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The Asylum Claim for Victims of Attempted Trafficking

Kelly Karvelis*

ABSTRACT

The state of the law regarding refugees in the United States has been characterized in the recent past by inconsistent rulings among the Circuit Courts, and narrow applications of the Immigration and Nationality Act of 1952, which provides the basis for asylum eligibility. In the midst of this sometimes-contradictory application of the INA, victims of attempted sex trafficking (those who have faced threats or attempts by sex traffickers to force them into sexual slavery) have consistently been rejected for asylum by U.S. courts. Federal courts have uniformly denied these asylum claims by ruling that these victims do not meet the INA's requirement that refugees fall into a particular social group. Therefore, this Comment focuses largely on the argument that U.S. courts have interpreted the "social group" provision in an unduly narrow fashion, and that victims of attempted trafficking do indeed satisfy this element of the INA's test for asylum eligibility. This Comment argues that U.S. courts' rejections of these asylum claims are inconsistent with the legislative intent behind the Immigration and Nationality Act of 1952, federal case law that has granted asylum petitions in similar contexts, and the United Nations' and international interpretations of refugee law. Based on these reasons and public policy concerns, U.S. courts should recognize the valid claims of many of these victims of attempted trafficking, and grant them the asylum that they deserve.

I. INTRODUCTION

While the United States government has stated that human trafficking, and sex trafficking in particular, is a grave problem that should not be tolerated,[1] U.S. jurisprudence has given insubstantial consideration to the asylum claims of those in danger of *becoming* victims of such trafficking. Federal courts have reviewed few cases involving women who have experienced threats or attempts by sex traffickers to force

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[1] *See Office to Monitor and Combat Trafficking in Persons*, U.S. DEP'T OF STATE, *available at* http://www.state.gov/j/tip/ (last visited Jan. 23, 2013) ("'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.' – President Barack Obama.").

them into sexual slavery, and they have denied asylum to all of these women.[2] This Comment argues that victims of attempted trafficking should be granted asylum in the United States because they meet the elements necessary for a successful asylum claim under the Immigration and Nationality Act of 1952[3] (INA): membership in a "social group," "persecution or well-founded fear of persecution" based on membership in that social group, and the inability or unwillingness of the claimant to "avail himself or herself of the protection" of his or her country of nationality.[4] This Comment analyzes this issue with a focus on Albanian victims of attempted trafficking.[5]

U.S. jurisprudence on asylum has long been characterized by its substantial intricacy and its lack of uniformity across circuits, sometimes even within circuits.[6] While the INA dictates the conditions under which applicants qualify for asylum, the proper interpretation of "membership in a particular social group"[7] has perplexed U.S. courts. The perceived ambiguity of this language has led courts to implement a variety of different tests to determine whether or not applicants making a social group-based claim meet asylum requirements. This has led to inconsistent, and sometimes contradictory, applications of the law.[8] As a result of this unsettled precedent, courts have been hesitant to find that the "social group" factor of an asylum claim has been met.[9] While there have also been varying interpretations as to what constitutes a well-founded fear of persecution and an inability of claimants to avail themselves of the protection of their home countries, the ambiguity surrounding membership in a social group serves as the largest barrier for victims of attempted trafficking. The failure to consider victims of attempted trafficking as a social group excludes them from asylum eligibility without examining the circumstances that give rise to their well-founded fear of persecution and inability to avail themselves of the protection of their countries.

For potential victims of human trafficking around the world, this skepticism toward social group claims has resulted in a frustrating denial of claims for asylum of trafficking targets based on a wide variety of standards. The seemingly arbitrary denial of asylum to those targeted by human traffickers is inappropriate for three reasons. First, it is contrary to the humanitarian purposes for which Congress passed the Refugee Act of 1980[10]

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[2] *See, e.g.*, Kalaj v. Holder, 319 F. App'x 374 (6th Cir. 2009); Rreshpja v. Gonzales, 420 F.3d 551 (6th Cir. 2005).

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

[4] 8 U.S.C. § 1101(a)(42)(A) (2012).

[5] This focus provides the best illustration of the problem because the majority of cases in which U.S. Courts have examined this issue have involved Albanian victims of attempted trafficking.

[6] *See* Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 422 (2007) (citing a study of U.S. Courts of Appeal that found "stunning variability from one circuit to another").

[7] 8 U.S.C. § 1101(a)(42)(A).

[8] T. David Parish, *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.").

[9] *Id.*

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

(Refugee Act), which amended the INA. Second, it is incompatible with U.S. case law governing asylum eligibility in comparable situations.[11] Third, it is inconsistent with the 1967 United Nations Protocol Relating to the Status of Refugees[12] and the international interpretation of what constitutes membership in a social group with a well-founded fear of persecution. By taking greater cognizance of these sources that should and were meant to inform courts' interpretations of the INA and Refugee Act, U.S. courts can finally issue sound rulings that recognize potential victims of human trafficking as constituting a "social group" with a "well-founded fear of persecution" and an "inability to avail [themselves] of the protection" of their native countries, for asylum purposes under the INA.[13]

II. THE REALITIES OF HUMAN TRAFFICKING

In analyzing the asylum claims of victims of attempted trafficking, it is important to understand the nature of human trafficking and the persecution victims fear if returned to their native countries. Human trafficking constitutes a modern-day form of slavery,[14] and in the case of sex trafficking includes rape, violence, psychological torment, and even the infliction of disease and addiction.[15] Disturbingly, human trafficking is the fastest growing criminal industry in the world, and it is one of the largest, second only to drug trafficking.[16] While the highly secretive nature of human trafficking makes it incredibly difficult to gather accurate statistics regarding the total number of trafficking victims, estimates suggest the number of trafficking victims worldwide is a staggering 12.3 million people.[17]

The United Nations (U.N.) defines "trafficking in persons" as

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[18]

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[11] Other asylum cases that involved threats or attempts at persecution have been decided in favor of the plaintiff. *See, e.g.*, Sarhan v. Holder, 658 F.3d 649 (7th Cir. 2011). This case is discussed in more detail *infra* text accompanying notes 129-134.

[12] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter U.N. Protocol].

[13] 8 U.S.C. § 1101(a)(42)(A) (2012).

[14] *See* Kendal Nicole Smith, *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, 18 GEO. MASON L. REV. 759, 760 (2011).

[15] *See* Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 414-15 (2011).

[16] *See Human Trafficking*, WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL, http://www.atg.wa.gov/HumanTrafficking.aspx#.UOoqg45dHqE (last visited Jan. 6, 2013).

[17] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2010), *available at* http://www.state.gov/documents/organization/142979.pdf.

[18] 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.

The U.N. explains further that human trafficking, in general, includes "at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."[19]

Once victims find themselves in the hands of traffickers, they may be subjected to rape, violence, and humiliation. Additionally, many trafficking victims must turn over all of their earnings to their traffickers, leaving them economically powerless.[20] To exert control over these women and to keep them captive, traffickers commonly use psychological manipulation, forced drug use, physical and sexual violence,[21] in addition to threats of violence against the trafficked women's family members.[22] For example, the trafficker of one Albanian survivor of sex trafficking "kept her in submission through physical abuse--beatings, rape, and slicing her with knives."[23] Another Albanian trafficking survivor stated that after she was successfully abducted, her kidnappers "often threatened to kill [her] or harm [her] family if [she] wouldn't comply,"[24] and that she "was afraid of them as [she] knew they carried guns and were on drugs."[25]

Aside from the physical and psychological torture that these women suffer throughout this forced prostitution, many also contract potentially life-threatening sexually transmitted infections.[26] For example, a Harvard School of Public Health study found that approximately thirty-eight percent of Nepalese survivors of human trafficking were found to have contracted HIV.[27] Furthermore, many traffickers force their victims to engage in drug use in order to render them less autonomous and to induce more dependency on their traffickers.[28]

With regard to targets of human trafficking, sex trafficking primarily affects young women.[29] According to the U.S. Department of Justice, eighty-seven percent of sex

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[19] *Id*.
[20] *See* Michelle Crawford Rickert, *Through the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level*, 4 LIBERTY U. L. REV. 211, 232 (2010).
[21] *See* Sangalis, *supra* note 15, at 414-15 (noting that "[f]orms of physical coercion can include assault, burning, or rape").
[22] *Id.* at 415; *see also Lithuanian Sex Slave's Bid to Escape Great Yarmouth Trafficker*, BBC NEWS NORFOLK (Sept. 1, 2011), http://www.bbc.co.uk/news/uk-england-norfolk-14751842 (explaining that a particular trafficking victim's "motivation for staying was that she was absolutely terrified of what might happen to her family in Lithuania and her boyfriend" because of her trafficker's "regime of threats").
[23] Sara Elizabeth Dill, *Human Trafficking: A Decade's Track Record, Plus Techniques for Prosecutors and Police Moving Forward*, ABA CRIM. JUST., Spring 2011, at 18, 24.
[24] *True Stories: The Story of M.*, ASS'N OF ALBANIAN GIRLS AND WOMEN, http://www.aagw.org/Education/TrueStories/True9M (last visited Apr. 29, 2013).
[25] *Id*.
[26] Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 464-65 (2011).
[27] *Id*. (citing Jay G. Silverman et al., *HIV Prevalence and Predictors of Infection in Sex-Trafficked Nepalese Girls and Women*, 298 JAMA 536, 538 (2007)).
[28] Sangalis, *supra* note 15, at 415.
[29] *See* ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, TRAFFICKING IN HUMAN BEINGS: IMPLICATIONS FOR THE OSCE 2.2.1 (1999), *available at* http://www.osce.org/odihr/16709#p221 ("Traffickers tend to target young women and girls in countries or regions where socio-economic conditions are difficult and opportunities for women are extremely limited.").

trafficking victims are under the age of twenty-five.[30] Additionally, poverty is an extremely common trait among trafficking victims and a major cause for the persistence of this industry.[31] For instance, after the arrest of a Lithuanian trafficker, an English police officer noted that he believed the victim "was targeted because of several desirable 'business' factors," including "her poor education, scant life experience," and youth.[32] The police report also noted that this woman came from a town with little economic opportunity.[33]

III. REJECTION OF ASYLUM CLAIMS OF VICTIMS OF ATTEMPTED TRAFFICKING BY U.S. COURTS AND AGENCIES

Despite the extreme dangers faced by targets of human trafficking, U.S. court decisions and administrative adjudications have not been receptive to the asylum claims of these victims. While data on the outcomes of these cases has not been comprehensively compiled, the Center for Gender & Refugee Studies collected information from about fifty-two administrative and federal judicial decisions on asylum claims involving trafficking as of 2007.[34] Each of these cases involved asylum claims by individuals who had been trafficked, forced into prostitution, or threatened with either of these fates.[35] The outcomes of these cases included seven grants and four denials at the Asylum Office, thirteen grants and twenty-six denials in immigration court, and three grants and nine denials at the Board of Immigration Appeals (BIA).[36] With regard to cases brought forth by Albanian claimants, which comprise 35 percent of the total, there were three grants and two denials at the Asylum Office, four grants and thirteen denials in immigration court, and no grants and five denials at the BIA.[37] While these statistics demonstrate a low rate of success of asylum claims by victims of actual trafficking—as well as those of attempted trafficking—there are other recourses available to victims of actual trafficking that are not available to victims of attempted trafficking, such as "T-visas" under the Victims of Trafficking and Violence Protection Act[38] and relief under the Convention Against Torture.[39]

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[30] U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008-2010 1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf.

[31] Sangalis, *supra* note 15, at 410-11 ("Perhaps the most pervasive of these causes is global poverty, which disproportionately affects women and girls.").

[32] BBC NEWS NORFOLK, *supra* note 22.

[33] *Id*.

[34] *See* Stephen Knight, *Asylum from Trafficking: A Failure of Protection*, IMMIGR. BRIEFINGS, July 2007, at 1, *available at* http://cgrs.uchastings.edu/documents/cgrs/advisories/Knight_%20ImmigBriefings_Trafficking_Asylum.pdf.

[35] *Id*.

[36] *Id*.

[37] *Id*.

[38] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 8 U.S.C. and 22 U.S.C.). "T-visas endow trafficking victims with an assortment of benefits, including medical services and possibly lawful permanent residency after

Part of the reason why asylum claims made by victims of attempted trafficking have not been successful is that U.S. courts have applied a narrow standard in interpreting what constitutes a "social group," one of the three elements that these claims must set out and fulfill. The dominant standard used to determine the existence of a proper social group claim in an asylum application is the "immutable characteristic" standard, established by the BIA in *In re Acosta* in 1985.[40] In *In re Acosta*, the BIA defined an immutable characteristic as "beyond the power of an individual to change or . . . so fundamental to individual identity or conscience that it ought not be required to be changed."[41] However, federal courts' interpretations of what constitutes a social group under this standard have been very narrow, in contravention of the various sources of law—to be discussed *infra* Part IV—that should inform courts' interpretations.

Rather than relying on proper canons of statutory interpretation to adequately take account of these sources of law that should inform their interpretations of the immigration laws at issue, U.S. courts have employed arbitrary analyses to determine which groups are sufficiently narrow to constitute a particular social group. Their method resembles the discretionary approach afforded to the Attorney General,[42] rather than a judicial undertaking to determine whether applicants qualify for asylum on the basis of the statute itself. Such subjective analyses for deciding these claims have contributed to the substantial inconsistency that characterizes current U.S. asylum law, making the system inherently unfair to asylum seekers, whose probabilities of success depend on which circuits and which individual judges review their cases.[43] Moreover, the courts' emphasis on the narrowness of a social group's uniting features has the troubling result of only protecting small classes of people from persecution, while

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three years, similar to the benefits afforded to refugees." Calvin C. Cheung, *Protecting Sex Trafficking Victims: Establishing the Persecution Element*, 14 ASIAN AM. L.J. 31, 34 (2007).

[39] *See* 8 C.F.R. § 208.16 (2012).

[40] *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985). While subsequent BIA decisions such as *In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74-76 (B.I.A. 2007), have added a requirement that a social group be "socially visible," there is debate about the force of that requirement or the BIA's meaning of the term. *See* Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009) ("Often it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even whether it understands the difference.").

[41] *In re* Acosta, 19 I. & N. Dec. at 233. However, some courts, such as the Court of Appeals for the Ninth Circuit, have rejected this standard and utilized contradictory tests, such as requiring that a social group be based on common interests or a voluntary associational relationship. *See, e.g.*, Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1576 (9th Cir. 1986).

[42] *See* 8 U.S.C. § 1158(b)(1)(A) (2012).

[43] *See* Jaya Ramji-Nogales et. al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (citing a study that demonstrated enormous disparities in asylum grant rates at the immigration judge level, the Board of Immigration Appeals level, and the federal courts of appeal level.). "The analysis reveals amazing disparities in grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country. For example, in one regional asylum office, 60% of the officers decided in favor of Chinese applicants at rates that deviated by more than 50% from that region's mean grant rate for Chinese applicants, with some officers granting asylum to no Chinese nationals, while other officers granted asylum in as many as 68% of their cases. Similarly, Colombian asylum applicants whose cases were adjudicated in the federal immigration court in Miami had a 5% chance of prevailing with one of that court's judges and an 88% chance of prevailing before another judge in the same building. Half of the Miami judges deviated by more than 50% from the court's mean grant rate for Colombian cases." *Id.*

disregarding oppression that has a broader impact. As will be discussed later in this piece, this highly restrictive interpretation fails to adhere to the principles of humanitarianism for which Congress passed the Refugee Act.[44]

In addition to, and in conjunction with, this narrow interpretation of what constitutes a "social group" for asylum purposes, U.S. case law has also not taken adequate account of the specific characteristics that make certain individuals susceptible to being targets of sex trafficking, or the substantial danger of being trafficked that they face if returned to the country in which they faced a threat or attempt by traffickers. Thus, virtually all circuits have rejected the position that victims of attempted trafficking fall into a particular social group under the INA.

The Sixth Circuit's decision in *Rreshpja v. Gonzales*[45] exemplifies this rejection of social group claims by victims of attempted trafficking. In that case, the Sixth Circuit denied asylum to an Albanian woman who was attacked and nearly abducted, but managed to break free from her potential kidnapper.[46] While the plaintiff was running from her attacker, he proclaimed that "she should not get too excited because she would end up on her back in Italy, like many other girls."[47] The plaintiff understood this statement to be a threat that she would be trafficked and forced into prostitution in the future.[48]

Despite the prevalence of sex trafficking in Albania and the specific targeting that the plaintiff in this case experienced, the Sixth Circuit rejected her social group claim of "young (or those who appear to be young), attractive Albanian women who are forced into prostitution," and thus, her claim for asylum.[49] The court stated that "a social group may not be circularly defined by the fact that it suffers persecution," and noted that if the plaintiff'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."[50] However, while the Sixth Circuit was correct in its assessment that a trait as subjective and as prone to change as attractiveness might not have been an appropriate defining characteristic of a particular social group, it arguably erred in finding that the plaintiff's claimed social group was defined by its persecution.

In *Kalaj v. Holder*,[51] the plaintiff's proffered description of her social group was slightly, yet importantly, different from the plaintiff's claim in *Rreshpja*. The plaintiff in *Kalaj* was also an Albanian woman who escaped traffickers who attempted to abduct her and force her into prostitution.[52] In that case, three men approached the plaintiff in the street and asked her if she was interested in working as a waitress in Italy.[53] She

[44] *See* Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (1980) ("The Congress declares that it is 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 asylum areas . . . .").
[45] 420 F.3d 551 (6th Cir. 2005).
[46] *Id.* at 553.
[47] *Id*.
[48] *Id*.
[49] *Id*. at 555.
[50] *Id.* at 556.
[51] 319 F. App'x 374 (6th Cir. 2009).
[52] *Id*. at 375.
[53] *Id.*

declined, suspecting that the supposed "waitress" position served as a guise for prostitution work.[54] In response to her rejection, the men threatened her verbally and tried to physically force her into their car.[55] Because of the plaintiff's sheer luck that a witness intervened on her behalf, she escaped her would-be captors.[56] However, as she fled, the men proclaimed that they knew where she lived and would return for her.[57]

In her asylum claim, the plaintiff in *Kalaj* (unlike the plaintiff in *Rreshpja*) made her social group claim on the basis of solely objective characteristics, arguing that "young, impoverished, single, uneducated women who risked kidnapping and forced prostitution in Albania" formed a particular social group.[58] Despite the plaintiff's use of multiple qualifiers besides gender to define her social group, the Sixth Circuit denied the claim, explaining that it was not sufficiently narrow.[59] In doing so, the court effectively equated her social group claim with that in *Rreshpja*,[60] ignoring the fundamental difference between the objective qualities of the claim in *Kalaj*, and the subjective qualities that the plaintiff in *Rreshpja* used for her social group claim.

Furthermore, the *Kalaj* court's reasoning failed to distinguish groups targeted for persecution based on membership in that group from groups defined by their persecution. In rejecting the plaintiff's claim, the court made the erroneous declaration that the plaintiff's proposed social group contained no "immutable group trait other than a generalized risk to women associated with the reportedly high levels of human trafficking in Albania."[61] While it is true that this class of women is particularly susceptible to the fate of being trafficked,[62] that susceptibility is not the social group's only common immutable characteristic, and it is not what defines them. In general, traffickers target those women for such persecution *because* they possess the aforementioned qualities of youth, poverty, and femaleness[63]—characteristics that they have no power to change. Therefore, in light of the immutability standard for assessing social groups, the Sixth Circuit erred in deeming those features insufficient to define a social group.

Finally, *Lushaj v. Holder*[64] presents an interesting case with regard to the standard the Second Circuit Court of Appeals relied on to reject the plaintiff's social group claims. As in *Rreshpja*, the plaintiff in *Lushaj* was a young Albanian woman—in this case, a twelfth grade girl.[65] She was abducted by a gang for the purposes of sex trafficking but

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[54] *Id*.
[55] *Id.* When the plaintiff attempted to run to safety, "[t]he men pursued and caught her and began dragging her back to the vehicle." *Id.*
[56] *Id*.
[57] *Id*.
[58] *Id*. at 376.
[59] *Id.* at 377.
[60] *Id*. at 376 (affirming the BIA's decision, in which"[r]elying on this Court's decision in *Rreshpja v. Gonzales* . . . [the BIA] conclud[ed] that Kalaj's claimed membership group did not constitute a 'particular social group' as that term is contemplated by the INA").
[61] *Id*.
[62] *See* Crystal Y. Twitty, *Pretty Pennies for Pretty Faces: Trafficking of Women for the International Sex Trade*, 2 REGENT J. INT'L L. 115, 123 (2004).
[63] *Id.* at 124.
[64] 380 F. App'x 41 (2d Cir. 2010).
[65] *Id.*

managed to escape her potential traffickers.[66] As part of her asylum claim, the plaintiff in *Lushaj* made her social group claim on the basis of multiple potential social groups, including the general group of "young women in Albania" and the more specific group of "women who were previously targeted for sex-trafficking by members of the Haklaj gang and who managed to escape and avoid capture."[67] In reviewing those claims, the Second Circuit deemed reasonable the interpretation that these groups were not defined solely by the persecution that their members faced, but that "as a member of this 'group,' [the plaintiff] had become a potential target of the Haklaj gang."[68] The court, however, rejected the asserted social groups because of "the absence of any evidence that such a 'group' was perceived as a discrete group by Albanian society."[69]

The *Lushaj* court's use of this "social visibility" test, in addition to the requirement of a common innate characteristic, contradicts dominant domestic precedent in the U.S.[70] The dominant and widely-held view of "social group" in U.S. case law requires only that the group share an "immutable characteristic." That definition does not impose an additional requirement that the applicant's country of origin perceive his or her social group as distinct. While the BIA adopted the social visibility test in *In re A-M-E & J-G-U-*,[71] many circuits have rejected that standard and noted that it simply does not make sense, particularly because those at risk of persecution would likely attempt to mute the physical attributes that would label them as part of that persecuted group, and thus attempt to hide the characteristics that would lead to their persecution.[72] Additionally, the immutability standard is the leading view, not only in the United States, but also among major common law states around the world. As the following Part will demonstrate, this discrepancy is but one of many areas where U.S. courts have failed to align themselves with international understandings of refugee law and, in turn, the original legislative intent of U.S. refugee statutes.

IV. INCONSISTENCY WITH THE LEGISLATIVE HISTORY OF THE REFUGEE ACT

U.S. courts have denied asylum to victims of attempted trafficking by applying narrow standards of what constitutes a "social group" with a "well-founded fear of persecution." Courts' standards for analyzing asylum law conflict with the congressional

[66] *Id*.
[67] *Id.* at 43.
[68] *Id*. It is interesting to note that had the *Kalaj* court employed this interpretation of what constitutes a social group, the plaintiff in that case would have made a successful social group claim.
[69] *Id*.
[70] See discussion of international interpretations of the definition of "refugee" *infra* Part VI.
[71] 24 I. & N. Dec. 69, 74 (B.I.A. 2007).
[72] *See* Gatmi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009) ("[The 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. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'"); *see also* Henriquez-Rivas v. Holder, No. 09-71571, 2013 WL 518048 (9th Cir. Feb. 13, 2013); Valdiviezo-Galdamez v. Att'y Gen. of U.S., 663 F.3d 582 (3d Cir. 2011).

intent behind the Immigration and Nationality Act of 1952[73] as well as the Refugee Act of 1980,[74] which amended the INA. Congress enacted the INA in order to compile the scattered mass of U.S. immigration laws into one organized and comprehensive doctrine.[75] In 1980, Congress passed the Refugee Act of 1980, which revised and expanded the INA's procedures for admitting refugees into the country and "establish[ed] a statutory right to seek asylum."[76] This amendment defined a "refugee" for asylum purposes as

> any 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.[77]

Under the INA, if an alien meets these qualifications, the United States government considers him or her a refugee, and the Secretary of Homeland Security or the Attorney General has the discretion to grant that person asylum.[78]

While there exists little elaboration in the Refugee Act's legislative history regarding the specific meanings of the terms "social group," "well-founded fear of persecution," or "inability or unwillingness to avail" oneself of the protection of one's country of origin, the reasons that Congress used that particular language illustrate how federal courts should interpret those terms. According to the Senate Committee Report,[79] Congress inserted this definition of "refugee" into the INA in order to make U.S. asylum law conform with the 1951 United Nations Convention Relating to the Status of Refugees (Convention),[80] as well as the United Nations Protocol Relating to the Status of Refugees (Protocol),[81] to which it acceded to in 1968.[82] In fact, Congress did not alter much the Protocol's language when Congress added it to U.S. immigration law.[83] In copying that

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[73] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).
[74] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).
[75] *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.").
[76] 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).
[77] 8 U.S.C. § 1101(a)(42)(A) (2012).
[78] 8 U.S.C. § 1158(b)(1)(A).
[79] *See* SEN. REP. NO. 96-256, at 4 (1979).
[80] Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter U.N. Convention].
[81] *See* U.N. Protocol, *supra* note 12.
[82] *See* Bobbie Marie Guerra, *A Tortured Construction: The Illegal Immigration Reform and Immigrant Responsibility Act's Express Bar Denying Criminal Aliens Withholding of Deportation Defies the Principles of International Law*, 28 ST. MARY'S L.J. 941, 956 (1997).
[83] The U.N. Convention defines refugee as one 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

language almost verbatim, Congress accepted an obligation to the people who qualified as refugees under the Protocol.[84]

In interpreting the Refugee Act in accordance with Congress' intended meaning, the Act's language must also be read in line with the United Nations' interpretation of its own refugee standards. The U.N. High Commissioner for Refugees (UNHCR) released the Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Handbook)[85] in order to further define the provisions of the Convention and Protocol. As the Supreme Court has stated, the Handbook "provides significant guidance in construing the Protocol, to which Congress sought to conform . . . and has been widely considered useful in giving content to the obligations that the Protocol establishes."[86] The U.N. released the Handbook in September of 1979, only six months before Congress passed the Refugee Act of 1980.[87] The Handbook codified the U.N.'s interpretation of "social group" at that time, construing the term expansively. As such, the Handbook states that "a 'particular social group' normally comprises persons of similar background, habits, or social status."[88] The concurrent timing of the release of this document with the Refugee Act's passage, Congress's clear legislative intent to comply with the Protocol, and Congress's failure to change or add qualifications to the U.N.'s definition of "refugee," demonstrate that Congress intended to adopt the U.N.'s interpretation of the word "refugee." Accordingly, the UNHCR's depiction of "social group" as a broad and adaptable term demonstrates that Congress intended an equally expansive construction of the same term in the Refugee Act.[89]

Additionally, the legislature's substantive purposes for enacting the Refugee Act demonstrate a congressional intent to apply the social group category as a flexible mechanism designed to be sensitive to the plights of victims of human rights violations, rather than a rigid test designed to exclude. The drafters of the Refugee Act have articulated that they were motivated chiefly by a sense of duty to combat human rights abuses around the world. According to Senator Edward Kennedy, a drafter of the legislation, the Refugee Act served to demonstrate the country's "national commitment to human rights and humanitarian concerns."[90] Furthermore, the Refugee Act itself

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protection of that country." U.N. Convention, *supra* note 80 at 153. Compare with the definition of refugee found at 8 U.S.C. § 1101(a)(42)(A): "any 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."

[84] *See* Parish, *supra* note 8, at 924.

[85] *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, http://www.hrea.org/learn/tutorials/refugees/Handbook/hbtoc.htm (last visited Jan. 6, 2013) [hereinafter Handbook].

[86] I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 439 (1987).

[87] *See* Handbook, *supra* note 85; Parish, *supra* note 8, at 929.

[88] Handbook, *supra* note 85*,* at ¶ 77.

[89] *See* Parish, *supra* note 8, at 929-30.

[90] S. REP. NO. 96-256, at 1 (1979). *See also Cardoza-Fonseca*, 480 U.S. at 436 ("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

explicitly states that the purpose for enacting it 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 asylum areas."[91] Congress's emphasis on the Refugee Act's function of responding to urgent needs around the world implies a sense of adaptability, meaning Congress intended the Refugee Act to confer benefits in a way that would account for constantly emerging events of humanitarian concern and not just according to limited, defined categories of refugees that existed at the time the statute was passed.

The Refugee Act's other objectives and the policies that it implemented further illustrate an inclusive intention. For example, through the Refugee Act, Congress substantially increased the maximum number of refugees to whom the government could grant entry annually: from 17,400 per year to 50,000 per year.[92] Furthermore, even if the United States filled its annual refugee quota, the Act provided "an orderly but flexible procedure" for granting admission to refugees of "special humanitarian concern."[93] These added procedures convey Congress's intent to assist emerging classes of refugees,[94] rather than to execute asylum law in a rigid way that would exclude deserving people because of arbitrary standards.

V. THE U.N. AND INTERNATIONAL INTERPRETATIONS OF "REFUGEE"

In addition to fulfilling the legislative intent behind the INA, a broad interpretation of what constitutes a social group by U.S. courts would also be consistent with other nations' legal interpretations of who should receive coverage under refugee laws. As immigration law concerns the migration of people across national borders, international standards are particularly appropriate in assessing the merits of U.S. immigration law, including laws pertaining to refugees.[95] While *Marbury v. Madison*[96] famously held that U.S. courts have the power to "say what the law is"[97] and thus to differentiate domestic law from international law, domestic law should still give weight to its international obligations and adhere to norms of international law.[98] In construing this intent, it is helpful to consider the legislative history that led Congress to enact the statute in question.[99] The legislative history leading to the insertion of "social group" into the INA provides no basis for diverging from the U.N. interpretation of the term. Thus, as stated previously, because of the complete absence of congressional differentiation between the

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Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.").

[91] Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (1980).

[92] *See* Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 143 (1981).

[93] *Id*.

[94] *Id*.

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

[96] 5 U.S. 137 (1803).

[97] *Id*. at 177.

[98] Fitzpatrick, *supra* note 95, at 2.

[99] *See, e.g.*, United States v. Childress, 104 F.3d 47, 53 (4th Cir. 1996) ("If the language of the statute is unclear, the court may look to the legislative history for guidance in interpreting the statute.").

Refugee Act's "social group" and the Protocol's "social group," courts should construe this term equally in both contexts.

Furthermore, by incorporating the Protocol's objectives and standards into U.S. law, Congress sought to influence other countries to follow suit.[100] As T. David Parish notes, Congress's use of the Protocol's specific language "in giving meaning to terms within U.S. domestic law reflects the purpose underlying U.S. accession to the Protocol: setting an example to other nations by complying with international norms in dealing with refugees."[101] However, in practice, the U.S. has not set an example for other countries to follow, and countries around the world have surpassed the U.S. in their adherence to the U.N. Protocol.

Diverging from international standards, the U.S. courts' narrow application of "social group" is inconsistent with the U.N.'s guidance on the term and with the more expansive ways other countries interpret the term. While some U.S. circuit courts have held that potential victims of human trafficking do not constitute a social group because their claimed social group is seemingly based solely on the persecution it suffers,[102] other countries' interpretations of what constitutes a social group reject this formulation. In particular, international standards have rejected the use of a "social visbility" test such as the one that was used by the Second Circuit in *Lushaj*. Instead, the immutability standard is the leading view among major common law states around the world. For example, Canada, New Zealand, and the United Kingdom all use that standard in discerning social groups.[103]

Furthermore, this social visibility test goes against the UNHCR's 2002 guidelines regarding how to interpret what constitutes a social group. Those guidelines provide that "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."[104] While the guidelines also note that the visibility of a social group may be helpful in discerning it,[105] there is no requirement that both an immutable characteristic and social visibility be present in order to constitute a social group, as some U.S. courts have imposed. Thus, by diverging from this widely held view, U.S. courts have prevented victims of attempted

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[100] *See* Parish, *supra* note 8, 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.").
[101] *Id*.
[102] *See, e.g.*, Kalaj v. Holder, 319 F. App'x 374, 377 (6th Cir. 2009) (holding that the claimant had not made a successful social group claim because her proffered social group contained "no such immutable group trait other than a generalized risk to women associated with the reportedly high levels of human trafficking in Albania").
[103] *See* 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, 56-57 (2008) (noting leading cases in each country that demonstrate "how the 'protected characteristic' approach set forth in *Acosta* has become 'transnationalized.'").
[104] U.N. HIGH COMM'R FOR REFUGEES, 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 3 (2002) [hereinafter UNHCR Guidelines], *available at* http://www.unhcr.org/refworld/docid/3d36f23f4.html (emphasis added).
[105] *Id.* at 4.

trafficking from attaining asylum based on varying and contradictory standards for defining a social group.

In addition to these general international understandings of what constitutes a social group for asylum purposes, international interpretations have also paid special attention to the gender aspects of social group claims. For example, Canada has released a set of guidelines regarding how decisionmakers should interpret asylum claims in which gender plays a large role.[106] These guidelines stipulate, "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."[107] Under this framework, 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.[108]

Moreover, in 2002, the UNHCR released a set of guidelines that advocate an expansive interpretation of gender-based asylum claims in order to adhere to the Convention and the Protocol. These guidelines state that while "[t]he size of the group has sometimes been used as a basis for refusing to recognise 'women' generally as a particular social group," this denial of asylum based on group size "has no basis in fact or reason, as the other grounds are not bound by this question of size."[109]

In accordance with the U.N.'s position on this matter, Canada's guidelines stipulate that "the 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."[110] This reading appropriately conforms to the U.N.'s interpretation of the treaty's language and rejects the unfounded notion that a social group's size is sufficient to render it ineligible for asylum, despite the possibility that that group has been persecuted or has a well-founded fear of persecution based on membership in that group.

Ireland's Refugee Act of 1996 demonstrates an even broader interpretation of the social group element, stating explicitly that it includes "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."[111] While most countries have not construed the term so broadly as to grant asylum to people based solely on gender, gender is becoming

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[106] *See Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender Related Persecution*, IMMIGRATION AND REFUGEE BOARD OF CANADA, http://www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx (last accessed March 4, 2012) [hereinafter Canada Guidelines].

[107] *Id*. at § 3.

[108] *See* Sangalis, *supra* note 15, at 414-15.

[109] UN HIGH COMM'R FOR REFUGEES, GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 8 (2002), *available at* http://www.unhcr.org/refworld/docid/3d36f1c64.html.

[110] Canada Guidelines, *supra* note 106, at § 3; *see also* 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).

[111] Refugee Act, 1996 (Act No. 17/1996) 1(1) (Ir.), *available at* http://www.irishstatutebook.ie/1996/en/act/pub/0017/index.html (last visited Jan. 23, 2013).

increasingly relevant in social group determinations when coupled with other characteristics that define a subset of people whose persecution is based on gender.[112]

VI. REMAINING ELEMENTS OF THE ASYLUM CLAIM

By relying, as they should, on the broad interpretations of "social group" that Congress intended and to which international standards adhere, U.S. courts will be able to traverse the most significant barrier facing victims of attempted trafficking in making a successful claim for asylum. The success of this social group claim, in turn, will enable courts to pay proper attention to the remaining elements of a successful asylum claim and grant these victims the relief they deserve.

A. Well-Founded Fear of Persecution

In addition to meeting the criteria to make a successful claim of membership in a social group, victims of attempted trafficking must also meet the second requirement under the INA of having a "well-founded fear of persecution." While there have been varying interpretations of this phrase in U.S. law, victims of attempted trafficking can demonstrate both reasonable objective and subjective fears of persecution based on the characteristics they share that link them to the fate of being trafficked, and the fact that they have already been targeted for an industry in which retribution for escape is a realistic fear.[113]

The showing required to establish a well-founded fear of persecution has been construed differently, depending on the circuit, but the overarching rule of interpretation is that a showing of past persecution gives rise to a presumption of a well-founded fear of future persecution.[114] However, according to the federal regulations governing asylum eligibility, a finder of fact may rebut this presumption if he or she decides that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality,"[115] or if the applicant could avoid this persecution by moving to another part of that country.[116] If an applicant has not experienced past persecution, the establishment of a well-founded fear requires that the following three elements be met: the applicant for asylum must have a fear of persecution based on his or her race, religion, nationality, membership in a social group, or political opinion;[117] there must be a "reasonable possibility" of facing

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[112] *See* 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, 468 (2010).

[113] *See, e.g.*, LONDON SCHOOL OF HYGIENE AND TROPICAL MEDICINE, THE HEALTH RISKS AND CONSEQUENCES OF TRAFFICKING IN WOMEN AND ADOLESCENTS: FINDINGS FROM A EUROPEAN STUDY 26 (2003), *available at* http://genderviolence.lshtm.ac.uk/files/health_risks__consequences_trafficking.pdf (describing potential consequences for escape as "[p]hysical or economic retribution for trying to escape, e.g., abduction of other female family members to pay off debts").

[114] *See* 8 C.F.R. § 208.13(b)(1) (2012) ("An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.").

[115] 8 C.F.R. § 208.13(b)(1)(i)(A).

[116] 8 C.F.R. § 208.13(b)(1)(i)(B).

[117] 8 C.F.R. § 208.13(b)(2)(i)(A).

persecution if the applicant returns to the country from which he or she has fled;[118] and the applicant must be "unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear."[119]

While courts have not applied this standard uniformly, most courts have required proof of an "objectively reasonable" fear in addition to the individual's subjective fear of persecution.[120] On paper, this standard aligns with the Handbook's policy that an asylum seeker's subjective fear "must be supported by an objective situation."[121] However, circuits have expressed different views as to what particular circumstances are sufficient to constitute an objectively reasonable fear of persecution.

If verbal threats or physical attempts of abduction do not amount to the degree of severity necessary to establish a claim of past persecution, courts should nevertheless hold that those actions demonstrate a well-founded fear of future persecution. As argued, traffickers target these women because of their membership in the social group of young, impoverished women in areas where trafficking is prevalent and, therefore, the persecution that they fear is based on their membership in that social group. Secondly, the experience of having already been targeted by traffickers, in conjunction with the fact that reprisal by traffickers toward escapees and their families is common,[122] demonstrates an objectively reasonable fear of future persecution.[123] The fear of a victim of attempted trafficking that traffickers may meet her upon her arrival in her native country is reasonable and legitimate, and it has been documented that some victims have been tracked by their former traffickers and swiftly re-trafficked.[124]

While some circuits have found instances of a well-founded fear of persecution by applicants who have experienced threats of or attempts at persecution in other contexts,[125] there has been little support in U.S. courts for the protection of victims of attempted human trafficking or those threatened with such a fate. In *Rreshpja*, for example, the Sixth Circuit declared that the plaintiff's attacker's attempted kidnapping and subsequent verbal threat about future forced prostitution was insufficient to demonstrate an

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[118] 8 C.F.R. § 208.13(b)(2)(i)(B).
[119] 8 C.F.R. § 208.13(b)(2)(i)(C).
[120] *See, e.g.*, Nzeve v. Holder, 582 F.3d 678, 684 (7th Cir. 2009); Huang v. I.N.S., 421 F.3d 125 (2d Cir. 2005); Feleke v. I.N.S., 118 F.3d 594 (8th Cir. 1997).
[121] Handbook, *supra* note 85, at ¶ 38.
[122] *See* Viviana Waisman, *Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard*, 33 HASTINGS INT'L & COMP. L. REV. 385, 389 (2010).
[123] *See* Gomez-Zuluaga v. Att'y Gen. of U.S., 527 F.3d 330, 348 (3d Cir. 2008) ("The objective experiences of Petitioner's family members, the threats she herself has received, and the country reports detailing the FARC's tendency to take revenge for perceived wrongs against it, combine to satisfy the requirement that her fear of persecution be objectively reasonable.").
[124] Cherish Adams, *Re-Trafficked Victims: How a Human Rights Approach Can Stop the Cycle of Revictimization of Sex Trafficking Victims*, 43 GEO. WASH. INT'L. L. REV. 201, 208 (2011).
[125] *See, e.g.*, Canales-Vargas v. Gonzales, 441 F.3d 739 (9th Cir. 2006) (finding that a claimant had a "well-founded fear of future persecution based on escalating threats she received after giving speeches criticizing terrorist organization"); Marcos v. Gonzales, 410 F.3d 1112 (9th Cir. 2005) ("Philippine national who, immediately before he fled to United States, had received three death threats over period of less than six months from communist militia with well-documented history of political violence, including the murder of its opponents, had well-founded fear of persecution, of kind making him eligible for asylum.").

objectively reasonable fear of future persecution, despite the attacker's conveyed intent of a repeat attempt.[126]

Courts have recognized, as in *Lleshanaku v. Ashcroft*,[127] that "threats may constitute persecution, or give rise to a well-founded fear of future persecution, if the perpetrators have the ability and apparent inclination to carry through on their threats or actually attempt to do so."[128] Following this rationale, in *Sarhan v. Holder*,[129] the Seventh Circuit determined that credible threats of "honor killing"[130] against a Jordanian woman accused of adultery were sufficient for a successful asylum claim. In that case, the plaintiff's brother threatened to kill her because the plaintiff's sister-in-law, who was known to have made false accusations of adultery in other instances, accused her of adultery.[131] Since the plaintiff received an explicit threat that she would be murdered in the form of an honor killing,[132] and because such honor killing was prevalent and socially significant in Jordan,[133] the court ascribed credibility to the threats.[134]

By comparison, many victims of attempted trafficking have received not only an explicit threat, but also an attempt to take the threatened action. Additionally, these threats are commonly based on the prevalent social ill of the human trafficking business, and not on personal disputes. Therefore, courts should use the rationales put forth in cases like *Sarhan* to find that threats against these victims of attempted trafficking are substantial and give rise to a well-founded fear of persecution. It is notable that, in *Sarhan*, the plaintiff made a successful claim for withholding of removal, a standard that is even more difficult to meet than that of a successful claim for asylum.[135] Thus, in applying the *Sarhan* court's reasoning, victims of attempted trafficking would meet the less burdensome showing of a well-founded fear of persecution.

B. Government's Unwillingness or Inability to Protect

In addition to the showing of a protected group and a fear of persecution based on that group, a successful applicant for asylum must show that, owing to past persecution or a well-founded fear or future persecution, he or she is "unable or unwilling to avail himself or herself of the protection" of the country from which he or she has fled to avoid

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[126] Rreshpja v. Gonzales, 420 F.3d 551, 556 (6th Cir. 2005).
[127] 100 F. App'x 546 (7th Cir. 2004).
[128] *Id*. at 548.
[129] 658 F.3d 649 (7th Cir. 2011).
[130] "Honor killing" is the act of a woman's family member murdering her for committing or being accused of committing supposed immoral acts, in the belief that the woman's conduct has tarnished the family reputation and that killing her is necessary to restore it. *Id.* at 651. Such "immoral acts" may be as innocent as taking a walk with a male who is not the female's relative. *Id*. at 654.
[131] *Id*. at 651.
[132] *Id*. at 657.
[133] *Id*. at 656.
[134] *Id.* at 657. To make a successful withholding of removal claim under the Convention Against Torture, an applicant must show that the feared persecution is "more likely than not" to occur. 8 C.F.R. § 208.16(b)(2) (2012).
[135] *See* Benitez Ramos v. Holder, 589 F.3d 426, 428 (7th Cir. 2009) ("Withholding of removal [is] a remedy that is similar to asylum . . . but that requires the applicant to establish a higher probability of persecution should he be returned to his native country.").

such persecution.[136] It is clear that victims of attempted human trafficking easily meet this final requirement.

Circuits have found evidence of governmental inability or unwillingness to protect claimants from persecution in a variety of contexts and countries, even in countries that have laws in place prohibiting the particular persecution at issue. In *Sarhan*, for example, the Seventh Circuit recognized that, despite official government policies against honor killing, "[t]he government of Jordan [was] complicit in the harm" that the plaintiff would suffer if forced to return to Jordan.[137] The court noted that the government prosecuted all seventeen reported honor killings in 2007, and that defendants were almost always found guilty.[138] However, the Court found that the leniency of the defendants' sentences demonstrated the government's permissive attitude toward honor killings.[139]

In countries such as Albania, where human trafficking is a pervasive problem, government corruption, collusion with traffickers, and ineffective protection from traffickers by law enforcement agents is common. There also exists a substantial amount of evidence that law enforcement officials have direct involvement in the human trafficking industry. According to the U.S. Department of State's *Trafficking in Persons Report* for 2002, ten percent of trafficking victims reported that police were directly involved with their traffickers.[140] Despite claims that the Albanian government had made efforts to curb human trafficking since that time, the Department of State's 2011 *Trafficking in Persons Report* notes that "[p]ervasive corruption in all levels and sectors of Albanian society continued to seriously affect the government's ability to address its human trafficking problem."[141] For example, the Albanian government "did not report any investigations, prosecutions, or convictions" of officials complying with traffickers in 2010.[142]

Even without intentional government collusion in trafficking, the enforcement of anti-trafficking laws creates numerous challenges for state officials. For example, the 2005 *Trafficking in Persons Report* stated that "implementation of Albania's anti-trafficking tools remained inadequate and a critical area of concern."[143] Although many government officials have a sincere desire to stop trafficking, it is an inherently difficult crime for them to prevent because traffickers conduct their business in unregulated industries, making it very hard to detect.[144] The clandestine nature of trafficking and the reluctance of victims to report these crimes contribute to keeping trafficking hidden from government authorities.

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[136] 8 U.S.C. § 1101(A)(42)(A) (2012).
[137] *Sarhan*, 658 F.3d at 660.
[138] *Id*. at 658.
[139] *Id*.
[140] U.S. DEP'T OF STATE, 2002 TRAFFICKING IN PERSONS REPORT 22 (2002), *available at* http://www.state.gov/documents/organization/10815.pdf.
[141] U.S. DEP'T OF STATE, 2011 TRAFFICKING IN PERSONS REPORT 64 (2011), *available at* http://www.state.gov/documents/organization/164453.pdf [hereinafter 2011 TIP REPORT].
[142] *Id*.
[143] U.S. DEP'T OF STATE, 2005 TRAFFICKING IN PERSONS REPORT 52 (2005), *available at*: http://www.state.gov/documents/organization/47255.pdf.
[144] Marouf, *supra* note 103, at 100 ("In addition, victims of trafficking remain invisible because they are put to work in sectors that remain largely unregulated, including the sex industry, domestic services, and agriculture.").

The 2011 *Trafficking in Persons Report* classifies Albania as a "Tier 2" country, meaning that it "does not fully comply with the minimum standards for the elimination of trafficking," but that it has made attempts to do so.[145] For example, Albania has allotted funding to non-governmental organizations working to fight trafficking, runs a "national toll-free, 24-hour hotline for victims and potential victims of trafficking," and has appointed two anti-trafficking prosecutors in an attempt to improve litigation against traffickers.[146] These measures, while certainly better than nothing, do not provide much direct assistance to victims and do not fully taking into account the unique aspects of trafficking that make it hard to prosecute. "Trafficking involves clandestine and illegal activity, widespread violence directed at the victims, and often violence directed at victim's families," therefore victims are reluctant to report crimes to the authorities.[147] Victims' reasonable fear of reporting trafficking makes telephone hotlines and litigation improvements ineffective for many victims.

Furthermore, the Albanian government's efforts to provide more effective litigation for trafficking victims' claims have been obstructed by governmental corruption. The 2011 *Trafficking in Persons Report* noted that "widespread corruption, *particularly within the judiciary*, continued to hamper overall anti-trafficking law enforcement and victim protection efforts."[148] These problems have persisted for years.[149] It could take a long time before the legal and enforcement measures the Albanian government employs to address the problem become effective at protecting trafficking victims.

Despite considerable evidence of the Albanian government's involvement in the persistence of trafficking, and its inability to curb the problem effectively, there has been little jurisprudence to support findings of government inability or unwillingness to protect trafficking victims and those vulnerable to becoming trafficking victims. Most circuits that have confronted the issue of asylum eligibility for victims of attempted trafficking rejected plaintiffs' social group claims, and, thus, declined to rule on the element of government ineffectiveness. In *Rreshpja*, for example, the court did not expound upon the government's inability or unwillingness to protect victims of attempted trafficking for the purposes of adjudicating the asylum claim.[150] However, the plaintiff's futile police report regarding the attempted kidnapping, after which "the police told Rreshpja that the information she had provided was insufficient to identify or arrest the man who had attacked her," illuminates the difficulty of relying on law enforcement officials to locate and prosecute traffickers.[151]

While most courts have not taken the opportunity to make rulings about the unwillingness or inability of government officials to protect claimants of attempted trafficking from persecution, agency determinations with regard to the issue are troubling.

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[145] 2011 TIP REPORT, *supra* note 141, at 64.
[146] *Id*. at 65.
[147] Waisman, *supra* note 122, at 389.
[148] 2011 TIP REPORT, *supra* note 141, at 64 (emphasis added).
[149] *See* DANIEL RENTON, SAVE THE CHILDREN, CHILD TRAFFICKING IN ALBANIA 10 (2001), *available at* http://www.childtrafficking.org/pdf/user/child_trafficking_in_albania_save_the_children.pdf ("Since the collapse of communism in 1991, Albania has emerged as a major source of trafficked women and girls.").
[150] The court did, however, reject the plaintiff's claim under the Convention Against Torture that the government acquiesced in trafficking. *See* Rreshpja v. Gonzales, 420 F.3d 551, 557 (6th Cir. 2005).
[151] *Id.* at 553.

In *Kalaj*, for example, the Sixth Circuit's denial of the plaintiff's social group claim led the court not to consider her claim of inadequate government protection against persecution.[152] In the agency decision the Sixth Circuit was reviewing, however, the BIA determined that the plaintiff "failed to show that the Albanian government was unwilling or unable to protect her" from future trafficking.[153]

In *Nesimi v. Gonzales*, the First Circuit found that conditions in Albania had improved and found an insufficient showing of government acquiescence in the claimant's persecution by traffickers.[154] In doing so, the First Circuit cited evidence found in reports, such as the U.S. Department of State's *Country Report on Human Rights Practices* from 2003 and 2004.[155] However, the First Circuit seemed to have ignored evidence found in those exact same reports that discussed government acquiescence in trafficking. The *Country Report on Human Rights Practices* from 2003, for example, stated explicitly that "[p]olice corruption and involvement in trafficking was a problem."[156]

The First Circuit's decision in *Nesismi* is an example of ignorance towards the statutory mandate that courts must review the factual determinations that agencies make, not based solely on the evidence that supports an agency's decision, but based on the "record considered *as a whole*."[157] Thus, in finding that a state's enactment of police methods against trafficking is sufficient to produce country conditions that constitute adequate government protection from traffickers, courts do not give enough consideration to the invisibility of trafficking. This reading of the facts does not align with the UNHCR's guidelines, which state that "[w]hether the authorities in the country of origin are able to protect victims or potential victims of trafficking" depends on "whether legislative and administrative mechanisms have been put in place to prevent and combat trafficking, as well as to protect and assist the victims *and on whether these mechanisms are effectively implemented in practice*."[158] In relying exclusively on the existence of laws against trafficking, the First Circuit ignored other information within the same reports demonstrating that these policies were not effective in practice.

VII. CONCLUSION

It is clear that victims of attempted human trafficking constitute a particular social group eligible for asylum under the INA, and sorely need grants of asylum to escape fates that could entail psychological torture, rape, physical violence, and enslavement. While most circuits have held that victims of human trafficking do not comprise a specific

[152] Kalaj v. Holder, 319 F. App'x 374, 377 (6th Cir. 2009).
[153] *Id*. at 374.
[154] 233 F. App'x 11, 12 (1st Cir. 2007).
[155] *Id*.
[156] *Country Report on Human Rights Practices 2003: Albania*, U.S. DEP'T OF STATE, sec. 6(f) (Feb. 25, 2004) http://www.state.gov/j/drl/rls/hrrpt/2003/27820.htm.
[157] I.N.S. v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (citing 8 U.S.C. § 1105a(a)(4) (2012)).
[158] 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 9 (2006), *available at* http://www.unhcr.org/refworld/docid/443679fa4.html (emphasis added).

social group entitled to asylum under the INA, some of these victims are eligible for T-visas, which permit them to remain in the U.S. on the basis of the hardships they have suffered in being trafficked.[159] However, while most circuits have also rejected the social group claim for targets of human trafficking whose assailants have not (yet) successfully trafficked them, those at risk of becoming trafficking victims are not eligible for T-visas and have little other recourse if their asylum claims are unsuccessful.[160]

By denying the refugee status of victims of human trafficking attempts, U.S. courts are creating a perverse policy that requires this group to experience the extreme psychological and physical torment that trafficking induces before the U.S. offers them any protection. Despite official legislation suggesting otherwise, the discrepancy "between available domestic protection and the imperatives of international obligation results in a serious denial of justice to many asylum-seekers."[161] Instead of restricting refugee eligibility so severely, U.S. courts should carry out the intention to prevent human rights abuses for which Congress enacted the Refugee Act. Thus, under current U.S. policy, in order for courts to provide victims of attempted trafficking with an escape from this very real threat of persecution, they must first be persecuted. Sadly, if these women are trafficked, then ineffective government prosecution of traffickers and the use by traffickers of violence, threats of violence against family members, and psychological manipulation to keep these women enslaved all raise doubts that these victims will receive another opportunity to escape.[162]

As it stands today, U.S. courts are applying arbitrarily exclusionary standards that thwart the intentions of the drafters of the Refugee Act and serve to endanger genuine refugees. Instead, the U.S. judicial system should interpret the asylum claims of victims of attempted trafficking in accordance with the humanitarian concerns that led to the Refugee Act and the inclusive U.N. and international interpretations of refugee law. Only then will the purposes of the Refugee Act be fulfilled and will victims of attempted human trafficking be able to rebuild their terrorized lives anew in the United States.

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[159] Michael A. Scaperlanda, *Human Trafficking in the Heartland: Greed, Visa Fraud, and the Saga of 53 Indian Nationals "Enslaved" by a Tulsa Company*, 2 LOY. U. CHI. INT'L L. REV. 219, 221 (2005); *see also* 8 U.S.C. § 1101(a)(15)(T).

[160] Victims of attempted trafficking may also make a claim for "withholding of removal" under the Convention Against Torture, but this standard is even more difficult to meet than that of an asylum claim. *See* Benitez Ramos v. Holder, 589 F.3d 426, 428 (7th Cir. 2009). "If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm." 8 C.F.R. § 208.16(b)(1)(iii) (2012).

[161] Fitzpatrick, *supra* note 95, at 3.

[162] Sangalis, *supra* note 15, at 414.