

REFORMING THE ASYLUM LAW OF THE PARTICULAR SOCIAL GROUP

By Matthew Nickson

(713) 204-3247

mpnickson@gmail.com

I. INTRODUCTION

In *Miranda v. Arizona*, Chief Justice Warren invoked the prescient observation of a Harvard Law School professor to justify the Supreme Court holding requiring that certain admonishments or their equivalents be spoken to persons in police custody:

“The quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law.”¹

The *Miranda* Court’s recognition of the rightness of a humanely enforced criminal law (which it eloquently relied upon to underscore its momentous decision) applies with equal force to the important measure of the qualitative structure and enforcement of federal asylum law, both in the affirmative context and particularly as a defense to removal. The principal provisions of the asylum law, sections 101(a)(42)² and 208³ of the Immigration and Nationality Act of 1952 (hereinafter, the “INA”),⁴ as amended by the Refugee Act of 1980,⁵ generally confer asylum eligibility upon individuals who do not pose a danger to the United States and who satisfy the primary definition of a refugee:

The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion,

¹ *Miranda v. Arizona*, 384 U.S. 436, 480 (1966) (citing Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L.REV. 1, 26 (1956)).

² 8 U.S.C. § 1101(a)(42).

³ 8 U.S.C. § 1158.

⁴ Immigration and Nationality Act of 1952, June 27, 1952, c. 477, 66 Stat. 163.

⁵ Refugee Act of 1980, Public Law 96-212, 94 Stat. 102.

nationality, membership in a particular social group, or political opinion[.]⁶

Fundamentally, the asylum law is the medium through which American society provides protection to individuals who, from the entire mass of persons with claims in U.S. courts, are *amongst the most deserving of mercy*: that is to say, *persecuted refugees*. This is because, as its moral duty, a merciful society will provide a fair and efficient legal apparatus for the swift vindication of well-founded asylum claims.⁷ Because the eyes of the world are surely exposed to the inhumane consequences of hatred and genocide, there

⁶ 8 U.S.C. § 1101(a)(42). The federal law definition of a refugee is modeled on the definition set out in Article 1(A)(2) of the United Nations Convention Relating to the Status of Refugees, *opened for signature* Jul. 28, 1951, 19 U.S.T. 6223 (hereinafter, the “U.N. Convention”). The U.N. Convention definition was the basis for refugee status determinations made by the Attorney General prior to the codification of the refugee definition in the 1980 Refugee Act, and it was also the basis for the Refugee Act definition. *See* S. Rep. No. 96–256 (1979), at 9, U.S. Code Cong. & Admin. News 1980, at 149 (“As amended by the Committee, the bill [S. 643; Senator Kennedy’s Refugee Act] establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States. The substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in November 1969 [in actuality, November 1968].”). The U.N. Convention is imported into U.S. law by the mechanism of the United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223 (entered into force with respect to the United States of America on Nov. 1, 1968) (hereinafter, the “U.N. Protocol”). Article I of the U.N. Convention provides a two-pronged test for establishing refugee status. Refugees are: (1) persons who have been accorded refugee status under previous international agreements, including the Conference of the International Refugee Organization, T.I.A.S. 1846, 62 Stat. 3037, and they are also (2) persons who satisfy the Convention’s normative definition. This definition confers protection upon an individual who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Under the U.N. Convention proper, parties had the option of restricting the refugee definition to persons who suffered from instances of European persecution or permitting the definition to include victims of worldwide persecution. Neither interpretation extended to persons fleeing instances of persecution that occurred after 1951; the U.N. Protocol of 1967 eliminated the temporal limitation. *See* U.N. Protocol art. 1(2).

⁷ The standard of proof for the establishment of a “well-founded” fear of persecution, as required by 8 U.S.C. § 1101(a)(42), has been described in some detail by the Supreme Court in *I.N.S. v. Cardoza-Fonseca*, **see n. 117 *infra***, but its interpretive refinement has been reserved for the federal courts of appeals. The standard for the establishment of a “credible fear” of persecution, the burden upon an affirmative application for asylum, is provided in 8 U.S.C. § 1225(b)(B)(v).

is no place anymore in the laws of any civilized nation, if ever there was, for the denial of credible asylum applications.⁸

Today's asylum law requires its own *Miranda*.⁹ Presently, the federal asylum law is not being fairly construed and enforced. No matter how just the principal asylum statute and the definition of a refugee may appear on their technical faces, the application of the laws in practice has fallen prey to a hesitancy that presumably is informed by policy considerations.¹⁰ Although the jurisprudence of the Board of Immigration Appeals—the appellate body within the Department of Justice that is responsible for reviewing decisions of the Executive Office for Immigration Review, the administrative court of first instance for deportation proceedings—has attracted public criticism from the federal courts of appeals, the appeals courts themselves have not construed the asylum law in a forthright manner. The shortcomings have already been amply documented elsewhere by

⁸ The problem of requiring, defining, and applying a credibility requirement in asylum cases has been studied. See Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEG. 101, 129–36 (2005).

⁹ The possible tendency of the Supreme Court to confine itself to narrow questions of immigration procedure has been mentioned in the academic literature. See Frederick Schauer, *The Court's Agenda—And The Nation's*, 120 HARV. L.REV. 4, 32 & n.92 (2006) (“Immigration has absorbed the nation’s citizens, pundits, and policymakers at least since the beginning of 2006, but the Court’s two narrow and procedural immigration decisions in the 2005 Term were leagues away from engagement with the central issues of immigration policy.”) (citing and discussing *Fernandez-Vargas v. Gonzales*, 126 S.Ct. 2422 (2006) (considering the retroactivity of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996); *Gonzales v. Thomas*, 126 S.Ct. 1613 (2006) (per curiam) (reversing a Ninth Circuit particular social group case on the grounds that the appeals court, sitting en banc, violated the “ordinary ‘remand rule’” that was affirmed in *INS v. Orlando Ventura*, 537 U.S. 12, 18 (2002) by finding, after overruling contrary circuit precedent to hold that a particular social group may be based upon family ties, that the petitioners before the court constituted a family-based social group and were persecuted on account of their family social group membership)).

¹⁰ It has been suggested that the poor quality of asylum decisions is also related to streamlining regulations that were promulgated in 2002 by Attorney General John Ashcroft. See David A. Martin, *Major Developments in Asylum Law Over the Past Year (2006)*, 83 NO. 34 INTERPRETER RELEASES 1889, 1891; 67 FED. REG. 54878–905 (2002).

judges¹¹ and in national newspapers,¹² as well as acknowledged by former Attorney General Alberto Gonzales, who proposed reforms to ameliorate the problem.¹³

Regrettably, the most unfair decisions concern asylum applicants who claim persecution on account of “membership in a particular social group.” These individuals, who are unable to advance claims of persecution on what might be considered to be more conventional grounds (assuming that the “typical refugee” is an individual fleeing religious persecution or a political dissident), include women from countries where gender rights are not respected; Hondurans and Salvadorans whose socioeconomic profiles have made them prey to onslaughts of gang violence; and others—like

¹¹ For example, in *Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005), Judge Posner cites various federal appeals cases that criticize the behavior of immigration judges and the BIA to accompany the factual observation that, from September 23, 2004 to September 23, 2005, panels of the Seventh Circuit reversed BIA decisions in whole or in part in 40% of the 136 cases that were disposed on the merits. Judge Posner states:

The tension between judicial and administrative adjudicators is not due to judicial hostility to the nation’s immigration policies or to a misconception of the proper standard of review of immigration decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice. [Citing *Niam v. Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2003)].

Similar criticisms have been voiced by other circuits. See *Jin Chen v. United States DOJ*, 426 F.3d 104 (2d Cir. 2005); *Qun Wang v. A.G. of the United States*, 423 F.3d 260 (3d Cir. 2005); *Pasha v. Gonzales*, 433 F.3d 530 (7th Cir. 2005); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005).

¹² See Henry Weinstein, *Contesting the Bar to Asylum*, L.A. TIMES (Aug. 21, 2006), available at http://cgrrs.uchastings.edu/documents/media/latimes_8-06.pdf (criticizing the opinion of the Fifth Circuit Court of Appeals in *Mwembie v. Gonzales*, 443 F.3d 405 (5th Cir. 2006) for holding that a Congolese office worker who suffered repeated beatings and rapes in a detention facility in connection with false accusations that she abetted the assassination of President Laurent Kabila did not establish persecution on account of a protectable ground); Adam Liptak, *Courts Criticize Judges’ Handling of Asylum Cases*, N.Y. TIMES (Dec. 26, 2005), at A1, available at <http://www.nytimes.com/2005/12/26/national/26immigration.html?ex=1293253200&en=64003a1468dafeda&ei=5088&partner=rssnyt&emc=rss>.

¹³ See Attorney General Alberto R. Gonzales *Outlines Reforms for Immigration Courts and Board of Immigration Appeals* (Dep’t of Justice Press Release, Aug. 9, 2006), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html. More recently, the Office of the Inspector General and the Office of Professional Responsibility of the U.S. Department of Justice have criticized the politicized hiring of Immigration Judges and members of the BIA. See *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (U.S. Department of Justice Office of Professional Responsibility, U.S. Department of Justice Office of the Inspector General, July 28, 2008), <http://trac.syr.edu/immigration/reports/194/include/DOJOIGGoodlingPoliticalHiring.pdf>.

homosexuals or victims of female genital mutilation—who are targeted in their native societies for reasons that do not directly implicate race, religion, nationality, or political opinion. The “particular social group” definition that determines the availability of relief for such applicants is somewhat difficult to conceptualize. What is a “social group?” Can any collection of individuals qualify as a protectable social group, for the reason that one or more members of any collection of individuals can, in theory, be targeted for harm on account of the characteristic that causes them to identify or be identified as forming a group? This article will argue, in line with the 1985 BIA holding in *Matter of Acosta*,¹⁴ that the most logically appealing and correct definition of a particular social group is one of *fundamentality* and *immutability*: that is, a “particular social group” that is worthy of protection under the asylum law is one whose members *cannot or ought not be required to disavow their group affiliations*. Such a definition appeals to our moral revulsion at mistreatment that is divorced from the rational punishment of willingly committed blameworthy acts, which mistreatment is directed instead at innate factors that render one or more individuals undesirable in the eyes of an ordering or power-wielding force.¹⁵ The definition—in reality, a deconstruction—is consistent with the deconstruction of the rationale for protection of victims of persecution on account of the four other grounds of protection in the federal law refugee definition: race, religion, nationality, and political opinion.

¹⁴ 19 I. & N. Dec. 211 (BIA 1985).

¹⁵ There is no reason why a “particular social group” cannot consist solely of one individual. If a person is harmed on account of a characteristic that he cannot or should not be required to change, he should be held to be a member of a particular social group, even in the rare instance in which he is the only person who possesses this type of characteristic. The animating components of the particular social group definition—fundamentality and immutability—must go before the cart.

Unfortunately, since *Acosta*, the BIA has altered its particular social group definition by endorsing unduly restrictive and logically inconsistent qualifications. Most strikingly, in its 2006 holding in *Matter of C-A*¹⁶—which the BIA reaffirmed in 2007 in *Matter of A-M-E- & J-G-U*¹⁷ and again in 2008 in *Matter of S-E-G*¹⁸ and *Matter of E-A-G*¹⁹—the BIA departed from the holdings of its prior cases by effectively requiring that applicants who allege persecution on account of a particular social group advance independent proof of the group’s discrete size and recognizability.

Seized of the foregoing, this essay will concentrate on the identification of two legal and administrative solutions to the problematic tilt of recent asylum case law. These are: (1) the repudiation of recent BIA decisions that define the statutory term “particular social group” in an unjustifiably narrow manner, especially the holdings in *Matter of C-A* and its progeny; and (2) the repudiation of federal appellate court decisions that invoke doctrines of judicial deference, especially a holding of dubious relevance in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,²⁰ to affirm

¹⁶ 23 I. & N. Dec. 951 (BIA 2006), *aff’d.*, *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub. nom.*, *Castillo-Arias v. Gonzales*, 127 S.Ct. 977 (2007).

¹⁷ 24 I. & N. Dec. 69 (BIA 2007), *aff’d.*, *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007).

¹⁸ 24 I. & N. Dec. 579 (BIA 2008); *see also Santos-Lemus v. Mukasey*, --- F.3d ----, 2008 WL 4111900, at *6–*8 (9th Cir. 2008).

¹⁹ 24 I. & N. Dec. 591 (BIA 2008).

²⁰ 467 U.S. 837 (1984). The central holding in *Chevron* implicates a two-step judicial review of agency action. An Article III court that reviews an agency interpretation of a provision of a statutory program that the agency administers must defer to the interpretation if it determines both that: (1) the meaning of the provision is ambiguous and its legislative history is ambiguous or nonexistent; and, (2) the agency interpretation amounts to a “permissible construction.” *Id.* at 843. In the words of Justice Stevens:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. *Rather*, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

faulty administrative constructions of statutory ambiguities in the asylum law. Therefore, in Part II, this article recommends that the jurisprudence of the BIA and the federal courts of appeals be rectified so that, once again, a showing of past persecution or well-founded fear of future persecution on account of a characteristic that an asylum applicant cannot or should not be required to change, *without qualifications or additional requirements*, be held to suffice for the conferral of asylum eligibility. And, in Part III, this article recommends that the federal courts of appeals undertake a more active role in the review of agency determinations of asylum ineligibility. It calls for the overruling of Supreme Court precedents that acknowledge the applicability of *Chevron* deference in the asylum context, particularly by emphasizing the similarity, in terms of consequences of poor decision-making, between asylum adjudications and capital punishment cases.

II. *MATTER OF ACOSTA*: THE RIGHT RESULT

The greatest challenge to judicial and agency application of a clear definition of a “particular social group” has been the inconsistent and hesitating nature of relevant BIA decisions. Ironically, the Board got the basic outline of the definition right in the first place, but then began to muddy the waters. In the seminal *Matter of Acosta*,²¹ the BIA offered a satisfactory two-pronged definition that entails an alternative immutability/unconscionability analysis: a “particular social group” is a collection of persons who share a common characteristic that “either is beyond the power of an

Id. at 842-43 (footnotes omitted). *Chevron* builds upon earlier Supreme Court administrative law holdings. See *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32, 39 (1981) (“Hence, in determining whether the Commission’s action was ‘contrary to law,’ the task for the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission’s construction was ‘sufficiently reasonable’ to be accepted by a reviewing court.”) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Train v. National Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975).

²¹ 19 I. & N. Dec. 211 (BIA 1985).

individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed.”²² This *Acosta* formulation, without qualification, is morally suitable for two reasons. First, it embraces individuals who have been harmed, or who fear harm, based on traits that they are helpless to alter. The *Acosta* opinion cites as examples “sex, color, or kinship ties, or . . . a shared past experience such as former military leadership or land ownership.”²³ Second, the “unconscionability” alternative reaches traits that, as a matter of basic ethics and rightness, an individual should not be required to change, even though he or she may be able to.²⁴ A possible example of this category of characteristics is homosexuality.²⁵

²² *Id.* at 233.

²³ *Id.*

²⁴ It may be well to consider “unconscionability” to constitute a type of “legal” immutability. The refugee law recognizes that an individual who may avoid persecution by abandoning a particular trait nevertheless cannot do so without losing an element of personal freedom or dignity in the process. This paradigm renders the trait in question immutable, at least so long as “that respect for the individual which is the lifeblood of the law,” to quote Justice Brennan, remains our lodestar. See *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring); *Farretta v. California*, 422 U.S. 806, 834 (1975) (citing *Allen*, 397 U.S. at 350-51); *Michigan v. Mosley*, 423 U.S. 96, 109 (1975) (citing *Farretta*, 422 U.S. at 834); *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting); *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 156 (2000).

²⁵ Homosexuality can be “changed” in the sense that, in instances in which a community merely punishes homosexual acts (as opposed to innate homosexual disposition), an applicant can abstain from homosexual conduct. See *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (designated as precedent by Attorney General Janet Reno in 1994 per Attorney General Order No. 1895-94), discussed *infra*. The *Toboso-Alfonso* Board held that Cuban homosexuals constitute a particular social group. See *id.* at 822 (“We do not find that the Service has presented persuasive arguments on which to reverse the immigration judge’s finding that the applicant established his membership in a particular social group in Cuba.”). The Board appears to have emphasized the fact that the applicant was persecuted on account of his innate homosexual predisposition, not because of his commission of homosexual acts. It stated:

The Service argues that “socially deviated behavior, i.e. homosexual activity is not a basis for finding a social group within the contemplation of the Act” and that such a conclusion “would be tantamount to awarding discretionary relief to those who engage in behavior that is not only socially deviant in nature, but in violation of the laws and regulations of the country as well.” The applicant’s testimony and evidence, however, do not reflect that it was specific activity that resulted in the governmental actions against him in Cuba, it was his having the status of being a homosexual.

Id. (citations omitted). Nonetheless, the Board indicated that homosexuality is immutable. *Id.* (“We principally note regarding this issue, however, that the Service has not challenged the immigration judge’s finding that homosexuality is an ‘immutable’ characteristic. Nor is there any evidence or argument that, once registered by the Cuban government as a homosexual, that that characterization is subject to change.”) (citation omitted).

As has been mentioned in Part I of this article, the principal advantage of the *Acosta* definition is that it extends asylum law protection to any group that is persecuted for the same reasons that individuals who belong to other legally protected groups are persecuted. Under the *Acosta* definition, the “particular social group” category acts as a logically consistent catchall.²⁶ The I.N.A. definition of a refugee, which is operative under the federal asylum statute (in the sense that an individual who meets the I.N.A. definition of a refugee under section 101(a)(42) satisfies a statutory prerequisite for a discretionary grant of asylum under section 208),²⁷ includes any person who has been persecuted or who fears persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion.”²⁸ The more specific grounds of protection—race, religion, nationality, and political opinion—are especially objectionable bases upon which to harm persons or restrict their freedoms precisely

²⁶ See Deborah Anker, *Membership in a Particular Social Group: Recent Developments in U.S. Law*, 1514 PRAC. LAW INST. CORP. 119 (2005) (article derived from a presentation on June 24, 2005 to the American Immigration Lawyers Association). Professor Anker, the Director of the Harvard Law School Immigration and Refugee Clinical Program, explains the unity and interchangeability of the five asylum grounds:

The grounds of persecution—race, nationality, religion, political opinion, and membership in a particular social group—represent basic civil and political rights and statuses, defined by immutable characteristics or protected beliefs and associations, which mark an individual as somehow outside the national community. In key respects, the grounds of persecution that precede MPSG [membership in a particular social group] are merely specific applications of the criteria for designating a MPSG. Thus, race and nationality (depending on the nationality laws) could be described as unchangeable characteristics. Religion and nationality may be considered a voluntary association for reasons so fundamental to human dignity that the individual should not be required to renounce them. Even where a person’s nationality has changed, persecutors may still target people because of their former nationality. Finally, political opinion may often overlap with MPSG, inasmuch as many politically active people associate with other like-minded people in political parties or organizations.

Id. at 126–27. It follows from Professor Anker’s observations about nationality that certain grounds of the refugee definition are both fundamental to conscience and immutable. Political opinion ought to be conceptualized as such. Even where an individual abandons a political opinion, his or her persecutor might continue to impute the opinion to the individual or to vindictively target the individual based on the past belief (consider the experience of converted Jews in Spain).

²⁷ 8 U.S.C. § 1158.

²⁸ 8 U.S.C. § 1101(a)(42).

because these characteristics either cannot be changed (*e.g.*, race) or should not be required to be changed (*e.g.*, religion, nationality, political opinion).²⁹ Thus, the *Acosta* BIA expressly arrived at its definition of membership in a particular social group by interpreting the term in light of the other four protectable grounds. The BIA invoked the “*eiusdem generis*” canon of statutory construction to treat the particular social group definition as a term of the same essence as its cohorts.³⁰

The history of the asylum law also supports the *Acosta* definition.³¹ Commending the particular social group category to an open-textured definition accords with the aims of the U.N. Convention, the treaty upon which the asylum law is based.³² This is

²⁹ Of course, the fact that a prospective refugee must demonstrate a link between his suffering and one or more statutorily protected personal factors is indicative of the limits of our compassion. As shall be argued in the conclusion *infra*, the most progressive reform of asylum law would be to strike the requirement of proving persecution on account of protected grounds.

³⁰ The *Acosta* Board stated:

We find the well-established doctrine of *eiusdem generis*, meaning literally, “of the same kind,” to be most helpful in construing the phrase “membership in a particular social group.” That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words. See, *e.g.*, *Cleveland v. United States*, 329 U.S. 14 (1946); 2A C. Sands, *supra*, § 47.17 [SUTHERLAND ON STATUTORY CONSTRUCTION (4th Ed. 1972)]. The other grounds of persecution in the Act and the Protocol listed in association with “membership in a particular social group” are persecution on account of “race,” “religion,” “nationality,” and “political opinion.” Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. See 1 A. Grahl-Madsen, *supra*, at 217 [THE STATUS OF REFUGEES IN INTERNATIONAL LAW (1966)]; G. Goodwin-Gill, *supra*, at 31 [THE REFUGEE IN INTERNATIONAL LAW (1983)]. Thus, the other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Id. at 233.

³¹ For a history of the genesis of the particular social group category, see the opinion of Judge Alito in *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (explaining that “[t]he Swedish representative [to the U.N. Convention] proposed this language, explaining only that it was needed because ‘experience had shown that certain refugees had been persecuted because they belonged to particular social groups,’ and the proposal was adopted”) (citing the record of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Rec. of the 3d Mtg., U.N. Doc. A/CONF.2/SR.3 at 14 (Nov. 19, 1951)). Judge Alito added that little else in the legislative history of the Refugee Act of 1980, which enacted INA section 208, *see* Refugee Act of 1980, tit. II (“Admission of refugees”; “Asylum Procedure”), 8 U.S.C. § 1158 (2000), Pub.L. No. 96–212, 94 Stat. 102; or the U.N. Protocol; or the U.N. Convention furnishes additional helpful legislative history. *See id.*

³² *See supra* note 6.

because the U.N. Convention was intended to break with the particularistic tradition of previous international pacts and to be comprehensive in scope.³³

Furthermore, the history of the Kennedy Refugee Act of 1980—the Act that codified both the definition of a refugee and the asylum statute—provides backing for the contention that the *Acosta* framework, without qualification, is statutorily required. Like the U.N. Convention (its progenitor), an essential goal of the Refugee Act was to normalize and systematize the process whereby asylum applicants are granted refugee status. Prior to 1980, there was no general statutory definition of persons eligible for asylum and withholding of removal.³⁴ The new law provided our universal refugee definition.³⁵ Ambassador Dick Clark, the U.S. Coordinator for Refugee Affairs, explained the need for the same in a 1979 Senate Judiciary Committee hearing:

Until now, we have carried out our refugee programs through what is essentially a patchwork of different programs that evolved in response to specific crises. The resulting legislative framework is inadequate to

³³ See John Hans Thomas, Note, *Seeing Through a Glass, Darkly: The Social Context of “Particular Social Groups”* in *Lwin v. INS*, 1999 B.Y.U.L. REV. 799, 801 (1999) (noting that the U.N. Convention “was the ‘first international compact to adopt a universal refugee definition, rather than one tied to a particular national or ethnic group’”) (citing Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 508 (1993)).

³⁴ A 1965 law, also championed by Senator Edward Kennedy (D-MA), made protection—initially subject to a strict numerical limitation (refugee visas were restricted to no more than 6% of the then-170,000 visas that were annually dispensed to all prospective worldwide immigrants)—available to persons fleeing persecution in communist countries and the “general area of the Middle East.” See An Act to Amend the Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911, 913 (1965); 8 U.S.C. § 1153(a)(7) (1976) (allowing the Attorney General to grant conditional entrant status to individuals from Communist areas and certain Middle Eastern countries if they could demonstrate persecution or fear of persecution on account of race, religion, or political opinion). An important accomplishment of the Refugee Act has been to reduce the reliance of the Attorney General on his parole authority, a power exercisable at his discretion without judicial review of eligibility determinations. See 8 U.S.C. § 1182(d)(5) (A) (providing that the Attorney General may “in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States”). See Edward M. Kennedy, *Refugee Act of 1980*, 15 INT’L MIGRATION REV. 1, 141 n.1 (1982) (noting that “[p]rior to the Refugee Act of 1980, this was the authority utilized to admit large groups of refugees beyond the 17,400 admissible under the former seventh preference”). See also Deborah Anker & Michael J. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L.REV. 9, 13-14 (1980).

³⁵ Of notable significance, the new law also led to the eventual abolition of the numerical limitation that had previously capped asylum grants. Compare 8 U.S.C. § 1158 with 8 U.S.C. § 1153(a)(7) (1976).

cope with the refugee problem we face today. It was originally designed to deal with people fleeing Communist regimes in Eastern Europe or repressive governments in the Middle East in the immediate post-war period and the early cold war years. This framework still assumes that most refugees admitted to the United States come from these two geographic areas, or from Communist-dominated countries.

The current law assumes that refugee problems are extraordinary occurrences. It provides for only a very limited number of refugees to enter the United States each year, on a conditional basis. But it also recognizes the Attorney General's power to parole additional individuals into the United States in case of unusually urgent humanitarian circumstances.³⁶

The Refugee Act's Senate Committee Report, which provides the bulk of the available congressionally-sanctioned legislative history, went on to describe the function of the new refugee definition:

The bill provides a new statutory definition of a refugee which will be added to the Immigration and Nationality Act. This definition eliminates the geographical and ideological restrictions now applicable to conditional entrant refugees under section 203(a)(7) of the Immigration and Nationality Act. Also, the new definition will bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968, and the United Nations Convention Relating to the Status of Refugees which is incorporated by reference into United States law through the Protocol.³⁷

The unqualified *Acosta* immutability/unconscionability framework is more consistent with the systematizing aim of the Refugee Act because it treats all persons who are victimized due to characteristics that they cannot or should not be required to change in a

³⁶ S.REP. NO. 96-256 (1979), at 4, U.S.Code Cong. & Admin. News 1980, at 144. *See also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 433-34 (1987) ("Section 203(a)(7) of the pre-1980 statute authorized the Attorney General to permit 'conditional entry' to a certain number of refugees fleeing from Communist-dominated areas or the Middle East 'because of persecution or fear of persecution on account of race, religion, or political opinion.' 79 Stat. 913, 8 U.S.C. § 1153(a)(7) (1976 ed.)").

³⁷ S.REP. NO. 96-256, at 4. *See id.* at 14-15 ("Section 201(a) of the bill [S. 643] provides a new refugee definition which basically conforms to that of the United Nations Convention and Protocol Relating to the Status of Refugees. It eliminates the geographical and ideological restrictions now applicable to conditional entrant refugees under Section 203(a)(7) of the Immigration and Nationality Act."). The Refugee Act also sought to make government benefits available to refugees on a more uniform basis. *Id.* at 10 ("Title III of the bill provides [federal refugee resettlement] assistance. It amends the Refugee Assistance Act of 1962, which has been the underlying source of authority for the Cuban and Indochinese refugee programs. *The bill expands these programs to cover all refugees admitted to the United States. . . .*") (emphasis added).

uniform manner. It does not make eligibility distinctions based upon subjective evaluations of the relative social visibility of persecuted groups; thus, the Refugee Act eschews the temptation to choose favorites among refugees. In this way, the unqualified *Acosta* approach is the most appealing interpretation of the particular social group.

Perhaps because of unspoken concerns about uncontrollable increases in the number of eligible asylum applicants from Central America, as well as the proliferation of fraudulent claims,³⁸ the Board of Immigration Appeals has limited the reach of *Acosta*. Thus, in practice, the process of affording recognition to particular social groups has involved a considerable deal of caution (and mysticism): the Board first conducts an immutability/unconscionability analysis and, if that inquiry is affirmatively satisfied, renders a secondary determination as to whether the group in question is sufficiently discrete. As refugee law scholar Deborah Anker has written regarding the general interpretation and application of the particular social group definition:

Regrettably, in misguided efforts to avoid “floodgates” objections, adjudicators and advocates have defined PSGs [particular social groups] with a narrowness and particularity that is inaccurate and inappropriate. One recent example of such a PSG is “young (or those who appear to be young), attractive Albanian women who are forced into prostitution.” In addition to narrowing the PSG along problematic lines, the example

³⁸ Historical and evidentiary considerations belie politicized floodgates concerns about the effects of asylum law reform on the actual number of eligible asylum applicants. See, e.g., Alex Kotlowitz, *Asylum for the World’s Battered Women: International Victims of Domestic Violence Should Find Haven in America*, N.Y. TIMES MAG. (February 11, 2007) (“During the cold war, when the U.S. quite readily granted asylum to political dissidents from the Soviet bloc, there were some who worried that tens of thousands of people who were unhappy under Communism would seek refuge in the U.S. It never happened. And Canada, which began granting asylum to victims of domestic violence in 1993, never experienced the surge that critics worried about. There are a number of reasons that today’s floodgate concerns are a red herring. Asylum seekers need to provide corroboration of their stories, and in the case of domestic violence, that could mean obtaining evidence like hospital records or affidavits from family members (which is what Vallabhaneni [an asylum applicant who is profiled in Mr. Kotlowitz’s article] provided). They must also be able to show that they can’t get governmental protection from their abusive husbands. What’s more, it is especially difficult for women, who often have little or no resources, to leave their home countries. It has also become more difficult to enter this country post-9/11.”).

defines a PSG in terms of persecution (“forced into prostitution”), inappropriately conflating the element of persecution into the PSG.³⁹

BIA recognition of protectable social groups has come in spurts. In 1988 in *Matter of Fuentes*,⁴⁰ the Board stated in dicta that former members of a national police force who are persecuted on account of past membership may qualify for protectable social group status.⁴¹ In 1990 in *Matter of Toboso-Alfonso*, the Board affirmed the protectable social

³⁹ Anker, 1514 PLI/Corp at 128 (discussing *Rreshjpa v. Gonzales*, 2005 FED Appx. **0341P**, **3 (6th Cir. 2005)).

⁴⁰ 19 I. & N. Dec. 658 (BIA 1988).

⁴¹ *Fuentes* involved a claim brought by a former member of the Salvadoran national police who alleged that he would be persecuted by guerrillas if returned to El Salvador. The BIA denied him relief, but stated in dicta that former members of a national police force could potentially constitute a particular social group:

The second aspect of the respondent’s claim is his fear arising from his status as a former member of the national police. This is in fact an immutable characteristic, as it is one beyond the capacity of the respondent to change. It is possible that mistreatment occurring because of such a status in appropriate circumstances could be found to be persecution on account of political opinion or membership in a particular social group. For example, where hostilities have ceased, an asylum applicant who is subject to mistreatment because of a past association may be able to demonstrate a well-founded fear of persecution on account of a ground protected by the Act.

Id. at 662. Mr. Fuentes had advanced two arguments in support of his asylum claim: (1) that he had been persecuted by guerillas for having served as a member of the Salvadoran national police, and (2) that he would be persecuted on account of his former police membership if returned to his home country. The BIA rejected the applicant’s fear of future persecution because, among other things, the BIA found that it was excessively localized. *Id.* at 663. The BIA also rejected the notion that Mr. Fuentes had suffered past persecution because it held that a person could not be persecuted by dint of his membership in a national police force or, by extension, his participation in a national civil war. *Id.* at 661 (“ . . . the dangers the police face are no more related to their personal characteristics or political beliefs than are the dangers faced by military combatants. Such dangers are perils arising from the nature of their employment and domestic unrest rather than ‘on account of’ immutable characteristics or beliefs within the scope of sections 101(a)(42)(A) or 243(h) of the Act, 8 U.S.C. §§ 1101(a)(42)(A) and 1253(h) (1982)”).

The BIA decision to unilaterally bar police and armed combatants from obtaining asylum is controversial because association with an internationally respected national military or rebel movement is arguably a characteristic that should not be required to be changed; rather, it could logically be found to satisfy the particular social group requirement in cases where persecution on account of actual or imputed political opinion cannot be proven. Instead of contestable reasoning (after all, it is unclear why the fact that policemen are targeted during civil wars on account of their employment status negates the facts that they are being targeted due to their actual or imputed political opinions or their employment-related association with others), a better way to exempt specified classes of otherwise eligible asylum applicants from prevailing would be through direct congressional enactments. Whether foreign civil war combatants merit asylum necessitates balancing competing interests: for example, the humane objective of non-refoulement against the fear of opening the doors to scores of participants in foreign wars and civil conflicts. (Interestingly, the *Fuentes* Board declined to hold that civil war combatants—police or rebels—must be barred from receiving asylum upon a default principle that participation in a civil war is tantamount to engagement in persecutory activities; *id.* at 661-62). An acceptable compromise might involve denying most civil war combatants asylum and withholding of removal while extending to them the protections of

group status of Cuban homosexuals.⁴² In 1996 in *Matter of H-*,⁴³ it extended recognition to members of the Marehan subclan of the Somali Darood clan based upon Marehan ties of kinship and linguistic commonalities going to issues of identifiability.⁴⁴ That same year in *Matter of Kasinga*,⁴⁵ the Board found that female members of the Tchamba-Kunsuntu tribe in Togo who have not undergone female genital mutilation and who oppose the practice form a cognizable particular social group for I.N.A. § 208 purposes.⁴⁶

Each of the above cases addressed or contemplated concerns about opening the floodgates to asylum applicants. In dismissing such concerns in *Matter of H-*, the Board cited the Supreme Court discussion in *I.N.S. v. Cardoza-Fonseca*⁴⁷ of a crucial observation that was recorded in the legislative history of the Refugee Act:

In *INS v. Cardoza-Fonseca*, *supra*, the Court recognized that Congress carefully considered arguments that the definition of “refugee” allowed for by the Refugee Act of 1980, Public Law No. 96–212, 94 Stat. 102, might expand the number of refugees eligible to come to the United States and force substantially greater refugee admissions than the country could absorb. However, citing a congressional report, the Court noted that “merely because an individual or group comes within the definition will not guarantee resettlement in the United States.” *INS v. Cardoza-Fonseca*,

the U.N. Convention Against Torture.

⁴² See also *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Cir. 2000) (holding that gay men in Mexico with female sexual identities form a particular social group); *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (same); *Matter of Tenorio*, No. A72-093-558 (BIA 1999) (per curiam) (holding that, in the case of a Brazilian applicant who was beaten and stabbed in Rio de Janeiro, homosexuality could form the basis of a particular social group claim); *In re Oscar Alberto Argueta*, A91 051 087 (BIA Nov. 14, 2003) (persons living with AIDS).

⁴³ 21 I. & N. Dec. 337 (BIA 1996) (en banc).

⁴⁴ *Id.* at 343.

⁴⁵ 21 I. & N. Dec. 357 (BIA 1996) (en banc).

⁴⁶ *Id.* at 365 (“In the context of this case, we find the particular social group to be the following: young women of the Tchamba-Kunsuntu tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”); *id.* at 366 (“The characteristics of being a ‘young woman’ and a ‘member of the Tchamba-Kunsuntu Tribe’ cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”).

As a sign of the government’s commitment to combating the pervasive effects of female genital mutilation in the United States, information regarding the practice is statutorily mandated to be distributed to new immigrant and nonimmigrant visa holders. See 8 U.S.C. § 1374. The statute—undoubtedly motivated by the publicity surrounding cases like *Matter of H-*—is also indicative of the halting, ad hoc manner in which viable particular social groups are legitimated.

⁴⁷ 480 U.S. 421 (1987).

supra at 444 (quoting H.R. Rep. No. 608, 96th Cong., 2d Sess. 10 (1979)). The Court further noted that “Congress has assigned to the Attorney General and his designates the task of making these hard *individualized* decisions; although Congress could have crafted a narrower definition, it chose to authorize the Attorney General to determine which, if any, eligible refugees should be denied asylum.” *Id.* at 444-45 (emphasis added).⁴⁸

The *H-* Board also cited an opinion issued in 1993 by Paul W. Virtue, the Acting General Counsel of the I.N.S., who dismissed the concern that equating clan membership with

⁴⁸ *Matter of H-*, 21 I. & N. Dec. at 344 n.5. The implications of the holding of the en banc BIA in *Matter of H-* were nevertheless contested in a dissenting opinion by Judge Heilman. *See id.* at 349–50 (dissenting opinion). Although Judge Heilman did not explicitly dispute the existence of incongruity between the establishment of membership in a particular social group and the establishment of eligibility for a discretionary grant of asylum, he concluded that the implications of the decision are too sweeping:

With this decision, we have joined the United States Court of Appeals for the Ninth Circuit in its quixotic attempt to right the wrongs of the world through the asylum process. For all intents and purposes, the majority has concluded that all persons who have been harmed or who fear harm due to civil war will be entitled to asylum in the United States. I see the situation differently, and do not understand the Refugee Act of 1980 to accord protection to members of warring clans in Somalia. Indeed, if one pursues the majority’s logic, all warring sides persecute one another, and this means that all civil wars are nothing more than acts of persecution. The implications of such a sweeping conception of “persecution” should give us all pause.

Judge Heilman’s dissent appears to contest the notion that persecution may exist in the context of a civil war. *See id.* at 343–44 (citing *Matter of Villalta*, 20 I. & N. Dec. 142 (BIA)). In fact, bearing in mind (to name but a few examples) the massacre by the Nigerian government of over one million Igbo persons during the Biafran independence war in the 1960s; the pogroms directed at Bosnians, Croats and Muslims in the former Yugoslavia during the 1990s; the Hutu genocide in Rwanda-Burundi in 1994; and, the racially and religiously-motivated bombings that are plaguing Iraq today; Judge Heilman should be understood to be objecting on policy grounds to a logical interpretation of the natural parameters of the refugee definition as that definition appears in I.N.A. section 101(a)(42). This is especially so because: (1) his dissent offers no alternative conception of the definition of membership in a particular social group, such as to modify *Acosta* or the application of *Acosta* in *Matter of H-*; and (2), as aforementioned, his dissent fails to contend with the truth that, to become eligible for a discretionary grant of asylum, a person who is found to be a member of a particular social group (or, for that matter, a person who is found to have been persecuted during a civil war) still must prove that he has satisfied all the additional elements for establishing asylum eligibility. Thus, Judge Heilman ignores the fact that, although “all warring sides persecute one another, and this means that all civil wars are nothing more than acts of persecution,” individuals who engage in acts of persecution are ineligible for asylum, withholding of removal, and protection under the U.N. Convention Against Torture. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(i)-(v) (asylum eligibility bars that apply to: individuals who have engaged in persecution; convicts of particularly serious crimes; individuals who have committed serious nonpolitical crimes abroad; individuals who pose a danger to the United States; and, individuals who are inadmissible or deportable due to terrorist activity). Judge Heilman’s fears of the pragmatic downside of a supposedly quixotic Ninth Circuit policy are therefore contestable both on overriding normative grounds and on grounds of statutory interpretation.

“membership in a particular social group” would render practically all Somalis eligible for asylum.⁴⁹ The opinion reads:

The fact that clans may be large, that almost all members of Somali society can claim some clan membership, and that inter-clan conflict is prevalent in Somalia, should not create undue concern that virtually all Somalis would qualify for refugee status. Any applicant for refugee status claiming membership in a particular social group must establish he or she has been persecuted, or may be persecuted, on account of that membership. Thus, while a Somali clan appears to meet the definitional criteria for a particular social group, this is merely the beginning of the inquiry into whether an individual applicant can establish refugee status.⁵⁰

Although not explicitly reviewed in *Matter of H-*, the I.N.S. opinion also mentions BIA precedents that distinguish between harm that is inflicted to overcome statutorily protected grounds and harm that is a mere product of general civil strife.⁵¹ The two kinds of harm do not always overlap,⁵² although persecution on account of statutorily

⁴⁹ See *id.* at 343-44 (citing U.S. Department of Justice, Immigration & Naturalization Service, Office of the General Counsel, Op. No. 93-91 (Dec. 9, 1993), available at 1993 WL 1504038).

⁵⁰ I.N.S. Gen. Co. Op. (at LEGAL ANALYSIS § A); see also Respondents’ Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 8-9 n. 7, *Thomas v. Gonzales*, 74 U.S.L.W. 3289 (U.S. Oct. 31, 2005) (No. 05-552).

Only in circumstances in which a reasonable fear of persecution directed against a specific group of individuals is self-evident will immigration courts dispense with the requirement of individualized showings of well-founded fears. See, e.g., *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1574 (9th Cir. 1986) (“Although no court has directly addressed this point, we previously have strongly indicated that, under the proper circumstances, a claim of persecution premised solely upon group membership could be maintained. In *Hernandez-Ortiz v. INS*, 777 F.2d 509 (9th Cir. 1985), we noted that a previous decision should not be read to suggest that membership in a persecuted group is insufficient in itself to require a finding of eligibility for asylum or an order prohibiting deportation. Such a suggestion would squarely contradict history. Few could doubt, for example, that any Jew fleeing Nazi Germany in the 1930’s or 40’s would by virtue of his or her religious status alone have established a clear probability of persecution. *Id.* at 515-16 n. 6 (citation omitted)”). For example, 8 C.F.R. § 208.16(b)(2) provides that an immigration judge need not require that an applicant for withholding of removal prove an individualized fear that his life or freedom would be threatened so long as the applicant can identify himself with a group against which there is “a pattern or a practice of persecution” in his country of proposed removal. Cf. *Tolego v. Ashcroft*, 452 F.3d 763, 766-767 (8th Cir. 2006) (denying the existence of a “pattern or practice” of persecution of Christians in Indonesia); *Ming Ming Wijono v. Gonzales*, 439 F.3d 868, 874 (8th Cir. 2006) (same).

⁵¹ I.N.S. Gen. Co. Op. (at LEGAL ANALYSIS § A) (“Somali clans are distinct from large, heterogeneous groups such as unenlisted young urban males, *Matter of Vigil*, 19 I. & N. Dec. 572 (BIA 1988), and those who oppose a legitimate national policy, *Rodriguez-Rivera v. I.N.S.*, 848 F.2d 998 (9th Cir. 1988), that have been found not to constitute particular social groups under the INA. In these cases, the avowed social group was defined largely by the fact that it was a population at risk of harm due to prevailing country conditions. Somali clans are distinct because they are defined by discrete criteria that are independent of prevailing country conditions.”) (emphasis added).

⁵² Take, for example, the theoretical circumstances of a Brazilian *Carioca* (Rio de Janeiro is among the most dangerous cities in the world) whose poverty requires him to live in a *favela* where he is

protectable grounds and conditions of general civil strife frequently coexist and interact in vicious cycles, with old neighbors turning upon old neighbors in Rwanda and the former Yugoslavia.⁵³ When persecution and general civil strife both appear to be present in combination in the homeland of the asylum applicant, the immigration court should attempt to ascertain the motivations of the persecutor according to the “reasonable person” test set forth by the BIA in *Matter of Fuentes*.⁵⁴ Specifically, the asylum applicant must satisfy the IJ that facts exist “on which a reasonable person would fear that the danger arises on account of his race, religion, nationality, membership in a particular social group, or political opinion.”⁵⁵ There is no requirement of proving the “exact motivation” of the persecutor.⁵⁶ Since persecutors do not always leave calling cards,⁵⁷ asylum applicants cannot be expected to arrive on U.S. shores with perfect

vulnerable to the depredations of marauding gangs and narcotics traffickers. The individual is at great risk of personal harm and property damage, but cannot be said to be specifically targeted or persecuted.

⁵³ See *id.* at § B(3) (stating that “civil strife and persecution are not mutually exclusive”).

⁵⁴ 19 I. & N. Dec. 658 (BIA 1988).

⁵⁵ *Id.* at 662. In 2005, Congress did attempt a codification of the applicant’s burden of establishing that alleged persecution was instigated on account of a protectable ground. See Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005, Public Law 109–13 (May 11, 2005), 119 Stat. 231. Section 101(a)(3) of the Act added 8 U.S.C. § 1158(b)(1)(B), which provides:

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant. (emphasis added).

Accord *Matter of S-P-*, 21 I. & N. Dec. 486, 489–90 (BIA 1996).

⁵⁶ *Fuentes*, 19 I. & N. Dec. at 658 (“An applicant does not bear the unreasonable burden of establishing the exact motivation of a ‘persecutor’ where different reasons for actions are possible.”). See also Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J.LEG. 101, 117 & nn. 124–26 (2006) (citing case law for the proposition that “[r]equiring asylum applicants to prove the mental states of their persecutors to an asylum adjudicator . . . ‘would largely render nugatory the Supreme Court’s decision in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and be inconsistent with the “well-founded fear” standard embodied in the “refugee” definition.”) (footnotes omitted) (citing *Zubeda v. Ashcroft*, 333 F.3d 463, 474 (3d Cir. 2003); *Matter of S-P-*, 21 I. & N. Dec. at 489–90. Professor Cianciarulo concludes that “[t]here is no evidence . . . suggesting that [Real ID Act] drafters intended a heightened nexus requirement for asylum applicants.” *Id.* at 120.

⁵⁷ See *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984) (“Authentic refugees rarely are able to offer direct corroboration of specific threats. ‘[I]t is difficult to imagine what other forms of testimony the petitioner[s] could present other than [their] own statement[s]. Persecutors are hardly likely

documentation of their assailants' motives.

On one occasion, the BIA has unsuccessfully attempted to crimp *Acosta*. In *Matter of R-A-*,⁵⁸ the BIA sought a departure from *Acosta* that would have imposed additional requirements upon applicants claiming social group membership; the decisive opinion, which provoked a spirited dissent, was vacated by Attorney General Janet Reno in 2001. *R-A-* concerned the political opinion and particular social group-based claims to protection of Ms. Rodi Alvarado, a savagely beaten Guatemalan woman.⁵⁹ In 1996, Ms. Alvarado was granted asylum by an IJ who found that Ms. Alvarado belonged to a particular social group that was composed of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”⁶⁰ The *R-A-* BIA partly rested its reversal of the IJ on a legal determination that the proposed social group failed to meet numerous “tests” (the Board did not explicitly posit that the tests would be mandatory) that go beyond the principal *Acosta* immutability/fundamentality inquiry. The General Counsel of the Department of Homeland Security has publicly criticized these purported modifications of *Acosta*.⁶¹

to provide their victims with affidavits attesting to their acts of persecution.”) (citing *McMullen v. I.N.S.*, 658 F.2d 1312, 1319 (9th Cir. 1981); according *Zavala-Bonilla v. I.N.S.*, 730 F.2d 562, 565 (9th Cir. 1984)). See also *In re M-B-A-*, 23 I. & N. Dec. 474, 485 (BIA 2002) (“Furthermore, it has long been accepted that “[t]he victim may not know the exact motivation of his or her persecutor, nor . . . are persecutors “likely to provide their victims with affidavits attesting to their acts of persecution.””) (citing Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1202 (1994) (quoting *Bolanos-Hernandez*, 767 F.2d at 1285).

⁵⁸ *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999), vacated and remanded (A.G. 2001), recertified to the Attorney General (A.G. 2003), remanded to BIA, 23 I. & N. Dec. 694 (A.G. 2005), stay lifted, 24 I. & N. Dec. 629 (A.G. 2008).

⁵⁹ An excellent resource for online information about the Alvarado case is maintained by the Center for Gender & Refugee Studies at Hastings College of the Law, a part of the University of California system. <http://cgrs.uchastings.edu/campaigns/alvarado.php>.

⁶⁰ *R-A-*, 22 I. & N. Dec. at 911.

⁶¹ See discussion in part III(B)(1), *infra*; *R-A-*, 22 I. & N. Dec. at 918; Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 25, *Matter of R-A-* (A.G. 2004).

One such modification was an incarnation of the “public view” requirement, which, as discussed *infra*, the Board revives in *C-A-*.⁶² Another, closely related, test emphasized the “prominence or importance of a[n asserted particular social group] characteristic,” although, confusing matters, the Board conceded that prominence and importance are “not determinative.”⁶³ While, as aforementioned, the *R-A-* BIA hinted

⁶² See discussion in part III(B)(1). The *R-A-* BIA stated:

The proposed group may satisfy the basic requirement of containing an immutable or fundamental individual characteristic. But, for the group to be viable for asylum purposes, we believe there must also be some showing of how the characteristic is understood in the alien’s society, such that we, in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm.

R-A-, 22 I. & N. Dec. at 918. Not only does this language impose an additional element of asylum eligibility upon *Acosta*, it also ignores (or implicitly discredits) much sociological evidence that was presented as to the role of women in Guatemalan society.

⁶³ *R-A-*, 22 I. & N. Dec. at 918. While dismissing Ms. Alvarado’s particular social group upon alternative grounds, the BIA also noted that, since the case arose in the Ninth Circuit, any particular social group should be defined by a “voluntary associational relationship.” *Id.* at 917–18 (citing *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996); *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir. 1990); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1572 (9th Cir. 1986)). The existence of a “voluntary associational relationship” to define a particular social group was first recommended (yet arguably not required; the court stated that voluntary nature is “[o]f central concern”) by the Ninth Circuit in *Sanchez-Trujillo*, which rejected a purported group “consisting of young, urban, working class males of military age who had never served in the military or otherwise expressed support for the government of El Salvador.” *Sanchez-Trujillo*, 801 F.2d at 1573, 1576. The *Sanchez-Trujillo* Court remarked that the applicant’s group was overly broad, and it hinted that such large groupings will rarely (but not never) qualify as particular social groups. *Id.* at 1577 (“Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct ‘social group’ for the purposes of establishing refugee status.”).

In 2000, one year after the (now vacated) BIA decision in *R-A-* came down, the Ninth Circuit clarified that a “voluntary associational relationship” is not a prerequisite to particular social group cognizability. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“We thus hold that a ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”); *Reyes-Reyes v. Ashcroft*, 284 F.3d 782 (9th Cir. 2004). The *Hernandez-Montiel* Court recognized the particular social group that is composed of “gay men with female sexual identities in Mexico”; it found that demonstrating a “voluntary associational relationship” among members of the group of transgender Mexican men should not be necessary to urge cognizability. *Id.* at 1092–93. The reason why is that the Court found “sexual orientation” and “sexual identity” to be “fundamental” and “immutable,” presumably not wholly dependent upon decisions that are reached by collections of individuals. See *id.* at 1093 (“Many social and behavioral scientists ‘generally believe that sexual orientation is set in place at an early age.’”) (citing Susan B. Goldberg, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 226 CORNELL INT’L L.J. 605, 614 n.56 (1993)). Thus, exclusive emphasis in *Sanchez-Trujillo* upon voluntary association, affiliation (which, in the context of *Sanchez-Trujillo*, implies voluntary union), and motivation by common impulses and interests arguably tilts the particular social group definition too far away from the innate

that its “public view” requirement is not absolute—the Board stated that “[t]he lack of a showing in this respect makes it *much less likely* that we will recognize the alleged group as a particular social group for asylum purposes, or that the respondent will be able to establish that it was her group characteristic which motivated her abuser’s actions”⁶⁴—it indicated that it reserved the right to modify the *Acosta* immutability/fundamentality test:

The starting point for “social group” analysis remains the existence of an immutable or fundamental individual characteristic in accordance with *Matter of Acosta, supra*. We never declared, however, that the starting point for assessing social group claims articulated in *Acosta* was also the ending point. The factors we look to in this case, beyond *Acosta*’s “immutableness” test, are not prerequisites, and we do not rule out the use of additional considerations that may properly bear on whether a social group should be recognized in an individual case. But these factors are consistent with the operation of the other four grounds for asylum and are therefore appropriate, in our judgment, for consideration in the “particular social group” context.⁶⁵

Due to protests from human rights activists and members of Congress, Attorney General Reno vacated the decision in 2001; it was subsequently remanded to the BIA by Attorney General Mukasey in 2008.⁶⁶ The Attorney General had been “holding” *R-A-* for decision following the (as yet unrealized) promulgation of new regulations, which essentially define a particular social group in line with *Acosta*:

A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution. In determining whether an applicant cannot change, or

protectable grounds: race and nationality (leaving aside the fact that both can, at times and to degrees, be social constructs; and, leaving aside the possibility that “voluntary association” may be defined broadly to encompass notions of implied identification with others by virtue of the active or passive exhibition of one or more characteristics). After all, under a strict reading of the affiliational social group quasi-requirement in *Sanchez-Trujillo*, it is the group membership that “imparts some common characteristic that is fundamental,” not vice versa. See *Sanchez-Trujillo*, 801 F.2d at 1576. This type of emphasis risks offending the rule from *Acosta* that the definition be interpreted consistently with all four of its sister grounds, in accordance with the canon of *esjudem generis*. See *Acosta*, 19 I. & N. Dec. at 233.

⁶⁴ *R-A-*, 22 I. & N. Dec. at 918-19.

⁶⁵ *Id.* at 919.

⁶⁶ See 24 I. & N. Dec. 629 (A.G. 2008).

should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and information [sic] country conditions information about the applicant's society.⁶⁷

The regulations also allow for the permissible consideration of six factors in determining whether a particular social group exists.⁶⁸ The proposed 8 C.F.R. § 208.15(c)(3) states:

Factors that may be considered in addition to the required factors set forth in paragraph (b)(2)(1) of this section, but are not necessarily determinative, in deciding whether a particular social group exists include whether:

- (i) The members of the group are closely affiliated with each other;
- (ii) The members are driven by a common motive or interest;
- (iii) A voluntary associational relationship exists among the members;
- (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- (v) Members view themselves as members of the group; and
- (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.

Subdivisions (i)–(iii) restate the *Sanchez-Trujillo* “voluntary associational relationship” test; subdivisions (iv)–(vi) focus upon the public view; and subdivision (v) touches upon individual conceptions of identity. All can be positively considered to yield potentially probative evidence of the existence of particular social groups, although concerns have arisen that Immigration Judges may lapse into treating them as being mandatory.⁶⁹

⁶⁷ 65 Fed. Reg. 76588, 76598 (Dec. 7, 2000) (proposed rule adding 8 C.F.R. § 208.15(c)(1)).

⁶⁸ *See id.* (proposed rule adding 8 C.F.R. § 208.15(c)(3)).

⁶⁹ Brief of *Amici Curiae* in Support of Affirmance of Decision of the Immigration Judge *In re R-A-A73-753-922* at 7 n.2, *Matter of R-A-* (A.G. 2004). In an amici curiae brief that was submitted to the Attorney General on behalf of Ms. Alvarado, Nancy J. Kelly, Deborah Anker, and John Willshire-Carrera of the Women Refugees Project of the Harvard Immigration and Refugee Clinic praised the 2000 Proposed Rules for: (1) acknowledging the appropriateness of *Acosta*; (2) acknowledging the immutable nature of gender (which, of course, the BIA itself recognized in *Acosta*, 19 I. & N. Dec. at 233); (3) acknowledging that marital status may be immutable; and, (4) acknowledging the “clarification” of *Sanchez-Trujillo* that was laid down in *Hernandez-Montiel*. *Id.* at 7 (citing authorities). The authors did, however, express “concerns regarding several aspects of the proposed rule, including possible misinterpretation of the significance of the six factors enumerated in Section 208.15(c)(3).” *Id.* at n.2 (emphasis added).

Nevertheless, on their face, the proposed Regulations plainly reinforce the *Acosta* immutability/fundamentality framework.

Case law demonstrates that the *Acosta* framework for the recognition of particular social groups is neither inadequate nor overly broad. *Acosta* is morally satisfactory because—especially in light of its unity with the considerations for granting protection to individuals who are persecuted on account of the other four statutory grounds—its immutability definition is in harmony with the humanitarian impulses of international and U.S. refugee law. Also, the *Acosta* definition is workable in practice because it does not excuse the failure to comply with any of the other elements of I.N.A. sections 101 and 208. *Acosta* gives the right interpretation of a particular social group. Any proffered encrustations should be resisted.

III. AN EXPLICIT AND INCONSISTENT BIA MODIFICATION OF *ACOSTA* IN *MATTER OF C-A-*

Despite problems of inconsistent application and with the rejected exception of *Matter of R-A-*, discussed *supra*, *Acosta* essentially remained unmodified by the Board until 2006. A decision in a case involving a family of Colombian asylum applicants, *In re C-A-*,⁷⁰ in which the Supreme Court denied certiorari, constitutes an unwarranted modification of *Acosta* on three erroneous grounds. In *C-A-*, the BIA declined to validate the particular social group status of “noncriminal drug informants working against the Cali drug cartel” by holding that any such group is: (1) joined voluntarily (i.e., employment risks are voluntarily assumed); (2) not socially visible; and, (3) not at a

⁷⁰ 23 I. & N. Dec. 951 (BIA 2006), *aff'd* *Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied sub nom. Castillo-Arias v. Gonzales*, -- S.Ct. --, 2007 WL 36174 (2007).

specially heightened risk, relative to others in Colombian society, from suffering at the hands of narcotics traffickers.⁷¹

C-A- is flawed because its interpretation of *Acosta* is unsupported by the plain language of the federal asylum statute. This statute, when construed logically, does not require any more proof of the existence of a particular social group than is furnished by the *Acosta* immutability/unconscionability analysis. The *C-A-* decision is unwarranted because its additional requirements for social group status—namely, that certain risky occupations not be undertaken voluntarily and that the social group be visible in the eyes of society as a whole—may be capitalized upon to prevent many traditional political and religious applicants from establishing eligibility. Troublingly, the “assumption of risk” doctrine, long damped in the tort law by elimination of the doctrine of contributory negligence, negates logical evidence that Colombian law enforcement and military personnel are targets of terrorist reprisals.⁷²

The lead applicant in *C-A-*, whom the Immigration Judge found to be credible,⁷³ was the owner of a bakery in Cali, Colombia from 1990 to 1995. He became acquainted

⁷¹ *Id.* at 961. The BIA considered the social group matter on remand from the Eleventh Circuit. *See Castillo-Arias v. U.S. Attorney General*, 446 F.3d 1190 (11th Cir. 2003).

⁷² Pursuant to the authority granted by 8 U.S.C. § 1159, the U.S. State Department has designated the Revolutionary Armed Forces of Colombia (FARC) as a terrorist organization. *See* 68 Fed. Reg. 56860, 56862 (Oct. 2, 2003). The Fifth Circuit has recognized that the FARC single out Colombian law enforcement officials—and those who collaborate with them—for reprisals. *See Tamara-Gomez v. Gonzales*, 447 F.3d 343 (5th Cir. 2006). In *Tamara-Gomez*, Judge Jolly writes:

Specifically, the reports [furnished by the asylum applicant] speak of FARC’s brutality, vandalism, and “continued practices of killing, attacking, and threatening off-duty police and military personnel, their families, and those who cooperate with them.” The State Department reports identify a campaign FARC refers to as “Plan Pistola,” which the State Department classifies as a “deliberate strategy” to kidnap, torture, and kill soldiers, police, and their families. The evidence outlines FARC’s use of wiretapping, monitoring bank accounts, and surveillance of specific individuals to identify and target persons cooperating with the police or military. Specific instances of violence including the use of gas explosives in cars, bikes, and canisters appear throughout these reports.

Id. at 346–47 (analyzing various sources provided by the applicant).

⁷³ *C-A-*, 23 I. & N. Dec. at 953.

with a customer who served as the chief of security for the Cali cartel, and the customer soon provided him with information “about the location and size of Cali cartel assets, including banks, bank accounts, mansions, haciendas, villas, and other assets both within and outside Colombia.”⁷⁴ The lead applicant communicated these details to the General Counsel of the City of Cali.⁷⁵ As a result, in May 1995, three men with pistols and an automatic weapon accosted the lead applicant and his son, and attempted to force them into a car. When each resisted, the gunmen hit the son in the face with a pistol and threatened the family and the city prosecutor. After the applicants went into hiding, subsequent lessees of the lead applicant’s bakery were harassed for failing to disclose his whereabouts. Eventually, the family fled to the United States.⁷⁶

A. “Volitional” Particular Social Group Membership

In denying the applicants’ asylum claims, the Board first held that “noncriminal informants” do not constitute a particular social group because of the elective nature of becoming an informant. The Board did not explain the statutory origins of its rule, which might naturally be interpreted to bar many persons from proving persecution on account of political opinion and religion, in the sense that most political and religious convictions and affiliations are the products of human choice. Instead, the Board drew an analogy to *Matter of Fuentes* and the principle that asylum is generally not available to policemen or soldiers based upon a theory of occupational assumption of risk.⁷⁷ The Board further

⁷⁴ *Id.* at 952.

⁷⁵ *Id.* at 952–53.

⁷⁶ In November 1998, the lead applicant’s brother-in-law, a civic leader who worked against the Cali Cartel, was murdered after a government meeting. The wife of the brother-in-law was threatened. *Id.* at 954 n.2.

⁷⁷ *Id.* at 958 (noting that “we do not afford protection based on social group membership to persons exposed to risks normally associated with employment in occupations such as the police or military. *Matter of Fuentes*, *supra*. In part, this is because persons accepting such employment are aware of the risks involved and undertake the risks in return for compensation.”). *See also Tamara-Gomez*, 447 F.3d at 349-50 (relying upon *Fuentes* to deny asylum to a helicopter mechanic whom the court found had suffered persecution due to his relationship with the Colombian National Police). For a discussion of

refused to distinguish uncompensated informants from paid state agents because it found that many of the latter, like uncompensated informants, act primarily from civic motives.⁷⁸ Thus, the BIA tacitly expanded a *Fuentes* exception to asylum eligibility that is unsupported by straightforward construction of the asylum statute and is inconsistent with its necessarily expansive and humane character. Arguably, the BIA's holding in *C-A* slams the door on all asylum claims that are related to occupational assumptions of risk, perhaps involving parliamentarians, human rights workers, and political activists, paid or unpaid.

B. The Erroneously Conceived "Public View" Requirement

Second, the Board erroneously held that "noncriminal informants" do not constitute a particular social group because "the very nature of the conduct at issue is generally out of the public view."⁷⁹ This "public view" qualification to the definition of a particular social group does not square with the plain language of I.N.A. section 101(a) (42). It is an overreaching vitiation of policy considerations and is inconsistent with BIA precedents.

methodological problems in *Fuentes*, see *supra* note 41. Note the BIA's failure to account for the role of forced conscription or extreme poverty in individual decisions, in developing countries, to join the military or police.

⁷⁸ *Id.* at 959. The Board conceded that appellate courts have found that some informants were persecuted on account of political opinion. *Id.* at 958 ("Courts have recognized that informants in some situations may be able to demonstrate persecution on account of political opinion. See, e.g., *Grava v. INS*, 205 F.3d 1177 (9th Cir. 2000) (stating that threats against whistleblower who reported corrupt behavior of government officials might be on account of political opinion); *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) (holding that death threats by a rebel group against confidential informer working for the government were on account of political opinion); cf. *Adhiyappa v. INS*, 58 F.3d 261 (6th Cir. 1995) (finding that evidence supported our conclusion that threats by terrorists were on account of status as a government informant rather than based on political opinion)."). It nevertheless distinguished applicants' claims, which included an allegation of persecution on account of political opinion, *id.* at 951, based on the facially insignificant (and, for purposes of a political persecution claim, irrelevant) fact that "[a]s far as we have found, no court has held that government informants against a criminal enterprise such as a drug cartel constitute a particular social group." *Id.* at 958. The BIA did not contemplate that the holdings in *Grava* and *Briones* compel a reexamination of its disallowance of the applicants' claim of persecution on account of an imputed political opinion.

⁷⁹ *Id.* at 960.

1. The plain language and animating policy of the refugee definition do not admit of the “public view” requirement;

Section 101(a)(42) defines a refugee as a person who has suffered or fears “persecution *on account of* race, religion, nationality, membership in a particular social group, or political opinion.”⁸⁰ The most natural reading of section 101(a)(42) indicates that real or imputed membership in a particular social group (or real or imputed possession of any belief or characteristic that is religious or political, or that implicates the applicant’s race or nationality) confers asylum eligibility when: (1) the persecutor, correctly or incorrectly, recognizes the applicant as belonging to the particular social group; and, (2) the persecutor persecutes the applicant because of such actual or imputed membership. The focus in I.N.A. section 101(a)(42) is solely fixated upon the *perceptions of the persecutor*; there is no reason why the perceptions of any other person or entity are of the least relevance.⁸¹

To the extent that the BIA in *C-A-* formulated its public view rule out of fear of inviting a flood of asylum claims, the concern is better addressed through scrupulous

⁸⁰ 8 U.S.C. § 1101(a)(42) (emphasis added).

⁸¹ Naturally, in some cases, the perceptions of others can provide circumstantial evidence of the perceptions of the persecutor. For example, if an African man claimed that he was persecuted on account of his black race by the apartheid-era government of occupied South-West Africa [present-day Namibia], his appearance would help to confirm or deny his assertion. If he had blond hair, blue eyes, and white skin, the applicant’s argument would be undermined, and he would be wise to bolster it by offering evidence of partial black ancestry as well as the effect of this mulatto ancestry as a determinant of second-class citizenship.

Under I.N.A. sections 101(a)(42) and 208, the ultimate inquiry into possession of a protectable belief or characteristic must turn exclusively upon the *perceptions of the persecutor*. This conclusion is the product of a straightforward reading, and there are no secondary interpretative considerations whatever that militate against it.

enforcement of federal conspiracy,⁸² obstruction of justice⁸³ and perjury laws,⁸⁴ as well as through the sagacious yet vigorous imposition of civil penalties for the filing of frivolous asylum applications.⁸⁵ The public view requirement is not, however, an acceptable or humane tamp upon eligibility, nor may it be said to be properly invoked by use of the adjective “particular” to modify the term “social group.”⁸⁶ Etymologically, the word “particular” ultimately derives from the Latin word “particula,” meaning “small part.”⁸⁷ Its primary definition, bearing on its constitutive nature, is “of, relating to, or being a single person or thing.”⁸⁸ In this sense, then, the word “particular” is best understood as having a meaning akin to “identifiable” or “separate and distinct from others; specific.”⁸⁹ As shall be further developed *infra*, there is no principled reason for burdening this identifiability component of the social group definition by looking to third party views of the asylum applicant; the identification by the persecutor of offensive characteristics in the victim is all that should matter. Despite its broad implications for eligibility determinations, the correctness of this conclusion is appreciated when one accepts a fundamental and related premise of broad potential eligibility: *the historical and humanitarian policies of the asylum statute must naturally require the conferral of eligibility upon all citizens of a country if all citizens of that country are persecuted on*

⁸² See chapter 19 of part I of title 18 of the United States Code, 18 U.S.C. §§ 371-73.

⁸³ See chapter 73 of part I of title 18 of the United States Code, 18 U.S.C. §§ 1501-20.

⁸⁴ See chapter 79 of part I of title 18 of the United States Code, 18 U.S.C. §§ 1621-23. *See also* 28 U.S.C. § 1746.

⁸⁵ 8 U.S.C. § 1158(d)(6) provides that “[i]f the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A) [concerning notification of the consequences of the knowing filing of a frivolous asylum application], the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.”

⁸⁶ *See* 8 U.S.C. 1101(a)(42).

⁸⁷ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981), at 956; MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.m-w.com/dictionary/particular>.

⁸⁸ *Id.*

⁸⁹ *Id.*

account of immutable characteristics. During certain historical periods, entire peoples have either been persecuted by their leaders or had good reason to fear it. Especially if we acknowledge that the asylum law is a shocked reaction to the atrocities of World War II, members of such peoples ought to be declared asylum eligible.⁹⁰

2. The public view requirement conflicts with BIA precedents;

The public view requirement is unsupported by the BIA case law definition of a well-founded fear of persecution, as laid down in *Acosta* and specifically reaffirmed in *Matter of Mogharrabi*⁹¹ and commented upon in *Matter of H-*⁹² and other BIA precedents. That definition relies entirely on the persecutor's perception of objectionable beliefs or characteristics. In *Acosta*, the BIA unequivocally placed all emphasis on the motives of the persecutor. The BIA established that such an emphasis was consistent with the pre-Refugee Act definition of "persecution."⁹³

In *Mogharrabi*, which involved an Iranian student in the United States who was deemed eligible for asylum due to his proof of an altercation with representatives of the

⁹⁰ See n. 63. Joseph Stalin applied Leninist theories of terror to subjugate the Soviet people (one might say that, by ordering his secret police to pursue real or imagined enemies in a vicious and paranoid fashion, Stalin successfully destroyed the Pavlovian linkage between conformism and safety). Virtually every citizen of the Stalinist Soviet Union ought to be understood as having possessed an immutable characteristic that could confer asylum eligibility. This defining characteristic might be understood as: (1) human sentence, or (2) nationality (in this instance, the nationality and the particular social group become indistinguishable).

⁹¹ 19 I. & N. Dec. 439 (1988).

⁹² 21 I. & N. Dec. 337 (BIA 1996) (en banc).

⁹³ In construing the Refugee Act definition of persecution, the *Acosta* BIA reviewed and adopted the pre-Refugee Act administrative and judicial gloss of I.N.A. section 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976), the repealed conditional parole law. See *Acosta*, 19 I. & N. Dec. at 220-23. See *id.* at 223 ("As was the case prior to enactment of the Refugee Act, 'persecution' as used in section 101(a)(42)(A) clearly contemplates that harm or suffering must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.").

Ayatollah Khomeini government at the Iranian Interests Section of the Algerian Embassy in Washington, D.C., the Board refined a well-founded fear test that amounts to a comprehensive measure of the probability that a potential persecutor will, in fact, act upon *his* perceptions (not societal perceptions) by persecuting his victim:

In *Acosta*, we set forth four elements which an applicant for asylum must show in order to establish a well-founded fear of persecution. What we required was that the evidence establish that (1) the alien possesses a belief or characteristic *a persecutor* seeks to overcome in others by means of punishment of some sort; (2) *the persecutor* is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) *the persecutor* has the capability of punishing the alien; and (4) *the persecutor* has the inclination to punish the alien. *Matter of Acosta*, *supra*, at 22.⁹⁴

There is no focus in this *Mogharrabi* definition on public view of the asylum applicant's social group membership.⁹⁵ The same is true for subsequent decisions. For example, in a

⁹⁴ *Id.* at 446 (emphasis added). A related Supreme Court case prompted a development in *Mogharrabi* that further highlights the unique emphasis that is placed upon the perceptions of the persecutor. In view of the Supreme Court's lessening, in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), of the standard of proof of persecution that is required for an applicant to establish asylum eligibility (see explanation *infra* note 117), the *Mogharrabi* BIA made one explicit change to the *Acosta* definition of a well-founded fear of persecution. The Board struck the requirement that, in cases that hinge upon proof of feared future persecution where the persecutor is demonstrably not already aware of the applicant's possession of a belief or characteristic that is obnoxious to the persecutor (and that the persecutor seeks to overcome), the persecutor must be shown to be *easily* able to become aware of the belief or characteristic, as opposed to merely "able," without qualification. *Mogharrabi*, 19 I. & N. Dec. at 446. Again, the dispositive emphasis is placed on the views of the persecutor, not those of the public writ large.

⁹⁵ Of course, "public" view (if such a conception, as fluid and amorphous as the "international public opinion" oft-cited by Soviet leaders, can be given legal meaning) may be implicitly considered as circumstantial evidence of the motive of the persecutor.

female genital mutilation social group asylum application, the fact that other members of the applicant's tribe or country viewed opposition to and refusal to undergo female genital mutilation as causes for punishment was treated as persuasive evidence of both the views and the persecutory intent of the feared future persecutor.⁹⁶ Yet no requirement involving third party perceptions was established.⁹⁷ Under the *Acosta-Mogharrabi* definition above (as well as under a plain meaning interpretation of I.N.A. sections 101(a)(42) and 208), the perceptions of others simply cannot substitute for (or expected in addition to) ascertainment of the perceptions of the persecutor.

The *Acosta* and *Mogharrabi* holdings notwithstanding, the *C-A*- BIA imposed its public view requirement via a strained recourse to other precedents. The Board argued that “[o]ur other decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question.”⁹⁸ The *C-A*- Board called attention to *Matter of V-T-S*⁹⁹ for its recognition of “Filipinos of mixed Filipino-Chinese ancestry”; *Matter of Kasinga*¹⁰⁰ for its recognition of “young women of a particular tribe who were opposed to female genital mutilation”; *Matter of Toboso-Alfonso*¹⁰¹ for its recognition of “persons listed by the government as having the status of a homosexual”; *Matter of Fuentes*¹⁰² for its recognition of “former members of the

⁹⁶ In *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (en banc), the feared persecutor was the husband of the applicant. In other cases, the fear of persecution may emanate from apprehension about harm perpetrated by a more generalized source of oppression (e.g., the state, the police, the tribal elders). Consider also the focus that the BIA placed upon the manner of ascertaining motivations for persecutorial action in *Matter of S-P*, 21 I. & N. Dec. 486 (BIA 1996) (en banc). See *id.* at 494 (providing a non-exhaustive list of factors to be weighed in assessing the motives of persecutors in cases in which motivation is either unclear or is mixed [e.g., the persecutor persecutes the applicant for multiple reasons, only one or some of which are protected under the I.N.A. section 101(a)(42) definition of a refugee]).

⁹⁷ See *Kasinga*.

⁹⁸ *Id.*

⁹⁹ 21 I. & N. Dec. 792, 798 (BIA 1997).

¹⁰⁰ 21 I. & N. Dec. 357 (BIA 1996) (en banc).

¹⁰¹ 20 I. & N. Dec. 819 (BIA 1990).

¹⁰² 19 I. & N. Dec. 658 (BIA 1988).

national police”; and even *Matter of Acosta*¹⁰³ to argue that “[t]he two illustrations of past experiences that might suffice for social group membership . . . ‘former military leadership or land ownership,’ are also easily recognizable traits.”¹⁰⁴

The *C-A-* BIA did not explain how or why women who oppose female genital mutilation (and, presumably, have not had their clitorises sown shut), homosexuals, or former national policemen or members of armed forces are necessarily distinctly recognizable to individuals other than their persecutors. If one follows the BIA’s reasoning to its logical conclusion, there would have been no need for the Nazis to order Jews to wear gold Stars of David, and there would be no such thing as a closeted homosexual or title insurance because religion and ethnicity, sexual orientation and ownership of land would always be, to borrow a phrase from the law of real property, “open and notorious.”

In emphasizing the visibility and recognizability of particular social groups, the *C-A-* Board also ignored its prior discussion in *Matter of H-*¹⁰⁵ of the “recognizable and discrete” requirement that had been propounded by the Second Circuit in *Gomez v. I.N.S.*¹⁰⁶—a requirement that Circuit has since repudiated.¹⁰⁷ Specifically, when, in

¹⁰³ 19 I. & N. Dec. 211 (BIA 1985).

¹⁰⁴ *C-A-*, 23 I. & N. Dec. at 960.

¹⁰⁵ 21 I. & N. Dec. 337 (BIA 1996) (en banc).

¹⁰⁶ 947 F.2d 660 (2d Cir. 1991)

¹⁰⁷ *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006) (acknowledging that *Gomez* has been criticized by the Tenth Circuit in *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) for its holding that “possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group,” yet noting that “in the analysis portion of *Gomez*, this Court rejected Gomez’s claim not because the particular social group she defined was ‘too broadly-based’ but rather because ‘there is no indication that Gomez *will be singled out* for further brutalization on [the basis of her past victimization.] 947 F.2d at 664 (emphasis added)’); *id.* at n.4 (“We based this statement [about the overly broad nature of the *Gomez* particular social group] on a formulation from the Ninth Circuit which that court has since disavowed as dicta and as inconsistent with BIA and other circuit precedent. *See*

Matter of H-, the BIA held that membership in the Somali Marehan subclan could constitute membership in a particular social group, it framed the utility of the “recognizable and discreet” requirement in terms of the perceptions of the persecutor:

The *Basic Law Manual* recognizes generally that clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties. *Id.* [citing INS, U.S. Department of Justice, *Basic Law Manual, U.S. Law and INS Asylum Adjudications* 48 in 8 Charles Gordon et al., *Immigration Law and Procedure* (Matthew Bender rev. ed. 1996) (Special Supp. 1995)]; *Matter of Acosta, supra*; see also *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (holding that a social group must be recognizable and discrete, *allowing would-be persecutors to identify victims of the purported group*).¹⁰⁸ (Emphasis added).

As aforementioned, the only federal court of appeals that ever arrived at a definition of a particular social group that resembles the “public view” requirement is the Second Circuit in *Gomez*,¹⁰⁹ and that Circuit has essentially disapproved that decision as antithetical to *Acosta* in *Gao v. Gonzales*.¹¹⁰ Criticism has also come from elsewhere. The Seventh Circuit has declined to extend this requirement in *Lwin v. I.N.S.* by stating that “the

Gomez, 947 F.2d at 664 (citing *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571 (9th Cir. 1986)); *Hernandez-Montiel* [*v. I.N.S.*], 225 F.3d [1084,] [] 1092-93 & n.5 [(9th Cir. 2000)] (disavowing *Sanchez-Trujillo*.)”

¹⁰⁸ *Matter of H-*, 21 I. & N. Dec. at 342; see *id.* at 345 (stating, in holding that persecution on account of a protectable ground may take place during a civil war and in a country without a national government, that the fact “[t]hat the applicant was persecuted in the context of clan warfare does not undermine his claim. The *motivation of the persecutors* reasonably appears to be, as the applicant contends, on account of his subclan affiliation.”) (emphasis added).

¹⁰⁹ 947 F.2d at 664 (2d Cir. 1991).

¹¹⁰ See *supra* note 107.

Second Circuit’s proposal, while useful in pointing out the significance of external perceptions of a group, offers little guidance in the way of a positive definition of the term ‘social group.’”¹¹¹ And, in *Niang v. Gonzales*, the Tenth Circuit dismissed *Gomez* for failing to take *Acosta* into account.¹¹²

Therefore, there is little support to be found in BIA or federal appellate precedents for the attempt, in *Matter of C-A-*, to place a new elemental hurdle on asylum applicants who allege persecution on account of a particular social group. It seems, rather, that the invention of the “public view requirement” signals an unnecessary and illogical departure from the most accepted and logical interpretation of the Immigration and Nationality Act.

3. The public view requirement conflicts with humane policy considerations;

In addition to the requirements of statutory plain meaning and the commands of BIA precedents, humane policy considerations dictate a jettisoning of the public view requirement. The following hypothetical scenario illustrates the principle that, in determining asylum eligibility, the asylum officer or Immigration Court need only adduce evidence of the existence of two sine qua non: (1) the threat or actual imposition of persecutory harm, (2) on account of a real or imputed immutable belief or characteristic.¹¹³ Assume, for purposes of this hypothetical scenario, that relatives of trade unionists in Nazi Germany constitute a particular social group:

¹¹¹ *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998).

¹¹² *Niang v. Gonzales*, 422 F.3d 1087 (10th Cir. 2005).

¹¹³ The use of the adjective “immutable” comprehends what may be termed “morally” immutable beliefs or characteristics: that is, beliefs or characteristics that should not be required to be changed.

A's maternal grandfather is a trade unionist, and the Nazi mayor of the German town in which he lives is aware of the fact. The Nazi Party wants to purify Germany of all descendants of trade unionists; hence, the mayor orders A's deportation (along with the deportation of other trade unionists). The residents of A's town are unaware of A's trade unionist heritage. A escapes to the United States and applies for asylum. Is A any less deserving of asylum than individuals whose blood ties to trade unionists (or to Jews, Gypsies, homosexuals, communists, and other undesirables) are widely known? *Has A suffered less persecution?*¹¹⁴

If the asylum law is to fairly distribute its humane protections, the fact that A's particular social group membership is invisible to the general population should be inconsequential. A contrary rule—one which incorporates a public view requirement—will inequitably allocate asylum protection among persons who are similarly situated. Indeed, the unfairness of the public view requirement is demonstrated by the fact that, as to trade unionists from the German town in the preceding example, all have suffered or

¹¹⁴ This example is inspired by the famous poem written by the German Pastor Martin Niemöller:

In Germany they first came for the Communists,
and I did not protest because I was not a Communist.

Then they came for the Jews,
and I did not protest because I was not a Jew.

Then they came for the trade unionists,
and I did not protest because I was not a trade unionist.

Then they came for the Catholics,
and I did not protest because I was a Protestant.

Then they came for me --
and by that time no one was left to protest.

reasonably fear persecution for the same morally unfair reason (the possession of an immutable characteristic), yet only a fraction (the publicly visible) will be held to have demonstrated membership in a particular social group. This is why the asylum law must look only to the motives of the persecutor; the impressions of unknown men, who populate the oppressor's streets and collectively share an impossibly elusive "public view," cannot prevent the granting of a humane and necessary benefit.

C. The Lack of Specialized Risk or Harm

As a final consideration for denying asylum eligibility, the *C-A-* BIA held that the applicants had not made out a sufficient showing of persecution because of the tendency of Colombian narcotics traffickers to target wide swaths of Colombian society. The problem with this justification is that it implies that breadth of persecution is inversely related to asylum law protection.¹¹⁵ Unfortunately, the *C-A-* BIA stated:

The record in this case indicates that the Cali cartel and other drug cartels have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises. In this sense, informants are not in a substantially different situation from anyone who has crossed the Cali cartel or who is perceived to be a threat to the cartel's interests. In fact, the Department of State country reports

¹¹⁵ To appreciate the weakness of the BIA reasoning in light of the foregoing hypothetical, consider that it logically requires that theoretically protectable groups like "relatives of trade unionists in Nazi Germany" do not constitute particular social groups if the persecutors in question (for instance, the Nazis) may also be shown to persecute multitudes of others (Jews, Gypsies, communists, anarchists, and homosexuals).

indicate that “[n]arcotics traffickers frequently resorted to terror in attempts to intimidate the Government and *the general population*.” Committees on Foreign Affairs and Foreign Relations, 103d Cong., 2d Sess., *Country Reports on Human Rights Practices for 1993* 393 (Joint Comm. Print 1994) (emphasis added). The victims of the narcotics traffickers included “politicians, labor organizers, human rights monitors, and-overwhelmingly-peasant farmers.” Committees on International Relations and Foreign Relations, 104th Cong., 2d Sess., *Country Reports on Human Rights Practices for 1995* 362 (Joint Comm. Print 1996); Committees on Foreign Relations and International Relations, 104th Cong., 1st Sess., *Country Reports on Human Rights Practices for 1994* 350 (Joint Comm. Print 1995). While these respondents present very sympathetic personal circumstances, it is difficult to conclude that any “group,” as actually perceived by the cartel, is much narrower than the general population of Colombia.¹¹⁶

This new BIA position is untenable. Most oppressive political regimes in history—Germany under Hitler; the Soviet Union under Stalin; China under Mao; or Cambodia under Pol Pot—have persecuted large proportions of their populations. What’s more, the new BIA position conflicts with its prior emphasis on the role of country conditions in determining the reasonableness of an asylum applicant’s well-founded fear. In *Matter of*

¹¹⁶ C-A-, 23 I. & N. Dec. at 960-61.

Mogharrabi,¹¹⁷ where the Board provided guidance as to the definition of a well-founded fear of persecution for asylum law purposes, Chairman Milhollan stated:

Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear, in other words, can be based on what has happened to others who are similarly situated. The situation of each person, however, must be assessed on its own merits.¹¹⁸

This guidance demonstrates that, *C-A-* notwithstanding, the BIA has previously upheld the significance and helpfulness (to the asylum applicant who can demonstrate

¹¹⁷ 19 I. & N. Dec. 439 (BIA 1987). As discussed in note 94 *supra*, the *Mogharrabi* Board considered the definition of a "well-founded" fear of persecution for asylum law purposes in light of the Supreme Court holding in *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In *Cardoza-Fonseca*, Justice Stevens wrote for the Court that the asylum law I.N.A. section 208 "well-founded fear" standard and the withholding of deportation I.N.A. section 243 "clear probability" standard are functionally different. *Id.* at 449 ("Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country."). In so doing, the Court overruled language in *Acosta* that approximated the twin standards without stating that they were equivalent. *Id.* at 447. Invoking separation of powers concerns that touch upon the Executive administration of immigration laws (as well as the Legislative authority to constitute and empower Executive agencies), Justice Stevens cited his previous opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) so as to decline to provide further judicial content to the meaning of a "well-founded fear." *Cardoza-Fonseca*, 480 U.S. at 448. The Court did, however, emphasize that the asylum and withholding standards are "significantly different," *id.* at 448 n.31, and it cited a respected treatise by Professor Grahl-Madsen that would confer asylum eligibility upon applicants who can demonstrate a 10% probability of future persecution. *Id.* at 431 ("Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have "well-founded fear of being persecuted" upon his eventual return.") (citing 1 A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 180 (1966)).

¹¹⁸ *Mogharrabi*, 19 I. & N. Dec. at 446 (citing OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES*, AT § 43 (1979)).

persecution on account of a particular social group, as opposed to random victimization¹¹⁹) of widespread persecution. In fact, the agency case law is inconsistent. In *Bolanos-Hernandez v. I.N.S.*, the Ninth Circuit criticized the BIA for hewing to the exact same line as in *C-A-* in the context of the El Salvadoran civil war:

The Board's conclusion that the threat against Bolanos' [the applicant's] life was insufficient simply because it was representative of the general level of violence in El Salvador constitutes a clear error of law. We are mystified by the Board's ability to turn logic on its head. While we have frequently held that general evidence of violence is insufficient to trigger section 243(h)'s prohibition against deportation, not once have we considered a specific threat against a petitioner insufficient because it reflected a general level of violence. Even when the credibility of a petitioner's evidence has been questioned, we have rejected the categorization of evidence of specific threats as "general." It should be obvious that the significance of a specific threat to an individual's life or

¹¹⁹ The *Mogharrabi* BIA explained that random victimization does not trigger a *non-refoulement* obligation under I.N.A. section 208:

It must also be remembered that an alien who succeeds in establishing a well-founded fear of persecution will not necessarily be granted asylum. He must also show that the feared persecution would be on account of his race, religion, nationality, membership in a particular social group, or political opinion. Thus, for example, aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum. Such persons may have well-founded fears, but such fears would not be on account of their race, religion, nationality, membership in a particular social group, or political opinion. See, e.g., *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *Contreras-Aragon v. INS*, 789 F.2d 777 (9th Cir. 1986); *Diaz-Escobar v. INS*, supra; *Lopez v. INS*, 775 F.2d 1015 (9th Cir. 1985); *Zepeda-Melendez v. INS*, 741 F.2d 285 (9th Cir. 1984); *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982); *Matter of Pierre*, 15 I. & N. Dec. 461 (BIA 1975). Finally, an applicant for asylum must also show that he merits the relief as a matter of discretion.

Id. at 447.

freedom is not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened. If anything, as we point out *infra*, that fact may make the threat more serious or credible.¹²⁰

Lastly, the new BIA position in *Matter of C-A-* is at odds with the congressional and regulatory policies that underlie the granting of temporary protected status to alien nationals of specified countries. The existence of temporary relief from removal for the alien nationals of countries designated by the Attorney General is evidence that even U.S. immigration authorities have previously affirmed the need for protection from fractious and catastrophic nationwide conditions, which necessarily includes nationwide persecution. The temporary protected status law is a reaction to the reality that large proportions of national populations may possess the characteristics that confer refugee status. I.N.A. section 244a confers temporary protected status upon eligible alien nationals of a country that, according to a designation made by the Attorney General, is experiencing: (1) ongoing armed conflict; (2) a natural disaster (coupled with (i) the temporary inability of a foreign government to manage a return of emigrants and (ii) a foreign government request for designation as a country whose alien nationals shall be granted temporary protected status); or, (3) extraordinary and temporary conditions, so long as any of these three circumstances indicate a potential threat to the safety of removed aliens.¹²¹ The Immigration and Naturalization Service and its applicable successor sub-organization, the Citizenship and Immigration Services division of the

¹²⁰ *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1284-85 (9th Cir. 1985) (citations and footnote omitted).

¹²¹ 8 U.S.C. § 1254a. Of course, the temporary protected status law is not an asylum law. It grants automatic relief of an extendable but temporary duration to applicants who satisfy eligibility requirements. There is no required showing of past or feared individualized persecution.

Department of Homeland Security, have previously designated the nationals of Bosnia, Burundi, Kuwait (following the Iraqi invasion), Liberia, Serbian Kosovo, Sudan, and Rwanda as entitled to the residency and employment authorization benefits of temporary protected status protection.¹²² The foregoing are nations in which policies of genocide, ethnic cleansing, and systemic state terror have been or are being carried out.

Likewise, in section 303 of the Immigration Act of 1990, passed towards the end of the civil wars in Central America, Congress granted Salvadoran aliens the right to apply for temporary protected status for an eighteen month period that began on January 1, 1991 and ended on June 30, 1992, and which roughly corresponds to the final period of hostilities in the El Salvadoran civil war.¹²³ These grants of protection demonstrate that

¹²² See Office of Public Affairs of the Immigration and Naturalization Service, *Honduras, Nicaragua Designated for Temporary Protected Status*, at <http://www.uscis.gov/graphics/publicaffairs/newsrels/tpsrel.htm>.

¹²³ Immigration Act of 1990 (IMMACT), Title III, section 303, Public Law 101-649, 104 Stat. 4978, 5036-38. In *Gomez v. INS*, 947 F.2d 660 (2d Cir. 1991), an El Salvadoran applicant who was ineligible for temporary protected status because she had been convicted of the possession and sale of controlled substances, *see id.* at (c)(2)(B)(i) (providing that “[a]n alien shall not be eligible for temporary protected status under this section if the Attorney General finds that the alien has been convicted of any felony or 2 or more misdemeanors committed in the United States”), argued that section 303 was probative of the eligibility of all El Salvadorans for asylum. *Gomez*, 947 F.2d at 664 (“As a result of Gomez’s New York State convictions for criminal possession and sale of a controlled substance, she is clearly ineligible for temporary protected status. Nevertheless, Gomez argues that congressional recognition of the plight of Salvadorans through Section 303 should be considered to have lessened the burden on Salvadoran aliens to prove that they have a well-founded fear of persecution. Essentially, Gomez argues that by enacting Section 303, Congress made satisfaction of the objective prong of the well-founded fear test unnecessary.”). The Second Circuit rejected Gomez’s argument by noting that her reading of section 303 would cause universal asylum eligibility to render the grant of temporary protected status to all Salvadorans superfluous. It concluded that Gomez’s contentions were unavailing because: (1) they would allow all Salvadorans to qualify for asylum, which would defeat the purpose of the Immigration Act to “supplement—rather than eviscerate or erode” the asylum law; and, (2) if Congress had intended for all Salvadorans to become eligible for asylum, it could have expressly drafted an applicable relief law. *Id.* at 664-65. Although the court rendered a finding of congressional intent, it only relied on a presidential signing statement. *Id.* (citing Statement by President of the United States Upon Signing S. 358, 26 Weekly Comp. Pres. Doc. 1946 (Dec. 3, 1990), *reprinted in* 1990 U.S.C.C.A.N. 6801).

The *Gomez* Court should have acknowledged that, while eligibility for temporary protected status does not confer asylum eligibility due to differences in the elements for establishing entitlements to benefits under both laws, the designation of a country under section 302 of the Immigration Act may be probative of an increased likelihood of persecution in the designated country. Instead, the *Gomez* Court did not allow the designation status of the country of origin of the applicant to play any role in its asylum designation. *Id.* (“Indeed, Congress could have chosen to recognize explicitly that all Salvadorans were eligible for political asylum, but it did not do so. Consequently, we find that Section 303 does not alleviate the burden

Congress and U.S. immigration authorities have extended relief to national classes of aliens who are at high risk of persecution. As a matter of evident historical record, persecution on account of statutorily protectable grounds ranks highly—perhaps foremost—among the perils that await TPS beneficiaries in their homelands.¹²⁴ Persecution on account of membership in a particular social group was undoubtedly the prime motivation in the Burundian and Rwandan genocides of 1994, since Hutu and Tutsi affiliations in Burundi and Rwanda are more properly understood as particular social groups as opposed to racial or national characteristics.¹²⁵

In short, the *C-A* BIA should not have denied asylum eligibility because of the fact that the applicants’ persecutors, like the Nazis, target a significant cross-section of Colombian society. The Ninth Circuit holding in *Bolanos-Hernandez* is instructive: where individualized persecution on account of a protectable ground can be established,

on Salvadoran nationals to prove their eligibility for political asylum.”). This Second Circuit approach is extreme, and the argument that Congress would have explicitly recognized the asylum eligibility of all Salvadorans if it had intended for all to benefit from a presumption of (past or well-founded fear of) persecution ignores the somewhat casuistic and non-systemic congressional approach to amending immigration (and, similarly, tax) laws. The formulation of immigration and, as all Americans can appreciate, tax laws, does not always proceed along a systemic pathway or at consistent levels of generality.

¹²⁴ Consider the possible fates of Kosovar TPS beneficiaries who may have been harmed on account of their Islamic religion; Kuwaiti beneficiaries who may have been harmed on account of their nationality; Liberians who may have been harmed on account of their clan or tribal membership, etc.

¹²⁵ There is a wealth of literature on the origins of the conflict between Hutus and Tutsis in Rwanda and Burundi. It attempts the difficult task of pinpointing the origins of persecution, genocide, and evil. See Claude Wauthier, *Rwanda: “Le Mystère du Mal,”* LE MONDE (Mar. 3, 2000) (explaining, in a review of a book by Jean-Pierre Chrétien, the various origins of the cleavage between the Tutsi and Hutu peoples, whose “somatic” variances are shrouded in mythical migration histories and whose mutual hatred finds its roots in the practices of German and Belgian colonists (and their strengthening of Tutsi *mwumi* chieftains); the introduction of foreign livestock and banana and cotton cultivation; as well as the impact of the Arab ivory and slave trades); Dr. Anastase Shyaka, *Le Conflit rwandais: origines, développement et stratégies de sortie: étude commandée par la commission nationale pour l’unité et la réconciliation*, <http://www.grandslacs.net/doc/3834.pdf#search=%22origines%20du%20conflit%20hutu%20tutsi%22> (noting, at page 8, that “the distinction between Hutu and Tutsi only became operational very recently, after divisionist discourses and successive anti-Tutsi pogroms in the two ex-Belgian colonies, so as to radicalize itself after the 1994 genocide”); Daniel Palmieri, *Le Temps pour comprendre la violence de guerre: l’exemple de l’Afrique*, 85 REVUE INTERNATIONALE DE LA CROIX-ROUGE 775 (2003), available at [http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/5WNJYF/\\$File/IRRC_852_Palmi%C3%A8ri.pdf](http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/5WNJYF/$File/IRRC_852_Palmi%C3%A8ri.pdf).

the generality of persecution is irrelevant.¹²⁶ This conclusion is bolstered by recourse to policy, BIA precedents, and analysis of related immigration laws such as the TPS statute.

D. Subsequent administrative history

Regrettably, the BIA reaffirmed its holding in *Matter of C-A-* in one of its first precedent decisions issued in 2007, *Matter of A-M-E- & J-G-U-*.¹²⁷ In *A-M-E-*, the Board denied the legal existence of a particular social group composed of affluent Guatemalans,¹²⁸ a holding that turned upon past precedents that wealth is a statutorily insufficient characteristic of a social group.¹²⁹ *A-M-E-* may be of limited importance because of its puzzling reliance on *Gomez v. I.N.S.*—a case which, as discussed *supra*, the Second Circuit had previously overruled—to require that social groups be “readily ‘identifiable’” and that they be sufficiently discrete.¹³⁰ As in *Matter of C-A-*, there is no justification by the *A-M-E-* Board of the reasons why groups of refugees must be defined by their identifiability in the eyes of third parties, or by their particularity. The injustice that is worked by the “social visibility” requirement is discussed above; the non-sensical foundation of the “particularity” requirement can be exposed in the Board’s own weak logic, which provides that a proposed social group may be “too loose[]” even though “we

¹²⁶ See *Bolanos-Hernandez*, 767 F.2d at 1284-85.

¹²⁷ 24 I. & N. Dec. 69 (BIA 2007).

¹²⁸ *Id.* at 73 (“The proposed group has been variously described during the course of these proceedings in terms of ‘wealth,’ ‘affluence,’ ‘upper income level,’ ‘socio-economic level,’ ‘the monied class,’ and ‘the upper class.’ Although we generally refer to wealth or affluence as the identifying characteristic in our discussion below, our analysis applies to each of these descriptions of the group characteristic.”).

¹²⁹ *Id.* at 72 (citing *Matter of S-V-*, 22 I. & N. Dec. 1306, 1310 (BIA 2000), *overruled on other grounds by Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003); *Matter of V-T-S-*, 21 I. & N. Dec. 792, 799 (BIA 1997); *Matter of T-M-B-*, 21 I. & N. Dec. 775, 779 (BIA 1997), *rev’d Borja v. I.N.S.*, 175 F.3d 732 (9th Cir. 1999) (en banc); *Bolshakov v. I.N.S.*, 133 F.3d 1279, 1281 (9th Cir. 1998)).

¹³⁰ *Id.* at 74.

do not generally require a ‘voluntary associational relationship,’ ‘cohesiveness,’ or ‘strict homogeneity among group members.’”¹³¹

IV. THE ULTIMATE DISPOSITION IN *C-A-* AND *CHEVRON* DEFERENCE

The United States Court of Appeals for the Eleventh Circuit dismissed the second of two appeals of the *C-A-* decision “with consternation.”¹³² The judges regretted the consequence of their holding, but affirmed the BIA decision by applying *Chevron* deference.¹³³ This manner of disposing of the principal applicant’s (Mr. Castillo-Arias’) appeal provides a suitable occasion for criticism of the correctness of a popular doctrinal tool for extending total deference to BIA decisions, rendering them unreviewable.¹³⁴

Chevron deference is unacceptable in the immigration context. Despite Supreme Court precedent that, in the opinion of the writer, should be overruled (or rendered nugatory by statute, as recommended in the conclusion to this article), the continuation of the doctrine of the extension of *Chevron* deference to administrative interpretations of the federal asylum law is objectionable for three major reasons.¹³⁵ The first reason is that,

¹³¹ *Id.* (discussing *C-A-*, 23 I. & N. Dec. at 956-57).

¹³² *Castillo-Arias v. United States AG*, 446 F.3d 1190, 1191 (11th Cir. 2006).

¹³³ *Id.* at 1196-99. The Court also emphasized the need for a supposedly balanced construction of the particular social group definition that will prevent the term from becoming overly elastic. The Court’s decision, like the BIA’s holding in *C-A-*, is flawed because it sacrifices humanitarian concerns for the sake of both administrative efficiency and numerical immigration limitations.

¹³⁴ As a statutory matter, factual findings by immigration judges are entitled to great deference. *See* 8 U.S.C. § 1252(b)(4)(B) (“Except as provided in paragraph (5)(B) [relating to derivative nationality claims]—the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.”). Section 1252(b)(4) concomitantly provides that “[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C), unless the court finds, pursuant to section 1252(b)(4)(B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.”

¹³⁵ The Supreme Court has repeatedly stated that *Chevron* is applicable in the immigration context, although it has never explained why the doctrine is suited to the resolution of adversary proceedings

because the risk of persecution and death inheres in the erroneous deportations of bona fide refugees, an appellate court reviewing an asylum case should always construe the law de novo. As in the capital punishment context, attention of the highest rigor must be lent to the correctness of legal (as well as factual) determinations in asylum cases; unlike in the *Chevron* context (where judicial review is statutory), the right of judicial review

involving individual rights of the most fundamental importance. Interestingly, however, the Court has itself only once extended *Chevron* deference to a BIA construction of an immigration statute. See *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999), discussed *infra*. In all other cases, the Court has found reasons to decline the extension of *Chevron* deference. See *Clark v. Martinez*, 543 U.S. 371, 402 (2005) (Thomas, J., dissenting) (arguing that the command in *Chevron* to exhaust “traditional tools of statutory construction” before deferring to an agency interpretation of a statute precludes deference to the BIA interpretation of 8 U.S.C. § 1231(a)(6)); *Hoffman Plastic Compounds v. National Labor Relations Board*, 535 U.S. 137, 160-61 (2002) (Breyer, J., dissenting) (disagreeing with the majority view that a National Labor Relations Board (NLRB) reinstatement and backpay award to an illegal immigrant to remedy an unlawful discharge (for union activity) in violation of section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), conflicted with prohibitions on the hiring of undocumented aliens in section 101 of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a; arguing in dissent, in support of the NLRB award, that the NLRB was entitled to *Chevron* deference for its interpretation of the interaction of the immigration and labor laws, particularly in light of a submission by the Attorney General, the official charged with enforcement of immigration laws, in agreement with the NLRB order, and notwithstanding the Court’s practice, stated at 143-44, of not extending deference to NLRB orders that “potentially trench upon federal statutes and policies [such as the federal mutiny law in *Southern S.S. Co v. NLRB*, 316 U.S. 31 (1942); the Bankruptcy Code in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); the federal antitrust laws in *Connell Constr. Co. v. Plumbers*, 421 U.S. 616 (1975); and the Interstate Commerce Act in *Carpenters v. NLRB*, 357 U.S. 93 (1958)] unrelated to the NLRA”); *I.N.S. v. St. Cyr*, 533 U.S. 298, 320 n.45 (2001) (arguing that the command in *Chevron* to exhaust “traditional tools of statutory construction” before deferring to an agency’s retroactive interpretation of a statute precludes deference to the BIA interpretation of section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 because (1) the Supreme Court holding in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) imposes a dual step analysis of its own for ascertaining the retroactive effect of ambiguous statutes, and (2) *Cardoza-Fonseca* ordains a “longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien”); *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 418 (1995) (Souter, J., dissenting) (arguing against the propriety, unaddressed by the majority, of applying *Chevron* deference to 8 C.F.R. § 243.1, which construed I.N.A. section 106(a)(6) as preventing the tolling of the ninety day period for filing a petition for review of a final BIA deportation order in a federal court of appeals upon the filing of a motion for BIA reopening or reconsideration; asserting, in rejecting the relevance of *Chevron*, that (1) the I.N.S. regulation resembles a statute that the Supreme Court interpreted to permit the tolling of Interstate Commerce Commission orders in *I.C.C. v. Locomotive Engineers*, 482 U.S. 270 (1987); (2) the proffered I.N.S. interpretation of the regulation is too elusive for the uninitiated lawyer; and, (3) the I.N.S. has advanced varying interpretations of the regulation in the past); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 445-48 (1987) (discussing *Chevron* in overturning the BIA position, elaborated in *Matter of Acosta*, Interim Decision No. 2986 (Mar. 1 1985), regarding the relative similarity of the burdens of proof for establishing eligibility for asylum and withholding of removal, and finding that “traditional tools of statutory construction”—namely, an analysis of “clear congressional intent”—indicate that the twin standards are “significantly different”; declining, in any event, to permit full bore *Chevron* deference in light of a finding that BIA interpretations of the relationship between the standards, in their various incarnations, have, from 1965 to 1985, been inconsistent) (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981) and *General Electric Co. v. Gilbert*, 429 U.S. 125, 143 (1976) in support of the application of reduced

must be held to be constitutionally ordained. The second reason why *Chevron* is ill-suited to review of decisions of the Board of Immigration Appeals concerns their poor quality. Insofar as the practice of judicial deference to the factual findings and statutory constructions of administrative agencies is founded upon the desire for efficiency and the recognition of administrative expertise, it must yield to the humanitarian demand that substantive institutional injustices be rectified. The third reason for rejecting *Chevron* in the asylum context, especially in respect of BIA constructions of the particular social group definition, turns upon the inconsistent nature of these constructions over time. The Supreme Court has traditionally held that an inconsistent agency interpretation is entitled to a reduction in deference. By dint of this line, *C-A-* and its progeny (along with any subsequent BIA construction of any unamended congressional definition of the particular social group) merit limited solicitude.

It may be argued that the Supreme Court has impliedly recognized that the application of *Chevron* deference to agency interpretations of immigration statutes is problematic. Although the Supreme Court has frequently conceded the applicability of *Chevron* deference in its immigration decisions, it has only once actually extended such deference to a BIA interpretation of the INA.¹³⁶ The one case in which the Supreme Court has affirmatively relied upon *Chevron* to justify a BIA holding is *I.N.S. v. Aguirre-Aguirre*, where the Court reversed the Ninth Circuit for failing to grant suitable *Chevron* deference to a BIA opinion interpreting the “serious non-political crime” exception to the

deference); *Jean v. Nelson*, 472 U.S. 846, 865 (1985) (Marshall, J., dissenting) (citing *Chevron* for the proposition that “[a]n agency’s reasonable interpretation of the statute it is empowered to administer is entitled to deference from the courts, and will be set aside only if it is inconsistent with the clear intent of Congress”).

¹³⁶ See *id.*

withholding of removal law.¹³⁷ In *Aguirre-Aguirre*, the Court grounded the applicability of *Chevron* upon: (1) the congressional grant to the Attorney General [now, for most purposes, the Secretary of Homeland Security] of authority and discretion to administer and enforce the immigration and naturalization laws, including the I.N.A., in 8 U.S.C. § 1103(a)(3); (2) the grant of discretionary authority to the Attorney General in 8 U.S.C. § 1253(h) [now 8 U.S.C. § 1231(b)] to determine “whether the statutory conditions for withholding have been met” in individual cases; and, (3) the need for judicial deference to executive branch actions that have an impact on foreign relations, a proposition for which the Court cited its opinion in *I.N.S. v. Abudu*.¹³⁸

The wisdom that undergirds these grounds for the Court’s decision in *Aguirre-Aguirre* is impeachable. For one thing, it is unclear why the discretionary power of the Attorney General to enforce the immigration laws should necessarily justify judicial deference to his designees in matters of legal interpretation.¹³⁹ That such discretionary power—unaccompanied, it must be emphasized, by a statutory rule limiting judicial review of statutory ambiguities—is furnished through the mechanism of the Immigration and Nationality Act cannot be denied. For while 8 U.S.C. § 1103(a)(1) provides that

¹³⁷ *United States v. Aguirre-Aguirre*, 526 U.S. 415 (1999). 8 U.S.C. § 1231(b)(3)(B) provides four exceptions to the general rule that “the Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” Section 1231(b)(3)(B)(iii), the statute at issue in *Aguirre-Aguirre*, states that the withholding obligation does not pertain to an alien if the Attorney General decides that “there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States.”

¹³⁸ *Id.* at 425 (citing *I.N.S. v. Abudu*, 485 U.S. 94, 110 (1988)).

¹³⁹ *See id.* at 424-25 (stating that the general grant of discretionary authority to the Attorney General in 8 U.S.C. § 1103(a)(1) as to determinations of questions of immigration law and the specific grant of discretionary authority to the Attorney General in 8 U.S.C. § 1253(h) [now 8 U.S.C. § 1231(b)] as to the determination of the existence of the conditions precedent to withholding of deportation, support the holding that an administrative construal of the “serious non-political crime” exception to the withholding law warrants deference as a “question[] implicating ‘an agency’s construction of the statute it administers’”) (citing *Chevron*, 467 U.S. at 842).

“determination and ruling by the Attorney General with respect to all questions of law shall be controlling”¹⁴⁰; 8 U.S.C. § 1158(b)(1)(A) expressly renders the conferral of asylum upon eligible individuals a matter of executive discretion¹⁴¹; and 8 U.S.C. § 1252(b)(4)(B) codifies the “substantial evidence” rule as articulated in *Elias-Zacarias*,¹⁴² Congress has nowhere codified the *Chevron* rule in the Immigration and Nationality Act. Nor, for that matter, has Congress codified the *Chevron* rule in the context of judicial review of other agency determinations of individual rights under federally administered statutes, such as the Internal Revenue Code.¹⁴³

Whatever the cause of Congressional failure to codify the *Chevron* principle in the immigration context, the reasoning of *Aguirre-Aguirre* is flawed because judicial deference to agency interpretations of ambiguous passages in the law is inappropriate when human lives are at stake. Reading *Aguirre-Aguirre* in light of the subsequent

¹⁴⁰ This grant of power has been held constitutional. See *Carlson v. Landon*, 342 U.S. 532, 537 (1952) (“The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, ‘with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.’ This power is, of course, subject to judicial review under the ‘paramount law of the constitution.’”) (citations to authorities omitted); *U.S. ex rel. Circella v. Sahli*, 216 F.2d 33, 40 (1954), cert. denied 348 U.S. 964 (1955) (citing *Carlson*, 342 U.S. at 537)).

¹⁴¹ 8 U.S.C. § 1158(b)(1)(A) provides that “[t]he Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.”

¹⁴² Stephen Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133 & n.4 (2005). But see *Secaida-Rosales v. I.N.S.*, 331 F.3d 297, 306-307 (2d Cir. 2003) (noting that, although the court reviews agency factual determinations under the substantial evidence standard, “if the issue on appeal involves the proper application of legal principles to the facts and circumstances of the individual case at hand, our review has been *de novo*”) (citations omitted).

¹⁴³ Considering that the power to tax is the power to destroy, see *McCullough v. Maryland*, 17 U.S. 316, 327 (1819) (“An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.”), it is notable that Congress has not codified the *Chevron* deference rule in the context of judicial review of U.S. tax court decisions. See *Reimels v. Comm’r*, 436 F.3d 344, 347 n.2 (2d Cir. 2006) (leaving open the possibility that the Second Circuit will not extend *Chevron* deference to I.R.S. Revenue Rulings in light of *U.S. v. Mead*, 533 U.S. 218). Cf. *Arnett v. Comm’r*, 2007 WL 93234 (7th Cir. 2007).

disposition, in less compelling circumstances, of *I.N.S. v. St. Cyr*, suggests that certain justices may be amenable to this conclusion. The *St. Cyr* Court held that, despite the discretionary nature of INA section 212(c) relief from deportation, the elimination of such relief in IIRIRA could not, absent a clear statement from Congress, apply to the case of a defendant who had entered into a plea bargain prior to passage of the law.¹⁴⁴ By extension of the reasoning in *St. Cyr*, the application of *Chevron* deference in the asylum context should, at the very least, depend upon an implementing law from Congress.¹⁴⁵ The fact that the decision to grant asylum is itself discretionary should not mean that an administrative decision about asylum eligibility should *also* receive deference.¹⁴⁶

That said, it is arguable that the *Chevron* issue was tangential to *Aguirre-Aguirre* and not the most robust basis for the decision. The *Aguirre-Aguirre* Court lodged a great exception to the construal by the Ninth Circuit of the serious non-political crime definition as hinging upon an assessment of the probability of persecution that the subject

¹⁴⁴ See *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001) (“Finally, the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation. Cf. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (an increased likelihood of facing a qui tam action constitutes an impermissible retroactive effect for the defendant); *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 81 L.Ed. 1182 (1937) (“Removal of the possibility of a sentence of less than fifteen years . . . operates to [defendants’] detriment” (emphasis added)).

¹⁴⁵ Even with Congressional endorsement, this article would question the constitutionality, under a vigorous Fourteenth Amendment analysis, of *Chevron* deference in the asylum context.

¹⁴⁶ The present extent of federal judicial jurisdiction over final agency orders of removal is theoretically consistent with the conclusion that the deference accorded the discretionary conferral or withholding of benefits cannot operate to pretermitt scrutiny of agency legal holdings. For example, although *no judicial review* is available to criminal aliens who have been denied any of the plethora of cancellation of removal benefits (such as cancellation of removal for lawful permanent residents, 8 U.S.C. § 1229b(a); cancellation of removal for non-lawful permanent residents, 8 U.S.C. § 1229b(b); special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act of 1997, Public Law 105-100, Title 11, Nov. 19, 1997, 111 Stat. 2193 (set out in a note to 8 U.S.C. § 1255); and, section 212(c) relief or suspension of deportation pursuant, respectively, to former 8 U.S.C. §§ 1182(c), 1244), there is no statutory impairment of judicial review of constitutional matters and questions of law that are relevant to the processing of applications for these benefits. 8 U.S.C. § 1252(a)(2)(D) (“Nothing in [8 U.S.C. § 1252(a)(2)](B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.”).

immigrant, if removed, will confront in his country of origin. The justices were unanimously unsympathetic to the Ninth Circuit’s intricate, three-pronged analysis, which required: (1) balancing the nature of the crimes committed by the immigrant “‘against the danger to him of death’” if removed; (2) considering whether the crimes were “‘grossly out of proportion to their alleged objective’ and were of an ‘atrocious nature’”; and, (3) considering the “‘political necessity and success’” of the crimes.¹⁴⁷ Quite simply, the justices seemed to believe that the Ninth Circuit had contorted the plain meaning of the third withholding exception.¹⁴⁸ *Chevron* likely did not have a great impact in the formulation of the Court’s opinion, and *Aguirre-Aguirre* does not make a strong case for the application of *Chevron* deference in the immigration context. Further, given that its protagonist had participated in acts of violent agitation in Guatemala, *Aguirre-Aguirre* is proof for the adage that bad facts make bad law.¹⁴⁹

From a historical perspective, *Chevron* deference does not square well with the traditional emphasis that the Supreme Court has lent to the principle that deportations possess a unique administrative character. In *Stone v. I.N.S.*, for example—where the Court found that Congress had not intended that a general procedural rule under the

¹⁴⁷ *Id.* at 423 (discussing and quoting *Aguirre-Aguirre v. Immigration and Naturalization Service*, 121 F.3d 521, 523-24 (9th Cir. 1997)).

¹⁴⁸ *See supra* note .

¹⁴⁹ In *Aguirre-Aguirre*, the applicant testified at trial to engaging in a pattern of violent conduct:

According to the official hearing record, respondent testified that he and his fellow members would “strike” by “burning buses, breaking windows or just attacking the police, police cars.” App. 20. Respondent estimated that he participated in setting about 10 buses on fire, after dousing them with gasoline. *Id.*, at 46. Before setting fire to the buses, he and his group would order passengers to leave the bus. Passengers who refused were stoned, hit with sticks, or bound with ropes. *Id.*, at 46-47. In addition, respondent testified that he and his group “would break the windows of . . . stores,” “[t]ake the people out of the stores that were there,” and “throw everything on the floor.” *Id.* at 48.

Aguirre-Aguirre, 526 U.S. at 421-22.

Administrative Procedure Act¹⁵⁰ and the Hobbs Administrative Orders Review Act,¹⁵¹ which rule provides that the filing of a motion to reconsider or reopen agency proceedings tolls the statutory period for seeking judicial review, shall extend into the immigration context—the majority expressly noted that, owing to their finality, deportation orders are distinct from other agency determinations.¹⁵² This point is consistent with the solicitude that the Supreme Court has accorded aliens in mid-twentieth century decisions like *Fong Haw Tan v. Phelan*¹⁵³ and *Delgadillo v. Carmichael*,¹⁵⁴ both of which held that ambiguities in 8 U.S.C. § 155(a) (a predecessor to subsections of the current statute ordering the deportation of lawful permanent residents who commit certain acts or crimes¹⁵⁵) ought to be construed in favor of the alien.

Bearing in mind the following prefatory considerations, it is right to pass to a study of three essential considerations for disallowing *Chevron* deference in the immigration context.

(a) *Chevron* is inapplicable because “death is different”

The facts of *Chevron* are too distinct from those typically implicated in asylum proceedings, and *Chevron* is ill-suited to the resolution of a kind of cases in which errors are uniquely unacceptable.¹⁵⁶ *Chevron* does not deal with matters of imminent life or

¹⁵⁰ 5 U.S.C. §§ 701-706.

¹⁵¹ 28 U.S.C. §§ 2341-2351.

¹⁵² See *Stone v. I.N.S.*, 514 U.S. 386, 400 (1995).

¹⁵³ *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948).

¹⁵⁴ *Delgadillo v. Carmichael*, 332 U.S. 388 (1947).

¹⁵⁵ 8 U.S.C. § 1227(a)(2)(A)-(E).

¹⁵⁶ See *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (stating that one member of the BIA had been discovered to have decided more than fifty immigration cases in one day, and stating that “Deference is earned; it is not a birthright. Repeated egregious failures of the Immigration Court and the Board to exercise care commensurate with the stakes in an asylum case can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate.”).

death. *Chevron* is a Clean Air Act case that affirms the discretionary authority of the Administrator of the Environmental Protection Agency to allow state air pollution control agencies to construe a statutory term by selecting between two practical definitions with varying (and uncertain) economic and environmental ramifications.¹⁵⁷

There may be superficial parallels between the facts of *Chevron* and those implicated in ascertainment of the legal viability of a “novel” particular social group¹⁵⁸: like the outer parameters of the particular social group definition, the statutory definition that was the subject of the *Chevron* dispute—the term “major stationary sources” in section 172(b) of the Clean Air Amendments of 1977—was neither defined by Congress nor possessed of an unambiguous legislative history.¹⁵⁹ This observation is offered

¹⁵⁷ The *Chevron* rule emerged in the context of review of an especially intricate tangle of environmental laws and regulations. Section 172(b) of the Clean Air Amendments of 1977, 42 U.S.C. § 7502(b), had required that the new construction or modification of sources of air pollution in states that had failed to attain national ambient air quality standards (NAAQS) by 1975, as had been required by the Clean Air Amendments of 1970, be conditioned upon the satisfaction of a new source review program that was to be administered by the states in accordance with the federal guidelines specified in section 173 of the 1977 Amendments, 42 U.S.C. § 7503. In *Chevron*, the respondent environmental and health organizations National Resources Defense Council, Citizens for a Better Environment, and the Northwestern Ohio Lung Association challenged a 1981 EPA interpretation of the term “major stationary sources” in section 172(b) of the 1977 Amendments, that allowed these “nonattainment” states to define the term in one of two ways if they had submitted approved, revised state implementation plans (SIPs) to the EPA, as prescribed by sections 107 and 110 of the Clean Air Amendments of 1970, 42 U.S.C. §§ 7407, 7410, and by section 172(b) of the 1977 Amendments. The flexible EPA definition—promulgated by the Reagan Administration at 40 C.F.R. parts 51.18(j)(1)(i)-(ii), 52.24(f)(1)-(2)—permitted states with approved SIPs to define a “source” as either an entire industrial plant, containing many pollutant-emitting production units (this reading is commonly referred to as a “bubble” definition), or as an individual production unit that is a discrete component of an integrated operation. The former, “plantwide” definition would allow the new construction or modification of pollution-emitting production units to escape new source review if the consequential increase in pollution could be offset by decreases in pollution at the same plant. See Brief for the Administrator of the Environmental Protection Agency at 10-23, *Chevron* (Nos. 82-1005, 82-1247, 82-1591), at 1982 U.S. Briefs 1005 (Lexis).

¹⁵⁸ A “novel” particular social group should be understood to be one that has not previously been legally recognized in a prior administrative or judicial decision.

¹⁵⁹ *Chevron*, 467 U.S. at 859-62. One might argue that the legislative history of the particular social group exception in the U.N. Convention and the U.N. Protocol, the latter of which incorporates practically all of the former, and which the United States sought to implement through passage of the Refugee Act, is not ambiguous in that: (1) both are inspired by remedial, humanitarian aspirations that favor grants of asylum; and, by implication, (2) the particular social group exception was primarily drafted in response to the broad nature of Nazi persecution, to serve as a future guardian against forms of persecution that do not adequately fit within the four, narrower exceptions. See n. 31 *supra* (analysis by the *Fatin* Court of the history of the particular social group exception).

despite the argument that the appraisal of similarity vis-à-vis Congressional vagueness is here a subjective matter of degree: the *Chevron* Court decided that a fuller definition of the term “stationary source” that was contained in section 111 of the Clean Air Amendments of 1970 was not intended to apply to the 1977 Amendments¹⁶⁰ and that the 1970 definition (as well as a related use of the term in section 302(j) of the 1970 Amendments) was ambiguous besides or even implied a result that was favorable to the EPA.¹⁶¹ The Court reached the same conclusion with respect to the fairly ample legislative history.¹⁶²

Although the reduction of air pollution—for which the effective means were contested by the *Chevron* parties—is an essential national priority that impacts the public

¹⁶⁰ *Chevron*, 467 U.S. at 859. The United States Court of Appeals for the District of Columbia reached the same conclusion as the Supreme Court regarding both the statutory text and the legislative history, although, perhaps contradictorily as to the latter finding (which concerned the existence of legislative history upon a detailed and specific question: the permissibility of EPA endorsement of the bubble concept), the D.C. Circuit invoked the purposes of the Clean Air Act (and past D.C. Circuit precedents construing the Act) to set aside the EPA regulation. *Id.* at 841-42 (“The [D.C. Circuit] court observed that the relevant part of the amended Clean Air Act ‘does not explicitly define what Congress envisioned as a “stationary source,” to which the permit program . . . should apply,’ and further stated that the precise issue was not ‘squarely addressed in the legislative history.’ In light of its conclusion that the legislative history bearing on the question was ‘at best contradictory,’ it reasoned that ‘the purposes of the non-attainment program should guide our decision here.’ Based on two of its precedents concerning the applicability of the bubble concept to certain Clean Air Act programs, the court stated that the bubble concept was ‘mandatory’ in programs designed merely to maintain existing air quality, but held that it was ‘inappropriate’ in programs enacted to improve air quality. Since the purpose of the permit program—its ‘*raison d’etre*,’ in the court’s view—was to improve air quality, the court held that the bubble concept was inapplicable in these cases under its prior precedents. It therefore set aside the regulations embodying the bubble concept as contrary to law. We granted certiorari to review that judgment, and we now reverse.”) (discussing *National Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982)) (citations and footnotes omitted).

¹⁶¹ *Id.* at 859-60.

¹⁶² *Id.* at 861-64. Of course, the Supreme Court in *Chevron* did not arrive at its holding in a vacuum: it relied on the statutory text and legislative history of the Clean Air Amendments of 1970 and 1977 to render its permissibility finding. The EPA regulation struck the Court as a positive effort at balancing the conflicting priorities of the 1977 law. *See, e.g., id.* at 851 (“The legislative history of the portion of the 1977 Amendments dealing with nonattainment areas does not contain any specific comment on the ‘bubble concept’ or the question whether a plantwide definition of a stationary source is permissible under the permit program. It does, however, plainly disclose that in the permit program Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue and the environmental interest in improving air quality.”).

health and welfare,¹⁶³ it cannot be compared to the important interests underlying the adjudication of cases involving life or death, in the way of the asylum and withholding defenses to removal. The question at issue in *Chevron*, which concerned whether a new or modified pollution “source” requiring “new source review” under the Clean Air Amendments of 1977 could be defined on a plant-wide basis (thereby allowing pollution increases owing to the construction of new production units to be netted against plant-wide emissions reductions, with the aim of encouraging the replacement of highly polluting older technologies with cleaner new technologies by removing an obvious governmental disincentive to plant modernization [new source review]), did not impact fundamental rights in the same manner as asylum and withholding determinations. This observation is consistent with the ethical contention that removal of a self-purported victim of persecution should only be accomplished when there is certainty that he or she will not be persecuted.¹⁶⁴ A mistake in this regard can lead to death and there is documentary proof that it had done so in the past.

¹⁶³ See Elisabeth Rosenthal and Andrew C. Revkin, *Science Panel Says Global Warming is 'Unequivocal,'* N.Y. TIMES (Feb. 3, 2007), at A1, A5. 42 U.S.C. § 7409(b)(1) (“National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.”).

¹⁶⁴ That the asylum and withholding laws mandate that an applicant prove that past persecution or reasonable fear of future persecution exist on account of one or more protectable characteristics invites the morally wrong denial of protection to individuals who cannot frame their asylum claims in the correct legal terms, either because they were not persecuted on account of protectable grounds or they could not afford good lawyers. To a degree, therefore, the asylum and withholding laws are structurally deficient and represent somewhat irrational reflections of societal apprehensions about uncontrollable immigration and immigration fraud. The 1951 U.N. Convention, which only provided protection to victims of acts of persecution that occurred before the year of its enactment, similarly reflected such apprehensions. See U.N. Convention art. 1, as discussed *supra* note 6.

By contrast, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment embodies a more humane and forward-looking refugee definition that embraces all torture victims and does not exclude persons who are not harmed on account of protectable grounds. See 8 C.F.R. § 208.16(c)(2) (“The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”). In the United States, however, the burden of proof for establishing a torture claim is upon the order of the daunting “more likely than not” withholding standard. See *Efe v. Ashcroft*, 293 F.3d 899, 907 (5th Cir. 2002). “More likely than not” means that there is “greater than a fifty percent chance.” *Wang v. Ashcroft*, 320 F.3d 130, 144 n.20 (2d Cir. 2003).

Thus, the practical consequences of erroneous removals cannot, in terms of their procedural exigencies, be meaningfully distinguished from those attending errantly imposed death sentences. The development of Supreme Court capital case jurisprudence has founded itself upon acknowledgment of the “uniqueness of death”: the fact that it is “an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.”¹⁶⁵ On numerous occasions, the specter of the death penalty has compelled the Court to act progressively in affirming the constitutional dimensions of important safeguards for criminal defendants, perhaps beginning with the right to counsel, which was held to be constitutionally ordained in the landmark 1932 *Scottsboro Boys* decision.¹⁶⁶ It has also caused the Court to insist that the death penalty be applied in a

¹⁶⁵ *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). One is ill-advised to distinguish deportation as non-punitive; although it is indisputably considered to be a civil measure, the Supreme Court has acknowledged its extraordinarily harsh effects. *See I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 488 (1992) (“Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 Congress sought to “give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world.” H. R. Rep. [96-608, p. 9 (1979)”) (citing *Cardoza-Fonseca*, 480 U.S. at 449-50).

¹⁶⁶ *Powell v. Alabama*, 287 U.S. 45 (1932). In *Powell*, the Court harshly criticized the rule at common law that accused misdemeanants were permitted representation but accused felons, whose predicament invoked the protection of the judge, were not allowed counsel. *See id.* at 60 (“An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageously and so obviously a perversion of all sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers.”). This indignation might also be directed at the reality that, under current Supreme Court precedent, indigent individuals who are confronted with the possibility of merely a single day of imprisonment are constitutionally entitled to representation, whereas there is no constitutional problem when an individual who confronts the possibility of death upon removal must appear in immigration court without an attorney (our incredulity might be compounded when we consider that, unlike asylum applicants, most criminal defendants are charged upon relatively straightforward factual and legal scenarios).

The *Powell* Court held that, “under the [capital] circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.” *Id.* at 71. The Court added:

Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not

manner that is not “wanton[]” or “freakish[]”,¹⁶⁷ modern state capital sentencing procedures were essentially furnished a constitutional imprimatur in *Gregg v. Georgia* because they require specific findings by judges or juries, in the context of bifurcated trials, of statutorily specified aggravating circumstances, and they provide for automatic review by state supreme courts.¹⁶⁸ ~~As procedures in criminal cases (and, naturally, the death penalty cases among them) have been shaped by an Eighth Amendment jurisprudence that “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society,”¹⁶⁹ the Supreme Court justices scrupulously contemplate future constitutional treatment of capital punishment regimens.¹⁷⁰ **YOU COULD BRING IN CASES ABOUT LETHAL INJECTION.** Now, the national emergence of a de facto moratorium on capital punishment—as a product of the Court’s decision to review cases involving the constitutionality of administration of lethal injection—is proof of the fact that different rules apply where death is a possibility.~~

discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, “that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.” *Holden v. Hardy* [169 U.S. 366, 386 (1898)], supra. In a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.

Id. at 71-72 (citations omitted). The above passage patently reveals the role of the death penalty in causing the Court to assert the constitutional necessity of a critical procedural guarantee.

¹⁶⁷ See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (“Indeed, the death sentences examined by the Court in *Furman* were ‘cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit the unique penalty to be so wantonly and so freakishly imposed.’ *Id.*, at 309-310 (STEWART, J., concurring)”). See also *Lockett v. Ohio*, 438 U.S. 586 (1976).

¹⁶⁸ See, e.g., *id.* at 187-207.

¹⁶⁹ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁷⁰ For a recent example, see *Kansas v. Marsh*, U.S. 2006 (Souter, J., dissenting, slip op. at 6) (“Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests.”).

The removal of a person seeking asylum may be equal to a condemnation of death. As aforementioned, there is at least one documented case of the murder of a removed asylum applicant in recent years; Edgar Chocoy, a Guatemalan boy who attempted to disassociate from the *Mara Salvatrucha* gang, was killed by gang members after being removed to his country in 2004.¹⁷¹ Murders of returned refugees are nothing new: the world still remembers the heinous deportations to concentration camps by the Nazis of Jewish refugees who were not permitted to disembark from the *S.S. St. Louis* by corrupt Cuban authorities in 1939. For this straightforward reason, which is as compelling as the basis for increased protection in capital cases, *Chevron* is a callous rule of appellate construction of administrative immigration decisions. It would not be acceptable in capital punishment cases, and because asylum and death cases are eminently comparable (minus the discrepancies, of arguable significance, of the identities of the killers and the degree of the governmental will for death), for while not all removed asylum applicants are murdered (indeed, no accurate percentage of murdered returnees has been compiled), there is a greater number of asylum applicants than capital defendants. Hence, the risk of “unacceptable death” is as disturbing in the asylum context as in capital cases. From a retributive perspective,¹⁷² this risk is even greater in the asylum context because only a narrow category of asylum applicants can be said to have committed morally reprehensible acts that may, depending upon one’s view of capital punishment, merit death.¹⁷³

¹⁷¹ See Michele Voss, *Young and Marked for Death: Expanding the Definition of “Particular Social Group” in Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS UNIV. L.J. 235 (2005).

¹⁷² Despite the eloquent dissents of Justices Brennan and Marshall, the Constitution is compatible with notions of retributive justice. *Gregg*, 428 U.S. at 183-84 (citing *Furman*, 408 U.S. at 394-95 (Burger, C.J., dissenting); *id.* at 452-54 (Powell, J., dissenting); *Powell v. Texas*, 392 U.S. 514, 531, 535-36 (1968) (plurality opinion)).

¹⁷³ Individuals who have engaged in acts of persecution are ineligible for asylum. See 8 U.S.C. § 1158(b)(2)(A)(i).

- (b) *Chevron* is better suited to the consideration of economic and technical cases that do not directly impact matters of life or death;

The *Chevron* question involved technical and scientifically complex laws and regulations that are best understood, and therefore interpreted and applied by, an agency rule-maker.¹⁷⁴ As Professor Cass Sunstein, a noted scholar of both constitutional and administrative law, has observed in reference to the role of agency expertise in formulating regulations that adequately address the effects of interactions between clean air and clean water laws:

Often the regulatory process is confounded by the difficulty of coordinating numerous statutes with one another. For example, the problems of air and water pollution are closely entangled. Efforts to control the one may aggravate the other, and there are complex interactions among various cleanup strategies. If the problems are treated separately, they will not be treated well. The EPA is charged with interpreting numerous statutes, and it is in a far better position than the judiciary, reacting as it must to single cases, to respond to difficulties of this sort.¹⁷⁵

¹⁷⁴ *Chevron*, 467 U.S. at 865 (“In these cases the Administrator’s interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies.”) (footnotes omitted).

¹⁷⁵ Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088 (1990). *See id.* n.209 (“The Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982), includes a large number of awkwardly related provisions, and the EPA is uniquely able to have an overview of the system as a whole. Moreover, the Clean Air Act relates to the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988), in important ways, with regulation of the air, for example, possibly increasing pollution of the water. The EPA is in a special position to take account of these effects.”).

For Professor Sunstein, *Chevron* represents an attempt at synthesizing “original constitutional principles and a twentieth century governmental apparatus that was created in self-conscious rejection of those principles.”¹⁷⁶ *Chevron* is not “self-applying”; on the contrary, its relevance in a variety of substantive postures ought to be considered an open question.¹⁷⁷

The *Chevron* Court did cite an immigration law precedent, *I.N.S. v. Jong Ha Wang*,¹⁷⁸ to support its particular theory of judicial deference to agency action.¹⁷⁹ In *Jong Ha Wang*, a Korean family applied for suspension of deportation through a motion to reopen deportation proceedings and advanced a claim of extreme hardship under I.N.A. section 244.¹⁸⁰ The BIA denied the motion but the en banc Ninth Circuit reversed and remanded the case for a hearing, laying down new standards for the consideration of suspension claims.¹⁸¹ In reversing the Ninth Circuit, the Supreme Court held in a per curiam opinion that the lower court had “improvidently encroached on the authority which the Act confers on the Attorney General and his delegates.”¹⁸² The Court enunciated a precursor to *Chevron*:

¹⁷⁶ *Id.* at 2119.

¹⁷⁷ Question of delegation of rule-making authority; question of agency jurisdiction versus authorization; question of agency bias; question of an agency attempt at altering an agency interpretation that a court has endorsed; question of agency competency; question of an agency resolution of a pure matter of law; question of Justice Stevens’ dissent in *Young v. Community Nutrition Institute*; question of interaction with other substantive canons of construction (liberal construal of statutes in favor of Native American tribes, and the doctrine that the seaman is the ward of the admiralty); question of consistency of agency interpretation over time.

¹⁷⁸ 450 U.S. 139 (1981).

¹⁷⁹ *Chevron*, 467 U.S. at 843 (citing *Jong Ha Wang*, 450 U.S. at 144, and *Train v. Natural Resources Defence Council*, 421 U.S. at 87, as illustrative of the proposition that “[s]ometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

¹⁸⁰ I.N.A. section 244(a), 8 U.S.C. § 1254(a)(1), which was repealed in 1996 by IIRIRA, permitted the Attorney General to suspend deportation and adjust the status

¹⁸¹ See *Jong Ha Wang*, 450 U.S. at 143 & 145.

¹⁸² *Id.* at 144.

The crucial question in this case is what constitutes “extreme hardship.” These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.¹⁸³

Since *Jong Ha Wang*, the Court has upheld the discretionary authority of the Attorney General to deny motions to reopen deportation proceedings to assert asylum and withholding claims. In reversing an opinion of the Ninth Circuit in *I.N.S. v. Abudu*, the Court held that an abuse of discretion standard of review applies to the BIA denial of a motion to reopen a deportation proceeding to permit an alien to request asylum and withholding of removal on the ground that the applicant has not met his burden, as required by 8 C.F.R. § 208.11, of reasonably explaining his earlier failure to apply for asylum.¹⁸⁴ Generally speaking, the *Abudu* Court underscored the limited nature of an alien’s right to contest an agency denial of a motion to reopen for purposes of applying for discretionary relief.¹⁸⁵ It explained that, in reviewing an immigration judge’s denial of such a motion, the BIA possesses the authority to treat as harmless any errant finding that an alien has failed to satisfy the regulatory prerequisites for a grant if the Board determines that the alien is not entitled to a favorable exercise of discretion.¹⁸⁶ The justification for the Court’s ratification of this deferential judicial standard (as either a

¹⁸³ *Id.* at 144.

¹⁸⁴ *Id.* at 104-105.

¹⁸⁵ *Id.* at 105.

¹⁸⁶ *Id.*

regulatory or perhaps a constitutional matter, there being no statutory provision for a motion to reopen a deportation proceeding) lay in the wariness with which it views motions to reopen, which it compared to petitions for rehearing and motions for new trials on the bases of newly discovered evidence.¹⁸⁷

Yet the *Abudu* decision (like *Jong Ha Wang*) is of limited usefulness in formulating asylum policy. This is because of two flaws in the *Abudu* Court's reasoning. First, the Court should not have compared a motion to reopen a deportation proceeding to a motion for a new trial in a criminal proceeding.¹⁸⁸ The analogy is inapt because even mendacious aliens who seek asylum do not pose the same threats to the social order as criminals. The social interest in denying relief to an unworthy asylum applicant cannot compare to the social interest in the finality of a criminal conviction; indeed, the force of the latter interest is invigorated by passage in 1996 of the amendments to the federal habeas corpus laws in the Antiterrorism and Effective Death Penalty Act.¹⁸⁹

¹⁸⁷ *Abudu*, 485 U.S. at 107 n. 11 (citing decisions that establish the discretionary nature of the rights of various agencies -- the Interstate Commerce Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, and the Environmental Protection Agency -- to consider motion to reopen agency proceedings in extraordinary circumstances) & n. 12 (citing authorities).

¹⁸⁸ *Id.* at 110 (citing *Taylor v. United States*, 484 U.S. 400, 414 n.18 (1988) (citing cases)).

¹⁸⁹ See *Calderon v. Thompson*, 523 U.S. 538, 554-55 (1998) ("In light of 'the profound societal costs that attend the exercise of habeas jurisdiction,' we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief.") (quoting *Smith v. Murray*, 477 U.S. 527, 539 (1986); citing *McCleskey v. Zant*, 499 U.S. 467, 487 (1991) to underline the limitation on the discretion of a district court to "entertain abusive petitions"; citing *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977) to underline the limitation on judicial discretion to "entertain procedurally defaulted claims"; citing *Teague v. Lane*, 489 U.S. 288, 308-310 (1989) (plurality opinion of O'Connor, J.) to underline the limitation on judicial discretion "to give retroactive application to 'new rules' in habeas cases"); citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1998) to underline the limitation on judicial discretion to grant "habeas relief on the basis of 'trial error'"). See also *Dodd v. United States*, 545 U.S. 353, 360 (2005) (holding that the one year limitation on the filing of a habeas corpus motion to correct or set aside a federal criminal sentence under paragraph 6(3) of 28 U.S.C. § 2255 runs from the date that a new right is initially recognized by the Supreme Court, not the date upon which the right is determined to apply retroactively to cases on collateral review, despite the "standard rule" (which the majority stated was inapplicable because of its opinion of the clarity of language of paragraph 6(3) of section 2255) providing "that the limitations period commences when the plaintiff has a complete and present cause of action") (citing *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409, 419 n.2 (2005))

Second, the Court held that agency discretion in considering motions to reopen is especially expansive due to the political character of administrative adjudication and attendant foreign policy considerations.¹⁹⁰ This finding is extremely troubling, in that it permits generalized collective interests related to U.S. foreign policy to trump acute individualized concerns (the motivation to avoid death or harm at the hands of foreign actors). The Preamble to the United Nations Convention Relating to the Status of Refugees expresses “the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,” and it should be an unwavering principle of U.S. law that a grant or denial of asylum cannot rest upon fears of causing offense to foreign potentates.¹⁹¹ This principle was subsequently conceded by the Department of Justice in a settlement that followed a series of lawsuits brought by the American Baptist Churches, among other religious organizations and Central American refugee service organizations, against the Immigration and Naturalization Service, the Department of Justice, the Department of State, and the Attorney General; among other things, the lawsuits alleged discriminatory treatment based upon U.S. foreign relations

¹⁹⁰ *Id.* at 109 (“In sum, although all adjudications by administrative agencies are to some degree judicial and to some degree political - and therefore an abuse-of-discretion standard will often apply to agency adjudications not governed by specific statutory commands - INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reason for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context.”).

¹⁹¹ Of course, leaving the asylum context, U.S. immigration laws ought certainly to reflect a wide variety of national priorities, including foreign policy priorities. *See Kleindienst v. Mandel*, 408 U.S. 753, 765-66 & n.6 (1972) (citing cases).

priorities of Salvadoran and Guatemalan refugees.¹⁹² Five years later, the BIA adopted an identical position in *Matter of S-P*:

It is also important to remember that a grant of political asylum is a benefit to an individual under asylum law, not a judgment against the country in question. When the international community was considering the 1967 Refugee Protocol, the U.N. General Assembly made clear that “the grant of asylum by a State is a peaceful and humanitarian act and . . . as such, it cannot be regarded as unfriendly by any other state.” Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), 22 U.N. GAOR, Supp. No. 16, at 81, U.N. Doc. A/6716 (1967). A decision to grant asylum is not an unfriendly act precisely because it is not a judgment about the country involved, but a judgment about the reasonableness of the applicant’s belief that persecution was based on a protected ground. This distinction between the goals of refugee law (which protects individuals) and politics (which manages the relations between political bodies) should not be confused in charting an approach to determining motive. While it is

¹⁹² See *American Baptist Churches v. Thornburgh*, 760 F.Supp. 796 (N.D. Cal. 1991); *American Baptist Churches v. Meese*, 712 F.Supp. 756 (N.D. Cal. 1989); *American Baptist Churches v. Meese*, 666 F.Supp. 1358 (N.D. Cal. 1987) (denial of motion to dismiss for failure to state a claim upon which relief may be granted as to a claim brought by religious organizations fearing constitutionally impermissible prosecution under 8 U.S.C. § 1324, the federal immigrant harboring and smuggling statute, for providing sanctuary to Guatemalan and Salvadoran refugees). Unlike Nicaraguans, Guatemalan and Salvadoran refugees hailed from repressive dictatorships with close ties to conservative forces in the White House and Central Intelligence Agency. They alleged disparate treatment at the hands of administrative adjudicators. Such de facto discrimination must be cured, just as the advancement of a humane law demands the elimination of de jure discrimination based upon national origin (which is evidenced, perhaps most blatantly, by a comparison of the legal regime attending Cuban refugees with the legal regime attending Haitian refugees). Cf. 8 C.F.R. § 245.15 (implementing the Haitian Refugee Immigrant Fairness Act of 1998, Public Law 105-277, Oct. 21, 1998, 112 Stat. 2681).

prudent to exercise great caution before condemning acts of another state,
this is not a reason for narrowly applying asylum law.

Id. at 492-93. This position of the *S-P-* Board is normatively superior to the Court's foreign policy rationale for deference to the Attorney General in *Abudu*. After an atrocious century of genocide, there is no excuse for sacrificing the interests of vulnerable refugees in the name of national political interests. If one reaffirms the bedrock principle that respect for the individual is the lifeblood of the law, then there is no satisfactory alternative to the disavowal of *Abudu*.

(c) Even if principles of administrative deference are embraced in the immigration context, *Chevron* deference should not be applied to particular social group cases.

Even if *Chevron* continues to be applied in the immigration arena, despite its ill-suited character, the notion that the BIA resolution of *Matter of C-A-* amounts to a "permissible" resolution of a statutory ambiguity, in line with the concept of *Chevron* deference, is unacceptable. This is because *Chevron* deference should not be extended to agency interpretations that shift over time, in line with the Supreme Court doctrine of reduced deference for an administrative guideline that is inconsistent with a previous guideline construing the same statutory provision.¹⁹³ Indeed, the Second Circuit Court of

¹⁹³ See *General Electric Co. v. Gilbert*, 429 U.S. at 141-42 (discounting an interpretive guideline promulgated by the Equal Employment Opportunity Commission that was inconsistent with previous regulatory guidance and legislative history in reference to the question whether Title VII of the Civil Rights Act of 1964 requires that employee disability insurance plans provide benefits for pregnancy-related leave and/or illness) (quoting and applying the rules in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *Skidmore* can be read to uphold the principle that determinations of individual private rights ought to be subject to a considerable modicum of judicial scrutiny, in lieu of mere deference to agency interpretations. *Skidmore* involved an action for overtime pay under the Fair Labor Standards Act maximum hours provision, 29 U.S.C. § 207. The precise issue concerned whether time spent on call to answer fire alarms at and around a company fire-hall should count as paid working time under the Act. *Skidmore*, 323 U.S. at 135. Justice Jackson, writing for the Court, affirmed the contextual nature of the inquiry and reviewed examples, prepared by the Administrator of the Wage and Hour Division of the U.S. Department of Labor, of work performed on call that the Administrator interpreted as not constituting working time. *Id.* at 138.

Appeals has suggested such a rule of reduced administrative deference, known as the *Skidmore* rule,¹⁹⁴ may apply in the immigration context, specifically as concerns decisions reached by immigration judges.¹⁹⁵ The resolution of the question must await a proper case in which the BIA has summarily affirmed the IJ decision, as BIA summary

The Court took notice of the Administrator's position, explained in an amicus curiae brief, that the worker's on call hours, except the proportion dedicated to eating and sleeping, should be treated as working time. *Id.* It hinted, however, that a fact-finder might decline to follow this position due to the existence of a preexisting agreement as to compensation for the actual answering of alarms, and reversed and remanded the cause for further findings. *Id.* at 140 ("The courts in the [companion] *Armour [& Co. v. Wantock*, 323 U.S. 126 (1944)] case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith. The evidence in this case in some respects, such as the understanding as to separate compensation for answering alarms, is different. *Each case must stand on its own facts.*") (emphasis supplied).

Skidmore is of special importance because it prescribes standards for the evaluation of a specimen of (in this case, FLSA Administrator) Executive Branch "rulings, interpretations, and opinions":

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140.

Skidmore should be applied in the immigration law context. It is true that the illustrations of FLSA non-working time situations that the Court considered were not, as the Court noted, products of the adjudicative resolution of litigated disputes. *Id.* at 139 (the Court compared the content of the FLSA Interpretive Bulletin to Treasury Regulations promulgated by the Internal Revenue Service, which are binding upon the Service but not the federal courts). Nevertheless, like the decisions of the Board of Immigration Appeals, the guidelines are valued because of two important considerations. The first is that they are products of occupational expertise. *Id.* (stating that "... the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"). At least in theory - *although in practice the point is highly contestable* - immigration judges are experts as to the application of the asylum and withholding of removal laws, *although no EOIR judge or BIA judge could reasonably be expected to be an expert about country conditions in all or even the majority of countries that are considerable sources of refugees*. The second is that, because the guidelines are binding upon the agency (just as asylum and withholding regulations are binding on asylum officers) and detail the circumstances under which the agency seeks to enforce the FLSA (by bringing actions in federal district court for injunctive relief pursuant to 29 U.S.C. § 217), it is desirable for uniformity purposes that the guidelines also prevail in private actions. *Id.* at 139-40 ("[The Administrator's guidelines] do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons."). For this pair of reasons, the *Skidmore* approach to interpretations of "agency rulings, interpretations, and opinions" offers a promising lens through which federal appeals courts should construe Board of Immigration Appeals

affirmances do not merit *Chevron* deference in the Second Circuit.¹⁹⁶ It is relevant, however, that, in the context of review of federal tax court interpretations of law, the Seventh Circuit has reconciled the joint operation *Chevron* and the tax case equivalents of *Skidmore*, which decisions accord the force of law to longstanding Treasury regulations.¹⁹⁷

Because in *Matter of C-A-*, for the reasons explored above, the Board of Immigration Appeals appears to have altered its definition of a particular social group through the addition of restrictive qualifications, its new definition appears less likely to accurately reflect the intent of Congress in enacting the 1980 Refugee Act. *C-A-* was first published 26 years after enactment of the Act, while *Acosta* was decided only five years thereafter.

The Eleventh Circuit opinion justified the BIA holding by invoking a “fear of opening the floodgates”-type argument, which operates to take away a grant of eligibility which I.N.A. section 101(a)(42) otherwise plainly commands. Thus, the Court speaks of balancing in two contexts. The first involves its endorsement of the *Acosta* immutability/unconscionability framework:

Furthermore, *Acosta* strikes an acceptable balance between (1) rendering “particular social group” a catch-all for all groups who might claim persecution, which would render the other four categories meaningless,

decisions. *Skidmore* calls for an admirable devotion to the careful consideration of each and every claim.

¹⁹⁴ See *id.*

¹⁹⁵ See *Shi Liang Lin v. U.S. Dep’t of Justice*, 416 F.3d 184, 190-91 (2d Cir. 2005).

¹⁹⁶ *Gao v. Gonzales* (2d Cir. 2006), <http://cgrs.uchastings.edu/documents/legal/gao.pdf>, at p. 6.

¹⁹⁷ See *Arnett v. Comm’r*, 2007 WL 93234, at *4 (7th Cir. 2007) (“[T]reasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the force of law.”) (citing *U.S. v. Correll*, 389 U.S. 299, 305-306 (1967); *Cottage Sav. Ass’n v. Comm’r*, 499 U.S. 554, 561 (1991)).

and (2) rendering “particular social group” a nullity by making its requirements too stringent or too specific.¹⁹⁸

The second involves an unsubstantiated assumption of congressional intent:

As stated previously, “particular social group” should not be a “catch all” for all persons alleging persecution who do not fit elsewhere. In restricting the grounds for asylum and withholding of deportation based on persecution to five enumerated grounds, Congress could not have intended that all individuals seeking this relief would qualify in some form by defining their own “particular social group.” See 8 U.S.C. § 1101(a)(42) (A); *id.* § 1253(h)(1) (1994) (now codified at 8 U.S.C. § 1231(b)(3)(A)).

The problem with the Eleventh Circuit approach is that it is not statutorily grounded: it relies upon extraneous policy considerations to place brakes on the definition of a particular social group. As aforementioned, in *Acosta*, the Board of Immigration Appeals stated that the point of departure for identification of a particular social group is the doctrine of *esjudem generis*. By its nature, this doctrine necessarily conceptualizes the particular social group as a distillation of the fundamental components (immutability and unconscionability) of the four other statutorily protected grounds. One would not be mistaken, contrary to the logic of the Eleventh Circuit, to define the particular social group as a “catch all.”¹⁹⁹ There is nothing wrong with the fact that our asylum law offers protection to every individual who proves past persecution or a well-founded fear of persecution on account of an associational characteristic that he cannot or should not be

¹⁹⁸ *Id.* at 1197.

¹⁹⁹ This is a good place to cite to Deborah Anker’s article.

required to change. It is distressing that, in the absence of any explicit (or implicit) legislative history in support of its position, the Eleventh Circuit assumed the existence of Congressional intent to limit the scope of the particular social group definition.

4. Federal Habeas Corpus Review of “Mixed Questions of Law”

***Thompson v. Keohane*, 516 U.S. 99 (1995)**

FN 13 -- Juries make determinations as to negligent conduct, whereas judges make determinations as to whether a defendant is in “custody” for purposes of *Miranda*. The allocation of functions of review, and the extent of reviewability itself, are informed by legal and moral conceptions of the relative importance of the various questions entertained by Courts.

***Brown v. Allen*, 344 U.S. 443, 507 (1953) (Frankfurter, J.) -- “Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts, the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so called mixed questions or the application of constitutional questions to the facts as found leave the duty of adjudication with the federal judge.” EXCEPTIONS -- competency to stand trial, *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam), and juror impartiality, *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).**

CONCLUSION

Like death penalty jurisprudence, the law of asylum deserves its own special attention because of the grievous implications posed by application denials. Agency judges and federal judges should do their best to reach the right results in cases, more than they should especially heed the division of power between the Executive and Legislative branches,²⁰⁰ as their decisions are of the utmost humanitarian importance. If, it may be acknowledged, the tilt in congressional attitudes towards asylum seekers has veered towards the skeptical, both in the form of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the Real ID Act of 2005, it is nevertheless essential that the definition of a refugee be construed in a manner that protects all victims of suffering. To the extent that political considerations influence the concern that Congress shows particular classes of individuals—witness, for example, the expansive scope of judicial review of Tax Court decisions²⁰¹—moral incentives must play the crucial role in structuring appellate review of asylum application denials.

The way forward may commence with lawyers urging the federal circuit courts to embrace *Acosta* and to turn away from subsequent agency holdings like *C-A-* and *A-M-E & J-G-U-*. Congress should amend the definition of a refugee to specifically define a social group as a collection of individuals defined by immutable or socially fundamental characteristics, without any requirement of homogeneity or discretion in the eyes of third parties. Indeed, Congress should expressly disavow *C-A-* and *A-M-E- & J-G-U-* as bad

²⁰⁰ From an originalist perspective, it is difficult to appreciate how principles of separation of powers can vigorously inform the application of *Chevron* deference, since the administrative courts that the Executive Office of Immigration Review and the BIA resemble are New Deal offspring that the Founding Fathers would not recognize.

²⁰¹ See 26 U.S.C. § 7482.

law that is expressly inconsistent with the federal refugee definition and the federal asylum statute. Congress should also strike the adjective “particular” from the phrase “social group,” as it adds nothing to the definition and serves as a grievous source of mischief and Kafkaesque claim denials.

Third, Congress should disavow *Chevron* deference in the asylum context and insist upon scrupulous judicial reexamination of administrative interpretations of the federal asylum statute and refugee definition. The asylum law is not scientifically technical like the Clean Air Act, and there is no reason why federal judges need to defer to the determinations of political appointees in the Department of Justice who are never subjected to Senate confirmation.²⁰² Given that the track record of the Board of Immigration Appeals (especially in the wake of streamlining regulations promulgated by Attorney General Ashcroft) does much to undermine confidence in “specialty courts” (especially “specialty courts” that are designed to weigh the rights of non-citizens), the solution to this nation’s asylum “crisis” may not be, as certain politicians and commentators have suggested, the establishment of a federal immigration court.²⁰³ Just as the Executive Office of Immigration Review (EOIR) (of which the Immigration Courts and the BIA form a part) and United States Citizenship and Immigration Services

²⁰² See 8 U.S.C. § 1103 (conferring authority over immigration matters to the Attorney General); 8 C.F.R. § 1003.1(a)(1) (providing that “[t]here shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General’s delegates in the cases that come before them”).

²⁰³ Howard Bashman, *Giving it to the Federal Circuit: Why Stop at Immigration Appeals?*, LAW.COM (April 10, 2006), <http://www.law.com/jsp/article.jsp?id=1144414532317>. Mr. Bashman’s article, which references legislative proposals in 2006 to transfer immigration appeals to the United States Court of Appeals for the Federal Circuit, employs a delicious hint of satire. “But why stop at immigration appeals?” Mr. Bashman asks. “There assuredly are other categories of appeals that the regional federal appellate courts view as dry, needlessly complex, burdensome or inconsequential. Perhaps these cases, too, could be sent to the Federal Circuit, so that the regional federal appellate courts would be left to handle only the extraordinarily interesting cases that appellate judges anticipate receiving when they take their oath of office.” Mr. Bashman notes that, in the fiscal year ending on September 30, 2005, the Federal Circuit disposed of 1,662 cases, whereas 12,349 immigration appeals were filed in the federal courts.

(USCIS) already receive a proportionately low share of federal funding in relation to the sums allocated to United States Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), a new specialty immigration court would surely risk the chronic receipt of inadequate financial support. Already, asylum seekers—along with other immigrants—are accorded a process of appellate administrative review that would never be acceptable to U.S. citizens, featuring the affirmance without opinion of their cases by single members of the BIA.²⁰⁴ There is no indication that any tendency towards treating asylum cases as unimportant or vectors for fraud will abate with another incarnation of a specialty immigration court, which will certainly be subject to radical fluctuations in appropriations and to control by enforcement-minded bureaucrats who become bored, jaded, or insensitive to the plight of refugees.

On a more general level, recent political events underscore the dangers of relying upon the Executive Branch to reliably staff agencies of a judicial character with competent and independent professionals. The highly scrutinized firing in 2006 of seven United States attorneys for allegedly political considerations (namely, their prosecutions of Republican politicians or their failure to energetically investigate wrongdoing by Democratic politicians) is proof that members of the United States Department of Justice—of which the EOIR is a sub-agency—remain highly susceptible to White House machinations, some thirty-five years after the Saturday Night Massacre. The same point is exemplified by the actions of top Justice Department officials who, in 2005, squelched a report authored by career attorneys that concluded that elements of the 2003 Texas congressional redistricting plan enacted by the Texas legislature violated the Voting

²⁰⁴ 8 C.F.R. § 1003.1(a)(7), (e).

Rights Act. Closer to the immigration arena, the (undoubtedly political) reticence of Attorneys General Ashcroft and Gonzales to promulgate the post-*Matter of R-A*-proposed regulations that afford protection to gender-based asylum claimants exemplifies the fact that federal agencies simply cannot be thought to share a similar approach to the construction of the Immigration and Nationality Act. In light of this history of politicization at the Justice Department, *Chevron* deference in asylum cases is a callous, lazy, and cruel abdication of judicial responsibilities.

The above does not serve to contend that the federal courts of appeals, with their deferential standards of review and their habits of disposing of immigration cases with per curiam or non-precedential opinions, have enhanced their prestige with their immigration law decisions. It goes only to emphasize that the federal courts, not any specialty or regulatory administrative body, may be in the best position to review immigration cases, and it may be well to provide for the federal district courts to review asylum cases *de novo*, making new findings of fact and new conclusions of law. At the very least, the right to an appeal of a BIA decision to a federal court of appeals should remain inviolate. The reviewing federal appellate courts should scarp *Chevron* deference; review credibility and factual determinations for substantial evidence; and publish all asylum law dispositions. In something of a break from present practice, the federal interpretation of the refugee definition in 8 U.S.C. § 1101(a)(42) should become a source of national pride.

Ultimately, the most humane way to resolve the asylum crisis that is facing this country is to renounce the applicability of all deferential doctrines relating to agency legal interpretations. Congress or the judiciary should also modify the “substantial evidence” standard that is set forth in *I.N.S. v. Elias-Zacarias*²⁰⁵ and codified in the Immigration and Nationality Act,²⁰⁶ which compares so poorly to the robust judicial standard of review governing appeals of Tax Court decisions, the ironic epitome of disputes involving “just money.”²⁰⁷ To accomplish this task, Congress must amend the

²⁰⁵ 502 U.S. 478 (1992). See Stephen Knight, *Shielded from Review: The Questionable Birth and Development of the Asylum Standard of Review Under Elias-Zacarias*, 20 GEO. IMMIGR. L.J. 133 (2005); Shayna S. Cook, *Repairing the Legacy of I.N.S. v. Elias-Zacarias*, 23 MICH. J.INT’L L. 223 (2002), available at <http://refugeecaselaw.org/cook.pdf>.

²⁰⁶ See 8 U.S.C. § 1252(b)(4) codifies the federal appellate standard of review of final agency orders of removal. Substantial deference is accorded to all manner of agency determinations, including dispositions of asylum claims:

Except as provided in paragraph 5(B) [relating to transfers of colorable nationality claims to federal district courts]--

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General’s discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4) (B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to section 1252(b)(4) (B) of this title, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

²⁰⁷ See 26 U.S.C. § 7482(a)(1) (“The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.”). Appellate court review of Tax Court decisions is also free of the remand rules that the Supreme Court has imposed upon the Ninth Circuit in immigration cases like *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 18 (2002) and *Gonzales v. Thomas*, 126 S.Ct 1613, 1614 (2006). Compare 26 U.S.C. § 7482(c)(1) (“Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.”) (emphasis added).

Immigration and Nationality Act both: (1) to disclaim errant agency limitations upon the *Acosta* definition of a particular social group, and (2) to renounce the applicability of *Chevron* deference in the asylum context. At the same time, to curb the use of the appeals process to delay the deportations of individuals whose applications are wholly lacking in merit -- a great source of (in certain cases justifiable) cynicism about asylum applicants among Immigration Judges and I.C.E. attorneys -- stricter penalties, including perhaps a federal provision calling for attorney disbarment, should be enacted for the bringing of frivolous appeals.

FROM DISCUSSION OF THE REFUGEE ACT AROUND P. 9:

Although refugee adjustment applications are limited to 10,000 per year,²⁰⁸ neither the number of individuals who are paroled into the United States as refugees nor the number of refugees whose status is adjusted to lawful permanent residence is factored into the worldwide level of immigration to the United States.²⁰⁹

²⁰⁸ See 8 U.S.C. § 1159(b).

²⁰⁹ See 8 U.S.C. § 1153(b)(1) (enumerating the classes of aliens who are not subject to worldwide levels of U.S. immigration, including refugees who are admitted pursuant to 8 U.S.C. § 1157 and refugees whose status is adjusted to lawful permanent residence pursuant to 8 U.S.C. § 1159).

