ARTICLES

THE CONSTRUCTION OF THE ULTIMATE OTHER: NATIONALISM AND MANIFESTATIONS OF MISOGYNY AND PATRIARCHY IN U.S. IMMIGRATION LAW AND POLICY

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I. INTRODUCTION

Nationalism necessitates exclusion. Even in its most benign form, nationalism is premised on people mutually agreeing to recognize each other as belonging to a common nation.[1] This concept operates by the exclusion of the Other, those not recognized as fellow citizens.[2] The process of Othering can manifest itself benevolently as a quest for community with a common destiny.[3] Yet, at its extreme, it can become ethno-nationalism, which builds primarily on cultural bonds. Such nationalism anchors its laws and policies in fostering a national political community based on a common ethnicity or race.[4]

President Donald Trump and his administration's "war on immigrants" is an example of the dangerous face of such ethnocentric nationalism. Since his early days on the campaign trail, President Trump promised to build a wall on the southern border of the United States, round up and deport individuals not legally authorized to be in the U.S., and ban entry into the U.S. by individuals from certain countries.[5] True to his word, seven days after being sworn into office, Trump issued an executive order entitled "Protecting the Nation from Foreign Terrorist Entry Into the United States."[6] The order halted the travel of certain non-citizens from seven Muslim countries and permanently suspended the U.S. overseas refugee resettlement program.[7] The program identifies, vets, and provides protection

1. *See* ERNEST GELLNER, NATIONS & NATIONALISM (1983).

2. *See* Rada Ivekovic, *Women, Democracy & Nationalism After 1989: The Yugoslav Case*, 16 CANADIAN WOMAN STUDI., LES CAHIERS DE LA FEMME 10, 10 (1995).

3. *See* David Brown, *Are There Good and Bad Nationalisms?*, 5 (2) NATIONS & NATIONALISM 281, 283 (1999).

4. *See id.* at 282-83.

5. *Promises About Immigration on Trump-O-Meter*, POLITFACT, https://www.politifact.com/truth-o-meter/promises/trumpometer/subjects/immigration/ (citing various comments made by Donald Trump when running for President).

6. Exec. Order No. 13,769, 82 Fed. Reg. 20, 8977 (Feb. 1, 2017).

7. On March 6, 2017, Executive Order 13780, "Protecting the Nation from Foreign Terrorist Entry into the United States," rescinded and replaced the January 27, 2017 order. *See* 82 Fed. Reg. 45, 13209 (Mar. 6, 2017). The March 6 order removed Iraq from the list of banned countries and provided exemptions for certain nationals from the remaining six countries banned from entering the United States, including Legal Permanent Residents and current visa holders. The March 6 order also replaced the permanent refugee resettlement moratorium with a 120-day freeze requiring review and renewal.

for individuals who meet the refugee definition and are seeking entry to the U.S. from a third country, typically in a refugee camp.[8] This executive order was one of many executive branch actions designed to severely limit entry of non-citizens to the United States and to facilitate mass deportations of individuals residing in the United States.[9] These policies have not been limited to non-citizens without valid immigration status but have also targeted individuals with valid visas and even naturalized U.S. citizens.[10] The Administration's language and policy decisions Other immigrants. For example, when describing the caravan of the thousands fleeing toward the Southern U.S. border in October 2018, President Trump invoked the rhetoric that Iris Marion Young describes as the masculinist protector in the context of a security state, because in his language and policy decisions immigrants are understood as threats to our security.[11] President Trump's exclusionary practices are justified because they are protecting us, the Americans, the citizens from them, the non-Americans, the immigrants. President Trump refers to Mexican and other immigrants[12] as rapists coming to harm "our women."[13] However, half the caravan is comprised of women and children fleeing violence, and research has repeatedly demonstrated that criminality is higher in the native population than with immigrant populations.[14] Given these realities, President

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There were several lawsuits filed challenging the legality and constitutionality of various portions of the travel ban. On June 26, 2018, in a 5-4 opinion, the U.S. Supreme Court held in *Trump v. Hawaii* that the travel ban does not violate the U.S. Constitution or the Immigration and Nationality Act. *See* 138 S. Ct. 2392, 2423 (2018).

8. *See* Claire Felter and James McBride, *How Does the U.S. Refugee System Work?*, COUNCIL ON FOREIGN RELATIONS, (Oct. 10, 2018), https://www.cfr.org/backgrounder/how-does-us-refugee-system-work.

9. *See* Nicholas Kulish et al., *Trump's Immigration Policies Explained*, N.Y. TIMES (Feb. 21, 2017), https://www.nytimes.com/2017/02/21/us/trump-immigration-policies-deportation.html.

10. *See* Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, THE NEW YORKER (June 18, 2018), https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence.

11. Iris Marion Young, *The Logic of Masculinist Protection: Reflections on the Current Security State*, 29 SIGNS: JOURNAL OF WOMEN IN CULTURE & SOC'Y 1, 2 (2003).

12. The term *immigrant* in this article is used as a lay term to define any non-U.S. citizen/national who could also be defined as an *alien* pursuant to the Immigration and Naturalization Act (INA). *See* 8 U.S.C. § 1101(a)(3) (West 2014). Immigration law does draw a legal distinction between individuals who are immigrants and nonimmigrants. Specifically, an *immigrant* is a noncitizen coming to the United States with the intent to remain permanently in the United States. In contrast, a *nonimmigrant* is a noncitizen coming to the United States on a temporary basis and intends to return to his or her home country. *See* § 1101(a)(15). This distinction is irrelevant for purposes of this article. I have consciously decided to not use the word *alien* to describe non-U.S. citizens/nationals because the word is derogatory. *See* Kevin R. Johnson, "*Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 UNIV. MIAMI INTER-AM. L. REV. 263, 282-83 (1997) (arguing the use of the word alien to describe a noncitizen solidifies cultural and racial stereotypes).

13. Aaron Blake, *Trump Conjures Yet Another Immigrant Rape Epidemic*, WASH. POST, (April 5, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/05/trump-conjures-yet-another-immigrant-rape-epidemic/?utm_term=.e0601f222bd5.

14. *See, e.g*, Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 Soc. Sci. Q. 531 (2010) (finding that increases in immigrant populations during 1990s contributed to the drop in violent

Trump's rhetoric reveals that his decisions about who should be allowed to live, work, and remain in this country are decidedly fueled by nationalistic notions entrenched in patriarchy.[15] As such, ethnic, cultural, and non-citizen exclusion is only part of the Othering that is happening under this Administration.

Extreme nationalism doesn't just Other race, national origin, or ancestry, it also engages in the Othering of persons and ideas that are nonconforming, including women, people with disabilities, and LGBTQI individuals. Looking at nationalism through a gendered lens illuminates how nationalism is steeped in patriarchal logic.[16] Catharine MacKinnon posits that male domination is used not only by individual, selfish, aggressive men seeking to dominate and exclude women in order to maintain their superiority, but also by male-dominated institutions and by extension, the Nation State.[17] Anyone who challenges the dominant paradigm or framework should be silenced, dominated and excluded. As such, "all nations depend on a powerful construction on gender. Despite nationalisms' ideological investment in the idea of popular *unity*, nations have historically amounted to sanctioned institutionalization of gender *difference*."[18] The protectors of the state—the military, the police, the patriarch—are privileged as male, the Nation State is positioned as female, and women "are typically construed as the symbolic bearers of the nation, but are denied any direct relation to national agency."[19]

Similarly, President Trump has used his position of power to degrade and Other groups not conforming to his understanding of nation, that of a white brotherhood. President Trump has publicly called women "dog," "slobs," "fat pigs," "nasty," "horse faced," and "bimbo" in attempts to silence their agency when they were critical or disobedient.[20] The broader Trump Administration's policy decisions have also marginalized and even erased the existence of individuals who are victims of gender-based violence. For example, the Department of

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crime rates); Alex Nowrasteh, The White House's Misleading & Error Ridden Narrative on Immigrants and Crime, (June 25, 2018), https://www.cato.org/blog/white-houses-misleading-error-ridden-narrative-immigrants-crime.

15. *See, e.g.*, Gerald F. Seib, *Trump Plunges Ahead with America-First, Nationalist Approach*, WALL ST. J. (Apr. 3, 2018), https://www.wsj.com/articles/trump-plunges-ahead-with-america-first-nationalist-approach-1522793064; Gideon Rachman, *Donald Trump Leads the Global Revival of Nationalism*, FIN. TIMES (June 25, 2018), https://www.ft.com/content/59a37a38-7857-11e8-8e67-1e1a0846c475.

16. *See generally* BELL HOOKS, THE WILL TO CHANGE: MEN, MASCULINITY, AND LOVE (2004) (discussing how men are also deeply and profoundly affected by patriarchy).

17. *See generally* CATHARINE A. MACKINNON, *Toward a Feminist Theory of the State* 161 (1989).

18. Anne McClintock, *Family Feuds: Gender, Nationalism and the Family*, 44 FEMINIST REV. 61, 61 (1993).

19. *Id*. at 62 (arguing that nationalism needs to be recognized as a feminist issue).

20. Claire Cohen, *Donald Trump sexism tracker: Every Offensive Comment in One Place* TELEGRAPH (July 14, 2017), https://www.telegraph.co.uk/women/politics/donald-trump-sexism-tracker-every-offensive-comment-in-one-place/.

Education withdrew historic guidance on schools and university responsibilities to address sexual assault and sexual harassment.[21]

Given the intersections between nationalism and patriarchy, this Article argues that President Trump and his Administration's policies have a uniquely insidious impact at the intersections of gender and immigration status.[22] Threaded throughout the Administration's exclusionary policies is another problematic Othering that positions non-citizen women as uniquely Other. The Trump Administration's most inhumane and insidious laws and policies are at the intersection of gender and immigration status. In other words, in a nationalistic state, the experience of being an immigrant and of fleeing gender-based violence, positions a person in ways that are not captured by examining the experiences of persons perceived solely as gendered or as an immigrant in a nationalistic state. The Trump Administration's concerted efforts to eliminate existing protections for those fleeing gender-based violence are different from his attacks on immigrants or his attacks on U.S. women - it is individuals at this intersection[23] of gender and immigration status that are at most risk of falling into what Hannah Arendt calls "holes of oblivion."[24] By erasing existing forms of immigration relief for people fleeing gender-based persecution, these individuals are forgotten because the public does not have the tools to see their plight.[25]

Each of these changes viewed in isolation demonstrate a callousness and ignorance to the prevalence of gender-based violence. Viewed collectively, a much more sinister picture emerges. The changes enacted by the Trump Administration to undermine protections for immigrants fleeing gender-based violence not only violate U.S. and international law, but also implicate a larger patriarchal nationalistic polemic that portends to have significant consequences for other intersectional populations in the United States if left unchecked.

This Article traces the immigration law and policy changes executed by the Trump Administration impacting immigrants fleeing gender-based violence. Part II of this Article traces the recent historical legal strides in protecting people who fear or who have endured gender-based violence. Specifically, it looks at

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21. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance, 83 Fed. Reg. 61462 (Nov. 29, 2018).

22. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) [hereinafter *Intersectionality*] ("because of their intersectional identity as both women *and* of color within discourses that are shaped to respond to one *or* the other, women of color are marginalized within both.").

23. An intersectionality lens helps us to understand how the actual experiences of gender-based violence are qualitatively different from those of white women. As Crenshaw posits "[m]y focus on intersections of race and gender only highlights the need to account for multiple grounds of identity when considering how the social world is constructed." Crenshaw, *supra* note 19, at 1245.

24. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL, 232 (Penguin 2006).

25. *See, e.g.*, Midori Takagi, *Orientals Need Apply: Gender-Based Asylum in the U.S.*, 33.1 ETHNIC STUDIES REV. 61 (2010) (arguing the women fleeing gender-based violence and applying for asylum in the United States have unique hurdles because the asylum "structure was created with no mention or recognition of women and their unique experiences in the original definition of refugee").

legislation, such as the Violence Against Women Act and the Trafficking Victims Protection Act, which provides protection specifically for survivors of gender-based violence such as domestic violence and human trafficking; the evolution of international human rights and refugee law in recognizing that violence against women is a structural manifestation of the historical unequal power distribution between men and women; and the evolving jurisprudence in refugee and asylum law to expand protection for people fleeing violence exacted upon them by a non-state actor on account of their gender. Part III catalogues the procedural and substantive changes made by the Trump Administration that are particularly fatal for asylum claims, (e.g., rolling back protections for victims of trafficking, eliminating training and personnel to assist adjudicators in assessing gender-based claims). Part IV concludes by highlighting the recent legal challenges mounted against these executive branch actions seeking to provide important checks to ensure that immigrants fleeing gender-based violence and their resistance against such violence is seen and acknowledged. These actions are significant because they work to construct counter-narratives shedding light on these problems, thus pushing against President Trump and his administration's attempt at Othering.

II. LEGAL STRIDES IN U.S. IMMIGRATION LAW TO PROVIDE PROTECTION AGAINST GENDER-BASED VIOLENCE

People seeking immigration status in the United States—even those fleeing gender-based violence and persecution, must navigate a legal regime entrenched in patriarch that creates hierarchies of privilege and preferential access to legal immigration based on gender, familial relations, race, education, and wealth. The next section first marks the statutory changes made by Congress to provide additional forms of immigration relief for individuals who were victims of certain crimes, including human trafficking, sexual assault, and domestic violence. It then highlights how the refugee definition is interpreted in certain instances to include protection for individuals fleeing gender-based violence and harm by non-state actors. The section ends by tracing the contemporary U.S. refugee regime's treatment of individuals fleeing gender-based violence.

A. CONGRESSIONAL CHANGES TO IMMIGRATION AND NATIONALITY ACT TO INCREASE PROTECTION FOR THOSE FLEEING GENDER-BASED VIOLENCE

While the statutory definition for a refugee has not changed significantly since the passage of the 1980 Refugee Act, Congress has amended the Immigration and Nationality Act (INA) in significant ways to provide humanitarian protection for individuals fleeing gender-based violence,[26] including victims of reproductive

26. Victims of Trafficking and Violence Prevention Act of 2000 ("VTUPA"), Pub. L. 106-386 (codified at 22 U.S.C. §7101 et. seq. (2012)).

coercion,[27] domestic violence,[28] and human trafficking.[29]

Congress explicitly changed the U.S. legal definition of refugee in 1996. The change was meant to expressly provide protection[30] for individuals fleeing persecution by the Chinese government for violating China's One-Child Policy, and to mandate that anyone forced to abort a pregnancy or undergo involuntary sterilization for resisting a "coercive population control program" was per se persecuted on account of political opinion, one of the explicit grounds for asylum protection. [31]

This congressional action was a response to, as Judge Ellis wrote, "a cacophony of administrative voices, each singing a different tune in a different key."[32] On August 5, 1988, Attorney General Richard Thornburgh promulgated regulations that noted defying the Chinese government's One-Child Policy was an act of "political dissent" and that "a finding of the requisite well-founded fear of persecution under these circumstances is reasonable."[33] Yet these regulations were never implemented. In May 1989, the Board of Immigration Appeals issued a precedential decision in *In the Matter of Chang*,[34] holding that the execution of China's One Child Policy was not per se persecution even to the extent that forced abortion and involuntary sterilization may occur, because it was a law passed by the Chinese government and it was a law of general application, (i.e. it was not targeted at certain groups or individuals; rather, it was for population control).[35] The Chinese government's population control policy only allowed each couple to have one child; if someone violated the one-couple/one-child policy, the Chinese government could force the individual to undergo abortions or sterilizations. In *Chang*, the male asylum applicant alleged that he and his wife were going to be forced to submit to sterilization after the birth of their second

27. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)).

28. Pub. L. No.102-322, 108 Stat. 1941-1923 (codified in part in scattered sections of 42 U.S.C. 13701 through 14040).

29. VTUPA Pub. L. 106-386.

30. *See generally* Sean T. Masson, *Cracking Open the Golden Door: Revisiting U.S. Asylum Law's Response to China's One-Child Policy*, 37 HOFSTRA L. REV., 1135, 1137 (2009), *available at* http://scholarlycommons.law.hofstra.edu/hlr/vol37/iss4/10 (explaining that "the core of the one-child policy consists of regulations that restrict 'family size, late marriage and childbearing, and the spacing of children (in cases in which second children are permitted)").

31. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1 101(a)(42)(2006)).

32. Guo Chin Di v. Carroll, 842 F. Supp. 858, 870 (E.D. Va. 1994).

33. 135 Cong. Rec. S8244 (daily ed. July 19, 1989) (the regulations never became final but were discussed in the Congressional Record pertaining to the Armstrong-DeConcini Amendment which was intended to overturn the BIA decision holding that the implementation of China's One Child Policy was not persecution).

34. 20 I & N. Dec. 38, 44 (BIA 1989). The Board did note that if the Chinese government selectively targeted violators "for a reason other than general population control (e.g. evidence of disparate, more severe treatment for those who publicly opposed the policy)" then the applicant might be able to meet the persecution threshold and qualify for asylum.

35. *Id.*

child. They fled China and sought asylum in the U.S. to protect his wife from forcible sterilization. The Board held, "[T]hus, an asylum claim based solely on the fact that the applicant is subject to this policy must fail."[36]

Immediately after this decision there were several attempts in Congress to overturn the decision through legislation. Finally, Congress amended the refugee definition in 1996 by adding the following paragraph to INA § 101 (a)(42)(A):

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.[37]

In addition to amending the refugee definition to protect a vulnerable population, Congress also created waivers to certain immigration provisions and established visas to provide protection for immigrant victims of domestic violence in the United States. Recognizing that immigrants married to U.S. citizens are particularly vulnerable to domestic violence,[38] Congress first amended the Marriage Fraud Amendments in 1990 to include an explicit hardship waiver for harm caused by domestic violence.[39] Then in 1994, Congress passed the Violence Against Women Act (VAWA)[40] to include a legal mechanism for an immigrant

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36. *Id.*

37. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)).

38. When Congress passed the Marriage Fraud Amendments in 1986, immigration activists recognized that '[t]he 1986 Immigration Reform Act and the Immigration Marriage Fraud Amendment have combined to give the spouse of the person applying for permanent residence a powerful tool to control his partner." Jorge Banales, *Abuse Among Immigrants: As Their Numbers Grow So Does the Need for Services*, WASH. POST, Oct. 16, 1990, at E5. The Executive Director of the Nihonmachi Legal Outreach in San Francisco noted the Marriage Fraud Amendments "bound these immigrant women to their abusers." Deanna Hodgin, *'Mail Order' Brides Marry Pain to Get Green Cards*, WASH. TIMES, Apr. 16, 1991, at E1.

39. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. The waiver was created for survivors of marital abuse with conditional legal permanent resident status who could not meet the requirements to remove the conditions if the survivor could demonstrate "the marriage was entered into in good faith and that after the marriage the alien spouse was battered by or was subjected to extreme mental cruelty by the U.S. citizen or permanent resident spouse." H.R. REP. NO. 723(I), at 78 (1990), *reprinted in* 1990 U.S.C.C.A.N 6710, 6758.

40. Pub. L. No. 102-322, 108 Stat. 1941-1923 (codified in part in scattered sections of 42 U.S.C.). This statute was enacted two years after an unprecedented number of women were elected to Congress on the heels of Anita Hill's testimony during the Clarence Thomas Supreme Court confirmation hearings. Jenny Gathright, *Violence Against Women Act Expires Because of Government Shutdown*, NPR (Dec. 24, 2018), https://www.npr.org/2018/12/24/679838115/violence-against-women-act-expires-because-of-government-shutdown.

woman married to a U.S. citizen or Legal Permanent Resident abuser and their children to self-petition for Legal Permanent Resident Status.[41] Typically, in order for an immigrant spouse to gain Legal Permanent Resident Status, a U.S. citizen or Legal Permanent Resident must petition the immigration service on behalf of the immigrant spouse. Therefore, the immigrant spouse could only achieve Legal Permanent Resident status if the qualifying spouse agreed to and filed the requisite paperwork for this immigration benefit. For immigrants in abusive relationships, the majority of whom continue to be women,[42] this dynamic allowed the abuser to wield even more power and control. The abuser had the ability to use their victim-spouse's immigration status, or lack of status, as a means to prevent them from calling the police or seeking help.[43] The VAWA self-petition provision attempted to disrupt this power dynamic by allowing immigrant spouses to file for Legal Permanent Resident status themselves based on the qualifying relationship with the batterer.[44] However, the only victims of abuse who could benefit from this relief had to be married to a qualifying relative, (i.e. a U.S citizen or Legal Permanent Resident spouse), and who, but for the abuse, the spouse would have petitioned for the immigrant spouse. Immigrant victims of domestic violence or other serious crimes who were not married to a qualifying relative were afforded no protection under VAWA. This gap in protections for immigrant women was remedied in part by later congressional action.

In 2000, Congress passed the Victims of Violence and Trafficking Protection Act (VTVPA), making human trafficking a federal crime and creating two new forms of immigration relief for victims of human trafficking and other serious crimes - the "U" and "T" visas.[45] This legislation criminalized both sex and labor trafficking and recognized not only physical bondage or restraint, but also other trafficking tactics, including psychological control to restrict an individual's freedom of movement as methods of trafficking.[46] It also recognized that

41. Janice Kaguyutan, et al., *The Violence Against Women Act of 1994 and 2000: Immigration Protections for Battered Immigrants*, 6 DOMESTIC VIOLENCE REP. 3, 33 (2001).

42. Although men are more likely to be victims of violent crime overall, a recent study by the U.S. Department of Justice reports that " intimate partner violence — primarily involves female victims." Callie Marie Rennison, *Intimate Partner Violence, 1993-2001*, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT. (Feb. 2008), *available at* https://www.bjs.gov/content/pub/pdf/ipv01.pdf.

43. *See* 146 Cong. Rec. S10, 195 (daily ed. Oct. 11, 2000).

44. The 1994 Act was not without problems. As implementation took place, it became evident that many of the VAWA "provisions merely extended many of the preexisting legal impediments that immigrant survivors of domestic violence faced." Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections Under VAWA I & II*, 17 BERKELEY WOMEN'S L.J. 137, 138 (2002). Indeed, "[s]uch inefficiencies were especially lamentable because of the multiple oppressions confronting battered immigrant women necessitated the successful application of Subtitle G protections." *Id*. (internal citations omitted).

45. Victims of Trafficking and Violence Prevention Act of 2000 ("VTUPA"), Pub. L. 106-386 (codified at 22 U.S.C. §7101 et. seq. (2012)).

46. 22 U.S.C. § 7101(b)(13) (2000); *see also* H.R. REP. NO.106-939 at 100-01 (2000), 2000 WL 1479163 (TVPA conference report stating intent "to address the increasingly subtle methods of

human traffickers exploited both immigrants and U.S. citizens in their criminal enterprises.[47]

Due to their lack of immigration status and a fear of deportation, trafficked individuals were reticent to report trafficking to local law enforcement.[48] Even when their traffickers were arrested, victims were unwilling to testify in criminal trials because they were afraid that immigration enforcement officials would commence deportation proceedings against them. In these cases, prosecutors were left without any witnesses to proceed with any criminal prosecution. Social service providers working in coalition with local law enforcement convinced Congress to provide a new and novel form of immigration relief for victims of human trafficking as well as domestic violence and other serious crimes[49] to address these concerns and promote the prosecution of perpetrators.[50]

The "T" visa is available for victims of human trafficking who are able to demonstrate they were a victim of human trafficking as defined by the statute; are present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port of entry due to trafficking; comply with any reasonable request from law enforcement agency for assistance in the investigation or prosecution of human trafficking;[51] and would suffer extreme hardship involving unusual and severe harm if removed from the United States.[52] In addition to providing proof of human trafficking, the victims also have to obtain a certificate from a local, state, or federal law enforcement agent or officer.[53] The statute explicitly recognizes that labor trafficking is a qualifying crime for relief.[54] The "U" visa provides relief for victims of serious crimes including domestic violence. Unlike VAWA, the victim does not need to be married to a U.S. citizen or

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traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence . . . [F]ederal prosecutors will not have to demonstrate physical harm or threats of force against victims") (emphasis added).

47. VTUPA, Pub. L. 106-386 §102.

48. Elizabeth Hooper, *Underidentification of Human Trafficking Victims in the United States*, 5 J. SOC. WORK AND EVAL. 125, 129 (2004).

49. INA § 101(a)(15)(U)(i)(IV) (Feb. 14, 2019); 8 C.F.R. § 214.14(b)(4) (qualifying crimes include rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, holding someone hostage, peonage, involuntary servitude, murder, felonious assault, witness tampering, obstruction of justice, perjury, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, and manslaughter).

50. Violence Against Women Act of 2000 § 1513(a), Pub. L. No. 106-386, 114 Stat. 1464. H.R. REP. NO. 106-939, at 73 (2000) (Conf. Rep.).

51. Individuals under the age of eighteen or those who are unable to cooperate due to physical or psychological trauma are not required to comply with law enforcement requests for assistance to qualify for the "T" visa. *See* 8 CFR § 1.1, 1.2, 100.1. (2011).

52. 8 C.F.R. § 214.11(i)(1). The fourteen non-exclusive, traditional "extreme hardship" factors can be found in 8 C.F.R. § 1240.58(b)(1-14).

53. 8 C.F.R. § 214.11(a) ("law enforcement agency" is any federal law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons.

54. 18 U.S.C. § 1584.

Legal Permanent Resident. Instead, the victim only needs to show that they are a victim of one of the qualifying crimes and that they are being, or are willing to be helpful to local, state, or federal law enforcement to apply for a "U" visa.[55] Both the "T" and "U" visas are valid for four years and also provide a pathway to permanent legal status in the United States.[56]

The statute also authorizes funding for services, including cash assistance, counseling, and other social services to help victims rebuild their lives in the United States.[57] The Office of Refugee Resettlement, housed at the U.S. Department of Health and Human Services, is charged with administering benefits to "U" and "T" visa holders.[58]

Since 2000, Congress has reauthorized the Trafficking Victims Protection Act four times.[59] In 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act made significant and important revisions that took a much more survivor-centered approach to trafficking, in particular sex trafficking.[60] Congress recognized that children under the age of eighteen could not consent to sex work and made any sex act involving a minor per se human trafficking. Furthermore, it recognized that young children are often recruited into sex work (i.e. sex trafficking). At the age of eighteen, for complex and complicated reasons directly attributable to the experiences inflicted upon them by sex traffickers, the individuals do not leave and continue to provide sex for money.[61]

In addition to statutory changes enacted by Congress to protect victims of gender-based persecution, federal administrative bodies (including immigration courts and asylum offices) starting in the 1990s began to recognize protections against gender-based violence as a basis for refugee and asylum protection. The next section traces the major agency decisions that began altering the landscape for individuals fleeing violence perpetrated by non-state actors.

B. EVOLVING JURISPRUDENCE BEGINS TO PROVIDE PROTECTION FROM GENDER-BASED PERSECUTION

The modern refugee-protection regime was a response by the international community to address the collective failure of nation states during World War II

55. INA § 101(a)(U)(i)(III); 8 C.F.R. § 214.14(b)(3) (2013).

56. INA § 245 (m) (for U visa holders); *See* 8 C.F.R. § 245.23(a) (2017) (requirements for "T" visa holder to adjust status).

57. Sec. 107, Pub. L. 106-386 (2000)

58. Pub. L. 106-386 (2000).

59. Trafficking Protection Reauthorization Act of 2003, P.L. 108-193; Trafficking Protection Reauthorization Act of 2005, Pub. L. No. 109-164; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457; Trafficking Protection Reauthorization Act of 2013 (passed as an amendment to the Violence Against Women Act of 2013, Pub. L. No. 113-4).

60. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

61. Noell Dickman, *For Trafficking Victims, Leaving is Never Easy*, Oskosh Northwestern, a USA TODAY NETWORK WISCONSIN (Sept. 18, 2016), https://www.thenorthwestern.com/story/news/2016/09/18/trafficking-victims-leaving-never-easy/90412452/.

to adequately protect millions of individuals fleeing Nazi persecution and execution, many due to their religious and ethnic Jewish identities. The dearth of international protection for individuals fleeing state sponsored persecution based on ethnic and religious identities during World War II was the impetus for establishing the affirmative duty of United Nations Member States to not return or refoul any individual to a territory whose life was threatened due to race, nationality, religion, political opinion, or membership in a particular social group.[62] In many ways the Refugee Convention was reactive, that is, it was responding to atrocities that had already occurred.[63] As such, the original 1951 Convention Relating to the Status of Refugees was limited geographically and temporally, in that it only contemplated protection for individuals fleeing the events in Europe prior to January 1, 1951.[64] Moreover the 1951 Convention "refugee" definition was not equipped to deal with large refugee movements[65] or other shifting political realities.[66]

Indeed for the drafters of the 1951 Refugee Convention, the paradigmatic refugee is a male political dissident jailed or tortured for his opposition to an authoritarian government.[67] A refugee is often understood as a person fleeing an oppressive, anti-democratic government.[68] As such, non-citizens fleeing gender-based violence and persecution who are seeking protection in the United States face unique challenges precisely because of their intersectional identity. Additionally, gender related claims for asylum and other related forms of protection have faced significant barriers. Often times gender-based persecution that is uniquely or disproportionately inflicted on women or LGBTQ people is done so by non-state actors such as fathers, husbands, or members of the victims' extended community.[69] Moreover, gender-based violence and persecution is

62. *See generally* Joan Fitzpatrick, *Revitalizing the 1951 Refugee Definition*, 9 HARV. HUM. RTS. J. 229 (1996) (discussing the political history of the drafting of the 1951 Convention Relating to the Status of Refugees).

63. *Id.*

64. Convention Relating to the Status of Refugees, Geneva, July 28, 1951, 189 U.N.T.S. 137, (entered into force Apr. 22, 1954).

65. Kay Hailbronner, *Comment: Temporary and Local Responses to Forced Migrations*, 35 VA. J. INT'L. L. 81, 92-93 (1994).

66. T. Alexander Aleinikoff, *The Refugee Convention at Forty: Reflecting on the IJRL Colloquium*, 3 INT'L J. REFUGEE L. 617, 618 (1991).

67. *See generally* Amy Shuman & Carol Bohmer, *Gender and Cultural Silences in the Political Asylum Process*, SEXUALITIES, Vol. 17(8) 939-57, (2014) (discussing how asylum applicants whose claims are based on gender or have a more difficult time prevailing because their claims are not seen as a typical refugee claim by the adjudicator).

68. *See* 9 HARV. HUM. RTS. J., *supra* note 62, at 238-42 (1996).

69. Individuals fleeing persecution by individual non-state actors, who are not acting in any official capacity; are typically unable to avail themselves of the protection against "return to torture" under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). CAT is limited in its scope to acts of torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51, U.N. Doc. A/39/51 at art. 1 (1984) [hereinafter CAT]. The United States Congress passed domestic legislation to ensure the United States honored its obligations pursuant to CAT. *See* Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No.105-277, 112

often condoned in a person's country not just by the legal system, which historically does not afford rights to these individuals under domestic law, but by society as a whole. At its inception, the international legal framework for refugees did not explicitly recognize gender-based persecution as a human rights violation worthy of surrogate state protection. As such, gender is not enumerated as one of the five grounds of protection in the international refugee treaty[70] or in the U.S. Refugee Protection Act of 1980.[71] The five grounds of protection are: race, religion, nationality, political opinion, and membership in a particular social group.

As women's rights have begun to be viewed as human rights, gender-based claims became legally viable in the United States.[72] In particular, several Board of Immigration Appeals cases, when read together, establish the framework for gender-based asylum claims as a type of "particular social group" meriting refugee protection. While gender-based claims can proceed under any of the enumerated grounds for refugee protection, they are most frequently formulated using the ground of membership in a particular social group. Gender-based asylum claims are premised on the argument that persecution, or fear of persecution, is unique or disproportionately inflicted upon them because of their membership in a particular social group that is gendered. Examples of such persecution include

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Stat. 2681 (1998) (Section 2242(b) requires the United States to implement its obligations under Article 3 of CAT).

70. *See* United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 629, 189 U.N.T.S. 137 (1954) [hereinafter 1951 Convention] (setting forth the definition of a refugee and State Parties' obligations under international law); Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol] (amending and expanding the 1951 Convention).

71. The Refugee Act of 1980, Pub. L. No. 96–212, § 101(a) 94 Stat. 102 (1980).

72. *See* Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13; Declaration on the Elimination of Violence Against Women, G.A. Res. 104, at Art. I, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (affirming that violence against women is a human rights violation which States should take all appropriate measures to eliminate); Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, U.N. Comm'n H. Rt. para. 23, U.N. Doc. EICN.4/1996/53 (1996) (defining domestic violence as "violence that occurs within the private sphere, generally between individuals who are related through intimacy, blood, or law"); Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights Resolution 1995/85: A Framework for Model Legislation on Domestic Violence, U.N. Comm'n H.R., para. 11, U.N. Doc. E/CN.4/1996/53/Add.2 (1996) (identifying several acts, among others, that constitute domestic violence). Those acts include: simple assault, aggravated physical battery, kidnapping, threats, intimidation, coercion, stalking, humiliating verbal abuse, forcible or unlawful entry, arson, destruction of property, sexual violence, marital rape, dowry or bride-price related violence, female genital mutilation, violence related to exploitation through prostitution, violence against household workers, and attempts to commit such acts; General Recommendation No. 19, Convention on the Elimination of All Forms of Discrimination against Women, para 23, 1992, U.N. Doc. CEDAW/C/19921L.1/Add. 1 [hereinafter General Recommendation No. 191(defining family/domestic violence as physically, mentally, and sexually violent acts that family members commit against women); *see also*, Katherine M. Culliton, *Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas*, 34 HARV. INT'L L.J. 507, 522 (1993) (arguing that failure to prosecute domestic violence is an international human rights violation).

rape, female genital cutting [FGC],[73] domestic violence, and forced marriage. In the 1990s, the Board of Immigration Appeals began to recognize the argument that gender-based persecution is persecution based on membership in a particular social group.

In 1996, the Board of Immigration Appeals, in the *Matter of Kasinga*,[74] reversed an immigration judge's denial of asylum and held that female genital cutting was persecution, thus allowing a woman fleeing this harm to be eligible for asylum. In this case, the feared harm was to be carried out by a non-state actor-elder woman of a tribe. Ms. Kasigna's father did not believe in female genital cutting.[75] When he died unexpectedly, Kasigna's paternal aunt assumed authority over her.[76] Her aunt arranged for Kasigna to be the fourth wife of a 45-year-old man. One of the conditions of the marriage was that Kasigna had to undergo female genital cutting.[77] Although Kasinga objected, she was married to the man, and her aunt informed Kasinga she would undergo female genital cutting four days after the marriage.[78] Kasigna's mother and sister helped Kasinga escape to Germany before she was forced to undergo this practice.[79] The Board held that Kasigna was a member of a particular social group – "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by the tribe, and who oppose the practice"[80] – and that the fear of female genital cutting constituted a well-founded fear of persecution, thereby meeting the requisite legal definition for asylum.[81] The decision is noteworthy in in at least two significant regards. First, the Board of Immigration Appeals recognized that agents of persecution may in fact be non-state actors, including family and community members. Second, it recognized the practice of female genital cutting was intended to control a woman's sexuality.[82] In finding that Kasigna merited a grant of asylum, the Board held that she could not change her gender and should not have to change the "characteristic of having intact genitalia," thereby recognizing that social groups may include a gender construct or definition.[83]

Yet in 1999, the Board of Immigration Appeals overturned a grant of asylum to a Guatemalan woman, Rody Alvardo, on account of her membership in the particular social group "Guatemalan women who have been involved intimately

73. Female genital cutting is also referred to a female genital mutilation (FGM). *See* Nahid Toubia, *Female Circumcision as a Public Health Issue*, 331 N. ENGL. J. MED. 712-716 (1994).

74. 21 I. & N. Dec. 357 (BIA 1996). The immigration officials improperly recorded the applicant's name as Kasigna. The correct spelling of her name is Fauziya Kassindja. KAREN MUSALO, ET. AL, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH, 712 (4th ed. 2011).

75. Karen Musalo, *In re Kasinga, A Big Step Forward for Gender-Based Asylum Claims*, 73 INTERPRETER RELEASES 853 (1996).

76. *Id*.

77. *Id*.

78. 21 I. & N. Dec. 357 (BIA 1996).

79. *Id*.

80. Musalo, *supra* note 75, at 853.

81. 21 I. & N. Dec. 357 (BIA 1996).

82. *Id*.

83. *Id*.

with Guatemalan male companions, who believe that women are to live under male domination."[84] Rody was fleeing over ten years of horrific domestic violence from her husband, a former soldier in the Guatemalan military.[85] The Board agreed that the violence perpetrated by Rody's husband constituted persecution[86] and that Rody was indeed unable to obtain state protection.[87] Yet the Board held that the persecution was *not* on account of any of the five protected grounds, including membership in a particular social group, because Rody failed to demonstrate that Guatemalan society recognized this social group.[88] Instead, the Board found that the persecution was only directed at Rody alone, and therefore, Rody was not part of a social group.[89]

Rody's counsel petitioned then-Attorney General Janet Reno to employ a rarely used power to certify the case for her decision.[90] Rody's attorneys argued that this extraordinary measure was needed because the Board's decision brought into question the Immigration and Nationalization Service's[91] commitment to its own Gender Guidelines,[92] and that the case was precedential raising serious concerns about the protection of other victims of gender-based persecution. The Attorney General did certify the case to herself, but instead of ruling on the merits of Rody's claim or interpreting previous Board decisions, Reno vacated the decision, thereby nullifying its precedential significance, and remanded the case back to the Board with instruction to stay the case until rules proposed by the Department of Justice became final.[93] To this day, those rules have not been finalized. However, eventually Rody was granted asylum by an immigration judge after the Department of Homeland Security (DHS) stipulated that she was eligible for asylum.[94] Yet, the disposition of *Matter of R-A-* left adjudicators without any binding precedent as to how asylum claims based on domestic violence should be decided.

84. *See In re* R-A-, 22 I. & N. Dec. 906, 911 (B.I.A. 1999), *vacated* 22 I. & N. Dec. 906 (A.G. 2001) (agreeing with immigration judge that domestic violence suffered by Ms. Alvarado was persecution).

85. *Id*. at 908-10.

86. *Id*. at 906-07.

87. *Id*. at 910-11.

88. *Id*. at 918-19.

89. *Id*. at 917-20.

90. *See In re* R-A-, 22 I. & N. Dec. 906, (B.I.A. 1999), *vacated* 22 I. & N. Dec. 906 (A.G. 2001).

91. The Immigration and Nationalization Service was dissolved in 2002 and its immigration functions were restructured into various components at the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

92. Memorandum from Phyllis Coven, Dep't of Justice, Office of Int'l Affairs, Considerations for Asylum Officers Adjudicating Claims from Women (May 26, 1995) [hereinafter U.S. Guidelines].

93. *See In re* R-A-, 22 I. & N. Dec. 906, 906 (A.G. 2001) (vacating the Board of Immigration Appeals decision in anticipation of regulations that would have provided interpretive guidance).

94. *See* Karen Musalo, *A Tale of Two Women: The Claims for Asylum of Fauziya Kassinjda, Who Fled FGC and Rody Alvarado, a Survivor of Partner (Domestic) Violence*, GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTRE 73, 74 (Efrat Arbel et al. eds. 2014).

It was not until 2014 in the case *Matter of A-R-C-G*[95] that the Board issued a precedential decision holding that a woman who has suffered horrific abuse at the hands of her husband in her native Guatemala qualified for asylum as a member of a particular social group. *In Matter of A-R-C-G-*, the Board of Immigration Appeals, in a published decision, "unambiguously establishe[d] that women fleeing domestic violence can be eligible for particular social group-based asylum."[96] The applicant, CG, fled Guatemala with her three children after her husband subjected her to brutal abuse.[97] Married at the age of seventeen, CG's husband beat her weekly, raped her, poured paint thinner on her, and regularly threatened to kill her.[98] When CG went to the police for help, they refused to help, and the abuse escalated.[99]

CG argued that the violence was persecution because she was a member of a particular social group of "married women in Guatemala who are unable to leave their relationship."[100] The Board held that both gender and marital status, particularly when a person cannot leave, were immutable characteristics because they are traits "that either cannot be changed or that the group members should not be required to change."[101] The Board recognized the barriers domestic violence victims face in leaving abuse. Importantly, "the Board instructed future adjudicators determining whether marriage is an immutable characteristic to consider the legal and social constraints on dissolution, the applicant's personal experiences, and background country information."[102] The Board also found that the group was defined with particularity because each of the elements "have commonly accepted definitions within Guatemalan society."[103] Finally, the Board held that this group is socially distinct because the Guatemalan "society in general perceived, considers, or recognizes persons sharing this particular characteristic[s] to be a group."[104]

The Board of Immigration Appeals decision *In Matter of A-R-C-G* came after a non-binding decision *In the Matter of L-R-* where the Department of Homeland Security (DHS) acknowledged that "in some cases, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such

95. *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014), *overruled by Matter of* A-B-, 27 I. & N. Dec. 316 (A.G. 2018) (confirming its holdings from *Matter of* W-G-R and *Matter of* M-E-V-G that to be a member of a recognized social group the group must have "social visibility" and "particularity").

96. *Asylum Law: Membership in a Particular Social Group – Board of Immigration Appeals Holds that Guatemalan Woman Fleeing Domestic Violence Meets Threshold Asylum Requirement – Matter of* A-R-C-G-, *26. I. & N. Dec. 388 (B.I.A. 2014)*, 128 HARV. L. REV. 2090, 2090 (2015).

97. *Matter of A-R-C-G-*, 26 I. & N. at 392-94.

98. *Id*. at 389.

99. *Id*.

100. *Id*. at 392.

101. *Id*.

102. 128 HARV. L. REV., *supra* note 96, at 2092.

103. *Matter of A-R-C-G-*, 26 I. & N. at 392-94

104. 128 HARV. L. REV., *supra* note 96, at 2093.

membership."[105] When the Board remanded the case to the immigration judge, DHS did not oppose granting asylum to L-R-. Initially, L-R- was denied asylum by an immigration judge because the immigration judge did not view the violence suffered by L-R- as gendered, but rather as random violence.[106]

L-R- appealed the case to the Board of Immigration Appeals, and DHS filed a brief stating that domestic violence victims can form a particular social group for purposes of asylum.[107] Specifically, the Center for Gender and Refugee Studies notes "[t]he brief takes the position that gender and status in a relationship, status in the family, and/or status in society can define a social group that fulfills all the current social group requirements, and that these characteristics may be one central reason for gender-based persecution."[108] Advocates representing individuals fleeing gender-based violence hailed DHS's opinion as a significant development in the law. Not only did the Board of Immigration Appeals recognize that gender as part of the construction of social group claim is legally viable, the government who historically opposed such claims, publicly reversed its long-held position and urged the Board of Immigration Appeals to grant L-R- asylum.

Overall, U.S. asylum law jurisprudence for gender-based claims can be characterized as progressing – albeit slowly when compared to other western countries, including Canada and European Union countries – with some steps forward yet often followed by a retreat from protection. "The evolution of U.S. case law reflected the tension between the two perspectives. At times it has demonstrated an openness, and a consistency with international guidance, while at times it has appeared to be motivated more by the fear of floodgates, than by principled application of legal standards."[109] In addition to the narrow avenues for immigration relief for gender-based asylum claims, there is also the reality of the women who are persecuted. Women globally face greater poverty, access to fewer resources, often exclusive responsibility for rearing children, and restricted mobility. For many women the challenges in accessing legal protection in another country, like the United States, are insurmountable.

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105. *See* DHS's Supplemental Brief at 12, *Matter of* L-R- (B.I.A. 2009) (unpublished), http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf (proposing a group defined as "Mexican women who are viewed as property by virtue of their positions within a domestic relationship") (internal quotation marks omitted).

106. Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 AM. U.J. GENDER SOC. POL'Y & L. 529, 557 (2015) (noting that "L-R- suffered many years of brutal physical and sexual violence and had 3 children, each of whom was conceived because of marital rape perpetrated by her common law husband . . . [and] [h]e also tried to rape her and prevented her from seeing her children").

107. *Matter of L-R-*, CENTER FOR GENDER AND REFUGEE STUDIES, UNIVERSITY OF CALIFORNIA HASTINGS, https://cgrs.uchastings.edu/our-work/matter-l-r (last visited Feb. 1, 2019).

108. *Id.*

109. KAREN MUSALO, ET. AL, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH, 616 (4th ed. 2011).

C. FEDERAL ADMINISTRATIVE AGENCY CHANGES

1. Credible Fear Interviews and Expedited Removal

In 1996, Congress empowered immigration officers at the border to summarily deny entry to individuals who presented themselves for admission and were not in possession of a valid travel document or visa.[110] Concerned that this extraordinary discretionary power for expedited removal would result in legitimate asylum seekers being turned away from U.S. borders thus abrogating the U.S. domestic and international legal responsibilities to refugees, Congress established the credible fear process.[111]

Because Congress wanted to make sure that "there should be no danger that an alien with a genuine asylum claim will be returned to persecution,"[112] it required immigration officers at the border to screen an individual for asylum eligibility when placed in expedited removal processing. Individuals subject to expedited removal under this new regime were required to be placed in detention until his or her removal was executed.[113] In practice, this meant the officer would ask the individual a series of questions in the individual's native language to determine if they had a credible fear of persecution.[114] A credible fear of persecution is defined by the statute as a "significant possibility" that the applicant "could establish eligibility for asylum."[115] If there was evidence of fear, the individual was referred to an asylum officer for an interview.[116] This interview was more robust than the initial border screening. It was designed intentionally to give the benefit of the doubt to the applicant and to determine only whether or not there was a colorable claim for relief that an immigration judge should adjudicate.[117] Until the applicant established a credible fear, the statute mandated the applicant's detention.[118] If a credible fear of persecution was found, the individual was provided the opportunity to present their claim for asylum before an immigration judge.[119] The decision to detain an individual after a credible fear finding is discretionary, and

110. Not all individuals presenting themselves at the border were subject to expedited removal. Unaccompanied children, returning Legal Permanent Resident, asylees and refugees were explicitly exempt. 8 U.S.C. § 1232(a)(5)(D) (unaccompanied children); 8 U.S.C. § 1225 (b)(1)(C) (legal permanent residents, asylees and refugees); 8 C.F.R. § 235.3.

111. 8 U.S.C. § 1225(b)(1)(B)(v) (2012).

112. H.R. REP. NO. 104-469, pt. 1, at 158 (1996).

113. Immigration and Nationality Act § 235 (b)(1)(B)-(iii)(IV), 8 U.S.C. § 1225 (mandating detention of any person referred for an asylum interview until a final determination of credible fear is made, or if no fear is found, until the individual is deported).

114. CREDIBLE FEAR REFERRAL IN EXPEDITED REMOVAL AT PORTS OF ENTRY IN THE UNITED STATES, REPORT, WASHINGTON, D.C., U.S COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM 20-23 (2005).

115. 8 U.S.C.§ 1225(b)(1)(B)(v).

116. 8 U.S.C. § 1225 (b)(1)(A)(ii).

117. The asylum officer is required during the interview to "elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d) (2012). In addition, the asylum officer must "conduct the interview in a non-adversarial manner." *Id*.

118. Immigration and Nationality Act § 235 (b)(1)(B)-(iii)(IV), 8 U.S.C. § 1225.

119. 8 C.F.R. § 208.3 (f).

as such, the applicant could also apply for release from detention.[120] While the process was intended to prevent asylum seekers from being returned to their countries where they feared harm, the practice was far from perfect.[121] Several studies by the U.S. Commission on International Religious Freedom found that in certain instances immigration officers improperly pressured individuals to withdraw their application for admission and effectively abandon their asylum claim. These studies also found that the government did not have sufficient quality assurance mechanisms in place to make sure asylum seekers were not improperly sent back.[122]

Despite these problems, the credible fear process tended to funnel asylum seekers through a robust adjudication process that provided an opportunity to present their claim for relief and an appeal by right to the Board of Administrative Appeals.[123] Yet, the Obama administration, concerned that the credible fear interview process was not sufficiently exacting, used executive branch authority, to alter the standard to determine if an asylum seeker possessed the requisite credible fear to proceed with their claim before an immigration judge.[124] Arguing that too many individuals without valid claims to asylum were allowed to present their cases to immigration judges, thereby exacerbating an already significant backlog in the federal immigration court system.[125] USCIS altered the standard required by an applicant to demonstrate a credible fear.[126] These changes to the standard of proof reduced the number of applicants allowed to proceed with their claims for asylum, but such changes were not designed to be a substitute for an adjudication before an immigration judge. Quite the contrary, such changes were designed to ensure that valid claims were given a fair hearing

120. Application for parole and likelihood of release was arbitrary and often time was determined by the district the applicant was detained in and applying for release. While the regulations and internal memorandums provided some guidance to detention and removal officers, in practice release varied significantly among districts and country of origin or humanitarian considerations did not significantly impact the decision to release.

121. *See* U.S. COMM'N ON INT'L RELIG. FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 34-37 (2016), https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf; *see also* U.S. COMM'N ON INT'L RELIG. FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME 1: FINDINGS & RECOMMENDATIONS 1-2, 4*;* VOLUME II: EXPERT REPORTS (2005).

122. U.S. COMM'N ON INT'L RELIG. FREEDOM, BARRIERS TO PROTECTION at 19 (2016); *See also* US COMM'N ON INT'L RELIG. FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL, VOLUME 1: FINDINGS & RECOMMENDATIONS 50; VOLUME II: EXPERT REPORTS (2005).

123. INA § 208(a)(1), 8 U.S.C. 1158; 8 C.F.R. §§ 208.14(c)(4)(ii)(A), 208.22.

124. John Lafferty, Release of Updated Asylum Division Officer Training Course (ADOTC) Lesson Plan, Credible Fear of Persecution and Torture Determinations, Feb. 28, 2014 (requiring that applicants "demonstrate a substantial and realistic possibility of succeeding on their case).

125. *Id*.

126. According to Professor Bill Ong Hing, "[a] fair reading of the Lesson Plan leaves one with the clearly improper message that officers must apply a standard that far surpasses what is intended in the statutory framework and U.S. asylum law." Memorandum from Bill Ong Hing to John Lafferty, Chief of USICS Division, re "Lesson Plan, Credible Fear of Persecution and Torture Determinations," Apr. 21, 2014.

and claims that could not be supported were not funneled into the immigration court backlog.[127] Many advocates representing asylum seekers were troubled by these changes because they were concerned that the design of the system was sending qualifying refugees back to persecution and even death.[128]

2. Creation of Asylum Corps for Adjudicate Affirmative Asylum Applications

Recognizing that asylum claims differed significantly from other claims for immigration benefits,[129] the Immigration and Nationality Service (INS) established the Asylum Corps, consisting of professional asylum officers trained in international relations and international law.[130] The Asylum Corps also provided access to asylum officers at a human rights documentation center that had information on human rights.[131] Prior to this regulatory overhaul,[132] applicants not in deportation proceedings lodged their asylum claims by filing an application with the Immigration District Office in the jurisdiction where they resided.[133] District immigration officers were responsible for adjudicating immigration benefits

127. These changes were instituted after a U.S. House of Representatives Judiciary Committee held a hearing on February 11, 2014 entitled, "Asylum Fraud: Abusing America's Compassion?" Hearing, Subcommittee on Immigration and Border Security, Committee on the Judiciary, 113 Cong. 2nd Sess., 113-66 (Feb. 11, 2014).

128. Sara Campos and Joan Friedland, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT, American Immigration Council Special Report, May 2014, 3-4, (discussing the various criticism voiced by immigrant advocates including Human Rights First) *available at* https://www.americanimmigrationcouncil.org/sites/default/files/research/asylum_and_credible_fear_claims_final_0.pdf.

129. An application for asylum is a request for an individual residing in the U.S. to be recognized as a refugee as defined by INA section 208 (established by the Refugee Act of 1980).

> "In 1980, Congress passed the Refugee Act, Pub. L. No. 96-212, 94 Stat. 102, which amended the INA, Pub. L. No. 82-414, 66 Stat. 163 (1952)(codified as amended in sections of 8 U.S.C.). The 'motivation for the enactment of the Refugee Act' was the 'United Nations Protocol Relating to the Status of Refugees ["Protocol"],' INS v. Cardoza-Fonseca, 480 U.S. 421, 424, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987), 'to which the United States had been bound since 1968.' *Id*. at 432–33. Congress was clear that its intent in promulgating the Refugee Act was to bring the United States' domestic laws in line with the Protocol. *See id*. at 437. (stating it is 'clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act . . . that one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol].'). The Board of Immigration Appeals ("BIA"), has also recognized that Congress' intent in enacting the Refugee Act was to align domestic refugee law with the United States' obligations under the Protocol, to give statutory meaning to 'our national commitment to human rights and humanitarian concerns,' and 'to afford a generous standard for protection in cases of doubt.' In Re S-P-, 21 I. & N. Dec. 486, 492 (B.I.A. 1998) (quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A. N. 141, 144)." Grace v. Whitaker, 344 F. Supp. 3d 96, 106 (D.D.C Dec. 19, 2018).

130. 55 Fed. Reg. 30,674, 30,676 (1990) (codified at 8 C.F.R. § 208.1 (b)).

131. 8 C.F.R. § 208.1(b) (2011).

132. For an insightful history of the asylum adjudication process and history, see David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*,138 U. PA. L. REV. 1247, 1294-1322 (1990).

133. David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725, 726 (1995).

including work authorization, employment and family based adjustment of status applications and requests for naturalization.[134] They did not receive robust training in human rights law or U.S. international treaty commitments and obligations.[135] Not surprisingly, these officers were not well positioned to make refugee status determinations.[136]

The 1990 and 1994 Reforms to the asylum adjudication process removed the asylum adjudication function from INS district offices and required that all affirmative asylum applicants were adjudicated by trained individuals which "guarantees refuge to those in genuine need,[137] and to reduce waiting times for adjudication to provide quicker resolution on the claims for applicants.[138] Under the new regime, applicants submit their asylum applications by mail to one of eight asylum offices, depending on geographic location,[139] and the applications are adjudicated based on the date the application is received. This practice was largely put in place because asylum applicants under the 1994 reforms were eligible to apply for work authorization if their asylum application had been pending for more than 150 days with the asylum office.[140]

These reforms are not a panacea. Still embedded in the adjudication process are significant cross-cultural challenges, structural impediments, and political and personal bias.[141] However, such reforms were a notable signal that the U.S. Governments bureaucracy was attentive to the need to transform systems to better accommodate its international human rights obligations and provide a more culturally sensitive approach to working with individuals who had experienced trauma.[142]

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134. *Id*.

135. *Id*. at 727.

136. Sarah Ignatius, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE, at 1 (National Asylum Law Project: Harvard Law School, 993) (noting that "[t]he first comprehensive nongovernmental study of the quality of decision-making of the INS asylum officer corps has found that overall it is a substantially more professional, informed, and impartial body of asylum decision-makers than the INS examiners who adjudicated asylum claims previously.).

137. Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455, 457 (1992).

138. Name-making Asylum Policy, *supra* note 133, at 755.

139. 8 C.F.R. §§ 208.2. – 208.4.

140. Name-making Asylum Policy, *supra* note 133, at 753. The clock stops if the applicant asks for additional time to prepare the case or fails to show up for a fingerprint appointment.

141. *See generally* Midori Takagi, *Orientals Need Apply: Gender-Based Asylum in the U.S.*, 33.1 Ethnic Studies Review 61 (2010) (discussing the forced binary asylum seekers fleeing gender-based violence in that they must somehow demonstrate their home country is barbaric and the U.S. is modern in order to articulate a colorable claim for many adjudicators); Amy Shuman and Carol Bohmer, *Representing Trauma: Political Asylum Narrative*, 466, J. AMER. FOLKLORE, 394-414 (2004) (discussing their findings on the gendered structure of the U.S. asylum system and how it impacts the decision by adjudicators of gender-based asylum claims); Andy J. Rottman, Christopher J. Fariss and Steven C. Poe, *The Path to Asylum in the US and the Determinants for Who Gets In and Why*, 43 INT'L MIGRATION REV. NO. 1 3-34 (2009) (analyzing asylum decision making process and the import of cultural and linguistic bias by decisions particularly post 9-11).

142. *See* Name-making Asylum Policy, *supra* note 133 at 755.

3. U.S. Gender Guidelines for Adjudicating Asylum Claims

After the United Nations High Commissioner[143] called upon governments to issue gender guidelines for asylum claims in 1995, then INS issued gender guidelines for asylum claims in the United States.[144] The guidelines recognize that female refugees experience harm unique to their gender.[145] They make it clear that sexual violence constitutes persecution and instruct asylum officers not to dismiss such violence as "purely personal harm."[146] The guidelines provide instruction to asylum officers on the intersection of gender and political opinion and gender and membership in a particular social group.[147] The guidelines reiterate the Board of Immigration Appeals case *Matter of Acosta*[148] that held a social group is a "group of persons all of whom share a common, immutable characteristic," which includes an "innate" characteristic "such as sex" or a "shared past experience."[149] Finally, the guidelines instruct officers to be sensitive to cross-cultural difference when making a credibility finding. For example, women who have experienced significant trauma may not maintain eye contact, may have trouble recalling certain events, or may show no emotion even when recounting horrific violence.[150]

Even though these guidelines provided important training and instruction, they are limited in reach. These guidelines did not change the law or the eligibility requirements for asylum, rather "they are an interpretation of existing law."[151] Furthermore, these guidelines are only binding on asylum officers and not immigration judges or appellate judges.[152] This means that many asylum applicants fleeing gender-based persecution do not benefit from the guidelines.

4. Vermont Service Center

Applicants for U and T visas and VAWA relief apply at the Vermont Service Center regardless of their geographic location.[153] Housed at the Vermont Service

143. *See, e.g.*, U.N. Exec. Comm., 36th Sess., No. 39(k), *Refugee Women and International Protection*, U.N. Doc. A/40/12/Add.1 (Oct. 18, 1985); U.N. Exec. Comm., 39th Sess., No. 54, *Refugee Women*, U.S. Doc. A/43/12/Add.1 (Oct. 10, 1988); U.N. Exec. Comm., 41st Sess., No. 64(a), *Refugee Women and International Protection*, U.N. Doc. A/45/12/Add.1 (Oct. 5, 1990); U.N. Exec. Comm., 44th Sess., No. 73(e), *Refugee Protection and Sexual Violence*, U.N. Doc. A/48/12/Add.1 (Oct. 8, 1993) [collectively, hereinafter *UN Guidelines*].

144. *See* Phyllis Coven, *Considerations for Asylum Officers Adjudicating Asylum Claims From Women* (Dep't. of Justice, INS Office of International Affairs), 1995 [hereinafter *U.S. Guidelines*]

145. *Id.* at 4.

146. *Id.* at 9.

147. *Id.* at 11.

148. 19 I. & N. 211, 1985 WL 56042, at *211 (BIA March 1, 1985).

149. *Id.* at *233.

150. *U.S. Guidelines* at 5.

151. Leslye Orloff & Nancy Kelly, NOTE, *A Look at the Violence Against Women Act and Gender Related Political Asylum*, 1 VIOLENCE AGAINST WOMEN, no. 4, Dec. 1995, at 392.

152. U.S. Guidelines at 22. Asylum officers are part of the U.S. Citizenship and Immigration Services at the U.S. Department of Homeland Security. Immigration Judges are housed within in the Executive Office for Immigration Review at the U.S. Department of Justice.

153. H.R. Rep. No. 109-233 at 116 (2005).

Center are adjudicators trained on the law and policy for U and T visas and immigration relief for certain battered immigrants.[154] Similar in design to the Asylum Corps, these adjudicators receive specific training on not only the law, but also the effects of trauma and cross-cultural differences and expectations.[155] In addition, USCIS established a hotline dedicated to U/T/VAWA applications staffed by knowledgeable personnel.[156]

USCIS also provides certain protections for applicants. For example, USCIS is not allowed to consider certain information filed in the application when making an adverse decision. Rather specific circumstances when information can be released and it is limited to who is able to request such information.[157] Importantly, if an applicant's request was not granted, the Vermont Service Center's general policy is to simply reject the application and not place the individual in removal proceedings before an immigration judge.[158] Applicants who were out of status or dependent on a batterer were fearful to seek law enforcement help and immigration benefits. This policy was put in place to alleviate such fears and encourage victims of gender-based violence to seek assistance and protection.[159]

III. THE TRUMP ADMINISTRATION'S SYSTEMATIC OTHERING OF WOMEN FLEEING GENDER-BASED VIOLENCE

Individuals fleeing gender-based violence face significant barriers to protection: adversarial hearings, heavy evidentiary burdens, narrowly conceived legal protections, cultural biases, and gendered expectations on the part of adjudicators on how an applicant should present a claim substantively and the applicant's demeanor during the presentation.[160] Over the past thirty years, as international laws and norms evolved to place gender violence in the public law space, U.S.

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154. *Id.*

155. *Id.*

156. USCIS Memo, Customer Service Avenues for VAWA, U and T Related Filings, http://www.ncdsv.org/images/USCIS_CustomerServiceAvenuesForVAWATandUrelated.pdf.

157. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 384, 110 Stat. 3009-1, 3009-652; *See also*, USCIS POLICY MANUAL, Vol. 1, Part A, Chapter 5 (2019), https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume1-PartA-Chapter5.html.

158. Martin de Bourmont, *Risk of Deportation for Immigrant Victims of Trafficking*, FOREIGN POLICY (July 9, 2018), https://foreignpolicy.com/2018/07/09/new-us-policy-raises-risk-of-deportation-for-immigrant-victims-of-trafficking-immigration-visa/.

159. 146 CONG. REC. S10,195 ("VAWA 2000 addresses residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationship that either had not come to the attention of the drafters of VAWA 1994 or have arisen since . . . ."); *see also* Anna Hanson, *The U-Visa: Immigration Law's Best Kept Secret*, 63 ARK. L. REV. 177 (2010) (discussing the legislative intent behind the Violence Against Women Act and the Trafficking Victims Reauthorization Act of 2000).

160. Amy Shuman & Carol Bohmer, *Gender and Cultural Silences in the Political Asylum Process*, SEXUALITIES, Vol. 17(8)939-57, 949 (2014) (noting the dissonance women face in having to retell their experiences of sexual violence as testimony because women victims of sexual violence often experience significant shame and so often work to hide or mask these acts of violence to protect themselves and their family) [hereinafter *Gender and Cultural Silences*].

humanitarian and refugee law made significant strides to address systems that had all too often worked to silence women and their trauma.[161]

Yet in a little over a year, decades of advocacy and education have been rolled back by President Trump and his Administration. These roll backs threaten to make it near impossible for those fleeing gender-based violence to find a safe haven and legal protection in the United States. The next section traces both the procedural and substantive changes exacted by the Trump Administration that explicitly target or disproportionally affect immigrant women fleeing gender-based violence.

A. PROCEDURAL ASSAULTS

Some of the first protections eliminated for people fleeing gender-based violence were procedural, a tactic often employed by the government when seeking to limit access to benefits.[162] While these administrative changes do not in themselves narrow or eliminate legal eligibility or grounds for relief, implementing greater procedural hoops in accessing the adjudication system that confers such relief had the immediate practical effect of thwarting relief to applicants in need of protection. Specifically, this section describes the efforts of the Trump administration to circumvent procedural due process by: (1) creating more procedural hurdles in credible fear determinations; (2) revamping scheduling asylum application interviews that both fast track new applications and increase delays for applications that have been waiting for an interview; (3) targeting potential victims of human trafficking and other serious crimes with deportation; and (4) handicapping immigration judges by eliminating training and technical assistance for cases involving gender-based persecution and creating unrealistic case completion goals.

1. Operationalizing the Expedited Removal and Credible Fear Process to Circumvent Asylum Hearings Before Immigration Judges

One of the most significant procedural changes made by the Trump Administration has been the circumvention of the credible fear interview in the asylum process. The Trump Administration, has characterized the credible fear interview process as "a loophole" in the immigration system[163] and has worked to further limit the credible fear process to guarantee that even fewer asylum claims

161. *Id.*

162. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that while terminating veteran benefits require certain constitutional procedural protections, the process afforded to the applicant was constitutionally sufficient); Kelly v. Goldberg, 397 U.S. 254 (1970) (holding that when a state contemplates terminating certain benefits, in this case state welfare assistance, that implicate a constitutionally protected right, including property, the individual potentially affected must be afforded certain procedural protections).

163. Sari Horwitz, *Sessions Calls on Congress to Tighten Rules for Asylum Seekers*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-calls-on-congress-to-tighten-rules-for-people-seeking-asylum/2017/10/12/9a1c6c3e-af56-11e7-a908-a3470754bbb9_story.html?utm_term=.b38956437af4.

would be lodged with immigration judges.[164] The Trump Administration has modified the requirements for the credible fear process, changing what Congress intended to be screening mechanism to apply for relief to an outright adjudication for relief.

The Trump Administration's practice is to collapse two distinct processes: the credible fear interview process and the asylum eligibility determination. The credible fear interview process intentionally has a low threshold for establishing a credible fear while in contrast, asylum eligibility requires applicants to meet a higher standard.[165] Asylum eligibility is determined by an immigration judge at a hearing in which the applicant testifies, can call on witnesses to testify, and present corroborating evidence to support the claim for asylum.[166] Now, under the Trump Administration, the credible fear process serves as the proxy for the asylum determination process.[167] This has played out in that asylum officers essentially have begun requiring that an asylum seeker, within days of their arrival and while in detention (and in the recent cases, while traumatized after separation from their child), must properly plead to each of the elements in the asylum definition.[168] Failure to satisfy anyone of these elements is a basis for a negative credible fear finding and an expedited removal order.[169] Not insignificant is the fact that at the credible fear determination process, an individual is not represented by counsel and is also detained by immigration authorities.[170]

While this change is harmful to all asylum applicants placed in credible fear determinations, it is particularly problematic for victims of gender-based violence. Specifically, women who have suffered trauma[171] may be unwilling to

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164. Exec. Order 13767 (EO 113767), *Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017), Fed. Reg., 8793-97, *available at* www.gpo.gov/fdsys/pkg/FR-2017-01-30/pdf/2017-02095.pdf.

165. *See* U.S. COMM'N ON INT'L RELIG. FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL 34-37 (2016), *available at* https://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf

166. 8 C.F.R. § 208, subpart A.

167. Grace v. Whitaker, 344 F. Supp. 3d 96, 104 (D.D.C Dec. 19, 2018) (striking down the changes to the credible fear process by USCIS after Matter of A-B- was decided and holding the new rule was arbitrary and capricious because it "impermissibly heighten[ed] the standard at the credible fear stage.")

168. Abigail Hauslohner and David Nakamura, *In Memo, Trump Administration Weighs Expanding the Expedited Deportation Powers of DHS*, WASH. POST, (July 17, 2017), https://www.washingtonpost.com/world/national-security/in-memo-trump-administration-weighs-expanding-the-expedited-deportation-powers-of-dhs/2017/07/14/ce5f16b4-68ba-11e7-9928-22d00a47778f_story.html?utm_term=.f9e4128bfabd; *See also*, Practice Advisory from law firm Henson, Pachuta & Kammerman, *Asylum Seekers under the Trump Administration: Expedited Removal, Credible Fear and Parole*, https://hensonpachuta.com/asylum-seekers-under-the-trump-administration-expedited-removal-credible-fear-and-parole (last visited Mar. 5, 2019).

169. *Id*.

170. INA § 235(b)(1)(B)(iii)(IV) (mandating detention of any person referred for an asylum interview until a final determination of credible fear is made or if no fear is found until the individual is deported).

171. Shuman, *supra* note 141, at 394 (discussing cultural obstacles to the asylum process and finding that "trauma narratives are culturally constructed" and how they are told are not just based on local cultural discourses, but bureaucratic and legal structures of the asylum process itself).

share their experiences with an asylum officer during a credible fear interview or may have difficulty recalling certain incidents or providing specificity about the harm to an immigration officer.[172]

2. A Race Against Time: Expediting Asylum Interviews

On January 29, 2018, USCIS changed its policy on how it will process asylum applications filed affirmatively with asylum offices. Specifically, applications are now adjudicated in reverse order, giving priority to the most recently filed asylum applications when scheduling asylum interviews ("last in, first out"). USCIS announced the new system for prioritizing asylum applications: "1) First priority: Applications that were scheduled for an interview, but the interview had to be rescheduled at the applicant's request or the needs of USCIS; 2) Second priority: Applications that have been pending twenty-one days or less; and 3) Third priority: All other pending affirmative asylum applications will be scheduled for interviews starting with newer filings and working back towards older filings."[173]

USCIS's purported justification was a protracted backlog of asylum applications of 311,000 pending asylum cases as of January 26, 2018.[174] Yet, it is unclear how this change in policy will alleviate the backlog. Instead, it is problematic both for individuals who recently filed their applications as well as for applicants who are already caught up in the backlog and have been waiting for an interview.[175] In particular, those who have suffered trauma, who have filed an asylum application before this policy, are anxious about waiting for an interview and resolution, will be forced to continue to live with uncertainty.[176] With the new policy in effect, now those who file their application are scheduled for an interview in as little as two weeks after filing, leaving them with little time to prepare or collect evidence to corroborate their claim.[177] Given that individuals fleeing gender-based violence often need extra time to prepare their claims, these individuals are

172. *Id*. at 396-97; *See also* Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637, 653 (2007).

173. USCIS, *USCIS To Take Action to Address the Asylum Backlog*, (Jan. 31, 2018), https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog.

174. *Id*.

175. CBJC Staff, *USCIS Announces Misguided Scheduling Interview Changes for Asylum Interviews*, CITY BAR JUST. CTR. (Feb. 1, 2018), https://www.citybarjusticecenter.org/news/uscis-announces-misguided-scheduling-changes-asylum-interviews/; *See also* Tania Karas, *Last In, First Out: Policy Change Moves Longtime Asylum Seekers to the Back of the Line*, PUBLIC RADIO INT'L, (Jan. 4, 2019), https://www.pri.org/stories/2019-01-04/last-first-out-policy-change-moves-longtime-us-asylum-seekers-back-line.

176. *Id*.

177. Under U.S. asylum law, asylum applicants are required to file their asylum application within one year of arrival (with certain narrow exceptions). As a result applicants that are running up to the deadline will often file a "skeletal" asylum application filling out the basic information on the form and supplementing the application with corroborating evidence after the initial application is filed. This new policy will not allow for this type of approach.

disproportionately harmed by this change in policy.[178]

3. USCIS Targets Potential Victims of Trafficking and Crimes for Deportation

In June 2018, the U.S. Citizenship and Immigration Services announced that it would begin deportation proceedings for undocumented immigrant victims or witnesses of crime.[179] Under U.S. immigration law almost any immigration officer, including officers housed within USCIS, has the authority to issue a Notice to Appear (NTA).[180]

This new practice has eliminated the traditional firewall between humanitarian relief applications and the removal process. USCIS officers are now instructed to place into removal proceedings victims who come out of the shadows to apply for a visa but then are denied the visa for reasons like incomplete paperwork or missing a deadline.[181] While USCIS would previously not guarantee that a U or T visa, an applicant who did not receive relief, would not be placed in removal proceedings the service did not routinely refer those applicants who did not receive a visa for removal.[182] Instead, USCIS only issued an NTA if the applicant revealed information outside of the evidence supporting the claim for a visa that established an independent basis for removability.[183]

These procedural changes make an already difficult process even more challenging, and erode protections for both victims of gender-based violence and persecution, as well as trafficking victims.[184]

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178. *See generally*, Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637 (2007) (arguing changes in asylum law under REAL ID disproportionally affect women asylum seekers).

179. DEPARTMENT OF HOMELAND SECURITY, *Revised Guidance for the Referral of Cases and Issuance of Notice to Appear (NTAs) in Cases involving Inadmissible and Removable aliens*, *available at* https://www.aila.org/infonet/uscis-issue-an-nta (last visited Feb. 5, 2019) ("NTA Memorandum").

180. 8 C.F.R. §§ 1003.14, 239.1 (2013). "In criminal law the corollary would be that a police or parole officer, a detective or a police chief could indict a suspected criminal and a trial would commence. While an Immigration and Customs (ICE) trial attorney – "immigration prosecutor"— represents the government in the hearing and is an immigrant's adversary, there is no requirement that the immigration prosecutor decide to go forward with a trial for the proceedings to commence and confer jurisdiction to the Immigration Court."; *See also*, Erin B. Corcoran, *Seek Justice, Not Just Deportation: How to Improve Prosecutorial Discretion in U.S. Immigration Law*, 48 LOYOLA L.A. L. REV. 119 (2015) (citing 8 C.F.R. § 239.1 (2013), which lists forty-one different categories of employees at DHS who have the authority to file a Notice to Appear and commence removal proceedings against a noncitizen).

181. *See* NTA Memorandum, *supra* note 179.

182. *See* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, *AILA Policy Brief: Expanded NTA Guidance Will Have Devastating Effects on Survivors of Domestic Abuse, Trafficking, and Other Serious Crimes*, https://www.aila.org/infonet/aila-policy-brief-expanded-nta-guidance-will-have (last visited Feb. 5, 2019) (summarizing the past practice of USCIS to not refer unsuccessful U and T Visa applicants).

183. *See* NTA Memorandum, *supra* note 179.

184. Sam Sipes, *Immigration change could protect human traffickers*, NEWS-PRESS (Aug. 23, 2018), https://www.news-press.com/story/opinion/contributors/2018/08/23/immigration-change-could-protect-human-traffickers/1073511002/.

4. Stripping Essential Tools for Immigration Judges: Eliminating Discretion, Training and Expertise

The Executive Office for Immigration Review (EOIR) is the administrative body within the U.S. Department of Justice that houses the immigration courts and the Board of Immigration Appeals.[185] There are fifty-eight immigration courts in the United States, and over 400 immigration judges who hear cases of immigrants charged by the Department of Homeland Security as removable from the United States. Generally speaking, when a non-citizen is charged as removable,[186] immigration judges are responsible for hearing any claims by a non-citizen applying for immigration relief. Increasingly, due to congressional changes, most notably the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), immigration judges have limited discretion to grant humanitarian relief to non-citizens who are otherwise removable.[187]

One of the few remaining discretionary decisions immigration judges still have is the decision of whether or not to grant asylum.[188] Prior to the Trump

185. The Board of Immigration Appeals is the administrative appellate body with jurisdiction to review immigration judge decisions granting relief or ordering the removal of immigrants from the United States. 8 C.F.R. §1003.1.

186. Typically, a non-citizen is either deportable, i.e. was lawfully admitted at some point to the United States, but the immigrant's status expired, or the immigrant committed an act, usually a crime, thereby making them deportable from the United States; or inadmissible, i.e. the individual was not admitted into the United States by an immigration officer. *See* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L. J. ONLINE 167, 171-72 (2012) (summarizing the legislative history of the 1996 legislation that created Immigration and Nationality Act section 235 (a)(1) and collapsed deportation proceedings and exclusion proceedings into removal proceedings. The provision made it clear that even if an immigrant crossed a physical border, if she had not been admitted or inspected by an immigration official, she was an applicant for admission).

187. Congress in recent years has criminalized non-violent minor immigration violations and stripped immigration judges almost all authority to exercise favorable discretion in cases where the equities may merit suspending deportation. *See* U.S. DEPT. OF JUSTICE, *Memorandum from Doris Meissner, Comm'r, Immigration & Naturalization Serv., on Exercising Prosecutorial Discretion* (last visited Feb. 5, 2019), https://www.shusterman.com/pdf/prosecutorialdiscretionimmigration1100.pdf. "Since the 1996 amendments to the Immigration and Nationality Act (INA) which limited the authority of immigration judges to provide relief from removal in many cases, there has been increased attention to the scope and exercise of the Immigration and Naturalization Service's (INS or the Service) prosecutorial discretion." *Id.*; "The IIRAIRA eliminated both the possibility of relief from deportation and the possibility of bond for many criminal and other aliens placed in deportation and/or removal proceedings who previously would have been eligible for relief. Consequently, the IIRAIRA rendered the exercise of prosecutorial discretion by the INS the only means for averting the extreme hardship associated with certain deportation and/or removal cases." Shoba Sivaprasad Wadia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 U. CONN. PUB. INT. L. J. 243, 252-53 (2010) (citing Letter from Robert Raben, Assistant Attorney General, to Rep. Barney Frank, U.S. H.R., on Use of Prosecutorial Discretion to Avoid Harsh Consequences of IIRAIRA (Jan. 19, 2000)).

188. One criticism of this discretion is an immigrant's ability to avail herself of this discretionary asylum relief: such relief is often more dependent on the jurisdiction she resides in than the merits of the situation. *See, e.g.*, Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (concluding that one of the strongest variables in determining the outcome of an asylum claim was not nationality of applicant or type of claim, rather what immigration district in the United States the applicant applied in).

Administration, immigration judges attended an annual conference[189] and received training on adjudicating cases involving vulnerable populations, which included victims of gender-based violence seeking asylum.[190] In 2013, EOIR also created an Assistant Chief Immigration Judge for Vulnerable Populations, whose primary responsibility was to provide training and oversight to immigration judges adjudicating cases involving vulnerable populations and to serve as a liaison with the non-profits representing immigrants considered "vulnerable" and appearing before immigration courts.[191]

In July 2017, the U.S. Department of Justice decided to eliminate the Assistant Chief Immigration Judge for Vulnerable Populations position and the training they provided.[192] Eliminating trainings for immigration judges is particularly problematic in gender-based asylum cases.[193] These cases are often hard to prove because corroborating evidence is difficult to obtain;[194] the applicant, usually suffering from post-traumatic stress, has a difficult time testifying;[195] the applicant may not appear to be credible due to the past harms they have suffered; and the law is nuanced.[196] Indeed, adjudicators in gender-based asylum claims often will find the female applicant not credible because she did not conform to their gendered and cultural expectations of motherhood.[197] Therefore, trainings by professionals to educate adjudicators on these potential issues provided guidance on understanding bias and how to adjudicate these claims in a professional, compassionate, and effective manner.

In addition to eliminating training and technical assistance for immigration judges, former Attorney General Jeff Sessions used his extraordinary power to certify a case to himself to further limit one of the few discretionary tools available to immigration judges - the ability to administratively close an immigration

189. Paul Wickham Schmidt, *EOIR Eliminates Annual Training for Immigration Judge Corps*, LEXISNEXIS NEWSROOM POST (Apr. 13, 2017), https://www.lexisnexis.com/legalnewsroom/immigration/b/insidenews/posts/eoir-eliminates-annual-training-for-immigration-judge-corps-paul-wickham-schmidt (discussing the annual immigration judge training).

190. *Id*.

191. Juan P. Osuna, Director of Executive Office for Immigration Review, Written Testimony to U. S. Senate Comm. on the Judiciary Hearing "The Unaccompanied Alien Children Crisis: Does the Administration Have a Plan to Stop the Border Surge and Adequately Monitor the Children, 5 (Feb. 23, 2016), https://www.judiciary.senate.gov/imo/media/doc/02-23-16%20Osuna%20Testimony.pdf.

192. Letter from US Department of Justice, Executive Office for Immigration Review to Erin B. Corcoran, (July 18, 2017) (notifying the recently appointed Assistant Chief Immigration Judge that the position had been eliminated in its entirety) (on file with author).

193. *See, e.g*., Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011, 1036 (2007) (arguing that training for immigration judges would result in better decision making and help mitigate bias in judicial decision making).

194. Aubra Fletcher, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. OF GENDER, L. & JUST. 111, 113 (2004) [hereinafter The REAL ID Act].

195. GENDER AND CULTURAL SILENCES, *supra* note 160, at 949.

196. Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 COLUM. HUMAN RIGHTS L. REV. 1 (2016).

197. GENDER AND CULTURAL SILENCES, *supra* note 160, at 949.

removal proceeding or suspend removal. In *Matter of L-A-B-R-*,[198] Sessions held that immigration judges are not permitted to administratively close cases or suspend removal while the immigrant is waiting for the government to rule on their visa application.[199] The EOIR housed in the U.S. Department of Justice, now measures an immigration judge's performance on case completion goals.[200]

Taking away immigration judges' discretion on the timing of individual hearings is particularly troubling for gender-based claims because these claims are complex, often involve expert witness testimony, and preparing the applicant to testify in a courtroom takes time.[201] If immigration judges' performance is based on case completion, regardless of outcome, immigration judges are discouraged from allocating the necessary time to complex cases,[202] including gender-based claims, and are unlikely to grant continuances even in cases where an applicant needs additional time to find representation or secure an expert witness.[203]

The Trump Administration's actions to effectively bar immigration judges from providing more time to applicants to present an asylum case further problematizes a system that is already inherently gendered[204] in ways that make obtaining protection significantly more challenging for individuals fleeing gender-based violence.[205] Shuman and Bohler's research on structural impediments to gender-based asylum claims illuminate the reality that for an asylum claim to succeed the applicant must force her narrative into U.S. cultural expectations of gender behavior, both in substance and in form. They conclude:

> Cultural perceptions of normative gendered behavior play an unarticulated role in immigration officials' assessments of applicants' narratives. Successful claims conform to the immigration officials' expectations, and in the case of asylum, officials have expectations not only about the content of the narrative but also about how it is told.

198. Matter of L-A-B-R- et al., 27 I&N Dec. 405 (A.G. 2018).

199. *Id*. at 415-16.

200. Letter from Jill E. Family, et. al. to Jeff Sessions, Attorney Gen. (Aug. 14, 2018) (expressing opposition by 120 law professors to the Attorney General's case completion goals for immigration judges) [hereinafter Law Professor Letter], *available at* https://commonwealthlaw.widener.edu/files/resources/letter-to-sessions-immigration-adjudication-with-s.pdf; *see also* Jeffrey S. Chase, *Lawyer Files Disciplinary Complaint Against Chief Immigration Judge* (Dec. 28, 2017), https://www.jeffreyschase.com/blog/2017/12/28/lawyer-files-disciplinary-complaint-against-chief-immigration-judge.

201. GENDER AND CULTURAL SILENCES, *supra* note 160, at 939 (arguing that women often have more difficulty telling their story, that often women are not comfortable retelling instance of sexual violence through a male interpreter or an interpreter who knows the woman's family).

202. Law Professor Letter, *supra* note 200, at 7.

203. Under the REAL ID Act asylum-seekers are required to produce corroborating evidence of "otherwise credible testimony," unless they do not have or cannot reasonably obtain such evidence. *See* INA, §208(b)(1)(B)(ii), 8 U.S.C. §1158(b)(1) (2012); *see also*, Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637 (2007) (arguing the increased corroboration requirements under the REAL ID Act significantly impact women asylum seekers).

204. GENDER AND CULTURAL SILENCES, *supra* note 160, at 948.

205. Melloy, *supra* note 203 at 653-57 (discussing the challenges women have in testifying about the trauma they have endured and the barriers to obtaining asylum).

> This is true in law generally, though it is even clearer in asylum cases because cultural assumptions of what is normal create obstacles to understanding accounts of usually extraordinary circumstances.[206]

B. SUBSTANTIVE CHANGES TO ASYLUM LAW SEVERELY LIMIT PROTECTIONS FOR GENDER-BASED ASYLUM CLAIMS

1. Overturning Precedential Case Law on Gender-Based Persecution

In addition to a variety of procedural hurdles put in place by the Trump Administration, former Attorney General Jeff Sessions intentionally narrowed the grounds of eligibility for gender-based asylum claims. In 2018, *In the Matter of A-B-*[207] then-Attorney General Jeff Sessions on his own initiative, not at the request of either party, certified the case to himself.[208] Sessions overturned the Board's decision in *Matter of A-R-C-G-*[209] holding in a precedential decision that the applicant, a victim of domestic violence perpetrated by her husband, was not eligible for asylum.[210] Even though the Department of Security took the position that *Matter of A-R-C-G-* was good law and should not be overturned.[211]

Similar to the asylum applicant in *Matter of A-R-C-G*, AB's relationship with her husband was characterized by constant brutality and she often feared for her life.[212] She repeatedly sought protection from the Salvadoran authorities, to no avail.[213] While she was able to obtain two restraining orders against her husband, they went completely unenforced, and he continued to abuse and threaten her.[214] One time, AB went directly to the police for help, but they told her "to get of here [the police station]."[215] AB eventually obtained a divorce from her husband, but he and his police officer brother found her and told her the divorce meant nothing and that her life was in danger.[216]

Yet, Sessions wrote:

> [g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum. While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group, in practice

206. GENDER AND CULTURAL SILENCES, *supra* note 160, at 948.
207. 27 I. & N. Dec. 316 (A.G. 2018).
208. 8 C.F.R. § 1003.l(h)(l)(i).
209. 26 I. & N. Dec. 388 (B.I.A. 2014).
210. *Id*.
211. *Id*.
212. Respondent's Opening Brief, Matter of A-B-, Apr. 2018, at. 6 (Copy of redacted brief on file with author).
213. *Id*. at 4-5.
214. *Id*. at 4.
215. *Id*.
216. *Id*. at 6.

> such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.[217]

He then held "[t]he mere fact that a country may have problems effectively policing certain crimes – such as domestic violence or gang violence – or that certain populations are more likely to be victims of crime cannot itself establish an asylum claim."[218] The "certain populations" Sessions refers to include individuals facing gender-based violence.

Even in the United States, victims of rape and sexual assault often have significant challenges to obtaining justice.[219] Indeed, just because a country has outlawed certain practices that harm marginalized groups does not mean such populations are safe or that they do not have a reasonable fear of harm. For example, in 1986 India began recognizing bride burning as a domestic violence crime, yet despite the criminalization of this heinous act, over 8,000 women die each year from bride burning and its occurrence is on the rise.[220]

The decision in *Matter of A-B-* does not just attempt to erase refugee protection from victims of domestic violence, but also to eliminate refugee protection for individuals who are victims of actions by non-state actors when such actions have been criminalized, regardless of whether such criminalization provides any, or adequate, protection and redress for victims. On a practical level, this means most people fleeing gender-based violence, whether domestic violence, forced marriage, or female genital cutting, which are criminalized but nonetheless exacted with impunity, will not qualify for asylum and refugee protection in the United States.[221]

2. State Department Ceases to Report on Global Gender-Based Violence

The current Administration's tactics in othering those fleeing gender-based violence works to erase available immigration protections for such individuals. Their disappearance is not only in our immigration system, but the reach is even

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217. 27 I. & N. Dec. at 320.

218. *Id.*

219. According to the Rape, Abuse and Incest National Network (RAINN) data, most rapists do not go to jail. Of 995 cases of rape, approximately only 230 cases are reported, only 46 cases lead to arrest, only 9 cases are referred for criminal prosecution and only 4 cases result in a felony conviction. *The Criminal Justice System: Statistics*, RAINN,https://www.rainn.org/statistics/criminal-justice-system (last visited Feb. 6, 2019).

220. Jason Koutsoukis, *India Burning Brides and Ancient Practices on the Rise*, SYDNEY MORNING HERALD, (Jan. 21, 2015), https://www.smh.com.au/world/india-burning-brides-and-ancient-practice-is-on-the-rise-20150115-12r4j1.html.

221. In fact, on July 11, 2018, USCIS issued a memorandum instructing asylum officers conducting credible fear interviews "be alert that under the standards clarified in *Matter of A-B-*, few gang-based or domestic-violence claims involving particular social groups defined by the members' vulnerability to harm may . . . pass the 'significant possibility' test in credible-fear screenings." USCIS Policy Mem., Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-, July 11, 2018 at 13 (PM-602-0162) [hereinafter A-B Memorandum].

more sinister. In an Oxfam report issued in November 2018, entitled "Sins of Omission: Women's and LGBTI Rights Reporting Under the Trump Administration"[222] a quantitative analysis by Marie E. Berry and Cullen S. Hendrix concluded that the U.S. State Department reporting on gender-based violence in its annual Country Reports on Human Rights Practices has significantly decreased, particularly in those countries that generate the highest number of asylum applications and have the greatest gender inequality.[223] Specifically, reporting on women's rights and issues outside the United States was down by thirty-two percent.[224]

This reversal in "naming and shaming" human rights abuses, targeted at gender-based violence and discrimination, erases these harms from documentation and undermines the work that is being done to address harms faced by women. The decision to cut back reporting on gender-based human rights violations is part of the Trump Administration's intentional plan to keep immigrants fleeing gender-based persecution from seeking protection in the United States. U.S. State Department Country Reports are important evidence in asylum cases because the reports can corroborate human rights conditions an applicant may be fleeing.[225]

> Applicants have to prove both that they were intentionally harmed and generally that they would be subject to further harm upon their return. In all asylum cases, the officials consider the conditions in the home country, and the immigration officials rely in part on official country reports for this information.[226]

For individuals fleeing gender-based violence, the violence is often perpetrated by non-state actors operating in the "private sphere" and so credibly corroborating the pervasiveness of the violence and the complicity of the state is challenging.[227] U.S. State Department Reports document and shed light on these acts and also serve as crucial evidence for such asylum claims. The Oxfam study finds:

> [H]olding all factors equal, every 1,000 successful asylum petitions from a sending country was associated with a decrease of one and half mentions. That is, a country whose citizens received 4,687 grants for

222. Marie E. Berry and Cullen C. Hendix, *Sins of Omission: Women's and LGBTI Rights Reporting Under the Trump Administration*, OXFAM (Nov. 2018), https://www.oxfamamerica.org/static/media/files/Sins_of_Omission.pdf. [hereinafter Sins of Omission]

223. *Id*. at 1.

224. *Id*. at 2.

225. *See, e.g*., Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, NORTHWESTERN J. LAW AND SOC. POL'Y , 1–29 (2007). The State Department reports are used by scholars and advocates because they did provide systematic data of human rights practices across the globe, even if these documents in the past were somewhat politicized. *See* David L. Cingranelli and David L. Richards, *The Cingranelli and Richards (CIRI) Human Rights Data Project*, 32 HUMAN RIGHTS QUARTERLY, 401–424.

226. GENDER AND CULTURAL SILENCES, *supra* note 160, at 943.

227. The REAL ID Act, *supra* note 194, at 113.

> asylum between 2014 and 2016, like El Salvador, would see a 50 percent decrease in reporting on women's issues and rights relative to a country with no asylum grantees."[228]

This finding is troubling because clearly the violence is not abating. Individuals continue to flee, but the proof of these acts is disappearing as the U.S. State Department is failing to document and corroborate. For example, the researchers found for the country of Afghanistan, the U.S. State Department Country Reports had changed significantly from 2015 and 2016 to 2017. Specifically, [t]he 2017 report eliminated many of these specific descriptions of violence against women and neglected to include a statement—central in the 2015 and 2016 reports—suggesting that women experiencing violence in Afghanistan have turned to suicide and self-immolation in large numbers."[229] This is at a time when other human rights organizations, including Amnesty International, are reporting in 2017 that during the ongoing conflict between the Taliban and government forces, the cases of gender-based violence were increasing in areas under Taliban control.[230] Examples of such violence included sexual harassment, acid attacks, kidnapping and death.[231]

IV. CONCLUSION

President Trump and his Administration's actions directed at immigrants seeking protection in the United States from gender-based violence are expansive and dangerous. These actions build upon our existing patriarchal scaffolding amassing an indomitable barrier – a wall – that keeps voices further silenced, and individuals further invisible. In its hegemonic quest for a certain kind of Nation, the Trump Administration has erected obstacles and distractions for those who threaten patriarchal identity and notions of who should have power and who should be submissive. Yet just as bricks can be laid, so too can they be broken and torn down. There is important work being done by lawyers, law students, and advocates to push back against this toxic nationalism and to protect the rule of law.

One of the most successful challenges to the Trump Administration's practices of Othering has been through the courts. In 2018, the American Civil Liberties Union and the Center for Gender and Refugee Studies at Hastings Law School filed a civil suit in federal court against the Attorney General[232] challenging administrative changes to the credible fear process for asylum seekers and Sessions' certified opinion in *Matter of A-B-*.[233] The plaintiffs in this case are

228. SINS OF OMISSION, *supra* note 222, at 4.

229. *Id*. at 6.

230. Amnesty International, *Forced Back to Danger: Asylum-Seekers Returned from Europe to Afghanistan* (2017), https://www.amnesty.org/download/Documents/ASA1168662017ENGLISH.PDF.

231. SINS OF OMISSION, *supra* note 222, at 6.

232. Grace v. Sessions (now Whittaker), 344 F.Supp.3d 96, 104 (D.D.C Dec. 19, 2018).

233. 27 I. & N. Dec. 316 (A.G. 2018).

twelve adults and children who fled sexual abuse and other severe violence in their home countries.[234] These individuals were referred for credible fear interviews with asylum officers by border patrol, and the asylum officers found that the applicants' testimonies were sincere and credible, yet refused to refer their cases to the immigration court system for a hearing on the merits of the claims.[235] The asylum office argued that a USCIS policy memorandum[236] on changes to the credible fear process, coupled with language in the Attorney General's decision in *Matter of A-B-*, created a heightened credible fear standard, which required them to deny the claims for protection.[237] The plaintiffs argued that the Trump Administration's changes to the credible fear process for asylum seekers violated the Administrative Procedures Act and the Immigration and Nationality Act.[238]

On December 19, 2018, in a 107-page opinion,[239] Federal District Court Judge Emmett Sullivan issued an injunction[240] barring USCIS from implementing its changes to the credible fear process, prohibiting the plaintiffs from being deported and requiring new credible fear interviews for each plaintiff. Importantly, the Court held that the Immigration and Nationality Act conferred jurisdiction for the court to review the Attorney's General written policy directive and specifically that INA § 243 (e)(3) provided exclusive jurisdiction to the District Court for the District of Columbia to hear systemic challenges to expedited removal.[241] The Court held that the U.S. Department of Homeland Security interpretation of the INA, which created a general rule against claims of domestic violence and gang violence at the credible fear stage, was an "impermissible interpretation of the statute."[242] In addition, the government's general rule created a heightened credible fear standard and was therefore arbitrary capricious.[243] This is an important victory not just for plaintiffs but for the rule of law. The federal judiciary is pushing back against attempts of the executive branch to unilaterally control immigration policy and signaling that immigration policy directives and decisions are bound by congressional intent and courts will not simply defer to the executive branch's own interpretation of a statute.[244]

In addition to federal litigation, much work is being done through advocacy, research, and scholarship to call attention to President Trump and his Administration's

234. Grace v. Whitaker, 344 F. Supp. 3d 96, 104 (D.D.C Dec. 19, 2018).
235. *Id.*
236. *See* A-B Memorandum, *supra* note 221.
237. *Id.*
238. *Grace*, 344 F. Supp. 3d at 105.
239. Grace v. Whitaker, 344 F. Supp. 3d 96 (D.D.C Dec. 19, 2018).
240. Grace v. Whitaker, no. 1:18-cv-01853 (EGS) Document 105 (Dec. 19, 2018).
241. Grace, 344 F. Supp. 3d at 115-17.
242. *Id.* at 125-26.
243. *Id.*
244. The Court applying Chevron deference and Brand X to Matter of A-B- held that the government could not instruct asylum officers to ignore other circuit court precedent and only apply the law of the circuit in which the credible fear interview took place because such instructions were arbitrary, capricious and contrary to law. Grace, 344 F. Supp. 3d 135-37.

attempts to assert executive branch authority in order to erase the identities of non-citizens fleeing gender-based persecution. This symposium edition is doing important and needed work – it is drawing attention to the Othering occurring under the Trump Administration and showcasing the work of both scholars and practitioners to provide a path forward. Ultimately, calling attention to Othering and the attempts at erasure create new ways to tell and understand the value difference, while demanding accountability from those in power. Not only does the law provide a powerful tool of resistance to this nationalism, but those who practice and theorize can use their knowledge and experience to stand up and push back against attempts to dilute its utility and value.