NOTE

Shouldn't All Asylum Be "Humanitarian"? A Case for Merging Traditional and Humanitarian Asylum and Eliminating the Particular Social Group

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ABSTRACT

Asylum law in the United States faces near-constant critique. The "membership in a particular social group" eligibility category is one of its persistent thorns. Faced with a lack of legislative instruction on what "particular social group" ("PSG") means, asylum adjudications of PSG claims have been chronically disjointed. Perhaps the only consensus regarding PSG is that its adoption into the asylum framework was intended to broaden asylum eligibility. However, the unique challenges posed by PSG have impeded this goal—even despite the creation of a separate "humanitarian asylum" inquiry designed to open other avenues for relief. To advance the inclusive goals both PSG and humanitarian asylum have failed to achieve, this Note advocates for amending the statutory refugee definition to replace PSG with more open-ended language drawn from the humanitarian asylum framework. The amendment and accompanying procedural guidance would allow applicants to successfully petition for asylum by proving past or prospective harm, regardless of nexus with a protected group, and eliminate the separate process for "humanitarian" claims.

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Introduction

When Meylin Lorena Mejia-Rodas was thirteen years old, an adult man raped her in her Guatemalan hometown.[1] *After Meylin reported the rape to local law enforcement, affiliates of her rapist threatened to kill Meylin and the rest of her family if they pursued criminal charges.*[2] *Meylin, her parents, and her two brothers fled their home and sought asylum in the United States.*[3] *Meylin's family claimed eligibility for asylum because Meylin belonged to the particular social group of "female children subjected to rape within a society where the subordination and devaluation of women by men ha[ve] allowed them to be sexually persecuted with government sanctioned impunity."*[4] *They alleged that the death threats they received had been persecution based on their kinship to Meylin and the government had demonstrated "indifference" when they reported Meylin's rape.*[5]

After multiple appeals, Meylin's family was ultimately denied asylum and ordered removed to Guatemala.[6] *Their failure to establish a qualifying particular social group precluded a grant of either asylum or humanitarian asylum.*[7]

As of November 2022, nearly 1.6 million asylum seekers in the United States awaited hearings.[8] Applicants coming from Latin America like Meylin's family file the vast majority of asylum claims.[9] In fiscal year 2023, asylum applicants from Guatemala, Honduras, El Salvador, and Mexico were among the least successful, with approval rates of between four and ten percent—in stark contrast to the highest-ranking countries, which saw anywhere from sixty-seven to seventy-three percent of claims granted.[10] Most asylum applicants at the U.S.-Mexico border claim persecution on account of membership in a particular social

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1 *See* Mejia-Lopez v. Barr, 944 F.3d 764, 766 (8th Cir. 2019). The Board of Immigration Appeals chose not to publish its decision in this case, so the only factual record available is that provided by the 8th Circuit opinion.

2 *Id.*

3 *Id.*

4 *Id.* (alteration in original) (quoting Admin. R.).

5 *Id.*

6 *See id.* at 767–69.

7 *See id.*

8 *See A Sober Assessment of the Growing U.S. Asylum Backlog*, TRAC Immigr. (Dec. 22, 2022), https://trac.syr.edu/reports/705/ [https://perma.cc/M99D-LYYR].

9 *See* Irene Gibson, U.S. Dep't of Homeland Sec., Off. of Homeland Sec. Stat., Annual Flow Report: Refugees and Asylees: 2022, at 9 (2023) (ranking of fiscal year 2022 asylum case filings by country of nationality).

10 Exec. Off. for Immigr. Rev., Adjudication Statistics: Asylum Decision Rates by Nationality (2023). *See generally The Impact of Nationality, Language, Gender and Age on Asylum Success*, TRAC Immigr. (Dec. 7, 2021), https://trac.syr.edu/immigration/reports/668/ [https://perma.cc/88DV-USPC].

group ("PSG"), making the controversial and inconsistent adjudication of PSG claims especially relevant to these applicants.[11] It seems a reasonable inference that the intersectional challenges facing many migrants from Latin America—poverty, gang violence, political instability, and pervasive "illegal immigrant" rhetoric within U.S. discourse, to name a few[12]—compound with the unpredictability of PSG to place them at a particular disadvantage.[13] But procedurally, why do so many PSG claims fail?

This Note explores why Meylin's family was denied asylum and outlines the statutory and procedural changes needed to protect future asylum seekers like them. Part I provides a general overview of U.S. asylum eligibility and procedures. Part II discusses the specific requirements for making a claim based on membership in a PSG and the interpretive challenges unique to PSG. Part III addresses three central problems posed by PSG as it stands: the prevalence of circuit splits, its inherently inferior status to that of the other four asylum eligibility categories, and vulnerability to political pressure. Part IV outlines this Note's proposed solution, and Part V illustrates how it would ameliorate each of the identified problems in turn. Finally, Part VI identifies and rebuts potential counterarguments.

I. Asylum Law Overview: Who Can Be a "Refugee"?

Asylum is a branch of immigration law that allows people who are present in the United States without legal status to petition for the right to lawfully remain because it would not be safe for them to go home.[14] Because asylum applicants are already present in the country, the practical outcome of a denial is deportation, or "removal."[15]

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11 *See* Talia Shiff, *Revisiting Immutability: Competing Frameworks for Adjudicating Asylum Claims Based on Membership in a Particular Social Group*, 53 U. Mich. J.L. Reform 567, 567 (2020).

12 *See generally* Gordon Hanson, Pia Orrenius & Madeline Zavodny, *U.S. Immigration from Latin America in Historical Perspective*, 37 J. Econ. Persps. 199 (2023); Diana Roy & Amelia Cheatham, *Central America's Turbulent Northern Triangle*, Council on Foreign Rels. (July 13, 2023, 2:55 PM), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle [https://perma.cc/3E7S-6H9H]; Kristián Hernandez, *Anti-Immigrant Rhetoric Spiked in this Election. Here's Why It's Dangerous.*, Ctr. for Pub. Integrity (Nov. 4, 2022), https://publicintegrity.org/politics/elections/anti-immigrant-rhetoric-spiked-in-this-election-heres-why-its-dangerous/ [https://perma.cc/6MEL-8D3E].

13 *See infra* Part III.

14 This Note discusses asylum law rather than refugee law. The difference between the two is that refugee applicants are located outside the United States, whereas asylum applicants apply from within the United States or a port of entry. *See* U.S. Dep't of State, Proposed Refugee Admissions for Fiscal Year 2024 Report to the Congress 15 (2023). This Note discusses asylum law specifically because the several prominent circuit splits that have emerged in recent years regarding PSG have involved asylum claims. *See infra* Section III.A.

15 *See, e.g.*, Mejia-Lopez v. Barr, 944 F.3d 764, 767, 769 (8th Cir. 2019) (appealing a "final order of removal").

To qualify for asylum in the United States, an applicant must prove that they meet the statutory definition of "refugee" as adopted into the Immigration and Nationality Act ("INA")[16] under the Refugee Act of 1980 ("Refugee Act").[17] The INA took its refugee definition in large part from the 1951 United Nations Refugee Convention, which is considered the birth of international refugee and asylum law.[18] The United States has not changed its "refugee" definition since adopting it in 1980.[19] The INA defines "refugee" as:

> [A]ny person . . . who is outside [their country of origin], and who is unable or unwilling to return to, and is unable or unwilling to avail [themselves] 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 . . . .[20]

The requisite elements to determine a "refugee" can be boiled down to two requirements: persecution and a nexus to a protected ground.

A. Persecution

> *Meylin and her family alleged past persecution in the form of death threats from accomplices of Meylin's rapist.*[21] *Meylin's family claimed that the government had demonstrated "indifference toward Meylin's rape" when they reported the crime.*[22] *On appeal, the Eighth Circuit never reached the issue of whether the alleged persecution rose to the requisite level, as Meylin had failed to prove a qualifying PSG.*[23]

International refugee law is rooted in the principle of non-*refoulement*: the general rule "assert[ing] that refugees should not be returned to a country where they face serious threats to their life or

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

17 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); *see* 8 U.S.C. § 1158(b)(1)(B)(i*)*; *id.* § 1101(a)(42)(A).

18 *See* Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S 138; *About UNHCR: The 1951 Refugee Convention*, U.N. High Comm'r for Refugees, https://www.unhcr.org/about-unhcr/who-we-are/1951-refugee-convention [https://perma.cc/65DW-UUL5].

19 *See* Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267; Refugee Act of 1980, 94 Stat. 102, 102–03 (1980) (codified as amended at 8 U.S.C. § 1101(a)(42)(A)).

20 8 U.S.C. § 1101(a)(42)(A). This Note adopts two forms of shorthand, designated in brackets: "their" as a gender-inclusive substitute for "his or her," given the inclusionary aims of this Note's proposed solution, and "country of origin" to encompass either the country of nationality or country of last habitual residence, whichever applies to a given applicant.

21 Mejia-Lopez v. Barr, 944 F.3d 764, 766 (8th Cir. 2019).

22 *Id.*

23 *Id.* at 767–69.

freedom."[24] Accordingly, an asylum applicant's primary motive for seeking asylum must be "a genuine apprehension or awareness of danger in another country."[25] The Code of Federal Regulations clarifies that

> persecution is an extreme concept involving a severe level of harm that includes actions so severe that they constitute an exigent threat. Persecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country, nor does it encompass all treatment that the United States regards as unfair, offensive, unjust, or even unlawful . . . .[26]

In the refugee definition, "persecution" refers to past persecution, while "well-founded fear of persecution" indicates future persecution.[27] The INA's interpretive guidelines state these as alternative options;[28] by a plain reading of the statute, an applicant need not prove both past and potential persecution to be granted asylum.[29] Indeed, an applicant may prevail on a finding of well-founded fear alone without having experienced past persecution.[30] On the other hand, if an asylum officer or immigration judge finds an applicant has proven qualifying past persecution but has *not* proven well-founded fear, they may discretionarily deny an asylum claim.[31] The government may successfully rebut the presumption of well-founded fear (and deny asylum) by demonstrating that there has been a "fundamental change in circumstances" in the applicant's country of origin or that the applicant could reasonably avoid future persecution by relocating within their country of origin.[32] This rebuttable presumption generally precludes approval for applicants who have shown only past persecution.[33]

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24 *The 1951 Refugee Convention and Key International Conventions*, U.N. High Comm'r for Refugees, https://www.unhcr.org/il/en/1951-refugee-convention-and-international-conventions [https://perma.cc/6AYK-PEBL].

25 Acosta, 19 I. & N. Dec. 211, 221 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

26 8 C.F.R. § 208.1(e) (2023).

27 8 U.S.C. § 1101(a)(42)(A); *see* U.S. Citizenship & Immigr. Servs., Well-Founded Fear Training Module 10 (2023).

28 S*ee* 8 C.F.R. § 208.13(b) (2023) ("The applicant may qualify as a refugee *either* because he or she has suffered past persecution *or* because he or she has a well-founded fear of future persecution." (emphases added)).

29 *See* 8 U.S.C. § 1101(a)(42)(A) (defining "refugee" as a person who cannot return to their country "because of persecution *or* a well-founded fear of persecution" (emphasis added)).

30 U.S. Citizenship & Immigr. Servs., Well-Founded Fear Training Module 11 (2023) ("[A]n applicant can show he or she is a refugee based solely on a well-founded fear of future persecution without having established past persecution.").

31 *See In re* Chen, 20 I. & N. Dec. 16, 18 (B.I.A. 1989) (codified at 8 C.F.R. § 208.13(b)(1) (2023)).

32 8 C.F.R. § 208.13(b)(1)(i), (b)(3) (2023).

33 *See Chen*, 20 I. & N. Dec. at 18. For further discussion of the rebuttable presumption and the potential exceptions to this general rule under humanitarian asylum, see also *infra* Section I.C.

Congress did not specify what an applicant must prove to establish well-founded fear of persecution when it incorporated the refugee definition into the INA.[34] However, the Board of Immigration Appeals ("BIA") asserted in its landmark, post-Refugee Act decision *In re Acosta*[35] that because Congress had not suggested a departure from the "accepted construction" of persecution, immigration officials and adjudicators should rely on pre-1980 decisions for its meaning.[36] The BIA accordingly defined persecution as "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[37]

The BIA also established the requirement that persecution must have been committed "either by the government of a country or by persons or an organization that the government was unable or unwilling to control."[38] This component generally precludes claims based on "civil strife or anarchy" or "harsh conditions shared by many other persons,"[39] as well as "private criminal acts of which governmental authorities were unaware or uninvolved."[40]

The Code of Federal Regulations defines "well-founded fear of persecution" as "a reasonable possibility of suffering such persecution" if the applicant were to return to their country of origin, such that the applicant is "unable or unwilling to return to, or avail [themselves] of the protection of, that country because of such fear."[41] The Supreme Court has established that a ten percent chance of being persecuted is a high enough possibility to qualify as a well-founded fear.[42] Although ten percent may seem a low hurdle, asylum officers weigh many factors that may lead them to determine it is no longer reasonable for someone to be afraid.[43]

This interplay is illustrated in the documentary film *Well-Founded Fear*, which follows several U.S. Citizenship and Immigration Services ("USCIS") officers through asylum interviews and deliberations.[44] Gladys Cruz, an asylum applicant from El Salvador, feared her family

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34 *See* 8 U.S.C. § 1101(a)(42) (defining "refugee").

35 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

36 *Id.* at 222–23.

37 *Id.* at 222.

38 *Id.* (codified at 8 C.F.R. § 208.1(e) (2023)).

39 *Id.* However, such claims may be discretionarily approved under humanitarian asylum. *See infra* Section I.C.

40 8 C.F.R. § 208.1(c) (2023). This prohibition has created turmoil in recent years regarding PSGs based on experiences of domestic violence. *See infra* notes 206–08 and accompanying text.

41 8 C.F.R. § 208.13(b)(2)(i) (2023).

42 *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

43 *See, e.g.*, U.S. Citizenship & Immigr. Servs., Well-Founded Fear Training Module 11–31 (2023).

44 *See* Well-Founded Fear (The Epidavros Project 2000).

was being targeted because of her brother's military service.[45] She told an officer how, shortly after her brother had escaped capture by guerilla fighters, a band of anonymous assailants kidnapped, tortured, and murdered his wife.[46] Strangers showed up at her funeral asking for information about Ms. Cruz's family, and the military moved them to another area for their safety.[47] Two more of Ms. Cruz's relatives were murdered in the years that followed, again by unknown attackers, after which she fled to the United States.[48] Ms. Cruz feared she would face similar abuse to that of her family members if she returned to her home country, given her brother was still in the military.[49]

When the interviewing officer consulted his coworkers on whether to recommend approval for asylum, both men insisted that Ms. Cruz was unlikely to qualify.[50] Her case could not prevail based on past persecution when she had never received an express, direct threat.[51] As to well-founded fear, the officers opined that Ms. Cruz may have had a viable claim shortly after her sister-in-law's murder as someone "similarly situated," but that it had essentially expired when she waited several years to leave El Salvador.[52] The officer who had conducted the interview expressed incredulity that the standard could be so "harsh" as to seemingly require "wait[ing] for another victim."[53]

B. Nexus to a Protected Ground

> *At their initial hearing and both appeals, courts found that Meylin's family had failed to prove that their past persecution was because of Meylin's status as a girl rape victim.*[54]

An asylum applicant's burden to establish their refugee status within the INA definition requires proving that one of five protected grounds—race, religion, nationality, membership in a particular social group, or political opinion—was "at least one central reason" for their persecution.[55] In other words, the persecution an applicant has suffered or fears suffering must be inflicted "in order to punish [them] for

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45 *Id.*
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.*
54 Mejia-Lopez v. Barr, 944 F.3d 764, 766–67, 769 (8th Cir. 2019).
55 8 U.S.C. § 1158(b)(1)(B)(i).

possessing a belief or characteristic a persecutor sought to overcome."[56] Each of the protected grounds technically carries equal weight in its potential to confer asylum eligibility.[57] Neither the INA nor the 1951 United Nations Refugee Convention defines these five categories, and attempts at statutory definitions have been unsuccessful.[58] Thus, much of U.S. asylum jurisprudence has relied on case law to establish guidance. Part II of this Note goes into more depth regarding the struggle to define PSG in particular.

C. Humanitarian Asylum

> *Meylin's family appealed the denial of their PSG claim and petitioned for humanitarian asylum because they would suffer "other serious harm" if removed to Guatemala.*[59] *The rape had caused Meylin to suffer from post-traumatic stress disorder, and her parents feared she would exhibit dangerous behaviors and face suicide risk.*[60] *They (mistakenly) argued that "a showing of past persecution based on a protected ground is not required as a prerequisite for a grant of humanitarian asylum."*[61] *Both the BIA and the Eighth Circuit denied the petition for humanitarian asylum because their claims of past persecution had failed to meet the nexus requirement.*[62]

For applicants who fail to prove well-founded fear, there are two alternative routes to asylum, falling under an umbrella commonly termed "humanitarian asylum."[63] The rebuttable presumption of well-founded fear to which asylum seekers are entitled relies upon having proven past persecution based on a statutorily protected ground (nexus).[64] If that presumption is rebutted by a finding of a fundamental change in circumstances or reasonable relocation, humanitarian asylum

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56 Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

57 *See id.* at 233 (relying on the principle of *ejusdem generis* to deduce that the INA establishes all five categories as "of the same kind"); *see also infra* Section III.B for a discussion of how establishing nexus poses unique challenges for PSG applicants.

58 *See, e.g.*, Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76588 (proposed Dec. 7, 2000). This proposed rule sought to amend the INA to include definitions for "persecution," "membership in a particular social group," and persecution "on account of" a protected ground. *Id.*

59 *Mejia-Lopez*, 944 F.3d at 767.

60 *Id.*

61 *Id.*

62 *Id.* at 769. This misunderstanding was not unique to Meylin's case; many claims have been thrown out as moot due to confusion about the relationship between "other serious harm" and the nexus requirement for past persecution. *See, e.g.*, Esenwah v. Ashcroft, 378 F.3d 763, 766 (8th Cir. 2004); Kanagu v. Holder, 781 F.3d 912, 919 (8th Cir. 2015).

63 *See* Rebekah Bailey & Laura Lunn, *Relief After Rebuttal: Reaching Humanitarian Asylum Under the Regulations*, Immigr. L. Advisor, Jan. 2013, at 1–3.

64 *See* Bushira v. Gonzales, 442 F.3d 626, 630–31 (8th Cir. 2006).

allows the discretionary grant of asylum in the absence of well-founded fear if (1) an applicant has experienced particularly severe past persecution such that "compelling reasons" justify not returning to their home country, or (2) there is a "reasonable possibility that [the applicant] may suffer other serious harm upon removal to that country."[65]

The United States introduced the first prong of humanitarian asylum in *In re Chen*,[66] in keeping with 1979 guidance from the United Nations High Commissioner for Refugees ("UNHCR") advocating for discretionary grants in the absence of well-founded fear.[67] *In re Chen* established the precedent that humanitarian asylum may be granted where past persecution was so heinous—exceeding the traditional standard—that "general humanitarian principle[s]" preclude forcing an applicant to return to their home country, even where future persecution is unlikely.[68] Applicant Chen had suffered extreme religious persecution during the Chinese Cultural Revolution, which had officially ended years before he applied for asylum.[69] The court held that although it was implausible Chen would experience the same persecution from which he had fled upon returning to China, the severity of that persecution entitled him to a discretionary grant of asylum.[70] Federal regulations codified this holding in 2001 under the "compelling reasons" prong.[71]

The regulations also added a second avenue for humanitarian asylum by which applicants who have demonstrated past persecution under the ordinary standard may prove a "reasonable possibility" of unrelated future persecution or "other serious harm."[72] "Reasonable possibility" is an equivalent standard to that of well-founded fear as

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65 8 C.F.R. § 208.13(b)(1)(iii) (2023).

66 20 I. & N. Dec. 16 (B.I.A. 1989).

67 U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 136, U.N. Doc. HCR/1P/4/ENG/REV.4 (Feb. 2019) [hereinafter *Handbook*] ("It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.").

68 20 I. & N. Dec. at 19 ("[W]hile the likelihood of future persecution is a factor to consider in exercising discretion in cases where an asylum application is based on past persecution, asylum may in some situations be granted where there is little threat of future persecution.").

69 *See id.* at 19–21.

70 *Id.* at 21.

71 *See* Asylum Procedures, 65 Fed. Reg. 76121, 76133 (Dec. 6, 2000) (codified as 8 C.F.R. § 208.13(b)(1)(iii)(A) (2023)).

72 *See id.*; *see also* 8 C.F.R. § 208.13(b)(1)(iii)(B) (2023).

established in *INS v. Cardoza-Fonseca*[73] (a ten percent likelihood).[74] This empowers factfinders with the discretion to offer protection to applicants who have suffered past persecution with the requisite nexus and are at risk of "other" future harm "that is not related to a protected ground"; in other words, "harm that may not be inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but [is] so 'serious' as to equal the severity of persecution."[75] Although "other serious harm" may encapsulate types of suffering ordinarily barred, such as extreme poverty or civil conflict, it merits emphasis that this relief is only available to claimants who have proven past persecution based on a nexus with a protected ground.[76]

II. Defining the PSG

> *Both the immigration judge and the BIA denied Meylin's family's asylum petition, holding that "young girls who have been sexually abused" did not qualify as a sufficiently immutable, socially distinct, and particular social group.*[77] *The Eighth Circuit did not address the validity of the proposed PSG, as its review was limited to the applicants' humanitarian asylum claim.*[78]

When analyzing the INA's refugee definition, the idea of persecution based on one's race, religion, nationality, or political opinion is relatively straightforward. By contrast, a reader naturally pauses to wonder, *what is a "particular social group?"* As one court lamented, "Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.'"[79] Scholars have assessed that PSG is more subjective and "open to interpretation" than the other grounds for asylum, and the failure of U.S. or international laws to define the term "has led to varied and evolving definitions across time and jurisdictions."[80]

Since the Refugee Act was enacted, all three branches of the U.S. government have struggled to handle the PSG category. Courts have

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73 480 U.S. 421, 440 (1987).

74 Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31945, 31947 (proposed June 11, 1998) (to be codified at 8 C.F.R. pt. 208); *see Cardoza-Fonseca*, 480 U.S. at 440.

75 Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. at 31947.

76 *See* 8 C.F.R. § 208.13(b)(1)(iii)(A)–(B) (2023); L-S-, 25 I. & N. Dec. 705, 710, 714 (B.I.A. 2012).

77 Mejia-Lopez v. Barr, 944 F.3d 764, 766–67 (8th Cir. 2019).

78 *Id.* at 767.

79 Fatin v. INS, 12 F.3d 1233, 1238 (3d. Cir. 1993).

80 Natalie Nanasi, *Death of the Particular Social Group*, 45 N.Y.U. Rev. L. & Soc. Change 260, 263 (2021).

demonstrated "reluctan[ce] and inconsisten[cy]" in determining and applying a PSG framework, characterizing judicial and agency guidance as "vague and sometimes divergent."[81] Domestic legislative attempts to formalize a PSG definition have likewise been unsuccessful.[82]

A. Legislative History

Central to the PSG quandary is the marked lack of indicia shedding light on drafters' intent in including PSG as an asylum category.[83] Records from the 1951 United Nations Refugee Convention that developed the refugee definition show only brief discussion of adding PSG[84] before its unanimous adoption by the drafting committee.[85] The sole rationale offered for the proposed PSG ground was that "experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included."[86]

Likewise, the United States lacks instructive legislative history on its decision to adopt the U.N.'s refugee definition in the Refugee Act.[87] In *In re Acosta*, the first decision in which the BIA attempted to define PSG, the court lamented that "[t]he requirement of persecution on account of 'membership in a particular social group' comes directly from the Protocol and the U.N. Convention. Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the Protocol."[88] The BIA posited that "the notion of a 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this

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81 Lwin v. I.N.S., 144 F.3d 505, 511 (7th Cir. 1998).

82 *See supra* note 58 and accompanying text.

83 *See* Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985) ("Congress did not indicate what it understood this ground of persecution to mean, nor is its meaning clear in the [United Nations Protocol Relating to the Status of Refugees]."), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

84 *See* U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 3d mtg. at 14, U.N. Doc. A/Conf.2/SR.3 (Nov. 19, 1951); U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 19th mtg. at 14, U.N. Doc. A/Conf.2/SR.19 (Nov. 26, 1951).

85 *See* U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 35th mtg. at 22, U.N. Doc. A/Conf.2/SR.35 (Dec. 3, 1951).

86 U.N. GAOR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 3d mtg. at 14, U.N. Doc. A/Conf.2/SR.3 (Nov. 19, 1951).

87 *See* Valdiviezo-Galdamez v. Att'y Gen. U.S., 663 F.3d 582, 594 (3d Cir. 2011) ("The concept [of PSG] is even more elusive because there is no clear evidence of legislative intent.").

88 *Acosta*, 19 I. & N. Dec. at 232 (citation omitted).

ground was added to the definition of a refugee."[89] It has become common understanding that PSG was designed to make asylum accessible to a swath of potential applicants who may be excluded by the other four categories—and this has borne out, to some extent.[90]

B. Judicial and Administrative Interpretation and Precedent

Given the lack of statutory definition or legislative record, it has been up to courts and administrative agencies to determine the requisite elements for a PSG over the last fifty years.[91] There are several stages during the asylum application and appeals process at which PSG determinations are made. Affirmative asylum applicants—people who are not in removal proceedings—apply through USCIS, an arm of the Department of Homeland Security ("DHS").[92] Applicants are interviewed by nonjudicial asylum officers to determine the merits of their applications—including the validity of any proposed PSGs.[93] Asylum officers make case-by-case determinations based on their training.[94]

An asylum officer may approve or deny an application outright or refer the applicant for a hearing with an immigration judge ("IJ") at the Executive Office for Immigration Review ("EOIR").[95] Although a referral is not technically a rejection, the presumption going into a hearing at EOIR is that the applicant has failed to demonstrate asylum

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89 *Id.*

90 *See id.* at 232–33 ("A purely linguistic analysis of this ground of persecution suggests that it may encompass persecution seeking to punish either people in a certain relation, or having a certain degree of similarity, to one another or people of like class or kindred interests, such as shared ethnic, cultural, or linguistic origins, education, family background, or perhaps economic activity."); *see also* Nanasi, *supra* note 80, at 263 ("As its jurisprudence has developed, the PSG ground has provided critical protections to many fleeing serious harms, in particular, harms that were not foreseen when the asylum regime was created in the aftermath of World War II, such as intimate partner abuse, gang-based violence, and persecution of LGBTQ and disabled individuals.").

91 *See Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm*, Dep't Homeland Sec. (Sept. 10, 2021), https://www.dhs.gov/hot-topics-asylum-examination-particular-social-group-and-other-serious-harm [https://perma.cc/2TFX-DT38].

92 *See Asylum in the United States*, Am. Immigr. Council (Aug. 16, 2022), https://www.americanimmigrationcouncil.org/research/asylum-united-states [https://perma.cc/N9YN-B9R6].

93 *See The Affirmative Asylum Process*, U.S. Citizenship & Immigr. Servs. (Mar. 29, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/the-affirmative-asylum-process [https://perma.cc/V6CB-9LQQ]. The anecdote provided in Section II.B from the film *Well-Founded Fear* provides an example of this process. *See supra* notes 45–53 and accompanying text.

94 *See* 8 U.S.C. § 1225(b)(1)(E)(i).

95 *Types of Affirmative Asylum Decisions: Referral to an Immigration Court*, U.S. Citizenship & Immigr. Servs. (May 31, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-affirmative-asylum-decisions [https://perma.cc/FTW6-5QPF].

eligibility.[96] Defensive asylum applicants—people who are applying for asylum as a defense against deportation—generally begin their petition process at this step, before an IJ at an EOIR court.[97] If the IJ denies asylum and the applicant is ordered removed, the applicant may appeal to the BIA.[98]

As "the highest administrative body for interpreting and applying immigration laws," statutory interpretation of ambiguous provisions like PSG falls to the BIA.[99] Interestingly, the BIA generally rules on cases by "paper review," rarely hearing oral arguments.[100] However, most BIA decisions are nonprecedential and unpublished, only binding the immigration judges and officers below in that specific case.[101] The Board occasionally chooses to publish decisions as precedential in future cases "involving the same issue or issues."[102] Furthermore, the Attorney General may modify or overrule BIA decisions at will, and designate its own decisions precedential.[103] This makes it very challenging to create PSG precedent.[104]

C. Elements of a PSG

The BIA is free to "change or adapt its policies,"[105] which includes the ability to introduce new PSG criteria or definitions.[106] Currently, the BIA has established three criteria that applicants must prove as requisite elements for a PSG: immutability, social distinction, and particularity.[107]

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96 *See* Holly Straut-Eppsteiner, Cong. Rsch. Serv., R47504, Asylum Process in Immigration Courts and Selected Trends 1 n.6 (2023) ("USCIS refers cases to EOIR when it finds an applicant ineligible for asylum and the applicant does not have a lawful status.").

97 *See* Am. Immigr. Council, *supra* note 92. For an explanation of the exceptions to this and recent changes, see 8 U.S.C. § 1225(b)(1)(A)–(B); *see also* Hillel R. Smith, Cong. Rsch. Serv., IF11357, Expedited Removal of Aliens: An Introduction (2022); *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. Citizenship & Immigr. Servs (Nov. 17, 2023), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule [https://perma.cc/E5PC-XTTJ].

98 8 C.F.R. § 1003.1(b) (2023).

99 *Board of Immigration Appeals*, U.S. Dep't Just. (Mar. 11, 2024), https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/B7LA-EDVM].

100 *Id.*

101 *See* U.S. Dep't of Just., Board of Immigration Appeals Practice Manual 11–12 (2022), https://www.justice.gov/eoir/book/file/1528926/dl?inline [https://perma.cc/7ATS-D3B3].

102 8 C.F.R. § 103.10(b) (2023); *see* U.S. Dep't of Just., *supra* note 101, at 11.

103 *See* 8 C.F.R. § 103.10(b) (2023).

104 See *infra* Section III.C for further discussion of the role of the executive branch in immigration adjudication.

105 Johnson v. Ashcroft, 286 F.3d 696, 700 (3d Cir. 2002).

106 *See id.*; *see, e.g.*, Acosta, 19 I. & N. Dec. 211, 232–33 (B.I.A. 1985) (defining and interpreting PSG), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

107 Amaya v. Rosen, 986 F.3d 424, 427 (4th Cir. 2021); 8 C.F.R. § 208.1(c) (2023).

Many BIA decisions deny asylum claims based on the deficiency of one characteristic and fail to discuss the other two elements.[108] Although the BIA has established these requisite elements, it has also emphasized that "[t]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis."[109]

1. Immutability

> *At Meylin's initial hearing, the IJ found that gender was an immutable characteristic, so Meylin's proposed PSG of "young girls who have been sexually abused" satisfied that prong of PSG analysis.*[110] *However, on appeal, the BIA characterized Meylin's PSG as an age-based group rather than a gender-based group.*[111] *The BIA found that childhood is not an immutable characteristic and rejected Meylin's PSG without discussing the other criteria.*[112] *The Eighth Circuit did not weigh in on any of the requisite PSG elements, as the appeal concerned the standard for humanitarian asylum.*[113]

In first attempting to construe PSG, the BIA identified immutability as the common element among the categories in the refugee definition.[114] PSG applicants had to prove only that persecution had been

> directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[115]

An early example of a PSG that passed the immutability standard focused on sexuality, when the BIA accepted an applicant's claim that "homosexuals form a particular social group in Cuba."[116] The BIA published the decision, and the Attorney General designated the case as

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108 *See, e.g.*, Cuate v. Att'y Gen. U.S., 774 F. App'x 568, 573 n.3 (11th Cir. 2019) ("Because we hold that [applicant]'s proposed social group—Mexican males who lived in the United States for over 10 years—lacked social distinction, we do not address whether this proposed group met the BIA's immutability and particularity requirements.").

109 *Acosta*, 19 I. & N. Dec. at 233.

110 Mejia-Lopez v. Barr, 944 F.3d 764, 766–67 (8th Cir. 2019).

111 *Id.* at 767.

112 *Id.* This was not a precedential decision, so courts may continue to differ on whether childhood is an immutable characteristic. *See generally* U.S. DEP'T OF JUST., *supra* note 101 (describing unpublished decisions as nonprecedential).

113 *Mejia-Lopez*, 944 F.3d at 769.

114 *Acosta*, 19 I. & N. Dec. at 233.

115 *Id.*

116 Toboso-Alfonso, 20 I. & N. Dec. 819, 820, 822–23 (B.I.A. 1990).

precedential "in all proceedings involving the same issue or issues,"[117] which "open[ed] the door to applications for asylum . . . based on sexual orientation."[118]

2. *Social Distinction*

> *At Meylin's initial hearing, the IJ found that "young girls who have been sexually abused" was not a socially distinct PSG.*[119] *Having dismissed Meylin's proposed PSG on immutability, the BIA did not reach the criterion of social distinction.*[120] *The Eighth Circuit's opinion does not include any additional detail explaining the IJ's finding.*[121]

Over time, *In re Acosta*'s immutability test "led to confusion and a lack of consistency."[122] In an attempt to further hone the category, the BIA added the social distinction criterion as a requisite PSG element in 2006.[123] Initially termed "social visibility," social distinction hinges on "whether the people of a given society would perceive a proposed group as sufficiently separate or distinct."[124] Although a PSG need not be visibly apparent,[125] its shared characteristic "should generally be recognizable by others in the community."[126]

An example of a socially distinct PSG is a family, which may be readily identified in various ways by other community members.[127] However, that is not to say that all PSG claims based on family ties will be automatically approved. The BIA has underscored that "[n]ot all social groups that involve family members meet the requirements of particularity and social distinction. . . . [T]he inquiry in a claim based on family membership will depend on the nature and degree of the relationships involved and how those relationships are regarded by the society in question."[128]

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117 *Id.* at 819 n.1.

118 Dorothy A. Harbeck & Ellen L. Buckwalter, *Asking and Telling: Identity and Persecution in Sexual Orientation Asylum Claims*, Immigr. L. Advisor , Sept. 2008, at 2.

119 Mejia-Lopez v. Barr, 944 F.3d 764, 766–67 (8th Cir. 2019).

120 *See id.* at 767.

121 *See id.* at 764–69. Immigration practitioners suggest that this lack of explanatory detail is common, perhaps especially in successful petitions—although this factor, like any, depends on the adjudicator. *See* Interview with Paulina Vera, Professorial Lecturer in L., Geo. Wash. Univ. L. Sch., in Washington, D.C. (Mar. 2, 2023). When asked what types of arguments tend to succeed in humanitarian asylum claims, immigration law professor and clinical supervisor Paulina Vera, Esq., replied: "I'm honestly not sure . . . because usually, [the decision] just says, 'petition approved.'" *Id.*

122 M-E-V-G-, 26 I. & N. Dec. 227, 231 (B.I.A. 2014).

123 *See* C-A-, 23 I. & N. Dec. 951, 959–61 (B.I.A. 2006).

124 *M-E-V-G-*, 26 I. & N. Dec. at 228, 241.

125 *Id.* at 234.

126 A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007).

127 *See C-A-*, 23 I. & N. Dec. at 959.

128 L-E-A- (*L-E-A- I*), 27 I. & N. Dec. 40, 42–43 (B.I.A. 2017).

3. *Particularity*

> *At Meylin's initial hearing, the IJ found that "gender alone" was insufficiently particular to satisfy this prong.*[129] *Having dismissed Meylin's proposed PSG on immutability, the BIA did not reach the criterion of particularity*.[130]

In 2007, the BIA introduced the particularity criterion as a third hurdle to proving the existence of a PSG.[131] Early descriptions of this new requirement in BIA decisions were difficult to distinguish from those of social distinction; for example, one decision defined particularity as "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[132] Later decisions provided at least some clarification that a sufficiently particular PSG "must have well-defined boundaries" and "must not be amorphous, overbroad, diffuse, or subjective"[133] "so as to provide a clear standard for determining who is a member."[134]

Proposed PSGs often fail on the particularity element.[135] In nearly two decades since particularity was established as a requirement, the BIA has officially recognized only two new PSGs[136]: "married women in Guatemala who are unable to leave their relationship"[137] and, more generally, claims based on family membership.[138]

III. Problems with PSG

Over the last half-century, the PSG ground has posed persistent and increasingly egregious challenges to asylum eligibility. In a contemporary society with ever-evolving conceptions of identity categories

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129 Mejia-Lopez v. Barr, 944 F.3d 764, 766 (8th Cir. 2019).

130 *See id.* at 767.

131 *See A-M-E-*, 24 I. & N. Dec. at 74, 76.

132 S-E-G-, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).

133 M-E-V-G-, 26 I. & N. Dec. 227, 232, 239 (B.I.A. 2014).

134 S.E.R.L. v. Att'y Gen. U.S., 894 F.3d 535, 552 (3d Cir. 2018).

135 *See, e.g.*, Raffington v. INS, 340 F.3d 720, 723 (8th Cir. 2003) (holding that the mentally ill population in Jamaica was "too large and diverse a group to qualify"); *S.E.R.L.*, 894 F.3d at 541, 557 (upholding BIA finding that "immediate family members of Honduran women unable to leave a domestic relationship" was insufficiently particular because it could encompass a diverse range of individuals, including family members who had no relationship with the domestic violence victim).

136 *See BIA Precedent Chart AI-CA*, U.S. Dep't Just. (Mar. 28, 2023), https://www.justice.gov/eoir/bia-precedent-chart-ai-ca [https://perma.cc/H438-V7QW]. The BIA has, however, published decisions *rejecting* several PSGs during this period, including "affluent Guatemalans," *A-M-E-*, 24 I. & N. Dec. at 69, and various PSGs relating to former or perceived gang affiliation. *See S-E-G-*, 24 I. & N. Dec. at 590; E-A-G-, 24 I. & N. Dec. 591, 596 (B.I.A. 2008).

137 A-R-C-G-, 26 I. & N. Dec. 388, 388–89 (B.I.A. 2014).

138 *See supra* notes 127–28 and accompanying text.

and belonging, this framework—which has posed challenges in U.S. jurisprudence since its inception[139]—no longer serves.

A. Circuit Splits

> *The outcome of Meylin's case, and the reasoning used to reach it, would have likely differed had it been appealed to a different federal circuit, as circuits have taken widely varying approaches to PSGs involving gender-based violence*.[140]

PSG is intrinsically amorphous and unstable, but it becomes truly definitionally untenable on appeal. Although the BIA has attempted to create more rigid PSG standards over the forty-odd years since the Refugee Act's enactment—and faced criticism for doing so[141]—this power is limited. The PSG criteria outlined in Section II.C govern because all asylum appeals go to the BIA first,[142] but BIA decisions appeal to the federal circuits; there is no "supreme" immigration court.[143] Perhaps unsurprisingly, in light of this unorthodox appellate structure, PSG is plagued by circuit splits.

Federal circuit courts defer to the lower courts' factual findings but review legal conclusions of whether a PSG exists de novo.[144] Although federal circuit courts show deference to the BIA's interpretation in theory, they are not required to use the three BIA criteria[145] when assessing potential PSGs.[146] The ability of federal circuits and, for that matter, all asylum adjudicators to weigh certain elements more than others in

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139 See, for example, Acosta, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987), for when the BIA first grappled with how to define PSG after the "refugee" definition took effect in domestic asylum proceedings.

140 *See, e.g.*, Velasquez-Martinez v. Garland, 852 F. App'x 240, 242–43 (9th Cir. 2021) (suggesting the potential validity of PSG "female victims of gender-based violence" in Honduras); Vicente-Pu v. Att'y Gen. U.S., 693 F. App'x 841, 843 (11th Cir. 2017) (rejecting PSG "fathers and daughters who are victims of extortion under threat of rape" as impermissibly circular); Castro-Perez v. Gonzales, 409 F.3d 1069, 1072 (9th Cir. 2005) (assuming arguendo that an applicant who had been raped belonged to a PSG but denying asylum because she could not demonstrate complicity by the Honduran government, having never reported the crimes to the police).

141 *See, e.g.*, Helen P. Grant, *Survival of Only the Fittest Social Groups: The Evolutionary Impact of Social Distinction and Particularity*, 38 U. Pa. J. Int'l L. 895, 910 (2017).

142 *See* 8 C.F.R. § 1003.1(b) (2023).

143 *See* U.S. Dep't Just., *supra* note 99.

144 S.E.R.L. v. Att'y Gen. U.S., 894 F.3d 535, 543 (3d Cir. 2018).

145 *See supra* Sections II.C.1–.3.

146 *See S.E.R.L.*, 894 F.3d at 546 ("Although several of our sister courts of appeals gave *Chevron* deference to that interpretation, we, along with the Seventh Circuit, rejected the BIA's social visibility and particularity requirements." (footnote omitted)); *see also* Nanasi, *supra* note 80, at 289.

determining PSGs—although they may not frame their decisions as such—limits the practicality of the BIA's definitional framework.[147]

Furthermore, circuit decisions only bind future BIA determinations within the same circuit—and even then, the BIA sometimes disregards prior circuit precedent.[148] Because federal circuits do not bind each other, not even the past approval of a prospective applicant's precise PSG at the highest available level offers security of a grant.[149] Although immigration law is federal, and thus ideally immune from regional variation, the ability of each circuit to independently determine PSG eligibility, save the few PSGs that have achieved universal precedent,[150] effectively emboldens each circuit to write its own PSG definition.[151]

A review of recent opposition between circuits over identical PSGs exposes the confusion and unpredictability perpetuated by the lack of a statutory definition—and how even courts that apply the same criteria may vastly diverge in their interpretations. As one example, in 2021, the Third Circuit denied the PSG of "Guatemalan women,"[152] although the Ninth Circuit had suggested that "women in Guatemala" may be a viable PSG more than a decade earlier in *Perdomo v. Holder*.[153] In 2010, Lesly Yajayra Perdomo petitioned for asylum under the PSG of "women in Guatemala" given the high rates of femicide throughout Guatemala, which she alleged the Guatemalan government did not address.[154] Perdomo did not allege past persecution, asserting only fear that she

147 *See* Brian Soucek, *Categorical Confusion in Asylum Law*, 73 Fla. L. Rev. 473, 475 (2021) ("The underlying substantive law—which currently looks at a persecuted group's immutability, particularity, and social salience in the country of persecution—is so poorly and inconsistently applied that litigants have lost sight even of *how* it should be applied: whether categorically or case-by-case. Lacking any principled justification, claims about the necessity of case-by-case adjudication become nothing but a litigation gambit opportunistically employed by anyone on the losing end of a prior categorical judgment." (footnote omitted)).

148 *See* Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995), *superseded on other grounds by statute*, Real ID Act of 2005, Pub. L. No. 109–13, div. B, 119 Stat. 231 (holding that "[a] federal agency is obligated to follow circuit precedent in cases originating within that circuit[,]" yet "[t]he BIA failed to discuss, let alone attempt to distinguish, contrary Ninth Circuit authority").

149 See *infra* notes 152–63 and accompanying text for an illustration of this dilemma in Chavez-Chilel v. Att'y Gen. U.S., 20 F.4th 138 (3d Cir. 2021) and Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010).

150 *See supra* notes 133–38 and accompanying text.

151 *See generally* Shannon J. Murphy, *Interpreting the Immigration and Nationality Act in Federal Circuit Courts: How the Ninth Circuit Became a Vessel Traveling "at Some Distance from the Main Fleet,"* 14 Drexel L. Rev. 261, 274–81 (2022) (discussing how the ability for each federal circuit to set its own immigration precedent has created jurisdictional discrepancies, including regarding cognizable PSGs between the Second and Ninth Circuits).

152 *Chavez-Chilel*, 20 F.4th at 141.

153 611 F.3d 662, 664, 667, 669 (9th Cir. 2010).

154 *See id.* at 664. Unfortunately, the BIA did not publish its decision on remand, so it is unknown whether Perdomo ultimately prevailed.

would be persecuted if forced to return to Guatemala.[155] Both the IJ and the BIA denied Perdomo's PSG as overly broad and determined that Guatemalan women were "a demographic rather than a cognizable social group under the INA."[156] On appeal, the Ninth Circuit remanded the BIA's decision for reconsideration under its two-prong approach to PSG eligibility, which essentially considers immutability and social distinction.[157] Regarding the BIA's finding of lack of particularity, the Ninth Circuit emphasized that either an "innate characteristic" or a "voluntary relationship" may sufficiently narrow a group and ordered the BIA to reconsider Perdomo's proposed PSG on those grounds alone.[158]

In 2021, the Third Circuit declined to follow the Ninth Circuit's reasoning in *Perdomo* and held in *Chavez-Chilel v. Attorney General of the United States*[159] that "Guatemalan women" was not a PSG.[160] Unlike Perdomo, Chavez-Chilel identified both past persecution and fear of future persecution as a Guatemalan woman; she had been raped as a teenager, the police did not act when she reported it, and her abuser threatened to rape her again.[161] The Third Circuit based its denial of Chavez-Chilel's claim almost entirely on lack of particularity, rationalizing its departure from the *Perdomo* holding by citing the Ninth Circuit's choice to omit that prong.[162] The court held that "Guatemalan women" was insufficiently particular because "there is no record evidence that all Guatemalan women share a unifying characteristic that results in them being targeted for any form of persecution based solely on their gender."[163]

The Third Circuit also cited two contradictory Eighth Circuit decisions to justify its holding.[164] The first case had denied the PSG of Iranian women, asserting that "a proposed PSG of all women in a particular country 'is overbroad[] because no factfinder could reasonably conclude that all [of a country's] women had a well-founded fear of persecution based solely on their gender.'"[165] The court stated this principle as the "general rule" but did not explain why.[166] However, later

155 *Id.*

156 *Id.* at 665.

157 *See id.* at 669; *see also* Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000) (holding that a PSG is a group "united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it").

158 *Perdomo*, 611 F.3d at 668–69.

159 20 F.4th 138 (3d Cir. 2021).

160 *Id.* at 146.

161 *Id.* at 142.

162 *See id.* at 146 & n.8.

163 *Id.* at 146.

164 *See id.*

165 *Id.* (quoting Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994)).

166 *Id.*

in the same paragraph, the court cited another Eighth Circuit opinion that had recognized the PSG of Somali women because all Somali women feared female genital mutilation.[167] Both of these PSG findings have remained intact, although how women from these nations differ in terms of particularity is unclear.

B. A Lesser Ground

> *Alongside their PSG claim, Meylin's family claimed that the threats they received after reporting Meylin's rape to law enforcement constituted persecution based on political opinion.*[168] *Filing under multiple eligibility categories based on the same persecution has become common practice in the face of uncertain PSG prospects.*[169] *In rejecting Meylin's proposed PSG, the BIA reasoned that "[t]he group female children subjected to rape is impermissibly circular because it is defined by reference to the persecution (i.e., rape) its members have suffered."*[170] *This epitomizes the challenges posed by the rule against circularity unique to PSG claimants.*[171]

Although the BIA established in *In re Acosta* that PSG should be equal to the other four statutory grounds,[172] and while it was designed to broaden asylum,[173] the PSG category "demands more than what is needed to prove the other four grounds for asylum."[174] UNHCR has noted that PSG claims "frequently overlap with a claim to fear of persecution on other grounds, i.e., race, religion or nationality."[175] This has proven true in U.S. jurisprudence, where asylum applicants are often discouraged from attempting to succeed on a PSG claim alone.[176] One rationale for this is that, although all asylum determinations necessitate a case-by-case factual inquiry, applicants applying under PSG face an added level of scrutiny in proving the validity of their proposed PSG.[177]

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167 *See id.* (quoting Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007)).

168 Mejia-Lopez v. Barr, 944 F.3d 764, 766 (8th Cir. 2019).

169 *See infra* notes 175–76 and accompanying text.

170 *Mejia-Lopez*, 944 F.3d at 767.

171 *See infra* notes 179–85 and accompanying text.

172 *See supra* note 56–57 and accompanying text.

173 *See* 1 GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW § 89, at 219 (1966).

174 Nanasi, *supra* note 80, at 274.

175 *Handbook*, *supra* note 67, ¶ 77.

176 For example, CLINIC Legal advises that attorneys preparing asylum petitions "should fully explore and put forth *protected* characteristics *in addition to* particular social group." *Attorney General Garland Vacates Matter of A-B- and Matter of L-E-A-*, CATH. LEGAL IMMIGR. NETWORK (July 28, 2021) (emphases added), https://cliniclegal.org/resources/attorney-general-garland-vacates-matter-b-and-matter-l-e [https://perma.cc/74L3-LJVR].

177 *See L-E-A- I*, 27 I. & N. Dec. 40, 42 (B.I.A. 2017) ("A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis, depending on whether the group is immutable and is recognized as particular and socially distinct in the relevant society.").

The determination of whether a PSG qualifies requires a complex inquiry into both "law and fact, since the ultimate legal question of cognizability depends on underlying factual questions concerning the group and the society of which it is a part."[178]

PSG also poses unique challenges regarding the nexus requirement.[179] This is evidenced by the fact that USCIS provides asylum officers with separate training modules for "Nexus and the Protected Grounds"[180] and "Nexus—Particular Social Group."[181] PSG applicants must prove that their PSG "exist[s] independently of the persecution or harm its members claim to suffer or fear."[182] In other words, a PSG cannot be self-referentially defined by the persecution its members have suffered.[183] This "rule against circularity" can be extremely difficult to follow, especially when an applicant has experienced cyclical abuse and trauma such as domestic or sexual violence.[184] The USCIS nexus and PSG training module reflect this confusion. One section, although entitled "Avoid Circular Reasoning," seems to endorse circular PSG scenarios:

> In some cases, the fact that an individual has been harmed in the past can create an independent reason why that individual would be targeted for additional harm in the future. . . . [S]urvivors of rape, if the rape is or were known to others, may be treated differently from other individuals by the surrounding society and/or may face social ostracism, or be more vulnerable to further harm as a result of their past harm. In such a case, the fact that the initial rape was not on account of a protected trait does not preclude a finding that subsequent harm, whether it is in the form of repeated rape or of some

178 S.E.R.L. v. Att'y Gen. U.S., 894 F.3d 535, 543 (3d Cir. 2018).

179 *See supra* Section I.B (discussing nexus requirement created by 8 U.S.C. § 1158(b)(1)(B)(i)); *see also* 8 U.S.C. § 1101(a)(42)(A) (defining "refugee" to include those who suffer or fear persecution "*on account of* race, religion, nationality, membership in a particular social group, or political opinion" (emphasis added)).

180 U.S. Citizenship & Immigr. Servs., Raio Directorate—Officer Training: Nexus and the Protected Grounds Training Module (2023).

181 U.S. Citizenship & Immigr. Servs., Raio Directorate—Officer Training: Nexus—Particular Social Group Training Module (2021). The PSG module is nearly the same page length as the module for the other four categories combined. *Compare id.* (fifty-seven pages), *with* U.S. Citizenship & Immgr. Servs., *supra* note 180 (sixty-three pages). The use of "the protected grounds" exclusive of PSG illustrates in itself the extent to which PSG is considered to be distinct. U.S. Citizenship & Immigr. Servs., *supra*.

182 Mejia-Lopez v. Barr, 944 F.3d 764, 767 (8th Cir. 2019). Meylin's proposed PSG of rape victims did not qualify because rape was the alleged persecution. *Id.*; *see* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74 (B.I.A. 2007) ("[A] social group cannot be defined exclusively by the fact that its members have been subjected to harm . . . .").

183 *See* 8 C.F.R. § 208.1(c) (2023) ("Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim.").

184 *See* U.S. Citizenship & Immigr. Servs., *supra* note 181, at 20.

> other kind of harm, may be on account of a shared characteristic that the applicant obtained by virtue of the initial rape.[185]

Another concern is that courts have accused PSG applicants of alleging "various possible social groups, some of which appeared to be created exclusively for asylum purposes."[186] The requisite PSG elements invite credibility challenges that applicants under the other four grounds, who have experienced more historically familiar or readily classified persecution, may not confront.[187] A recent example of this inequity in practice can be found in *Herrera-Martinez v. Garland*,[188] in which the applicant claimed to have been persecuted after he had testified against drug traffickers.[189] Throughout the course of his asylum application process, Herrera-Martinez had phrased his PSG formulation in eight different ways to try to articulate a qualifying PSG.[190] One such iteration was "Honduran small business owners who report the criminal activity of narcotraffickers perpetrated against them to the police and the police leak both the fact [that] the report was made and also the identity of the reporter such that the narcotraffickers become aware of these facts."[191] Ironically, the Fourth Circuit ultimately denied his PSG for lack of particularity, as its review was limited to the proposed PSG of "prosecution witnesses."[192]

Had Herrera-Martinez claimed persecution based on, say, his national origin, he likely would not have struggled to formulate—or been questioned extensively regarding the existence of—his Honduran nationality.[193] The stringent requirements for establishing a PSG render it an inherently inferior category.

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185 *Id.* at 19–20 (footnote omitted).

186 M-E-V-G-, 26 I. & N. Dec. 227, 231 (B.I.A. 2014).

187 *See id.*

188 22 F.4th 173, 180 (4th Cir. 2022).

189 *See id.* at 176.

190 *See id.* at 181.

191 *Id.*

192 *Id.* at 185. This decision also evidences the plague of circuit splits, as it departed from both the Third and Ninth Circuits' approvals of very similar PSGs. *See* Guzman Orellana v. Att'y Gen. U.S., 956 F.3d 171, 180 (3rd Cir. 2020) (approving PSG of witnesses who publicly provided assistance to law enforcement against major gangs); Henriquez-Rivas v. Holder, 707 F.3d 1081, 1093 (9th Cir. 2013) (approving PSG of people who publicly testified against gang members). Most recently, the Eighth Circuit joined the Fourth Circuit's approach in Lemus-Coronado v. Garland, denying the PSG of "witnesses who cooperate with law enforcement"—but for lack of social distinction, rather than particularity. 58 F.4th 399, 404 (4th Cir. 2023).

193 *See* U.S. Citizenship & Immigr. Servs., *supra* note 180, at 26–27.

C. Political Instability

> *Meylin's family crossed the border during the final months of the Obama Administration, shortly before the 2016 presidential election.*[194] *The Eighth Circuit denied them asylum in December 2019.*[195] *Between 2017 and 2019, political turbulence had upended PSG precedent, invalidating two PSGs that were germane to Meylin's claims.*[196] *In the more than three years that passed between filing their asylum application and receiving a verdict, the state of U.S. asylum law had utterly transformed.*[197]

Meylin's case epitomizes how the PSG framework, particularly in the struggle to establish precedent,[198] is vulnerable to political manipulation. Earlier, this Note[199] identified that the BIA has published only two PSG approvals under the current criteria: in 2014, married Guatemalan women who were unable to leave their relationship,[200] and in 2017, claims based on family membership.[201] Both of those precedents would have informed Meylin's legal counsel in formulating her PSG claims. First, given the relationship between domestic violence and rape, and that the precedential domestic violence case *In re A-R-C-G-*[202] had been specific to Guatemala, Meylin could have reasonably assumed that precedent would benefit her in proving "female children subjected to rape" constituted a PSG within Guatemala's societal conditions.[203] Second, Meylin's family members "averred past persecution based on their kinship to Meylin,"[204] making the positive precedent for PSGs based on family ties vital to their claims.[205]

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194 *See* Mejia-Lopez v. Barr, 944 F.3d 764, 766 (8th Cir. 2019).

195 *Id.*

196 In 2018, Attorney General Sessions overruled a 2014 B.I.A. decision that approved of domestic violence as a basis for PSG claims. *See* A-B- (*A-B- I*), 27 I. & N. Dec. 316, 317 (A.G. 2018) (overruling A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014)), *vacated by* A-B- (*A-B- III*), 28 I. & N. Dec. 307 (2021). Similarly, in 2019, Attorney General Barr overruled a 2017 decision's approval of family membership as a basis for PSG claims. *See* L-E-A- (*L-E-A- II*), 27 I. & N. Dec. 581, 589 (A.G. 2019) (overruling *L-E-A- I*, 27 I. & N. Dec. 40 (B.I.A. 2017)), *vacated by* L-E-A- (*L-E-A- III*), 28 I. & N. Dec. 304 (A.G. 2021).

197 *See generally A Timeline of the Trump Administration's Efforts to End Asylum*, Nat'l Immigr. Just. Ctr. (Jan. 2021), https://immigrantjustice.org/sites/default/files/content-type/issue/documents/2021-01/01-11-2021-asylumtimeline.pdf [https://perma.cc/M3D7-63T9] (chronological overview of asylum restrictions enacted during the Trump administration).

198 *See supra* notes 101–04 and accompanying text.

199 *See supra* Section II.C.3.

200 *See A-R-C-G-*, 26 I. & N. Dec. at 388–89.

201 *See L-E-A- I*, 27 I. & N. Dec. at 42–43.

202 26 I. & N. Dec. 388 (B.I.A. 2014).

203 *See* Mejia-Lopez v. Barr, 944 F.3d 764, 766 (8th Cir. 2019).

204 *Id.*

205 *See L-E-A- I*, 27 I. & N. Dec. at 42–43.

Tragically for Meylin, both of those precedents were invalidated during the Trump Administration. In 2018 and 2019, Attorneys General Sessions and Barr overturned the decisions approving domestic violence and family based PSGs, citing disagreements with how lower courts had applied the BIA's interpretive framework.[206] Perhaps most damaging to Meylin's claims as a rape victim was the extent to which Sessions' order relied on the framing of domestic violence as "private criminal activity,"[207] as PSGs may not be defined by "private criminal acts of which governmental authorities were unaware or uninvolved."[208] The Trump Administration created additional obstacles for asylum applicants in January 2021, after Meylin would have presumptively been deported.[209]

Throughout his presidential campaign, now-President Biden derailed Trump's broad immigration restrictions and headlined pro-asylum policies.[210] Soon after assuming office, Biden issued an Executive Order[211] pursuant to which Attorney General Garland vacated the aforementioned Trump-era decisions, ordering a return to the previous precedents.[212] Over just a few years, asylum applicants with PSGs dependent on domestic violence and family membership had had their claims presumptively validated, then rejected, then reinstated.[213] Of course, this upheaval also aggravated the circuit divide.[214]

The vulnerability of PSG to political swings persists even within presidential administrations, as evidenced by the asylum restrictions

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206 *See A-B- I*, 27 I. & N. Dec. 316, 316 (A.G. 2018) (overruling *A-R-C-G-*, 26 I. & N. Dec. at 388), *vacated by A-B- III*, 28 I. & N. Dec. 307 (2021); *L-E-A- II*, 27 I. & N. Dec. 581, 581 (A.G. 2019) (overruling *L-E-A- I*, 27 I. & N. Dec. at 40), *vacated by L-E-A- III*, 28 I. & N. Dec. 304 (A.G. 2021).

207 *A-B- I*, 27 I. & N. Dec. at 317; *see id.* at 316 ("An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.").

208 8 C.F.R. § 208.1(c) (2023).

209 Days before Trump left office, then-acting Attorney General Rosen issued A-B- (*A-B- II*), 28 I. & N. Dec. 199 (A.G. 2021), making it harder for asylum applicants to establish nexus. *See id.* at 211 (holding that to prove nexus, "the applicant's protected status must be *both* a but-for cause of her persecution *and* it must play more than a minor role that is neither incidental nor tangential to another reason for the harm or a means to a non-protected end").

210 *See* John Burnett, *Biden Pledges to Dismantle Trump's Sweeping Immigration Changes–But Can He Do That?*, NPR (Sept. 14, 2020, 5:00 AM), https://www.npr.org/2020/09/14/912060869/biden-pledges-to-dismantle-trumps-sweeping-immigration-changes-but-can-he-do-tha [https://perma.cc/3B3A-WWSP].

211 Exec. Order No. 14,010, 3 C.F.R. 496 (2022).

212 *A-B- III*, 28 I. & N. Dec. 307, 307 (A.G. 2021); *L-E-A- III*, 28 I. & N. Dec. 304, 304 (A.G. 2021).

213 *See* sources cited *supra* note 196.

214 *See* Michael Kareff & Jorge Roman-Romero, *Post*-Matter of A-B-, *the Ninth Circuit Joins the First and Sixth Circuits in Finding Domestic Violence-Based Asylum Claims Are Still Viable*, 35 Geo. Immigr. L.J. 349, 349 (2020).

enacted by the Biden Administration in 2023.[215] The same Administration that denounced Trump's targeting of Central American migrants[216] has devised and fought to uphold a new program that "presumes most migrants are not eligible to apply for asylum" and applies almost exclusively to migrants who enter by way of the U.S.-Mexico border.[217] This rule has been met with intense criticism[218] for contradicting Biden's self-proclaimed pro-asylum stance[219] and closely resembling Trump's "transit ban."[220] Immigration advocacy groups challenging the rule won in federal district court, which held that the policy violated federal asylum law.[221] The Ninth Circuit stayed that decision on appeal, leaving the restrictions in place pending a final ruling.[222]

Given the precedential challenges of PSG and the prominent role of the executive branch in immigration jurisprudence, potential asylees relying on PSG claims are especially susceptible to politically motivated ebbs and flows of rights.[223] As of December 2023, the average wait time

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215 *E.g.*, Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R pts. 1003, 1208); *see* Priscilla Alvarez, *Biden Administration Rolls Out New Asylum Restrictions Mirroring Trump-Era Policy*, CNN (Feb. 21, 2023, 4:51 PM), https://www.cnn.com/2023/02/21/politics/asylum-policy-biden-administration/index.html [https://perma.cc/FY4V-BMGK].

216 *See FACT SHEET: Department of Defense and Department of Homeland Security Plans for Border Wall Funds*, The White House (June 11, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/06/11/fact-sheet-department-of-defense-and-department-of-homeland-security-plans-for-border-wall-funds/ [https://perma.cc/44QC-UW2A] ("Wall construction along the Southern border in recent years is just one example of the prior Administration's misplaced priorities and failure to manage migration in a safe, orderly, and humane way. . . . Most contraband is likely to come through legal ports of entry. And many families fleeing the violence in Central America are voluntarily presenting themselves to border patrol officials.").

217 *See* Daniel Wiessner, *Biden Administration Urges US Court to Uphold Asylum Restrictions*, Reuters (Nov. 7, 2023, 7:59 PM), https://www.reuters.com/world/us/biden-administration-urges-us-court-uphold-asylum-restrictions-2023-11-08/ [https://perma.cc/PJQ5-KL2E].

218 *See* MJ Lee & Priscilla Alvarez, *Fury over Biden's New Asylum Policy Grows After He Thanks Poland for Welcoming Ukrainian Refugees*, CNN (Feb. 23, 2023, 9:54 AM), https://www.cnn.com/2023/02/23/politics/biden-asylum-policy-ukraine-poland/index.html [https://perma.cc/G66V-T7V4]; *see also IRC: Court Order Blocking Asylum Ban Shows Need for Biden Administration to Adopt Humane and Orderly Approaches*, Int'l Rescue Comm. (July 25, 2023), https://www.rescue.org/press-release/irc-court-order-blocking-asylum-ban-shows-need-biden-administration-adopt-humane-and [https://perma.cc/98RG-3BS8].

219 *See The Biden Plan for Securing Our Values as a Nation of Immigrants*, J. Sparks L., PLLC (Sept. 29, 2022, 4:00 PM), https://www.sparksimmigration.com/biden-plan-nation-immigrants/ [https://perma.cc/U27Y-SKHH].

220 Katrina Eiland & Jonathan Blazer, *Biden Must Reverse Plans to Revive Deadly Trump-Era Asylum Bans*, ACLU (Jan. 26, 2023), https://www.aclu.org/news/immigrants-rights/biden-must-reverse-plans-to-revive-deadly-trump-era-asylum-bans [https://perma.cc/WQT3-8LMK].

221 *See* E. Bay Sanctuary Covenant v. Biden, No. 18-cv-06810, 2023 U.S. Dist. LEXIS 128360, at *1 (N.D. Cal. July 25, 2023).

222 *See* E. Bay Sanctuary Covenant v. Biden, 93 F.4th 1130, 1131 (9th Cir. 2023).

223 *See supra* notes 206–14 and accompanying text.

for an asylum hearing was 1,444 days, or nearly four years.[224] The likely outcome of a PSG claim could utterly transform as it cycles its way through appeals and presidential administrations.[225] Although this phenomenon is by no means unique to PSG,[226] recent years have catapulted PSG applicants into a state of limbo—though, as has been established, they have lacked secure footing from the beginning of domestic asylum law.[227] It should not be a matter of political whim who is deemed deserving of asylum in the United States at any given moment. The uncertainty posed by PSG leaves thousands of lives hanging in the balance.[228]

IV. Solution: Drawing from Humanitarian Asylum to Replace PSG

The central principle of asylum law is that people who are fleeing harm should not have to return to harm.[229] If an applicant can prove that it is not safe for them to go home, why should it matter whether the source of their persecution fits into a predetermined category that was devised more than seventy years ago? Why must an applicant establish a nexus if they can prove severe past harm or a well-founded fear of harm in their country of origin that they would not face in the United States? The standard for applicants to prove that the suffering they have experienced rises to the statutory level of persecution is so high[230] that further gatekeeping via the five protected grounds[231] is unnecessary.

This Note proposes a two-pronged solution to the quandary created by PSG: first, to amend the refugee definition in the INA to substitute "membership in a particular social group"[232] with "other serious

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224 *See Immigration Court Asylum Backlog*, TRAC Immigr., https://trac.syr.edu/phptools/immigration/asylumbl/ [https://perma.cc/V2GC-PAHF] (under "Average Days Pending since Court Filing," select "to Asylum Hearing"; under "Tables showing Fiscal Year," select "2023"; and then select "All-2023" for "Immigration Court State," "Immigration Court," and "Nationality").

225 *See* Edwards v. Att'y Gen. U.S., 97 F.4th 725, 747 (11th Cir. 2024) (Jordan, J., concurring) ("With each change of administrations, there come new policies. In the immigration context such policies—sometimes expressed through the Attorney General's rulings—are often 180 degree turns from settled norms that have widespread effects on then-pending immigration proceedings. . . . What this has meant in practice over the last two decades is that existing immigration precedent is subject to change every four or so years.").

226 *See Immigration Court Backlog Tops 3 Million; Each Judge Assigned 4,500 Cases*, TRAC Immigr. (Dec. 18, 2023), https://trac.syr.edu/reports/734/ [https://perma.cc/UN87-MR3P].

227 *See supra* Sections III.A–.B.

228 *See* Shiff, *supra* note 11, at 567 ("This question [of defining PSG] has become ever-more pressing in light of the fact that the majority of migrants seeking asylum at the U.S.-Mexico border are claiming persecution on account of their 'membership in a particular social group.'").

229 *See* Guzman Chavez v. Hott, 940 F.3d 867, 869 (4th Cir. 2019).

230 *See supra* Section I.A.

231 *See supra* Section I.B.

232 8 U.S.C. § 1101(a)(42)(A).

harm,"[233] and second, to provide step-by-step guidance for implementation at all levels of asylum adjudication. This change would absorb an amended version of the humanitarian asylum process into a singular multistep inquiry for all asylum applicants and allow an asylum seeker to qualify either by establishing a nexus with one of the four preexisting, clear-cut categories—race, religion, nationality, and political opinion—or by proving other serious harm.

A. Amending the INA

The statutory definition of a refugee under the proposed change would read as follows, with the amended portions italicized:

> Any person who is outside [their country of origin] and who is unable or unwilling to return to, and is unable or unwilling to avail [themselves] of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, *or* political opinion, *or because of other serious harm or a well-founded fear thereof* . . . .[234]

This proposed language maintains all the key goals of asylum law. First, it still allows applicants to argue their cases using a nexus to established categories to speed the factfinding inquiry when useful, but it eliminates nexus as an absolute requirement.[235] As the law currently stands, each of the other four categories effectively hastens the factual inquiry,[236] which was perhaps one rationale behind the nexus framework as a whole, but PSG slows it down (and leads to more appeals) by requiring applicants to first establish the existence of the qualifying group.[237] Second, it maintains the high standard for proving persecution, as it is well-established that "'other serious harm' should be 'equal in severity' to persecution reviewed in the primary analysis."[238] Third, in

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233 8 C.F.R. § 1208.13(b)(1)(iii)(B).

234 This Note proposes amending the fundamental refugee definition provided in 8 U.S.C. § 1101(a)(42)(A). Accompanying revisions would naturally need to be made to other provisions governing asylum elsewhere in the U.S. Code and the Code of Federal Regulations where "membership in a particular social group" currently appears. An exhaustive reconstruction of all such provisions is beyond the scope of this Note, but key areas include in the "special circumstances" clause in 8 U.S.C. § 1101(a)(42)(B), 8 C.F.R. § 208.1, and 8 C.F.R. § 208.13(b).

235 *See supra* Section I.B.

236 For example, someone claiming persecution because they belong to a certain political party in a certain country will have an easier argument if another member of that party in that country has already been approved for asylum, effectively limiting the inquiry to credibility and the severity of the persecution. *See* Imran v. Boente, 678 F. App'x 37, 40 (2d Cir. 2017) (relying on successful political opinion claim in Uwais v. Att'y Gen. U.S., 478 F.3d 513, 519 (2d Cir. 2007), in granting petition for review of similarly affiliated individual). Of course, circuit splits may still arise, but precedent is more clearly established with well-defined categories. *See infra* notes 308–312.

237 *See* L-E-A- (*L-E-A- I*), 27 I. & N. Dec. 40, 42 (B.I.A. 2017).

238 Dep't Homeland Sec., *supra* note 91 (quoting Chuck Adkins-Blanch, BIA representative).

keeping with the spirit of the BIA precedential case for "other serious harm" and to maintain equal footing with the other four grounds,[239] guidelines for application of this Note's solution will preserve the safeguard against truly "private" offenses contained within the persecution definition[240] by maintaining the requirement that an asylee be persecuted by either the government or someone the government is unable or unwilling to control.[241]

B. Procedural Guidance

To ensure proper application of the relevant humanitarian asylum concepts, this Note's solution includes guidelines to accompany the proposed amendment, to supplement portions of existing C.F.R. provisions governing "Establishing asylum eligibility."[242] Humanitarian asylum was created in apparent recognition of the reality that U.S. courts' application of the refugee definition had departed from its plain language.[243] Although the refugee definition presents past persecution and well-founded fear as alternative avenues for claiming asylum, through the adoption of the rebuttable presumption, prior to *In re Chen*,[244] U.S. precedent had necessitated that an applicant who had demonstrated past persecution must always also prove well-founded fear.[245] Appropriate application of this Note's proposed amendment would eliminate the need for a rebuttable presumption[246] by requiring every asylum adjudicator to consider alternative avenues for relief if an applicant has proven past persecution but lacks well-founded fear.

By incorporating what is currently a separate humanitarian asylum provision into the amended refugee definition, the following procedure applies the most logical natural reading to the original phrasing of the refugee definition.[247] This solution would offer every asylum seeker a genuine opportunity to prove *either* past *or* prospective harm without the added hurdle of appealing on humanitarian grounds. In determining asylum eligibility under this revised statutory framework, an asylum adjudicator would undertake the following inquiry.

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239 *See* L-S-, 25 I. & N. Dec. 705, 714 (B.I.A. 2012).

240 *See* 8 C.F.R. § 208.1(c) (2023) (explaining "private criminal acts of which governmental authorities were unaware or uninvolved" is not considered persecution for purposes of asylum); *id.* § 208.1(f)(1) (noting claims of persecution borne of "[i]nterpersonal animus or retribution" will generally fail).

241 8 C.F.R. § 208.1(e) (2023).

242 *Id.*§ 208.13.

243 *See supra* Section I.A.

244 20 I. & N. Dec. 16 (B.I.A. 1989).

245 *See supra* Section I.A.

246 *See* 8 C.F.R. § 208.13(1).

247 *See* 8 U.S.C. § 1101(a)(42)(A); *see also supra* note 28.

1. Past Harm

First, the adjudicator should ask whether the applicant has experienced either past persecution on account of a protected ground or other serious harm, either at the hands of their government or from which their government was unable or unwilling to protect them. If the adjudicator finds the applicant's claims credible, they should assess whether the harm reached the precedential level of severity for past persecution.[248] If the harm was committed by a private actor, the adjudicator should consider whether the case's facts and an analysis of country conditions support the conclusion that the applicant's government was unable or unwilling to protect them, warranting relief.[249]

2. Well-Founded Fear

Whether or not the adjudicator has found past persecution or harm, their next step is to conduct a well-founded fear inquiry: whether the applicant has a well-founded fear (ten percent likelihood)[250] of future persecution on account of a protected ground or other serious harm if returned to their country of origin. After establishing credibility, an adjudicator should consider whether an analysis of country conditions supports the conclusion that the applicant's government would be unable or unwilling to protect them from the feared future harm. In cases where the applicant has demonstrated past persecution or harm, this may be a speedy inquiry; as the rebuttable presumption of well-founded fear was designed to reflect, certain plights can be naturally foreseen to repeat themselves.[251] If an adjudicator finds the applicant has demonstrated a well-founded fear of future harm, whether based on nexus or other serious harm, asylum should be granted, regardless of the adjudicator's findings regarding past harm.

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248 *See supra* Section I.A.

249 Adjudicators are encouraged to consider the examples of other serious harm cited in L-S-, 25 I. & N. Dec. 705, 714–15 (B.I.A. 2012).

250 The proposed language uses "well-founded fear" rather than "reasonable possibility" (the present standard of proof for "other serious harm"). 8 C.F.R. § 208.13(b)(1)(iii) (2023). This achieves the supplemental benefit of bringing asylum legislation in line with accepted principles of statutory interpretation given that "reasonable possibility" and "well-founded fear" are equivalent standards, both requiring a ten percent likelihood. *See supra* note 74 and accompanying text. Although the administrative confusion of using different phrases to indicate the same standard was presumably justified to help adjudicators identify traditional versus humanitarian claims on appeal, consolidating this language alongside the merging of the two doctrines will promote effective statutory interpretation by way of the presumption of meaningful variation. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 170–73 (2012).

251 *See supra* note 236. Another example that comes to mind is that of an applicant who experienced abuse due to their perceived sexual orientation in a country where non-heteronormative sexual relationships or marriage remain criminalized.

If an applicant has proven past persecution but fails to demonstrate well-founded fear—for example, due to improved country conditions or a finding of changed circumstances[252]—the adjudicator should ask whether the applicant's past harm was so severe as to prohibit the United States from returning the applicant to their country of origin.[253] The adjudicator should refer to *In re Chen*[254] and its progeny[255] to address the severity threshold. If the past harm meets that threshold, asylum should be granted even in the absence of well-founded fear; if not, asylum should be denied.[256]

C. Practical Outcomes

In broad terms, the revised language and procedure would effectuate the following concrete changes:

1. Asylum applicants may continue to claim persecution based on religion, race, nationality, or political opinion, and precedent regarding these grounds would remain intact.[257] However, an applicant may also make a successful claim based on past or prospective harm that lacks a nexus to any particular identity category or group ("other serious harm").
2. The asylum inquiry is consolidated and expedited by eliminating the rebuttable presumption[258] process, while still requiring the adjudicator to consider relevant contextual factors regarding

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252 This inquiry should somewhat resemble the current rebuttable presumption inquiry, save the nexus requirement. *See supra* note 64 and accompanying text.

253 This mirrors the "compelling reasons" inquiry found in 8 C.F.R. § 208.13(b)(1)(iii)(A), with the slight change of also considering past other serious harm in addition to past persecution.

254 20 I. & N. Dec. 16 (B.I.A. 1989).

255 *See* S-A-K- & H-A-H-, 24 I. & N. Dec. 464, 464–65 (B.I.A. 2008).

256 It merits noting that by a truly plain reading of the refugee definition as it currently stands, no higher threshold for past persecution should be necessary to waive the need for well-founded fear. *See supra* notes 27–29 and accompanying text. However, this Note advocates for maintaining the *Chen* test and requiring more severe persecution where there is no well-founded fear, given the overarching goal of global and domestic asylum law to avoid returning someone to a situation where they would face persecution. *See generally* U.N. High Comm'r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Jan. 26, 2007), https://www.refworld.org/node/49727 [https://perma.cc/9XC3-T6SG] (discussing various authorities of international law that create non-*refoulement* obligations for parties to the Refugee Convention).

257 This Note would also propose that adjudicators may consider the positive precedent of the few BIA-approved PSGs in determining eligibility of related claims, such as an applicant who asserts other serious harm in the form of female genital mutilation. *See* Kasinga, 21 I. & N. Dec. 357, 369 (B.I.A. 1996).

258 *See supra* Section I.C.; *In re* Chen, 20 I. & N. Dec. 16, 18 (B.I.A. 1989) (codified at 8 C.F.R. § 208.13(b)(1) (2023)).

country conditions[259] and the government's role.[260] An asylum adjudicator must always assess whether there is well-founded fear of harm and, where there is a negative finding, automatically conduct a "compelling reasons"[261] inquiry. A claim will only be barred if an applicant can prove neither severe past harm nor well-founded fear.

V. How Will This Resolve PSG's Challenges?

The benefits of this proposed solution can be illustrated by applying it to Meylin's case. Meylin's family was denied asylum because (1) their proposed PSG failed, (2) the court did not find a nexus between their persecution and any qualifying ground, and (3) the combination of those conclusions precluded a discretionary grant of humanitarian asylum.[262]

Under the proposed changes, Meylin and her family would be able to petition for asylum due to other serious harm based on the rape and death threats Meylin suffered, as well as well-founded fear that the threats would be carried out and Meylin would experience serious psychological harm.[263] *If an adjudicator found their claims credible, that the alleged past harms were severe enough to qualify, the well-founded fears of harm met the probability threshold, and the government had not and would not protect them, their claims would be approved. Alternatively, the adjudicator could grant asylum in the absence of well-founded fear if the past harms met the* In re Chen *severity threshold.*[264]

It is widely accepted that the PSG category was designed to broaden asylum eligibility, not restrict it.[265] Yet PSG decisions have become so intensely specific—and so unpredictable—as to render the apparent open-endedness of the category counterproductive.[266] The flexibility within this proposed solution would remedy the identified problems with PSG and improve the current status of asylum law in several ways.

First, it would assuage the battles among circuits over PSGs, and between circuits and the BIA,[267] by simplifying asylum criteria while giving credence to the intrinsically individualized assessments of asylum

259 *See Chen*, 20 I. & N. Dec. at 18 (codified at 8 C.F.R. § 208.13(b)(1) (2023)).

260 *See* 8 C.F.R. § 208.1(c) (2023).

261 *Id.* § 208.13(b)(1)(iii)(A).

262 Mejia-Lopez v. Barr, 944 F.3d 764, 769 (8th Cir. 2019).

263 *Id.* at 766–67.

264 *See Chen*, 20 I. & N. Dec. at 18 (codified at 8 C.F.R. § 208.13(b)(1) (2023)).

265 *See* Grahl-Madsen, *supra* note 173, at 219–20.

266 *See supra* Part III.

267 *See supra* Section III.A.

applications.[268] Second, it would substitute PSG with a fifth avenue for eligibility equal to the four established grounds while simultaneously eliminating the need for a separate humanitarian asylum process based on the rebuttable presumption.[269] Third, it would help protect asylum applicants from political manipulation and lay the groundwork for long term stability in the field.

A. Circuit Split Resolution

The conflicting circuit decisions outlined in Section III.A illustrate the extent to which PSG applicants face the luck of the draw.[270] Which federal circuit hears an appeal can make or break a PSG claim, but even within the same circuit, PSG distinctions can seem arbitrary.[271] The amended statutory language proposed by this Note would put an end to the quibbling between and within circuits regarding the appropriate PSG criteria.[272] Replacing PSG with "other serious harm" would cast aside decades of confusion and inconsistency in favor of the humanitarian framework's more genuinely individualized approach. Although PSG has left courts scrambling to establish impossible precedent, adjudicators considering claims of other serious harm apply an authentically case-by-case analysis that does justice to each applicant's lived experience.[273]

Revisiting the case studies in Section III.A, this Note's reframing of "other serious harm" would empower both Chavez-Chilel[274] and Perdomo[275] with viable asylum claims, as both applicants' allegations of harm were found to be credible.[276] Each woman could prevail based on her individual personal narrative without relying on a threshold determination that "Guatemalan women" constitutes a "group" worthy

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268 *See* Acosta, 19 I. & N. Dec. 211, 233 (1987) ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.").

269 *See* Bailey & Lunn, *supra* note 63, at 2 (detailing the step-by-step procedure for humanitarian asylum claims).

270 *See supra* Section III.A.

271 *See, e.g.*, *supra* notes 164–67 and accompanying text.

272 *See supra* Section III.A.

273 *See* L-S-, 25 I. & N. Dec. 705, 714 (B.I.A. 2012) ("[A]djudicators considering 'other serious harm' should be cognizant of conditions in the applicant's country of return and should pay particular attention to major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant. Such conditions may include, but are not limited to, those involving civil strife, extreme economic deprivation beyond economic disadvantage, or situations where the claimant could experience severe mental or emotional harm or physical injury.").

274 Chavez-Chilel v. Att'y Gen. U.S., 20 F.4th 138 (3d Cir. 2021).

275 Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010).

276 *Id.* at 664; *Chavez-Chilel*, 20 F.4th at 142.

of protection.[277] Under the revised framework, Chavez-Chilel could file a successful claim based on her allegations of both past and prospective other serious harm, and Perdomo could have prevailed based on well-founded fear of other serious harm.[278] Neither woman would have been crippled by failed PSGs or arbitrarily benefited by successful ones.[279]

B. Equal Grounds

Replacing the inherently unequal PSG category with "other serious harm" would level the playing field among asylum applicants, as PSG claimants are currently disadvantaged both in the added steps required to formulate initial claims and, resultingly, in petitioning for humanitarian asylum.[280] Although the current framework for humanitarian asylum embraces a more open-minded approach to future harm,[281] it maintains the nexus requirement for past persecution.[282] Given the unequal footing of PSG among the protected grounds,[283] it naturally follows that humanitarian asylum is harder to attain for PSG applicants.[284] The proposed revision adopts the benefits of humanitarian asylum without disadvantaging any particular subset of applicants.

Although applicants who feel they can make their strongest case based on persecution on account of one of the four other grounds would be free to pursue their claims under the traditional approach, applicants forced to devise a PSG category under the current system would gain a more likely avenue for successful claims. Applicants with straightforward claims under a clear-cut category may opt to take advantage of decades of precedent and institutional knowledge weighing in their favor; however, eliminating the absolute nexus requirement[285] would extend protection to applicants who have been seriously harmed but struggle to fit their trauma within a predetermined box. The revised inquiry boils down to the applicant's credibility and whether they have or will face serious harm without government protection, focalizing the welfare concerns that have historically formed the core of international asylum law and practice.[286]

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277 *Chavez-Chilel*, 20 F.4th at 141; *Perdomo*, 611 F.3d at 664–65.

278 *See Chavez-Chilel*, 20 F.4th at 142; *Perdomo*, 611 F.3d at 664.

279 *See supra* Sections IV.A–.B.

280 *See supra* Section III.B.

281 *See* L-S-, 25 I. & N. Dec. 705, 714 (B.I.A. 2012) (clarifying that inquiry into "other serious harm" is "forward-looking" and "*no nexus* between the 'other serious harm' and an asylum ground protected under the Act need be shown").

282 *See* Kanagu v. Holder, 781 F.3d 912, 919 (8th Cir. 2015) ("[H]umanitarian asylum may only be granted to 'an alien found to be a refugee on the basis of past persecution' . . . .").

283 *See supra* Section III.B.

284 *See, e.g.*, *Kanagu*, 781 F.3d at 919.

285 *See supra* Section I.B.

286 *See* U.N. High Comm'r for Refugees, *supra* note 256.

Furthermore, this Note's proposed solution would foster administrability and efficiency currently absent from PSG and humanitarian asylum inquiries by streamlining asylum claims and assuaging overall confusion. Currently, an adjudicator's need to determine whether a proposed PSG qualifies makes a PSG inquiry far more complicated and time-intensive than the other four categories.[287] The substitution of "other serious harm" for the present requirement of establishing a PSG will ameliorate asylum backlogs[288] by limiting fact-finding to that which pertains to credibility and the likelihood of future harm rather than inquiries into the existence of a cognizable group.[289]

This proposed solution would also improve efficiency by eliminating the added steps for humanitarian asylum. Currently, humanitarian asylum claims are only available to applicants who have established past persecution on a qualifying ground and had the presumption of well-founded fear rebutted based on an adjudicator's findings.[290] Under the revised framework, all relevant asylum claims would be presented and considered in an application's initial review.[291] Furthermore, requiring the first reviewer of an asylum application to make a finding regarding well-founded fear proactively addresses and resolves potential concerns rather than leaving them to inevitably form the basis of a DHS rebuttal.

C. Checks and Balances

The BIA has stated that the "distinction between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies) should not be confused."[292] Political battles over asylum often blur this distinction.[293] Effectuating the proper balance of powers through legislative action would help insulate the asylum process from its present vulnerability to political pressure from the executive branch.

Past examples of amendments to the INA have demonstrated the potential efficacy of this solution. The Illegal Immigration Reform

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287 *See supra* Section III.B.

288 *See supra* notes 8, 224, 226 and accompanying text.

289 *See supra* note 236 and accompanying text.

290 *See* L-S-, 25 I. & N. Dec. 705, 709–10 (B.I.A. 2012); *see also* 8 C.F.R. § 208.13(b)(1).

291 This solution would also ease the administrative burden by eliminating moot humanitarian asylum claims based on lack of nexus, such as Meylin's. *See supra* note 62 and accompanying text.

292 S-P-, 21 I. & N. Dec. 486, 492–93 (B.I.A. 1996).

293 *See* Jonathan Blazer & Katie Hoeppner, *Five Things to Know About the Right to Seek Asylum*, ACLU (Sept. 29, 2022), https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum [https://perma.cc/Q5Z6-L8JM] ("Elected officials in both parties have sought to justify restrictive asylum policies for their 'deterrence' value, claiming that they discourage migrants from coming to the border. But these policies do not stop people from seeking safety . . . .").

and Immigrant Responsibility Act of 1996 ("IIRIRA"),[294] while largely anti-immigrant, amended the refugee definition to add that

> a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.[295]

This amendment simplified the asylum process for victims of forced sterilization by resolving the question of how to categorize their persecution.[296] It is unclear at face value what made this group of prospective applicants more aligned by political opinion than membership in a PSG.[297] Perhaps the fact that the legislators who enacted IIRIRA chose the cabining of political opinion suggests that even in 1996, immigration decisionmakers were eager to avoid PSG.

This categorization also raises the chicken-or-egg question of why PSGs cannot be statutorily defined. Many scholarly critics of asylum jurisprudence have recommended Refugee Act amendments adding subcategories to the PSG definition, such as gender or sexual identity, and some parties to the United Nations Refugee Convention have done so.[298] However, the seemingly unlimited number of potential PSGs that exist in the world, not to mention the continuous development of identity categories as society evolves, would make this an endless statutory project. IIRIRA's success in protecting survivors of forced sterilization cannot be infinitely replicated.

VI. Addressing Potential Concerns

A. A Flood of Claims Is Unlikely

One anticipated challenge to this Note's proposal is that replacing PSG with "other serious harm" will cause a significant increase in asylum petitions—and within that, a flood of unsuccessful or frivolous

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294 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

295 8 U.S.C. § 1101(a)(42)

296 *See id.*

297 *See id.*

298 *See, e.g.*, Marnie Leonard, *A Particular Social Group: The Inadequacy of U.S. Asylum Laws for Transgender Claimants*, 25 Hum. Rts. Brief 161, 164–65 (2022) (advocating for an amendment to include gender identity and citing similar amendments in Sweden and Portugal); Grace Carney, *Re-Defining Particular Social Group in the United States: Looking to International Guidance in the Wake of the* Matter of A-B- *Vacatur*, 45 Fordham Int'l L.J. 575, 602 (2022) (advocating for United States adoption of Canada's or Australia's PSG criteria).

claims.[299] The fear of an untenable wave of migrants is a commonly voiced concern whenever immigrant advocates propose any measure that could foreseeably broaden the scope of asylum.[300] Politicking aside, it is true that the United States has recently seen unprecedented asylum volumes; in both 2021 and 2022, the United States received the most individual asylum applications of any nation, with the number skyrocketing from 188,900 in 2021 to 730,400 applicants in 2022.[301] By the end of June 2023, the United States was poised to blow both those figures out of the water with 540,600 new claims in just six months.[302] Any proposed amendment to asylum policy must take the immense asylum backlog into account.[303]

Historically, however, approving broad categories has not led to a flood of claims—for example, when the right to asylum was established for applicants with a well-founded fear of female genital mutilation.[304] Additionally, UNHCR Guidelines dictate that "the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate."[305] Furthermore, the proposed solution in no way provides for the automatic grant of asylum; it merely opens a window to certain claimants for whom presently, the door is shut and locked. Although the goal of adopting "other serious harm" is to make a path accessible for asylum applicants who lack viable claims under the current framework, the

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299 *See* Chen, 20 I. & N. Dec. 16, 21–22 (B.I.A. 1989) (citing the government's stated concerns that the establishment of humanitarian asylum would "lead to 'endless litigation' and 'frivolous claims'").

300 *See, e.g.*, Bernardo M. Velasco, *Who Are the Real Refugees: Labels as Evidence of a "Particular Social Group"*, 59 Ariz. L. Rev. 235, 260 (2017) ("A label-based test as straightforward as the one articulated in this Note raises the immediate concern that courts—and the United States—will be inundated with PSG-based claims.").

301 *See* U.N. High Comm'r for Refugees, Global Trends: Forced Displacement in 2021, at 3 (June 16, 2022), https://www.unhcr.org/us/sites/en-us/files/legacy-pdf/62a9d1494.pdf [https://perma.cc/6KZZ-J5G2]; *see also* U.N. High Comm'r for Refugees, Global Trends: Forced Displacement in 2022, at 3, 31 (June 14, 2023), https://www.unhcr.org/sites/default/files/2023-06/global-trends-report-2022.pdf [https://perma.cc/52GF-BVMT].

302 United Nations High Comm'r for Refugees, Mid-Year Trends 2023, at 2, 23 (Oct. 25, 2023), https://www.unhcr.org/sites/default/files/2023-10/Mid-year-trends-2023.pdf [https://perma.cc/X8NB-YHUU].

303 *See* sources cited *supra* notes 8, 224.

304 *See* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (recognizing PSG of young women of a certain tribe in Togo who had not been subjected to female genital mutilation and opposed the practice); *see also* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 Va. J. Soc. Pol'y & L. 119, 120, 132–33 (2007) ("[T]he dire predictions of a flood of women seeking asylum never materialized.").

305 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, ¶ 18, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).

proposed amendment maintains the established standards for credibility, government role, severity of harm, and threshold for well-founded fear.

Consider, for example, everything Meylin and her family would still have to prove to gain asylum under this amendment. An immigration adjudicator would not only have to find their narrative credible, but that Meylin's rape and the subsequent death threats met the high threshold to constitute other serious harm; that it had harmed the entire family; that the Guatemalan government could not or would not protect them from those harms; that there was at least a ten percent likelihood of Meylin suffering psychologically, exhibiting dangerous behaviors, or committing suicide were she returned to Guatemala; and that those concerns met the threshold for other serious harm. Although the proposed solution would offer Meylin and her family a more genuine chance at asylum than under PSG, it is narrowly tailored enough to maintain sufficient burdens of proof for applicants.

Finally, any proposed expansion of potential claims is likely to trigger the complaint—by politicians and asylum officers alike—that asylum applicants fabricate their stories of persecution.[306] However, the INA is unambiguous regarding the harsh punishment for frivolous, or knowingly falsified, applications: permanent ineligibility for asylum.[307] The irreversible consequence of filing false asylum claims combined with this Note's provision of clear guidance for implementing the amended refugee definition will ameliorate this sort of abuse.

B. The Exception Will Not Swallow the Rule

Another potential counterargument to the adoption of "other serious harm" is that asylum applicants will overwhelmingly favor this approach, effectively making the other four categories redundant. This is unlikely given the relative straightforwardness and precedential advantages of the four established categories. Consider, for example, the precedential religion-based asylum decision *In re S-A-*.[308] The BIA

306 For example, the Trump Administration justified its "Remain in Mexico" policy by claiming a need to "deter people who seek to 'game the system' and make fake asylum claims," although the policy "d[id]n't even attempt to identify people with fraudulent asylum claims." Michael Tan & Julie Veroff, *Trump Administration Is Illegally Forcing Asylum Seekers Out of the United States*, ACLU (Feb. 14, 2019), https://www.aclu.org/news/immigrants-rights/trump-administration-illegally-forcing-asylum-seekers-out-united-states [https://perma.cc/Z35Z-CDRN]. One asylum officer featured in the documentary *Well-Founded Fear* explained his immediate distrust upon hearing certain narratives common among Chinese claimants: "With the Chinese cases, you have to just go for them in terms of their credibility, and usually, you can get them. And I realize that sounds kind of sinister . . . . It's usually not too difficult. They're not too sophisticated . . . and they've been basically practicing some story." WELL-FOUNDED FEAR, *supra* note 44.

307 *See* 8 U.S.C. § 1158(d)(6).

308 22 I. & N. Dec. 1328 (B.I.A. 2000).

granted asylum to a "woman with liberal Muslim beliefs" who claimed her father had routinely persecuted her because of his "orthodox Muslim views concerning the proper role of women in Moroccan society."[309] The applicant feared that if she returned to Morocco, her father would kill her for having left without his approval.[310] Despite a relatively extensive review of the factual record, the BIA granted the petition with little discussion of the specificity or legitimacy of either the applicant's or her father's religious views; the underlying rationales behind the abuse were self-evident.[311]

Given the tragically common societal narrative of persecution due to religious differences, were this applicant to apply for asylum under the proposed INA amendment, she would have little reason to petition under "other serious harm" rather than persecution on account of her religious beliefs. Certain claims due to religion, race, nationality, and political opinion have a long cultural history and precedent that favors a grant.[312] Straightforward asylum cases under these categories would likely be unaffected by the proposed changes.

C. Amending the Refugee Definition Is Consistent with International Law

A final potential concern is that changing the refugee definition as proposed would constitute a departure from international refugee maxims and perhaps even violate U.S. global commitments.[313] However, although the INA's definition was drawn from international law, both the United Nations Refugee Convention and the 1967 Protocol[314] are non-self-executing in the United States.[315] Each country that has adopted the refugee definition from the Convention must decide how

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309 *Id.*

310 *Id.* at 1331.

311 *See id.* at 1329–31, 1336.

312 *See, e.g.*, O-Z- & I-Z-, 22 I. & N. Dec. 23, 25–27 (B.I.A. 1998) (holding that cumulative acts of antisemitism qualified as persecution); D-V-, 21 I. & N. Dec. 77, 78–80 (B.I.A. 1993) (finding persecution of applicant who was gang raped and beaten due to her open support of a Christian church that supported a controversial public figure).

313 The United States joined the U.N. Refugee Convention in 1967. *See* United Nations Protocol Relating to the Status of Refugees, *supra* note 19.

314 G.A. Res. 2198 (XXI) (Dec. 16, 1966).

315 *See* U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 42, U.N. Doc. HCR/1P/4/ENG/REV.4 (Feb. 2019) ("It has been seen that the 1951 Convention and the 1967 Protocol define who is a refugee for the purposes of these instruments. It is obvious that, to enable States parties to the Convention and to the Protocol to implement their provisions, refugees have to be identified. Such identification, i.e., the determination of refugee status, although mentioned in the 1951 Convention (cf. Article 9), is not specifically regulated."). For an overview of what it means for a treaty to be non-self-executing, see *ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties*,

to domestically enforce its treaty commitments.[316] This doctrine allowed the United States to create a specific allowance for asylum claims based on forced sterilization in IIRIRA.[317]

Regional instruments in other parts of the world have amended and expanded their definitions of "refugee" far beyond what this Note proposes. For example, the Cartagena Declaration on Refugees expanded the "refugee" definition to include "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[318] The Common European Asylum System took its implementation of the refugee definition a few steps beyond U.S. advances in IIRIRA by adding that a broad range of gender-based claims should be considered under PSG, including well-founded fear regarding sexuality, genital mutilation, or forced sterilization.[319]

The success of other Convention adherents in expanding their asylum policies,[320] and the protection the United States has offered victims of forced sterilization through its own amendments,[321] speak to the potential benefits of adapting long-ago drafted international law to the evolving needs of prospective asylees and societies.

Conclusion

Over the forty-four years since PSG was implemented into U.S. asylum law, all three branches of government have failed to resolve its problems.[322] Courts need not agree on how to handle PSG, given the fractured structure of immigration adjudications;[323] legislators cannot successfully define it;[324] and the executive branch has more often than

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Const. Annotated, https://constitution.congress.gov/browse/essay/artII-S2-C2-1-4/ALDE_00012955/ [https://perma.cc/C4JK-DLBR].

316 *See* U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ II, U.N. Doc. HCR/1P/4/ENG/REV.1 (Jan. 1992) ("[T]he determination of refugee status under the 1951 Convention and the 1967 Protocol, is incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status.").

317 *See* 8 U.S.C. § 1101(a)(42)).

318 U.N. High Comm'r for Refugees , Cartagena Declaration on Refugees 36 (Nov. 22, 1984), https://www.unhcr.org/sites/default/files/legacy-pdf/45dc19084.pdf [https://perma.cc/7N98-Z6BN].

319 Council Directive 2011/95/EU, pmbl., 2011 O.J. (L 337) 11 (EU).

320 *See* Carney, *supra* note 298, at 602–15.

321 *See* X-P-T-, 21 I. & N. Dec. 634, 635–36 (B.I.A. 1996) (recognizing IIIRA's addition of "involuntary sterilization" to 8 U.S.C. § 1101(a)(42)).

322 *See supra* Part III.

323 *See supra* Sections II.B, III.A.

324 *See supra* text accompanying notes 79–90.

not perpetuated the confusion of PSG by using it as a political tool.[325] Not even the establishment of humanitarian asylum appeals has remedied the plight of PSG claimants.[326] The only way to do justice by the most vulnerable asylum applicants, who are currently forced to seek asylum under PSGs, is to offer them a new framework. Amending the INA to absorb ideals currently reserved for "humanitarian asylum" would formalize the reality that persecution need not be easily definable to constitute serious, irremediable harm. To honor its global commitments to promoting human welfare, all U.S. asylum law must be genuinely humanitarian. This Note's solution would give applicants like Meylin, whose devastating case epitomizes why asylum is so vital, a solid legal foundation for hope at establishing a safer future.

325 *See supra* Section III.C.

326 *See supra* Section I.C.