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## Persecution of Particular Social Groups and the Much Bigger Immigration Picture

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# PERSECUTION OF PARTICULAR SOCIAL GROUPS AND THE MUCH BIGGER IMMIGRATION PICTURE

R. GEORGE WRIGHT\*

I.	INTRODUCTION.....	163
II.	THE CIRCUIT SPLIT ON ITS OWN TERMS.....	165
	<i>A. The General Background of Judicial Deference.....</i>	165
	<i>B. The Preliminary Problem of a Supposedly Universally Shared Group     Characteristic.....</i>	166
	<i>C. The Substantive Dimensions of the Current Appellate Circuit     Split .....</i>	170
	<i>D. The Persecution of Particular Social Groups:     Further Complications.....</i>	172
III.	ASYLUM, REFUGEE, AND GENERAL IMMIGRATION LAW IN THE LIGHT OF BROADER MORAL AND HUMAN RIGHTS CONCERNS.....	174
	<i>A. Immigration Law and Broader Moral and Jurisprudential     Standards.....</i>	174
	<i>B. The Moral and Jurisprudential Limits of the Case Law as Currently     Interpreted.....</i>	175
	<i>C. The Persecution Requirement as a Distinctive Limitation on the Range     of Responses.....</i>	177
	<i>D. Basic Human Needs, Basic Human Goods, and Basic Human     Capabilities .....</i>	179
	<i>E. Immigration and Human Rights Theories.....</i>	180
	<i>F. Uncertainties Over How Much is Morally Required of Us in Assisting     the World’s Desperate in General .....</i>	182
IV.	SOME FINAL PROBLEMS, AND A BRIEF CONCLUSION: IMMIGRATION, THE CURRENT DOMESTIC POOR, AND THE WELL-BEING OF FUTURE GENERATIONS .....	184

## I. INTRODUCTION

Often, aliens seek what is called discretionary asylum, which requires that they show “persecution or a well-founded fear of persecution on account of race, religion, nationality, *membership in a particular social group*, or political opinion.”<sup>1</sup> While

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<sup>1</sup> Immigration and Naturalization Act of 1952 (INA), 8 U.S.C. § 1158(a) (2006); 8 U.S.C. § 1101(a)(42)(A) (2006) (emphasis added); see also the qualitatively parallel but more stringent standard for those aliens seeking the less discretionary remedy of withholding of removal. *Id.*; 8 U.S.C. §1231(b)(3)(A) (2006); Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 438-39 (1987). For general background, see REGINA GERMAIN, ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE §§ 2.2.-2.4 (6th ed. 2010). For some sense of the agency discretion in defining the idea of persecution, see *Negusie v. Holder*, 555 U.S. 511, 524 (2009); *Yasinsky v. Holder*, 724 F.3d 983 (7th Cir. 2013); *Bathula v. Holder*, 723 F.3d 889 (7th Cir. 2013); *Tegegn v. Holder*, 702

virtually every word of this requirement is of doubtful meaning and scope, the focus of this Article will be on the idea of persecution based specifically on “membership” in a particular group. Defining, for practical purposes, the idea of a “particular social group” has proven to be remarkably difficult, as is evidenced by widespread official illogic and dubious public policy.<sup>2</sup>

Matters have only been further complicated by the Board of Immigration Appeals’ (BIA) gloss on the “particular social group” category as requiring the “social visibility” of the particular social group in question.<sup>3</sup> This unavoidably murky and perhaps illegitimate agency interpretation has in turn resulted in a conspicuous split<sup>4</sup> among the federal appellate courts.<sup>5</sup> This federal circuit split certainly counts as interesting and important, as circuit splits go. The split is well worthy of resolution, by one means or another, with one substantive outcome or another. This Article explores some of the relevant issues below.<sup>6</sup>

The main point of this Article, however, is not to sort through the currently contending approaches and to declare any particular approach to a group “social visibility” requirement to be superior. Rather, the approach below will introduce into the problem some much broader, and frankly even more important, considerations. These broader jurisprudential considerations, including matters of human rights, global justice, and of immigration policy more generally, will operate in part to steer our thinking regarding the persecuted group “social visibility” circuit split at issue. But they will more importantly add some much needed broader perspective, and will in particular show that even what strikes us as a genuinely important circuit split actually involves relatively minimal stakes within a narrowly constricted jurisprudential universe. Ultimately, what is most important is not the legal turf on which the persecuted group “social visibility” circuit split focuses, but what is backgrounded and unfortunately left out of account by the circuit split in question.

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F.3d 1142, 1144 (8th Cir. 2013); *Chun Hua Zheng v. Holder*, 666 F.3d 1064, 1067 (7th Cir. 2012); *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011); *Halim v. Holder*, 590 F.3d 971, 975-76 (9th Cir. 2009); and the cases cited therein.

<sup>2</sup> See *infra* Sections II.C-D.

<sup>3</sup> See *In re C-A-*, 23 I. & N. Dec. 951, 957, 960 (BIA 2006) (interpreting *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985)), *overruled on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (1987).

<sup>4</sup> For a recent reference to the particular social group “social visibility” circuit split in question, see *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1085 (9th Cir. 2013) (en banc); see also the references and discussion *infra* Sections II.C-D.

<sup>5</sup> For a brief judicial elaboration of the broader statutory scheme in connection with some of the more specific ambiguities discussed below, see, for example, *Zelaya v. Holder*, 668 F.3d 159, 161-62 (4th Cir. 2012) (young Honduran males allegedly persecuted with impunity by identifiable members of a gang they refused to join as not constituting, for asylum purposes, a particular social group); *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 590-91 (3d Cir. 2011) (ultimately declining to defer to BIA’s interpretation of a role for “social visibility” in “particular social group” persecution cases).

<sup>6</sup> See *infra* Sections II.C-D.

## II. THE CIRCUIT SPLIT ON ITS OWN TERMS

A. *The General Background of Judicial Deference*

In its simplest form, the appellate circuit split in question begins with the question of whether the person seeking asylum, or some related remedy, can show some degree of probability of persecution based on that person's "membership in a particular social group."<sup>7</sup> What constitutes a "particular social group" for purposes of this section of the immigration statute will not in every case be obvious. The term, undeniably, bears a certain haziness.

As a general rule, an agency's interpretation of a term or phrase in the statute it enforces is commonly governed by the *Chevron* test, from *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>8</sup> Where *Chevron* applies, a court reviewing an agency's interpretation of a statutory term or phrase, such as "particular social group," looks first to see, through any traditional tool of statutory construction, whether Congress has somehow unambiguously addressed and resolved the precise question of statutory interpretation at issue in the case.<sup>9</sup> If Congress did not so address and resolve that issue, and assuming that Congress delegated interpretive authority to the agency, the reviewing court will generally accept any agency interpretation of the relevant term so long as that interpretation qualifies as permissible, reasonable, or non-arbitrary.<sup>10</sup>

There is, lurking in the background, a technical way by which a court reviews agency statutory interpretations on a non-deferential or *de novo* basis.<sup>11</sup> However, the Supreme Court has held that, at least as a general matter, that statutory constructions of the Attorney General and the Board of Immigration Appeals are to be typically subjected to review under the *Chevron* standard, and thus accorded substantial judicial deference in appropriate cases.<sup>12</sup>

In fact, courts have further held that "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"<sup>13</sup> On this theory, the subject matter of immigration, and the relative competencies of agencies and courts, tip toward judicial deference. Or, agency, rather than judicial policymaking,

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<sup>7</sup> See *supra* note 1 and accompanying text.

<sup>8</sup> *Chevron, U.S.A. Inc. v. Natural Resource Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See, e.g., *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir. 2009); *Elien v. Ashcroft*, 364 F.3d 392, 396 (1st Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186, 1193-94 (9th Cir. 2003); *Murillo-Espinoza v. Immigration & Nationality Serv.*, 261 F.3d 771, 773 (9th Cir. 2001).

<sup>12</sup> See *Immigration & Nationality Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Pantoja-Medrano v. Holder*, 520 Fed. App'x 147, 149 (4th Cir. 2013) (*per curiam*).

<sup>13</sup> *Negusie v. Holder*, 555 U.S. 511, 517 (quoting *Immigration & Nationality Serv. v. Abudu*, 485 U.S. 94, 110 (1988)); see also *Scatambuli*, 558 F.3d at 58.

could be said to better reflect congressional intent.<sup>14</sup> This judicial deference should extend not only to agency rulemaking, but to sufficiently careful and formalized agency individual adjudication as well.<sup>15</sup>

On the other hand, there are areas where judicial deference to administrative interpretation of statutory immigration language may be inappropriate.<sup>16</sup> Any rule of judicial deference to agency interpretations will be subject to arguable exceptions. But settling on some particular judicial attitude, deferential or not, toward agency determinations in our context would hardly begin to resolve the most pressing problems. The problems associated with a particular group “social visibility” requirement run, as we shall now see, far deeper.

*B. The Preliminary Problem of a Supposedly Universally Shared Group Characteristic*

The crucial statutory language with which we are concerned—persecution on account of membership in a “particular social group”<sup>17</sup>—is open-ended and potentially almost limitlessly inclusive.<sup>18</sup> Limitless breadth, however, is only one possible reading, and there is little or no unequivocal evidence of any relevant congressional intent in this regard.<sup>19</sup>

The agency and the courts, from the beginning, have unfortunately built into their interpretations a logical blunder: The basic assumption, which may seem unproblematic, is that the particular social group must “share a common immutable characteristic that they either cannot change or should not be required to change because it is ‘fundamental to their individual identities or consciences.’”<sup>20</sup> While the reference to the ‘immutability’ of the group’s shared characteristic plainly cannot be taken literally—‘immutable’ includes ‘mutable, but only at some excessive moral cost’—the reference to a genuinely universally shared common characteristic is not inadvertent. Reference by agencies and courts to one (or more) universally shared characteristic as a descriptive of the group are, in this context, nearly exceptionless. All of the relevant group members must, it is thought, share that common

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<sup>14</sup> See *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (quoting *Immigration & Nationality Serv. v. Ventura*, 537 U.S. 12, 16 (2002) (per curiam) (ultimately quoting the leading case *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 88 (1943))).

<sup>15</sup> *Negusie*, 555 U.S. at 517 (quoting *Aguirre-Aguirre*, 526 U.S. at 425).

<sup>16</sup> See, e.g., *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967 (9th Cir. 2003) (“Congress did not grant discretion to the BIA to decide questions of law related to nationality.”). For cases of unexplained changes of agency policy, see *Henrique-Rivas v. Holder*, 707 F.3d 1081, 1091 n.13 (9th Cir. 2013) (citing *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)).

<sup>17</sup> See, e.g., *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 594 (3d Cir. 2011).

<sup>18</sup> See *id.*; *Fatin v. Immigration & Nationality Serv.*, 12 F.3d 1233, 1238 (3d Cir. 1993).

<sup>19</sup> See *Valdiviezo-Galdamez*, 663 F.3d at 594; *Fatin*, 12 F.3d at 1239.

<sup>20</sup> *Orellana-Monson v. Holder*, 685 F.3d 511, 518 (5th Cir. 2012) (quoting *Mwembie v. Gonzales*, 443 F.3d 405, 414-15 (5th Cir. 2006) (in turn quoting *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352-53 (5th Cir. 2002) (referring to the key administrative case of *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985))); *Valdiviezo-Galdamez*, 663 F.3d at 603 (citing BIA case authority).

characteristic,<sup>21</sup> for how else would we recognize a particular social group unless all of the members of that group shared, universally, some characteristic or quality?

The problem is that while it is natural to think of all the members of any meaningful social group as possessing one or more common qualities, if not some shared essence, this does not always match reality, and does not reflect how we classify and treat social groups in reality. Neither the agency nor the courts seem to have noticed, let alone addressed, this problem.

The philosopher Ludwig Wittgenstein did, however, famously address this problem in a much broader form years ago.<sup>22</sup> Wittgenstein concedes that there is often a place for strict definitions, for necessary and sufficient conditions for group membership, and for universal group essences.<sup>23</sup> However, Wittgenstein argues that we must not assume that every member of any meaningful group, social or otherwise, will share one or more crucial qualities in common. As one commentator puts it, for Wittgenstein, “in *some* cases there can be a general term when there is nothing common to all the entities which we commonly subscribe under it.”<sup>24</sup> Or in Wittgenstein’s own words:

We are inclined to think that there must be something common to all games, say, and that this common property is the justification for applying the general term ‘game’ to the various games; whereas the games form a *family* the members of which have [only, or no more than] family likenesses.<sup>25</sup>

Thus “all the entities falling under a given term need not have anything in common, but [may be] related to each other in many different ways.”<sup>26</sup>

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<sup>21</sup> While this language is indeed apparently nearly unchallenged, see, for merely one example, *Valdiviezo-Galdamez*, 663 F.3d at 595 (referring to “persecution that is directed toward an individual who is a member of a group of persons *all* of whom share a common, immutable characteristic,” innate or experiential (emphasis added)). Note, incidentally, the curious time asymmetry at work here—virtually all of one’s past, however tangential to one’s core identity, is in some sense immutable, setting aside pardons and expungements and such. But much of the continuing development of even one’s core identity might well be mutable, in the sense of taking diverse forms, without undue moral cost. Judge Posner also appears to endorse the “universally shared common characteristic” requirement in *Gatimi v. Holder*, 578 F.3d 611, 614 (7th Cir. 2009) (“[I]f the ‘members’ have no common characteristics they can’t constitute a group.”).

<sup>22</sup> See LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 17-18 (Harper ed., 1965) [hereinafter WITTGENSTEIN, *BLUE & BROWN*]; LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 65-71, at 35-38 (G.E.M. Anscombe, et al., trans.) (P.M.S. Hacker & Joachim Schulte rev. 4<sup>th</sup> eds., 2009) (1953).

<sup>23</sup> See, e.g., J.E. Llewellyn, *Family Resemblances*, 18 PHIL. Q. 344, 344 (1968); Heather J. Gert, *Family Resemblances and Criteria*, 105 SYNTHESIS 177, 177 (1995).

<sup>24</sup> Pamela M. Huby, *Family Resemblance*, 18 PHIL. Q. 66, 66 (1968).

<sup>25</sup> WITTGENSTEIN, *BLUE & BROWN*, *supra* note 22, at 17-18 (quoted in, for example, Nicholas Griffin, *Wittgenstein, Universals and Family Resemblances*, 3 CANADIAN J. PHIL. 635, 635 (1974)).

<sup>26</sup> Hjalmar Wennerberg, *The Concept of Family Resemblance in Wittgenstein’s Later Philosophy*, 33 THEORIA 107, 107 (1967), available at <http://onlinelibrary.wiley.com/doi/>

Now, while there is no evidence that this “mere family resemblance” problem has been raised at the agency or judicial level, some might suppose that any harm in failing to so raise the problem would be minimal, ironically, because the statutory drafters failed to think about the problem as well. In that case, the agency and courts at least would not be violating any relevant specific intention of the drafters.

Unfortunately, the problem remains even if no one involved appreciates the possibility of a particular social group with no shared characteristic. Rather than thinking further about the idea of games, though, let us briefly consider a somewhat more closely related analogy. Imagine a sovereign state governed by a single tyrannical ruler. This ruler is, in some degree, a creature of vengeance. By whatever means we care to count as “persecution,” the ruler intends to, and does in fact, uniformly persecute all and only those of his subjects who have non-politically annoyed him, or frustrated his wishes. We can vary this hypothetical, if we like, to include those subjects who the ruler falsely imagines to have done something to annoy or frustrate him, or we can rule out the possibility of mistaken or groundless reactions on the ruler’s part.

Now, it is possible to avoid Wittgenstein’s “no shared characteristic” problem in several ways. For one, we could just bypass the problem by simply declaring that no one persecuted, however severely or continuously, on just these grounds, could ever count as being persecuted on account—wholly or partially—of membership in a particular social group.<sup>27</sup> A “particular social group,” in this case, would therefore not encompass these victims.

This option would indeed sidestep the “no shared characteristic” problem, but only at the cost of raising an even larger and more disturbing problem: Why would we want to say, with no further reflection or investigation, that this above group of severely and continuously officially persecuted subjects, of whatever size, should not count as a “particular social group?” Surely, some substantive argument would be necessary to justify such an exclusion. Could the above persecuted group, some or all of whom might be entirely innocent of any moral or legal wrongdoing, not say with Shylock: “[I]f you poison us, do we not die?”<sup>28</sup> Why should their plight be dismissed on mere formalistic grounds, without any normative argument? This hardly seems like a satisfactory option.

Relatedly, we could sidestep the “no shared characteristic” problem by pointing out, perhaps quite rightly, that the members of this persecuted group may not have even the vaguest “family resemblance”<sup>29</sup> independent of and pre-existing whatever they might have individually done to annoy or frustrate the tyrannical ruler. Perhaps we can say that they now comprise a group, even if the of this victim group do not recognize one another. But their group status is, in a way, artificial, or merely trivial, as it came into existence only with and because of the ruler’s annoyance or

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10.1111/j.1755-2567.1967.tb00614.x/abstract. For further commentary, see, for example, Anthony Manser, *Games and Family Resemblances*, 42 PHIL. 210 (1967).

<sup>27</sup> See *supra* note 1 and accompanying text. Our hypothetical rules out political opinion, etc., as grounds of persecution in order to avoid implicating the political opinion and other alternatives to particular social group status.

<sup>28</sup> See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 1 (c. 1590s).

<sup>29</sup> See *supra* notes 20-23 and accompanying text. Of course all victims of persecution share, trivially, a vulnerability to persecution, physiologically and geographically.

frustration, leading directly to their persecution. It is not as though the victim group identity was in any way previously well established; only later did the ruler take notice and disapprove, creating this group identity.

Again, we would clearly want some meaningful normative argument for ignoring the plight of such persons, whatever their numbers. Perhaps, in the extreme case, they are the society's only persecuted group. Under our hypothetical, their persecution is severe, unjustified, and sustained. Why should the legal response to their plight, as potential asylees, depend crucially on the obscure metaphysics of whether their particular social group status pre-existed the decisions to persecute them, or arose only with such decisions? A similar question could even be asked in the case of those victims, if any, who were officially persecuted before anyone, including the ruler, became aware that the crucial grounds for persecution consisted simply of having annoyed or frustrated the tyrannical ruler. Whether we want to call these distinctions "arbitrary" or not is less crucial than the substantive moral reasoning that would oddly deny obvious persecution victims any legal accommodation.

Under our above hypothetical, we can imagine as long or as short a list of persecuted victims as we care to. Consider the range of possible grounds for persecution. Perhaps the victims and their richly diverse supposed offenses are known to each other, or not. Perhaps one victim had the temerity to conspicuously share the ruler's birthday. Others are in some way obviously talented. Others are athletes who, depending upon their team affiliations, either succeeded or failed at crucial moments. Yet others are former palace maintenance workers in whom the tyrannical ruler is, rationally or irrationally, disappointed. Perhaps others owned a particular disfavored breed of dog. Others delayed the ruler's motorcade, or remind him of a parent, or bid up the price of the his favorite commodity, or have a tendency to mumble. Others are simply misperceived by the ruler.

The point, of course, is that prior to their annoyance-based persecution, these victims had, in reality and by anyone's perception, essentially nothing of relevant substance in common.<sup>30</sup> If we merely vary the above hypothetical examples, no two victims need have anything relevant in common, actually or by anyone's perception, apart from vulnerability to persecution, before being persecuted. While we have in this hypothetical sacrificed realism—to a degree—for the sake of clarity, the validity of Wittgenstein's point<sup>31</sup> seems undeniable. Agencies and courts that universally assume that in asylum cases, all relevant particular social groups will have at least one pre-existing characteristic in common,<sup>32</sup> therefore, are clearly mistaken.

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<sup>30</sup> See *supra* notes 21-23 and accompanying text.

<sup>31</sup> See *supra* notes 21-23 and accompanying text.

<sup>32</sup> See, e.g., the authorities cited *supra* note 18. One slight complication is that it is natural to assume that a social group must have at least two members. See, e.g., *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1094-97 (9th Cir. 2013) (Kozinski, C.J., dissenting). But why not a class or group of one, as in the case of a uniquely placed or charismatically disfavored individual? And in such case, the target of persecution would share all of his or her qualities with "every other" member of the group.



*C. The Substantive Dimensions of the Current Appellate Circuit Split*

The crucial statutory term “particular social group” has, not surprisingly, been considered to be ambiguous.<sup>33</sup> We have already exposed basic problems with the typical legal interpretation of this term.<sup>34</sup> As a matter of current law, the Board of Immigration Appeals has at least in some cases sought to clarify this language by requiring that a purported particular social group demonstrate both “particularity”<sup>35</sup>—which may strike us as rather tautological—and what the agency briefly describes as “social visibility.”<sup>36</sup> Group amorphousness, group definability, some sort of social recognizability, and social perception by one group or another have emerged as considerations in this context.<sup>37</sup> Whether a reviewing court judges that *Chevron* deference<sup>38</sup> is properly accorded to any agency interpretation of “particular social group” then factors in.<sup>39</sup>

As these cases have accrued, so too has the relevant division among the federal circuit courts. As articulated, for example, by a Ninth Circuit court en banc:

Most circuits have accepted the BIA’s “social visibility” and “particularity” criteria. See, e.g., *Gaitan v. Holder*, 671 F.3d 678, 681-82 (8th Cir. 2012); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 649-52 (10th Cir. 2012); *Scatambuli v. Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009). But the Third and Seventh Circuits have rejected “social visibility” as an unreasonable interpretation of the ambiguous statutory term. See *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 606-07 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009). The Third Circuit also rejected “particularity” as merely a “different articulation[ ] of the [“social visibility”] concept.”<sup>40</sup>

In addition to this catalogue of circuit cases, the *Valdiviezo-Galdamez* case cited immediately above includes the Second,<sup>41</sup> Ninth,<sup>42</sup> and Eleventh<sup>43</sup> Circuits on the

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<sup>33</sup> See, e.g., *Henriquez-Rivas*, 707 F.3d at 1083 (citing *Donchev v. Mukaskey*, 553 F.3d 1206, 1215 (9th Cir. 2009)).

<sup>34</sup> See *supra* Section II.B.

<sup>35</sup> See *Henriquez-Rivas*, 707 F.3d at 1084-95 (citing, inter alia, *In re C-A-*, 23 I. & N. Dec. 951, 957-60 (BIA 2006)).

<sup>36</sup> See *id.*; see also, e.g., *In re S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008) (Salvadoran youths who had rejected major criminal gang recruitment). Note, on the merits, that while group visibility will of course often be a disadvantage for potentially persecuted group, intra-group visibility may in some case reduce the costs of their political organizing. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

<sup>37</sup> See *Henriquez-Rivas*, 707 F.3d at 1085.

<sup>38</sup> See *supra* notes 7-14 and accompanying text.

<sup>39</sup> See, e.g., *Henriquez-Rivas*, 707 F.3d at 1087.

<sup>40</sup> *Id.* at 1085.

<sup>41</sup> *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 603 n.16 (3d Cir. 2011).

<sup>42</sup> See *id.* But see *Henriquez-Rivas*, 707 F.3d at 1091 (“We clarify the ‘social visibility’ and ‘particularly’ criteria without reaching the ultimate question of whether the criteria themselves are valid. . . . Thus, we need not decide, in this case, at this time, whether we

side of the deferential majority. A recent unpublished Fourth Circuit opinion adds the Fifth Circuit<sup>44</sup> to the majority as well, but does not itself take a position on the permissibility of the Board of Immigration Appeals' "social visibility" requirement.<sup>45</sup> A Fifth Circuit case survey adds the Sixth Circuit to the deferential majority position as well.<sup>46</sup> Other case counts and surveys are consistent with this circuit breakdown.<sup>47</sup>

The circuit split is motivated in part by the availability of more, and less, literal families of interpretations of the idea of "social visibility."<sup>48</sup> Some group characteristics, whether universally shared or not, can be visually detected, at least under some circumstances, by whomever we consider the relevant detecting group. Other characteristics, even if they are common to a "particular social group," cannot. We must therefore ask whether the Board of Immigration Appeals intends the narrower, more literal interpretation of social visibility, and if so, whether reviewing courts should endorse such an interpretation.<sup>49</sup>

Thinking of severely persecuted groups whose members could not readily be distinguished by their literal visual appearance would not be difficult. But if we broaden the idea of "social visibility" to include other sorts of perceptibility, interpretive problems clearly remain. As one court has observed:

Neither we [(the Ninth Circuit)] nor the BIA has clearly specified whose perspectives are most indicative of society's perception of a particular social group: the Petitioner herself? Her social circle? Her native country as a whole? The United States? The global community? Different audiences will be more or less likely to consider a collection of individuals as a social group depending on their own history, course of interactions with the group, and the overall context.<sup>50</sup>

Or, we and the courts could decide to forgo adopting any particular approach, and defer to any reasonable approach that is articulated and adhered to consistently by

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should align ourselves with the Third and Seventh Circuits and invalidate these requirements.").

<sup>43</sup> See *Valdiviezo-Galdamez*, 663 F.3d at 603 n.16.

<sup>44</sup> See *Pantoja-Medrano v. Holder*, 520 Fed. App'x 147, 150 (4th Cir. 2013) (citing *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012)).

<sup>45</sup> See *Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012); *Pantoja-Medrano*, 520 Fed. App'x at 150. The Fourth Circuit does appear to accept the agency's gloss on the "particularity" requirement. See *Zelaya*, 668 F.3d at 166-67.

<sup>46</sup> See *Orellana-Monson*, 685 F.3d at 520 (citing *Al-Ghorbani v. Holder*, 585 F.3d 980, 991, 994 (6th Cir. 2009)).

<sup>47</sup> See, e.g., *Gaitan v. Holder*, 683 F.3d 951, 952 (8th Cir. 2012) (Colloton, J., concurring in denial of rehearing en banc); *Scatambuli v. Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009).

<sup>48</sup> See *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087-88 (9th Cir. 2013).

<sup>49</sup> Note the similar ambiguity in the idea of "recognition." We can visually "recognize" a person as they come into view, but in a broader sense we can also "recognize" someone's musical gifts, or their superior musical gifts, or the hopelessness of a situation.

<sup>50</sup> *Henriquez-Rivas*, 707 F.3d at 1089 (footnote omitted).

the agency until the agency reasonably explains a change in view.<sup>51</sup> We could also maintain some distance from all of the particular substantive interpretations listed above and express sympathy for the idea, however initially disturbing, “that the perception of the persecutors may matter the most.”<sup>52</sup> Finally, with a sense either of judicial modesty, or of a judicial desire to maintain ample room for discretion, the courts could leave the chosen interpretation vague and manipulable, as through a focus merely on “society” or on “others in the country.”<sup>53</sup>

All of this may suggest that the idea of a “visible social group” is largely a very malleable social construct. Some might not welcome the idea that a key element of the law of persecution, or for that matter, of human rights, relies on a readily malleable social construct. In the end, however, we should not be surprised that even the idea of persecution itself, its forms, or of basic human rights must at least in some respects depend on context, as well as on diverse group perceptions of one sort or another.<sup>54</sup>

#### *D. The Persecution of Particular Social Groups: Further Complications*

Let us consider briefly a recurring practical example. Whether categories such as young males victimized for refusing to join, for leaving, or for testifying against local gangs should qualify as a particular social group, or credited with social visibility, cannot be uniformly decided apart from context.<sup>55</sup> As Judge Richard Posner, the most prominent critic of alleged agency inconsistency in this regard,<sup>56</sup> has argued, a state that seeks to eliminate even a broad economic class might well render such an otherwise hazy, indeterminate, and unselfconscious group sufficiently

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<sup>51</sup> See *supra* notes 7-14 and accompanying text.

<sup>52</sup> *Henriquez-Rivas*, 707 F.3d at 1089; Kristin A. Bresnahan, *The Board of Immigration Appeals's New "Social Visibility" Test for Determining "Membership of a Particular Group" in Asylum Claims and Its Legal and Policy Implications*, 29 BERKELEY J. INT'L L. 649, 668 (2011). The actual persecutors may not themselves hold any governmental or formal status, as in the case of persecution by gangs that the government is powerless to stop. See, e.g., *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010); *Gatimi v. Holder* 578 F.3d 611, 616-17 (7th Cir. 2009).

<sup>53</sup> *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 603 (3d Cir. 2011); cf. *Malonga v. Mukaskey*, 546 F.3d 546, 553 (8th Cir. 2008) (“society at large” as the group with the most relevant perceptions, correct or not, of the “particular social group” in question).

<sup>54</sup> For a range of perspectives on the role of social constructs and conventions in the theory and practice of human rights, see, for example, ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* (1983); JAMES GRIFFIN, *ON HUMAN RIGHTS* (2008); CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009); MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* (2000); MICHAEL J. PERRY, *HUMAN RIGHTS IN THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2013).

<sup>55</sup> For rejections of such claims, see, for example, *Orellana-Monson v. Holder*, 685 F.3d 511, 521-22 (5th Cir. 2012); *Santos-Lemus v. Mukaskey*, 542 F.3d 738, 744-47 (9th Cir. 2008); as well as the BIA logic quoted in *Valdiviezo-Galdamez*, 663 F.3d at 600-01. For broader discussion, see Linda Kelly Hill, *The Gangs of Asylum*, 46 GA. L. REV. 639 (2012).

<sup>56</sup> See, e.g., *Benitez Ramos v. Holder*, 589 F.3d 426, 430-32 (7th Cir. 2009) (finding, contrary to BIA decision, sufficient membership in a particular social group for purposes of withholding of removal); *Gatimi*, 578 F.3d at 614-16 (same).

“particular” for asylum law purposes.<sup>57</sup> This determination would inevitably involve awkwardly fitting matters of degree into the statutory and regulatory binary, yes-or-no format.

As a matter of evolving cultural fact, Judge Posner’s further illustrations are of greater persuasive effect than perhaps even Judge Posner appreciates. Consider his observation, in the context of more or less literal social visibility theories, that “[i]n our society, . . . redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can’t be.”<sup>58</sup> Oddly enough, while still falling short of persecuted status, the phenomenon, or at least the idea, of “ginger-bashing”<sup>59</sup> would tend to elevate redheads in the direction of “particular social group” status, or toward “social visibility” in some relevant sense.<sup>60</sup>

The most contentious legal problem in this context, though, is the alleged inconsistency, without satisfactory explanation, among Board of Immigration Appeals cases as to whether “social visibility” is a (valid or invalid) requirement, or perhaps merely a factor of some weight used to establish “particular social group” status. In Judge Posner’s view, the BIA has in this general respect “been inconsistent rather than silent,”<sup>61</sup> and is thus not entitled to any special judicial deference.<sup>62</sup>

In this view, Judge Posner and the Seventh Circuit cases are followed by the Third Circuit Court of Appeals.<sup>63</sup> The Third Circuit argued in *Valdiviezo-Galdamez*<sup>64</sup> that the Board of Immigration Appeals had, at relevant times, found sufficient “particular social group” status of a number of groups<sup>65</sup> without inquiring into their “social visibility,”<sup>66</sup> especially with respect to groups without social visibility<sup>67</sup> in any reasonably literal sense. Its unexplained inconsistent application of a social visibility requirement thus disqualified the Board’s judgment from the otherwise

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<sup>57</sup> See *Benitez Ramos*, 589 F.3d at 431.

<sup>58</sup> *Id.* at 430.

<sup>59</sup> See, e.g., Nelson Jones, *Should Ginger-Bashing Be Considered a Hate-Crime?*, NEWSTATSMAN.COM (JAN. 10, 2013), <http://www.newstatesman.com/nelson-jones/2013/01/should-ginger-bashing-be-considered-hate-crime> (last visited July 24, 2013).

<sup>60</sup> A Google search for “ginger bashing” conducted on July 24, 2013 yielded a total of about 12,300 results.

<sup>61</sup> *Gatimi*, 578 F.3d at 615; see also *id.* at 616 (“We just don’t see what work ‘social visibility’ does [given a presumably independent denial of ‘particular social group’ status].”); see also Melissa J. Hernandez Pimentel, *The Invisible Refugee: Examining the Board of Immigration Appeals’ “Social Visibility” Doctrine*, 76 MO. L. REV. 575, 596 (2011) (“Even within the BIA, it seems that judges decide when to apply social visibility and when to simply ignore it.”). For a summary of Judge Posner’s approach, see *id.* at 596-97.

<sup>62</sup> Hernandez Pimentel, *supra* note 61, at 596-97.

<sup>63</sup> See, e.g., *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 603-04 (3d Cir. 2011).

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 604.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

applicable generous deference under *Chevron*.<sup>68</sup> On this basis, the *Valdiviezo-Galdamez* court held that

[s]ince the “social visibility” requirement is inconsistent with past BIA decisions, we conclude that it is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group.<sup>69</sup>

It is not our aim herein to resolve the obviously important division between the Seventh and Third Circuits on the one hand and the more deferential majority of circuits on the other. Our point instead is one of perspective. While the agency and inter-circuit disputes discussed above are, by ordinary standards, undoubtedly important, that importance should, we argue, be placed in a broader context that is at most only hinted at in the case law. The controversies noted above hardly begin to suggest the far more significant issues underlying asylum and refugee law, and immigration policy more general. In fact, it is possible to imagine that the sorts of narrowly focused legal wrangling discussed above may operate in effect, though not by intent, to distract attention away from the possibilities of broader legal asylum and immigration reform within the administrative and judicial branches through generous but reasonable interpretations of existing, unrevised immigration statutes.<sup>70</sup>

### III. ASYLUM, REFUGEE, AND GENERAL IMMIGRATION LAW IN THE LIGHT OF BROADER MORAL AND HUMAN RIGHTS CONCERNS

#### *A. Immigration Law and Broader Moral and Jurisprudential Standards*

It is nearly always possible for agencies and courts, with their inevitable discretion, to reflect on broader moral and human rights concerns in deciding legal asylum and general immigration cases, even within the scope of the immigration statutes as they stand. Our aim herein is not to determine what the best moral thinking, or the best understanding of human rights, actually requires of agencies, courts, or even legislatures<sup>71</sup> in the area of legal asylum, refugee, or broader immigration law. That ambitious goal is well beyond our scope.

Nor do we deny the importance of the above “social visibility” circuit split, or the value of its best resolution. The point is instead that focusing on the importance of the above circuit split, compared only to narrow immigration law squabbles, distracts attention from the much broader and far more significant asylum and legal immigration issues. The most significant issues are left to be discussed mostly by other actors, including activists and academics.

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<sup>68</sup> *See id.*

<sup>69</sup> *Id.*

<sup>70</sup> While the agencies and courts may thus preoccupy themselves with policy skirmishes at the margins, that does not prevent legislative revisiting of more significant immigration, if not narrower asylum, issues. *See, e.g.*, The Border Security, Economic Opportunity, and Immigration and Modernization Act, S. 744, 113th Cong. (2013). And there is no guarantee that legislative initiatives will reflect the broader moral and human rights issues at stake, as distinct from whatever the current balance of domestic political and economic forces may be at any given moment.

<sup>71</sup> *See, e.g., id.*

The above-mentioned “social visibility” circuit split rightly attracts attention if the “comparison class” includes only concerns limited to narrow, largely fact-specific legal immigration disputes. But this is not the only reasonable perspective on the importance of the “social visibility” circuit split in question. Broader perspectives can be legally quite legitimate.

The perspective we briefly explore below incorporates broader considerations. Professor Stephen Legomsky, among others, usefully calls attention to the much broader jurisprudential picture:

Asylum challenges the national conscience in distinctive ways. It generates hard questions about our moral responsibilities to fellow humans in distress; the recognition of human rights and our willingness to give them practical effect; the extent of our obligations to those who are not U.S. citizens; U.S. legal and moral obligations to the international community; the roles of state sovereignty and borders; foreign relations; allocation of finite national resources; and racial, religious, linguistic, and ideological pluralism.<sup>72</sup>

Here, we conspicuously find broad concepts including conscience, moral responsibilities, human rights in theory and practice, moral and treaty obligations to distant strangers and to the international community, sovereignty, borders, scarcity, and various dimensions of pluralism.<sup>73</sup> We suggest below how such considerations can be legitimately considered in adjudicating immigration cases and interpreting immigration statutes.

*B. The Moral and Jurisprudential Limits of the Case Law as Currently Interpreted*

This is not to suggest that the case law discussed above<sup>74</sup> ignores all legally appropriate roles for broader considerations akin to those highlighted by Professor Legomsky. The problem is instead one of agency and judicial minimization, question-begging, tunnel-vision, and of taking particular controversial answers for granted. Broader moral and jurisprudential questions can be legitimately asked at the court and agency level. Again, our purpose herein is not to select and defend any particular set of case results or broader principles. The point is instead to notice that even relatively important actual cases substantially under-recognize and under-consider relevant broader and more crucial concerns. The particular outcome of the cases discussed above<sup>75</sup> is not in question, as opposed to the potential jurisprudential depth and political seriousness of the logic of their resolution, and of irresponsibility in focusing unduly on narrow concerns.

By way of example, consider the observations of Judge Alex Kozinski, dissenting in *Henriquez-Rivas*.<sup>76</sup> Judge Kozinski recognizes both the difficulty<sup>77</sup> and

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<sup>72</sup> Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 250 (Jaya Ramji-Nogales et al. eds., 2009).

<sup>73</sup> *See id.*

<sup>74</sup> *See supra* Section II.

<sup>75</sup> *See id.*

<sup>76</sup> *See Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1094, 1096 (9th Cir. 2013) (Kozinski, C.J., dissenting).

the importance<sup>78</sup> of determining who counts as a member of a (visible) social group, including problems of “granularity,”<sup>79</sup> or of determining the best level of generality or specificity to describe the purported group.<sup>80</sup> For Judge Kozinski, the major problem is largely practical, and has a distinctive and important normative dimension:

[A]ny number of people sharing a characteristic<sup>81</sup> could be considered a social group. The group may be as small as two<sup>82</sup> and as large as a majority of the population, *paving the way for huge numbers of people to obtain political asylum*. Yet, Congress surely didn’t mean to open the immigration floodgates to everyone in the world who is oppressed. Indeed, the Guidelines to the U.N. Protocol state quite clearly that “the social group category was not meant to be a ‘catch all’ applicable to all persons fearing persecution.”<sup>83</sup>

Thus on Judge Kozinski’s analysis, however it is developed,<sup>84</sup> the gates of asylum are proverbial “floodgates,”<sup>85</sup> and the underlying jurisprudential aim is assumed to be to avoid “huge numbers”<sup>86</sup> of successful asylum applicants.<sup>87</sup> Again, our aim is neither to endorse nor condemn this or any other specific substantive normative approach or outcome. Instead, it is to point out the breadth and importance of evidently relevant concerns that are left, at best, under-addressed and under-considered in the relevant agency and judicial opinions.

Under the current law, the President, in consultation with Congress, annually sets a maximum ceiling on the number of admissible refugees.<sup>88</sup> However, there is no

<sup>77</sup> See *id.* at 1096.

<sup>78</sup> See *id.*

<sup>79</sup> *Id.*

<sup>80</sup> For general background discussion, see, for example, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 55 U. CHI. L. REV. 1057 (1990).

<sup>81</sup> As we have seen, this requirement of a shared characteristic is evidently arbitrary and misleading. See *supra* Section II.B.

<sup>82</sup> The question of whether one individual person could be literally singled out, as a group of one, for severe persecution, and if so, why such a targeted person should not on such grounds be eligible for asylum, is left unaddressed. Perhaps there is always the purely abstract and empty category of any and all (non-existent) others who are similarly situated.

<sup>83</sup> *Henriquez-Rivas*, 707 F.3d at 1096 (Kozinski, C.J., dissenting) (citations omitted) (emphasis added (the emphasized sentiment is unmistakably reinforced in *id.* at 1097)).

<sup>84</sup> See *id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See, e.g., DANIEL C. MARTIN & JAMES E. YANKAY, OFFICE OF IMMIGRATION STATS., ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2012 (Apr. 2013), available at [http://www.dhs.gov/sites/default/files/publications/ois\\_rfa\\_fr\\_2012.pdf](http://www.dhs.gov/sites/default/files/publications/ois_rfa_fr_2012.pdf); Monica Li & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POLICY INST. (Aug. 23, 2011), <http://www.migrationinformation.org/usfocus/display.cfm?ID=851>.

corresponding annual maximum limit<sup>89</sup> on the number of persons potentially granted asylum.<sup>90</sup> Typically, though, in any given year, the number of successful asylum seekers is substantially lower than the ceiling for refugee admissions.<sup>91</sup> In one recent year, for example, 21,000 persons were granted asylum in the United States,<sup>92</sup> with the maximum number of admitted refugees—many arriving from the same few countries<sup>93</sup>—being fixed at 80,000.<sup>94</sup> As of 2013, the refugee ceiling had been revised downward to 70,000.<sup>95</sup> For some perspective on these figures, it has been said that the United States has a total immigrant population, the highest in the world,<sup>96</sup> of about forty million,<sup>97</sup> or twenty percent of the world's total immigrants,<sup>98</sup> with perhaps in the neighborhood of 11.5 million unauthorized immigrants.<sup>99</sup> These numbers give us at least some minimal background with which to work.

*C. The Persecution Requirement as a Distinctive Limitation on the Range of Responses*

Given this minimal background, we can begin to consider some of the broader and more important issues that are underplayed, if they are recognized at all, in the range of immigration cases we have discussed above.<sup>100</sup> First, the relevant statutes and treaties directly involved largely confine the attention of agencies and courts to

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<sup>89</sup> See *supra* note 88.

<sup>90</sup> For our purposes, we may very roughly distinguish between refugees and asylum applicants by thinking of refugees as typically outside the United States, with asylum applicants as in some sense within the United States.

<sup>91</sup> See Li & Batalova, *supra* note 88.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> See *id.* Of course, other government programs can be administered so as to speed up or slow down admissions and deportations.

<sup>95</sup> See Emma Britz & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INST. (Jan. 31, 2013), <http://www.migrationinformation.org/USfocus/display.cfm?id=931>. For comparative historical data on these and related subjects, see OFFICE OF IMMIGRATION STATS., 2011 YEARBOOK OF IMMIGRATION STATISTICS (Sept. 2012), available at [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois\\_yb\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf).

<sup>96</sup> See Britz & Batalova, *supra* note 95.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* Among the possible complications is that while the United States accepts the greatest numbers of refugees, nations such as Sweden and Canada tend to accept more refugees on a per capita basis. See Joseph H. Carens, *Who Should Get In? The Ethics of Immigration Admissions*, 17 ETHICS & INT'L AFF. 95, 100 (2003). Also, a given country may have causally or morally contributed distinctively to the need for refuge or asylum in a particular case, and thus bear special responsibility to assist in some meaningful way. See *id.*

<sup>100</sup> See *supra* Section II.



cases of alleged “persecution.”<sup>101</sup> We of course do not intend to criticize agencies and courts for adhering to statutes. Nor, of course, do we wish in the slightest to minimize the importance of the legal category of persecution.

But it should be noted that in typical use, “persecution” does not encompass every instance of extreme and persistent basic human deprivation or every grievous human rights violation. To the extent that “persecution” fails to encompass the latter, current immigration law may be limiting entry, under the relevant program, at the cost of unremedied human misery or uncorrected basic human rights violations.

Consider, for example, a group, whether socially visible or not, that faces starvation due to natural disaster or the unintended consequences of war, perhaps coupled with the breakdown of civil order. Would we normally say that such a group is genuinely being “persecuted?” The general idea of persecution, in a dictionary sense,<sup>102</sup> may be clear enough for casual uses. But that general idea does not seem especially inclusive, as demonstrated by the hypothetical cases immediately above. In the United States legal context, “there has never been a succinct . . . definition of ‘persecution,’”<sup>103</sup> and the more informal definitions do not seem especially encompassing in general immigration contexts.

More than a century ago, for example, one scholar<sup>104</sup> referred to the spirit of persecution as “the spirit which prompts a man to calumniate, torture, burn, or otherwise put down and injure his neighbor who refuses to reverence the things which he, himself, deems sacred.”<sup>105</sup> While this language is plainly too narrow, even today’s broader understandings of persecution<sup>106</sup> do not seem to encompass, say,

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<sup>101</sup> See, e.g., 8 U.S.C. § 1158(a) (2006); *id.* § 1101(a)(42)(A) (emphasis added); *id.* § 1231(b)(3)(A); Immigration & Nationality Serv. v. Cardoza-Fonseca, 480 U.S. 421, 438-39 (1987); GERMAIN, *supra* note 1; Negusie v. Holder, 555 U.S. 511, 524 (2009); Yasinsky v. Holder, 724 F.3d 983 (7th Cir. 2013); Bathula v. Holder, 723 F.3d 889 (7th Cir. 2013); Tegegn v. Holder, 702 F.3d 1142, 1144 (8th Cir. 2013); Chun Hua Zheng v. Holder, 666 F.3d 1064, 1067 (7th Cir. 2012); Stanojkova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011); Halim v. Holder, 590 F.3d 971, 975-76 (9th Cir. 2009); and the cases cited therein.

<sup>102</sup> See, for example, the second definition of ‘persecution’ presented by the Oxford English Dictionary, focusing on a “particular course or period of systematic violent oppression.” *Persecution Definition*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/141431?> (last visited Feb. 21, 2014).

<sup>103</sup> Legomsky, *supra* note 72, at 98. For contributions to a related debate over whether the idea of persecution should be essential to qualifying as a refugee, see, for example, Andrew E. Shacknové, *Who Is a Refugee?*, 95 ETHICS 274 (1985); Matthew Lister, *Who Are Refugees?*, L. & PHILOSOPHY, Sept. 2013, at 645, available at <http://ssrn.com/abstract=2128409>.

<sup>104</sup> See John Fiske, *The Philosophy of Persecution*, 132 N. AM. REV. 1 (1881).

<sup>105</sup> *Id.* at 12.

<sup>106</sup> See, e.g., Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 343 (2013) (“the illegitimate infliction of sufficiently severe harm”); Jaakko Kuosmanen, *What’s So Special About Persecution?*, 17 ETHIC THEORY MORAL PRAC. 129 (2014), available at <http://link.springer.com/article/10.1007%2Fs10677-013-9425-4> (“[P]ersons facing persecution are facing ‘an asymmetrical and systemic threat of severe and sustained harm that is inflicted discriminatorily and unjustly.’”). For a broad-ranging and especially insightful discussion, see Francesco Maiani, *The Concept of “Persecution” in Refugee Law: Indeterminacy, Context-Sensitivity, and the Quest for a Principled Approach*, LES DOSSIERS DU GRIHL, <http://dossiersgrihl.revues.org/3896> (last visited Feb. 21, 2014).

severe and sustained faultless disasters and are unclear as to their relation to various conceptions of human rights.<sup>107</sup>

Unless “persecution”—as it has been narrowly defined by the case law<sup>108</sup>—somehow turns out to have surprising breadth, however, our asylum, refugee, and overall legal immigration policies will seem arbitrarily narrow to many, and will be subject to powerful critique from several angles. Again, we do not herein try to assess such immigration policy critiques on their ultimate merits. It is important, though, to emphasize the moral and jurisprudential significance of meaningful broad perspectives that are consistently under-recognized or ignored by our positive immigration law.

#### *D. Basic Human Needs, Basic Human Goods, and Basic Human Capabilities*

A moral focus on persecution, as important as it is, must, especially at the “big picture” level, be considered arbitrary until some distinctive justification is offered. There are certainly other concepts through which we can think about various aspects of the current law of immigration, and which might in some respects improve upon a narrow focus on the idea of persecution.

One possibility is to incorporate, at one stage of the overall legal process or another, through statutory interpretation, an explicit concern for fundamental human needs. In the words of the English philosopher Philippa Foot, “[t]here are many things that all humans need, though some amount of relativity does emerge from different ways of life. . . . But we mustn’t lose sight of the fact that there are many things that are absolutely basic human needs.”<sup>109</sup> From a very different philosophical

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<sup>107</sup> See the recognition of this basic “disconnect” in Mark Gibney, *A “Well-Founded” Fear of Persecution*, 10 HUMAN RTS. Q. 109, 114 (1988).

<sup>108</sup> See 8 U.S.C. § 1158(a) (2006); *id.* § 1101(a)(42)(A) (emphasis added); *id.* § 1231(b)(3)(A); *Immigration & Nationality Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987); *GERMAIN*, *supra* note 1; *Negusie v. Holder*, 555 U.S. 511, 524 (2009); *Yasinsky v. Holder*, 724 F.3d 983 (7th Cir. 2013); *Bathula v. Holder*, 723 F.3d 889 (7th Cir. 2013); *Tegegn v. Holder*, 702 F.3d 1142, 1144 (8th Cir. 2013); *Chun Hua Zheng v. Holder*, 666 F.3d 1064, 1067 (7th Cir. 2012); *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011); *Halim v. Holder*, 590 F.3d 971, 975-76 (9th Cir. 2009); and the cases cited therein. See also *Chevron, U.S.A. Inc. v. Natural Resource Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir. 2009); *Elien v. Ashcroft*, 364 F.3d 392, 396 (1st Cir. 2004); *Zheng v. Ashcroft*, 332 F.3d 1186, 1193-94 (9th Cir. 2003); *Murillo-Espinoza v. Immigration & Nationality Serv.*, 261 F.3d 771, 773 (9th Cir. 2001); *Immigration & Nationality Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Pantoja-Medrano v. Holder*, 520 Fed. App’x 147, 149 (4th Cir. 2013) (per curiam); *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967 (9th Cir. 2003); *Valdiviezo-Galdamez v. Att’y Gen.*, 663 F.3d 582, 594 (3d Cir. 2011); *Fatin v. Immigration & Nationality Serv.*, 12 F.3d 1233, 1238 (3d Cir. 1993); *Orellana-Monson v. Holder*, 685 F.3d 511, 518 (5th Cir. 2012); *Gatimi v. Holder*, 578 F.3d 611, 614 (7th Cir. 2009); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1094-97 (9th Cir. 2013) (Kozinski, C.J., dissenting); *Zelaya v. Holder*, 668 F.3d 159, 165 n.4 (4th Cir. 2012); *Gaitan v. Holder*, 683 F.3d 951, 952 (8th Cir. 2012); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010); *Santos-Lemus v. Mukaskey*, 542 F.3d 738, 744-47 (9th Cir. 2008); *Benitez Ramos v. Holder*, 589 F.3d 426, 430-32 (7th Cir. 2009).

<sup>109</sup> Philippa Foot, *The Grammar of Goodness: An Interview with Philippa Foot*, 11 HARV. REV. PHIL. 32, 38 (2003). For much more elaborate treatments, see PHILIPPA FOOT, *NATURAL GOODNESS* (2001); DAVID BRAYBROOKE, *MEETING NEEDS* (1987).

perspective, John Finnis has argued that there are a limited number of self-evident, indemonstrable, and incommensurable basic human goods, including the goods of life itself, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness, and religion.<sup>110</sup> Of course, not all of these presumed goods would be appropriately thought of, in all circumstances, as legally enforceable human rights.

Or relatedly, and with similar limitations, the legal process, including statutory terms and their interpretation, could attempt to take legitimate and proper account of matters of basic human capabilities or capacities, allowing for the pursuit of “a dignified and minimally flourishing life.”<sup>111</sup> At least some minimal capacity for bodily movement “from place to place”<sup>112</sup> in particular is thought by Professor Martha Nussbaum to fall within the scope of the ten “central capabilities.”<sup>113</sup> Less directly, but ultimately more crucially, relevant to refugee policy is Professor Nussbaum’s category of the required availability of nutrition<sup>114</sup> and shelter,<sup>115</sup> to at least some degree.<sup>116</sup>

#### *E. Immigration and Human Rights Theories*

Most fundamentally, one could ask whether an immigration regime, or an immigration adjudication in a particular case, that requires a showing precisely of persecution or some risk thereof will always be consistent with proper respect for basic human rights. Are there sensible understandings of human rights that are inadequately recognized by, or even incompatible with, our current immigration law regime?

Resolving this question in any decisive, authoritative way is unfortunately not possible given current fundamental disputes over the basic nature, status, and content of human rights. While even some official documents refer to a right to seek asylum from persecution in particular,<sup>117</sup> one recent survey resulted in a list of thirty-six additional internationally recognized rights.<sup>118</sup> One might argue, therefore, that the greater the number of official human rights, the greater the possibility of conflicts

<sup>110</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 85-90 (2d ed. 2011).

<sup>111</sup> MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 33 (2011). The relevant capacities are listed and briefly described therein. *Id.* at 33-34.

<sup>112</sup> *Id.* at 33.

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *See id.*

<sup>116</sup> Cf. GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* 47 (2009) (referring to a “needs-based minimum floor principle”); see also Gillian Brock, *Contemporary Cosmopolitanism: Some Current Issues*, 8 *PHIL. COMPASS* 689 (2013).

<sup>117</sup> See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS, IN THEORY AND PRACTICE* 27 (3d ed. 2013) (drawing upon the Universal Declaration of Human Rights; the International Covenant on Economic, Social, and Cultural Rights; and the International Covenant on Civil and Political Rights, and in the specific context of asylum from persecution, the Universal Declaration of Human Rights).

<sup>118</sup> *See id.*

among such rights, and the greater the likelihood of exceptions or of justifiably limited enforcement.

The philosopher John Rawls seeks to reduce such problems, if only through formulating human rights at a higher level of generality.<sup>119</sup> Rawls argues that “[a]mong the human rights are the rights to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).”<sup>120</sup> Several of these human rights, including the means to minimal subsistence and security,<sup>121</sup> could be subject to wrongful, or at least non-justified deprivation, without any official or unofficial persecution.

Supplementing at least the discretionary elements of immigration law and policy with a concern for reducing the impact of the violation of fundamental human rights seems sensible, if not morally required. But there are also a number of preliminary problems,<sup>122</sup> as well as problems regarding the strength and scope of any underlying moral obligations<sup>123</sup> and of practical implementation in a world of diverse and uncooperating sovereign states and other entities.<sup>124</sup>

To begin with, there is no genuine global consensus as to what constitutes human rights at a meaningful level; approaches vary even among theorists with very similar political commitments.<sup>125</sup> Given this complex moral environment,<sup>126</sup> it is not surprising that even the United Nations’ *Universal Declaration of Human Rights* leaves its listing of human rights unranked and unweighted.<sup>127</sup> Other writers focus less on human rights universalism or foundationalism<sup>128</sup> and more on empirical investigation of actual social practices.<sup>129</sup> In fact, it is not even universally agreed

<sup>119</sup> See JOHN RAWLS, *THE LAW OF PEOPLES* 65 (2001 ed.).

<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See infra* notes 128-29 and accompanying text.

<sup>123</sup> *See infra* notes 130-39 and accompanying text.

<sup>124</sup> *See infra* notes 136-39 and accompanying text.

<sup>125</sup> Compare, for example, approaches based on human well-being, or human capacity development, with those focusing on personal autonomy. *See, e.g.*, GRIFFIN, *ON HUMAN RIGHTS*, *supra* note 54, at 45 (“[W]hat we attach value to, in this account of human rights, is specifically our capacity to choose and to pursue our conception of a worthwhile life. . . . Call it ‘normative agency.’”).

<sup>126</sup> *See, e.g.*, JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 53 (1987) (noting the relevance of broader moral principles, of moral considerations other than rights, and of the moral consequences of policies, as duly subject to deliberation).

<sup>127</sup> For discussion, *see id.* at 48.

<sup>128</sup> *See, e.g.*, Joseph Raz, *Human Rights Without Foundations* (Univ. of Oxford, Working Paper No. 14, 2007), available at <http://ssrn.com/abstract=999874>.

<sup>129</sup> *See, e.g.*, BEITZ, *supra* note 54, at 197-98; ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* 4 (2013 ed.).

that a human right must necessarily be especially morally important.<sup>130</sup> All of these unresolved controversies further complicate the relations among interpretive discretion in our immigration law, any legal development of the idea of persecution, and respect for human rights.

*F. Uncertainties Over How Much is Morally Required of Us in Assisting the World's Desperate in General*

Many of us, whatever the actual quality of our moral choices, sense a certain logic to the demanding principle articulated by Professor Peter Singer: “[I]f it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.”<sup>131</sup> Or, roughly, we should assist until our marginal cost in so doing becomes comparable to the marginal gains for those we assist. Geographic distance, lack of causal blame, or the absence of other relationships in and of themselves do not alter Singer’s basic principle. But Singer’s principle clearly distinguishes personal morality and substantial liberalization of immigration and refugee policy from relief of persecution and other avenues of relief.

Such views are often discussed in terms of utilitarianism or a morally demanding form of “consequentialism.”<sup>132</sup> It has been said, again at a personal moral level, that “if the [demanding] consequentialist is right, many of us ought to change our lives. Given the undeniable fact of massive suffering across the globe, most people reading these words are arguably complicit in the perpetuation of an ethical atrocity.”<sup>133</sup>

By contrast, it has been argued that “a requirement that we sacrifice *most* of our welfare for the sake of strangers whose suffering is not our fault seems unreasonably demanding, particularly when most others in a position to help are not doing so.”<sup>134</sup> Thus, while failing to meet even a remarkably demanding standard of assistance to the world’s desperate may “seem counter-intuitively mean,”<sup>135</sup> there is also the

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<sup>130</sup> See, e.g., Raz, *supra* note 128, at 14; CARL WELLMAN, THE MORAL DIMENSIONS OF HUMAN RIGHTS 39 (2010) (“It is not true that moral human rights are by their very nature the most important species of moral rights.”). But cf. BEITZ, *supra* note 54, at 197 (human rights as norms of practices intended to protect our “most important interests”).

<sup>131</sup> Peter Singer, *Famine, Affluence and Morality*, 1 PHIL. & PUB. AFF. 229, 231 (1972). Singer and others have presented variations on this theme, again literally at the level of personal morality. See, e.g., PETER UNGER, LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE 134 (1996) (“On pain of living a life that’s seriously immoral, a typical well-off person, like you and me, must give away most of her financially valuable assets, and much of her income, directing the funds to lessen efficiently the serious suffering of others.”). At some point, questions of incentives to accumulate substantial assets in the first place must be addressed, if the potential producer of those assets knows in advance that most of such assets and income will go to strangers.

<sup>132</sup> See, e.g., SHELLEY KAGAN, NORMATIVE ETHICS 157 (1998).

<sup>133</sup> Hallvard Lillehammer, *Consequentialism and Global Ethics*, in THE MORALITY AND GLOBAL JUSTICE READER 5 (Michael Boylan ed. 2011).

<sup>134</sup> BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY 160 (2000). Professor Hooker has his own recommended general contribution standard. See *id.* at 163.

<sup>135</sup> Brad Hooker, *Sacrificing For the Good of Strangers—Repeatedly*, 59 PHIL. & PHENOMENOLOGICAL RES. 177, 181 (1999).

popular sense that the more rigorous standards may be “counter-intuitively demanding.”<sup>136</sup> A sort of generous-spirited, if uncomfortable accommodation might encourage us—individually, or as a sovereign nation-state—to “combine a proper recognition of the desperate needs of other people with a full engagement with the goods that provide us with our own interests.”<sup>137</sup>

These crucial problems, at individual and governmental levels, are inescapable. Some sort of stance, ultimately, must be officially adopted in refugee, asylum, general immigration, and other official contexts. Broad, general, or ambiguous statutory and regulatory language opens up broad policy alternatives. The complexity of the underlying moral problems can hardly excuse immigration officials, agencies, and courts from addressing such problems as best they can. One might imagine that immigration adjudicators and policymakers could even contribute to the relevant debates with special insight and expertise. But as our discussion above of the persecution “social visibility” circuit split<sup>138</sup> illustrates, the agencies and courts tend instead to leave the most serious moral and jurisprudential questions out of account even where some degree of agency and judicial recourse to such considerations may be permissible and fully legitimate.<sup>139</sup>

This is not to suggest that agencies and courts can solve problems of international coordination, of partial international compliance, and of the proper role of non-immigration-oriented solutions to human rights violations. But thoughtful court decisions, on, say the plight of refugees, might eventually have at least some effect on our collective sense of obligation to such persons. We cannot, for example, simply assume that our current intuitions about fairness to potential refugees are unalterable and unchallengeable. As one philosopher has written, perhaps our intuitions are “simply our selfishness talking. . . . Indeed, one of our firmest moral beliefs is that from the moral point of view everyone counts *equally*.”<sup>140</sup> While agencies and courts should avoid immigration policies that demand more of the receiving nation than the receiving nation is realistically capable of sacrificing,<sup>141</sup> the actual extent of capacity for the sacrifice of self-interest is controversial.<sup>142</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> GARRETT CULLITY, *THE MORAL DEMANDS OF AFFLUENCE* 204 (2004).

<sup>138</sup> *See supra* Section II.

<sup>139</sup> Merely as one hypothetical example, an agency or court with one view of such matters, seeing them not addressed by other governmental agencies and policies, might construe vague or ambiguous statutory or regulatory language so as to bring the total of admitted refugees closer to the arguably already low annual ceiling. *See supra* note 86 and accompanying text.

<sup>140</sup> KAGAN, *supra* note 132, at 159.

<sup>141</sup> *See* JAMES GRIFFIN, *VALUE JUDGMENT: IMPROVING OUR ETHICAL BELIEFS* 91 (1998) (“But what [is in the accessible] psychological repertoire of the minute exception may well not be in the repertoire of the vast majority of human beings.”).

<sup>142</sup> *See generally* JOHN E. HARE, *THE MORAL GAP: KANTIAN ETHICS, HUMAN LIMITS, AND GOD’S ASSISTANCE* (1996). *See also* Bonnie Steinbock, *The Extent of Our Duties*, 44 J. SOC. PHIL. 110, 110 (2013); James P. Sterba, *A Moral Obligation to Sacrifice Our Lives?*, 44 J. SOC. PHIL. 108, 108 (2013); Peter Vallentyne, *On the Duty of Altruism*, 44 J. SOCIAL PHIL. 118, 118 (2013).

Of course, we should all give some thought to what role immigration policies in general, including the extreme option of nearly open borders,<sup>143</sup> should play in any official response to either persecution or to human rights or other basic moral violations. Immigration officials and courts must also consider not only matters of principle in interpreting statutes, but the best policy thinking on alternative national or global institutional roles advantages, disadvantages, and limitations.<sup>144</sup>

#### IV. SOME FINAL PROBLEMS, AND A BRIEF CONCLUSION: IMMIGRATION, THE CURRENT DOMESTIC POOR, AND THE WELL-BEING OF FUTURE GENERATIONS

Immigration policy, and refugee decisions as an element thereof, should in theory take account of the various economic effects—direct and indirect, and short- and long-term—on both the receiving and sending nations. But while some such effects may be well documented, the magnitude of long-term indirect economic effects may not be as clear, or may be of modest size. Further, where there are overall net

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<sup>143</sup> Various authors have contributed to various aspects of the complex debate over nearly open immigration or nearly open borders. *See, e.g.*, FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY (Brian Barry & Robert E. Goodin eds., 1992); OPEN BORDERS? CLOSED SOCIETIES? THE ETHICAL AND POLITICAL ISSUES (Mark Gibney ed., 1988); Michael Blake, *Immigration, Jurisdiction, and Exclusion*, 41 PHIL. & PUB. AFF. 103, 104 (2013) ("The right to exclude . . . cannot justify anything like the exclusionary practices undertaken by modern wealthy states."); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Richard W. Miller, *Global Power and Economic Justice*, in GLOBAL BASIC RIGHTS 156, 178 (Charles R. Beitz & Robert E. Goodin eds., 2009); Michael Huemer, *Is There a Right to Immigrate?*, 36 SOC. THEORY & PRAC. 429 (2010) (immigration restrictions as prima facie coercive); Kieran Oberman, *Can Brain Drain Justify Immigration Restrictions?*, 123 ETHICS 427 (2013); Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109, 109 (2008) ("I appeal to freedom of association to defend a state's right to control immigration over its territorial borders.").

<sup>144</sup> In the broader human rights context, the influential scholar Henry Shue observes, "[i]nstitutional design must combine judgments about what it is fair to expect people to do, what it is efficient to ask people to do, and what it is possible to motivate people to do . . . [involving] hard choices about which aspects of individuals and societies can be changed while which others remain fixed." HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 170 (2d ed. 1996). At the level of broad principle, Professor Thomas Pogge has argued that "[w]e have a duty not to collaborate in the design or imposition of social institutions that foreseeably cause a human rights deficit that is reasonably avoidable through better institutions—unless we fully compensate for our fair share of the human rights deficit." Thomas Pogge, *Are We Violating the Human Rights of the World's Poor?*, 14 YALE HUM. RTS. & DEV. L.J. 1, 14 (2011).

For a brief discussion of institutional complements to, if not substitutes for, immigration policy, including enhanced wealth production generally, and freer or fairer international trade, as well as efficient forms of foreign aid, see, for example, RICHARD W. MILLER, *GLOBALIZING JUSTICE: THE ETHICS OF POVERTY AND POWER* (2010); DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 429-30 (2012) (subordinating the influence of the standard forms of foreign aid to developing inclusive economic and political institutions, enforcing property rights, equal opportunity, and incentivizing investments in skills and technology rather than in extractive privilege); D.W. Haslett, *Values, Obligations, and Saving Lives*, in MORALITY, RULES, AND CONSEQUENCES: A CRITICAL READER 96 (Brad Hooker, Elinor Mason & Dale E. Miller eds., 2000) (emphasizing the importance of overall global wealth creation).

economic benefits from immigration, there may still be winners and uncompensated losers under any policy, thus creating the need for immigration and refugee policy to take controversial normative stands.

A number of years ago, Professor George J. Borjas posed the underlying general question: Of any particular immigration policy, “[w]ho gains by it? Who loses?”<sup>145</sup> Several years later, Borjas argued that immigration in general, and in large numbers, tends to reduce the wages, at least to a limited degree,<sup>146</sup> of the competing, often low-skilled, pre-existing workers in the receiving nation.<sup>147</sup> But the various economic effects, when further broken down by sub-group, actually seem mixed,<sup>148</sup> even if the broad economic theory is clear at a very general level.<sup>149</sup>

Thus, it might be rational for immigration agencies and courts to assume that generally, refugee and immigration decisions should not be decisively influenced by what may be mixed or rather modest employment effects.<sup>150</sup> There may well be a case, however, for governmental agencies, beyond the immigration context, to devise efficient and equitable ways to compensate those adversely affected in the employment market by immigration policies that offered them few real benefits.

By way of conclusion, then, immigration agencies and courts should focus more on questions of justice, essential human goods, basic human fulfillment, human rights, and on their limitations when they are legally permitted to do so, as in construing broad or vague statutory provisions and agency regulations and precedents.<sup>151</sup> Such a path, taken with due intellectual humility, is actually far more responsible than distractingly pursuing—at substantial costs in time, attention, and

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<sup>145</sup> George J. Borjas, *The New Economics of Immigration*, 278 ATLANTIC MONTHLY 72, 72 (1996), available at <http://www.theatlantic.com/past/docs/issues/96nov/immigrat/borjas.htm>.

<sup>146</sup> For competing, as opposed to complementary, pre-existing workers, Borjas estimated that a 10% increase in labor supply resulted in a 3-4% wage reduction. *See id.* at 1035. Others have found lower wage effects even for low-education workers. *See, e.g.*, Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effect of Immigration on Wages*, 10 J. EUR. ECON. ASS'N 152, 152 (2012) (finding as well a small positive effect on native wages in general, and a larger negative effect on the wages of previous immigrants).

<sup>147</sup> *See* George J. Borjas, *The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q. J. ECON. 1335, 1370 (2003).

<sup>148</sup> *See* Ottaviano & Peri, *supra* note 146.

<sup>149</sup> *See* Giovanni Peri, *The Effect Of Immigration On Productivity: Evidence from U.S. States*, 94 REV. ECON. & STAT. 348, 357 (2012) (“We conjecture that at least part of the positive productivity effects are due to an efficient specialization of immigrants and natives in manual-intensive and communication-intensive tasks, respectively (in which each group has a comparative advantage), resulting in a gain in overall efficiency.”); George J. Borjas, *The Impact of Immigration on the Labor Market* 5 (Jan. 2006), available at [http://www.jvi.org/fileadmin/jvi\\_files/Warsaw\\_Conference/Papers\\_and\\_Presentations/Borjas\\_paper.pdf](http://www.jvi.org/fileadmin/jvi_files/Warsaw_Conference/Papers_and_Presentations/Borjas_paper.pdf) (noting the favorable effects of comparative advantage, along with some adverse wage effects); George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LITERATURE 1667 (1994).

<sup>150</sup> *See supra* notes 137-41 and accompanying text.

<sup>151</sup> *See supra* Sections III.D-F.



institutional energy—the circuit-splitting but clearly narrower issues<sup>152</sup> involved in cases such as *Henriquez-Rivas*<sup>153</sup> discussed above.

One final perspective, though, calls for some attention. This involves the question of intergenerational justice. When we think of basic questions of justice and rights in the refugee and the broader legal immigration context, we naturally think of separation across territorial borders, and thus of persons separated by space or geography.<sup>154</sup> But, as in environmental contexts, it is often useful to also think about how official policies, in this case immigration, might affect the well-being, and even the basic moral rights, of future generations, wherever they may be located geographically.<sup>155</sup> Refugee and immigration policy should presumably promote, or at least not impair, the prospects of persons either too young to bargain or exercise any political influence, or who simply do not yet exist. We should presumably refrain from selfishly sacrificing the future to enhance, even globally, the present.

The question of intergenerational justice, in general and as focused on broad immigration policy, is controversial. But on a mainstream approach, we might say that “[a] society is intergenerationally just when each generation does its fair share to enable members of succeeding generations, both inside and outside its borders, to satisfy their needs, to avoid serious harm and to have the opportunity to enjoy things of value.”<sup>156</sup> Again, we do not endorse this or any other particular approach to intergenerational justice. The point, rather, is that refugee and broader legal immigration policies and adjudications should not, where permissible, simply ignore potentially morally weighty considerations in favor of squabbling over narrower issues (including many group “social visibility” issues, which are of importance only by contrast with the many other legal issues routinely addressed by immigration agencies and courts).

Immigration policy may or may not deeply implicate mainstream theories of that which, if anything, is owed to future generations, within or without the borders of the United States. It is possible, however unlikely, that an immigration policy that benefits one or more current groups—think by loose analogy of taking on unrepayable indebtedness—might adversely affect future groups. One indicator of intergenerational injustice is the overall societal savings rate,<sup>157</sup> on the theory that the savings rate helps determine the ratio of current consumption to genuine capital investment that is more oriented toward the future.<sup>158</sup> Of course, a society contributes

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<sup>152</sup> See *supra* note 4 and accompanying text.

<sup>153</sup> See *id.*

<sup>154</sup> See, e.g., *supra* note 8 and accompanying text.

<sup>155</sup> See Lukas Meyer, *Intergenerational Justice*, STANFORD ENCYCLOPEDIA PHIL. (Feb. 26, 2008), <http://plato.stanford.edu/entries/justice-intergenerational>. Professor Derek Parfit introduced a number of intriguing complications, none of which are considered herein. DEREK PARFIT, *REASONS AND PERSONS* (1984).

<sup>156</sup> Janna Thompson, *What is Intergenerational Justice?*, FUTURE JUSTICE, 2010, at 6, 10, available at [http://www.futureleaders.com.au/book\\_chapters/pdf/Future\\_Justice/Janna\\_Thompson.pdf](http://www.futureleaders.com.au/book_chapters/pdf/Future_Justice/Janna_Thompson.pdf).

<sup>157</sup> See, e.g., Joseph Heath, *The Structure of Intergenerational Cooperation*, 41 PHIL. & PUB. AFF. 31, 33 (2013).

<sup>158</sup> See *id.*

to or detracts from the opportunities available to future generations through various elements other than the savings rate. Technological innovation, environmental and educational policy, and maintaining the responsiveness and stability of key social and legal institutions may be important as well.<sup>159</sup>

As the literature on moral and jurisprudential obligations to future generations, domestically and globally, grows more complex,<sup>160</sup> it may be sensible, as in the case of labor markets,<sup>161</sup> for immigration agencies and courts to simply avoid such considerations, or to conclude that even where such matters may legitimately be considered, their immigration implications are mixed, surprisingly limited, or unclear.<sup>162</sup> But again, whether such a conclusion is eventually reached or not, the

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<sup>159</sup> See *id.*; see also Tyler Cowen, *Caring About the Distant Future: Why It Matters and What It Means*, 74 U. CHI. L. REV. 5, 18-19 (2007) (a concise but striking discussion of the dramatic cultural and other differences that may flow over time from different degrees of economic growth and genuine investment in the future); Matthew D. Adler, *Economic Growth and the Interests of Future (and Past and Present) Generations: A Comment on Tyler Cowen*, 74 U. CHI. L. REV. 41 (2007).

The idea that a society should aim at responsible, sustainable development and various forms of collective progress is commonly referred to as societal perfectionism. See Steven Wall, *Perfectionism in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA PHIL. (Oct. 10, 2012), <http://plato.stanford.edu/entries/perfectionism-moral>; DAVID O. BRINK, PERFECTIONISM AND THE COMMON GOOD: THEMES IN THE PHILOSOPHY OF T.H. GREEN (2003); THOMAS HURKA, PERFECTIONISM (1993); STEVEN LECCE, AGAINST PERFECTIONISM: DEFENDING LIBERAL NEUTRALITY (2008); GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS (1997); STEVEN WALL, LIBERALISM, PERFECTIONISM AND RESTRAINT (2006 paperback ed. 1998); Joseph Chan, *Legitimacy, Unanimity, and Perfectionism*, 29 PHIL. & PUB. AFF. 5 (2000); Dale Dorsey, *Three Arguments for Perfectionism*, 44 NOÛS 59 (2010); Thaddeus Metz, *Respect for Persons and Perfectionist Politics*, 30 PHIL. & PUB. AFF. 417 (2002).

<sup>160</sup> See JOHN RAWLS, A THEORY OF JUSTICE 284-93 (1971) (a modestly developed but highly influential discussion of obligations to future generations, at least within the context of a single society). For a mere sampling of the critical literature of Rawls's theory, initially and as later developed, see, for example, Jane English, *Justice Between Generations*, 31 PHIL. STUD. 91 (1977); Axel Gosseries, *On Future Generations' Future Rights*, 16 J. POL. PHIL. 446 (2008); David Heyd, *A Value or an Obligation? Rawls on Justice to Future Generations*, in INTERGENERATIONAL JUSTICE 168 (Axel Gosseries & Lukas H. Meyer eds., 2009); D. Clayton Hubin, *Justice and Future Generations*, 6 PHIL. & PUB. AFF. 70 (1976); Steven Wall, *Just Savings and the Difference Principle*, 116 PHIL. STUD. 79 (2003).

Perhaps the most interesting recent treatment of moral obligations to future generations is TIM MULGAN, FUTURE PEOPLE: A MODERATE CONSEQUENTIALIST ACCOUNT OF OUR OBLIGATIONS TO FUTURE GENERATIONS 197-99 (2006). For useful reviews, see M.A. Roberts, *Review*, 116 MIND 770 (2007); Rahul Kumar, *Mulgan's Future People*, 57 PHIL. Q. 679 (2007); Rivka Weinberg, *Tim Mulgan, Future People: A Moderate Consequentialist Account of Our Obligations to Future Generations*, NOTRE DAME PHIL. REV. (Dec. 2, 2006), <https://ndpr.nd.edu/news/25167-future-people-a-moderate-consequentialist-account-of-our-obligations-to-future-generations/>

<sup>161</sup> See *supra* notes 137-142 and accompanying text.

<sup>162</sup> Consider, for starters, the literature cited *supra* note 149. Of course, if the best analyses disagreed on the extent of our obligations, but agreed that immigration policy should at a minimum fulfill, where permissible, some baseline obligation, the agencies and courts presumably could not escape all responsibility by pointing to the remaining disputes among the theorists.

immigration agencies and courts should not preoccupy themselves with matters such as the particular group “social visibility” circuit split discussed in cases such as *Henriquez-Rivas*<sup>163</sup> without also considering, to the extent permitted by vague or broadly written law, the potentially far more important matters discussed above.<sup>164</sup>

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<sup>163</sup> See *supra* note 4 and accompanying text.

<sup>164</sup> See *supra* Sections III.D-F, IV.