From Definition to Exploration: Social Groups and Political Asylum Eligibility

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Available at: https://digital.sandiego.edu/sdlr/vol26/iss4/3
From Definition to Exploration: Social Groups and Political Asylum Eligibility†

MAUREEN GRAVES*

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MAUREEN GRAVES*

INTRODUCTION

Despite this country's self-image as a haven for the persecuted, political asylum claims may receive less careful consideration, given the stakes, than claims in any other proceedings in American law. This lack of care creates undue obstacles for applicants even when criteria for decision—such as religious or racial persecution—are relatively straightforward. When the reasons for persecution are less familiar, not only the petitioner's claims, but also the purpose and intent of this country's asylum law can be completely lost. The right to claim asylum based on persecution due to "membership in a particular social group"\(^1\) is in danger of suffering this fate. Such grants have always been rare, partly because of institutional inadequacies; recent decisions restrict this basis for asylum even more. This Article will criticize recent judicial and administrative attempts to define and apply the concept of "persecution" on account of "membership in a particular social group," and will analyze how these attempts relate to broader questions concerning the availability of asylum.

Both petitions for protection based on "social group" membership and attempts to bring group-level evidence to bear in adjudications have fared badly in administrative proceedings and sometimes in courts. Recent attempts to define "social group" have produced narrowing constructions which are not only inconsistent with the language and legislative history of the Immigration and Nationality Act (INA), but mutually inconsistent and internally confused as well.

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\(^{†}\) I am grateful for the helpful suggestions and criticisms of Alex Aleinikoff, Ricky Blum, Steve Cohen, Rochelle Dreyfuss, Lewis Kornhauser, Anne Pilsbury, and Ken Pomeranz. I am also grateful to Carolyn Patty Blum for providing briefs from the Sanchez-Trujillo case as well as for her critical comments.

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The flexibility intended by Congress—and demonstrated by decisions applying the "social group" concept without elaborate discussion—has been undermined. Two major cases which have produced important, incorrect, and mutually inconsistent definitions—Sanchez-Trujillo v. INS and In re Acosta—will be analyzed in detail.

In Sanchez-Trujillo, the Ninth Circuit, claiming to rely on word meaning, interpreted "social group" as limited generally to voluntary, cohesive, and homogeneous groups in which people know one another; it preferred small and "readily identifiable" groups. Many of Pol Pot's victims would be excluded. The court offered the family as the paradigm group, suggesting that it is more important that the group be small than that it be voluntary. The Board of Immigration Appeals (BIA) took an almost opposite tack in In re Acosta, limiting eligibility to members of groups sharing characteristics which are "immutable" or so "fundamental" that people ought not to have to change them. Both the Ninth Circuit and BIA appear concerned that, without some restriction of the kind they offer, the "social group" provision is dangerously expansive. I will argue that courts should neither pioneer nor acquiesce in attempts to reduce asylum eligibility to a level more "realistic" than that mandated by Congress.

These decisions violate the doctrine of separation of powers and defy logic. Part I of this Article will examine congressional intent and the separation of powers doctrine with respect to immigration law and will show that neither the courts nor the executive may properly narrow asylum standards. Part I then turns to the logic of both restrictive definitions of "social group," and shows that the decisions are historically and linguistically indefensible. Both fail to do what useful definitions should: clarify issues so that individual adjudications will be simpler yet remain fair.

Part II argues that a proper understanding of "social group" could

2. 801 F.2d 1571 (9th Cir. 1986).
4. See infra text accompanying notes 208-75.
5. The Khmer Rouge, who ruled Cambodia from 1975 until 1979, persecuted large groups, such as educated people and urban dwellers.
6. Sanchez-Trujillo, 801 F.2d at 1576.
7. See infra text accompanying notes 171-93.
help confine the executive’s role in asylum adjudications to that assigned it by Congress. A proper understanding of “social group” would also clarify the basic, yet currently unclear, concept of “persecution.” Such an understanding would cast more light on the evidentiary burdens properly placed on asylum seekers than the abstract analyses of probability of persecution thus far preoccupying courts and commentators. It would draw attention to the right questions: whether particular groups of people are subject to persecution; and whether group membership combined with whatever individual evidence an asylum seeker can offer justifies or requires protection.

Part III of the Article goes beyond the question of how to interpret “social group” as a basis for eligibility to examine a broader problem in asylum hearings. The broader problem predates Acosta and Sanchez-Trujillo and has roots which are more bureaucratic than doctrinal: evidence on “social groups” to which petitioners claim to belong tends to be excluded or discounted. This rejection sometimes is based on an explicit narrowing of the statute, and sometimes on an amorphous insistence on “individualized” asylum cases. Greater openness to group-level evidence would improve adjudications, which now rely on an unsatisfactory combination of: (1) highly subjective evaluations of individual credibility; and (2) generalized country-wide evidence. The latter is often dismissed as overly “general” when offered by applicants, but accepted uncritically when it comes from the Department of State. Like a literal, consistent reading of “social group,” increased openness toward group-level evidence would bring asylum adjudications closer to what Congress intended—careful assessment and resolution of individual claims of persecution in accordance with our international obligations.

PART I: “SOCIAL GROUP”—CONGRESSIONAL INTENT AND INTERPRETIVE DISTORTION

A. The Asylum Framework and Social Group Membership

The Refugee Act of 1980 was enacted after experience with refugees from Southeast Asia, Africa, Haiti, and elsewhere made tragically obvious the inadequacy of the then existing global and domestic framework for providing havens. Burdens fell mainly on poor countries close to crises, which received inadequate financial and resettlement assistance. Several important subscribing states, including the

9. For a discussion of Southeast Asia, see infra note 101. For a discussion of Latin America, see infra notes 144-46. Many African countries have been extremely generous as countries of first asylum. See, e.g., Fuchs, Immigration and Fear, Wash. Post, Aug. 6, 1982, at A17, col. 3 (“Tiny Somalia, with a miserable per capita gross
United States, had not fully implemented international covenants requiring protection of refugees.10

By passing the Refugee Act of 1980, Congress not only responded to the immediate crisis, but established a framework for fulfilling international obligations. The Act was the result of years of committee and other deliberations on refugee policy.21 As the Supreme Court put it:

If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968.12

Congress established procedures for admitting refugees from abroad,13 and created two remedies for foreigners already within the United States who fear persecution from their governments or from forces their governments are unable or unwilling to control.14 "Political asylum" is available under section 208 of the INA for persons who can demonstrate a "well-founded fear" of persecution on account of race, religion, nationality, political opinion, or membership in a particular "social group."15 However, this relief, which includes eligibility for adjustment to permanent resident status, is discretionary; the power to grant or deny asylum is vested in the Attorney General.16 A stricter standard—showing a "clear probability" of
persecution on one of the five grounds—applies to nondiscretionary “withholding of deportation” under section 243(h) of the INA: a person cannot be deported to any country in which she would “more likely than not” be persecuted. 17 Both standards have subjective as well as objective components; the applicant must be afraid, and the level of risk must be sufficient either to create a “clear probability” of persecution, for withholding of deportation, or make fear “well-founded,” for purposes of section 208 asylum. 18 Both forms of relief are popularly known as asylum, and section 208 applications raised in the context of deportation proceedings are automatically also considered as section 243(h) petitions for withholding of deportation. 19 Persons who have persecuted others or committed serious nonpolitical crimes are excluded from any relief. 20

Asylum may be sought affirmatively, by applying to an Immigration and Naturalization Service (INS) district director, 21 or defensively, during deportation 22 or exclusion 23 proceedings. Denials by a district director cannot be challenged directly, but such claims can be raised de novo in a deportation proceeding. 24 Denials in deportation hearings may be appealed to the BIA, and then to the federal courts of appeals. 25 Denials in exclusion proceedings may be challenged by petitioning a federal district court for a writ of habeas corpus. 26

In passing the Refugee Act of 1980, Congress attempted to introduce standard procedures and uniform criteria for refugee decisions, moving decisionmaking away from the older and chaotic ad hoc approach 27 (which included such phenomena as executive grants of mass “parole” followed by congressional adjustment of status). 28 Congress directed the Attorney General to create standardized procedures 29 to assess the factual bases underlying petitions for relief

17. INS v. Stevic, 467 U.S. 407 (1984). This distinction, developed by the Supreme Court in Stevic and Cardoza-Fonseca, may misread congressional intent and fail to meet international obligations. Congress may have intended to bar deporting any person to a country where she would face a well-founded fear of persecution. See Helton, Stevic: The Decision and its Implications, 3 IMMIG. L. REV. 49, 54 (1984).
18. See supra notes 15-17.
19. Avila-Torres v. INS, 790 F.2d 1433, 1435 (9th Cir. 1986); see also 8 C.F.R. § 208.3(b) (1987).
22. Aliens who have entered the country may face deportation proceedings.
23. Aliens who have not technically “entered” are placed in exclusion proceedings.
24. T. ALIENIKOFF & D. MARTIN, supra note 21, at 643.
26. Id. § 106(b), 8 U.S.C. § 1105(b) (1982).
29. Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1982). Proce-
from persons already here. These procedures were to be available regardless of manner of arrival or status; persons otherwise deportable for unlawful entry or excludable for lack of a visa could interpose asylum petitions as a defense.

A central aim of the 1980 Refugee Act was to change the pattern in which the United States had generously protected persons fleeing left wing governments but had denied protection to victims of right wing, often "friendly," governments. This intention was noted by legislators of varying political perspectives. Congress repealed geographic restrictions which limited refugee status to persons fleeing the Middle East and communist or communist dominated countries. Congress was aware that the new definition of refugee was much broader than the old. Legislators who wished to continue the pattern of discriminatory, ad hoc preferences for anticommmunist refugees lost.

The Act mandated preferential treatment in overseas admission

30. For an explanation of the distinction between "deportable" and "excludable" aliens, see infra notes 79-82 and accompanying text.

31. Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1982) (provides that "the Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum . . .") (emphasis added).

32. See S. REP. NO. 256, 96th Cong., 1st Sess. 1 (1979) (Refugee Act "repeals the current immigration law's discriminatory treatment of refugees by providing a new definition of a refugee that recognizes the plight of homeless people all over the world"). During the Senate debates, elimination of ideological discrimination was mentioned repeatedly by members of varying political stances. See, e.g., 125 CONG. REC. 23,240 (1979) (statement of Sen. Thurmond); id. at 23,239 (statement of Sen. Boschwitz). House materials make the same point. See H.R. REP. No. 608, supra note 12, at 1 ("the bill amends the definition of refugee to eliminate current discrimination on the basis of outmoded geographical and ideological considerations").

33. See Anker, supra note 11.

34. See 125 CONG. REC. 37,241 (1979) (statement of Rep. Weiss) ("There may be those who contend that the proposed definition [from the UN Protocol] is too broad. I believe the current definition is far too narrow and that it prevents far too many desperate people from receiving asylum in our country.").

35. A few legislators proposed that some special arrangement be made for Indochinese refugees, but opposed broader initiatives. See, e.g., 126 CONG. REC. 4,502 (1980) (statement of Rep. McClory in debate on Conference Committee bill). Since the National Commission on Refugee Policy has not yet reported, all we should be doing at the present time is to provide some kind of interim legislation which would authorize a program for the present accommodation of refugees from Southeast Asia. To suggest that we should here and now establish a new mechanism for receiving refugees in large numbers over a relatively long period of time seems to me to be a most unfortunate step for the Congress to be taking at this time.

Id.
for persons of "special humanitarian concern" to the United States. This included persons of diverse ideological positions for whom the United States felt special concern or responsibility, whether because of close historic connections with the individual or her country, family ties, the refugee's previous assistance to this country, or this country's complicity with the persecuting regime. The term "humanitarian" was inserted for fear that a "special concern" provision might be used by the executive to perpetuate existing ideological and nationality biases. The expression was intended to make clear that it was the plight of the refugee, not the connection with the United States, that was crucial. For refugees facing a "clear probability" of persecution, ideology became irrelevant; protection was mandatory. Whether the executive may consider ideology in making discretionary determinations about persons who establish a "well-founded fear" of persecution but fall short of showing a "clear probability" is disputed.

The 1980 Refugee Act also introduced a new ground for protection—persecution "on account of membership in a particular social group." Prior to 1980, political asylum had been available under section 243(h) of the INA, which authorized but did not require the Attorney General "to withhold deportation of any alien . . . to any country in which in his opinion the alien would be subject to physical persecution" on account of race, religion, or political opinion. The 1980 Refugee Act's new definition of "refugee" for section 208 asy-
lum and list of types of persecution for section 243(h) mandatory withholding of deportation were drawn from international documents ratified by the Senate in 1968.42 In international instruments43 a “refugee” is any individual “who owing to a well-founded fear of being persecuted. . .[because] 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.” Article 33 of the United Nations Convention Relating to the Status of Refugees prohibits contracting states, with certain exceptions, from expelling or returning a refugee to a territory where his or her life or freedom would be threatened on account of one of these bases.44 In 1968, when the Senate ratified the International Protocol on the Status of Refugees, which incorporated the earlier Convention, it did not address the meaning of the new “social group” ground.45 The meaning of “social group” also was not addressed in 1980, when Congress created the legal mechanisms to implement it. But, it is clear from committee reports and from statements of members from diverse camps that congressional intent in ratifying the Protocol and passing the Refugee Act was to bring United States law into conformity with international law.46

The international drafting history and other states’ interpreta-

42. T. ALENIKOFF & D. MARTIN, supra note 21, at 626-27.
44. Article 33(1) of the Convention reads that:
1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Convention, supra note 43, at art. 33(1).
45. The only language which might conceivably be taken to cast light on the meaning of “social group” is inconclusive, and comes not from Congress but from President Johnson’s letter transmitting the proposed Convention and Protocol: “The Protocol constitutes a comprehensive Bill of Rights for refugees fleeing their country because of persecution on account of their political views, race, religion, nationality, or social ties.” 114 Cong. Rec. 24,628 (1968).
46. See supra note 12 and accompanying text.
tions—both before and after 1980—make plain that “social group” was intended to be interpreted broadly.47 As the United Nations High Commissioner for Refugees put it, a “social group” “normally comprises persons of similar background, habits or social status.”48 The international drafters deliberately created a residual category for persons not covered by any of the other grounds.49 Possible narrower constructions, such as “ethnic minority” and “cultural group,” were not used.50 The Conference of Plenipotentiaries, which finalized the draft Convention, recognized that persecutors had sometimes victimized groups other than those identifiable by race, nationality, religion, or political conviction. They sought to protect victims of persecution regardless of the persecutors’ motives, and unanimously adopted the Swedish delegation’s proposal that the concept of refugee be broadened by adding the “social group” basis for eligibility.51 As a special consultant to the United Nations High Commissioner for Refugees wrote, in an important reference work published just before the adoption of the 1967 Protocol, “[t]he notion of ‘social group’ is of broader application than the combined notions of racial, ethnic, and religious groups, and in order to stop a possible gap, the Conference felt that it would be as well to mention this reason for persecution explicitly.”52 He explained that “[n]obility, capitalists, landowners, civil servants, businessmen, professional people, farmers, workers, members of a linguistic or other minority, even members of certain associations, clubs, or societies, all constitute social groups of various kinds.”53 International fora and courts in other countries have recognized members of formerly privileged classes attacked by


48. U.N. HIGH COMM’R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS subpara. 77 (1979) [hereinafter UN HANDBOOK].


50. Helton, supra note 47, at 43.


52. 1 A. Grahl-Madsen, STATUS OF REFUGEES IN INTERNATIONAL LAW 219 (1966) (citing UN Doc. A/CONF.2/SR.19, at 14 (1951)).

53. Id.
revolutionary governments as victims of persecution on the basis of membership in class and occupational “social groups.” The drafters created an open-ended formulation which could deal with “evolving,” “creative” forms of persecution. In the mid-1960s, during the development of the 1967 Protocol (which broadened the concept of refugee to include persons not victimized by events before 1951 and extended geographic coverage), it was recognized that new kinds of refugees would be included.

54. Comment, supra note 47, at 927-28. For a summary of European cases involving textile manufacturers and dealers, former large property owners, capitalists and tradespeople, and former Chinese bureaucrats, see 1 A. GRAHL-MADSEN, supra note 52, at 17.

55. Helton, supra note 47, at 45 (the term “social group” is meant to cover “all the bases for and types of persecution which an imaginative despot might conjure up”). There appears to have been concern that more specific language might be construed as creating “negative implications” concerning grounds for persecution which were not mentioned. See U.N. Doc. A/CONF.2/SR.16, at 7 (1951). The delegate of the Holy See noted with respect to the nonrefoulement provision that: besides the grounds already stated. . .on which the life or freedom of refugees might be threatened, the Swedish amendment sought to add the further ground of membership of a particular social group. Further grounds of the same kind can be found, but their enumeration might have dangerous consequences. In order to avoid such a contingency, he considered it would be preferable to amend article 28 to read: “where his freedom would be threatened on account of the reasons which had compelled him to seek refuge.”

56. The Preamble to the 1967 Protocol recites:

The States Parties to the present Protocol,

Considering that the Convention. . .covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows. . .

Protocol, 19 U.S.T. 6223, 6225, T.I.A.S. No. 6577, at 3, 606 U.N.T.S. 267, 268 (1967). The Protocol permitted states which had already subscribed to the 1951 Convention, but limited coverage to European refugees, to “grandfather” in that limitation, but newly acceding states no longer had the option of limiting protection to refugees from Europe. These limitations had been viewed as crucial in 1951; many governments insisted that a covenant without such limitations would constitute a “blank check.” See U.N. Doc. A/CONF.2/SR.19, at 28 (1951) (statement of United States delegate); U.N. Doc. A/CONF.2/SR.9, at 11, 13 (1951) (French delegate argued that failure of many developing countries to attend convention meant that the “system of generalized protection. . .had suffered a setback,” that given failure of those countries to accept obligations, “a general provision from which the words ‘in Europe’ were missing would be a travesty,” that “[without dateline] governments would in fact be asked to sign a blank cheque,” and that even with dateline, omission of “in Europe” language would create blank check, because “it would be almost impossible to determine what non-European
Nothing in the ratification documents or debates on the 1980 Refugee Act suggests that congressional intent was narrower. Many of the just admitted Indochinese suffered as members of large occupational or cultural groups; such persons continued to be admitted after the Refugee Act limited overseas admission to persons who qualified as refugees under section 101(a)(42) of the INA. The broad definition of refugee was viewed as correcting past Eurocentric biases. Congress was fully aware both during the 1968 ratification discussions and during the passage of the 1980 Refugee Act that it was creating a right to *nonrefoulement*—that is, a right on the part of a refugee not to be returned to any country where she is likely to face persecution or danger to life or freedom. Giving individuals such an entitlement creates a situation in which protection cannot be restricted to members of particular types of “social groups”; rather, which groups are protected depends on which groups are persecuted.

Attempts to limit asylum law appear to be based on a sense that Congress could not have intended to extend asylum to large numbers of people. In fact, Congress in 1979 and 1980 was determined to fulfill international obligations and what it saw as this country’s historic role in protecting people persecuted in their home countries. The United States was in the process of resettling large numbers of Indochinese refugees, and while it was hoped that need would soon subside, Congress refused to set firm ceilings. Provisions for overseas admissions set an annual target of 50,000, but permitted the President to exceed that figure following consultation with Con-

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57. See Van Esterik, Lao, in *Refugees in the United States: A Reference Handbook* 149, 154-55 (D. Haines ed. 1985) [hereinafter *Refugees in the United States*]. There was concern in the Senate that some Indochinese, including persons evacuated from South Vietnam in 1975, would not be covered by the United Nations language, and the Senate accordingly added “displaced persons” to cover such persons. See S. Rep. No. 256, supra note 32, at 4. That language was not accepted by the Conference Committee. See infra note 408.

58. See 125 Cong. Rec. 35,818 (1979) (statement of Rep. Mikulski) (“the outdated definition that we now have of a refugee... limits that primarily to those from Europe, when at the same time the refugee problem is enormously present in Asia and Africa”); 126 Cong. Rec. 4,507-08 (1980) (statement of Rep. Chisholm) (too few Latin American and African refugees have been admitted considering those regions' human rights situations). Congresswoman Chisholm also argued that the practice of permitting refugee applications from abroad to be made only in Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon “discriminate[s] against refugees from the Caribbean, Latin America, and Africa, most of whom would be people of color.” 125 Cong. Rec. 35,820 (1979).


60. N.Y. Times, Sept. 16, 1984, at A12, col. 3 (United States accepted 455,000 Vietnamese refugees).

61. Congress hoped that while the Indochina crisis might require flows above 50,000 for several years, that figure would prove adequate in the long run. H.R. Rep. No. 608, *supra* note 12, at 11.

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Opponents warned that "consultation" would give the President great leeway and could open the way for "unlimited" immigration. Nevertheless, a House proposal to create a House veto over admissions above the "normal" figure was rejected by the Conference Committee.

The Refugee Act was viewed as a matter of urgent humanitarian concern and an international obligation, not as just another category of immigration. The House rejected a proposal to reduce family reunification slots if admissions exceeded predicted levels. Congress rejected suggestions that action on refugees be delayed until the re-

63. See, e.g., H.R. Rep. No. 608, supra note 12, at 61, 63 (Additional and Minority Views—statement of Rep. Sawyer) ("I believe that this bill dilutes the Congressional mandate of absolute authority over immigration matters. This bill gives the Executive Branch and the President complete control over refugee matters whether we like it or not.").

Further minority views voiced were:

Only pro forma consultation with Congress is required of the President, and there is no number limit to the number of refugees he may add. We oppose this bill, as presently written, on the grounds that we have failed to adequately consider all the implications of unlimited increases in immigration to the United States. In Vietnam, America learned that it cannot be the world's policeman. From the Vietnamese, we also have to learn that we cannot be the world's refuge.

Id. at 65; see also 125 Cong. Rec. 35,813 (1979) (statement of Rep. Lott) (arguing that bill opened way to unlimited numbers, and expressing concern over how many refugees United States could absorb); 125 Cong. Rec. 37,241 (1979) (statement of Rep. Tauke) ("The proposed legislation does not address the implications of unlimited increases in immigration, although it potentially expands immigration without limits.").

Sponsor Holtzman denied that the bill would "open the floodgates to hordes of refugees." 125 Cong. Rec. 35,814 (1979) (statement of Rep. Holtzman). She argued that "[t]o say that it creates some sort of entitlement for refugees all over the world to come to the United States is completely erroneous and in no way characterize [sic] what this conference report does." 126 Cong. Rec. 4,507 (1980) (statement of Rep. Holtzman). Representative Fish pointed out that "[t]he bill also forbids the use of parole for refugees except in individual cases involving compelling reasons in the public interest. Therefore, we expect very few refugees to be admitted who would come in outside the structure established in this legislation." 126 Cong. Rec. 4,507 (1980) (statement of Rep. Fish).


65. In passing the Refugee Act of 1980, Congress rejected a proposal to subtract "excess" refugee slots from those normally available for family reunification. 125 Cong. Rec. 37,227 (1979) (negative vote on Sensenbrenner amendment to reduce other slots by one for every two refugee openings over 50,000 "ordinary" level). Opponents of the proposed amendment argued that no such trade-off was necessary. See 125 Cong. Rec. 37,223 (1979) (comments of Rep. Holtzman) (arguing that it is not necessary to pit entry of refugees against the reunification of families).
lease of a comprehensive report on immigration. In 1982, after the relevant report came out, Congress took up comprehensive immigration reform and again rejected a proposal to tie refugee admissions to overall immigration ceilings. Congress refused to fix firm ceilings or force refugees to compete with persons with domestic sponsors because it realized that America's response to refugees was often too little, too late, and often reflected short-term political concerns rather than urgent needs.

No numerical ceiling was placed on asylum grants, even though the United States had already begun to be a country of first asylum. Haitians had come in large, accelerating numbers during the 1970s, and their asylum prospects were discussed during debates about the Refugee Act. Setting asylum quotas is inherently problematic anyway because applicants "choose" and transport themselves. Though a ceiling was placed on adjustments from refugee to permanent resident status, temporary protection was not limited.

66. Senator Huddleston feared that the Act could permit "undetermined hundreds of thousands of refugees" and warned that legal immigration, illegal immigration, and refugees should no longer be treated separately. 125 CONG. REC. 23,241 (1979).


68. See Fuchs, supra note 9 (describing reasons for Select Commission on Immigration and Refugee Policy conclusion that "lumping" refugees with other immigrants is "bad public policy").


70. Congresswoman Chisholm reported the conclusion of a congressional Black Caucus study that "there can be no doubt that Haitians are in fact political refugees," and argued that the current practice of permitting refugee applications from abroad to be made only in Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon "discriminate[s] against refugees from the Caribbean, Latin America, and Africa, most of whom would be people of color." 125 CONG. REC. 35,820 (1979). Congress was further put on notice of the United States role as a country of first asylum by Florida representatives who successfully sought financial assistance in dealing with Haitians who had won a slowdown of deportation proceedings through federal litigation. 125 CONG. REC. 37,239 (1979). This survived in the final Conference Committee version. H.R. REP. No. 781, supra note 64, at 23. Congressman Fascell informed his colleagues that Dade County alone had 5,000 refugees, which he called the "normal" level for the whole country. 125 CONG. REC. 37,238 (1979). In the final debates on the Conference Committee bill, Congressman Pepper of Florida asked sponsor Holtzman whether Haitians would get asylum, and whether there were any numerical limits. She responded:

Whether any particular Haitian will qualify for asylum under the law is a matter to be determined by the Attorney General under appropriate regulations. . . . This bill does not deal with the numbers who can be granted asylum. This bill simply mandates a procedure for the consideration of asylum claims by people who are here on our shores.

H.R. REP. No. 781, supra note 64, at 23. Congress was also reminded of the estimated 500,000 Cubans in Dade County, and appropriated funds for assisting recent Cuban immigrants. 125 CONG. REC. 23,251 (1979) (statement of Sen. Chiles).

71. Several commentators have inferred from section 208(b)'s 5,000 per year ceil-
In sum, while Congress did not specifically address the meaning of "social group," interpretations of "social group" are still constrained by legislative intent. Congress intended to bring the law into conformity with United States international obligations, and to adopt a politically neutral, geographically unrestricted, definition of "refugee." Constructions of persecution on account of membership in a particular "social group" which undermine those objectives are inconsistent with congressional intent.

B. The Constitution and Immigration: "Plenary Congressional Power" and Asylum Eligibility

1. The Judiciary and Congress

The judiciary's historic deference to Congress in immigration matters should both bar courts from narrowing asylum eligibility and require them to uphold a literal interpretation of eligibility against executive efforts to narrow it. Neither the courts nor the executive may legitimately interfere with the broad eligibility standards created by Congress. In *Fong Yue Ting v. United States,* the Supreme Court found the "inherent and inalienable right of every sovereign and independent nation" to control aliens is to be exercised by the "political" branches, and most particularly by Congress:

The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the...
the United States; to establish a uniform rule of naturalization; ... and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

Courts have been extremely deferential to the political branches when aliens are involved. While a few cases suggest inherent executive authority, courts have generally treated immigration as an area of "plenary congressional power" subject to few if any substantive constitutional constraints. Measures which would violate equal protection if used domestically can be applied to foreigners, even though citizens are affected as well. Courts have protected procedural due process rights for "deportable" aliens—those who have already "entered" the United States—but have found almost no constitutional limits on the treatment of "excludable" aliens—persons who have not technically entered. American courts have refused, with a few exceptions, to find that a treaty or inter-

73. This referred to slavery. See Berns, The Constitution and the Migration of Slaves, 78 YALE L.J. 198 (1968).
74. Fong Yue Ting, 149 U.S. at 712.
77. S. Legomsky, supra note 75, at 143-222; Note, Developments In the Law—Immigration Policy and the Rights of Aliens, 96 HARV. L. REV. 1286, 1296-1302 (1983); see also Boutilier v. INS, 387 U.S. 118, 123 (1967) (sustaining exclusion of homosexuals based on congressional "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden"); Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [admission of aliens].").
78. See, e.g., Fiallo v. Bell, 430 U.S. 787 (1977) (denial of immigration benefit to nonlegitimated children of citizen fathers not violative of equal protection, despite gender and legitimacy classifications and impact on family relationships).
80. One circuit has held that detention conditions may violate due process. See Lynch v. Cannatella, 810 F.2d 1363, 1373-74 (5th Cir. 1987) (due process clause protects excludable stowaways from physical abuse); see also Verkuil, A Study of Immigration Procedures, 31 UCLA L. REV. 1141, 1151 (1984) (applying "flexible due process" analysis to argue that "an initial entrant seeking asylum has higher interests than those presented by the typical applicant for admission").
81. See, e.g., Shaughnessy v. Mezei, 345 U.S. 206 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (due process is whatever process Congress defines as due). For a recent reaffirmation that "[a]liens seeking admission to the United States therefore have no constitutional rights with regard to their applications, and must be content to accept whatever statutory rights and privileges they are granted by Congress," see Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985). The Supreme Court held that it had been unnecessary to reach the constitutional issue, since the statute and regulations did not permit lower level officials to discriminate on the basis of national origin. Jean, 472 U.S. at 854-56.
83. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (deliberate torture
national law creates rights enforceable by the individuals ostensibly protected.84

Courts have traditionally treated foreign policy matters generally as involving classic “political questions”85 not susceptible to judicial resolution,86 even when they appear to involve clear separation of powers issues. The theory that immigration inherently involves foreign policy has been invoked to prevent judicial insistence on any but the most minimal rationality in the treatment of individuals, even where the matters at stake have appeared vital to individuals but politically insignificant to the United States.87 Courts have adhered to literal statutory language, even where the results are extremely harsh,88 on the ground that a more flexible approach would shift power away from Congress toward the executive, and ultimately to the courts, a result “impermissible in our tripartite scheme of government.”89 Courts’ nearly total deference to the political branches in this area of constitutional interpretation has been widely and powerfully criticized,90 but courts have persisted in this attitude.


87. See S. LEGOMSKY, supra note 75, at 261-69; see, e.g., De Los Santos v. INS, 690 F.2d 56 (2d Cir. 1982) (deferring to INS insistence that only foreign procedures which resulted in treating children born out of wedlock exactly the same as children born to married parents sufficed to create parent-child relationship for purposes of relative admissions).

88. One important exception was Rosenberg v. Fleuti, 374 U.S. 449 (1963), in which the Court found an afternoon trip by a permanent resident to Mexico an “innocent, casual and brief” absence which did not subject him to the consequences of “entry” (in this case, exclusion for the “psychopathic personality” of homosexuality) upon return. However, in INS v. Phinpathya, 464 U.S. 183 (1984), the Court found that the expression “continuous physical presence” in the statute permitting suspension of deportation for long-term de facto residents precluded such an exception. Attempts to overturn Phinpathya culminated in the Immigration Reform and Control Act of 1986 § 315(b), 8 U.S.C. § 1254(b) (1986).

89. Phinpathya, 464 U.S. at 196.

Whatever the merits of greater judicial scrutiny of decisions using suspect classifications or affecting liberty or other fundamental interests, no one argues that courts should begin to show independence by deciding optimal levels of immigration, something they are neither well suited nor constitutionally empowered to do.91

2. The Executive and Congress

Although creative judicial initiatives to guard the borders are easily condemned, it seems more defensible in principle for the INS and BIA to produce “administrable” interpretations of broad statutory language. The views of the INS—the agency charged with enforcing immigration restrictions and administering benefits—are entitled to some weight. As the body set up by the Attorney General92 to develop certain positions on immigration issues, the BIA may be entitled to some deference.93 However, final responsibility remains with Congress, and excessive judicial deference to administrative interpretations undermines ultimate congressional control.

Immigration decisions stress that whichever political branch is the immediate beneficiary of judicial deference, the ultimate power lies
with Congress. Decisions approving executive initiatives in the treatment of aliens have stressed the compatibility of presidential actions with congressional mandates. Determining who can live here and who can acquire citizenship are fundamental acts of national self-constitution. One recent commentary goes so far as to argue that this requires rethinking the traditional, probably constitutionally required, policy that birth here confers citizenship. Congress has guarded this power: for overseas admission of refugees, Congress insists on consultations with regard to both total numbers and allocations among countries, and requires public hearings on allocations. Regular immigration quotas are the subject of political debates and deals.

Some central rationales for deference to the President in foreign

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95. See, e.g., Jean v. Nelson, 727 F.2d 957, 977 (11th Cir. 1984) (en banc) (stating that “Congress has delegated remarkably broad discretion to executive officials under the INA,” and indicating in dicta that responsible executive officials have authority to “address to discriminate on the basis of nationality,” aff’d, 472 U.S. 846 (1985); Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding regulation directing Iranian students to report to INS, promulgated under INA section 103(a), which permits Attorney General to “perform such other acts as he deems necessary” to administer and enforce immigration laws), cert. denied, 446 U.S. 957 (1980).

96. See United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898) (it “is the inherent right of every independent nation. . . to determine. . . what classes of persons shall be entitled to its citizenship”).

97. See P. SCHUCK & R. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985) (children born in United States to undocumented or temporarily present parents not entitled to citizenship by Constitution, since citizenship should be “consensual” rather than “ascriptive,” and “responsibility for defining the boundaries of the political community” should rest “with the representative organs of the nation”). But see, e.g., Schwartz, The Amorality of Consent, 74 CALIF. L. REV. 2143 (1986).

98. H.R. REP. No. 608, supra note 12, at 10; 126 CONG. REC. 4,498 (1980); 125 CONG. REC. 35,814 (1979) (statement of Rep. Holtzman) (“The committee was extremely concerned about assuring that Congress has a proper and substantial role in refugee admissions, given our plenary power over immigration.”); 125 CONG. REC. 23,245 (1979) (Sen. Kennedy accepted as friendly the proposed amendment by Sen. Huddleston providing for publication of information concerning refugee admissions). In practice, Congress has exercised pro forma supervision, leaving crucial allocation decisions to the executive. See Anker, supra note 37, at 162-66.

99. See, e.g., Mailman, Legal Immigration: An Introduction to S. 1611, 10 IMMIGR. J. 7 (July-Sept. 1987) (describing changes which would have benefited groups “adversely affected” by 1965 immigration changes, such as the Irish, English, and Canadians).
policy—needs for haste, confidentiality, and a “single voice” in negotiations—are comparatively weak in immigration.\textsuperscript{100} There are, of course, refugee emergencies,\textsuperscript{101} and possibly, situations in which aliens threaten national security,\textsuperscript{102} meriting narrow exceptions to congressional dominance; since Congress has left the executive room to deal with such emergencies,\textsuperscript{103} the ultimate issue of constitutional power is unlikely to arise. Not only are pragmatic justifications for executive dominance absent, but control over refugee flows is closely linked to powers granted Congress by the Constitution’s text.\textsuperscript{104} Except for handling enemy aliens in wartime, refugee control is remote from commander-in-chief powers, even on the broad view of those powers espoused and practiced by modern presidents.

Whatever the merits of judicial deference when individuals claim constitutional rights, deference to executive attempts to limit benefits Congress has created is inappropriate.\textsuperscript{105} Extending judicial “re-

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\item United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), which upholds a broad congressional delegation, sets forth most fully the rationales for deference to the executive in foreign policy matters. For an analysis concluding that the decision’s history is “shockingly inaccurate,” see C. LOFGREN, supra note 86, at 205.
\item For instance, the willingness of countries of first asylum to accept Indochinese “boat people” was directly related to perceptions of other countries’ willingness to share financial burdens and resettle refugees. For an account of the July 1978 Geneva conference, see G. GOODWIN-GILL, supra note 47, at 112-14 (describing agreement by countries of first asylum to stop repelling landing attempts). Congress acted slowly, and eventually ratified what President Carter had done. See generally W. SHAWCROSS, THE QUALITY OF MERCY (1984).
\item See Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979) (upholding requirement that Iranian students report to INS as legitimate exercise of authority delegated by Congress to Attorney General), cert. denied, 446 U.S. 957 (1980).
\item The parole power has traditionally been used for this purpose. The Refugee Act of 1980 aimed to limit that power to individual hardship cases, and to require consultation with Congress when unforeseen circumstances require immediate action. For Senator Kennedy’s explanation of the Conference Committee’s resolution of this issue, see 126 CONG. REC. 3,757 (1980). Extended voluntary departure (EVD)—a moratorium on deportations—is another executive option. See Hotel & Restaurant Employees Union, Local 25 v. Attorney Gen., 804 F.2d 1256, 1272 (D.C. Cir. 1986) (calling EVD “extra-statutory” relief, and refusing to mandate EVD for Salvadorans, because “[w]here Congress has not seen fit to limit the agency’s discretion to suspend enforcement of a statute as to particular groups of aliens, we cannot review facially legitimate exercises of that discretion”). This status has been extended at various times to nationals of Afghanistan, Cambodia, Cuba, Chile, Czechoslovakia, the Dominican Republic, Ethiopia, Iran, Laos, Nicaragua, Poland, Uganda, and Vietnam. See Justice Department Drafts Relaxed Asylum Procedure for Poles, 63 INTERPRETER RELEASES 300 (1986). Congress has recently considered creating a statutory framework for safe haven. See House Subcommittee Hears Testimony on Safe Haven Bill, 64 INTERPRETER RELEASES 1289 (1987). See generally Note, Extended Voluntary Departure: Limiting the Attorney General’s Discretion in Immigration Matters, 85 Mich. L. Rev. 152 (1986).
\item See supra notes 72-77 and accompanying text.
\item It may be unusual as well. One commentator argues that in interpreting immigration statutes American courts “have been generally liberal, assertive, and extremely purposive,” while on constitutional matters, they have “tended toward exceptional conservatism and deference, . . . ” He suggests that courts may rule on aliens’ behalf on statutory grounds to avoid constitutional difficulties. S. LEGOMSKY, supra note 75, at
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straint" to such contexts permits the executive to expand its power at congressional expense. Particularly after the demise of the legislative veto, Congress has minimal ability to directly supervise executive adherence to the policies underlying the INA. Congress relies on the judiciary to ensure that its aims are carried out.

The central innovations in the 1980 Refugee Act were to expand and depoliticize the definition of "refugee," and to bar deportation in certain cases. Creating a statutory provision for asylum was intended to curtail politicized executive decisionmaking and to protect the rights of those fleeing right wing governments. Judicial review was to be a crucial tool in carrying out these reductions in executive discretion. By 1980, even though the Attorney General had already increased immigration judges' economic independence and administrative detachment from the INS, Congress intended ample and strong judicial review. Congress recognized that, as an agency charged with guarding the borders, the INS often has trouble administering benefits fairly and as Congress intended. Depoliticizing asylum decisions required increasing the role of the judiciary as compared to the executive, given that courts are far better suited to promoting consistent treatment of individuals than are executive officials who are preoccupied with foreign policy concerns. Even as the asylum caseload pressure has increased, proposals to curtail judicial review have gotten nowhere.

233-34, 325.


108. See supra notes 32-40 and accompanying text.


110. For a discussion of the evolution, which was intended to increase efficiency as well as respond to charges of unfairness, see T. Aleinikoff & D. Martin, supra note 21, at 87-91.

111. See, e.g., H.R. Rep. No. 608, supra note 12, at 18 ("The committee intends to monitor the Attorney General's implementation of the [asylum] section so as to insure the rights of those it seeks to protect.").

112. See supra notes 32-40 and accompanying text.

113. See G. Goodwin-Gill, supra note 47, at 188-89; P. Weiss Fagen, supra note 69, at 55 (lawyers and law groups defended broad judicial review in congressional debates during 1981 and 1982). For a discussion of the provisions of the 1983 version of the Immigration Reform & Control Act which would have narrowed judicial review, see Refugees and Repoulement, N.Y. Times, May 12, 1983, at A22, col. 1. For a discussion
Many concepts in the Refugee Act require judicial construction. The scope of persecution on account of "political opinion" and the very nature of "persecution," as distinct from universal oppression and violence, require and have often received careful judicial analysis.114 Judicial review has become more aggressive under the 1980 Act,115 as Congress directed. However, courts still frustrate congressional efforts to enlist their help in overseeing asylum to the extent that they acquiesce in restrictive executive views of asylum eligibility or produce their own narrowing interpretations.

3. Drawing the Line: Why the Temptation Should be Resisted

Immigration is generally an area in which courts insist on congressional prerogatives; the reasons for that posture are particularly strong in asylum matters. Courts which "rewrite" asylum criteria usurp principled decisions that Congress must make. Moreover, many asylum criteria and procedures are inevitably shaped by expedient concerns which are legitimately weighed by the political branches but not by courts. In particular, the Ninth Circuit and the BIA seem to have been moved by one "expedient" concern—fear that broad eligibility would bring on excessive asylum seeking. In what follows, I begin by considering why even principled distinctions among asylum seekers are not properly made by courts, and then move to the sorts of expedient considerations that should be restricted to political policymakers. I conclude that manipulating or


114. For a discussion of persecution on account of political opinion, see infra notes 347-65 and accompanying text. For a discussion of "singling out," see infra text accompanying notes 396-444.

115. Previously, denials were reversible only for abuse of discretion. Most courts now apply a "substantial evidence" standard to withholding of deportation. See Chavarria v. Department of Justice, 722 F.2d 666 (11th Cir. 1984); McMullen v. INS, 658 F.2d 1312, 1316-17 (9th Cir. 1981). A "substantial evidence" standard also applies to eligibility for discretionary asylum. See Bolanos-Hernandez v. INS, 749 F.2d 1316, 1321 n.9 (9th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 567 (7th Cir. 1984); Sarkis v. Nelson, 585 F. Supp. 235, 237-38 (E.D.N.Y. 1984). One court has proposed, in dicta, that the abuse of discretion test be retained because substantial evidence review ignores the "necessary application of expertise" in the determination of whether fear is well founded. Marroquin-Manriquez v. INS, 699 F.2d 129, 133 n.5 (3d Cir. 1983), cert. denied, 467 U.S. 1259 (1984); see also Sotto v. INS, 748 F.2d 832 (3d Cir. 1984) (BIA abused discretion in failing to consider key affidavit). If an applicant has demonstrated a "well-founded fear" but not a "clear probability" of persecution, the case is remanded for a discretionary determination. Courts differ in their willingness to scrutinize exercises of discretion. See infra notes 157, 341 and accompanying text.
revising congressional language to conform to numerical targets is a matter for Congress alone: only Congress is equipped to assess such problems and empowered to devise solutions.

It is conceivable that political support for a generous asylum policy has eroded since 1980, as the United States has faced increasing numbers of asylum seekers, though there are some indications to the contrary.116 Whatever Congress's current attitude, it would be inappropriate for courts to narrow the Refugee Act in accordance with public or evolving congressional opinion. Immigration has been declared an area of "plenary Congressional power," and Congress created a permanent statutory framework for asylum, in part because it recognized that this country often failed to respond to refugee crises, or did so in ad hoc, politicized ways.117

The asylum framework—and possible changes in it—depend on principled decisions about which refugees the United States is willing to protect, decisions so central to the nation's self-definition that they necessarily belong to the majoritarian branches. These considerations often point in directions unavailable to a court committed to

116. Strong support for proposals to extend voluntary departure status to Salvadorans and Nicaraguans, or to Salvadorans alone, suggests disapproval of restrictive interpretations of the Act. See Array of Legal Issues Face Congress This Fall, Nat'l L. J., Sept. 21, 1987, at 5; House Passes Bill Deferring Deportation of Salvadorans and Nicaraguans, 64 INTERPRETER RELEASES 894 (1987). Failure so far to extend voluntary departure to all Salvadorans does not, of course, imply that Congress approves of the current pattern, in which virtually no Salvadorans receive asylum.

117. See H.R. REP. No. 608, supra note 12, at 2, 5 (quoting Rep. Holtzman to effect that "[i]n good measure, our country's humanitarian tradition of extending a welcome to the world's homeless has been accomplished in spite of, not because of, our laws relating to refugees," and concluding that "our response to refugee emergencies has been haphazard, incoherent and often inadequate"); 125 CONG. REC. 16,298 (1979) (statement by Sen. Boschwitz). The Senator noted the lack of systematic approach to prewar refugees from Europe, described his family's good luck, and stated:

We respond to casualties on a case-by-case basis with no established policy or statute that guides our actions. Our response to each crisis is subject to the mood of the times rather than being guided by a set procedure. . . . We want to be able to avoid situations like we have faced in the last couple of months with the Indochinese boat people. When people are in need of help, we must be able to respond quickly without long delays.

Id.; see also 125 CONG. REC. 16,300 (1979) (statement of Sen. Dole) ("I am gratified that the international community has refused to repeat history [of European Jews in dealing with Indochinese boat people]," but noting the urgency of the situation, and citing Secretary of State Vance's estimate that tens of thousands of boat people had died); 125 CONG. REC. 35,813 (1979) (statement of Rep. Holtzman) ("This ad hoc response to refugee problems has not only caused inordinate delays in admissions and led to great human suffering on the part of the refugees themselves, but has made long-range planning by States and voluntary agencies involved in the resettlement process virtually impossible.").
“consistent” treatment of individuals. For example, the United States may have a special responsibility to people who were brought by this country into social and geopolitical conflicts and then attacked for “collaboration” following a United States defeat, or for victims of United States sponsored governments. It may also be morally legitimate (and is constitutional though incompatible with international covenants) to prefer refugees with certain values. Some political theorists argue that political communities naturally welcome those who share their basic values, and that a goal of ideological neutrality is neither realistic nor morally required. Another possibility would be to favor persons who act courageously to change conditions in their countries before fleeing.

Courts should also be reluctant to set asylum criteria because such decisions may ultimately and sometimes necessarily depend on expediency rather than principle, and expediency is rarely an acceptable basis for judicial action. Relative generosity toward refugees from communist countries, for instance, may have been based less on a conviction that their plight was the worst than on expedient factors. Accepting Eastern Europeans has been easier than offering refuge to Central Americans because distance and strict travel restrictions ensured that very few people could take advantage of this openness. Various political purposes were served by welcoming Eastern Europeans—pleasing relatives and compatriots, encouraging discontent with Soviet rulers, and making Americans feel generous and su-

118. For a discussion of the Hmong (Meo) people in Laos, see supra note 35; for a discussion of Chilean refugees, see infra notes 144, 146.

119. See, e.g., M. Walzer, Spheres of Justice: A Defense of Pluralism and Equality 48-51 (1983). Walzer points out that this concern for “community” is no excuse for denying foreigners’ claims to distributive justice. A resource rich country might fulfill its moral obligations either by admitting people or by sacrificing territory or resources. Id. at 47-48.

120. See generally A. Bickel, The Least Dangerous Branch 24-28 (1962) (in legislatures, expediency dominates principle, while court processes are suited for and courts are charged with responsibility for decision according to principle); Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469 (1981).

121. This has continued, despite the congressional attempt to eliminate ideological discrimination. See General Accounting Office, Asylum: Approval Rates for Selected Applicants (1987); General Accounting Office, Asylum: Uniform Application of Standards Uncertain—Few Denied Applicants Deported (1987) [hereinafter GAO Report]; Awaiting Ruling On Asylum, Haitians Ponder Going Home, N.Y. Times, Mar. 2, 1986, at 41, col. 1 (quoting Arthur Helton of Lawyers’ Committee for International Human Rights to effect that one percent of Haitians, 73% of Libyans, 59% of Rumanians, and 57% of Czechs are successful in asylum cases); Anker, supra note 37, at 162 (since 1980, 393 of the 463,665 refugees admitted from overseas were from countries which are not “communist-dominated”). As Elliott Abrams, then Assistant Secretary of State for Human Rights, put it: “We are politically biased. We don’t like Russia or Czechoslovakia, so we take anyone who wants in. We like El Salvador and Haiti, so we don’t take them.” Miami Herald, July 1, 1984, at 16A, col. 4. This situation is bound to change to some degree due to recently changed policies in Eastern Europe, allowing unrestricted emigration, at least temporarily.
perior at low "cost," since so few actually came. Further, most of those who did come were well educated and highly skilled. That these expedient concerns are important is suggested by recent developments. As more people began to leave communist countries, approval ceased to be nearly automatic; some Polish Solidarity activists were turned down, and when United States relations with the People's Republic of China improved, Chinese applicants received asylum at a much lower rate than Russians.

Protecting Central and South Americans who flee "friendly" regimes involves serious political "liabilities"—acknowledging that client states persecute their citizens, and admitting nonwhite, poor, unschooled, non-English speaking immigrants, many of them "peasants," whose political activities once here, if any, are likely to be critical of current United States foreign policy. Because it is easier to get here, and because communications are still easier than with the Eastern bloc, receptiveness to Western hemisphere applicants carries a greater risk that others will follow.

122. Such people can more easily obtain permission to come temporarily both from their government and ours. Visa applicants must generally convince a consular officer that they have funds for return and for maintenance in the United States, and that their "stake" at home will induce return. See P. Weiss Fagen, supra note 69, at 53.

123. See R. STEEL, supra note 27, at 277 ("[p]reviously favorable consideration of claims for people from various communist countries is no longer the rule").


125. Note, Cardoza-Fonseca: Supreme Court Takes Initiative to End Current Inequities in Law of Asylum, 18 CAL. W. INT'L L.J. 179 (1987). The events at Tiananmen Square during the summer of 1989 will undoubtedly increase the number of applications for asylum, and possibly, the number granted.

126. This is relative. Financing one person's voyage over land to "el norte" often requires all of a family's savings and involves serious physical dangers. See, e.g., 26 Aliens Found Locked in Railroad Car in Texas, N.Y. Times, July 11, 1986, at A8, col. 6. See generally T. CONOVER, COYOTES: A JOURNEY THROUGH THE SECRET WORLD OF AMERICA'S ILLEGAL ALIENS (1987). Over water, the dangers are greater. One court observed:

For the most part, the plaintiffs reached the United States in old, small, leaky wooden sailboats. The boats are dangerously overcrowded, but these Haitians continue to brave the elements across eight hundred miles of open sea. The vast majority spent weeks adrift without food or water. Many died in the attempt.


127. See Letter from Attorney General responding to letter from 89 members of
Other factors have both moral and expedient dimensions. Afghans’ situations may be more compelling in humanitarian terms than Eastern Europeans’ were, but the BIA has taken the position that rewarding persons who “cut in line” frustrates “orderly” handling of refugees in Pakistan.\(^\text{128}\) Other countries’ receptiveness may reduce the need for the United States to protect certain groups.\(^\text{129}\)

While these factors may have some proper place in decisions Congress has committed to executive discretion, the courts’ role should be limited to reviewing that discretion, and should not include attempting to apply such considerations on their own.

The distorted definitions of “social group” employed by the Ninth Circuit\(^\text{130}\) and the BIA\(^\text{131}\) appear to have been prompted by an expedient concern—fear of an “excessive” number of asylum applicants.\(^\text{132}\) Each mistakenly saw its arbitrary limitation as necessary to prevent a situation in which huge segments of,\(^\text{133}\) or even entire,\(^\text{134}\) populations would be eligible to stay in the United States.\(^\text{135}\) While there is no reason to suppose a “numbers crisis” is imminent,\(^\text{136}\) if one were, there would be many possible ways to deal with it—such as making protection more genuinely temporary\(^\text{137}\) or tightening se-

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129. In the mid-1970s, the “White Australia” policy was modified to admit many Southeast Asian refugees. B. Grant, The Australian Dilemma 16-18 (1983).
130. See infra notes 208-75 and accompanying text.
131. See infra notes 171-93 and accompanying text.
132. See infra text accompanying notes 193, 249-52.
133. In re Acosta, Interim Dec. No. 2986, at 33 (BIA 1985) (Congress intended that “not all harm with political implications, such as that which arises out of civil strife in a country, qualify[ ] an alien as a ‘refugee’”).
134. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986).
135. This ignores the possibility of refuge elsewhere; the only type of refuge which is mandatory— withholding of deportation—is country specific.
136. By historic standards, current immigration is low. See generally M. Morris, Immigration—the Belgaeugered Bureaucracy (1985) (concluding after review of empirical literature that “the country is not about to be engulfed by a great alien tide” and “has not lost its capacity to absorb immigrants and benefit from their presence”). Some economists predict a labor shortage. See, e.g., Stanford University: Food Research Institute, Food Research Institute Studies, Mexican-American Migration and Projections on the Labor Force, Vol. 17, No. 2 (1979). Congress is considering major increases in quotas for regular immigration. See Senate Passes Legal Immigration Reform Bill, 65 Interpreter Releases 265 (1988).
137. Temporary protection would comply with international law, and many countries take that approach. See G. Goodwin-Gill, supra note 47, at 207, 225-26; 1 A. Grahl-Madsen, supra note 52, at 430 (describing provisional asylum, in which a state
Refugees represent a small portion of the entire legal and illegal immigration flow; Congress might prefer to adjust other parts of that flow were it convinced numerical restrictions are necessary. Congress could step up enforcement against illegal immigration or reduce admissions in the numerically dominant categories—joining relatives or possessing scarce skills. Congress could also take steps to encourage the development of refuge elsewhere, a process which is frustrated when the United States evades its own international commitments. Such options are available to Congress but not to the courts or the executive.

Judicial or executive action to “adjust” this particular part of the immigration flow not only intrudes on congressional power, but the admits asylum seeker without guaranteeing opportunity to settle. While 5,000 people can adjust annually from section 208 asylee to permanent resident, the Attorney General may terminate asylee status prior to adjustment if conditions in the asylee’s country improve sufficiently. However, the INS has not exercised this power. Withholding of deportation lasts only until conditions improve or the United States finds another source of refuge. Informal executive moratoria on deportation are theoretically temporary as well. Such options are available to Congress but not to the courts or the executive.

T. ALEINIKOFF & D. MARTIN, supra note 21, at 727-29.

In fact, refuge under any mechanism tends to become permanent as people develop work and family ties which lead to permanent status, or “lose touch” with the INS. The employer sanctions and documentation requirements of the Immigration Reform and Control Act facilitate a stricter approach to time limits. See G. TYSSE, THE 1986 IMMIGRATION ACT: A HANDBOOK ON EMPLOYER SANCTIONS AND NONDISCRIMINATION REQUIREMENTS 19-20, 23-31 (1987). Such a policy would cause great pain and instability in the lives of refugees, would involve inequalities which might be objectionable per se, and would make refugees highly vulnerable. It would be difficult, moreover, to predict which “improvements” would last. One can imagine sending refugees back to Uganda after Obote’s fall, when Amin was promising a return to civilian government and posing as a restorer of unity. See R. OLIVER & A. ATMORE, AFRICA SINCE 1800, at 347-48 (1981). Despite these problems, enforcing temporariness is one option Congress might consider were it to conclude that the current law covers too many people.

138. In 1965, Congress eliminated the requirement that applicants face “physical persecution,” defined as torture, detention, or death, and substituted the language “persecution on account of race, religion, or political opinion.” Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (1965).


140. See 125 CONG. REC. 23,240 (statement of Sen. Hatfield) (“As a result of our efforts and encouragement, other nations are following our example. At the recently held Geneva Conference on Refugees, nearly every nation in attendance pledged to increase aid and admit significantly larger numbers of refugees into their borders.”). Thailand has responded to United States criticisms of its handling of refugees by pointing to this country’s interdiction and abuse of Haitians.
particular means chosen may subvert central aims of the 1980 Act. While Congress did not define "social group," it did express intentions which rule out certain interpretations. Excluding persecution based on membership in large or diffuse groups and the related requirement that refugees prove "singling out" for unusual abuse tend to limit protection to victims of relatively stable regimes, such as the recent governments of the Eastern bloc, while denying it to victims of regimes using ongoing violence against large parts of the population to maintain power.\textsuperscript{142} Demotion and imprisonment of individual government critics in Bulgaria, and murders of peasant cooperative members or natives of villages considered "subversive" in Guatemala serve roughly similar goals. Although the latter is more "severe," the former is more easily recognizable as "persecution" under restrictive interpretations of "social group." This not only resurrects a preference Congress wanted to abolish, but involves a kind of political choice which courts should be reluctant to make.

There is yet another reason for courts to be loath to narrow the scope of the Refugee Act. While the Refugee Act attempted to depoliticize asylum determinations,\textsuperscript{143} that decision itself has political implications. The Refugee Act of 1980 was, in a sense, a quite radical document. It was clear in 1980 that dictatorships backed by the United States had generated large numbers of exiles.\textsuperscript{144} Mexico, Costa Rica, and other countries\textsuperscript{145} had been absorbing refugees, and it was foreseeable some would seek refuge here if feasible.\textsuperscript{146} Despite

\textsuperscript{141} See infra text accompanying notes 396-444.

\textsuperscript{142} Not only do the types of persecution practiced by leftist and rightist represive regimes tend to differ, but the fact that no one has standing, or probably, the inclination, to object to asylum grants by INS district directors means the executive may construe "social group" or other grounds loosely when it wishes.

\textsuperscript{143} See supra notes 32-40 and accompanying text.

\textsuperscript{144} For example, after the 1971 Banzer coup in Bolivia, which was followed by major increases in United States military and economic assistance, over 5,000 people went into exile. J. Nash, \textit{We Eat the Mines and the Mines Eat Us} xi-xii (1979). Many Chileans went into exile following the 1973 Pinochet coup. See G. Goodwin-Gill, supra note 47, at 112 (estimating 14,000); Teitelbaum, \textit{Migration and U.S.-Latin American Relations in the 1980's}, in \textit{The United States and Latin America in the 1980's}, at 481, 491 (1986) (estimating 30,000). For a discussion of U.S. involvement, compare P. Sigmund, \textit{The Overthrow of Allende and the Politics of Chile, 1964-76}, at 275-92 (1977) (arguing for primacy of internal factors but conceding United States involvement) with J. Petras & M. Morley, \textit{The United States and Chile: Imperialism and the Overthrow of the Allende Government} (1975) (United States role was key in "disaggregating" Unidad Popular government).

\textsuperscript{145} For a discussion of the tradition of asylum in Latin America, see G. Goodwin-Gill, supra note 47, at 14, 106-07.

\textsuperscript{146} See, e.g., 126 Cong. Rec. 4,507 (1980) (statement of Rep. Chisholm) ("only a mere handful" of Latin American and African refugees have been admitted despite appalling human rights situations). In describing provisions of the Conference Committee bill for admitting persons who had not left their home countries, Congresswoman Holtzman referred to Chile and Cuba as places "where there are political detainees or prisoners of conscience of special humanitarian concern to the U.S." 126 Cong. Rec. 4,507.
an extremely negative reaction, thousands of Haitians risked their lives and came throughout the 1970s.\textsuperscript{147}

Congress, during the same period, took various measures to reduce United States support for dictatorships in Latin America and to force respect for human rights,\textsuperscript{148} as did the Carter Administration.\textsuperscript{149} Fully aware that United States policies affect refugee flows in this hemisphere,\textsuperscript{150} Congress gave the executive discretion to protect anyone who could demonstrate a "well-founded fear" of persecution, and mandated protection for anyone who could establish a risk of persecution at the "clear probability" level.\textsuperscript{151} The executive branch, under the structure created by the Refugee Act of 1980, may no longer pursue policies which create refugees, and then deny responsibility for their fate if they escape to this country. This does not mean all refugees must be allowed to stay, but it does imply that: (a) safe places must be found or developed for those entitled to withholding of deportation,\textsuperscript{152} and (b) discretionary determinations...
must be made concerning refugees falling short of the "clear probability" standard. Effects of executive policies and statements on the number of refugees are a "cost" the Refugee Act forces presidents to consider, rather than counting on deportations and border guards to deal with such ripple effects. The Constitution divides foreign policy powers between Congress and the President; tensions resulting from this division involve precisely the kinds of political considerations which have led courts to refuse to intervene in substantive immigration decisions.

In sum, virtually no one in our society suggests that fundamental questions of community self-constitution and foreign policy should be resolved by courts. While there are strong arguments that courts should prevent certain considerations—most notably, racial prejudice and hatred—from affecting immigration policy, courts have rejected any such role. The other "expedient" or political factors discussed here are clearly constitutionally permissible considerations, but only for the appropriate branch. Congress is empowered to seek "desirable" aliens who will bring capital and skills. It may award refuge based on ideological or "interest" criteria, or allow the executive to consider such issues in making discretionary determinations. Courts facing the pleas of aliens have denied they have any proper role in setting substantive standards for admission to this country. When pressed by the executive, or alarmed by growing asylum caseloads, they should be no less stubborn. If asylum eligibility is to be curtailed to fend off "alien hordes," only Congress properly has


153. Attacks on journalists and opponents of Duvalier increased dramatically following Reagan's election, based on confidence that human rights pressures were a thing of the past. See Conway & Buchanan, Haitians, in Refugees in the United States, supra note 57, at 100.

154. Numerous commentators have observed this connection. See, e.g., Miller & Papademetriou, Immigration and U.S. Foreign Policy, in The Unavoidable Issue: U.S. Immigration Policy in the 1980's, at 155, 178 (1983). The authors stated:

In Haiti, like El Salvador, U.S. foreign policy plays a central role in encouraging or discouraging refugee flows over the short term and the long run. One wonders if migration from Haiti and El Salvador would be such grievous problems in the 1980s if the United States had not supported tyranny in those two countries over the preceding decades.

Id.


157. For a review of administrative decisions under section 208, see Helton, The Proper Role of Discretion in Political Asylum Determinations, 22 San Diego L. Rev. 999 (1985); see also infra note 341.

158. See supra text accompanying notes 72-78.
the power to do so and the ability to choose appropriate means. As a matter of separation of powers, courts must adhere to and enforce immigration laws, and are powerless to rewrite them according to their own or the executive’s vision of a more “practical” approach.

C. Current Interpretations of “Social Group”

In making asylum available to persons persecuted “on account of membership in a particular social group,” Congress intended to make domestic law conform with international law, in which “social group” constitutes a broad, flexible, and ideologically neutral category. Several courts have respected that language and intent. However, despite the “plenary power” of Congress over immigration, both the judiciary, which has addressed the “social group” ground at greatest length, and the executive have strayed far from the original purpose of the “social group” provision, albeit in virtually opposite ways. The BIA stresses immutable characteristics as defining groups, while the Ninth Circuit views voluntary association as key. Both approaches narrow eligibility in ways which contradict the statutory language and have no basis in legislative intent; they appear instead to be policy oriented efforts to limit eligibility to some “manageable” level. Since the BIA typically adopts a stringent approach to eligibility, its construction is predictable. The Ninth Circuit’s view is more surprising, as well as more disturbing, both substantively and in terms of appropriate institutional roles. Both are important practically, since the BIA handles appeals from all over the country, while the Ninth Circuit handles a large percentage of the asylum cases and generates influential case law.

Both outcomes are of theoretical interest as well. “Defining” statutory language seems a natural first step in applying a new statute’s broad language. Confronted with rival definitions, one is tempted

159. See supra text accompanying notes 47-58.
160. See infra text accompanying notes 194-207.
161. See infra text accompanying note 172.
162. See infra text accompanying note 231.
163. S. LEGOMSKY, supra note 75, at 325.
164. For a description of how the Ninth Circuit’s jurisprudence has departed from, and in some cases led, developments elsewhere, see Blum, The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980, 23 SAN DIEGO L. REV. 327, 353 (1986).
165. S. LEGOMSKY, supra note 75, at 234 (1987) (over 60% of immigration cases are decided by Ninth Circuit).
166. Even a quite critical commentator treats Sanchez-Trujillo as “the first significant judicial interpretation of the term ‘particular social group,’” and states that
either to figure out which better effectuates Congress's intent, or to seek middle ground. I will argue that the arbitrariness of both restrictive definitions instead leads to the question of whether attempting to "define" "social group" is a reasonable enterprise at all. Given that an administrative agency and a court of appeals steeped in American legal traditions have thrown up virtually opposite definitions, it appears futile to seek a "definition" encompassing the diversity of persecuted groups in the world. The drafters intentionally used broad language to create a residual category which, by its very nature, cannot be defined by enumerating characteristics. European courts have shown that it is possible to confront "social group" claims on a case-by-case basis, with no attempt at a general definition. Not only does congressional language not cry out for narrowing glosses, but narrowing definitions inevitably distort language and subvert legislative intent.

1. The Board of Immigration Appeals

The BIA recognizes the usefulness of the Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees to interpreting domestic law. The handbook indicates that a "social group" "normally comprises persons of similar background, habits or social status." In keeping with this broad approach, even the INS originally saw "social group" as a highly inclusive residual category for persons facing risks not otherwise covered. Recently, however, the executive, through the BIA, has changed course.

In In re Acosta, the Board considered the petition of a San Salvador taxi driver who reported being threatened by both government and guerrilla soldiers seeking to force his cooperation. The Board rejected the claim that taxi drivers, or those active in a cooperative, formed a "particular social group," suggesting that the petitioner could abandon this strategic line of work. The Board found it decisive that being a taxi driver is not an "immutable" characteristic, or one which "members...should not be required to change because it is fundamental to their individual identities or consciences."
Acosta appears plausible, in part, because of its resonance with American equal protection doctrine,\(^\text{174}\) which provides for heightened judicial scrutiny of state action which classifies people by certain immutable characteristics or which burdens “fundamental” interests.\(^\text{176}\) However, this implicit analogy is only apparent.\(^\text{176}\) Though the BIA’s decision is carefully reasoned, it is a tightly constructed house of cards, built on three flawed bases. The first is its choice of a maxim to guide statutory interpretation; the second is its definition of persecution; and the third is its view on the burden of proof (which was subsequently rejected by the Supreme Court).\(^\text{177}\)

The Board invoked *ejusdem generis*, the principle that general words enumerated along with specific words should be construed as similar to (or, as the Board put it, in a manner “consistent with”) the specific words.\(^\text{178}\) Because race and nationality are immutable, while religious and political beliefs are things people should not be forced to change in order to live safely, the Board limited “social group” to characteristics meeting one or the other of these criteria.\(^\text{179}\) This ignores the fact that the term “social group” was intended to compensate for the narrower categories’ inability to encompass the full range of persecution.\(^\text{180}\) It also fails to explain why “social group” membership should not be treated like religion and

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174. The BIA did not comment on this similarity.
176. Most obviously, “discrimination” is not the same as “persecution.” Asylum law deals not with mere government decisions to disadvantage certain traits or behavior, but with severe mistreatment of persons with those characteristics. Second, that the main bases for discriminatory abuse in our society, or at least those which have received constitutional recognition, involve “immutable” characteristics, does not suggest Congress would impose analogous limitations when writing an asylum law. Many societies producing asylum applicants are not places where only persons with immutable characteristics are persecuted. Congress indicated no intention to limit asylum to members of “minority groups” or “suspect classifications.” In fact, our society is unusual in the extent discriminatory treatment has focused on “immutable” characteristics such as race and gender, in part, because our economic system and institutional structure of federalism make it relatively feasible to change or hide many other things about oneself and, in part, because of the absence of openly class-based politics. Finally, there is an obvious distinction between the role of a court in reviewing presumptively “majoritarian” decisions by American legislatures in light of constitutional equal protection guarantees, on one hand, and that of courts and administrative tribunals applying broadly worded immigration statutes, on the other. The separation of powers concerns which mandate caution in the former instance require literality in the latter.
180. See supra text accompanying notes 47-58.
political opinion—as something people should not be forced to change.

The “immutability” focus is connected to the Board’s conception of persecution as “harm or suffering. . .inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”\textsuperscript{181} However, much persecution is not aimed at forcing “change” or at “punishing,” but is based on the view that it is right or useful to severely mistreat certain people.\textsuperscript{182} As the United Nations High Commissioner for Refugees has put it, “[m]embership in a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedent or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.”\textsuperscript{183}

Along with its extensive reflection on “social group,”\textsuperscript{184} in \textit{Acosta} the Board clearly set forth its view that the “well-founded fear” standard for asylum and the “clear probability” standard for withholding deportation are “not meaningfully different and, in practical application, converge.”\textsuperscript{185} This theory was rejected by the Supreme Court in \textit{INS v. Cardoza-Fonseca}.\textsuperscript{186} \textit{Acosta}’s stress on immutability is subtly linked to that holding: a mere possibility of changing jobs or relocating might well prevent most applicants from showing that, even if they did so, they would still face a “clear probability” of persecution or a practically indistinguishable “likelihood” thereof.\textsuperscript{187} It is rarely possible to predict confidently whether such strategies will succeed in avoiding persecution; how much that matters depends on the applicant’s evidentiary burden. Now that the Supreme Court has made it clear that a “well-founded fear” (which may fall far short of a “clear probability”) of persecution is sufficient for asylum, the mere possibility of changing jobs or relocating is far from dispositive.

The BIA test permits the ready characterization of claims as defi-
tionally inadequate—because the characteristics involved are apparently “mutable” or not self-evidently “fundamental”—without an examination of either the actual risk a person faces because of them, or the real feasibility of obtaining safety at home. Neither Acosta nor subsequent BIA decisions explain how “fundamental” characteristics are to be identified, or even whether the concept is a descriptive one aimed at identifying the actual centrality of given activities to applicants’ lives, or a normative one aimed at protecting only traits that “we” judge fundamental. The first approach raises difficult empirical questions, while the second is problematic in light of Congress’s decision to protect victims whether or not the characteristics resulting in persecution are ones most Americans find appealing. Conceptions of what is “fundamental” vary. A requirement that traits linking members be viewed as fundamental by adjudicators threatens to reintroduce the cultural and geographic narrowness and bias Congress removed from the definition of refugee by the 1980 Act. It may also introduce a class bias which has no place in refugee law. It is probably easier for adjudicators to see work in

188. In a pre-Acosta decision, the Board rejected a student’s claim, noting she had not established that students and former students were a persecuted class. Martinez-Romero v. INS, 18 I. & N. Dec. 75 (BIA), aff’d, 692 F.2d 595 (9th Cir. 1982); see also Castaneda-Hernandez v. INS, 826 F.2d 1526 (6th Cir. 1987).

189. Of course, “we” are not homogeneous. In re Taboso, A23 220 644 (Feb. 3, 1986), reprinted in 63 INTERPRETER RELEASES at 1009 (1986), suggests that what is considered “fundamental” may vary before different courts and in different contexts. In that case, the immigration judge found that under the Acosta standard, homosexuals in Cuba face persecution on account of membership in a particular social group. The applicant described severe human rights violations aimed at male homosexuals, including detention and physical and verbal abuse of him personally on repeated occasions. The judge concluded that the applicant is “a member of a group of persons who share a common, immutable characteristic (i.e. homosexuality), and that this characteristic is one which members of the group cannot change or should not be required to change because it is fundamental to their individual identities or consciences.” The judge noted the INS itself treats homosexuals as a “particularly identifiable group,” in that it has procedures for enforcing the bar on adjustment of status for “self-declared homosexual aliens.” Id. at 56, 63 INTERPRETER RELEASES at 1010. The judge granted withholding of deportation to Cuba, but denied asylum because of the applicant’s criminal convictions. The INS appealed to the BIA. Compare Bowers v. Hardwick, 478 U.S. 186 (1986) (finding no “resemblance” between claimed rights of homosexuals to “engage in acts of sodomy” and family, marriage, and procreational interests previously recognized as fundamental).

190. See infra notes 312-15, 372-73 and accompanying text.

191. See supra notes 32-40, 57-58 and accompanying text.

192. The international drafters decided that states could not bar refugees because of concern they would become “public charges,” but only for much weightier national security reasons. See, e.g., U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. A/CONF.2/44 (1951). The Egyptian proposal, which was not accepted, was to permit expulsion of a refugee on three grounds, namely:

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high status occupations such as musician or psychiatrist as "fundamental" than to so view taxi driving or farming.

The BIA's only attempt to ground its position in congressional intent comes in the observation that Congress decided not to define as refugees all persons displaced by strife. The Board overlooked the considerable space between that rejected course and its own restrictive alternative.

2. The Courts: Applying Without Defining

Several courts have applied the "social group" provision in a broad, common sense way, without attempting to "define" the category. In Ananeh-Firempong v. INS, the First Circuit decided a Ghanaian had presented a prima facie case for withholding of deportation because of her membership in the Ashanti tribe and in the social class of "professionals, businesspeople, and those who are highly educated." The court quoted the UN Handbook's broad language and noted that, as required in Acosta, the characteristics were essentially beyond her power to change. The Fourth Circuit declined, in Cruz-Lopez v. INS, to determine whether a Salvadoran's proposed group of "affluent students who attend private schools, have relatives in the intelligentsia, receive direct threats against their lives, and have friends and family members who have been singled out for persecution" was a cognizable "social group," and found that in any event, the refugee had failed to demonstrate a sufficient risk of persecution. Castaneda-Hernandez v. INS in (a) because he has been convicted of a crime or offense punishable by more than three months' imprisonment; (b) because he has engaged in activities of a subversive nature or which are prejudicial to public order, the internal or external security of the State, public morals or health; (c) because he is indigent and is a charge on the State. Id; see also U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc. A/CONF.2/SR.16, at 7 (1951) (statement of French delegate that "France and the United Kingdom, however, had no intention of opposing the right of asylum on grounds of indigence. Reasons such as the security of the country were the only ones that could be invoked against that right."). United States law does not apply most exclusions, including those for illiteracy and likelihood of becoming a public charge, to applicants for asylum and withholding of deportation. See 8 U.S.C. §§ 1158, 1182(b) (1982).

194. 766 F.2d 621 (1st Cir. 1985) (reversing BIA denial of motion to reopen to apply for withholding of deportation).
195. Id. at 623, 626.
196. See supra notes 169, 183 and accompanying text.
197. Ananeh-Firempong, 766 F.2d at 626. The court did not, however, say immutability was required.
198. 802 F.2d 1518 (4th Cir. 1986).
199. Id. at 1521.
200. Id. at 1520 n.2.
201. 826 F.2d 1526 (6th Cir. 1987).
volved a twenty-four-year-old Salvadoran who argued that he risked persecution because “[a]ll young men who are not in the military are subject to persecution,”\textsuperscript{202} and because he had “actively critic[i]zed” government policies.\textsuperscript{203} The Sixth Circuit remanded for further factfinding. The court was impressed by affidavits from academics and a journalist averring that the government would view a young man who had not served in the military and had fled the country as an enemy, and might arrest, torture, or kill him.\textsuperscript{204} The court found that the BIA had been “entirely too dismissive” when it found that petitioner’s allegations involved conditions affecting all Salvadorans, and thus failed to support the claim of persecution due to “social group” membership.\textsuperscript{205} In \textit{Fernandez-Roque v. Smith},\textsuperscript{206} a district court ordered the BIA to reopen cases to consider whether Cubans on the Mariel boatlift were a persecuted “social group.”\textsuperscript{207} Thus, the First and Sixth Circuits and a district court have taken unrestrictive approaches to identifying “social groups,” without lengthy discussions; the Fourth Circuit also has refused to reject a broad interpretation.

3. \textit{A Step Backwards: Sanchez-Trujillo v. INS}

Unfortunately, the court of appeals decision featuring the most extensive, though arguably unnecessary,\textsuperscript{208} discussion of “social group” diverges from these judicial interpretations by taking an approach nearly opposite to, but at least as narrow as, the BIA’s. In \textit{Sanchez-Trujillo v. INS},\textsuperscript{209} a Ninth Circuit panel\textsuperscript{210} found that young, urban, working-class Salvadoran men of military age who had not served in the military or otherwise demonstrated loyalty to the government were not a “particular social group.”\textsuperscript{211} Its rationale differed from that of the BIA decision below. Though confronted with some characteristics over which individuals clearly lack control, the BIA had

\begin{itemize}
\item \textsuperscript{202} \textit{Id.} at 1528 (quoting the trial hearing record at 124).
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{Id.} at 1531.
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{207} The court found that the BIA abused its discretion in refusing to reopen cases when new evidence indicated that persons who came on the boatlift were persecuted and viewed as “scum” in Cuba. \textit{Fernandez Roque}, 599 F. Supp. at 1106, 1109.
\item \textsuperscript{208} See infra note 276 and accompanying text.
\item \textsuperscript{209} 801 F.2d 1571 (9th Cir. 1986).
\item \textsuperscript{210} The panel consisted of Judges Choy, A'ron, and Beezer.
\item \textsuperscript{211} \textit{Sanchez Trujillo}, 801 F.2d at 1574-77.
\end{itemize}
rejected the Sanchez-Trujillo asylum seekers’ claim on the basis that “sex and age were not significant factors with regard to the risk of harm.” The Board acknowledged that persecution “follows” certain groups, naming religious leaders, educators, campesino or agrarian reform groups, and journalists, but noted that respondents had not claimed membership in any such group, and that Congress did not protect all “displaced persons.” The BIA also apparently shared the immigration judge’s view that the variables defining the group were arbitrary and not sharply defined.

The Ninth Circuit went much further. The result in Sanchez-Trujillo—refusing to protect all members of the proposed group—is defensible. Even advocates of an expansive definition of “social group” acknowledge that membership in a target group does not automatically establish entitlement to protection. The result may be inevitable in light of existing law concerning political refuge, which has strong, perhaps unshakable, foundations in ideas of sovereignty and realpolitik. Much “suspicion” of young men in El Salvador is expressed in the context of efforts to force them into the military; harsh treatment helps enforce conscription in the face of intense fear and widespread moral and political objections. Pressure to “serve” extends to those who share the government’s political orientation as well as to those who are neutral or hostile, and is based on the supposed “bona fide occupational qualification” for fighting—being young and male. This abuse may be based not on any proscribed factor, but on a separate concern with compelling military service. Fleeing conscription has historically been viewed as an inadequate

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213. This Spanish word may be translated as “peasant” or “farmer.”
215. See infra text accompanying notes 227-33.
216. See, e.g., Blum, supra note 164, at 327, 353 (quoting the U.N. Handbook at paras. 70, 73, 79); Helton, supra note 47, at 42 (contrasting social group with racial or religious groups, where he argues that membership creates a presumption of entitlement to protection); UN HANDBOOK, supra note 48, ¶ 79 (mere social group membership will not necessarily create eligibility).
217. The traditional line is expressed in Villegas v. O’Neill, 626 F. Supp. 1241 (S.D. Tex. 1986) (any action against deserter would be prosecution, not persecution). See UN HANDBOOK, supra note 48, ¶¶ 167-73 (“fear of prosecution and punishment for desertion or draft-evasion does not in itself constitute well-founded fear of persecution under the definition,” but various circumstances concerning the character of hostilities, the availability of conscientious objector status, and the moral views of the person in question may create a basis for refugee status).
218. See, e.g., Mendez-Efrain v. INS, 813 F.2d 279 (9th Cir. 1987) (petitioner failed to establish a legally sufficient claim of persecution). Much of the evidence on risks to young men involved these dangers. See Brief for Petitioners at 11-15, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (No. 85-7609) (on file with the author). This evidence is summarized in Comment, supra note 47, at 918-19.
219. Of course, in practice, conscription is often far from universal; student or occupational deferments and bribes often make privileged classes immune.
basis for asylum, generally without inquiry into the morality of a government’s internal or external use of force. More recently, the BIA has applied the same approach to “discipline” by guerrilla forces aimed at preventing desertion. The traditional view of conscription is changing; several courts have remanded to gather information about reasons for objecting, or indicated that the extent of punishment likely to result is relevant, and, at least one granted withholding of deportation on the ground that refusal to fight in the armed forces made the applicant a prime target. Nevertheless, characterizing pressure to fight as “persecution” would require evidence of individual moral beliefs, and is not a promising basis for a group based claim.

Another possible objection to the petitioner’s claim in Sanchez-Trujillo is that the incidence of persecution in the proposed group was too low to justify, much less require, protection. However, an-

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220. See, e.g., Delgado-Corea v. INS, 804 F.2d 261, 263-64 (4th Cir. 1986) (wish to avoid conscription in Nicaragua no basis for asylum). For a discussion of foreign approaches, see G. GOODWIN-GILL, supra note 47, at 33-35. See generally Brelick, Conscientious Objectors as Refugees, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY—1986 IN REVIEW 29 (1987) (“The community of nations has been slow to recognize the right of conscientious objectors to refuse military service, and even slower to grant asylum to those who flee countries where conscientious objection is not recognized.”).

221. See In re Maldonado-Cruz, Interim Dec. No. 3041, at 10 (BIA 1988) (noting that “a guerrilla organization may therefore have a rational basis to punish deserters, devoid of any intent to inflict harm on account of political opinion,” and describing analysis as “virtually identical to that applied in the case of a deserter from a conventional military force”). Contra Arteaga v. INS, 836 F.2d 1227 (9th Cir. 1988) (forced recruitment by revolutionary is tantamount to kidnapping and constitutes persecution).


223. See, e.g., Saballo-Cortez v. INS, 761 F.2d 1259, 1263-65 (9th Cir. 1985) (evidence insufficient that petitioner would be persecuted for resisting conscription in Nicaragua).

224. Aviles-Torres v. INS, 790 F.2d 1433 (9th Cir. 1986).

225. Rather than opening the way for such analysis, the Ninth Circuit’s approach may discourage it by suggesting that harsh treatment of sizable groups associated with war rarely, if ever, creates asylum eligibility. Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986).

226. INS v. Cardoza-Fonseca left open the degree of risk required to make fear “well-founded”: “There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted that he or she has no ‘well-founded fear’ of the event happening. . . . [I]t is enough that persecution is a reasonable possibility.” INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987). The BIA has done little to clarify matters. In re Mogharrabi,
alyzing whether group members' fears are "well-founded" and whether they risk "persecution" on account of group membership would require some attempt to assess the level of risk and its relation to that faced by others, rather than conclusory dismissal.

The court went beyond the defensible conclusion that merely belonging to the proposed group did not justify asylum, and found that the class was not, as a threshold matter, a "particular social group" within the meaning of the Refugee Act of 1980. The court did not even mention the BIA's principal "social group" opinion—In re Acosta—in formulating its own, virtually opposite, limitation. The court set forth a four part inquiry:

First, we must decide whether the class of people identified by the petitioners is recognizable as a "particular social group" under the immigration statutes. Second, the petitioners must have established that they qualify as members of the group. Third, it must be determined whether the purported "social group" has in fact been targeted for persecution on account of the characteristics of the group members. Finally, we must consider whether such "special circumstances" are present to warrant our regarding mere membership in that "social group" as constituting per se eligibility for asylum or prohibition of deportation.

The court found the petitioners had not met even the first hurdle, using an extraordinarily narrow definition of "social group" purportedly drawn from the terms "particular" and "social":

The statutory words "particular" and "social" which modify "group," indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.

Perhaps a prototypical example of a "particular social group" would consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people.

The court noted "[i]ndividuals falling within the parameters of this sweeping demographic division naturally manifest a plethora of

Interim Dec. 3028, at 9-12 (BIA 1987), the Board acknowledged that "a reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable," and found that "an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." Id. at 9-10. Yet the Board claimed that this would entail only a minor shift from its previous approach.

227. For a discussion of the significance of the holding's threshold character, see infra text accompanying notes 267-75.
228. Sanchez-Trujillo, 801 F.2d at 1574-77.
229. Interim Dec. No. 2986 (BIA 1985); see supra text accompanying notes 171-93.
230. Sanchez-Trujillo, 801 F.2d at 1574-75 (citations and footnotes omitted).
231. Id. at 1576 (citation omitted).
different lifestyles, varying interests, diverse cultures, and contrary political leanings, and concluded, "such an all-encompassing grouping...simply is not that type of cohesive, homogeneous group to which we believe the term 'particular social group' was intended to apply."

The panel offered no support in legislative history—which it dismissed as "generally uninformative"—for its constricted definition. After suggesting that "analogous" interpretations in international arenas might be helpful, the court went no further than mentioning—and implicitly rejecting—the United Nations High Commissioner's Handbook. Specific applications by other states which are parties to the Convention and Protocol were ignored entirely, though such interpretations are relevant to treaty interpretation. To treat foreign and international interpretations as no more than potentially useful analogies ignores the congressional intent to bring the United States into conformity with international law. Rather than exploring areas of legislative history which bear indirectly on the interpretation of "social group," or examining international obligations, the court purported to draw on the meanings of "particular" and "social group."

The court slightly relaxed its insistence on voluntary association

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232. Id. at 1577.
233. Id.
234. Id. at 1575.
235. Id. at 1576. To review the formulation presented by the UN Handbook, see supra text accompanying notes 169, 183.
236. For the citations to relevant materials, see supra note 54.
237. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) ("The High Commissioner's analysis of the United Nations' standard is consistent with our own examination of the origins of the Protocol's definition, as well as the conclusions of many scholars who have studied the matter.") (footnote omitted); id. at 450-51 (Blackmun, J., concurring) (reiterating majority's direction that BIA look for meaning of "well-founded fear" in international obligations, and noting that "[s]uch language has a rich history of interpretation in international law and scholarly commentaries").
238. See supra note 12 and accompanying text.
239. The international legal background was thoroughly summarized, and the status of international law as part of domestic law stressed, in the Amicus Curiae Brief of ACLU Foundation of Northern California, ACLU Foundation of Southern California, and National Lawyers Guild, Seattle Chapter in Support of Petitioners, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (No. 85-67609) (on file with the author) [hereinafter Amicus Brief]. See Comment, supra note 47, at 939 ("Congress intended that the Act include language which originated in the Refugee Convention and Protocol, language which reflects the intent of the drafters of those instruments. By not giving this background of the Refugee Act enough consideration, the Sanchez-Trujillo court essentially belittled the commitment that the Act embodies.").
240. Sanchez-Trujillo, 801 F.2d at 1574.
and cohesion in a footnote acknowledging that “a persecutor’s perception of a segment of a society as a ‘social group’” might be relevant, but indicating that “neither would such an outside characterization be conclusive.” The court also conceded that mere group membership could conceivably, under “special circumstances,” justify protection, and noted reassuringly that “[i]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.” Of course, that conclusion was not so inescapable at the time. The effect of the court’s focus on internal group dynamics is that what should be central—perceptions and attitudes of persecuting powers—becomes peripheral and determinative only, if ever, in the most “extreme” cases.

Perhaps most remarkable is the court’s use of the family to illustrate the kind of “group” it has in mind. Families are, of course, groups in which many relationships were never voluntarily assumed and few can easily be terminated. The family is, in fact, a problematic candidate for “social group,” though family members’ fates are relevant evidence. The family’s appeal seems to be that it

241. Id. at 1576 n.7.
242. Id. at 1575 n.4.
243. Id. at 1574 (citation omitted). Persecution of Jews would be covered by the religion ground; the relevance of the court’s concession seems to be that individual evidence would be unnecessary. The court found in the instant case that since “the petitioners have failed to identify a cognizable ‘social group’ or sustain their burden of proof we need not further define the contours of the ‘special circumstances’ requirement.” Id. at 1575 n.4.
244. Jews in Germany and occupied areas were not able to convince Western democracies that their risks justified relaxing immigration quotas or even expediting procedures so that existing quotas could be filled. See generally H. Feingold, The Politics of Rescue: The Roosevelt Administration and the Holocaust, 1938-45 (1970); A. Morse, While Six Million Died: A Chronicle of American Apathy (1968); D. Wyman, The Abandonment of the Jews (1984).
245. Sanchez-Trujillo, 801 F.2d at 1576.
246. Most “family” claims derive from some other, at times difficult to pinpoint, type of persecution. See, e.g., Del Valle v. INS, 776 F.2d 1407, 1413 (9th Cir. 1985) (though petitioner had little information as to who killed his relatives, or why, evidence suggested that his family was “particularly affected” by conditions). Where the only basis is family membership, the claim may border on the kind of “personal” grievance which cannot justify asylum. See Flores-DelSolis v. INS, 796 F.2d 330, 335 (9th Cir. 1986) (guerillas came to petitioner’s home not for political reasons but to collect a debt); Zayas-Marini v. INS, 785 F.2d 801, 806 (9th Cir. 1986) (threats to member of Paraguayan political elite from other members resulted from “personal animosity” and “personal dispute,” and thus not basis for protection).
247. To review cases where family members had been threatened or harmed, see, e.g., Blanco-Comarrribas v. INS, 830 F.2d 1039, 1043 (9th Cir. 1987) (alien whose father had disappeared and many of whose relatives had been arrested and threatened showed well-founded fear of persecution); Chavarria v. INS, 722 F.2d 666, 668 (11th Cir. 1984); Fleurinor v. INS, 585 F.2d 129, 134 (5th Cir. 1978). Family members’ apparent safety was viewed as evidence against the petitioner in Gumbol v. INS, 815 F.2d 406, 413 (6th Cir. 1987).
presents a "small, readily identifiable group." Not only does the Ninth Circuit impose ad hoc limitations which distort statutory language and have no basis in congressional intent, but the example it treats as "paradigmatic" blatantly fails to meet those criteria.

The court's decision makes sense only in terms of another set of concerns. The court gives us some sense of what those are. The Ninth Circuit prefers that groups be small and "readily identifiable," and states that "[m]ajor segments of the population of an embattled nation" will "rarely, if ever" constitute a "social group" for asylum purposes. It insists that the interpretation of "membership in a particular social group...must be informed primarily through a careful evaluation of the statutory language, and a practical appreciation of the reasonably limited scope of the term 'refugee' as reflected in our previous decisions." The court concluded that: "To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country." Thus, the court's real concerns are three: first, that persecution really be on a statutory basis, which requires both that the group exist as a real social phenomenon rather than merely as a statistical artifact, and that group members face distinctive risks; second, that groups be small; and third, that they

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248. Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985), cited in Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986).
249. When literary and social critics see smart people making very bad arguments, they suspect the existence of a hidden, often subconscious, agenda and try to figure out what it is. This familiar method is spelled out explicitly in The Archaeology of Knowledge. M. Foucault, The Archaeology of Knowledge 186 (1972). ("Theoretical contradictions, lacunae, defects may indicate the ideological functioning of a science (or of a discourse with scientific pretensions); they may enable us to determine at what point in the structure this functioning takes effect.") One of the concerns commonly revealed through such an analysis is fear of "the other"—the alien. See, e.g., S. de Beauvoir, The Second Sex (H. Parshley trans. & ed. 1974); see also Henkel, International Protection of Refugees and Displaced Persons: A Global Problem of Growing Complexity, in 8 In Defense of the Alien 142, 143 (L. Tomasi ed. 1986). The author wondered: What is prompting these developed, and in the main basically prosperous countries to adopt such restrictive postures? We can discern at least some of them: economic slowdown; "compassion fatigue"; fear for the loss of ethnic, cultural or national identity; xenophobia or outright racism; and in the most atavistic sense, just plain deep-seated fear of the stranger. A psychologist rather than a lawyer is needed adequately to explore the mysterious ramifications of this question.

Id.
250. Sanchez-Trujillo, 801 F.2d at 1577.
251. Id. at 1576 (emphasis added).
252. Id. at 1577.
253. The court almost says as much. See id. at 1576 ("we have regarded evidence of persecution directed against a family unit as relevant in determining refugee

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be "readily identifiable." The court has improperly addressed the first concern, and the second two are illegitimate.

The court correctly required that persecution really be on an enumerated basis. The court raises the specter of a "disparate impact" claim based on evidence that men over six feet tall face unusually high risks from political instability. It is a fair interpretation of persecution on account of "social group" membership to require more than an unexplained correlation. To say, for instance, that all persons "persecuted" form a "social group," even if they have nothing else in common, would read the five grounds out of the Act altogether. This result may also be dictated by an ordinary understanding of groups as amalgamations which are not arbitrary. However, correlations which might initially strike American adjudicators as statistical artifacts may reflect real social phenomena. The court's requirement that groups be voluntary, cohesive, and homogeneous does not promote conformity to the statutory criterion, but arbitrarily narrows it. Nor can protection be denied to people who face elevated risk of persecution on account of race, nationality, religion, political views, or "social group" membership because those around them suffer "general" oppression or war. Like the BIA's approach, the Ninth Circuit's decision cannot be justified as necessary to avoid opening the United States to all the oppressed and displaced people of the world.

Where a group is the target of persecution, there is no statutory basis for denying protection simply because many people are at risk. Despite the government's repeated references in Sanchez-Trujillo to the size of the proposed group, concern with group size could only be legitimate had Congress authorized it—and Congress did not. Congress did not limit protection to members of small or minority racial, ethnic, religious, political, or "social groups." The Ninth Circuit itself saw European Jews, a large group, as a paradigmatic case

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254. Id.
255. Id.
256. Even height variations, offered by the court as an absurd example of the lengths to which asylum seekers might attempt to "gerrymander" societies, could be socially relevant or a visible proxy for things which are. See Sulzberger, To Be Obscurely Massacred, N.Y. Times, July 2, 1972, § 4, at 9, col. 1 (describing conflict between Tutsi (tall) and Hutu (short) peoples in Burundi); Howe, Burundi Massacre in the Heart of Africa, N.Y. Times, June 4, 1972, § 4, at 2, col. 1.
257. See infra text accompanying notes 286-324.
258. See infra text accompanying notes 396-444.
259. Brief for Respondent at 22, Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (No. 85-7609) (noting that immigration judge had concluded that group would cover 12% to 17% of a total population of 4.8 million, and warning that "if the aliens prevailed, the entire population of El Salvador or large segments of that population would be entitled to asylum and withholding of deportation") (on file with the author).
for protecting all members of a group.260 Members of a majority race may be persecuted by a minority.261 Refugee flows following United States withdrawal from Indochina were large,262 and included substantial portions of some groups identified with the American "presence" or viewed as reactionary for other reasons.263 "Smallness" is simply not relevant to the statutory definition of refugee, which applies both to overseas admissions and to asylum.

Nor is ease of identification relevant. By requiring individualized inquiries into risk and creating separate standards of proof for discretionary asylum and mandatory withholding of deportation,264 Congress necessitated difficult factfinding. In creating a category as flexible as "social group," Congress required adjudicators to assess which groups are persecuted.265 In any event, any serious attempt to determine whether groups actually fit the Ninth Circuit's criteria would require factfinding and sociological analysis much more complex than those required by a more literal interpretation.266 In summary, the court failed to present a coherent definition or to justify its criteria.

Moreover, while emphasizing the threshold character of its approach,267 the court failed to pursue the implications of that path. The threshold definitional approach to the scope of protection ignores a crucial distinction between two uses of the "social group" provision. In its concern to prevent the more problematic use—substituting for individualized evidence—the court apparently blocked even the previously noncontroversial use of "social group" as a "catch-all" for persons at risk for reasons not otherwise covered.268 Persons facing risk of harm due to some group identity rather than

260. However, the court did not make clear whether Jews would be protected as a "social group" per se, since they could also be protected under the race or religion grounds.

261. See UN HANDBOOK, supra note 48, at 76.

262. See supra notes 57, 60.

263. Van Esterick, Lao, in REFUGEES IN THE UNITED STATES, supra note 57, at 149.

264. The latter point assumes the correctness of Stevic. See supra note 17.

265. For an argument that one explanation for narrowing statutory interpretations is that courts find it less disturbing to decide that applicants are ineligible "as a matter of law" than to assess the truthfulness of their factual accounts, see Martin, COMPARATIVE POLICIES ON POLITICAL ASYLUM: OF FACTS AND LAW, in 9 IN DEFENSE OF THE ALIEN 105, 108-09 (L. Tomasi ed. 1987).

266. See infra text accompanying notes 312-17.

267. Sanchez v. Trujillo, 801 F.2d at 1575.

268. This was noncontroversial prior to In re Acosta, Interim Dec. No. 2986 (BIA 1985). See supra note 170 and accompanying text.
because of random or universal abuses, idiosyncratic personal conflicts, or by way of legitimate criminal punishment, were previously covered even if the reason for abuse was not race, religion, nationality, or political opinion. That Congress meant to bring domestic law into conformity with international law, which clearly permits this type of claim, is beyond doubt.\textsuperscript{269} The Ninth Circuit thwarted that intent.

While the “residual” character of “social group” was, until Acosta and Sanchez-Trujillo, undisputed, the more difficult issue is whether group membership alone can justify or require protection where an individual cannot establish personal “targeting.” There should be no barrier in principle to this use of the provision, which the Ninth Circuit conceded would have been appropriate for Jews in Nazi Germany.\textsuperscript{270} The applicant must prove risk sufficient to permit asylum under the “well-founded fear” standard or to require withholding of deportation under the “clear probability” standard. Pointing to group membership could meet that burden in whole or in part. In its haste to resolve “social group” claims at the definitional level, the Ninth Circuit blocked off this empirical inquiry and set forth a narrow definition which threatens to foreclose even the formerly noncontroversial coverage of persons whose exposure to danger is clear but not explainable in terms of race, religion, nationality, or political opinion. The court dismissed Ananeh-Firempong\textsuperscript{271} in a footnote,\textsuperscript{272} expressing “no view” as to its merits, but concluding that it had not addressed the “outer limits” of the “social group” category.\textsuperscript{273} Though stressing the “threshold” character of its decision,\textsuperscript{274} the Ninth Circuit ignored its approach’s potential to exclude the claims based on tribal membership and family class position found sufficient in Ananeh-Firempong.\textsuperscript{275}

Technically, Sanchez-Trujillo’s definition of “social group” might be viewed as dicta. The court did not find that the persons before it faced an unusual risk of harm which they could explain only by pointing to membership in a large, diffuse group. Rather, it asserted in somewhat confusing terms that the risk they faced was indistinguishable from that faced by the rest of the population.\textsuperscript{276} Even if

\textsuperscript{269} See supra notes 12, 41-59 and accompanying text.
\textsuperscript{270} Sanchez-Trujillo, 801 F.2d at 1574. But see Dally v. INS, 744 F.2d 1191 (6th Cir. 1984) (individualized evidence required to meet “clear probability” standard).
\textsuperscript{271} 766 F.2d 621 (1st Cir. 1985); see supra text accompanying notes 194-97.
\textsuperscript{272} Sanchez-Trujillo, 801 F.2d at 1575 n.6.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 1575.
\textsuperscript{275} This is disturbing; it is generally regarded as essential to fairness that courts attempt to develop rationales which will hold up in subsequent cases, thus promoting consistency among parties. See, e.g., Kornhauser & Sager, Unpacking the Court, 96 Yale L.J. 82, 102-04 (1986).
\textsuperscript{276} Sanchez-Trujillo, 801 F.2d at 1577-78 (“[T]he evidence indicates that the
the "social group" definition is not strictly necessary, it is likely to prove influential. Labeled a "threshold" holding,\textsuperscript{277} it is the only extensive judicial treatment to date.\textsuperscript{278} The Ninth Circuit has developed the most extensive, and in general most protective, body of asylum law.\textsuperscript{279} This reputation makes it less likely that \textit{Sanchez-Trujillo} will be recognized as constricting and poorly reasoned. Few asylum seekers have the resources required to litigate their cases fully,\textsuperscript{280} so language from the few cases that do reach the courts of appeals has substantial impact on cases resolved below. The paucity of "social group" claims reaching the courts in the wake of \textit{Sanchez-Trujillo} suggests many petitioners' attorneys may be discouraged by the decision from pursuing such claims. At the very least, \textit{Sanchez-Trujillo} represents the Ninth Circuit's current position. The circuit may change course, particularly if confronted with a narrower and more compelling candidate group. The "exception" which the court suggests may exist for groups which do not conform to its definition but which are viewed by persecutors as meaningful may be recognized and even swallow the rule.\textsuperscript{281} If the approach persists, its im-

\begin{footnotesize}
\textsuperscript{277} Id. at 1575.
\textsuperscript{278} A number of courts have applied the concept as intended without any elaborate discussion. See supra notes 194-207 and accompanying text.
\textsuperscript{279} See Blum, supra note 164.
\textsuperscript{280} Most asylum seekers rely on volunteers and on charitable legal assistance programs, which are generally understaffed and overworked. See generally COMMITTEE ON LEGAL ASSISTANCE & COMMITTEE ON IMMIGRATION AND NATIONALITY LAW OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, REPORT ON CIVIL LEGAL ASSISTANCE NEEDS OF ALIENS IN THE NEW YORK METROPOLITAN AREA (Nov. 1986). For a description of how the INS's "Haitian Program" undermined counsel's ability to reach and represent asylum applicants, see Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982); J. MILLER, THE PLIGHT OF HAITIAN REFUGEES 107-14 (1984). More recently, the INS has placed refugees in "remote detention" facilities far from counsel. The Ninth Circuit has barred this treatment of aliens who already have lawyers, but refused to intervene on behalf of unrepresented persons. Committee of Cent. Am. Refugees v. INS, 795 F.2d 1434 (9th Cir. 1986), modified, 807 F.2d 769 (9th Cir. 1987). A district court has recently issued an injunction attempting to ensure that persons in such facilities will have improved opportunities to obtain counsel. Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988).
\textsuperscript{281} This approach seems to be advocated in Comment, supra note 47.
\end{footnotesize}
pact will depend in part on whether the BIA adheres to Acosta or adopts an even more narrowing construction. Immigration judges and INS district directors may even use whichever theory “works” in a given case. So long as Sanchez-Trujillo is confined to the Ninth Circuit, broad interpretations of persecution on account of political opinion would limit the risk of threshold definitional disqualification. The construction will be far more damaging if implemented in jurisdictions with narrower approaches to political grounds.

In narrowing “social group,” the Ninth Circuit has strayed far from deference; its restrictive and peculiar interpretation distorts statutory language and ignores legislative history. Its approach was not urged by the Attorney General as a litigation posture, and contradicts the BIA’s approach in Acosta. Faced with an influx of asylum seekers from this hemisphere, the Ninth Circuit may have succumbed to its own sense of foreign policy imperatives—a sense that the line must be drawn somewhere. If a reading more faithful to statutory language and congressional intent would grant refuge to large groups from nearby countries, a more “reasonable,” narrower approach must be sought. Of course, judges’ deepest underlying social visions are rarely knowable, and even more rarely reported in law reviews. Whatever its reasons, the effect of the court’s decision is to alter the asylum policy which Congress attempted to institutionalize.

282. The Ninth Circuit entertains claims based on political opinion which is not actual but “imputed” to a party by a government. See Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985). It has recognized that the “personal” can be political. See Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987) (woman who worked as maid for Salvadoran army officer and had been raped and threatened with execution as a subversive by him stated claim for asylum, since officer’s view that he had a right to dominate women was political, as were his use of power derived from military position and her resistance to his demands). The court has acknowledged that neutrality can be a political opinion. Bolanos-Hernandez v. INS, 749 F.2d 1316, 1324-26 (9th Cir. 1984). In Sanchez-Trujillo itself, after rejecting the social group claim, the court moved on to examine each petitioner’s case in light of the “individual” circumstances involving “actual or imputed political opinion.” Sanchez-Trujillo, 801 F.2d at 1577-78.

283. In Desir v. Ilchert, 840 F.2d 723, 729 n.7 (9th Cir. 1988), the court did not reach petitioner’s claim of persecution based on membership in the social group of small merchants and fishermen who refused to pay bribes to the Tonton Macoutes and were thus victimized by Haiti’s allegedly “kleptocratic” government, because it found that he was eligible for protection based on political opinion cynically imputed to him in order to facilitate extortion.

284. For a discussion of Acosta, see supra text accompanying notes 171-93. The Brief for Respondent argued that the proposed group fails to fit into Acosta’s requirements and stressed that the roots of petitioners’ problems are in a “generalized” war. Brief for Respondent, supra note 259, at 29-33.

285. For an attempt to elucidate such a vision and a discussion of the difficulties of doing so, see H. Steiner, Moral Argument and Social Vision in the Courts: A Study of Tort Accident Law 92, 204-07 (1987).
4. Ordinary Usage and the Meaning of "Social Group"

The BIA and Ninth Circuit have narrowed the "social group" concept in virtually opposite ways, focusing on immutability and voluntariness respectively. Not only is neither approach grounded in or compatible with legislative intent, but each conflicts with ordinary understandings of "social group" in speech, in sociology, in court decisions, and in government documents. Where Congress has not stipulated a precise meaning for statutory language—either explicitly or by using terms of art—courts normally look to ordinary usage, rather than stipulating a partial, restrictive meaning on their own initiative. Assigning unusual or atypically precise meanings to words is, in effect, legislating; it is unsurprising that the Supreme Court insists on ordinary meanings in reading immigration statutes. Much as the petitioners in Sanchez-Trujillo argued, the only limitation the "social group" requirement imposes is that the

286. There is a limited "intersection" of groups whose members might be eligible under either definition: voluntary associations of people who share a "fundamental" characteristic and, perhaps, persons sharing immutable characteristics which cause all or almost all of them to be persecuted, despite lack of cohesion.

287. See supra text accompanying notes 41-59.

288. For a discussion of this usage, see Helton, supra note 47, at 39 ("social group" is used to refer to voluntary associations, statistically described groups, groups possessing internal solidarity, and so on).

289. R. Robinson, Definition 59-62 (1950) (stipulative definition, which consists of laying down what a word is to mean when one uses it, rather than "finding out what some set of people actually had meant by [the] same word," is also known as "legislative definition").

290. In INS v. Cardoza-Fonseca, 480 U.S. 421, 431 (1987), the Supreme Court held that "well-founded fear" can exist where persecution is not more likely than not, stating that the "ordinary and obvious meaning of the phrase is not to be lightly discounted," and noted that for the INA, "we have considered ourselves bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used" (citations and quotation marks omitted).

291. The Sanchez-Trujillo petitioners argued:
The analysis has been developed most fully perhaps in the jury composition context where criminal defendants have claimed particular groups are underrepresented on their juries. In order to make such a claim based on a relationship to a group, the defendant is required to demonstrate that the group is distinct from the rest of society and definable in some non-arbitrary way. The criteria for determining whether a distinct, identifiable (i.e. particular or cognizable) social group exists are not static, but vary depending on the nature of the injury alleged and the local historical and political context in which cognizability of the group is being claimed.

See Brief for Petitioners, supra note 218, at 17; see also Amicus Brief, supra note 239, at 14 ("First, this court should consider whether the petitioner has identified a particular social group that is subject to persecution. In making its evaluation the court should recognize that membership in virtually any type of group or social category may be a basis for persecution.").
group must be socially meaningful; it cannot be merely a set of persons connected in no way other than all facing persecution. Nor does "particular" impose any restriction; placing "particular" before a noun in this fashion merely means "certain." 283

Though "membership in a particular social group" has a particular meaning in international covenants protecting refugees, 294 "social group" is not otherwise a legal term of art. American case law uses the expression in a broad, nearly all-inclusive sense; it encompasses voluntary associations as well as groups based on "immutable" characteristics or defined by outsiders' stereotypes. 295 American constitutional adjudication has singled out "discrete and insular" groups for


293. One commentator has concluded that "[t]he word 'particular' can simply function as singling out one of these groups for identification; it need not narrow the scope of the group being defined." Comment, supra note 47, at 923. In fact, none of the meanings of "particular" in this context lends itself to the narrowing construction suggested but not elaborated by the court. A dictionary offers the following meanings for "particular":

1. of or pertaining to a single or specific person, thing, group, class, occupation, etc., rather than to others or all; special rather than general: one's particular interests in books. 2. immediately present or under consideration; in this specific instance or place: Look at this particular clause in the contract. 3. distinguished or different from others or from the ordinary; noteworthy, marked, unusual: She sang with particular warmth at last evening's concert. 4. exceptional or especial: Take particular pains with this job. 5. being such in an exceptional degree: a particular friend of mine. 6. dealing with or giving details, as an account or description, of a person; detailed; minute. 7. exceptionally selective, attentive, or exacting; fastidious; fussy: to be particular about one's food. 8. Logic. a. not general; referring to an indefinite part of a whole class. b. (of a proposition) containing only existential quantifiers. c. partaking of the nature of an individual as opposed to a class. 9. Law. a. noting an estate that precedes a future or ultimate ownership, as lands devised to a widow during her lifetime and after that to her children. b. noting the tenant of such an estate. —n. 10. an individual or distinct part, as an item of a list or enumeration. 11. Usually, PARTICULARS. specific points, details, or circumstances; to give an investigator the particulars of a case. 12. Logic. an individual or a specific group within a general class. 13. IN PARTICULAR, particularly; specifically; especially: There is one book in particular that may help you.


294. See supra notes 47-56 and accompanying text.

295. A summary of the results of a WESTLAW search of federal cases, showing that "social group" is used to refer to all kinds of groups, defined by age, class, voluntary characteristics, and organizational membership, for example, is on file with the author. Comment, supra note 47, at 931-34, concludes that some groups are legally relevant because of internal cohesion and shared attitudes, while others are relevant as targets for outsiders' animus. H. Steiner describes modern courts' tendencies to view parties in tort cases as representing broader business or consumer groups, and notes that:

[T]he common law has long included doctrines whose reach is defined in terms of groups: status groups of an ascriptive character deriving from political and social order; groups that individuals can choose to enter and leave (married women); or groups defined in terms of physical and mental characteristics (minors, mentally incompetent).

H. Steiner, supra note 285, at 115, 117.
protection from political processes. Other government documents illustrate a similarly ordinary use of “social group.” For instance, Pentagon studies on how to increase American “influence” in a number of societies identified a variety of “social groups” as promising targets.

Like ordinary usage, sociological treatments make clear that any attempt to define “social groups” as either “voluntary” or “immutable” is bound to fail. Courts face severe difficulties in assimilating and testing social science insights, and probably should not be expected or even encouraged to follow developments on the cutting edges of social theory. However, given that Congress defined asylum eligibility in terms most frequently considered in sociology, and that sociology has helped to shape ordinary usage, some attention to that discipline’s insights is in order. Students of society have recognized for hundreds of years that a key distinction among “social groups” is precisely the extent to which they are ascriptive—defined in terms of immutable characteristics—or voluntary.

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297. In 1959, the Pentagon commissioned a 471-page study by the American University Special Operations Research Office, entitled “Psychological Operations: Cambodia,” which attempted to identify which “social groups” were both “effective” and “susceptible” to American pressures. The “social groups” found most promising were the urban middle class and officer corps; other groups examined included peasants, ethnic Chinese, police, Buddhist monks, and youth. Similar studies were done for Egypt, Burma, China, Iran, Iraq, Laos, Syria, Thailand and Vietnam. W. SHAWCROSS, SIDESHOW 55-58 (1979). Another “ordinary” use of “social group” is presented by a 1936 Federal Housing Administration underwriter’s manual cited in Bradley v. School Bd., 338 F. Supp. 67 (E.D. Va. 1972), which states that:

Deed restrictions are apt to prove more effective than a zoning ordinance in providing protection from adverse influences. Where the same deed restrictions apply over a broad area and where these restrictions relate to types of structures, use to which improvements may be put, and racial occupancy, a favorable condition is apt to exist. If, in addition to physical attraction of the neighborhood, the present class of occupants is of such quality as to make the area desirable to the social group which will form the prospective market, additional appeal is created. Of prime consideration to Valuator is the presence or lack of homogeneity regarding types of dwellings and classes of people living in the neighborhood.

Id. at 215 (citations to transcript omitted).


299. See generally R. ARON, MAIN CURRENTS IN SOCIOLOGICAL THOUGHT 73-143, 237-302 (1965) (discussing Comte and Tocqueville); R. DAHRENDORF, CLASS AND CONFLICT IN INDUSTRIAL SOCIETY 218-23 (1959); 2 R. FLETCHER, THE MAKING OF SOCIOLOGY 27-83 (1971) (discussion of Gemeinschaft-Gesellschaft distinction); A. GID-
tant classifications, such as social class, fall between these absolutes, with the degree and type of mobility varying among societies. Some group characteristics are important because outsiders care about them, whether or not they are central to individual members’ identities. Some “social groups” are defined by similarity among members, and others by unity. Both members of a society and outside observers frequently disagree violently over the extent of social cohesion, the importance of ascription and family connections, the importance of “luck” and “merit,” and the “voluntariness” of “voluntary associations.” Sociologists so bold as to attempt to define “social group” invariably produce amorphous, all-inclusive definitions.

The Ninth Circuit requires that groups be cohesive and “acteduated by some common impulse or interest.” Both sociological and
popular discourse often refer to groups which lack cohesion. “Minority group,” probably the common expression closest to “social group,” describes people united by some common characteristic, such as race or religion; members differ in many ways and are not, except in some very small groups, “closely affiliated” with one another.\textsuperscript{308} Classes, of course, vary in the extent and kind of “class consciousness.” Much political organizing consists of trying to develop cohesion among people who share “objective” interests.

The Ninth Circuit introduces yet another complexity by demanding “homogeneity.”\textsuperscript{309} The court quoted the immigration judge to the effect that the proposed class “may be so broad and encompass so many variables that to recognize any person who might conceivably establish that he was a member of this class is entitled to asylum or withholding of deportation would render the definition of ‘refugee’ meaningless.”\textsuperscript{310} Only in egalitarian groups without role differentiation would the homogeneity criterion literally be met. Again, treating the family\textsuperscript{311} as paradigmatic is strange, since families are not noted for egalitarianism or role similarity. This requirement seems based on concern that members of a heterogeneous group face uneven risks. However, persecutors frequently disregard individual variations within target groups. The Ninth Circuit simply assumed that membership in a diverse population would be minimally relevant to individual risk, rather than treating the extent to which risk varies from member to member as an empirical question.

Paradoxically, while it is easy to recognize these elementary sociological insights, and thus to see that the views of both the Ninth Circuit and the BIA are incomplete, it would require far greater insight to administer either restrictive scheme. Applying either definition rigorously would require immense sociological sophistication, and might demand a level of social science explanation, as opposed to description, which is not attainable even under the best conditions,\textsuperscript{312} much less in asylum proceedings. Before reaching the ques-

\textsuperscript{309} Sanchez-Trujillo, 801 F.2d at 1577.
\textsuperscript{310} Id.
\textsuperscript{311} Id. at 1576.
\textsuperscript{312} See generally C. Lindblom & D. Cohen, Usable Knowledge: Social Science and Social Problem Solving 40-53, 83-84 (1979) (criticizing the “mistaken pursuit of authoritativeness” in social science policy research, and observing that “reporting” rather than “explaining” social phenomena is generally more feasible and may often
tion of whether a group faces persecution, it would be necessary to
determine whether it is sufficiently “voluntary” and “homogeneous”
to satisfy the Ninth Circuit\textsuperscript{313} or, conversely, sufficiently “immutable” or “fundamental” to meet BIA standards.\textsuperscript{314} Such determinations are often difficult for our own society, and much more so for others. It is hard enough to find out whether a village has been picked out as subversive, and much more difficult to determine whether residence varies over time or has been stable from “time immemorial,” whether villagers who go elsewhere would be identifiable, and the like. Whether persons doing particular work form a qualifying “social group” would require analysis of the social meaning of work. Land, certain occupations, and communal work responsibilities may be passed down through kinship groups, with limited individual choice;\textsuperscript{315} guilds and governments sometimes tightly control occupational entry. Persons with a common occupation may vary in ways which affect government attitudes; whether they have contact with each other is not always obvious. Determining whether “immutable” features outweigh “voluntary” ones, the readiness with which characteristics once “chosen” can be changed, or the extent of a group’s internal differentiation would often require information inaccessible to asylum seekers, their attorneys, the INS, or adjudicators.

For the Ninth Circuit, part of the appeal of its limiting criteria—and of the “paradigmatic” example of the family—was that such groups appeared “readily identifiable.”\textsuperscript{316} In fact, though, far from reducing the complexity of the adjudicator’s task, these oversimplified theoretical dichotomies aggravate it. For better or worse, it is unlikely that asylum adjudicators will permit themselves to become bogged down in anthropology dissertations. It is far more likely that the “immutable” and “voluntary” categories will be invoked casually. Adjudicators may either assume other societies are like our own, or employ misleading stereotypes to identify differences. So used, these categories may obscure more than they reveal.

The \textit{Acosta} and, to a lesser extent, \textit{Sanchez-Trujillo} criteria may

\begin{thebibliography}{99}
\bibitem{311} See supra text accompanying notes 231-33.
\bibitem{312} See supra text accompanying notes 172-73.
\bibitem{313} See R. Bierstedt, supra note 305, at 250-51, 297 (in some societies occupational status is function of age and kinship); Stephens, \textit{Family and Kinship}, in N. Smelser, supra note 305, at 520-21; \textit{see also} Wolf, \textit{Closed Corporate Peasant Communities in Mesoamerica and Central Java}, 13 S.W. J. ANTHRO. 1 (1957) (contrasting subsistence cultivators who control land and maintain perpetuity of rights and membership, and limit privileges to insiders, with “open” peasant communities where communal jurisdiction over land is absent, membership is unrestricted, and wealth is not redistributed). In a society of “closed” villages, “just moving” means losing supports which are vital to survival in hard times. \textit{Id.} at 12-15.
\bibitem{314} \textit{Sanchez-Trujillo}, 801 F.2d at 1576.
\end{thebibliography}
often be relevant in assessing risk of persecution. Pressure to change certain "nonfundamental" characteristics is not a basis for asylum; requiring people to conform to government dictates in certain matters—such as paying taxes or receiving vaccinations—does not strike us as persecution. "Mutability" is relevant: if a person can realistically escape danger by selling shoes rather than clothes, or by moving to another neighborhood, the case for asylum is weakened. Mutual acquaintance and solidarity within a group may affect the likelihood of persecution. However, these factors could cut either way. Solidarity might make a group more threatening and thus increase the "need" for persecution, or make persecution too politically costly. "Homogeneity" bears on how probative abuse of some members is of risks to others.

However, treating immutability, cohesiveness, or homogeneity not simply as relevant factors but as definitional prerequisites would require sociological expertise and capacity for inquiry on the part of adjudicators and parties which far exceed what can realistically be hoped for. Asylum law, as Congress wrote it, places heavy burdens on asylum seekers. Requiring evidence with the historical depth necessary to show the feasibility of mobility out of a group, or demanding proof of homogeneity and cohesion, would impose tremendous new evidentiary burdens. Eligible persons would often face insurmountable problems of proof, both because relevant information is inaccessible,317 and because evaluations of such subtle matters vary.

Both the BIA and Ninth Circuit leave some room for "special cases" outside their respective immutability and voluntariness frameworks. The BIA acknowledges that certain characteristics are so fundamental to personal identity that people should not have to change to live in safety,318 and its conception of "immutability" includes shared past experiences.319 The Ninth Circuit concedes that outsiders' hostility could, in special circumstances, help define a "social group," leaving open whether that alone would ever be enough.320 Thus, both formulations leave room for fleeing from soci-

317. In In re (Name Confidential), A27 479 990-New York City (Apr. 21, 1986), an anthropologist who had worked in Nueva Eden, El Salvador, submitted a detailed affidavit describing marriage and residence patterns, and how natives and inhabitants were perceived elsewhere. L. Crandon, Affidavit (Apr. 21, 1986) (on file with the author). In most cases, of course, it would be impossible to find an expert with such extensive knowledge concerning the proposed group.
319. Id. (giving former military leadership or land ownership as examples).
320. Sanchez-Trujillo, 801 F.2d at 1576 n.7.
ological analysis should it become too difficult or generate horrifying results; adjudicators could simply explain that the case at hand is "special." However, prescribing a rigid definitional analysis for run of the mill cases, and focusing attention on questions which are likely to prove unanswerable, diverts attention from the difficult inquiries which Congress mandated—the extent of risk, and whether that risk is of "persecution" on a statutory basis. Nor should we be confident about the "world community's" ability to recognize "special cases" in time; the court's example of Jews in Nazi Germany is instructive. The Nazis concealed the extent of their plans and actions, as have other persecutors, and people elsewhere were unwilling to believe the worst reports. Rigid limiting definitions will be particularly damaging if the government renews attempts to screen out, without a hearing, "frivolous" applications—which would presumably include those which allege facts failing to meet the statutory test even if accepted as true.

PART II: INSTITUTIONAL AND THEORETICAL IMPLICATIONS OF A CORRECT READING OF "SOCIAL GROUP"

In the rest of this Article, I will suggest ways in which moving from efforts to define "social group" in the abstract toward exploring whether particular "social groups" are persecuted can help resolve


322. During China's Cultural Revolution, ideological struggle and transformation were emphasized rhetorically, and many foreigners took avoidance of physical force to be a distinctive aspect of Maoism. See, e.g., Friedman, The Original Chinese Revolution Remains in Power, 13 BULL. OF CONCERNED ASIAN SCHOLARS 42 (1981) (acknowledging his own and colleagues' misunderstanding of Cultural Revolution); see also F. SCHURMANN, IDEOLOGY AND ORGANIZATION IN COMMUNIST CHINA 513, 516 (1968) (though there was some physical fighting, most struggle was verbal and constituted a "scientific campaign to change the soul of man"). The ideology of the military junta which ruled Argentina from 1976 to 1983 "was hard to pinpoint in its public statements, which were impregnated with euphemisms and protocol denouncing official corruption and subversion and defending true democracy. . . . There was no such thing as missing persons. Nor secret trials. Nor the death penalty." J. TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER 103 (1981).


324. On August 28, 1987, the Department of Justice published proposed regulations giving INS "asylum officers" power over future applications, ending hearings in "frivolous" cases, preventing cross-examination of government witnesses, restricting testimony favorable to aliens, and closing hearings. Helton, The Proposed Asylum Rules: An Analysis, 64 INTERPRETER RELEASES 1070 (1987). This proposal was withdrawn in the face of strong resistance, and it appears that the current structure will be maintained essentially intact. See Proposed Asylum Regulations to be Republished Shortly, 65 INTERPRETER RELEASES 271 (1988).
theoretical and evidentiary problems in asylum proceedings. A proper interpretation of "social group" can improve asylum adjudications in several crucial ways. First, eliminating improper threshold requirements would both limit discretion in asylum proceedings and make surviving discretion explicit, thus correcting institutional imbalances. Second, a proper application of the "social group" basis could clarify eligibility in three kinds of difficult cases: cases where a "social group" claim involves a type of persecution on the border of another statutory ground; cases involving groups which fit uneasily into the predominantly Western derived categories created by the other grounds for protection; and cases in which adjudication is distorted by an excessively strong version of a judicial and administrative gloss which requires that petitioners show they have been "singled out" for persecution. In sum, a broad, literal interpretation of "social group"—and, as will be addressed in Part III, greater receptiveness to group-level evidence—would better serve the prevailing understanding of the constitutional role of Congress in immigration matters. It also would help bring United States practice into conformity with our international obligations.

A. Institutional Considerations: Restoring the Proper Constitutional Balance

The practical effects of a broader "social group" conception—while less dramatic than some would hope or others fear—would be substantial, and could help restore a proper constitutional balance in asylum law. Cases in which "social group" claims standing alone would meet the clear probability standard—such that courts would themselves bar deportation to the country where persecution is faced—would probably be rare. More often, group membership combined with another ground would meet that standard. Probably the most common effect of recognizing currently disqualified groups would be to establish "well-founded fear." Applying the correct eligibility standard would limit the executive to the role Congress has assigned—making discretionary decisions about persons who have a "well-founded fear" of persecution which falls short of a "clear probability"—while displacing the executive from a legislative role of developing basic eligibility standards.325

325. Again, this assumes the correctness of INS v. Stevie, 467 U.S. 407 (1987). As discussed at supra note 17, it is not clear that Congress intended to permit deportation of persons to countries where they would have a well-founded fear of persecution. My argument here is not that discretion is undesirable, but that where it exists, it should
If courts refused either to narrow asylum eligibility or to acquiesce in executive efforts to do so, the executive would have to exercise openly the discretion (which is now reflected in low visibility decisions) on focusing apprehension efforts and deciding which petitions to grant and which to resist. The Reagan Administration avoided that responsibility, supporting limits on its own formal discretion.\(^\text{326}\) The INS, when opposing petitions, and the BIA, when denying them, usually maintain that because the alien meets neither the "well-founded fear" nor the "clear probability" standard, they have no choice. Before \textit{Cardoza-Fonseca},\(^\text{327}\) the BIA treated the standards as identical,\(^\text{328}\) though BIA and immigration judges unsuccessfully attempted to insulate decisions from reversal by reciting that even if the standards were different, the alien failed under each.\(^\text{329}\) Although conflating the standards is no longer viable, narrowing "social group" lets the executive disregard risks which people genuinely and reasonably fear, denying protection to persons statutorily entitled to it, and sparing the executive from its responsibility to act openly in discretionary cases.

Adhering to the statutory meaning of "social group" would open now nearly invisible decisions to scrutiny,\(^\text{330}\) permitting Congress and the public to detect ways in which executive implementation may subvert congressional intent. An examination of contexts in which the executive has exercised discretion openly suggests the importance of scrutiny. While INS "prosecutorial discretion" and immigration judge and BIA discretion often invoke unobjectionable humanitarian aims,\(^\text{331}\) the asylum area has generated some problematic discretionary determinations. In \textit{In re Salim},\(^\text{332}\) the BIA held that an Afghan

\(^{\text{326.}}\) In \textit{INS v. Cardoza-Fonseca}, Justice Stevens noted that "[i]f anything is anomalous, it is that the Government now asks us to restrict its discretion to a narrow class of aliens," \textit{INS v. Cardoza-Fonseca}, 480 U.S. 421, 444 (1987). He went on to observe that "Congress has assigned to the Attorney General and his delegates 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." \textit{Id.}


\(^{\text{329.}}\) This failed in, \textit{e.g.}, \textit{Brice v. United States Dep't of Justice}, 806 F.2d 415, 418 (2d Cir. 1986); \textit{Martinez-Sanchez v. INS}, 794 F.2d 1396, 1398 (9th Cir. 1986) (refusing to honor BIA's "insurance clause for the standard of proof" and deciding that wrong standard had been used).

\(^{\text{330.}}\) For discussions of the general democratic virtues of making decisions and their bases explicit, see \textit{T. Lowi, The End of Liberalism} (1979) (covert interest group involvement in regulation of private sector undermines democratic control); \textit{Ackerman & Stewart, Reforming Environmental Law}, 37 STAN. L. REV. 1333, 1351-55 (1985).


\(^{\text{332.}}\) 18 I. & N. Dec. 311 (BIA 1982).
had "clear probability" entitlement not to be deported to Afghanistan, but denied asylum. The respondent was ordered deported to a Pakistani camp because by entering dishonestly he had "cut" in the years-long line of Afghans seeking admissions as refugees. While the decision that certain groups could best be "helped" abroad was anticipated and accepted by Congress, the discretionary decision to deny asylum to Afghans on this basis is one of which Congress should have notice, and of which it has had notice because of the openly discretionary character of the executive's decisions.

In dealing with Central Americans and Africans, even though there are no overseas refugee admission programs, the Salim rationale has occasionally surfaced. Central Americans have faced even more dubious "discretionary" arguments. For instance, the INS views entry with the assistance of a paid "smuggler" as a strong negative factor. A class action brought to light another factor which may result in denial of asylum—illegal work in this country. "Smoking out" discretion would let Congress and others focus

333. See also Walai v. INS, 552 F. Supp. 998 (S.D.N.Y. 1982) (Afghan denied asylum, but eligible for withholding, could be deported without Pakistan's prior consent, but would be brought back to United States if rejected). See generally P. Weiss Fagen, supra note 69, at 46-50.

334. See 126 Cong. Rec. 37,225 (1979) (statement of Rep. Fish) (describing repatriation or nearby resettlement as often "the best solutions and the solutions most desired by the refugees themselves," and giving Afghans in Pakistan as example where eventual repatriation, not resettlement, appropriate); see also 125 Cong. Rec. 23,232 (1979) (statement of Sen. Kennedy) (technically eligible Palestinians have not been admitted as refugees "because we have made a policy decision that our best humanitarian response" was to "assist...where they were locally resettled and...resettlement in the United States was not necessary").

335. See In re Saavedra-Hernandez, A24 327 050 & A24 327 051, Slip. Op. at 7 (BIA 1986) (ordering withholding of deportation for Salvadoran petitioners, but upholding denial of asylum on grounds that "respondents willingly participated in a criminal scheme to circumvent our immigration laws so that they could come to live in the United States").

336. Coyote, the Spanish term, is not necessarily disparaging.

337. See In re Shirdel, Interim Dec. No. 2958, at 7 (BIA 1984) (upholding discretionary denial of asylum and observing that "[w]e have in the past considered it a strong negative factor to enter the United States with the aid of a professional smuggler because of the threat it presents to the enforcement of our immigration laws").

338. In Diaz v. INS, 648 F. Supp. 638 (E.D. Cal. 1986), a district court enjoined the INS from denying work permission to asylum applicants whose cases it deemed to be without substantial merit, though it permitted the INS to screen out "frivolous" applications. The court found that the INS's position that plaintiffs had somehow managed to "get by" so far was not only "at odds with the law in this circuit," but "does not do much to enhance the defendants' reputation for common decency." Id. at 647. The court noted that affected persons might be forced to abandon claims or to "work illegally to survive which, as conceded by the district director at oral argument, might be considered by the INS as a negative discretionary factor in adjudicating the asylum request." Id. at
on whether such irregularities should prevent asylum. In fact, perhaps as a result of criticism, the BIA has reduced the stress on entry-related illegality.\textsuperscript{339} Light might be cast not only on asylum but on "broader" foreign policy matters: denial of asylum to Salvadorans because the predicament of being tortured or of having one's village destroyed is too common, and might inform considerations of whether and how to support the Salvadoran government.\textsuperscript{340} Such oversight possibilities are denied when the executive evades responsibility by attributing negative discretionary decisions to the basic eligibility formula.

Apart from facilitating congressional and public scrutiny, placing executive conduct on a openly discretionary plane would facilitate judicial review. Commentators and courts have disagreed over how much congressional goals and designs in passing the Refugee Act constrain executive discretion.\textsuperscript{341} Given the congressional shift toward an ideologically neutral conception of refugee, it would be improper to grant asylum to persons fleeing leftist dictatorships who have a "well-founded fear" of persecution but cannot establish a "clear probability," while rejecting similarly situated Salvadorans and Guatemalans. The shift since 1965 to an ostensibly nonracist immigration policy,\textsuperscript{342} and the absence of any statutory authority to discriminate, bar racial discrimination against Haitians. The con-

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\textsuperscript{339} Rewritten regulations mandate that permission is to last throughout administrative and judicial review if the application is "nonfrivolous." 8 C.F.R. §§ 274a.12(c)(8), 274a.13(a) (1987).

\textsuperscript{339} See In re Pula, Interim Dec. No. 3033 (BIA 1987) (circumvention of orderly refugee procedures is a relevant factor in exercise of discretion but insufficient alone to require the most unusual showing of countervailing equities). In that case, the Board indicated that "[i]n the absence of any adverse factors. . .asylum should be granted in the exercise of discretion." Id., revised slip op. at 10, quoted in BIA Amends who Designates Asylum Decision, 65 INTERPRETER RELEASES 137 (1988).


\textsuperscript{341} The Ninth Circuit takes the view that "where the Board has not identified an alternative source of refuge, it can deny asylum only on the basis of genuine compelling factors—factors important enough to warrant returning a bona fide refugee to a country where he may face a threat of imminent danger to his life or liberty." Hernandez-Ortiz v. INS, 777 F.2d 509, 519 (9th Cir. 1985). The Fifth Circuit will disturb a denial only upon a showing that "such action was arbitrary, capricious or an abuse of discretion." Young v. United States Dep't of Justice, 759 F.2d 450, 455 n.6 (5th Cir. 1985) (continuing standard of review under prior statute). See generally Helton, supra note 157, at 1004-07. A recent Supreme Court case suggests an expansive view of agency discretion, at least where the integrity of procedures is at stake. INS v. Abudu, 485 U.S. 94 (1988) (BIA refusal to reopen deportation proceeding because alien had not sufficiently explained failure to assert asylum claim at outset upheld, using abuse of discretion standard).

gressional decision to make asylum eligibility independent of immigration status\textsuperscript{343} arguably bars treating illegal entry and the methods associated with it as adverse factors, at least when the unlawful behavior was necessary to reach safety.\textsuperscript{344} Denying petitions of anyone falling short of the "more likely than not" standard would constitute refusal to exercise discretion rather than a permissible exercise thereof. Evaluation of particular grounds for exercising discretion must rest on an examination of congressional intent and language; unacceptable bases can only be spotted if discretion is exercised explicitly. The executive should be required to articulate rationales for discretionary denials of asylum status rather than hiding behind an artificially constructed statutory eligibility formula.

\textbf{B. Theoretical Contributions of a Literal Reading}

\textit{1. "Hard Cases"}

Apart from dealing with new and "creative" forms of persecution,\textsuperscript{346} the "social group" category functions to eliminate some areas of doubt by providing a straightforward resolution for matters on the periphery of another type of persecution.\textsuperscript{346} For instance, the BIA has recently suggested that persons persecuted for political opinions which the persecutor erroneously or cynically imputes to them are not protected,\textsuperscript{347} while courts have generally disagreed.\textsuperscript{348}

\begin{itemize}
  \item \textsuperscript{343} See supra notes 29-31.
  \item \textsuperscript{344} Cf. Nasser v. INS, 744 F.2d 542 (6th Cir. 1984) (discretionary denial of asylum justified because the fraudulent attempt by Iraqi living in Greece to enter United States was not essential to flight from Iraq).
  \item \textsuperscript{345} See supra note 55 and accompanying text.
  \item \textsuperscript{346} The UN has said:
  
  \begin{quote}
  Membership in a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the government's policies.
  \end{quote}

  \begin{itemize}
  \item UN \textit{Handbook, supra} note 48, at 78. G. Goodwin-Gill writes:
  \begin{quote}
  The reference to "membership of a particular social group", however, makes little practical difference in the respective areas of competence of UNHCR [United Nations High Commissioner for Refugees] and states parties to the Convention. It can be seen as clarifying certain elements in the more traditional grounds for persecution—race, religion, or political opinion, and examples of persecution on social group grounds will often prove, on closer examination, to have a political basis; thus, the group may be persecuted because the government considers it inherently disloyal and, rightly or wrongly, attributes dissident opinions to members of the group as a class.
  \end{quote}

  \begin{itemize}
  \item G. Goodwin-Gill, \textit{supra} note 47, at 12-13 (citations omitted).
  \item \textsuperscript{347} In an opinion not designated as precedential, the BIA insisted that "the alien
gimes that violate human rights rarely conduct careful, detailed investigations of political beliefs, but rely on stereotypes, guilt by association, and "hunches" to identify opponents, mistakes are frequent. Torture and informants often produce "false positives." The "social group" category makes this question largely academic, since even if imputed political opinion were not covered as political opinion, imputations are most often based on group generalizations.

The same conclusion should apply to certain other persons singled out for "political" purposes which have little to do with their own political views. Persons "framed" as "examples," for instance, may be selected according to group criteria rather than at random. Witnesses to persecution or corruption may form an endangered group. Such people may be difficult to fit into the "political opinion must show that it is his own, individual political opinion that a persecutor seeks to overcome by infliction of harm or suffering." Campos-Guardado v. INS, 809 F.2d 285, 288 (5th Cir.) (describing and deferring to BIA's rationale), cert. denied, 484 U.S. 826 (1987).

348. The Ninth Circuit has long held and recently reaffirmed that persons victimized because of imputed political opinion are protected. Argueta v. INS, 759 F.2d 1395, 1397 (9th Cir. 1985) (death threat based on erroneous belief that petitioner was guerrilla established clear probability of persecution due to political opinion); Kovac v. INS, 407 F.2d 102, 104 (9th Cir. 1969) (Yugoslav defector eligible for asylum even though "[t]he opinion on account of which he would have been punished was the one the masters of Yugoslavia would have attributed to him").

349. See, e.g., Turcios v. INS, 821 F.2d 1396 (9th Cir. 1987) (petitioner arrested and tortured after seen speaking with a leftist professor in a park).

350. See, e.g., Platero-Cortez v. INS, 804 F.2d 1127 (9th Cir. 1986) (former Salvadoran "security" agent testified as to how petitioner's name had been placed on list of people he was assigned to kill). A classic description appears in R. Cobb, The Police and the People: French Popular Protest 1789-1820, at 14-37 (1970).

351. The commission appointed by President Reagan and headed by Henry Kissinger to report on the situation in Central America said of Guatemala's "security forces": "In the cities they have murdered those even suspected of dissent. In the countryside, they have at times killed indiscriminately to repress any sign of support for the guerrillas." President's National Bipartisan Commission on Central America, The Report 119 (1984) [hereinafter Kissinger Commission Report]; see also R. Shaplen, Time Out of Hand: Revolution and Reaction in Southeast Asia 26-27, 91-131 (1970) (hundreds of thousands of persons killed after 1965 coup in Indonesia "mostly communists or communist sympathizers") (emphasis added).

352. This is not always true, and interpreting persecution "on account of political opinion" is a necessary and appropriate judicial role.

353. The Ninth Circuit has held that: [I]n determining whether threats or violence constitute political persecution, it is permissible to examine the motivation of the persecutor; we may look to the political views and actions of the entity or individual responsible for the threats or violence, as well as to the victim's and we may examine the relationship between the two.

Hernandez v. INS, 777 F.2d 509, 516 (9th Cir. 1985).

354. See Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.) (Salvadoran woman said she had witnessed murder of her activist uncle by soldiers who then raped her, and believed herself to be in danger as a surviving witness), cert. denied, 484 U.S. 826 (1987). The Fifth Circuit ignored a possible "social group" claim, based on family members' involvement with an agricultural cooperative, and deferred to the BIA's decision.
The "social group" category since their own views may be irrelevant; what matters are the opinions officials find it expedient to attribute to them.

The political character of participation in certain social movements might be questioned as well. Whether certain cultural activities reflect "political" orientations may be unclear. In In re Acosta, for instance, the petitioner claimed that the San Salvador taxi cooperative to which he belonged was viewed by the government as having socialist and insurgent tendencies, while the guerrillas saw members as progovernment because they had not joined work stoppages. Whatever the merits of the particular claim, members of certain occupation-based organizations are sometimes targets. Whole occupations may be targets because of supposed political beliefs or because the work is considered evil or undesirable. Joining associations that Americans often do not view as "political"—such as certain trade unions—may be seen as a political statement or as sufficiently threatening to warrant reprisals. Such membership information is more available both to the authorities and to American asylum adjudicators than are the precise opinions of "ordinary" people. Indeed, the "social group" provision has been used to protect trade unionists.

Even membership or activism in certain political parties might
have a problematic connection to the "political opinion" provision. Many parties are unified and driven as much or more by patronage as by ideology. Some ostensibly partisan struggles may be understood more accurately in terms of class conflict—in effect, as conflict among "social groups." These matters on the periphery of "political opinion" are encompassed in the notion of "membership in a particular social group."

Some immigration judges have rejected claims by Latin American Catholics who allege persecution due to involvement in "base communities" and other religious activities, finding it implausible that Latin American regimes persecute Catholics. While such persecution should be viewed as religious and political, the "social group" provision removes any doubt.

"Social group" also encompasses certain groupings on the margin of "nationality" and "race." In Ananeh-Firempong v. INS, the concept was applied to tribal membership in Ghana. It is often unclear how African "tribes" fit into Western social scientists' categories. Many scholars prefer to avoid the term because they think its connotations overly "exotic." Many "tribal" divisions are based on what were "nation-like" boundaries before they were destroyed by colonialism, and feelings of "tribal" unity are sometimes stronger.


363. See P. Oquist, Violence, Conflict, and Politics in Colombia 83, 90-91, 330-32 (1980) ("the violence" in Colombia in late 1940s through 1958, particularly later phases, must be understood in terms of class conflict and "vendettas" rather than as purely "partisan").

364. See Weiss Fagen, supra note 69, at 39 (describing negative attitude of INS toward claim by lay Catholic teacher).

365. In re Paniagua, A24 166 230—Los Angeles (BIA 1985), reported in 2 IMMIGR. L. & PROC. RPTR. B1-53 (1985) (granting asylum on political opinion ground to activist in Catholic study group), also cited in 62 INTERPRETER RELEASES 227 (1985). The more traditional attitude is reflected in BIA member Vacca's dissent: "Surely, there is not evidence in the record to show that the government of a country which is predominantly Catholic is opposed to the teachings of the Catholic church or is against private charity to the hungry and the homeless." 2 IMMIGR. L. & PROC. RPTR. at B1-64.

366. The UN High Commissioner indicates that these terms too are to be treated broadly. Race is a social category which includes ethnicity. UN HANDBOOK, supra note 48, at 68. Nationality extends beyond citizenship to refer to members of ethnic or linguistic groups, and may overlap with race. Id. ¶ 74.

367. 766 F.2d 621, 628 (1st Cir. 1985).

368. See R. Oliver & A. Atmore, supra note 137, at 316-17, 319 (noting great diversity among types of "tribes").

369. See P. Curtin, S. Feierman, L. Thompson & J. Vansina, African History 579 (1978) ("ethnic loyalty" in Africa has much in common with the "nationalism" of nineteenth century Poland, and calling it "tribalism" causes "immense confusion" and "tends to distort the fundamental similarities among social processes").

than nationalism. These processes puzzle anthropologists and historians, and are unlikely to be understood by asylum adjudicators. Tribal identifications can change very rapidly, sometimes due to government actions. Thus, certain tribes are problematic under the BIA approach, and probably few could survive strict application of the Sanchez-Trujillo criteria. It was partly in order to overcome the ethnocentricity of previous law that Congress abandoned geographical and ideological limitations by adopting the Protocol definition of refugee, adding to the more precise grounds for persecution the flexible “social group” concept.

In some contexts, the “social group” category serves as a basis for granting asylum without accepting persecutors’ ideological categories. Groups which do not think of themselves as separate, distinct, or cohesive are sometimes persecuted by governments which disagree. The flexible “social group” category makes it unnecessary to resolve who is “right.” Jewish victims of anti-Semitic persecution qualify as members of a “social group” even if they are not religious; it is not necessary to consider whether being “Jewish” is a matter of “race,” “nationality,” or something else. The Eta people in Japan look no different to outsiders, and there is no obvious basis for considering them a “race.” However, they are viewed as a racial minority, with a distinct origin, and at times have been mistreated on that basis. “Social group” provides a neutral way of describing differences which a government believes to exist and finds relevant, without accepting often loaded characterizations of them as differences of “race” or “nationality.”

2. Transcending Ethnocentrism

A related function which the “social group” category should serve is to assist immigration tribunals and reviewing courts in viewing other societies on their own terms, without imposing foreign notions of what demographic or associational divisions are socially meaningful and apt to result in persecution. The “social group” category re-

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371. R. OLIVER & A. ATMORE, supra note 137, at 316-17, 319, 321.
374. See supra notes 32-40, 56, 58 and accompanying text.
376. See M. HANE, PEASANTS, REBELS, AND OUTCASTS 139-43 (1982).
377. Id.
quires decisionmakers to focus on the realities of power and persecution in another society, rather than applying dangerously misleading "common sense." Groups may be important which are not significant, or do not even exist, in contemporary Western societies. Examples of the latter include "tribes" and "castes." Groups which do exist here, but are less central to our lives and the way governments view us, may be even more likely to be dismissed as possible "social groups" for asylum purposes.

For instance, counsel for Central American asylum seekers have argued that governments view certain villages as hostile, and abuse their inhabitants or natives. While it may be difficult for American legal decisionmakers, unfamiliar with Central America, to grasp or believe that foreign governments would decide to persecute people based on such apparently crude screening devices, anthropologists, historians, and sociologists with regional expertise have provided considerable evidence, both in materials prepared for asylum cases and in academic writings, that such categorizations are used. In much of the world, villages are tightly knit social units. In deeply polarized societies, village membership and place of origin may in fact convey a great deal of information about the "subversive" or "loyal" character of an inhabitant. Opposition or other political activities are often conducted on a neighborhood or village basis, and retaliation is often collective as well. Refusal by some

378. See Brief by Sister Kathryn Walsh, Accredited Representative, In re (Name confidential), A27 479 990—New York City (Apr. 21, 1986) (on file with author). This should not be confused with the claim, rejected in Zepeda-Melendez v. INS, 741 F.2d 285, 290 (9th Cir. 1984), that persons may be eligible because of pressures on them as inhabitants of a strategically situated village.


380. See, e.g., Tan, The Municipios of the Midwestern Highlands of Guatemala, 39 AM. ANTHROPOLOGIST 423, 438 (1937) ("If the municipios typically are set apart one from another by language, costume, and a consciousness of racial, cultural, and historical uniqueness, as well as by differing ecological compositions and population elements, they constitute economic, political, and religious units as well.").


384. One Salvadoran asylum seeker reports that in her town, "the people" demonstrated against the government. Because her family had money, they did not participate. However, soldiers started killing people "without taking the time to see if they were really anti-government or not." LAWYERS COMMITTEE, supra note 355, at 21-22; see also J. NASH, supra note 144, at 88 ("When, as often happens in the labor strife of the
villagers to give up land the state wants for other purposes sometimes leads to attacks on everyone who refuses to evacuate.\footnote{385} Counterinsurgency programs often provide extra “security” where the opposition is strong.\footnote{386}

The Ninth Circuit may be right that in El Salvador “the risk of persecution relates principally to the existence of actual or imputed political opinion.”\footnote{387} However, its view that, except for persons at particular risk, such as “political or social activist leaders and members of organizations directly identified as opposing or criticizing the government,”\footnote{388} exposure to risk “applies equally to all segments of the population of El Salvador”\footnote{389} based on purely “individual” factors\footnote{390} is a view which few if any students of that society would accept.\footnote{391} Imputations of political opinion are rarely random; they are generally based on membership in groups of one kind or another.

Classifications which strike Americans as crude and irrelevant were also used in China during the Cultural Revolution. People with overseas relatives,\footnote{392} young people whose families were privileged before the revolution,\footnote{393} and people who had studied or worked with [Bolivian] mines, there is a ‘red massacre’ or bloodbath provoked by a strike or worker protest, children are killed along with women and men.”).\footnote{385}

\footnote{386} See Lawyers Committee, \textit{supra} note 355, at 3-5 (account of attacks on South African village).

\footnote{387} The Kissinger Commission reported:
The Guatemalan Army continues to apply counter-insurgency tactics developed through 20 years of experience in the field. At the heart of these tactics is aggressive and persistent small-unit patrolling in areas of guerrilla activity. A key feature of the counter-insurgency effort has been the organization of about 400,000 \textit{campesinos} and Indians into Civil Defense Forces. These forces are poorly armed—only about one in ten men in some units is armed with a gun, usually an M-1 rifle—but they provide security for villagers, go on patrol regularly and have taken heavy casualties in contacts with insurgents.\footnote{Kissinger Commission Report, \textit{supra} note 351, at 118.}

\footnote{388} Sanchez-Trujillo v. INS, 801 F.2d 1571, 1577 (9th Cir. 1986).

\footnote{389} \textit{Id.}

\footnote{390} \textit{Id.}

\footnote{391} Even Senator Allan Simpson, who opposes extended voluntary departure for all Salvadorans, acknowledges that certain groups face elevated risks. He says: \textit{[W]e should develop guidelines that would identify certain classes of people who might well be subject to particular risk if returned to El Salvador. There is evidence that this may be true of teachers and medical personnel. In such cases, a “case-by-case” review of the need for extended voluntary departure would certainly be in order.}

\footnote{Simpson, \textit{We Can't Allow All Salvadorans to Stay}, Wash. Post, July 10, 1984, at A13, col. 2.}


\footnote{393} For a discussion of “class struggle” based on pre-1949 status, see \textit{id.} at 103-
foreigners or who were influenced by Western art, literature, and music were deprived of freedom and, in some cases, of life.

For American adjudicators, it may be difficult to recognize that certain groups, too diffuse or internally disparate to constitute meaningful social units here, might be viewed as relevant “social groups” by members, persecutors, or both. By establishing persecution on account of “social group” membership as a basis for protection, Congress required that this possibility be investigated.

3. “Singling Out” and “Modern” Persecution

Reading the “social group” language literally, as Congress intended, elucidates the Refugee Act’s central concept of “persecution” by highlighting the sense in which asylum seekers must show that they have been “singled out” for persecution. Reluctance to recognize large “social groups” seems to be rooted in concern that the concept of “persecution” retain an individualistic focus.

State Department spokespersons, the INS, the BIA, and some courts and commentators have distinguished between “genera-

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396. See Helton, Forward, The Sanctuary Movement: Ecumenical, Municipal and Legal Challenges to United States Refugee Policy, 21 HARV. CR.-C.L. L. REV. 493, 538 (1986) (“Persecution on account of membership in a social group as grounds for refugee status has been resisted by the courts, perhaps because it is regarded as conflicting with the requirement for an individualized asylum case.”).

397. The Deputy Assistant Secretary of State for the Bureau of Human Rights and Humanitarian Affairs argues that asylum law is designed to aid victims of human rights violations on an “individual” basis, while broader problems of violence and poverty are “addressed” by the United States “every day in its foreign policy.” Dietrich, U.S. Asylum Policy, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY—1985 IN REVIEW (1986).

398. INS district directors sometimes take this to incredible lengths. One denied asylum to a Salvadoran teacher and union activist who reported twice being kidnapped and beaten. The second time he was held for 30 days, burned with acid, and left for dead. After he left the country, his brother was mistaken for him and found decapitated, castrated, with eyeballs out of their sockets. The petitioner presented medical evidence of torture. The district director denied asylum in January 1985, saying that in El Salvador “kidnapping and other excesses are endured and perpetrated by all.” Van Der Hout, The Politics of Asylum, 5 CAL. L. 72 (1985).

399. In re Sibrun, Interim Dec. No. 2932, at 7-8 (BIA 1983) (“the Act requires that this qualifying persecution derive solely on account of one of the five prescribed grounds in the statute. Generalized oppression by a government of virtually the entire populace does not come within those specified grounds”).

400. The Ninth Circuit’s position on this issue is somewhat unclear. Compare Bolanos-Hernandez v. INS, 749 F.2d 1316, 1324 (9th Cir. 1984) (focusing on threat severity and the likelihood of fulfillment) with Sarvia-Qintanilla v. INS, 767 F.2d 1387, 1394 (9th Cir. 1985) (evidence should indicate that alien’s predicament is appreciably distinct). The Sixth Circuit has also wavered. Compare Yousif v. INS, 794 F.2d 236, 242 (6th Cir. 1986) (“general description of upheaval” insufficient and petitioner “must show
lized" economic and political "oppression" of a country's people and the "singling out" of individuals for "persecution." The executive is effectively free to "waive" the singling out requirement, since no one has standing to object to asylum grants, and few critics of ideological bias would be inclined to do so. Surprisingly, most critics of restrictive definitions of persecution have focused on the degree of risk, without addressing in depth the "singling out" requirement.

The "singling out" gloss is often expressed unclearly. It sometimes appears evidentiary—that it is not enough to show that many people are injured without pointing to abuse or threats aimed at the petitioner. Other decisions suggest that the kind of injury must be unusual, and that no matter how much personalized evidence an individual can offer of past and future injury, the claim will fail if the abuse suffered is common. "Singling out" has been presented as

that he as an individual will be... singled out for persecution or some other 'special circumstances'") with Reyes v. INS, 693 F.2d 597 (6th Cir. 1982) (proof that individual would be singled out not required). The Seventh Circuit did not require "singling out" in Carvajal-Munos v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (it can be inferred that applicant would be persecuted based on treatment of like individuals). The District of Columbia Circuit observed in Sanchez v. INS, 707 F.2d 1523, 1527 (D.C. Cir. 1983), that "[i]f we were to agree with the petitioner's contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely" (citation omitted). The Fifth Circuit required an "individualized" showing of danger in Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978).


The United States has pressed the United Nations to treat all Afghans in Pakistan, including participants in the armed struggle, as refugees. Kamm, Aid to Afghan Refugees: Donors Bend the Rules, N.Y. Times, Apr. 2, 1988, at A2, col. 3; see also Brelick, supra note 220, at 32-33 (noting that "[c]uriously, while the State Department appears to ignore conscription at gunpoint practiced by both El Salvador and Iran, this fact provided the basis for a positive advisory opinion on behalf of Afghan draft evaders"). The United States generally recognizes Afghans as having an entitlement to withholding of deportation to Afghanistan itself. See supra notes 332-33 and accompanying text.

See, e.g., Note, The Need for a Codified Definition of "Persecution" in United States Refugee Law, 39 Stan. L. Rev. 187 (1986). The author stresses the political manipulation which is facilitated by the absence of a standardized definition of "persecution"; while she addresses the "singling out" question, id. at 204-05, 208-09, she does not indicate how this issue should or most likely would be resolved in the codification she advocates. See also Note, Political Legitimacy in the Law of Political Asylum, 99 Harv. L. Rev. 450, 468-71 (1985) (rejecting the "singling out" requirement as lacking statutory basis and advocating asylum for persons mistreated by governments courts find "politically illegitimate").

See, e.g., Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1987) (withholding claim must be factually supported by specific evidence showing alien is, more likely than not, subject to persecution as an individual).

For example, the Second Circuit has said:
implicit in the plain meaning of persecution,\textsuperscript{406} and as a practical necessity, since the United States cannot offer and has not committed itself to provide refuge to all the world's oppressed or displaced people.\textsuperscript{407} The congressional decision neither to protect all displaced persons\textsuperscript{408} nor to follow Western Europe in explicitly recognizing "de facto refugees"\textsuperscript{409} supports some type of "singling out" requirement.

However, like the attempt to restrict "social group" to small groups, a strong "singling out" requirement—which demands more evidentiarily or substantively than a showing of risk of the prescribed gravity on account of one or more statutory criteria—is supported neither by the statute's language nor by its history. The Ninth Circuit has described well the limited extent to which "singling out" may properly be required: "the evidence should be sufficiently specific to indicate that the alien's predicament is appreciably different from the dangers faced by all his countrymen."\textsuperscript{410} More recently, the court has explained that the petitioner must show that "he or those similarly situated are at greater risk than the general population" and that the risk is a serious one.\textsuperscript{411} The BIA's own position has
grown increasingly restrictive in recent years. Persecution "on account of" a statutory basis may fairly be read to imply that the target group must face a higher risk of injury than the general population, but it cannot be read to require that danger be unique to group members. Requiring individualized evidence in every case is no more justifiable; the statute established burdens of proof, but does not insist on any particular type of evidence.

It is difficult even to make sense of the "singling out" requirement. "Neutral" policies may constitute persecution as applied to some persons. Uniformly applicable dress laws in Iran, for instance, have very different significance for fundamentalist Moslems and their opponents. Requirements that women wear Islamic dress and stay out of public life create a profound sense of violation for some women, while being no more than an inconvenience or mandate to do what they prefer for others. Acosta recognized that a "social group" may be defined by a shared characteristic so fundamental that people should not be required to change it. The reflexive dismissal of asylum claims based on "nondiscriminatory" requirements ignores that insight.

The "singling out" notion is also peculiar in that several bases for asylum are intrinsically group criteria—race, nationality, and membership in a particular "social group"—and even the others—political and religious conviction and activity—are usually shared by many people. As the BIA pointed out in holding that the Protocol was compatible with and supplemented domestic provisions for withholding of deportation:

Platero-Cortez v. INS, 804 F.2d 1127, 1130 (9th Cir. 1986)).

For a flexible approach, see In re Martinez-Romero, 18 I. & N. Dec. 75, 78 (BIA 1985) (inquiry should focus on whether violence affects population indiscriminately or is directed against an individual or his social group). For an analysis of recent trends, and insights on BIA member thinking deriving from interviews, see Note, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 VA. L. REV. 681, 699-705 (1989).

See LAWYERS COMMITTEE, supra note 355, at 27, 31 (immigration judge rejected asylum petition of Iranian man based, inter alia, on dress restrictions, because these rules affected all Iranians).

Cf. Ghadessi v. INS, 797 F.2d 804, 808 (9th Cir. 1986) (evidence that Khomeini's government "might act upon its suspicions of her political opposition" and the "unfavorable attitude toward female activists in that radical Islamic environment" stated prima facie case). See generally D. HIRO, IRAN UNDER THE AYATOLLAYS 220, 256, 258-59 (1986) (describing dress requirements for women, violations of which are punishable by prison, sex discrimination in universities, and exclusion of women from judiciary and legal profession).


See supra note 173 and accompanying text.
Congress sought generally to shield aliens from the actions of their own home governments in singling them out for punitive treatment, not because of their individual conduct or demerits, but solely because they are members of dissident or unpopular minority groups. The inclusion of the two new classes [nationality and membership in a particular “social group”] within the ambit of section 243(h), far from creating a conflict, is clearly compatible with the beneficent purposes underlying that provision.417

We consider race and nationality criteria wrong partly because they are irrelevant to individual qualities. Asylum is available to persons persecuted on identifiable, generally collective grounds, not to victims of mysterious Kafkaesque attacks or people whose peril stems from personal conflicts with powerful officials.418

The problems with “singling out” are not only theoretical. Most “persecution” occurs in a context of “general” oppression or instability or both. It is rare that stable, tolerant, and democratic governments single out a few people for persecution. The more common situations—those which prompted the 1951 Convention, the 1967 Protocol, and the 1980 Refugee Act—involve generally “oppressive,” often unstable governments which treat certain groups in particularly abusive ways. Such governments sometimes do not care, and often do not explore carefully, whether target individuals actually have disfavored views or traits.419 When such attacks single out particular “social groups”—even if conducted with utter indifference as to individual characteristics—they are “covered” persecution.

Rejecting groups as “too large” or “too diffuse” excludes many of the world’s most desperate refugees. It has the perverse effect of denying asylum to people who are the focus of persecution, if only that focus is crude enough.420 When abuses are widespread and grotesque, victims meet the argument that their risk is not cognizable because it is indistinguishable from that faced generally in their country. The Ninth Circuit has occasionally recognized and avoided this consequence.421 However, there and elsewhere, threats which are among the most likely to be carried out are often characterized as “generalized” oppression and distinguished from persecution.

Pleas for asylum from countries at war provide a dramatic exam-

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418. See supra note 246.
419. See supra notes 347-52 and accompanying text.
420. One commentator has suggested that “[t]he message to tyrants is clear. Make your atrocities random enough, and spare yourself the embarrassment of having your subjects qualify for asylum in the United States.” Rowe, *Murder by Deportation*, WASH. MONTHLY, Feb. 1984, at 13, 20.
421. See Hernandez-Ortiz v. INS, 777 F.2d 509, 515 (9th Cir. 1985) (exhibits documenting Salvadoran government’s abuse of civilians strengthens case); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984) (fact that petitioner “resides in a country where the lives and freedom of a large number of persons are threatened” does not lessen significance of evidence of threat to his life or freedom).
Where segments of the community have taken up arms against the government or vice versa, abusive acts are often ascribed to the "horrors of war" as distinct from individualized "persecution," even though it is often "persecution" which provokes armed resistance, and that same "persecution" rarely stops once "civil war" breaks out. Persecution and "civil war" are often a contin-


423. This tendency was apparent in Acosta, though that decision does recognize that divisions arising out of war may provide bases for asylum, listing "military leadership" as a "shared past experience" which might define a social group. In re Acosta, Interim Dec. No. 2986 (BIA 1985). Immigration judges have taken Acosta to extreme and unwarranted lengths. One judge rejected a former national policeman's claim based on his fear of the Salvadoran guerrillas, reasoning that "[i]n any event, the holding in Acosta clearly excludes from consideration harm arising out of civil or military strife in the country in question." In re (Name confidential), A24 028 838—New York City, reported in 2 IMMIGR. L. & PROC. RPTR. BI-51 (1985) (Immigration Judge's Oral Decision at 8 (1983)).

424. Diskin & Sharpe, El Salvador, in CONFRONTING REVOLUTION, supra note 149, at 50, 53-54 (nonviolent direct action and armed insurgency arose out of collapse of "reformist optimism" with 1972 electoral fraud and accompanying repression); Mandela, The Case for a Violent Resistance Movement, in THE AFRICA READER: INDEPENDENT AFRICA 319-32 (1970) (repression of nonviolent protests against apartheid makes armed struggle necessary); Trudeau & Schoultz, Guatemala, in CONFRONTING REVOLUTION, supra note 149, at 23, 46 ("armed insurgency is largely a response to repression by the military and oligarchy which has closed moderate avenues to reform").

425. For a discussion of Guatemala, see J. FRIED, M. GETTLEMAN, D. LEVENSON & N. PECKENHAM, GUATEMALA IN REBELLION: UNFINISHED HISTORY 235-37, 240 (1982) (reporting that as death squad activities dropped in cities in early 1980s, military campaigns, including scorched earth policies, bombing, massacres, and creation of "strategic hamlets" in the countryside "clearly surpass in geographic scope and brutality anything previously experienced in the country," and attributing the increase in violence to the fact that "[t]he guerrilla opposition, strengthened by the support and participation of large numbers of Guatemalans, particularly the country's Indian campesinos, is for the first time mounting a serious threat to the regime"). In El Salvador and Guatemala, even apparently "random" killings are often based on supposed indications of support for the guerrillas. See R. BONNER, supra note 148, at 360 (on El Salvador); R. WHITE, THE MORASS 104-06 (1984) (massacres in Guatemala have increased at times and places of popular resistance, and Indians have been singled out because of rebel sympathies). The Salvadoran death squads have shifted in recent years to fewer but more carefully focused murders. Diskin & Sharpe, supra note 424, at 76-78.
uum, not sharply distinct phenomena.\textsuperscript{426} The basic meaning of a refugee is a person for whom the bonds of trust, loyalty, protection, and assistance existing between citizen and country have been broken and replaced by the relation of an oppressor to a victim.\textsuperscript{427} Ironically, the most dramatic refusal by a government to protect a segment of its citizens—waging war against them—is often treated as disqualifying for asylum purposes.

An examination of the changing hurdles facing Salvadoran petitioners illustrates this phenomenon. Salvadoran targets of death squads\textsuperscript{428} were often denied asylum in the early 1980s on the grounds that they had really come for "economic opportunity."\textsuperscript{429} However, even the Reagan Administration eventually retreated to some extent from that line.\textsuperscript{430} Death squad activity has since been largely though not wholly replaced by "regular" military force such as bombing and artillery shelling of "hostile" areas.\textsuperscript{431} Fluctuations in political violence, not economic variations, still best explain patterns of Salvadoran emigration.\textsuperscript{432} Many Salvadorans seeking asylum have lost family members in bombing raids or have left because they feared continued government bombing of their villages.\textsuperscript{433} Salvadorans fleeing current military tactics—singling out villages suspected of harboring guerrillas—are generally denied asylum on the grounds that they are victims not of "persecution" but of the "generalized horrors of war." Immigration judges and INS examina-


\textsuperscript{427} In re Acosta, Interim Dec. No. 2986, at 33 (BIA 1985) (citing I A. Grahl-Madsen, supra note 52, at 97, 100).

\textsuperscript{428} Death squads are ostensibly private, often officially well-connected groups, which single out peasant, student, religious, and labor activists for intimidation and execution. See Pyes, Roots of the Salvadoran Right: Origins of the Death Squads, in El Salvador: Central American in the New Cold War 86 (1987) [hereinafter El Salvador]; Christian, El Salvador's Divided Military, in El Salvador, supra, at 90. For estimates of the number of people killed and an analysis of the timing of violence, see Stanley, supra note 379, at 135-36.

\textsuperscript{429} See Parker, Geneva Convention Protections for Salvadoran Deportees, Immigr. NewsL., May-June 1984, at 1 (from 1980 to July 1983, 76 Salvadorans were granted asylum and over 35,000 were deported).

\textsuperscript{430} See Dietrich, supra note 397.

\textsuperscript{431} This occurred partly because the congressional linkage of military aid to human rights improvements gave the military a strong incentive to "clean up its act." The "improvements" were noted by diverse commentators. Compare Americas Watch & Lawyers Committee for International Human Rights, Free Fire: A Report on Human Rights in El Salvador (1984) with Kissinger Commission Report, supra note 351, at 113, 115, 157-58.

\textsuperscript{432} Stanley, supra note 379, at 136. His data confirmed a shift away from departures based on death squad singling out of individuals toward decisions to leave prompted by "sweep" attacks on whole communities.

\textsuperscript{433} See Diskin & Sharpe, supra note 424, at 50, 74-81 (noting shift from death squads to "air war" and "indiscriminate" attacks on areas where the armed left is strong, aimed at cutting off guerrillas' food supply by forcing civilians to flee).
tion officers “make a distinction between people who have a well-founded fear of death and those with a well-founded fear of persecution.”

It is true that Congress did not intend asylum for all wartime “displaced persons.” However, attacks based on the political tendencies of a community sometimes are not merely the universal “horrors of war,” but constitute the singling out of a certain “social group”—a geographic area with a distinct political history—for special abuse. The fact that such violence occurs in the context of war should not bar victims from asylum eligibility. While the statutory definition of “refugee” is narrower than the ordinary meaning, which includes persons displaced by war, victims of war were within the scope of Congress’s concern and were central to that of the international drafters. Victims of war were mentioned during the deliberations on ratification of the 1967 Protocol. President Johnson

434. P. Weiss Fagen, supra note 69, at 43.
435. See supra notes 193, 408. Arguments that the United States is barred under the Geneva Conventions or customary international law from deporting people to countries where civilians are mistreated in war have not prevailed. See Note, supra note 84.
436. See, e.g., H.R. REP. 608, supra note 12, at 18 (additional minority views of Reps. Hyde and Sawyer) (we should make sure “that the other nations of the world are doing their part to alleviate the misery caused by war and disruption”). Estimates of the number of refugees in the world confirm that Congress was considering the plight of victims of war, though its definition of refugee did not encompass all of them. One congressman said:

The largest part of the world’s [14 million] refugees are the upward of 8 million in Africa, most of whom are not candidates for resettlement, 3 to 4 million Palestinians. There are also refugees in Bangladesh, Pakistan, and in Latin America. . . . [T]he overwhelming majority of them are either candidates for repatriation or for local resettlement locally. The situation in the Soviet Union and in the countries of first asylum in Southeast Asia is unique. There, resettlement is the only option. This simply is not true elsewhere.

125 Cong. Rec. 37,225 (1979) (statement of Rep. Fish). Victims of war were central to the 1951 UN Convention, which covered only persons who became refugees as a result of pre-1951 events, although not all victims of war qualified as refugees. UN GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. A/CONF.2/SR.22, at 6 (1951) (statement of Mr. Robinson, Israeli delegate) (“Nor did that text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities unless they were otherwise covered by article 1 of the Convention.”). However, the UN High Commissioner recognizes that wars do produce qualifying refugees. Senator Kennedy, reading a UN High Commissioner Report dated Sept. 13-18, 1981, stated:

The UNHCR should continue to express its concern to the United States government that its apparent failure to grant asylum to any significant number of Salvadorans, coupled with continuing large-scale forcible and voluntary return to El Salvador, would appear to represent a negation of its responsibilities assumed upon adherence to the Protocol.

noted that both "oppression" and war create "refugees." While the congressional definition of refugee does not include all displaced persons, neither does it bar otherwise eligible persons because their persecution occurs in the context of generalized violence.

If "persecution" is difficult to recognize in the context of civil war, it is even harder during foreign wars, even though such episodes are often used to suppress internal dissent. Revolutions have often grown out of foreign wars. People displaced by the "random" events of civil as well as foreign war often become hostile to the regimes they blame for that displacement, and are sometimes "singled out" for violent attacks as a consequence.

Other disasters, including some partially "natural" in origin, involve similar government strategies. For instance, denial of famine relief to antigovernment areas is not merely "generalized oppre-

of Protocol and UN Convention on Status of Refugees) ("During the period when we are seeing a brutal civil war in Nigeria-Biafra and the reckless invasion of Czechoslovakia—both conflicts resulting in numerous refugees—it would be most fitting for the Senate to ratify the Convention and the Protocol and for the press to take notice of them."). While "displaced persons," who were defined as refugees in the Senate bill, were not included in the version of the Refugee Act which emerged from the Conference Committee in 1979, neither is there any suggestion that harms arising out of war could not create a basis for protection.

438. 114 CONG. REC. 27,757-58 (1968) (Letter of transmission of Protocol and UN Convention on Status of Refugees) ("Refugee problems in their origin and in their resolution cannot be divorced from the strife, tensions, and oppression which are so detrimental to the well-being of nations and peoples.").


440. The Formation of National States in Western Europe 73-76 (C. Tilly ed. 1975) (wartime exactions have provoked resistance, and state's weakness and diversion have encouraged enemies to rebel).

441. Kissinger Commission Report, supra note 351, at 98-99. The report noted "[t]he refugee camps and overcrowded cities to which [Salvadoran and Guatemalan displaced persons] have fled become breeding grounds for discontent and frustration." Id. at 99.

442. For a discussion of Central America see, e.g., El Salvador, supra note 428, at 264-66 (describing an attack on refugees near Honduran border). For a discussion of the Palestinians, see G. Lenczowski, The Middle East in World Affairs 492-97 (1980); D. Shipler, Arab and Jew: Wounded Spirits in a Promised Land 52-78 (1986). For a discussion of the special insecurity faced by women refugees in camps, see N.Y. Times, Apr. 28, 1985, § 1, at 9, col. 1. See generally M. Veuthey, supra note 422, at 5-6 (discussing "doubly victimized" refugees, who are first displaced and then attacked in refugee camps).

443. Famines are often considered unfortunate "natural" events for which American refugee law provides no relief. See Parker, Victims of Natural Disasters in United States Refugee Law and Policy, 1982 Mich. Y.B. Int'l L. Stud. 91, 137. However, roots of famines are sometimes more political and economic than meteorological. See generally A. Sen, Poverty and Famines: An Essay on Entitlement and Deprivation (1981) (the key question is not how much food "exists" but who can command what resources given entitlement relations); R. Conquest, The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine (1986) (arguing that Stalin exacerbated Ukraine famine in order to break nationalist resistance to Soviet rule and peasant resistance to collectivization).

444. For a discussion of political manipulation of famine relief, see Foreign Ar-
tion”; it is as “focused” as—and likely more effective than—more “individualized” attacks on residents. The “social group” eligibility criterion was designed to protect people facing persecution because of some collective identity. That groups so persecuted may be large or that their elevated risk may occur in the context of “general” oppression or war are not disqualifying.

While many victims of war and oppression do not risk persecution on a statutory basis, some do. Excluding such persons from protection either by narrow constructions of “social group” or by blanket exclusion of victims of war or generalized oppression is inconsistent with United States obligations under international law, and finds no support in legislative intent or statutory language.

**PART III. EVIDENCE ON SOCIAL GROUPS: THE POTENTIAL FOR IMPROVED FACTFINDING**

Part III of this Article moves beyond the question of how to interpret “social group” to examine a related but even more fundamental problem with asylum proceedings: refusal to take seriously petitioners’ group-level evidence, and reliance instead on unannounced judicial notice and on United States government assertions about country conditions. Group-level evidence is frequently more available, more reliable, and more easily contested than evidence about individual experiences which are physically, and sometimes temporally, remote. Increased use of group evidence could help shift asylum hearings from their current emphasis on uninformed speculations about petitioners’ credibility toward something closer to the adversary model which American law generally accepts for truthseeking.

A more inclusive interpretation of “social group” would help immigration adjudicators deal more adequately with “background” information, which is not specifically addressed to the applicant’s case, but which focuses on people similar to her. A broad definition of “social group” would make relevant some evidence discounted under one or the other restrictive definition. Information addressing the risks groups face would become relevant as group members became

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potentially eligible for asylum. Many applicants bring a "social
group" claim in addition to another type of claim. Often they
claim they are at risk for having expressed opinions, as well as be-
because of group membership. Other petitioners might include group-
based claims were they not so often dismissed as a threshold matter;
some counsel may consider "social group" claims a "last resort," the
very assertion of which may weaken the case. Combined claims may
make sense in many of the strongest cases for asylum. For petitions
resting in whole or in part on group membership, removing arbitrary
restrictions on the definition of "social group" would make certain
group-level evidence relevant.

The role proposed here for "social group" in refugee determina-
tions would require the INS and adjudicators confronted with peti-
tions based on group membership to undertake useful and appropri-
ate inquiries. They would have to examine the extent to which group
membership creates a risk of persecution, and the extent of supple-
mental individualized evidence, if any, required to establish eligibil-
ity for asylum or entitlement to withholding of deportation. Rather
than engaging in a complex analysis of whether a group is "cohe-
sive," "voluntary," or "immutable"—or using an ad hoc, "common
sense" answer to bar many claims at the outset—adjudicators would
have to examine the extent to which particular activities and charac-
teristics subject people to persecution.

In cases alleging persecution on account of race, religion, national-
ity, or political opinion, evidence on persons like the petitioner could
and should be admitted and given weight regardless of how "social
group" is defined. The likelihood that certain opinions or traits
will result in persecution often varies among people of unequal eco-
nomic and social status and connections. However, even in these
cases, a narrow conception of "relevance" has led to the exclusion or,
more often, discounting of group-level evidence. Increased familiar-
ity with the diversity of "social groups" and the information availa-
ble about them—and recognition of the extent to which governments
target groups as opposed to random individuals—could increase re-
ceptivity to group-level evidence even in cases alleging another basis

445. See, e.g., Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986) (combining
"social group" and political opinion grounds); Desir v. Ilchert, 840 F.2d 723 (9th Cir.
1988) (same).

446. The UN Handbook states that a refugee should show:
that his continued stay in his country of origin has become intolerable to him
for the reasons stated in the definition, or would for the same reasons be intol-
erable if he returned there. These considerations need not necessarily be based
on the applicant's own personal experience. What, for example, happened to
his friends and relatives and other members of the same racial or social group
may well show that his fear...is well founded.

UN HANDBOOK, supra note 48, ¶¶ 42-43.
for persecution.

A. The Limits of Individual Testimony

Using group evidence where it is available would be a great improvement over the current adjudication method, which places excessive emphasis on judges' guesses as to applicants' credibility. This can work to asylum seekers' advantage. The United Nations High Commissioner for Refugees, who is responsible for overseeing compliance of state parties with the Protocol, recommends that because refugees have difficulty obtaining proof, "coherent and plausible" accounts which are consistent with "generally known facts" be given the "benefit of the doubt." However, United States courts have refused to force any such requirement on generally unwilling administrators. For a combination of reasons, applicants with strong cases often fail to offer an account of their experiences which clearly establishes their eligibility or entitlement. The system does not help them do so. I-589 application forms ask refugees, many of whom are unrepresented at that stage or have barely consulted with counsel, to answer English language questions whose wording comes right out of the Refugee Act. Failure to provide information at this stage may be used against refugees who attempt to do so later. Information supplied in writing may be ignored if the applicant does not manage to communicate it orally at the hearing.

447. Id. ¶ 203-04.
448. See infra note 580 (describing application of "substantial evidence" standard).
449. For persons who enter by land, the I-589 must often be completed when persons are first arrested near the border, where legal services are particularly strained. The district court in Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 457, 522 (S.D. Fla. 1980), modified sub nom. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982), found that adequately preparing an I-589 form required 10 to 40 hours of an attorney's time. This figure for Haitians may overestimate the average because of language barriers.
450. See app. (I-589 Form).
451. See, e.g., Mendez-Efrain v. INS, 813 F.2d 279, 281 (9th Cir. 1987) (immigration judge found petitioner not particularly credible, "based on his physical demeanor and on the fact that much of his oral testimony was not included in his asylum application"); cf. Civiletti, 503 F. Supp. at 526 (absence of information on I-589s apparently "has more to do with the accelerated procedure than the validity of the plaintiff's claims").
452. See, e.g., Castro-O'Ryan v. INS, 821 F.2d 1415 (9th Cir. 1987) (error occurred through unwaved absence of counsel when alien was unable to articulate the basis of his fears of persecution under oral examination by the immigration judge and INS counsel, and the immigration judge never considered his detailed and circumstantial affidavit).
Deportation and exclusion hearings rarely feature the informal practice common in other administrative hearings, where persons "testify in a simple, natural and direct fashion, without unnecessary interruptions from either the attorney who is directing the questioning or his adversary." Judges sometimes block counsel's attempts to elicit the petitioner's account. In a number of cases, the INS has attempted, sometimes successfully, to keep counsel out of the process altogether, despite the statutory right to retained or volunteer counsel. While persons who subsequently find counsel may be able to obtain remand on this ground, many cases may end in deportation or "voluntary" departure rather than in discovery of a lawyer willing to help. Where aliens are unrepresented, judges are supposed to ensure that the case is fully explored, but they often fail to do so.

There are also more subtle reasons asylum seekers have trouble establishing valid claims. Asylum seekers are often in custody when they complete asylum applications; to people mistreated by the INS or who are from countries where police brutality is common, waiting to tell one's story to a judge rather than to captors may seem prudent. At the hearing, some asylum seekers try to establish "in-
nocence” of activity which would provoke the authorities’ hostility, naturally but mistakenly assuming that this will help, or at least not hurt, their petitions. It may be difficult for refugees from “friendly” regimes to understand that revealing antigovernment sentiments and activity will strengthen their asylum cases, even though having the same information become known by the United States client government could result in detention, torture, or death. Some may even think the purpose of the hearing is to establish that things are so bad in their home country that no one should be forced to return. Regardless of the character of the regime fled, even refugees’ attorneys often have difficulty establishing the trust necessary to find the true underlying circumstances. Applicants’ fears that information will get back to their governments are sometimes exacerbated by the INS, and are sometimes well founded. It is often difficult for people who have been engaging in clandestine activities to speak openly and firmly in a hearing; hesitancy is often seen as evidence of fabrication.

Linguistic differences aggravate communication diffic-

“easily intimidated by uniformed border authorities who are...reminiscent of repressive authority figures in their home countries. Even if...aware of their right to apply for asylum, they seldom do so immediately on arrival, but rather assert such claims only after achieving more secure surroundings.”).

See LAWYERS COMMITTEE, supra note 355, at 27-35 (affidavit of an attorney stating Iranian clients were obviously terrified of being deported and concerned he might be “acting not in their interests but in the interests of the government of either the United States or Iran”). See generally Schirmer, A Different Reality: The Central American Refugee and the Lawyer, in SALVADORAN AND GUATEMALAN ASYLUM CASES: A PRACTITIONER’S GUIDE TO REPRESENTING CLIENTS IN DEPORTATION PROCEEDINGS app. 8-b (1985 & 1988 update) (on file with author).

Rowe, supra note 420, at 13, 16 (INS allegedly threatened an applicant that if she refused voluntary departure she would not get asylum, she would be put in a cell with men likely to sexually molest her, and Salvadoran authorities would be told what she said). A district court recently found that INS officers routinely coerce “voluntary departure” by informing Salvadorans that if they apply for asylum, they will lose, but the information would be reported to El Salvador, and they would never be able to return. Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1497 (C.D. Cal. 1988).

See, e.g., Guevara-Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), cert. denied, 480 U.S. 930 (1987) (remanding to BIA). The asylum seeker, who was mistakenly suspected of being a guerrilla leader, was discussed by the FBI and the Salvadoran government, which wished to prosecute her for possession of “subversive literature,” including a tape of assassinated Archbishop Oscar Romero’s last sermon. The case was widely reported in the Salvadoran press, and the head of the Salvadoran military had asked to be told the date and number of her return flight. Her asylum petition was rejected because she refused to complete the form without assurances of confidentiality, which the immigration judge refused to give.

Kalin, Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing, 20 INT’L MIGRATION REV. 230 (1986). (former members of political parties and groups illegal in their home countries have deeply internalized the values of secrecy and suspicion toward all outsiders, and are not likely to open up, but rather
culties. Asylum applicants often speak as though or admit that everyone in their country is at comparable risk, even when a more "sophisticated" analysis might reveal their own situation to be especially dangerous. In light of the general truism that finders of fact, not witnesses, decide what evidence means, it is ironic that asylum seekers' own conclusions on "ultimate issues of fact" receive tremendous, often devastating, weight.

Asylum seekers often cannot corroborate what has happened to them. Potential witnesses are usually abroad; those who are in the United States often do not testify because they fear deportation or reprisals from compatriots. Witnesses who do come forth are often distrusted and sometimes excluded. The absence of letters from home containing detailed bad news is sometimes held against applicants, but letters which are received are often discounted as vague

express themselves in a reserved and hesitant manner).


466. Salvadorans, for example, often state that they left "por la situación"—because of the situation—and for a variety of reasons, including trauma and guilt at having left others behind, they reveal individual details with great reluctance. Orantes-Hernandez, 685 F. Supp. at 1497.

467. See, e.g., LAWYERS COMMITTEE, supra note 355, at 21, 25-26 (Salvadoran asylum seeker who left husband and two children, including a three-week-old baby, because of killings of family members, explained that "[m]y country is a victim of violence. It is not just my family that has suffered these things. Thousands in El Salvador suffer as I have.").

468. Lay and, sometimes, expert witnesses have historically been barred from making such ultimate evaluative statements, and if something slipped out, the jury was instructed to ignore it. While the rigid rules used to enforce the underlying principle have been relaxed recently, see MCCORMICK ON EVIDENCE, supra note 453, at 30-32, the principle that the factfinder draws the conclusion remains.

469. The failure to produce witnesses seems to be common in administrative contexts involving people with limited resources. See J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUI & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 61 (1978) (though questioning frequently centers on how claimant spends the day, neighbors and former employers are virtually never called to testify) [hereinafter SOCIAL SECURITY HEARINGS AND APPEALS].

470. In Platero-Cortez v. INS, 804 F.2d 1127 (9th Cir. 1986), the petitioner produced a witness who claimed to be a former member of the Salvadoran National Guard who had been ordered to kill the petitioner. He refused because petitioner was a friend of his. The immigration judge found the witness's testimony not credible, both because of atrocities he had committed as a Guardsman, and because of his friendship with the applicant. The BIA found the testimony not credible on the friendship basis alone.

471. See, e.g., Najaf-Ali v. Meese, 653 F. Supp. 833, 837 (N.D. Cal. 1987) (immigration judge excluded testimony from Afghan's children because judge mistook counsel's purpose as being "mere corroboration," and because children could have little influence because "they would naturally be biased in favor of their mother").

472. In one hearing I attended, the judge asked the petitioner, an 18-year-old Salvadoran, what he had heard from his family lately. He responded that he had heard that the situation was still bad, but that his family was afraid to give specific details. The judge replied in a loud voice: "What do you mean? Letters are here. They aren't in El Salvador." (paraphrase). The petitioner explained calmly that his parents write letters in El Salvador and mail them to the United States.
Government responses rarely engage claims sufficiently to help distinguish strong cases from weak ones. The INS can, through the Department of State, locate foreign affiants to check the veracity of their claims or seek other relevant information. In practice, INS attorneys with large caseloads rarely, if ever, research factual dimensions of individual cases, and embassy cooperation might not be forthcoming if requested. At hearings, which are generally brief, trial attorneys sometimes seek to expose “discrepancies” in petitioners’ testimony, often minor ones on which courts have said immigration judges should not rely. Some INS attorneys use hearings to try to ferret out undocumented relatives who have not yet come to the Service’s attention. More relevantly, trial attorneys inquire about use of “smugglers,” time spent elsewhere before coming to the United States, and other factors seen as relevant to any discretionary determinations required. However, they rarely offer evidence on the central question of persecution or argue aggressively.

473. See, e.g., Zavala-Bonilla v. INS, 730 F.2d 562, 563, 565 (9th Cir. 1984) (noting critically that “[t]he BIA also waved aside the four letters from [petitioner’s] friends as gratuitous and non-specific,” pointing out that the writers’ “understandable fear of reprisal may...account for the letters’ lack of specificity”). In other cases, courts of appeals have been equally willing to ignore letters. See Young v. INS, 759 F.2d 450, 457-58 (5th Cir. 1985) (Goldberg, J., dissenting) (arguing that majority was disregarding that BIA had ignored two letters and discounted without explanation another letter, all of which supported petitioner’s account that he had been fired because of his son’s political affiliation, and that the entire family would be in “grave danger of death, considering the current political situation”).

474. See Ananeh-Firempong v. INS, 766 F.2d 621, 628 (1st Cir. 1985) (noting INS’s ability to dispute veracity of information, its significance, and authority of sources, and to introduce conflicting evidence casting doubt on petitioner’s allegations); Carvajal-Munoz v. INS, 743 F.2d 562, 578 (7th Cir. 1984). There is a rarely, if ever, used procedure to verify information connected with asylum applications in a confidential manner, without disclosing that an asylum application has been filed. See Guevara Flores v. INS, 786 F.2d 1242, 1252 n.11 (5th Cir. 1986).

475. See, e.g., P. Weiss Fagen, supra note 69, at 32 (noting that lawyers representing Haitians claim that “[n]o matter what issues are raised in the individual cases...the INS submits essentially the same ‘package’ of responses”).

476. When asked to track the fates of deportees to El Salvador, the Embassy personnel responsible apparently considered this task “ridiculous” and did not attempt seriously to do so. Rowe, supra note 420, at 20.

477. P. Weiss Fagen, supra note 69, at 6, 15 (hearings in New York often take up to two hours, but New York lacks the southwestern atmosphere of crisis).

478. See infra note 502.

that the grounds for fear are not cognizable. Sophisticated cross-examination aimed at testing veracity is rare. INS trial attorneys rarely play the role of one side in an adversarial process for truth-seeking. Indeed, it would be irrational for INS attorneys to be more thorough or aggressive in cases where the nationality of the applicant makes the chance that asylum will be granted extremely remote.

Without other evidence, judges’ subjective impressions of claimants’ credibility become determinative, yet usually they have little to go on. Unsurprisingly, both administrative and judicial tribunals make highly questionable findings. Immigration judges frequently focus on minor, insignificant discrepancies. Some have made ludicrously restrictive evidentiary rulings. A major factor in credibility determinations is whether the claim is raised affirmatively (by initiating contact with the INS) or defensively (in deportation proceedings), even though approaching the INS is inadvisable for anyone of a disfavored nationality, no matter how meritorious the case. When the only account presented is the petitioner’s, occasionally buttressed with testimony from friends or relatives, the adjudicator cannot listen to “both sides” and determine which story seems more persuasive, or whether the truth lies “in between.” The judge hears only one side, and may imagine alternative scenarios with no relation to reality; the “check” imposed when adversaries agree on certain points, or at least on what the issues are, is absent. Linguistic and cultural differences and confusions, as well as the anxiety inherent

480. See B. HING, HANDLING IMMIGRATION CASES 223 (1985) (“As a practical matter... the INS attorney seldom offers documentary or rebutting evidence (aside from the BHRHA letter)...”). Even in Sanchez-Trujillo, where the hearing spanned over three weeks, the government offered no evidence beyond State Department advisory opinions. See Brief for Petitioners, supra note 218, at 5.

481. Some countries, in contrast, rely heavily on detailed questioning by persons knowledgeable about the country the applicant has left in assessing asylum claims. Martin, supra note 265, at 109-11.

482. On nationality discrimination, see N.Y. Times, supra note 121, at 41, col. 1.

483. See infra note 502.

484. Rowe, supra note 420, at 18, describes a case in which a lawyer in El Centro, California, tried to show the immigration judge a wound on her Salvadoran client, and brought a surgeon to testify that the wound was from a gunshot. The judge indicated that he would accept no testimony short of a forensics expert who had witnessed the shooting.

485. See P. Weiss Fagen, supra note 69, at 36, 53 (noting that INS officials, immigration judges, and State Department Bureau of Human Rights and Humanitarian Affairs staff “all act on the assumption that asylum applications made by people in exclusion or deportation proceedings are less likely to be valid than those made affirmatively prior to apprehension, and preferably by in-status entrants,” but that given the pattern of denials, Salvadorans with strong claims are often advised by counsel to wait for the INS to find them).

486. Judges sometimes imagine discrepancies. See, e.g., Zavala-Bonilla v. INS, 730 F.2d 562, 566 (9th Cir. 1984) (“[d]espite a confusing series of questions, objections, translations, and answers, [petitioner’s] testimony overall does not contradict her asylum
in speaking at a hearing where something as important as asylum is at stake, make accurate “intuitions” as to credibility particularly improbable. The inherent subjectivity of such determinations makes them vulnerable both to conscious political manipulation and to unconscious rationalization of results which do not “rock the boat.” There is reason to doubt a Ninth Circuit panel’s optimism:

An immigration judge alone is in a position to observe an alien’s tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether an alien’s testimony has about it the ring of truth. The courts of appeals should be far less confident of their ability to make such important, but often subtle, determinations.\[487\]

There is much greater skepticism in Congress\[488\] and among commentators\[489\] about the quality of first-level asylum factfinding.

There are signs that this situation is improving. Moves to increase immigration judges’ financial and administrative autonomy\[490\] had little immediate effect, probably because most have come up through INS enforcement or trial attorney ranks.\[491\] However, there has been rapid turnover and expansion in recent years, and efforts have been made to diversify the backgrounds of immigration judges. At least one new judge has a background in immigrant advocacy, and a number have not worked in the INS.\[492\] New personnel have begun to make a mark: more persons from disfavored nationalities have been granted asylum in recent years.\[493\] Despite these encouraging developments, the general picture remains bleak.

The situation before the BIA is only slightly better. The vast ma-

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\[487\] Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985).

\[488\] The 1982 version of the Immigration Reform & Control Act provided that a specialized corps of immigration judges would henceforth hear all asylum claims, and that no former immigration judge could become a member. S. 2222, 97th Cong., 2d Sess., § 124 (1982).


\[490\] See supra note 110 and accompanying text.

\[491\] Note, supra note 77, at 1364.

\[492\] See New Immigration Judges Appointed, 64 Interpreter Releases 880 (1987).

\[493\] Id. For example, Jeffrey Zlatow, who became an immigration judge in El Centro, a detention center in the California desert, after solo immigration practice, has apparently granted asylum to a substantial percentage of Salvadoran applicants. N.Y. Times, May 8, 1988, § 1, at 16, col. 1.
The majority of applicants from disfavored nationalities are denied asylum initially, and many hearings generate plausible issues for appeal. In New York, until mid-1987, one stage in the appeals process was waiting for the INS to answer the appellant's brief. Generally, the INS filed a very brief response setting forth the standards for BIA review but failing to address the individual case. In a recent innovation, processing is no longer held up to wait for an INS answer at all; files are forwarded to the BIA without any response, and the BIA processes appeals without even noting the absence of opposition papers.\footnote{Telephone interview with Anne Pilsbury, director of Central American Legal Assistance, in Brooklyn, New York (Sept. 24, 1987).} BIA review is often perfunctory,\footnote{See generally Note, supra note 412, at 706-09; see also Notre Dame Center for Civil and Human Rights, Issue Summaries, in SELECT COMM'N ON IMMIGRATION AND REFUGEE POLICY, STAFF REPORT, app. C, 43, 64-65 (1980), reprinted in A. LEIBOWITZ, supra note 13, at 5-107, 5-113. The Notre Dame Center pointed out that: \ldots the complexity of multiple levels of review works against an applicant's best interests by making every stage of the process appear pro forma and dilatory, thus encouraging the exercise of available discretion either to refuse an appeal altogether (as in the case of the BIA), or to render a decision which accepts without genuine inquiry the adequacy of the record generated below and the adequacy of the manner in which it was generated and rights were interpreted. \ldots Id. In Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986), the immigration judge's oral opinion said that petitioner's credibility was not established without saying why, while the BIA explained that this finding was "on the basis of his demeanor as well as the inconsistencies in the record." The court of appeals found that the inconsistencies were too minor to justify an adverse credibility finding. For an example, see supra note 470.} and the BIA's tendency to designate as precedential sweeping decisions denying asylum, while failing to publish the considerable number of decisions granting asylum or remanding for further factfinding, creates an anti-applicant slant. The Board generally relies on the record developed below. The BIA's tendency to designate as precedential sweeping decisions denying asylum, while failing to publish the considerable number of decisions granting asylum or remanding for further factfinding, creates what has been described as an anti-applicant bias for the asylum process. It generally accepts immigration judges' credibility findings and overall conclusions; it occasionally substitutes a rationale where one is missing\footnote{In Townsend v. INS, 799 F.2d 179, 181 n.1 (5th Cir. 1986), the court found the immigration judge's view that petitioner contradicted himself "dubious, at best," and based on misunderstanding. It still dismissed the appeal because the petitioner had failed} or substitutes one more likely to withstand review.\footnote{See supra note 280.}

Court of appeals review is more aggressive. However, most asylum seekers lack the knowledge or resources to appeal to that level.\footnote{For an example, see supra note 470.} Many are barred from judicial review by failure to invoke administrative remedies in a timely manner;\footnote{In Townsend v. INS, 799 F.2d 179, 181 n.1 (5th Cir. 1986), the court found the immigration judge's view that petitioner contradicted himself "dubious, at best," and based on misunderstanding. It still dismissed the appeal because the petitioner had failed} overworked counsel often find
it difficult to keep closely in touch with clients who are trying to live unobtrusively. Procedural defaults are likely to become more important if standards for reopening cases are tightened in the wake of INS v. Abudu. 500

Where judicial review is obtained, reversals and remands are common. Courts require that immigration judges set forth a “legitimate, articulable basis” for doubts about credibility, 501 and sometimes find that immigration judges seized improperly on minor, irrelevant discrepancies or confusions to justify adverse credibility findings. 502 One court of appeals disputed the BIA’s characterization of detailed allegations of violence and threats aimed at family members as too “conclusory.” 503 Courts occasionally correct the view that having motivations, in addition to fear, is disqualifying. 504

However, courts’ ability to correct credibility determinations is limited. Transcript quality is sometimes very poor. 505 Considerable

to exhaust administrative remedies since the BIA had rejected his appeal for containing an inadequate statement of “Reasons for this Appeal.” The court described the killing of petitioner’s father, national chair of the Liberian True Whig Party, and petitioner’s involvement as head of the party’s youth section, and observed that the petition “may have had substantial merit.” The court noted that the applicant might be eligible for another form of relief from deportation based on long-term presence. Id. at 182.

500. 485 U.S. 94 (1988) (abuse of discretion standard applies to review of BIA refusal to reopen deportation case, and Board did not abuse discretion in denying motion to reopen on ground that alien had not reasonably explained his failure to assert asylum claim at outset).

501. See, e.g., Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986).

502. See, e.g., Zavala-Bonilla v. INS, 730 F.2d 562, 566 (9th Cir. 1984). Confusions on dates have been particularly popular. See Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986) (there was confusion about precisely when petitioner had joined Salvadoran right wing paramilitary group). Confusion over the date of entry, before the question became highly material with the passage of the amnesty provisions of the 1986 Immigration Reform & Control Act, was often taken by the BIA as probative on the issue of credibility. See Platero-Cortez v. INS, 804 F.2d 1127, 1131 (9th Cir. 1986) (holding confusion over dates of entry and of prior deportation irrelevant to merits); cf. Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1987) (rejecting INS’s suggestion that confusion over date petitioner’s father was killed undermined evidence, given immigration judge’s conclusion that applicant’s testimony was credible).

503. See Hernandez-Ortiz v. INS, 777 F.2d 509, 514 (9th Cir. 1985).

504. See, e.g., Garcia-Ramos v. INS, 775 F.2d 1370, 1374-75 (9th Cir. 1983) (it is not inconsistent with claimed fear of persecution that a refugee, after fleeing homeland, comes to United States seeking economic opportunities, nor need fear be the only reason for fleeing); Najaf-Ali v. Meese, 663 F. Supp. 833, 836 (N.D. Cal. 1987) (immigration judge and BIA unreasonably inferred that petitioner left Afghanistan only to regain support and companionship of family members in United States).

505. In McLeod v. INS, 802 F.2d 89, 95 (3d Cir. 1986), the court counted 96 “indiscernibles” and noted that this was not a new problem. The court affirmed, finding that the breakdowns in transcription were not at “critical junctures.” However, it wrote that “[t]ranscript deficiencies reflect adversely upon the integrity of the administrative process, and upon the possibility of meaningful review during the critical appellate
deference is necessitated by the view that "demeanor" can justify adverse findings. The absence of evidence beyond the applicant's often poorly developed testimony usually means that nothing in the record suggests that remand would be other than futile. Moreover, while courts reject some hasty and ill-founded impressions of dishonesty where falsifications are discovered, courts of appeals, as well as immigration judges, sometimes draw unwarranted conclusions. Lies told in order to enter the United States or to shield relatives from the INS are sometimes treated as evidence of basic untruthfulness on the underlying issues of persecution, ignoring the possibility that desperate fear based on a situation accurately reported might induce generally honest people to lie. Some witnesses are

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stage." Id. (footnote omitted).

506. See Artiga Turcios v. INS, 829 F.2d 720 (9th Cir. 1987); see also B. HIng, supra note 480, at 222 ("Unlike the personal statement. . .more preparation must be given to hearing testimony, where demeanor, clarity, and personality come into play. It is critical that the applicant practice. . .testimony, because there is no doubt that the credibility of the applicant has great influence over the adjudication of the application.").

507. See In re X.Y., May 10, 1984, transcript and opinion, reprinted in T. ALEINIKOFF & D. MARTIN, supra note 21, at 686-700. The petitioner reported having been imprisoned and beaten by Tonton Macoutes, who accused him of speaking against Duvalier. The immigration judge rendered a brief oral decision, which concluded:

The applicant has stated that he spent seven months in prison, but escaped when he was taken on a work detail to clean a bridge. He has stated that he escaped into the forest at that time. He has stated that he believes if he stayed in Haiti he would die. Although, if his testimony is credible, previously he was detained and obviously not killed. This is the sum, in essence, of the applicant's testimony. . . . In sum, the burden being upon the applicant to establish that he would be subject to persecution should he return or be returned to Haiti and the evidence of record reflecting essentially conjecture that he would be subject to persecution should he return to Haiti, I must find that his claim is not sufficient to merit a grant of asylum.

Id. at 699-700. The Ninth Circuit has responded to the problem of implicit determinations by holding that absent express findings by the immigration judge and BIA on credibility, courts must presume that testimony was found credible. Artiga Turcios, 829 F.2d at 720.

508. See supra notes 501-02 and accompanying text.

509. For an example of a lie told to enter the United States, see Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1391 (9th Cir. 1985). The immigration judge found the applicant's testimony that he had left a leftist group when he discovered that some members intended to use violent tactics incredible, reasoning as follows: "The [petitioner] admitted that he had lied to suit his purposes. He lied to get the Mexican passport in Mexico. He lied in order to be deported to Mexico. It appears that [he] will tell whatever story he feels will benefit his situation at the time." Id. The court of appeals found that "[g]iven the petitioner's admitted history of dishonesty, the immigration judge's decision to give his testimony 'very little weight' was the only reasonable one." Id. at 1393. But see Turcio v. INS, 821 F.2d 1396, 1401 (9th Cir. 1987) (in the context of fear of deportation to El Salvador, a false statement to the INS "does not detract from but supports [petitioner's] claim of fear of persecution"). The government noted in Sanchez-Trujillo that one petitioner claimed not to know his father's immigration status, and that though he testified at the asylum hearing that his sister had lived in Los Angeles since 1971, he had previously stated on a 1980 asylum application that she was in El Salvador. Brief for Respondent, supra note 259, at 7.
found not credible for reasons that reflect how little adjudicators know about the situations they are evaluating. In some particularly frightening cases, accounts have been dismissed as “too stereotypical”\footnote{510. Immigration officials dismissed many Haitians’ accounts of imprisonment, torture, and murder as falling into one of “the five basic Tonton Macoute stories.” See P. Weiss Fagen, supra note 69, at 31. That experiences like those reported were common has been acknowledged by United States and international official sources. See J. Miller, supra note 280, at 25-26.} or even too “bad”\footnote{511. See In re Paniagua-Vides, A24 166 230-Los Angeles, at 20 (BIA 1985), reported in 2 IMMIG. L. & PROC. RPTR. B1-55, 57 (1985) (BIA granted asylum, noting that immigration judge had found expert witness not credible because “he paints a picture of conditions in El Salvador that are so bad that it is not believable”).} to be plausible. As long as asylum decisions depend so heavily on whether the claimant’s testimony is “accepted” or “rejected,” life and death determinations will be based on unreliable estimations of individual credibility.

**B. The Promise of Group-Based Evidence**

Not only do individual applicants find it very difficult to explain themselves and be believed, but much of what needs to be proved exceeds their own knowledge or capacity to articulate at a hearing. While the petitioner is generally the best source of information on his motivations, fear must be “well-founded” as well as genuine to qualify for asylum, and persecution must be “more likely than not” to require withholding of deportation.\footnote{512. See supra notes 14-19 and accompanying text.} Evaluating risk often requires information from people with special knowledge, including not only persons with academic credentials, but others with relevant knowledge such as journalists, businesspeople, diplomats, human rights activists, missionaries, and even former “securities forces” members. Such people are often willing and able to provide valuable perspectives, and counsel seek them out.\footnote{513. See R. Steel, supra note 27, at 273; B. Hing, supra note 480, at 222-23, 219-20.} Such information can educate factfinders.\footnote{514. See, e.g., In re Fuentes-Villacorta, A24 373 048-San Francisco (Immigration Judge 1982), described in B. Hing, supra note 480, at 226 (immigration judge persuaded by Amnesty International information, articles, and testimony that student activists are, as a group, subject to persecution).} The current tendency to exclude or, more often, ignore petitioners’ evidence on broader questions does not “individualize” consideration; instead, the individual’s testimony is considered out of context, or placed in the context of a State Department account of her country’s situation which she has no meaningful oppor-
Attempts by petitioners and their representatives to use material that goes beyond the individual case are often of little avail. Expert testimony poses special problems in immigration proceedings, and seems to be avoided by immigration judges and INS attorneys. Judges sometimes exclude background information as too general to cast light on the individual's claim. More often, particularly where, due to vigorous representation, exclusion will likely bring remand, the evidence is admitted but ignored. Experts are sometimes barred from speaking but are permitted to submit affidavits. This preference for affidavits is, of course, strange in light of the general stress in American legal proceedings on orality and the "powerful engine" of cross-examination. Relaxation of strict evidentiary rules is supposed to maximize openness to probative evidence; here, it sometimes creates a situation in which evidence comes in an easily discounted, far from compelling, form. Decisions often simply ignore expert affidavits, and at least once, a decision was rendered without reading the affidavit presented. Immigration

515. See infra text accompanying notes 557-73.
516. See, e.g., In re X.Y., reprinted in T. Aleinikoff & D. Martin, supra note 21, at 694-96 (refusing to let Michael Posner of Lawyers' Committee for International Human Rights testify, on grounds that his testimony would be too general). The government urged a similar approach in Sanchez-Trujillo. See Brief for Respondent, supra note 259, at 11 ("Several other witnesses testified at the joint deportation hearing over the Government's objections. The bases for the trial attorney's objections were that none of the witnesses knew the petitioners, and that much of their testimony about the general conditions in El Salvador was repetitive."); id. at 14 (describing relevancy objection to a religious organization human rights director's "historical information about El Salvador," because he did not know petitioners, and events he described had not occurred in their towns).
517. Sometimes judges refuse to admit proffered materials into evidence; on other occasions, the materials are admitted but given no weight. For an example of the former approach, see In re X.Y., reprinted in T. Aleinikoff & D. Martin, supra note 21, at 697-98 (immigration judge barred newspaper articles as too general, adding that "maybe I could be stretching a point a little if I said...it would be more likely to find something about me in the newspaper articles than about Mr. X.Y.").
520. In the BIA's consideration of the Sanchez-Trujillo claim, the Board essentially ignored the ample expert testimony, without giving any reasons for doing so. See Brief for Petitioners, supra note 218.
521. In In re (Name Confidential), A27 479 990-New York City (Apr. 21, 1986), an anthropologist was not allowed to testify in person, but wrote a detailed affidavit explaining that the petitioner's village was cohesive in terms of village's self-perceptions and marriage patterns, and that it was perceived by the government as cohesive for purposes of collective retaliation for dissent. See L. Crandon, Affidavit, supra note 317. As a courtesy, the attorney referred the judge to the "social group" discussion in Sanchez-Trujillo, 801 F. 2d 1571 (9th Cir. 1986). For a discussion, see supra text accompanying notes 208-75. The judge announced that he would render a decision the next morning after reading the materials presented, in contrast to his usual policy of ruling on the spot. The next morning, he dismissed the petition on the grounds that the petitioner's asylum
judges frequently ask counsel to "circle each place where respondent's name appears" on documents offered into evidence, so they can read only these sections. Since human rights reports rarely mention the petitioner's name, they are discounted or ignored as being about general conditions rather than the petitioner's own situation.

While this dismissiveness occurs even with materials which discuss particular segments of the population, the materials presented are sometimes overly general. Representatives sometimes provide only very general background material, failing to generate evidence on persons similar to the petitioner.\textsuperscript{522}

The reluctance in asylum proceedings to take seriously evidence beyond the petitioner's oral testimony has complex roots, the most important ones being bureaucratic rather than doctrinal. In part, it reflects the "processing" mentality of an institution with heavy caseloads.\textsuperscript{523} The work routine of immigration judges resembles that of bureaucrats far more than that of most judges. They generally rule orally immediately after hearing testimony rather than writing detailed opinions\textsuperscript{524} requiring thought and, often, reconsideration.\textsuperscript{525} They rarely talk to colleagues about their decisions.\textsuperscript{526} Oral argument is generally not permitted.\textsuperscript{527} Many first-level adjudicators...
pear more concerned with finishing hearings rapidly than with ensuring that cases are presented fully. 528

Disinterest in expert testimony may also reflect suspicion that sympathetic experts might say anything to help people avoid deportation. 529 Of course, expert partiality is not peculiar to asylum cases, and financial interest—a powerful source of bias—is virtually absent, though political views and humanitarian concerns could distort perception, analysis, or reporting. Concerns with reliability do not normally result in excluding or ignoring specialized information; rather, cross-examination and, where justified, other impeachment measures are used to ensure that statements receive their proper weight. Opposing experts are often brought in. The INS, in contrast, has shown no interest in creating “battles of experts.” 530

In summary, the adversary processes our judicial system generally uses to test evidence, expert as well as lay, are largely absent from immigration court. A processing mentality extends to many INS attorneys and some immigration judges. Even where expert affidavits are accepted, INS attorneys rarely challenge their accuracy. Without adversary testing, adjudicators tend to discount drastically, and without explanation, oral or affidavit testimony as well as documentary submissions.

Excluding or discounting rather than testing and incorporating group evidence greatly reduces factfinding accuracy. Information is not rendered irrelevant by virtue of being aggregative; in fact, it may often be more trustworthy and probative than the individualized evidence which typically dominates asylum proceedings. It is always difficult to evaluate highly “interested” persons’ credibility; in asylum, the situation is complicated by cultural differences and the frequent unavailability of other witnesses. Courts have been troubled by both perceived alternatives—granting refuge based solely on “self-serving” reports, or insisting upon external corroboration 531 which

528. See supra note 457 and accompanying text.

529. A similar phenomenon has emerged in social security disability hearings. Administrative law judges suspect that treating physicians will say whatever their patients wish. The discounting is so marked that claimants have actually been worse off with treating physician testimony than without it, even though treating physicians’ reports tend to support claims. Social Security Hearings and Appeals, supra note 469, at 56. In social security cases, this discounting is fostered by the fact that treating physicians—the physicians of the poor—tend to be less impressive than evaluating physicians. Id.

530. Even in the long hearing in Sanchez-Trujillo, a key test case for the potentially expansive “young male” theory, the INS did not counter petitioner’s experts with its own. The only evidence the government introduced was State Department advisory opinions. Brief for Petitioners, supra note 218, at 5.

531. Compare Dawood-Haio v. INS, 800 F.2d 90, 96-97 (6th Cir. 1986) (“we ought not to jump to the assumption that what governments have not documented they have not done”) with Daily v. INS, 744 F.2d 1191, 1195-97 (6th Cir. 1984) (finding one petitioner’s allegations of severe beating by police inadequate because “there is abso-
may be hardest to come by in the most compelling cases.  

In fact, even if it is assumed that applicants are honest and accurate, or that adjudicators can somehow cut through deception or error to ascertain what has happened to them in the past, background evidence about experiences of similarly situated individuals may often be more probative, and have less potential for misleading the factfinder, than individualized evidence. Social psychologists have demonstrated that listeners tend to exaggerate the probativeness of "vivid" stories, while giving inadequate weight to background information on the frequency of certain traits or events in a population. Group evidence is relevant to assessing whether an event which appears to reduce danger—such as release from detention, acquittal of "subversion," or dismissal of political charges—really means the person is safe. Group-oriented background information is relevant to determining how likely a threat is to culminate in persecution: "you'll be sorry" obviously had a different significance in Mayor Daley's Chicago than in General Videla's Argentina. Evidence of threats or acts of persecution aimed at other group members could inform consideration of an individual's risk. Conversely, evidence that a country respects human rights could cast doubt on a superficially plausible claim by undermining the applicant's credibility, or by suggesting that expressions of official hostility would not culminate in persecution.

532. See P. Weiss Fagen, supra note 69, at 50 ("people who are genuinely afraid very often dispose, as quickly as possible, of anything in writing that might identify them as dissenters or opponents, and they are especially reluctant to take such material with them if they decide to flee").


534. A commentator has noted that instead of viewing individual and group claims in conjunction: [T]he [Sanchez-Trujillo] court analyzed the group and individual claims separately, not allowing the one to inform the other. The individual persecution was dismissed as isolated or coincidental. In this respect, the court's approach here resembled its treatment of the cognizability issue: each step of analysis was isolated from the others so that the interaction of elements could not come into play. Comment, supra note 47, at 937 n.177.

535. See, e.g., Chatila v. INS, 770 F.2d 786 (9th Cir. 1985) (noting Venezuela's excellent human rights record and dismissing asylum and withholding petitions).
For some closed, highly repressive, or little-studied societies it may be impossible to obtain information on human rights violations. The statistical information necessary to offer rigorous demonstrations on individual risk will rarely if ever be available. Nevertheless, openness to whatever information is available is preferable to the current pattern in which judges feel free to assert, based on unimproved "common sense," that danger never existed, has passed, or can be escaped within the country. Using group-oriented evidence to supplement and check "common sense" is particularly important in assessing both objective and subjective levels of danger, because certain facts about decisions to go into exile are nonintuitive or even counterintuitive. The "common sense" that currently substitutes for such inquiry is a pervasive and dangerous feature of asylum proceedings.

For instance, adjudicators often assume that persons who have not been politically active will not be persecuted. This theme is most recurrent in cases involving people fleeing "friendly" regimes, suggesting that disparate treatment of persons fleeing leftist and rightist regimes may be based partially on implicit distinctions between "totalitarian" regimes, which seek to control all aspects of people's lives and demand active support, and "authoritarian" regimes, which tolerate a sizable private sphere and settle for passivity.36 Courts have recently begun to realize that, even in noncommunist countries, neutrality can be a political position which may bring reprisals.37 However, it is often assumed that nonactivists are not at risk, and therefore that their "true" motivation for leaving must have been poverty or—of little more avail—dislike of "oppression" or fear of the "generalized horrors of war."

A pervasive intuition, or at least argument, is that poor people with little formal education are seldom sufficiently politicized or threatening to be worth persecuting. In Haitian Refugee Center v. Civiletti,38 the government denied that Haitian asylum seekers would be persecuted if forcibly returned, arguing that since most

536. For a discussion of this distinction, see Linz, Totalitarian and Authoritarian Regimes, in 3 HANDBOOK OF POLITICAL SCIENCE 175 (1975).
537. The court in Bolanos-Hernandez v. INS reasoned as follows:
When a person is aware of contending political forces and affirmatively chooses not to join any faction, that choice is a political one. A rule that one must identify with one of two dominant warring political factions in order to possess a political opinion, when many persons may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology. Moreover, construing "political opinion" in so short-sighted and grudging a manner could result in limiting . . . benefits . . . to those who join one political extreme or another; moderates who choose to sit out a battle would not qualify.
749 F.2d 1316, 1325 (9th Cir. 1984).
were "uneducated," they were probably politically unaware and thus excluded from actual or potential participation in opposition activities. Even conflicts with obvious political overtones were characterized as "personal." The district court correctly rejected the claim that only intellectuals and leaders of parties could be classified as political opponents of the Duvalier regime. Over the long term, however, similar views may have shaped United States responses to Haitian refugees.

While a correlation between education and socioeconomic status, on one hand, and "degree" of political awareness or sophistication, on the other, has been asserted for the United States, there is no reason to believe that any such correlation can be extrapolated to the entire globe. Indeed, many governments quite rationally take mass
threats more seriously than challenges by an isolated intellectual elite. Even though persons who are not sufficiently prominent to draw international or press attention but who have characteristics which identify them to their governments as enemies may be at the greatest risk, some courts have assumed that obscurity implies safety.

Narrower examples of dubious judicial notice also abound. Passage of time since threats or detentions is thought to suggest that the government has "forgotten" the petitioner. Immigration judges sometimes suppose that persons facing a serious, personalized threat would leave immediately, and that delay shows that the petitioner felt no great alarm or faced little objective danger. In fact, persons fleeing individual threats often do not leave as rapidly as persons fleeing attacks on their villages, because they must go into hiding to make preparations to get out of the country. Release from detention is taken to indicate that suspicions were "cleared up." Another intuition held by many immigration judges and some courts is that governments do not allow opponents to travel freely.

544. See generally C. BERGQUIST, LABOR IN LATIN AMERICA: COMPARATIVE ESSAYS ON CHILE, ARGENTINA, VENEZUELA AND COLOMBIA (1986); L. NORTH, BITTER GROUNDS (1981) (in El Salvador, even if major massacres are excluded, the majority of victims of political violence have been campesinos).


546. One court appears to have viewed prominence and risk as directly correlated, noting that the Phillipine petitioner, who had attended lectures by Benito Aquino, who was later assassinated, "has not...adduced evidence that he is a political leader of national notoriety, which might satisfy the clear probability standard by supporting a finding that [he] as an individual would be likely to be singled out for similar, even if less drastic, persecution." Dolores v. INS, 772 F.2d 223, 226 (6th Cir. 1985).

547. See, e.g., Najaf-Ali v. Meese, 653 F. Supp. 833 (N.D. Cal. 1987) (court found that immigration judge had exaggerated amount of time petitioner spent in Afghanistan following her husband's abduction, and noted that during the time she remained, "the circle of persecution" was drawing closer and closer to her).

548. See, e.g., Del Valle v. INS, 776 F.2d 1407, 1413 (9th Cir. 1985) (criticizing this BIA theory because it would "lead to the absurd result of denying asylum to those who have actually experienced persecution and were fortunate enough to survive arrest or detention").
course, some governments are pleased when their enemies leave, especially if they send money to their families.

Adjudicators often suggest that aliens can avoid danger by moving within their own countries. This may be impossible in planned economies, where work and residence are assigned and difficult or impossible to change. Even in capitalist countries, this may not be a feasible road to safety where required identification papers indicate place of origin, where settling in a new area effectively requires family connections, or for people “blacklisted” by potential employers. Sometimes the only domestic option is a refugee camp which fails to offer personal security.

When immigration tribunals reject attempts by asylum applicants to present information on “social groups” to which they belong, or when they excessively discount such information, they are thrown back on potentially misleading “common sense,” and on materials provided by the Bureau of Human Rights and Humanitarian Affairs of the Department of State (BHRHA). By regulation, these re-

petitioner received exit permission cut against claim that persecution was likely). The INS has often argued that people who can obtain and renew passports are not at risk, although it also argues that illegal entrants lack credibility. P. Weiss Fagen, supra note 69, at 54. The INS recognizes that there are exceptions, and has directed field offices to be aware of this possibility. See INS Clarifies Position on Asylum Seekers with Passports, 63 INTERPRETER RELEASES 965 (1986).

552. Some courts have realized this. See, e.g., Turcios v. INS, 821 F.2d 1396, 1402 (9th Cir. 1987) (“persecutors may want to eliminate their political opposition and to achieve that end will either persecute them or allow them to leave”); see also Garcia-Ramos v. INS, 775 F.2d 1370, 1374 (9th Cir. 1985) (passport obtained through bribe had little or no relevance to risk).

553. See Quintanilla-Ticas v. INS, 783 F.2d 955, 957 (9th Cir. 1986) (“deportation to El Salvador does not require petitioners to return to the area of the country where they formerly lived”).

554. See Kirmeyer, There’s No ‘Safe Haven’ in El Salvador, Wash. Post, July 14, 1984, at A17, col. 2 (“While the western area of [El Salvador] is relatively less violent at this time, persons without family ties to the west really have no means to become established in that area. . . .”).

555. Some observers believe that the Salvadoran government and business interests maintain computerized “blacklists” which extend to low-level union activists. See Affidavit, Prepared for Asylum Case A27 677 033-New York City (Dec. 4, 1986) (author is a member of the New York Committee for Democracy & Human Rights in El Salvador) (on file with author); cf. Carcamo-Flores v. INS, 805 F.2d 60 (2d Cir. 1986) (petitioner active in strike stated that participants were known by factory owners and felt threatened, and that other workers who, like him, had pressed severance pay claims, were killed by death squads).

556. See supra notes 441-42.

557. See generally Preston, Asylum Adjudications: Do State Department Advisory Opinions Violate Refugees’ Rights and U.S. International Obligations?, 45 MD. L. REV. 91 (1986) (arguing that changes in way opinions are produced and presented, and modifications in application procedures, could reduce frivolous claims and improve qual-
ports were, until recently, a required part of the application process. While these were supposed to reflect individualized examination of the petitioner's case, in practice the vast majority were conclusory form letters. They rarely discuss any particular "social group" to which the petitioner belongs; they reflect, rather, the most general kind of country-wide conclusions. Underlying evidence, if any, is revealed neither to the alien nor to the adjudicator. Freedom of Information Act requests attempting to discover such materials are routinely ignored.

Decisions rarely if ever acknowledge reliance on advisory opinions. In the wake of circuit court holdings disapproving of reliance on State Department letters, immigration judges have taken to reciting that they have not relied on the reports. New regulations abandon advisory opinions in routine cases. The BHRHA will no longer provide the information available in State Department "Country Conditions" Reports, but the BHRHA will still provide information when it has specific insights concerning individual situations or situations of groups to which individuals belong which supplement materials in Country Reports. The aspect of reports that judges have found most persuasive—general country informa-

558. 8 C.F.R. §§ 208.7, 208.10 (1987). While the Reagan Administration at one point proposed curtailing aliens' rights to present evidence and, in effect, greatly increasing the importance of State Department advisory opinions, see Helton, The Proposed Asylum Rules: An Analysis, 64 Interpreter Releases 1070 (1987), a subsequent proposal was published which would abandon advisory opinions altogether in "routine" cases.

559. P. Weiss Fagen, supra note 69, at 55.


561. P. Weiss Fagen, supra note 69, at 10-11; R. Steel, supra note 27, at 275. Steel described the process:

The process of obtaining an opinion from the Bureau is essentially a closed one in which neither the applicant nor his representative can become directly involved. The BHRHA makes its recommendation, based on information in the particular case forwarded by the Immigration Service or Immigration Court and its own background information. Its officers generally are not made available for depositions or examination.

Id. (citations omitted).


563. See, e.g., Kasravi v. INS, 400 F.2d 675, 697 n.1 (9th Cir. 1968); Zamora v. INS, 534 F.2d 1055, 1061-63 (2d Cir. 1976); Berdo v. INS, 432 F.2d 824, 844 (6th Cir. 1970).

564. T. Aleinikoff & D. Martin, supra note 21, at 705.

tion—will remain available, albeit not in the form of pseudo-individual opinions. Judges receive from State Department letters "cues" as to the outcome the State Department prefers,666 along with general "country" information, which they take seriously even when skeptical about the basis for a particular recommendation.667 Courts of appeals sometimes accept State Department materials as highly probative,668 despite criticisms of materials which purport to address individual cases but plainly do not. At least one immigration judge has said in an interview that he would "never overrule" the State Department; knowledgeable observers consider this attitude typical.669 Keeping track of evolving human rights conditions around the world is a difficult job and one for which most immigration judges are ill-prepared. Given the weakness of adversary testing and the tendency to ignore petitioners' group-oriented evidence, judges are usually left with little more than the State Department's position and applicants' personal accounts on which to base their decisions. INS district directors depend even more on State Department views in evaluating claims of persons who apply affirmatively.670

Thus, the government's "background" information and, when it cares to be more specific, perspectives on particular social groups,

566. P. Weiss Fagen, supra note 69, summarized interviews with immigration judges:

Several noted the presence of political factors and pressure in asylum cases, especially with regard to the larger, more controversial groups, e.g. Salvadorans, Haitians, and Poles. None would elaborate on the nature of these political factors, and all asserted their independence of judgment, but some did express the feeling that they were being obliged to make judicial decisions which were more properly made in the political arena, and on political grounds.

For the immigration judges, as for the examinations officers, political judgments are seen as the domain of the Department of State.

Id. at 16.

567. Weiss Fagen found that "[j]udges do not dispute State Department country expertise, even if they may differ with advisory opinion letters on specific cases." Id.

568. See McLeod v. INS, 802 F.2d 89, 93 n.4 (3d Cir. 1986) (permitting "official notice" of certain information derived from department materials, and explaining that "official notice" is broader than "judicial notice" because it allows consideration of a wider range of accepted facts that are within agency expertise).


570. P. Weiss Fagen, supra note 69, at 12, 56 ("[i]n New York the examinations officers in the District Office acknowledge that they always follow the advisory opinions if there is a positive or negative recommendation," and District Director Sava confirmed this reliance on the State Department).
are already admitted. Both accounts by decisionmakers\textsuperscript{571} and the close correlation between outcomes and country of origin\textsuperscript{572} suggest that this general information is extremely influential. Unlike most industrial countries, in the United States human rights and refugee organizations have no institutionalized role.\textsuperscript{573} Aliens' own efforts to have group-oriented materials play an important role in decisions on their cases are often rejected through explicit narrowing constructions of the "social group" criterion, or by a more amorphous requirement that petitioners provide "specific" evidence that they have been "singled out" for persecution. Making reasonable inferences about unfamiliar settings requires evidence transcending individual experiences. Evidence about people similar to or close to the petitioner is the most probative. Though the extent to which group-level evidence is probative will often be a difficult question, factfinding would improve substantially if adjudicators welcomed such evidence rather than ignoring anything that does not have the petitioner's name on it.

C. Bureaucratic Constraints and Evidentiary Reform

There are practical difficulties with the proposal for greater use of group evidence. Some even apply, with less force, to denying adjudicators the shortcut of defining groups out of existence. If tribunals deal so badly with current evidence and groups they do recognize, increasing their responsibilities might exacerbate the problems. If applicants often do not articulate their experiences persuasively, leading adjudicators to expect evidence on similarly situated individuals may only accentuate their disadvantages.

However, these objections are weaker than they may at first appear. From the point of view of meeting the congressional goal of

\textsuperscript{571} Professor David Martin described his experiences at the State Department: Many times I have heard INS officials speak as though the really important decisions in every asylum case are made by the reviewing staff at the State Department. This view is mistaken but understandable. . . . The Department's acquaintance with conditions in foreign countries helps little in the actual adjudication. Knowing such conditions merely furnishes a rough guess about the plausibility of the persecution risk that is claimed. \textit{Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981), reprinted in A. Leibowitz, supra note 13, at 5-121, 5-122.}

\textsuperscript{572} GAO REPORT, \textit{supra} note 121 (Central Americans have a much lower approval rate than other applicants with similar claims; for those who described being tortured, four percent of Salvadorans, 15% of Nicaraguans, 64% of Iranians, and 80% of Poles were granted asylum, and of the four countries examined, only Salvadorans were actually deported).

\textsuperscript{573} P. Weiss Fagen, \textit{supra} note 69, at 56. The role of the UN High Commissioner for Refugees is also comparatively small in the United States. See Henkel, \textit{International Protection of Refugees}, in \textit{5 IN DEFENSE OF THE ALIEN} 53 (L. Tomasi ed. 1983).
bringing the United States practice into conformity with its international obligations, the changes proposed here can only improve matters. There are examples of careful and intelligent consideration of "social group" claims, both here and abroad, and immigration adjudicators have sometimes proven capable of assimilating group evidence. Increasing numbers of immigration judges may become able and willing to do so in the future. Moreover, even given existing time and financial constraints, increased use of group-level evidence might make proceedings more genuinely adversarial. Whether or not adversarial proceedings are the ideal way to handle asylum claims, they would be more revealing and fairer than bureaucratic processing and would require a less radical transition than alternatives. Introducing more group-level evidence might make judges more sophisticated triers of future claims; it holds more promise for this than does hearing a much larger number of purely individual cases. Eliminating the option of defining "social group" claims out of existence would remove a "path of least resistance" which causes the distribution of "error" to be lopsidedly against the party with the greatest stake in the proceedings. Finally, if existing institutions really require the shortcuts criticized here, courts should not pretend that the process is functioning as Congress envisioned by ratifying the results.

These claims will now be discussed in more detail. Although some immigration judges have an open approach to evidence and reach unpredictable results, asylum hearings rarely provide the individualized consideration Congress prescribed. This is most obvious for national groups generating many applications, some of which must have merit, but virtually none of which are granted. Even for nationalities receiving substantial grants, there is no assurance that those protected are at greatest peril. The difference in quality of adjudication, as opposed to outcomes, appears small; the major difference is that many Eastern Europeans have been granted asylum by INS district directors and thus avoided an adversary hearing altogether.

In any event, openness to group evidence could produce more feasible types of inquiry, thus improving hearings without substantially

574. See supra notes 488-93 and accompanying text.
575. For alternatives to the adversary system, see generally Aleinikoff, supra note 489; Avery, Refugee Status Decision-Making: The Systems of Ten Countries, 19 STAN. J. INT'L L. 235 (1983); Martin, supra note 265.
576. See supra notes 492-93 and accompanying text.
577. See GAO: Asylum Approval Rates, 64 INTERPRETER RELEASES 976 (1987) (approval rates for Poles in Fiscal Year 1984 was 0% before district directors, but only 7.4% before immigration judges).
delaying adjudication and, where indicated, deportation. While the INS is theoretically free to dispute the veracity and significance of individualized accounts, challenging group evidence is really more feasible. The INS could seek experts to support its positions. It could try to impeach petitioners’ experts by exposing claims made on behalf of various asylum seekers which conflict with each other or with academic writings subjected to peer criticism. The INS has belatedly begun to establish internal procedures for collecting information on international human rights situations.

An obvious way to force the INS to deal with asylum seekers’ claims would be to require it to do so in order to win cases. Short of such drastic reform, which may be inconsistent with substantial evidence review, a more literal reading of “social group” and greater openness to group evidence could lead adjudicators in some cases to grant asylum based on group membership, on group evidence, or on combinations of group and individual evidence. This might induce the INS to contest such information, rather than waiting complacently for its almost inevitable “victory,” and thus push asylum adjudications closer to an adversarial truthseeking process. Having to take group evidence seriously could require both the INS and immigration judges to learn more about the countries of people whose fates they determine.

Given the tremendous evidentiary difficulties asylum seekers already face, any proposal which might augment their burden deserves skepticism. “Litigation imbalances” make expert and social science evidence problematic: certain parties are vulnerable to expert testi-

578. See supra note 474.
579. See Attorney General Announces New Asylum Policy Unit, 64 INTERPRETER RELEASES 472, 473 (1987) (new unit will, inter alia, “[c]ompile and disseminate to INS officers information concerning the persecution of persons in other countries on account of race, religion, nationality, membership in a particular social group, or political opinion”); New Asylum Policy and Review Unit Created, 64 INTERPRETER RELEASES 439-40 (1987) (first director of new unit was former Director of Policy at State Department Bureau of Human Rights and Humanitarian Affairs).
580. See Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986) (proper standard of review is in between clear error and de novo review, and “to hold that once an alien puts forth unrefuted and credible testimony he automatically satisfies his burden of proof unless the INS comes forth with substantial evidence to rebut the testimony would approximate de novo review”); Saballo-Cortez v. INS, 761 F.2d 1259, 1265 n.4 (9th Cir. 1985) (“Congress allocated the burden of proving a clear probability of persecution to the alien, and we cannot reallocate that burden under the guise of review.”).
581. While in a “pure” adversary model, the less the arbiter knows the better, asylum proceedings are not purely adversarial. Some petitioners are unrepresented, and in those cases the judge is supposed to ensure that relevant evidence is brought out. It is unrealistic to suppose that judges confronted with repeated petitions from members of certain national groups could put aside all they had learned in other cases, and it would not be desirable for them to do so. Most proposals for reform call for increasing, not decreasing, adjudicators’ levels of knowledge. See, e.g., Aleinikoff, supra note 489.
mony which they lack the resources to refute.\textsuperscript{582} Reliance on individual testimony can benefit petitioners if adjudicators give credible accounts "the benefit of the doubt." In the asylum area, ironically, refugees, many of whom are poor, seek to introduce expert evidence and the government resists. In theory, use of social science and other group-level evidence could favor the INS as the better endowed party, but in practice increased openness to group-level evidence is unlikely to prejudice asylum seekers. Specialized offices and pro bono programs coordinate evidentiary research,\textsuperscript{583} and would likely augment such efforts if this evidence became more important. University area studies and human rights programs generate considerable information about many countries; writings and live witnesses are often available free of charge. In any event, the status quo is not that supra-individual information is ignored in favor of individual circumstances, but that petitioner's attempts to influence the consideration of broader factors are frustrated.

Group, as contrasted with individual, evidence involves economies of scale for both sides in gathering information and potentially in testing it as well. A "rule-making" approach—"listing" persecuted "social groups"—would interfere with the right to present evidence. Formal collective factfinding procedures could easily deteriorate: the executive could "listen" to comments and then do whatever served its own concerns. Nonetheless, with strong judicial or congressional oversight, procedures might be developed which would permit both asylum seekers and the government to marshal evidence more comprehensively and efficiently than in individual hearings and to test that evidence carefully. For some countries or groups, eligibility may be sufficiently widespread or individual factfinding sufficiently difficult that extended voluntary departure—a moratorium on deportations—makes more sense than individual hearings. Congress has allowed the executive to grant this status,\textsuperscript{584} and has considered doing so itself for certain groups.\textsuperscript{585} In summary, increased openness to group evidence might make hearings substantially more revealing.

\textsuperscript{582} See Davis, supra note 298, at 1549-57, 1579-80, 1598-99 (contrasting success of parents presenting expert testimony in custody cases with failure of poor parents to invoke psychological parent theory to defend biological family from state intervention).
\textsuperscript{583} See, e.g., A GUIDE TO AVAILABLE RESOURCES FOR GUATEMALAN ASYLUM CLAIMS (K. Steinburg ed. 1986); Helton, supra note 522, at 21 (describing training programs and "master exhibits" developed by INS and Haitian Refugee Center). The ACLU maintains a data base on assassinations in El Salvador.
\textsuperscript{584} See supra note 103.
\textsuperscript{585} See supra note 116.
without greatly increasing the burden on petitioners, the INS, or the adjudicative system.

Even if increased openness to "social group" evidence and "social group" claims would overburden adjudication mechanisms, that is no excuse for letting asylum seekers' procedural and substantive rights be eviscerated. The entire immigration bureaucracy is understaffed relative to its tasks, and asylum may have particularly low priority. Although the recent amnesty is reducing INS and immigration court backlogs, the ratio of aliens to adjudicators may make it impossible to consider petitions both quickly and adequately. If so, promptness should be sacrificed rather than adequacy of consideration: Congress has mandated substantive standards and procedural safeguards, not timetables. The tradeoff may be less sharp than it superficially appears, in that judicial intervention prompted by administrative abuses can itself disrupt immigration enforcement. To the extent that there is a tradeoff, some delays in expulsions should be tolerated in order to minimize the number of people killed, tortured, and imprisoned.

586. See generally M. Morris, supra note 136.
588. As of August 1987, there were 69 immigration judges, plus four assistant chief immigration judges. There were eight, with many responsibilities besides asylum, in New York City. EOIR Updates List of Immigration Judges, 64 INTERPRETER RELEASES 922, 934 (1987). There are an estimated 100,000 undocumented Central Americans, mostly Salvadorans, living in the New York City area. N.Y. Times, Nov. 3, 1986, at A1 (quoting estimate of the Inter-Religious Task Force).
589. According to one commentator:
For through its use and misuse of "advisory opinions," and its systematic denial of due process to applicants from particular countries, the INS has not rid itself of refugees, but has instead subjected itself to ever more vigilant, and more critical, judicial scrutiny—scrutiny which has periodically brought exclusion and deportation machinery to a halt, and can be expected to do so again in the future.
590. Cf. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Court prescribed a test for "what process is due" in social security disability termination hearings which examines:
First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
Id. Further, as Justice Harlan explained elsewhere:
The standard of proof influences the relative frequency of these two types of erroneous outcomes. . . . In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. . . . In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to
Like substantive standards, how many resources to devote to asylum adjudications and how to deploy them are ultimately decisions for Congress. Congress has acted both to fulfill its sense of what our history and values require, and to honor our international covenants. The means it has chosen require complex case-by-case factfinding. If more adjudicative or investigative resources are needed to implement the Refugee Act properly, this is a problem for Congress. The executive has not requested more resources for asylum adjudications.\(^{591}\) The executive and courts act improperly if they adopt shortcuts that frustrate legislative intent, but proceed as though Congress's design was being implemented.

**CONCLUSION**

I have argued that “social group” as used in the asylum eligibility formula retains its ordinary, broad meaning. Recent conclusions that surely Congress must have had in mind something narrower are both factually incorrect and institutionally illegitimate. Administrative and judicial tribunals should abandon the misguided and formidable project of trying to determine whether “social groups” meet their limiting definitions, and shift toward examining claims that certain groups' members are targets for persecution. If they were to undertake that task seriously, group-level evidence would prove extremely valuable not only in resolving newly cognizable “social group” claims but in resolving evidentiary dilemmas which often arise in adjudicating other claims. The individualistic focus of current asylum law—both theoretically, as reflected by attempts to narrow the “social group” criterion, and practically, as expressed by failure to take advantage of group-based evidence—has helped to perpetuate the exclusion from asylum eligibility of many persons whom Congress mandated be protected in order to honor its recognized obligations under international law.

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\(^{591}\) For a discussion of budget priorities, see *Administration Budget Request Shows Large Increase for INS, Cuts for Refugee Programs*, 64 INTERPRETER RELEASES 29 (1987).

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the disutility of acquitting someone who is guilty.

**APPENDIX—Form I-589**

**U.S. Department of Justice**  
**Immigration and Naturalization Service**

**REQUEST FOR ASYLUM IN THE UNITED STATES**

<table>
<thead>
<tr>
<th>Request for Asylum in the United States</th>
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<td><strong>INS Office:</strong></td>
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<tbody>
<tr>
<td>1</td>
<td>Family Name:</td>
</tr>
<tr>
<td>2</td>
<td>Middle Name:</td>
</tr>
</tbody>
</table>

**All other cases need at any time (outside races same if married)**

| 3 | Sex: |
| 4 | Marital Status: |
| 5 | Divorced: |
| 6 | Widowed: |

| 7 | Nationality at birth: |
| 8 | Present: |
| 9 | Other nationalities: |

**If混血, how did you become mixed?**

| 10 | Ethnic group: |
| 11 | Religion: |

**Language spoken:**

| 12 | Language(s) spoken: |

**Address in United States (in any of: C/O, if appropriate):**

| 13 | (Name No.) |
| 14 | (City or town) |
| 15 | (State) |
| 16 | (Zip Code) |

**Telephone number (including area code):**

| 17 |  |

**Alien's arrival prior to coming to the United States (if any):**

| 18 | (Date) |
| 19 | (City) |

**At the port of entry (City, State):**

| 20 | (Name of vessel or airplane and flight number, etc.) |

**Date of birth (Month/Day/Year):**

| 21 | Date of arrival (Month/Day/Year): |

**If yes, was the alien inspected?**

| 22 | Date of inspection (Month/Day/Year): |

**My passport was issued in:**

| 23 | (Country) |

**Name and location of schools attended:**

| 24 | Type of school: |
| 25 | From (Month/Year): |
| 26 | To (Month/Year): |
| 27 | Highest grade completed: |
| 28 | Title of degree or certification: |

**What specific skills do you have?**

| 29 |  |

**Social Security No. (if any):**

| 30 |  |

**Name of husband or wife (if any):**

| 31 |  |

**Address (Apt. No.):**

| 32 | (City or town) |
| 33 | (Province or state) |

| 34 | (Country) |

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**Form I-589**  
(Ret. 3-18) N  
(OVER)  
RECEIVED  
TRADE  
PERIOD  
COMPLETED  
Page 1  
844
18. If in the U.S. is your spouse included in your request for asylum?  ☐ Yes ☐ No (If not, explain why)

19. If in the U.S. is spouse making separate application for asylum?  ☐ Yes ☐ No (If not, explain why)

20. If in the U.S. are children included in your “proof of asylum”?  ☐ Yes ☐ No (If not, explain why)

21. Have you been in the U.S. less than six months?  ☐ Yes ☐ No (If so, give name(s) of individuals who have been here longer)

**Table:**

| Name | Sex | Place of birth | Date of birth | New living ar
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22. Relatives of U.S. other than immediate family

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Relationship</th>
<th>Immigration status</th>
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23. Other relatives who are refugees but outside the U.S.

<table>
<thead>
<tr>
<th>Name</th>
<th>Relationship</th>
<th>Country where presently located</th>
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</table>

24. List all travel or identity documents such as passport, refugee documents, travel documents or national identity cards

<table>
<thead>
<tr>
<th>Document type</th>
<th>Document number</th>
<th>Issuing country or authority</th>
<th>Date of issue</th>
<th>Date of expiration</th>
<th>Cost</th>
<th>Obtained by whom</th>
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25. Have you obtained a U.S. visa?

26. If you did not apply for a U.S. visa, explain why not?

27. Date of departure from your country of nationality (Month/Day/Year)

28. Was exit permission required to leave your country?  ☐ Yes ☐ No (If so, did you obtain exit permission?  ☐ Yes ☐ No)
10. Are you entitled to return to country of issuance of your passport? □ Yes □ No □ Travel document □ Yes □ No □ Other document □ Yes □ No (If not, explain why).

11. What do you think would happen to you if you returned? (Explain).

12. When you left your home country, to what country did you intend to go?

13. Would you return to your home country? □ Yes □ No (Explain).

14. Have you or any member of your immediate family ever belonged to any organization in your home country? □ Yes □ No. (If yes, provide the following information relating to such organization, name of organization, dates of membership or affiliation, purpose of the organization, what, if any, were your official duties or responsibilities, and are you still an active member? (If not, explain).

15. Have you taken any action that you believe will result in persecution in your home country? □ Yes □ No (If yes, explain).

16. Have you ever been □ detained □ interrogated □ convicted and sentenced □ imprisoned in any country? □ Yes □ No (If you specify for each instance: what occurred and the circumstances, date, location, duration of the detention or imprisonment, reason for the detention or conviction, what formal charges were preferred against you, reason for the release, names and addresses of persons who could verify these statements. Attach documents referring to these incidents, if any).

17. If you hope to claim for asylum or current conditions in your country, do these conditions affect your personal status and the rest of that country's population? □ Yes □ No. (If yes, explain).

18. Have you, or any member of your immediate family, ever been persecuted by the authorities of your home country/country of nationality? □ Yes □ No. If yes, was it

19. After leaving your home country, have you traveled through (other than in transit) or stayed in any other country before entering the U.S.? □ Yes □ No. (If yes, specify each country, length of stay, purpose of stay, address, and reason for leaving, and whether you are enticed to return to that country for remunerative purposes.

20. Why did you continue traveling to the U.S.?

21. Did you apply for asylum in any other country? □ Yes—Give details □ No—Explain why not
42. Have you been recognized as a refugee by another country or by the United Nations High Commissioner for Refugees? □ Yes □ No  (If yes, where and when)

| □ | Yes | □ | No | Explain why not |

43. Are you registered with a consulate or any other authority of your home country abroad? □ Yes—Give details □ No—Explain why not

| □ | Yes | □ | No | Explain why not |

44. Is there any additional information not covered by the above questions?  (If yes, explain)

| □ | Yes | □ | No | Explain why not |

45 Under penalties of perjury, I declare that the above and all accompanying documents are true and correct to the best of my knowledge and belief.

(Signature of Applicant)  

(Date)

| Interviewing Officer |  
| Action by Adjudicating Officer |  
| (Date of Interview) |  
| □ Granted □ Denied |  
| (Adjuncting Officer) |  
| (Date) |  

Advocate opinion requested □  

(Date)