

# SEX AND GENDER VIOLENCE IN ASYLUM LAW: EXPANDING PROTECTION BEYOND DOMESTIC VIOLENCE

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## ABSTRACT

*Individuals who seek asylum and refugee protection are forced to compress the oppression they have suffered into narrow categories of sanctuary within the modern jurisprudence. Victims of harm based on sex and gender face a near-vertical uphill battle in seeking refuge and are frequently neglected by the law. Scholars that have broached the subject frequently speak in limited terms of domestic violence faced by women. Sex and gender-based persecution, however, is not confined only to those categories of harm and victims. Recent adjudications, like Matter of A-R-C-G-, have granted shelter to certain victims of domestic violence, but leave other victims without an avenue to relief. Therefore, the statutory definition of "refugee" must be amended and new regulations must be promulgated in order to extend protection beyond domestic violence claims. Only then will the law be able to provide consistent and adequate protection to victims of the myriad forms of sex and gender-based persecution.*

*An impactful analysis of the problem requires an examination of the deficiencies inherent in asylum law and its "particular social group" standard. A broader approach is needed to encapsulate all noncitizens at risk for sexual violence, regardless of sex or marital status. The experiences of other nations, which have expanded asylum protection to sufferers of sex and gender violence, offer encouraging examples. Revising asylum law and policy is the next step in protecting not only married women, but all people who have faced sexual violence or violence rooted in gender.*

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## INTRODUCTION

Tatyana awoke naked and handcuffed to a bed.<sup>1</sup> For the next week, she was gang-raped, beaten, and abused by members of the Chechen mafia.<sup>2</sup> Throughout a two-and-half year period, Tatyana was drugged, kidnapped, and raped repeatedly.<sup>3</sup> In total, Tatyana was abducted and released over one hundred times.<sup>4</sup> She was targeted at random—her captors only learned her name when she regained consciousness during the first abduction.<sup>5</sup> The attackers' only motive was to demonstrate their power over society.<sup>6</sup> Local Russian authorities refused to intervene because they did not "want to get extra problems on their hands."<sup>7</sup> Eventually, Tatyana became preg-

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1. CENTER FOR GENDER AND REFUGEE STUDIES, *Case #175*, U.C. HASTINGS, <http://cgrs.uchastings.edu/case/case-175> (last updated Aug. 31, 1999).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Basova v. INS*, No. 98-9540, 1999 U.S. App. LEXIS 15715, at \*8 (10th Cir. July 14, 1999).

6. *Id.*

7. *Id.* at \*7.

nant from the rapes and underwent an abortion.<sup>8</sup> Even after Tatyana fled Russia, the Chechen mafia set fire to her parents' home and threatened to kill Tatyana if she ever returned.<sup>9</sup> Once Tatyana arrived in the United States, she sought asylum.<sup>10</sup> Despite the agonizing persecution she faced, an immigration judge denied Tatyana's asylum claim.<sup>11</sup>

Tatyana's case went unnoticed by the public, which is typical for most asylum cases. Perhaps, this is due to the fact that public awareness of asylum, as a whole, stems from news coverage of political unrest,<sup>12</sup> and more recently, involves refugees fleeing conflict-shattered nations.<sup>13</sup> But individuals facing sex and gender-based persecution, like Tatyana, deserve the attention and support of humanity.

Other missteps and inadequacies act to perpetuate the lack of protection for victims of sex and gender-based violence. Such violence is ignored, or worse, condoned or encouraged, by certain governments.<sup>14</sup> Law enforcement officials and governments alike may also be unable or unwilling to provide protection, just as Tatyana experienced.<sup>15</sup> What is more, victims of sex and gender violence struggle to obtain asylum because their claims differ from more traditional asylum cases.<sup>16</sup> These concepts create barriers to protection from persecution.

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8. *Id.*

9. *Id.*

10. *Id.* at \*2-3.

11. *Id.* at \*3 ("The Immigration Judge (IJ) determined Ms. Basova did not have a well founded fear of persecution on any of the five grounds enumerated in [the statute]. He determined instead that the rapes were done on a personal level and she was not eligible for asylum.").

12. See, e.g., Andrew Roth & Ellen Barry, *Snowden Seeks Asylum in Russia, Putting Kremlin on the Spot*, N.Y. TIMES, July 2, 2013, at A6 (discussing former National Security Agency contractor, Edward Snowden).

13. See, e.g., Somini Sengupta, *Influx Puts Refugee Crisis on West's Agenda*, N.Y. TIMES, Oct. 1, 2015, at A4 (discussing the current crisis in Syria).

14. CENTER FOR GENDER AND REFUGEE STUDIES, U.C. HASTINGS, REVIEW OF GENDER, CHILD, AND LGBTI ASYLUM GUIDELINES AND CASE LAW IN FOREIGN JURISDICTIONS: A RESOURCE FOR U.S. ATTORNEYS 2 (2014) [hereinafter REVIEW OF FOREIGN GUIDELINES], [http://cgrs.uchastings.edu/sites/default/files/Review\\_Foreign\\_Gender\\_Guidelines\\_Caselaw\\_0.pdf](http://cgrs.uchastings.edu/sites/default/files/Review_Foreign_Gender_Guidelines_Caselaw_0.pdf).

15. See *supra* note 7.

16. See REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 2 (citing Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claims*, 29 REFUGEE SURV. Q. 46 (2010)); see also Allison W. Reimann, Comment, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1216-17 (2009) (noting that gender is not a statutorily enumerated category entitled to protection, that sex and gender violence is traditionally

Sex, gender, and sexual orientation<sup>17</sup> are such fundamental characteristics of human existence that the need for protection almost goes without saying. These qualities are intrinsically immutable characteristics, since they cannot be changed or are otherwise fundamental aspects of a person's identity.<sup>18</sup> From a biological standpoint, sex and gender give rise to specific forms of persecution, like female genital cutting.<sup>19</sup> But the immutability of sex and gender is "not confined to biological traits" since "social categories too may be assigned at birth."<sup>20</sup> The concept of gender acquires its meaning over time through social and cultural constructs.<sup>21</sup>

Thus, victims like Tatyana are tormented due to characteristics they cannot control and face abuse in many forms. Women and girls are targets of "serious human rights violations," such as discrimination and violence, on account of their gender.<sup>22</sup> As the result of armed conflict, women and children become victims of sex and gender-based violence on a large scale.<sup>23</sup> But women and children are not the only victims, and in reality "[n]o one is spared the violence."<sup>24</sup> Men face other forms of sexual abuse, especially during

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viewed a private matter, and that such violence may be condoned by a victim's religion or culture).

17. The role of sexual orientation within the asylum context is beyond the purview of this Note and warrants a separate discussion. See David W. Austin, *Sexual Orientation and Gender Identity*, 44 INT'L LAW. 547 (2010); Leonard Birdsong, "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution . . .": *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357 (2008); Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207 (2008); Ritu Ghai, *Deciphering Motive: Establishing Sexual Orientation as the "One Central Reason" for Persecution in Asylum Claims*, 43 COLUM. HUM. RTS. L. REV. 521 (2012).

18. See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

19. REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 2.

20. Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 15 (2015).

21. U.N. High Comm'r for Refugees, *Guidelines on International Protection: 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*, ¶ 3, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) ("Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination.").

22. U.N. High Comm'r for Refugees, *UNHCR Handbook for the Protection of Women and Girls* 7, 11 (2008) [hereinafter *UNHCR Handbook*], <http://www.unhcr.org/47cfa9fe2.html>.

23. See U.N. High Comm'r for Refugees, *Statistical Yearbook 2013* 35 (2014) [hereinafter *Statistical Yearbook*], <http://www.unhcr.org/54cf9bd69.html> (discussing specifically the Democratic Republic of Congo).

24. *UNHCR Handbook*, *supra* note 22, at 7 (noting that conflict and war affects all those involved, but that girls and women are particularly at-risk due to their gender).

times of conflict.<sup>25</sup> The methods of violence are as varied—rape, child sexual abuse, forced prostitution, sexual exploitation, sexual harassment, and attempts at these offenses—as they are sickening.<sup>26</sup> Many times, these acts are accompanied by emotional and other physical violence, like humiliation and confinement.<sup>27</sup> Harmful cultural and traditional policies, like female genital cutting, forced marriage, honor killing and maiming, and infanticide, also persist.<sup>28</sup> Additionally, sex and gender-based violence can be committed by numerous individuals: smugglers, soldiers, family members, co-workers, and others in positions of power, authority, and control, such as spouses, significant others, and caregivers.<sup>29</sup>

Presently, asylum law in the United States is incapable of providing adequate protection for victims of such persecution. While recent advances in domestic violence asylum litigation<sup>30</sup> and a history of slackening immigration requirements<sup>31</sup> are promising, it is time to take direct action to provide protection to a broader category of victims. The Immigration and Nationality Act (“INA” or “the Act”) must be amended and accompanying regulations must be promulgated in order to provide an avenue for protection that builds on recent progress and extends beyond domestic violence claims. These proposed changes may raise fears of a supposed overwhelming inpouring of refugees.<sup>32</sup> Yet the experiences of other countries, which have less restrictive asylum systems, demonstrate that the “floodgates” will not lay agape if and when more progressive legislation is enacted.<sup>33</sup>

This Note proceeds as follows. Part II provides the history and current state of asylum law in the United States, including recent

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25. Valorie K. Vojdik, *Sexual Violence Against Men and Women in War: A Masculinities Approach*, 14 NEV. L.J. 923, 929 (2014) (“It is recognized to include rape, both oral and anal; castration and/or sterilization; genital violence, including beatings and electric shocks aimed at the penis or testicles; forced incest; forced masturbation; forced nudity, often accompanied by threats or humiliation; and sexual slavery.”).

26. See U.N. High Comm’r for Refugees, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons* 16 (2003), [http://www.unicef.org/emerg/files/gl\\_sgbv03.pdf](http://www.unicef.org/emerg/files/gl_sgbv03.pdf).

27. See *id.* at 17.

28. See *id.* at 18.

29. See *id.* at 16.

30. See *infra* Part II.B.

31. See *infra* Part IV.A.

32. See, e.g., 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, 563 (2015).

33. See *infra* Part V.

asylum litigation involving sex and gender-based persecution in the form of domestic violence. Part III asserts the current inadequacies of immigration and asylum law relating to sex and gender-based violence. Part IV lays out a history of loosening immigration restrictions as a foundation for expanding asylum protection to victims of sex and gender-based violence. Part IV of this Note then argues that sex and gender-based persecution warrants legislative action, including the amending of the INA and the promulgation of guiding regulations in order to achieve equitable adjudication of asylum claims based on sex or gender violence. In addition, this Part examines the successes of other nations. Finally, Part V rejects overwrought concerns of “floodgates” opening in response to proposed reform.

### I. REFUGEE AND ASYLUM LAW FRAMEWORK

The world has long recognized the existence of large populations of refugees.<sup>34</sup> In 1950 the United Nations established the High Commissioner for Refugees (“UNHCR”) and then produced the Convention Relating to the Status of Refugees (“UN Convention”) one year later.<sup>35</sup> The United States did not immediately become a party to the UN Convention.<sup>36</sup> During the mid-twentieth century, however, Congress intermittently produced ad hoc legislation to address international and humanitarian issues.<sup>37</sup> Finally, in 1968, the United States acceded to the Protocol Relating to the Status of Refugees (“Protocol”).<sup>38</sup> Congress then passed the Refugee Act in 1980,<sup>39</sup> which amended the INA, established a statutory definition of “refugee,” and laid the foundation for contemporary refugee and asylum law.<sup>40</sup> The Refugee Act was passed as a response to the Protocol,<sup>41</sup> inadequate refugee legislation, and other problems.<sup>42</sup> As it stands,

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34. See generally Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. (entered into force Apr. 22, 1954). The United Nations High Commissioner for Refugees (UNHCR) recently estimated the world refugee population for 2013 to be 11.7 million individuals. *Statistical Yearbook*, *supra* note 23, at 25.

35. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, *IMMIGRATION AND REFUGEE LAW AND POLICY* 906, 906–07 (6th ed. 2015) (citing Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137).

36. See *id.* at 907.

37. See *id.* at 908; *infra* Part IV.A.

38. See LEGOMSKY & RODRIGUEZ, *supra* note 35, at 909.

39. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

40. See *id.*; LEGOMSKY & RODRIGUEZ, *supra* note 35, at 910.

41. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987).

42. See LEGOMSKY & RODRIGUEZ, *supra* note 35, at 910.

the United States, like many nations, permits resettlement for certain refugees<sup>43</sup> and asylum seekers.<sup>44</sup>

### A. *Asylum Requirements*

The INA defines “refugee” as:

[A]ny person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .<sup>45</sup>

Notably, sex and gender are not mentioned in this definition.

An applicant for asylum must satisfy four fundamental criteria in order to qualify as a refugee.<sup>46</sup> The Board of Immigration Appeals (“BIA” or “Board”) has enunciated these criteria as:

(1) the alien must have a “fear” of “persecution”; (2) the fear must be “well-founded”; (3) the persecution feared must be “on account of race, religion, nationality, membership in a particular social group, or political opinion”; and (4) the alien must be unable or unwilling to return to his country of nationality or to the country in which he last habitually resided because of persecution or his well-founded fear of persecution.<sup>47</sup>

Markedly, persecution is not defined in the INA, resulting in pervasive ambiguity.<sup>48</sup> However, the BIA has concluded that persecution is the objective “infliction of harm or suffering.”<sup>49</sup> The Board has also recognized that “[t]he harm or suffering need not only be physical, but may take other forms, such as the deliberate imposition of

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43. See Immigration and Nationality Act (INA) of 1990, § 207, 8 U.S.C. § 1157 (2012).

44. See *id.* § 208.

45. *Id.* § 1101(a)(42)(A).

46. See *Matter of Acosta*, 19 I. & N. Dec. 211, 219 (B.I.A. 1985).

47. *Id.*

48. See generally Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283 (discussing the importance of the term itself and pointing out the use of inconsistent definitions throughout immigration law).

49. *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life.”<sup>50</sup>

Applicants must assert that they have suffered from past persecution or have a well-founded fear of persecution.<sup>51</sup> Individuals who can establish they have been persecuted in the past qualify as refugees.<sup>52</sup> In addition, “[a]n applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.”<sup>53</sup> The government then has the burden to rebut this presumption.<sup>54</sup> The evaluation of persecution is fact-intensive and occurs across a spectrum of harm.<sup>55</sup>

An applicant that cannot establish past persecution, can instead demonstrate that “he or she has a well-founded fear of future persecution.”<sup>56</sup> Generally, a fear of persecution is well-founded when (1) the fear of persecution is on account of one of the protected grounds, (2) “[t]here is a reasonable possibility of suffering such persecution” upon the individual’s return to the country in question, and (3) the individual is “unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.”<sup>57</sup> To demonstrate the existence of a well-founded fear of persecution, an applicant must satisfy subjective and objective components.<sup>58</sup> The subjective component requires a “genuine apprehension or awareness of danger,”<sup>59</sup> and the objective component requires that “a reasonable person in [the individual’s] circumstances would fear persecution.”<sup>60</sup>

50. *Matter of Laipenieks*, 18 I. & N. Dec. 433, 457 (B.I.A. 1983), *rev’d on other grounds*, 750 F.2d 1427 (9th Cir. 1985); *see also* *Matter of T-Z-*, 24 I. & N. Dec. 163, 169–71 (B.I.A. 2007).

51. Immigration and Nationality Act (INA) of 1990, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

52. *See id.*; *Matter of Chen*, 20 I. & N. Dec. 16, 18 (B.I.A. 1989).

53. 8 C.F.R. § 208.13(b)(1) (2015).

54. *Id.*

55. *See Rempell, supra* note 48, at 292–316. “Without a description of each type of harm that factors into the persecution assessment, a comprehensive understanding of each harm’s significance diminishes.” *Id.* at 294.

56. 8 C.F.R. § 208.13(b).

57. *Id.* § 208.13(b)(2)(i)(A)–(C).

58. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430–31 (1987).

59. *Matter of Acosta*, 19 I. & N. Dec. 211, 221 (B.I.A. 1985).

60. *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 445 (B.I.A. 1987); *see also Cardoza-Fonseca*, 480 U.S. at 431 (“That the fear must be ‘well founded’ does not alter the obvious focus on the individual’s subjective beliefs, nor does it transform the standard into a ‘more likely than not’ one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.”).



The persecution, or fear of persecution, must occur “on account of” one of the five protected grounds.<sup>61</sup> A generalized underlying motive is not sufficient to satisfy the “on account of” criteria.<sup>62</sup> Rather, a more significant nexus is required: the protected ground must “be at least one central reason for [the] persecut[ion of] the applicant.”<sup>63</sup>

When an applicant seeks asylum based on their membership in a particular social group (“PSG”), they must satisfy additional criteria, which each contain their own requirements. An asylum applicant must establish their claimed group is “(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.”<sup>64</sup> The common immutable characteristic “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>65</sup> A number of characteristics have been accepted as immutable.<sup>66</sup> The social distinction of the group need not be visible to the naked eye, but the group must be “perceived as a group by society.”<sup>67</sup>

While “the particularity requirement flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a ‘particular social group,’”<sup>68</sup> the analysis is not quite that simple. As a benchmark matter, it must be clear who is considered a member of the PSG within the given society.<sup>69</sup> Additionally, the claimed PSG “must also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.”<sup>70</sup>

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61. Immigration and Nationality Act (INA) of 1990 § 101(a), 8 U.S.C. §1101(a)(42)(A) (2015).

62. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

63. 8 U.S.C. § 1158(b)(1)(B)(i) (2012).

64. *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 237 (B.I.A. 2014); see also *Matter of Acosta*, 19 I. & N. Dec. at 233.

65. *Matter of Acosta*, 19 I. & N. Dec. at 233.

66. See, e.g., *id.* (stating sex as an example of an immutable characteristic); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (stating that homosexuality is an immutable characteristic); *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (finding “[t]he characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it”).

67. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 240.

68. *Id.* at 239 (quoting *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649 (10th Cir. 2012)).

69. *Id.*

70. *Id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005)); see, e.g., *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (finding the attributes of youth, poverty, and homelessness to be “too vague and all encompassing” to possess a definable boundary); *Matter of*

Thus, the particularity of a PSG is a “question of delineation.”<sup>71</sup> Individuals seeking asylum based on sex or gender persecution may attempt to assert their claims on any of the protected grounds, but typically do so under the PSG framework.<sup>72</sup>

### B. Recent Domestic Violence Litigation

Thankfully, two key BIA decisions have provided stepping-stones toward improved protection for victims of domestic violence.<sup>73</sup> Unfortunately, these decisions are limited in scope and provide an inadequate basis for protection in future claims. In *Matter of R-A*,<sup>74</sup> a case that lasted nearly a decade, the respondent was finally granted asylum after asserting a narrow PSG claim based on her status as a married woman.<sup>75</sup> Subsequently, in *Matter of A-R-C-G*,<sup>76</sup> the Board explicitly recognized that PSG claims by women fleeing domestic violence could be cognizable.<sup>77</sup> These decisions are notable within the domestic violence context, but they do not provide broad enough protection to victims of sex and gender-based violence that is not “domestic” in nature.

#### 1. Matter of R-A-

The first significant progression in sexual violence asylum law was presented in the lengthy litigation of *Matter of R-A*.<sup>78</sup> Initially, the BIA denied asylum for a Guatemalan woman who was constantly beaten and raped on a near daily basis by her alcoholic husband.<sup>79</sup> The Board concluded that a specific motivation for the abuse was not apparent and that the abuse did not occur as a result of her

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A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 76 (B.I.A. 2007) (finding that wealthy Guatemalans were not a discrete PSG).

71. *Matter of W-G-R*, 26 I. & N. Dec. 208, 214 (B.I.A. 2014).

72. REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 1.

73. See *Matter of A-R-C-G*, 26 I. & N. Dec. 388 (B.I.A. 2014); *Matter of R-A*, 22 I. & N. Dec. 906 (B.I.A. 1999; A.G. 2001).

74. 22 I. & N. Dec. 906 (B.I.A. 1999; A.G. 2001).

75. Brief for Respondent at 3, *Matter of R-A*, 24 I. & N. Dec. 629 (A.G. 2008) [hereinafter Brief for R-A-], [http://cgrs.uchastings.edu/sites/default/files/R-A\\_brief\\_immigration\\_court\\_08\\_19\\_2009\\_0.pdf](http://cgrs.uchastings.edu/sites/default/files/R-A_brief_immigration_court_08_19_2009_0.pdf).

76. 26 I. & N. Dec. 388 (B.I.A. 2014).

77. Recent Adjudication, *Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement*, 128 HARV. L. REV. 2090, 2090 (2015) [hereinafter *Recent BIA Adjudication*].

78. See 22 I. & N. Dec. 906 (B.I.A. 1999; A.G. 2001).

79. *Id.* at 908.

membership in a particular social group (“PSG”).<sup>80</sup> Notably, the Board stated:

The issue of whether our asylum laws (or some other legislative provision) should be amended to include additional protection for abused women, such as this respondent, is a matter to be addressed by Congress. In our judgment, however, Congress did not intend the “social group” category to be an all-encompassing residual category for persons facing genuine social ills that governments do not remedy. The solution to the respondent’s plight does not lie in our asylum laws as they are currently formulated.<sup>81</sup>

Attorney General Reno later remanded the case to the Board in light of proposed changes to the regulations governing asylum,<sup>82</sup> which sought to include gender as the basis for a PSG and to remove the barriers imposed by *Matter of R-A-* regarding domestic violence asylum claims.<sup>83</sup> The regulations, however, simply enumerated sex as cognizable basis for a PSG and reiterated the traditional conception that a recognizable group shared a “common, immutable characteristic.”<sup>84</sup> Regardless, the proposed regulations were never made final, and the Attorney General again certified the case.<sup>85</sup> Attorney General Mukasey remanded the case to the Board in light of various asylum decisions rendered between 2005 and 2008.<sup>86</sup>

One such case was *Matter of L-R-*, where the Department of Homeland Security (“DHS”) filed a brief arguing that “Mexican women in domestic relationships who are unable to leave” may qualify as a PSG.<sup>87</sup> Subsequently, the respondent in *Matter of R-A-*,

80. *Id.* at 927.

81. *Id.* at 928.

82. *Matter of R-A-*, 23 I. & N. Dec. 694 (A.G. 2005).

83. *See Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,589, 76,592 (proposed Dec. 7, 2000).

84. *Compare Asylum and Withholding Definitions*, 65 Fed. Reg. at 76,593, 76,598 (“A particular social group is composed of members who share a *common, immutable characteristic*, such as *sex*, color, kinship ties . . . .”) (emphasis added), *with Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (“[W]e interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a *common, immutable characteristic*. The shared characteristic might be an innate one such as *sex*, color, or kinship ties . . . .”) (emphasis added).

85. *See Matter of R-A-*, 24 I. & N. Dec. 629 (A.G. 2008).

86. *See id.* at 630.

87. Supplemental Brief for Dep’t of Homeland Sec. at 14–15, *Matter of L-R-* (B.I.A. Apr. 13, 2009), [http://cgrs.uchastings.edu/sites/default/files/Matter\\_of\\_LR\\_DHS\\_Brief\\_4\\_13\\_2009.pdf](http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf).

Rody Alvarado, filed a brief asserting that she was persecuted on account of her membership in the PSG of “married women in Guatemala who are unable to leave the relationship.”<sup>88</sup> Ms. Alvarado was finally granted asylum by an immigration judge in December of 2009.<sup>89</sup> *Matter of R-A-* was a humanitarian victory, but the case failed to enunciate a transparent standard for domestic violence asylum claims – this would come later in *Matter of A-R-C-G-*.

## 2. *Matter of A-R-C-G-*

With *Matter of R-A-* as a basis, the BIA issued a noteworthy decision with *Matter of A-R-C-G-*,<sup>90</sup> where it “unambiguously establishe[d] that women fleeing domestic violence can be eligible for particular social group-based asylum . . . .”<sup>91</sup> The respondent, a Guatemalan woman, was beaten on a weekly basis, raped, and burned with paint thinner.<sup>92</sup> The Board noted that gender was an immutable characteristic and that “marital status can be an immutable characteristic where the individual is unable to leave the relationship.”<sup>93</sup> Noting the “machismo culture” in Guatemala and the apparent lack of enforcement of domestic violence laws, the Board held that the respondent had asserted a socially distinct PSG since there was “evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.”<sup>94</sup> Ultimately, the Board found the respondent’s claimed PSG of “married women in Guatemala who are unable to leave their relationship” was socially distinct and defined with particularity.<sup>95</sup>

Without question, *A-R-C-G-* was a landmark decision that afforded increased protection for victims of domestic violence. Moreover, *A-R-C-G-* left room for domestic violence PSG claims for women who are not married.<sup>96</sup> By “holding that marital status can be immutable, *A-R-C-G-* makes clear that ‘[a] range of factors [can] be relevant’ to determining whether this requirement is met.”<sup>97</sup> Thus, un-

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88. Brief for R-A-, *supra* note 75, at 2.

89. See Center for Gender and Refugee Studies, *Our Work, Matter of R-A-*, U.C. HASTINGS, <http://cgrs.uchastings.edu/our-work/matter-r> (last visited Sept. 26, 2016).

90. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

91. *Recent BIA Adjudication*, *supra* note 77, at 2090.

92. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 389.

93. *Id.* at 392–93.

94. *Id.* at 393–94 (quoting *Matter of W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)).

95. See *id.* at 390, 393–94.

96. *Recent BIA Adjudication*, *supra* note 77, at 2096–97.

97. *Id.* at 2096 (quoting *Matter of A-R-C-G-*, 26 I. & N. Dec. at 393).

married women may demonstrate they are unable to leave their non-marital relationship based on “[their] own experiences, as well as more objective evidence, such as background country information.”<sup>98</sup> Additionally, in discussing the particularity requirement, the Board took note of two key factors: (1) that “sexual offenses against women [are] a serious societal problem in Guatemala,” and (2) that Guatemalan police desired “not [to] interfere in a marital relationship.”<sup>99</sup> Unmarried women could similarly argue that Guatemalan domestic violence laws also permit punishment of men who disallow their “partners” to leave the relationship.<sup>100</sup> Finally, unmarried women could point to the aforementioned evidence in order to satisfy the social distinction requirement.<sup>101</sup> Ultimately, however, “[t]he holding of *Matter of A-R-C-G-* is still somewhat narrow . . . because every application for asylum will be analyzed on a case-by-case basis.”<sup>102</sup>

### 3. *The aftermath of A-R-C-G-*

As a result of the restrictive holding in *A-R-C-G-*, federal courts have struggled to interpret domestic violence asylum claims. In a recent example, *Ordonez-Tevalan v. Attorney General*, a Guatemalan woman sought asylum on the basis that her former boyfriend “subjected her to verbal, physical, and sexual abuse.”<sup>103</sup> After engaging in a lengthy discussion upholding an adverse credibility finding against the applicant, the Third Circuit briefly stated that the applicant was not a member of the PSG articulated in *A-R-C-G-* because “she acknowledge[d] that she never was married to [her boyfriend].”<sup>104</sup> Upon petition for rehearing, the Third Circuit vacated its opinion and ordered the issuance of a revised opinion.<sup>105</sup> Notably, in

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98. *Matter of A-R-C-G-*, 26 I. & N. Dec. at 393-94; *Recent BIA Adjudication*, *supra* note 77, at 2096.

99. *See Matter of A-R-C-G-*, 26 I. & N. Dec. at 393; *Recent BIA Adjudication*, *supra* note 77, at 2096.

100. *See Recent BIA Adjudication*, *supra* note 77, at 2096.

101. *See id.* at 2096-97.

102. Kristen Shively Johnson, *Paving the Way to Better Protection: Matter of A-R-C-G-*, 24 TEX. J. WOMEN, GENDER & L. 151, 164 (2015); *see also* *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 394-95 (B.I.A. 2014) (“[E]ven within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case . . .”).

103. 826 F.3d 670, 674-75 (3d Cir. 2016) *vacated*, No. 15-2187, 2016 U.S. App. LEXIS 17222, at \*2 (3d Cir. Sept. 21, 2016).

104. *Id.* at 682.

105. *Ordonez-Tevalan v. Att’y Gen.*, No. 15-2187, 2016 U.S. App. LEXIS 17222, at \*1-2 (3d Cir. Sept. 21, 2016).

its revised opinion, the court completely withdrew its erroneous application of *A-R-C-G-*.<sup>106</sup> The Third Circuit is not alone in its apparent confusion, as other circuit courts have also declined to expand the narrow PSG articulated in *A-R-C-G-*.<sup>107</sup>

The Board has attempted to clarify its holding in *A-R-C-G-*, but has done so without issuing a precedential decision.<sup>108</sup> These non-binding decisions indicate that marital status is not necessarily required as part of a cognizable PSG claim under *A-R-C-G-*.<sup>109</sup> In one such decision, the Board upheld the immigration judge's rejection of the PSG of "women who are victims of domestic violence in a relationship [they] cannot leave" because the group was "defined solely by the risk of persecution."<sup>110</sup> Laudably, however, the Board concluded that "women who cannot leave a relationship" was a valid PSG.<sup>111</sup> In commenting on *A-R-C-G-*, the Board stated that "a victim of domestic violence [is not required to] be married to the abuser . . . [or] be in a lengthy relationship with the abuser."<sup>112</sup>

Thus, while the Board's attempts at elucidation should help alleviate judicial ambivalence regarding the necessary elements of a valid social group under *A-R-C-G-*, the lack of precedential decisions is troubling.<sup>113</sup> Furthermore, many questions remain unanswered in the wake of *A-R-C-G-*. Will non-married women be able to consistently articulate a viable PSG? Are country conditions indicating the

106. *Ordonez-Tevalan v. Att'y Gen.*, No. 15-2187, 2016 U.S. App. LEXIS 17224, \*25 (3d Cir. Sept. 21, 2016).

107. *See, e.g., Vega-Ayala v. Lynch*, No. 15-2114, 2016 U.S. App. LEXIS 14717, at \*8-11 (1st Cir. Aug. 10, 2016) (declining to extend *A-R-C-G-* to "Salvadoran women in intimate relationships with partners who view them as property"); *Maldonado v. Lynch*, 646 F. App'x 129, 131 (2d Cir. 2016) (implying that *A-R-C-G-* would not apply to the applicant since "she was not married to the man she claimed to fear in Guatemala . . .").

108. *In re E-M-*, slip op. at 1 (B.I.A. Feb. 18, 2015); *In re H-R-M-*, slip op. at 1 (B.I.A. Mar. 17, 2016). [staff: these sources/how to access are on Sharepoint]

109. *See E-M-*, slip op. at 1 (stating that stated "the absence of a legal marriage is not *ipso facto* a distinguishing factor that precludes otherwise analogous claims under the particular social group rationale set forth in [*A-R-C-G-*]"); *see also H-R-M-*, slip op. at 2.

110. *H-R-M-*, slip op. at 2 (quoting *Matter of W-G-R-*, 26 I. & N. Dec. 208, 215 (B.I.A. 2014) ("Persecutory conduct aimed at a social group cannot alone define the group, which must exist independently of the persecution.")).

111. *Id.* at 2-3. The Board held that the proposed group satisfied all of the elements of a cognizable PSG: (1) gender was the common immutable characteristic binding the group; (2) the words "women," "relationship," and "cannot leave" satisfied the particularity requirement; and (3) country conditions evidence in the record established social distinction. *Id.* at 3.

112. *Id.*

113. *See Blaine Bookey, Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT'L L. 1, 10 (2016) ("The government does not make available to the public immigration judge decisions, or most non-precedential Board decisions, leading to a deficit of information on how cases are faring across the country.").

presence of “machismo culture” and widespread family violence required? Must the violence be “domestic” in nature? This uncertainty is exacerbated by the ineffectiveness of the current regime of immigration law as a whole, with respect to victims of sexual violence.

## II. INADEQUACIES OF THE CURRENT IMMIGRATION SYSTEM

Discussions of the inadequacies of the current immigration system usually involve the undocumented immigrant “problem,”<sup>114</sup> however, immigration law is also particularly inadequate for providing relief to victims of sex and gender-based violence. As a general matter, asylum law seeks to squeeze round pegs into square holes, especially in cases of gender-related claims.<sup>115</sup> Similarly, humanitarian asylum—a form of asylum that takes into account the status of individuals who are of “special humanitarian concern to the United States”<sup>116</sup>—is a convoluted process with significant barriers.<sup>117</sup> Other areas in the law that provide for special visas and special permanent resident status,<sup>118</sup> which were enacted with victim protection in mind, are notably hard to secure or otherwise inapplicable.<sup>119</sup> In sum, immigration law is devoid of adequate solutions for victims of sex and gender-based violence.

### A. *The Futility of Specialty Visas*

Asylum law is not the only area lacking sufficient means for protecting victims of sexual violence. The Violence Against Women Act (“VAWA”)<sup>120</sup> was an important statutory step in specially recogniz-

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114. See, e.g., Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009); Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723 (2010); Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463 (2012); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

115. See LEGOMSKY & RODRIGUEZ, *supra* note 35, at 986.

116. Immigration and Nationality Act (INA) of 1990 § 207(c)(1), 8 U.S.C. §1157(c)(1) (2012).

117. See generally Rebekah Bailey & Laura Lunn, *Relief After Rebuttal: Reaching Humanitarian Asylum Under the Regulations*, IMMIGR. L. ADVISOR, (Exec. Office of Immigration Review Law Library, Falls Church, Va.), Jan. 2013 at 1, <http://www.justice.gov/sites/default/files/eoir/legacy/2013/04/15/vol7no1.pdf>.

118. See Violence Against Women Act (“VAWA”) of 1994, 42 U.S.C. § 13925 (2012).

119. In order to obtain these visas, individuals must assist law enforcement officials with the investigation or prosecution of a crime. See INA § 101(a)(15)(T)(i)(III)(aa), (U)(i)(III).

120. VAWA, 42 U.S.C. § 13925.

ing victims of trafficking and abuse in the immigration context.<sup>121</sup> The VAWA “authorized funding related to domestic violence for enforcement efforts, research and data collection, prevention programs, and services for victims.”<sup>122</sup> On that basis, Congress established the T and U visas,<sup>123</sup> and permitted “abused noncitizen spouses . . . to ‘self-petition’ for . . . lawful permanent resident . . . status.”<sup>124</sup> The T visa may be obtained by “victims of severe forms of trafficking and . . . individuals assisting in the prosecution of trafficking offenses.”<sup>125</sup> The U visa was established for “persons who have suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.”<sup>126</sup> These provisions were enacted specifically to protect non-citizen victims of domestic violence. Thus, the T and U visas provided for in VAWA confer valuable immigration benefits.

These visas, however, are of little use to most of the victims considered within the context of this Note. Firstly, as the Department of Homeland Security has acknowledged, Congress established the T and U visas in order to aid law enforcement officers to carry out investigations and prosecutions with the help of individuals who might otherwise be reluctant to provide assistance due to their lack of valid immigration status in the United States.<sup>127</sup> Furthermore, meeting the statutory requirements for these visas is not a given. For example, in order to obtain a U visa, the crime in question must have occurred in the United States or violated U.S. laws.<sup>128</sup> Therefore, it is terribly unlikely that an applicant will secure a U visa based on a crime committed abroad.

Most importantly, in order to obtain a T or U visa, the victim must help law enforcement officials in the investigation or prosecution of

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121. See Danielle L.C. Beach, *Battlefield of Gendercide: Forced Marriage and Gender-Based Grounds for Asylum and Related Relief*, 09-02 IMMIGR. BRIEFINGS, Dec. 2009, at 3, Westlaw.

122. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42477, IMMIGRATION PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT (“VAWA”) 1 (2012).

123. See Beach, *supra* note 121, at 3.

124. KANDEL, *supra* note 122, at 1.

125. Beach, *supra* note 121, at 3; see Immigration and Nationality Act (INA) of 1990, 8 U.S.C. §1101(a)(15)(T)(i)(I),(III)(aa) (2012).

126. Beach, *supra* note 121, at 3; see also 8 U.S.C. § 1101(a)(15)(U)(i)(I).

127. DEP’T OF HOMELAND SEC., U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES, AND OTHER GOVERNMENT AGENCIES 4, 9 (2016) [hereinafter DHS U AND T VISA GUIDE], [https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide\\_1.4.16.pdf](https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf).

128. 8 U.S.C. § 1101(a)(15)(U)(i)(IV).



the crime.<sup>129</sup> This requirement is particularly troublesome, since applicants must obtain law enforcement certification.<sup>130</sup> While some jurisdictions have implemented protocols and bodies to perform the certifications,<sup>131</sup> applicants face barriers, especially in obtaining U visas, because of the shortcomings of law enforcement entities.<sup>132</sup> What is more, law enforcement officers and prosecutors may actively deny certification based on prejudice and obfuscation.<sup>133</sup> This behavior leaves room for law enforcement officers to use the promise of a T or U visa as a false incentive to secure evidence from the applicant. All of these issues persist notwithstanding the UNHCR's recommendation that protection for victims of sexual abuse and trafficking, like T and U visa applicants, "should be long-term and should not be dependent upon the victim's willingness or ability to provide information to the authorities."<sup>134</sup>

VAWA self-petitioner provisions in the INA require the victim-applicant to be married to a U.S. citizen or permanent resident abuser-spouse or the marriage must have ended within two years preceding the filing of the application.<sup>135</sup> There are two additional narrow categories as well: renunciation or loss of U.S. citizenship by the abuser-spouse due to an incident of domestic violence<sup>136</sup> or that the marriage was made illegitimate because of the abuser-spouse's big-

129. *Id.* § 1101(a)(15)(T)(i)(III)(aa), (U)(i)(III).

130. 8 U.S.C. § 1184(o)(7)(B)(i), (p)(1).

131. *See, e.g., Mayor de Blasio Announces NYC Commission on Human Rights First Such Agency in Major U.S. City to Issue U And T Visa Certifications*, NYC (Feb. 9, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/148-16/mayor-de-blasio-nyc-commission-human-rights-first-such-agency-major-u-s-city-to>; *U-Visa*, OFFICE OF L.A. CITY ATTORNEY, <http://www.lacityattorney.org/#!u-visa/c19eg> (last visited Oct. 7, 2016).

132. *See How Law Enforcement is Using the U-Visa*, PRACTICE BRIEF (Vera Inst. of Justice, New York, N.Y.), Oct. 2011, at 1-3, <http://www.vera.org/sites/default/files/resources/downloads/U-visa-practice-brief.pdf>. These shortcomings include the overall lack of law enforcement protocols and policies for the U visa application process, a misunderstanding of law enforcement's role in the process, fears of opening law enforcement agencies to negative consequences, and the insufficient level of information and training about the process. *Id.*

133. *See generally* Giselle Hass et al., *Barriers and Successes in U Visas for Immigrant Victims: The Experiences of Legal Assistance for Victims Grantees*, S1 ARTS & SOC. SCI. J. 1 (2014), <http://www.omiconline.com/open-access/barriers-and-successes-in-u-visas-for-immigrant-victims-the-experiences-of-legal-assistance-for-victims-grantees-2151-6200-S1-005.pdf>. Police departments may be unresponsive to requests for certification or have policies against certifying U visas. *See id.* at 7. Additionally, applicants may face pushback from law enforcement due to the personal views and attitudes of individual officers. *Id.* at 9.

134. U.N. High Comm'r for Refugees, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, 160 (2004) [hereinafter *UNHCR Comparative Analysis*], <http://www.unhcr.org/40c071354.html>.

135. 8 U.S.C. § 1154(a)(1)(A)(iii)(II) (2012).

136. *See id.* § 1154(a)(1)(A)(iv)-(v).

amy.<sup>137</sup> These provisions preclude relief by default for many victims of domestic violence, since they must be married or recently married to a U.S. citizen.<sup>138</sup> Moreover, “[a]dvocates for battered immigrants . . . maintain that the requirements under VAWA are so stringent that they sometimes deter qualified battered spouses and children from self-petitioning, and prevent those who apply with legitimate cases from having their petitions approved.”<sup>139</sup> Thus, only a very limited number of victims can utilize VAWA benefits – the overlap between members of this group and individuals requesting asylum is likely to be minimal.

### B. *The Fruitlessness of the Current Asylum System*

An applicant’s asylum claim can fail when any of the relevant criteria are not met to the satisfaction of the adjudicating immigration judge.<sup>140</sup> This is especially true in cases where applicants claim they were persecuted on account of their membership in a PSG. At a recent DHS roundtable, Dorothea Lay of United States Citizenship and Immigration Services, Office of Chief Counsel, “noted that the way PSG is generally analyzed does not present a realistic version of the persecutor/persecuted dynamic.”<sup>141</sup> Upon first glance, this seems likely because “not every ‘immutable characteristic’ is sufficiently precise to define a particular social group.”<sup>142</sup> Ms. Lay noted that “while shared past experience may be an immutable trait, the experience may still not be socially distinct” and that “[a]buse or harm in of itself cannot be an immutable trait.”<sup>143</sup>

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137. *Id.* § 1154(a)(1)(A)(iii)(II)(aa)(BB).

138. *Id.* § 1154(a)(1)(A)(iii)(II). It is highly implausible that refugees and individuals seeking asylum will be able to satisfy this requirement due to the nature and implications of their situation.

139. KANDEL, *supra* note 122, at 6.

140. *See, e.g.,* *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993) (acknowledging women as a potential PSG but denying asylum because respondent could not show persecution solely on account of being a woman); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 224 (B.I.A. 2014) (finding that respondent was not persecuted on account of his status as a former gang member); *Matter of Acosta*, 19 I. & N. Dec. 211, 235–36 (B.I.A. 1985) (denying asylum, in part, because the respondent failed to demonstrate that persecution was countrywide).

141. *Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm*, HOMELAND SECURITY, <http://www.dhs.gov/hot-topics-asylum-examination-particular-social-group-and-other-serious-harm> (last updated Aug. 24, 2015) [hereinafter *USCIS Roundtable*].

142. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 392 (B.I.A. 2014) (quoting *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014)).

143. *USCIS Roundtable*, *supra* note 141.

The PSG analysis is further confounded when the claim is gender-based.<sup>144</sup> Neither the INA nor the UN Convention includes gender as a basis for recognizable persecution.<sup>145</sup> Courts have been reluctant to accept gender as a permissible ground for asylum and fear the potential group would be overwhelmingly large.<sup>146</sup> Even when the Board or courts have found gender to be the basis of a PSG, few applicants have been able to demonstrate that they feared persecution on account of their gender.<sup>147</sup> Additionally, “women who have been victims of attempted sex trafficking have frequently been unsuccessful on their applications for asylum.”<sup>148</sup> Domestic violence asylum applicants face an additional hurdle: the “harm or suffering ha[s] to be inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”<sup>149</sup> This “non-state actor” issue is especially problematic for women, due to societal and cultural practices that give rise to harms inflicted by “private” actors.<sup>150</sup>

As it stands, the current asylum framework fails to ensure that correct and equitable decisions are rendered by immigration judges

144. See Johnson, *supra* note 102, at 165; Bookey, *supra* note 113, at 10–19 (examining the typical impediments to protection for victims of domestic violence).

145. See LEGOMSKY & RODRIGUEZ, *supra* note 35, at 983.

146. See Jessica Marsden, Note, *Domestic Violence Asylum After Matter of L-R-*, 123 YALE L.J. 2512, 2526 (2014); Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) (“There may be understandable concern in using gender as a group-defining characteristic. One may be reluctant to permit, for example, half a nation’s residents to obtain asylum on the ground that women are persecuted there.”); see also Rreshpja v. Gonzales, 420 F.3d 551, 555–56 (6th Cir. 2005) (finding “young, attractive Albanian women” to be too inclusive to constitute a cognizable PSG); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994) (“[Respondent] asserts that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, are a particular social group. We believe this category is overbroad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution based solely on their gender.”); Gomez v. INS, 947 F.2d 660, 663–64 (2d Cir. 1991) (rejecting “women who have been previously battered and raped by Salvadoran guerillas” as too “broadly-based” to be sustained as a PSG).

147. See, e.g., Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (stating that sex is “an innate characteristic” but that the respondent “ha[d] not shown that she would suffer or that she has a well-founded fear of suffering ‘persecution’ based solely on her gender”).

148. Johnson, *supra* note 102, at 165 (citing Kelly Karvelis, *The Asylum Claim for Victims of Attempted Trafficking*, 8 NW. J.L. & SOC. POL’Y 274, 279–80 (2013)). This is due to the narrow interpretation by courts of PSG criteria and the failure to account for “the specific characteristics that make certain individuals susceptible to being targets of sex trafficking, or the substantial danger of being trafficked that they face if returned to the country in which they faced a threat or attempt by traffickers.” Karvelis, *supra*, at 279–80.

149. *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (emphasis added).

150. Deborah Anker, *Refugee Status and Violence Against Women in the “Domestic” Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 392 (2001) (discussing tribal authorities’ roles in female genital cutting and the acts of family members in forced marriage situations).

and the Board. Moreover, the “dearth of binding standards as well as the lack of training for immigration judges on the dynamics and sensitivities of domestic and other gender-based violence has continued to result in inconsistent and arbitrary decision-making.”<sup>151</sup> Together, statutory, adjudicatory, and practical pitfalls prevent the conferral of sufficient asylum protection to victims of sex and gender violence.

### C. *Humanitarian Asylum: An Appealing but Ineffective Option*

Another seemingly appealing avenue for change is humanitarian asylum, which is provided in section 207 of the INA and is now codified under 8 U.S.C. § 1157. This provision, which appears broad at first read, allows the Attorney General to use discretion to admit refugees as immigrants when they are “determined to be of special humanitarian concern to the United States.”<sup>152</sup> The President is tasked with establishing the number of humanitarian asylum seekers to be admitted.<sup>153</sup>

Like traditional asylum applicants, individuals seeking humanitarian asylum must establish “past persecution on account of one of the protected grounds.”<sup>154</sup> Humanitarian asylum applicants, however, have two options for demonstrating their eligibility: (1) the applicant may show “compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution;”<sup>155</sup> or (2) the applicant may show “that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.”<sup>156</sup>

The severity of the past persecution may be established “if [the applicant] demonstrates that in the past [he] or his family has suffered under atrocious forms of persecution.”<sup>157</sup> When an applicant cannot establish “compelling reasons” for obtaining humanitarian asylum, “then the applicant can still fulfill his or her burden by showing that there is a ‘reasonable possibility’ that ‘other serious

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151. Bookey, *supra* note 113, at 19.

152. Immigration and Nationality Act (INA) of 1990 § 207(c)(1), 8 U.S.C. §1157(c)(1) (2012).

153. *Id.* § 1157(a)(3).

154. Bailey & Lunn, *supra* note 117, at 2 (citing Matter of D-I-M-, 24 I. & N. Dec. 448, 449-50 (B.I.A. 2008)).

155. *Id.* (emphasis omitted) (quoting 8 C.F.R. § 1208.13(b)(1)(iii)(A) (2013)).

156. *Id.* (emphasis omitted) (quoting 8 C.F.R. § 1208.13(b)(1)(iii)(B)).

157. Matter of L-S-, 25 I. & N. Dec. 705, 712 (B.I.A. 2012) (quoting Matter of N-M-A-, 22 I. & N. Dec. 312, 325 (B.I.A. 1998)).

harm' may be suffered upon removal."<sup>158</sup> In order to satisfy the "other serious harm" requirement, the applicant must demonstrate that they "might suffer new 'physical or psychological harm'" in their country of removal.<sup>159</sup> Thus, humanitarian asylum seemingly offers increased flexibility for victims to make successful claims.<sup>160</sup>

Despite the apparent accessibility of humanitarian asylum in general, and the supposed breadth of the second branch of humanitarian asylum,<sup>161</sup> it remains an imperfect remedy for sex and gender persecution victims. Notably, the legal community typically overlooks humanitarian asylum as a viable option for relief.<sup>162</sup> Further, "[l]ike the lack of concrete definition of persecution [in the INA], there is no specific standard for . . . 'atrocious persecution.'"<sup>163</sup> Instead, "the [Board] expects some . . . showing of long-lasting physical, emotional, or psychological effects of the harm."<sup>164</sup> Moreover,

158. Bailey & Lunn, *supra* note 117, at 2 (citing *Matter of L-S-*, 25 I. & N. Dec. at 713).

159. *Id.* at 3, 10; *see also* *Matter of L-S-*, 25 I. & N. Dec. at 714 ("Such conditions may include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury.").

160. *See* Lauren N. Kostas, Note, *Domestic Violence and American Asylum Law: The Complicated and Convoluted Road Post Matter of A-R-C-G-*, 30 CONN. J. INT'L L. 211, 237-38 (2015) (proposing that a victim of domestic violence, for example, might be a prime candidate for humanitarian asylum based on "atrocious" persecution, or might be able to make an "other serious harm" claim as a national of a war-torn or gang-riddled country).

161. *See* Bailey & Lunn, *supra* note 117, at 3 (citing 8 C.F.R. § 1208.13(b)(1)(iii)(B)) ("If the applicant did not suffer from past persecution severe enough to provide a basis for humanitarian asylum under 8 C.F.R. § 1208.13(b)(1)(iii)(A), then an adjudicator may also consider whether the applicant merits humanitarian asylum based on 'other serious harm' he or she may face in the country of removal.").

162. *See* Rebecca H. Gutner, *A Neglected Alternative: Toward a Workable Standard for Implementing Humanitarian Asylum*, 39 COLUM. J.L. & SOC. PROBS. 413, 421 (2006) (discussing an increase in cases discussing humanitarian asylum and humanitarian asylum grants, but pointing out that courts, nevertheless, rarely use the approach); *see also* *Kone v. Holder*, 596 F.3d 141, 151-52 (2d Cir. 2010) (remanding the case and indicating that the parties had overlooked the humanitarian asylum option in a female genital cutting claim).

163. Kostas, *supra* note 160, at 237.

164. *Id.* (citing *Matter of S-A-K- & H-A-H*, 24 I. & N. Dec. 464, 465 (B.I.A. 2008) (granting humanitarian asylum for a mother and daughter that suffered severe female genital mutilation, since they possessed long-lasting effects and experienced ongoing pain); *see also* *Jalloh v. Gonzales*, 498 F.3d 148, 149 (2d Cir. 2007) (upholding denial of humanitarian asylum since the applicant did not demonstrate "long-lasting physical or psychological effects of the persecution"); *Geburu v. INS*, No. 98-1927, 1999 U.S. App. LEXIS 2470, at \*7 (4th Cir. Feb. 18, 1999) ("[T]he IJ and Board noted [the applicant] presented no evidence demonstrating that she suffers from physical and psychological disabilities . . . ."); *Rusu v. INS*, 296 F.3d 316, 318, 325 (4th Cir. 2002) (declining to extend humanitarian asylum and finding insufficient persecution where applicant was repeatedly assaulted, interrogated, and tortured by having his teeth removed with pliers).

the “other serious harm” analysis is clouded in indefiniteness,<sup>165</sup> despite guidance from the BIA and federal courts.<sup>166</sup> Humanitarian asylum cases are also adjudicated differently depending on the forum.<sup>167</sup> The result of these issues is that humanitarian asylum is a flawed solution for sex and gender persecution victims and asylum seekers as a whole.

### III. PROPOSAL FOR LEGISLATIVE ACTION

The inadequacies of the current immigration system have caused the victims of sex and gender-based violence to be overlooked. In the past, Congress has occasionally enacted impromptu refugee and asylum legislation in similar special circumstances.<sup>168</sup> Congress has even protected victims of domestic violence through such ad hoc legislation.<sup>169</sup> Largely, however, these reforms were instituted for foreign policy reasons and did not provide far-reaching solutions.<sup>170</sup> Sex and gender-based persecution is sufficiently widespread<sup>171</sup> to warrant the adopting of comprehensive immigration solutions to provide relief to the diverse and multitudinous victims. The situation demands direct legislative action, through the amending of the INA. Additionally, new regulations should be promulgated to improve transparency in asylum law, remove judicial discretion, and expand upon the progress provided by A-R-C-G-.

#### A. Congress's Willingness to Loosen Requirements on an Ad Hoc Basis

Like many categories of immigration status contained in the INA, asylum seekers must take on a considerable burden in order to se-

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165. “‘Other serious harm’ determinations must be made on a case-by-case basis.” Matter of L-S-, 25 I. & N. Dec. 705, 715 (B.I.A. 2012).

166. See *id.* (citing various circuit court cases but “not necessarily endors[ing] any particular analysis or outcome”).

167. See Gutner, *supra* note 162, at 429–46 (discussing the variance in application of humanitarian asylum standards amongst the courts).

168. See, e.g., Foreign Operations, Export Financing, and Related Program Appropriations Act of 1990, Pub. L. No. 101-167, § 599D(a), 103 Stat. 1195, 1261-62 (1989) (codified as amended at 8 U.S.C. § 1157 (1994 & Supp. IV. 1998)) [hereinafter *Lautenberg Amendment*].

169. See Beach, *supra* note 121, at 3 (discussing the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009).

170. See, e.g., Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, § 203(a)(5), 111 Stat. 2193, 2196-98 (1997) (providing special rule cancellation of removal for foreign nationals of particular countries). NACARA was enacted in light of civil strife in Central America. See LEGOMSKY & RODRIGUEZ, *supra* note 35, at 645.

171. See *supra* Part I.

cure lawful status in the United States. Notably, however, Congress has at times reluctantly facilitated the admission of refugees through ad hoc legislation.<sup>172</sup> While these moments of leniency tend to inspire hope for progress in immigration law, Congress usually intended to effectuate a foreign relations or public policy goal.<sup>173</sup> The brief discussion that follows is provided only to demonstrate instances of congressional lenity and to highlight the pushback faced by such reform.

Enacted in 1989 near the end of the Cold War, the Lautenberg Amendment was a notable slackening of refugee status requirements for “Soviet Jews, Evangelical Christians” and others.<sup>174</sup> The bill was proposed in “reaction to the Soviet inability to protect certain categories of its nationals in the wake of *perestroika* and *glasnost*.”<sup>175</sup> Markedly, the Lautenberg Amendment only required a showing of a “credible basis for concern about the possibility of such persecution.”<sup>176</sup> The Consolidated Appropriations Act of 2004 subsequently amended the Lautenberg Amendment to include the Specter Amendment, which compelled the designation of certain Iranian national religious minorities and loosened the evidentiary requirements for establishing refugee status.<sup>177</sup>

Congress has shown concern for humanitarian crises as well. In the early 1990s, Congress made immigrant visas available to Tibetan refugees that had been displaced by many years of Chinese communist oppression.<sup>178</sup> Later, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) added provisions to make domestic violence offenses grounds for deportation.<sup>179</sup> With IIRIRA, Congress also amended the “statutory definition of a ‘refu-

172. See LEGOMSKY & RODRIGUEZ, *supra* note 35, at 908.

173. See Melanie Laflin Allen, *Changes to the Lautenberg Amendment May Even the Score for Asylees; Legislative Reform*, 27 J. Legis. 215, 220 (2001); see also Andrew Brower, Note, *Asylum and the American Spirit: The Shift from Foreign Policy-Based Bias in Favor of Applicants from Enemy Countries to a Domestic Policy Based Bias Against Applicants from "High Risk" Countries*, 7 ELON L. REV. 571 (2015) (discussing the history of foreign policy-based asylum in the United States).

174. Allen, *supra* note 173, at 219; see also *Lautenberg Amendment*, *supra* note 168 at 1261–62.

175. Allen, *supra* note 173, at 219 (citing THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 723–27 (2d ed. 1991)).

176. See *id.* (citing *Lautenberg Amendment*, *supra* note 156 § 599D(a), 103 Stat. at 1262).

177. ANDORRA BRUNO, CONG. RESEARCH SERV., RL31269, REFUGEE ADMISSIONS AND RESETTLEMENT POLICY 7 (2015), <http://www.fas.org/sgp/crs/misc/RL31269.pdf>.

178. See Immigration Act of 1990, Pub. L. 101-649, § 134, 104 Stat. 4978 (1990); Ashley Dunn, *Resettlement of Tibet Refugees in U.S. to Begin*, LA TIMES (Jan. 1, 1992), [http://articles.latimes.com/1992-01-01/news/mn-1056\\_1\\_tibetan-refugee](http://articles.latimes.com/1992-01-01/news/mn-1056_1_tibetan-refugee).

179. Pub. L. No. 104-208, § 350, 110 Stat. 3009-546, 3009-639 to -640 (1996); see also Beach, *supra* note 121, at 3 (calling the domestic violence provision “a tool against violence against women”).

gee' to include any person who has been forced, or fears that she would be forced, to abort a pregnancy or to undergo involuntary sterilization."<sup>180</sup>

Nonetheless, lawmakers have expressed disapproval with legislative progress in this area. In 1996, for example, Senator DeWine proposed a bill to amend the INA to loosen asylum criteria for women "forced to undergo coerced abortions and sterilizations."<sup>181</sup> Senator DeWine eventually withdrew the proposed amendment in the face of vehement opposition by his peers.<sup>182</sup> Senator Simpson viewed the amendment with strong contempt: "if this amendment, in any form or this form, were to come to pass . . . I suggest that there will be millions of people who, under this language, will qualify."<sup>183</sup>

Despite these "floodgate" concerns, Congress continued to make exceptions for certain groups of refugees. In 1997, for instance, the Omnibus Consolidated Appropriations Act implemented the McCain Amendment, which made the adult children of Vietnamese re-education camp survivors eligible for U.S. refugee resettlement.<sup>184</sup> That same year, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACARA")<sup>185</sup> "[i]n response to prolonged civil wars in Nicaragua, Guatemala and El Salvador."<sup>186</sup> NACARA permitted adjustment of status for Nicaraguan and Cuban nationals and suspension of deportation or special rule cancellation of removal for nationals of certain Central American and former Soviet bloc nations.<sup>187</sup> The Haitian Refugee Immigration Fairness Act of 1998 granted permanent resident status to Haitian refugees already present in the United States.<sup>188</sup> The Syrian Adjustment Act of 2000 made it possible for Jewish nationals of Syria, to bypass the

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180. Beach, *supra* note 121, at 3 (citing § 601, 110 Stat. at 3009-689).

181. 142 CONG. REC. S4593 (daily ed. May 2, 1996) (statement of Sen. DeWine).

182. *See id.*

183. *Id.* (statement of Sen. Simpson). Note that scholars have criticized IIRIRA on other grounds. *See, e.g.,* Lee Gelernt, *The 1996 Immigration Legislation and the Assault on the Courts*, 67 BROOK. L. REV. 455, 455 (2001) (noting that IIRIRA "ha[s] greatly restricted the substantive rights of immigrants"); Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved but Still Unfair*, 16 GEO. IMMIGR. L.J. 1, 7-32 (2001) (criticizing IIRIRA's one-year filing deadline for asylum applications and its expedited removal provisions).

184. BRUNO, *supra* note 177, at 8.

185. Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, §§ 202-203, 111 Stat. 2160, 2193-2200 (1997).

186. LEGOMSKY & RODRIGUEZ, *supra* note 35, at 645.

187. NACARA §§ 202-203.

188. Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, §902, 112 Stat. 2681-538, 2681-538 to -541 (1998).



numerical limit on asylum-based immigrant visas and obtain permanent resident status.<sup>189</sup>

These ad hoc provisions make it clear that Congress has at times provided relief to individuals who would not otherwise qualify for refugee or asylum status. This framework for change has even been extended to include victims of domestic violence, under IIRIRA.<sup>190</sup> Congress's actions, however, should only be viewed as precedential backdrop, since they were designed to serve ulterior goals and did not result in satisfactory reform of refugee and asylum policy.

### B. Amending the INA Definition of "Refugee"

Without doubt, congressional reform of the definition of "refugee" in the INA would provide the statutory protections needed by victims of sexual violence seeking asylum. As we have seen, Congress has been willing to amend the definition in the past.<sup>191</sup> The current exclusive list of protected grounds in section 101(a)(42)(A) of the INA — "race, religion, nationality, membership in a particular social group, or political opinion" — is insufficient in practice to provide consistent protection to victims of sexual persecution. By amending the INA, the United States would follow in the footsteps of governments abroad that have acknowledged that gender-related persecution, including sexual violence, demands protection.<sup>192</sup>

A 2004 survey by UNHCR found that seventeen of the forty-one European countries surveyed recognized sexual violence as a conceivable form of persecution.<sup>193</sup> The Scandinavian countries that are parties to the UN Convention have expanded their protected grounds to incorporate gender, sexual orientation, and other categories of gender-related persecution.<sup>194</sup> Sweden included "gender, sexual orientation or other membership of a particular social group" in

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189. Syrian Adjustment Act, Pub. L. No. 106-378, 114 Stat. 1442 (2000).

190. Immigration Control and Financial Responsibility Act of 1996, 142 Cong. Rec. S4592, 4592 Append (1996).

191. See *supra* note 180 and accompanying text.

192. See, e.g., UNHCR *Comparative Analysis*, *supra* note 134, at 34–35 (listing Austria, Belarus, Belgium, Denmark, France, Germany, Greece, Hungary, Ireland, the Netherlands Norway, Romania, Slovenia, Spain, Sweden, Switzerland and the United Kingdom as countries recognizing sexual violence as persecution).

193. See *id.* at 35.

194. See generally Petter Hojem, *Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia* 10–16 (U.N. High Comm'r for Refugees, Paper No. 181, 2009), <http://www.unhcr.org/4b18e2f19.pdf> (discussing cases in which asylum is granted on grounds of sexual orientation).

the Swedish Aliens Act of 2005.<sup>195</sup> Norway revised its asylum policy in 2008 to expand protection for persecution directed towards gender or against children.<sup>196</sup> Denmark's Aliens Act offers subsidiary protection to individuals who do not fit within the traditional protected grounds of the UN Convention, "but who risk death sentence, torture, inhuman or degrading treatment."<sup>197</sup>

Moreover, other nations have updated their immigration legislation to recognize sex and gender-based persecution, either in light of criticism or to take into account the pressing need to specifically protect victims of gender-based and sexual violence. Germany, for example, was disparaged for maintaining a system of asylum laws that were "discriminatory against women and others with gender-related claims, as the grounds for their asylum claims traditionally did not fit the designation of political persecution."<sup>198</sup> In response, Germany amended its immigration laws in 2004 to "clarif[y] that persecution based on membership in a particular social group may be established if there is a threat to a person's life, physical integrity, or liberty solely on account of gender."<sup>199</sup> Similarly, South Africa amended its Refugees Act in 2008 to "explicitly incorporate[] gender-related persecution claims by including gender as one of the possible bases for a 'particular social group' as well as by adding gender as a separate ground for refugee status."<sup>200</sup> These countries only represent a portion of international states that have recognized the importance of enacting laws to specifically recognize sex and gender-based asylum claims.

Despite international progress, any potential amendment to U.S. immigration law must be carefully designed to encompass those who need protection and to allay fears of unrestricted immigration.<sup>201</sup> A new protected ground must explicitly recognize gender-related persecution and retain flexibility to include persecution in the form of sexual violence. Thus, this Note proposes that section

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195. 4 ch. 1 § UTLANNINGSLAG [ALIENS ACT] (Svenskforfuttning-sumling [SFS] 2005;716) (Swed.), [http://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005\\_716.pdf](http://www.government.se/contentassets/784b3d7be3a54a0185f284bbb2683055/aliens-act-2005_716.pdf); see also Hojem, *supra* note 194, at 14.

196. Hojem, *supra* note 194, at 11-12.

197. *Id.* at 10.

198. REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 29 (citing Birthe Ankenbrand, *Refugee Women under German Asylum Law*, 14 INT'L J. REFUGEE L. 45, 48 (2002)).

199. REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 30 (citing Zuwanderungsgesetz [Immigration Act], July 30, 2004, BGBl. I at §§ 60 (1), 60(1)(c) (Ger.)).

200. REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 48 (citing Refugees Amendment Act 33 of 2008 § 1(xxi) (S. Afr.)).

201. See *infra* Part V.

101(a)(42)(A) of the INA should be revised to read, “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group – including gender, sex, sexual orientation – or political opinion.”

These five innocuous words would serve to provide asylum relief to victims of persecution based upon inherently particular, distinct, and immutable characteristics. The addition of gender, sex, and sexual orientation into the “refugee” definition would establish an independent basis for victims of sexual violence to assert recognizable claims.<sup>202</sup> This would obviate the need of applicants to shoehorn their claims into the traditionally protected grounds.<sup>203</sup> Applicants would also be able to express a more “realistic version” of the persecution they faced by diminishing the effect of discretionary inconsistencies in PSG cases.<sup>204</sup> Furthermore, adjudicators would no longer have to determine whether gender is a cognizable basis for a PSG.<sup>205</sup> Revising the “refugee” definition alone, however, is inadequate to accomplish sufficient reform.

### C. Devising New Asylum Regulations

In concert with amending the INA, new regulations should be implemented to facilitate the consistent and equitable adjudication of gender and sex-based asylum claims. Presently, the asylum regulations provide only superficial guidance for establishing asylum eligibility and fail to expound upon the protected grounds established in the INA.<sup>206</sup> Previous attempts at revising the regulations have been fruitless and misplaced.<sup>207</sup> New regulations should delineate typical categories of sex and gender-based claims and criteria for establishing asylum eligibility. As a foundation for new regulations, the UNHCR Guidelines on the Protection of Refugee Women furnish substantive and salient direction.<sup>208</sup> Expanding upon these

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202. See Immigration and Nationality Act (INA) of 1990, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012); LEGOMSKY & RODRIGUEZ, *supra* note 35, at 983.

203. Tatyana, for example, unsuccessfully attempted to assert her claim for asylum under the political opinion and PSG categories. See *Basova v. INS*, No. 98-9540, 1999 U.S. App. LEXIS 15715, at \*3-4 (10th Cir. July 14, 1999).

204. USCIS Roundtable, *supra* note 141.

205. See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993).

206. Compare 8 C.F.R. § 208.13(b) (2015), with INA § 101(a)(42)(A).

207. See *supra* text accompanying notes 82-84.

208. See U.N. High Comm’r for Refugees, *Guidelines on Protection of Refugee Women*, ¶ 71, U.N. Doc. EC/SCP/67 (July 1991) (“Promote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining ref-

guidelines, parties to the UN Convention “have promulgated guidelines for adjudicators determining gender-based asylum claims that explicitly recognize gender-based persecution as a ground for asylum.”<sup>209</sup>

Countries that possess characteristics akin to those of the United States,<sup>210</sup> and that are therefore appealing to individuals seeking asylum protection, have successfully articulated regulations and guidelines for adjudicating sex and gender-based claims. Canada, for example, was the first nation to promulgate guidelines on gender-based persecution in 1993.<sup>211</sup> The guidelines establish four general gender-based categories, including a “gender-defined social group.”<sup>212</sup> The Canadian guidelines distinguish the general categories based on the typical nature of persecution against women, and provide examples of claims or situations under each criteria.<sup>213</sup> The guidelines also enumerate the various subcategories of particular social groups that include gender-related persecution and provide relevant factors for evaluating statutory asylum criteria.<sup>214</sup> Finally, the guidelines provide information on special problems that may arise during an immigration hearing, as well as a framework for analysis of gender-based asylum claims.<sup>215</sup>

Likewise, Australia issued new gender guidelines in 2010, which were updated in 2012, setting forth procedural considerations for evaluating gender-related “protection” visa cases.<sup>216</sup> Notably, Aus-

ugee status.”); *Id.* ¶ 73 (“Adjudicators should be familiar with the status and experiences of women in the country from which a refugee claimant has fled.”).

209. LAURA SHERIDAN MOUTON, COMM. ON IMMIGRATION AND NATIONALITY LAW ASS’N OF THE BAR OF N.Y.C. GENDER-RELATED ASYLUM CLAIMS AND THE SOCIAL GROUP CALCULUS: RECOGNIZING WOMEN AS A “PARTICULAR SOCIAL GROUP” *PER SE* 1 (2003) (discussing guidelines issued by Canada, Australia, and the United Kingdom).

210. Desirable characteristics could include opportunity, prosperity, and quality of life.

211. REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 16 (citing Judith Ramirez, *The Canadian Guidelines On Women Refugee Claimants Fearing Gender-Related Persecution*, 14 REFUGEE 3, 3 (1994)).

212. *Id.* (citing IMMIGR. & REFUGEE BD. OF CAN., GUIDELINE 4 WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT (1996) (Can.) [hereinafter CANADA GENDER GUIDELINES] (providing for women who fear persecution (1) in similar circumstances to men, (2) because of kinship ties, (3) resulting from gender discrimination or violence, or (4) because of religious or cultural laws and practices), <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx>).

213. *See generally* CANADA GENDER GUIDELINES, *supra* note 212.

214. *Id.*

215. *Id.*

216. REVIEW OF FOREIGN GUIDELINES, *supra* note 14, at 8–9 (discussing Migration and Refugee Div., *Guidelines on Gender*, ADMIN. APPEALS TRIBUNAL 4 (July, 2015) (Austl.) [hereinafter AUSTRALIA GENDER GUIDELINES], <http://www.aat.gov.au/AAT/>

tralia's guidelines carefully identify "gender-related persecution," "gender specific persecution," and "gender based violence" as sufficient bases for recognizable claims.<sup>217</sup> The Australian guidelines provide a nonexclusive list of gender-related claims based on specific types of violence, set forth the difficulties individuals face in making a gender or sex-related claim, and note the various issues adjudicators should be sensitive to when evaluating such claims.<sup>218</sup> Similarly, the United Kingdom promulgated regulations in 2006, which declare that persecution may be "an act of physical or mental violence, including an act of sexual violence[.]"<sup>219</sup>

The United States should observe similar practices to its international peers and set forth regulations detailing the adjudication of sex and gender-based asylum claims. Taking cues from Canada and Australia, this Note proposes that these new regulations must include the following three sections.

First, new regulations should define general categories for sex- and gender-related asylum claims. These categories should consist of a non-exhaustive list of the most common types of claims as a benchmark for applicants and adjudicators.<sup>220</sup> Simultaneously, these categories would constrict a potentially overbroad<sup>221</sup> applicant pool and would provide guidance for applicants to tailor their claims.

Second, new regulations should provide detailed guidance regarding what constitutes and satisfies the *prima facie* criteria for asylum in sex- and gender-related claims.<sup>222</sup> These criteria would help identify the qualities and characteristics needed to make a successful claim. By enumerating affirmative factors, the regulations would protect against inequitable outcomes in cases that would tra-

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media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Gender.pdf).

217. AUSTRALIA GENDER GUIDELINES, *supra* note 216, at 3–4.

218. *See id.* at 3–7.

219. The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI 2006/2525, § 5(2)(a) (U.K.),

[http://www.legislation.gov.uk/uksi/2006/2525/pdfs/uksi\\_20062525\\_en.pdf](http://www.legislation.gov.uk/uksi/2006/2525/pdfs/uksi_20062525_en.pdf). The U.K. regulations also denote a possible PSG based on sexual orientation. *Id.* § (6)(1)(e).

220. Canada's guidelines, for example, which list four main categories of cases, provide, "Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons." CANADA GENDER GUIDELINES, *supra* note 212, at § A(I)(3).

221. *See Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (B.I.A. 2014) (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005)).

222. *See, e.g.,* CANADA GENDER GUIDELINES, *supra* note 212 (directing decision-makers to consider various enumerated criteria and specific evidence when applying the statutory framework and evaluating cases).

ditionally fail the “on account of” requirement.<sup>223</sup> Adjudicators would therefore be equipped to evaluate asylum claims more consistently based on these criteria.

Finally, the regulations should set forth a framework for analysis with information on the nuances of sex- and gender-related asylum claims.<sup>224</sup> This would make adjudicators aware of the sensitive nature and particular difficulties inherent in these claims at a personal level, thereby facilitating dignified and efficient decision-making. Regulations that succeed in accomplishing these goals would effectively provide sufficient protection to victims of sex and gender-based persecution beyond typical domestic violence cases.

#### IV. FLOODGATES CONCERNS

Those who seek to criticize the expansion of asylum protection to include gender and sex-based persecution may fear an immigration influx, but there is no “reasonable possibility”<sup>225</sup> that these fears will come to fruition.<sup>226</sup> As courts<sup>227</sup> and scholars have noted, the main apprehension haunting the enumeration of gender as protected

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223. See *supra* notes 61–63 and accompanying text.

224. Australia, for example, provides:

The difficulties faced by applicants may include but are not limited to: an assumption that female applicants' claims are derivative of male relatives' claims[;] difficulty an applicant may have in discussing his or her experiences of persecution because of shame or trauma[;] cultural differences or experience of trauma affecting an applicant's ability to give testimony or his or her demeanour[;] the compounding effect on an applicant's trauma that immigration detention may have[;] difficulties establishing the credibility of an applicant's claims[;] a fear of rejection and/or reprisals from his or her family and/or community.

AUSTRALIA GENDER GUIDELINES, *supra* note 216, at 5.

225. 8 C.F.R. § 208.13(b)(2)(i)(A)–(C) (2015).

226. Security concerns may also arise when considering asylum reform, especially in a post-9/11 setting. Places like Iraq and Syria constitute a “battlefield [containing] the largest concentration of foreign extremists we have seen in any major war . . . .” *The Syrian Refugee Crisis and Its Impact on the Sec. of the U.S. Refugee Admissions Program: Hearing Before the Subcomm. on Immigration and Border Sec. of the H. Comm. on the Judiciary*, 114th Cong. 20, 42 (2015) (statement of Seth G. Jones, Director, International Security and Defense Policy Center, Rand Corporation). The United States government, however, has taken substantial measures to protect against dangerous foreign nationals to the detriment of persecuted and displaced individuals. In fact, the current state of security procedures is “[s]o strong, that it has made the refugee resettlement program into more fortress than ambulance, causing massive backlogs of legitimately deserving and unnecessarily suffering refugees.” *Id.* (statement of Mark Hetfield, President and CEO, Hebrew Immigrant Aid Society). Further efforts are being considered to this end, including in November of 2015, the House of Representatives passed a bill requiring in-depth background investigation of nationals, current residents, and recent residents of Syria and Iraq. American Security Against Foreign Enemies Act of 2015, H.R. 4038, 114th Cong. §2(a), (e)(1) (2015).

227. See *supra* note 146 and accompanying text.

ground is “a concern about the size of the group and a fear that too many of the world’s downtrodden women will rush the gates of the more prosperous countries of the developed world seeking asylum there.”<sup>228</sup> Detractors of reform not only cast aside the reality of legitimate asylum claims, but they cite obtuse justifications for restricting sex and gender-based claims.<sup>229</sup> These individuals fail to recognize the practical restrictions on asylum claims and refuse to accept the experiences of countries that permit sex and gender-based claims.

The current asylum framework already provides large potential applicant pools—the result of which has not been catastrophic. The “classic fear of opening the ‘floodgates’ has not prohibited recognition in refugee law that other enumerated grounds—such as race, religion, and nationality—necessarily encompass huge populations.”<sup>230</sup> Thus, Congress would not create or increase the burden on the system by enumerating gender as a protected ground.

Additionally, from a statutory standpoint, the asylum process is a labyrinth.<sup>231</sup> Notably, all asylum seekers must establish that they have suffered harm that rises to the level of persecution.<sup>232</sup> Victims of merely occasional abuse are unlikely to satisfy this high standard.<sup>233</sup> Individuals that face persecution by “non-state actors” face an additional hindrance in making a successful asylum claim.<sup>234</sup> Furthermore, case-by-case review is a tenet of asylum law, which requires an individualized review by an experienced adjudicator who is unable to simply rubber-stamp each asylum claim or issue blanket approvals.<sup>235</sup> These statutory and procedural safeguards protect against any potential deluge of claims.

Various practical reasons also act to constrict the flow of abused refugees. Victims of sexual violence are often reluctant to disclose the details of the abuse they faced, which may prevent them from satisfying their burden of proof.<sup>236</sup> The very nature of abusive rela-

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228. Randall, *supra* note 32, at 563.

229. “‘A lot of these cases are undeniably horrific, but do we want to destroy our refugee system to make these ultimately political statements about domestic violence?’ asked Michael M. Hethmon, a lawyer . . . for the Federation for American Immigration Reform, a group that seeks reduced immigration.” Julia Preston, *Woman Is First to Be Ruled Eligible for Asylum in U.S. on Basis of Domestic Abuse*, N.Y. TIMES, Aug. 30, 2014, at A12.

230. See Randall, *supra* note 32, at 564.

231. See *supra* Part II.A.

232. See *id.*

233. See Marsden, *supra* note 146, at 2554.

234. See *supra* notes 149–50 and accompanying text.

235. See Randall, *supra* note 32, at 564.

236. See, e.g., *An Overview of Asylum Policy: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 46 (2001) (statement of Allen S. Keller, Physician, New

tionships, of all types, prevents victims of abuse from leaving the relationship.<sup>237</sup> Even victims that are able to flee their abusive situation may be forced to choose between leaving their life, family, and country behind, and seeking sanctuary abroad.<sup>238</sup> Moreover, many victims of sex and gender-based violence lack the financial wherewithal and other resources necessary to travel to the United States and make a compelling asylum claim.<sup>239</sup> All of these issues pose formidable barriers to asylum seekers sufficient to quell floodgate fears.

The experiences of other countries lend support to the expansion of asylum protection for victims of sex and gender violence. As the first nation to provide gender guidelines in 1993, it would seem likely that Canada faced an explosion in the number asylum claims it received. In reality, "Canada 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 [g]ender [g]uidelines."<sup>240</sup> Furthermore, even a cursory review of Canadian immigration statistics leads to the same conclusion: the "floodgates" did not open with gender claims or claims by women.<sup>241</sup> Similarly, Australia was not plagued by an immigration influx following the enactment of its 2010 gender guidelines, and instead saw the following trend in applications for "protection visas": 5,760

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York University School of Medicine) (discussing a former patient who had been incarcerated and raped by police in her home country: "[S]he once told me that she wasn't going to apply for asylum because she couldn't bear to tell her story . . . . It would have been psychologically devastating for her to have to recount these events . . .").

237. See 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, 380 (2009) (discussing the cycle of domestic violence).

238. See *id.* at 380–81 (discussing the cycle of domestic violence); 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).

239. See Leonard Birdsong, *A Legislative Rejoinder to "Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution..."*, 35 WM. MITCHELL L. REV. 197, 214 (2008) (citing experience in immigration court); Musalo, *supra* note 238, at 133.

240. Musalo, *supra* note 238, at 133 (citing e-mail from Janet Dench, Canadian Council for Refugees, to Karen Musalo, (on file with author)).

241. Citizenship and Immigration Canada, *Facts and Figures 2013*, IMMIGRANT OVERVIEW, TEMPORARY RESIDENTS 64, fig. 10.1 (2013) (Can.), <http://www.cic.gc.ca/english/pdf/2013-facts-temporary.pdf> (providing the following statistics for refugee claims made by female persons within Canada per year: 8,596 in 1994; 10,263 in 1995; 10,214 in 1996; 9,376 in 1997; 9,817 in 1998; 11,815 in 1999; 15,112 in 2000; 18,484 in 2001; 13,999 in 2002; 13,400 in 2003; 11,095 in 2004; 8,715 in 2005; 10,279 in 2006; 12,841 in 2007; 16,358 in 2008; 14,550 in 2009; 10,166 in 2010; 11,492 in 2011; 9,196 in 2012).



applications in 2008–2009; 10,578 applications in 2009–2010;<sup>242</sup> 11,511 applications in 2010–2011,<sup>243</sup> 14,436 applications in 2011–2012,<sup>244</sup> and 8,480 applications in 2012–13.<sup>245</sup> Thus, even if millions of people potentially qualified under gender and sex-based persecution grounds,<sup>246</sup> real-world experiences of other nations demonstrate that an explosion in immigration is improbable.

### CONCLUSION

Asylum law recognizes individuals that have suffered persecution because of their race, religion, nationality, and political opinion. Yet it fails to recognize a concept that is equally important: our right to be free from violence based in sex and rooted in gender. Sex and gender-based persecution affects all genders and takes a myriad of forms. Its victims exist across the globe. Congress demonstrated its leniency in the past, when action was needed to protect those in dire situations. Yet Congress's benevolence did not open the floodgates. Similarly, the floodgates did not open in other countries that enacted progressive legislation designed to create safe harbors for those that have suffered sexual violence. What remains to be done is clear: we must amend the INA and accompanying regulations to provide an avenue for protection that builds on *A-R-C-G-* and goes beyond domestic violence claims. Only then will victims like Tatyana find a safe haven in the law and on U.S. soil.

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242. Dep't of Immigration and Border Prot. (DIBP), *Asylum Statistics – Australia: QUARTERLY TABLES—JUNE QUARTER 2011 1*, tab. 1 (2011) (Austl.), <http://www.border.gov.au/ReportsandPublications/Documents/statistics/asylum-stats-june-quarter-2011.pdf>.

243. Dep't of Immigration and Border Prot. (DIBP), *Asylum Statistics – Australia: QUARTERLY TABLES—JUNE QUARTER 2012 2*, tab. 1 (2012) (Austl.), <http://www.border.gov.au/ReportsandPublications/Documents/statistics/asylum-stats-june-quarter-2012.pdf>.

244. Dep't of Immigration and Border Prot. (DIBP), *Asylum Statistics – Australia: QUARTERLY TABLES—JUNE QUARTER 2013 1*, tab. 1 (2013) (Austl.), <http://www.border.gov.au/ReportsandPublications/Documents/statistics/asylum-statistics-aus-jun-qtr-2013.pdf>.

245. Dep't of Immigration and Border Prot. (DIBP), *Asylum Statistics – Australia: QUARTERLY TABLES—JUNE QUARTER 2014 6, 12*, tab. 1, tab. 9 (2014) (Austl.), <http://www.border.gov.au/ReportsandPublications/Documents/statistics/asylum-statistics-aus-jun-qtr-2014.pdf>.

246. See 142 CONG. REC. S4593–94 (daily ed. May 2, 1996) (statement of Sen. Simpson).