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Refugee Roulette: Wagering on Morality, Sexuality, and Normalcy in U.S. Asylum Law

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Note*

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"[H]uman displacement has become a far more complex issue. . . . We must not lose sight of the individual people who are fleeing persecution."[1]

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* Angela DeVolld: J.D. Candidate, May 2014, University of Nebraska College of Law. Thank you to the *Nebraska Law Review* staff and editors. Special thanks to Professor Anna W. Shavers for providing helpful guidance and feedback on this topic.

1. Ban-Ki Moon, Secretary-General Press Release for World Refugee Day (2008), UNITED NATIONS (June 17, 2008), http://www.un.org/News/Press/docs/2008/sgsm11643.doc.htm.

I. INTRODUCTION

Public morality and sexual norms have no place in asylum law; yet, the influence of both in the fates of sexually controversial asylum applicants is undeniably present. For instance, a young victim of an attempted kidnapping for sex trafficking will be sent back to risk cycling through vicious prostitution rings.[2] The stakes are just as high for transgender immigrants, as no published immigration decision recognizes transgender identity in the asylum context.[3] At the same time, despite inconsistent applications of the law, asylum claims for gay men and lesbian women based on sexual orientation have only recently become commonplace.[4]

When it comes to the fates of refugee applicants, the influence of public morality cannot be contained in a manner that would allow fair and consistent outcomes for each person. Although the consideration of societal norms is important in the admission of immigrants, the adjudication of asylum applications requires a special degree of international perspective and cultural fluency.[5] The consideration of these norms, particularly those surrounding sex, can inhibit, and even endanger, the lives of numerous applicants seeking asylum under the protected ground of "membership in a particular social group."[6] This includes sexual minorities and victims of forced prostitution.[7] A decision maker's perceptions of what is moral should not justify the abandonment of desperate individuals truly in need of refuge. To accept the influence of public morality and sexual norms in asylum law is to subject desperate individuals to a ruthless game of "refugee roulette,"[8]

2. *See, e.g.*, Rreshpja v. Gonzales, 420 F.3d 551 (6th Cir. 2005).
3. *Immigration Law and the Transgender Client*, IMMIGR. EQUALITY, http://immigrationequality.org/issues/law-library/trans-manual/asylum/#5-5-asylum%E2%80%94sources-of-law (last visited Feb. 28, 2013).
4. *See, e.g.*, Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005); Molathwa v. Ashcroft, 390 F.3d 551 (8th Cir. 2004); Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003).
5. Under the Immigration and Nationality Act (INA) §§ 212(a) and 237(a), crimes involving moral turpitude, aggravated felonies, and certain political affiliations may constitute grounds for inadmissibility or deportability. 8 U.S.C. § 1182 (1952); 8 U.S.C. § 1227 (1996). However, an alien in such proceedings may make a separate claim for asylum as a form of relief from removal, irrespective of his or her deportability status under the Act. 8 U.S.C. § 1158(a) (2006).
6. 8 U.S.C. § 1158(a).
7. Throughout this Article, the terms "LGBTQ" and "sexual minorities" will refer to the lesbian, gay, bisexual, transgender, and queer (including intersex) members of society. For more information on the definitions encompassed in the "LGBTQ" acronym, see *Definition of Terms*, GENDER EQUITY RESOURCE CENTER AT U. OF CAL.–BERKELEY, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms (last visited Nov. 26, 2012).
8. This "refugee roulette" analogy refers to the infamous practice of Russian roulette—a potentially lethal game of chance where a player loads a single bullet into the chamber of a revolver, spins the cylinder, and pulls the trigger while

where many applicants receive the metaphorical bullet when a court pulls the trigger and issues its decision.[9]

In order to understand the influence of public morality in asylum law, it is important to understand what public morality is. There is no set definition of public morality; however, it is undisputed that it concerns the regulation of the moral conduct or character of individual persons through the law.[10] Public morality attempts to justify the enforcement of a particular society's ethical and moral standards of right and wrong. As a result, the concept of what is moral may vary from state to state or region to region.[11] In the United States, public morality often manifests itself in the government regulation of sex, including adultery, homosexuality, and prostitution.[12]

At first blush, having judicial decisions reflect popular societal norms appears to be a good idea. Society would maintain its distinct culture, and a majority of the population would be satisfied with the result. However, when a judge begins to adhere to popular norms, we are no longer a country of law, but instead a country of arbitrary rulings based on no standard at all. Without objective law, there can be no voice for the minority, no positive change, and no progression of society.

This Note highlights how public morality hides under the guise of judicial discretion in asylum decisions involving interpretations of "membership in a particular social group." Part I discusses the United States' current asylum obligations under both international and domestic law. Part II highlights the current influence of morality in two types of controversial sex-based claims:[13] those based on identification as a sexual minority and those involving victims of forced prostitution

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pointing the gun at someone or one's own head. *Definition of Russian Roulette*, OXFORD DICTIONARIES, http://oxforddictionaries.com/us/definition/american_english/Russian%2Broulette (last visited Apr. 27, 2013).

9. This analogy plays upon the idea that an asylum applicant may never know just how the public morals of society and the decision maker will affect the outcome of the decision, and ultimately, his or her life. If a refugee receives the "bullet" and is denied relief, he or she will be sent back to a life of dangerous persecution and, potentially, death. When public morality and sexual norms, irrelevant in the grant of asylum, creep into the decision-making process, the U.S. asylum process becomes nothing more than a game of chance, where the result depends on the location of the court and the presiding judge.

10. Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 65 (2000).

11. *See id.*

12. *Id.* at 66.

13. For purposes of this Note, sex-based claims do not necessarily refer to gender-based claims. Unless otherwise stated, the term "sex" will reference human sexuality and sex practices only. The term "gender" will reference the state or identification of being male, female, or gender-neutral.

and sex trafficking.[14] Part III analyzes how morality has found its way into the asylum courtroom. Specifically, common misconceptions surrounding sex and inconsistent interpretations of statutory language have allowed judges and agency decision makers to exercise great discretion in evaluating asylum claims, often leading to unjust and arbitrary results. Finally, Part IV proposes solutions to the issues raised by the influence of public morality and sexual norms in asylum law, including amendments to domestic refugee statutes and international instruments.

II. STATE ASYLUM OBLIGATIONS UNDER INTERNATIONAL AND DOMESTIC LAW

Immediately following the tragedies of World War II, the United Nations (U.N.) faced an increased demand to focus on the numerous war victims and displaced persons seeking international refuge.[15] Specifically, the devastated and overwhelmed countries of Europe called for a revision of previous international agreements regarding refugee and asylum matters, as well as a standard international definition of "refugee."[16] In 1951, the U.N. responded to these demands by adopting the Convention Relating to the Status of Refugees.[17] Under this Convention, the U.N. defined a refugee as any person who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside of the country of his [or her] nationality and is unable, or owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.[18]

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14. "Forced prostitution" or "sex trafficking" is when a commercial sex act is induced by force, fraud, or coercion. The coercion may come from a variety of sources, including economic factors, duress, kidnapping, drug addiction, and domestic violence. Because of this, sex trafficking and prostitution are seen as inextricably linked in the United States. Heather J. Clawson, Nicole Dutch, Amy Solomon & Lisa Goldblatt Grace, *Human Trafficking Into and Within the United States: A Review of the Literature*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (Aug. 2009), http://aspe.hhs.gov/hsp/07/humantrafficking/litrev/index.pdf. *See also* Susan A. Cohen, *Ominous Convergence: Sex Trafficking, Prostitution, and International Family Planning*, GUTTMACHER INST. 12 (Feb. 2005), http://www.guttmacher.org/pubs/tgr/08/1/gr080112.html (explaining how prostitution and sex trafficking are closely related).

15. Melissa J. Hernandez Pimentel, *The Invisible Refugee: Examining the Board of Immigration Appeals' "Social Visibility" Doctrine*, 76 MO. L. REV. 575, 580 (2011).

16. *See id.*

17. Guy S. Goodwin-Gill, *Convention Relating to the Status of Refugees (1951) & Protocol Relating to the Status of Refugees (1967)*, UNITED NATIONS AUDIO VISUAL LIBR. OF INT'L L. 1, http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf (last visited Mar. 3, 2013).

18. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter *1951 Convention*].

The 1951 Convention also adopts the obligation of *nonrefoulement*, which is the responsibility of a state not to return any person whose "life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group, or political opinion."[19]

However, the original scope of the Convention was extremely limited by both time and space.[20] Under Article 1(A)(2), a refugee had to prove that his or her fear was a "result of [the] events occurring [in Europe] before 1 January 1951."[21] Because of these restrictions, the Convention could not properly address the needs of the international refugee community during the first decade of its existence. Due to the ever-changing scheme of refugee applicants throughout the next decade, the U.N. adopted the 1967 Protocol Relating to the Status of Refugees.[22] Contrary to popular belief, the Protocol did not "add" to the 1951 Convention; rather, it operated as an independent international instrument under which State Parties agreed to apply Articles 2 through 34 of the Convention.[23] Thus, the Protocol eliminated the spatial and temporal limitations of the refugee definition in Article 1 of the Convention.[24] The United States is a signatory to the Protocol and, pursuant to its international obligations, has adopted a nearly identical version of the 1951 Convention.[25]

The United States' domestic version of the 1951 Convention is found in sections 101(a)(42), 208, and 241(b)(3) of the Immigration and Nationality Act of 2000 (INA). Under United States asylum law,[26] there are two procedural avenues to "refugee" relief: asylum under INA § 208 or withholding of removal under INA § 241(b)(3). Although asylum and withholding of removal are closely related, each form of relief requires different procedures and carries a different burden of proof.[27] Asylum grants relief to applicants and paves a path to

19. *Id.* at 30.
20. *See id.* at 14.
21. *Id.* at 14–15.
22. Goodwin-Gill, *supra* note 17, ¶¶ 32–34.
23. *Id.*
24. *Id.*
25. *Id.*; *see also* 8 U.S.C. § 1158 (2006); 8 C.F.R. § 208.16 (2013) (containing statutory provisions similar to the 1951 Convention).
26. To be clear, the two forms of relief (asylum and withholding of removal) apply only to immigrants present in the United States at the time they file their claim. Conversely, actual "refugee" relief is given only to those who are outside of the United States when they apply and qualify for asylum. *See, e.g.*, 8 U.S.C. § 1158(a)(1)–(2).
27. INS v. Cardoza-Fonesca, 480 U.S. 421, 430–31 (1987) (holding that asylum is governed under the reasonable fear standard; a ten percent chance of being persecuted can be sufficient to satisfy the definition); INS v. Stevic, 467 U.S. 407, 413 (1984) (holding that withholding of deportation is governed under the clear probability standard); *see also* 8 C.F.R. §§ 208.13(b)(1)(ii), 208.16(b) (placing the burden of proof on the applicant).

lawful permanent residency and citizenship.[28] It is, however, a form of discretionary relief. The United States government, via judges and agency decision makers, may still exercise great discretion in determining whether an applicant qualifies for asylum.[29] Even if an applicant successfully establishes that he or she is a refugee under the INA, the federal government still has the authority to grant or deny asylum based on the circumstances of each case.[30]

Withholding of removal, on the other hand, is the United States' version of *nonrefoulement*. Unlike asylum, withholding of removal is not discretionary. If an applicant qualifies for withholding of removal, INA § 241(b)(3) compels the United States government to either find a third country within which the applicant may safely relocate or provide the necessary refuge itself.[31] However, the burden of proof for withholding of removal[32] is much higher than that of asylum.[33] Unless the applicant's denial was based solely on the discretionary factors, an applicant who is denied asylum will rarely find relief in a claim for withholding of removal.[34]

In order to successfully apply for either form of refugee relief, the applicant bears the burden of satisfying the statutory elements of "refugee" embodied in INA § 101(a)(42). This section defines a refugee as a person who is "unable or unwilling to return" to his or her country because of "persecution or a well-founded fear of persecution on account of" one of the five protected grounds enumerated in the statute: race, religion, nationality, membership in a particular social group, or

28. Lawful permanent resident (LPR) status allows an alien to legally reside and work in the United States, but such aliens are entitled to less due process than United States citizens. On the other hand, citizens are persons who are either born or naturalized as fully loyal members of society. Landon v. Plasencia, 459 U.S. 21, 34 (1982) (holding that a lawful permanent resident cannot be deprived of full due process rights due to a brief absence); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (stating that if an alien's brief absence is extended, he may lose his entitlement to lawful permanent resident status); Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("[W]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Chae Chan Ping v. United States, 130 U.S. 581, 609–10 (1889) (holding that the power to decide immigration issues is vested entirely with Congress and the President and that domestic constitutional norms are not entirely applicable to the immigration field).

29. Hernandez Pimentel, *supra* note 15, at 578.

30. *Id.* n.27 (citing 8 U.S.C. § 1158(b)(1)(A) ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum.")).

31. 8 C.F.R. § 208.16.

32. Withholding of removal is governed under the clear probability standard. INS v. Stevic, 467 U.S. 407 (1984).

33. Asylum is governed under the reasonable fear standard. INS v. Cardoza-Fonesca, 480 U.S. 421 (1987).

34. Hernandez Pimentel, *supra* note 15, at 578; 8 C.F.R. § 208.16(d) (2013).

political opinion.[35] A well-founded fear indicates a subjective standard of fear; however, to prove persecution, the applicant must show that the harm is objectively reasonable by proving both the type of harm and the likelihood of that harm.[36] Additionally, the persecutor must be the government or an individual or entity that the government is unwilling or unable to control.[37] The applicant must also file for asylum within one year of entering the country, unless he or she can prove "changed" or "extraordinary circumstances" to justify extending the deadline.[38]

Perhaps the most widely criticized area of domestic refugee law lies in the legal interpretations of what it means to have "membership in a particular social group." Because membership in a particular social group is the broadest of the five protected grounds in asylum claims, it naturally follows that courts tend to struggle with its interpretation.[39] Interpretations of the provision, both by agency officials and judges, have evolved over the past few decades, leaving asylum adjudicators with two well-established approaches to the legal application of membership in a particular social group: the protected characteristic approach and the social visibility test.[40]

In 1985, the Board of Immigration Appeals (BIA) first attempted to harness the interpretation of particular social group in *In re Acosta*, where it established the protected characteristic approach.[41] In creating the protected characteristic approach, the BIA held that certain groups are defined by "common, immutable characteristic[s]" that the members "cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[42] For example, members of a taxi cooperative are not members of a particular social group because they could easily change jobs.[43] Likewise, a group of "noncriminal drug informants working against the Cali drug

35. 8 U.S.C. § 1101(a)(42) (2006).
36. Persecution has various definitions in immigration law, including "the infliction of suffering or harm upon persons who differ [in one of the five protected grounds] in a way regarded as offensive" and "a serious threat to life or freedom on account of" one of the five protected grounds. Tala Hartsough, *Asylum for Trafficked Women: Escape Strategies Beyond the T Visa,* 13 HASTINGS WOMEN'S L.J. 77, 104–05 (2002).
37. 8 U.S.C. § 1101(a)(42).
38. 8 U.S.C. § 1158(a)(2)(B)–(D) (2006).
39. For purposes of this Note, the term "courts" is a catchall term for the courts involved in immigration hearings, including agency courts, such as the immigration court and the Board of Immigration Appeals (BIA), the circuit courts of appeal, and the Supreme Court of the United States.
40. *See* Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985) (adopting protected characteristic test); A-M-E-, 24 I. & N. Dec. 69 (B.I.A. 2007) (adopting social visibility test); C-A-, 231 I. & N. Dec. 951 (B.I.A. 2006) (same).
41. *See Acosta*, 19 I. & N. Dec. at 233.
42. *Id.*
43. *Id.* at 234.

cartel" are not socially visible because "the very nature of the conduct . . . is such that it is generally out of the public view."[44] This approach remained the interpretive standard for particular social group for more than two decades, until the BIA announced its new social visibility test in 2006.[45] This test is not precisely defined, but unlike the protected characteristic approach, it does not address identifying protected characteristics of the particular group.[46] Rather, it focuses on whether the group members are "externally distinguishable" through "highly visible" traits that may be recognizable to natives in their home country.[47]

Despite this clear change in the particular social group analysis, the BIA has never expressly recognized its departure from its own precedent.[48] This has resulted in a current split among the circuit courts.[49] The majority of the courts apply the *Chevron* doctrine,[50] de-

44. C-A-, 231 I. & N. Dec. at 960–61.
45. *Id.*
46. Hernandez Pimentel, *supra* note 15, at 576.
47. *Id.*
48. The BIA and the federal courts relied solely on the protected characteristic approach from *In re Acosta* for more than two decades without any other considerations. Only in the mid-2000s did the courts begin to include a social visibility factor in the analysis. As legal scholar Fatma Marouf noted, "Prior to these decisions, neither the BIA nor the federal courts mentioned 'social visibility' as relevant to the particular social group analysis, yet the BIA did not acknowledge any departure from precedent." 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, 63 (2008).
49. *Compare* Fuentes-Hernandez v. Holder, 411 F. App'x 438, 438–39 (2d Cir. 2011) (stating that the BIA did not err in determining plaintiffs, Salvadoran individuals who resisted gang recruitment, were not members of a particular social group because the group lacked social visibility); Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582 (3d Cir. 2011) (rejecting BIA's social visibility doctrine); Lizama v. Holder, 629 F.3d 400, 447 (4th Cir. 2011) (noting that the Seventh Circuit rejected the social visibility doctrine but declining to decide on the issue); Valladares v. Holder, 632 F.3d 117, 125 (4th Cir. 2011) (same); Urbina-Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir. 2010) (concluding that being a former gang member is part of a particular social group because it is an immutable characteristic and socially visible to persecutors); Scatambuli v. Holder, 558 F.3d 53, 60 (1st Cir. 2009) (rejecting the claim that BIA is precluded from considering social visibility); Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) (rejecting BIA's social visibility doctrine as inconsistent and arbitrary), *with* Perdomo v. Holder, 611 F.3d 662, 666–67 (9th Cir. 2010) (affirming the BIA's visibility standard); Guevara-Acosta v. Att'y Gen., 372 F. App'x 52, 53–54 (11th Cir. 2010) (finding the BIA's legal definition of membership in a particular group under the social visibility approach, neither arbitrary, capricious, nor clearly contrary to law); Ramos-Lopez v. Holder, 563 F.3d 885, 862 (9th Cir. 2009) (affirming the BIA's visibility standard); Malonga v. Mukasey, 548 F.3d 546, 553 (8th Cir. 2008) (same).
50. The *Chevron* doctrine is a judicially created doctrine that requires courts to defer to agency interpretations of relevant law so long as its interpretation is permissi-

ferring to the BIA's interpretation of membership in a particular social group to include the new social visibility factor.[51] The Third and Seventh Circuits are the only circuits to expressly reject the social visibility doctrine as a misapplication of international guidelines and an injustice to the refugee system.[52]

With multiple approaches to interpreting "member of a particular social group," uncertainty and misunderstandings are inevitable. Judges and agency decision makers should be objective triers of fact, and officials should use their discretion only after the applicant has satisfied the definition of refugee.[53] However, inconsistent interpretations blur objective areas of the law and open the door for officials to use discretion before it is warranted. Thus, the influence of morality slips through the cracks of expanded discretion, allowing agencies and courts to improperly impose their own moral code in deciding the fates of individuals in need of refuge.

III. CURRENT APPLICATION OF ASYLUM LAW IN SEXUALLY CONTROVERSIAL ASYLUM CLAIMS

United States jurisprudence surrounding gender-based and sexuality-based asylum claims has followed a twisted and often contradictory path. American culture often suppresses human sexuality, resulting in a severely limited understanding of nonconforming sexual experiences. American public schools lack comprehensive sex education,[54] and much educational discussion regarding sexuality is stifled in favor of hetero-normative sex culture as displayed in pop culture and media.[55] These sexual "norms" influence decisions in asylum adjudications, particularly with applicants who are victims of sex trafficking, as well as applicants who identify as lesbian, gay, bisexual, transgender, or queer (LGBTQ). Despite the objective role of asylum adjudicators, judges and agency decision makers are not ignorant of

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ble. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). For further discussion of the doctrine and its effect on the circuit split, see *infra* Part IV, section B.

51. *See, e.g.*, *Fuentes-Hernandez*, 411 F. App'x at 438–39 (upholding the BIA's definition); *Urbina-Mejia*, 597 F.3d at 365–67 (same); *Malonga*, 548 F.3d at 556 ("[W]e must give *Chevron* deference to the BIA's reasonable interpretation of the phrase 'particular social group.'").

52. *Valdiviezo-Galdamez*, 663 F.3d at 599–603; *Gatimi*, 578 F.3d at 615–16.

53. *See generally* INA § 208(b)(1), 8 U.S.C § 1158 (2006).

54. *See, e.g.*, *State Policies on Sex Education in Schools*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/issues-research/health/state-policies-on-sex-education-in-schools.aspx (last updated Apr. 26, 2013).

55. Thomas Peele, *Composition Studies, Heteronormativity, and Popular Culture*, BOISE ST. U., http://www.bgsu.edu/departments/english/cconline/peele/CulturalStudies.html (last visited Apr. 27, 2013); *see generally* Alice Park, *Parents' Sex Talk with Kids: Too Little, Too Late*, TIME MAG. (Dec. 7, 2009), http://www.time.com/time/health/article/0,8599,1945759,00.html.

these norms. Nor are they immune to their strong influence. When the law is inconsistent and vague, adjudicators' biases may sway them to inaccurately apply the relevant factors for establishing asylum claims. This section analyzes the highly discretionary application of asylum law by judges and immigration authorities, as well as the inconsistent consequences for sexually controversial asylum seekers.

A. Victims of Forced Prostitution and Sex Trafficking as Asylum Applicants

The practice of sex trafficking is often considered abhorrent in Western[56] society.[57] Prostitution, on the other hand, is viewed as a victimless crime arising from a personal choice to earn money through female promiscuity.[58] What many Westerners fail to realize is that sex trafficking comes in many forms. It is not always as easily recognized as the mainstream Hollywood movies and documentaries make it out to be.[59] Women can be forced into prostitution in a number of ways, including through domestic violence, economic necessity, and kidnapping or enslavement.[60]

Recognizing trafficking as a major international concern, Congress passed the Victims of Trafficking and Violence Protection Act (TVPA) in October of 2000.[61] The TVPA tackles the issue of human trafficking with a three-pronged approach: protection of victims, prosecution of traffickers, and prevention of trafficking both domestically and abroad.[62] Through the TVPA, victims of sex trafficking may obtain two forms of immigration relief: continued presence or the T visa.[63]

56. The term "western" is used to refer to cultural norms and ideas originating in the noncommunist states or Europe and North America. *Definition of Western in English*, OXFORD DICTIONARIES, http://oxforddictionaries.com/us/definition/american_english/western (last visited Apr. 27, 2013).
57. *See* Clawson, Dutch, Solomon & Grace, *supra* note 14.
58. *See id.*
59. *See, e.g.*, *Movies About Slavery and Human Trafficking*, ART4ABOLITION, http://www.art4abolition.org/movies-about-slavery.html (last visited Apr. 27, 2013) (providing a list and synopses of movies about human trafficking).
60. Catharine A. McKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 25–26 (1993).
61. Hartsough, *supra* note 36, at 96; *see also* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified in scattered sections of 8 and 22 U.S.C.) (establishing new protections for trafficking victims, including continued presence and the T visa). It is also important to note that since its original enactment, the TVPA has reauthorized twice to enhance protections for abused and trafficked women and children. *See* Trafficking Victims Protection Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified as amended in scattered sections of 8 and 22 U.S.C.).
62. M. Margaret McKeown & Emily Ryo, *The Lost Sanctuary: Examining Sex Trafficking Through the Lens of* United States v. Ah Sou, 41 CORNELL INT'L L.J. 739, 765–66 (2008).
63. *Id.*

Continued presence is a form of temporary protected status (TPS) that allows immigrant victims to be present legally in the United States during the pendency of a criminal investigation against the sex trafficker.[64] Continued presence may be granted for a year at a time and is renewable.[65] However, this form of TPS is extremely discretionary and may be revoked "at any time should officials deem the victim uncooperative."[66]

The T visa, on the other hand, provides victims with work authorization and legal status for up to four years. After the third year of T visa status, victims may apply for lawful permanent resident status. Although the number of T visas awarded annually is capped at 5000, eligibility for the visa is subject to strict requirements,[67] and successful applications rarely exceed 250 recipients per fiscal year.[68]

Prior to the passage of the TVPA, successful sex trafficking asylum cases were few and far between. Unfortunately, the Act did not change this trend.[69] Because the TVPA offered more predictable immigration solutions, asylum claims became backburner arguments for many victims[70] Thus, while investigations into sex trafficking may have increased, successful claims of asylum did not.[71] The reasons for the rejection of these asylum claims rest on two main issues: (1) sex trafficking is generally a gender-specific crime, and (2) these women do not fit into any particular social group under the BIA's interpretations of particular social group.

For example, being an attractive and young woman in a high-risk country is not enough to claim asylum as a "member of a particular social group."[72] But it is precisely these characteristics that make women the target of kidnapping, threats, and eventual enslavement in many source countries.[73] Vitore Rreshpja was a young, attractive Al-

64. *Id.*
65. *Id.*
66. *Id.*; *see also Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons Fiscal Year 2006*, U.S. DEP'T OF JUST. 43–53 (May 2007), *available at* http://www.justice.gov/archive/ag/annualreports/tr2006/agreporthumantrafficing2006.pdf (listing cases prosecuted in 2006).
67. An applicant must meet four requirements to be eligible for a T visa. He or she must (1) be a victim of a "severe form of trafficking;" (2) be physically present in the United States "on account of such trafficking;" (3) have complied with "any reasonable request for assistance in the investigation or prosecution of acts of trafficking;" and (4) face "extreme hardship involving unusual and severe harm upon removal." 8 U.S.C. § 1101(a)(15)(T)(i)(I)–(IV) (2006).
68. McKeown & Ryo, *supra* note 62, at 769 ("In fiscal year 2006, out of 346 trafficking victims who applied for a T-visa, only 182 were successful.").
69. *Id.* at 767.
70. *Id.*
71. *Id.*
72. *See* Rreshpja v. Gonzales, 420 F.3d 551 (6th Cir. 2005).
73. A source country in the human trafficking context is a country that supplies young men, women, and children for the commercial sex trade. While most vic-

banian woman who, because of her youth and beauty, was targeted for sex trafficking.[74] Shortly before her arrival to the United States in late 2001, she was the victim of an attempted kidnapping. During this attempt, she was told that she would "end up on her back in Italy, like many other girls."[75] Fearing for her life and freedom, Vitore and her family made arrangements for her to study in the United States. Upon the expiration of her student visa, Vitore filed for asylum based on her status as a young, attractive Albanian woman forced into prostitution work.[76] Both the immigration judge and the BIA denied her claim.[77] The Sixth Circuit affirmed.[78] In its opinion, the court reasoned that her claim was unlike recognized gender-specific claims for female genital mutilation because "the practice of forcing young women into prostitution in Albanian is [not] nearly as pervasive as the practice of female genital mutilation in Somalia."[79] Furthermore, the court argued that her social group could not be defined circularly.[80] In other words, Vitore could not assert her persecution into the particularity of her social group, rendering her status as a "young attractive Albanian woman" overbroad for purposes of defining a particular social group.

In 2012, a similar trafficking case was presented before the Seventh Circuit. Johana Cece, a young Albanian woman, was harassed and assaulted by gang leaders who wished to force her into prostitution work.[81] After the police took no action to help her, she fled to the United States and petitioned for asylum.[82] The BIA held that Johana did not belong to a particular social group because "young Albanian women targeted for trafficking" are not socially visible and do not share "a narrowing characteristic other than their risk of being persecuted."[83] The Seventh Circuit initially affirmed the BIA's denial of asylum, adding that there is no evidence that "sex trafficking poses the same particularized and inescapable threat to all young Albanian

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tims are trafficked from Asia, Europe is the destination for the majority of these commercial sex workers and trafficking victims. *Human Trafficking FAQs*, UNITED NATIONS OFF. ON DRUGS & CRIME, http://www.unodc.org/unodc/en/human-trafficking/faqs.html#Which_countries_are_affected_by_human_trafficking (last visited Apr. 27, 2013).

74. *Rreshpja*, 420 F.3d at 553.
75. *Id.*
76. *Id.* at 555.
77. *Id.* at 553.
78. *Id.*
79. *Id.* at 556.
80. *Id.*
81. Cece v. Holder, 668 F.3d 510, 512 (7th Cir. 2012), *vacated*, No. 11-1989, 2013 WL 4083282 (7th Cir. Aug. 9, 2013).
82. *Id.*
83. *Id.*

women" as other gender-specific crimes.[84] However, a year later, the court had an unprecedented change of heart. Upon rehearing, the court focused on a key "characteristic" that went overlooked in the first opinion—Johana's status as a "young woman from a minority religion *who has lived by herself* . . . and thus is [ ] particularly vulnerable to traffickers . . . ."[85] By including this detail in her particular social group, the court concluded that "[w]omen who fear female genital circumcision sound a lot like women who fear prostitution" and rejected the circular argument it had previously relied on.[86]

In an attempt to avoid a particular social group analysis altogether, other courts have denied sex trafficking victims on different grounds, including a re-characterization of the victim's suffering. For example, in 2000, the BIA denied a Congolese woman refugee status because her husband was simply a "despicable person" rather than an actor persecuting her based on her "membership in the particular social group of Congolese women."[87] And, in yet another case, the immigration judge denied relief to a young Russian woman because her proposed social group—"women from her country forced into prostitution by the mafia who escape sexual bondage"—failed "to pass muster . . . under the Board's analysis" of particular social group.[88]

As evidenced above, sex trafficking asylum cases rarely survive these murky and discretionary applications of the law, even after the TVPA made the issue a clear priority. Establishing both social visibility and particularity for these claims is an incredibly difficult task, particularly for these victims.[89] Their only socially visible quality is their gender, which has never been particularly narrow enough to satisfy the definition of particular social group.[90] Even statistical evidence proves a strong negative trend toward these types of asylum cases. A 2007 evaluation of fifty-two trafficking cases revealed that only 35% of these claims are granted at the immigration court level.[91] That number declines to 25% upon review by the BIA.[92] Although some BIA dissents and federal circuit court reviews provide promising language in their written decisions, the strong negative trend still

84. *Id.*

85. *Id.* at *15.

86. *Id.* at *18–19 (internal quotation omitted).

87. Martina Pomeroy, *Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement,* 16 MICH. J. GENDER & L. 453, 482 (2010).

88. Stephen Knight, *Asylum from Trafficking: A Failure of Protection,* IMMIGR. BRIEFINGS, July 2007, at 1, 10.

89. *See* Marouf, *supra* note 48, at 98–102.

90. Knight, *supra* note 88, at 11.

91. *Id.* at 5.

92. *Id.*

prevails in sex trafficking asylum claims.[93] Women are consistently denied protection and returned to a life of sexual violence and forced prostitution.

B. Sexual Minorities as Asylum Applicants

In 1994, former Attorney General Janet Reno officially designated as binding precedent the BIA's 1990 decision in *In re Toboso-Alfonso*,[94] which involved a gay Cuban man who was repeatedly abused by the Cuban government.[95] As a result of his victimization, Immigration and Nationality Service (Legacy INS) first recognized sexual orientation as a protected ground under particular social group.[96] The immigration judge applied the protected characteristic test in finding that homosexuality was an immutable characteristic.[97] The BIA elaborated on this finding by stating that, once registered by the Cuban government as a homosexual, his status, whether imputed[98] or actual, was unlikely to change.[99]

However, since the early 1990s, recognition of LGBTQ asylum claims has been inconsistent at best. In 1996, Legacy INS formally adopted the position that homosexuals are part of a particular social group for asylum purposes.[100] But operating under the influence of public opinion surrounding nonconforming sexual preferences, some immigration courts still found ways around the recognition of LGBTQ asylum claims. In the mid-1990s, Alla Pitcherskaia petitioned for asylum and withholding of removal on the protected ground of membership in a particular social group: Russian lesbians.[101] Alla had participated in various political protests in favor of the expansion of rights for gays and lesbians.[102] The militia detained her on numerous occasions for "hooliganism" and pressured her to reveal the identities

93. *See, e.g.*, Cece v. Holder, 668 F.3d 510, 514 (7th Cir. 2012) (Rovner, J., dissenting), *vacated*, No. 11-1989, 2013 WL 4083282 (7th Cir. Aug. 9, 2013).
94. Att'y Gen. Order No. 1895-94 (June 19, 1994); *see Asylum*, IMMIGR. EQUALITY, http://immigrationequality.org/issues/law-library/trans-manual/asylum/#5-5-asylum%E2%80%94sources-of-law (click on 5.6.1 "Membership in a Particular Social Group") (last visited Mar. 1, 2013) [hereinafter *Asylum*].
95. Toboso-Alfonso, 20 I. & N. Dec. 819, 821 (B.I.A. 1990).
96. *Id.* at 823.
97. *Id.* at 822.
98. Imputed sexual orientation refers to the perceived sexual orientation of the person by the persecutor, regardless of the person's actual sexual orientation. *See* Amanfi v. Ashcroft, 328 F.3d 719, 721 (3d Cir. 2003) (recognizing imputed sexual orientation when a heterosexual man from Ghana was persecuted as a homosexual after engaging in a single homosexual act to avoid a ritual sacrifice).
99. *Toboso-Alfonso*, 20 I. & N. Dec. at 822.
100. Memorandum from David A. Martin, INS General Counsel, to All Regional and District Counsel (Apr. 4, 1996) (on file with author).
101. Pitcherskaia v. INS., 118 F.3d 641, 643 (9th Cir. 1997).
102. *Id.* at 644.

of her gay and lesbian friends.[103] Because of her suspected status as a lesbian, Alla was eventually forced into clinical psychiatric treatment.[104] Both the immigration judge and the BIA denied her asylum application based on the lack of persecution in her case.[105] On appeal, the Ninth Circuit Court of Appeals reprimanded the BIA's unsound reasoning in stating:

> The fact that a persecutor believes the harm he is inflicting is 'good for' his victim does not make it any less painful to the victim . . . Human rights laws cannot be sidestepped by simply couching actions that torture mentally or physically in benevolent terms such as 'curing' or 'treating' the victims.[106]

In 2005, the Ninth Circuit recognized that both homosexual status and homosexual acts fall within membership of a particular social group.[107] In *Karouni v. Gonzales*, an HIV-positive Lebanese man petitioned for asylum after witnessing the murder of his friends and being outed[108] to the government as a gay man.[109] The court criticized the Attorney General's attempt to saddle the applicant with a Hobson's choice[110] to either "face persecution" for being gay or live "a life of celibacy."[111] Furthermore, the court cemented the immutability of same-sex attraction, both in status and in act:

> As the Supreme Court has counseled, "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." This is but one reason why "the sexual identities [of homosexuals] are so fundamental to their human identities that they should not be required to change them."[112]

Two years later, the Eighth Circuit evaluated a Ugandan lesbian's asylum claim based on the claim that sexual orientation is a particular social group.[113] Olivia Nabulwala fled her country after suffering from repeated sexual violence and abuse at the hands of her family and clan because of her sexual orientation.[114] Upon first review, the immigration judge recognized sexual orientation as a particular social

103. *Id.*
104. *Id.*
105. *Id.* at 645.
106. *Id.* at 648.
107. Karaouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005).
108. "Outing" is defined as the practice of revealing the sexual orientation of a person. *See Definition of Outing in English*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/english/outing (last visited Apr. 27, 2013).
109. *Karaouni*, 399 F.3d at 1173–75.
110. Named after Thomas Hobson in the fifteenth century, a "Hobson's choice" is an apparently free choice in which the chooser has only one real option. In other words, it is a forced choice. *See Hobson's Choice*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/hobson%27s%20choice (last visited Apr. 27, 2013).
111. *Karaouni*, 399 F.3d at 1173.
112. *Id.* (quoting Lawrence v. Texas, 539 U.S. 588, 567 (2003); Hernandez-Montiel v. INS, 225 F.3d 1084, 1094 (9th Cir. 2000)).
113. Nabulwala v. Gonzales, 481 F.3d 1115, 1117 (8th Cir. 2007).
114. *Id.* at 1116–17.

group but then used her particular social group to hold her to a higher standard of past persecution.[115] The court criticized the immigration judge's comparison of Olivia's claim to another case demonstrating an extreme example of persecution against a sexual minority, rather than conducting an independent analysis of her claim based on the totality of her particular circumstances.[116] It also criticized the immigration judge's insufficient findings of fact and the BIA's use of those facts to mischaracterize Olivia's situation.[117]

At no point in the aforementioned cases did the courts conduct an independent analysis of the BIA's social visibility test to award sexual orientation a *per se* status under particular social group. Although the BIA listed "homosexuals" as a socially visible group when it created the social visibility test in *In re C-A-*, this declaration does not substitute for application of the law.[118] Sexual orientation would arguably fail the social visibility test if properly applied, as many sexual minorities residing in intolerant countries hide their sexual orientation from society to protect themselves, their partners, and their families.[119] Furthermore, applying social visibility to sexual minorities would result in arbitrary and inconsistent decisions, as it would only provide for the masculine women or effeminate men who are immediately perceived as sexual minorities in society.[120] Not all sexual minorities conform to cognizable stereotypes; therefore, not all sexual minorities are socially visible.

The BIA's social visibility test forgets that a refugee's well-founded fear of persecution need not come from the world at large. Nor must it come from a governmental actor.[121] Just because a person's status is not visible to society as a whole does not protect him or her from potential persecution. It is enough that a persecutor could cause harm once the particular characteristic of the group is manifest.[122] There-

115. The immigration judge held that the applicant did not establish past persecution because her level of abuse did not meet the extreme level suffered by the gay applicant in *In re Toboso-Alfonso*. *Id.* at 1117.
116. *Id.* at 1118.
117. *Id*.
118. C-A-, 23 I. & N. Dec. 951, 961 (B.I.A. 2006).
119. "[T]he social stigma associated with homosexuality forces the majority of lesbians and gay men to hide their sexual orientation. . . . *Secrecy, silence and invisibility are themselves contributing factors to the human rights violations suffered by lesbians and gay men*." Marouf, *supra* note 48, at 79 (quoting Bill Fairbairn, *Gay Rights Are Human Rights: Gay Asylum Seekers in Canada*, *in* PASSING LINES 237, 243–44 (Brad Epps et al. eds., 2005)).
120. Marouf, *supra* note 48, at 84–87.
121. *See, e.g.*, Singh v. INS, 94 F.3d 1353, 1360 (9th Cir. 1996) ("Persecution meted out by groups that the government is unable or unwilling to control constitutes persecution under the Act. . . . Non-governmental groups need not file articles of incorporation before they can be capable of persecution."); McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981).
122. Marouf, *supra* note 48, at 83–84.

fore, a claim for asylum should not rest on whether the applicant dresses or acts a certain way, but rather on the merits of his or her claim.

Additionally, the BIA has yet to recognize transgender identity as a particular social group. When compared to the great strides achieved by other sexual minorities in asylum law, the courts' reluctance to expressly recognize transgender identity only mirrors the negativity associated with transgender persons in American culture. Instead, both the immigration courts and the courts of appeal have creatively used sexual orientation to grant transgender applicants asylum.[123] Although transgender identity could arguably be the only member of the sexual minorities to pass both the protected characteristic and social visibility tests, the courts of appeal have avoided such an analysis.[124] Rather than recognize transgender identity as its own politically correct social group, the courts have granted asylum based on membership in the particularly awkward social group of "gay men with female characteristics."[125] This uncomfortable rhetoric highlights the court's refusal to understand or recognize the realities and universality of personal identity outside the gender binary.

The Ninth Circuit is currently the only circuit to step closer to the proper recognition of transgender persons in asylum claims in recognizing "male-to-female transsexual[s]" as a particular social group.[126] However, the term transsexual cannot substitute for the recognition of the transgender community. Gender identity and expression are very personal forms of identity that vary with each individual. Transsexual is an older term used in the medical and psychological communities to refer to a person whose gender identity does not match his or her anatomical gender.[127] Many transsexual people seek to anatomically correct their gender through surgery.[128] But it is a specific term with which very few transgender people identify and, consequently, it does not encompass the majority of the transgender community.[129] For example, not every drag queen or cross-dresser identifies as transsexual. Transgender, on the other hand, is an umbrella term that encompasses people "whose gender identity or gender expression differs from the sex they were assigned at birth."[130] This includes, but

123. *See, e.g.*, Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007); Hernandez-Montiel v. INS, 225 F.3d 1084, 1085 (9th Cir. 2000) (holding that "gay men with female sexual identities" in Mexico may be a particular social group).
124. *Asylum*, *supra* note 94.
125. *Id.*
126. *Morales*, 478 F.3d at 975.
127. *Definition of Terms*, *supra* note 7.
128. *Id.*
129. *Id.*
130. *Frequently Asked Questions*, GLAD ALLIANCE, http://www.gladalliance.org/gender-identity/transgender/frequently-asked-questions (last visited Apr. 27, 2013).

is not limited to, transsexuals and cross-dressers.[131] Because of its all-encompassing nature, the term transgender is the only proper term to use when dealing with questions of gender identity, nonconforming gender roles, and gender-variant behavior.[132] If the courts continue using the term "transsexual," they will also continue to deny the majority of the transgender community proper recognition under the law, thereby allowing the perceived norms of the adjudicator to fill any analytical gaps.

IV. IDENTIFYING SOURCES OF "MORALITY" IN SEXUALLY CONTROVERSIAL ASYLUM CLAIMS

When taken together, the aforementioned cases indicate that the presence of morality in asylum decisions creates inconsistencies and injustices in the law. Public morality's subtle grip on asylum law does not render it any less forceful, particularly when its influence affects the most important player in the asylum process: the decision maker. Two main concepts contribute to the unsettling effect of morality in the asylum context: (1) the limited American understanding of nonconforming sexual experiences and (2) the inconsistent interpretations of "particular social group" in United States asylum law.

A. The American Understanding of Nonconforming Sexual Experiences is Severely Limited

Society's discomfort should not snatch away a victim's potential for refugee status, as that status may be his or her last form of protection. Unfortunately, as demonstrated in the above cases, the American understanding of nonconforming sexual experiences is so limited that it interferes with immigration adjudications, particularly in asylum cases. Moreover, this limited knowledge is so pervasive that judges and agency decision makers are not immune to the influence of these widespread moral judgments. This lack of cultural objectivity improperly inhibits the success of otherwise eligible asylum applicants, particularly when the nature of these cases is of a controversial sex-based nature.

The blinders on the American understanding of nonconforming sexual experiences in the context of forced prostitution and sex trafficking are undeniable. In the United States, women's equality is more than a movement—it is a policy. The modern American culture recognizes the autonomy of women in various life decisions, including decisions involving her career, marriage, and reproductive choices.[133]

131. *Id.*
132. Gender-variant behavior refers to behavior that diverges from the normative gender roles of society. *Id.*
133. McKinnon, *supra* note 60, at 14–15.

Women in Western cultures are also portrayed as having sexual power in the media and pop culture.[134] These widespread perceptions of women lead the American public to believe that prostitution is an individual choice made by the woman herself.[135] Yet, in many cases, the public could not be more wrong.

The sharp line drawn between prostitution and sex trafficking is nothing more than an illusion, painted by society to blanket reality. Americans often stereotype prostitution in one of two ways: a girl dragged at gunpoint from one job to another or a young, uneducated woman seeking wealth, glamour, and self-confidence through payment for her sexual services.[136] Reality's true line is much more blurred. In her article *Prostitution and Civil Rights*, Catharine McKinnon boldly describes the realities of prostitution by stating that "[m]ost, if not *all*, prostitution is ringed with force in the most conventional sense, from incest to kidnapping to forced drugging to assault to criminal law."[137] She continues to describe the effects of the ignorant American attitude toward prostitution by saying, "Prostitution as an institution silences women by . . . terrorizing them . . . by punishing them for telling the truth about their condition, [and] by degrading whatever they do manage to say about virtually anything because of who they are seen as being."[138]

A common misunderstood phenomenon in prostitution and trafficking is that of "survival sex." For many impoverished women and children, sex becomes a legitimate, and sometimes the only, foreseeable option to continue to survive and provide for a family. Once in the trade and without the basic knowledge necessary to defend themselves, these young women and children quickly become victims of fear, abuse, and forced drug addiction.[139] Although some cases of prostitution present an individualized choice, many do not. The women involved in prostitution rings suffer from inexplicable violence and racism, but their torture remains socially invisible.

The actual effect of public morality in asylum claims is, perhaps, most evident in LGBTQ asylum claims. A brief history of sexual minorities in the asylum process uniquely illustrates how popular norms in American culture affect outcomes in adjudications. When the

134. *Id.*
135. *See id.*
136. Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 110 (2006).
137. McKinnon, *supra* note 60, at 25–26 (emphasis added).
138. *Id.* at 15.
139. Dale Youngbee, *Chicago: A Survivor of Gay Sex Trafficking Speaks Up About His Ordeal*, WASH. TIMES, June 18, 2012, http://communities.washingtontimes.com/neighborhood/rights-so-divine/2012/jun/18/chicago-survivor-gay-sex-trafficking-speaks-about-/.

United States first adopted the Refugee Act of 1980, homosexuality was not tolerated, in practice or in law.[140] Sexual minorities faced criminal charges for expressing same-sex affection.[141] In 1986, the Supreme Court upheld such sodomy statutes.[142] It was not until 2003 that sodomy laws were ruled unconstitutional.[143] The spotlight on gay rights first gained momentum in 1993, when the Hawaii Supreme Court struck down a ban on same-sex marriage.[144] In the decade following that decision, the intimate lives of sexual minorities became a hot topic of conversation, both in the media and at the American dinner table.

Throughout this timeline, case law shows a significant rise in the grants of LGBTQ asylum claims through the consistent recognition of gay men and lesbian women as members of particular social groups.[145] This increase in successful asylum applications for the gay and lesbian community is corollary to the growing support of civil rights and equality for the American gay community. In 1996, only 27% of Americans supported same-sex marriage.[146] As of 2013, an unprecedented majority of the public (55%) now *supports* same-sex marriage.[147] However, the marriage debate faces political opposition, and these lower numbers may not accurately reflect American attitudes toward same-sex attraction in general. In a separate study released in May of 2011, the Pew Research Center found that 58% of Americans believe that "homosexuality should be accepted, rather than discouraged, by society."[148]

By contrast, the reluctance of adjudicators to properly recognize an entire group's gender identity[149] can be linked to current American sentiment toward transgendered individuals. Although support for the gay and lesbian community has grown to a majority over the past decade, the understanding and support of the transgender community

140. Lawrence v. Texas, 539 U.S. 558 (2003); Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).
141. *Lawrence*, 539 U.S. 55; *Bowers*, 478 U.S. 186.
142. *Bowers*, 478 U.S. 186.
143. *Lawrence*, 539 U.S. 558.
144. Baehr v. Lewin, 852 P.2d 44 (1993).
145. *See, e.g.*, Nabulwala v. Gonzales, 481 F.3d 1115 (8th Cir. 2007); Karaouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005); Amanfi v. Ashcroft, 328 F.3d 719 (3d Cir. 2003); Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).
146. Caitlin Stark & Amy Roberts, *By the Numbers: Same-Sex Marriage,* CNN POL. (June 26, 2013, 4:29 PM), http://www.cnn.com/2012/05/11/politics/btn-same-sex-marriage.
147. Susan Page, *Poll: Support for Gay Marriage Hits High After Ruling*, USA TODAY (July 1, 2013, 10:38 PM), http://www.usatoday.com/story/news/politics/2013/07/01/poll-supreme-court-gay-marriage-affirmative-action-voting-rights/2479541/.
148. *Most Say Homosexuality Should Be Accepted by Society,* PEW RES. CENTER (May 13, 2011), http://www.people-press.org/2011/05/13/most-say-homosexuality-should-be-accepted-by-society/.
149. *Asylum*, *supra* note 94.

is minimal at best.[150] The results of a preliminary survey of American attitudes toward transgender people "indicate that negative attitudes are widespread."[151] In a 2011 study, researchers found that transgender persons had double the unemployment rate of the general population and nearly one-fifth of the transgender population had been denied housing or medical care on the basis of gender identity or expression.[152] Some researchers suggest that these attitudes may be a result of a general discomfort with the deviation from the comfortable gender binary; however, more research is needed to confirm this hypothesis.[153] Regardless of the early nature of the studies, the numbers show that transgendered persons face an overwhelmingly negative public opinion and have yet to gain the acceptance attained by other sexual minorities.[154]

B. Inconsistent Interpretations Lead to Unfettered Discretion in Interpreting "Particular Social Group"

Normally, agency discretion should only be exercised after an applicant meets the refugee definition.[155] But owing to the inconsistent approaches to defining membership in a particular social group, judges and other asylum adjudicators must decide which test to follow and often find themselves with expanded discretion. Furthermore, because the BIA's own results of its social visibility analysis are so inconsistent,[156] courts are left to wade through unguided analysis when determining social visibility. Such power with so little guidance invites the influences of morality and, consequently, an abuse of discretion.

The courts' unwavering adherence to the *Chevron* doctrine, combined with the BIA's inconsistent understanding of its own test, only enables this abuse of discretion. In 2006, the United States Supreme Court firmly reprimanded the federal courts of appeal in *Gonzales v. Thomas* by holding that the BIA's interpretation of membership in a particular social group is entitled to deference under the well-estab-

150. Aaron T. Norton & Gregory M. Herek, *Heterosexuals' Attitudes Toward Transgender People: Findings from a National Probability Sample of U.S. Adults*, ACADEMIA (Jan. 10, 2012), http://www.academia.edu/1220851/Heterosexuals_Attitudes_Toward_Transgender_People_Findings_from_a_National_Probability_Sample_of_U.S._Adults.

151. *Id.* at 14.

152. JAIME M. GRANT ET AL., NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3–4 (2011), *available at* http://transequality.org/PDFs/Executive_Summary.pdf.

153. Norton & Herek, *supra* note 150. Gender binary is a term used to describe the normative expression of male and female gender and gender roles. *Id.*

154. *Id.*

155. 8 U.S.C. § 1158(b)(1)(A) (2006).

156. *See, e.g.*, Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009).

lished *Chevron* doctrine.[157] The *Chevron* doctrine arose out of a former Supreme Court case in which the Court clearly articulated the doctrine of administrative deference and set forth a legal test for determining whether to give an administrative agency deference in the interpretation of its applicable statutes.[158] The test requires a court to review two issues: (1) whether Congress explicitly addressed the issue and, if not, (2) whether the agency's interpretation is a permissible construction of the statute.[159] Mindful of the Supreme Court's "admonition," most circuit courts have utilized the *Chevron* doctrine to accept the BIA's social visibility test without questioning the method in which it is used or whether such a test overrides its former applications of the law under the protected characteristic test.[160]

This form of reflexive deference operated by the majority of the circuit courts is inappropriate in the asylum context. In his opinion for the Seventh Circuit, Judge Posner most clearly articulates how the BIA's application of the law has been inconsistent at best and why this inconsistency requires a rejection of the "social visibility" test:

> [The BIA's social visibility test] makes no sense; nor has the Board attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility. Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual . . . [And] those former employees of the Colombian attorney general [who were targeted for assassination] tried hard, one can be sure, to become invisible and, so far as appears, were unknown to Colombian society as a whole.[161]

Particularly, Judge Posner noted that under current interpretations of the law, it would be impossible to "classify socially invisible groups as particular social groups . . . without repudiating the other line of

157. Gonzales v. Thomas, 547 U.S. 183 (2006).

158. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

159. *Id.* at 842–43.

160. *See, e.g.*, Fuentes-Hernandez v. Holder, 411 F. App'x 438, 438–39 (2d Cir. 2011) (stating Salvadoran individuals who resist gang recruitment are not part of a particular social group because they are not socially visible); Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582 (3d Cir. 2011) (rejecting BIA's social visibility doctrine); Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011); Lizama v. Holder, 629 F.3d 400 (4th Cir. 2011) (calling social visibility doctrine into doubt); Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011); Perdomo v. Holder, 611 F.3d 662, 666–67 (9th Cir. 2010); Guevara-Acosta v. Att'y Gen., 372 F. App'x 52, 53–54 (11th Cir. 2010); Urbina-Mejia v. Holder, 597 F.3d 360, 365–67 (6th Cir. 2010) (concluding that being a former gang member is part of a particular social group because it is an immutable characteristic and socially visible to his persecutors); Ramos-Lopez v. Holder, 563 F.3d 885, 862 (9th Cir. 2009); *Gatimi*, 578 F.3d at 615–16 (rejecting BIA's social visibility doctrine as inconsistent and arbitrary); Scatambuli v. Holder, 558 F.3d 53, 60 (1st Cir. 2009) (rejecting claims that BIA is precluded from considering social visibility); Malonga v. Mukasey, 548 F.3d 546, 554 (8th Cir. 2008).

161. *Gatimi*, 578 F.3d at 615–16.

cases."[162] Inconsistency in application should raise the flag for courts to reject the BIA's social visibility test under the *Chevron* doctrine. Picking and choosing one of multiple inconsistent interpretations will only "condone arbitrariness and usurp the agency's responsibilities."[163]

Furthermore, the rejection of the social visibility doctrine is also consistent with the international guidelines issued by the United Nations High Commissioner on Refugees (UNHCR) in 2002.[164] The UNHCR recognized the predominant use of the protected characteristic and social perception approaches in various countries and sought to reconcile the various approaches with the proposal of a single definition of particular social group:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights . . . [Only if] a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental [should] further analysis . . . be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.[165]

The UNHCR guidelines make it clear that social visibility and public perception is a secondary form of analysis reserved only for when a protected immutable characteristic is disputed or nonexistent. It should not be a dual requirement or a factor in every analysis of "particular social group."

To conform to the current interpretations of the law inevitably leads to arbitrary and inconsistent results, influenced by the majority views of morality and harming well-deserving and otherwise eligible asylum seekers. As legal scholar Richard A. Wasserstrom once noted: "[T]he judge usually begins with the conclusion that he deems proper and only later seeks to rationalize this result by purporting to show that it derives necessarily from the 'relevant' legal rule. . . . [R]ules of law are nothing more than expressions of the judge's desire."[166] Without concrete context and guidelines in the law, the decision maker's morals will also influence his or her thinking. But judges are not meant to rule according to popular societal norms. They are meant to be an objective voice in the judicial system and weigh all things

162. *Id.* at 616.
163. *Id.*
164. Marouf, *supra* note 48, at 60.
165. U.N. High Comm'r for Refugees [UNHCR], Guidelines on International Protection: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *UNHCR Guidelines*].
166. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION TOWARD A THEORY OF LEGAL JUSTIFICATION 21 (1961).

equally, in adherence with the law. The inconsistencies created by the BIA cannot continue to expand judicial discretion and the influence of morality. To curb the effect of morality in the decision-making process, judges and agency decision makers require clear, concise, and consistent guidelines, both in statutory and case law, to eliminate the problem of unwarranted judicial discretion.

V. FULFILLING INTERNATIONAL AND HUMANITARIAN OBLIGATIONS THROUGH REDRAFTING AND THE LEGISLATIVE PROCESS

The situations of refugees alter with the developments of the world, and courts cannot continue to deny protection to victims of hate crimes, torture, trafficking, and other horrifying forms of persecution merely because the statutory language fails to account for the greatest harms facing humanity today. But introducing gender as a protected ground to qualify for refugee status would greatly reduce the influence of morality in the asylum courtroom. Likewise, adopting the UNHCR's guidelines on membership in a particular social group would help minimize the ambiguity surrounding its interpretation, thereby reducing the overexpansion of judicial discretion in sex-based claims. Although reducing morality's effect is a large task, redrafting both the domestic and international law is a necessary first step in eliminating statutory ambiguity, unfettered agency discretion, and ultimately, the morality bias.

Currently, the absence of gender as a protected ground for refugee status fails to adequately align the law with the purposes of the 1951 Convention and its subsequent 1967 Protocol. When a trafficked woman cannot rely on her gender to provide her protection, she is left with few, if any, options for an asylum claim. Her only recourse lies within a claim for membership in a particular social group, but even that will be denied due to the circular nature of the identifying group and its form of persecution.[167] Furthermore, a transgender individual must creatively characterize his or her claim by refusing to recognize the true basis for his or her persecution based on a gender nonconforming identity. Gender-based claims are often swept into membership in a particular social group, where current interpretations of the phrase fail to account for gender-related harms.

For example, although the UNHCR has recognized that trafficking victims may be refugees when they "face serious repercussions after their escape and/or upon their 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," this guiding language focuses more on the analysis of

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

persecution than the recognition of trafficking victims as a particular social group.[168] As a result, a court may accept or deny its interpretation of a trafficking victim's particular social group based on its characterization of her facts. Unfortunately, this allows a court to allow public morality to influence its view of her situation. In other words, depending on the facts of her claim, the court may see her case as one involving nothing more than a "despicable" husband with bad intentions or one involving "children who have been abandoned by their parents and who have no received surrogate form of protection."[169] Both interpretations completely exclude the very serious issue of sex trafficking, and this refusal to recognize the issue fails to meet the international obligations established by the 1951 Convention and its subsequent Protocol.

A. Domestic Redrafting

The unfair outcomes for sexually controversial asylum seekers are unacceptable, and both international and humanitarian obligations demand change. Congress should provide better guidance in the statutory language to eliminate the majority views of morality in the asylum courtroom. In order to accomplish this change, I propose two changes to the definition of refugee under INA § 101(a)(42): (1) the addition of sex/gender as a protected ground and (2) the inclusion of specific factors in the interpretation of particular social group through the adoption of the UNHCR's aforementioned definition.

Opponents of immigration reform have argued that changing the current definitions of refugee law will only open the floodgates to the admission of nearly any person into the United States.[170] However, this fear is misplaced. Qualifying for a protected ground does not simultaneously qualify an individual for asylum. Asylum seekers must prove all elements of the refugee definition, including persecution, a nexus between that persecution and the protected ground, and the existence of an uncooperative or inept government in the home country. Furthermore, there are certain bars to asylum, including the material support bar and certain gang-related bars based on criminal activity, that operate as safeguards for the state's interest in maintaining control over its population.[171]

By incorporating gender as a protected ground for refugee status, the law will be one step closer to properly addressing the needs of

168. Pomeroy, *supra* note 87, at 482.
169. *See id.*; Knight, *supra* note 88, at 14.
170. Kristin A. Bresnahan, *The Board of Immigration Appeals' New "Social Visibility" Test for Determining "Membership of a Particular Social Group" in Asylum Claims and Its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 675 (2011).
171. *Id.* at 676.

many sexually controversial asylum applicants and eliminating the influence of morality in the courtroom. As mentioned in Part III, sex trafficking is often a gender-specific crime. Because of this, women struggle to form a legally sufficient description of their particular social group. By adding gender as a protected ground, women will no longer have claims dismissed on criticisms of rhetoric. Rather, women will qualify for a protected ground in the context of their experiences and must demonstrate their refugee status through the severity of their circumstances under an analysis of persecution.

Gender will provide additional protections for sexual minorities seeking asylum. Recognizing gender would recognize the difficulties facing gender nonconforming individuals and not preempt their cases by a mischaracterization of gender identity as an awkward phrasing of sexual orientation under particular social group. Furthermore, by understanding sexual orientation as a limit on whom an individual may romantically associate with based on his or her gender, sexual orientation may also be covered by gender as a protected ground.

Sexual minorities traditionally fall into this foggy realm of particular social group. Although the disputed understanding of particular social group begs for reform outside of the context of sexually controversial asylum seekers, its inconsistent results in the aforementioned cases exemplify why reform is necessary. By adopting the UNHCR's definition of particular social group into the INA's statutory framework, Congress would effectively eliminate the inconsistent interpretations and tests circling the various circuits and courts. The UNHCR's definition provides the necessary guidance to interpreting the phrase, as well as covering both actual and imputed characteristics. Moreover, the existence of a secondary test, should the proposed group fail the first test, will not open the floodgates to asylum applications. It is sufficiently narrow to safeguard the state's interest in protecting its borders from arbitrary overpopulation, while simultaneously providing adequate coverage of internationally persecuted groups in need of asylum.

B. International Redrafting

As a major influence in the international community, the United States' obligation to provide for the needs of refugees should not stop at its own borders. Rather, the United States should endorse and encourage refugee reform on the international level through an amendment to Article 1 of the 1951 Convention. Over forty-five years after the adoption of the 1967 Protocol, the international community has again begun to demand for the restructuring of the international definition of refugee, as well as state obligations. The passage of time brings about new schemes of natural disasters, political conflict, and

targeted oppression that a strict reading of that language simply does not cover. It is time for change.

The current definition, which has been adopted by hundreds of state actors, fails to include various types of refugees, including internally displaced persons, environmental refugees, and stateless persons. Because of the model language's lack of coverage, various persons in need of international assistance may not qualify for asylum in any country outside of their own. Admittedly, providing adequate coverage without opening the floodgates is a tricky task. However, the case of sexually controversial applicants clearly demands, at the very least, the recognition of gender and sex as an international refugee instrument. Such a change would be consistent with many of the international community's purposes and goals in promoting the equality of women and sexual minorities.[172] In order to provide the most protection to those in need, the United States should propose the following amendment to Article 1 of the 1951 Convention:

Article 1
DEFINITION OF THE TERM "REFUGEE"

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who . . . (2) . . . [O]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, *sex*, membership in 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 . . .

This new definition of refugee would then be incorporated into the 1967 Protocol, mandating state compliance with the 1951 Convention's provisions.[173] In proposing and supporting an amendment to an international document, the United States should mirror much of the language used in other significant international instruments, such as the Universal Declaration of Human Rights (UDHR)[174] or the International Covenant on Civil and Political Rights (ICCPR).[175] Both the UDHR and the ICCPR contain provisions safeguarding all rights "without distinction of any kind, such as . . . sex . . . ."[176] While "sex" has commonly been interpreted to mean gender, the United Nations Human Rights Commission officially included sexual orientation in

172. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979); *Security Council Resolutions*, UNITED NATIONS SECURITY COUNCIL, http://www.un.org/en/sc/documents/resolutions/index.shtml (last visited Nov. 26, 2012); *U.N. Backs Gay Rights for First Time Ever*, CBS NEWS (June 17, 2011, 2:28 PM) http://www.cbsnews.com/2100-202_162-20072040.html.

173. Goodwin-Gill, *supra* note 17, ¶¶ 32–34.

174. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948).

175. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316, at 52 (1966) [hereinafter ICCPR].

176. *Id.* art. II, ¶ 1.

the ICCPR's definition of "sex."[177] In the subsequent years, this expanded interpretation of sex in international law has been extended to other legally binding international instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture (CAT), the Convention on the Rights of the Child, and the International Convention on the Economic, Social and Cultural Rights (ICESCR).[178] The use of the word "sex" rather than "gender" would ensure more comprehensive coverage of the various sexually controversial claims in international law, including those surrounding sexual orientation, gender identity, and forced prostitution, and would provide more statutory protection against the influence of morality in the fates of well-deserving refugees.

VI. CONCLUSION

The current scheme of asylum law does not lead to desirable outcomes, and the reality of its legal inadequacies demands change. The BIA's construction of particular social group under the social visibility test allows the objective decision maker to be easily influenced by the popular view of the majority and inevitably results in the improper exclusion of previously recognized particular social groups and other inconsistencies. This absence of cultural objectivity within the courts should not arbitrarily rob well-deserving individuals of the opportunity to rebuild their lives. To manifest the change necessary to guarantee access to fair asylum procedures for all applicants, the United States must aim to eliminate the statutory ambiguity surrounding the particular social group analysis. By simply incorporating gender as a protected ground and redefining particular social group consistent with international asylum guidelines, the United States can take enormous strides in eliminating the expansion of judicial discretion and its resulting inequities in controversial sex-based asylum claims. This additional statutory guidance, both domestically and internationally, will work to assure that popular opinions will no longer be the voice of the courts in refugee and asylum law—the law will.

177. In *Toonen v. Australia*, a Tasmanian gay activist filed an individual complaint directly with the Human Rights Commission, alleging that Australian laws criminalizing consensual and private sex between adult males violated his right to privacy under Article 17 of the ICCPR. *Toonen v. Australia*, U.N. GAOR Human Rights Comm'n, 50th Sess., Supp. No. 40, vol. 2, U.N. Doc. A/49/40, at 226 (1994) (holding that a statute criminalizing homosexual conduct violated the ICCPR).

178. Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law,* 71 U. CHI. L. REV. 1689, 1701–02 (2004).