

## DISCRETIONARY (IN)JUSTICE: THE EXERCISE OF DISCRETION IN CLAIMS FOR ASYLUM

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*Section 208(a) of the Immigration and Nationality Act provides that asylum may be granted to an applicant who meets the definition of a refugee—that is, someone who has been persecuted or has a well-founded fear of future persecution in her own country on account of race, religion, nationality, political opinion, or membership in a particular social group. Asylum is a discretionary form of relief, which means that the United States government is not required to grant asylum to every refugee within the United States but instead may decide whether or not to do so.*

*This Article sets out in Part I the history and current application of discretion as an element of asylum adjudications, including several case studies to illustrate when and how adjudicators deny asylum in an exercise of discretion and the serious impact of those decisions. Part II then argues that the fact that asylum is discretionary is highly problematic. First, discretion is unnecessary to achieve the purported goals of such a policy, namely, screening individuals for their suitability to become permanent members of the United States community. Second, the fact that asylum is discretionary results in inadequate protection for those fleeing persecution. Finally, the meaning of the term “discretion” is so inherently vague and confused as to make its use inappropriate, at least in the asylum context. This Article concludes that asylum should be a mandatory, not a discretionary, form of immigration relief. An adjudicator’s exercise of discretion in asylum claims should be eliminated, or at least substantially limited with an eye towards the problems discussed herein.*

### INTRODUCTION

Offering refuge to those who are fleeing persecution in other nations has historically been asserted as part of the national identity of the United States.<sup>1</sup> It is not surprising, then, that a Russian Jew

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1. One prominent example is the line from Emma Lazarus’ poem, *The New Colossus*, inscribed on a plaque in the Statue of Liberty:

Give me your tired, your poor,  
Your huddled masses yearning to breathe free, . . .  
I lift my lamp beside the golden door!

who was harassed, threatened, arrested, and detained; whose daughter was kidnapped twice; and whose wife was purposefully injured in a serious car accident; all because the family was Jewish, would apply for protection in the United States and be found by an immigration judge to have a well-founded fear of returning to Russia.<sup>2</sup> It would be somewhat more surprising, if not shocking, to learn that this same man, Nikolai Kouljinski, was not granted asylum and was instead ordered removed to Russia, the very country where he feared persecution, despite being found fully statutorily eligible for asylum. In fact, that is exactly what happened.<sup>3</sup> The Sixth Circuit Court of Appeals affirmed an immigration judge's decision to deny Mr. Kouljinski asylum in an exercise of discretion based primarily on two factors: Mr. Kouljinski's three convictions for driving under the influence, the most recent six years prior to issuance of the court's decision, and his lack of family ties in the United States.<sup>4</sup>

This same outcome is possible in every single asylum claim heard in the United States. Section 208(a) of the Immigration and Nationality Act provides that the Attorney General or the Secretary of Homeland Security may grant asylum to an applicant who meets the definition of a refugee—that is, one who has been persecuted or has a well-founded fear of future persecution in his or her own country on account of race, religion, nationality, political opinion, or membership in a particular social group.<sup>5</sup> Particular import has been given to the word “may” in this section of the law. It means that the United States government is not required to grant asylum to a refugee within the United States; instead, the designated official has discretion to decide whether to do so.<sup>6</sup> This Article focuses

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Emma Lazarus, *The New Colossus* (1883), reprinted in 1 THE POEMS OF EMMA LAZARUS 202–03 (1899). It is worth noting, however, that the perception of the United States as a haven for refugees and other forced migrants has throughout much of U.S. history been more of an idealized vision than a factual reality. See, e.g., PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 17 (2000) (“For much of American history, with the exception of a brief, remarkable thaw from 1965 to 1990, lawmakers imposed ever-increasing limitations on immigration into the United States. Some of the restrictions . . . had a devastating effect on people who had been forced by the threat of persecution to flee their native lands.”).

2. These facts, and the following facts in this paragraph, are drawn from *Kouljinski v. Keisler*, 505 F.3d 534, 538–39 (6th Cir. 2007).

3. *Id.* at 540–41.

4. *Id.* at 543. Mr. Kouljinski was also denied withholding of removal because he did not meet the necessary higher standard of proof. *Id.* at 545.

5. Immigration and Nationality Act of 1952 (INA) § 208(a), 8 U.S.C. § 1158(a) (2006); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

6. See *infra* Part I-B.

on when, how, and why this discretion is exercised, and the problems inherent in its use.

This Article first sets out in Part I the history and current application of discretion as an element of asylum adjudications. Part I will also discuss several case studies to illustrate when and how adjudicators deny asylum in an exercise of discretion and the serious impact of those decisions. Part II will then argue that asylum as discretionary relief is highly problematic for a number of reasons. The first two reasons focus on the asylum context, while a third is grounded in and applicable to immigration law and the practice of administrative law more generally.

First, making asylum discretionary is unnecessary to achieve the purported goals of such a policy. One reason often given to justify discretion as an element in addition to the substantive requirements for asylum is that, when receiving asylum, an individual is invited to become a permanent and vested member of the United States community.<sup>7</sup> However, discretion at the asylum stage is not necessary to achieve this purpose. The most significant factors that have been developed as relevant to an adjudicator's discretionary determination are explicitly taken into consideration during later parts of the process of becoming a United States citizen. Second, the fact that asylum is discretionary results in inadequate protection for those fleeing persecution. Individuals like Mr. Kouljinski are sent back to face the very harm they fled to escape, and even individuals who are granted some lesser form of fear-based relief from removal face such significantly restricted rights and opportunities that their relief is insufficient. Finally, the meaning of the term "discretion" is so inherently vague and confused as to make its use inappropriate, at least in the asylum context.

This Article concludes that asylum should be a mandatory, not a discretionary, form of immigration relief. An adjudicator's exercise of discretion should be eliminated, or at least substantially limited with an eye towards the problems discussed here, as an element in asylum claims.

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7. See, e.g., *Salim*, 18 I. & N. Dec. 311, 314–15 (BIA 1982); see also Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1, 16–17 (1987). Administrative adjudications will be cited in this Article according to Bluebook Rule 14.3.1(a), which provides that case names of administrative adjudications should be cited without procedural phrases.

## I. HISTORY AND BACKGROUND

A. *The Fact That Asylum Is Discretionary Is More Than a Theoretical Problem*

Several courts of appeals have described discretionary denials of asylum claims as rare,<sup>8</sup> and a quick glance through the more recent published decisions of the Board of Immigration Appeals (BIA) would suggest that discretionary denials survive administrative review only in the cases with exceptionally negative discretionary factors.<sup>9</sup> It would be a mistake to conclude on this basis, however, that discretionary denials are an insignificant issue.

Unfortunately, it is not possible to calculate the percentage of asylum cases decided on the basis of discretion with existing public information. While both agencies responsible for asylum claims, United States Citizenship and Immigration Services (USCIS) and the Executive Office for Immigration Review (EOIR), keep statistics on their asylum grant and denial rates (as well as referral rates for USCIS), neither appears to separate their denial statistics by the particular grounds for the denial.<sup>10</sup> Because neither asylum officer nor immigration judge decisions are publicly available, an independent statistical analysis cannot be conducted.<sup>11</sup> It is highly likely, then, that the circuit courts are overstating the rarity of discretionary denials. Because there is no other source of information

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8. See, e.g., *Zuh v. Mukasey*, 547 F.3d 504, 507 (4th Cir. 2008); *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007); *Huang v. INS*, 436 F.3d 89, 92 (2d Cir. 2006); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1135 (9th Cir. 2004). See also, e.g., 3 CHARLES GORDON, STANLEY MAILMAN, AND STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 34.02(12)(d) (Matthew Bender, Rev. Ed. 2011) (stating, without citation, that “denials of asylum on discretionary grounds have been rare”).

9. See, e.g., *A-H-*, 23 I. & N. Dec. 774 (AG 2005) (denying asylum in the exercise of discretion to the leader of an organization with ties to armed Islamist groups known to engage in acts of persecution and terrorism).

10. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., AFFIRMATIVE ASYLUM WORKLOAD FROM USCIS ASYLUM DIVISION QUARTERLY STAKEHOLDER MEETING (2010), available at <http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2010%20Events/October%202010/Affirmative%20Asylum%20Workload%20-%20May%20-%20Sept%202010.pdf>; EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK I-L (2011), available at <http://www.justice.gov/eoir/statpub/fy10syb.pdf>. Indeed, such separation would be extremely difficult, given that adjudicators often give multiple, sometimes intertwined, grounds for their decisions.

11. For analyses of other statistics related to asylum (and other immigration) cases, see JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ, AND PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2009) and the Immigration Reports created by the Transactional Records Access Clearinghouse (TRAC). See, e.g., *Immigration Reports*, TRAC, <http://trac.syr.edu/immigration/reports> (last visited Oct. 7, 2011).

available to them, they must be basing their conclusions on the number of published BIA and federal cases. These cases represent only a small proportion of the asylum claims handled by the United States government each year,<sup>12</sup> and, particularly before the BIA, tend to have extreme facts that lend themselves to setting precedent.

Furthermore, the following case studies illustrate that discretionary denials of asylum have such a significant impact on individual asylum seekers that, even if the number of individuals affected is proportionally small, this is nevertheless an important issue. The case studies discussed below are drawn from actual cases, but the names and other identifying details have been changed to protect the identity and privacy of the individuals concerned. Their stories demonstrate many of the issues surrounding discretionary denials of asylum, including the profound and far-reaching impact of a discretionary denial on the individual, the inadequacy of alternative forms of protection, and the indeterminate and contradictory nature of the discretionary standard.

### 1. Case Study Number One: Celine

Celine<sup>13</sup> fled to the United States after suffering horrific persecution spanning many years in her native Rwanda. Her problems began with the 1994 Rwandan genocide. Celine and her family were Tutsi, the minority ethnicity targeted during the 1994 genocide. Celine and one of her younger sisters survived the genocide, but her parents and the rest of her siblings were brutally murdered; they were hacked to pieces with machetes and stuffed into a tank on the family's farm. Celine and her sister hid in the fields for months until the genocide ended.

Eventually, Celine married a Hutu man who had not been involved with the genocide. She and her husband raised Celine's

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12. For example, in fiscal year 2010, the immigration courts nationwide completed adjudication in 40,545 asylum cases. EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2010 STATISTICAL YEAR BOOK 12 (2011), available at <http://www.justice.gov/eoir/statspub/fy10syb.pdf>. During calendar year 2010, the Board of Immigration Appeals issued only 5 published decisions dealing with claims for asylum. See C-T-L-, 25 I. & N. Dec. 341 (BIA 2010); X-M-C-, 25 I. & N. Dec. 322 (BIA 2010); B-Y-, 25 I. & N. Dec. 236 (BIA 2010); H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209 (BIA 2010); T-M-H- & S-W-C-, 25 I. & N. Dec. 193 (BIA 2010). Based on these numbers, only approximately .01% of asylum claims will result in a published BIA decision. While this is an imperfect comparison for multiple reasons, it does illustrate the massive disparity between the number of asylum claims heard and decided and the number of precedential decisions in asylum claims issued over a year's time.

13. Names and identifying details of the asylum seekers, as well as some aspects of the asylum seekers' stories, discussed in this Article have been changed to protect their privacy.

younger sister and her husband's child from a prior relationship as their own children. Celine's experiences during the genocide had a profound impact on her, and as a way of dealing with them she became very involved with a number of different organizations to support genocide survivors. She also joined an opposition political party, in part because she was unhappy with the Rwandan government's policy towards the genocide survivors. Her husband, still a member of the Rwandan army, was also a high level officer in a different party.

Celine and her husband had always had difficulties because of their various activities and memberships, but their problems escalated upon Celine's return from a trip to the United States. When one of Celine's genocide survivor organizations was given an award in the United States, Celine was invited to attend a ceremony to accept the award on behalf of the organization. Celine obtained a visitor's visa, traveled to the United States, accepted the award, and returned to Rwanda. After she returned from her trip, government officials came to her home repeatedly to threaten and question her and her husband. Celine's husband was arrested and disappeared. Celine herself was arrested and detained for approximately two weeks. During her detention, she was beaten, interrogated, and otherwise mistreated. One of the blows to her head left her with severely impaired vision. She was eventually released, but the government officials warned her that they would not leave her alone. Terrified that such treatment would continue, Celine fled alone to the United States, hoping that she would soon be able to bring her stepdaughter and sister to join her.

Celine applied for asylum affirmatively in the United States as soon as she was able.<sup>14</sup> The Asylum Office referred Celine's case to Immigration Court, where Celine renewed her request for asylum and also made requests for withholding of removal and relief under the Convention Against Torture. The immigration judge issued a written decision some months after Celine's individual hearing. He found Celine credible, and agreed that she had proven a well-founded fear of persecution in Rwanda on account of multiple protected grounds. However, he denied her asylum because he speculated that she had not told the truth in obtaining the visa she used to come to the United States to accept the award for the gen-

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14. Individuals who are not in removal proceedings apply for asylum affirmatively before United States Citizenship and Immigration Services, while individuals who are in removal proceedings apply for asylum defensively before an immigration court. *See* 8 C.F.R. §§ 208.2, 1208.2 (2010).

ocide survivor's organization, and granted her only withholding of removal.<sup>15</sup>

Withholding of removal was not an acceptable form of relief for Celine. It meant that she would be unable to ever legally petition for her stepdaughter and her sister to come to the United States to join her. Even worse, it meant that she would probably never see them again. Because of Celine's situation, it would be unlikely that her stepdaughter and sister would be granted United States nonimmigrant visas to come to visit her,<sup>16</sup> and Celine could not leave the United States to visit them in some safe third country without executing the order of removal against her and risking being unable to return to the United States. Celine would be stuck in limbo, able to remain in the United States only if the United States government was unable to deport her to some country other than Rwanda, but unable to apply for legal permanent residence or citizenship here.

Because of these very severe consequences, Celine chose to appeal the denial of asylum. While Celine's appeal was ultimately successful, she did not receive a final decision until almost two and half years after the immigration judge initially issued a decision. During that time, Celine remained in the United States alone, separated from the only family she had left and struggling to support herself without authorization to work. Unfortunately, Celine passed away shortly after receiving the final decision in her case. Because of the delay caused by the immigration judge's discretionary denial of her claim to asylum, she was never able to bring her family to the United States.

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15. Withholding of removal is a fear-based form of immigration relief—with a higher standard of proof and fewer benefits than asylum—that is available to some who are barred from asylum eligibility or denied asylum in an exercise of discretion. It results only in a relatively tenuous legal status with no direct opportunity to make that status more direct or secure; an individual granted withholding is ordered removed but physical removal (deportation) to the country where the individual fears persecution is withheld. For a more detailed discussion of withholding of removal, and the differences between withholding and asylum, see *infra* text accompanying notes 42–53.

16. Nonimmigrant visas typically require proof of intent to stay only temporarily in the United States and to return to one's home country at the end of the period of authorized stay. *See* INA § 214(b); 8 U.S.C. § 1184(b) (2006); 8 C.F.R. § 214.1(a)(3)(ii) (2010); 22 C.F.R. § 41.11 (2010). Celine's stepdaughter and sister would have a very difficult time as a practical matter proving their intent to return to Rwanda after a visit to the United States because of Celine's presence in the United States as the result of a fear of persecution in Rwanda in combination with Celine's uncertain legal status in the United States.

## 2. Case Study Number Two: Yusef

Yusef,<sup>17</sup> a native and citizen of Pakistan, had lived in the United States for just under ten years at the time he was detained and placed in removal proceedings. He was unable to bond out,<sup>18</sup> and therefore he remained detained for approximately five months while his proceedings were pending. Before his detention, Yusef lived with his wife, a citizen of Pakistan and a legal permanent resident of the United States, and their two children (one a legal permanent resident and one a United States citizen) in a town several hours away from the facility where he was detained. Yusef was a member of a large family. His parents, who were Christian activists, remained in Pakistan. At the time he was placed in removal proceedings, his mother was suffering from cancer. His siblings had fled Pakistan because of the danger that they faced there and were scattered in a number of different countries, including England, Canada, and the United States.

Yusef himself had also been a Christian activist while in Pakistan. He had experienced a number of problems and threats as a result of his religion and work, and it was ultimately decided that he and his wife needed to leave Pakistan for the United States for their safety. While he lived in the United States, Yusef never applied for asylum because he had always been able to maintain another legal immigration status: he first entered as a nonimmigrant student and subsequently adjusted his status to legal permanent residence based on an employment opportunity. After he was placed in removal proceedings, though, he applied for asylum and withholding of removal. Conditions for Christians and his family in Pakistan had only worsened during the time he had spent in the United States.

At the end of Yusef's individual hearing, the immigration judge indicated that he found Yusef credible and believed that he had a well-founded fear of future persecution in Pakistan on account of his religion or his family ties. He said, however, that he would be inclined to deny Yusef asylum in an exercise of his discretion because of Yusef's criminal history,<sup>19</sup> which was not serious enough to

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17. The names and identifying details of the asylum seekers, as well as some aspects of the asylum seekers' stories, discussed in this Article have been changed to protect their privacy.

18. Some non-citizens detained during the pendency of their removal proceedings are eligible to be released from detention upon payment of a bond or on their own recognizance. *See* INA § 236(a)(2), 8 U.S.C. § 1226(a)(2) (2006). Others, like Yusef, are subject to mandatory detention and are not eligible to be released on bond except under limited, extreme circumstances. *See* INA § 236(c), 8 U.S.C. § 1226(c) (2006).

19. Yusef had two convictions for financial crimes, but was sentenced only to probation and did not serve any jail time.



constitute a mandatory bar to asylum, and that if either party intended to file an appeal in the case he would need time to further review the record and draft his decision. The attorney for the Department of Homeland Security said that he would not appeal a grant of withholding of removal if Yusef agreed not to appeal a denial of asylum. Yusef, offered a certain way to stay in the United States, albeit with limited benefits, versus additional, potentially significant time in detention while an appeal was adjudicated with an uncertain outcome, agreed to accept withholding of removal.

If Yusef had been granted asylum, he would have been able to travel freely and eventually would have been eligible to apply again for legal permanent residence or even citizenship. Because the court granted him only withholding of removal, however, he may never leave the United States without executing the order of removal against him. He will likely never be able to travel to visit his siblings in Canada and England. More importantly, he was unable to see his mother before she died of cancer after his individual hearing because the United States was too far for her to travel and he was unable to leave the United States to travel to a third country closer to her.

Furthermore, Yusef will always face the potential risk of being removed to some country other than Pakistan. Because this option exists, Yusef has had to attend regular meetings with a deportation officer and report his travel inside the United States. He could be subjected to these check-ins for the rest of his life. His status in the United States will always be precarious, and a potential hindrance to his future life, but he will likely have no opportunity to regularize it. He cannot even seek a more secure status elsewhere without giving up the right to return to the United States, the country where one of his children was born and where he and his family made their lives, without special permission.<sup>20</sup>

### 3. Case Study Conclusions

In both of these cases, it is important to note that the respective immigration judges found that it was *more likely than not* that Celine and Yusef would be persecuted if forced to return to their home

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20. As required by *I-S- & C-S*, 24 I. & N. Dec. 432, 433–34 (BIA 2008), the immigration judge entered an order of removal against Yusef before granting withholding of removal. As a result, it will probably be necessary for Yusef to convince the Department of Homeland Security to join him in a joint motion to reopen his removal proceedings in order for him ever to obtain any immigration benefit that he might become eligible for in the future. See INA § 240(c)(7), 8 U.S.C. § 1229a(c)(7) (2006); 8 C.F.R. § 1003.23(b)(4)(iv) (2010).

countries. That is, they met a factual burden many times higher than they needed to in order to be eligible for asylum.<sup>21</sup> Yet both were nevertheless denied asylum in an exercise of the immigration judges' discretion. Law and precedent did not mandate these outcomes; an adjudicator faced with these facts could have—and possibly should have—easily reached the opposite outcome. As a result of being denied asylum, Celine and Yusef faced extreme consequences. While they were protected from persecution and could legally work, Celine and Yusef did not and will not receive any other benefits in the United States. They were separated from family, their freedom of movement was restricted, and they will always have the threat of deportation from the country where they have built a life hanging over them. Ultimately, they became a very real form of second-class, long-term residents in the United States.

*B. How Did Discretion Become an Element in Asylum Eligibility?*

“Asylum” as it exists today became a part of immigration law in the United States with the Refugee Act of 1980.<sup>22</sup> While the history of protection from persecution for immigrants to the United States is somewhat lengthy, for purposes of this Article it is sufficient to understand that the primary form of relief prior to 1980 for non-citizens within the United States who feared a return to their home country was withholding of removal, which authorized the Attorney General to “withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion.”<sup>23</sup> Withholding of removal was understood to be discretionary.<sup>24</sup> The Refugee Act of 1980, intended to bring United States law into compliance with our obligations under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees,<sup>25</sup> made withholding of removal mandatory.<sup>26</sup>

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21. In order to be eligible for asylum, an applicant must demonstrate a one in ten chance of future persecution; in order to be granted withholding of removal that same applicant must demonstrate that the likelihood of future persecution is greater than 50 percent. *See infra* text accompanying notes 43 and 50.

22. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102, 105 (codified as amended in scattered sections of 8 U.S.C.).

23. *See* INA § 243(h), 8 U.S.C. § 1253(h) (2006).

24. *See* *INS v. Stevic*, 467 U.S. 407, 423 n.18 (1984).

25. *See id.* at 421–22; *see also* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223.

26. Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107; *see also Stevic*, 467 U.S. at 421.

Article 33 of the 1951 Convention as amended and incorporated by the 1967 Protocol provide that “[n]o 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.”<sup>27</sup> This is commonly known as the obligation of “non refoulement.” Because, before 1980, withholding of removal was both discretionary and the only form of protection from return to persecution for individuals inside the United States, the United States was at least potentially failing to comply with its non-refoulement obligation: an individual denied withholding of removal in an exercise of the adjudicator’s discretion could be returned to a country where “his life or freedom would be threatened” on account of one of the protected grounds.<sup>28</sup> Withholding of removal was therefore made mandatory by the Refugee Act of 1980 to conform to the obligation of non refoulement.<sup>29</sup>

At the same time as withholding was made mandatory, a new form of relief from removal to a country of persecution was created: asylum. The Refugee Act of 1980 added INA section 208 which then, as now, provided that the Attorney General may grant asylum to those meeting the definition of a refugee.<sup>30</sup> A “refugee” was defined as:

[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that

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27. Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223.

28. *Id.* It is worth noting that the United States appears to have taken the position that it was in compliance with Article 33 even before the Refugee Act of 1980. H.R. REP. NO. 96-608, at 17–18 (1979) (“Although this section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it is desirable, for the sake of clarity, to conform the language of that section to the Convention.”). This was at least in part because administrative action took care of the apparent discrepancy between the Refugee Convention and Protocol and the language of the INA; in practice withholding of removal was not, or only rarely, denied in an exercise of discretion. *Stevic*, 467 U.S. at 429 (“The Attorney General, however, could naturally accommodate the Protocol simply by exercising his discretion to grant such relief in each case in which the required showing was made, and hence no amendment of the existing statutory language was necessary.”).

29. *Stevic*, 467 U.S. at 421 (“Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol.”).

30. Refugee Act of 1980 § 208.

country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>31</sup>

Asylum was understood from its inception to be a non-mandatory form of relief. In fact, INA section 208 as enacted in 1980 was explicitly discretionary. It stated: “[A]n alien . . . may be granted asylum *in the discretion of the Attorney General* if the Attorney General determines that such alien is a refugee . . . .”<sup>32</sup> The Supreme Court confirmed that this discretion meant more than the power to decide whether an applicant was statutorily eligible for asylum as early as 1984, stating in an aside in a footnote: “Meeting the definition of ‘refugee,’ however, does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a).”<sup>33</sup> The question of why asylum was created and understood as a discretionary form of relief is slightly more complex, simply because there is little direct evidence of why Congress made this change.

The term “discretion” remained a part of section 208(a) of the INA until 1996. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) passed that year enacted sweeping changes to many different facets of immigration law, including those dealing with asylum.<sup>34</sup> Section 208 was fundamentally restructured and expanded.<sup>35</sup> In the process, the equivalent of 208(a) was revised to read: “The Attorney General may grant asylum to an alien . . . if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).”<sup>36</sup> The phrase “in the discretion of the Attorney General” was removed entirely from section 208.

While there is substantial literature discussing the changes made by IIRIRA to immigration law generally and asylum law specifically,<sup>37</sup> this particular change appears to have been largely, if not entirely, overlooked. If observed in isolation as a textual interpreta-

31. INA § 101(a)(42)(a), 8 U.S.C. § 1101(a)(42)(A) (2006).

32. Refugee Act of 1980 § 208(a), 8 U.S.C. § 1158(b)(1)(A) (2006) (emphasis added).

33. *INS v. Stevic*, 467 U.S. 407, 423 n.18 .

34. *See* Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

35. *See id.* Notable other revisions include the adoption of a one year filing deadline for asylum claims and the enactment of an expedited removal procedure that affected asylum seekers arriving at the borders of the United States. *See id.*

36. IIRIRA, § 208(b)(1), 8 U.S.C. § 1158(b)(1) (1996). The language of INA § 208(b)(1) remains substantially the same today, differing only in the addition of references to the Secretary of Homeland Security. *See* INA § 208(b)(1), 8 U.S.C. § 1158(b)(1) (2006).

37. *See, e.g.,* SCHRAG, *supra* note 1.

tion question, this might appear to be a significant change, one that Congress intended to redefine the role of discretion in an asylum case or even to diminish its importance. Viewed in the context of the overwhelmingly more restrictive changes made by IIRIRA and other related 1996 laws,<sup>38</sup> however, it is abundantly clear that Congress did not intend to remove any barriers for asylum seekers.<sup>39</sup> The removal of this phrase may have been an oversight. It is more likely, however, that the phrase was removed as superfluous, as the statute still states that the adjudicator *may*, not *must*, grant asylum to eligible refugees. This interpretation is supported by the fact that the section of the INA dealing with judicial review of asylum claims still refers to “the Attorney General’s discretionary judgment whether to grant relief under section 208(a).”<sup>40</sup>

Asylum today is still viewed as a discretionary form of relief, while withholding of removal is mandatory relief.<sup>41</sup> There do not appear to be any publicly available cases, treatises, or law review articles that challenge or discuss this discretionary/mandatory distinction as a bedrock assumption of asylum law. There are also, however, other important differences between asylum and withholding of removal.

Asylum is still available to those who meet the definition of a refugee, that is, those who have suffered past persecution or who have a well-founded fear of future persecution on account of one of the five protected grounds.<sup>42</sup> The Supreme Court has held that a one in ten chance of future persecution is enough to demonstrate that a fear of persecution is well-founded.<sup>43</sup> An individual granted asylum is given permanent legal status in the United States.<sup>44</sup> Such individuals may apply immediately to bring spouses and minor children to join them as derivative asylees in the United States,<sup>45</sup>

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38. See Illegal Immigration Reform and Immigration Responsibility Act, Pub. Law 104-208, 110 Stat. 3009 (1996). These changes included the creation of the one year filing deadline for asylum seekers and the application of expedited removal procedures to individuals seeking asylum at the borders of the United States. *Id.* at §§ 302, 604.

39. See, e.g., SCHRAG, *supra* note 1, at 225–39.

40. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (2006); see also *Huang v. INS*, 436 F.3d 89, 97 n.9 (2d Cir. 2006).

41. See, e.g., GORDON ET AL., *supra* note 8, at § 34.02(12)(d); IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK Ch. 4, §§ III.F, IV (12th ed. 2010).

42. See INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006); see also INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006).

43. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439–40 (1987).

44. See INA § 208(c)(1)(A), 8 U.S.C. § 1158(c)(1)(A) (2006); 8 C.F.R. 208.14(e) (2010) (“If the applicant is granted asylum, the grant will be effective for an indefinitely period, subject to termination as provided for in 208.24.”). *But cf.* 8 U.S.C. 1158(c)(2) (2006) (allowing the Attorney General to act to terminate asylum status if certain conditions are met).

45. See INA § 208(b)(3)(A), 8 U.S.C. § 1158(b)(3)(A) (2006).

they may work legally in the United States,<sup>46</sup> they may travel into and out of the United States with the permission of the government,<sup>47</sup> and they will eventually be eligible to apply for permanent legal residence and United States citizenship.<sup>48</sup>

Individuals who are not granted asylum but who demonstrate that their “li[ves] or freedom would be threatened” in their country on account of one of the five protected grounds are granted withholding of removal.<sup>49</sup> The Supreme Court has held that “would be threatened” means a clear probability, or a greater than 50 percent chance, of future persecution.<sup>50</sup> Withholding of removal prevents foreign nationals from being sent back to the country where they would be persecuted<sup>51</sup> and allows them to work legally while in the United States;<sup>52</sup> however, it comes with few other benefits. Unlike an asylee, an individual granted withholding of removal has an order of removal against him or her<sup>53</sup> and therefore cannot easily travel outside the United States, cannot apply to bring family members to the United States, and is not entitled to apply for legal permanent residency or United States citizenship.

Both the Department of Justice (DOJ), under the direction of the Attorney General, and the Department of Homeland Security (DHS), under the direction of the Secretary of Homeland Security, are responsible for adjudicating asylum applications.<sup>54</sup> USCIS, within DHS, hears and makes discretionary determinations on affirmative asylum applications, that is, applications filed by individuals who are not in removal proceedings.<sup>55</sup> Asylum officers within USCIS have the power to grant asylum applications, and they may deny applications only for individuals still in some legal

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46. INA § 208(c)(1)(B), 8 U.S.C. § 1158(c)(1)(B) (2006).

47. INA § 208(c)(1)(C), 8 U.S.C. § 1158(c)(1)(C) (2006). An asylee may not, however, be able to travel back to her country of persecution. *See* INA § 208(c)(2)(D), 8 U.S.C. § 1158(c)(2)(D) (2006).

48. *See* INA § 209(b), 8 U.S.C. § 1159(b) (2006); INA § 316, 8 U.S.C. § 1427 (2006).

49. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006). While the INA today calls this form of relief “restriction on removal,” it is more commonly known as withholding or withholding of removal because of its history. *See, e.g.,* GORDON ET AL., *supra* note 8, at § 34.03(1). There are reasons other than a discretionary denial of asylum that an individual might be granted withholding of removal in the alternative, including the one year filing deadline, INA § 208(a)(2)(B), 8 U.S.C. § 1158(a)(2)(B) (2006), the particularly serious crime bar due to conviction of an aggravated felony with a sentence of less than five years, INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006), or one of the other bars to relief applicable to asylum but not to withholding of removal.

50. *See* *INS v. Stevic*, 467 U.S. 407, 413, 429–30 (1984).

51. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (2006).

52. 8 C.F.R. § 274a.12(a)(10) (2010).

53. *See* I-S- & C-S-, 24 I. & N. Dec. 432 (BIA 2008).

54. INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006).

55. 8 C.F.R. §§ 208.2, 208.14(b) (2010).

immigration status. If they do not want to grant asylum to an individual who is not in a valid immigration status, they do not deny the application but instead refer that individual to the immigration courts, where he will have another opportunity to present his claim for asylum.<sup>56</sup> Immigration judges, within DOJ, hear these referred asylum claims as well as defensive asylum applications raised by individuals for the first time in removal proceedings.<sup>57</sup> There is no appeal of an Asylum officer's decision other than renewing the claim for asylum before an immigration judge.<sup>58</sup> Adverse immigration judge decisions may be appealed to the Board of Immigration Appeals (BIA),<sup>59</sup> and ultimately to the federal Circuit Court with jurisdiction over the place where the proceedings before the immigration judge took place.<sup>60</sup>

The standard of review is quite different at the various levels. An immigration judge is not bound by an asylum officer's discretionary determination. The BIA reviews an immigration judge's discretionary determination *de novo*.<sup>61</sup> The ability to review discretionary determinations at the administrative level, then, is quite broad and unconstrained by deference to the adjudicator at the level below.

Review of discretionary determinations at the circuit court level, on the other hand, is extremely deferential. The INA states that the Attorney General's discretionary decision in asylum claims "shall be conclusive unless manifestly contrary to the law and an abuse of discretion."<sup>62</sup> Abuse of discretion is one of the most deferential standards of review a circuit court may apply.<sup>63</sup> It has been defined in this context as action by the BIA that is "arbitrary, irrational, or contrary to law."<sup>64</sup> In practice, the circuits struggle with what this standard means<sup>65</sup> and apply it somewhat inconsistently.<sup>66</sup>

56. 8 C.F.R. §§ 208.14(c)(1), 1208.14(c)(1)(2010).

57. See 8 C.F.R. § 1208.2(b) (2010).

58. See 8 C.F.R. §§ 208.14(c), 1208.14(c) (2010).

59. 8 C.F.R. § 1003.1(b)(9) (2010).

60. INA § 242(a), 8 U.S.C. § 1252(a) (2006); 28 U.S.C. §§ 2341, 2342, 2343 (2006).

61. See 8 C.F.R. § 1003.1(d)(3)(ii); Burbano, 20 I. & N. Dec. 872, 873 (BIA 1994).

62. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (2006); see also, e.g., Zuh v. Mukasey, 547 F.3d 504, 506–07 (4th Cir. 2008); Kouljinski v. Keisler, 505 F.3d 534, 541 (6th Cir. 2007).

63. 6-51 ADMINISTRATIVE LAW § 51.03 (Matthew Bender ed., 2011).

64. *Kouljinski*, 505 F.3d at 541 (citing *Gilaj v. Gonzales*, 408 F.3d 275, 288 (6th Cir. 2005)).

65. See, e.g., *Huang v. INS*, 436 F.3d 89, 96–97 n.8 (2d Cir. 2006).

66. Compare, e.g., *Kouljinski*, 505 F.3d at 541–43 (considering only whether two particular discretionary factors considered by the immigration judge and the BIA were permissible factors) with *Zuh*, 547 F.3d at 510–12 (setting out a list of discretionary factors for adjudicators to consider and emphasizing the immigration judge's failure to balance the positive and negative factors that existed in the case).

They are as a whole, however, relatively reluctant to overturn discretionary determinations made by the executive branch.<sup>67</sup> Discretionary determinations in asylum claims remain one of the few discretionary determinations that are reviewable at the circuit court level at all. As part of the IIRIRA, Congress removed jurisdiction from the federal courts to review:

[A]ny judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . .<sup>68</sup>

The INA sections referenced by Congress include most forms of discretionary relief other than fear-based relief available in removal proceedings: certain waivers of inadmissibility, all types of cancellation of removal, voluntary departure, and adjustment of status. It is likely that jurisdiction stripping informs the circuit courts' application of the abuse of discretion standard as it applies to discretionary determinations in asylum claims, causing them to be even more deferential than this already extreme standard of deference would otherwise demand.

Asylum officers are delegated their authority to adjudicate asylum claims by the Secretary of Homeland Security, while immigration judges are delegated their authority by the Attorney General. Therefore, each could receive separate and potentially distinct instructions on what discretion means in this context and how to exercise it. Despite this risk, as discussed in more detail below, both agencies apply the same basic standard.<sup>69</sup> As neither DOJ

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67. Cf., e.g., *Zuh*, 547 F.3d at 507–08, 513 (explaining the infrequency with which circuit courts overturn a discretionary denial of asylum but in fact reversing and remanding such a denial). Note, however, that *Zuh* likely overstates the rarity of discretionary denials as it appears to rely only on published Board of Immigration Appeals decisions and publically available circuit court decisions, which together represent only a small percentage of total immigration cases, in its analysis. *Id.*

68. INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2006).

69. This may be at least in part a function of the history of the administrative structure of the relevant agencies. Up until 2003, the only relevant agency was the DOJ under the direction of the Attorney General. Prior to 1983, there was a single agency within the DOJ responsible for immigration, the Immigration and Naturalization Service or INS. See Fed. Reg. 9115 (Nov. 26, 1958). The INS contained immigration judges responsible for adjudicating deportation cases, officers responsible for awarding immigration benefits to those who applied affirmatively, and officers charged with enforcing the federal immigration laws. *Id.* In 1983, a separate agency was created within DOJ to house the adjudication functions: the Executive Office for Immigration Review, or EOIR, which was comprised of the immigration judges and the Board of Immigration Appeals. Immigration Review Function; Editorial



nor DHS has clarified standards by issuing regulations for this exercise of discretion in asylum cases, the standard is elucidated only in internal agency memoranda and manuals, publicly available decisions of the agencies,<sup>70</sup> and decisions of the federal circuit courts.<sup>71</sup>

### *C. What Does “Discretion” Mean Today in the Context of an Asylum Case?*

#### 1. The Basic Application of Discretion

The mere fact that asylum remains unquestioningly discretionary does not answer the questions what it means for an adjudicator to exercise that discretion and when and how it is exercised. The most straightforward explanation is that, once an adjudicator has determined that an applicant meets all requirements to be statutorily eligible for asylum, an adjudicator must then decide whether, in an exercise of his or her discretion, to grant that form of relief.<sup>72</sup> The reverse is not true—an adjudicator cannot grant asylum to an applicant who is for any reason not statutorily eligible.<sup>73</sup>

Over time, a list of factors intended to guide this exercise of discretion has developed. The list of discretionary factors used today

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Amendments, 48 Fed. Reg. 8038 (Feb. 25, 1983). Both EOIR and the INS remained under the direction of DOJ and the Attorney General until 2003. In 2003, in response in significant part to the terrorist attacks of September 11, 2001, the Homeland Security Act created the Department of Homeland Security under the Secretary of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135, 2142. The effective date of the Homeland Security Act of 2002 was sixty days after enactment, or January 24, 2003. *Id.* The INS was abolished, and its functions were for the most part shifted to three separate agencies within DHS: United States Citizenship and Immigration Services or USCIS, responsible for affirmative immigration benefits; Immigration and Customs Enforcement; and Customs and Border Patrol. *See* Homeland Security Act of 2002, §§ 471 (abolishment of INS), 451 (Bureau of Citizenship and Immigration Services), 442 (Bureau of Border Security), 411 (U.S. Customs Service), (codified respectively at 6 U.S.C. §§ 211, 271, 252); 8 C.F.R. 1.1(x)-(z) (2011) (listing the current names of the agencies, which have been changed on multiple occasions). EOIR, including the immigration judges, remained within DOJ. 8 C.F.R. § 1003.0(a) (2011).

70. Because neither immigration judges nor asylum officers issue published or pre-emptive decisions in individual cases, these are primarily decisions of the BIA.

71. USCIS also acknowledges that its asylum officers are bound by BIA and applicable circuit court decisions in making discretionary determinations on applications for asylum. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., *Sources of Authority, ASYLUM OFFICER BASIC TRAINING COURSE* (2007); U.S. CITIZENSHIP & IMMIGRATION SERVS., *Mandatory Bars to Asylum and Discretion, ASYLUM OFFICER BASIC TRAINING COURSE* (2009) [hereinafter *Mandatory Bars to Asylum and Discretion*].

72. *See, e.g.,* GORDON ET AL., *supra* note 8, at § 34.02(12)(d); KURZBAN, *supra* note 41, at 519.

73. *See generally,* GORDON ET AL., *supra* note 8, at § 34.02(12)(d); KURZBAN, *supra* note 41, at 519; *see also Mandatory Bars to Asylum and Discretion, supra* note 71, at 34.

stems from a series of BIA cases decided beginning early in the 1980's, just after the Refugee Act of 1980 was enacted.<sup>74</sup> A BIA case from 1987, *Pula*,<sup>75</sup> is the seminal case in this respect. With some minor modifications and changes in emphasis, the list of factors identified in *Pula* is still referenced by adjudicators in both USCIS<sup>76</sup> and EOIR,<sup>77</sup> and *Pula* remains the most frequently cited case by the federal circuit courts.<sup>78</sup> The factors listed in *Pula*, however, have been fleshed out, and several additional considerations have been added by subsequent agency case law and guidance. The basic discretionary factors considered today can be divided into two major categories: factors related to immigration and asylum process and procedures specifically, and factors related to the applicant's life more generally.

Within the first category, adjudicators primarily focus on how the applicant came to be in the United States and her conduct during the application process. Adjudicators also look to the applicant's circumstances before coming to the United States, including whether the applicant passed through other countries on the way to the United States,<sup>79</sup> whether he or she could have found safe haven in a third country,<sup>80</sup> and whether overseas refugee procedures were available to the applicant.<sup>81</sup> Adjudicators also focus on how the applicant entered the United States;<sup>82</sup> if the applicant is

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74. See *Pula*, 19 I. & N. Dec. 467 (BIA 1987); *Gharadaghi*, 19 I. & N. Dec. 311 (BIA 1985); *Shirdel*, 19 I. & N. Dec. 33 (BIA 1984); *Salim*, 18 I. & N. Dec. 311 (BIA 1982).

75. *Pula*, 19 I. & N. Dec. 467 (BIA 1987).

76. See *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

77. See, e.g., *S-K*, 24 I. & N. Dec. 475, 477 (BIA 2008).

78. See, e.g., *Singh v. Holder*, 638 F.3d 1264, 1271 (9th Cir. 2009); *Zuh v. Mukasey*, 547 F.3d 504, 510 (4th Cir. 2008); *Edimo-Doualla v. Gonzales*, 464 F.3d 276, 288 (2d Cir. 2006); *Alsaghladi v. Gonzales*, 450 F.3d 700, 701–02 (7th Cir. 2006); *Aden v. Ashcroft*, 112 Fed. Appx. 852, 854 (3rd Cir. 2004); *Farbakhsh v. INS*, 20 F.3d 877, 881 (8th Cir. 1994).

79. See, e.g., *Gulla v. Gonzales*, 498 F.3d 911, 917–18 (9th Cir. 2007); *Tandia v. Gonzales*, 437 F.3d 245, 248–49 (2d Cir. 2006); *Alsaghladi v. Gonzales*, 450 F.3d 700, 702 (7th Cir. 2006); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004) (note that the regulations discussed no longer exist); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1140 (9th Cir. 2004); *Andriasan v. INS*, 180 F.3d 1033, 1042–47 (9th Cir. 1999); *Izatula*, 20 I. & N. Dec. 149, 154 (BIA 1990); *Soleimani*, 20 I. & N. Dec. 99, 105–07 (BIA 1989); *Pula*, 19 I. & N. Dec. at 473; *Gharadaghi*, 19 I. & N. Dec. 311, 314–16 (BIA 1985).

80. See, e.g., *Gulla*, 498 F.3d at 917–18; *Tandia*, 437 F.3d at 248–49; *Alsaghladi*, 450 F.3d at 702; *Mamouzian*, 390 F.3d at 1138 (note that the regulations discussed no longer exist); *Kalubi*, 364 F.3d at 1140; *Andriasan*, 180 F.3d at 1042–47; *Soleimani*, 20 I. & N. Dec. at 105–07; *Pula*, 19 I. & N. Dec. at 473, 474; *Gharadaghi*, 19 I. & N. Dec. at 314–16.

81. See, e.g., *Gulla*, 498 F.3d at 917–18; *Alsaghladi*, 450 F.3d at 702; *Andriasan*, 180 F.3d at 1042–47; *Pula*, 19 I. & N. Dec. at 473–74; *Gharadaghi*, 19 I. & N. Dec. at 314–16; *Shirdel*, 19 I. & N. Dec. 33, 37–39 (BIA 1984); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

82. See, e.g., *Li v. Holder*, 2011 U.S. App. LEXIS 18208, at \*20–22 (9th Cir. Sep. 1, 2011); *Zuh*, 547 F.3d at 511; *Gulla*, 498 F.3d at 916–17; *Huang v. INS*, 436 F.3d 89, 99–100 (2d Cir. 2006); *Alsaghladi*, 450 F.3d at 701–02; *Mamouzian*, 390 F.3d at 1138; *Kasinga*, 21 I. & N.

in removal proceedings, the nature and circumstances of the charged grounds for removal;<sup>83</sup> and any other violations of U.S. immigration law.<sup>84</sup> Fraud is a major concern at all times, causing adjudicators to scrutinize closely the nature and degree of any fraud involved in the applicant's flight from persecution or entry into the United States.<sup>85</sup> They also closely inspect the applicant's level of candor with immigration officials through his or her entire immigration history, including an actual adverse credibility finding by an adjudicator at any point during the asylum process.<sup>86</sup>

Within the second category, adjudicators take a broad focus, looking at multiple facets of the applicant's life outside of the immigration and asylum process. Adjudicators consider an applicant's ties to the United States,<sup>87</sup> including how long the applicant has lived here,<sup>88</sup> whether he or she has family here and the immigration status of such family members,<sup>89</sup> and community ties.<sup>90</sup> Business and employment relationships and property ownership are also relevant.<sup>91</sup> These ties to the United States are often compared to the applicant's ties to third countries, that is, countries other than the United States and the country of feared

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Dec. 357, 368 (BIA 1996); *Soleimani*, 20 I. & N. Dec. at 107–08; *Pula*, 19 I. & N. Dec. at 474; *Gharadaghi*, 19 I. & N. Dec. at 314–16; *Salim*, 18 I. & N. Dec. 311, 315–316 (BIA 1982).

83. See, e.g., *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 35.

84. See, e.g., *Kaur v. Holder*, 561 F.3d 957, 959–60 (9th Cir. 2009); *Aioub v. Mukasey*, 540 F.3d 609, 612 (7th Cir. 2008); *Ibrahim v. Gonzales*, 434 F.3d 1074, 1079 (8th Cir. 2006); *Soleimani*, 20 I. & N. Dec. at 108; *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 35.

85. See, e.g., *Alsaghladi*, 450 F.3d at 701–02; S-A-, 22 I. & N. Dec. 1328, 1337 (BIA 2000); *Kasinga*, 21 I. & N. Dec. at 368; *Izatula*, 20 I. & N. Dec. 149, 154 (BIA 1990); *Soleimani*, 20 I. & N. Dec. at 107; *Pula*, 19 I. & N. Dec. at 474; *Gharadaghi*, 19 I. & N. Dec. at 314–16; *Shirdel*, 19 I. & N. Dec. at 37–39; *Salim*, 18 I. & N. Dec. at 315–16; *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

86. See, e.g., *Kaur*, 561 F.3d at 959–60, 961–62; *Ibrahim*, 434 F.3d at 1079; *In re T-Z-*, 24 I. & N. Dec. 163, 165 (BIA 2007); S-A-, 22 I. & N. Dec. at 1337; *Gharadaghi*, 19 I. & N. Dec. at 314–16; *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 35.

87. See, e.g., *Zuh v. Mukasey*, 547 F.3d 504, 511 (4th Cir. 2008); *Pula*, 19 I. & N. Dec. at 473–74.

88. See, e.g., *Chen*, 20 I. & N. Dec. 16, 21 (BIA 1989) (discretionary grant noting that the respondent had lived in the United States for more than eight years); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

89. See, e.g., *Kouljinski v. Keisler*, 505 F.3d 534, 543 (6th Cir. 2007); A-H-, 23 I. & N. Dec. 774, 783 (AG 2005); *Kasinga*, 21 I. & N. Dec. at 359; H-, 21 I. & N. Dec. 337, 347–48 (BIA 1996); *Izatula*, 20 I. & N. Dec. at 154; *Soleimani*, 20 I. & N. Dec. at 108; *Pula*, 19 I. & N. Dec. at 474; *Gharadaghi*, 19 I. & N. Dec. at 314–16; *Shirdel*, 19 I. & N. Dec. at 37–39; *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

90. See, e.g., *Zuh*, 547 F.3d at 511; *Pula*, 19 I. & N. Dec. at 474; *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

91. See, e.g., *Zuh*, 547 F.3d at 511; *Dhine v. Slattery*, 3 F.3d 613, 619–20 (2d Cir. 1993); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

persecution.<sup>92</sup> As part of this analysis, adjudicators are directed to consider evidence of hardship to the applicant and his or her family if deported to another country, or if denied asylum such that the applicant cannot be reunited with family members in this country.<sup>93</sup> In addition, adjudicators assess both positive and negative aspects of an applicant's past conduct, considering good character, value, and service to the community,<sup>94</sup> proof of rehabilitation if the applicant has a criminal record,<sup>95</sup> the nature, recentness, and seriousness of any criminal record,<sup>96</sup> terrorist activities,<sup>97</sup> and any other behavior or evidence that indicates bad character or undesirability for permanent residence in the United States.<sup>98</sup> Finally, humanitarian considerations such as age or health are also germane.<sup>99</sup>

The discretionary determination is often treated as a balancing test, with adjudicators weighing the positive factors against any negative factors.<sup>100</sup> Because asylum allows an individual to apply for

92. See, e.g., *Kasinga*, 21 I. & N. Dec. at 368; *Izatula*, 20 I. & N. Dec. at 154; *Chen*, 20 I. & N. Dec. at 21; *Soleimani*, 20 I. & N. Dec. at 108; *Pula*, 19 I. & N. Dec. at 474–75.

93. See 8 C.F.R. § 1208.16(e) (2010); see also, e.g., *Zuh*, 547 F.3d at 511; *Huang v. INS*, 436 F.3d 89, 100–01 (2d Cir. 2006); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1140–41 (9th Cir. 2004); *T-Z-*, 24 I. & N. Dec. 163, 165 (BIA 2007); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

94. See, e.g., *Zuh*, 547 F.3d at 511; *Dhine v. Slattery*, 3 F.3d 613, 619–20 (2d Cir. 1993); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

95. See, e.g., *Dhine*, 3 F.3d at 619–20; *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

96. See, e.g., *Jean*, 23 I. & N. Dec. 373, 385 (AG 2002):

I am highly disinclined to exercise my discretion—except, again, in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of relief would result in exceptional and extremely unusual hardship—on behalf of dangerous or violent felons seeking asylum. As with applications for adjustment of status, even a showing of exceptional and extremely unusual hardship may be inadequate to justify a grant of asylum, depending on the nature of the alien's crime.

*Zuh*, 547 F.3d at 511; *Kouljinski v. Keisler*, 505 F.3d 534, 542–43 (6th Cir. 2007); *Tandia v. Gonzales*, 437 F.3d 245, 250 n.12 (2d Cir. 2006); *Dhine*, 3 F.3d at 619–20; *T-Z-*, 24 I. & N. Dec. at 165; *Gonzalez*, 19 I. & N. Dec. 682, 685 (BIA 1988); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 35, 36.

97. See, e.g., *Kaur v. Holder*, 561 F.3d 957, 959–60 (9th Cir. 2009); *Kalubi*, 364 F.3d at 1139; *S-K-*, 24 I. & N. Dec. 475, 477 (BIA 2008); *A-H-*, 23 I. & N. Dec. 77, 782 (AG 2005); *McMullen*, 19 I. & N. Dec. 90, 99–100 (BIA 1984); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 35.

98. See, e.g., *Zuh*, 547 F.3d at 511; *A-H-*, 23 I. & N. Dec. at 782–83; *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 35.

99. See, e.g., *Kalubi*, 364 F.3d at 1141; *H-*, 21 I. & N. Dec. 337, 347–48 (BIA 1996); *Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

100. See *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34. See also, e.g., *Zuh*, 547 F.3d at 511; *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007); *Mamouzian v. Ashcroft*,

legal permanent residence and, if granted residency, eventually for U.S. citizenship, the question is sometimes posed as whether the applicant is someone deserving of full rights and membership in the community of the United States.<sup>101</sup> The BIA has emphasized that the facts should be weighed in favor of granting asylum, as “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”<sup>102</sup> Although its interpretation of what exactly constitutes a particularly egregious negative factor has changed over time,<sup>103</sup> both the BIA and the federal courts have adhered to this general principle, at least in name.<sup>104</sup>

## 2. Other Interpretations of Discretion

This discussion of discretion in asylum cases, however, is somewhat oversimplified. While it is tempting to assert that discretionary determinations in asylum cases are no more than a straightforward weighing of factors unrelated to eligibility for asylum in the first instance, that is in fact not the case. The boundary between substantive qualification and discretionary determination has been blurred in at least two separate respects. First, there has been some fluidity between what constitutes a discretionary factor and what is instead an element of statutory eligibility. Second,

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390 F.3d 1129, 1138 (9th Cir. 2004); *Kalubi*, 364 F.3d at 1139; *Kasinga*, 21 I. & N. Dec. 357, 367–68 (BIA 1996) (“We have weighed the favorable and adverse factors and are satisfied that discretion should be exercised in favor of the applicant.”); *Soleimani*, 20 I. & N. Dec. 99, 108 (BIA 1989) (“Under the balancing analysis set forth in *Matter of Pula*, *supra*, the Board finds that a grant of asylum is warranted as a matter of discretion.”); *Gharadaghi*, 19 I. & N. Dec. 311, 316 (BIA 1985) (“[W]e are unable to conclude that the applicant has established sufficient equities to outweigh the negative factors in the record.”); *Shirdel*, 19 I. & N. Dec. 33, 38 (BIA 1984) (“We have weighed all the equities . . . .”); *A-H-*, 23 I. & N. Dec. at 782–83 (AG 2005).

101. See, e.g., *A-H-*, 23 I. & N. Dec. at 782–83 (“My view, based on a thorough review of the record and considering the balance of factors discussed above, is that respondent is not entitled to become a lawful permanent resident of the United States. Therefore, I deny respondent’s application for asylum in the exercise of my discretion.”).

102. *Pula*, 19 I. & N. Dec. at 474.

103. Compare, e.g., *Salim*, 18 I. & N. Dec. 311, 315–16 (BIA 1982) (“This Board finds that the fraudulent avoidance of the orderly refugee procedures that this country has established is an extremely adverse factor which can only be overcome with the most unusual showing of countervailing equities.”) with *Pula*, 19 I. & N. Dec. at 473–74 (“[W]e agree with the applicant that *Matter of Salim* places too much emphasis on the circumvention of orderly refugee procedures.” (internal citation omitted)).

104. See, e.g., *Zuh*, 547 F.3d at 512–13; *S-K-*, 24 I. & N. Dec. 475, 477 (BIA 2008) (“We also find that the respondent deserves a favorable exercise of discretion in the absence of any notable adverse factors.”); *Izatula*, 20 I. & N. Dec. 149, 154 (BIA 1990) (“As there are no adverse factors in his record, we find . . . that the applicant’s asylum application should be approved as a matter of discretion.”).

persecution, and particularly the degree of severity of the past persecution, has explicitly been made a part of the discretionary calculus.

*a. Discretionary Factor or Element of Statutory Eligibility?*

A number of factors—among them firm resettlement,<sup>105</sup> safe haven in a third country,<sup>106</sup> and conviction of a particularly serious crime<sup>107</sup>—have been considered part of both the statutory structure governing eligibility for asylum and the discretionary analysis. Today, an individual may not be granted asylum if he or she “was firmly resettled in another country prior to arriving in the United States.”<sup>108</sup> “Firmly resettled” is defined, with certain exceptions, as “an offer of permanent resident status, citizenship, or some other type of permanent resettlement.”<sup>109</sup> An individual further is not eligible for asylum if he or she may be removed, pursuant to a treaty, to a “safe third country.”<sup>110</sup> This bar is of relatively narrow applicability because the United States has such a treaty only with Canada, and even then the bar applies only under certain circumstances in the absence of enumerated exceptions.<sup>111</sup> Finally, an applicant is barred from asylum if he or she, “having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.”<sup>112</sup> An aggravated felony is always a particularly serious crime for purposes of asylum adjudications;<sup>113</sup> whether or not other crimes (and which ones)

105. See INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi) (2006).

106. See INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A) (2006).

107. See INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006).

108. INA § 208(b)(2)(A)(vi), 8 U.S.C. § 1158(b)(2)(A)(vi) (2006); see also 8 C.F.R. § 1208.13(c)(1), (2)(B) (2010).

109. 8 C.F.R. § 1208.15 (2010). An individual with such an offer is considered to be firmly resettled unless (1) entry into the offering country was “a necessary consequence of . . . flight from persecution,” only “as long as was necessary to arrange onward travel,” and without the development of “significant ties” or (2) “the conditions of . . . residence in that country were . . . substantially and consciously restricted.” *Id.*

110. See INA § 208(a)(2)(A), 8 U.S.C. § 1158(a)(2)(A) (2006).

111. See United States-Canada Safe Third Country Agreement, U.S.-Can., Aug. 30, 2002, State Dept. No. 05-35; 8 C.F.R. § 208.30(e)(6) (2010).

112. INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (2006).

113. INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006). Aggravated felony is a term of art defined at INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006). Particularly serious crime is defined differently for purposes of restriction on (withholding of) removal. See INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2006).

may also constitute particularly serious crimes differs between Circuits.<sup>114</sup>

The firm resettlement and particularly serious crimes bars have been part of the regulations governing asylum adjudications since as early as 1981.<sup>115</sup> Before 1996, however, these regulations applied only to the “district director,” that is, adjudicators hearing affirmative applications for asylum;<sup>116</sup> they did not apply to immigration judges hearing asylum applications in defense to exclusion or deportation.<sup>117</sup> At the same time, firm resettlement and an applicant’s criminal history have consistently been part of the discretionary analysis for asylum since the Refugee Act of 1980. *Pula* specifically listed “the length of time the alien remained in a third country, and his living conditions, safety, and potential for long-term residency there” in its first list of enumerated discretionary factors.<sup>118</sup> These particular factors were considered, for example, in *Matter of Soleimani*, where the BIA analyzed the Iranian national respondent’s ties to Israel, but ultimately concluded that they did not warrant a discretionary denial where she entered Israel on a nonimmigrant visa, did not receive an offer of more permanent status, and did not work or seek employment, but simply took language classes and recuperated from pneumonia.<sup>119</sup> Criminal convictions, likewise, were frequently an important discretionary factor. In *Matter of Gonzalez*, the BIA considered the respondent’s two criminal convictions for

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114. Compare, e.g., *Alaka v. Attorney General*, 456 F.3d 88, 104 (3d Cir. 2006) (holding that an offense must be an aggravated felony in order to be found a particularly serious crime for purposes of the bar to withholding of removal) with *Ali v. Achim*, 468 F.3d 462, 470 (7th Cir. 2006) (holding that an offense need not be an aggravated felony in order to be found a particularly serious crime that will bar withholding of removal); but see *N-A-M-*, 24 I. & N. Dec. 336, 337 (BIA 2007) (holding, subsequent to *Alaka* and *Ali*, that a crime need not be an aggravated felony in order to bar withholding of removal as a particularly serious crime). Note that separate statutory provisions, with slightly different language, create the particularly serious crime bars for withholding of removal and for asylum and that the term “particularly serious crime” is therefore sometimes interpreted differently depending on the form of relief. Compare INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006) (for purposes of asylum, “an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.”), with INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2006) (For purposes of withholding of removal, “an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.”). See also, e.g., *Gao v. Holder*, 595 F.3d 549, 553–58 (4th Cir. 2010).

115. See 8 C.F.R. § 208.8 (1981).

116. See *id.*

117. See, e.g., *Gonzalez*, 19 I. & N. Dec. 682, 684 (BIA 1988).

118. *Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

119. See *Soleimani*, 20 I. & N. Dec. 99, 107–08 (BIA 1989).

possession of heroin with intent to deliver. The BIA ultimately remanded the case to the immigration judge to hold an evidentiary hearing for the purpose of considering those convictions in conjunction with all other applicable discretionary factors.<sup>120</sup>

All three of these bars—safe third country, firm resettlement, and particularly serious crime—were incorporated into the Immigration and Nationality Act by IIRIRA in 1996.<sup>121</sup> Simultaneously, they were made to apply to *all* adjudicators hearing asylum applications, both those hearing applications affirmatively and those hearing applications in what would now be called removal proceedings.<sup>122</sup> Even after these factors became statutory bars to asylum in all instances, however, an applicant's life or potential life in a third country and an applicant's criminal history continued to be considered as part of the discretionary determination. In *Matter of Kasinga*, the BIA weighed the nature of the respondent's flight through Ghana and Germany to escape persecution in Togo before arriving in the United States as part of its weighing of the "favorable and adverse" discretionary factors in the case.<sup>123</sup> In *Matter of T-Z*, the respondent's "record of arrest and conviction in the United States" was considered as part of the discretionary analysis.<sup>124</sup>

While these "converted" factors may play a reduced role today in the discretionary part of an asylum determination as a result of

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120. *Gonzalez*, 19 I. & N. Dec. at 685–86 (remanding because "[t]he nature and gravity of the conviction may militate heavily against an applicant for asylum, and in cases may ultimately be the determinative factor, but it is not the only evidence that should be received and considered by an immigration judge or this Board in evaluating whether an otherwise eligible applicant warrants a grant of asylum as a matter of discretion.").

121. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009, 691-92 (1996). For opaque reasons, these three bars were incorporated in two different subsections of the INA, § 208(a)(2), 8 U.S.C. § 1158(a)(2) (2006), and § 208(b)(2), 8 U.S.C. § 1158(b)(2) (2006).

122. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 302, 110 Stat. 3009, 592-94 (1996). Among its many other changes, IIRIRA also combined exclusion (for those seeking admission into the United States) and deportation (for those the government was trying to deport from the United States) into a single form of proceedings that it named removal proceedings. *Id.* at § 392, 110 Stat. at 589.

123. *See Kasinga*, 21 I. & N. Dec. 357, 367–68 (BIA 1996); *see also, e.g., Gulla v. Gonzales*, 498 F.3d 911, 917–18 (9th Cir. 2007) (analyzing the nature and circumstances of Gulla's time in Turkey, Greece, and Mexico during his flight to the United States and balancing those details against the other discretionary factors present in Gulla's case).

124. *See T-Z*, 24 I. & N. Dec. 163, 165, 176 (BIA 2007) (remanding in part for the immigration judge to consider the effect of a discretionary denial on the respondent's ability to reunite with his wife and minor child without discussing the adverse factors relied on by the immigration judge, including the nature of the respondent's criminal record, in detail). *See also, e.g., Kouljinski v. Keisler*, 505 F.3d 534, 543 (6th Cir. 2007) (holding that it was appropriate for the immigration judge to consider Kouljinski's three convictions for driving under the influence in denying his application for asylum in an exercise of discretion).



their incorporation into statutory eligibility, the fact that they play any role at all points to a substantial overlap between statutory and discretionary requirements. This overlap requires reflection on the rationale for imposing a separate discretionary determination once an applicant has demonstrated statutory eligibility for asylum. That factors can move back and forth between categories, and that they can be simultaneously considered as part of both statutory eligibility and discretionary determination, highlight that the term “discretion” has little inherent meaning and only a very loose and fluid definition.

Furthermore, the choice to label a decision as discretionary rather than one of statutory eligibility allows an adjudicator to avoid making more precise, and likely more difficult, statutory determinations. In fact, the Attorney General has specifically used this overlap to avoid making a statutory determination.<sup>125</sup> In considering the case of a Haitian woman, Melanie Beaucejour Jean, with a New York second degree manslaughter conviction, he stated:

Ultimately, however, it is unnecessary for me to resolve whether the respondent’s conviction constitutes a “crime of violence” or whether she has otherwise satisfied the eligibility standards for asylum. Even assuming that the respondent not only qualifies as a “refugee,” but that her criminal conviction does not preclude her eligibility, she is manifestly unfit for a *discretionary* grant of relief.<sup>126</sup>

Precise statutory determinations lead to more reliable standards and greater predictability of outcome. In cases where the applicant must decide whether or not to proceed at potentially great risk to her and where the outcome—in some cases life or death—is of

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125. It is relatively unusual for the Attorney General to issue a decision in a case in removal proceedings. As discussed above, a case is typically heard by an immigration judge, with appeal first to the BIA and subsequently to the circuit court for the circuit in which the initial immigration judge was physically located. However, the Attorney General is allowed to direct a case be certified to himself at will pursuant to 8 C.F.R. § 3.1(h)(1)(i) (2010). In the case to be discussed, “a BIA panel declared that the respondent’s conviction for second-degree manslaughter did not render her ineligible for asylum or withholding of removal, and that the likely hardship her family would endure if she were returned to Haiti merited adjusting her status from refugee to lawful permanent resident.” Jean, 23 I. & N. Dec. 373, 374 (AG 2002). The Attorney General certified the case to himself to reverse the BIA on both counts, and to make the larger point that “dangerous or violent felons” should be granted relief from removal only in the most exceptional circumstances. *Id.* at 374, 383–84, 385.

126. *Id.* at 385 (emphasis in the original). This decision was issued during the tenure of Attorney General John Ashcroft.

such great consequence to the applicant, the difficulties of uncertainty are magnified.

Also concerning is the fact that labeling a decision discretionary results in a more deferential standard of review. The question that the Attorney General was avoiding, whether Ms. Jean's conviction was an aggravated felony crime of violence and therefore a *per se* particularly serious crime and a mandatory bar to asylum, is a question of law. Legal determinations are reviewed *de novo* by the circuit courts, rather than for abuse of discretion like discretionary determinations.<sup>127</sup> By denying Ms. Jean asylum in an exercise of his discretion, rather than as a matter of statutory eligibility, the Attorney General made it more likely that his decision in this particular case would withstand scrutiny if appealed.<sup>128</sup>

#### *b. Past Persecution as Part of the Discretionary Analysis*

The second respect in which the boundary between substantive qualification and discretionary determination has been blurred is that persecution has explicitly been made a part of the discretionary calculus in at least two different ways. First, as early as its decision in *Pula*, the BIA has held that "the danger of persecution should generally outweigh all but the most egregious of adverse factors," particularly where "an alien . . . has established his statutory eligibility for asylum but cannot meet the higher burden required for withholding of deportation."<sup>129</sup> USCIS still echoes this guidance in its Asylum Officer Basic Training Course, including in its list of positive discretionary factors "[e]vidence of severe past persecution and/or well-founded fear of future persecution, in-

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127. See INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D) (2006); see also *Mai v. Gonzales*, 473 F.3d 162, 164 (5th Cir. 2006). Of course circuit court review of administrative interpretations of law is not purely *de novo* because it is subject to the principles of deference articulated in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984), but the *de novo* standard of review is clearly less deferential than an abuse of discretion standard. Courts of appeals have and exercise greater freedom to review legal determinations than discretionary ones.

128. Ms. Jean's case was appealed. Although it was caught in some procedural wrinkles because of jurisdictional changes made by the Real ID Act, it was eventually heard as a petition for review by the Fifth Circuit. See *Jean v. Gonzales*, 452 F.3d 392 (5th Cir. 2006). There is no substantive discussion of the Attorney General's discretionary denial of asylum in the Fifth Circuit's decision. There is some ambiguity in the decision, but the failure to discuss the discretionary denial of asylum may be because Ms. Jean abandoned that claim. *Id.* at 394 ("Jean raised several arguments in her original habeas petition; however, she maintains only her *ultra vires* claim on this appeal."); *contra id.* ("Second, she argued that the Attorney General's decision effectively rewrote the 'aggravated felony' asylum limits of 8 U.S.C. § 1158, establishing a *per se* rule in place of Congress's guided discretion.").

129. *Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987); see also *Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996).

cluding consideration of other relief granted or denied the applicant.”<sup>130</sup>

Second, individuals who have suffered particularly severe past persecution may be granted asylum “in the exercise of discretion” even in the absence of a well-founded fear of future persecution.<sup>131</sup> This second method of incorporating persecution into the discretionary analysis requires a bit more explanation because it represents a departure from the weighing of positive and negative factors previously discussed and a different way of viewing what it means to make a discretionary determination in an asylum case. The statutory definition of a refugee makes both those who suffered past persecution and those who have a well-founded fear of future persecution eligible for asylum.<sup>132</sup> The regulations implementing this statute, however, provide that an applicant who has suffered past persecution but cannot demonstrate a danger of future persecution may be granted asylum only if the harm suffered in the past was particularly severe or the applicant faces a risk of other serious harm if returned to her home country.<sup>133</sup> The BIA has explained its rationale for granting asylum to those who have suffered severe persecution in the past as follows:

[T]here may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution . . . . “It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.” . . . Thus, while the likelihood of future persecution is a factor to consider in exercising discretion in cases where an asylum application is based on past persecution, asylum may in some situations be granted where there is little threat of future persecution.<sup>134</sup>

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130. *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 34.

131. *Chen*, 20 I. & N. Dec. 16, 21 (BIA 1989). A grant of asylum under such circumstances is also sometimes described as “humanitarian asylum.” *See, e.g.*, *Yuk v. Ashcroft*, 355 F.3d 1222, 1233 (10th Cir. 2004); *S-A-K- & H-A-H-*, 24 I. & N. Dec. 464, 464 n.1 (BIA 2008).

132. INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006); INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2006).

133. 8 C.F.R. §§ 208.13(b)(1)(i), (iii) (2010); 8 C.F.R. §§ 1208.13(b)(1)(i), (iii) (2010).

134. *Chen*, 20 I. & N. Dec. at 19 (quoting Office of the United National High Commissioner for Refugees, THE HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING

This rationale has been used to grant asylum to, for example, a Chinese national from a prominent Christian family that was tortured for years during China's Cultural Revolution;<sup>135</sup> an Afghan national from a family that was believed to be assisting the mujahidin and who was personally detained, interrogated, and tortured by the communist-supported Afghan government for more than a year prior to the time that the mujahidin took power;<sup>136</sup> and a Somali mother and daughter who both suffered severe complications from atrocious forms of female genital mutilation.<sup>137</sup> On the other hand, the month-long detention and beating of a different Afghan national whose father was disappeared and likely killed by the communist-supported Afghan government for the family's support of a local mujahidin faction was found not to rise to the necessary level of severity given "the degree of harm suffered by the applicant, the length of time over which the harm was inflicted, and the lack of evidence of severe psychological trauma stemming from the harm."<sup>138</sup>

USCIS (the Department of Homeland Security) has not explicitly recognized that this constitutes a different interpretation of discretion. In fact, the Asylum Officer Basic Training Course describes "a reasonable possibility of future persecution" as a positive factor weighing "heavily in favor of exercising discretion to grant asylum," while a "finding that there is no reasonable possibility of future persecution (no well-founded fear) is a heavy adverse factor."<sup>139</sup> Circuit courts appear, for the most part, to follow USCIS's approach.<sup>140</sup> The BIA (the Department of Justice) has been more inconsistent in its treatment of this type of a determination.<sup>141</sup> In

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REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES § 136 (Geneva, 1979)).

135. *Chen*, 20 I. & N. Dec. at 16.

136. *B-*, Interim Dec. # 3251 (BIA May 19, 1995). Note, however, that the Board in this case did not describe their decision as a discretionary one.

137. *S-A-K- & H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008); *see also A-T-*, 25 I. & N. Dec. 4, 6 n.1 (BIA 2009).

138. *N-M-A-*, 22 I. & N. Dec. 312, 325–26 (BIA 1998).

139. *Mandatory Bars to Asylum and Discretion*, *supra* note 71, at 35.

140. *See, e.g., Xiu Qin Wang v. Holder*, 391 Fed. Appx. 976, 977–78 (2d Cir. 2010) (stating that the agency should consider the danger of future persecution as a mitigating factor); *Zuh v. Mukasey*, 547 F.3d 504, 512–13 (4th Cir. 2008); *Vata v. Gonzales*, 243 Fed. Appx. 930, 940 (6th Cir. 2007) (stating that the danger of persecution should typically outweigh all but the worst adverse factors); *Aden v. Ashcroft*, 112 Fed. Appx. 852, 854 (3d Cir. 2004) (stating that the danger of persecution should typically outweigh all but the worst adverse factors); *Mirmehdi v. Mukasey*, 2009 U.S. App. LEXIS 1995, at \*5 (9th Cir. 2009) (finding that the likelihood of future persecution is a particularly important factor to consider).

141. *Compare, e.g., H-*, 21 I. & N. Dec. 336, 347–48 (BIA 1996) (treating severe past persecution as one of many positive discretionary factors, albeit a particularly important one) *with N-M-A-*, 22 I. & N. Dec. 312, 325, n.7 (BIA 1998) (stating that the determination of

the case in which it considered this rationale in the greatest detail, however, and where its determination on the issue was most central to its decision, it was clear that the determination of “whether the applicant has demonstrated compelling reasons arising out of the severity of his past persecution for being unable or unwilling to return to Afghanistan”<sup>142</sup>—and therefore the determination of whether to grant the applicant asylum based on his past persecution alone—should be made prior to and separately from consideration of the other discretionary factors enumerated in its prior case law:

We recognized in *Matter of H*, *supra*, that there are a variety of discretionary factors, independent of the circumstances that led to the applicant’s refugee status, such as his age, health, or family ties, which are relevant to the ultimate exercise of discretion. Contrary to the arguments of the applicant’s claim in his motion and on appeal, under the current regulations, these factors bear on the exercise of discretion in past persecution cases where a well-founded fear of persecution is presumed to exist because country conditions have not been shown to have changed or in cases where the “compelling reasons” requirement has been satisfied. Such factors, however, are not relevant in assessing whether the “compelling reasons” standard itself has been met, unless they are shown in some respects to arise from the past persecution.<sup>143</sup>

Not only, then, is it possible to define discretion within the context of asylum claims in many different ways, but various adjudicators do define it differently. Furthermore, they are apparently not even aware that they are doing so, as there is no discussion of these multiple interpretations in any published case. Again, this increases potential discrepancies in decisions and uncertainty for applicants.

### 3. The All-Encompassing Nature of Discretionary Determinations

It should be clear by this point that discretionary determinations in asylum claims are all encompassing: virtually anything is a permissible factor. In fact, adjudicators are directed to view these

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whether there were “compelling reasons arising out of the severity of . . . past persecution for being unable or unwilling to return” to the applicant’s home country should be made before and separately from consideration of the other discretionary factors).

142. *N-M-A*, 22 I. & N. Dec. at 325.

143. *Id.* at 325.

determinations broadly. The BIA in *Pula* said that adjudicators should consider “the totality of the circumstances.”<sup>144</sup> Circuit courts have criticized immigration judges and the BIA for their failure to follow this directive.<sup>145</sup> The Fourth Circuit, the one court of appeals that has most explicitly developed its own list of factors (heavily drawn from *Pula*<sup>146</sup> and the Asylum Officer Basic Training Course<sup>147</sup>), has emphasized that its list is “non-exhaustive.”<sup>148</sup>

The fact that an immigration judge can consider essentially anything he wishes in making a discretionary determination in an asylum claim is a problem from a practical perspective. Such discretion makes it difficult to anticipate, gather, and present the necessary evidence for applicants represented by counsel and even more so for those asylum applicants who must appear *pro se*.<sup>149</sup> It is also a problem for two additional structural, policy-based reasons. First, recent studies have already demonstrated that the outcome in an asylum claim is highly dependent on particular characteristics of the adjudicator assigned to the case.<sup>150</sup> Allowing adjudicators to freely consider such broad ranging discretionary factors only increases these discrepancies in outcome, making it more likely that the very same applicant could face a different outcome depending on which asylum officer or immigration judge she appears before. Second, allowing discretionary factors to be outcome determinative represents a move away from what should be at the heart of refugee law: protection of those whose own country cannot or will not protect them.

## II. THE PROBLEMS OF MAKING ASYLUM DISCRETIONARY

In addition to the issues highlighted above arising out of allowing asylum determinations to be discretionary, asylum should not be discretionary for three separate reasons. First, it is unnecessary to include these factors as a check at this stage in the immigration process. Second, allowing discretionary denials of asylum results in insufficient relief for those genuinely in fear for their lives and

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144. *Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987).

145. *See, e.g., Zuh v. Mukasey*, 547 F.3d 504, 513, 515 (4th Cir. 2008).

146. *Pula*, 19 I. & N. Dec. at 473–74.

147. *Mandatory Bars to Asylum and Discretion*, *supra* note 71.

148. *Zuh*, 547 F.3d at 510.

149. There is no right to government-provided counsel in immigration proceedings, and some non-citizens are therefore unable to secure representation. INA § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2006).

150. *See* RAMJI-NOGALES, *supra* note 11.

safety. Finally, the term discretion is so malleable and indeterminate that its use is inappropriate in the asylum context.

*A. It Is Unnecessary to Include Discretion as  
a Check at the Asylum Stage*

Because asylum is a route to legal permanent residency and ultimately United States citizenship, one frequently offered rationale for the particular balancing of discretionary factors in any given claim is whether the applicant merits permanent membership in United States society.<sup>151</sup> Determining who merits membership in a society of course involves a number of value judgments. Setting those judgments aside for the moment, however, and assuming that immigration law today actually reflects how we would like to form and define our society, applying the discretionary factors as they currently exist is redundant. Virtually every negative discretionary factor is accounted for at one or more of the other stages of the process towards becoming a United States citizen.<sup>152</sup>

Becoming a legal permanent resident or a United States citizen is not automatic for asylees. An asylee must apply and qualify for both.<sup>153</sup> For purposes of adjustment of status to legal permanent residence, one requirement is that the applicant must not be inadmissible pursuant to section 212 of the Immigration and Nationality Act.<sup>154</sup> While a waiver of many grounds of inadmissibility is available to asylees, that waiver is not mandatory and requires that the applicant demonstrate that waiving the provision is justified “for humanitarian purposes, to assure family unity, or [because] it is otherwise in the public interest.”<sup>155</sup> For purposes of naturalization, one requirement is that the applicant be of good moral character.<sup>156</sup> This requirement cannot be waived. Both discretionary factors related to immigration procedures and the

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151. See, e.g., *Dhine v. Slattery*, 3 F.3d 613, 619 (2d Cir. 1993) (“The Attorney General is not obliged to shelter people from despotism abroad so that they may enjoy lawful imprisonment in the United States.”).

152. Because *Pula* and the subsequent cases state that asylum should be granted in the absence of adverse discretionary factors, only the negative factors matter for the purposes of this analysis. *Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

153. See INA § 209(b), 8 U.S.C. § 1159(b) (2006) (adjustment of status); INA §§ 316, 312, 8 U.S.C. §§ 1427, 1423 (2006) (naturalization).

154. See INA § 209(b)(5), 8 U.S.C. § 1159(b)(5) (2006); INA § 212, 8 U.S.C. § 1182 (2006).

155. INA § 209(c), 8 U.S.C. § 1159(c) (2006).

156. INA § 316(a), 8 U.S.C. § 1427(a) (2006). “Good moral character” is a legal term of art, defined for purposes of naturalization at INA § 101(f), 8 U.S.C. § 1101(f) (2006), and 8 C.F.R. § 316.10 (2010).

asylum process—and discretionary factors related to the applicant's life outside of the immigration and asylum process—are covered by the grounds of inadmissibility and good moral character. Furthermore, if an asylee somehow violates immigration laws at any point during their time prior to becoming a citizen, they may be charged with the relevant grounds of removability, placed in removal proceedings, and, if so ordered in those proceedings, deported from the United States.<sup>157</sup>

Examining some of the cases discussed in part I(C)(1) above where discretionary denials of asylum were at issue provides a useful illustration of this fact. Within the first category, discretionary factors related to immigration procedures and the asylum process, an applicant who has made a material misrepresentation or committed fraud at any point during any part of his immigration process—including his entry into the United States, his application for asylum, and his application for any other immigration benefit—will be inadmissible<sup>158</sup> and may also be barred from demonstrating good moral character.<sup>159</sup> For example, the respondent in *Matter of Gharadaghi*, who attempted to enter the United States using a false name with the assistance of a smuggler,<sup>160</sup> would be at least inadmissible, as would the respondent in *Alsaghladi v. Gonzales*, who entered the United States using his own passport containing a nonimmigrant visitor's visa but lied about his intent to stay permanently in obtaining the visa and in entering the United States.<sup>161</sup> Misrepresentations to the immigration court regarding his use of an alias, where he lived, and his work would render the respondent in *Matter of T-Z* inadmissible and unable to demonstrate good moral character.<sup>162</sup> The respondent in *Ibrahim v. Gonzales* would likely be inadmissible for his initial failure to disclose his arrest and conviction for driving with a suspended drivers license and giving a false identity to police, all related to a drivers license in an assumed name.<sup>163</sup>

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157. INA § 237, 8 U.S.C. § 1227 (2006); INA § 240, 8 U.S.C. § 1229 (2006).

158. INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2006).

159. See INA § 101(f)(6), 8 U.S.C. § 1101(f)(6) (2006); 8 C.F.R. § 316.10(b)(2)(vi) (2010). The mandatory bar to good moral character applies only if false testimony is given; a lack of good moral character may still be found even if the mandatory bar does not apply. INA § 101(f), 8 U.S.C. § 1101 (f) (2006); 8 C.F.R. § 316.10(a)(2) (2010).

160. 19 I. & N. Dec. 311, 314–16 (BIA 1985).

161. 450 F.3d 700, 702 (7th Cir. 2006); INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2006).

162. 24 I. & N. Dec. 163, 165 (BIA 2007); INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2006).

163. 434 F.3d 1074, 1077–79 (8th Cir. 2006); INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C) (2006).



Applicants with previous immigration violations, such as fraudulent marriages, participation in smuggling undocumented individuals into the country, or entries without inspection on multiple occasions or after prior removal orders or unlawful presence in the United States, will also be inadmissible.<sup>164</sup> For instance, the respondent in *Aioub v. Mukasey* entered into a fraudulent marriage for the purpose of obtaining legal immigration status. At the point of his application for adjustment of status, he would be at least inadmissible for having made a material misrepresentation to obtain an immigration benefit.<sup>165</sup> As another example, the female respondent in *Kaur v. Holder* was accused by the Department of Homeland Security of smuggling her daughter and nephew into the United States. If this were proven to be true, she would be inadmissible and barred from demonstrating good moral character for purposes of naturalization because of her role in assisting others in entering the country illegally.<sup>166</sup> As discussed above, the applicant's ties to third countries are now already part of the statutory eligibility requirements.

Within the second category, factors related to the applicant's life more generally, many applicants with criminal records will be inadmissible and barred from demonstrating good moral character regardless of rehabilitation.<sup>167</sup> For example, the respondent in *Dhine v. Slattery* would be inadmissible and unable to show good moral character as a result of his several controlled substance convictions.<sup>168</sup> Applicants who have engaged in or have ties to terrorist activities will be likewise inadmissible.<sup>169</sup> The involvement of the respondent in *Matter of McMullen* in the Provisional Irish Republican Army's random violence against civilians would render him inadmissible as well.<sup>170</sup>

The only factor not explicitly accounted for, then, is whether the applicant circumvented overseas refugee procedures. The BIA in *Pula* minimized the importance of this factor, stating that alone it was not enough to require outstanding "countervailing equities."<sup>171</sup>

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164. INA § 212(a)(6)(E), 8 U.S.C. § 1182(a)(6)(E) (2006); 8 C.F.R. § 316.10(b)(2)(viii) (2010); INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (2006); *cf.* INA § 204(c), 8 U.S.C. § 1154(c) (2006).

165. *Aioub v. Mulcasey* 540 F.3d 609, 610–12 (7th Cir. 2008).

166. *Kaur v. Holder*, 561 F.3d 957, 961 (9th Cir. 2009).

167. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006); 8 C.F.R. §§ 316.10(b)(1)(i)–(ii) (2010); 8 C.F.R. §§ 316.10(b)(2)(i)–(iv) (2010).

168. *Dhine v. Slattery* 3 F.3d 613, 615 (2d Cir. 1993).

169. INA § 212(a)(3), 8 U.S.C. § 1182(a)(3) (2006).

170. *Insert McMullen* 19 I. & N. Dec. 90, 99–100 (BIA 1984).

171. *See Pula*, 19 I. & N. Dec. 467, 473 (BIA 1987).

It is duplicative and excessive to include these kinds of checks at both the front (asylum) and the back (permanent residence and United States citizenship) ends of the process. Due to the nature of asylum claims, the dire need of many asylum seekers for protection, and the government and private resources required to present asylum claims, it would be better to include these factors only at the latter part of the process, namely, applications for legal permanent residency and United States citizenship.

*B. Including Discretion Results in Inadequate Protection  
for Those Fleeing Persecution*

Including discretion as an element in the asylum determination results in inadequate protection in at least two ways for many who are fleeing persecution. First, those like Mr. Kouljinski<sup>172</sup> who face between a 10 percent (the standard of proof for asylum) and a 50 percent (the standard of proof for withholding of removal) likelihood of future persecution are not eligible for withholding of removal and will likely receive no protection whatsoever if denied asylum on discretionary grounds.<sup>173</sup> Such an applicant for asylum will be ordered removed back to the country where he is in danger and will face, by definition, at least a one in ten chance of suffering serious harm or even death. The fact that it will be virtually impossible for an adjudicator to accurately predict the precise likelihood of future events on the basis of the evidence available to most asylum seekers provides further support for a contention that this kind of a distinction between asylum and withholding of removal is ill founded.

For Mr. Kouljinski, this could mean essentially that the United State government sentenced him to the death penalty in civil proceedings as punishment for three driving under the influence convictions for which he had already paid a criminal penalty. When the result is phrased in this manner, it sounds so extreme as to be ridiculous. It is difficult to imagine that an immigration judge would ever reach such a result, and therefore tempting to say that there is no need to place external constraints on immigration judges' and other adjudicators' discretion. Not only did the immigration judge reach this decision in Mr. Kouljinski's case, however,

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172. See *Kouljinski v. Keisler*, 505 F.3d 534 (6th Cir. 2007); Introduction, *supra*.

173. *Kouljinski*, 505 F.3d at 545.

but the BIA and the Sixth Circuit Court of Appeals affirmed it.<sup>174</sup> Similar results have been reached in other published cases.<sup>175</sup>

Second, withholding of removal is not sufficient security for those like Celine and Yusef who must be granted this form of relief because their fear of future persecution is greater than 50 percent. The realities of a grant of withholding of removal are harsh. Yusef must live with the fear that he could be removed to any other country besides Pakistan that will agree to accept him, deported away from his wife, their two sons, and his sister, all of whom are either legal permanent residents or United States citizens. He may have to report regularly to an immigration officer and comply with strict conditions on his release for an indefinite period of time, in part so that the Department of Homeland Security can deport him if it locates any other country that will accept him. If he leaves the United States to see his brothers, who sought asylum in Canada, or his father, who remained in Pakistan despite the danger, Yusef may not be allowed to return or may suffer other immigration consequences. He will likely remain in this limbo-like status for the rest of his life. Although he will be able to work, he cannot do much else. It will be difficult if not impossible for him to take advantage of any other immigration benefits that he may become eligible for due to the removal order against him.

Even though Celine was eventually granted asylum, the delay caused by the immigration judge's discretionary denial and the resulting necessity of appeal to the BIA was very difficult for her. During that period of time, she was unable to see her sister and stepdaughter, much less bring them to the United States, and had to live with the risk that, if her appeal were unsuccessful, she might never see them again. Because during the appeal Celine's grant of withholding of removal was not final and Celine was not eligible for employment authorization during the pendency of her asylum claim, Celine was not even able to work during this period of time.

It does not make sense as a humanitarian or as a practical matter to tell an applicant that we believe they will more likely than not be severely harmed, tortured, or even killed if they return to their own country, and we understand that they will likely remain in the United States permanently—but at the same time subject them to these kinds of stringent limitations and insecurities. In addition, this structure of granting and denying benefits as it is currently implemented at least arguably violates the United States' obligation of non refoulement under international law because

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174. *Id.* at 537–38, 545.

175. *See, e.g.,* *Dhine v. Slattery*, 3 F.3d 613, 619–20 (2d Cir. 1993).

individuals are in fact returned to countries where their lives and freedom are threatened on account of one of the five protected grounds in the refugee definition.

### C. “Discretion” Is Inherently Vague

Upon first reading, the term “discretion” seems clear. In everyday English, it means that a decision maker has the power to exercise his or her own judgment and conscience in making a particular decision. The word is frequently used to mean both the “[f]reedom to act or judge on one’s own” and the “[a]bility or power to decide responsibly.”<sup>176</sup> Black’s Law Dictionary incorporates both of these aspects into a more specific definition for a legal context: “[a] public official’s power or right to act in certain circumstances according to personal judgment and conscience, often in an official or representative capacity.”<sup>177</sup> This definition has particular importance in the administrative law context, where by definition agencies are delegated specific powers and responsibilities in a limited arena such as immigration.

When one begins to analyze the application and implications of “discretion” as applied in a particular area of law, however, its meaning becomes much less clear. Other authors have written about the problems inherent in the use of the term in immigration law generally and thoughtfully, so those issues are only highlighted here.<sup>178</sup> Courts and commentators struggle with what “discretion” as a term in the immigration law context means.<sup>179</sup> That is understandable, given the frequency with which the word discretion appears in immigration law and the diversity of its usage. One Third Circuit court case counted no less than thirty-seven usages within just one subchapter of the INA.<sup>180</sup> Like asylum, many other forms of relief from removal are discretionary: adjustment of status to legal permanent residence,<sup>181</sup> waivers of inadmissibility,<sup>182</sup> all

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176. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2011).

177. BLACK’S LAW DICTIONARY (8th ed. 2004).

178. See, e.g., Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006); Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002); Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997).

179. See, e.g., *Alaka v. Attorney General*, 456 F.3d 88, 95–96 (3d Cir. 2006).

180. *Id.* at 97 nn.16–17.

181. See INA § 245, 8 U.S.C. § 1255 (2006).

182. INA § 212, 8 U.S.C. § 1182 (2006).

types of cancellation of removal,<sup>183</sup> and voluntary departure,<sup>184</sup> to name a few. To make things even more complicated, the standard of proof and the relevant discretionary factors differ for each form of relief.

The breadth of and discrepancies within what discretion means within the asylum context should be clear from the discussion above. The “standard” construal is not the only possible understanding of discretion even within the asylum context; this is not the only possible interpretation(s) of discretion that the executive agencies charged with implementing asylum law could have adopted.

The standards for eligibility for asylum, in contrast to the family-sponsored immigrant preference categories, for example, are much less precisely defined in the statute and therefore subject to much greater levels in interpretation. The word “may” in section 208 of the INA could be understood as simply awarding the power to the agencies to flesh out the meaning of these statutory provisions and which non-citizens met them, as they saw fit.

Even assuming that “may,” and therefore “discretion,” mean something in addition to the statutory eligibility standards, the executive agencies charged with their implementation could have interpreted them differently than the status quo. At one extreme, the agency heads could have delegated this power without any direction or limitation, leaving it up to each individual adjudicator to apply her own judgment and values as she saw fit. At the other extreme, the agency heads could have delegated this power with explicit instructions, for example directing all adjudicators that asylum must be denied in an exercise of discretion if the applicant has any criminal convictions.

The meaning of “discretion” is inherently vague, and discretion therefore cannot be consistently and properly exercised in practice. This vagueness has been cabined to some extent in the asylum context by the case law that has developed on the factors that adjudicators can and should consider in making their decisions on discretion, but not to a degree that it is no longer problematic. At its most straightforward level, this issue is evidenced by the fact that different adjudicators, given identical facts, could easily and well within the bounds of the law reach opposite discretionary determinations on whether or not to grant asylum. This is, of course, not unique to this situation. There are many difficult, close questions of law and fact in virtually every area of the law on which reasonable adjudicators can and do differ. It is, however, more

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183. INA § 240A, 8 U.S.C. § 1229b (2006).

184. INA § 240B, 8 U.S.C. § 1229c (2006).

problematic when we consider that we are discussing whether an individual who is fully statutorily eligible for asylum on the basis of past persecution or a well-founded fear of future persecution should in fact be granted that benefit and when we take in to account the concrete and severe consequences discussed above of not being granted asylum.

#### CONCLUSION

Courts and commentators have not questioned the designation of asylum as a discretionary form of relief essentially since it was introduced as a form of relief from removal by the Refugee Act of 1980. Despite this lack of controversy, however, there are significant problems with this designation and its implementation. Problems with the interpretation of discretion in asylum claims—including the movement and overlap of factors between statutory and discretionary, the full importation of severe past persecution and the danger of future persecution into the discretionary standard, the inconsistent definitions of discretion, and the fact that virtually anything can be considered as part of a discretionary determination—combine to make the term discretion virtually meaningless. Even outside the asylum context, the concept of discretion suffers from problematic vagueness. Moreover, it is unnecessary to make asylum discretionary at all as adverse discretionary factors are either already taken into account at some other juncture in the immigration process or could be more precisely imported into the determination of statutory eligibility for asylum. Finally, the fact that asylum is discretionary provides insufficient relief for those seeking protection from persecution on account of a protected ground.

Asylum should therefore be mandatory like withholding of removal and the other forms of fear-based relief from removal, and not discretionary. This would not negate the difference between asylum and withholding of removal because it would still be necessary for those subject to one of the asylum-specific bars to demonstrate that they meet the higher standard of proof for withholding of removal.<sup>185</sup> It would, on the other hand, remove the problems with the designation of asylum as discretionary as discussed here.

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185. The problem that this also may result in inadequate protection for genuine refugees is beyond the scope of this Article.

This is a change that is unlikely to occur as a broad-based mandate from the Board of Immigration Appeals, the circuit courts, or even the Supreme Court, given the breadth and depth of the existing case law holding that asylum is discretionary. The most straightforward and secure way to make this change would be through legislation passed by Congress, perhaps as part of more comprehensive immigration reform.<sup>186</sup> Legislation is not, however, the only option. The Departments of Homeland Security and Justice could promulgate regulations directing their adjudicators to always exercise their discretion favorably to applicants who demonstrate statutory eligibility for asylum, or even simply reinterpreting discretion in a more narrow, cabined respect.

In the absence of legislative or regulatory change, individual adjudicators could weigh the likelihood of future persecution so heavily as to always, or virtually always, outweigh any negative factors present. If consistently coupled with a comprehensive explanation of the problems with interpreting discretion more freely, and undertaken by a sufficient number of adjudicators, such individual decisions might eventually motivate more systemic change, whether on a formal or a more informal basis. However, even if a radical policy change never occurs, awareness of and attention to the problems articulated here by government adjudicators should result in the application of greater care in discretionary determinations in asylum claims, and thereby make a difference in the lives and safety of the individual human beings like Mr. Kouljinski, Celine, and Yusef who seek refuge through asylum in the United States.

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186. This is relatively unlikely to occur given the current political climate.