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The Fractured Colossus: An Evaluation of Gender-Based Asylum Claims for the 2020s

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*Karlo Goronja**

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* Candidate for J.D. May 2021, Washington & Lee University School of Law. I would like to thank my parents and friends simply for existing, and all of my fellow refugees and migrants across the world who inspired this Note. I would also like to thank my faculty advisor, David C. Baluarte, for his wisdom, guidance, and enthusiasm for this project even when I had my doubts.

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I. Introduction

Tatyana Vladimirova Basova, a native and citizen of Russia, arrived in the United States in 1994.¹ While in her home country, Ms. Basova was a victim of repeated abduction and rape by the Chechen Mafia for a period of more than two-and-a-half years.² She even became pregnant from the rapes and faced the decision of aborting the pregnancy.³ Each time her attackers allowed her to go home, they threatened her and told her to remain silent about the rapes and abductions.⁴ Her parents attempted to receive help from local authorities who refused to intervene, expressing concern about a potential conflict with the Mafia, given its strength and political influence.⁵ Upon Basova’s departure from Russia, the Mafia burned down her parents’ cottage and threatened to kill her if she ever returned.⁶

Basova sought asylum in the United States and was denied by the immigration court, by the Board of Immigration Appeals, and by the Tenth Circuit Court of Appeals because—although she was found to have been persecuted—her persecution did not fall into the statutory categories of race, religion, political opinion, nationality, or membership in a particular social group.⁷ Basova was ordered removed from the United States.⁸ The rest of her story is unknown.

1. *See* Basova v. I.N.S., No. 98-9540, 1999 WL 495640, at *1 (10th Cir. 1999) (explaining Basova’s background and experiences).

2. *Id.* (describing Basova’s path to her asylum application).

3. *Id.* at *3 (explaining the extent of her persecution).

4. *Id.* (describing the threats Basova received).

5. *Id.* (stating that the Chechen mafia was essentially a quasi-governmental entity).

6. *Id.* (explaining that the persecution continued even after she left Russia).

7. *See id.* (“[W]e cannot rewrite the law or force the INS to permit asylum under these circumstances.”).

8. *See id.* (“Because Ms. Basova cannot establish her entitlement to asylum,

Basova's experience with American immigration law is not particularly unique.⁹ This is because the prevailing interpretation of asylum law in the United States does not allow for asylum claims on the basis of gender.¹⁰ Currently, an individual seeking asylum must establish that they meet the definition of "refugee" in that race, religion, nationality, political opinion, or membership in a particular social group was one central reason for their persecution.¹¹ Because gender is absent from the categories listed, applicants like Basova must try to fit their asylum claim into one of the enumerated grounds, and are regularly met with denial.¹²

Victims of gender-based persecution most commonly try to mold their asylum claims to fit under the fifth category, "membership in a particular social group."¹³ This category is notably vague, rendering it a potential "catch-all" for claims that do not fall within the other categories.¹⁴ Claims based on gender have not been particularly successful, and in 2018, former Attorney General Jeff Sessions issued an opinion in *Matter of A-B*¹⁵ attempting to foreclose the opportunity for successful

she cannot satisfy the more stringent standard required for withholding of removal.").

9. See, e.g., R-A-, 22 I. & N. Dec. 906, 917 (B.I.A. 2001) (denying asylum to a Guatemalan woman who was raped, sodomized, and brutally beaten by her husband).

10. See *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991) ("Possession of broadly-based characteristics such as youth or gender will not by itself endow individuals with membership in a particular group.").

11. See 8 U.S.C. § 1158(b)(1)(B)(i) (2018) (articulating that for an applicant to establish being a refugee under 8 U.S.C. § 1101(a)(42)(A), the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecution).

12. See Valerie Plant, *Honor Killings and the Asylum Gender Gap*, 15 J. TRANSNAT'L L. & POL'Y 109, 118 (2005) ("Many cases necessarily framed in gender-related terms have met with failure.").

13. See Danette Gomez, *Last in Line – The United States Trails Behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 965 (2003) (explaining the best chance of success for victims of gender-based persecution).

14. See Plant, *supra* note 12, at 118 ("A 'Particular Social Group,' as a category, was never defined in the United Nations Convention Relating to the Status of Refugees or in the Refugee Act of 1980, which has allowed it to be a malleable catch-all . . .").

15. A-B-, 27 I. & N. Dec. 316, 320 (AG 2018) (holding that victims of private violence will not be eligible for asylum and countries' problems policing certain crimes does not establish asylum eligibility).

asylum applications from victims of domestic violence, complicating gender-based claims further.¹⁶

A. Roadmap for the Future

This Note analyzes asylum law's lack of explicit protection for individuals who suffer persecution based on their gender, and the reluctance of immigration courts to grant asylum for claims centered on the applicant's gender. This Note explores opportunities for relief from removal for gender-based asylum claims under the current framework, namely under the particular social group category of United States immigration law. After analysis under current law, this Note proposes a judicial resolution explicitly recognizing particular social groups such as "women from [country]." Next, a statutory or regulatory amendment is suggested that unequivocally allows for asylum claims on the basis of gender or sex. Additionally, prosecutorial discretion is analyzed as an avenue of quick and efficient change to immigration enforcement. Next, this Note proposes a series of general immigration law changes that would indirectly address gender-based asylum. This Note suggests that a "hard look" standard of review be adopted for immigration cases in appellate courts, departing from the current, highly deferential "substantial evidence" and *Chevron*¹⁷ reviews. Finally, this Note proposes a public defender program for immigration courts, as well as removing such courts from the influence of the Department of Justice.

B. Historical Application

In 1985, the Board of Immigration Appeals (The Board) issued a decision defining "particular social group" to aid in analyzing asylum claims.¹⁸ The Board determined that a particular social

16. See *id.* at 320 ("Generally, claims by aliens pertaining to domestic violence . . . will not qualify for asylum.").

17. See *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

18. See *Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985) (outlining a guideline

group is a group of persons who share a common, immutable characteristic such as sex, color, kinship ties, or even certain shared past experiences.¹⁹ Although this created a very basic and inclusive framework, the general vagueness that remained still left inconsistency in the analysis of applicants who claimed membership in a particular social group.²⁰

For example, in *Fatin v. I.N.S.*,²¹ the Third Circuit denied asylum to an Iranian woman because she did not have a well-founded fear of persecution.²² Despite this, the Court was open to the applicant's suggestion that women in Iran could be a particular social group.²³ Conversely, the same court denied the claim of an Armenian woman who was kidnapped and trafficked, stating that a characteristic like gender is too broad to constitute a claim.²⁴ This highlights the uncertainty and inconsistency that exists even within a single circuit.²⁵

The ambiguity in particular social group analysis has harmed many asylum-seekers, perhaps none more than women who have suffered persecution, with denials ranging from debatable to especially egregious, as shown in *In re R-A*.²⁶ In that case, Rodi

definition for particular social group analysis).

19. See *id.* at 233 (explaining what constitutes a particular social group).

20. See Plant, *supra* note 12, at 119 (“That room for judicial interpretation has led to widely varying application and results.”).

21. See *Fatin v. I.N.S.*, 12 F.3d 1233, 1244 (3d Cir. 1993) (holding that the petitioner, an Iranian woman, was not entitled to withholding of deportation or asylum).

22. See *id.* at 1243 (“In sum, whether her argument is couched in terms of membership in a ‘particular social group’ or in terms of ‘political opinion,’ the administrative record is insufficient to show that she has a well-founded fear of persecution.”).

23. See *id.* at 1240 (“In the excerpt from *Acosta* quoted above, the Board specifically mentioned ‘sex’ as an innate characteristic that could link the members of a ‘particular social group.’”).

24. See *Sarkisian v. Att’y Gen. of U.S.*, 322 F. App’x 136, 143 (3d Cir. 2009) (“But, as we have noted, ‘[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group.’” (citing *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003))).

25. Compare *Fatin*, 12 F.3d at 1240 (stating that sex could link members of a particular social group), with *Sarkisian*, 322 F. App’x at 143 (stating that gender is too broad to constitute a particular social group).

26. See *R-A*, 22 I. & N. Dec. 906, 927 (B.I.A. 2001) (finding that a Guatemalan woman’s severe abuse was not on account of membership in a

Alvarado, a Guatemalan woman who married at age sixteen, experienced incomprehensible abuse for years at the hands of her husband.²⁷ He regularly beat her both at home and in public, dislocated her jawbone when her menstrual period was late, violently kicked her in the spine when she did not want to abort the child, kicked her genitalia causing her to bleed severely for eight days, whipped her with electrical cords, pistol-whipped her, threw a machete at her, and on several occasions beat her to unconsciousness.²⁸ He repeatedly raped and sodomized her, beat her before, after, and during the unwanted sex, and gave her a sexually transmitted disease.²⁹ He abused her psychologically as well by telling her stories about killing babies and the elderly during his time in the army, he threatened to deface her and cut off her limbs, and he threatened to hunt her down and kill her if she left.³⁰ He told her his reason for the abuse was because, “You’re my woman, you do what I say,” and, “I can do it if I want to.”³¹ After she attempted suicide on one occasion, he responded, “If you want to die, go ahead. But from here, you are not going to leave.”³² She sought help from the police and even appeared in front of a judge, who brushed off the abuse as a domestic issue.³³

Alvarado managed to escape to the United States and apply for asylum, only to be denied relief from removal.³⁴ The Board of Immigration Appeals recognized that she suffered harm more than sufficient to constitute persecution, that her testimony was credible, and that she was unable to avail herself of the protection of the Guatemalan government.³⁵ However, the Board denied her application on the basis that her proposed social group was not an actual social group.³⁶ Namely, “Guatemalan women who have been

particular social group, and therefore she was ineligible for asylum).

27. *See id.* at 908–09 (detailing the abuse the asylum applicant suffered).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 909.

33. *See id.* (“When the respondent appeared before a judge, he told her that he would not interfere in domestic disputes.”).

34. *See id.* at 928 (granting the respondent voluntary departure).

35. *See id.* at 914 (stating that the respondent meets all of the criteria).

36. *See id.* at 917 (“[W]e find that the respondent’s claimed social group fails

involved intimately with Guatemalan male companions, who believe that women are to live under male domination” was too abstract to be formally recognized.³⁷ The Board reasoned that it is unclear whether the proposed group is recognized and understood to be a societal faction, or whether the abuse suffered was due to membership in the group.³⁸ In 2009, after a fourteen-year legal battle, Alvarado was eventually granted asylum, although no published opinion was issued.³⁹

Cases like Basova’s and Alvarado’s represent the significant flaw present in immigration jurisprudence in the United States. There is a general reluctance and refusal among courts to recognize valid claims based on gender because of the confusing framework that currently exists.⁴⁰ Courts regularly leave individuals who have exhausted their available remedies to return to the danger from which they fled.⁴¹ In 1995, the Immigration and Naturalization Service issued a memorandum to assist asylum officers in making preliminary decisions regarding gender-based claims, stating that such claims fall within the asylum framework, but courts continued analyzing particular social groups more

under our own independent assessment of what constitutes a qualifying social group.”).

37. See *id.* at 914, 917 (“The determinative issue . . . is whether the harm experience by the respondent was, or in the future may be, inflicted ‘on account of a statutorily protected ground.’”).

38. See *id.* at 918 (“The respondent has shown neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.”).

39. See *Matter of R-A*, U. CAL. HASTINGS, <https://cgrs.uchastings.edu/our-work/matter-r-a-> (last visited Nov. 7, 2020) (providing a timeline of Alvarado’s legal proceedings) [perma.cc/L2JY-76DX].

40. See Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L. J. 361, 363 (2012) (“[T]he United States fails to honor asylum’s political conception, i.e., to protect this subset of refugees who need surrogate international protection.”).

41. Cf. Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women*, 59 AM. U. L. REV. 337, 368 (2009) (“However, the Board rejected the asylum claim on grounds that are likely to continue to plague domestic violence-based asylum claims until there is a significant change in how gender-based claims are viewed overall.”).

narrowly and exclusively.⁴² In 2000, the Department of Justice issued a proposed regulation aimed at helping analyze cases based on violence by non-state actors.⁴³ The Department of Justice stated that in some cases, domestic abusers are motivated by the victims' gender or status in a domestic relationship, but ultimately did not go so far as to guarantee protection in these cases.⁴⁴ The language that made it to the regulation was much weaker, only outlining gender, among other things, as something to be considered that "may or may not be relevant."⁴⁵

Even in cases where the courts came to a favorable result, they avoided concluding that a broad category based on gender alone could constitute a particular social group.⁴⁶ For example, in *In re Kasinga*,⁴⁷ the Board of Immigration Appeals recognized that female genital mutilation was widespread in Togo and that the Togolese government took no action against it.⁴⁸ Rather than

42. See UNHCR, *Guidelines on International Protection* at 2, HCR/GIP/02/01 (May 7, 2002) ("Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status."); see also Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 AM. U. J. GENDER SOC. POL'Y & L. 529, 553 (2014) ("[T]he same troubling classification phenomenon pertains in the U.S. case law with regard to 'particular social groups,' which have been continuously defined in narrow and individualized terms.").

43. Asylum and Withholding Definitions, 65 Fed. Reg. 76588-01 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

44. See *id.* at 76593 ("Thus, it may be possible in some cases for a victim of domestic violence to satisfy the 'on account of' requirement . . ."); see also Silenzi Cianciarulo & David, *supra* note 41, at 371 ("Although it is useful that the Department rejected the Board's strict approach, the proposed regulations fall short of guaranteeing refugee protection for battered women.").

45. See 8 C.F.R. § 208.16(b)(3) (2019) ("[A]djudicators should consider . . . age, gender, health, social and family ties. These factors may or may not be relevant . . . and are not necessarily determinative . . .").

46. See Randall, *supra* note 42, at 555 ("The definition of 'particular social group' in *Kasinga*, while representing a positive legal development in the U.S. context, is nevertheless one that shies away from grappling with gender as a category in its own right.").

47. See *Kasinga*, 21 I&N Dec. 357, 368 (B.I.A. 1996) (granting asylum to a member of a Togolese tribe who has not had female genital mutilation performed on her).

48. See *id.* at 362 (citing U.S. State Department reports on the practice of female genital mutilation in Togo).

accept a particular social group that consisted simply of Togolese women, the Board layered qualification upon qualification to determine that the relevant group was “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”⁴⁹ The case is recognized as a step in the right direction, but the Board evaded the heart of the problem and refused to acknowledge that the practice of female genital mutilation is the plainest version of gender persecution.⁵⁰

C. Modern Application

Throughout the years, the Board of Immigration Appeals has attempted to delineate the requirements for particular social groups.⁵¹ This was largely a result of challenges to the inconsistent application of the particular social group category.⁵² For example, the Third Circuit stated that the Board would not be entitled to *Chevron* deference for “erratic, irreconcilable interpretations of their governing statutes.”⁵³ As a response, in 2014, the Board expounded on a “social distinction” requirement, stating that while a group does not need ocular visibility, it must be perceived as a group by society generally.⁵⁴ Further, the Board noted that groups must be sufficiently particular, explaining that groups must not be amorphous, overbroad, diffuse, or subjective.⁵⁵ It reiterated that

49. See *id.* at 365 (stating that the particular social group in question meets all standards).

50. See Randall, *supra* note 42, at 555 (“The BIA failed to acknowledge that the persecution existed precisely ‘on account of her gender.’”).

51. See *M-E-V-G-*, 26 I. & N. Dec. 227, 252 (B.I.A. 2014) (implementing social distinction requirements); see also *W-G-R-*, 26 I&N 208, 222 (B.I.A. 2014) (cautioning against overbroad social groups).

52. See *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582, 604 (3d Cir. 2011) (“Although we afforded the BIA’s interpretation of “particular social group” *Chevron* deference in *Fatin*, this did not give the agency license to thereafter adjudicate claims of social group status inconsistently, or irrationally.”).

53. See *id.* (explaining that agencies are not free to generate reckless interpretations of the statutes they are charged with enforcing).

54. See *M-E-V-G-*, 26 I. & N. Dec. at 240 (“Society can consider persons to comprise a group without being able to identify the group’s members on sight.”).

55. See *id.* at 239 (“The particularity requirement clarifies the point, at least implicit in earlier case law, that not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.”).

“immutable characteristics” includes characteristics the individual cannot change or should not be required to change because they are fundamental to their identities.⁵⁶ The Board also stated that “particularity” should be viewed with the specificity that race, religion, and nationality are viewed, and that the group “must be defined by characteristics that provide a clear benchmark for determining who falls within the group.”⁵⁷

Despite the attempts at clarification, courts largely remain confused about how to perform particular social group analyses.⁵⁸ For example, within the Arlington Immigration Court alone, the asylum grant rate between judges varies from nine percent to eighty-five percent.⁵⁹ Nationally, the rate varies from zero percent by Immigration Judge Farrar-Crockett in Atlanta, to ninety-seven percent by Immigration Judge Bukszpan in New York City.⁶⁰ Many courts have complained that the “particular social group” category is difficult to navigate, referring to it as “an enigmatic and difficult-to-define term.”⁶¹ Scholars suggest that the confusion stems from the Board of Immigration Appeal’s inconsistent explanations, like requiring defined boundaries on one hand but

56. See *W-G-R-*, 26 I. & N. Dec. at 213 (“The critical requirement is that the defining characteristic of the group must be something that either cannot be changed or that the group members should not be required to change to avoid persecution.”).

57. See *W-G-R-*, 26 I. & N. Dec. at 213 (“[T]he particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a ‘particular social group.’”).

58. See Fatma Marouf, *Becoming Unconventional: Constricting the Particular Social Group Ground for Asylum*, 44 N.C. J. INT’L L. 487, 490–91 (2019) (“Despite the BIA’s efforts to clarify the meanings of social distinction and particularity, they remain confusing even for attorneys and are almost impossible for unrepresented asylum seekers to understand.”).

59. See *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-2019*, TRANSACTIONAL RECORDS CLEARINGHOUSE (2019), <https://trac.syr.edu/immigration/reports/judge2019/denialrates.html> (last visited Sep. 6, 2020) (charting asylum grant rates for every immigration judge nationally) [perma.cc/8D85-CLU5].

60. *Id.*

61. See *Rios v. Lynch*, 807 F.3d 1123, 1126 (9th Cir. 2015) (“Over time, the flexible nature of the common, immutable characteristic test created ‘confusion and a lack of consistency’ among the judges tasked with adjudicating asylum and withholding claims.”); see also *Donchev v. Mukasey*, 553 F.3d 1206, 1215 (9th Cir. 2009) (“Although the other four protected grounds are denoted with a fair degree of clarity . . . the term ‘particular social group’ is ambiguous.”).

rejecting well-defined groups because they are large on the other hand.⁶² The Board's guidelines were criticized for their failure to recognize persecution based solely on gender, particularly in societies where women are persecuted widely.⁶³ Although there have been cases that recognized the possibility of a particular social group based simply on gender alone, they have failed to accrue any significant following that could change the landscape of asylum law in the United States.⁶⁴

II. The 1951 Convention and the Current State of Immigration Jurisprudence in the United States

The 1951 United Nations Convention Relating to the Status of Refugees (Convention) and the 1967 Protocol Relating to the Status of Refugees (to which the U.S. is a party), declared that human beings should have unassailable rights and set forth standards for the treatment of refugees.⁶⁵ The Convention was drafted in response to the atrocities committed during World War II, with its concern stemming from the persecution suffered by Jews and others on the grounds of race, religion, or politics.⁶⁶ Notably, the Convention is gender-neutral and neglects to

62. See Marouf, *supra* note 58, at 491 (“Similarly, the BIA held that social distinction is based on the view of society as a whole, but in maintaining that previously recognized PSGs satisfied this standard, it relief on the perspectives of the persecutors.”).

63. See Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN'S L. J. 221, 237–38 (2000) (“[T]he particular social group theory is flawed because it requires the female claimant to distinguish her persecution as greater than that of the average woman.”).

64. See *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (disagreeing with a BIA decision that stated that “all women in Guatemala” could not constitute a particular social group).

65. See Ivor C. Jackson, *The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection*, 3 INT'L J. REFUGEE L. 403, 403 (1991) (“[I]t should at least be ensured that victims of oppression and persecution obliged to leave their home country as refugees should be decently treated by the international community.”).

66. See Andrea Binder, *Gender and the Membership in a Particular Social Group Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 169 (2001) (“This refugee definition was drafted against the background of the atrocities committed by Nazi-Germany.”).

explicitly list gender as a ground for asylum.⁶⁷ This is a reflection of a framework “drawn primarily from the realm of public sphere activities dominated by men,” and does not necessarily account for certain private oppression that is unique to women.⁶⁸ Moreover, a sharp distinction has been drawn between public and private oppression, signaling an inability to recognize the political, public nature of oppression such as domestic violence or rape.⁶⁹ This distinction coupled with the Convention’s framework ignores the role that gender plays even in non-domestic, enumerated forms of oppression like political opinion.⁷⁰

In 1991, as a response to narrow interpretations of the Convention leading to gaps in asylum protection, the United Nations issued guidelines expressly directing countries to adopt measures that would protect refugee women.⁷¹ Again in 2002, the United Nations reiterated the desire to create a more inclusive interpretation of the Convention and urged countries to consider gender-based claims.⁷² Once more in 2016, the United Nations High Commissioner for Refugees expressed that women may constitute a particular social group.⁷³ Countries like Canada, the

67. See Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L. J. 625, 627 (1993) (“[T]his failure to incorporate the gender-related claims of women refugees is a product of the general failure of refugee and asylum law to recognize social and economic rights . . .”).

68. See Doreen Indra, *Gender: A Key Dimension of the Refugee Experience*, 6 REFUGEE: CAN.’S J. ON REFUGEES 3, 3 (Feb. 1, 1987) (“With regard to private sphere activities where women’s presence is more strongly felt, there is primarily silence—silence compounded by an unconscious calculus . . .”).

69. See Kelly, *supra* note 67, at 628 (“Refusal of Iranian women to wear the chador, though a significant form of political protest, is often characterized as a simple preference for style of dress.”).

70. See Jacqueline Greatbach, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT’L L. J. 518, 520 (1989) (“The bifurcated version of society itself ignores the realm of women’s lives outside domesticity, and creates a rhetorical and theoretical wall between domestic and social culture.”).

71. See UNHCR, *Guidelines on the Protection of Refugee Women*, ¶ 3 (July 1991) (“In addition to these basic needs shared with all refugees, refugee women and girls have special protection needs that reflect their gender.”).

72. See UNHCR, *Guidelines on International Protection*, at 2, HCR/GIP/02/01 (May 7, 2002) (“Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status.”).

73. See UNHCR, *UNCHR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender*, at 3 (Nov. 2016) (“It is

United Kingdom, and Australia have all adopted approaches that recognize particular social groups on the basis of gender, but the United States notably lags behind.⁷⁴

A. *Matter of A-B- and Its Implications on Asylum Law in the United States*

While the United States has always had a tumultuous relationship with immigration, there has been an increased, visceral reaction to the country's immigration policies and practices in the Trump administration.⁷⁵ In 2018, former Attorney General Jeff Sessions unilaterally issued a controversial decision in *Matter of A-B*.⁷⁶ overruling *Matter of A-R-C-G*,⁷⁷ a precedential decision from 2014.⁷⁸ In *Matter of A-R-C-G*, the Board of Immigration Appeals granted asylum to a Guatemalan woman who faced shocking abuse from her husband.⁷⁹ He beat her weekly,

our view that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' . . .").

74. See Lobo, *supra* note 40, at 363 ("The lower U.S. courts rarely recognize 'women' as a particular social group; they either deny gender asylum claims or grant relief via a more narrowly-defined particular social group."); see also *Minister for Immigr. and Multicultural Affs. v. Khawar* [2002] HCA 14 (Austl.) ("The 'group' is capable of being properly defined in a principled manner, specifically by reference to the ground upon which the state concerned has withdrawn the protection of the law and its agencies."); see generally *Perdomo v. Holder*, 611 F.3d 662, 667 n.5 (citing *Higbogun v. Canada*, [2010] F.C. 445 (Can.)).

75. See B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 92 (2017) (stating that immigrants and advocates have been thrust into a state of uncertainty following the election of Donald Trump).

76. *A-B-*, 27 I. & N. Dec. 316, 346 (AG 2018) (holding that victims of private violence will not be eligible for asylum and countries' problems policing certain crimes does not establish asylum eligibility).

77. *A-R-C-G-*, 26 I. & N. Dec. 388, 389 (B.I.A. 2014) (recognizing "married women in Guatemala who are unable to leave their relationship" as a cognizable social group).

78. See Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J. L. REFORM 343, 346 (2019) ("The Attorney General's decision to overrule *Matter of A-R-C-G-* in *Matter of A-B-* quashed any hope for fairer and more consistent determinations in asylum cases involving intimate partner violence until new legislation or regulations are put in place to provide guidance.").

79. See *A-R-C-G-*, 26 I. & N. Dec. at 389 ("It is undisputed that the

broke her nose, threw paint thinner on her which burned her breasts, and raped her.⁸⁰ She called the police several times, but they refused to interfere in a marriage.⁸¹ She attempted to flee, staying with her father and even moving to Guatemala City, but her husband found her each time and threatened to kill her if she did not return.⁸² The Board determined, and the Department of Homeland Security agreed, that “married women in Guatemala who are unable to leave their relationship” was a cognizable social group, finding the respondent eligible for asylum.⁸³ The Board executed a thorough inquiry, looking to societal norms, country conditions, and treatment of spousal abuse in Guatemala to bolster the decision.⁸⁴

The decision in *Matter of A-R-C-G-* was not particularly profound or broad, and did not create a sweeping precedent that addressed the shortcomings of gender-based asylum claims.⁸⁵ Nonetheless, Attorney General Sessions stated that the decision “caused confusion because it recognized an expansive new category of particular social groups based on private violence.”⁸⁶ This characterization of *Matter of A-R-C-G-* is largely incorrect because courts overwhelmingly distinguished the case due to its narrow holding, with only a few applying it in favor of the asylum seeker.⁸⁷

respondent, who married at age 17, suffered repugnant abuse by her husband.”).

80. *See id.* (describing the abuse the respondent suffered).

81. *See id.* (“On one occasion, the police came to her home after her husband hit her on the head, but he was not arrested.”).

82. *See id.* (explaining each instance she fled, leading to her leaving Guatemala altogether).

83. *See id.* at 395 (“The DHS also concedes in this case that the mistreatment was, for at least one central reason, on account of her membership in a cognizable particular social group.”).

84. *See id.* at 393–94 (“Supporting the existence of social distinction, and in accord with the DHS’ concession that a particular social group exists, the record in this case includes un rebutted evidence that Guatemala has a culture of ‘machismo and family violence.’”).

85. *See Vogel, supra* note 78, at 373 (“Unfortunately, the narrow holding of *Matter of A-R-C-G-* allowed adjudicators in subsequent cases to disregard any guidance the BIA provided in evaluating gender-based asylum claims, in particular those involving intimate partner violence.”).

86. *See A-B-*, 27 I. & N. Dec. 316, 319 (AG 2018) (“Since that decision, the Board, immigration judges, and asylum officers have relied upon it as an affirmative statement of law, even though the decision assumed its conclusion and did not perform the necessary legal and factual analysis.”).

87. *See Vogel, supra* note 78, at 373 (“Contrary to Attorney General Sessions’

Rather, Sessions himself issued a broad, sweeping decision attempting to foreclose victims of persecution by non-governmental actors from successfully seeking asylum in the United States, narrowing an already under-inclusive system.⁸⁸ The decision in *Matter of A-B-* was immediately criticized for the adverse effect it would have on victims of gender-based violence.⁸⁹ Sessions was accused of ignoring thirty years of precedent, the dynamics of domestic violence, and perpetuating “rejected understandings of intimate partner violence inflicted against a female partner”⁹⁰ Indeed, Sessions’ approach ignores how domestic violence is treated in the United States regarding its evolution from a private matter to a matter of public interest with the passing of the Violence Against Women Act and similar legislation.⁹¹

Among other things, Sessions raised the standard for the requirement that the government of an applicant’s home country is “unable or unwilling” to protect the applicant.⁹² Instead, he changed it to a requirement that the government “condoned or was completely helpless” in the matter.⁹³ This approach was contrary

assertions that *Matter of A-R-C-G-* created confusion, the U.S. circuits courts, the BIA, and immigration judges predominantly distinguished *Matter of A-R-C-G-*, and few adjudicators favorably applied the case for the asylum applicant.”).

88. See *A-B-*, 27 I. & N. Dec. at 320 (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”).

89. See Ruby Robinson, *How the U.S. Attorney General Tried (But Failed) to Stop Domestic-Violence-Based Asylum Claims*, 98 MICH. B. J. 30, 31 (2019) (“*A-B-* had an immediate adverse effect on all persons seeking protection as survivors of domestic and gender-based violence as well as their advocates.”).

90. See Vogel, *supra* note 78, at 374 (“He ignored entirely the underlying cause of intimate partner violence inflicted against female partners: [G]ender and subordination, or the abuser’s view that the woman is subordinate to him in the relationship”).

91. See *id.* at 409 (“Despite public awareness in the United States of the problem of intimate partner violence and substantial progress in federal and state law combating it, asylum law trails behind by almost fifty years.”).

92. See *A-B-*, 27 I. & N. Dec. at 337 (“The fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States.”).

93. See *id.* (“The applicant must show that the government condoned the private actions “or at least demonstrated a complete helplessness to protect the victims.”).

to precedent, and the cases he cited do not actually recognize or apply such a standard.⁹⁴

Matter of A-B- was challenged and abrogated in *Grace v. Whitaker*.⁹⁵ The U.S. District Court for the District of Columbia determined that the Board of Immigration Appeals was entitled *Chevron* deference and held that the Attorney General’s decision was arbitrary and capricious because “there is no legal basis for an effective categorical ban on domestic violence and gang-related claims.”⁹⁶ However, the District Court’s decision is only in regard to credible fear determinations, which are initial determinations made by an asylum officer that only require a “significant possibility” that an applicant could potentially establish asylum eligibility before they move on to actual adjudication.⁹⁷ Although *Grace v. Whitaker* only addresses the credible fear stage, similar arguments would apply in challenges to asylum adjudications.⁹⁸ On appeal, the Court of Appeals for the D.C. Circuit, like other courts, evaded the heart of the issue with particular social groups and affirmed much of Sessions’ reasoning.⁹⁹ The Court explained the circular reasoning problem of defining particular social groups by the harm suffered, using “women who fear being forced into prostitution” as an example of a group that is not separated from the harm.¹⁰⁰ The Court went on to explain that the specific group alleged would have to share another common characteristic—such

94. See Vogel, *supra* note 78, at 398 (“[I]t is inconsistent with *Matter of Acosta*, the standard applied in *Matter of M-E-V-G-* and *Matter of W-G-R-* upon which he so emphatically relied.”).

95. See *Grace v. Whitaker*, 344 F. Supp. 3d 96, 125 (D.C. Cir. 2018) (holding that precluding domestic and gang-related claims is an impermissible reading of the statute and is arbitrary and capricious).

96. See *id.* at 126 (“Second, such a general rule runs contrary to the individualized analysis required by the INA.”).

97. See *id.* at 126–27 (“The Attorney General’s decision to deny most domestic violence or gang violence claims at the credible fear determination stage is fundamentally inconsistent with the threshold screening standard that Congress established.”).

98. See Vogel, *supra* note 78, at 379 (“In other words, *Grace v. Whitaker* dealt the first blow to Attorney General Sessions’s decision in *Matter of A-B-*, but the decision is in the appeal process.”).

99. See *Grace v. Barr*, 965 F.3d 883, 905 (D.C. Cir. 2020) (upholding the PSG requirements of *Matter of A-B-*).

100. See *id.* at 903 (“Stated that way, the group is defined by the harm alleged (forced prostitution).”).

as being targeted for prostitution because of their political views—to be valid.¹⁰¹ This line of reasoning came close, but ultimately failed to see the obvious: The common characteristic the group shares is the fact that they are women.

Matter of A-B- represents a backwards slide in American immigration jurisprudence.¹⁰² Instead of improving the laws, we are left patching up a mangled interpretation of them. It is a transparent attempt at curbing migration from Central and South America at the expense of legitimate, established laws.¹⁰³ It invokes outdated views of domestic violence and places the United States further away from honoring its international obligations under the Refugee Convention.¹⁰⁴

B. Progress in the Wake of Matter of A-B-

Former Attorney General Sessions' decision in *Matter of A-B-* still leaves open the possibility of an interpretation of asylum law that includes a broad application of "gender" as a particular social group.¹⁰⁵ Sessions emphasized and outlined key features of a particular social group analysis: An immutable characteristic; defined with particularity; and social distinction.¹⁰⁶ He used this framework to determine the social group in *Matter of A-R-C-G*—

101. See *id.* at 903 (explaining that a shared characteristic outside of the harm alleged is required to avoid circularity).

102. See Fatma Marouf, *Becoming Unconventional: Constricting the 'Particular Social Group' Ground for Asylum*, 44 N.C. J. INT'L L. 487, 512 (2019) ("In the short term, we are likely to see much higher rates of asylum claims related to domestic violence, which had become accepted under *Matter of A-R-C-G* . . .").

103. See *id.* at 511 ("Policies calling for a 'border wall' and stopping migration from Mexico and Central America go hand-in-hand with these administrative decisions making it harder for people escaping those countries to obtain asylum in the United States.").

104. See *id.* at 517 ("This backwards slide undercuts the fundamental human rights protections that these treaties aim to provide and injects ever greater inconsistencies and uncertainty into our asylum system.").

105. See *id.* at 514 ("[F]ormer Attorney General Sessions unintentionally made some immigration judges more open to consider a much simpler, more logical version of the PSG that has long been advocated by immigration lawyers and scholars: [W]omen.").

106. See *A-B-*, 27 I. & N. Dec. 316, 330 (A.G. 2018) (outlining the necessary elements of a particular social group).

“married women in Guatemala who are unable to leave their relationship,”—was not a cognizable group because Guatemalan society would likely not view them as a group, and it did not exist independently from the persecution.¹⁰⁷

Under Sessions’ approach, however, a gender-based or a domestic violence claim could still be successful if the particular social group is simply and cleverly framed.¹⁰⁸ Suggestions have included formulating particular social groups that “avoid focusing on harm but combining gender, nationality, treatment of women as property, or political opinion” to maximize success.¹⁰⁹ Unintentionally, Sessions has already caused judges to consider simple, broad particular social group claims.¹¹⁰ Immigration judges in at least three different cities, potentially more, have recognized gender alone as a particular social group since Sessions’ decision, a sharp contrast from what he intended.¹¹¹

This handful of decisions has not stoked much optimism, however. *Matter of A-B-* still shows a propensity for an already imperfect system to perform flawed analyses, exhibit misogynistic reasoning, and harm large numbers of people.¹¹² A path to a more coherent and just asylum system includes application of the law as

107. See *id.* at 336 (“By contrast, there is significant room for doubt that Guatemalan society views these women, as horrible as their personal circumstances may be, as members of a distinct group in society . . .”).

108. See Robinson, *supra* note 89, at 32 (“First, humanitarian relief like asylum and withholding of removal for survivors of domestic and gender violence is still available post *A-B-*”).

109. See *id.* at 32 (“Formulations of particular social groups like ‘Guatemalan women,’ ‘Guatemalan women unable to leave their relationships,’ and ‘Guatemalan women viewed as property’ can be sufficient . . .”).

110. See Marouf, *supra* note 102, at 514 (“[F]ormer Attorney General Sessions unintentionally made some immigration judges more open to consider a much simpler, more logical version of the PSG that has long been advocated by immigration lawyers and scholars: [W]omen.”).

111. See *id.* at 514 (“In at least three asylum decisions issued after *Matter of A-B-*, immigration judges in Philadelphia, San Francisco, and Arlington have done just that, finding that gender alone defined the PSG.”); see also, Deborah Anker, *Federal Bar Association’s 2018 Annual Meeting and Convention* (May 18, 2019), https://www.fedbar.org/wp-content/uploads/2019/12/Anker_FBA-Materials_2019-pdf.pdf (last visited Sept. 27, 2020) (sharing immigration court decisions) [perma.cc/FM9N-K5DT].

112. See Vogel, *supra* note 78, at 434 (“*Matter of A-B-* demonstrates that the flawed analysis, confusion, and inconsistencies in the adjudications of asylum claims based on intimate partner violence persist.”).

it is meant to be, regulatory changes addressing the issue of gender-related persecution, and a uniform understanding of how these claims will be treated moving forward.¹¹³

III. Fitting Gender-Based Asylum Claims in the Current Framework

As discussed above, asylum applicants must meet several amorphous requirements to qualify for relief from removal under the “particular social group” category.¹¹⁴ Applicants must possess an immutable characteristic, social distinction, and sufficient particularity to be considered a cognizable social group by courts.¹¹⁵ In contrast to the prevailing approach taken in the United States, commentators and even some courts recognize that gender-based asylum claims meet all of the requirements.¹¹⁶ An approach that embraces gender-based claims has been referred to as “the only plausible construction” of asylum law.¹¹⁷

A. Immutable Characteristic

The “particular social group” category was introduced as a mechanism to fill in gaps where asylum claims based on race, religion, nationality, or political opinion sometimes fell short.¹¹⁸

113. See *id.* at 434 (outlining recommendations to resolve issues in the interpretation and application of the refugee definition).

114. See *supra* Section II.B (discussing how women easily fit into any immigrant social group as recognized by U.S. courts yet, nevertheless, those same courts have refused to recognize gender as a distinct immigrant social group itself).

115. See *M-E-V-G-*, 26 I. & N. Dec. 227, 252 (B.I.A. 2014) (describing and delineating the various requirements in the particular social group category).

116. See Allison W. Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1237 (2009) (“More recently, the Eighth, Ninth, and Tenth Circuits have recognized that all of the women of a particular nationality or ethnicity may comprise a particular social group, at least for claims based on FGM.”).

117. See *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (“[T]he social group comprised of Somalian females . . . not only reflects a plausible construction of our asylum law, but the only plausible construction.”).

118. See Thiele, *supra* note 63, at 227 (“In introducing this amendment, Mr. Petren stated, ‘experience has shown that certain refugees have been persecuted

While the Refugee Convention did not define this term, the United Nations High Commissioner for Refugees Handbook contains a broad interpretation, requiring simply “similarity of background, habits or social status.”¹¹⁹ In contrast, U.S. courts, among others, have required particular social groups to have a certain degree of immutability that mirrors the other enumerated categories.¹²⁰ Specifically, particular social groups must be based on an “immutable characteristic,” which is one that an individual cannot change or should not be required to change.¹²¹ For example, it is widely accepted that homosexuals are a cognizable social group that satisfies all requirements.¹²² On the other hand, a proposed group consisting of wealthy Guatemalans was considered “too subjective, inchoate, and variable to provide the sole basis for membership in a particular social group.”¹²³ Following established reasoning and caselaw, a gender-based claim is certain to satisfy any immutability requirement.¹²⁴

Indeed, it would be difficult to argue that a characteristic such as gender or sex is one that an individual can or should be forced to change. These are traits that meet or exceed the immutability of other enumerated grounds like religion or political opinion, and

because they belong to a particular social group’ and, thus, a category designed to cover them should be included.”).

119. *See id.* at 228 (“U.N. and U.S. jurisprudence arrive at differing interpretations regarding the scope of protection offered by the particular social group category.”).

120. *See* W-G-R-, 26 I&N Dec. 213, 213 (B.I.A. 2014) (stating that particularity should be viewed with the specificity that race, religion, and nationality are viewed).

121. *See id.* at 213 (describing the immutability requirement of particular social groups).

122. *See* Karouni v. Gonzales, 399 F.3d 1163, 1172 (9th Cir. 2005) (“Thus, to the extent that our case-law has been unclear, we affirm that *all* homosexuals are members of a ‘particular social group.’”).

123. *See* Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007) (“If ‘wealth’ defined the boundaries of a particular social group, a determination about whether any petitioner fit into the group . . . would necessitate a sociological analysis as to how persons with various assets would have been viewed by others in their country.”).

124. *See* JAMES C. HATHAWAY & MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 442 (2d ed. 2014) (“In sum, the recognition that a particular social group can be defined simply on the basis of gender or sex, is . . . ‘simply a logical application of the seminal reason in *Acosta* . . .’” (quoting *Regina v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) 644)).

courts rarely, if ever, dispute the immutability of gender when these claims arise.¹²⁵ The innate, immutable character of a gender-based group has been defined as “axiomatic” and embodying an *ejusdem generis* approach.¹²⁶ Further, the United Nations High Commissioner for Refugees issued guidelines in 2002 stating that an immutability standard is sufficient in asylum analysis and that other standards, like social visibility, only need to be considered when immutability cannot be established.¹²⁷ In fact, these guidelines specifically use women as an example of a particular social group under the immutability standard, stating, “It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.”¹²⁸ Although gender clearly meets an immutability standard, the U.S. approach adopts other, narrower requirements to establish a successful asylum claim.¹²⁹

B. Social Distinction

Prior to the adoption of the social distinction test, in 2005 the Board of Immigration Appeals introduced a social visibility test,

125. See *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (“The characteristics of being a ‘young woman’ and a ‘member of the Tchamba-Kunsuntu Tribe’ cannot be changed.”).

126. See HATHAWAY & FOSTER, *supra* note 124, at 436 (“Indeed, acknowledgment that gender-based groups are clear examples of social subsets defined by an innate and immutable characteristic are properly within the ambit of the social group category is now decades old.”).

127. See UNHCR, *Guidelines for 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*, ¶ 13, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), <https://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html> (last visited Sept. 27, 2020) (“If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken”) [perma.cc/72EU-6MLF].

128. See *id.* ¶ 12 (explaining how history and fundamental rights can create the basis for a particular social group).

129. See *M-E-V-G-*, 26 I. & N. Dec. 227, 252 (B.I.A. 2014) (discussing the social distinction requirements).

which analyzed the visibility and perception of proposed groups in their respective societies.¹³⁰ While the United Nations considers something like visibility an additional ground for asylum claims, the United States incorporates it as a further limiting requirement.¹³¹ Scholars criticized the social visibility test for lacking a basis in international law and for potentially harming victims of sexual or gender-based persecution, like female genital mutilation, which is oftentimes hidden out of sight.¹³²

Although no one would argue that women do not have social visibility, this requirement is an impediment because particular social groups consisting simply of women from a certain country are not widely accepted in the United States.¹³³ This causes women to narrow their social groups by including other characteristics such as family membership, political opinion, education level, etc.¹³⁴ For example, Rodi Alvarado defined her social group as “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”¹³⁵ Under a social visibility standard, this proposed group falls short, as there are several aspects outside of her gender that may not be readily recognizable by the general public in Guatemala.¹³⁶

130. See C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2005) (“The recent Guidelines issued by the United Nations confirm that ‘visibility’ is an important element in identifying the existence of a particular social group.”).

131. See Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining “Particular Social Group” and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 49 (2008) (“[S]uggesting in an ambiguous and internally inconsistent decision that the ‘protected characteristic’ and ‘social visibility’ tests may now represent dual requirements in all social group cases.”).

132. See *id.* at 50 (“Initially, gender-related forms of harm, such as sexual violence, domestic abuse, female genital cutting, and honor killings were dismissed as ‘private matters’ that did not constitute persecution.”).

133. See *id.* at 90–91 (“The recognition of gender itself as defining a [particular social group] has encountered opposition based on a misunderstanding that it is overbroad and in effect would recognize every woman in certain countries as refugee . . .”).

134. See *id.* at 91 (“[A]pplicants often define groups in ‘overly complicated and unnecessarily detailed’ ways . . .”).

135. See R-A-, 22 I. & N. Dec. 906, 917 (B.I.A. 2001) (“[W]e find that the respondent’s claimed social group fails under our own independent assessment of what constitutes a qualifying social group.”).

136. See Marouf, *supra* note 131, at 97 (“[T]he group is nevertheless likely to

In response to a lack of practicality in this approach, courts developed a social distinction requirement.¹³⁷ Courts reiterated that ocular visibility is not required, but the analysis requires courts to look at whether a proposed group would be considered a group by society.¹³⁸ Even under this softer approach, the social distinction requirement may “paradoxically demand that [marginalized groups] be recognized by the very people who have denied or suppressed their identities.”¹³⁹ Critics expressed concern about the discretion this affords adjudicators given that social perception is not a rigid, static quality and requires analysis that may be outside of the judges’ expertise.¹⁴⁰ While a category consisting only of women from a certain country would meet the standard, disregarding the social distinction test would simplify the asylum analysis, particularly in the United States where women are forced to qualify their proposed social groups with various other characteristics.¹⁴¹

C. Particularity

The particularity requirement adds another hurdle for asylum applicants to overcome.¹⁴² This requirement attempts to delineate

fail the BIA’s social visibility test because the general population in Guatemala would not automatically recognize which women are married and unable to leave their relationships.”).

137. See, e.g., W-G-R-, 26 I. & N. Dec. 208, 216 (B.I.A. 2014) (“We now rename that requirement [previously social visibility] ‘social distinction’ to clarify that social visibility does not mean ‘ocular’ visibility . . .”).

138. See *Reyes v. Lynch*, 842 F.3d 1125, 1136 (9th Cir. 2016) (describing that the requirement is a question of whether the society in question would recognize the group as a discrete class of persons).

139. See Marouf, *supra* note 131, at 105 (explaining the difficulties of a social visibility approach).

140. See *id.* at 106 (“In short, the ‘social visibility’ test effectively gives decision-makers total discretion to decide whether or not a particular social group exists.”).

141. See *id.* (“Embracing the BIA’s new approach will not only lead to chaotic case law and abdication of the United States’ obligations under the convention, but also will cause the legal community to reject the refugee status determination as a serious, principled process.”).

142. See M-E-V-G-, 26 I. & N. Dec. 227, 233 (B.I.A. 2014) (stating that the board was seeking to provide greater specificity to the definition of a social group.).

the outer limits of proposed groups,¹⁴³ acting as a benchmark to clearly determine who falls within the group.¹⁴⁴ A group must be “discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”¹⁴⁵ The Board stated not every immutable characteristic meets this standard.¹⁴⁶ For example, groups based on wealth, poverty, youth, or homelessness are considered “too vague and all encompassing” to set the perimeters of a particular social group.¹⁴⁷ Ironically, the Ninth Circuit, which has shown favorability towards gender-based asylum claims, stated that major segments of a population will rarely, if ever, constitute a distinct social group.¹⁴⁸

The introduction of this standard, much like other attempts at delineating social groups, created confusion among courts.¹⁴⁹ The Third Circuit was particularly critical and refused to adopt the “particularity” standard, stating:

We do not believe that the government is using particularity to impose a numerical or size limitation on the meaning of “particular social group.” However, we 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, while at times both confusing and obfuscating. Indeed, “Particularity” appears to be little more than a reworked definition of “social

143. See *id.* at 238 (“The ‘particularity’ requirement relates to the group’s boundaries . . .”).

144. See *W-G-R-*, 26 I&N Dec. 208, 214 (B.I.A. 2014) (defining particularity).

145. See *id.* (“A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group.”).

146. See *M-E-V-G-*, 26 I&N Dec. at 239–40 (“[N]ot every ‘immutable characteristic’ is sufficiently precise to define a particular social group.” (citing *Escobar v. Gonzales*, 713 F.3d 363, 383 (3d Cir. 2005))).

147. See *id.* (clarifying what the particularity requirement seeks to accomplish).

148. See *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (“To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.” (quoting *Sancho-Trujillo v. I.N.S.*, 801 F.2d 1571, 1577 (9th Cir. 1986)).

149. See Benjamin Casper et al., *Matter of M-E-V-G- and the BIA’s Confusing Legal Standard for ‘Membership in a Particular Social Group’*, 14-06 IMMIGR. BRIEFING 1 (2014) (stating that the particularity and social visibility requirements ensures a new round of litigation aimed at restoring simplicity).

visibility” and the former suffers from the same infirmity as the latter. The government’s use of “particularity” is inconsistent with the prior BIA decisions discussed in the “social visibility” portion of this opinion. We therefore hold that adopting a “particularity” requirement is unreasonable because it is inconsistent with many of the BIA’s prior decisions.¹⁵⁰

Further, the Third Circuit denied the Board *Chevron* deference because the agency departed from its prior decisions without stating a principled reason for doing so.¹⁵¹ In fact, after introducing the “particularity” standard in 2008, the Board did not recognize a new social group until 2014.¹⁵²

The uncertainty caused by the Board’s particularity requirement has led to vastly inconsistent approaches and applications among courts.¹⁵³ For example, the Fifth Circuit rejected a group defined as “Salvadoran males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join because of their principal opposition to the gang and what they want.”¹⁵⁴ The Court determined the proposed group was not particular enough, stating it was “exceedingly broad and encompass[ed] a diverse cross-section of society.”¹⁵⁵ In contrast, the Tenth Circuit stated that a group consisting of “Salvadoran women between the ages of 12 and 25 who resisted gang recruitment” met the particularity standard.¹⁵⁶ However, the proposed group was

150. *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 608 (3d Cir. 2011).

151. *See id.* (explaining that the Board’s departure from precedent was unreasonable).

152. *See Particular Social Group Practice Advisory: Applying for Asylum After Matter of M-E-V-G- and Matter of W-G-R-*, NAT’L IMMIGRANT JUST. CTR. (Jan. 22, 2016), <https://immigrantjustice.org/for-attorneys/legal-resources/file/particular-social-group-practice-advisory-applying-asylum-1> (last visited Sep. 6, 2020) [hereinafter *Practice Advisory*] (“In August 2014, the BIA issued the first published decision recognizing a new particular social group”) [perma.cc/V6Z8-SLA8].

153. *See Casper et al.*, *supra* note 149, at Part III (contrasting various Circuit Courts’ decisions).

154. *See Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012) (“The proposed groups for Jose and Andres do not meet the test established by the BIA, and we cannot say that the rejection of such a group is arbitrary and capricious.”).

155. *See id.* (describing that gang recruitment reaches young men of all backgrounds in El Salvador).

156. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 650 (10th Cir. 2012) (disagreeing with the BIA’s conclusion that the group was not defined with sufficient particularity).

rejected in the end because it did not meet the “social visibility” standard.¹⁵⁷

The latter case illustrates a problem that arises in gender-based claims under the combination of the various standards. While a proposed social group consisting simply of women from a particular country undoubtedly has well-defined boundaries and social distinction, the refusal of courts to recognize this group forces women to qualify their proposed groups with other characteristics like relationship status or familial ties, for example.¹⁵⁸ Although particularity and social distinction have significant overlap, language that a society would use to define a group (“young women,” for example) is not always language that would define a group with the requisite legal particularity.¹⁵⁹ Inversely, when a group is defined with precision (“women between the ages of 20 and 25”), there is a challenge in establishing that society would view that group distinctly from women between the ages of 26 and 30, for example.¹⁶⁰ Critics of the particularity and social distinction requirements claim they place an immense burden on asylum-seekers and immigration judges alike, due to the amount of information it takes to prove country conditions and the sociological aspect of the analysis required.¹⁶¹ Although purely gender-based asylum claims meet the particularity standard by definition, the requirement is too vague and confusing to be applied with any consistency, leading some courts to reject it entirely.¹⁶²

157. See *id.* at 653 (“The fact that Rivera-Barrientos was targeted thus does not provide evidence that society perceives her to be a member of a particular social group.”).

158. See Marouf, *supra* note 131, at 91 (“[A]pplicants often define groups in ‘overly complicated and unnecessarily detailed ways’” (quoting MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS 326–28 (2007))).

159. See *Practice Advisory*, *supra* note 152, at 5 (“For example, ‘young’ does not say how young; ‘wealthy’ does not say how wealthy.”).

160. See *id.* (“Thus, the particularity requirement . . . effectively precludes the use of common parlance labels to describe a PSG, even as the social distinction test requires that a PSG be limited by parameters a society would recognize.”).

161. See Casper et al., *supra* note 149, at Part V (“Not only is this process onerous on applicants, but it forces judges to evaluate issues outside their expertise.”).

162. See *Cece v. Holder*, 733 F.3d 662, 677–78 (7th Cir. 2013) (holding that a particular social group consisting of “young Albanian women who live alone” can

IV. Resistance to Broad Gender-Based Claims

Women can satisfy any type of social group test that U.S. courts can apply.¹⁶³ Women have immutable characteristics and are socially distinct.¹⁶⁴ Further, as a group, women are well-defined, and, unfortunately, subject to persecution around the globe.¹⁶⁵ It is a principle of the refugee treaties that all human beings shall enjoy fundamental rights and freedoms without persecution, and there is a need to offer such protection to women.¹⁶⁶ Currently, valid asylum claims can be based on persecution due to an applicant's race, nationality, religion, or political opinion in addition to particular social group.¹⁶⁷ Women meet or exceed requirements when compared to the unquestionably recognized enumerated grounds.¹⁶⁸ In fact, other countries have embraced gender-based groups by recognizing that race, religion, nationality, and political opinion are also extremely broad traits.¹⁶⁹ The United Nations has repeatedly encouraged countries to recognize the unique plight of women and to accept

constitute a social group).

163. See Sarah Siddiqui, *Membership in a Particular Social Group: All Approaches Open Doors for Women to Qualify*, 52 ARIZ. L. REV. 505, 525 (2010) ("U.S. courts all take an approach that applies to women and yields outcomes that should be favorable to female asylum-seekers.").

164. See *id.* at 526 (explaining how women satisfy all PSG requirements).

165. See *id.* ("Women have a 'fundamental right to protection from abuse based on gender . . .'" (quoting R-A-, 22 I&N Dec. 906, 931 (BIA 2001))).

166. United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150; see Thiele, *supra* note 63, at 221 ("The principle that women's rights are human rights is now widely accepted, at least at the international level of discourse.").

167. See *infra* Part I and accompanying text (establishing that an asylum seeker must meet the definition of "refugee" under 8 U.S.C. § 1158(b)(1)(B)(i)).

168. See W-G-R-, 26 I&N Dec. 213, 213 (B.I.A. 2014) (stating that particularity should be viewed with the specificity that race, religion, and nationality are viewed).

169. See HATHAWAY & FOSTER, *supra* note 124, at 438–39 (explaining Spain's resolution of concerns regarding the breadth of the group).

asylum claims based on gender.¹⁷⁰ Many countries have adopted this approach.¹⁷¹ Notably, the United States has not.¹⁷²

Although the law, international practice, and common sense all point to accepting a claim based solely on gender, the pushback in U.S. courts is based largely on the size of a group consisting of all women in a country.¹⁷³ This is a concern about potentially “opening the floodgates,” and it has been a constant in American immigration jurisprudence.¹⁷⁴ The basic premise of this concern is that if a category such as “women” is recognized, the United States will be flooded with claims from individuals merely because they fall under this broad characterization, not because of actual persecution.¹⁷⁵

The Ninth Circuit articulated this concern in *Sanchez Trujillo v. I.N.S.*,¹⁷⁶ stating that a class consisting of “young, urban, working-class males of military age who had maintained political neutrality” was so broad as to “encompass so many variables that to recognize any person who might conceivably establish that he

170. See *supra* Part II (discussing the various guidelines issued by the UN throughout the years).

171. See generally UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 38, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), <https://www.unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html> (last visited Sept. 27, 2020) (“UNHCR encourages States who have not already done so to ensure a gender-sensitive application of refugee law and procedures . . .”) [perma.cc/4QUP-WBGM].

172. See Lobo, *supra* note 40, at 363 (“The lower U.S. courts rarely recognize ‘women’ as a particular social group; they either deny gender asylum claims or grant relief via a more narrowly-defined particular social group.”).

173. See Peter C. Godfrey, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J. L. POL’Y 257, 280 (1994) (“Group size is perhaps the greatest obstacle to extension of the ‘particular social group’ to include those who fear persecution on account of membership in a broadly based group such as gender or sexual orientation.”).

174. See *id.* (“The concern with allowing an expansive interpretation . . . is that it will ‘open the floodgates’ to vast demographic divisions of people . . .”).

175. See *id.* (“[I]f immigration statutes are so broadly construed as to provide asylum in such instances, any individual persecuted on account of gender or sexual orientation may successfully allege an asylum claim . . .”).

176. *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986) (holding that class of young, urban, working-class males of military age who had maintained political neutrality was not a PSG).

was a member of this class is entitled to asylum and withholding of deportation would render the definition of ‘refugee’ meaningless.”¹⁷⁷ This attitude stems from the fear that if such a broad group is allowed, individuals who are merely dissatisfied with social or economic conditions could use a mechanism designed for bona fide refugees to enter the United States.¹⁷⁸

The concern about allowing a broad particular social group that will open the floodgates to an unmanageable number of asylum-seekers, while facially logical, is unfounded.¹⁷⁹ First, there is no historical foundation for such a concern.¹⁸⁰ Countries that have adopted an approach recognizing social groups based on gender have not experienced an inundation of women asylum seekers.¹⁸¹ For example, in 1993, Canada was the first country to recognize asylum claims from victims of gender-related persecution.¹⁸² Canada kept track of statistics on gender-based asylum, and “reported that there was no explosion of claims; to the contrary, gender claims consistently constituted only a minuscule fraction of Canada’s total claims, and had actually declined in the seven-year period following the adoption of the Gender Guidelines.”¹⁸³ This result is not paradoxical.¹⁸⁴ By their nature, persecuted groups have limited rights and mobility, constricting the members’ ability to seek protection.¹⁸⁵

177. See *id.* at 1577 (explaining why a broad social group is unfavorable).

178. See Godfrey, *supra* note 173, at 280–81 (“Such a construction could be used to circumvent the narrow selection process used to determine who is a bona fide ‘refugee’ . . .”).

179. See Siddiqui, *supra* note 163, at 527 (“However, this belief—that adopting the international guidelines and caselaw as models will result in a substantial rise in the number of female asylum applicants—is unfounded.”).

180. See *id.* (“History reveals that the acceptance of gender asylum does not give rise to a deluge of claims.”).

181. See *id.* (“For example, Canada’s experience corroborates the conclusion that countries that recognize gender asylum claims do not experience floods of women refugees.”).

182. See Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119, 133 (2007) (explaining that Canada has kept statistics on gender asylum since its introduction in the country in 1993).

183. *Id.*

184. See *id.* (“There are several explanations why the number of women asylum seekers has not dramatically increased . . .”).

185. See *id.* (explaining the difficulties of seeking asylum for persecuted

The second reason why the “floodgates” concern is unwarranted is because there is no real legal basis that allows courts to legitimize this concern.¹⁸⁶ Even U.S. courts have noted that size and breadth of a group are not determining factors in the group’s legitimacy.¹⁸⁷ Further, the fact that some women may be able to avoid persecution does not negate the validity of a gender-based group.¹⁸⁸ Membership in a particular social group alone is not enough to satisfy asylum requirements; applicants must individually prove that they have suffered harm that rises to the level of persecution or a well-founded fear of future persecution, and that this harm was on account of their membership in a particular social group, along with certain other requirements.¹⁸⁹ An additional hurdle that comes along with this burden of proof is that many of these asylum seekers will have very little physical evidence, and instead will have to rely on the asylum adjudicators’ assessments of the applicants’ credibility.¹⁹⁰ Because immigration proceedings are administrative hearings, many asylum seekers appear pro se and therefore may not know how to testify in a manner that persuades an immigration judge.¹⁹¹

A third reason why the refusal to recognize gender as a valid asylum claim lacks merit is the effect on judicial economy and the “constant re-litigating” of claims that results from overly

groups).

186. See HATHAWAY & FOSTER, *supra* note 126, at 440 (“It is not a phenomenon generally found in respect of other Convention grounds, nor does it tend to arise in respect of other applications of the social group category.”).

187. See *Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) (stating that an immigration judge’s determination that a group was not small enough to establish a PSG was legally incorrect).

188. See HATHAWAY & FOSTER, *supra* note 126, at 441 (“[N]or is the fact that some women in the relevant group are able to avoid persecution an ‘answer to treating women . . . as a relevant social group.’” (quoting *Regina v. Sec’y of State for the Home Dep’t* [1999] 2 AC 629 (HL) (644))).

189. See *id.* (“All other elements of the definition, must of course, be satisfied.”).

190. See Helen P. Grant, *The Floodgates Are Not Going to Open, But Will the U.S. Border?*, 29 Hous. J. Int’l L. 1, 22–23 (2006) (explaining the evidentiary burdens of asylum seekers who are fleeing domestic violence).

191. See *id.* at 22 (“[T]he applicant has generally fled her country of origin without much thoughtful planning and in total ignorance of what will be required to persuade the U.S. asylum adjudicator that she should be afforded protection.”).

specific gender-based groups.¹⁹² This leads to a social group analysis that “degenerates into an ‘obstacle course in which the postulated group undergoes constant redefinition.’”¹⁹³ Currently, social group analysis that is based around gender is often a pedantic evaluation of minutiae, when in reality the persecution faced by applicants is simply on account of their gender.¹⁹⁴ Scholars claim this creates an impediment for women seeking asylum and raises issues of gender equality because gender claims are disproportionately evaluated under intense scrutiny.¹⁹⁵

V. Proposal

In order to resolve the shortcomings of gender-based asylum jurisprudence, this Note first proposes a judicial resolution to simplify what has become an inconsistent, inequitable, and incorrect application of asylum law in the United States. This requires a definition of “particular social group” that clearly encapsulates asylum claims based plainly on gender, along with the explicit recognition that gender-based groups are valid. Next, a statutory or regulatory amendment is suggested to include gender as a cognizable ground upon which to apply for asylum. Additionally, prosecutorial discretion by the Department of Homeland Security is suggested as an effective and immediate way to alleviate the issue at hand. Next, more general changes are suggested, such as a re-examination of the standards of review given to immigration courts, as well as an enactment of a public defender program for those courts.

192. See HATHAWAY & FOSTER, *supra* note 126, at 442 (describing the constant re-litigation of claims as an especially pernicious concern of overly specific gender-based groups).

193. *Id.* (quoting Liu v. Sec’y of State for the Home Dep’t, [2005] 1 WLR 2858 (AC) 2864 [12]).

194. See *id.* (“[D]ecision-makers and advocates engage in ‘nitpicking around the margins of the definition,’ when in truth the reason for an applicant’s risk is simply her membership in the social group ‘women.’” (quoting Liu v. Sec’y of State for the Home Dep’t, [2005] 1 WLR 2858 (AC) 2864 [12])).

195. See *id.* (“[R]aises questions of gender equality given that it is disproportionately gender-based claims that are subjected to such scrutiny and re-litigation.”).

A. Judicial Resolution

Purely gender-based asylum claims are not without precedent. In *Matter of Acosta*,¹⁹⁶ the Board of Immigration Appeals noted that “particular social group” was undefined by Congress or the Refugee Protocol, but explicitly listed “sex” as an example of a characteristic on which a social group is based.¹⁹⁷ The Board came to this determination by construing the term “particular social group” in a manner consistent with the more specific, enumerated grounds for asylum.¹⁹⁸ In fact, even the Supreme Court of Canada adopted the *Acosta* approach because of how well it reflected the spirit and purpose of the Refugee Convention.¹⁹⁹

In the United States, courts lack a defining guideline and new, binding precedent to offer protection to qualified female asylum-seekers. Ideally, the U.S. Supreme Court could unequivocally rule that gender is a valid particular social group *per se*. Although the Supreme Court rarely grants certiorari for asylum cases, there are countless eligible cases that flow to the Federal Courts of Appeals each year.²⁰⁰

A more realistic approach is for the Appellate Circuits to adopt a definition of particular social groups along with the recognition that gender-based claims are facially valid. Courts should embrace an enhancement to their current definitions of particular social group that explicitly states, “Traits such sex or gender are prototypical examples of valid characteristics upon which particular social groups are based.” This would be a minor addition

196. See *Acosta*, 19 I&N Dec. 211, 233 (B.I.A. 1985) (establishing that persecution on account of a particular social group is directed toward individuals with common, immutable characteristics).

197. See *id.* at 232–34 (“The shared characteristic might be one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience . . .”).

198. See *id.* at 232 (“Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.”).

199. See HATHAWAY & FOSTER, *supra* note 126, at 427 (“[I]t takes into account the ‘general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative.’” (quoting *Att’y Gen. v. Ward* [1993] 2 S.C.R. 689, 736–38 (Can.))).

200. See *Gonzales v. Thomas*, 547 U.S. 183 (2006) (remanding a case to the BIA to determine if family membership constitutes a PSG).

to the current language that defines groups based on characteristics the applicant cannot or should not be forced to change.²⁰¹ For example, the Ninth Circuit Court of Appeals has taken a lead on this issue, recognizing all women within a country as a cognizable social group.²⁰² Since 2010, the Ninth Circuit has remanded decisions by the Board of Immigration Appeals that rejected gender-based groups as overly broad.²⁰³

B. Statutory Amendment / Regulation

The most effective way to solidify gender as a legitimate social group is to amend the current law to include gender-based claims. The term “particular social group” appears without definition in both the United States Code and the Code of Federal Regulations.²⁰⁴ Because “particular social group” is a historically confusing term, adding a definition that includes gender-based groups as a prototypical example would provide protection to a deserving group and clarify an ambiguity in the courts.

Some commentators have proposed adopting a new category altogether.²⁰⁵ A sixth category encapsulating gender alone, outside of the particular social group sphere, would eliminate the need to mold gender-based claims into existing categories. Although a new category would require a new judicial framework, the new asylum ground would be a familiar term, not requiring the elaborate definitions of particular social groups. Further, the United States would lead the world in this approach, given that most countries

201. See *Perez-Zenteno v. U.S. Att’y Gen.*, 913 F.3d 1301, 1309 (11th Cir. 2019) (“The shared characteristic uniting the social group ‘must be one that the members of the group either cannot change, or should not be required to change’” (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985))).

202. See *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (holding that the BIA’s rejection of “all women in Guatemala” was misguided).

203. See *Torres Valdivia v. Barr*, 777 F. App’x 251, 252 (9th Cir. 2019) (determining that the BIA’s rejection of a group consisting of “women from Mexico” was legally erroneous).

204. 8 C.F.R. § 1208.13(b)(2)(i)(A) (2019); 8 U.S.C. § 1101(a)(42)(2018).

205. See Vogel, *supra* note 78, at 417 (“First, scholars have proposed that gender should be a sixth ground for asylum in addition to race, religion, nationality, political opinion, and particular social group.”).

have adopted gender as a particular social group, not a separate group itself.²⁰⁶

The likelihood of such a statutory or regulatory amendment in the Joe Biden administration is unclear. Biden’s immigration plan proposes to “modernize” the American immigration system.²⁰⁷ More specifically, Biden promises to restore asylum eligibility for domestic violence survivors.²⁰⁸ This change would certainly help to strengthen the asylum claims of many women and reverse some of the damage done by the Trump administration, but it still falls short of recognizing women as a group all on their own. Biden’s immigration proposals do signal a willingness to consider alternate options, and perhaps the administration would be amenable to a provision in an immigration reform package that explicitly protects women across the globe.

C. Prosecutorial Discretion in Immigration Law

An often-overlooked area of immigration enforcement is the role prosecutorial discretion takes in the immigration context.²⁰⁹ The Department of Homeland Security (DHS) can exercise discretion, both widely and in specific cases, for a variety of reasons.²¹⁰ For example, DHS may decide to refrain from pursuing actions against certain groups of immigrants to save resources, or they may decide that certain qualities may redeem an individual who is otherwise ineligible for removal.²¹¹ Further, enforcement

206. See *Vogel supra* note 78, at 418 (“Moreover, the addition of gender as a sixth ground for asylum would set apart the refugee definition in U.S. asylum law from other countries in a very important way.”).

207. See generally *The Biden Plan for Securing Our values as a Nation of Immigrants*, BIDEN FOR PRESIDENT, <https://joebiden.com/immigration/> (last visited Nov. 8, 2020).

208. See *id.* (“Department of Justice will reinstate explicit asylum protections—rescinded by the Trump administration—for domestic violence and sexual violence survivors . . .”).

209. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L. 243, 243–44 (2010) (“The concept of ‘prosecutorial discretion’ appears in the immigration statute, agency memoranda, and court decisions about select immigration enforcement decisions.”).

210. See *id.* at 244–45 (explaining theories behind the exercise of discretion by the DHS).

211. See *id.* at 244–45 (describing various situations where the DHS may

priorities shift with each presidential administration.²¹² Under the Bush administration, DHS focused on workplace and home raids, but under the Obama administration, the focus was on noncitizens who enter the criminal justice system.²¹³

Additionally, agency leaders can issue memoranda to guide the enforcement priorities of the relevant agents.²¹⁴ This memoranda can “[designate] categories of persons warranting special consideration and providing for a scenario-based training program[.]”²¹⁵ This mechanism can be the most immediate way gender-based asylum claims are recognized. DHS officials can issue a memorandum directing the agency to not challenge proposed particular social groups that consist simply of women from a certain country. This would be effective, within the bounds of the law, and infinitely more mild than previous DHS policies that were adopted, such as intentionally separating families at the border.²¹⁶ The DHS under the Biden administration should adopt a policy of prosecutorial discretion that recognizes and allows gender-based asylum claims.

D. General Immigration Proposals

The following section will describe generalized proposals to the immigration system that would indirectly help to solve the issue presented in this Note. A change to the standards of review, legal representation, and status of the immigration courts would improve the immigration system overall, thereby strengthening the claims of women from across the globe.

exercise discretion).

212. See Jason A. Cade, *Enforcing Immigration Equity*, 84 *FORDHAM L. REV.* 661, 687 (2015) (describing the areas the Bush and Obama administrations focused on prosecuting).

213. See *id.* at 687–89 (outlining the differences between the enforcement priorities of the two presidential administrations).

214. See *id.* at 692 (“Over the next year, agency leaders issued a series of memoranda setting forth positive and negative factors to be balanced in the exercise of discretion . . .”).

215. *Id.* at 692.

216. See generally Cora Currier, *Prosecuting Parents—and Separating Families—Was Meant to Deter Migration, Signed Memo Confirms*, *THE INTERCEPT* (Sept. 25, 2018), <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/> (last visited Nov. 7, 2020) [perma.cc/Z5L8-K7SX].

1. Standard of Review

A hurdle and potential area for effective judicial change is the highly deferential standards of review that appellate courts afford the immigration courts. A stricter standard of review, coupled with an understanding that gender-based asylum claims are the most reasonable application of the law, would ensure that immigration courts faithfully apply the law. Currently, questions of fact—including mixed questions of fact and law—receive “substantial evidence” review, while interpretations of immigration statutes receive *Chevron* deference.²¹⁷ Asylum adjudication at the agency level is notoriously backlogged, short on resources, and each individual judge is encumbered with a 700 case-per-year quota.²¹⁸ This leads to significant disparities in immigration decisions, with asylum grant rates deviating by more than fifty percent between similarly situated applicants.²¹⁹ Notably, in 2005 Judge Richard Posner levied a scathing criticism of the immigration courts, stating that the tension between judicial and administrative adjudicators is due to administrative decisions falling below the minimum standards of legal justice.²²⁰ Judge Posner’s frustration stemmed from the fact that in the preceding year, forty percent of decisions by the Board of Immigration Appeals were reversed by the Seventh Circuit, compared to just eighteen percent in civil cases.²²¹ This figure is particularly striking due to the deferential standards of review given to agency findings.

217. See *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (establishing that substantial evidence review is appropriate in immigration cases); see also, *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (stating that *Chevron* deference is afforded to the agency’s construction of the statute which it administers).

218. See Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 585 (2013) (“[R]ecent studies that have cast doubt on the agency’s competence and expertise, including the shortage of resources and time for immigration judges to adequately consider each case . . .”).

219. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 328 (2007) (“[W]e are primarily concerned with court-wide grant rates that deviate by more than 50% from the national average grant rate for any of these countries.”).

220. See *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005) (“[T]he adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.”).

221. See *id.* at 829 (expounding on the high rate of reversal in immigration cases).

Enacting a stricter standard of review is a path appellate courts should take to ensure that immigration courts are accurately adjudicating claims, especially in light of the difficulties faced by immigration judges. Interpretations of particular social groups are issues of law, and therefore receive *Chevron* deference. When courts are applying *Chevron* deference, they can successfully hold that a rejection of a gender-based social group is not a reasonable construction of the agency's statutes.²²² Courts can conduct an analysis—not dissimilar to the one performed by this Note—that looks to precedent, international standards, and common sense to reach the conclusion that the current interpretation is unreasonable. After the Ninth Circuit held that the denial of a gender-based group was legally erroneous, the opinion was never successfully challenged and remains good law.²²³ Although this approach has been successful for the Ninth Circuit, a less deferential standard of review would bolster asylum seekers' claims by allowing appellate courts to more closely review all of the surrounding facts and circumstances of an applicant's claim.²²⁴ This is imperative even if gender-based claims are accepted, because the stricter standard of review would be beneficial in analyzing immigration courts' reasoning of individualized factors, such as the applicant's persecution and whether it was on account of their membership in the proposed group.²²⁵

Illustrative of this point is the Second Circuit's characterization of the "substantial evidence" standard in 2003.²²⁶ The Court described "substantial evidence" as slightly stricter than a "clear error" standard.²²⁷ In the eight subsequent

222. See *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (holding that the BIA's rejection of "all women in Guatemala" was misguided).

223. See *Martinez-Mefia v. Barr*, 2020 WL 5054885, at *1 (9th Cir. 2020) (applying the tested used in *Perdomo*).

224. See *supra* Section V.A.1 (arguing a stricter standard of review would ensure the law is faithfully applied).

225. See *supra* Part IV (arguing that gender-based claims fulfill social group tests applied more broadly); see also *supra* Part V.A.1 (arguing a stricter standard of review would ensure the law is faithfully applied).

226. See *Qiu v. Ashcroft*, 329 F.3d 140, 149 (2d Cir. 2003) (explaining the substantial evidence standard of review).

227. See *id.* ("Substantial evidence review in the immigration context is 'slightly stricter' than the clear-error standard that the circuit courts typically

immigration cases where this stricter standard was applied, six were reversed.²²⁸ Additionally, courts have seemingly already applied a stricter standard of review to other agencies.²²⁹ Scholars state that courts have applied a “hard look” review to certain EPA and NLRB decisions, resulting in a reversal rate of forty-six percent in these cases.²³⁰ An agency’s expertise is the principle reason for applying deferential standards, but given the lack of resources in immigration courts and the fact that immigration cases can make up to forty percent of an appellate court’s docket, the expertise of the two adjudicative bodies is not significantly disparate.²³¹

Further, the “substantial evidence” standard is fairly malleable, giving courts the ability to articulate a standard that results in a more comprehensive review of the immigration courts’ decisions.²³² For example, various agencies have defined the standard in different ways, ranging from “less than a preponderance” to a “reasonable minds” review.²³³ This flexibility would allow appellate courts to outline a standard of review that resembles a “hard look,” and operates as more than a mere rubberstamp of agency decisions.²³⁴ Although the particular social group analysis receives *Chevron* deference as discussed above, a change to the standard of review for issues of fact will further strengthen gender-based asylum claims, albeit indirectly.

apply in reviewing a district court’s factual findings . . .”).

228. See Kim, *supra* note 218, at 592–93 (“In six of the eight cases, the court reversed the IJ’s factual findings. This reversal rate of 75% is remarkably high.”).

229. See *id.* at 644 (“Moreover, courts appear to be applying hard look review to other agencies, which provides precedent for the stricter review standard articulated in immigration.”).

230. See *id.* (“Thomas Miles and Cass Sunstein have argued that courts appear to be applying hard look review when applying the substantial evidence and arbitrary and capricious standards.”).

231. See *id.* at 633 (“In 2005, close to 40% of the Second Circuit’s docket was immigration cases. The Ninth Circuit was not far behind.”).

232. See *id.* at 640 (“Courts have iterated the substantial evidence standard in a variety of ways in a variety of contexts.”).

233. See *id.* at 640 (describing the various ways differing bodies have defined the substantial evidence standard).

234. See Tae-Hyun Kim *supra* note 218, at 585 (“[R]ecent studies that have cast doubt on the agency’s competence and expertise, including the shortage of resources and time for immigration judges to adequately consider each case . . .”).

2. Legal Representation

In immigration proceedings, applicants are not entitled to legal representation.²³⁵ However, local and state governments can allocate funding to provide free or low-cost attorneys to individuals in immigration courts.²³⁶ In 2013, New York City unveiled the New York Family Unity Project, funded by the City Council and aimed at providing representation to immigrants appearing in the city's immigration courts.²³⁷ Before the program, detained immigrants who did not have a lawyer faced removal at a rate of ninety-seven percent.²³⁸ In the first three years of the program, the removal rate dropped to fifty-two percent.²³⁹

Although immigration proceedings are administrative hearings, asylum claims are often matters of life and death.²⁴⁰ A public defense program for immigrants would be an improvement for immigration hearings generally, and victims of gender-based persecution would be beneficiaries. Even if courts were to accept gender as a valid basis for a particular social group, asylum-seekers would face far better odds with an attorney crafting their case and dealing with the intricacies of a niche area of the law.²⁴¹ The importance of representation was noted by Chief Judge Robert Katzmann of the Second Circuit in 2012, who said,

235. See U.S. CONST. amend. VI (ensuring right to attorney in all criminal trials).

236. See *infra* note 237 and accompanying text (describing New York's success with a project "that provides pro bono lawyers for detainees.").

237. See Mazin Sidahmed, Opinion, *It's Like an Automatic Deportation if You Don't Have a Lawyer*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/opinion/facing-the-injustice-of-immigration-court.html> (last visited Sep. 6, 2020) (describing the New York Family Unity Project) [perma.cc/F4UH-97B4].

238. See *id.* ("97 percent of detained immigrants who lacked a lawyer were being deported.").

239. See *id.* ("The rate of success—defined as the immigrant's being allowed to stay in the United States—had risen by 1,100 percent.").

240. See Nicole Acevedo & Adiel Kaplan, *Hundreds deported from U.S. to El Salvador have been killed or abused, new report says*, NBC NEWS (Feb. 5, 2020), <https://www.nbcnews.com/news/latino/hundreds-deported-u-s-el-salvador-have-been-killed-or-n1126906> (last visited Sep. 6, 2020) (describing Human Rights Watch report stating that 138 people deported to El Salvador have been killed, while 70 more have been seriously abused) [perma.cc/5A4A-H3B3].

241. See Sidahmed, *supra* note 237 (stating that immigrants with representation were eleven times more likely to have a successful claim).

“In all too many cases, I had the sense that if only the immigrant had competent counsel at the very outset of immigration proceedings, the outcome might have been different, the noncitizen might have prevailed.”²⁴²

Cities in which immigration courts are located should enact programs to provide counsel to the immigrants appearing before their adjudicative bodies. The success of the program in New York serves as an incentive, and basic notions of justice all but demand it.

3. Status of the Immigration Courts

Another general improvement that would benefit immigration adjudication in the United States broadly is to remove the courts from the executive branch and assign them as Article I courts. Currently, immigration courts operate under the Department of Justice and the Attorney General, raising questions about the impartiality of immigration judges.²⁴³ Although asylum denial rates increased toward the end of the Obama administration, they have exploded under the Trump administration, rising from fifty percent in 2015 to sixty-nine percent in 2019.²⁴⁴ The total number of asylum cases decided also rose significantly, from 19,779 in 2015 to 67,406 in 2019.²⁴⁵ The push by the Trump administration to decide a record number of cases along with the hardline stance taken on immigration (such as *Matter of A-B*) are reflected in these numbers.²⁴⁶

242. *Id.*

243. See Leonard Birdsong, *Reforming the Immigration Courts of the United States: Why is There No Will to Make it an Article I Court?*, 19 BARRY L. REV. 17, 19 (2013) (“This method of judicial appointment has always appeared to me to create a conflict of interest.”).

244. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, RECORD NUMBER OF ASYLUM CLAIMS IN FY 2019 fig. 1 (2019) <https://trac.syr.edu/immigration/reports/588/> (last visited Sep. 6, 2020) (charting immigration court asylum decisions between 2001 and 2019) [perma.cc/HHM6-4B7K].

245. *Id.*

246. See Kate Smith, *Asylum denial rates hit record-high in 2018 as Trump administration tightens immigration policy* (Dec. 4, 2018), <https://www.cbsnews.com/news/asylum-seekers-asylum-denials-hit-record-high-in-2018-as-trump-administration-tightens-immigration-policy-as-the-caravan->

To soften the influence the executive branch can have over immigration courts, proposals have been made to transform the courts into Article I courts, like the Bankruptcy Court or Tax Court.²⁴⁷ This change would afford the immigration tribunals a degree of independence and an identity that is separate from the President's or the Attorney General's.²⁴⁸ Judges would have fixed terms of office, more autonomy to control their dockets, and liberation from the bureaucracy present in the immigration courts today.²⁴⁹ This proposal has gained support among many scholars and organizations, including the Federal Bar Association.²⁵⁰

VI. Conclusion

Immigration adjudication in the United States is deeply broken. A refugee framework that was created and adopted to protect human beings from atrocities has been mangled and misapplied, leaving countless individuals abandoned in its wake. The current application of asylum law in the United States has strayed from the humanitarian aspirations of the Twentieth Century, opting instead to close the door and close its eyes on the suffering from which it once sought to offer shelter.

A judicial or legislative framework that accepts gender as a basis for asylum claims is an essential step in ensuring that women suffering harm are able to seek the protection to which they are entitled. This, along with a stricter standard of review in appellate courts, a guarantee of legal representation, and independence of the immigration courts will provide the base needed to effectively

arrives/ (last visited Sept. 27, 2020) (describing reasons for the rise in decisions and denials) [perma.cc/H7CK-5SJ9].

247. See Birdsong, *supra* note 243, at 42 (“The next most cited suggestion for immigration is to transform the immigration courts into an Article I legislative court.”).

248. See *id.* at 43 (“Although the judges on these courts lack life-time tenure, such courts provide a modicum of independence and transparency that is missing from the EOIR based immigration courts.”).

249. See Elizabeth J. Stevens, *Making Our Immigration Courts Courts*, 65 FED. LAW. 17, 17–18 (2018) (“[A]s we look to implement changes in our current immigration system, we must also aspire to lift the immigration courts from ‘halfway there’ not-quite-courts to true Article I courts.”).

250. See *id.* (stating that the Federal Bar Association’s position is that immigration courts should be Article I courts).

and properly decide women's asylum claims. The proposals in this Note, however, are merely guideposts. A new understanding of the unique nature of gender persecution and its role in public and private spheres is the final step necessary to ensure that these claims are adjudicated accurately and equitably.

The legislative, executive, and judicial branches all have the power to enact change necessary to begin applying immigration law correctly and consistently. No progress can be made without official action. The United States is commonly referred to as a nation of immigrants, but it has been countries such as Canada, the United Kingdom, and Australia that have opened the door to asylum claims of women.²⁵¹ It is time for the United States to glow a world-wide welcome to the tempest-tost masses, yearning to breathe free.²⁵²

251. See *supra* note 74 and accompanying text (discussing how other countries created gender-based asylum claims).

252. See EMMA LAZARUS, THE NEW COLOSSUS (1883) ("From her beacon-hand glows a world-wide welcome . . . Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!").