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Protection from a Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases

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I. Introduction

In 1998, Taty Lieana Tearsa Sael filed a petition for asylum and withholding of removal.[1] Ms. Sael was an Indonesian citizen who was

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1. *See* Sael v. Ashcroft, 386 F.3d 922, 924 (9th Cir. 2004) ("[Ms. Sael and her husband] overstayed their visas, and responded to Notices to Appear by applying for political asylum, withholding of removal, and relief under the Convention Against Torture.").

ethnically Chinese and Christian.[2] During her childhood in Indonesia, Ms. Sael faced discrimination because of her race and religion.[3] As a young woman, native Indonesians attacked the boarding house where she lived, vandalized her car, and aimed racist remarks at her.[4] On one occasion, she was riding in a taxi with her native Indonesian husband when a mob threw rocks at the car upon realizing that Ms. Sael was ethnically Chinese.[5] In 1998, Ms. Sael and her husband fled Indonesia and came to the United States.[6] After they overstayed their non-immigrant visas, Ms. Sael filed a petition for asylum and withholding of removal.[7] The Ninth Circuit found that Ms. Sael was eligible for asylum.[8]

In 2003, Wan Chien Kho filed a petition for asylum and withholding of removal.[9] Mr. Kho was an Indonesian national who was ethnically Chinese and who converted to Christianity around 1992.[10] As a child, Mr. Kho experienced anti-Chinese discrimination at school.[11] As a young adult, fellow bus riders "heckled" him when he carried a Bible in public.[12] In 1996, a group of Muslims robbed him.[13] During anti-Chinese riots in 1998, Mr. Kho was hit in the face when the store he worked in was robbed and looted.[14] Later that year,

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2. *Id.* at 923.

3. *See id.* at 923–24 (describing the violence that occurred in Indonesia because of Muslim-Chinese Christian tensions).

4. *See id.* at 927 (discussing the pattern of discrimination Ms. Sael faced in Indonesia). The court stated:

> [Ms.] Sael lived . . . in a boarding house with many other residents but only one other Chinese woman. . . . The two women received threats from native Indonesians; their car was often vandalized, scrawled with sexist and racist remarks . . . [and] a group stoned the boarding house . . . saying "the neighborhood is not for the Chinese."

Id.

5. *Id.* at 928.

6. *Id.* at 924.

7. *Id.*

8. *Id.* at 929. The Ninth Circuit heard the case on appeal; initially, the immigration judge granted Ms. Sael's asylum petition, but the Board of Immigration Appeals (BIA) reversed that decision. *Id.* at 923.

9. Kho v. Keisler, 505 F.3d 50, 52 (1st Cir. 2007).

10. *Id.*

11. *See id.* ("School officials unsuccessfully tried to block his registration to public elementary school.").

12. *Id.*

13. *See id.* ("In 1996, a group of men that Kho identified as Muslim robbed him on a side street in Jakarta; Kho believes they targeted him because of his ethnicity.").

14. *See id.* at 52–53 ("In May 1998, violent anti-Chinese rioting took place in Jakarta. A mob targeted a largely Chinese-owned shopping center where Kho operated an electronics store. Rioters broke shop windows and looted goods from Kho's store; one looter hit Kho in the

the Christian church that Mr. Kho attended was burned and destroyed.[15] The following year, Mr. Kho's new church was also burned down.[16] Mr. Kho fled to the United States in 2001, and two years later he applied for asylum and withholding of removal.[17] The First Circuit upheld the immigration judge's denial of asylum.[18]

The above stories show how asylum applicants are treated differently across the United States. Both Ms. Sael and Mr. Kho showed evidence that they had experienced discrimination and persecution because of their race and religion. Despite the similarity of the applicants' stories and that both based their claims of persecution on their status as ethnically Chinese Christians who feared returning to their native Indonesia, only one of them was granted asylum and allowed to remain in the United States.[19] This disparity resulted from different interpretations of the statutory requirements for proving asylum across the circuits.[20]

Asylum is a means by which an alien can remain in the United States because of a fear of persecution upon return to his or her home country. An alien is eligible for asylum if he is unable or unwilling to return to his home 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."[21] In order to establish a well-founded fear of persecution,

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face.").

15. *Id.* at 53.

16. *Id.*

17. *Id.* at 52.

18. *Id.* at 58. The immigration judge initially denied the application and the BIA upheld that decision. *Id.* at 53.

19. Asylum is an area of immigration that is particularly inconsistent, even outside the scope of the issue of the appropriateness of the disfavored group analysis. *See, e.g.*, Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007) (discussing a survey of asylum cases and the rate at which claims were accepted and denied). The authors concluded that there is "remarkable variation in decision making from one official to the next, from one office to the next, from one region to the next, from one Court of Appeals to the next, and from one year to the next." *Id.* at 302. Despite the discrepancies that seem to be a systematic failing of the asylum system, I suggest that the disparity that results from different approaches to the disfavored group analysis is nonetheless an important issue. First, the requirement for proving well-founded fear is central to asylum adjudication, because it is the substantive element of an asylum claim that is based on the possibility of future persecution. In addition, this is an area where reduced disparity is a realistic objective. Unlike the disparity that results solely from the subjective and discretionary nature of asylum procedures, the acceptance or rejection of the disfavored group analysis is relatively easy to approach.

20. *See infra* Part IV (discussing the various interpretations by several circuits).

21. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (2000) [hereinafter

the alien must establish either that he was the victim of individual, particularized persecution or that a likelihood of future persecution exists because of membership in a persecuted group.[22]

Some circuit courts have held that asylum applicants who are unable to prove individual risk of persecution or membership in a group that is targeted for systematic persecution may nonetheless qualify for withholding of removal if they are members of a disfavored group.[23] A disfavored group is one that is not targeted for systematic persecution, but is at an increased risk of non-systematic persecution.[24] The disfavored group analysis essentially incorporates a lower threshold standard for the withholding of removal, because the asylum applicant can obtain asylum if he can show membership in a disfavored group, accompanied by some lesser individualized risk of persecution.[25] Not all circuits have adopted the Ninth Circuit approach, and variation in acceptance of the disfavored group analysis across the circuits means that similar asylum applicants will be treated differently across the United States. It is this variation that led to the different outcomes for Ms. Sael

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INA].

22. In order to prove future persecution based on membership in a persecuted group the applicant must show: (1) that in his country "there is a pattern or practice . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion," and (2) his own "inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable." 8 C.F.R. § 208.13(b)(2)(iii) (2008); *see also id.* § 208.16(b)(2) (setting forth a similar standard for withholding of removal).

23. *See generally* Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994) ("[A]lthough members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk."); Chen v. INS, 195 F.3d 198, 203–04 (4th Cir. 1999) ("Individual targeting and systematic persecution do not necessarily constitute distinct theories. Rather, an applicant will typically demonstrate some combination of the two to establish a well-founded fear of persecution."); Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995) (explaining the disfavored group analysis).

24. *See Kotasz*, 31 F.3d at 853 ("[A]lthough members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk.").

25. *See id.* (explaining that membership in a disfavored group combined with some personal risk of persecution can satisfy the well-founded fear element). The court stated:

> [A]lthough members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole.

Id.

and Mr. Kho. Ms. Sael was fortunate enough to fall under the jurisdiction of the Ninth Circuit, the court where the disfavored group analysis originated. Mr. Kho was not so lucky.

This Note explores the use of the disfavored group analysis in asylum and withholding of removal cases. Part II introduces the asylum system, providing the background information necessary to understand the disfavored group analysis and the effect its acceptance will have on asylum cases. Part III looks at the Ninth Circuit's creation of the disfavored group analysis and how the Ninth Circuit has elaborated on and applied it. Part III then discusses how other courts have adopted the disfavored group analysis. Part IV examines those courts that have refused to adopt the disfavored group analysis and the reasons they give. Part V explores the failed efforts to take the issue to the Supreme Court. Part VI examines the statutory and regulatory provisions that guide asylum, including a discussion of relevant legislative history, in order to better determine whether the legislature meant to consent to an approach to asylum cases that uses the disfavored group analysis. Finally, Part VII offers a recommendation for absorbing the intent and design of the disfavored group analysis into the current regulatory guidelines for asylum procedure. I suggest a two-prong test that should be adopted by the United States Citizenship and Immigration Service (USCIS). The test would allow an applicant to establish well-founded fear of persecution based on membership in a disfavored group combined with some individual risk of persecution. This conclusion is based on the various courts' arguments, an interpretation of the relevant language in the Immigration and Nationality Act (INA) and the Code of Federal Regulations (C.F.R.), and an understanding of the intent behind the American asylum system.

II. Asylum

Asylum is a method through which an alien may be granted permission to remain in the United States because of past persecution or a fear of future persecution in his home country.[26] Any alien present in the United States can apply for asylum regardless of how he arrived in the country.[27] In order to obtain asylum, the applicant must establish that he is a refugee.[28] A refugee is

26. *See* INA, 8 U.S.C. § 1158(a)(1) (2000) (explaining that any applicant who establishes that he or she is a refugee may obtain asylum).

27. *Id.* § 1158(a)(1).

28. *See id.* § 1158(b)(1)(B) ("The burden of proof is on the applicant to establish that the applicant is a refugee.").

an alien who can show that race, religion, nationality, membership in a particular social group, or political opinion has or will result in persecution in his home country.[29] An applicant will qualify for asylum by establishing either (1) past persecution due to his race, religion, nationality, membership in a particular social group, or political opinion; or (2) a well-founded fear of future persecution based on at least one of those factors.[30] In establishing a well-founded fear of future persecution, the applicant must show that he fears persecution if he returns to his home country, that his fear is reasonable, and that he is unable or unwilling to return home because of this fear.[31]

In order to establish a well-founded fear of persecution, the alien must establish either that he was the victim of individual, particularized persecution or that a likelihood of future persecution exists because of membership in a systematically persecuted group.[32] The applicant must prove a reasonable fear of being singled out for individual persecution.[33] It is not necessary that the applicant prove that he will be singled out for persecution if he can show: (1) that in his home country there is a pattern or practice of "persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion," and (2) his own "inclusion in, and identification, with such group of persons" such that there is a reasonable possibility that he would be threatened upon return to

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29. *See id.* § 1101(a)(42)(A) ("The term 'refugee' means . . . any person . . . who is unable or unwilling to return to . . . [his] country [of nationality] 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.").

30. *See* 8 C.F.R. § 208.13(b) (2008) ("The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.").

31. *See id.* § 208.13(b)(2)(i) (explaining what is necessary to obtain asylum based on a well-founded fear of future persecution). The regulation states:

> An applicant has a well-founded fear of persecution if: (A) The applicant has a fear of persecution in his or her country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion; (B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

Id.

32. *See id.* § 208.13(b) ("Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.").

33. *See id.* § 208.13(b)(2)(iii) (explaining when it is not necessary that the applicant prove that he will be singled out for persecution, and demonstrating that individualized risk is necessary in all other circumstances).

that country.[34] The applicant carries the burden of showing a reasonable possibility of persecution.[35] Courts have not clearly defined what constitutes a reasonable possibility of persecution.

A type of relief that is closely intertwined with asylum is withholding of removal. Withholding of removal is a method through which an alien who is otherwise removable may be able to obtain relief if his life or freedom would be threatened upon removal.[36] An asylum application is also an application for withholding of removal.[37] Like asylum, withholding of removal is established when the alien shows that he has "suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion."[38] Withholding of removal may also be based on future persecution; however, the standard of proof with regard to future persecution is higher for a withholding claim than an asylum claim. To obtain withholding of removal based on a future persecution, the alien must "establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal . . . ."[39]

There are a few key differences between asylum and withholding of removal. Asylum is within the discretion of the Secretary of Homeland

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34. *Id.*

35. *See id.* § 208.13(b)(2)(i) ("An applicant has a well-founded fear of persecution if: . . . There is a reasonable possibility of suffering . . . persecution if he or she were to return to that country.").

36. *See id.* § 208.16(b) ("The burden of proof is on the applicant for withholding of removal . . . to establish that his or her life or freedoms would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion.").

37. *See id.* § 208.13(b) ("An asylum application shall be deemed to constitute at the same time an application for withholding of removal.").

38. *Id.* § 208.16(b)(1)(i).

39. *Id.* § 208.16(b)(2). Like asylum, withholding of removal requires that the applicant prove either that he will be singled out for persecution, or that there is a pattern or practice of persecution against a particular group in his home country and that he will be persecuted because of such membership if he returns to his home country. *Id.* The rule states:

> The asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for . . . persecution if: (i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

Id.

Security or the Attorney General, whereas withholding of removal is mandatory.[40] In addition, asylum is easier to prove because it requires only a reasonable possibility of future persecution, whereas withholding of removal requires that persecution upon return to the home country be more likely than not.[41] Finally, the panoply of rights that accompanies a successful asylum claim is greater than that accompanying withholding of removal.[42] These differences are procedural; the substantive elements of both forms of relief are the same—both require either past persecution or an individualized or group-based risk of future persecution. Because the disfavored group analysis focuses on the risk of future persecution, the differences between asylum and withholding of removal are not central to the courts' analyses and are not the focus of the disfavored group analysis case law.[43] Where the differences affect the disfavored group analysis or the relevant discussion, explanation of the differences will be included to ensure clarity.

Asylum is a particularly timely issue in the American immigration system. The number of asylum petitions has increased drastically in the past twenty years. In 1990, 8,472 applicants obtained asylum.[44] By 2001, that number had risen to 38,825.[45] Although the number fell to 26,113 in 2006,[46] the USCIS is still receiving and processing asylum claims at rates far out-pacing its activity

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40. *Compare* 8 U.S.C. § 1158(b)(1)(A) (2000) (stating that either cabinet member "*may* grant asylum") (emphasis added) *with* 8 C.F.R. § 208.16(d)(1) (2008) ("[A]n application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established . . . .").

41. *See* 8 C.F.R. § 208.16(b)(2) (2008) (An applicant . . . may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted . . . upon removal.").

42. For example, asylees are able to adjust status to legal permanent residency after one year. 8 U.S.C. § 1159(b)(2) (2000). There is no similar guarantee for those granted withholding.

43. The key differences between the asylum and withholding of removal claims are procedural. If the asylum officer or immigration judge who is considering the application or petition finds that the applicant has not met his burden of proof to establish a reasonable possibility of persecution, asylum will be denied. *Id.* § 1158(b)(1)(B). The alien will also be automatically denied withholding of removal, because his inability to prove a well-founded fear means that he will be unable to meet the higher burden of proof necessary to obtain withholding of removal. 8 C.F.R. § 208.16(b) (2008). If the asylum officer or immigration judge finds that the alien is eligible for asylum, it is within his discretion to grant asylum. *Id.* § 208.14(a). If the asylum officer or immigration judge acts within his or her discretion to deny asylum, the alien can pursue the withholding of removal claim; if he is able to meet the higher burden of proof, he is automatically granted withholding of removal. *Id.* § 208.16(d).

44. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2006 YEARBOOK OF IMMIGRATION STATISTICS 43 (2007).

45. *Id.*

46. *Id.*

level eighteen years ago. With its rising popularity as a method for attempting to obtain the protection of the United States, the asylum system can benefit from greater uniformity.

III. Applying the Disfavored Group Analysis in Asylum Cases

Some courts have held that asylum applicants who are unable to prove membership in a group that is targeted for systematic persecution may nonetheless qualify for withholding of removal if they are members of a "disfavored group."[47] A "disfavored group" is one that is not targeted for systematic persecution, but whose members are at an increased risk of non-systematic persecution.[48] Introduced by the Ninth Circuit and referred to as the disfavored group analysis,[49] this approach balances the risk of group-based persecution and evidence of particularized persecution: The greater the risk of persecution because of membership in a group, the less extensive the evidence of particularized persecution necessary for asylum must be.[50] This approach in essence institutes a lower threshold standard for the withholding of removal, because the asylum applicant need not show that he will be specifically targeted for persecution or that he is a member of a group that faces systematic persecution in his country of removal. Instead, the applicant can show some membership in a disfavored group, accompanied by some degree of persecution. The degree of individual persecution necessary to obtain asylum will vary depending on the group, and the level of persecution it faces as an entity.

A. The Disfavored Group Analysis in Kotasz v. INS

The Ninth Circuit first articulated the disfavored group analysis in *Kotasz v. INS*.[51] In *Kotasz*, a Hungarian family applied for asylum based on their

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47. See *supra* note 23 and accompanying text for a description of courts' adoption of the disfavored group analysis.

48. *See* Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994) ("[A]lthough members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk.").

49. *See, e.g.*, Kho v. Keisler, 505 F.3d 50, 55 (1st Cir. 2007) (discussing the Ninth Circuit's "disfavored group" analysis).

50. *See Kotasz*, 31 F.3d at 853 ("[T]he more egregious the showing of group persecution—the greater the risk to all members of the group—the less evidence of individualized persecution must be adduced.").

51. *See id.* at 855 (holding that the BIA should analyze petitions for asylum under the

status as gypsies.[52] The Board of Immigration Appeals (BIA) denied the application, finding that neither Mihaly Kotasz nor his wife had been individually targeted or singled out for persecution in Hungary.[53]

On appeal, the Ninth Circuit disagreed, finding that the BIA erred in requiring Mr. Kotasz to show particularized persecution.[54] The court explained the statutory and regulatory requirements for proving well-founded fear.[55] The novelty of the *Kotasz* opinion came in the next part of the decision, where the Ninth Circuit explained that the two ways to establish a well-founded fear are inadequate in dealing with the realities of global persecution.[56] The court acknowledged that the Immigration and Naturalization Service (INS) had made a valid effort to deal with the problems of major group oppression, but that oppression rarely meets the level of systematic persecution that would satisfy

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correct standard of particularization, which considers possible membership in a disfavored group).

52. *Id.* at 849.

53. *See id.* at 850 ("The immigration judge found [Mr. Kotasz's] testimony generally credible, but denied the Kotaszes' asylum and withholding of deportation claims and granted them voluntary departure. The BIA affirmed in a three-page disposition."). The judge examined the facts alleged in the asylum claim, noting that Mr. Kotasz was arrested in Hungary as a result of his protest of the communist government and was forced to serve briefly in a labor camp because of his refusal to serve in the military. *Id.* at 849–50. During the hearing, Mr. Kotasz also described the current political situation in Hungary and the fact that he would continue to face difficulty if he returned to Hungary because of his past political activities. *Id.* at 850. The court stated: "Mihaly testified at much greater length, describing his mistreatment at the hands of the Hungarian government. He asserted that because of his past political activities he would have 'great difficulty' if he returned to Hungary." *Id.* With regard to Mr. Kotasz's arrests and forced labor at the hands of the Hungarian government, the BIA noted that because he was arrested with a handful of other demonstrators, he was never singled out for persecution: "[T]he BIA stated . . . that 'there is no evidence in the record that [he] was singled out for persecution—rather, he was arrested with numerous other demonstrators and incarcerated for a short period of time.'" *Id.* (alteration in original).

54. *See id.* at 849 ("[T]he BIA erred in its application of the requirement of a particularized threat of persecution.").

55. *See id.* at 851–52 (explaining that an asylum applicant can prove status as a refugee based on a well-founded fear of persecution in two types of situations). The court stated: "A requirement that the alien show that he faces a particularized threat of persecution—sometimes referred to, especially in BIA opinions, as a requirement that the alien show that he will be 'singled out' for persecution—is encompassed within the well-founded fear standard." *Id.* Alternatively, the applicant can show a reasonable likelihood that he will be persecuted upon return home because of his membership in a group that suffers from a pattern of persecution. *Id.* at 852. "There are, in contrast, more extreme situations in which members of an entire group—though perhaps not of an entire nation—*are* systematically persecuted. In such cases, group membership itself subjects the alien to a reasonable possibility of persecution." *Id.*

56. *See id.* at 853 (explaining that non-systematic persecution is more common than pattern persecution against members of oppressed groups).

the requirement of a pattern of persecution.[57] According to the Ninth Circuit, there is a level of persecution that falls between being individualized and systematic; this level of persecution is not so particularized as to be an example of singling out an individual, yet the persecution does not rise to the level of being a pattern or practice against such a group.[58] The court referred to this persecution as attacking "disfavored groups," whose members do not face a pattern of systematic oppression but are nonetheless persecuted for their membership in the group.[59] Thus, the court argued, the plain language of the well-founded fear element of asylum omits a large class of aliens who reasonably face the possibility of persecution if they return to their home countries.[60]

Based on this view, the Ninth Circuit proposed an approach that would allow an applicant to obtain asylum based on membership in a disfavored group. According to this approach, membership in a disfavored group, though not necessarily putting the alien at risk of systematic persecution, nonetheless puts the alien at risk of persecution.[61] The court explained that in some cases membership in a disfavored group would be adequate in proving well-founded fear of persecution and obtaining asylee status, if the applicant was a member of a faction that is at particular risk.[62] In other cases, the court put forward a sliding-scale approach in determining whether an alien established well-founded fear.[63] The court explained:

> [The] risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the

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57. *See id.* ("Although past and even present-day events show that the INS has rightly attempted to deal with the problem of systematic persecution of members of oppressed groups, the problem of non-pattern and practice persecution of members of such groups is far more common.").

58. *See id.* (explaining that disfavored groups are oppressed but are not subject to a pattern of persecution, and that individual members face more targeted persecution).

59. *See id.* ("[M]embers of the disfavored groups are not threatened by systematic persecution of the group's entire membership, [but] the fact of group membership nonetheless places them at some risk.").

60. *See id.* (asserting that many refugees who are not in danger of systematic persecution are still at a high risk because of their membership in a particular group).

61. *See id.* (explaining that membership in a disfavored group puts an applicant at an increased risk of persecution upon return to his home country).

62. *See id.* at 854 ("In some cases, of course, where persecution of the subgroup is systematic, the subgroup member may meet his burden of showing a well-founded fear of persecution simply by showing membership in the subgroup.").

63. *See id.* ("[T]he categories of group targeting and individual targeting are not absolute and distinct. In most cases, they co-exist.").

> group that is itself at greater risk of persecution than is the membership of the group as a whole.[64]

The court went on to explain that membership in a disfavored group that experiences some persecution, coupled with some degree of individualized persecution, may establish the well-founded fear of persecution necessary to obtain asylum.[65] The court discussed this coupling as a sort of balancing approach: The greater the persecution against the disfavored group of which the alien is a member, the less evidence of individualized persecution is necessary.[66]

B. The Disfavored Group Analysis Applied

The Ninth Circuit has fully embraced the disfavored group analysis since *Kotasz*. In *Sael v. Ashcroft*,[67] the Ninth Circuit explained that where an asylum applicant has not been subjected to individual persecution, he can establish a well-founded fear of persecution upon removal either by showing membership in a group subject to a pattern of persecution or by showing membership in a disfavored group coupled with some individual risk of persecution.[68] According to the court, "[t]he [disfavored group] claim consists of two elements—membership in a 'disfavored group' and an individualized risk of being singled out for persecution—that operate in tandem."[69]

The Ninth Circuit recently reaffirmed its loyalty to the disfavored group analysis in *Lolong v. Gonzales*.[70] The court in *Lolong* also elaborated on the requirements that must be met in order for asylum to be granted based on membership in a disfavored group. The court explained that membership in a disfavored group alone is not sufficient to show well-founded fear:

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64. *Id.* at 853.

65. *See id.* at 854 (explaining the application of the disfavored group analysis).

66. *See id.* ("In the non-pattern or practice cases, there is a significant correlation between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized threat of persecution.").

67. *See* Sael v. Ashcroft, 386 F.3d 922, 929 (9th Cir. 2004) (holding that the petitioner, an Indonesian who was ethnically Chinese Christian, had a well-founded fear of persecution).

68. *See id.* at 925 (stating that an asylum applicant can demonstrate well-founded fear by showing patterned persecution against a group in which the applicant is a member). "Alternatively, an applicant may prove that she is a member of a 'disfavored group' coupled with a showing that she, in particular, is likely to be targeted as a member of that group." *Id.*

69. *Id.*

70. *See* Lolong v. Ashcroft, 400 F.3d 1215, 1225 (9th Cir. 2005) *aff'd en banc*, 484 F.3d 1173 (9th Cir. 2007) (holding that the applicant, an Indonesian Christian who was ethnically Chinese, showed substantial evidence supporting her asylum petition).

> If the applicant demonstrates that she is a member of a "disfavored group," but the group persecution does not rise to the level of a pattern or practice of persecution, then the applicant must also demonstrate that she is more likely to be targeted as a member of that group.[71]

In rehearing *en banc*, the Ninth Circuit gave further explanation.[72] The court clarified that in past cases where applicants obtained asylum based on membership in a disfavored group, the applicant also showed some evidence of individual risk upon removal.[73] The court differentiated between cases where the applicant claims membership in a group subjected to patterned persecution and those who claim membership in a disfavored group, explaining that some individualized risk is necessary to obtain asylum based on the latter but that individual risk is irrelevant in the former.[74]

The Fourth and Eighth Circuits have also expressed support for the disfavored group analysis.[75] The Fourth Circuit embraced the disfavored group

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71. *Id.* at 1219.

72. *See* Lolong v. Ashcroft, 484 F.3d 1173, 1178, 1181 (9th Cir. 2007) (en banc) (holding that the Ninth Circuit had jurisdiction to reinstate a removal order and that the petitioner failed to show an objective fear of persecution and therefore did not prove a well-founded fear of persecution).

73. *See id.* ("[In past cases] the petitioner had presented some evidence that he or she faced a unique risk of persecution upon return that was distinct from the petitioner's mere membership in a disfavored group.").

74. *See id.* (explaining that certain evidence that is not applicable in examining the validity of an asylum claim based on some level of individual risk of persecution may be relevant where the applicant seeks asylum based on membership in a group subject to patterned persecution). This explanation helps in our understanding of well-founded fear as a continuum. On one end there is the asylum claim entirely based on individual persecution. On the other end is the claim based on membership in a group subject to a pattern of persecution. Membership in a disfavored group puts an applicant somewhere in between the two extremes. The more similar the applicant's disfavored group is to those groups subject to patterned persecution, the less a showing of individualized risk is necessary. Likewise, the greater the individual risk posed by membership in the disfavored group, the less a showing of systematic persecution against the group is necessary. *Id.*

75. *See* Chen v. INS, 195 F.3d 198, 204 (4th Cir. 1999) (rejecting the requirement that an asylum applicant show either particularized persecution or membership in a systematically persecuted group). "[A] stronger showing of individual targeting will be necessary where the underlying basis for the applicant's fear is membership in a diffuse class against whom actual persecution is haphazard and rare." *Id.*; *see also* Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995) (explaining the disfavored group analysis). The court stated:

> In such cases, "although members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole."

analysis in asylum cases in *Chen v. INS*,[76] where the court considered a petition for asylum and withholding of removal based on a claim that the Chinese petitioner, who had three children, would be subjected to involuntary sterilization upon a return home based on China's one-child policy.[77] The BIA found that Chen had no objective reason to fear individualized persecution on the basis of his violation of the one-child policy and denied his petition.[78]

In considering whether to uphold the BIA's denial of asylum, the Fourth Circuit explained that the petitioner can prove well-founded fear by demonstrating that he or she has been individually targeted for persecution or that he or she is a member of a group against which there exists a pattern of persecution.[79] The court then went one step further and embraced the Ninth

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Id. (quoting Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994)).

76. *See Chen*, 195 F.3d at 205 (holding that petitioner alien Yong Hao Chen failed to show well-founded fear of persecution and upholding denial of asylum and withholding of removal). Chen and his wife claimed that they faced pressure in China to abort their first child, born in May 1990; they avoided the abortion by paying government officials and also agreed to avoid future conception and to sterilization, though neither was sterilized. *Id.* at 200. The couple's second child together was born in the United States, and they claimed they would face repercussions if they returned to China with this child. *Id.* They introduced a 1995 report by Human Rights in China describing the consequences for violations of the "one child" rule. *Id.* at 200–01. The INS responded with a report demonstrating that forced abortions and sterilization were declining in China and that couples returning home from study abroad were generally not penalized. *Id.* at 201.

77. *See id.* at 200 ("Chen maintains that he is entitled to refugee status because he has a well-founded fear, based on China's 'one child' population control program, of being subjected to an involuntary sterilization procedure, or of being persecuted for a refusal to undergo such a procedure."). The Fourth Circuit agreed that Congress explicitly included in its 1996 definition of "refugee" in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) those persecuted for violations of family planning policies, in response to the BIA's original policy of rejecting such claims. *Id.* at 201. The court said that such discrimination would be considered persecution on account of political opinion and could allow the alien to meet the well-founded fear prong of the asylum cases. *Id.* The Act states: "[A] person who has a well founded fear that he or she will be forced to undergo [an abortion or involuntary sterilization] or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion." INA, 8 U.S.C. § 1101(a)(42) (2000). Petitioner Chen claimed that, because of this definition, he had a well-founded fear of forced sterilization based on his political opinion and was therefore entitled to withholding of removal. *Chen*, 195 F.3d at 201.

78. *See id.* at 202 ("[T]he judge found that Chen did not qualify for asylum . . . because he was unable to establish that his fears of persecution and involuntary sterilization are objectively reasonable.").

79. *See id.* at 201–02 (describing the statutory elements of a successful asylum claim). The court stated:

> The [INA] provides the Attorney General with discretion to grant asylum to any alien who is a 'refugee,' . . . a person unable or unwilling to return to his home country 'because of persecution or a well-founded fear of persecution on account of

Circuit's interpretation of the INA from *Kotasz*, explaining that the petitioner can prove well-founded fear by demonstrating that he or she falls somewhere in between individualized and patterned persecution.[80] Citing *Kotasz*, the court stated:

> [T]he more egregious the showing of group persecution . . . the less evidence of individualized persecution must be adduced. . . . Conversely, a stronger showing of individual targeting will be necessary where the underlying basis for the applicant's fear is membership in a diffuse class against whom actual persecution is haphazard and rare.[81]

Despite the court's adoption of the Ninth Circuit's disfavored group analysis, it upheld the BIA's rejection of Chen's asylum petition.[82] The court explained that the State Department report on China's "one-child" policy showed diminished levels of retaliation against those who violated the policy, and that the haphazard nature of the persecution against violators required that Chen introduce evidence of individual persecution targeting him and his wife.[83] The court said that such evidence was lacking, and thus Chen was not entitled to asylum or withholding of removal.[84] Thus, the Fourth Circuit's application of the disfavored group analysis shows that where there is a risk of persecution based on group membership but the persecution is not systematic in nature, a greater showing of individual risk is necessary.

> race, religion, nationality, membership in a particular social group, or political opinion' . . . .

Id. at 201 (quoting INA, 8 U.S.C §§ 158(b), 101(a)(42) (2000)). "The 'well-founded fear of persecution' standard contains a subjective and an objective component. . . . An applicant may satisfy the subjective element by . . . demonstrating a genuine fear of persecution." *Id.* "The objective element requires the asylum petitioner to show, with specific, concrete facts, that a reasonable person in like circumstances would fear persecution." *Id.* at 202.

80. *See id.* at 203–04 ("Individual targeting and systematic persecution do not necessarily constitute distinct theories. Rather, an applicant will typically demonstrate some combination of the two to establish a well-founded fear of persecution.").

81. *Id.* at 204 (citation omitted).

82. *See id.* ("In this case . . . we must conclude that substantial evidence supports the Board's decision.").

83. *See id.* ("The Chinese government . . . impose[s] these measures in a far from systematic way, and with decreasing frequency. As a result, an applicant must proffer some additional evidence that his fears . . . are objectively reasonable.").

84. *See id.* at 204–05 (explaining that Chen failed to establish that his fears were objectively reasonable). The court stated that "[a]t most, a reasonable factfinder would be compelled to conclude that Chen faces the possibility of incurring fees associated with the cost of housing and educating his son." *Id.* at 205.

In *Makonnen v. INS*,[85] the Eighth Circuit considered an application for asylum founded on a claim of ethnic-based persecution. In upholding the immigration judge's rejection of the asylum petition, the BIA articulated its interpretation of the standard for proving a successful asylum claim, explaining that the INA required that Petitioner Makonnen show either individualized persecution or that all members of her ethnic-based political group face persecution.[86] On appeal, the Eighth Circuit said that the BIA erred when it failed to consider Makonnen's well-founded fear once it was established that she was not singled out for persecution and there was no pattern of persecution against all Oromo.[87] The court referred to the Ninth Circuit's *Kotasz* opinion and explained that an alien may meet the requirements for asylum even if the group in which he is a member is not subject to patterned persecution.[88] The Eighth Circuit looked to where the BIA had grounded its explanation in the language of the INA, which says that an asylum applicant need not show he would be singled out for persecution if he can show membership in a group against which there is a pattern or practice of persecution in his home country.[89] The court said that the BIA had adopted too restrictive a definition of "pattern or practice," and that the language should be read broadly so that a petitioner might still be able to prove a well-founded fear of persecution with evidence of some group persecution combined with some individual persecution.[90] In adopting the disfavored group analysis, the court explained:

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85. *See* Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995) (holding that the BIA erred in its failure to consider petitioner's well-founded fear of persecution even if the petitioner is unable to prove either individual persecution or membership in a group against which there is a pattern of persecution, and remanding to the BIA to consider petitioner's additional evidence). The Ethiopian petitioner, Elizabeth Makonnen, claimed that membership since childhood in the Oromo Liberation Front, a political group that opposed the Marxist Mengistu government, would cause her to be persecuted upon her return to Ethiopia. *Id.* at 1380.

86. *See id.* 1382–83 ("The Board . . . not[ed] that Makonnen . . . 'does not demonstrate a well-founded fear of persecution within the meaning of the [INA] unless there is some evidence that [Makonnen] will be singled out for persecution or that all members of the Oromo ethnic group are being persecuted.'"). The petitioner was an active member of the Oromo Liberation Front, an Ethiopian political group that has rallied for autonomy in Ethiopia's southern region for over three decades. *Id.* at 1381.

87. *See id.* at 1383 ("[F]or the Board to construe the regulation to require a showing of persecution of all the members of the applicant's group represents an unreasonable reading of the 'pattern or practice' language.").

88. *See id.* (citing the Ninth Circuit *Kotasz* decision to explain that "the [INA] leaves the standards governing non-pattern or practice cases to be developed through case law").

89. *See id.* (describing the BIA's analysis and its reference to the language of the INA).

90. *See id.* ("The Board also failed to consider whether Makonnen might have a well-founded fear of persecution even if she is unable to establish a pattern or practice of persecution of the Oromo people or of the OLF.").

> [A]lthough members of the disfavored group are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole.[91]

The court remanded the case to the BIA to apply the disfavored group analysis in considering whether Makonnen had a well-founded fear of persecution.[92]

The Fourth and Eighth Circuits' respective adoptions of the analysis provide good examples for implementation. In rejecting the asylum petition in *Chen v. INS*, the Fourth Circuit articulated what would be necessary for a successful claim, explaining that the group at issue was large and disconnected and that persecution was not only non-patterned but no longer common.[93] Where this situation exists, a strong showing of individualized persecution would be necessary; the court denied petition for asylum in *Chen* because the petitioner failed to make this showing.[94] The Eighth Circuit's decision in *Makonnen* explains the application of the disfavored group analysis where an alien's particular status in a group that is not systematically persecuted might be the basis for a successful asylum claim.[95] There, the court suggested that it was not petitioner Makonnen's OLF membership alone that made a fear of persecution upon return to Ethiopia reasonable, but her active participation in group activities and leadership role that put her at special risk.[96] These explanations of how the disfavored group analysis is applied are helpful in determining whether it can be consistently applied.

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91. *Id.* The court also noted that Makonnen's fear seemed to be based not just on her membership in OLF, but on her active role in the group since childhood. *Id.*

92. *See id.* at 1384 ("We hold that the BIA was incorrect as a matter of law in suggesting that it must be shown that all ethnic Oromos were being persecuted, in not considering the possibility of non-pattern-and-practice persecution . . . .").

93. *See* Chen v. INS, 195 F.3d 198, 204 (4th Cir. 1999) ("The Chinese government and its local agents, according to the State Department, impose these measures in a far from systematic way, and with decreasing frequency.").

94. *See id.* at 204–05 ("[A]n applicant must proffer some additional evidence that his fears of this policy are objectively reasonable. . . . Taken as a whole, the record does not compel the conclusion that Chen reasonably fears [substantial economic disadvantage] because of his decision to have a third child.").

95. *See* Makonnen v. INS, 44 F.3d 1378, 1383 (8th Cir. 1995) (explaining that membership in a faction within a disfavored group that is at particular risk can prove a well-founded fear of persecution).

96. *See id.* at 1384 ("[I]t appears Makonnen bases her claim primarily on her active membership in the OLF.").

IV. Rejecting the Disfavored Group Analysis in Asylum Cases

Despite its acceptance by the Fourth and Eighth Circuits, the disfavored group analysis has been soundly rejected by the First, Third and Seventh Circuits.[97] In *Lie v. Ashcroft*, the Third Circuit considered a claim by an Indonesian national that she would be persecuted upon return home because she is an ethnically Chinese Christian.[98] After agreeing with the BIA that Lie had failed to show a well-founded fear of future persecution because she and her family would either suffer individualized persecution or were members of a group that was subjected to a pattern or practice of persecution in Indonesia, the Third Circuit considered the disfavored group analysis.[99] The Third Circuit explicitly rejected the disfavored group analysis: "We disagree with the Ninth Circuit's use of a lower standard for individualized fear absent a 'pattern or practice' of persecution and, similarly, we reject the establishment of a 'disfavored group' category."[100] The court did not discuss the disfavored group analysis further in the opinion.

In *Firmansjah v. Gonzales*,[101] the Seventh Circuit considered the disfavored group analysis. In explaining why Firmansjah, an ethnically Chinese Indonesian national with residency in Singapore, had failed to meet the requisite burden of proof for a successful asylum claim, the court noted the Third Circuit's approach in *Lie* and contrasted the Ninth Circuit's approach to a

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97. *See* Kho v. Keisler, 505 F.3d 50, 55 (1st Cir. 2007) (rejecting the disfavored group analysis); Lie v. Ashcroft, 396 F.3d 530, 538 (3d Cir. 2005) (rejecting the disfavored group analysis, which according to the Third Circuit lowers the standard for particularized persecution despite the lack of evidence of membership in a systematically persecuted group); Firmansjah v. Gonzales, 424 F.3d 598, 607 n.6 (7th Cir. 2005) ("This circuit has not recognized a lower threshold of proof based on membership in a 'disfavored group.'").

98. *See Lie*, 396 F.3d at 538 (holding that Petitioner Lie, an Indonesian, failed to establish a well-founded fear of persecution based on her Christian religion and Chinese ethnicity). See *supra* Part I for a further discussion of the facts in *Lie*.

99. *Id.* at 535–37 (explaining why Lie's evidence failed to establish a well-founded fear of future persecution). The court discussed *Sael v. Ashcroft*, a factually similar Ninth Circuit case where the petitioner was also an Indonesian citizen who was ethnically Chinese and Christian. *Id.* at 538. The *Sael* court applied the *Kotasz* disfavored group analysis and said that because Chinese Christians in Indonesia constitute a disfavored group, less individualized persecution need be shown in order to render an alien eligible for asylum. *Id.* The Third Circuit in *Lie* refused to apply the Ninth Circuit standard. *Id.*

100. *Id.*

101. *See* Firmansjah v. Gonzales, 424 F.3d 598, 607 (7th Cir. 2005) (holding that substantial evidence supported the immigration judge's decision that the petitioner had failed to show a well-founded fear of persecution). Like the petitioner in *Lie*, the petitioner filing for asylum in *Firmansjah* was an Indonesian national of Chinese ethnicity. *Id.* at 600.

similarly-situated applicant in *Sael*.[102] The *Firmansjah* court explained how the Ninth Circuit had used the disfavored group analysis in *Sael*, stating that "[t]he *Sael* court concluded that 'ethnic Chinese [were] significantly disfavored in Indonesia,' and then required the applicant to demonstrate a '"comparatively low" level' of risk in order to establish a well-founded fear of persecution."[103] The court explained that the Ninth Circuit in *Sael* had loosened its requirement of individualized persecution where the alien showed membership in a disfavored group.[104] The court was explicit in its rejection of the disfavored group analysis: "This circuit has not recognized a lower threshold of proof based on membership in a 'disfavored group.'"[105] The court cited the Third Circuit decision in *Lie*, but gave no further explanation for its rejection of the disfavored group analysis.[106]

The First Circuit recently joined the Third and Seventh Circuits in rejecting the disfavored group analysis. In *Kho v. Keisler*,[107] the First Circuit considered an asylum petition filed by an Indonesian citizen who claimed a fear of persecution based on his status as an ethnically Chinese Christian.[108] After briefly describing the disfavored group analysis,[109] the court flatly refused to apply the disfavored group analysis and stated that "[i]n rejecting the 'disfavored group' standard, we join other circuit courts that have rejected the use of a lower standard for individualized fear absent a pattern or practice of persecution and rejected the establishment of a disfavored group category."[110] The court was harsh in its rejection of the analysis, and believed that the Ninth

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102. *See id.* at 607 (contrasting the Third and Ninth Circuits' approaches to the well-founded fear of persecution standard).

103. *Id.* at 607 n.6.

104. *See id.* ("*Sael* required an even lower level of individualized risk after finding that the applicants were members of a 'disfavored group.'").

105. *Id.*

106. *Id.*

107. *See* Kho v. Keisler, 505 F.3d 50, 54–55, 58 (1st Cir. 2007) (holding that there is no patterned persecution against ethnic Chinese in Indonesia and that the BIA did not err in finding that petitioner Kho had not suffered persecution in Indonesia). The Court rejected the disfavored group analysis and the contention that there is a presumption of credibility when the petitioner claims membership in a disfavored group. *Id.* at 55–56.

108. See *supra* Part I for a further discussion of the facts in *Kho*.

109. *See id.* at 55 ("Under the Ninth Circuit's 'disfavored group' rule, asylum applicants who have not shown a pattern or practice of persecution under Section 208.16(b)(2) but have shown membership in a group that is disfavored are subject to a lower burden of showing an individualized risk of threats to their lives . . . .").

110. *Id.*

Circuit acted outside its authority in expanding the methods by which an applicant can obtain asylum beyond the scope of the INA.[111]

V. The Supreme Court Has Refrained from Considering the Disfavored Group Analysis

The cases show that there is a split among the circuits in their acceptance and rejection of the disfavored group analysis. Despite the split, the Supreme Court has declined to resolve the issue, denying certiorari petitions that raise the issue. In 2005, the Supreme Court denied certiorari in *Camara v. Gonzales*,[112] a case from the Third Circuit where the petitioner argued that the circuit split demanded that the Supreme Court establish a consistent standard.[113] In 2007, the Supreme Court denied certiorari in *Avetisian v. Gonzales*,[114] a petition from the Ninth Circuit.[115] In *Avetisian* the petitioner stated:

> To prove the objective component of well-founded fear, and thereby asylum, Ms. Avetisian needs to prove either (1) that there is "a pattern or practice" of persecution, or else (2) that she is a member of a "disfavored group" and she is within a sub-group of the disfavored group that faces heightened persecution.[116]

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111. *See id.* (explaining that courts that apply the disfavored group analysis act outside the scope of the authority they have received from Congress). The court stated:

> While Congress has delegated the authority to the Attorney General and the Secretary of Homeland Security to establish regulations in this area, *see* 8 U.S.C. § 1103, it has made no such delegation to the courts. The disfavored group analysis works a subtle alteration of the usual standards of review. We are bound by the standards Congress sets.

Id.

112. *See* Camara v. Gonzales, 110 F. App'x 262, 265 (3d Cir. 2004), *cert. denied*, 544 U.S. 977 (2005) (holding that the BIA's denial of asylum and withholding of removal for a petitioner from Cote d'Ivoire based on her membership in a political party should be upheld).

113. *See* Petition for Writ of Certiorari at 9, Camara v. Gonzales, 544 U.S. 977 (2005) (No. 04-1159) ("The federal courts of appeals adjudicate thousands of petitions for review challenging denials of asylum or requests for withholding of removal every year. For reasons of both judicial efficiency and basic fairness, the rules governing such adjudications should be uniform throughout the nation.").

114. *See* Avetisian v. Gonzales, 206 F. App'x 711, 712 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2946 (2007) (holding that the BIA's denial of asylum and withholding of removal for an Armenian petitioner should be upheld).

115. *Id.*

116. Petition for Writ of Certiorari at 23, Avetisian v. Gonzales, 127 S. Ct. 2946 (2007) (No. 06-1365) (including an incorrect labeling of the petitioner as "Ashcroft").

In both *Camara* and *Avetisian*, the Attorney General waived response.[117]

Most recently, the court denied certiorari for an appeal from the Seventh Circuit. In *Sanusi v. Gonzales*,[118] the Seventh Circuit denied review of the immigration judge and BIA decisions to deny asylum to an Indonesian woman who claimed that she would be persecuted upon return to Indonesia because she was a Christian of Chinese ethnicity.[119] In his petition for writ of certiorari, petitioner Sanusi argued that the Supreme Court should resolve the supposedly clear split among the circuits with regard to the disfavored group analysis.[120] Petitioner Sanusi explained that the inconsistency in application of the disfavored group analysis will render decisions regarding asylum and withholding of removal claims unreliable, and will lead aliens to be treated differently depending on where they are located.[121]

In response, the Attorney General claimed that the split among the circuits regarding the disfavored group analysis is not as clear as the petitioner alleged.[122] The Attorney General said that neither the Eighth nor the Fourth Circuit has actually "embraced" the disfavored group analysis.[123] The Attorney General explained that no court was willing to allow membership in a disfavored group alone to establish proof of a well-founded fear of persecution, and that therefore the disfavored group analysis had not spread beyond the

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117. *See* Waiver of Right of Respondent Alberto R. Gonzales, Attorney Gen. to Respond at 1, *Avetisian*, 127 S. Ct. at 2946 (waiving the respondent's right to respond to the petition for writ of certiorari); Waiver of Right of Respondent Alberto R. Gonzales, Attorney Gen. to Respond at 1, *Camara*, 125 S. Ct. at 1861 (waiving the respondent's right to respond to the petition for writ of certiorari).

118. *See* Sanusi v. Gonzales, 188 F. App'x 510, 513 (7th Cir. 2006), *cert denied*, 127 S. Ct. at 2935 (2007) (holding that Indonesian petitioners who were ethnically Chinese and Christian did not show a "clear probability" of persecution upon return to Indonesia).

119. *See* Petition for Writ of Certiorari at 9, Sanusi v. Gonzales, 127 S. Ct. at 2935 (2007) (No. 06-1094) (stating that the Seventh Circuit denied review).

120. *See id.* at 11 ("The federal courts of appeals are irreconcilably split over the issue of whether a showing of membership in a 'disfavored group' still requires an applicant to show actual individualized persecution to establish eligibility for withholding of removal.").

121. *See id.* at 17 ("[H]ad Sanusi's application for withholding been presented to an IJ [Immigration Judge] whose immigration court is under the jurisdiction of the Fourth, Eighth or Ninth Circuit court of appeals, she would have received a different outcome on her case.").

122. *See* Brief for Respondent at 10, *Sanusi*, 127 S. Ct. at 2935 (No. 06-1094) ("[T]here is no conflict in the circuits on the question of whether membership in a disfavored group alone, without any individualized evidence of persecution, is sufficient to establish a well-founded fear or likelihood of persecution.").

123. *See id.* at 11–12 (explaining that the Fourth and Eighth Circuits have not "embraced" the disfavored group analysis, and that the Fourth Circuit, though quoting from the Ninth Circuit *Kotasz* case, did not grant asylum based on the disfavored group analysis).

Ninth Circuit.[124] The Attorney General also noted that the Ninth Circuit agrees that membership in a disfavored group alone is not enough to establish proof of a well-founded fear of persecution.[125] Thus, because there is no clear circuit split, according to the Attorney General, there is no need for the Supreme Court to resolve the issue.[126]

While the Attorney General in *Sanusi* was correct to argue that no circuit has held that membership in a disfavored group is sufficient to create the well-founded fear necessary for a successful asylum claim, this argument misstates the disfavored group analysis. In *Lolong v. Gonzales*, which the respondent cited for the proposition that an alien is not "eligible for asylum 'absent an individualized risk of persecution,'" the Ninth Circuit said that membership in a disfavored group alone is not adequate to establish a well-founded fear.[127] The Ninth Circuit explained that they have never granted asylum based entirely on the petitioner's membership in a disfavored group.[128] In successful asylum cases, the alien has shown both membership in a disfavored group coupled with some risk of individualized persecution.[129] In his petition, Sanusi phrased the issue as whether an "asylum applicant . . . who has demonstrated membership in a 'disfavored group' . . . will not be found to have shown a well founded fear of persecution unless she can also demonstrate that she has been 'singled out' for persecution."[130] It was in response to this description of the disfavored group analysis that the Attorney General argued that the disfavored group analysis has not actually been embraced by the Fourth and Eighth Circuits. The disfavored group analysis as formulated by the Ninth Circuit in *Kotasz* does require that the petitioner make some showing of an individualized risk of

124. *See id.* at 11 ("[N]either the Fourth nor the Eighth Circuit has held that membership in a 'disfavored group' obviates the need to establish an individualized risk of persecution.").

125. *See id.* at 10 ("The en banc Ninth Circuit recently revisited its precedent and . . . reaffirmed that aliens are not eligible for asylum 'absent an individualized risk of persecution or a pattern and practice of persecution.'") (quoting Lolong v. Gonzales, 484 F.3d 1173, 1181 (9th Cir. 2007)).

126. *See id.* ("[T]here is no conflict in the circuits on the question whether membership in a disfavored group alone, without any individualized evidence of persecution, is sufficient to establish a well-founded fear or likelihood of persecution.").

127. *See* Lolong v. Gonzales, 484 F.3d 1173, 1181 (9th Cir. 2007) (explaining that the Ninth Circuit has never granted asylum where the claim was entirely based on membership in a disfavored group without any evidence of individual persecution).

128. *See id.* (stating that past successful asylum claims included some individual threat separate from membership in the disfavored group).

129. *See id.* (explaining that the disfavored group analysis requires some individualized threat of persecution).

130. Petition for Writ of Certiorari at 3, Sanusi v. Gonzales, 127 S. Ct. 2935 (2007) (No. 06-1094).

persecution. The level of risk necessary for a successful asylum petition corresponds to the level of risk stemming from membership in the disfavored group.[131] Thus, despite the stance of the Attorney General in his *Sanusi* brief, circuits are split over the legitimacy of the disfavored group analysis.

VI. Statutory and Regulatory Guidance

In order to determine whether the disfavored group analysis is appropriate in asylum decisions, it is necessary to look at the legislation and administrative rules that govern the asylum procedure. When it was originally passed in 1952, the INA allowed individuals fleeing persecution to come to the United States and included an immigrant preference category for individuals fleeing persecution from communism.[132] The Refugee Act of 1980, however, was the first statute that created a legal framework for refugees and asylees in accordance with international guidelines.[133] The Refugee Act is based largely on the United Nations Convention relating to the Status of Refugees (Convention). The definition of "refugee" in the Refugee Act is almost identical to the one in the Convention.[134]

The current statutory basis for asylum is found in the INA.[135] As originally passed in 1980, the provision gave no guidance as to how asylum would be granted or what the procedural requirements for an asylum claim were.[136] The statute instructed the Attorney General to establish an asylum

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131. *See* Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994) ("[T]he more egregious the showing of group persecution—the greater the risk to all members—the less evidence of individualized persecution must be adduced.").

132. *See* INA, 8 U.S.C. § 1153(a)(7) (repealed 1980) (allowing persecution-fleeing individuals to come to the United States).

133. *See id.* § 1101 (revising the INA to provide for a uniform refugee assistance procedure).

134. *See* United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S 137 (defining a refugee). The Convention definition of a refugee is one who:

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

Id.

135. *See* 8 U.S.C. § 1158 (2000) (defining asylum, setting the conditions for granting asylum and establishing procedure for asylum cases).

136. *See id.* (commanding the Attorney General to establish a procedure for granting asylum).

procedure and stated that the Attorney General would have discretion to grant asylum once the applicant proved that he met the definition of a refugee.[137] In its current form, the INA gives both the Department of Homeland Security (DHS) and the Attorney General discretion to grant asylum once an applicant has shown that he is a refugee, but it provides very little guidance as to how the decision should be made.[138] The statute explains that the applicant has the burden to prove that he is a refugee, and states that the applicant is a refugee if he can "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant."[139] The statute gives no further direction in how to determine whether the applicant has established that he is a refugee under the INA. Thus, the INA guides the Secretary of Homeland Security and the Attorney General only with the actual definition of a refugee. A refugee is 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 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.[140]

The language of the INA provides little assistance in determining the appropriateness of the disfavored group analysis in asylum cases. The INA tells the decision maker that asylum may be granted where the applicant is a refugee, but does not explain how the applicant can show that he has a "well-founded fear" that satisfies the INA. Thus, the statute does not help in the determination of whether the applicant can show a well-founded fear based on

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137. *See id.* (creating an asylum institution for aliens already within the United States). The statute stated:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

Id.

138. *See id.* ("The Secretary of Homeland Security or the Attorney General may grant asylum to an alien . . . if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).").

139. *Id.*

140. *Id.* § 1101(a)(42)(A).

membership in a disfavored group combined with some individual risk of persecution.

Congress's intent when it drafted the asylum provision of the Refugee Act of 1980 provides little help in determining how an applicant will be able to show well-founded fear. The Senate Report discusses the procedural elements of the Refugee Act and explains that the Attorney General will establish a clear and uniform procedure for adjudicating asylum claims.[141] With respect to obtaining asylum, the Report simply states that asylum may be granted to those aliens who fit within the United Nations definition of a refugee.[142] The Report says nothing about the role of the asylum program within the larger refugee framework in the United States, thus providing no guidance about whether the definition of "refugee" for purposes of asylum will be narrow or broad in scope. The House of Representatives Report provides even less light into Congress's intent, simply stating that "the Attorney General [is directed] to establish a new uniform asylum procedure."[143]

Additional sources of procedural and substantive rules for asylum claims are the administrative rules and adjudications promulgated and decided by the executive agencies that implement immigration law. Because Congress provided so little guidance for the determination of asylee status, the INS[144] established procedures for making asylum determinations in 1990.[145]

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141. *See* S. REP. NO. 96-256, at 9 (1979), *reprinted in* 1979 U.S.C.C.A.N. 141, 149–50 ("[T]he bill establishes an asylum provision in the Immigration and Nationality Act for the first time by improving and clarifying the procedures for determining asylum claims filed by aliens who are physically present in the United States.").

142. *See id.* at 9 ("[A]sylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol relating to the status of refugees.").

143. H.R. CONF. REP. NO. 96-781, at 20 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 160, 161.

144. The INS, a former agency within the Department of Justice, is the predecessor to the current federal immigration service and enforcement agencies. *See* Immigration and Naturalization Service, 8 U.S.C. § 1551 (2000) ("There is created and established in the Department of Justice an Immigration and Naturalization Service."). The INS was dissolved in 2003, when the DHS was created and immigration jurisdiction was divided among the branches. *See* 6 U.S.C. § 291(a) (2000 & Supp. II 2002) ("[T]he Immigration and Naturalization Service of the Department of Justice is abolished."). Immigration services and enforcement were divided among three branches: Bureau of Citizenship and Immigration Services (USCIS), Bureau of Customs and Border Patrol (CBP), and Bureau of Immigration and Customs Enforcement (ICE). *Id.* §§ 201–271. The agency that issues rules that would amend the asylum and withholding of removal rulings at issue here is CIS, which is the service arm of the immigration regulation system. *Id.* § 271. Because much of the relevant asylum statutes and regulations were passed when the INS still oversaw immigration, much of this section refers to the INS.

145. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674-01 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253)

According to the Code of Federal Regulations (CFR), the applicant will qualify for asylum by establishing either (1) past persecution due to his or her race, religion, nationality, membership in a particular social group, or political opinion; or (2) a well-founded fear of future persecution based on at least one of those factors.[146] This language comes from the definition of a refugee in the INA.[147] The requirements for proving a well-founded fear of persecution, however, are found only in the CFR.[148] The CFR states that:

> An applicant has a well-founded fear of persecution if: (A) The applicant has a fear of persecution . . . on account of race, religion, nationality, membership in a particular social group, or political opinion; (B) There is a reasonable possibility of suffering of such persecution if he or she were to return to [his or her] country; and (C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.[149]

This language expands upon the INA's definition of a refugee, with the addition of a standard of a reasonable possibility. The CFR goes on to state:

> The immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if: (A) The applicant establishes that there is a pattern or practice in his or her home country . . . of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion, and (B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.[150]

The language of the CFR requires that in order to have a well-founded fear, the applicant must either face individual persecution or be a member of a group that suffers a pattern of persecution. The language does not allow an applicant to establish a showing of well-founded fear based on some combination of

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(establishing asylum procedures).

146. *See* 8 C.F.R. § 208.13(b) (2008) ("The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.").

147. *See* INA, 8 U.S.C. § 1101(a)(42)(A) (2000) ("The term 'refugee' means . . . any person . . . who is unable or unwilling to return to . . . [his or her] country [of nationality] 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.").

148. See *supra* Part II for a detailed explanation of the requirements.

149. 8 C.F.R. § 208.13(b)(2) (2008).

150. *Id.* § 208.13(b)(2)(iii); *see also id.* § 1208.16(b)(2) (requiring the same standards for withholding of removal).

individual risk and group persecution. Thus, it appears that the disfavored group analysis is not an appropriate approach to well-founded fear according to the language of the CFR as promulgated by the INS.

Although the language of the CFR does not explicitly support the disfavored group analysis, the intent of the INS may have been to allow an approach to well-founded fear that was broad in scope. The INS's intent in drafting the provisions of the Code can be found in the final rule promulgated in 1990.[151] This rule was promulgated to "establish[] procedures to be used in determining asylum . . . and withholding of deportation."[152] The rule describes the statutory framework within which it would operate.[153] In describing the motivation behind the Refugee Act and the rule that expounded upon it, the INS explained that:

> [The asylum] policy reflects two basic guiding principles: A fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process; and a recognition of the essential need for an orderly and fair system for the adjudication of asylum claims.[154]

These two principles demonstrate the intent of both Congress and the INS in creating a procedure for individuals who fear persecution to obtain refuge in the United States. Beyond this articulation of the rule's intent, however, the analysis of the asylum provision provides no indication that an applicant can prove a well-founded fear of persecution based on membership in a disfavored group combined with some level of individual risk of persecution.[155]

VII. Recommendation: A Disfavored Group Test

The well-founded fear standard articulated by the INS in the CFR, requiring the asylum applicant to show either membership group subject to patterned persecution in his home country or an individualized risk of persecution, is inadequate. The objective of the asylum system is to provide

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151. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674-01 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253) (establishing asylum procedures).

152. *Id.* at 30,675.

153. *See id.* ("The Refugee Act of 1980 created a statutory basis for asylum in the United States. . . . In passing the Act, Congress for the first time established a statutory definition of refugee.").

154. *Id.*

155. *See id.* at 30,683 (stating the an applicant need not show individual risk of persecution if he can show membership in a group subject to patterned persecution in his home country).

safety to aliens who fear persecution.[156] As the INS explained in the background material it provided when promulgating its final asylum procedure, "the granting of asylum is inherently a humanitarian act."[157] The current well-founded fear standard, however, does not meet this objective because it denies asylum to applicants who face persecution upon removal to their home country. As the Ninth Circuit said in *Kotasz*, there are aliens who fall between the two methods of proving well-founded fear who are nonetheless at the same risk of persecution as successful asylum applicants.[158] The Ninth Circuit explained that "[a]lthough past and even present-day events show that the INS has rightly attempted to deal with the problem of systematic persecution of members of oppressed groups, the problem of non-pattern and practice persecution of members of such groups is far more common."[159] The court went on to say that "categories of group targeting and individual targeting are not absolute and distinct."[160] Thus, a modification to current well-founded fear standard as articulated by the INS is necessary in order to more fully meet the aim of the asylum system.

The disfavored group analysis was one effort to ameliorate the harshness of the regulatory standard. The original disfavored group analysis as it was understood by the other circuit courts that either embraced or rejected it, however, is too lenient and unclear. First, the Ninth Circuit did not clearly define a "disfavored group" in *Kotasz*. The court simply explained that "although members of the disfavored group are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk."[161] The Ninth Circuit also said in *Kotasz* that "the problem of non-pattern and practice persecution of members of [oppressed] groups is . . . common."[162] Thus, the only explanation for what constitutes a disfavored group is a group that is oppressed, but whose members do not face systematic, patterned persecution. This explanation leaves much room for subjectivity and discretion in judicial application, particularly because the INS does not define a "pattern or practice" of persecution in its procedural

156. *See* HUMAN RIGHTS FIRST, ASYLUM: SAFETY & FREEDOM IN AMERICA 2 (2005) (explaining the American asylum system and its goals).

157. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674-01 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253).

158. *See* Kotasz v. INS, 31 F.3d 847, 853 (9th Cir. 1994) (explaining that most persecution based on group membership is not patterned persecution).

159. *Id.*

160. *Id.* at 854.

161. *Id.* at 853.

162. *Id.*

guidelines for asylum. In addition, the disfavored group analysis as originally articulated seemed to allow an applicant to obtain asylum based solely on membership in the disfavored group. Specifically, the court in *Kotasz* stated:

> In such cases, although members of the disfavored groups are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk. That risk can rise to the level required for establishing a well-founded fear of persecution either as a result of an individual's activities in support of the group, or because an individual is a member of a certain element of the group that is itself at greater risk of persecution than is the membership of the group as a whole.[163]

The Ninth Circuit in *Kotasz* appeared to assert that something more than membership in a disfavored group would be necessary only in some cases and did not clearly explain when such cases would arise.[164] The closest the court came to asserting that a successful asylum claim should show both group and individual risk was its statement that:

> In the non-pattern or practice cases, there is a significant correlation between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized risk of persecution. Specifically, the more egregious the showing of group persecution—the greater the risk to all members of the group—the less evidence of individualized persecution must be adduced.[165]

Since its inception, however, the disfavored group analysis has been clarified by the Ninth Circuit in a manner that has effectively narrowed its original meaning as understood by other courts. In 2007, the Ninth Circuit in *Lolong* elaborated on the requirements that must be met in order for asylum to be granted based on membership in a disfavored group. The court explained that membership in the disfavored group is not sufficient to show well-founded fear, stating:

> If the applicant demonstrates that she is a member of a "disfavored group," but the group persecution does not rise to the level of a pattern or practice of persecution, then the applicant must also demonstrate that she is more likely to be targeted as a member of that group.[166]

The Ninth Circuit's recent articulation of the disfavored group analysis explains that the applicant must show membership in a disfavored group and some

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163. *Id.*

164. *See supra* Part III.A (discussing the *Kotasz* decision).

165. Kotasz v. INS, 31 F.3d 847, 853–54 (9th Cir. 1994).

166. Lolong v. Ashcroft, 400 F.3d 1215, 1219 (9th Cir. 2007).

individual risk of persecution. The persecution against the group need not rise to the level of being systematic, and the individual risk need not rise to the level of that necessary to prove well-founded fear based on individual risk alone. Rather, the applicant must show that he falls somewhere between the two statutory alternatives for proving a well-founded fear of persecution, by showing some degree of each. This is a standard that is somewhat narrower than that originally understood to be the disfavored group analysis.

Even in its clarified and narrowed form, however, the disfavored group analysis is still imprecise. The Ninth Circuit's articulation in *Lolong* provides no further guidance to asylum officers and reviewing courts as to what groups are disfavored and what correlation of individual risk is necessary to establish in the alien a well-founded fear of future persecution. The Ninth Circuit has never articulated a clear test for how the disfavored group analysis is to be applied. In addition, the BIA has not articulated a version of the disfavored group analysis for use by its asylum officers, nor has the DHS promulgated a rule clarifying how, or even whether, the asylum applicant can establish well-founded fear based on membership in a disfavored group.

In addition to the imprecise nature of the Ninth Circuit's test, a problem with the disfavored group analysis created by case law is that it is outside the bounds of judicial authority. Congress is given great discretion in the area of immigration.[167] In the case of asylum, it has passed much of its broad authority to the immigration agencies. It was the DHS's predecessor agency, the INS, that articulated the well-founded fear standard, and any changes to the standard should be promulgated by the DHS.[168] Although the Ninth Circuit may have had in mind the humanitarian interest that should guide asylum law when it formulated the disfavored group analysis, the court was acting beyond the scope of its authority.

This Note recommends a two-fold approach for addressing the problems with the disfavored group analysis. First, the DHS should articulate a clear two-step test that allows well-founded fear to be based on membership in a disfavored group combined with some corresponding level of individual risk. The asylum applicant will sustain his burden of proving a well-founded fear of persecution if: (1) He establishes that he is a member of a disfavored group in

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167. *See* Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893) ("The power of [C]ongress, therefore, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through the executive officers . . . .").

168. *See* Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674-01 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, and 253) (specifying that the rule establishing asylum procedures is promulgated by the INS of the Department of Justice).

his country of nationality that is oppressed on account of race, religion, nationality, membership in a particular social group, or political opinion but that does not face a pattern of persecution; and (2) he establishes an individual risk of persecution beyond that faced by other members of the disfavored group of which he is a member, which corresponds conversely to his risk based on group membership. Though the language of this test still renders it somewhat ambiguous, it is clearer and more defined than the imprecise disfavored group analysis that has been developed through case law.

Second, it should be the DHS together with the Executive Office for Immigration Review (EOIR) of the Department of Justice (DOJ)[169] that adds this two-step test, through appropriate procedure under the Administrative Procedure Act,[170] to the procedural guidelines for asylum claims found in the CFR. The test should be added to 8 C.F.R. § 213(b)(2)(iii) to provide a third avenue for proving well-founded fear of persecution other than individual risk or membership in a systematically persecuted group.[171] There are two advantages to implementing this test as an agency rule rather than as court-created common law. First, it will provide for uniformity across the United

169. While the USCIS is the agency that adjudicates affirmative asylum claims, the EOIR, an agency within the DOJ, continues to adjudicate removal proceedings where asylum and withholding of removal will arise in defensive claims. *See* 6 U.S.C. § 291 (2000 & Supp. II 2002) (dissolving the INS of the DOJ). The DHS only took over the responsibilities of the INS, but the DOJ maintained its authority over removal procedures. *Id.*

170. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2000).

171. With the proposed addition, 8 C.F.R. § 208.13(b) will read:

> The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution. . . . (2) Well-founded fear of persecution. . . . (iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if: (A) Membership in a persecuted group: (I) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and (II) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable; or (B) Membership in a disfavored group: (I) The applicant establishes that he is a member of a disfavored group in his country of nationality that is oppressed on account of race, religion, nationality, membership in a particular social group, or political opinion but that does not face a pattern of persecution; and (II) The applicant establishes an individual risk of persecution beyond that faced by other members of the disfavored group of which he is a member, which corresponds conversely to his risk based on group membership.

Id.

States. Uniformity through jurisprudence will require that an asylum claim challenging a refusal to apply the disfavored group analysis be heard by the Supreme Court, and this is unlikely given the recent certiorari denials of this issue. Uniformity has not necessarily been a paramount concern in asylum law; asylum is in fact notorious for inconsistency.[172] A consistent application of a test that recognizes well-founded fear where there is a combination of membership in a disfavored group and some individual risk will improve consistency in adjudications of asylum petitions by similarly-situated applicants. Once a group is consistently recognized as disfavored in a specific country, petitioners that are members of the disfavored group will face greater predictability across the United States. Any effort that can be made to enhance the uniformity of asylum cases is much needed, and USCIS and EOIR should do all that they can to do so.

Second, establishing the test through the appropriate administrative agency rather than through the courts is appropriate here. Immigration is historically an area where the courts have taken a hands-off approach, and the Supreme Court has given Congress great deference in immigration.[173] Congress passed its discretion and authority on to the immigration agencies in the specific area of asylum.[174] It is simply most appropriate that the test this Note recommends be promulgated through agency rule.

VIII. Conclusion

Asylum applicants have faced great disparity in the treatment of their efforts to prove well-founded fear based on their membership in particular oppressed groups and the individual risk they face. The cases of Ms. Sael and Mr. Kho described in Part I show how two similarly situated asylum applicants

172. *See* Ramji-Nogales et al., *supra* note 19, at 302 (asserting that the authors' study of the success rate of asylum claims within single immigration courts, across the country, and within single nationality groups shows that there is gross disparity in granting asylum); *but see* Stephen H. Legomsky et al., *Learning to Live With Unequal Justice: Asylum and the Limits of Consistency*, 60 STAN. L. REV. 413, 415–16 (2007) (responding to Ramji-Nogales et al., and arguing that not only is the lack of consistency in asylum adjudication no cause for concern, but that consistency is in fact detrimental in asylum claims). Legomsky et al. claimed that subjectivity is necessary in asylum because of the unique nature of every claim and the individual experience of each applicant. *Id.*

173. *See* Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893) ("The power of [C]ongress, therefore, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through the executive officers . . . .").

174. *See* INA, 8 U.S.C. § 1158 (2000) (granting the Secretary of Homeland Security and the Attorney General the authority to grant asylum).

can be treated differently depending on where they file their claim, simply because one court applies the disfavored group analysis in asylum cases and the other does not. This kind of inconsistency is especially cruel in asylum, which is a humanitarian immigration tool aimed at protecting those aliens who will face persecution if removed to their countries of nationality. Dispensing of the disfavored group analysis, however, would be even more cruel, because it would leave aliens with only two methods to prove well-founded fear of future persecution: Membership in a systematically persecuted group or individual risk of persecution. To ameliorate the harshness of the current regulatory asylum procedures while avoiding the risk of abuse created by a lenient standard like the Ninth Circuit's disfavored group analysis articulated in *Kotasz*, the USCIS and the EOIR should promulgate a rule to add an additional method of proving well-founded fear. The new two-prong test will require the applicant to show membership in a disfavored group alongside some individualized risk of persecution separate from other members of the group. The addition of the test will provide more clarity in an area of immigration law that is particularly subjective and uncertain. If the USCIS and EOIR adopt the test, aliens like Ms. Sael and Mr. Kho will no longer have to hope that they have chosen the best city to reside in during the pendency of their asylum case, or hope that they landed in the best circuit for their removal hearing. Ms. Sael and Mr. Kho will know what they must show to establish well-founded fear of persecution and obtain asylum. And we will no longer have to see Mr. Kho sent home while Ms. Sael builds a new life with the protection of the United States.