

NOTE

Assumption of Risk in United States Refugee Law

IAN ATKINSON*

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* University of Virginia School of Law, J.D. 2008; Tulane University, B.A. 2005. The author would like to thank Professor David Martin for his insights and suggestions on this Note.

*Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.*¹

INTRODUCTION

Assumption of risk is well known in tort law. Certain activities entail a risk of injury, and participants who knowingly engage in those activities should not expect compensation should those risks materialize. In the words of Justice Cardozo:

Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.²

Confined to the law of torts, the principle is uncontroversial. But when, if ever, should this principle be imported into the law of refugee status, where the risks are more serious than “the chance of contact with the ball” and where the consequence of assuming the risk is not lack of compensation but denial of protection from persecution? If an applicant has shown that he has a well-founded fear of persecution, should protection nonetheless be denied because the applicant knowingly engaged in behavior with a foreseeable risk of harm?

In *In re C-A-*, the Board of Immigration Appeals (BIA) began to articulate a concept very similar to assumption of risk in the context of claims of membership in a particular social group based on past, shared experiences.³ But is such a principle legitimate? So far, there has been no scholarly analysis examining whether assumption of risk can be justified within the international and domestic frameworks for refugee protection.⁴ This Note begins to fill that void by arguing that assumption of risk can play a role in U.S. refugee law, but rejects its current application by the BIA. Specifically, this Note attempts to formulate a theory of

1. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (emphasis added).

2. *Id.* (citation omitted).

3. 23 I. & N. Dec. 951, 958–59 (BIA 2006).

4. That is not to say that no one has observed the emergence of assumption of risk. Soon after *In re C-A-* was handed down, Professor Martin acknowledged that the case turned on assumption of risk analysis. See DAVID A. MARTIN, ASYLUM CASE LAW SOURCEBOOK: CASE ABSTRACTS FOR U.S. COURT DECISIONS xiii (2007).

assumption of risk that remains faithful to U.S. obligations under international law.

This Note proceeds by examining the emergence of an assumption of risk principle and its problematic consequences before suggesting an alternative doctrinal foothold. Part I outlines the protection offered refugees by the 1951 Convention relating to the Status of Refugees and the United States' implementing legislation. Part II surveys the BIA's social group jurisprudence related to protection for groups united by past, shared acts and examines the emergence of assumption of risk in *In re Fuentes*⁵ and *In re C-A*.⁶ In Part III, this Note analyzes assumption of risk and its consequences as currently applied—specifically, this Part argues that assumption of risk is troubling as a complete bar to withholding of removal because it is inconsistent with social group theory and the structure of both international and domestic law. Finally, Part IV argues that while assumption of risk cannot be a complete bar to withholding removal, which is consistent with U.S. obligations under international law, it can be rationalized as a factor weighing against a discretionary grant of asylum. Thus reconceived, assumption of risk becomes less problematic as a matter of international legal compliance, but it raises broader issues concerning whether the principle should be applied outside the social group context. After examining the unsatisfactory results that occur when assumption of risk is applied to other enumerated grounds, Part IV concludes by examining the cultural legitimacy concerns leading to the emergence of assumption of risk within particular social group cases and recommends an application of the doctrine that explicitly takes into account those concerns.

I. INTERNATIONAL AND DOMESTIC PROTECTION OF REFUGEES

Following the Second World War, the United Nations supplanted the defunct League of Nations as the leading international actor attempting to resolve the matter of displaced persons.⁷ The Office of the UN High Commissioner for Refugees (UNHCR) became the modern international organization addressing refugee displacement.⁸

Unquestionably, the most novel feature of the UNHCR was the manner in which it defined refugees. While the United States proposed lim-

5. 19 I. & N. Dec. 658 (BIA 1988).

6. 23 I. & N. Dec. 951.

7. See 1 LOUISE W. HOLBORN, REFUGEES: A PROBLEM OF OUR TIME 23–81 (1975).

8. DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 37 (2007).

iting the organization's definition to those refugees covered by previous agreements, other countries, including the United Kingdom, sought a broader definition that could be adapted to emerging refugee situations.⁹ Perhaps because the UNHCR was originally meant to be a temporary organization of modest means, those proposing a broader definition succeeded over those proposing the more limited edition.¹⁰ In addition to including refugees recognized by prior instruments, the Statute of the Office of the UN High Commissioner for Refugees (UNHCR Statute) defined refugees as:

[a]ny . . . person who is outside the country of his nationality or, if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.¹¹

This definition was a clear departure from the approach taken by prior agreements. Instead of defining refugees categorically according to specific crises, as was done previously,¹² the new definition linked refugee status to persecution—specifically, persecution on account of four enumerated grounds: race, religion, nationality, and political opinion.¹³ The move to a more flexible, persecution-based definition proved to be especially significant, serving as the model for the drafters of the 1951 Convention relating to the Status of Refugees¹⁴—the keystone of modern international refugee protection.¹⁵

Following its experience with the International Refugee Organization (IRO), which determined individuals' refugee status and assisted displaced persons, the United Nations expected that individual nations rather than the UNHCR would conduct the work of resettling and aiding Europe's lingering refugee population, giving rise to the need for an in-

9. 1 HOLBORN, *supra* note 7, at 78–79.

10. *Id.* at 78, 80; *see also* MARTIN ET AL., *supra* note 8, at 38.

11. Statute of the Office of the UN High Commissioner for Refugees, G.A. Res. 428 (V), Annex, ¶ 6(B), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Dec. 14, 1950) [hereinafter UNHCR Statute].

12. *See* 1 HOLBORN, *supra* note 7, at 36.

13. UNHCR Statute, *supra* note 11, ¶ 6(B).

14. Convention relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

15. MARTIN ET AL., *supra* note 8, at 36.

ternational instrument defining the obligations that nations owed to refugees within their territories.¹⁶ Yet, after several years of costly and extensive assistance under the IRO, states were generally unwilling to commit themselves and their resources to providing broad mandatory legal entitlements.¹⁷ Many countries sought a retreat from the costly obligations imposed by the IRO in favor of a successor organization demanding fewer obligations.¹⁸ By 1949, the United States viewed the refugee problem in Europe as largely resolved. At this point, the U.S. government could no longer muster the public support necessary to maintain its involvement in international refugee assistance at prior levels.¹⁹

The resulting Convention displays this hesitance in both the persons it reaches and the substantive obligations it imposes. The Convention adopted a broad universal definition nearly identical to that contained in the UNHCR Statute, but expanded on the Statute's definition in one important respect.²⁰ Towards the end of the Conference of Plenipotentiaries, an additional protected ground—membership in a particular social group—was added to the four grounds enumerated in the UNHCR Statute.²¹ It is tempting, therefore, to view the Convention as an expansive guarantee of refugee rights. In reality, however, the Convention's drafters limited states' obligations in several ways. First, the Convention's reach was specifically limited in both time and locality.²² The refugee definition limited the Convention's scope to those persons displaced as a result of events occurring before January 1, 1951, and countries had the option to further limit its reach to events causing displacement in Europe.²³ Additionally, the Convention excluded from protection certain individuals who might be dangerous to the country providing relief.²⁴ Most importantly, the Convention declined to extend to refugees the right of asylum.²⁵ The Convention enumerated a broad range of rights, but most of these rights were restricted to refugees "lawfully in"

16. *Id.* at 36-38.

17. 1 HOLBORN, *supra* note 7, at 80-81.

18. *Id.* at 61-63.

19. *Id.*

20. Compare UNHCR Statute, *supra* note 11, ¶ 6(A)(ii), with Refugee Convention, *supra* note 14, art. 1(A)(2).

21. Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 508-09 (1993).

22. See MARTIN ET AL., *supra* note 8, at 39.

23. *Id.*; see also Refugee Convention, *supra* note 14, art. 1(B)(1).

24. Refugee Convention, *supra* note 14, art 1(F).

25. 1 HOLBORN, *supra* note 7, at 162-63; MARTIN ET AL., *supra* note 8, at 40-41.

or “lawfully staying in” the country of refuge.²⁶ All refugees were, significantly, granted protection against *nonrefoulement*, or return to the country in which they feared persecution, but other benefits and lawful status remained solely within the discretion of the state to grant or deny.²⁷ The subsequent 1967 Protocol relating to the Status of Refugees removed both the “in Europe” option and the 1951 cut-off date, but the basic legal framework, including the purely discretionary nature of asylum, remains today.²⁸

In 1968, the United States joined the 1967 Protocol, which incorporated the Convention’s obligations, including the mandatory protection against *nonrefoulement* and the additional benefits guaranteed for those lawfully in or lawfully staying in the United States.²⁹ Under the Immigration and Nationality Act (INA), refugees within the United States currently have two options for seeking protection.³⁰ Section 241(b)(3) guarantees mandatory withholding of removal where the alien’s “life or freedom would be threatened . . . because of . . . race, religion, nationality, membership in a particular social group, or political opinion.”³¹ Section 208 allows the Attorney General, at his discretion, to grant asylum to any person outside his country of origin who “is unable or unwilling to return to, and unable or unwilling to avail himself . . . of the protection of, that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”³² Withholding insulates the recipient from return to the country where his life or freedom would be threatened. A discretionary grant of asylum carries with it numerous benefits, including work authorization, derivative status for family members, and the eventual opportunity to adjust status to a lawful permanent resident.³³

Thus, Sections 241 and 208 conform roughly to the protection regime set in place by the Convention. Mandatory *nonrefoulement* is guaranteed through withholding, and the benefits conferred by a grant of asylum encompass the substantive rights given to refugees lawfully in or

26. MARTIN ET AL., *supra* note 8, at 40, 69–71.

27. *Id.* at 70.

28. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967); *see also* MARTIN ET AL., *supra* note 8, at 41.

29. MARTIN ET AL., *supra* note 8, at 72.

30. Immigration and Nationality Act § 101, 8 U.S.C. § 1101 (2008).

31. *Id.* § 241(b)(3).

32. *Id.* §§ 101(a)(42)(A), 208(b)(1)(A).

33. *Id.* §§ 208(b)(3)(A), 208(c)(1)(B), 209.

lawfully staying in the country of refuge. Importantly, consistent with the Convention and customary norms of international law, the greater benefit of asylum remains a purely discretionary benefit within the power of the Attorney General or the Secretary of Homeland Security to grant or withhold.³⁴

II. FROM *IN RE ACOSTA* TO *IN RE C-A-*: THE EMERGENCE OF ASSUMPTION OF RISK

The concept of assumption of risk has emerged within the context of case law discussing particular social group claims.³⁵ Relying on the doctrine of *ejusdem generis*—the practice of interpreting a general term consistently with specific terms in the same list—the panel in *In re Acosta* defined “persecution on account of membership in a particular social group” as “persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.”³⁶ The Board elaborated that “whatever the common characteristic that defines the group, it must be one that members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”³⁷ It concluded:

Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.³⁸

The approach articulated in *In re Acosta*—the immutability approach—is a thoughtful attempt to define “particular social group” and has been praised by scholars and jurists alike.³⁹

The *In re Acosta* panel spent very little time, however, indicating how its immutability criteria should be applied. The Board made short work of the respondent’s claim that he would be persecuted by guerillas because of his membership in a taxi driver collective that refused to par-

34. *Id.* § 208(b)(1)(A).

35. *See In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985).

36. *Id.* at 233.

37. *Id.*

38. *Id.* at 233–34.

39. *See, e.g.,* Ward v. Canada, [1993] 2 S.C.R. 689 (Can.); James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*, 15 INT’L J. REFUGEE L. 477, 486–87 (2003).

ticipate in work stoppages, stating only that “members of the group could avoid the threats of the guerillas either by changing jobs or by cooperating in work stoppages” and that “the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.”⁴⁰ The only guidance the Board gave concerning how its newly formulated social group definition should be applied comes from a short passage stating that “[t]he shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or landownership,” but that “[t]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.”⁴¹

Considering the paucity of examples enumerated by the Board, it is notable that two circumstances, former military leadership and landownership, come under the rubric of past, shared experiences. Given that the Board’s touchstone for recognizing a social group is immutability, this is not that surprising. Past, shared experiences, after all, cannot be changed by those who lived through them, and the BIA as well as various courts of appeal have recognized that social groups united by past, shared experiences should be protected if the applicant can show persecution on account of membership in that group.⁴²

No court, however, has gone so far as to say that all past, shared experiences should count. Indeed, *In re Acosta* itself recognized that social group determinations need to be made on a “case-by-case basis” and that groups united by past, shared experiences would only qualify “in some circumstances.”⁴³ Recently, the BIA has begun to define more fully which past, shared experiences give rise to protection. In a pair of recent precedent decisions, the BIA has begun to carve out a potentially expansive exception based on considerations similar to the tort concept of assumption of risk.

40. *Acosta*, 19 I. & N. Dec. at 234; see also Fullerton, *supra* note 21, at 546–48 (criticizing the *In re Acosta* panel’s application of its social group test to the facts).

41. *Acosta*, 19 I. & N. Dec. at 233.

42. See, e.g., *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672–73 (7th Cir. 2005) (recognizing that educated former landowners could constitute a distinct social group and remanding to the BIA to determine whether the applicants’ feared persecution was on account of their membership in this group); *Lukwago v. Ashcroft*, 329 F.3d 157, 178 (3d Cir. 2003) (recognizing that former child soldiers from Uganda could be a particular social group because of their past, shared experience of “abduction, persecution and escape” from the Lord’s Resistance Army).

43. *Acosta*, 19 I. & N. Dec. at 233.

In *In re Fuentes*, the BIA began to develop a principle closely resembling assumption of risk.⁴⁴ In *In re Fuentes*, the applicant was a former member of the El Salvadoran national police and guard at the U.S. Embassy.⁴⁵ During his tenure as a guard and a policeman, Fuentes encountered armed resistance from leftist guerillas intent on undermining the El Salvadoran government.⁴⁶ According to Fuentes, he could not return to his hometown because guerillas there knew him to be a former policeman and routinely killed people for “having been” in the military.⁴⁷ Fearing persecution, Fuentes fled to the United States, where he entered without inspection.⁴⁸

Fuentes sought asylum and withholding based on two theories: the past persecution he experienced while a policeman and guard in El Salvador and the fear that as a former policeman he would face future persecution should he return.⁴⁹ The BIA rejected his first claim based on its understanding of the term “persecution.”⁵⁰ Policemen during periods of civil strife were, according to the BIA, analogous to combatants in a civil war.⁵¹ During times of generalized violence, policemen could expect to experience harm from the opposing side as a natural result of revolutionary conflict.⁵² Inflicting harm on the opposing side in such a conflict, however, could not be considered persecution because doing so would render all participants in an armed struggle “persecutors,” permanently ineligible for asylum and withholding under U.S. law.⁵³ Unwilling to define persecution so broadly, the BIA rejected Fuentes’s first claim.⁵⁴

Fuentes fared no better on his claim that he would face persecution in the future based on his status as a former police officer. The Board recognized that his status as a former policeman was immutable and conceded that where hostilities had ceased, a claim based on his former status might be successful.⁵⁵ Yet where violence was ongoing, status as a former combatant was not sufficient to receive protection, because

44. 19 I. & N. Dec. 658 (BIA 1988).

45. *Id.* at 659.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 660–61.

50. *Id.* at 661–62.

51. *Id.* at 661.

52. *See id.*

53. *Id.* at 661–62.

54. *Id.*

55. *Id.* at 662.

“participants in an ongoing armed struggle may well have reasons for refusing to tolerate the presence of ‘past’ opponents in territories under their control or under dispute”⁵⁶ In other words, Fuentes’s claim based on his former status failed for reasons similar to why his past persecution claim was unsuccessful. Whether Fuentes was identified as part of a cognizable social group was irrelevant. Rather, for the Board, the reading of persecution as excluding harm to a former combatant during a period of generalized violence was determinative.⁵⁷ *In re Fuentes* turned on a modest expansion of the general rule that violence between combatants in a civil war does not rise to the level of persecution. Technically speaking, the decision said very little about the contours of social group doctrine.

The BIA’s subsequent decision in *In re C-A-*, however, interpreted *In re Fuentes* in a manner having serious implications for asylum applicants basing their claims on membership in a particular social group.⁵⁸ The facts of *In re C-A-* are sympathetic. C-A- owned a bakery in Cali, Columbia, the headquarters of the Cali drug cartel, a violent organization involved in drug trafficking, money laundering, kidnapping and assorted other crimes.⁵⁹ A-D-, a member of the cartel, would visit C-A-’s bakery on weekends and openly discuss details of the cartel’s activities, including trafficking narcotics to the United States and Europe.⁶⁰ A-D- also boasted of close ties to the Rodriguez Orejuela brothers, known influential members of the cartel.⁶¹ Acting out of civic responsibility, C-A- conveyed information he learned from A-D- to V-M-M-, General Counsel for the City of Cali, in order to aid the prosecution of the cartel.⁶² C-A-’s altruism, however, did not go unpunished. On May 15, 1995, C-A- and his son were attacked and beaten in the streets of Cali.⁶³ Although both father and son evaded capture, C-A-’s son was forced to undergo reconstructive surgery on his mouth and jaw to repair injuries inflicted by their attackers.⁶⁴ Fearing further retribution, C-A- and his

56. *Id.* at 663.

57. *Id.* (noting that, in the alternative, Fuentes had not shown that that he could not reasonably find safety in another part of his home country).

58. 23 I. & N. Dec. 951 (BIA 2006).

59. *Id.* at 952.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 952–53.

family fled to the northern section of Cali and eventually to the United States.⁶⁵

Before the BIA, C-A- argued that he had suffered past persecution and had a well-founded fear of future persecution on account of his membership in a particular social group.⁶⁶ C-A- proffered two social group definitions, the latter of which was “former noncriminal government informants working against the Cali drug cartel.”⁶⁷ The BIA recognized that C-A-’s act of informing against the Cali cartel was a historical fact and therefore immutable, but refused to afford protection on that basis.⁶⁸ Citing *In re Fuentes*, the Board explained that it would “not afford protection based on social group membership to persons exposed to risks normally associated with employment in occupations such as the police or the military” because “persons accepting such employment are aware of the risks involved and undertake the risks in return for compensation.”⁶⁹

According to the panel, employment as a paid informant was similar to work as a policeman or member of the military, because “a person who agrees to work as a government informant in return for compensation takes a calculated risk and is not in a position to claim refugee status should such risks materialize.”⁷⁰ C-A-, of course, had not received compensation but acted out of a sense of civic obligation. This distinction, however, was “not particularly helpful” to the Board because many compensated informants may also be motivated, in part, by a sense of civic obligation.⁷¹ As a result, the BIA denied C-A-’s application for both asylum and withholding.

In *In re C-A-*, the BIA moved well beyond its holding in *In re Fuentes* to announce a rule with much broader implications for particular social group doctrine. *In re Fuentes* turned primarily on the Board’s interpretation of the term “persecution,” relying on the well-established rule that combatants engaged in a civil war or generalized violence are not persecutors. But *In re C-A-* does not fall under this rule so easily. The BIA interpreted the rule much more broadly, concluding that persons who knowingly risk persecution cannot claim protection based on membership in a particular social group should that risk materialize.

65. *Id.* at 953.

66. *See id.* at 957.

67. *Id.*

68. *Id.* at 958–59.

69. *Id.* at 958.

70. *Id.*

71. *Id.* at 959.

Such persons have assumed the risk of their own persecution and must live with the consequences.

III. *IN RE C-A*-’S PROBLEMATIC IMPLICATIONS

The end result of an adverse assumption of risk determination is complete denial of both withholding of removal and asylum.⁷² Under the Convention, however, *nonrefoulement* is guaranteed to any applicant who satisfies the refugee definition and is not excluded from protection by the terms of the Convention.⁷³ As a result, assumption of risk is problematic as a matter of international legal compliance, unless it can be seen as a limit on who should be considered a “refugee” or can fit within the exclusions embedded within the Convention. An examination of contemporary social group theory, however, reveals that assumption of risk cannot be reconciled with the theoretical justifications given for considering certain group members as refugees. In addition, an analysis of the structure of the Convention and of U.S. law demonstrates that assumption of risk is equally problematic as an exclusionary bar.

A. *Assumption of Risk and Social Group Theory: Who is a Refugee?*

Of the five grounds for refugee status enumerated in the Convention, the category “membership in a particular social group” is the most elusive and ill-defined.⁷⁴ This ground is not included in the UNHCR Statute but was added to the Convention definition towards the end of the Conference of Plenipotentiaries because, according to the Swedish delegate, “experience ha[s] shown that certain refugees ha[ve] been persecuted because they belonged to particular social groups.”⁷⁵ Since the draft convention made no provision for such cases, the social group ground was added without further comment.⁷⁶

Unfortunately, the Swedish delegate’s remarks are the only legislative history devoted to the meaning of “particular social group,” and the delegate’s words are hardly illuminating. The United States’ implement-

72. See *In re Fuentes*, 19 I. & N. Dec. 658 (BIA 1988).

73. Refugee Convention, *supra* note 14, art. 33.

74. Hathaway & Foster, *supra* note 39, at 477.

75. Fullerton, *supra* note 21, at 509 (citation omitted). The legislative history, or lack thereof, surrounding the addition of the social group ground to the Refugee Convention is well-documented. For a brief summary, see *id.* at 508–10.

76. *Id.* at 509.

ing legislation is equally devoid of insight.⁷⁷ Congress offered no indication of what it understood “particular social group” to mean when enacting the Refugee Act and made no attempt to define the term further.⁷⁸ As a result, more administrative, academic, and judicial ink has been spilled in wrestling with the proper scope of the social group doctrine than perhaps any other term in the Convention’s definition. Commentators and jurists have “adopted a range of (often conflicting) constructions of the Convention language,”⁷⁹ with several theorists proclaiming that no fixed definition is possible or desirable.⁸⁰

Over the past several decades, however, several theories of social group doctrine have achieved prominence in the academic and judicial treatment of the subject.⁸¹ This Section examines assumption of risk in light of the two most prominent theories that have emerged: the protected characteristics theory and the social perceptions theory.⁸² Specifically, this Section asks why and under what circumstances groups united by past, shared experience can be defined as social groups under these theories and whether assumption of risk is consistent with why these theories offer such groups protection.

1. *Shared Principles of the Theories*

As the following discussion indicates, the protected characteristics and social perceptions theories differ widely on how membership in a “particular social group” should be defined and for what reasons. That being said, several shared principles have emerged concerning the basic contours of the doctrine. The foremost of these principles is the need for limitation.⁸³ Because of the vagueness of the term “particular social group,” it is subject to expansive interpretation, and commentators have felt the need to develop some principle to limit its scope. An overly broad definition risks overturning the balance between protection of

77. *Id.* at 513–14.

78. *Id.*

79. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership in a Particular Social Group,”* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 263, 264–65 (Erika Feller et al. eds., 2003).

80. *See, e.g.*, Applicant A v. Minister for Immigration and Ethnic Affairs (1997) 190 C.L.R. 225, 307–08 (Austl.); Fullerton, *supra* note 21, at 529–30.

81. *See* Hathaway & Foster, *supra* note 39, at 480 (“While as recently as a decade ago a number of different approaches proliferated, it is accurate to say that currently there are two key methods of interpreting the [member of a particular social group] ground . . .”).

82. *Id.*

83. Aleinikoff, *supra* note 79, at 285.

refugees and the limited state obligations that the Convention's drafters meant to set out.⁸⁴ In addition, an overly broad definition threatens to make the other enumerated grounds—race, religion, nationality, and political opinion—redundant.⁸⁵ Consequently, with few exceptions, scholars and jurists have consistently rejected a “safety net” approach to social group doctrine.⁸⁶

A second important principle shared by both protected characteristics and social perceptions theorists is that the group must exist independently outside of the persecution.⁸⁷ Put another way, the act of persecution cannot be used to define the group.⁸⁸ Courts and commentators emphasize this principle to avoid circularity between persecution and group definition, though rigid application of this principle has dwindled over time. Recently, courts have relaxed their enforcement of this principle and have been willing to look to persecution as one relevant factor in determining whether a group exists.⁸⁹ There are reasons why this principle, especially if applied rigidly, should perhaps be discarded. The principle, however, is widely considered to be a background norm of social group theory and is one that commentators and jurists alike continue to consider to be important.

Finally, it is generally accepted that there need not be a voluntary, associational link in order to make out a successful social group claim.⁹⁰ The Ninth Circuit Court of Appeals was previously the only court that suggested a “voluntary associational relationship” was necessary, but it has subsequently backed away from its initial insistence on this requirement.⁹¹

2. *Protected Characteristics Theory*

The leading approach to defining “particular social group” has been described as the “protected characteristics” theory.⁹² Essentially, the protected characteristics theory defines members of a social group as those “who would suffer significant harm if asked to give up their group

84. *Id.*

85. *Id.*

86. *See, e.g.*, JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 189 (1991).

87. *Islam v. Sec’y of State for Home Dep’t*, (1999) 2 A.C. 629, 633–34 (H.L.) (U.K.).

88. *Applicant A v. Minister for Immigration and Ethnic Affairs* (1997) 190 C.L.R. 225, 263 (Austl.).

89. *See Islam*, 2 A.C. at 657.

90. Hathaway & Foster, *supra* note 39, at 478.

91. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092–93 (9th Cir. 2000).

92. Hathaway & Foster, *supra* note 39, at 480.

affiliation, either because it would be virtually impossible to give up an 'immutable' characteristic or because the basis of affiliation is the exercise of a fundamental human right."⁹³

According to protected characteristics theorists, because the other Convention grounds are grounded in human rights, it is appropriate to consider human rights concepts when defining "particular social group" as well.⁹⁴ Defining social groups to encompass only those groups united by an immutable or fundamental characteristic achieves this end.⁹⁵

This approach has its roots in the BIA's decision in *In re Acosta*.⁹⁶ In that case, the Board recognized that each of the other enumerated grounds involved a characteristic that was immutable and, applying the doctrine of *ejusdem generis*, limited its social group definition to groups united by characteristics that are immutable or fundamental to individual identity.⁹⁷

The *In re Acosta* definition has had considerable influence on the jurisprudence of other common law countries.⁹⁸ In its influential asylum decision *Ward v. Canada*, the Canadian Supreme Court relied heavily on *In re Acosta* in developing its own definition of membership in a particular social group.⁹⁹ Finding that the *In re Acosta* formulation embraced the "general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative," the Canadian Supreme Court set forth three categories of social groups modeled on the *In re Acosta* definition: "(1) groups defined by an innate or unchangeable characteristic[]; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence."¹⁰⁰ *In re Acosta* has also been highly influential in the United Kingdom.¹⁰¹ In the seminal social group case *Islam v. Secretary of State for Home Department*, several members of the House of Lords rested their decision to extend protection to the

93. Aleinikoff, *supra* note 79, at 294.

94. *Id.*

95. *Id.*

96. Hathaway & Foster, *supra* note 39, at 480.

97. *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

98. Hathaway & Foster, *supra* note 39, at 480.

99. *Ward v. Canada*, [1993] 2 S.C.R. 689 (Can.); Hathaway & Foster, *supra* note 39, at 480–81.

100. *Ward*, 2 S.C.R. at 692.

101. Hathaway & Foster, *supra* note 39, at 480.

social group “Pakistani women” on immutability grounds.¹⁰² Although several members of the *Islam* panel based their decision on other theories, subsequent U.K. decisions have interpreted *Islam* as advocating a protected characteristics approach.¹⁰³

In re Acosta has had considerable appeal to scholars and international agencies as well. Professor James Hathaway has consistently advocated the protected characteristics approach, claiming that the *In re Acosta* definition “respect[s] both the specific situation known to the drafters—concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories—and the more general commitment of grounding refugee claims in civil or political status.”¹⁰⁴ In addition, the UNHCR has previously thrown its support behind the *In re Acosta* definition, advocating, by way of an amicus brief in *Islam*, that “[p]articular social group’ means a group of people who share some characteristic which distinguishes them from society at large. That characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it.”¹⁰⁵

Despite its near universal acceptance, the protected characteristics approach is open to several criticisms. For one, the *In re Acosta* definition rests primarily on the application of *ejusdem generis*. But as Professor T. Alexander Aleinikoff points out, membership in a particular social group is not necessarily more general than the other enumerated grounds.¹⁰⁶ Rather, “‘particular social group’ appears to define a free-standing Convention ground of equal kind and status to the other identified grounds.”¹⁰⁷

Second, nothing in the *travaux préparatoires* indicates that immutability was particularly meaningful to the drafters.¹⁰⁸ Even if this characteristic was the driving force behind the rest of the refugee definition, the *travaux* indicate that “particular social group” was added later in the drafting process than the other grounds—apparently as an “after-thought.”¹⁰⁹ To the extent that the drafters may have valued immutabil-

102. (1999) 2 A.C. 629, 644, 658 (H.L.) (U.K.).

103. See, e.g., *Montoya v. Sec’y of State for Home Dep’t*, [2002] EWCA (Civ) 620, [8] (Eng.); see also Aleinikoff, *supra* note 79, at 274.

104. HATHAWAY, *supra* note 86, at 161.

105. Aleinikoff, *supra* note 79, at 267.

106. *Id.* at 289.

107. *Id.*

108. *Id.* at 294.

109. 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966).

ity in including the other four grounds, this says very little about what considerations motivated the later inclusion of “particular social group.” It is an equally permissible inference that “particular social group” was added later because the basis for its inclusion was different from that of its predecessors.

3. *Social Perceptions Theory*

Although the protected characteristics approach is the most widely adopted in common law countries,¹¹⁰ social perceptions theory continues to receive support from scholars, international organizations, and a minority of jurists as an alternative to the *In re Acosta* formulation. The basis for social perceptions theory can be traced to the work of Guy Goodwin-Gill, an early and influential refugee law scholar.¹¹¹ Writing at a time when social group theory was largely undeveloped, Goodwin-Gill espoused a social group definition that foreshadowed both the protected characteristics and social perceptions theories. Elements of the protected characteristics approach can be seen in Goodwin-Gill’s emphasis on “shared interests, values, or background,” such as “ethnic, cultural, and linguistic origin” as important criteria in determining whether a social group exists.¹¹²

Immutability, however, was not Goodwin-Gill’s sole criteria. Goodwin-Gill also noted characteristics that are not necessarily immutable or fundamental, such as “shared values, outlook and aspirations,” as equally relevant to whether a social group is cognizable.¹¹³ Importantly, Goodwin-Gill emphasized the role of external perception as relevant to the social group inquiry. “[T]he attitude to the putative social group of other groups in the same society and, in particular, the treatment accorded to it by state authorities” was helpful in determining whether a group existed.¹¹⁴ “The importance, and therefore the identity, of a social group may well be in direct proportion to the notice taken of it by others, particularly the authorities of the state.”¹¹⁵ To Goodwin-Gill, whether a group is linked together by a particular characteristic does not end the social group inquiry. When defining a social group, the social

110. See Aleinikoff, *supra* note 79, at 294.

111. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* (1983).

112. *Id.* at 30.

113. *Id.*; Fullerton, *supra* note 21, at 517.

114. GOODWIN-GILL, *supra* note 111, at 30.

115. *Id.* (emphasis added).

perceptions of society and the persecutor must be examined along with internal characteristics.¹¹⁶

Goodwin-Gill's insight achieved practical significance in the Australian High Court's decision in *Applicant A v. Minister for Immigration and Ethnic Affairs*.¹¹⁷ In *Applicant A*, the High Court faced the question of whether "those . . . having only one child [who] do not accept the limitations placed on them" by the Chinese government were members of a cognizable social group.¹¹⁸ Relying heavily on the term "social" in the refugee definition, Justice Dawson defined "particular social group" as "a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large."¹¹⁹ Writing separately, Justice McHugh reinforced this approach, stating that "the existence of . . . a group depends in most, perhaps all, cases on external perceptions of the group" because "persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit."¹²⁰

Under the Australian High Court's approach, primary significance is given to whether society considers a particular collection of persons to be a distinct group, requiring the applicant to show "a common attribute and a societal perception that they stand apart."¹²¹ The approach taken in *Applicant A*, of course, diverges substantially from the approach taken in *In re Acosta*. Although *Applicant A* requires that a social group be perceived as sharing a common characteristic, that characteristic does not have to be immutable or otherwise fundamental to the group's identity. Rather, the exclusive emphasis is on whether the group is perceived as such.

While Australia is the only nation where the highest court has officially endorsed the social perceptions approach, similar sentiments can be found in German, U.S., and English case law. For example, Germany's Administrative Court of Wiesbaden has articulated an approach to a social group definition that examines whether society views a collection of persons as a group and whether an objective observer would say that society treats the group as undesirable.¹²² In the United States,

116. See Aleinikoff, *supra* note 79, at 298.

117. (1997) 190 C.L.R. 225 (Austl.).

118. *Id.* at 239.

119. *Id.* at 241.

120. *Id.* at 264.

121. *Id.* at 265–66.

122. For a discussion of social group claims in German asylum law, see Fullerton, *supra* note 21, at 531–35.

the Second Circuit adopted a “middle approach” in *Gomez v. INS*¹²³ that includes elements of the social perceptions approach.¹²⁴ In *Gomez*, the Second Circuit defined social group as “individuals who possess some fundamental characteristic in common *which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.*”¹²⁵ This approach, which both incorporates and departs from *In re Acosta*, is unique in U.S. law.¹²⁶ In addition, although *Islam* has been interpreted in the United Kingdom as espousing a protected characteristics approach, not all of the judges rested their decision on that basis. Significantly, Lord Craighead’s opinion claimed that “in general terms a social group may be said to exist where a group of people with a particular characteristic is recognized as distinct by society.”¹²⁷

Like the protected characteristics theory espoused in *In re Acosta*, the social perceptions approach has distinct advantages and disadvantages. For one, the social perceptions approach appears to follow more intuitively from the plain language of the Convention.¹²⁸ In addition, it can be seen as less restrictive and therefore reach more groups than would be recognizable under *In re Acosta*, including most groups that would otherwise find protection under a protected characteristics theory.¹²⁹ This more liberal approach, however, risks extending protection to an overly broad class of persons and presents difficult evidentiary issues associated with determining the social perceptions present in a foreign country.¹³⁰ Also, scholars have asked the sensible question: if the characteristic that sets the group apart from society is not immutable, why should the group members not be required to change?¹³¹

Despite these criticisms, the social perceptions approach appears to be gaining legitimacy. Notably, the UNHCR has recommended a social group definition that incorporates both the protected characteristics and social perceptions approaches.¹³² According to the new UNHCR guide-

123. 947 F.2d 660 (2d Cir. 1991).

124. Aleinikoff, *supra* note 79, at 279.

125. *Gomez*, 947 F.2d at 664 (emphasis added).

126. MARK R. VON STERNBERG, *THE GROUNDS OF REFUGEE PROTECTION IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 209 n.96 (2002).

127. *Islam v. Sec’y of State for Home Dep’t*, (1999) 2 A.C. 629, 657 (H.L.) (U.K.).

128. See Hathaway & Foster, *supra* note 39, at 484.

129. Aleinikoff, *supra* note 79, at 297.

130. *Id.* at 298–99; Hathaway & Foster, *supra* note 39, at 488.

131. This debate has centered around Professor Aleinikoff’s position that a social group made up of rollerbladers should receive protection if they are targeted for persecution. Professor Hathaway takes the position that the rollerbladers should have to take off their skates. See Aleinikoff, *supra* note 79, at 299.

132. UN High Comm’r for Refugees, *Guidelines on International Protection: “Membership*

lines, if an applicant fails to allege a group based on a shared immutable characteristic the adjudicator should then ask whether the group is nonetheless perceived as a group by society.¹³³ Although scholarly response to this approach is mixed,¹³⁴ it clearly indicates that the social perceptions approach is gaining importance and acceptance despite the predominance of *In re Acosta* and its progeny.

4. *Assumption of Risk, Social Group Theory, and Groups United by Past, Shared Experiences*

Assumption of risk has emerged within the context of social group claims premised on past, shared experiences.¹³⁵ Its application, however, is in considerable conflict with the theoretical justifications for protecting such groups offered by the protected characteristics and social perceptions approaches.

Both the protected characteristics and social perceptions approaches contemplate that some groups united by past, shared experiences will receive protection. Under the protected characteristics approach, the theoretical basis for protecting such groups is straightforward. Indeed, the possibility of formulating a social group claim based on a past, shared experience follows directly from making immutability the touchstone for successful claims. Past experiences are, of course, immutable to the persons who have lived through them, and jurists advancing protected characteristics theories have acknowledged that groups persecuted because of past experiences should be protected for that reason.¹³⁶

The *In re Acosta* court acknowledged explicitly that groups united by former military leadership or past landownership would be cognizable social groups under its definition.¹³⁷ In addition, the *Ward* court devoted its third protected social group category to “groups associated by a former voluntary status, unalterable due to its historical permanence” because “one’s past is an immutable part of the person.”¹³⁸ Because past

of a Particular Social Group” within the Context of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *Guidelines on International Protection*]; see also Hathaway & Foster, *supra* note 39, at 489–91.

133. *Guidelines on International Protection*, *supra* note 132, ¶ 13; see also Hathaway & Foster, *supra* note 39, at 489–91.

134. Compare Hathaway & Foster, *supra* note 39, at 489, with Aleinikoff, *supra* note 79, at 300–01.

135. See *supra* Part II.

136. See, e.g., *Hong v. Attorney Gen. of U.S.*, 165 F. App’x 995, 1001–02 (3d Cir. 2006).

137. *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

138. *Ward v. Canada*, [1993] 2 S.C.R. 689, 739 (Can.).

experiences cannot be changed, they are “relevant to the anti-discrimination influences [informing the Convention].”¹³⁹ Under the protected characteristics theory, then, protection for groups united by past experiences is grounded in general human rights or anti-discrimination principles.¹⁴⁰ Just as it is illegitimate to persecute an individual based on other Convention grounds such as race or nationality because these characteristics are not within the person’s power to change, it is equally illegitimate to persecute a group because they share an experience of which they can no longer divest themselves.¹⁴¹

This analysis reveals a severe tension between assumption of risk and the theoretical approach enunciated by *In re Acosta*. As applied in *In re C-A-*, assumption of risk requires that protection be withheld from groups despite the fact that group members are unable to change the characteristic that makes them susceptible to persecution. Past experiences, however, do not become less immutable by virtue of a group having acted in a manner likely to bring about future persecution; such groups remain unable to alter the characteristic that defines their group identity. As such, the theoretical basis for affording protection to such groups is not weakened because the group assumed the risk. Once a social group united by a past, shared experience is established, it is fundamentally inconsistent with the protected characteristics approach to claim that the group does not meet the Convention’s definition because of assumption of risk.

Assumption of risk is equally problematic when applied to the social perceptions approach. Although not specifically mentioned in *Applicant A*, the social perceptions approach seems sufficiently capable of protecting groups united by shared, past experiences. According to this theory, groups are considered particular social groups if they are perceived as distinct subsets of society.¹⁴² It is certainly conceivable that certain groups united by past experiences will be highly visible and perceived to be distinct groups. *In re Acosta*’s example of past military leadership would almost certainly meet this criterion in many circumstances—as would the post-World War II “former capitalists” of the Eastern Bloc identified by the *Ward* court as the most well-known examples of social group persecution known to the Convention drafters.¹⁴³

139. *Id.*

140. Aleinikoff, *supra* note 79, at 294.

141. *Id.*

142. *See supra* Part III.A.3.

143. [1993] 2 S.C.R. 689.

For the social perceptions theorist, however, it is irrelevant why the social group is perceived as a distinct group and therefore singled out for persecution. Past acts are only relevant if they form the basis for the present identification of the group as a visible subset of society.¹⁴⁴ Further, assumption of risk will only rarely affect a certain group's visibility within a particular society in a manner adversely affecting their eligibility for refugee status. Indeed, assumption of risk behavior may render certain groups more visible, thus increasing their likelihood of recognition. Should a team of law enforcement officers successfully thwart the efforts of a drug cartel in a highly publicized bust, it is certainly possible that those particular law enforcement officers may be perceived as a distinct social group in their community. At the same time, those officers have engaged in behavior carrying a clear risk of reprisal. Yet this risk-taking behavior *increases* social visibility and therefore the likelihood of social group status under a social perceptions definition.

There may be circumstances in which engaging in assumption of risk behavior would coincide with lack of protection under a social perceptions approach. *In re C-A-* is a one example. Yet, for the social perceptions theorist, lack of protection is tied to the fact that informants, because of the confidential nature of informing, are not likely to be perceived as a group by society, not because of assumption of risk behavior.¹⁴⁵

Both the protected characteristics and the social perceptions theories approach "particular social group" as a legal term and offer definitions to give that term meaning within the Convention's framework. Based on various factors, each approach theorizes what it means to be a member of particular social group—the consequence being inclusion in the Convention's protective framework if the applicant can show persecution on account of the identified group. *In re C-A-*, however, is inconsistent with both of these approaches. Unless assumption of risk can be rationalized as an exclusionary principle that justifies denying *nonrefoulement*

144. See STERNBERG, *supra* note 126, at 209 ("As the Supreme Court in fact recognized, capitalists were persecuted historically, 'not because of their contemporaneous activities, but because of their past status *as ascribed to them by the communist leaders.*' In this sense, they were persecuted not because they were *former* capitalists, but because they *were* former capitalists; not because what they had done, but because of what they were considered to be today; not because of any actual or imagined voluntary association, but because of the perceived threat of the class (defined *incidentally* by what they had once done) to the new society." (quoting GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 360-61 (2d ed. 1996))).

145. Indeed, in *In re C-A-* the BIA based its decision to deny protection partially on lack of visibility. *See* 23 I. & N. Dec. 951, 959-61 (BIA 2006).

to otherwise qualified candidates, its application conflicts with the United States' international legal obligations. Assumption of risk denies the protection guaranteed by the Convention to candidates qualifying as refugees under the two most accepted approaches to defining particular social group. As the following Section demonstrates, however, assumption of risk is equally problematic as an exclusionary bar.

B. Assumption of Risk's Structural Inconsistency with International and U.S. Law

Considering the effect of an adverse assumption of risk determination, it may be more accurate to conceptualize assumption of risk as an exclusionary bar. If assumption of risk is interpreted not as a limitation on the refugee definition but as a bar on applicants that otherwise satisfies the Convention definition, the doctrine is inconsistent with the structure of both the Convention and U.S. law.

The Convention both defines and limits the obligations that states owe to refugees. Article 1(A) defines the term "refugee," and Article 33(1) states: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."¹⁴⁶ Although Article 33(1) is written in absolute terms, the Convention qualifies this obligation in several places. First, Article 33 itself excludes from the protection of *nonrefoulement* refugees for whom "there are reasonable grounds for regarding as a danger to the security of the country," as well as those refugees who have "been convicted by a final judgment of a particularly serious crime" and are "a danger to the community."¹⁴⁷ In addition, Article 1 excludes from the scope of the Convention persons who have performed certain actions, even though they might otherwise be eligible.¹⁴⁸ Most notably, Article 1(F) provides that the "Convention shall not apply to any person with respect to whom there are serious reasons for considering that: he has committed a crime against peace, a war crime, or a crime against humanity . . . he has committed a serious non-political crime outside the country of refuge [and] . . . he has been guilty of acts contrary to the purposes and principles of the United Nations."¹⁴⁹ The Convention, therefore, sets forth the

146. Refugee Convention, *supra* note 14, art. 33(1).

147. *Id.* art. 33(2).

148. *Id.* art. 1(F).

149. *Id.*

terms under which *nonrefoulement* should be granted and excepts from that protection certain persons that the drafters felt should not be included because of actions they have taken in the past.

The United States' implementation of Article 33's protection against *refoulement* is structured in a similar manner. Section 241(b)(3) of the INA provides for mandatory withholding of removal to any alien whose life or freedom would be threatened because of race, religion, nationality, membership in a particular social group, or political opinion.¹⁵⁰ Section 241 goes on to except from eligibility certain aliens based on criteria similar to those listed in the Convention. For example, among those ineligible for withholding are persons who have "been convicted by a final judgment of a particularly serious crime," aliens for whom "there are serious reasons to believe . . . committed a serious nonpolitical crime outside the United States," and aliens for whom "there are reasonable grounds to believe . . . [are] a danger to the security of the United States."¹⁵¹ In addition, aliens that have participated in the persecution of others or engaged in genocide are ineligible.¹⁵²

The drafters of both the Convention and U.S. law made judgments about what actions should completely remove an otherwise eligible applicant from the protection of *nonrefoulement*. In certain cases, these exclusions may in fact coincide with applicants that exhibit assumption of risk behavior. Aggravated felonies with a sentence of more than five years are considered particularly serious crimes, thus making the applicant ineligible for withholding under U.S. law, and the Attorney General may designate certain offenses as particularly serious crimes regardless of length of sentence.¹⁵³

In *In re Y-L-*, the Attorney General exercised this power to designate drug trafficking as a particularly serious crime with limited exceptions.¹⁵⁴ Presumably, this decision alone would render ineligible many applicants who would otherwise be barred by an assumption of risk principle. Notably, the drug informant that implicates his fellow cartel members in order to receive a reduced sentence would likely be ineligible for withholding.

But when the applicant would not be excluded under the terms of the Convention or the INA, the assumption of risk doctrine becomes unsatisfactory. In these circumstances, assumption of risk bars protection to

150. Immigration and Nationality Act § 241(b)(3)(A), 8 U.S.C. § 1101 (2008).

151. *Id.* § 241(b)(3)(B).

152. *Id.* § 237(a)(4)(D).

153. *Id.* § 241(b)(3)(B).

154. 23 I. & N. Dec. 270, 274 (BIA 2002).

applicants based on considerations unmentioned in the applicable provisions of domestic and international law, and it is inconsistent with the structure of the Convention and the INA for judges to limit the protection of *nonrefoulement* in such a way. *Nonrefoulement*, after all, is an obligation of the Convention States, except for the limited exceptions provided for in the Convention itself. Similarly, the INA mandates that judges withhold removal of all aliens whose lives or freedom would be threatened because of an enumerated ground, except for those aliens meeting the criteria for exclusion listed above. Inasmuch as assumption of risk bars withholding to otherwise eligible applicants based on considerations not listed in the INA or the Convention, its application is illegitimate.

IV. TOWARDS A SOLUTION: ASSUMPTION OF RISK AS A DISCRETIONARY FACTOR WITHIN THE SOCIAL GROUP SETTING

This Note has argued that assumption of risk is problematic as a complete bar to *nonrefoulement* because it is inconsistent with the leading theories of social group protection and the structure of both the Convention and U.S. law. Despite these defects, assumption of risk retains some intuitive appeal.

Asylum is a scarce political resource.¹⁵⁵ Perhaps a distinction should be made between those who have voluntarily brought about their own likelihood of persecution through their behavior and those applicants whose behavior is more benign. If we acknowledge that in the highly politicized setting of refugee law, asylum cannot be available to all applicants, assumption of risk provides one means of distinguishing between those applicants who our society deems worthy of protection and those it does not. But the question remains, even if assumption of risk should be considered a limiting factor in determining who is worthy of protection, how can this principle be rationalized within the existing domestic and international structure for refugee protection?

Assumption of risk as applied in *In re C-A-* is unappealing because the BIA has conceptualized the principle as a bar not only to asylum but to withholding as well.¹⁵⁶ *Nonrefoulement*, however, is obligatory on all nations that are parties to the Convention or to subsequent protocols.

155. See MARTIN ET AL., *supra* note 8, at 61 (quoting David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 30–51 (H. Adelman ed., 1991)).

156. See 23 I. & N. Dec. 951, 953, 961 (BIA 2006).

Because assumption of risk does not declare who can validly claim refugee status and does not fit comfortably within one of the exceptions or exclusions the Convention sets out, assumption of risk conflicts with U.S. obligations under international law.

Asylum, on the other hand, is a discretionary benefit under customary international law and the Convention. Under customary international law, obligations owed by nation-states to foreigners generally extend only to those who can claim the protection of another nation-state.¹⁵⁷ Refugees, who cannot claim such protection, are unable to claim the same rights and benefits, leaving them essentially without rights in their country of refuge.¹⁵⁸ Past international human rights instruments have recognized the right to “seek and enjoy” asylum,¹⁵⁹ but the right to be granted asylum has never been accepted as a controlling norm of international law.¹⁶⁰ Most notably, the Convention stopped short of guaranteeing refugees the right to asylum, leaving this greater benefit to the discretion of the sovereign.¹⁶¹

The 1980 Refugee Act implemented this distinction between discretionary asylum and mandatory withholding,¹⁶² and the BIA has previously limited the availability of asylum based on factors such as fraudulently avoiding available refugee procedures abroad.¹⁶³ It is equally within the power of the Attorney General to deny asylum to applicants who voluntarily engaged in behavior they knew was likely to bring about persecution. Reconceived as a discretionary factor bearing on whether an applicant should be given asylum, assumption of risk becomes considerably less problematic from the perspective of the United States’ obligations under international law.

This approach eliminates many problems of international legal compliance but raises several other issues. Current BIA practice concerning whether to exercise discretion to grant asylum emphasizes that a risk of persecution outweighs all but the most egregious adverse factors.¹⁶⁴ Allowing assumption of risk to bar asylum would be a considerable departure from this practice.

157. 1 HOLBORN, *supra* note 7, at 154.

158. *See id.*

159. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, art. 14, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

160. *See* 1 HOLBORN, *supra* note 7, at 154.

161. *See* Refugee Convention, *supra* note 14, art. 1(F).

162. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440–41 (1987).

163. *In re Salim*, 18 I. & N. Dec. 311, 316 (BIA 1982).

164. *In re Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996); *In re Pula*, 19 I. & N. Dec. 467, 474 (BIA 1987).

More troubling, however, is the potential interaction between assumption of risk and other enumerated grounds. So far, assumption of risk has been applied solely within an analysis of membership in a particular social group. Yet, if *In re C-A-* stands for the broad principle that persons who knowingly pursue activities that entail a risk of persecution are not worthy of asylum, why should this principle apply only to applicants basing their claim on membership in a particular social group? The reasons underlying the application of assumption of risk in the social group context are seemingly just as applicable to claims based on other enumerated grounds. But application of assumption of risk outside the social group context, particularly as applied to political opinion and religious persecution, leads to plainly undesirable results.

A. *Assumption of Risk and Political Opinion*

With the increase in civil war and generalized violence occurring around the world in the past half century, claims based on political opinion have become increasingly complicated.¹⁶⁵ “Classic” political opinion claims, however, remain relatively straightforward and uncontroversial.¹⁶⁶ No one challenges the fact that either the “recognizable political dissident” or the asylum seeker who “participated in political demonstrations” and now fears persecution fits within the refugee definition and merits protection.¹⁶⁷ Yet these applicants, in many cases, will clearly exhibit assumption of risk behavior.

Consider the “activist.” According to Aristide Zolberg, “[t]he classic activists are dissenters and rebels whose actions contribute to the conflict that eventually forces them to flee.”¹⁶⁸ The activist presents a clear example of “classic” persecution on account of political opinion—the person who disagrees with the current regime and publicly proclaims his dissent. Yet it will often be foreseeable, if not likely, that publicly criticizing the government will bring about retaliation. Moreover, persecution could be avoided easily through the simple expedient of keeping quiet. Refugee law, however, does not require the activist to keep quiet even though the activist assumes the risk of persecution by speaking out.

165. MARTIN ET AL., *supra* note 8, at 191.

166. *See id.*

167. *Id.*

168. MARTIN ET AL., *supra* note 8, at 56 (quoting ARISTIDE R. ZOLBERG ET AL., ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD 269-72 (1989)).

Indeed, the BIA's jurisprudence concerning political neutrality indicates that persons who assume the risk of persecution may occupy a preferred position on the spectrum of political opinion claims. The BIA has been skeptical of political opinion claims grounded on neutrality.¹⁶⁹ A political opinion applicant will normally have to show that he has affirmatively taken sides in a dispute to receive protection, putting the politically neutral applicant in a worse position than the applicant actively broadcasting an opinion that could bring about repercussions.¹⁷⁰ Should the neutral applicant be singled out for failure to choose sides in a conflict, he may be unable to receive protection while the active dissenter may receive asylum even though his persecution is brought on, in part, through his own actions. This contrast indicates a clear uneasiness with the assumption of risk principle as applied to political opinion. U.S. refugee law not only tolerates assumption of risk in connection with political opinion claims but privileges those applicants who engage in some types of assumption of risk behavior.

B. Assumption of Risk and Religious Acts

A similar rejection of assumption of risk principles can be seen in the BIA's religious persecution case law. Perhaps the closest analogue to the assumption of risk doctrine outside the membership in a particular social group context is the Board's former distinction between religious acts and religious beliefs. In *Li v. Gonzales*, the BIA faced the issue of whether to grant withholding to a Chinese Christian who was imprisoned, beaten, and forced to clean public toilets without pay as a penalty for holding unlawful prayer services in his home.¹⁷¹ The Board distinguished between punishing unlawful religious acts, which it considered legitimate, and punishing religious beliefs, which it did not.¹⁷² Applying this distinction, the BIA denied withholding because the applicant was punished for violating China's laws against unregistered churches, not because of his religion.¹⁷³ The Fifth Circuit affirmed, reasoning that "it is axiomatic that Li was punished because of religious activities, nonetheless, it does not necessarily follow that Li was punished because of his religion."¹⁷⁴ The court concluded, "Li faces prosecution for illegal

169. See *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1297-98 (11th Cir. 1990); *In re Acosta*, 19 I. & N. Dec. 211, 234-35 (BIA 1985).

170. See *Perlera-Escobar*, 894 F.2d at 1297-98.

171. 420 F.3d 500 (5th Cir. 2005).

172. *Id.* at 510-11.

173. *Id.*

174. *Id.* at 510.

activities if returned to China, not prosecution on account of religion.”¹⁷⁵

The distinction between religious acts and beliefs functions in a similar manner to assumption of risk. Harboring religious beliefs is not an offense in China. It is only when a person, like Li, takes the additional step of organizing an unregistered church that his actions become criminal. By holding services in his home, Li assumed the risk that he would be caught undertaking an unlawful activity and be punished accordingly. To the BIA and the Fifth Circuit, taking this additional step—assuming the risk of persecution by breaking the law—removed Li from the protection that is afforded to people persecuted for their religious beliefs.

The *Li* decision, however, was short lived. The decision provoked uproar from religious freedom advocates, church groups, and human rights defenders.¹⁷⁶ One religious freedom organization proclaimed that the religious acts/beliefs dichotomy “removed religion as a basis of gaining asylum.”¹⁷⁷ In response, the BIA vacated its previous decision, reinstating the immigration judge’s earlier granting of withholding.¹⁷⁸ The Fifth Circuit followed by dismissing its own judgment as moot.¹⁷⁹

Much of the condemnation associated with the *Li* decision must, of course, be attributed to the underlying ground on which the claim was brought. As a result, the controversy surrounding the acts/beliefs dichotomy may have little bearing on assumption of risk’s legitimacy within the social group setting. At the very least, however, the *Li* decision and its aftermath, along with the BIA’s approach to political opinion claims, qualify the assumption of risk principle announced in *In re C-A-* and demonstrate that, in many circumstances, asylum law does indeed tolerate assumption of risk behavior.

C. *Justifying Assumption of Risk’s Exclusive Application within the Social Group Context*

Whatever appeal assumption of risk may have in the social group context, it quickly loses traction when applied to other enumerated grounds. Seemingly paradigmatic asylum claims—vocalizing opposi-

175. *Id.*

176. MARTIN ET AL., *supra* note 8, at 250 (quoting Jonathan R. Nelson, *Shaking the Pillars: An Asylum Applicant Shakes Loose Some Unusual Relief*, 83 INTERPETER RELEASES 1 (2006)).

177. *Id.*

178. *Li v. Gonzales*, 429 F.3d 1153, 1153 (5th Cir. 2005), *vacating as moot* 420 F.3d 500 (5th Cir. 2005).

179. *Id.*

tion to a totalitarian regime or holding peaceful prayer services in the home—would be denied. The BIA’s religion and political opinion case law indicate that the Convention and U.S. asylum law tolerate and even promote the activism associated with assumption of risk in some settings. As a result, any theory justifying assumption of risk, even as a discretionary factor weighing against asylum, must account for its current application solely to social group claims based on past, shared experiences.

This Section briefly examines the asylum system’s preference for claims based on political opinion and religion over social groups claims in order to offer a rationalization for the emergence of assumption of risk solely within the particular social group context. Yet it suggests that the weight of these arguments is largely undercut by the manner in which the BIA has applied this doctrine in *In re C-A-*. This Section concludes by critiquing the Board’s implementation of assumption of risk and argues that assumption of risk might be more legitimately employed if the doctrine explicitly took into account the considerations that justify its emergence.

The distinction we have seen between assumption of risk’s applicability within the social group context on the one hand, and its rejection within the religion and political opinion settings on the other, can be explained by examining the cultural assumptions behind the BIA’s “immutability” approach and the circumscribed role recommended for the social group doctrine by critics and commentators. The *In re Acosta* panel arrived at its definition of “particular social group” by examining the refugee definition’s four other enumerated grounds and applying the doctrine of *ejusdem generis*.¹⁸⁰ Because each of those other grounds “describes persecution aimed at an immutable characteristic,” the Board defined social group as a “group of persons all of whom share a common, immutable characteristic.”¹⁸¹ Several scholars, however, have pointed out that not all of the other grounds can be accurately described as immutable.¹⁸² While race and nationality clearly fit this description, political opinion and religion do not. Political opinions, no matter how deeply established, can be changed or at the very least stifled voluntarily in the face of persecution. Religious views, by the same token, are not entirely unchangeable. No matter how objectionable it may be to ask a

180. *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

181. *Id.*

182. See, e.g., Aleinikoff, *supra* note 79, at 267; Fullerton, *supra* note 21, at 545 (labeling the BIA’s use of the term immutable to describe its approach as “inaccurat[e]”).

person to change his entrenched political or religious beliefs, as a descriptive matter, the term immutable is inaccurate as applied to these grounds. Despite this, the *In re Acosta* panel considered political opinion and religion immutable because both were “fundamental to individual identity or conscience”¹⁸³

This analysis typifies the asylum system’s distinct preference for claims based on political opinion and religious persecution. While a social group applicant must undergo an ad hoc inquiry into whether the characteristic that unites him with a larger group is “fundamental,” an applicant with claims based on religious or affirmative political beliefs does not. Religious beliefs and affirmative political opinions are considered fundamental to identities or consciences per se.¹⁸⁴

The BIA’s attitude is not altogether surprising. Religion and political opinion are fundamental autonomy interests in American society; both are constitutionally protected by the First Amendment.¹⁸⁵ Asylum claims based on these grounds have their own guarantees of legitimacy because they correspond with entrenched societal values. Assumption of risk is unsatisfactory as applied to these grounds precisely because it results in the denial of protection to applicants who, by virtue of the enumerated ground on which they base their claims, are considered fundamentally meritorious.

Social group claims based on past, shared experiences, however, do not have the same guarantees of intrinsic value. Potentially trivial or nefarious shared experiences could result in successful social group claims—the former drug dealer being placed on equal footing with the political activist or pious worshipper. Understandably, both the BIA and INS viewed this state of affairs as objectionable. While the INS considered addressing this situation by limiting the availability of asylum based on past acts to experiences that were immutable or fundamental when they occurred, the BIA turned to assumption of risk.¹⁸⁶ Assump-

183. *Acosta*, 19 I. & N. Dec. at 233.

184. I say “affirmative political beliefs” because, as discussed in Part III.A, courts have taken a more ambivalent attitude towards political opinion claims grounded in neutrality.

185. U.S. CONST. amend. I.

186. See *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). These proposed regulations would certainly have the effect of eliminating certain undesirable social group claims, but would essentially require applicants to hurdle the immutability bar twice: once by showing they have a well-founded fear of persecution based on a past and therefore immutable experience and again by showing that the past experience on which their claim is based was fundamental or immutable itself. *Id.* In addition, this approach denies that any nonfundamental past experience should serve as the basis for a successful claim. The *Acosta* panel itself, however, acknowledged that former landowners may be able bring a suc-

tion of risk can be rationalized within this setting as an intuitive means of linking asylum to meritorious behavior where, because of the open-ended nature of “particular social group,” protection might otherwise be offered to less deserving candidates. Because *In re Acosta*’s recognition of protection based on past, shared experiences has made the particular social group ground susceptible to claims which may be considered undesirable, the BIA has attempted to limit social group claims in a manner that provides similar guarantees of cultural legitimacy as are present in the contexts of religion and political opinion.

Placing limits on the social group doctrine to ensure legitimacy is not without basis. Much of the commentary by scholars and international organizations is unopposed to using discretion to limit the availability of social group claims further than claims based on other enumerated grounds.¹⁸⁷ UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* maintains that “[m]ere membership of a particular social group will not normally be enough to substantiate a claim to refugee status.”¹⁸⁸ According to the UNHCR handbook, only in “special circumstances” should membership in a particular social group be sufficient to warrant protection.¹⁸⁹ This guidance from UNHCR suggests that countries have greater discretion to deny asylum in particular social group claims. Presumably, this greater discretion is wide enough to encompass assumption of risk candidates.

From this perspective, assumption of risk is understandable and seemingly legitimate. Whatever appeal assumption of risk may have in the abstract as a means of assuring legitimacy within the social group context, however, has been severely undermined by the BIA’s application of it in *In re C-A-*. C-A- was an exceedingly virtuous candidate. He risked great harm to himself and his family in order to turn over evidence that would be used to prosecute one of the most notorious drug cartels in recent history. Unquestionably, C-A- has a claim to asylum that should be recognized. While assumption of risk may resonate when applied to drug dealers and gang members, *In re C-A-* reduces the credi-

cessful claim under their definition, and it is debatable whether landownership would be considered fundamental to the identity or conscience of the landowner at the time of ownership. *Acosta*, 19 I. & N. Dec. at 233.

187. See *supra* Part III.A.1.

188. UN High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 79, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter *Handbook on Procedures and Criteria for Determining Refugee Status*].

189. *Id.*

bility of assumption of risk because of the Board's lack of subtlety when applying the principle.

Despite its application in *In re C-A-*, assumption of risk is not completely beyond redemption. A viable theory of assumption of risk must link the doctrine more neatly to the theoretical basis for its emergence within the particular social group context. To achieve this, the Board must consider more explicitly merit or legitimacy within the assumption of risk analysis on an individualized, case-by-case basis. In *In re C-A-*, the BIA veered away from this approach by refusing to recognize a distinction between paid informants and informants acting solely out of a sense of civic obligation because paid informants also "could plausibly claim that their primary motivation was a sense of civic duty" ¹⁹⁰ Yet immigration judges are often called upon to determine the subjective motivations of applicants and, in many cases—*C-A-* being an obvious example—the true motivation of the respondent will be easily discernable. ¹⁹¹ Hard choices, of course, must be made, but there is no reason to view assumption of risk as a blunt instrument, incapable of distinguishing between criminal drug informants and applicants such as *C-A-*. An approach that weighs, on a case-by-case basis, whether specific assumption of risk behavior is a legitimate basis for asylum not only increases the likelihood that the BIA will comply with the United States' international legal obligations, but also reinforces the cultural and moral assumptions that underlie the American asylum system more generally.

CONCLUSION: RECONSIDERING *IN RE C-A-*

This Note has attempted to rationalize the legal principle announced in *In re C-A-*. While the origins of assumption of risk in *In re Fuentes* are benign, its application in *In re C-A-* as a complete bar to withholding poses real difficulties as a matter of international legal compliance. These problems would be avoided if assumption of risk could be justified as limiting the class of applicants who satisfy the refugee definition or as an exclusionary bar. Unfortunately, examining social group theory and the structures of international law and U.S. law reveals that neither

190. *In re C-A-*, 23 I. & N. Dec. 951, 959 (BIA 2006).

191. See MARTIN ET AL., *supra* note 8, at 153 ("The term 'well-founded fear' . . . contains a subjective [element] and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration. . . . The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned." (quoting *Handbook on Procedures and Criteria for Determining Refugee Status*, *supra* note 188, ¶ 37)).

of these justifications is satisfactory. As a result, this Note has suggested that assumption of risk could be reconceived as a factor that judges may permissibly consider when weighing whether to grant asylum in the social group context, though only with a more discerning consideration of merit and legitimacy.

While this may not seem like a considerable departure from the current position of assumption of risk within the BIA's jurisprudence, it has at least two important consequences. First, and most obviously, applicants such as C-A- who exhibit meritorious assumption of risk behavior will be eligible for asylum rather than, as is the case under the Board's current case law, be barred completely from both asylum and withholding. Second, and perhaps more significantly, *all* assumption of risk candidates *regardless of merit* will remain eligible for withholding of removal because, as I have argued, assumption of risk is not a legitimate bar to *nonrefoulement*. This position is not without distinct political disadvantages in a country where *nonrefoulement* may amount to a de facto grant of asylum.¹⁹² This solution, however, remains perhaps the only way to rationalize fully an intuitive yet problematic doctrine within the existing framework of international legal protection for refugees.

192. MARTIN ET AL., *supra* note 8, at 70