

CECE V. HOLDER: AN UNPRECEDENTED LOOK AT THE ASYLUM CLAIM FOR VICTIMS OF ATTEMPTED SEX TRAFFICKING

INTRODUCTION

In 2001, Johana Cece, a woman in her mid-twenties, fled her hometown of Korçë, a small city near Albania’s Greek border.¹ Cece had been the victim of attempted sex trafficking by a local gang member who was notorious for kidnapping young Albanian women and forcing them into prostitution.² Cece encountered this trafficker several times, but always managed to escape. Ultimately, Cece fraudulently obtained an Italian passport and sought refuge in the United States.³ Within a year of her arrival, Cece affirmatively applied for asylum, knowing a return to Albania meant a return to the fear of becoming a sex trafficking victim.⁴

The primary question in Cece’s case, which eventually made its way before the United States Court of Appeals for the Seventh Circuit, was whether she proffered a “particular social group” (PSG) cognizable under 8 U.S.C. § 1101(a)(42)(A), thus making her statutorily eligible for asylum under that provision.⁵ In its opinion, the Seventh Circuit held that Cece did in fact belong to a cognizable PSG, and the court issued an extensive defense of asylum for targets of sex trafficking.⁶ The court’s ruling set a precedent with the potential to protect thousands of other asylum-seekers, and Cece is expected to earn refugee status when her case goes back to the Board of Immigration Appeals (BIA).⁷

Prior to Cece’s case, United States jurisprudence failed to adequately consider the asylum claims of those in danger of becoming sex trafficking victims because U.S. courts were improperly denying the legitimacy of petitioners’ proffered PSGs. The United States Court of Appeals for the Sixth

¹ Cece v. Holder, 733 F.3d 662, 667 (7th Cir. 2013) (*en banc*).

² *Id.* at 666.

³ *Id.* at 666–67.

⁴ *Id.* at 667.

⁵ *Id.* at 668.

⁶ *Id.* at 677–78.

⁷ *Id.*

Circuit considered the issue previously in 2005 and again in 2009⁸ and held that women in similar circumstances (i.e. women who were the targets of attempted sex trafficking in their home countries) did *not* meet the statutory criteria essential to asylum, mainly because the petitioners could not meet their burdens of proof to show that they belonged to a PSG as required by the Immigration and Nationality Act (INA).⁹ This Comment argues against the Sixth Circuit's opinions, deeming the court's conclusion incorrect as a result of improperly interpreting PSG.¹⁰

In *Cece v. Holder*, the Seventh Circuit recognized that the Sixth Circuit took an unduly restrictive approach to interpreting the PSG language contained in the INA.¹¹ The Seventh Circuit correctly split from the precedent of that circuit, holding that Cece's legitimate PSG was defined as: young Albanian women living alone at risk of becoming victims of sex trafficking.¹²

Because the Seventh Circuit recognized victims of attempted sex trafficking as a particular social group, the court opened the door to the possibility of asylum for thousands of deserving women. By contrast, cases arising out of the Sixth Circuit are categorically excluded from asylum eligibility, as the Sixth Circuit has yet to recognize the PSGs offered by victims of attempted sex trafficking as legitimate. The Seventh Circuit's decision in *Cece*, which does not mean a petitioner will *necessarily* receive asylum,¹³ nonetheless remains important by embracing an expansive reading of the potential grounds upon which asylum applicants may claim to receive the protection of the U.S. government.

This Comment focuses on this recent circuit split between the Seventh Circuit Court of Appeals and Sixth Circuit Court of Appeals. *Cece v. Holder* is a monumental decision in United States jurisprudence for two important reasons: first, the Seventh Circuit correctly interpreted the "particular social

⁸ See *infra* text accompanying notes 151–79.

⁹ See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (2013) (codified as amended in scattered sections of 8 U.S.C.).

¹⁰ Immigration and Nationality Act § 1101(a)(42), 8 U.S.C.A. § 1101(a)(42) (2013).

¹¹ *Cece v. Holder*, 733 F.3d 662, 672, 675 (7th Cir. 2013) (*en banc*).

¹² *Id.* at 671 (explaining that the parties and the immigration courts were inconsistent about defining Cece's PSG, but the inconsistencies did not upset her claim.).

¹³ In addition to providing a cognizable social group, asylum applicants must also show there is a nexus between the persecution and the membership in the social group. *Escobar v. Holder*, 657 F.3d 537, 542 (7th Cir. 2011); *Ishitiq v. Holder*, 578 F.3d 712, 715 (7th Cir. 2009). Furthermore, the alien must show that he or she would be persecuted or has a well-founded fear of persecution based on that membership. *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

group” language contained in the Immigration and Nationality Act (INA) for the first time in a case involving a victim of *attempted* sex trafficking; and second, the decision places the United States in compliance with its international obligations under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol),¹⁴ and its domestic obligations under the Victims of Trafficking and Violence Protection Act of 2000 (Victims Protection Act or TVPA).¹⁵

This Comment contains the following sections: Part I explains the global issue of sex trafficking. Part II explores national and international efforts to combat sex trafficking. Part III provides a background on asylum law in the United States, including the varying interpretations of the particular social group category. Part IV looks at cases arising from the Sixth Circuit that deal with attempted sex trafficking in Albania. Part V examines the Seventh Circuit’s opinion in *Cece v. Holder* and shows why it was correctly decided. Finally, Part VI contains suggestions for the President of the United States, Congress, and the Supreme Court of the United States in dealing with future cases regarding the asylum claims of attempted sex trafficking victims.

I. SEX TRAFFICKING: A GLOBAL ISSUE

Prior to analyzing the asylum claim of victims of attempted trafficking, it is essential to understand the nature of sex trafficking and the persecution victims fear if forced to return to their native countries. Sex trafficking is a contemporary form of slavery that violates a victim’s fundamental human rights.¹⁶ Victims of sex trafficking often endure rape, violence, and

¹⁴ United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, supplementing, United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/Res/55/25, (Dec. 25, 2003) [hereinafter Palermo Protocol].

¹⁵ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–7110 (2000)); *see also* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008); Trafficking Victims Protection Reauthorization Act of 2011, S. Res. 1301, 112th Cong. (2011). And in 2013, the Trafficking Victims Protection Reauthorization Act was added, in its entirety, as an amendment to the Violence Against Women Act. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

¹⁶ *See* Anne Gallagher, *Contemporary Forms of Female Slavery*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 487, 495–96 (Kelly D. Askin & Doreen M. Koenig, eds., 2000).

humiliation.¹⁷ Additionally, many trafficking victims are economically powerless, as their trafficker demands that they give up all of their earnings.¹⁸ Furthermore, “[t]o exert control over these women and to keep them captive, traffickers commonly use psychological manipulation, forced drug use, physical and sexual violence, in addition to threats of violence against the trafficked women’s family members.”¹⁹ For example, one Albanian sex trafficking survivor stated that her trafficker “kept her in submission through physical abuse—beatings, rape, and slicing her with knives.”²⁰ Another stated that, “after she was successfully abducted, her kidnappers ‘often threatened to kill [her] or harm [her] family if [she] wouldn’t comply,’²¹ and that she ‘was afraid of them as [she] knew they carried guns and were on drugs.’”²²

Acknowledging the gravity of the issue, former U.N. Secretary General Kofi Annan declared: “trafficking of persons, particularly women and children, for forced and exploitative labor, including sexual exploitation, is one of the most egregious violations of human rights which the United Nations now confronts.”²³ Though it is well documented that sex trafficking is a globally pervasive issue, “[i]t is extremely difficult to assess the true scale of sex trafficking due to the clandestine nature of the crime.”²⁴ According to the United States Department of Health and Human Services, human trafficking is rapidly growing and is already one of the largest criminal industries in the world, second only to drug trafficking.²⁵ The International Organization for

¹⁷ See Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 414–15 (2011).

¹⁸ See Michelle Crawford Rickert, *Through the Looking Glass: Finding and Freeing Modern-Day Slaves at the State Level*, 4 LIBERTY U. L. REV. 211, 232 (2010).

¹⁹ Kelly Karvelis, *The Asylum Claim for Victims of Attempted Trafficking*, 8 NW J. L. & SOC. POL’Y 274, 277 (2013) (citing Theodore R. Sangalis, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 414–15 (2011)).

²⁰ See *id.* (quoting Sara Elizabeth Dill, *Human Trafficking: A Decade’s Track Record, Plus Techniques for Prosecutors and Police Moving Forward*, 26 CRIM. JUST. 18, 24 (2011)).

²¹ *Id.* (quoting *True Stories: The Story of M.*, ASS’N OF ALBANIAN GIRLS AND WOMEN, <http://www.aagw.org/Education/TrueStories/True9M> (last visited Oct. 23, 2014)).

²² *Id.*

²³ Jenna Shearer Demir, *The Trafficking Of Women For Sexual Exploitation: A Gender-Based And Well-Founded Fear Of Persecution?* (UNHCR Evaluation and Policy Analysis Unit, Working Paper No. 80, 2003 (quoting Deen Thalif, *Trafficking in Human Beings Reprehensible says, UN’s Koffi Anan*, IPR, Dec. 14, 2000, at 1)).

²⁴ Tyler Marie Christensen, *Trafficking for Sexual Exploitation: Victim Protection in International and Domestic Asylum Law*, (UNHCR Policy Development and Analysis Service, Paper No. 206 (2011), available at <http://www.unhcr.org/4d9c7c869.pdf>).

²⁵ See Press Release, Dep’t of Health and Human Services, HHS Fights to Stem Human Trafficking, available at <http://www.hhs.gov/news/factsheet/humantrafficking.html>.

Migration places trafficking as the third most profitable illegal industry with a value of \$7 billion.²⁶ According to conservative estimates, at least 27 million people are held in slavery or slave-like conditions worldwide²⁷ and some estimates suggest the number of trafficking victims worldwide is an overwhelming 12.3 million people.²⁸ According to the United Nations Office on Drugs and Crime, approximately seventy-nine percent of all human trafficking is for the purpose of sexual exploitation,²⁹ and the International Labor Organization (ILO) estimates that ninety-eight percent of the people trafficked for sexual exploitation are women and girls.³⁰ At least 20.9 million adults and children are bought and sold worldwide into commercial sexual servitude, forced labor and bonded labor.³¹

As this Comment focuses specifically on attempted sex trafficking cases arising from Albania, it is important to understand the current landscape of the problem of sex trafficking there. Once a strict communist state almost entirely isolated from the outside world,³² Albania has long been considered a hub for sex trafficking.³³ The Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, stated, “[t]rafficking in women flourishes in many less developed countries because the vulnerabilities arising from women’s lack of access to resources, poverty and gender discrimination are maintained through the collusion of the market, the State, the community and the family unit.”³⁴ According to one report, “[t]here are . . . about 30,000 Albanian

²⁶ Pino Arlacchi, Under-Secretary-General Director-General, Opening Statement to the International Seminar on Trafficking in Human Beings (Nov. 28–29, 2000), http://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-11-28_1.html.

²⁷ Sandhya Drew, *Human Trafficking: A Modern Form of Slavery?*, 4 EUR. HUM. RTS. L. REV. 481, 492 (2002).

²⁸ U.S. DEP’T OF STATE, 2010 TRAFFICKING IN PERSONS REPORT 7 (2010), available at <http://www.state.gov/documents/organization/142979.pdf>.

²⁹ U.N. Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons*, 37 (Dec. 2012).

³⁰ INT’L LABOUR OFFICE, GIVE GIRLS A CHANCE: TACKLING CHILD LABOUR, A KEY TO THE FUTURE 39 (2009).

³¹ INT’L LABOUR ORG., ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13 (2012).

³² Bob Woodruff, *Albanian Girls Trafficked for Sex*, ABC NEWS (May 21, 2013), <http://abcnews.go.com/WNT/story?id=131011>.

³³ *Dying to Leave Human Trafficking Worldwide: Albania*, PBS (Sept. 25, 2003), <http://www.pbs.org/wnet/wideangle/episodes/dying-to-leave/human-trafficking-worldwide/albania/1447/> (summarizing the episode).

³⁴ Special Rapporteur on Violence Against Women, *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, ¶57, U.N. ESCOR, 56th Sess., Agenda Item 12(a), at 19, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000).

prostitutes walking the streets of Europe.”³⁵ The same report noted, “[i]n a country of only about three million people, that is almost one percent of the Albanian population.”³⁶ One commentator states, “[a] teenage girl can be bought in Albania for as little as [fifteen] hundred [U.S.] dollars for work in a brothel in Western Europe.”³⁷

The 2011 *Trafficking in Persons Report* for Albania created annually by the United States Department of State notes that “widespread corruption, particularly within the judiciary, continued to hamper overall anti-trafficking law enforcement and victim protection efforts.”³⁸ Moreover, the Department of State classified Albania as a “Tier 2 Watch List” country for purposes of the *Trafficking in Persons Report* for 2013.³⁹ According to the U.S. Department of State website, Tier 2 Watch List countries are those:

[W]here governments do not fully comply with the [Trafficking Victims Protection Act]’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards; and: a) the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; b) there is a failure to provide evidence of *increasing efforts* to combat severe forms of trafficking in persons from the previous year . . . ; or c) the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take *additional future steps over the next year*.⁴⁰

The 2013 Albanian country report begins by stating, “Albania is a source country for men, women, and children subjected to sex trafficking and forced labor.”⁴¹ It explains: “Many women are subjected to trafficking after accepting offers of employment in waitressing, bartending, dancing, or singing in neighboring countries, specifically in Kosovo, Greece, and Macedonia.”⁴² The

³⁵ Woodruff, *supra* note 32. The report does not distinguish between the number of victims of sex trafficking and the number of prostitutes in Albania.

³⁶ *Id.*

³⁷ Arlacchi, *supra* note 26.

³⁸ U.S. DEP’T OF STATE, 2011 TRAFFICKING IN PERSONS REPORT 64 (2011), available at <http://www.state.gov/documents/organization/164453.pdf>.

³⁹ U.S. DEP’T OF STATE, 2013 TRAFFICKING IN PERSONS REPORT 67–69 (2013), available at <http://www.state.gov/documents/organization/210738.pdf>.

⁴⁰ U.S. DEP’T OF STATE, INTRODUCTORY MATERIAL TO THE 2013 TRAFFICKING IN PERSONS REPORT 44, 46 (2013), available at <http://www.state.gov/documents/organization/210737.pdf>.

⁴¹ U.S. DEP’T OF STATE, *supra* note 38 at 67.

⁴² *Id.*

report goes on to detail the problems the country faces in complying with international standards and declares, “[t]he Government of Albania does not fully comply with the minimum standards for the elimination of trafficking[.]”⁴³

The State Department’s 2013 report also explains that the Albanian government “failed to demonstrate evidence of increasing efforts to address human trafficking over the previous reporting period[.]”⁴⁴ The report notes the lack of prosecutions pursued in the country for criminals involved in sex trafficking, explaining that the government of Albania reduced its anti-trafficking law enforcement efforts in the previous year.⁴⁵ Moreover, the Albanian government did not make a discernable effort to reduce the demand for commercial sex acts.⁴⁶

Despite these extreme dangers faced by targets of sex trafficking, especially in Albania, U.S. court decisions and administrative adjudications had not, until *Cece v. Holder*, been receptive to the asylum claims of the victims of attempted sex trafficking.⁴⁷ By recognizing that a woman who is the victim of *attempted* sex trafficking, without yet having been trafficked, should be afforded protection under the INA’s asylum provisions, the Seventh Circuit’s opinion in *Cece v. Holder* is arguably the first asylum case to acknowledge that we need to stop sex trafficking before it starts.

The Court’s decision in *Cece* is a step in the right direction for protecting victims of attempted sex trafficking, but as discussed in Part VI, the United States needs to protect this group of deserving women on a national level, not just within the jurisdiction of the Seventh Circuit, so that the United States can more effectively combat this global issue and can fulfill its obligations under both the Palermo Protocol and the Victim Protection Act of 2000, both of which are discussed in more detail in the following section.

⁴³ *Id.*

⁴⁴ *Id.* at 68.

⁴⁵ *Id.*

⁴⁶ *Id.* at 69.

⁴⁷ See *Pellumbi v. Att’y Gen. of the U.S.*, 505 Fed. App’x. 205 (3d Cir. 2012); *Burbienne v. Holder*, 568 F.3d 251 (1st Cir. 2009).

II. COMBATING SEX TRAFFICKING

A. *International Efforts to Combat Sex Trafficking*

To address the growing international crime of sex trafficking, the United States introduced a resolution on trafficking in women and children at the April 1998 session of the United Nations Commission for Crime Prevention and Criminal Justice.⁴⁸ The proposed resolution called for the establishment of a protocol on trafficking in women and children under the proposed U.N. Convention against Transnational Organized Crime.⁴⁹ The proposed resolution was subsequently adopted, and the United States and Argentina introduced a draft protocol at the first negotiation session of the Convention in January 1999.⁵⁰

On November 15, 2000, the U.N. General Assembly adopted one of the most important instruments against trafficking: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, generally referred to as the “Palermo Protocol.”⁵¹ The United States signed the Palermo Protocol on December 13, 2000, and ratified it on November 3, 2005.⁵² The Palermo Protocol was designed to supplement the UN Convention Against Transnational Organized Crime and was created through the United Nations Office on Drugs and Crime⁵³ in order to foster “effective action to prevent and combat trafficking in persons, especially women and children, [which] requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking.”⁵⁴

The Palermo Protocol is the first international instrument to define trafficking, and it does so comprehensively.⁵⁵ Under the Protocol, Article 3 defines trafficking as:

⁴⁸ See *International Trafficking in Women and Children: Hearings Before the Subcomm. on Near Eastern And Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 13 (2000), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg63986/html/CHRG-106shrg63986.htm>.

⁴⁹ *Id.* at 13.

⁵⁰ *Id.*

⁵¹ G.A. Res. 55/25, U.N. Doc. A/RES/55/25 at Annex II (Nov. 15, 2000) (supplementing the Convention against Transnational Organized Crime).

⁵² Palermo Protocol, *supra* note 14.

⁵³ *Id.*

⁵⁴ *Id.* at Annex II.

⁵⁵ See *id.* at Annex II, art. 3(a).

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]⁵⁶

The success of achieving a consensus on this definition cannot be understated as it reflects the first international consensus on the definition of trafficking.⁵⁷ This definition serves as a primary step toward a concerted international effort to combat trafficking.

Beyond the definition, the true force of the document lies in its law enforcement provisions. Article 5 obligates State Parties to criminalize trafficking, *attempted trafficking*, participating as an accomplice, and organizing and directing trafficking.⁵⁸ Article 6 also requires states to ensure that there are measures to provide assistance to victims of trafficking through support in legal proceedings and to consider the implementation of measures to provide for physical, psychological, and social recovery.⁵⁹ Article 7 requires states to consider permitting victims to remain on the territory, and Article 8 deals with questions of repatriation.⁶⁰

B. Domestic Efforts to Combat Sex Trafficking

Though the Palermo Protocol is an important international document, such agreements only go so far, and ultimately nation-state legislation plays an integral role in the battle against human trafficking. The United States government enacted the Victims of Trafficking and Violence Protection Act of

⁵⁶ *Id.*

⁵⁷ See Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, *Integration of the Human Rights of Women and a Gender Perspective*, U.N. Doc. E/CN.4/2006/62 para. 32 (Feb. 20, 2006) (Sigma Huda); Michelle Madden Dempsey, Carolyn Hoyle, & Mary Bosworth, *Defining Sex Trafficking in Int'l and Domestic Law: Mind the Gaps*, EMORY INT'L L. REV. 137, 140 (2012).

⁵⁸ *Palermo Protocol*, *supra* note 14, at art. 5 (emphasis added).

⁵⁹ *Id.* at 44.

⁶⁰ *Id.* at 44–45.

2000 (the Victims Protection Act) on October 28, 2000.⁶¹ The Act was reauthorized in 2003, 2005, 2008, and 2013.⁶² The Victims Protection Act is essentially an implementation of Article 5 of the U.N. Protocol, which requires states to adopt specific anti-trafficking legislation making the act of trafficking an offense.⁶³ The Victims Protection Act's statement of purpose is "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."⁶⁴

The Victims Protection Act defines "severe forms of trafficking" in persons as: "(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion . . . or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."⁶⁵ Further, "sex trafficking" is defined in the Victims Protection Act as, "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex."⁶⁶ It is worth noting that according to these two definitions, a victim need not be physically transported from one location to another in order for the crime to fall within these definitions,⁶⁷ in fact, a significant number of trafficking

⁶¹ The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in various titles of U.S.C.) [hereinafter TPVA], available at <http://www.state.gov/j/tip/laws/61124.htm>. The TPVA is comprised of three divisions: A) The Trafficking Victims Protection Act of 2000, B) Violence Against Women Act of 2000, and C) Miscellaneous Provisions.

⁶² Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; Wilber Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. In 2013, the Trafficking Victims Protection Reauthorization Act of 2013 was added, in its entirety, as an amendment to the Violence Against Women Reauthorization Act of 2013, codified at 42 U.S.C. §§ 13701-14045(d).

⁶³ *Palermo Protocol*, *supra* note 14, art. 5 ("(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. (2) Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.").

⁶⁴ TVPA, *supra* note 61, at § 102(a).

⁶⁵ *Id.* at § 103(8).

⁶⁶ *Id.* at § 103(9).

⁶⁷ Martti Lehti & Kauko Aromaa, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 175 (2006).

victims never travel any distance or cross a border.⁶⁸ Important to the *Cece v. Holder* case discussed below, mere recruitment is sufficient to violate the Act.⁶⁹

The Victims Protection Act's anti-trafficking strategy has three primary purposes, commonly referred to as the "three P's":⁷⁰ to punish traffickers; to support countries in preventing trafficking; and to provide restorative services to victims of trafficking.⁷¹ Despite its stated mission, a disconnect remains between the three goals of the Victims Protection Act. According to Kelly Hyland Heinrich, who examined the success of the Palermo Protocol ten years after its enactment, "the most common anti-trafficking strategy remains enforcement-only, relegating victim protection to a secondary role rather than a complementary or necessary role."⁷² Instead of an enforcement-only approach, she explains that the Palermo Protocol "encourage[s] a compassionate and humanitarian response with due regard for the trafficked person's physical and mental recovery."⁷³

As detailed in the following sections, the Court's decision in *Cece v. Holder* is a practical application of the victim protection provisions of the Palermo Protocol and the Victims Protection Act because it recognizes the need to protect victims of attempted sex trafficking via asylum laws of the United States. The *Cece v. Holder* decision demonstrates that implementation of the Palermo Protocol and the Victims Protection Act can come from domestic courts, since the Palermo Protocol lacks a practical enforcement mechanism.

⁶⁸ *Id.* at 186.

⁶⁹ See *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (*en banc*).

⁷⁰ See Barbara Stolz, *Educating Policymakers and Setting the Criminal Justice Policymaking Agenda: Interest Groups and the Victims of Trafficking and Violence Act of 2000*, 5 CRIM. J. 407, 409 (2005).

⁷¹ 22 U.S.C. § 7101(a) (2006) ("The purposes of this chapter division are to combat trafficking in persons . . . to ensure just and effective punishment of traffickers, and to protect their victims.").

⁷² Kelly Hyland Heinrich, *Ten Years After The Palermo Protocol: Where Are Protections For Human Trafficking Victims*, 18 NO. 1 HUM. RTS. BRIEF 2, 3 (2010).

⁷³ *Id.* at 5.

III. BACKGROUND ON ASYLUM LAW

A. *International Law*

The main sources of refugee law are treaty law, notably the 1951 Convention relating to the Status of Refugees (Convention)⁷⁴ and its 1967 Protocol relating to the Status of Refugees (Protocol).⁷⁵ Regional instruments represent a further set of protections, particularly the 1969 Organization of African Unity Convention for African countries;⁷⁶ and the 1984 Cartagena Declaration for Latin American countries,⁷⁷ which, while not legally binding, is still influential.

Under Article 1(A)(2) of the Convention, the term “refugee” shall apply to any person who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷⁸

This refugee definition was drafted in the context of the atrocities committed by Nazi Germany.⁷⁹ The drafters’ primary objective was “to address the mass persecutions suffered by the European Jews and other persons targeted based on racial, religious, and political grounds.”⁸⁰ Moreover, “[t]he definition is also a product of the Cold War, which prompted ideologically-based concerns by

⁷⁴ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

⁷⁵ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223606 U.N.T.S. 267 [hereinafter U.N. Protocol].

⁷⁶ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 5, 1969, 1001 U.N.T.S. 45.

⁷⁷ Cartagena Declaration on Refugees, Nov. 22, 1984, OAS/SERAL.IV/II.bb, doc. 10, rev. 1.

⁷⁸ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

⁷⁹ Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 239–40 (1996) (stating that “[t]he paradigm inspiring the Refugee Convention was the right-wing totalitarian regime of Nazi Germany”).

⁸⁰ Daniel Jianu, *Beyond the Reach of the Law: Refugees from Gender-Based Rights Abuse* 10 (2007), available at http://www.academia.edu/1934571/Beyond_the_Reach_of_the_Law_Refugees_from_Gender-Based_Rights_Abuse.

the West about the international protection of political dissidents from Eastern European communist regimes.”⁸¹

The definition of “refugee” under U.S. law is derived directly from the 1951 United Nations Convention and 1967 Protocol, thus demonstrating that the United States sought to align itself with international norms regarding its asylum laws.⁸² Notably, U.S. refugee law enumerates the same protected groups as contained in Convention, including the broad “membership in a particular social group” category.⁸³ The following sub-part examines asylum law and “membership in a particular social group” in the United States.

B. Asylum in the United States

In 2012, 58,179 people were admitted to the United States as refugees and 29,484 were granted asylum.⁸⁴ U.S. asylum law has evolved since 1980 through case law, regulations, and numerous administrative guidelines and policy memoranda. Asylum officers and immigration judges are bound by U.S. Supreme Court decisions, decisions from the federal circuit court of appeals having jurisdiction over the state in which they sit, and decisions from the Board of Immigration Appeals.⁸⁵

The United States signed the Protocol relating to the Status of Refugees in 1968⁸⁶ and, to ensure compliance with its international obligations under the Protocol, enacted the Refugee Act of 1980, adopting essentially the same definition of refugee as set forth by the Convention.⁸⁷ To be eligible for asylum, an applicant must show that: (1) she has suffered persecution or has a well-founded fear of persecution, (2) on account of race, religion, nationality, political opinion, or membership in a particular social group, and (3) is unable

⁸¹ Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 169 (2001).

⁸² See UN Protocol, *supra* note 74; Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 40 (1983).

⁸³ See Helton, *supra* note 82, at 40.

⁸⁴ DANIEL C. MARTIN & JAMES E. YANKAY, OFFICE OF IMMIGR. STAT., REFUGEES AND ASYLEES: 2012, 1 (Apr. 2012), http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf.

⁸⁵ Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 349–50 (2007).

⁸⁶ Protocol Relating to the Status of Refugees, Nov. 1, 1968, T.I.A.S. No. 6577.

⁸⁷ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (1980); Immigration and Nationality Act of 1952, Pub.L. No. 82-414, 66 Stat 163 (codified as amended at 8 U.S.C. §§ 1101 et seq.). See Helton, *supra* note 82, at 40 & nn. 7–8).

or unwilling to escape this persecution.⁸⁸ The basic definition of “refugee” can be found at 8 U.S.C. § 1101(a)(42):

The term “refugee” means . . . any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.⁸⁹

The applicant must show not only that she fits within one of the five categories (race, religion, nationality, membership in a particular social group, political opinion), but also that there is “a nexus between his fear of future persecution and one of those five protected grounds.”⁹⁰ Furthermore, an applicant who successfully proves that she was subjected to past persecution is presumed to have a well-founded fear of future persecution.⁹¹

Though there exists a statutory framework, United States jurisprudence on asylum has been characterized by its “substantial intricacy” and “lack of uniformity across circuits, sometimes even within circuits.”⁹² This lack of uniformity is even more prominent in cases involving petitioners seeking relief under the “particular social group” category, in part because of the broad structure of the appellate process in immigration cases.⁹³ For example, an asylum applicant can appeal a decision of the immigration judge to the BIA. The applicant can then appeal the BIA’s decision to the U.S. circuit court of appeals where the initial decision arose.⁹⁴ However, a court of appeals’ decision only binds and affects the asylum cases and decisions from its own circuit.⁹⁵ Thus, due to the lack of binding decisions that apply nationally, there

⁸⁸ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42) (2006). There is also an element of discretion included in the statute. 8 C.F.R. § 208.13(b)(1)(i). *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

⁸⁹ 8 U.S.C. § 1101(a)(42).

⁹⁰ *Escobar v. Holder*, 657 F.3d 537, 542 (7th Cir. 2011) (quoting *Ishitiaq v. Holder*, 578 F.3d 712, 715 (7th Cir. 2009)).

⁹¹ 8 C.F.R. § 208.13(b)(1). The Attorney General can rebut this presumption by demonstrating a change in condition in the applicant’s home country. *See* 8 C.F.R. § 208.13(b)(1)(i).

⁹² *Karvelis*, *supra* note 19, at 275.

⁹³ *Id.*

⁹⁴ ROBERT C. DIVINE ASSISTED R. BLAKE CHISAM, IMMIGRATION PRACTICE, 11-98-11-99 (2009-2010 ed.).

⁹⁵ REGINA GERMAIN, AILA’S ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 17 (5th ed. 2007).

has been “stunning variability from one circuit to another.”⁹⁶ Additionally, asylum applicants do not enjoy the benefit of *stare decisis* because similar asylum cases do not always have similar results.⁹⁷

Unfortunately, asylum applicants and their attorneys cannot predict the outcome that will have lasting effects on the “litigants’ lives, liberty, or property.”⁹⁸ That is why, as argued in Part VI, the President of the United States, the Supreme Court of the United States, and/or Congress need to intervene to establish a consistent interpretation when it comes to applying the PSG language to victims of attempted trafficking.⁹⁹

As previously noted, there are numerous hurdles a petitioner must overcome in asserting a successful claim for asylum. One of these obstacles, at the core of the Seventh Circuit’s opinion in *Cece v. Holder*, is whether a petitioner can establish that she belongs to a cognizable PSG.¹⁰⁰ The following section will explore the various interpretations of this category both domestically and internationally and will support the conclusion that the Seventh Circuit correctly interpreted the PSG category in *Cece*.

1. Particular Social Group Requirement

The category of membership in a “particular social group” (PSG) has been the source of varied interpretations by courts and academics around the world, resulting in the lack of a viable, clear standard for use in refugee status determinations in the United States.¹⁰¹ It is important to note that the underlying premise behind a sensible interpretation of the term membership PSG is that it must “be responsive to victims of persecution without . . . impos[ing] upon states obligations to which they did not consent.”¹⁰²

The term “membership in a particular social group” was added near the end of the deliberations on the 1951 Convention, and there is no explanation of the

⁹⁶ Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 422 (2007).

⁹⁷ See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 299–05 (2007).

⁹⁸ See *id.*

⁹⁹ See *infra* Part VI.

¹⁰⁰ *Cece v. Holder*, 733 F.3d 662, 670–77 (7th Cir. 2013) (*en banc*).

¹⁰¹ T. Alexander Aleinikoff, *Membership in a Particular Social Group* 7 (Aug. 1, 2000) (working paper), available at <http://www.unhcr.org/3b83b1c54.pdf>.

¹⁰² *Id.* at 3.

term contained in the Convention.¹⁰³ Similarly, the *travaux préparatoires* contains relatively no discussion¹⁰⁴ regarding the reason for the adoption of this fifth category within the refugee definition.¹⁰⁵ The *travaux* contains only the Swedish delegate's observation, that "experience has 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."¹⁰⁶

Somewhat instructive, though not binding on United States courts, is that the United Nations High Commissioner for Refugees (UNHCR) has stressed that membership in a PSG "should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."¹⁰⁷ Furthermore, the preamble of the Refugee Convention states that the purpose of the Convention is, "without discrimination, to assure refugees the widest possible exercise of these fundamental rights and freedoms."¹⁰⁸ Likewise, the UNHCR Handbook is relatively short and generalized; it does not provide a great deal more assistance to interpreting the parameters of the particular social group category, stating that that a PSG is normally comprised of "persons of similar background, habits or social status."¹⁰⁹

¹⁰³ See *id.* at 4.

¹⁰⁴ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Rec. of the 32d Mtg., U.N. Doc. A/CONF.2/SR.3 at 14 (Nov. 30, 1951); Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 401 (2010) (noting how the 1951 Convention did not define social group for the U.S. or the international community).

¹⁰⁵ GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 201 (3d ed. 2007) (citing U.N. Doc. A/CONF.2/SR.3, 19 Nov. 1951, ¶14: "The lack of substantive debate on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the 'restructuring' of society then being undertaken in the socialist States and the special attention reserved for landowners, capitalist class members, independent business people, the middle class and their families.").

¹⁰⁶ Aleinikoff, *supra* note 101, at 4.

¹⁰⁷ U.N. Refugee Agency, *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*, para. 3 U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d58de2da> [hereinafter UNHCR Group Guidelines].

¹⁰⁸ Convention and Protocol Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954), available at http://www.unhcr.ch/html/menu3/b/o_c_ref.htm.

¹⁰⁹ Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, para. 77 available at <http://www.hrea.org/learn/tutorials/refugees/Handbook/hbtoct.htm> (last visited Oct. 31, 2013) [hereinafter Handbook].

The United States is not the only nation to struggle with interpreting the particular social group category. As pointed out in Australian jurisprudence by the court in *Applicant A v. Minister for Immigration & Ethnic Affairs*,

Courts and jurists have taken widely differing views as to what constitutes “membership of a particular social group” for the purposes of the Convention. This is not surprising. The phrase is indeterminate and lacks a detailed legislative history and debate. Not only is it impossible to define the phrase exhaustively, it is pointless to attempt to do so.¹¹⁰

As noted by T. Alexander Aleinikoff, the current Deputy High Commissioner in the Office of the United Nations High Commissioner for Refugees, “[in] recent years, the number and variety of refugee claims based on ‘membership in a particular social group’ have increased dramatically.”¹¹¹ Furthermore, PSG cases have “push[ed] the boundaries of refugee law, raising issues such as: domestic abuse,¹¹² homosexuality,¹¹³ coercive family planning policies,¹¹⁴ female genital mutilation (FGM), and discrimination against the disabled.”¹¹⁵ The breadth of issues covered within these cases demonstrates that the term PSG “was adopted to cover an assortment of groups whose need for protection was based on circumstances distinct from those that provide the justification for inclusion of the other categories.”¹¹⁶

There are two distinct lines of analysis for PSG cases in the United States: one arising from the Board of Immigration Appeals’ decision in *Matter of Acosta*¹¹⁷ and the other from the Second Circuit’s decision in *Gomez v. INS*.¹¹⁸ The clearest and most widely-endorsed definition of “particular social group” is the immutable characteristic test enunciated by the BIA in *Matter of Acosta*.¹¹⁹

¹¹⁰ *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4, 89 (Austl.).

¹¹¹ Aleinikoff, *supra* note 101, at 2.

¹¹² See generally *Islam v. Sec’y of State for the Home Dept. and R. v. Immigr. Appeal Tribunal and Sec’y of State for the Home Dept. ex parte Shah*, [1999] 2 A.C. 629 (H.L.) (appeal taken from Eng.).

¹¹³ See Derek McGhee, *Persecution and Social Group Status: Homosexual Refugees in the 1990s*, 14 J. REFUGEE STUD. 20 (2001).

¹¹⁴ See *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4 (Austl.).

¹¹⁵ *Supra* notes 111–14.

¹¹⁶ Aleinikoff, *supra* note 101, at 5.

¹¹⁷ See *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

¹¹⁸ See *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

¹¹⁹ *Matter of Acosta*, 19 I. & N. Dec. at 212.

Matter of Acosta “involved a member of a taxi cooperative operating in [El Salvador] who became the target of threats and physical violence from anti-government guerrilla operations.”¹²⁰ In *Acosta*, the BIA applied the principle of *ejusdem generis*, meaning, “general words used in an enumeration with specific words should be construed in a manner consistent with the specific words”¹²¹ to interpret membership in a particular social group in accordance with the other four enumerated categories.¹²² The Board noted that the other four grounds of persecution recognized under the Refugee Convention—race, religion, nationality and political opinion—describe persecution directed at an immutable characteristic that is “either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”¹²³

The BIA subsequently applied this interpretation to the fifth category, stating that persecution based on membership in a PSG means “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”¹²⁴ The court then gave some examples of what might constitute a shared characteristic: “The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.”¹²⁵

The federal courts of appeals, including the Seventh Circuit, have endorsed the *Matter of Acosta* approach for discerning particular social groups as a valid interpretation of the statute.¹²⁶ Moreover, foreign courts have also relied on *Acosta*’s immutable characteristics test in defining particular social group. For example, in *Canada (Attorney-General) v. Ward*, the Canadian Supreme Court adopted the *Acosta* “particular social group” definition.¹²⁷ The case involved the claim of a former member of the Irish National Liberation Army who was

¹²⁰ Christensen, *supra* note 24, at 9 (citing *Matter of Acosta*, 19 I. & N. Dec. at 216–17).

¹²¹ *Matter of Acosta*, 19 I. & N. Dec. at 232–33.

¹²² *Id.* at 233.

¹²³ *Id.* at 233–34.

¹²⁴ *Id.* at 233.

¹²⁵ *Id.*

¹²⁶ The Courts of Appeals for the First, Third and Seventh Circuits have adopted the immutable characteristics test. *See, e.g.*, *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Meguenine v. INS*, 139 F.2d 25, 28 n.2 (1st Cir. 1998); *Fatin v. INS*, 12 F.3d 1233, 1239–41 (3d Cir. 1993); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1st Cir. 1990); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

¹²⁷ *Canada (Attorney General) v. Ward*, [1993] 103 D.L.R. 4th 1, 743 (Can.).

sentenced to death by the group for aiding in the escape of hostages.¹²⁸ In that case, the court announced the immutable characteristics test by reference to three categories: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.¹²⁹

Additionally, in the *Islam & Shah* case decided by the British House of Lords,¹³⁰ the three Law Lords based their reasoning on the *Acosta* decision, which Lord Steyn described as “seminal.”¹³¹ The Australian Tribunal has also embraced the immutable characteristics test in evaluating asylum claims based on the PSG ground.¹³² Not only has the immutable characteristics standard been embraced by courts around the globe, it is also embodied in the United Nations High Commissioner for Refugees’ own guidelines on the law of refugees.¹³³

After nearly a quarter-century of relying on the standard articulated by the BIA in *Acosta*, the Second Circuit articulated another standard for interpreting the particular social group language in *Gomez v. INS*.¹³⁴ This standard, called the “social visibility test,” requires that a particular social group’s fundamental characteristic be distinguishable to the persecutor or visible to the eyes of the outside world.¹³⁵ The BIA added the social visibility test to the particular social

¹²⁸ *Id.*

¹²⁹ *Id.* at 739.

¹³⁰ *Islam v. Secretary of State for the Home Dep’t, and Regina v. Immigration Appeal Tribunal, ex parte Shah*, [1999] 2 A.C. 629 (H.L.) 635 (Lord Steyn).

¹³¹ *Islam & Shah*, [1999] 2 All E.R. 545 at 556 (Lord Steyn) (finding that the *Acosta* Board’s explanation that the shared characteristic might be an innate one “such as sex, color, or kinship ties” covers Pakistani women because they are discriminated against and as a group they are unprotected by the state, which, indeed, tolerates and sanctions the discrimination).

¹³² See Aleinikoff, *supra* note 101, at 11.

¹³³ UN Higher Comm’r for Refugees, *Guidelines on International Protection: “Membership in a Particular Social Group” within the context of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02, ¶¶ 11–12 (May 7, 2002), available at <http://www.unhcr.org/3d58de2da.html>. For a discussion of *Acosta*’s role in the development of social group jurisprudence internationally, as well as the BIA’s erroneous social visibility test, see F. Marouf, *The Emerging Importance of ‘Social Visibility’ in Defining a ‘Particular Social Group’ and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 103 (2008).

¹³⁴ *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991).

¹³⁵ *Id.* at 664 (finding that *Gomez*’s membership in a group comprised of women who had been previously battered and raped by Salvadoran guerillas is not a particular social group because would-be persecutors could not identify members of said group from the common population).

group analysis in *In re C-A-*,¹³⁶ decided in 2006, after relying on *Matter of Acosta* for more than two decades.¹³⁷

The BIA, in *In re C-A-*, found that “noncriminal drug informants working against the Cali drug cartel” do not constitute a particular social group because the members lacked social visibility.¹³⁸ The BIA claimed to reaffirm *Acosta* and characterized the new elements as compatible with the traditional immutable characteristics test, while at the same time modifying some of its earlier social group cases as though considerations of social visibility had been relevant to their outcome.¹³⁹

Rather than bringing greater uniformity to the law of particular social groups, the recent social visibility cases have caused confusion and ambiguity because the concept of social visibility cannot be reconciled with many of the BIA’s earlier particular social group precedents.¹⁴⁰ To demonstrate why this is problematic, consider the fact that, “homosexuals living in intolerant societies will often seek to remain invisible, individually or collectively, precisely to avoid persecution.”¹⁴¹ This group, though potentially eligible for asylum under the immutable characteristics test, would be categorically ineligible under the social visibility test.

Furthermore, international bodies have rejected the use of a “social visibility” test.¹⁴² Instead, the immutability standard articulated in *Acosta* is the leading interpretation among major common-law states around the world. For example, Canada, New Zealand, and the United Kingdom all use the immutable characteristics standard in discerning social groups.¹⁴³

¹³⁶ *Matter of C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A. 2006).

¹³⁷ *Id.*

¹³⁸ *Id.* at 961.

¹³⁹ See, e.g., *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 819 (B.I.A. 1990) (homosexual Cuban deemed member of particular social group); *Matter of Kasinga*, 21 I. & N. Dec. 357, 357 (B.I.A. 1996) (recognizing social group of “young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice”).

¹⁴⁰ Kristin E. Bresnahan, *The Board of Immigration Appeals’s New Social Visibility Test for Determining Membership of a Particular Social Group in Asylum Claims and Its Legal Policy Implications*, 29 BERKELEY J. INT’L L. 649, 658 (2011).

¹⁴¹ Benjamin Casper et al., Regina Germain & Ilana Greenstein, *The Evolution, Convolution of Particular Social Group Law: From the Clarity of Acosta to the Confusion of S-E-G-*, 2010 AILA 565, 568 (2010) (citing *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009)).

¹⁴² See Bresnahan *supra* note 139, at 657–58.

¹⁴³ See Marouf, *supra* note 132, at 56–57 (noting leading cases in each country that demonstrate “how the ‘protected characteristic’ approach set forth in *Acosta* has become ‘transnationalized’”).

With respect to victims of trafficking, immigration judges in the United States have struggled with the interpretation of “particular social group.” They have endeavored to interpret this category in compliance with the standard outlined in *Matter of Acosta*, while at the same time creating limits on the United States’ obligations for protection. The following are examples of particular social groups both accepted and rejected by immigration tribunals in the United States.¹⁴⁴

In one case, the judge accepted the group of “sex slaves from foreign countries who are brought to the U.S. under false pretenses and forced at the threat of death and destruction to participate in sexual activities.”¹⁴⁵ While this group is partially defined by the persecution feared, it is also defined by the immutable historical characteristic of having been trafficked for sexual exploitation.¹⁴⁶ In a similar case, the immigration judge rejected the category of women from the victim’s country of origin “forced into prostitution by the mafia who escape from sexual bondage.”¹⁴⁷ This social group included three immutable characteristics: gender, nationality and the historical experience of being subjected to sexual exploitation.¹⁴⁸

The Seventh Circuit in *Cece v. Holder* correctly applied the “immutable characteristic” standard articulated in *Acosta* by reasoning that, to be immutable, the common trait must be unchangeable or truly fundamental to an applicant’s identity.¹⁴⁹ By applying the *Acosta* immutable characteristic standard and rejecting the *Gomez* social visibility standard, the court in *Cece* was able to correctly hold that Cece did in fact proffer a cognizable PSG as a victim of attempted sex trafficking.¹⁵⁰ This comment argues that the Seventh Circuit’s interpretation is correct and should be uniformly adopted by federal courts in every circuit.

¹⁴⁴ Because of issues relating to victim confidentiality, it is difficult to obtain published immigration decisions. The cases discussed in this section are unpublished decisions and the analysis for the purposes of this paper is limited to the information provided by Stephen Knight in his article. See Stephen Knight, *Asylum from Trafficking: A failure of Protection*, 2007 IMMIGRATION BRIEFINGS 1, 6, available at http://cgrs.uchastings.edu/sites/default/files/Asylum_From_Trafficking_Knight_Immigration_Briefings_7_07.pdf.

¹⁴⁵ *Matter of P-H-*, A # redacted, 13 (Houston, Tex., Immigration Court, March 4, 2004) (CGRS Case # 3695).

¹⁴⁶ *Id.* at 10–11.

¹⁴⁷ *Matter of Anon.*, A# redacted, 5 (Seattle, WA, Immigration Court, Feb. 7, 2000) (CGRS Case # 275).

¹⁴⁸ *Id.*

¹⁴⁹ *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013) (*en banc*).

¹⁵⁰ *Id.* at 668.

IV. SIXTH CIRCUIT CASES DEALING WITH ATTEMPTED SEX TRAFFICKING IN ALBANIA¹⁵¹

The Sixth Circuit's decision in *Rreshpja v. Gonzales*¹⁵² illustrates the illogical rejection of particular social group claims by victims of attempted trafficking. In *Rreshpja*, the Sixth Circuit denied an Albanian woman asylum even though she was attacked and nearly abducted, but managed to break free from her attacker.¹⁵³ While the petitioner was escaping from her would-be trafficker, he proclaimed that, "she should not get too excited because she would end up on her back in Italy, like many other girls."¹⁵⁴ The petitioner understood his statement "to be a threat that she would be kidnapped and forced to work as a prostitute."¹⁵⁵

In spite of the fact that sex trafficking is pervasive in Albania and the fact that the petitioner herself was attacked by a potential trafficker, the Sixth Circuit rejected her claim for asylum.¹⁵⁶ The court found that the petitioner's proffered PSG of "young (or those who appear to be young), attractive Albanian women who are forced into prostitution," was not cognizable under the INA.¹⁵⁷ The court reasoned that, "a social group may not be circularly defined by the fact that it suffers persecution. The individuals in the group must share a narrowing characteristic other than their risk of being persecuted."¹⁵⁸ The court also noted that if the petitioner's proffered social group were to be deemed legitimate, "virtually any young Albanian woman who possesses the subjective criterion of being 'attractive' would be eligible for asylum in the United States."¹⁵⁹

The court's reasoning in *Rreshpja* is flawed for two reasons. First, while the Sixth Circuit might have been correct in its assessment that a trait as subjective and as prone to change as attractiveness might not have been an appropriate defining characteristic of a PSG,¹⁶⁰ it erred in ignoring the age and

¹⁵¹ The Second Circuit has also addressed a similar issue in *Gjura v. Holder*, 502 F. App'x 91 (2d Cir. 2012), but in that case the court avoided the issue of whether "young, unmarried Albanian women could constitute a social group" and found instead that the applicant had failed to establish the requisite nexus. *Id.*

¹⁵² *Rrhespja v. Gonzales*, 420 F.3d 551 (6th Cir. 2005).

¹⁵³ *Id.* at 553.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 555.

¹⁵⁸ *Id.* at 556.

¹⁵⁹ *Rrhespja*, 420 F.3d at 556.

¹⁶⁰ *Id.*

gender claims, which were both objective and immutable characteristics that led to the persecution of the petitioner.¹⁶¹ These objective criteria show that the group is not circularly defined; rather, the petitioner was being persecuted based on her age and gender. Second, the potential breadth of the group is not dispositive and has never been a per se bar to protected status.¹⁶² In fact, in 2002, the UNHCR released a set of guidelines that advocate an expansive interpretation of asylum claims in order to adhere to the Convention and the Protocol.¹⁶³ These guidelines state that while “[t]he size of the group has sometimes been used as a basis for refusing to recognise [a particular social group],” this denial of asylum based on group size “has no basis in fact or reason, as the other grounds are not bound by this question of size.”¹⁶⁴

In *Kalaj v. Holder*,¹⁶⁵ another case dealing with the asylum claim of an Albanian victim of attempted trafficking, the petitioner proffered a social group that was similar, yet importantly distinct from the petitioner’s proffered group in *Rreshpja*. The petitioner in *Kalaj* was also a young Albanian woman who escaped kidnappers attempting to force her into prostitution.¹⁶⁶ In that case, three men approached Kalaj in the street and “asked her if she had an interest in traveling to Italy to work as a waitress.”¹⁶⁷ Kalaj declined, believing the supposed “waitress” position was an attempt to recruit her for prostitution.¹⁶⁸ A few days later, the same men threatened her verbally and tried to physically force her into their car two weeks later.¹⁶⁹ A good Samaritan intervened and told the men to let Kalaj go.¹⁷⁰ Upon fleeing the scene the men shouted that they knew where Kalaj lived and would be back.¹⁷¹

¹⁶¹ See *id.* at 555.

¹⁶² See *Iao v. Gonzales*, 400 F.3d 530 (7th Cir. 2005) (“The number of followers of Falun Gong in China is estimated to be in the tens of millions, all of them subject to persecution [Because] [a]nyone, we suppose, can get hold of a book of [Falun Gong] teachings, start doing the exercises, and truthfully declare himself or herself a bona fide adherent to Falun Gong[,] [t]he implications for potential Chinese immigration to the United States may be significant But Congress has not authorized the immigration services to [control Chinese immigration] by denying asylum applications in unreasoned decisions.”). *Id.* at 533.

¹⁶³ U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* 1 U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

¹⁶⁴ *Id.* at 8.

¹⁶⁵ *Kalaj v. Holder*, 319 F. App’x 374 (6th Cir. 2009).

¹⁶⁶ *Id.* at 375.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Kalaj*, 319 F. App’x at 375.

¹⁷¹ *Id.*

Unlike the petitioner in *Rreshpja*, the petitioner in *Kalaj* explained her particular social group on the basis of *solely* objective characteristics. The petitioner in *Kalaj* defined her PSG as: “young, impoverished, single, uneducated women who risked kidnapping and forced prostitution.”¹⁷² Despite the petitioner’s use of objective, immutable characteristics to define her social group, the Sixth Circuit, relying on *Rreshpja* denied her claim.¹⁷³ In its opinion the court explained, “Kalaj presents no [] immutable group trait other than a generalized risk to women associated with the reportedly high levels of human trafficking in Albania.”¹⁷⁴ In its cursory analysis into the PSG offered by Kalaj, the court essentially equated her social group claim with that in *Rreshpja*, ignoring the important difference between the objective qualities of the claim in *Kalaj*, and the subjective quality of “attractiveness” that the petitioner in *Rreshpja* used as a part of her social group claim.¹⁷⁵ Even if it is argued that traits such as being young and impoverished are not wholly objective, they are still immutable because they are characteristics that members of the group “either cannot change, or should not be required to change, because such characteristics are fundamental to their individual identities.”¹⁷⁶

Furthermore, in rejecting the petitioner’s claim, the court made the erroneous declaration that the petitioner’s proposed social group contained no “immutable group trait other than a generalized risk to women associated with the reportedly high levels of human trafficking in Albania.”¹⁷⁷ The court failed to see that the traffickers targeted those women because they possessed the aforementioned qualities of youth, poverty, and femaleness—characteristics that they have no power, or should not be forced, to change. Therefore, in light of the immutability standard for assessing social groups, the Sixth Circuit erred in deeming those qualities insufficient to define a social group.

Additionally, the Sixth Circuit failed in both *Rrhespja* and *Kalaj* to acknowledge the possibility that these could be analyzed as “mixed-motives” cases. A mixed-motives case is one in which “race, religion, nationality, political opinion, or membership in a particular social group is at least *one central reason* for the claimed persecution.”¹⁷⁸ In a mixed-motive case,

¹⁷² *Id.* at 376.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 377.

¹⁷⁵ *Id.* at 376.

¹⁷⁶ *Escobar v. Holder*, 657 F.3d 537, 542 (7th Cir. 2011).

¹⁷⁷ *Kalaj*, 319 F. App’x at 376.

¹⁷⁸ REAL ID Act of 2005 § 101(a)(3), Pub. L. No. 109-13, 119 Stat. 302, 303 (to be codified at section 208(b)(1)(B)(iii) of the Act); *In re J-B-N & S-M-*, 24 I. & N. Dec. 208, 209 (BIA 2007).

an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur; however . . . the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed protected ground.¹⁷⁹

Both petitioners in *Rrhespja* and *Kalaj* provided evidence demonstrating that they were being targeted, at least in part, for belonging to a particular social group of young Albanian women at risk of being forced into prostitution.¹⁸⁰ The Sixth Circuit ignored this possibility and rejected the petitioners' claims for asylum.

As discussed in Part V, the Seventh Circuit disagreed with the Sixth Circuit's refusal to apply a mixed-motives analysis in *Rrhespja*, a case factually similar to *Cece v. Holder*. The Seventh Circuit analyzed *Cece v. Holder* using the mixed-motives doctrine, which led it to conclude that Cece merited the protection of asylum.¹⁸¹ This holding is correct because it is consistent with the Board of Immigration Appeals' long line of cases recognizing "an individual may qualify for asylum if his or her persecutors have more than one motive as long as one of the motives is specified in the Immigration and Nationality Act."¹⁸²

V. *CECE V. HOLDER*: THE CORRECT RESULT

A. *Cece's Narrative*

The following is a narrative of Cece's story, as written by the Seventh Circuit in its opinion in *Cece v. Holder*:

Cece lived with her family in Korçë, Albania until her parents left the country in 2001. As a young woman living alone in Albania, Cece caught the attention of a well-known local criminal gang that was notorious for forcing women into prostitution rings. One of the leaders of that gang, a man Cece knew as "Reqi," began following her around town, offering her rides, and inviting her on dates. Cece knew Reqi by reputation—that is, for his membership in a gang known for its participation in prostitution rings, murder of other gang members, and the drug trade. Cece also testified that the gang

¹⁷⁹ *Matter of S-P-*, 21 I. & N. Dec. 486 (BIA 1996).

¹⁸⁰ *Rrhespja*, 420 F.3d at 554; *Kalaj*, 319 F. App'x at 376.

¹⁸¹ *Cece v. Holder*, 733 F.3d 662, 672 (7th Cir. 2013) (*en banc*).

¹⁸² *Bueso-Avila v. Holder*, 663 F.3d 934, 937 (7th Cir. 2011).

members appeared to enjoy complete immunity from the law. Cece had long seen Reqi near her high school, where he cruised the area looking for girls and offering drugs to young women. Cece had heard that one of these women had been kidnapped by Reqi and forced into prostitution. Reqi's stalking culminated in a confrontation on June 4, 2001, when Reqi followed Cece into a cosmetics store, cornered her, and pinned her to a wall. There he confronted her and asked her why she would not go out with him. Reqi made it clear to Cece that he could not be stopped and that he would find her and do whatever he wanted to her. She told him to let go, but he merely tightened his grip and held her there. There were several people in the store, but no one came to her aid. Cece surmised that they too were frightened by Reqi. Cece's friend convinced her to report the assault to the police, but the police perfunctorily dismissed her accusation, claiming she lacked proof.

A few days later someone threw a rock through Cece's window. She stopped going out, stopped going to school, and made plans to leave Korçë.

Cece moved 120 miles north to Tirana to stay with her sister, who lived in a university dormitory, but her safety there was short-lived. A year later, her sister left the country and, without access to the dormitory or family with whom to live, Cece was once again left alone to fend for herself. As a single woman living alone in Albania, Cece claims she remained a target no matter where she lived.

In 2002, fearing for her safety, Cece fraudulently procured an Italian passport and came to the United States under the Visa Waiver Program. Less than a year later, she applied for asylum and withholding of removal, asserting that she feared returning to Albania because she believed that as a young woman living alone she would be kidnapped and forced to join a prostitution ring.¹⁸³

B. Analysis of the Opinion

The Seventh Circuit, in its opinion in *Cece v. Holder*, changed the landscape for victims of attempted sex trafficking seeking refuge in the United States by acknowledging that victims of attempted sex trafficking constitute a particular social group for purposes of asylum. Part B discusses the procedural history of the case and analyzes the Seventh Circuit's reasoning to argue that the court reached the proper conclusion.

¹⁸³ *Cece*, 733 F.3d at 666–67.

In *Cece v. Holder*, the Seventh Circuit convened *en banc* and overruled a determination by a three-judge panel, with one judge dissenting.¹⁸⁴ The panel it overruled had upheld a decision by the BIA denying asylum relief to the young Albanian woman who asserted a fear of being trafficked for prostitution.¹⁸⁵ In its opinion, the Seventh Circuit highlighted the BIA's inconsistent holdings regarding what constitutes a particular social group.¹⁸⁶

The central question of Cece's nearly ten-year fight was whether she belonged to a particular social group cognizable under the asylum provisions of the INA.¹⁸⁷ Cece argued that her particular social group was "young Orthodox wom[en] living alone in Albania" who are a "perfect target" of forced prostitution.¹⁸⁸ Over the course of her legal battle, various courts ruled six separate times on whether her proffered group constituted a valid category cognizable under the INA.¹⁸⁹ At the trial level, an immigration judge originally granted Cece's application but was ultimately overturned; in its decision overturning the immigration judge, the BIA held that Cece's group could not constitute a valid social group because it was defined in large part by the harm feared and did not exist independently of the traffickers.¹⁹⁰ The asylum claim was also denied because the BIA found that Cece had "failed to establish past persecution."¹⁹¹ Furthermore, the BIA found that Cece safely relocated within Albania when she moved in with her sister in another part of the country.¹⁹² "The Board dismissed Cece's second appeal, emphasizing that Cece's proposed group was defined in large part by the harm inflicted on its members and did not exist independently of the traffickers."¹⁹³

The Seventh Circuit initially denied Cece's petition for review in a 2-1 decision, agreeing with the BIA that she did not have a valid social group and

¹⁸⁴ *Id.* at 668, 671.

¹⁸⁵ *Id.* at 667-68.

¹⁸⁶ *Id.* at 670.

¹⁸⁷ *Id.* at 668.

¹⁸⁸ *Id.* at 670. The Court notes that there were several different particular social groups proffered throughout the litigation process. *Id.* The Seventh Circuit designates "young Albanian women who live alone" as the accepted particular social group. *Id.* at 673.

¹⁸⁹ Molly Redden, *A Sex-Trafficking Victory That Shows Just How Broken the System Is*, NEW REPUBLIC (Aug. 29, 2013), <http://www.newrepublic.com/article/114512/obama-should-fix-gender-based-asylum-claims-he-leaves-office>.

¹⁹⁰ *Cece*, 733 F.3d at 667-68.

¹⁹¹ *Id.* at 668.

¹⁹² *See id.*

¹⁹³ *Id.*

that she had safely relocated in Albania.¹⁹⁴ Cece filed a petition for rehearing *en banc* asking the entire court to hear the case; in May 2012, the Court granted that petition.¹⁹⁵ The full court, with two dissenters, granted the petition for review of the BIA's conclusion that Cece could safely relocate within Albania despite the fact that she was a "young woman from a minority religion who has lived by herself most of the time in Albania, and thus is vulnerable, particularly vulnerable to traffickers for those reasons."¹⁹⁶

The exact parameters of Cece's social group changed throughout her proceedings. Cece first defined the group as "young Orthodox wom[en] living alone in Albania,"¹⁹⁷ but the immigration judge described the group as "young women who are targeted for prostitution by traffickers in Albania" and also as "women in danger of being trafficked as prostitutes."¹⁹⁸ The Court noted that these various social group definitions were "simply shorthand for describing women who are vulnerable to trafficking."¹⁹⁹ While these definitions referenced the harm Cece feared, the Court explained that adjudicators must look beyond the language used to define the social group to determine whether a group shares common characteristics that members cannot change or should not be required to change: "[I]t is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used rather than determining what underlying characteristics account for the fear and vulnerability."²⁰⁰

As discussed in Part IV, Congress did not directly address what it meant by a protected "social group."²⁰¹ Therefore, the Court in *Cece* looked to the agency's determination and reviewed it *de novo*, while giving *Chevron* deference²⁰² to the BIA's "reasonable interpretation set forth in precedential opinions interpreting the statute."²⁰³ The *en banc* Court concluded that the BIA's determination that Cece did not belong to a particular social group was

¹⁹⁴ *Id.*

¹⁹⁵ *Scott Bratton Wins En Banc Case in the Seventh Circuit Court of Appeals*, IMWONG.COM (Aug. 12, 2013), <http://www.imwong.com/news/scott-bratton-wins-en-banc-case-in-the-seventh-circuit-court-of-appeals/>.

¹⁹⁶ *Cece*, 733 F.3d at 668, 677–78 (emphasis added).

¹⁹⁷ *Id.* at 670.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 671.

²⁰⁰ *Id.* at 672.

²⁰¹ *Id.* at 669.

²⁰² *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

²⁰³ *Cece*, 733 F.3d at 668.

“not a reasoned conclusion”²⁰⁴ and found that Cece’s proffered social group was cognizable under the INA.²⁰⁵ This conclusion placed the Seventh Circuit in direct conflict with the Sixth Circuit’s holdings in *Rreshpja v. Gonzales* and *Kalaj v. Holder*, both of which rejected similar claims for asylum by young Albanian women.²⁰⁶

In its opinion, the Court applied the “immutable characteristics test” articulated by the BIA in *Acosta* and found that the characteristic that unifies the petitioner’s particular social group is not the fact that its members fear persecution, but the fact that they are young, single, Albanian women.²⁰⁷ Although the Sixth Circuit purported to apply the same test for its PSG analysis in *Rrhespja* and *Kalaj*, the Sixth Circuit clearly deviated from the test’s proper application. The Seventh Circuit was willing to go beyond the cursory analysis employed by the Sixth Circuit by finding that the group at issue is not simply women “being targeted for prostitution.”²⁰⁸ Such a group would exist exclusively because of the members’ fear or risk of harm and would not share any immutable characteristics. The Court found Cece’s group to be different because it is the members’ status as young single women from a particular country that unites them, not their risk of harm. This is a point that the Sixth Circuit failed to take notice of in *Rreshpja* and *Kalaj*.

In attempting to “determine the contours” of Cece’s social group, the Court focused on the characteristic that Cece lived alone.²⁰⁹ According to the Court, Cece credibly testified at trial that “women do not live alone in Albania,” that “she did not know anyone who lived alone,” that “she was afraid to live alone,” and that “she was targeted because she was living alone.”²¹⁰ Furthermore, “[a]t Cece’s hearing, Dr. Bernd Fischer, a Professor in Balkan History at the Indiana University–Purdue University Fort Wayne and an ‘expert on Albania,’²¹¹ testified that Cece’s experience was ‘unfortunately usual.’”²¹² Dr. Fischer described how unusual it is for a single woman to live alone in Albania, that such a woman would be an “ideal target for a trafficker,

²⁰⁴ *Id.* at 671.

²⁰⁵ *Id.* at 677.

²⁰⁶ *See supra* Part IV.

²⁰⁷ *Cece*, 733 F.3d at 672. The court uses “single” to be synonymous with “living alone.” *Id.* at 670 n.3.

²⁰⁸ *Id.* at 672.

²⁰⁹ *Id.* at 670.

²¹⁰ *Id.* at 671.

²¹¹ *Id.* at 667.

²¹² *Id.*

particularly if she had been such a target in the past,” and that the problem was prevalent throughout Albania and was not limited to Cece’s home village.²¹³

In determining whether “singleness” meets *Acosta*’s immutable characteristic test, the Court considered whether living alone is “plausibly alterable.”²¹⁴ The Court noted that Cece no longer had any family living in Albania and acknowledged that, although Cece could have married, “this is the type of fundamental characteristic change,” i.e., marital status, “that we do not ask of asylum applicants.”²¹⁵

By focusing on the objective, immutable characteristics of Cece’s proffered group, the Court was able to analogize Cece’s PSG to many of the groups previously approved by the BIA. For example, the Court found that Cece’s proffered social group was not unlike that proposed by the following groups: “women who, in accordance with social and religious norms in Jordan, are accused of being immoral criminals and, as a consequence, face the prospect of being killed;” “Christian women in Iran who do not wish to adhere to the Islamic female dress code;” “Iranian women who refuse to conform to the government’s gender-specific laws and social norms.”²¹⁶ All of these groups satisfied the BIA’s PSG requirement.

The Court further justified its conclusion by classifying Cece’s case as a “mixed-motive” case.²¹⁷ According to the Court, a mixed-motive case is one “in which the persecutor targets an individual for more than one reason and one of the reasons does not warrant protection under the Act.”²¹⁸ Under mixed-motives analysis, “an applicant may qualify for asylum so long as the applicant demonstrates by either direct or circumstantial evidence that his persecutors were motivated, at least in part, by one of the enumerated grounds.”²¹⁹ This mixed-motives analysis, though very much applicable in both *Rrhespja* and *Kalaj*, is noticeably absent from the Sixth Circuit’s reasoning in those cases.

The Seventh Circuit also addressed the dissents’ concerns about Cece’s proposed PSG being circularly defined.²²⁰ The Court found that a particular

²¹³ *Cece*, 733 F.3d at 667.

²¹⁴ *Id.* at 669.

²¹⁵ *Id.*

²¹⁶ *Id.* at 669–70 (citing *Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011); *Yadegar-Sargis v. INS*, 297 F.3d 596, 603 (7th Cir. 2002); *Fatin v. INS*, F.3d 1233, 1241 (3d Cir. 1993)).

²¹⁷ *Cece*, 733 F.3d at 672.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 680.

social group's circular definition can create problems for the nexus or "on account of" asylum element, but a circularly-defined group can still be viable as long as the group's members share an immutable characteristic.²²¹ Importantly, the Court found that, though a PSG "cannot be defined *merely* by the fact of persecution,"²²² the fact that a group's definition includes the fact of persecution does not disqualify an otherwise valid social group.²²³ Just because all members of a group suffer persecution does not mean that this characteristic is the only one that links them.

Applying this principle to Cece's case, the Court found that the characteristics of the social group consist of the fundamental traits of being "young, female, and living alone in Albania."²²⁴ These alone would suffice to prove the group is not circularly defined, but the Court takes it a step further and explains, "[e]ven if the group were defined in part by the fact of persecution (and we do not believe it to be), that factor would not defeat recognition of the [PSG] under the [INA]" because the BIA "has never required complete independence of any relationship to the persecutor."²²⁵

Moreover, the Seventh Circuit found that the Board's decision that Cece was able to safely relocate within Albania was unreasoned and could not stand because of the fact that Cece had no family left in Albania, and Dr. Fischer testified that women typically do not live alone in Albania.²²⁶ Furthermore, the Court opined that Cece's fruitless police report regarding her attempted kidnapping illuminates the difficulty of relying on law enforcement officials to locate and prosecute traffickers, and the Seventh Circuit relied on this to make a finding that the Albanian government was unwilling or unable to protect Cece.²²⁷

²²¹ *Id.* at 672–73.

²²² *Cece*, 733 F.3d at 671 (citing *Jonaitiene v. Holder*, 660 F.3d 267, 271 (7th Cir. 2011) (emphasis in original)).

²²³ *Cece*, 733 F.3d at 671.

²²⁴ *Id.* at 672.

²²⁵ *Id.*

²²⁶ *Id.* at 667–68. "The Board found that Cece could live safely in Tirana, though perhaps not in her parent's city. Part III of the majority's opinion declares that this decision is not supported by substantial evidence." *Id.* at 679.

²²⁷ *Id.* at 675. See Aliens and Nationality Act, 8 U.S.C. §1101(A)(42)(2012). Another requirement is that the applicant show that, owing to past persecution or a well-founded fear or future persecution, he or she is "unable or unwilling to avail himself or herself of the protection" of the country from which he or she has fled to avoid such persecution. 8 U.S.C. § 1101(A)(42)(A) (2012).

The Seventh Circuit also confronts a point raised by the dissent (and previously by the Sixth Circuit) that its decision “makes eligible for asylum everyone who faces a substantial risk of harm in his native land, no matter the reason.”²²⁸ The court clarified that the breadth of a social group is irrelevant to the viability of the group.²²⁹ This point is in direct contention with the Sixth Circuit’s opinion in *Rrëshpja*, which reasoned that the group of young-looking, attractive Albanian women who are forced into prostitution was not a cognizable social group because it was too broad and sweeping of a classification.²³⁰ The Seventh Circuit found that, while the category may include many people, only a few with legitimate claims would be able to make the necessary linkage to prove that the persecution was being carried out because of membership in the designated group.²³¹

As a result of this clarification, future adjudicators will examine social groups in the same way they examine the other protected grounds, all of which can have very broad parameters.²³² This finding is extremely important and serves to align the court with international norms seeking to protect trafficking victims such as the Palermo Protocol and the Victims Protection Act. Indeed, other signatories to the 1951 Refugee Convention have rejected a bar based on size of a particular group, recognizing, for example, that “[t]here are instances where the victims of persecution in a country have been a majority. It is power, not number, that creates the conditions in which persecution may occur.”²³³

Additionally, the Court followed the reasoning of “mixed motives” cases in which an applicant qualifies for asylum so long as she demonstrates by either direct or circumstantial evidence that persecutors were motivated, at least in part, by one of the enumerated grounds in the INA.²³⁴ This type of mixed-

²²⁸ *Cece*, 733 F.3d at 680 (Easterbrook, J., dissenting).

²²⁹ *Cece*, 733 F.3d at 673.

²³⁰ *Rrëshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005).

²³¹ *Cece*, 733 F.3d at 673. “Although the category of protected persons may be large, the number of those who can demonstrate the required nexus likely is not.” *Id.*

²³² *Id.* at 674.

²³³ See U.N. High Comm’r for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 1 U.N. Doc. HCR/GIP/02/01 (May 7, 2002). See also *Minister for Immigration & Multicultural Affairs v Khawar*, [2002] HCA 14 S128/2001 1, 8 (Austl.). Refugee-Pakistani woman having a well-founded fear of violence from her husband and members of his family because of personal, family consideration—repeatedly seeking but failing to receive police protection—whether she feared “persecution” “for reasons of” membership of a particular social group” for purposes of definition of “refugee in Article 1A(2) of the *Convention Relation to the Status of Refugees*. *Id.*

²³⁴ *Cece*, 733 F.3d at 672–73.

motive analysis could apply in a variety of PSG asylum cases and has the potential to expand protection to a vast number of groups who would otherwise be excluded.

VI. RECOMMENDATIONS

Despite official legislation suggesting otherwise, the discrepancy between “available domestic protection and the imperatives of international obligation results in a serious denial of justice to many asylum-seekers.”²³⁵ It is clear that victims of attempted sex trafficking constitute a legitimate social group cognizable under the INA when the court properly acknowledges the objective, immutable characteristics underlying the applicants’ claims, as established by the BIA in *Acosta*.²³⁶ By conducting a substantive analysis of Cece’s case and not perfunctorily dismissing it, the Seventh Circuit provided the important opportunity for victims of attempted sex trafficking to be eligible for asylum, thereby escaping persecution in their home countries. The rule coming out of the Seventh Circuit’s decision in *Cece v. Holder* serves not only to promote the United States’ obligations under the Palermo Protocol as well as the Trafficking Victims Protection Act; it is also straightforward and easily applicable to future cases: without reference to size of the group or the extent of harm suffered, a particular social group can exist for purposes of asylum law so long as it is based on at least one common immutable characteristic.

The “immutable characteristics rule” stemming from the *Acosta* case should be adopted in every circuit court of appeals because uniformity and consistency in the definition of PSG is a desirable goal that will provide asylum applicants the most fair and just access to protection under asylum law of the United States. The Sixth Circuit’s subjective analyses for deciding these claims has contributed to the substantial inconsistency that characterizes current U.S. asylum law, making the system inherently unfair to an asylum seeker, whose probability of success depends on which circuit and which individual judge reviews her case.²³⁷ Applying the rule arising out of the decision in *Cece* would give effect to the intention to prevent human rights

²³⁵ Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT’L L. 1, 1 (1997).

²³⁶ *Cece*, 773 F.3d at 669; *Matter of Acosta*, I & N Dec. 211, 233 (BIA 1985).

²³⁷ See Jaya Ramji-Nogales et. al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (citing a study that demonstrated enormous disparities in asylum grant rates at the immigration judge level, the Board of Immigration Appeals level, and the federal courts of appeal level).

abuses for which Congress ratified the Palermo Protocol and the Trafficking Victims Protection Act.

The Supreme Court of the United States should resolve the interpretation confusion by adopting a uniform definition of PSG. Furthermore, the Supreme Court should address the circuit split between the Sixth and Seventh Circuits and give guidance to immigration judges, the Board of Immigration Appeals, and other circuit courts, by following the holding of the Seventh Circuit in its *Cece* decision. A decision from the Supreme Court upholding *Cece* would send a message to the international community that the United States recognizes sex trafficking as a form of persecution and is willing to provide refuge to young women living alone in Albania who are at risk for being forced into sex trafficking.

In the alternative, the President of the United States should issue a joint rule from the Department of Justice and the Department of Homeland Security outlining a policy of recognizing particular social groups for asylum. This solution would have widespread effect similar to a Supreme Court ruling on the issue, but it would be easier to lay out guidelines for what constitutes a particular social group without the confines the Supreme Court faces. For example, when a holding is limited to the facts of the specific case before it, this substantially limits the opinion's effect on future adjudications.

Furthermore, the Obama administration could merely clarify the asylum statute. Former Attorney General Janet Reno attempted to do in 2000, which resulted in the Department of Justice writing a rule to spell out how immigration judges should apply "particular social groups" to groups of women.²³⁸ Another possibility would be for current Attorney General Eric Holder to designate the decision in *Cece v. Holder* as a precedential decision and all federal courts would be bound by it. Former Attorney General Janet Reno designated the decision in *Toboso-Alfonso* as a precedential decision, which established homosexuality as a particular social group for asylum purposes, an interpretation of the INA that has been accepted by all federal courts.²³⁹

²³⁸ See Redden, *supra* note 189 (Janet Reno had a fit of activity on gender based asylum in 2000, which resulted in the Department of Justice writing a rule to spell out how immigration should apply "particular social groups" to groups of women).

²³⁹ Matter of Toboso-Alfonso, 201 I. & N Dec 819 n.1 (B.I.A. 1990); Matter of Toboso-Alfonso (A23 220 644), 1994 WL 16515318 (U.S.A.G. June 16, 1994).

CONCLUSION

By taking greater cognizance of national and international sources that should inform courts' interpretations of the INA, U.S. courts can finally issue sound rulings that recognize potential victims of human trafficking as constituting a "social group" with a "well-founded fear of persecution" and an "inability to avail [themselves] of the protection" of their native countries, for asylum purposes under the INA.²⁴⁰

Until the Seventh Circuit's decision in *Cece v. Holder*, federal courts uniformly denied asylum claims of victims of attempted sex trafficking by ruling that these victims do not meet the INA's requirement that refugees belong to a particular social group.²⁴¹ The Seventh Circuit is the only court to properly apply the intentions of Congress and the international community with respect to the particular social group requirement. Federal courts all over the United States should follow the precedent set by the court in *Cece* and interpret the asylum claims of victims of attempted trafficking in accordance with the humanitarian concerns that led to the Palermo Protocol, the Trafficking Victims Protection Act, and the inclusive international interpretations of refugee law. Only when United States courts begin recognizing the valid claims of many of these victims of attempted trafficking will these refugees have the protection of the United States government that they deserve.

EMILY NIKLAUS DAVIS*

²⁴⁰ Victoria Neilson, *Homosexual Or Female? Applying Gender-Based Asylum Jurisprudence To Lesbian Asylum Claims*, 16 STAN. L. & POL'Y REV. 417, 421 (2005).

²⁴¹ *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (*en banc*).

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