush.transcript/>.

¹³ U.S. DEPT OF STATE, TRAFFICKING IN PERSONS REPORT 45 (2012) [hereinafter TIP REPORT], available at <http://www.state.gov/documents/organization/192587.pdf> (stating that the International Labor Organization's global estimate of forced labor found that ninety-eight percent of sex trafficking victims are women and girls). This Note focuses solely on sex trafficking of females; however, males are also forced into sex trafficking and their absence here does not suggest they do not face the same victimization.

¹⁴ Knight, *supra* note 1, at 2 (quoting the U.N. High Commissioner for Refugees).

¹⁵ Bush, *supra* note 12.

¹⁶ See Knight, *supra* note 1, at 1.

¹⁷ See *id.*; Obama Fact Sheet, *supra* note 10.

combat human trafficking,¹⁸ this sentiment fails to carry over into asylum law and to the adjudicators that control whether this group of women and girls receives refugee status.¹⁹

The underlying goal of U.S. asylum law is to prevent foreign nationals from returning to their home countries if doing so could “put them in danger of being persecuted by their government, or by a source that their government is unable or unwilling to control.”²⁰ To be eligible, the asylum seeker must establish that she experienced persecution or has a reasonable fear of future persecution.²¹ Previous persecution or the fear of future persecution must arise from one of five enumerated grounds, including membership in a particular social group (“PSG”).²² Many asylum claims are brought under this category, but unfortunately, the law does not define the term “particular social group.”²³ Adjudicators, ranging from immigration judges (“IJ”), the Board of Immigration Appeals (“BIA”), to the U.S. federal circuit courts, are left to interpret the meaning of PSG, and their interpretation usually determines the outcome of cases.²⁴ These decisions lack uniformity, leading to inconsistency and arbitrariness among the definitions.²⁵

¹⁸ The last two U.S. Presidents, George W. Bush and Barack Obama, each made strong statements during their terms reflecting the country’s commitment to taking serious steps to fight this growing problem. For example, Bush stated in an address to the United Nations General Assembly:

Because we believe in human dignity, America and many nations have joined together to confront the evil of trafficking in human beings. We’re supporting organizations that rescue the victims, passing stronger anti-trafficking laws, and warning travelers that they will be held to account for supporting this modern form of slavery. Women and children should never be exploited for pleasure or greed, anywhere on Earth.

Knight, *supra* note 1, at 2. President Obama released a statement, as recently as September 25, 2012, directing his Cabinet to heighten its efforts to eliminate sex trafficking and announcing, “Our fight against human trafficking is one of the great human rights causes of our time, and *the United States will continue to lead it . . .*” Obama Fact Sheet, *supra* note 10 (emphasis added).

¹⁹ See Knight, *supra* note 1, at 1.

²⁰ Tina Javaherian, Comment, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 425 (2012).

²¹ Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(42) (West 2014).

²² *Id.*

²³ See generally Trafficking Victims Protection Act, 22 U.S.C.A. § 7102 (West 2014) (lacking a definition for the particular social group category).

²⁴ See Knight, *supra* note 1, at 6; see also Javaherian, *supra* note 20, at 445–46.

²⁵ See *infra* Part II.

This Note explains that under current asylum law in the United States, these female sex trafficking victims face a number of hurdles before being awarded refugee status. Most notably, the required demonstration of being persecuted “on account of”²⁶ being a member of a PSG has proven to be extremely difficult.²⁷ Sadly, this difficulty often results in many sex trafficking victims being returned to their traffickers and back into the life that they had escaped from in the first place.²⁸ Historically, courts have interpreted PSG narrowly by stating that a group of sex trafficking victims do not share a defining characteristic other than the risk of being forced into prostitution and they must share a common immutable or fundamental characteristic.²⁹ Arguably, this interpretation has prevented sex trafficking victims from finding refuge in our country.³⁰ Given the extensive recognition of sex trafficking as a serious international issue, it seems to be an egregious error for the United States to deny these applications from a victimized group that fits the type of people refugee laws were meant to protect.

This Note argues that the IJ, the BIA, and the circuit courts got it wrong. The courts reject creating a category representing young women in fear of being forced into prostitution because they feel it is too broad and does not establish a common characteristic.³¹ However, due to the courts’ analyses’ inconsistencies with the initiatives of the United Nations (“UN”) and the United States to prevent and put an end to sex trafficking, a new analysis should be conducted to fulfill this goal.

Part I provides a detailed discussion of the sex trafficking issue and the response at the domestic and international levels, through the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and U.S. legislation such as the Trafficking Victims Protection Act of 2000. Part I also discusses in depth the history, requirements, and analysis of obtaining asylum in the United States and internationally. Part II outlines the split among the circuits regarding the application of the BIA’s tests on what constitutes a

²⁶ 8 U.S.C. § 1101(a)(42).

²⁷ See *infra* Part II.

²⁸ See Knight, *supra* note 1, at 1–6.

²⁹ See *infra* Part II.

³⁰ *Id.*

³¹ *Id.*

“particular social group.” Part II also surveys the inconsistent outcomes of sex trafficking cases, where asylum seekers proposed groups based on gender and on their shared experience of sex trafficking in a particular country. Finally, Part II reveals the courts’ overwhelming reluctance to grant asylum applications relying on a PSG based solely on status as a prior victim of sex trafficking. Part III advocates a solution to the problem: that the main analysis should not be simply whether young women in fear of trafficking are a group, but rather providing for further investigation into the prevalence of the persecution and other potential forms of persecution, such as severe societal ostracism and discrimination. Instead of trying to force these women to fit into a particular mold of “acceptable” asylum seekers, courts should try to make the mold fit around them by avoiding sweeping generalities and instead making individualized assessments of conditions within a particular region to determine the particularity and inescapability of sex trafficking. Then, courts should carve out a special test based on the totality of the circumstances, as they have for other gender-based groups, such as those in fear of female genital mutilation.

I. AN IN-DEPTH LOOK AT THE SEX TRAFFICKING ISSUE AND ASYLUM LAW

A. *Sex Trafficking—Reality, Reactions, and Responses*

The international community has expressed great concern over the “epidemic proportions”³² of sex trafficking occurring globally. The U.N. defines “trafficking in persons” as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.³³

³² Shelly George, *The Strong Arm of the Law Is Weak: How the Trafficking Victims Protection Act Fails To Assist Effectively Victims of the Sex Trade*, 45 CREIGHTON L. REV. 563, 563 (2012).

³³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. GAOR, 55th Sess.,

Sex trafficking is a subcategory of human trafficking where the “exploitation” amounts to sexual exploitation by forcing victims into prostitution or other commercial sexual services.³⁴ According to the U.S. Department of State’s 2012 Trafficking in Persons Report (“TIP Report”), there were a staggering 4.5 million victims of sex trafficking worldwide.³⁵ Females represented ninety-eight percent of these victims.³⁶ Experts proclaim and studies reveal that trafficking tends to originate in “impoverished areas [lacking] viable economic opportunities for women.”³⁷ Traffickers prey on this vulnerability by luring women with promises of work and a better life, then convincing them to migrate into richer countries only to be forced into the sex industry when they arrive.³⁸

When recounting the experiences of real-life survivors of trafficking, the elements of preying on the vulnerable in impoverished areas and offering economic opportunities recur. Take Nayantara’s story, for example.³⁹ She was an impoverished woman from Nepal when she met a labor broker who offered her a job as a domestic worker in Lebanon.⁴⁰ He urged her to take advantage of the opportunity and assured her it would be at no cost.⁴¹ She went with him; however, he brought her to India instead.⁴² Upon arrival, she was stripped of her passport and sold into a brothel where she was forced to have sex with at least thirty-five men each day on only five hours of sleep.⁴³ Any refusal resulted in the brothel owner brutally beating her with

U.N. Doc. A/RES/55/25, at 31 art. 3, para. (a) (Jan. 8, 2001) [hereinafter Palermo Protocol].

³⁴ The Trafficking Victims Protection Act defines “severe forms of trafficking in persons” as instances where “a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.” 22 U.S.C.A. § 7102(8)(A) (West 2014).

³⁵ TIP REPORT, *supra* note 13, at 45.

³⁶ *Id.* The TIP Report used a number of statistics and findings of the International Labour Organisation regarding human trafficking, including these estimates. INT’L LABOUR ORG., ILO 2012 GLOBAL ESTIMATE OF FORCED LABOUR EXECUTIVE SUMMARY (2012), available at http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-/declaration/documents/publication/wcms_181953.pdf.

³⁷ George, *supra* note 32, at 564.

³⁸ See, e.g., *id.* at 564 n.11.

³⁹ TIP REPORT, *supra* note 13, at 23.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

an iron pole.⁴⁴ Nayantara was under the constant control of her traffickers and completely banned from speaking with anyone outside the brothel.⁴⁵ After a police raid, she was arrested and spent seventeen months in jail, only to be sold into another brothel following her release.⁴⁶ Ultimately, she was able to run away.⁴⁷ The tragic circumstances endured by trafficking victims like Nayantara make their stories difficult to hear but also reinforce the importance of ensuring that these atrocious acts are stopped.

The TIP Report reveals that the regions where sex trafficking is most prevalent include Southeast Asia, Central and Eastern Europe, Latin America, and Africa.⁴⁸ For example, in Central and Eastern European countries, 4.2 out of every 1,000 people are victims.⁴⁹ This list of geographic areas is not exhaustive. In fact, a recent study revealed that even the United States is not immune to this inhumane behavior.⁵⁰ The study found the staggering number of people trafficked domestically every year to be between 14,500 and 17,500.⁵¹ More notably for asylum purposes, the United States attracts as many as 50,000 women and children from around the world through the sex trade.⁵²

As a country that proffers itself as a leader in this fight, U.S. legislative policies and procedures are of the utmost importance to successfully putting an end to sex trafficking.⁵³ Corrective and preventative measures against sex trafficking have been initiatives of presidential administrations for over a decade.⁵⁴ The Bush administration proposed the landmark legislation known as the Trafficking Victims Protection Act of 2000

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.* at 45.

⁴⁹ *Id.*

⁵⁰ *See* Press Release, Fed. Bureau of Investigation Minneapolis Field Office, U.S. Dep't of Justice, Minneapolis Man Sentenced on Human Trafficking Charges (Nov. 5, 2007) (on file with U.S. Fed. News).

⁵¹ *Id.*

⁵² George, *supra* note 32, at 565.

⁵³ Knight, *supra* note 1, at 3 (“‘America will continue to be a champion of refugee women. We will promote programs to protect them from sexual and gender-based violence.’” (quoting former Secretary of State Colin Powell)).

⁵⁴ *See, e.g.*, Bush, *supra* note 12; Obama Fact Sheet, *supra* note 10.

("TVPA").⁵⁵ The statute defined "sex trafficking" as "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."⁵⁶

The TVPA contained three levels: prevention, protection, and prosecution.⁵⁷ The prevention level required the Department of State to issue an annual TIP Report, which assesses other countries' efforts to adhere to minimum standards of prevention.⁵⁸ The statute designated "specific requirements regarding United States funding," and any country grossly out of compliance with the standard may have faced suspension of economic assistance.⁵⁹ The protection level mandated providing medical services, housing, and legal services to victims.⁶⁰ Finally, the prosecution level managed departments ranging from the Department of Homeland Security, to the Bureau of Immigration, to the Department of Justice.⁶¹ The TVPA required these departments to conduct criminal investigations of sex trafficking, with the goal of identifying the traffickers and prosecuting them for their crimes.⁶²

Despite the importance of the TVPA legislation, its assistance of *all* victims of trafficking has not been particularly successful. Practice has revealed its shortcomings due to ineffective enforcement of the law and a focus solely on addressing the criminality of trafficking, as opposed to humanitarian concerns.⁶³ Under the statute, "women who are trafficked into United States can gain legal status in exchange for their cooperation with criminal investigations. [However,] [f]or women who escape to the U.S., rather than being trafficked into the U.S., the TVPA does not apply."⁶⁴ Consequently, victims and those in fear of becoming victims of sex trafficking, who

⁵⁵ Trafficking Victims Protection Act, 22 U.S.C.A. § 7102 (West 2014).

⁵⁶ *Id.* The legislature adopted similar language to the definition the U.N. provided in the Palermo Protocol. *See* Palermo Protocol, *supra* note 33 and accompanying text.

⁵⁷ George, *supra* note 32, at 570.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See* TIP REPORT, *supra* note 13, at 40.

⁶¹ George, *supra* note 32, at 570.

⁶² *Id.*

⁶³ *See id.* at 580.

⁶⁴ Knight, *supra* note 1, at 16 n.7.

manage to escape to the United States and want to stay, have essentially no other option but to turn to the immigration courts for help through asylum application.⁶⁵

In reaction to concerns over sex trafficking, the UN released guidelines for member approval, known as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Palermo Protocol”), in 2001.⁶⁶ This protocol addressed the issue and proposed ways to prevent it from continuing.⁶⁷ From the very beginning, the document recognized that preventing and combating this problem will require a “comprehensive international approach in the countries of origin, transit and destination.”⁶⁸

The Palermo Protocol advocated for a proactive response and required approving countries to adopt “comprehensive” policies and programs.⁶⁹ This requirement was aimed at “prevent[ing] and combat[ing] trafficking in persons” and “protect[ing] victims of trafficking . . . especially women and children, from revictimization.”⁷⁰ Additionally, the UN suggested that governments “consider adopting legislative . . . measures” allowing sex trafficking victims, present within their territories, to remain there “temporarily or permanently.”⁷¹ While many members of the international community approved the proposal, including the United States, and despite the UN’s efforts, the Palermo Protocol faced some criticism because none of the provisions were mandatory; therefore, domestic laws of adopting countries would trump the requirements.⁷²

Victims of sex trafficking who seek asylum in the United States primarily have been rejected by the courts at all levels.⁷³ Statistics demonstrate a downward trend in granting asylum to

⁶⁵ See *id.* at 15.

⁶⁶ Palermo Protocol, *supra* note 33, at 31.

⁶⁷ Knight, *supra* note 1, at 2.

⁶⁸ Palermo Protocol, *supra* note 33, at 31.

⁶⁹ *Id.*

⁷⁰ *Id.* at 35 art. 9, para. 1(a)–(b).

⁷¹ *Id.* at 34 art. 7, para. 1.

⁷² Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention’s “Nexus” Requirement*, 16 MICH. J. GENDER & L. 453, 458 (2010) (“Specifically, the treaty does *not* require states to regularize the immigration status of trafficking victims who are transported into their borders, but merely obliges states to *consider* measures that would allow victims to remain ‘in appropriate cases.’”).

⁷³ See Knight, *supra* note 1, at 5.

these women as one moves higher in the court system.⁷⁴ In a recent study of fifty-two cases, the results revealed “seven grants and four denials at the Asylum Office; 13 grants and 26 denials in immigration court; and the BIA . . . issued three grants and nine denials.”⁷⁵ These statistics demonstrate the declining pattern with sixty-five percent of applications granted at the lowest level in Asylum Offices, down to thirty-five percent at the IJ level, and only twenty-five percent at the BIA level.⁷⁶ In addition, the federal courts of appeals’ grant rate was zero, as no cases out of the fifty-two had been granted on appeal by any of the circuits.⁷⁷ These rates cannot be interpreted to represent the agencies performing their jobs efficiently and distinguishing the strong cases from the weak; the legal framework and rules associated with asylum claims preclude even the most worthy and credible cases for failure to sufficiently meet the criteria the courts require.⁷⁸

B. History and Requirements of Obtaining Asylum in the United States

In accordance with international asylum law, the Refugee Act of 1980 defines “refugee” as “any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution.”⁷⁹ Asylum law found its origin after World War I and World War II to aid those displaced or persecuted during the wars.⁸⁰ In 1951, the UN formed the United Nations High Commissioner for Refugees (“UNHCR”), which was responsible for creating a treaty on refugees, known as the 1951 United Nations Convention Relating to Status of Refugees (“1951 Convention”).⁸¹ About a decade later, the

⁷⁴ *See id.*

⁷⁵ *Id.* (footnote omitted).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(42)(A) (West 2014).

⁸⁰ *See* Leonard Birdsong, “Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning To Breathe Free of Sexual Persecution . . .”: *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357, 362 (2008); *see also* Javaherian, *supra* note 20, at 427.

⁸¹ Javaherian, *supra* note 20, at 427.

UNHCR released the 1967 Protocol to the original 1951 treaty, and collectively they were adopted by seventy-five percent of countries in the world.⁸²

The 1951 Convention and the 1967 Protocol contain the “doctrine of *nonrefoulement*.”⁸³ This doctrine represents a core principle of asylum and humans rights law: “[N]o party shall return a person to a country where they will be persecuted.”⁸⁴ The United States signed the Protocol in 1967; however, its provisions were not implemented simply by ratification.⁸⁵ Hence, to fulfill the obligations set forth by the UNHCR, the United States passed legislation that effectively mirrored the provisions, known as the Immigration and Nationality Act.

The Immigration and Nationality Act requires every person seeking asylum in the United States to follow a particular process to obtain refugee status.⁸⁶ First, asylum applications fit into two categories: affirmative⁸⁷ or defensive.⁸⁸ Affirmative applications for asylum are filed by anyone not currently in a removal proceeding,⁸⁹ whereas defensive applications for asylum are filed when removal proceedings are already underway.⁹⁰ Affirmative applicants may file an application with the U.S. Bureau of Citizenship and Immigration Services.⁹¹ Then, specialized asylum officers receive the applications, review them, interview the individual applicants, and make their determinations.⁹² Asylum officers will grant refugee status in “meritorious cases,” but they do not deny the remaining cases; they simply become defensive applications.⁹³ The officers place them in removal proceedings, which automatically refer them to the immigration court.⁹⁴

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Knight, *supra* note 1, at 3.

⁸⁵ Javaherian, *supra* note 20, at 427 n.40.

⁸⁶ See *id.* at 428. See generally Immigration and Nationality Act, 8 U.S.C.A. § 1101 (West 2014) (establishing the process for application).

⁸⁷ Birdsong, *supra* note 80, at 364.

⁸⁸ Javaherian, *supra* note 20, at 428 n.45.

⁸⁹ *Id.* at 428 n.44.

⁹⁰ Birdsong, *supra* note 80, at 365.

⁹¹ *Id.* at 364.

⁹² *Id.* at 364–65.

⁹³ *Id.*

⁹⁴ *Id.* at 365.

The IJs provide the initial review of defensive applications and the second review of affirmative applications.⁹⁵ "This allows the case to be heard in the more formal setting of the immigration court where witnesses may be examined and cross examined by the alien's counsel and the Department of Homeland Security's . . . counsel."⁹⁶ If the IJ denies asylum, the decision may be appealed to the BIA.⁹⁷ Further, if the result of that appeal is still unfavorable to the asylum seeker's claim, then the applicant can appeal the order to the federal courts of appeal.⁹⁸ Despite the applicants receiving "another bite at the apple," upon review of the BIA's decision, the circuit courts must give "substantial deference" to the BIA's interpretation of the law and regulations when deciding whether it was a permissible statutory construction.⁹⁹

Both the UN and the U.S. definitions of "refugee" contain a limitation on the general "*nonrefoulement*"¹⁰⁰ principle, namely that one of five protected grounds must be established before obtaining asylum.¹⁰¹ Essentially, to be considered a refugee, an applicant must prove "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁰² First, an applicant seeking to successfully qualify for asylum must prove incidents amounting to persecution or creating a reasonable fear

⁹⁵ *Id.*

⁹⁶ *Id.* (internal quotation marks omitted).

⁹⁷ Javaherian, *supra* note 20, at 428.

⁹⁸ *Id.*

⁹⁹ *Id.* at 428 n.49. The "substantial deference" standard of review for the circuit courts stems from the Supreme Court decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." (footnotes omitted)).

¹⁰⁰ See *supra* note 83 and accompanying text.

¹⁰¹ See Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(42)(A) (West 2014).

¹⁰² *Id.*

of persecution.¹⁰³ Then, the government, or forces the government is unable or unwilling to control, must have committed the proposed persecution.¹⁰⁴ Finally, the applicant must demonstrate a nexus between the persecution and one of the enumerated grounds.¹⁰⁵

To prove an incident amounted to persecution or a well-founded fear of persecution, there must be credible testimony and sufficient corroborating evidence.¹⁰⁶ If applicants establish past persecution, they are “entitled to a presumption that [their] life or freedom will be threatened if [they] return[].”¹⁰⁷ When applicants are unable to prove past persecution, they may still apply for asylum by demonstrating a well-founded fear of future persecution.¹⁰⁸ This standard requires both a “subjectively genuine fear” and an “objectively reasonable possibility of persecution.”¹⁰⁹

Most of the five protected grounds are easily definable, except for “membership in a particular social group.”¹¹⁰ For purposes of the refugee definition, “race” simply means “all kinds of ethnic groups that are referred to as ‘races’ in common usage.”¹¹¹ In addition, religion also maintains its regular meaning; thus, individuals suffer persecution because of their faith or belief.¹¹² “Nationality” refers to citizenship, ethnicity, or linguistic group; therefore, this ground may overlap with race.¹¹³

¹⁰³ “Persecution” was not defined in the 1951 Convention or the Refugee Act of 1980, leaving it up to the court system to determine through the IJ, BIA, and federal circuit courts. The Ninth Circuit defined persecution as “the infliction of suffering or harm . . . in a way regarded as offensive.” Javaherian, *supra* note 20, at 429.

¹⁰⁴ *Id.* at 431.

¹⁰⁵ Knight, *supra* note 1, at 3.

¹⁰⁶ See 8 U.S.C. § 1158(b)(1)(B)(ii) (2012).

¹⁰⁷ Valdiviezo-Galdamez v. Att’y Gen. of the U.S., 663 F.3d 582, 590 (3d Cir. 2011) (quoting Gabuniya v. Att’y Gen. of the U.S., 463 F.3d 316, 321 (3d Cir. 2006)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 590–91 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 430–31 (1987)).

¹¹⁰ See *infra* Part II.

¹¹¹ UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, ¶ 34, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) [hereinafter *UNHCR Guidelines on Trafficking Victims*].

¹¹² *Id.* ¶ 35.

¹¹³ *Id.* ¶ 36.

Finally, "political opinion" also receives a literal interpretation where individuals are targeted due to their actual or perceived political views.¹¹⁴

Many refugees come to the United States seeking asylum, but not all fit into the previous four categories. The reality is that persecution can come in a variety of forms that the former groups do not capture. Thus, "membership in a particular social group" is used to try to fit their needs.¹¹⁵ However, problems have arisen because neither the UNHCR nor the United States have provided a clear definition of what this phrase means and what it takes to be included.¹¹⁶ Accordingly, due to the statute's open-ended language and lack of guidance, determining what it means to be a member of a "particular social group" has been the most debated of the five grounds.¹¹⁷

II. SEX TRAFFICKING VICTIMS' FAILURE TO FIT INTO THE UNITED STATES' ASYLUM FRAMEWORK

In accordance with asylum law requirements, the victims of sex trafficking must prove their experience amounted to persecution at the hands of their government or parties their government is unwilling or unable to control, on account of either race, religion, nationality, political opinion, or membership in a PSG.¹¹⁸ A victim of trafficking will not usually have any problem establishing that they endured incidents amounting to persecution, which "include[], but [are] not limited to, 'threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.'"¹¹⁹ Adjudicators of these proceedings typically find their "stories of feared or

¹¹⁴ *Id.* ¶ 40.

¹¹⁵ Javaherian, *supra* note 20, at 445–46.

¹¹⁶ *Lukwago v. Ashcroft*, 329 F.3d 157, 170–71 (3d Cir. 2003) ("[T]he 'statutory language standing alone is not very instructive' and . . . 'in its broadest literal sense, the phrase is almost completely open-ended.'" (quoting *Fatin v. Immigration & Naturalization Serv.*, 12 F.3d 1233, 1238 (9th Cir. 1993))).

¹¹⁷ *Valdiviezo-Galdamez v. Att'y Gen. of the U.S.*, 663 F.3d 582, 594 (3d Cir. 2011) ("Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.' Thus, the statutory language standing alone is not very instructive.'" (quoting *Fatin*, 12 F.3d at 1238)).

¹¹⁸ *Knight*, *supra* note 1, at 3.

¹¹⁹ *Gomez-Zuluaga v. Att'y Gen. of the U.S.*, 527 F.3d 330, 340 (3d Cir. 2008) (quoting *Yu v. Att'y Gen. of the U.S.*, 513 F.3d 346, 348 (3d Cir. 2008)).

actual abduction, rape and trafficking” to be credible.¹²⁰ The international community also views sex trafficking as an egregious violation of human rights and the UNHCR’s Guidelines on Trafficking Victims assert that persecution may involve “serious human rights violations.”¹²¹ Additionally, the victims often face little trouble proving that the persecution was carried out by traffickers who their government is unwilling or unable to control, especially since many countries either have not yet “adopted or implemented sufficiently stringent measures to criminalize and prevent trafficking or to meet the needs of victims.”¹²²

Accordingly, the fundamental obstacle these women face stems from the requirement of establishing persecution due to one of the five enumerated grounds.¹²³ Generally, sex trafficking victims do not fall under persecution on account of their race, religion, nationality, or political opinion; therefore, to be successful on their claim for asylum, they must prove the highly debated “particular social group” ground.¹²⁴ When applying for protection as a member of a PSG, the applicant must satisfy three requirements: “(1) the applicant must identify a group that constitutes a ‘particular social group’; (2) the applicant must establish that s/he is a member of that group; and (3) the applicant must show that s/he was persecuted based on that membership.”¹²⁵

Section A of this Part outlines the divide between both the BIA and the circuit courts over the appropriate analysis to use when defining what constitutes a PSG. Section B discusses the courts’ two opposing schools of thought on whether sex trafficking victims’ proposed group, “females of a specified country,” is a sufficient PSG. Section C establishes another proposed PSG based on the asylum seekers’ shared past experience as victims of sex trafficking.

¹²⁰ Knight, *supra* note 1, at 6.

¹²¹ See Javaherian, *supra* note 20, at 445 n.168 (“Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant.”).

¹²² UNHCR Guidelines on Trafficking Victims, *supra* note 111, ¶ 23.

¹²³ See *infra* Part II.B–C.

¹²⁴ Javaherian, *supra* note 20, at 445–46.

¹²⁵ Lukwago v. Ashcroft, 329 F.3d 157, 170 (3d Cir. 2003).

A. Differing Interpretations of "Particular Social Group"

1. BIA Tests for What Constitutes a Particular Social Group

Through a series of cases, the BIA established a few tests for determining when an applicant represents a member of a legally recognized PSG. The seminal case, *In re Acosta*,¹²⁶ was the first BIA decision to interpret the meaning of PSG, but more importantly provided the immutable characteristic test.¹²⁷ This test required groups to be defined by a " 'common, immutable characteristic' that the members 'either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.' "¹²⁸ When analyzing the asylum law's five enumerated groups, the court reasoned that because race, religion, nationality, and political opinion were all immutable traits, it necessarily followed that a "particular social group" must be too.¹²⁹ The court indicated the test could be satisfied by innate characteristics "such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience."¹³⁰ However, the court also expressed that qualifying traits were "to be determined on a case-by-case basis."¹³¹

The BIA case, *In re C-A*,¹³² expanded on the immutable characteristic test by adding a second part to PSG analysis: the social visibility test.¹³³ In that case, the BIA found that "noncriminal drug informants working against the Cali drug cartel" were not socially visible because their status as informants was kept confidential in order for them to successfully do their job.¹³⁴ Ultimately, the necessary element of secrecy involved with being an informant led to their rejection as

¹²⁶ 19 I. & N. Dec. 211 (BIA 1985).

¹²⁷ *Id.* at 233–34 (holding that a Salvadorian cooperative organization of taxi drivers, COTAXI, did not constitute a social group because the state of being a taxi driver was not immutable and the threat could have been avoided by changing occupations).

¹²⁸ Knight, *supra* note 1, at 3 (quoting *Acosta*, 19 I. & N. Dec. at 233).

¹²⁹ *Acosta*, 19 I. & N. Dec. at 233 (stating that the BIA utilized statutory canon "ejusdem generis," meaning "of the same kind," to find the immutable characteristic requirement).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 23 I. & N. Dec. 951 (BIA 2006).

¹³³ *Id.* at 959–60; Nitzan Sternberg, Note, *Do I Need To Pin a Target to My Back?: The Definition of "Particular Social Group" in U.S. Asylum Law*, 39 FORDHAM URB. L.J. 245, 265–66 (2011).

¹³⁴ *C-A*, 23 I. & N. Dec. at 960–61.

a “particular social group.”¹³⁵ Adopted from a Second Circuit case,¹³⁶ the social visibility test requires the characteristics be “recognizable and understood by [other members of the asylee’s society] to constitute social groups.”¹³⁷

This additional test has been widely criticized. Critics argue that the test “diverges from the international accepted approach of discerning a social group, undermines the principled framework of analysis set for [sic] in *Acosta*, and ‘will lead to incoherent, inconsistent decisions’ that have no basis under international law.”¹³⁸ C-A- also introduced a principle which categorically prohibited defining a PSG by nothing more than a shared fear of persecution.¹³⁹ The court rationalized this standard because it opined the alternative would result in irrational reasoning “whereby a person would be at risk of being persecuted because they were at risk of being persecuted—an outcome that would also make the nexus clause superfluous.”¹⁴⁰

Subsequent BIA cases reaffirm the social visibility requirement and add yet another new requirement, known as the particularity test.¹⁴¹ The requirement was designed to give greater specificity to the groups by removing those that were “amorphous,” “indeterminate,” or “too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group.”¹⁴² Consequently, when faced with an application for asylum “on account of” being a member of a particular group,

¹³⁵ *Id.*

¹³⁶ See *Gao v. Gonzales*, 440 F.3d 62, 64 (2d Cir. 2006) (holding that in order to fit the definition of social group, an applicant must prove a “visibility” requirement that the group be “identifiable to would-be persecutors”), *vacated sub nom.* *Keisler v. Hong Yin Gao*, 552 U.S. 801 (2007).

¹³⁷ C-A-, 23 I. & N. Dec. at 959.

¹³⁸ Danielle L.C. Beach, *Battlefield of Gendercide: Forced Marriages and Gender-Based Grounds for Asylum and Related Relief*, IMMIGR. BRIEFINGS, Dec. 2009. Despite reviewing the UNHCR Guidelines’ approach, “[t]he BIA’s interpretation of ‘social visibility’ . . . diverged from the international community’s understanding of . . . ‘social perception’ . . . as it focused on the visibility of group members rather than whether the group as a whole was recognized by society, and stressed a subjective rather than an objective standard.” Sternberg, *supra* note 133, at 268.

¹³⁹ See C-A-, 23 I. & N. Dec. at 960 (citing *UNHCR Guidelines on Trafficking Victims*, *supra* note 111, ¶ 2) (noting that a “particular social group” could not be defined solely by being persecuted).

¹⁴⁰ Sternberg, *supra* note 133, at 266.

¹⁴¹ See *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (BIA 2008); *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008); *In re A-M-E-*, 24 I. & N. Dec. 69, 73–76 (BIA 2007).

¹⁴² *A-M-E-*, 24 I. & N. Dec. at 76.

the BIA's analysis will consist of weighing the factors described above: immutable characteristics, social visibility, and particularity.¹⁴³

2. Circuit Courts' Conflicting Approaches to Defining Particular Social Group

A division also exists among the circuit courts regarding how to approach defining "particular social groups." First, there are the courts that follow the BIA analysis precisely the way it is, meaning they look for immutable characteristics, social visibility, and particularity.¹⁴⁴ The majority of circuit courts adopted these tests, including the First Circuit, Second Circuit, Fourth Circuit, Sixth Circuit, Eighth Circuit, Tenth Circuit, and Eleventh Circuit.¹⁴⁵ Although these courts continue to refer to the immutable characteristic test in their decisions, the onset of utilizing the other two prongs of the analysis has greatly diminished its level of relevancy and significance.¹⁴⁶

The dissenting Third Circuit and Seventh Circuit continue to only adhere to the immutable characteristic test set forth in *Acosta*, thereby rejecting the social visibility and particularity tests.¹⁴⁷ In the Seventh Circuit's decision *Gatimi v. Holder*,¹⁴⁸ the court took issue with the social visibility requirement.¹⁴⁹ In the

¹⁴³ It has been argued that the recent decisions, from *C-A-* to *S-E-G-*, greatly diminished the role the original *Acosta* test prescribed, instead of combining the approaches into one "super" analysis. This notion is supported by the fact that the UNHCR Guidelines, which the BIA reviewed in adopting the requirements, "follows both the protected characteristics and the social perception approaches, and presents them as alternative approaches to defining PSG." See Sternberg, *supra* note 133, at 268.

¹⁴⁴ *Id.* at 270-72.

¹⁴⁵ *Id.*; see, e.g., *Larios v. Holder*, 608 F.3d 105, 108-09 (1st Cir. 2010) (rejecting "young Guatemalan men recruited by gang members who resist such recruitment" as a group for lack of social visibility and particularity); see also *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628-29 (8th Cir. 2008) (rejecting "family business owners" in Guatemala for lack of "social visibility to be perceived as a group by society" and for lack of particularity because it was "too amorphous" to adequately describe a social group).

¹⁴⁶ Sternberg, *supra* note 133, at 270-72.

¹⁴⁷ See *Valdiviezo-Galdamez v. Att'y Gen. of the U.S.*, 663 F.3d 582, 607-08 (3d Cir. 2011) (rejecting social visibility and particularity requirements); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009) (rejecting the particularity requirement); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting the social visibility test).

¹⁴⁸ 578 F.3d 611.

¹⁴⁹ *Id.* at 615-16.

court's view, the test "makes no sense" and the BIA failed to give adequate reasoning behind it.¹⁵⁰ Moreover, the court logically concluded that this requirement would only lead to more asylum denials because "[i]f you are a member of a group that has been targeted for . . . persecution, you will take pains to avoid being socially visible."¹⁵¹ In *Valdiviezo-Galdamez v. Attorney General of the United States*, the Third Circuit adopted the Seventh Circuit's view, but also indicated its rejection of the particularity requirement, reasoning that "social visibility" and "particularity" referred to the same concept, meaning particularity was nothing more than a reformulation of social visibility; therefore, it was dismissed for the same reasons as social visibility.¹⁵²

The Ninth Circuit uses a unique approach. Depending on the circumstances of the appeal, the court analyzes the issue under either the BIA's test or its own dual test.¹⁵³ The court uses the BIA test when the BIA already decided a case concerning a very similar group.¹⁵⁴ If no BIA precedent exists on a particular group or a similar one, the court will use a two-prong test that requires voluntary association or innate characteristics.¹⁵⁵ Voluntary association, which originated in Ninth Circuit precedent as an addition to the *Acosta* test, requires members of the PSG to have a "common identity based on . . . *intentional* affiliations with each other."¹⁵⁶

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² 663 F.3d at 608 ("[W]e are hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility.' Indeed, they appear to be different articulations of the same concept and the government's attempt to distinguish the two oscillates between confusion and obfuscation . . . 'Particularity' appears to be little more than a reworked definition of 'social visibility' and the former suffers from the same infirmity as the latter.").

¹⁵³ Sternberg, *supra* note 133, at 276.

¹⁵⁴ *Barrios v. Holder*, 581 F.3d 849, 855–56 (9th Cir. 2009) (relying on the BIA's analysis of the proposed social group of Guatemalan youths who refuse to join gangs according to the BIA's earlier precedential decision in *S-E-G*, which rejected those who resist recruiting by a Salvadoran gang).

¹⁵⁵ *See, e.g., Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010).

¹⁵⁶ Sternberg, *supra* note 133, at 264 (emphasis added); *see also Sanchez-Trujillo v. Immigration & Naturalization Serv.*, 801 F.2d 1571, 1576 (9th Cir. 1986).

B. *Courts' Rulings on Whether Sex Trafficking Victims' Proposed Group "Females of a Particular Country" Constitutes a Sufficient Particular Social Group*

Many asylum applicants attempt to define their PSG as something like "females in [her specified country];"¹⁵⁷ however, the BIA has never addressed the sufficiency of gender as a social group in a precedential decision.¹⁵⁸ Nevertheless, the issue has reached IJs and federal circuit courts, and the results have offered little guidance due to their inconsistencies. Subsection 1 summarizes a number of circuit court decisions, which reject "females of a particular country" as a valid PSG. Subsection 1 also establishes the overwhelming rationale for the refusal to accept this proposed group, namely that defining the group by gender was too broad and would open the floodgates for asylum eligibility in the United States. In contrast, Subsection 2 provides circuit courts that recognized women within a particular country as a sufficient PSG by rejecting overbreadth as an issue and instead focusing on gender as an immutable characteristic.

1. *Courts That Found "Females of a Particular Country" To Be an Insufficient Social Group*

The Sixth Circuit first addressed the issue of whether women within a particular country defined a cognizable social group in *Rreshpja v. Gonzales*¹⁵⁹ and found this type of group insufficient.¹⁶⁰ In *Rreshpja*, an unknown man attempted to abduct Rreshpja on her walk home from school.¹⁶¹ She managed to escape, but not before the attacker told her to "not get too excited because she would end up on her back in Italy, like many other girls."¹⁶² After receiving no help from the police, Rreshpja fled to the United States out of fear that she would be abducted and applied for asylum on the grounds that "she is an attractive young woman who risks being kidnapped and forced into prostitution if she returns to Albania."¹⁶³ The court held "young . . . attractive Albanian women" did not constitute a social

¹⁵⁷ See *infra* Part II.B.1–2.

¹⁵⁸ Javaherian, *supra* note 20, at 448.

¹⁵⁹ 420 F.3d 551 (6th Cir. 2005).

¹⁶⁰ *Id.* at 555.

¹⁶¹ *Id.* at 553.

¹⁶² *Id.*

¹⁶³ *Id.* at 553–54.

group because it was too broad, noting “almost all . . . pertinent decisions have rejected generalized, sweeping classifications.”¹⁶⁴ Moreover, the court argued recognizing such a group would allow “virtually any young Albanian woman who possesses the subjective criterion of being ‘attractive’ [to] be eligible for asylum in the United States.”¹⁶⁵

Other circuit courts have decided the issue of establishing a PSG through gender consistently with the Sixth Circuit’s holding in *Rreshpja*. For instance, in *Kuci v. Attorney General of the United States*,¹⁶⁶ the Third Circuit found that “young women who have been approached or threatened with kidnapping, forced [prostitution] or killing by human traffickers that the government of Albania either cannot or will not control” was too broad a definition to establish a PSG because it was based merely on gender and contact with the traffickers.¹⁶⁷

Similarly, two recent Second Circuit decisions affirmed the position against gender-based PSGs. In *Qeta v. Holder*,¹⁶⁸ an Albanian woman who had multiple encounters with men who tried to force her into prostitution and received threatening phone calls did not receive asylum.¹⁶⁹ According to the court, “young single women in Albania who do not have male relatives to protect them from sex traffickers” was also too broad to be a cognizable social group.¹⁷⁰ The other Second Circuit case, *Lushaj v. Holder*,¹⁷¹ also illustrates consistency with the previous cases but exemplifies another potential problem facing the asylum seekers regarding the nexus requirement. The court rejected the proposed PSG of “women whom ‘members of the Haklaj gang wished to kidnap . . . and force . . . into prostitution, at least in part to punish [their] family members for their political activities in Albania’ ” on the grounds that it was overly broad and lacked

¹⁶⁴ *Id.* at 555.

¹⁶⁵ *Id.* at 556.

¹⁶⁶ 299 F. App’x 168 (3d Cir. 2008). In that case, Kuci received regular telephone calls encouraging her to go to Italy for “a greater and brighter future” and known traffickers attempted to kidnap her on two separate occasions. *Id.* at 169. After the second kidnapping attempt, they threatened her, saying “this is not the end of it.” *Id.* These incidents were reported to the police in Albania, and Kuci remained in her home for months, until she finally escaped to the U.S. *Id.*

¹⁶⁷ *Id.* (alteration in original).

¹⁶⁸ 378 F. App’x 93 (2d Cir. 2010).

¹⁶⁹ *Id.* at 94.

¹⁷⁰ *Id.*

¹⁷¹ 380 F. App’x 41 (2d Cir. 2010).

perception as a discrete group in Albanian society.¹⁷² In addition, the court went beyond this argument by pointing out the applicant's failure to prove she was targeted for any reason besides pure pecuniary gain, which the nexus requirement commands.¹⁷³

2. Courts That Found "Females of a Particular Country" To Be a Sufficient Social Group

In contrast, some circuit courts have recognized that gender is not too broad to establish a PSG. *Mohammed v. Gonzales*,¹⁷⁴ a 2005 Ninth Circuit decision, expressly recognized that women of a particular nationality or "even in some circumstances females in general" could constitute a PSG.¹⁷⁵ In making its decision, the court took note of the underdevelopment of U.S. law with regard to gender persecution; nevertheless, it found its decision was "simply a logical application" of the existing law.¹⁷⁶ The court referenced the BIA decision in *Acosta* and its characterization of the immutable characteristic test by stating that gender is an innate characteristic fundamental to one's identity.¹⁷⁷ In fact, within the case itself "the BIA listed gender as an example of a prototypical immutable characteristic that could form the basis" of a social group.¹⁷⁸ After this decision, a number of other circuits also adopted the Ninth Circuit's reasoning.¹⁷⁹

Another notable case recently came from the Ninth Circuit in which the court decided the IJ and the BIA erred in holding that "women in Guatemala" did not constitute a particular social

¹⁷² *Id.* at 43 (alteration in original).

¹⁷³ *Id.* at 44. However, the law only requires that at least one central reason be linked to the enumerated grounds. While it is generally accepted that trafficking victims are likely targeted for their potential monetary value to the traffickers, the existence of this non-related ground does not preclude the possibility of victimization on the basis of a protected ground too. In other words, a trafficking victim may be chosen on the basis of both economic motives and being a member of a PSG, such as young, attractive Albanian women, if that is what the clientele prefers.

¹⁷⁴ 400 F.3d 785 (9th Cir. 2005).

¹⁷⁵ *Id.* at 797.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See, e.g., Diallo v. Mukasey*, 268 F. App'x 373, 382–83 (6th Cir. 2008) (following BIA's *Acosta* and adopting the Tenth Circuit's position); *Hassan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007) (finding that Somali females constituted a social group); *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (requiring only gender or tribe membership to identify a social group).

group.¹⁸⁰ In *Perdomo v. Holder*,¹⁸¹ the court stated “women may constitute a particular social group under certain circumstances based on the common characteristic of sex.”¹⁸² Unlike other instances where social groups were struck down as too broad, the court reasoned that gender could be a narrowing factor that unifies an overly diverse group.¹⁸³ However, the Ninth Circuit remanded the case to the BIA without making a conclusive determination.¹⁸⁴ Nevertheless, the decision of the Ninth Circuit to recognize that gender may define a PSG marks a noteworthy change to approach that will be of utmost importance to future victims of trafficking asylum cases.¹⁸⁵

C. Courts’ Reactions to Fear of Future Persecution as a Result of Being a Victim of Sex Trafficking

Besides the female in a specified country argument, asylum seekers have proposed membership in another social group: victims of sex trafficking.¹⁸⁶ In essence, the victims argue that their shared experience now represents a historical event which cannot be changed; thus, their past persecution creates a common, immutable characteristic that defines them as a PSG.¹⁸⁷ Unfortunately, courts have been extremely unreceptive to this proposed social group.¹⁸⁸ The reason for the overwhelming rejection of “victims of sex trafficking” as a PSG is the principle that “a social group cannot be defined *exclusively* by the fact that it is targeted for persecution.”¹⁸⁹

¹⁸⁰ See *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010).

¹⁸¹ 611 F.3d 662.

¹⁸² *Id.* at 667.

¹⁸³ *Id.* at 668.

¹⁸⁴ *Id.* at 669.

¹⁸⁵ See *Javaherian*, *supra* note 20, at 451.

¹⁸⁶ *Knight*, *supra* note 1, at 4.

¹⁸⁷ *Id.*

¹⁸⁸ See *Javaherian*, *supra* note 20, at 446 (“Case law has been bleak as to whether ‘victims of human trafficking’ may constitute a social group.”).

¹⁸⁹ UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *UNHCR Social Group Guidelines*]. However, it is important to note that past persecution may be a relevant factor in determining visibility of a PSG. *Id.*

However, status as a “victim of sex trafficking” may still be valid as a motivation for fear of future persecution.¹⁹⁰ The Third Circuit first adopted this position in *Lukwago v. Ashcroft*,¹⁹¹ which found that membership in a group of “children from Northern Uganda who ha[d] escaped from involuntary servitude after being abducted and enslaved” by the Lord’s Resistance Army established a well-founded fear of future persecution.¹⁹² Similarly, in *Gomez-Zuluaga v. Attorney General of the United States*,¹⁹³ the proposed social group of “women who have escaped involuntary servitude after being abducted and confined by the FARC” was sufficient because the applicant’s escapee status would motivate the abductors to persecute her in the future.¹⁹⁴

Conversely, in *Sarkisian v. Attorney General of the United States*,¹⁹⁵ the court declined to extend its findings in *Lukwago* and *Gomez-Zuluaga* to an Armenian female victim of sex trafficking who contended that she was targeted in the past and that her abductors knew who she was and would likely target her again should she return.¹⁹⁶ The distinguishing factor between these opposing cases was the element of retribution for escape.¹⁹⁷ The court found this fact dispositive, compelling the conclusion to deny asylum because the applicant in *Sarkisian* did not produce evidence explaining why her past persecution would motivate her abductors to target her again.¹⁹⁸

Ultimately, under the current U.S. framework many victims of sex trafficking are being left out in the cold. In light of the proclaimed commitment of the country’s highest government officials to combat this serious global issue and the policy considerations behind offering asylum, a major discrepancy

¹⁹⁰ See *Lukwago v. Ashcroft*, 329 F.3d 157, 178–79 (3d Cir. 2003); see also *Gomez-Zuluaga v. Att’y Gen. of the U.S.*, 527 F.3d 330, 346 (3d Cir. 2008).

¹⁹¹ 329 F.3d at 172.

¹⁹² *Id.* at 174.

¹⁹³ 527 F.3d 330.

¹⁹⁴ *Id.* at 345–46.

¹⁹⁵ 322 F. App’x 136 (3d Cir. 2009).

¹⁹⁶ *Id.* at 138, 142–43.

¹⁹⁷ In *Lukwago*, the applicant provided evidence of his persecutor’s tendency to retaliate against people who escape by “killing escaped children to punish them or to make an example of them.” *Id.* at 143 (citing *Lukwago*, 329 F.3d at 179–80). Likewise, in *Gomez-Zuluaga*, proof of the persecuting party killing other escaped members of the applicant’s family was a decisive factor in approving the asylum claim. See 527 F.3d at 347.

¹⁹⁸ *Sarkisian*, 322 F. App’x at 143.

exists between their intent and the actual state of the law.¹⁹⁹ Consequently, U.S. asylum law should be modified to grant protection to this worthy group.

III. AN "OPEN-MINDED" SOLUTION TO THE VICTIMS OF THE SEX TRAFFICKING PROBLEM

Despite the United States proclaiming heightened support to crack down on sex trafficking crimes and recognition of them as the "modern form of slavery," this rhetoric has not been accompanied "by action to protect trafficking victims who escape their persecutors and seek the protection of asylum."²⁰⁰ In particular, the interpretation and application of the "immutable characteristic" and the "social visibility" requirements are flawed, leading to an overwhelming result of exclusion from protection.²⁰¹ Courts have adopted sweeping generalizations and faulty justifications to reject proposed attempts to establish a PSG. To fulfill the promise of the United States to be a "champion of refugee women,"²⁰² changes need to be made to the current state of the law, invoking a standard where courts take the totality of the circumstances into account.

The main problems in U.S. refugee law stem from misinterpretations of guidelines from the UNHCR.²⁰³ As the originators of the 1951 treaty on refugees, marking the beginning of refugee status as it exists today, the UNHCR's opinion on matters related to asylum should be given close and careful consideration.²⁰⁴ U.S. immigration courts, like the BIA, have recognized the significance and relevance of considerations from this committee.²⁰⁵ Their acceptance and recognition of the UNHCR guidelines is exemplified through reliance and even direct quotation of them in many cases. Nevertheless, simply citing to specific principles advised by the UNHCR does not guarantee correct interpretation and use. In fact, underlying most decisions is an overwhelming concern with opening the

¹⁹⁹ See *supra* Part I.

²⁰⁰ Knight, *supra* note 1, at 15.

²⁰¹ See *supra* Part II; *infra* Part III.A.

²⁰² See *supra* note 53 and accompanying text.

²⁰³ See *infra* notes 207–08 and accompanying text.

²⁰⁴ See *supra* Part I.A.

²⁰⁵ Sternberg, *supra* note 133, at 260 & n.103.

floodgates for every immigrant to gain refugee status in the United States;²⁰⁶ however, this consideration is completely inconsistent with UNHCR guidelines.²⁰⁷

Section A outlines how the courts' primary concern over opening the floodgates for virtually any refugee to be eligible for United States asylum rests on flawed reasoning and lacks merit. Section A also establishes that the current application of the law is inconsistent with UNHCR guidelines and refugee law's overall intent to protect human dignity. Section B proposes a solution by requiring courts to examine the totality of the circumstances, which may include the prevalence of sex trafficking within a particular region and other forms of future persecution victims face, like severe backlash, ostracism, and discrimination in their communities.

A. *Concerns for Permitting Categorization of Gender-Based Groups or Victims of Sex Trafficking as Particular Social Groups and Their Shortfalls*

Denial in cases where a female victim of sex trafficking tried to use a gender-based PSG best illustrates the floodgate concern and its flawed reasoning. The primary basis for refusing to grant asylum rested on the contention that "women of a particular country" was too broad to be a PSG.²⁰⁸ Essentially, adjudicators feared that recognizing an entire gender within a country as a PSG would allow every woman in that country to be eligible for asylum.²⁰⁹ However, the UNHCR advised that "[t]he size of the purported social group [should] not [be] a relevant criterion"; therefore, "the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate."²¹⁰ Furthermore, other protected grounds, such as religion or political views, are universally accepted, yet they also have the potential to include a vast amount of people in a country.²¹¹

²⁰⁶ See Knight, *supra* note 1, at 11.

²⁰⁷ See UNHCR Social Group Guidelines, *supra* note 189, ¶ 18.

²⁰⁸ See Knight, *supra* note 1, at 11.

²⁰⁹ *Id.*

²¹⁰ UNHCR Social Group Guidelines, *supra* note 189, ¶ 18.

²¹¹ See *id.*

Critics argue that the idea that allowing a gender-based PSG would render all applicants eligible for asylum is clearly erroneous.²¹² The courts' reasoning is without merit in light of "well-established facts."²¹³ Initially, it is important to note the immense difficulty for "women, who often have little or no resources, to leave their home countries" in the first place.²¹⁴ What is more, to be successful on an asylum claim, an applicant must do more than just prove membership in a social group. A number of hurdles exist for asylum seekers, which include showing past persecution or a well-founded fear of persecution and that this persecution is on account of membership in a PSG.²¹⁵ Despite the focus on the trouble associated with fitting into a PSG, these other hurdles are still no easy task to overcome.²¹⁶

Moreover, the passage of the Real ID Act poses yet another obstacle.²¹⁷ The law states that judges in refugee cases may decide to require corroborating evidence of the victim's story.²¹⁸ If an applicant fails to provide corroborating evidence of her testimony, the court may decide she lacks credibility and deny her protection.²¹⁹ Thus, the floodgate argument fails again because if an applicant's claim is fraudulent, she would not have corroborating evidence, and hopefully the adjudicators would see through such an improbable, transparent claim. In light of these facts, the overbreadth and floodgate concerns are nothing more than red herrings.

Courts also adopted the position that gender plus the country of origin would not suffice as a PSG because such a broad, diverse group would lack social visibility.²²⁰ However, this category can be narrowed further by an investigation into the prevalence of female sex trafficking in the geographic region.²²¹ Prevalence of particular persecution against a certain group can

²¹² See Knight, *supra* note 1, at 11.

²¹³ *Id.*

²¹⁴ Alex Kotlowitz, *Asylum for the World's Battered Women*, N.Y. TIMES MAG., Feb. 11, 2007, at 32.

²¹⁵ See Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(42) (West 2014).

²¹⁶ See Javaherian, *supra* note 20, at 465–66.

²¹⁷ Real ID Act, 8 U.S.C. § 1158 (2012).

²¹⁸ *Id.* § 1158(b)(1)(B)(ii)–(iii).

²¹⁹ *Id.*

²²⁰ See *supra* Part II.B.1.

²²¹ See Knight, *supra* note 1.

be a relevant factor in determining whether it satisfies a protected ground.²²² The U.S. immigration courts have engaged in this type of particularized investigation before when deciding whether victims of female genital mutilation (“FGM”) should be granted asylum.²²³ Ultimately, the court found FGM to be so prevalent and deeply embedded in the culture within a given country that it considered “Somalian females” to be a PSG.²²⁴

In *Rreshpja*, the Sixth Circuit explicitly denied application of a FGM type of rule to female trafficking victims;²²⁵ however, this was the wrong decision. The crux of the court’s refusal to extend the rule was lack of “evidence to show that the practice of forcing young women into prostitution in Albania [was] nearly as pervasive as the practice of female genital mutilation.”²²⁶ This strict adherence to the particular facts would essentially require “approximately 98 percent of all females” to suffer from a common persecution in order for the persecution to be sufficiently prevalent.²²⁷ Relying on such an arbitrary mathematical approach creates a bright-line test. This type of rule is inconsistent with the chief concern and original intent behind refugee law: to protect people’s human rights and dignity.²²⁸

B. The Totality of the Circumstances Should Be Considered When Analyzing the Sufficiency of Female Sex Trafficking Victims as a Particular Social Group

Ultimately, the courts should create an exception within asylum law, like they did for FGM victims, to allow victims of sex trafficking to use “women of a particular country” as a PSG. For sex trafficking to be labeled as “one of the great human rights causes of our time,” it must necessarily follow that it has a significant amount of pervasiveness in the international community.²²⁹ The UNHCR advocated defining PSG “in an evolutionary manner, open to the diverse and changing nature of

²²² See *infra* note 223 and accompanying text.

²²³ See, e.g., *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005).

²²⁴ *Id.* at 797.

²²⁵ *Rreshpja v. Gonzales*, 420 F.3d 551, 555–56 (6th Cir. 2005).

²²⁶ *Id.*

²²⁷ *Id.* at 555 (quoting *Mohammed*, 400 F.3d at 797).

²²⁸ See *supra* Part I.A.

²²⁹ See *supra* note 18 and accompanying text.

groups in various societies and evolving international human rights norms.”²³⁰ Therefore, courts should adopt a more flexible standard in which the totality of the circumstances is considered.

Just as courts ruling on asylum cases should be open to new ways of thinking about gender-based PSG proposals, the same should be done for “victims of sex trafficking” as a social group. Most adjudicators write off this group due to the general UNHCR rule stating that “a social group cannot be defined *exclusively* by the fact that it is targeted for persecution.”²³¹ However, the UNHCR did not stop there. It advanced the role of persecution in PSG determinations because “[w]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.”²³² Consequently, while the past persecution cannot be established on account of membership in a group of trafficking victims, fear of *future* persecution embodies a more viable option.

To utilize the social group “victim of sex trafficking,” applicants may take two different approaches. The first approach would be to argue for a well-founded fear of future persecution through reprisals or re-trafficking upon return to her country.²³³ While the Third Circuit rejected this claim from a victim of sex trafficking on the ground that she failed to produce evidence of specific instances of repeated trafficking or retaliation, the court neglected to consider the impracticability of such a request.²³⁴ This request is impracticable especially in light of the fact that many countries have failed to take reasonable steps to offer protection to victims or to enforce laws against traffickers.²³⁵ Common sense would suggest that if the law was not effectively used to arrest and punish traffickers, then the victims’ abductors are likely still at large. Concrete evidence of re-trafficking is not likely to be available because law enforcement may not have a record of the culprits, much less an

²³⁰ *UNHCR Social Group Guidelines*, *supra* note 189, ¶ 3.

²³¹ *Id.* ¶ 2.

²³² *Id.* ¶ 14.

²³³ *UNHCR Guidelines on Trafficking Victims*, *supra* note 111, ¶ 17 (stating that reprisals or possible re-trafficking when returned to the territory from which the victims fled could also amount to persecution).

²³⁴ *Sarkisian v. Att’y Gen. of the U.S.*, 322 F. App’x 136, 143 (3d Cir. 2009).

²³⁵ *UNHCR Guidelines on Trafficking Victims*, *supra* note 111, ¶ 23.

idea of their whereabouts.²³⁶ Therefore, an escaped victim of sex trafficking has every reason to fear returning to her home country because not only does the government not extend protection, but also her abductors know her by name and in many instances have already repeatedly attempted to kidnap her.²³⁷ Thus, in light of these circumstances, courts should recognize the unfairness of placing such a high standard on the asylum applicants.

The second approach "victims of sex trafficking" could take to prove fear of future persecution does not deal with re-trafficking or retaliation at all but rather harm in the form of backlash from their community.²³⁸ Upon return to their country, former victims of trafficking may be considered a social group within that society "based on the unchangeable, common and historic characteristic of having been trafficked."²³⁹ In view of the likelihood that women who were victims will be recognized as such in their community, another serious harm emerges in the form of "ostracism, discrimination or punishment by the family[,] . . . the local community or, in some instances, [even] the authorities."²⁴⁰ The UNHCR discussed how future stigma and ostracism faced could rise to the level of persecution, especially in conservative countries like Albania where sex trafficking is particularly prevalent.²⁴¹ Rejection and discrimination from support networks, like family and the community, become especially severe when aggravated by the traumatic experience already endured by victims of trafficking.²⁴² Moreover, this isolation puts victims at an even higher risk of re-trafficking or exposure to retaliation.²⁴³

By referring to the future harm in the form of social ostracism, "victims of sex trafficking" satisfies the requirements for a valid PSG, even under the law as it currently stands. First, being a past victim of trafficking instills a new fundamental characteristic or "immutable trait" because of its status as

²³⁶ See *supra* notes 1–9 and accompanying text.

²³⁷ See Knight, *supra* note 1, at 9–10 (discussing the failure of many states to take reasonable steps to prevent and provide effective protection against trafficking).

²³⁸ See *UNHCR Guidelines on Trafficking Victims*, *supra* note 111, ¶ 18.

²³⁹ *Id.* ¶ 39.

²⁴⁰ *Id.* ¶ 18.

²⁴¹ Knight, *supra* note 1, at 5.

²⁴² *UNHCR Guidelines on Trafficking Victims*, *supra* note 111, ¶ 18.

²⁴³ *Id.*

“unchangeable [due to] its historical permanence.”²⁴⁴ Similarly, as discussed, the society to which the victims return perceives them as a social group as a result of their abduction; thus, the social visibility requirement is also met.²⁴⁵ Also, this group would not violate the principle prohibiting definition of a PSG by the harm because “it is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared in the form of ostracism, punishment.”²⁴⁶

The UNHCR suggested the courts should review such asylum applications with an open mind to the diverse nature of social groups within societies; however, adjudicators often overlook or ignore this point.²⁴⁷ Therefore, the analysis of whether “victims of sex trafficking” constitutes a PSG should take this other potential fear of persecution from sources other than the traffickers into account.

CONCLUSION

After analyzing the body of law that exists on asylum cases, a heightened amount of uncertainty arises in the application of refugee law, as well as striking proof of “a troubling failure to protect women fleeing a serious violation of human rights, against which the entire world has risen up in opposition.”²⁴⁸ Implementation of the suggested modifications to PSG analysis may help a number of victims of sex trafficking obtain asylum in the United States and safety from persecution. Not only would these changes assist victims domestically, but they also could send a prescriptive message to countries around the globe to follow the same standards. Then, the United States could truly fulfill its promise to be a leader in the fight against this extraordinary evil through action, which always speaks louder than words.

²⁴⁴ *UNHCR Social Group Guidelines*, *supra* note 189, ¶ 6.

²⁴⁵ *See UNHCR Guidelines on Trafficking Victims*, *supra* note 111, ¶ 39.

²⁴⁶ *Id.*

²⁴⁷ *UNHCR Social Group Guidelines*, *supra* note 189, ¶ 3.

²⁴⁸ Knight, *supra* note 1, at 15.

