
HUMAN TRAFFICKING AND U.S. ASYLUM: EMBRACING THE SEVENTH CIRCUIT’S APPROACH

KELSEY M. MCGREGOR*

I. INTRODUCTION

After struggling to provide for her children in her native country of Mexico, Esperanza lost one of her children to starvation.¹ Devastated, she determined to leave her children in the care of family and seek work in Los Angeles.² Pursuing what she believed to be a legitimate job offer, Esperanza was instead trafficked into a U.S. sweatshop.³ Separated from her children and unable to send any earnings home, Esperanza was cruelly abused by her traffickers.⁴ She recalls one trafficker asserting: “Dogs have more rights than you in this country. You are here illegally. And nobody can trust you. If you go to the police they might put you in jail because you have no papers . . . and if you do something I will call to the INS and they send you back, and not only send you back, they might put you in jail.”⁵

Esperanza is not alone in her experience. Globally, the U.S. Department of State has estimated that approximately six hundred thousand to eight hundred thousand people are trafficked annually across international borders, approximately half of whom are younger than

* J.D., University of Southern California Gould School of Law; M.P.H., Brigham Young University. Special thanks to Professor Edwin Smith for his support and guidance throughout the drafting and publication process.

1. *About the Issue: Providing Survivors with the Seeds of Renewal*, COAL. TO ABOLISH SLAVERY & TRAFFICKING, <http://www.castla.org/survivor-stories> (last visited Sept. 7, 2014).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Esperanza*, COAL. TO ABOLISH SLAVERY & TRAFFICKING, <http://www.castla.org/esperanza> (last visited Sept. 7, 2014).

eighteen years of age.⁶ Estimates of the total current number of individuals who have been trafficked worldwide range from four million to twenty-seven million.⁷ Even in the “land of the free,” thousands of individuals like Esperanza are trafficked into the U.S. each year and forced into exploitative, slave-like labor.⁸ The U.S. Citizenship and Immigration Services, a division of the Department of Homeland Security (“DHS”), has described human trafficking as a form of “modern-day slavery,” in which traffickers prey on the marginalized, particularly individuals who are:

poor, frequently unemployed or underemployed, and who may lack access to social safety nets, predominantly women and children in certain countries. Victims are often lured with false promises of good jobs and better lives, and then forced to work under brutal and inhuman conditions.⁹

Victims of trafficking are exploited in a variety of ways, including commercial sex, forced labor, domestic servitude, factory work, and agricultural labor.¹⁰ In the last ten to fifteen years, this pervasive trade in human beings has come under global scrutiny, with many nations instituting policies to combat it. In 2000, a watershed international treaty—the Protocol to Prevent, Suppress and Punish Trafficking in Persons (“the Palermo Protocol”)—was passed, defining three main elements necessary for a crime of trafficking: (1) an act of “recruitment, transportation, transfer, harboring or receipt of persons”; through (2) “means” such as the “threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits”; for (3) the “purpose” of “prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal

6. HEATHER J. CLAWSON ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., HUMAN TRAFFICKING INTO AND WITHIN THE UNITED STATES: A REVIEW OF THE LITERATURE 4 (2009), available at <http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/index.pdf>.

7. *Id.*

8. Christian Sabyan, Emily Smith & Manav Tanneeru, *Trafficking into the U.S.*, THE CNN FREEDOM PROJECT, <http://thecnnfreedomproject.blogs.cnn.com/2011/06/17/trafficking-and-the-u-s/> (last visited Sep. 8, 2014) (“Between 14,500 and 17,500 people are trafficked into the U.S. each year . . .”).

9. U.S. CITIZENSHIP & IMMIGRATION SERVS., IMMIGRATION REMEDIES FOR TRAFFICKING VICTIMS (2008) [hereinafter TRAFFICKING PAMPHLET], available at http://www.dhs.gov/xlibrary/assets/ht_uscis_immigration_remedies.pdf.

Trafficking can also involve the removal of organs. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Nov. 15, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

10. TRAFFICKING PAMPHLET, *supra* note 9.

of organs” or other types of exploitation.¹¹ The U.S. has championed this definition and the fight against human trafficking by adopting the definition in our domestic law,¹² establishing a State Department Office to Monitor and Combat Trafficking in Persons,¹³ and developing and issuing an annual report on human trafficking around the globe,¹⁴ to name a few measures. Human trafficking clearly constitutes persecution under U.S. law, and “often occurs on account of social group membership or other protected grounds.”¹⁵

Despite this, the U.S. offers limited protection measures for survivors or potential victims of trafficking seeking redress. While approximately 14,500 to 17,500 individuals are trafficked into the U.S. each year,¹⁶ as of June 2007, only 1,264 foreign nationals had been certified by the U.S. Department of Health and Human Services as “victims” of human trafficking.¹⁷ Indeed, even though Congress has provided for an annual allocation of up to 5,000 trafficking-specific visas for survivors, the government has issued fewer than 1,000 per year.¹⁸ Despite the availability of several remedies to survivors of trafficking, some trafficked persons cannot secure protection under our current laws, nor safely return to their nations of origin.¹⁹ This disparity results in a class of refugees who do not consistently receive protection for which it rightfully qualifies. Providing asylum to these individuals would fill the current gaps in our system, and a 2013 decision in the U.S. Court of Appeals for the Seventh Circuit has made that remedy more plausible.

In *Cece v. Holder*, the Seventh Circuit split with the Sixth when it issued a judgment acknowledging that young women living alone in Albania who fear being trafficked for sex may qualify as members of a

11. Palermo Protocol, *supra* note 9, art. 3(a).

12. 22 U.S.C. § 7102(8)–(9) (2012).

13. *Id.* § 7103(e)(1). See also *Office to Monitor and Combat Trafficking in Persons: About Us*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/about/index.htm> (last visited Sept. 20, 2014).

14. *Id.* § 7107(b)(1). See also *Trafficking in Persons Report*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/rls/tiprpt/index.htm> (last visited Sept. 20, 2014).

15. WORLD ORG. FOR HUMAN RIGHTS USA, GUIDE TO ESTABLISHING THE ASYLUM ELIGIBILITY OF VICTIMS OF HUMAN TRAFFICKING AND FORCED MARRIAGE 8 (2011) [hereinafter ASYLUM ELIGIBILITY GUIDE], available at http://www.uscirefugees.org/2010Website/5_Resources/5_4_For_Lawyers/5_4_3_Human_Trafficking_Resources/5_4_3_3_Human_Trafficking_Links/Guide_to_Establishing_Asyum_Trafficking_Lynsey_Gott.pdf.

16. U.S. DEP’T OF JUSTICE ET AL., ASSESSMENT OF U.S. GOVERNMENT EFFORTS TO COMBAT TRAFFICKING IN PERSONS 5 (2004) [hereinafter TRAFFICKING ASSESSMENT].

17. CLAWSON ET AL., *supra* note 6, at 4.

18. Katherine Kaufka, *T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner’s Guide*, 06-09 IMMIGR. BRIEFINGS 1, n.8 (2006).

19. ASYLUM ELIGIBILITY GUIDE, *supra* note 15, at 7–8.

“particular social group” eligible for asylum in the U.S.²⁰ In order for an applicant to succeed on such a claim she must demonstrate a well-founded fear of persecution due to her membership in this newly-acknowledged group.²¹ Until now, individuals who asserted inclusion in such a group were typically ineligible for asylum; however, the Seventh Circuit’s ruling opens the door to future consideration of asylum for trafficked persons and persons vulnerable to trafficking. Unlike past rulings, this recent decision is more in line with U.S. treaty obligations, foreign case law, and our own abolitionist rhetoric.²² In light of this decision and relevant international jurisprudence and treaty obligations, the Department of Justice (“DOJ”) and DHS would do well to specifically acknowledge survivors of trafficking and people vulnerable to trafficking as members of a “particular social group” eligible for asylum.

This Note aims to explore the holes in our system of trafficking redress, the Seventh Circuit’s decision and the justifications for its conclusions, and next steps for more consistently and effectively adjudicating trafficking-related asylum claims. Part II outlines how the Trafficking Victims Protection Act (“TVPA”)²³ falls short of protecting potential victims and survivors of trafficking. Part III briefly reviews the U.S. federal courts’ history of excluding trafficking-related parties from the asylum regime. It also describes the Seventh Circuit’s decision in *Cece v. Holder*, which split with this history. Part IV interprets pertinent domestic law in light of legislative intent, U.S. treaty obligations, and related United Nations (“UN”) guidelines. This discussion illustrates that the Seventh Circuit’s approach is correct, and that U.S. asylum law ought to be construed so that victims and potential victims of trafficking are legitimate candidates for refuge. Part V surveys relevant foreign jurisprudence, which provides further evidence that the U.S. ought to interpret its asylum law in a broad rather than inflexible manner, as did the Seventh Circuit in *Cece*. Part VI concludes by observing that the Seventh Circuit’s decision represents a better alignment with relevant U.S. policy, treaty obligations, and foreign jurisprudence. It further notes that, while broader reforms are

20. *Cece v. Holder*, 733 F.3d 662, 668, 672 (7th Cir. 2013). For the Sixth Circuit’s decision, see *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Cir. 2005).

21. Female-gendered pronouns are used here in reference to the female social group acknowledged in the prior sentence. This is not to say males may not be eligible for similar claims.

22. *See, e.g.*, Barack Obama, Remarks to the Clinton Global Initiative (Sept. 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/25/remarks-president-clinton-global-initiative> (“It ought to concern every person, because it is a debasement of our common humanity. It ought to concern every community, because it tears at our social fabric. . . . I’m talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery.”).

23. 22 U.S.C. §§ 7101–13 (2012).

needed in our protection regime for survivors of trafficking or persons vulnerable to trafficking, strong interim measures would include other courts following the Seventh Circuit's inclusive approach to asylum, and the publication of related, specific regulations by the DOJ and DHS. To that end, Part VI advocates the adoption of UNHCR language as a regulation, acknowledging that survivors of trafficking and people vulnerable to trafficking may qualify as members of a "particular social group" eligible for asylum.

II. OVERVIEW OF THE TRAFFICKING VICTIMS PROTECTION ACT

The U.S. has developed several remedies for trafficked persons who wish to remain in this country; however, broader forms of protection are needed to adequately shelter trafficked persons and persons vulnerable to trafficking who do not qualify for these forms of relief.²⁴ Under the TVPA, victims of trafficking are eligible for either T visas or U visas.²⁵ These visas have benefited many trafficked persons; at a minimum, recipients are permitted to obtain temporary legal residence and access to refugee benefits.²⁶ While these visas have provided many with protection, the definitions in the TVPA, "along with other requirements for T visas, have serious limitations that have allowed many trafficked persons to fall through the cracks,"²⁷ including: (1) individuals who were trafficked elsewhere and seek refuge in the U.S.; (2) women trafficked as brides; (3) survivors who refuse to work with prosecutors due to trauma or legitimate fear of retaliation against their families etc.;²⁸ and (4) individuals who have a well-founded fear of trafficking and seek refuge in the U.S.

24. WORLD ORG. FOR HUMAN RIGHTS USA, *supra* note 15, at 3.

25. "The T Nonimmigrant Status (T visa) is a set aside for those who are or have been victims of human trafficking, protects victims of human trafficking and allows victims to remain in the United States to assist in an investigation or prosecution of human trafficking." *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-human-trafficking-t-nonimmigrant-status> (last visited Sept. 20, 2014) [hereinafter *T Visas*]. Alternatively, "[t]he U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity." *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last visited Sept. 20, 2014).

26. *E.g.*, *T Visas*, *supra* note 25.

27. ASYLUM ELIGIBILITY GUIDE, *supra* note 15, at 5.

28. *See id.* at 5-7 (noting that asylum "can fill in the gaps left by the T visa" by potentially protecting those trafficked into other countries and victims of forced marriage, and that asylum does not require cooperation with the authorities).

These individuals, with the exception of those in the fourth category, are “considered ‘trafficked’” under the U.S.-authored international treaty on trafficking, yet they face deportation from the U.S. because they are unlikely to qualify for relief under domestic law.”²⁹ Individuals within the fourth category are left without any form of recourse at all. Providing asylum to these persons would fill the current gaps in our system; it could protect people trafficked into the U.S., trafficked in other countries, and victims of forced marriage or other situations that are not clearly protected by the TVPA’s provisions.³⁰ Additionally, while the T and U visa processes require that most applicants cooperate with law enforcement, asylum protection does not require cooperation.³¹ The World Organization for Human Rights USA contends that cooperation with law enforcement can be too challenging for victims for a variety of reasons:

Many people are simply too traumatized or afraid to cooperate with law enforcement efforts. For example, trafficked persons suffering from post-traumatic stress disorder . . . or other symptoms of trauma may have memory problems or other cognitive difficulties that would make providing information difficult. Going through a police interrogation or testifying in front of their traffickers could also result in further psychological trauma. Trafficked persons also have legitimate fears of retaliation at the hands of traffickers. Traffickers often operate in organized networks, and even if the immediate abuser is arrested, that person’s colleagues can track down and punish the escaped individual or members of her family. Many individuals may fear their traffickers will be even more likely to punish them if they provide information to police or testify in criminal proceedings.³²

While the 2005 TVPA amended its provision requiring T visa applicants to cooperate with law enforcement by providing exceptions for certain individuals, qualifying for an exception is not easy.³³ Neither Congress nor DHS have provided standards for identifying eligible parties, and even if an exception is invoked, there is no way to ensure that prosecutorial interests will not continue to outweigh victim’s interests.³⁴

29. *Id.* at 3.

30. *Id.* at 5.

31. Minors are exempted from law enforcement cooperation requirements. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(cc) (2012).

32. ASYLUM ELIGIBILITY GUIDE, *supra* note 15, at 6 (footnotes omitted) (citing Hussein Sadruddin, Natalia Walter & Jose Hidalgo, *Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses*, 16 STAN. L. & POL’Y REV. 379, 395 (2005); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 181 (2007)).

33. *Id.*

34. *Id.*

Furthermore, even if a T visa applicant willingly cooperates with law enforcement, that person must provide proof of cooperation. Ideally, a certification form is employed as proof, but because officers or prosecutors have discretion in determining whether to certify certain applicants, some legitimate survivors of trafficking are not properly certified.³⁵

Additionally, the TVPA's definitions can be limiting: to qualify as a "victim" under the law, a person must be "in the United States . . . on account of . . . trafficking."³⁶ This requirement precludes granting asylum to individuals who were trafficked outside the U.S. or face the threat of trafficking elsewhere, and afterwards escaped to the U.S. Thus, these individuals face deportation³⁷—a very serious threat to a survivor or potential victim of trafficking. Traffickers have been known to recapture or punish returnees, show up to harass them at the border station or airport, or even at the individual's home.³⁸ In cases where the survivor still owes a debt to the trafficker, re-trafficking is particularly likely, most especially in cases of women and children.³⁹

Finally, the numbers themselves are telling: while Congress provided for an annual allocation of up to 5,000 T-visas, the government has issued fewer than 1,000 per year.⁴⁰ As noted earlier, between 14,500 and 17,500 individuals are trafficked into the U.S. each year—a far greater influx than the number of visas the U.S. is providing.⁴¹ This suggests that the current legal framework does not adequately provide relief to even those victims

35. *Id.* at 6–7. All of this is true of the U-visa process as well.

36. 8 C.F.R. § 214.11(g) (2009). *See also* ASYLUM ELIGIBILITY GUIDE, *supra* note 15, at 7.

37. Technically, these parties face "removal." "'Removal' is a legal term that includes the two formerly separate processes of 'deportation' and 'exclusion.' Deportation applied to individuals already present within the United States, while exclusion applied to individuals attempting to enter the United States, such as someone attempting to pass through customs at an airport. Both processes are now referred to as removal." ASYLUM ELIGIBILITY GUIDE, *supra* note 15, at 7 n.9.

38. Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 59 (2001); U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, ¶ 17, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006) [hereinafter "*UNHCR Trafficking Guidelines*"], available at <http://www.refworld.org/docid/443679fa4.html>.

39. U.N. High Comm'r for Refugees, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, ¶ 18 (May 7, 2002) [hereinafter "*UNHCR Gender Guidelines*"], available at <http://www.refworld.org/docid/3d36f1c64.html> ("[T]rafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.").

40. Kaufka, *supra* note 18, at n.8.

41. TRAFFICKING ASSESSMENT, *supra* note 16, at 5; Sabyan, Smith & Tanneeru, *supra* note 8.

who are exploited within the U.S. In sum, the current TVPA regime falls short of offering necessary protection to all victims or potential victims of trafficking who rightfully seek refuge under our laws.

III. CONFLICTING U.S. CASE LAW

To be granted asylum in the U.S., a victim or potential victim of trafficking must fall within the definition of “refugee,”⁴² a hard task for most to accomplish.⁴³ Provided that a trafficking-related applicant “is found credible and does not encounter evidentiary problems,” she or he “typically has little trouble proving that her [or his] abduction and trafficking amounts to persecution.”⁴⁴ Instead, the primary obstacle encountered by trafficking-related asylum seekers is the third requirement of an asylum claim: demonstrated persecution that is based on one of five protected grounds.⁴⁵ Specifically, an asylum seeker must demonstrate an inability to return to his or her country of nationality due to past persecution or well-founded fear of future persecution on account of:

42. “[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .” 8 U.S.C. § 1101(a)(42)(A) (2012).

43. See *UNHCR Trafficking Guidelines*, *supra* note 38, ¶ 6 (“Not all victims or potential victims of trafficking fall within the scope of the refugee definition.”).

44. Tina Javaherian, Comment, *Seeking Asylum for Former Child Soldiers and Victims of Human Trafficking*, 39 PEPP. L. REV. 423, 445 & n.168 (2012) (citing *UNHCR Trafficking Guidelines*, *supra* note 38, ¶ 14 (“Persecution can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable predicament, as assessed in the light of the opinions, feelings and psychological make-up of the asylum applicant.”)). The “evolution of international law in criminalizing trafficking” has made it easier to determine whether an act of trafficking amounts to persecution. *UNHCR Trafficking Guidelines*, *supra* note 38, ¶ 15. Trafficking inherently involves “serious violations of human rights which will generally amount to persecution.” *Id.* In addition, if an applicant is able to prove that she will be re-trafficked upon return to her country, such actions would also usually amount to persecution. *Id.* ¶ 17.

45. See *UNHCR Trafficking Guidelines*, *supra* note 38, ¶ 29 (“In relation to asylum claims involving trafficking, the difficult issue for a decision-maker is likely to be linking the well-founded fear of persecution to a [protected] ground.”). “Central to the dispute over the applicability of refugee law to trafficking victims is the question of the link, or . . . nexus between the persecution and one of the protected grounds.” Stephen Knight, *Asylum from Trafficking: A Failure of Protection*, 07-07 IMMIGR. BRIEFINGS 1, 3 (2007), available at http://cgrsdrupal.uchastings.edu/sites/default/files/Asylum_from_Trafficking_Knight_Immigration_Briefings_7_07.pdf. Human trafficking is a commercial enterprise and is primarily motivated by profit rather than persecution on a ground under the Convention. See *id.* at 8 (arguing that this should not in itself be “a barrier to a grant of protection”). Immigration judges and the Board of Immigration Appeals “most frequently treat the claims of women refugees fleeing trafficking as victims of personal, criminal problems, and thus as ineligible for asylum for failure to demonstrate any link to any of the five statutory grounds.” *Id.* at 6.

(1) race, (2) religion, (3) nationality, (4) membership in a particular social group, or (5) political opinion.⁴⁶ Typically, the most promising ground for a trafficking-related applicant is membership in a “particular social group.”⁴⁷

Unfortunately, “U.S. courts have denied asylum to victims of attempted trafficking by applying narrow standards of what constitutes a ‘particular social group’ with a ‘well-founded fear of persecution.’”⁴⁸ Furthermore, there are both circuit splits and conflicting holdings within circuits as to whether gender and youth—typical factors considered in the group definitions sought by trafficking-related applicants—can define social groups.⁴⁹

A. THE SIXTH CIRCUIT’S *RRESHPJA* DECISION

The U.S. Court of Appeals for the Sixth Circuit’s decision in *Rreshpja v. Gonzales*⁵⁰ is perhaps most illustrative of the U.S. courts’ rejection of social group claims by victims of attempted trafficking. *Rreshpja* is also the decision with which the Seventh Circuit’s recent judgment most clearly conflicts. In *Rreshpja*, the Sixth Circuit denied asylum to an Albanian woman who was attacked and barely escaped capture by a trafficker.⁵¹ While the appellant was running from her trafficker, he called after her that “she should not get too excited because she would end up on her back in Italy, like many other girls.”⁵² Understandably, she took this statement as a threat that she would be trafficked for sex in the future.⁵³ Even though Albania is well known as a country with high rates of sex trafficking, and the appellant had been specifically targeted as a victim, the Sixth Circuit rejected her claim of belonging to a social group of “young (or those who appear to be young), attractive Albanian women who are forced into prostitution,” thus refusing her claim for asylum.⁵⁴

46. 8 U.S.C. §§ 1101(a)(42)(A) & 1158(b)(1)(B)(i) (2012).

47. Javaherian, *supra* note 44, at 445–46.

48. Kelly Karvelis, Comment, *The Asylum Claim for Victims of Attempted Trafficking*, 8 NORTHWESTERN J. L. & SOC. POL’Y 274, 282 (2013).

49. *Id.* at 275 (citing Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 422 (2007) (discussing a study that found “stunning variability from one circuit to another” with regard to asylum jurisprudence)); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 923 (1992) (“Current judicial and agency standards for judging social group status are vague and contradictory. As a result, courts have been slow to invoke this language and inconsistent in applying it.”).

50. *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Cir. 2005).

51. *Id.* at 553–56.

52. *Id.* at 553.

53. *Id.*

54. *Id.* at 555.

The Sixth Circuit concluded that “a social group may not be circularly defined by the fact that it suffers persecution,” observing that if the appellant’s social group claim were to be successful, then “virtually any young Albanian woman who possesses the subjective criterion of being ‘attractive’ would be eligible for asylum.”⁵⁵ While the Sixth Circuit fairly concluded that a subjective and flexible characteristic like being “attractive” should not be the defining trait of a particular social group, “it arguably erred in finding that the [appellant’s] claimed social group was defined by its persecution.”⁵⁶ Furthermore, its implication that such a broad social group would be inappropriate is inconsistent with U.S. treaty obligations and related foreign law.⁵⁷

B. THE SEVENTH CIRCUIT’S *CECE* DECISION

In 2013, the Seventh Circuit split with the Sixth when it issued its judgment in *Cece v. Holder*.⁵⁸ The case began when Johana Cece, a young woman from Albania, fled to the U.S. and applied for asylum because she feared she would be trafficked for sex.⁵⁹ An immigration judge granted her request on the ground that she belonged to a social group of “young women who are targeted for prostitution by traffickers in Albania.”⁶⁰ DHS appealed and the Board of Immigration Appeals (“BIA”) vacated the immigration judge’s finding, concluding that: (1) Ms. Cece’s social group was not socially visible and did not share a narrowing characteristic beyond the mere risk of being persecuted, and (2) Ms. Cece had successfully relocated within Albania before fleeing to the U.S.⁶¹

The immigration judge expressed concern about the BIA’s decision, but recognized that he was bound by it on remand, and therefore he denied asylum.⁶² Ms. Cece appealed, and while the Seventh Circuit had rejected the BIA’s visibility requirement at that point,⁶³ the BIA still dismissed Ms. Cece’s appeal. The BIA concluded that: (1) her proposed group was substantially defined by the harm inflicted on its members, (2) the proposed group did not exist independent of her persecutors, and (3) there was

55. *Id.* at 556.

56. Karvelis, *supra* note 48, at 280.

57. *See infra* Parts IV–VI.

58. *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013).

59. *Id.* at 666–67.

60. *Id.* at 667 (internal quotation marks omitted).

61. *Id.* at 668.

62. *Id.*

63. *Id.* at 668 n.1. The social visibility test is not discussed here given that it ultimately had no bearing on Ms. Cece’s case.

insufficient evidence that internal relocation was unreasonable.⁶⁴ Ms. Cece filed a petition for review, which the Seventh Circuit denied over one dissent.⁶⁵ Afterwards, the Seventh Circuit granted Ms. Cece's petition for rehearing en banc and vacated the BIA's judgment.⁶⁶

In its opinion, the court noted that its primary issue was "whether Cece [had] proffered a particular social group that is cognizable" under asylum law.⁶⁷ When examining Ms. Cece's social group, the Seventh Circuit discussed three unique issues that clarify the meaning of "particular social group." First, it considered the definition of "particular social group," observing that the BIA had limited its definition to "groups whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change."⁶⁸ Examples of an immutable or fundamental characteristic could include "membership in an extended family, sexual orientation, a former association with a controversial group, or membership in a group whose ideas or practices run counter to the cultural or social convention of the country."⁶⁹ The court observed that group members "need not be swimming against the stream of an embedded cultural norm." Rather:

Sometimes the characteristic is immutable because a shared past experience or status has imparted some knowledge or labeling that cannot be undone. Thus, we have held that former truckers (or, more generally, those with a special skill needed by the persecutors) constitute a social group because their past actions and acquisition of skills are unchangeable⁷⁰

Here, Ms. Cece feared persecution (trafficking) because she was (1) a single woman, (2) in Albania, who (3) lived alone. Although she could have married, the court explained that "this is the type of fundamental characteristic change that we do not ask of asylum applicants."⁷¹

Second, the court considered whether Ms. Cece's use of the feared harm (trafficking) in her proposed social group resulted in its exclusion under the TVPA.⁷² While her group definition did reference the harm she

64. *Id.* at 668.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 669.

69. *Id.*

70. *Id.* at 670 (citations omitted).

71. *Id.* at 669.

72. Ashley Huebner, *Cece v. Holder*, NAT'L IMMIGRANT JUSTICE CTR. (Aug. 12, 2013),

feared, the court advised adjudicators: “it is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used rather than determining what underlying characteristics account for the fear or vulnerability.”⁷³ When identifying whether a group shares common characteristics that members cannot or should not be required to change, adjudicators must look beyond the language used to define the social group.⁷⁴ Thus, the court found that the BIA erred, given that the group’s characteristics include the immutable qualities of being young, female, and living alone in Albania.⁷⁵ Even if her proposed group was defined in part by the feared harm—and it wasn’t—that would not preclude it from being recognized, given that it also included immutable factors.⁷⁶ Furthermore, the BIA had never required that a social group exist completely independent of the persecutor: “[J]ust because all members of a group suffer persecution, does not mean that this characteristic is the only one that links them That shared trait . . . does not disqualify an otherwise valid social group.”⁷⁷

Third, the court laid to rest the concern that “broad categories” create a slippery slope that will open the asylum floodgates⁷⁸—a common argument against granting asylum to applicants like Ms. Cece. While Ms. Cece had established a cognizable social group, this was merely the “first step in determining asylum”: she must still establish a nexus between her persecution and her membership in the social group.⁷⁹ Thus, “[a]lthough the category of protected persons may be large, the number of those who can demonstrate the required nexus likely is not.”⁸⁰ The court reasoned that just as the breadth of categories under Title VII of the Civil Rights Act does not control who is eligible to sue an employer for discrimination, the

<http://www.immigrantjustice.org/litigation/blog/cece-v-holder-0#.UoAacI2zhs8>. Heubner correctly highlights that the exact variables of Ms. Cece’s social group changed throughout the proceedings: the group was first defined as “young Orthodox women living alone in Albania”; later, in his decision granting asylum, the immigration judge designated her group as “young women who are targeted for prostitution by traffickers in Albania,” as well as “women in danger of being trafficked as prostitutes.” *Id.* See also *Cece*, 733 F.3d at 670 (noting that the immigration judge in his later descriptions of Ms. Cece’s social group “omitted the important characteristic that [she] lived alone”). The court in *Cece* observed that these varied definitions were “simply shorthand for describing women who are vulnerable to trafficking.” *Id.* at 671.

73. *Cece*, 733 F.3d at 672.

74. Heubner, *supra* note 72.

75. *Cece*, 733 F.3d at 677.

76. *Id.* at 671.

77. *Id.*

78. *Id.* at 673.

79. *Id.*

80. *Id.*

breadth of a social group does not determine the requirements of asylum.⁸¹ The court went on to note:

[T]he breadth of category has never been a per se bar to protected status. . . . Many of the groups recognized by the [BIA] and courts are indeed quite broad. . . . It would be antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims.⁸²

The Seventh Circuit concluded that Ms. Cece's social group was comparable to many other recognized social groups that are "based primarily on broad, immutable characteristics (e.g., gender and nationality), but can be narrowed by other changeable, but fundamental characteristics (e.g., living alone . . .)." ⁸³ For example, in a case of clan-based persecution in Somalia, the BIA appropriately determined that "the fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership."⁸⁴ Thus, the court concluded that Ms. Cece's social group was properly defined by "gender plus one or more narrowing characteristics."⁸⁵ Furthermore, the court observed that guidance from the United Nations High Commissioner for Refugees ("UNHCR") and the BIA states that gender alone is an immutable trait that can form the basis of a particular social group, though it left the official determination of that question for another day.⁸⁶

Ultimately, the court remanded "for further proceedings consistent with this opinion", citing the BIA's lack of substantial evidence in support of its conclusion on Ms. Cece's ability to relocate within Albania.⁸⁷

IV. U.S. ASYLUM LAW & RELATED TREATY OBLIGATIONS

A. DOMESTIC ASYLUM LAW AND ITS ROOTS IN TREATY

While the Seventh Circuit provided ample reasoning for its judgment

81. *Id.* at 673–74.

82. *Id.* at 674–75 (listing various recognized protected social groups).

83. Heubner, *supra* note 72. *See also Cece*, 733 F.3d at 676 ("[T]he [BIA's] decision is inconsistent with its decisions in other similar cases. Cece's social group is not different than many of the groups approved by the BIA.").

84. *Cece*, 733 F.3d at 674 (internal quotation marks omitted).

85. *Id.* at 676.

86. *Id.* at 676–77.

87. *Id.* at 677–78 (noting, as the reason for remand, the BIA's "failure to provide . . . reasoned analysis" on the subject of Ms. Cece's relocation).

in favor of broader social group categorizations, U.S. law and treaty also lend support to its conclusion. Specifically, the Immigration and Nationality Act of 1952⁸⁸ (“INA”) and the Refugee Act of 1980⁸⁹ (“Refugee Act”), which amended the INA, align with the Seventh Circuit’s inclusive interpretation of asylum. In 1952, Congress enacted the INA in an effort to simplify the scattered mass of U.S. immigration laws.⁹⁰ Later, Congress revised and expanded the INA’s procedures for admitting refugees into the country by passing the Refugee Act, establishing a statutory right to seek asylum.⁹¹ This amendment defines a refugee as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion⁹²

Under the INA, the U.S. government deems any alien who meets these requirements a refugee, and the Secretary of Homeland Security or the Attorney General has the discretion to grant that individual asylum.⁹³

A Senate report illuminates the intention behind this change⁹⁴: by including this new definition of “refugee,” Congress intended to conform with both the 1951 United Nations Convention Relating to the Status of Refugees (“the Convention”),⁹⁵ and its amendment, the United Nations Protocol Relating to the Status of Refugees (“the Protocol”).⁹⁶ Originally, the Convention guaranteed European refugees displaced during World War II a right of non-return to states that threatened their lives or freedom.⁹⁷ The

88. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

89. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

90. See H.R. REP. NO. 82-1365, at 5 (1952) (“The purpose of the bill is to enact a comprehensive, revised immigration, naturalization, and nationality code.”).

91. Kendall Coffey, *The Due Process Right to Seek Asylum in the United States: The Immigration Dilemma and Constitutional Controversy*, 19 YALE L. & POL’Y REV. 303, 305 (2001).

92. 8 U.S.C. § 1101(a)(42)(A) (2012) (emphasis added).

93. 8 U.S.C. § 1158(b)(1)(A) (2012).

94. See S. REP. NO. 96-256, at 4 (1979).

95. Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 150 [hereinafter UN Convention]. While the U.S. never signed the Convention specifically, it acceded in November of 1968 to the UN Protocol Relating to the Status of Refugees, an amendment to the Convention.

96. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19.5 U.S.T. 6223 [hereinafter UN Protocol] (acceded to by the U.S. on Nov. 1, 1968).

97. See DAVID MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 69–70 (2007).

Convention's focus was to facilitate refugee integration in the new state, not to deny refugees admission,⁹⁸ and these protections were later expanded in the Protocol.

The U.S. signed the Protocol in 1967,⁹⁹ and because the treaty was not self-executing,¹⁰⁰ legislators passed the Refugee Act in order to give effect to its terms. Even though the U.S. never signed the Convention specifically, Congress indicated its assent to the Convention's principles through its ratification of the Protocol and passage of the Refugee Act, as clarified in the Senate Committee Report mentioned above:

[The Refugee Act] will bring United States law into conformity with our international treaty obligations under [the Protocol] which the United States ratified in November 1968, and [the Convention] which is incorporated by reference into the United States law through the Protocol.¹⁰¹

Senator Edward Kennedy, a drafter of the legislation, explained that the Refugee Act was intended to demonstrate the country's "national commitment to human rights and humanitarian concerns."¹⁰² These goals suggest that Congress did not aim to exclude asylum applicants based on rigid definitions; rather, it explicitly intended to adopt a dynamic, humanitarian instrument that would provide protection to people suffering from diverse human rights violations. Indeed, the Senate Committee Report states that Congress specifically amended the INA so as "to include 'displaced persons' who are not [even] technically covered by the United Nations Convention—to insure maximum flexibility in responding to the needs of the homeless."¹⁰³ The Refugee Act itself states that its goal is to further "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including . . . humanitarian assistance for their care and maintenance in

98. *Id.* at 70 (noting that "in today's world . . . this is the major focus").

99. Robert J. Williams, Comment, *Sale v. Haitian Centers Council and Its Aftermath: A Problematic Gap in International Immigration Law*, 9 TEMP. INT'L & COMP. L.J. 55, 55 n.3, 68 (1995).

100. "A treaty is 'self-executing' when ratification of the treaty alone gives that treaty the force of law in the United States." *Id.* at 57 n.21 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 166–67 (1993)).

101. S. Rep. No. 96-256, at 4 (1979).

102. *Id.* (citing S. REP. NO. 96-256, at 1 (1979)). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress's primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees . . ." (citation omitted)).

103. S. Rep. No. 96-256, at 4 (1979).

asylum areas.”¹⁰⁴ This ample evidence clarifies that it was Congress’s intention to adopt a principle of flexibility in the Refugee Act. As such, the Refugee Act best implements Congress’s intent when it responds to the contemporary, changing human rights needs around the world, rather than solely addressing the populations displaced at the time of the statute’s passage.¹⁰⁵

Additional objectives and policies articulated in the Refugee Act further illustrate an inclusive intention consistent with the Seventh Circuit’s approach. For instance, Congress utilized the law to increase the maximum annual number of refugees granted entry from 17,400 per year to 50,000 per year.¹⁰⁶ In the event that the government met its annual refugee allocation, the Refugee Act further provided “an orderly but flexible procedure” for granting admission to refugees of “special humanitarian concern.”¹⁰⁷ These additional policies confirm the legislators’ intent to protect emerging classes of refugees, “rather than to execute asylum law in a rigid way that would exclude deserving people because of arbitrary standards.”¹⁰⁸

The legislative context of the Act’s passage also validates the Seventh Circuit’s inclusive approach to “social group” categorizations.¹⁰⁹ In September 1979—six months before Congress passed the Refugee Act—the UNHCR released the illuminating *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (“the Handbook”)¹¹⁰ which was “intended to guide government officials, judges, practitioners, as well as UNHCR staff applying the refugee definition.”¹¹¹ Specifically, the Handbook codified a tremendously expansive definition of the term “particular social group”: “A ‘particular social group’ normally comprises persons of similar background, habits or social status.”¹¹² In evaluating this statement, T. David Parish aptly observed:

104. Refugee Act of 1980, Pub. L. No. 96-212, sec. 101(a), 94 Stat. 102, 102.

105. Karvelis, *supra* note 48, at 285.

106. See Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 141, 143 (1981).

107. *Id.*

108. See Karvelis, *supra* note 48, at 285.

109. *Id.* at 284.

110. U.N. High Comm’r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/IP/4/ENG/REV.3 (reprint 2011) (1979) [hereinafter *UNHCR Refugee Handbook*].

111. *Id.* at 2 (“It is hoped that they will continue to provide an important reference for refugee status determination around the world and help resolve variations in interpretation.”).

112. *Id.* at 17.

This definition is so vague as to represent only an illusory limit: demonstration of “similar background” will suffice to establish a social group, and the possibility that a social group can be composed of individuals without even so much as a “similar background” is left open by use of the modifier “normally.” The UNHCR’s almost boundless interpretation, codified in the Handbook, further demonstrates that the social group category had developed into a broad and flexible concept by the time of its incorporation into U.S. law.¹¹³

Given that the Handbook was available when Congress determined to pass a law adopting the Protocol’s “particular social group” definition, its characterization of the term ought to be considered highly persuasive. Indeed, the Supreme Court went on to explicitly affirm the validity of utilizing the Handbook in interpreting the Refugee Act: “[T]he Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to the obligations that the Protocol establishes.”¹¹⁴ Notably, Congress conformed with near exactness the language of the Protocol and the Convention.¹¹⁵

Furthermore, scholars of the time consistently characterized “particular social group” as an inclusive term, and their publications were available to Congress when it passed the Refugee Act.¹¹⁶ For example, Atle Grahl-Madsen explained in his 1966 text:

‘[M]embership of a particular social group’ was added by the Conference of Plenipotentiaries as an afterthought. Many cases falling under this term are also covered by the terms [race, religion and

113. Parish, *supra* note 49, at 929.

114. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987). *Accord* M.A. A26851062 v. INS, 858 F.2d 210, 214 n.3 (4th Cir. 1988), *rev'd on reh'g*, 899 F.2d 304 (4th Cir. 1990) (en banc); Hernandez-Ortiz v. INS, 777 F.2d 509, 514 n.3 (9th Cir. 1985); Stevic v. Sava, 678 F.2d 401, 405–06 (2d Cir. 1982), *rev'd on other grounds sub nom*; INS v. Stevic, 467 U.S. 407 (1984); *In re* Frentescu, 18 I. & N. Dec. 244, 246 (BIA 1982).

115. For example, the Convention defines a refugee as a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” UN Convention art. 1(A)(2), *supra* note 95, at 152. This is comparable to the language used to define refugee in the U.S. Code: “[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .” 8 U.S.C. § 1101(a)(42)(A).

116. See Richard Plender, *Admission of Refugees: Draft Convention on Territorial Asylum*, 15 SAN DIEGO L. REV. 45, 52 & n.35 (1977) (reviewing and discussing literature endorsing the broad interpretation of the term “social group”).

nationality], but the notion of ‘social group’ is of broader application than the combined notions of racial, ethnic, and religious groups, and in order to stop a possible gap, the Conference felt that it would be as well to mention this reason for persecution explicitly.¹¹⁷

Likewise, Congress had access to foreign decisions that consistently approved broad claims of asylum via the “social group” provision.¹¹⁸ For example, inclusive German precedents were well documented in the literature,¹¹⁹ such as grants of asylum to groups as broad as: “families of former capitalists, independent businessmen, and former members of a particular country's Royal Foreign Service.”¹²⁰

Ultimately, given the concurrent timing of the Handbook’s release and the passage of the Refugee Act; the simultaneous availability of foreign law and scholarly texts consistently defining “particular social group” broadly; Congress’s articulated legislative intent to comply with the Protocol; its increased acceptance of refuge seekers and successive “flexible procedure[s]” providing for adaptability;¹²¹ and its choice not to change or add qualifications to the UN’s definition of “refugee,” the most rational interpretation of Congress’s intent is that it intended to adopt the UN’s interpretation of the word “refugee.” Thus, the interpretation of the Act that best honors Congress’s intent is one read in accordance with the UN’s interpretation of its own refugee standards. Some may contest this approach, but—given that refugee law concerns the migration of people across national borders—international standards are particularly appropriate in evaluating the effectiveness of U.S. refugee law.¹²² Indeed, there is considerable precedent for utilizing international tools and law as

117. ATLE GRAHL-MADSEN, 1 *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966) (citation omitted).

118. Parish, *supra* note 49, at 928–29.

119. *E.g.*, GRAHL-MADSEN, *supra* note 117, at 219–20; S. PRAKASH SINHA, *ASYLUM AND INTERNATIONAL LAW* 103 (1971). “While information about the fine points of foreign state practice in the area of immigration is often difficult to obtain, German immigration law is unusually accessible and well developed. As a result, it is often referenced in scholarly comments on international immigration practice.” Parish, *supra* note 49, at 928 (footnote omitted).

120. Parish, *supra* note 49, at 928–29. *See* GRAHL-MADSEN, *supra* note 117, at 219–20. “German practice has continued to be liberal in this respect. Social groups recognized by courts in the Federal Republic of Germany since U.S. adoption of the Protocol’s definition include wealthy landowners in China and their families, the Baganda people of Uganda, and individual families.” Parish, *supra* note 49, at 929 n.27 (citing Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 *GEO. IMMIGR. L.J.* 381, 437–43 (1990)).

121. *See id.*

122. *See* Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 *BERKELEY J. INT’L L.* 1, 1 (1997) (“The regulation of transboundary migration inherently implicates relations between nation states. Refugee law, in particular, draws heavily upon agreed international standards.”).

persuasive authority.¹²³

B. APPLYING THE UNHCR HANDBOOK

Congress's intent to comply with treaty and UN standards is particularly relevant in light of the UN's April 7, 2006 additions to the Handbook: an entire subsection, or "guideline," discussing the application of Article 1A(2) of the Convention and/or Protocol relating to victims of trafficking and persons at risk of being trafficked.¹²⁴ In its guideline, the UNHCR first adopts the definition of "trafficking" as articulated by the Palermo Protocol.¹²⁵ The Handbook then explicitly states that victims or potential victims of trafficking may qualify as refugees under the Convention or Protocol in cases where it can be shown that they fear being persecuted for reasons of their membership in a particular social group.¹²⁶ In qualifying as such, trafficking alone may be a form of persecutory conduct, but a person's fear of persecution need not be a fear of trafficking.¹²⁷ An applicant may fear other persecutory conduct that has arisen in relation to a trafficking experience, such as community or family ostracism, social exclusion, re-traumatization or victimization, or other forms of violence.¹²⁸

Moreover, in qualifying as a member of a particular social group under the Handbook, it is not necessary that the alleged group members associate with one another as an explicit group; rather, they must "share a common characteristic other than their risk of being persecuted, or [be] perceived as a group by society."¹²⁹ This "shared characteristic will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one's human rights."¹³⁰ Of particular interest here, the Handbook disregards the "opening of the floodgates" concern with reasoning almost identical to part of the Seventh Circuit's opinion in *Cece*:

123. See *infra* Part V.C.

124. *UNHCR Refugee Handbook*, *supra* note 110, at 133 (incorporating the *UNHCR Trafficking Guidelines*, *supra* note 38) ("In addition to the Handbook . . . the UNHCR has continued to issue legal positions on specific questions of international refugee law. . . . [t]hese Guidelines complement and update the Handbook and should be read in combination with it.")

125. *Id.* ¶ 8, at 135–36.

126. *Id.* ¶ 37, at 143.

127. *Id.* ¶39, at 143–44. There have been numerous key asylum decisions reinforcing this analysis in several countries, including Austria, Australia, Canada, and the United Kingdom. See *infra* Part VI.

128. *UNHCR Refugee Handbook*, *supra* note 110, ¶¶ 17–18, at 138.

129. *Id.* ¶ 37, at 143.

130. *Id.*

[T]he size of the purported social group is not a relevant criterion in determining whether a social group exists within the meaning of Article 1A(2). While a claimant must still demonstrate a well-founded fear of being persecuted based on her or his membership of the particular social group, she or he need not demonstrate that all members of the group are at risk of persecution in order to establish the existence of the group.¹³¹

The Handbook cites women as a potential social group, given that they are defined by immutable characteristics, and are frequently treated differently than men.¹³² Furthermore, “[f]actors which may distinguish women as targets for traffickers are generally connected to their vulnerability in certain social settings; therefore certain social subsets of women may also constitute particular social groups,” for example, “single women, widows, divorced women, illiterate women, separated or unaccompanied children, orphans or street children.”¹³³

Former victims of trafficking could also qualify as a legitimate social group, given the “unchangeable, common and historic characteristic of having been trafficked.”¹³⁴ Nevertheless, the Handbook notes that groups cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of persecution:

[I]t is the past trafficking experience that would constitute one of the elements defining the group in such cases, rather than the future persecution now feared in the form of ostracism, punishment, reprisals or re-trafficking. In such situations, the group would therefore not be defined solely by its fear of future persecution.¹³⁵

In sum, these varied factors—congressional intent, relevant international treaties, and related tools—all point to the conclusion that American asylum statutes should be interpreted broadly, as the Seventh Circuit has done. This notion is further supported by foreign case law, as discussed in the next part.

V. COMPARATIVE ANALYSIS OF FOREIGN ASYLUM LAW

By adopting the Protocol’s definitions and standards in the Refugee Act, Congress strove to influence other countries to follow suit.¹³⁶ As

131. *Id.* (footnote omitted).

132. *Id.* ¶ 38, at 143.

133. *Id.*

134. *Id.* ¶ 39, at 143.

135. *Id.* ¶ 39, at 144.

136. *See* Parish, *supra* note 49, at 925–26 (“This goal was stressed at every stage of the Protocol’s ratification: in the State Department’s letter submitting the Protocol to the President, in the President’s letter of transmittal to the Senate, and in Senate discussion of the Protocol.” (footnotes

T. David Parish observes, Congress's use of the Protocol's specific language "reflects the purpose underlying U.S. accession to the Protocol: setting an example for other nations by clear compliance with international norms in dealing with refugees."¹³⁷ Furthermore, common law states ought to construe the Convention uniformly, so as to ensure "equitable, consistent treatment of refugees," and because "most common-law states consider other states' particular social group jurisprudence as persuasive authority."¹³⁸ Unfortunately, with the notable exception of the Seventh Circuit's ruling in *Cece*, the U.S. in practice has not set an example for other countries to follow; indeed, "countries around the world have surpassed the U.S. in their adherence to the U.N. Protocol."¹³⁹

A. "PARTICULAR SOCIAL GROUP" TESTS

Some U.S. courts have adopted a complex "social visibility" test;¹⁴⁰ however, the international community has rejected the use of this test.¹⁴¹ Instead, most major common law states employ the immutability standard¹⁴² also applied by the Seventh Circuit in *Cece*.¹⁴³ The immutability standard recognizes particular social groups that are defined by a characteristic that is "innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one's human rights."¹⁴⁴ Canada, New Zealand, and the United Kingdom ("U.K.") all use this standard in discerning particular social groups.¹⁴⁵

omitted)).

137. *Id.* at 926.

138. Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361, 362 (2012) (citing T. Alexander Aleinikoff, *Protected Characteristics & Social Perception: An Analysis of the Meaning of "Membership of a Particular Social Group"*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 263, 268 (Erika Feller, Volker Turk & Frances Nicholson eds., 2003)). A detailed discussion of foreign law as persuasive ensues *infra* Part V.C.

139. Karvelis, *supra* note 48, at 286.

140. *See, e.g., Lushaj v. Holder*, 380 F. App'x 41, 43 (2d Cir. 2010) (requiring evidence that the claimed social group "was perceived as a discrete group" by the society of the refugee's country of origin).

141. Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 103 (2008) ("[T]he new 'social visibility' test represents a sudden, unexplained departure from U.S. precedent and the dominant view of the international community.").

142. Karvelis, *supra* note 48, at 282.

143. *See supra* Part III.B.

144. *UNHCR Refugee Handbook*, *supra* note 110, ¶ 37, at 143.

145. *See* Marouf, *supra* note 141 at 54–57 (noting leading cases in these countries that demonstrate "how the protected characteristic approach . . . has become transnationalized" (internal quotation marks omitted)).

Specifically, the U.K. House of Lords has held that a “particular social group” is not even limited to the groups that the Convention drafters may have envisioned.¹⁴⁶ For example, the U.K. acknowledges that gender could be a particular social group characteristic, given that it is immutable.¹⁴⁷ Furthermore, the U.K. has recognized such groups, including trafficking-related groups, in many cases.¹⁴⁸ In *Secretary of State for the Home Department v. Dyhygun*, a trafficked Ukrainian woman’s refugee status was upheld on appeal,¹⁴⁹ while another case addressed and established the refugee status of a sixteen-year-old Nigerian girl who was trafficked for prostitution.¹⁵⁰ Similarly, in Austria, an appellate court overruled a prior decision that had denied refugee status to a Nigerian woman trafficked for sex.¹⁵¹

In Australia, a court granted asylum to a sex worker who feared being forcibly re-trafficked based on her membership in a “particular social group” of Thai sex workers.¹⁵² After referencing the Handbook in its judgment, the court made several keen observations about the term “particular social group”:

146. *R v. Immigration Appeal Tribunal, Ex parte Shah*, [1999] 2 A.C. 629 (H.L.) 651 (appeal taken from Eng.) (“[T]he concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind.”).

147. *Id.* at 658 (“[T]he shared common, immutable characteristic which would qualify to form a particular social group could include the person’s sex. . . . [T]o hold that the appellants are members of a particular social group in Pakistan because they are women . . . would be consistent with previous authority.”); Heaven Crawley & Trine Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, ¶¶ 416–18, U.N. Doc EPAU/2004/05 (May 2004).

148. *E.g.*, *Sec’y of State for the Home Dep’t v. Dzhygun*, [2000] UKIAT 00TH00728 (Immigration Appeal Tribunal); *Josephine Ogbeide v. Sec’y of State for the Home Dep’t*, [2002] Immigration Appellate Authority Appeal No. HX/08391/2002. For further discussion of these cases and others, see MIKE KAYE, ANTI-SLAVERY INT’L, THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS’ HUMAN RIGHTS 19 (2003); Satvinder S. Juss, *Human Trafficking, Asylum and the Problem of Protection*, in THE ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY 281, 291 n.60 (Satvinder S. Juss ed., 2013).

149. *Dyhygun*, UKIAT 00TH00728 [36–37].

150. In *Ogbeide v. Secretary of State for the Home Department*, discussed *supra* note 148, a teenage Nigerian girl was granted asylum in the U.K. because of her membership in “the particular social group of young girls from Nigeria whose economic circumstances are poor.” KAYE, *supra* note 148, at 19. In another case decided in 2003, *Miss A.B. v. Secretary of State for the Home Department*, another teenage Nigerian girl was granted asylum in the U.K. because of her membership in “the well-documented social group of girls trafficked from West Africa.” *Id.* See also Juss, *supra* note 148, at 281, 291 n.60.

151. *Verwaltungsgerichtshof [VwGH] [administrative court] Jan. 31, 2002*, docket No. 99/20/0497-6 (Austria). See also Juss, *supra* note 148, at 281, 291 n.57; Alice Edwards, *Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor*, 36 DENV. J. INT’L L. & POL’Y 9, 36 n.151 (2007).

152. *VXAJ v. Minister for Immigration & Anor* [2006] FMCA 234 ¶ 9 (Austl.). See Juss, *supra* note 148, at 281, 291 n.58.

The expression is flexible[,] intended to apply whenever persecution is found directed at a group or section of a society not necessarily persecuted for racial, religious, national or political reasons. The word “social” is of wide import and may be defined to mean “pertaining, relating, or due to . . . society as a natural or ordinary condition of human life. “Social” may also be defined as “capable of being associated or united to others” or “associated, allied, combined.” A broad interpretation is needed to encompass all those who fall fairly within its language and should be construed in light of the context in which it appears. . . . The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups which might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.¹⁵³

Interestingly, the Canadian government has produced guidelines that articulate how decisionmakers should interpret gender-based asylum claims.¹⁵⁴ These guidelines specify that “[a] group is not defined *solely* by common victimization if the claimant’s fear of persecution is also based on her gender, or on another innate or unchangeable characteristic of the claimant.”¹⁵⁵ This framework suggests that “women who have experienced attempts at human trafficking are a social group, not because they are subject to human trafficking, but because they possess the traits of female gender, low socioeconomic status, and youth, on account of which traffickers persecute them.”¹⁵⁶ Additionally, Ireland’s Refugee Act of 1996 represents an even more inclusive interpretation of “particular social group,” defining one option explicitly as, “membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation.”¹⁵⁷

153. *Id.* ¶ 15 (citing *Morato v. Minister for Immigration* (1992) 39 FCR 401, 416 (Lockhart, J.) (Austl.); *Ram v. Minister for Immigration* (1995) 57 FCR 565 (Austl.)).

154. *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, IMMIGR. AND REFUGEE BOARD OF CANADA (last modified June 16, 2014) [hereinafter *Canadian Guidelines*], available at <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir04.aspx>. For further discussion of these guidelines, see Karvelis, *supra* note 48, at 287.

155. *Id.* § 3.

156. Karvelis, *supra* note 48, at 287. See also Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 414–15 (2011) (describing the unifying experiences of female victims of sex trafficking).

157. Karvelis, *supra* note 48, at 287 (citing Refugee Act, 1996 (Act No. 17/1996) 1(1), available at <http://www.irishstatutebook.ie/1996/en/act/pub/0017/index.html>).

B. DAMMING THE “FLOODGATES” ARGUMENT

Several countries offer insight into the concern that broader social group definitions will open the floodgates to many more viable asylum claims. For example, Canada’s guidelines stipulate that “[t]he fact that the particular social group consists of large numbers of the female population in the country concerned is *irrelevant*—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.”¹⁵⁸ This position properly conforms to the Handbook by rejecting the unfounded notion that a social group’s size is sufficient to render it ineligible for asylum consideration, “despite the possibility that that group has been persecuted or has a well-founded fear of persecution based on membership in that group.”¹⁵⁹ Canadian jurists have applied this inclusive approach in a variety of cases¹⁶⁰ without experiencing a flood of asylum claims.¹⁶¹

Indeed, even the US has acknowledged broad social groups in some instances, without facing an unmanageable influx of refugees.¹⁶² For example, the BIA has ruled that essentially half the population of an individual country may be considered a particular social group, without facing an unmanageable influx of asylum seekers.¹⁶³ In *In re Kasinga* the BIA considered the practice of female genital mutilation—a practice that affected practically all females in the asylum applicant’s homeland—as relevant to a social group definition.¹⁶⁴ This case was differentiated from other cases involving female genital mutilation because it concerned mutilation which was either going to occur or would be ongoing, rather than a past event without any future repercussions.¹⁶⁵

158. *Canadian Guidelines*, *supra* note 154, § 3; Lori A. Nessel, “Willful Blindness” to Gender-Based Violence Abroad: United States’ Implementation of Article Three of the United Nations Convention Against Torture, 89 MINN. L. REV. 71, 100 (2004).

159. Karvelis, *supra* note 48, at 287.

160. *E.g.*, *In re X*, [1999] C.R.D.D. T98-06186 1, 4, 7 (Can.). *See* Juss, *supra* note 148, at 281, 291 n.59.

161. Marian Kennady, Note, *Gender-Related Persecution and the Adjudication of Asylum Claims: Is a Sixth Category Needed?*, 12 FLA. J. INT’L L. 317, 339 (1998).

162. *See infra* notes 182–185.

163. *In re Kasinga*, 21 I. & N. Dec. 357, 368 (BIA 1996) (finding that an asylum applicant had “a well-founded fear of persecution” in the form of female genital mutilation (“FGM”) if returned to her country of origin, “on account of her membership in a particular social group consisting of young women of the Tchamba-Kunsuntu Tribe who have not had FGM . . . and who oppose the practice”).

164. *Kasinga*, 21 I. & N. Dec. at 365 (“[W]e find the particular social group to be the following: young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”).

165. *See id.*

C. THE PERSUASIVE ROLE OF FOREIGN LAW

In weighing the persuasiveness of these various foreign cases and laws, some may argue that it is improper to give them any weight, and that they should have no bearing in evaluating the merit of the Seventh Circuit's *Cece* conclusions. However, there is precedent for considering foreign perspectives—particularly in light of international treaty.¹⁶⁶ The U.S. Supreme Court has cited foreign law as persuasive in many instances.¹⁶⁷ For example, in *Grutter v. Bollinger*, Justice Ginsburg found foreign law relevant when the Court upheld the use of affirmative action in university admissions.¹⁶⁸ In her concurrence, Justice Ginsburg (joined by Justice Breyer) explained that “[t]he Court’s observation that race-conscious programs ‘must have a logical end point’ accords with the international understanding of the office of affirmative action,” and cited the International Convention on the Elimination of All Forms of Racial Discrimination (which the U.S. has ratified).¹⁶⁹ Similarly, during the oral arguments of *Gratz v. Bollinger*, decided the same day as *Grutter*, Justice Ginsburg asked the solicitor general the following:

[W]e’re part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject?¹⁷⁰

More recently, in *Roper v. Simmons*, the Court struck down state laws that allowed the execution of juvenile offenders, acknowledging that other

166. See Hon. Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL’Y 431, 441–42 (2004) (comments by D.C. Circuit judge supporting the use of foreign materials in domestic jurisprudence).

167. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (finding execution of “mentally retarded” criminals unconstitutional under the Eighth Amendment, and referencing the “world community” and its “overwhelming[]” disapproval of imposing the death penalty in that context); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (striking down Texas legislation that criminalized sodomy, and relying not only on a 1957 report in the British Parliament, but also a decision of the European Court of Human Rights); *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997) (referencing the Dutch experience with physician-assisted suicide in order to determine whether recognizing a right to physician-assisted suicide would encourage other forms of euthanasia). See generally Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005) (discussing the Supreme Court’s long practice of citing foreign law in constitutional cases).

168. *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

169. *Id.* at 344 (citation omitted).

170. Transcript of Oral Argument at 25, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

countries and international conventions have banned such executions.¹⁷¹ Writing for the majority, Justice Kennedy cited specifically to the UN Convention on the Rights of the Child (which the U.S. has signed but not ratified) and the International Covenant on Civil and Political Rights (“ICCPR”) (which the U.S. has ratified with reservations).¹⁷² Similarly, in her dissent Justice O’Connor recognized that foreign sources of law were pertinent to the issues before the Court.¹⁷³ Commentators determined that the Court’s reliance on foreign jurisprudence in *Roper* “portend[ed] a sea change in the Court’s doctrine.”¹⁷⁴ Beyond these specific cases, Justices Breyer and Kennedy—who are often viewed as the “leading proponents for citing foreign sources”—tend to “respond defensively, if not with bewilderment” when questioned about the relevance of foreign law in examining American jurisprudence.¹⁷⁵

Opponents of citation to foreign law in U.S. legal opinions argue that the practice “undermines (1) the Court’s legitimacy by impermissibly expanding judicial discretion and (2) our national and democratic sovereignty.”¹⁷⁶ However, these critics “confuse the question of validity with the question of what weight to afford [foreign] law.”¹⁷⁷ Furthermore, opponents also ignore U.S. courts’ history of considering foreign legal materials in constitutional analysis.¹⁷⁸ State courts have “long embraced” this practice “when interpreting their own, unique state constitutions.”¹⁷⁹ Austen L. Parrish thus argues that “[l]urking under the surface of arguments made by those who oppose the use of foreign sources appears to be the hubris of American exceptionalism.”¹⁸⁰ As Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit has

171. *Roper v. Simmons*, 543 U.S. 551, 575–76 (2005) (“[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”).

172. *Id.*

173. *Id.* at 604–05 (O’Connor, J., dissenting).

174. Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 644 (2007) (alteration in original).

175. *Id.* at 640–41.

176. *Id.* at 640.

177. *Id.* at 641. Parrish continues: “Instead of exploring how to utilize foreign materials in a refined way, the debate has been debased to an all-or-nothing proposition, with extreme and fringe positions obtaining a degree of superficial credibility. The result is problematic, and its impact real. Lessons that could be learned from other countries are missed. Moreover, the Court’s failure to engage more meaningfully with foreign law divorces the Court from an ongoing transnational dialogue that is developing and shaping international norms—norms that, one day, may exert some control domestically.” *Id.* at 641–42.

178. *Id.* at 641; Calabresi & Zimdahl, *supra* note 167, at 755.

179. Parrish, *supra* note 174, at 641.

180. *Id.*

rightfully observed:

[T]he trend for American judges to look at, in full context, foreign decisions certainly not as precedent but for knowledge as to how other judges have dealt with similar problems is one that should be encouraged. I believe that the law shouldn't be the only discipline that is totally isolated from the rest of the world. So I would say that judicial use of foreign decisions and other foreign law material, as well as international law, . . . should definitely move ahead.¹⁸¹

In this context, consideration of international and foreign law is particularly apt, given that the problem of trafficking is international in nature and the relevant laws are based in treaty. Thus, the treaties, foreign law, and foreign cases discussed in this Note ought to be considered highly persuasive as to whether the Seventh Circuit's approach in *Cece* is the best interpretation of what constitutes a "particular social group." Though this part demonstrates just a small sample of the policies and case law of other countries, it is clear that other jurisdictions are, in many ways, more effective than the U.S. at embracing the broad definition of "particular social group" established by the U.N. in the Handbook. While U.S. case history is inconsistent and rarely illustrates a full embrace of this approach, the *Cece* decision demonstrates significant progress in that regard.

VI. CONCLUSION

Prior to the Seventh Circuit's decision in *Cece v. Holder*, U.S. courts had acknowledged a broad range of social groups, including: "Christian women in Iran who do not wish to adhere to the Islamic female dress code";¹⁸² "the educated, landowning class of cattle farmers targeted by FARC," a guerrilla group in Columbia;¹⁸³ "former . . . employees of the Attorney General's Office";¹⁸⁴ and "truckers who, because of their anti-FARC views and actions, have collaborated with law enforcement and refused to cooperate with FARC."¹⁸⁵ In light of these precedents, it seems hardly strange to validate social groups including individuals who, due to immutable characteristics, have faced serious threats of enslavement, or who have in fact been enslaved and face repercussions or re-trafficking upon return to their country. Because "particular social group" requirements have never been spelled out, asylum applicants with trafficking-related claims are currently subject to inconsistent and arbitrary

181. Wald, *supra* note 166, at 441.

182. *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002).

183. *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005).

184. *Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006).

185. *Escobar v. Holder*, 657 F.3d 537, 545, 547 (7th Cir. 2011).

determinations by immigration judges, the BIA, and the federal judiciary. Thankfully, the Seventh Circuit has now provided ample legal reasoning for embracing a definition of “particular social group” that is broad enough to address issues of trafficking. Indeed, given Congress’s predominant concern with conformance to the requirements of the Protocol, the expansive interpretation of “particular social group” by the UNHCR, and supportive foreign case law, it is reasonable to suggest that the DOJ and DHS issue regulations that conform to the Handbook clarifying the asylum statute on trafficking-related social groups.

Pursuant to that goal, congressional oversight committees could ask the DOJ and DHS why they have not yet modified their regulations to include a more appropriate definition. Or perhaps more simply, the Obama administration could follow through with its priority to issue a relevant joint rule with the DOJ and DHS—a priority which “has appeared on [the] administration’s regulatory plan since fall 2009,” but which has been neglected.¹⁸⁶ This step is particularly important since recent “attempts to resolve such issues in Congress have hit a wall.”¹⁸⁷ Lisa Frydman, the managing attorney at the University of California—Hastings Center for Gender and Refugee Studies, had been working to rewrite a proposed 2013 comprehensive immigration reform bill to include language that would partially clarify how to apply the asylum statute; however, the amendments were “effectively cut off” as part of a border security deal.¹⁸⁸ Ms. Frydman observed: “With [the House] in a holding pattern about how to move forward on immigration, now is not the time to try our luck there.”¹⁸⁹

Regardless of whether Congress or the President initiates a clarification of the definition, a regulation would help fill the gaps of current protection regimes for survivors of trafficking and individuals vulnerable to trafficking. Ideally, wider reforms to trafficking-related protections will be initiated and implemented by Congress in the future. But as an important first step, the U.S. can broaden the interpretation of its existing asylum law and create a safety net for qualifying individuals who fall through the cracks of the TVPA. To that end, the following adapted language from the Handbook would provide effective clarification if adopted as a regulation under 8 C.F.R. § 1208.13:

186. Molly Redden, *A Sex Trafficking Victory That Shows Just How Broken the System Is*, NEW REPUBLIC (Aug. 29, 2013), <http://www.newrepublic.com/article/114512/obama-should-fix-gender-based-asylum-claims-he-leaves-office>.

187. *Id.*

188. *Id.*

189. *Id.* (alteration in original).

Victims and potential victims of trafficking may qualify [for asylum] where it can be demonstrated that they fear being persecuted for reasons of their membership of a particular social group. In establishing this ground it is not necessary that the members of a particular group know each other or associate with each other as a group. It is, however, necessary that they either share a common characteristic other than their risk of being persecuted or are perceived as a group by society. The shared characteristic will often be one that is innate, unchangeable or otherwise fundamental to identity, conscience or the exercise of one's human rights. Persecutory action against a group may be relevant in heightening the visibility of the group without being its defining characteristic. The size of the purported social group is not a relevant criterion in determining whether a social group exists within the meaning of [the TVPA]. While a claimant must still demonstrate a well-founded fear of being persecuted based on her or his membership of the particular social group, she or he need not demonstrate that all members of the group are at risk of persecution in order to establish the existence of the group.¹⁹⁰

Rather than allowing eligible applicants to languish through the appeals process while differing circuits battle out their varied conclusions on the subject, an administrative clarification of this nature would streamline the process and enforce U.S. treaty obligations to offer refuge to qualified asylum-seekers.

Finally, with respect to the oft-voiced concern of “opening the floodgates,” the fear of fraudulent asylum claims inundating the INS is clearly unfounded.¹⁹¹ Like in other U.S. courts, an immigration attorney who presents a frivolous claim is subject to sanctions.¹⁹² Thus, “[r]eluctance to encourage frivolous claims should not lead courts to deny those with a meritorious claim for asylum.”¹⁹³ Furthermore, a variety of large social groups—“gays and lesbians in Cuba, or any Filipino of Chinese ancestry living in the Philippines” to name a handful—have been granted American asylum in the past, demonstrating that just because a category is broad, it is not therefore immaterial.¹⁹⁴ Instead, courts, adjudicators, and regulators ought to adopt the reasoning of the Seventh Circuit in *Cece v. Holder* so as to better comport with domestic law, international treaty, and persuasive foreign law.

190. *UNHCR Refugee Handbook*, *supra* note 110, ¶ 37, at 143 (footnotes omitted).

191. *Kennady*, *supra* note 161, at 339.

192. *Id.*

193. *Id.*

194. *Redden*, *supra* note 186 (noting the comments of an attorney who advocates on behalf of women seeking refugee status).

