IN THE WAKE OF *CARDOZA-FONSECA*: DOCTRINAL PUZZLES IN ASYLUM LAW

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INTRODUCTION

Political developments in the past two years suggest that asylum law may soon be a thing of the past. Around the globe, repressive governments have fallen and bitter armed struggles have moved toward peaceful resolution. These developments may lead us to expect that in the future the number of refugees from persecution, repression and violence will dramatically decrease, making the asylum system obsolete. Unfortunately, as more recent events such as ethnic uprisings in the Soviet Republics and the recent Gulf War illustrate, such a scenario is not likely in the foreseeable future. World society remains in the grip of deep and powerful conflicts and inequalities. Despite apparently positive signs and the best efforts of human rights institutions, the world continues to descend rapidly into a deepening economic/ecological crisis. Though some progress may seem palpable, there is every reason to believe that organized atrocities committed in the context of bitter struggles over wealth and power will continue and perhaps even worsen. Therefore, it will remain important to maintain an appropriate system for providing asylum.

The Immigration and Naturalization Act of 1980 ("Act") provides that political asylum should be granted if the applicant shows "a well-founded fear of persecution" based on race, religion, nationality, group membership or political opinion.[1]

Prior to 1987, some circuit courts interpreted the asylum provision's "well-founded fear" standard to be identical to the stringent "clear probability" test of the Act's withholding of deportation provision.[2] Under the latter standard, applicants seeking withholding of deportation must prove a "clear probability" of persecution for reasons of race, religion, nationality, group membership, or political opinion if deported.[3] In *INS v. Cardoza-Fonseca*,[4] which is widely

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[1] 8 U.S.C. § 1158(a)-(c) (Supp. 1989).

[2] *See, e.g.*, Sankar v. INS, 757 F.2d 532, 533 (3d Cir. 1985); *See also*, 8 U.S.C. § 1253(h)-(i) (Supp. 1989)

[3] *See* Cañas-Segovia v. INS, 902 F.2d 717, 722 (9th Cir. 1990); Blaco-Lopez v. INS, 858 F.2d 531, 533 (9th Cir. 1988); INS v. Stevic, 467 U.S. 407, 424 (1984).

thought to have marked a major turn toward liberalizing United States political asylum law, the Supreme Court held that to meet the asylum provision's "well-founded fear" of persecution standard an applicant need only show something akin to "reasonable possibility" of persecution.[5] Under *Cardoza-Fonseca*, asylum applicants can no longer be held to the more stringent "clear probability" standard applied to the withholding of deportation provision.

Since *Cardoza-Fonseca*, the circuit courts and the Board of Immigration Appeals ("BIA" or "Board") opinions have encountered and created new issues in political asylum law which call into question the practical effects of *Cardoza-Fonseca*. An analysis of these opinions illustrates how the interpretation of the "well-founded fear" standard and the statutory grounds for relief have at times expanded, but often negated, the anticipated liberalization of political asylum availability under *Cardoza-Fonseca*.

This article explores some of the problems presented by post *Cardoza-Fonseca* Board and circuit court opinions. In some cases, adequate perspective requires background discussion of Board and appellate court rulings issued prior to *Cardoza-Fonseca*. Part I of this article addresses the problems in determining the appropriate standard for appellate review of Board decisions. Part II addresses the issues in developing a methodology to ensure Board compliance with *Cardoza-Fonseca*. Part III addresses the difficulties in defining "political opinion" in various contexts. Part IV addresses the problems concerning various doctrinal approaches to asylum applications based on resistance to compulsory military service.

From the doctrinal developments analyzed below, I make the following observations: (1) the courts may experience and perpetuate fundamental confusion over what levels of deference to apply in review of Board asylum rulings; (2) although the courts have articulated some criteria for ensuring Board compliance with *Cardoza-Fonseca's* generous interpretation of the "well-founded fear standard," a less vigilant approach to ensuring compliance has recently begun to emerge; (3) the courts have, in certain circumstances, developed broad interpretations of the kinds of disputes in which persecution on account of "political opinion" will be found; (4) the courts may begin to deal generously with asylum claims based on religious—or perhaps principled—opposition to *all* military service; and (5) the courts fail to deal generously with asylum claims based on objection to atrocities committed by particular military forces.

I. Confusion In Appellate Review Standards

Appellate courts when reviewing Board rulings must determine the appropriate standard of review. When making such a determination, the courts confront the usual difficulties of distinguishing legal questions from factual ones. Questions of fact are supposedly reviewed under the deferential "substantial

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[4] 480 U.S. 421 (1987).

[5] *Id.* at 440.

evidence" standard: presumably the Board's ruling should be sustained if it is supported by substantial evidence in the record.[6] The theory behind this standard is that the lower tribunal is in a better position to evaluate evidence than the appellate court. Questions of law are reviewed *de novo*: the reviewing court gives no deferential weight to the Board's determinations. The problem associated with determining the correct standard of review is compounded by the presence of a third category of questions: questions of "statutory interpretation." This third category confuses the reviewing process, because questions of statutory interpretation may be difficult to distinguish from both questions of fact and questions of law.

Several appellate court cases seem to hold that Board statutory interpretations warrant a heightened degree of appellate deference tantamount to "abuse of discretion" review.[7] This abuse of discretion approach is presumably even more deferential than the "substantial evidence" standard applied on "questions of fact." There are, however, several appellate court decisions which seem to hold that Board rulings based on statutory interpretation should be reviewed more *strictly* than questions of fact. These latter opinions seem to imply *de novo* scrutiny. Indeed, some decisions have explicitly treated statutory interpretations as rulings of law, warranting *de novo* review on appeal.[8] At first blush, choosing the appropriate standard of review seems simple in asylum cases. The Board's adjudications seem to represent factual assessments of whether the applicant's circumstances satisfy the legal standard of "well-founded fear" of persecution for one of the five statutory grounds: race, religion, nationality, social group membership, or political opinion.[9] Viewed as such, the court should reverse the Board only if there is no "substantial evidence" to support the ruling. However, since the Board implicitly interprets statutory terms such as "well-founded fear," "persecution," "religion," "social group," and "political opinion" when deciding the applicant's eligibility, the choice of standards of review turns out not to be clear cut.

As the discussion below illustrates, the Board and the courts regularly make rulings that classify *types* of claims as falling either within or outside the statute. Such rulings could arguably be treated either as findings of fact or as rulings on statutory interpretation. Therefore, a circuit court may treat one

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[6] This "substantial evidence" requirement has been defined to mean something more than a scintilla of evidence. Thus, it is a very low evidentiary standard. Bloodsworth v. Heckler, 703 F.2d 1233, 1239 (11th Cir. 1983).

[7] *See, e.g.*, Novoa-Umania v. INS, 896 F.2d 1, 2 (1st Cir. 1990); Montecino v. INS, 915 F.2d 518, 520 (9th Cir. 1990).

[8] M.A.A26851062 v. INS, 899 F.2d 304, 317-318 (4th Cir. 1990) (Winter, J., dissenting). *See* Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989);Rodriguez-Rivera v. INS, 848 F.2d 998, 1001 (9th Cir. 1988); Lazo-Majano v. INS, 813 F.2d 1432, 1434 (9th Cir. 1987). *See also*, Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990); Desir v. Ilchert, 840 F.2d 723, 726 (11th Cir. 1988); .

[9] *See* 8 U.S.C. § 1158(a)-(c) (Supp. 1989).

appeal as a question of fact but treat a closely similar appeal as a question of statutory interpretation. Meanwhile, because there is no clear distinction between questions of statutory interpretation and questions of law, the potential for confusion becomes pervasive and the issue of proper review standards becomes deeply indeterminate. Compounding the problem are the many appellate courts that fail to articulate the standard of review being applied. As a result, there seems to be no disciplined way to determine what level of deference should be applied in appellate review of any given ruling.

Although several courts have addressed standard of review ambiguities presented by specific cases,[10] no court has addressed the intrinsic ambiguity created by the Board's typical method of resolving cases. Typically the Board rules that certain *types* of factual circumstances do or do not meet the statutory standard.[11]

Consistent appellate review could ultimately be attained if appellate courts announced whether various types of fact patterns fit *prima facie* within the statute. Such pronouncements, if understood by the Board and lower courts as legal rules, could mandate stringent *de novo* appellate scrutiny to later rulings in similar cases. Until the courts address and clarify the overall issue of an appropriate review standard, inconsistent appellate review will continue, camouflaged by arbitrary classifications of Board decisions as factual findings, legal rulings or statutory interpretations. The following discussion must be understood in the context of this problem, but will not directly refer to it. The remaining sections focus instead on the developing doctrinal structure for assessing asylum claims.

II. THE *CARDOZA-FONSECA* STANDARD FOR ASYLUM: POLICING CORRECT IMPLEMENTATION OF THE "WELL-FOUNDED FEAR" STANDARD

Cardoza-Fonseca purportedly liberalized asylum availability by declaring "well-founded fear"—not "clear probability"—to be the correct standard for asylum claims. Unfortunately, the case left unresolved many issues that are critical to the effective enforcement of the proper standard. Although *Cardoza-Fonseca* holds that "well-founded fear" is different from "clear probability," the holding does not specify how the two standards differ. At a minimum, *Cardoza-Fonseca* establishes that the asylum standard is different from, and more generous than, the "clear probability" standard. Because the difference between the two standards is unclear, as is the question of how much proof is necessary to show "well-founded fear," the courts find it diffi-

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[10] Novoa-Umania, 896 F.2d at 2; Alvarez-Flores v. INS, 909 F.2d 1, 3-4 (1st Cir. 1990); Beltran-Zavala v. INS, 912 F.2d 1027, 1029 (9th Cir. 1990); M.A. v. INS, 899 F.2d 304 (4th Cir. 1990).

[11] In a recent case, the Eleventh Circuit seemed to recognize that it had a choice of three review standards, but sidestepped the issue with an all-purpose finding that the Board's motion in denial of relief had been "reasonable." Perlera-Escobar, 894 F.2d at 1296-1297.

cult to determine whether the Board has applied the generous *Cardoza-Fonseca* standard or has merely renamed the "clear probability" standard.

A. *The Board: Practical Difficulties in Implementing the "Well-Founded Fear" Standard*

Because *Cardoza-Fonseca* offers the Board so little guidance as to how a more generous asylum standard is to be understood, it has produced few changes in Board review of claims. Perhaps because the Board is reluctant to broaden asylum availability or perhaps because the Board finds old habits of review hard to break, there has been no discernible difference in the treatment of asylum claims since *Cardoza-Fonseca.*

1. Determining the Standard of Proof for Asylum Claims

One hinderance to uniform liberalization of asylum availability is *Cardoza-Fonseca's* failure to address the question of how much proof is required to establish a "well-founded fear." Some post-*Cardoza-Fonseca* rulings suggest that the Board views the standard of proof for asylum claims as less demanding than the standard of proof for withholding of deporting claims. For example, in *Matter of Mogharrabi* the Board granted asylum to an Iranian applicant whose petition was denied by the hearing tribunal at the initial level of application review.[12] On appeal, the Board found that the applicant, who was known to Iranian officials as a political critic of the Khomeini regime, had successfully shown a "well-founded fear" of persecution even though he had failed to show a "probability" of persecution.[13] Although explicit departure from the "well-founded fear" standard suggests a more liberal asylum review, *Mogharrabi* still imposes strict limits on asylum applications by reiterating, with only slight modification, a four-point test for proving "well-founded fear" that the Board had developed in *Matter of Acosta*[14] prior to *Cardoza-Fonseca.* Under the *Mogharrabi* formulation, an asylum applicant seeking to prove a "well-founded fear" must prove the following:

> (1) [The applicant] possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is aware or could become aware that [the applicant] possesses this belief or characteristic; (3) the persecutor has the capability of punishing the [applicant]; and (4) the persecutor has the inclination to punish [the applicant].[15]

There are three significant problems with the Board's continued application of the *Mogharrabi/Acosta* formula, which are contrary to the intent of the *Cardoza-Fonseca* court. First, the formula was originally devised *in Acosta* as

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[12] Matter of Mogharrabi, 19 I & N Dec. 439 (BIA 1987).

[13] *Id.*

[14] *See* Matter of Acosta, 19 I & N Dec. 211, 219 (BIA 1985).

[15] 19 I & N Dec. at 446.

a framework for applying the "clear probability" standard and hence may be overly restrictive for applying the more generous *Cardoza-Fonseca* asylum standard. Second, the cumulative anti-asylum effects of habits of judgment formed in a "clear probability" context from the *Mogharrabi/Acosta* cases may be carried over unwittingly to the asylum context. Third, several particulars of the four-factor test may make it incompatible with a more generous asylum standard. Requirements such as the victim's possession of identifiable beliefs or characteristics, and victimizer's inclination to "punish" and purpose to "overcome," may too sharply constrain the circumstances that should be regarded as "persecution" for asylum purposes. Hence, the framework may allow both the Board and its subsidiary administrative tribunals to restrict asylum relief in a fashion contrary to its proper scope.

To date, no court has squarely confronted the problem of reconciling *Cardoza-Fonseca's* generous "reasonable possibility" language with the continued application of the cumulative *Mogharrabi/Acosta* four-point formula. Given the formula's restrictive effects one could argue that the proper implementation of *Cardoza-Fonseca* requires that the formula be discarded for purposes of asylum analysis, even if it continues to be used for withholding of deportation analysis.

2. The Practical Difficulties of Reviewing Joint Applications Under Different Standards

Another problem the Board faces when attempting to apply the appropriate "well-founded fear" standard stems from the interplay, in most cases, between the two distinct remedies: the withholding of deportation and asylum. Under current practice, petitions for asylum and for withholding are usually combined in the same action. This combined petition creates an odd situation for administrative tribunals, which must evaluate the same set of facts against two different statutory provisions.

Prior to *Cardoza-Fonseca*, some circuit courts interpreted the "well-founded fear" standard for asylum as equivalent to the "clear probability" standard for withholding of deportation. This interpretation avoided the conceptual difficulty of appraising the same facts by two different standards.[16] Confusion arose in those circuit courts which recognized that the two standards were different, with the asylum standard being the more generous of the two.[17] *Cardoza-Fonseca* now forces all the circuits to face the dual-standard perplexity previously acknowledged by only some appellate courts.

3. The Practical Difficulties of Issuing Boilerplate Rulings to Satisfy All Circuits on Review

Prior to *Cardoza-Fonseca*, the Board, in an effort to comply with reviewing

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[16] *See, e.g.*, Sankar, 757 F.2d 532.

[17] *See, e.g.*, Carvajal-Munoz v. INS, 743 F.2d 562 (7th Cir. 1984).

court standards, was forced by the split in the circuits to apply two different and contradictory legal frameworks: one treating the "well-founded fear" standard as identical to "clear probability"; the other treating it as more generous. The Board faced not just the difficult question of how the two standards differ, but also whether the dual-standard framework was actually applicable in the appeal of a particular case. Typically, the Board simplified its task by ruling that the evidence presented was insufficient to meet both the withholding of deportation standard and the more lenient asylum standard. By adopting such a catch-all approach, the Board sought to avoid the potential review problems created by the split in the circuits. In circuits applying the single-standard approach, review of Board denials of relief raised no question as to the Board's application of the correct standard. In circuits applying the dual-standard framework, the question of appropriate standard did arise theoretically, but posed no practical difficulty if the Board had already given a negative answer on whether the applicant met a hypothetical and more lenient asylum standard.

Unfortunately, the Board's approach may have sacrificed conscientiousness for convenience and simplicity. The Board routinely ruled that applicants failed to meet both the "clear probability" standard for withholding and the hypothetically-more-lenient asylum standard. The Board's opinions suggest that despite superficial tribute to the dual standard, the Board in fact resolved cases under a more or less unitary "clear probability" standard.

B. *Reviewing Courts*

Because of *Cardoza-Fonseca's* declaration of a dual standard, the problem of determining whether the Board has in fact reviewed the applicant's asylum claim under the correct more-lenient standard now arises in all circuits.[18]

In *Rodríguez v. INS*[19] the Ninth Circuit confronted the problem of possible Board failure to apply the generous asylum standard. *Rodríguez* involved a Salvadoran woman and her son who claimed asylum on the basis of the murders committed by government security forces against other family members.[20] On appeal from the Board's denial of relief, the Ninth Circuit upbraided the Board for systematically deciding asylum cases under a "clear probability" standard while claiming to have recognized and applied a more generous test. Among the many reasons *Rodríguez* cites as a basis for suspicion of such systematic Board error is the Board's habitual use of boilerplate

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[18] The problem of determining which standard was in fact applied arises in one of two contexts: (1) pre-*Cardoza-Fonseca* decisions in which the Board merely recited rather than scrupulously applied a hypothetically more lenient asylum standard; and (2) post-*Cardoza-Fonseca* Board decisions that failed to articulate and apply the appropriate, more lenient asylum standard. Though distinguishable in origin, these two situations are by and large identical in the analytical issues they raise. The case discussion which follows will not make a point of distinguishing them.

[19] 841 F.2d 865, 870-71 (9th Cir. 1987).

[20] *Id.* at 870-71.

phrasing in its decisions ruling the applicant ineligible for relief regardless of the applicable standard.[21] Another reason for suspicion was the Board's invocation of its decision in *Matter of Acosta*, which had treated asylum and "clear probability" standards identically.[22] A third reason the Ninth Circuit suspected systematic error was the Board's enunciation of the "well-founded fear" asylum standard in phrases associated with the "clear probability" test. Such phrases, for example, required applicants to show that persecution is "likely" or that the applicants "would" be targeted by authorities.[23] The terms "likely" and "would" carry undertones of "probability" inappropriate to the less-demanding asylum standard.[24]

To more easily determine which standard the Board had used, the Ninth Circuit required the Board, in future cases, to articulate clearly and to apply explicitly the more lenient standard mandated by *Cardoza-Fonseca*. Under *Rodríguez*, the Board must clearly articulate the standard it applies. Otherwise the Ninth Circuit will attack the problem by overturning Board rulings.[25]

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[21] *Id.* at 869.

[22] *Id.*

[23] *Id.* at 870.

[24] In Castaneda-Hernandez v. INS, 826 F.2d 1526 (6th Cir. 1987), the Sixth Circuit couched its suspicion in such a way as to provide a potentially major boost to the theory that draft age Salvadoran males, applicants in the "average weak case," *see* note 25, should be deemed eligible for asylum. The court found the Board's purported application of a more lenient asylum standard problematic because of its "entirely too dismissive" treatment of the claim that conditions in El Salvador placed draft age males in a position of vulnerability to persecution. 826 F.2d at 1530-31. The court's remand instructed the Board to review information in the record on the vulnerability to persecution of Salvadoran draft age males as a "social group," especially in light of possibly worsening conditions in El Salvador. *Id.* at 1531. Such a remand suggests that predicaments faced by young Salvadoran males threatened with ill-treatment for avoiding the war might be exactly the sort of situation meant to be alleviated by the generous asylum standard.

Distinctions between the asylum standard and "clear-probability" were further marked out in Blanco-Comarribas v. INS, 830 F.2d 1039 (9th Cir. 1987), which involved a Nicaraguan male who had petitioned for asylum based on his fear of persecution in retaliation for his and his family's opposition to their government's policies. *Id.* at 1041. The Ninth Circuit affirmed the Board's denial of withholding of deportation because the applicant had shown no "clear probability" of persecution. *Id.* The Ninth Circuit reversed the Board's denial of asylum, however, finding that the applicant had established facts sufficient to warrant relief under the more lenient standard. *Id.* at 1043. Although the Ninth Circuit did not explicitly state that the Board had failed to apply the more generous asylum standard, it was implied that the Board had not applied the right test. *See* Rodriguez, 841 F.2d 865.

[25] Rodriguez, 841 F.2d at 869-70. *See Castaneda-Hernandez*, for the Sixth Circuit's treatment of Board application of the two standards. *Castenda-Hernandez* is an early example of how the Sixth Circuit dealt with the problem of insuring Board consideration of the more lenient nature of the asylum standard. The facts presented by theapplicant constituted what could be called the "average weak case" for asylum: the

Rather than remanding *Rodríguez* for Board reassessment, the Ninth Circuit reviewed the record *de novo* and found the applicant to have met not only the more lenient asylum standard, but even the more stringent "clear probability" standard for withholding of deportation.[26]

The Ninth Circuit in *Arteaga v. INS*,[27] reiterates the *Rodríguez* suggestion that *Cardoza-Fonseca* requires the Board to articulate and to apply explicitly an asylum standard clearly distinct from the less-generous "clear probability" standard.[28] In *Arteaga*, the Board denied asylum to a draft-age Salvadoran male who claimed he had been menaced by guerrillas for refusing to join their ranks.[29] On appeal, the Ninth Circuit again corrected the Board for its boilerplate ruling which declared the applicant ineligible for relief where "it appear[ed] that the appropriate legal standard has not been applied but merely invoked as so many 'magic words.'"[30] *Arteaga* supports the *Rodríguez* notion that Board rulings should clearly articulate and apply the more-lenient asylum standard.[31]

Arteaga also formulates a method for testing whether the Board has indeed applied a differentiated and more-generous asylum standard. *Arteaga* formulates this method with references to its pre-*Cardoza-Fonseca* decision in *Sánchez-Trujillo v. INS*.[32] *Sánchez-Trujillo* allowed a Board ruling to stand despite hints that the dual-standard model had not been correctly applied. Though the Board's asylum review in that case had "inartfully" used phrases like "would be" or "will be," phrases suggesting application of an erroneous "clear probability" standard, the court nevertheless found the Board applied

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applicant was a draft age Salvadoran male lacking dramatic personal experiences of persecution, but claiming based upon his demographic exposure to the draft. When the Board denied asylum it purported to assess the claim under a hypothetically lenient standard. On appeal, the Sixth Circuit was unpersuaded by the Board's ruling that the applicant had failed to qualify for relief regardless of what standard governed and voiced its suspicion that the Board had not actually applied the more lenient standard. The Sixth Circuit held that the Board could not "foreclose judicial review" merely by invoking "magical words suggesting a recognition of the difference in standards for asylum and witholding of deportation." *Id.* at 1530. Under *Cardoza-Fonseca* the Sixth Circuit explained, "the issue remains whether ... the Board in fact applied a more generous standard to evaluate [the] petioner's asylum claim." *Id.* The Sixth Circuit then remanded the case to the Board for determination of whether the applicant's claim met the "well-founded fear" standard properly interpreted as "reasonable possibility," even though he had not met the "clear probability" test. *Id.* at 1530-31.

[26] *See* Rodriguez 841 F.2d at 870-71. This disposition arguably relegates the court's comments on Board standard-bungling to dicta status, since the Board's ruling was found to be erroneous even under application of the stricter standard.

[27] 836 F.2d 1227 (9th Cir. 1988).

[28] *Id.* at 1229-30.

[29] *See id.* at 1228.

[30] *Id.* at 1231.

[31] *Id.* at 1231, 1233.

[32] 801 F.2d 1571 (9th Cir. 1986).

the correct asylum standard.[33] The court based this finding on the fact that the Board had quoted extensively from the Ninth Circuit's lower-court *Cardoza-Fonseca* ruling[34] adopting the dual-standard approach as the law of the circuit.[35] *Sánchez-Trujillo* suggested that the reviewing courts should weigh indications in the Board ruling that signal noncompliance with the dual-standard approach against indications of compliance. Therefore, *Rodríguez* may be reconciled with *Sánchez-Trujillo* if it is considered to represent a case in which the balance of indicators suggests noncompliance with the dual-standard framework.

Arteaga seems to adopt this balance-of-indicators approach and uses the *Sánchez-Trujillo* and *Rodríguez* fact patterns to guide its assessment. *Arteaga*, in effect, attempts to discern whether the record before it falls closer to *Rodríguez*, in which case it would be appropriate to reverse the Board, or to *Sánchez-Trujillo*, in which case it would be appropriate to affirm the Board. *Arteaga* noted that the record before it resembled *Sánchez-Trujillo* in one respect: both cases involved a Board ruling referring deferentially to the Ninth Circuit's *Cardoza-Fonseca* decision, which endorsed the dual standard.[36] *Arteaga* differs from *Sánchez-Trujillo*, however, in several critical ways. First, as in *Rodríguez*,[37] the Board in *Arteaga* cited *Matter of Acosta* as authority, even though *Acosta* adopted "clear probability" as the correct asylum test.[38] *Sánchez-Trujillo*, by contrast, contained no such positive reference to *Acosta's* erroneous approach.[39] Second, the *Arteaga* Board not only used phrases suggesting an erroneous "clear probability" test, but cited federal court decisions expounding or applying that test.[40] In *Sánchez-Trujillo* the Board made no such references.[41] Third, the Board in *Arteaga* assessed the asylum claim in terms of "likelihood" of persecution,[42] a test erroneously lifted from the "clear probability" standard. *Sánchez-Trujillo*, in contrast, used "inartful" terms such as "would be" or "will be" but qualified them through its "lengthy quotation from *Cardoza-Fonseca* . . . together with an explicit statement that it was bound by Ninth Circuit precedent."[43]

In sum, *Arteaga* is not only quite different from *Sánchez-Trujillo* but is quite similar to *Rodríguez*. It differs from *Rodríguez* in only two respects, both of which were deemed non-decisive by the court.[44] Because, on bal-

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[33] *Id.* at 1578-79.

[34] 767 F.2d 1448 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987).

[35] *See* Sanchez-Trujillo, 801 F.2d at 1578.

[36] 836 F.2d at 1230.

[37] Rodriguez, 841 F.2d at 868.

[38] *See* 836 F.2d at 1230.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] The differences were: (1) minor differences in the boilerplate language used to

ance, *Arteaga* seems much closer to *Rodríguez* than to *Sánchez-Trujillo,* the court remanded the case and directed the Board to make an explicit application of the correct asylum test.[45]

Though *Arteaga* seems to adopt a coherent approach to compliance-monitoring, by balancing indicators suggesting compliance and non-compliance with the dual standard analysis, the approach may be misapplied and, therefore, may not attain authoritative status. These problems are illustrated in *Rodríguez-Rivera v. U.S. Dept. of Immigration and Naturalization* (*Rivera*),[46] a questionably-reasoned decision involving a draft-age Salvadoran male who asserted fear of persecution based on both his refusal to serve in the military and his failure to vote in the March 1982 elections.[47] The applicant challenged the Board's denial of relief on several grounds, one of which was that the Immigration Judge ("IJ") in the original hearing erroneously applied a "clear probability" standard to the asylum claim.[48] The Ninth Circuit found that the "IJ" had indeed applied the improper standard but ruled that this was harmless error if the subsequent Board review had correctly distinguished and applied the two standards.[49]

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deny relief regardless of the standard; and (2) references to the Ninth Circuit's *Cardoza-Fonseca* decision which endorsed the dual standard approach. *Id.* at 1230-31.

[45] *Id.* at 1231, 1233.

[46] 848 F.2d 998 (9th Cir. 1988).

[47] *Id.* at 999-1000.

[48] *Id.* at 1001.

[49] *Id.* at 1002. *Rivera* held that IJ error in applying the asylum standard was harmless error because the court, on review, perceived and applied the proper standard. A subsequent decision by the First Circuit disputed the *Rivera* court's analysis. Perez-Alvarez v. INS, 857 F.2d 23 (1st Cir. 1988), involved a Salvadoran refugee who claimed asylum based on fear of persecution for his union membership. *Id.* at 23-24. The Board had perceived and acknowledged the IJ's failure to apply the properly-generous asylum standard. *Id.* at 24. Because the Board corrected the IJ in this regard, *Rivera* would suggest treating the IJ's error as harmless. The First Circuit in *Perez-Alvarez* declined to do this, however, arguing that the IJ's error on the proper standard had led it to exclude evidence it should properly have considered. *Id.* at 24.

The excluded evidence in question concerned the applicant's union membership. *Id.* at 25. The exclusion of such evidence was reversible error according to *Perez-Alvarez,* because the exclusion could have resulted from the IJ's improper use of the "probability standard in an asylum decision." *Id.* The entire argument in support of this conclusion is, in substance, contained in the following excerpt:

> When a judge is confused as to the standard of proof to be applied in the case before him, his rulings on evidence are very likely to be affected by that confusion. . . . Handicapped by confusion as to the standard of proffered testimony.
>
> The error requires reversal.

Id.

One may agree that the evidence in question should have been heard and yet find something lacking in the court's reasoning. What is the supposed relationship between the IJ's confusion on standards and its exclusion of the proffered evidence? There is no relationship whatsoever, unless the court imagines the evidence was properly excludable

The Ninth Circuit devoted considerable time analyzing whether the Board had in fact applied the correctly-articulated test. However, although the court acknowledged that the Board had not addressed the applicant's asylum and withholding claims in two separate paragraphs to ensure correct use of the two distinct standards,[50] the court concluded that the Board had properly applied the dual-standard approach.[51] In brief, the court reasoned that differences from *Rodríguez* and *Arteaga* outweighed similarities[52] and also that resemblances to *Sánchez-Trujillo*,[53] and more importantly the flavor of the Board's "entire opinion,"[54] indicated correct use of the standards.

The court distinguished *Rivera* from *Rodríguez* based on the Board's use of quotes from the Ninth Circuit's ruling in *Cardoza-Fonseca* recognizing the two-standard framework as significant.[55] The court found that differences between the two cases outweighed the one similarity: the Board's use of boilerplate language denying relief regardless of which standard governed.[56]

Rivera's conclusion that the Board's proper use of *Cardoza-Fonseca* quotes outweighed its improper use of boilerplate language was not sound considering that similar *Cardoza-Fonseca* quotes had not been enough to prevent reversal of the Board ruling in *Arteaga*.[57] If the inclusion of *Cardoza-Fonseca* quotes did not sufficiently distinguish *Arteaga* from *Rodríguez*, it is difficult to understand how the very same factor could serve to distinguish *Rivera*. This anomaly is more troublesome because *Rivera* failed to overrule *Arteaga* directly on

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under a "probability" standard, though not under the more-generous asylum standard.

It is questionable, however, whether the admissibility of the evidence in dispute has anything to do with the standard applied. For a country like El Salvador, evidence of union membership is highly relevant to dangers of persecution, regardless of what standard may be applied. *Perez-Alvarez* makes sense only if union membership provides a "reasonable possibility" but never a "probability" of persecution. The strangeness of such a proposition makes the reasoning of *Perez-Alvarez* appear either confused or less than straightforward in reaching the right outcome. A resort to dubious logic was perhaps compelled by the fact that overturning administrative tribunals on the sole basis of an erroneous evidentiary ruling might have seemed extravagant, since rules of evidence do not apply to such tribunals. The absence of evidence rules, however, has more to do with the problem of allowing evidence which rules would exclude than with excluding evidence that should be included. In the absence of evidence rules, all relevant evidence should be admissible. The absence of evidence rules should not give tribunals carte blanche to exclude relevant evidence. Regardless what asylum standard might be applied, the *Perez-Alvarez* court could, therefore, have attacked as an abuse of discretion, the Board's exclusion of evidence as to the applicant's union membership.

[50] 848 F.2d at 1002.

[51] *Id.*

[52] *Id.* at 1002.

[53] *Id.* at 1003.

[54] *Id.*

[55] *Id.* at 1004.

[56] *Id.* at 1002.

[57] *Id.*

[58] *See* Arteaga, 836 F.2d at 1230-31.

this point.

The Ninth Circuit also distinguished *Rivera* from *Rodríguez* because the Board in *Rodríguez* had "repeatedly" stated that the asylum and withholding standards were not significantly different, whereas the Board in *Rivera* had not done so.[58] *Rivera* suggests that the *Rodríguez* reversal actually turned on the fact that the Board "repeatedly" emphasized a faulty standard in its ruling.[59] In actuality, the *Rodríguez* court did not accuse the Board of invoking the wrong standard "repeatedly" *in that particular case*.[60] Rather, the court attacked the Board for invoking the wrong standard "repeatedly" in *case after case*.[61] By incorrectly construing *Rodríguez*, *Rivera* was able to rule, in effect, that the invocation of a faulty standard only once or twice within a particular ruling does not raise a *Rodríguez*-level problem.

Rivera went on to distinguish *Arteaga*, with no more effectiveness than its attempt to distinguish *Rodríguez*. The court began its analysis by acknowledging the essential similarities between *Arteaga* and *Rivera*. One similarity was the juxtaposition of Ninth Circuit *Cardoza-Fonseca* quotes suggesting use of the right standard, with several factors suggesting use of the wrong standard.[62] For example, Board rulings in both cases made positive reference to *Acosta*, which mistakenly combined the withholding and asylum standards.[63] The Ninth Circuit distinguished *Rivera* from *Arteaga*, however, because the Board in *Rivera* followed its positive reference to *Acosta* with an *immediate* reference to *Cardoza-Fonseca's* correct approach.[64] This reasoning is weak. Board rulings in both cases referred to *Acosta*, which articulated the wrong standard, and also referred to *Cardoza-Fonseca*, which articulated the right one. It is questionable whether the error in mentioning *Acosta* should be annulled merely because a counter-balancing reference to *Cardoza-Fonseca* appears "immediately" thereafter, not just elsewhere in the ruling. Unfortunately, the Board's "immediate" *Cardoza-Fonseca* reference was precisely what *Rivera* cited to dismiss the *Acosta* problem.

In addition, the court acknowledged that the Board in both *Rivera* and *Arteaga* erroneously required applicants to show they "would" or "will" be persecution targets, terminology suggesting the erroneous "probability" standard. *Rivera* distinguished the cases on grounds that, unlike the Board in *Arteaga,* the *Rivera* Board had not "immediately followed" its "would be" language with citations to cases applying the "clear probability" standard.[65] Once again, it is hard to be impressed by the court's argument. If "would be" or "will be" language presents a problem, as *Rivera* acknowledged it does, it is

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[58] 848 F.2d 1003, (citing Rodriguez, 841 F.2d at 868).

[59] *Id.*

[60] *See* Rodriguez, 841 F.2d at 869-70.

[61] *See* Rodriguez, 848 F.2d at 870.

[62] *See* Rivera, 848 F.2d at 1003.

[63] *Id.*

[64] *Id.*

[65] *Id.*

doubtful whether absence of cites to other cases using incorrect language significantly rectifies the problem. *Rivera* and *Arteaga* also have in common the erroneous use of "likelihood" language in the Board decision. *Rivera* wanly distinguished *Arteaga* by observing that the "likelihood" phrase is "slightly different" in wording between the cases.[66] The court made no attempt to defend this weak distinction.[67]

As if acknowledging the weakness of its attempts to distinguish *Arteaga, Rivera* insisted that its decision to affirm the Board ruling did not rest on these distinctions at all.[68] The court explained: "To base our conclusion on such distinctions would impermissively raise the factors in *Arteaga* to the status of shibboleths upon which a case will turn."[69] After painstakingly struggling to show how its ruling maintains fealty to *Arteaga's* methodology, the court renounced any notion that it was bound to do so.[70]

Rivera is correct in pointing out that courts need not bind themselves to particular methodologies when monitoring Board standard compliance. *Rivera* dramatically emphasizes that courts are free to review the Board's "entire opinion" in a case, not just specific passages, when assessing proper application of standards. The court concluded that:

> . . .[e]ven the presence of all three factors we found significant in *Arteaga* would not necessarily mandate reversal in another case, if after examining the entire Board opinion, we concluded that the Board applied the appropriate legal standards.[71]

If *Rivera* amounts to an outright repudiation of the *Arteaga* methodology, it is strange that the court so assiduously, though unconvincingly, insists that the methodology results in a different conclusion in *Rivera* than in *Arteaga*.[72]

After announcing the prerogative to follow an "entire opinion" approach to the problem, *Rivera* concluded that as "shown earlier," the Board's "entire opinion" in the case at hand indicated that the correct standard had been applied.[73] This application of an "entire opinion" approach turns out to be

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[66] *Id.* at 1004.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] In an ironic counterpunch to criticisms of Board boilerplate used to rule an applicant's claim invalid regardless which standard applies, the court admonishes itself against following its own "magic words"—tests inherited from previous decisions—such as *Rodriguez* and *Arteaga*, in assessing Board performance.

The comparison of the *Rodriguez/Arteaga* methodologies with Board boilerplate is inapt. The *Rodriguez/Arteaga* methodologies represent attempts to articulate a structured approach to the problem of Board compliance. The problem of Board boilerplate, by contrast, is that the Board—by continuing to invoke old formulas in a new context—may fail to distinguish the new standard from the old.

[71] 848 F.2d at 1004.

[72] *Id.*

[73] *Id.*

startlingly vacuous. Despite the court's claim that correct standard-application had been "shown earlier," the decision actually contained no such showing.[74] The only hint of such a "showing" lies in an unsupported statement earlier in the opinion, which is to the effect that a "reading of the entire Board decision" revealed proper application of standards.[75] This statement may qualify as a conclusion, but can hardly be deemed a "showing," unless an unsupported and conclusory statement, twice repeated, acquires the status of a "showing."

Only one item received mention as a specific indication of the Board's proper application of standards under the "entire Board decision" approach: the court's use of quotes from the Ninth Circuit's *Cardoza-Fonseca* case. Hence, *Rivera's* "entire opinion" approach boils down to nothing more than a focus on one of the factors analyzed under the *Arteaga* item-by-item factor-comparison approach that *Rivera* explicitly renounces. To focus on *Cardoza-Fonseca* quotes as a distinguishing item, is especially confounding in light of *Arteaga*. As stressed above, *Arteaga* itself had already ruled that such quotes do not suffice to save an otherwise unsound Board ruling.[76] Hence, *Rivera's* treatment of the quotes as establishing the soundness of a Board's ruling under an "entire opinion" approach in effect overrules *Arteaga*, provided that *Rivera's* other attempts to distinguish *Arteaga* are treated with the skepticism they deserve.

III. Developing Doctrine In The Wake Of *Cardoza-Fonseca*: Political Opinion

The Board has often limited the benefits of the new *Cardoza-Fonseca* standard by narrowly defining the five factors listed in the 1980 Act on which the fear of persecution must rest.[77] As discussed above, the *Mogharrabi* decision purported to apply *Cardoza-Fonseca's* lowered threshold on whether a fear is "well-founded."[78] The Board nevertheless insisted that applicants could not receive asylum without showing that their fear of persecution is narrowly tied to one of the five statutory grounds: race, religion, nationality, social group membership, or political opinion.[79] Though *Mogharrabi's* mandated focus on the five statutory grounds is in and of itself restrictive, the degree of restriction turns on the broadness or narrowness of the constructions given to those grounds.

Of the five factors, "persecution on account of . . . political opinion" has been subjected to especially important interpretations and will be the focus of discussion in this section. Some background on developments prior to *Car-*

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[74] *Id.* at 999-1004.

[75] *Id.* at 1002.

[76] *See* Arteaga, 836 F.2d at 1231.

[77] Smith, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals Actions in Asylum Cases*, 75 VA. L. REV. 681, 699 (1989).

[78] 19 I & N Dec. at 446.

[79] *Id.* at 447.

doza-Fonseca is necessary to put these interpretations in perspective.

A. *The Expansion of Political Opinion to Include Neutrality, Imputed Opinion, and Beyond*

Interpretations of the statutory term "political opinion" present some of asylums law's most important, complex, and controversial doctrinal developments. Asylum is warranted where persecutory treatment is due to "political opinion," yet "political opinion" may mean many different things. Significant interpretation problems as to whether an opinion falls within the statutory definition of "political opinion" arise in the context of neutral or imputed opinions. For example, such a problem arises where the applicant is persecuted for her neutral stance in an ongoing conflict or for a political opinion imputed to her by her persecutors.

1. Civil War Neutrality As Political Opinion

In Central America and other regions torn by civil strife, people are subject to persecution—both by governments for supporting or appearing to support insurgency movements and by insurgents for refusing support. As a result of such constant turmoil, many Central American males who desire to remain inactive or neutral in the conflict claim asylum to avoid persecution. A narrow interpretation of "political opinion" would result in the denial of asylum for such inaction or neutrality. The alleged persecution for inaction or neutrality arguably does not stem from an expression of political opinion, and hence may not be thought to provide no grounds for asylum. A less restrictive interpretation, and one more in keeping with the spirit of the 1980 Act, however, might posit that *any* noncompliance or at least *some* forms of noncompliance with either the government or insurgent forces could be deemed an expression of an opposing "political opinion."

In *Bolanos-Hernández v. INS*,[80] the Ninth Circuit adopted this more liberal interpretation of political opinion. The Ninth Circuit overruled the Board and granted asylum to a Salvadoran applicant who had fled El Salvador in fear when leftist insurgents threatened his life after he had refused to join their unit. The Immigration Judge and the Board characterized this threat as simply "representative of the general level of violence in El Salvador,"[81] and thus found that the applicant had not shown that his danger was grounded in "political opinion."[82]

The Ninth Circuit, reversing the Board, maintained that a person's choice to remain neutral may manifest a political opinion:

> A rule that one must identify with one of the two dominant warring political factions in order to possess a political opinion, when many persons

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[80] 767 F.2d 1277 (9th Cir. 1984).

[81] *Id.* at 1280.

[82] *Id.* at 1284.

> may, in fact, be opposed to the views and policies of both, would frustrate one of the basic objectives of the Refugee Act of 1980—to provide protection to all victims of persecution regardless of ideology.[83]

The Ninth Circuit also explicitly ruled that neutrality toward armed conflict could constitute "political opinion."[84] The Court suggested, however, that to base a persecution claim on political neutrality, the alien must prove that the decision to remain neutral was a conscious, affirmative choice.[85]

Although the Ninth Circuit approach recognizes that neutrality may constitute "political opinion" and is true to the spirit of the Act, the Board has announced that it will not apply this decision outside Ninth Circuit cases.[86] Furthermore, at least one circuit court has explicitly repudiated the notion that neutrality may constitute "political opinion."[87] These restrictive interpretations of political opinion create difficult barriers for asylum seekers outside the Ninth Circuit.

2. Persecutory Motives and Imputed Opinion

The Ninth Circuit further broadened its interpretation of "political opinion" to include political opinion "imputed" to someone by his persecutor. In *Hernández-Ortiz v. INS*[88] several members of the applicant's immediate family were killed or threatened by Salvadoran security forces. The applicant felt that she personally was in danger because the authorities knew her and considered her a traitor.[89] The Board nevertheless ruled that her fears were simply those "concerning the political upheaval and random violence" in El Salvador and were "not related to her political opinion."[90]

The Ninth Circuit reversed the Board's decision and broadened the meaning of "political opinion" in two ways. First, the court concluded that when determining whether persecution is based on "political opinion," an asylum tribunal "may look to the political views and actions of the entity or individual responsible for the threats or violence, as well as to the victim's," in determining whether the government's actions constitute political persecution.[91] Moreover, if a government victimizes someone it has no reason to regard as an actual criminal, its motives may presumptively be deemed political. Second, the court held that asylum can be granted on the basis of an "imputed" political opin-

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[83] *Id.* at 1286.

[84] *Id.*

[85] *Id.*

[86] The Board has explicitly repudiated the "neutrality" theory of "political opinion" adopted by the Ninth Circuit in *Bolanos-Hernandez* for cases arising in circuits other than the Ninth. Matter of Vigil, 19 I & N Dec. 572 (BIA 1988); Matter of Maldonado-Cruz, 19 I & N Dec. 509 (BIA 1988).

[87] 894 F.2d at 1297 n. 4.

[88] 777 F.2d 509 (9th Cir. 1985).

[89] *Id.* at 512.

[90] *Id.* at 513.

[91] *Id.* at 516.

ion, stating:

> It is irrelevant whether a victim's political view is neutrality, as in *Bolanos-Hernández*, or disapproval of the acts or opinions of the government. Moreover, it is irrelevant whether a victim actually possesses any of these opinions as long as the government thinks he does.[92]

The Ninth Circuit has coherently defended the "imputed opinion" approach, reasoning that:

> It is at least as arbitrary and unjust for a government to persecute persons falsely accused of being ideological enemies as it is for a government to persecute real ideological enemies.[93]

Although the Ninth Circuit's expansive readings of "political opinion" in *Bolanos-Hernandez* and *Hernandez-Ortiz* seem compelling, other circuit courts have refused to adopt either the expanded definition of "political opinion"[94] or the "imputed opinion" concept.[95] There may be anxiety in other circuits and in the Board that the category of "imputed opinion" could lead to a slippery slope, as manifested in the pre-*Cardoza-Fonseca* decision of *Lazo-Majano v. INS*[96].

3. *Lazo-Majano*: Unsound and Sound Expansions of "Political Opinion"

Lazo-Majano granted asylum based on "political opinion" to a Salvadoran woman with a history of victimization at the hands of a certain Salvadoran man.[97] The applicant had been raped, beaten, and threatened by a Salvadoran army sergeant who called her a "subversive."[98] The Board denied her asylum claim on the grounds that her tormenter's actions were of a "personal" character not constituting "persecution" for asylum purposes.[99] The Ninth Circuit, however, held that the situation was not "purely personal," but instead represented persecution based on "political opinion."[100] Unfortunately, this holding rests on a dubious body of reasoning which does not clarify how the case involves "political opinion."

Lazo-Majano implies that mistreatment inflicted because of the *persecutor's* "political opinion" could qualify as "persecution" for asylum purposes.[101] This

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[92] *Id.* at 517.

[93] Ramirez-Rivas v. INS, 899 F.2d 864, 867 (9th Cir. 1990), *petition for cert. filed*, (U.S. Jan. 31, 1991) (No. 90-1223).

[94] *See* Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987). (Affirming the Board's denial of asylum to an applicant who was persecuted because of her persecutor's political hostility toward the applicant's family).

[95] *See* Perlera-Escobar, 894 F.2d at 1295.

[96] 813 F.2d 1432 (9th Cir. 1987).

[97] *Id.* at 1433.

[98] *Id.*

[99] *Id.* at 1434.

[100] *Id.* at 1435-36.

[101] *Id.* at 1435.

approach builds on the suggestion in *Hernandez-Ortiz* that the "political views" of those "responsible for the threats or violence" should be considered for "political opinion" analysis.[102] The Supreme Court has recently ruled in *INS v. Elias-Zacarias*[103] that asylum cannot be granted based upon the persecutor's political opinion rather than the victim's.[104] The decision does not defend this position and the Court may come to reconsider it, because a blanket rejection of the persecutor's opinion approach has little to recommend it other than the simplicity it achieves by throwing out potential claims under a bright line rule. Though an approach stressing the persecutor's own political opinion may make good sense in certain contexts, *Lazo-Majano* represents a questionable application of this approach. In *Lazo-Majano*, political opinion—one of male "right to dominance" over women—was found *implicit* in a tormenter's brutality. Under such a construction of political opinion, any instance of male violence against women could be deemed an expression of the man's "political opinion" that he has a sexist right to commit such brutality, even if he has not actually articulated such a "right." Moreover, if this reasoning were taken to its logical extreme, any case of brutality could be deemed an implicit assertion of a "political opinion" ("People have a right to torture others;" or "I, myself, have a personal right to intimidate people"), thus qualifying the victim for asylum relief.[105]

With its dubious notion of treating the sergeant's brutality as an implicit assertion of a "right to dominate," *Lazo-Majano* threatens to broaden "political opinion" to the point of meaninglessness. Fortunately, *Lazo-Majano* does not exalt this notion as decisive.[106] Yet *Lazo-Majano's* further discussion of "political opinion" also suffers from serious shortcomings.

The court next suggested that the applicant's escape is an implicit assertion of an opposing "political opinion": men have no right to dominate.[107] Although

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[102] *See* notes 87-94 and accompanying text.

[103] 60 U.S.L.W. 4130 (1992).

[104] *Id.*

[105] The *Lazo-Majano* argument demonstrates a systematic problem in current asylum law: it exemplifies how "hard cases," historically speaking, make "bad law." Due to El Salvador's civil war with its massive social dislocations, huge numbers of Salvadorans have fled to the U.S. The situation presents a compelling case for a blanket grant of asylum to all Salvadorans in the U.S., especially because U.S. assistance to the Salvadoran government has helped prolong the war and heighten its violence. The asylum process is overwhelmed by the huge number of Salvadoran applicants. As a result, sympathetic judges recognize broad and even absurd theories of asylum in order to grant asylum. This distortion of asylum law obscures its central rationale and purpose.

It should be remembered that for El Salvador pro-applicant distortions by the courts have been outweighed heavily by niggardly and anti-applicant legal distortions in the INS and by the cumulative effect of negative State Department advisory opinions which reject applications in blunderbuss fashion.

[106] 813 F.2d at 1436.

[107] *Id.* at 1435.

this notion of "political opinion" approaches "political opinion" in terms of views held by the applicant,[108] it is subject to the same slippery slope problem as the persecutor's "political opinion" argument above. By treating an action as the implicit assertion of a "political opinion," without any evidence to support the notion that the actor viewed the act as involving any such implicit assertion, virtually any attempt to avoid any persecution would be found to be "political opinion" whether or not one was held.

Lazo-Majano adopts yet another curious notion of "political opinion." Because the sergeant had called the applicant a "subversive," the court reasoned, she can be granted asylum under an "imputed opinion" theory.[109] Such a notion of "imputed opinion" is contrary to standard "imputed opinion" cases, where the refugee typically seeks asylum because a persecutor *believes* she holds intolerable political views and threatens mistreatment accordingly. The original meaning of "imputed opinion" concerned an assumption by the persecutor that the victim held some objectionable viewpoint. In *Lazo-Majano*, however, the court found that the sergeant had not actually believed that his victim held a subversive view.[110] Rather, the persecutor falsely attributed subversive views to his victim to excuse his personally-motivated brutality.[111] *Lazo-Majano* covertly raises the question whether asylum on the basis of imputed political opinion be granted when the persecutor imputes the opinion falsely in order to excuse his own personal misconduct. Unfortunately, *Lazo-Majano* fails to discuss this question.

Lazo-Majano adopted a fourth and possibly a fifth curious view of political opinion. It cited as "political opinion" the applicant's belief that the Salvadoran army was responsible for egregious crimes.[112] This is a strange view of persecution based on political opinion. An opinion for why one suffers is not the same as suffering for one's opinion.[113] The latter, not the former, is the intended ground for asylum relief.

The court also suggested that the applicant held the "political opinion" that, because Salvadoran army brutality was entirely unconstrained by any political control, she had no choice but to submit to the sergeant's brutality.[114] This

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[108] Circuit Judge Noonan failed to clarify whether his focus is on the sergeant's "opinion" (male dominance) or the applicant's "opinion" (no male dominance), 813 F.2d at 1435.

[109] *Id.* at 1435-36.

[110] *Id.* at 1435.

[111] *Id.* at 1436.

[112] *Id.* at 1435.

[113] The court did not explain what the relevance of such an opinion might be, but presumably the point is that she regards the sergeant's brutality as part of the army's organizational behavior, not just a personal crime. If this is indeed the point, perhaps the court is right in suggesting that the applicant had a "political opinion" about the causes of her suffering. This is not the same thing, however, as claiming that she had been persecuted for having that view.

[114] 813 F.2d at 1435.

approach initially appears more logical than the previous one, because it suggests a way that the applicant has actually suffered because of her political opinion. This approach differs from merely having a "political opinion" about why one suffers, because a causal link is posited here between the "political opinion" and the suffering.

There is a causal link between suffering and an opinion of its inescapability only if holding the opinion precludes actions which would effectively prevent the suffering. There is, however, no causal link between suffering and an opinion of its inescapability if the suffering is *in fact* inescapable. If the suffering is in fact inescapable, belief in its inescapability cannot itself be deemed a cause of the suffering. On the other hand, if a causal link does exist between the suffering and the opinion of inescapability—because the suffering could have been avoided by someone believing escape were possible—there may be grounds to say the suffering is "on account of" the opinion.

Nevertheless, even there it seems odd to conclude that a victim's mistaken belief in the inescapability of mistreatment is a "political opinion" for purposes of asylum relief. First, this type of "political opinion" has nothing in common with the kind of political opinion which causes mistreatment by provoking hostility or insufficient respect from a persecutor. Second, this approach to "political opinion" would result in the granting of asylum to anyone who suffers victimization of any kind due to an erroneous belief that no authority could restrain the victimizer. Such broad relief would not be in keeping with the purposes of political asylum.

Unfortunately, *Lazo-Majano's* unsound treatment of "political opinion" may induce some courts to disparage legitimate broadening interpretations of political opinion—including focus on neutrality and "imputed opinion"—developments which are necessary in order to vindicate the core objectives of asylum relief.

B. *Political Opinion: The Focus on Organized Power and Convergence on Due Process Inquiry*

In the aftermath of *Cardoza-Fonseca* there have been important developments which further test the proper scope of "political opinion." These developments suggest that the "political opinion" analysis has become a proxy inquiry into whether or not there has been victimization by an illegitimate organized power.

1. The Personal/Political Distinction: Implicitly Asserted Opinion And Imputed Opinion

Desir v. Ilchert,[115] raised questions concerning the circumstances under which a victim could be thought to hold political opinions subject to persecution or could be thought to have had political opinions imputed by a persecu-

[115] 840 F.2d 723 (9th Cir. 1988).

tor. In *Desir*, the Ninth Circuit suggested potentially broad answers to both the above questions in cases where persons resist illegitimate exercises of official force. The applicant was a Haitian man who had been arrested and beaten severely on several occasions by the Ton Ton Macoutes, the gang-like security police of Haiti's Duvalier regime.[116] He also had been shot at by the Macoutes and had his life threatened, forcing him to abandon his livelihood.[117] He had suffered this harassment because he refused to pay extortion to the Macoutes.[118] The Board denied asylum, ruling that neither the Macoutes' extortion and harassment nor the applicant's refusal to pay bribes had anything to do with the statutory grounds for asylum: race, religion, nationality, group membership, or political opinion.[119] Instead, the Board ruled that the Macoutes and the applicant had acted entirely from "personal" concerns centered on wealth.[120]

The Ninth Circuit overturned the Board, holding that the applicant had been persecuted on grounds of political opinion imputed to him by the Macoutes.[121] The Ninth Circuit based its holding on several observations about the Duvalier regime, which was characterized as a "kleptocracy" in which loyalty to the regime was determined by compliance with a hierarchically-ordered system of extortion, corruption and violence.[122] In such a "government by thievery," anyone resisting the extortion will in effect be regarded as an enemy of the regime.[123] Such people were "marked as political subversives and subjected to official repression."[124] Hence, the applicant—treated as a "subversive" by the regime's Macoutes security forces—could qualify for asylum based on an imputed "political opinion."[125]

Desir, in contrast to *Lazo-Majano*, provided some foundation for future attempts to demonstrate that experiences which may be labelled "personal" actually cross the frontier into "political."[126] *Desir* did this by focusing on the power of political operatives to define certain people as enemies. This approach

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[116] *Id.* at 724-25.

[117] *Id.* at 725.

[118] *Id.* at 724-25.

[119] *Id.* at 725.

[120] *Id.*

[121] *Id.* at 729.

[122] *Id.* at 727.

[123] *Id.*

[124] *Id.* at 724.

[125] *See id.* at 729. *Desir* is ambiguous as to whether the applicant qualifies for asylum on the additional basis that he actually held a "political opinion" for which he was persecuted. *Id.* At one point, *Desir* characterized the applicant's noncompliance with extortion as a "political choice" akin to holding a "political opinion" for purposes of asylum. *Id.* at 728. It is not clear to what extent the court's finding of asylum eligibility relies on this theory of "political opinion."

[126] Despite *Lazo-Majano*'s various notions on viewing personal victimization in terms of "political opinion," its weak reasoning will probably prevent it from influencing Board decisions in future cases.

might have yielded a defensible pro-applicant outcome in *Lazo-Majano* without relying on the convoluted reasoning revealed in the actual decision there.

Limitations on *Desir's* scope, however, were illustrated in the Eleventh Circuit's subsequent decision in *Pierre v. Rivkind.*[127] *Pierre*, decided without reference to *Desir*, which also involved extortionate strong-arming by the Macoutes.[128] The *Pierre* Board denied asylum to the applicant, who had been threatened by a Macoutes chief. Her father had confronted the chief with the theft of his mule and its death from overuse.[129] Fearful of the Macoutes chief's threat, the daughter/applicant then fled Haiti.[130] The Board in *Pierre* ruled that the mule dispute was personal, not political, and denied asylum.[131]

On a *habeas corpus* petition the district court reversed the Board ruling.[132] The district court insisted that the threats against the applicant should be viewed as involving a "political opinion"[133] in the context of Haiti's oppressive system.[134] The case was appealed to the Eleventh Circuit, which reversed the district court and reinstated the Board ruling denying relief, along with the Board's rationale for that denial.[135]

In treating the mule dispute as private and personal, *Pierre* appears directly at odds with *Desir. Desir* focuses realistically on Macoutes power to make personal disputes political by defining official enemies and by bringing security force violence or intimidation to bear on them. *Pierre* repudiates this reasoning, treating the dispute as a personal one "regardless of any power that the Ton Ton Macoute may enjoy in Haiti. . . ."[136]

The pro-applicant outcome in *Lazo-Majano* would make more sense if it were based on a *Pierre style* argument, focusing on the Salvadoran army's social power to define people as subversives. The applicant's claim could then more closely resemble the more established notion of imputed political opinion. Although the sergeant himself did not believe that his female victim was actually a subversive, the charge might nevertheless be believed in army circles, whereupon the applicant could find herself exposed to persecution based on imputed opinion. Beyond its comparability to *Desir* and *Pierre* on this count, *Lazo-Majano* presents an intriguing issue not found in other cases. This issue, already mentioned above, is whether asylum may be grounded on imputed

[127] 825 F.2d 1501 (11th Cir. 1987).

[128] *Id.* at 1504-05.

[129] *Id.*

[130] *Id.* at 1505.

[131] *Id.*

[132] *Id.* at 1503, 1505.

[133] The district court did not specify whether the "political opinion" purportedly involved was one actually held or implicitly asserted through the actions by the father, or whether it was one imputed to either the father or the daughter by the Macoutes. *Id.* at 1505.

[134] *See id.* at 1505.

[135] *See id.* at 1506.

[136] *Id.* at 1505.

opinion if the persecutor himself does not believe the imputation, but merely uses it to excuse personal exploitation.[137]

When considered together, *Lazo-Majano, Desir*, and *Pierre* present variations on a theme: tensions created by the imputed opinion theory and questions about the boundaries of the political/personal frontier. *Blanco-Lopez v. INS*[138] represents a further variation on this theme. *Blanco-Lopez* reversed the Board's denial of relief to a man who had claimed asylum based on his fear of Salvadoran security forces.[139] The applicant, himself a member of the security forces, had criticized their brutal methods.[140] This resulted in various difficulties and eventually forced his resignation.[141] The applicant was later denounced as a subversive guerilla by someone with personal enmity toward him.[142] He was arrested by security forces and coerced under the threat of death to confess. He was eventually released, however.[143] Subsequently, the applicant's personal enemy attacked him with a knife, wounded himself instead, and then told the security forces that the applicant had attacked and robbed him.[144] The applicant fled to the United States after the security forces had searched for him.[145]

The Board denied asylum, claiming that the applicant's troubles emerged from a mixture of a "personal" dispute and a "criminal" inquiry lacking any "political" dimensions.[146] On appeal the Ninth Circuit reversed. According to the court, security force harassment of the applicant plus the applicant's record of criticizing the security forces had provided ample basis for believing the security forces had attributed subversive attitudes to the applicant.[147] Asylum was warranted under the notion of imputed opinion, even if a personal dispute and a criminal inquiry were also implicated.[148]

2. *Matter of Juan-Sebastian*: Asylum Law Convergence On Due Process Inquiry?

The Board has recently recognized that perceived or "imputed" political opinion can be a legitimate basis for asylum claims filed in the Ninth Circuit. In *Matter of Juan Sebastian*,[149]the Board granted asylum to a Guatemalan applicant, under controlling Ninth Circuit law, because he adequately demon-

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[137] *See* Lazo-Majano, 813 F.2d at 1435.
[138] 858 F.2d 531 (9th Cir. 1988).
[139] *Id.* at 532-33.
[140] *Id.* at 532.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 533.
[146] *Id.*
[147] *Id.* at 533-34.
[148] *Id.*
[149] Unpublished decision, File No. A27 091 255 (BIA Aug. 3, 1989).

strated a fear of persecution based on "imputed political opinion." In that case, Guatemalan soldiers killed and decapitated the applicant's father for giving food to insurgents. The applicant's father did not belong to the insurgent group but gave the group food under threat of death. The applicant's mother was subsequently abducted and killed by the insurgents after refusing their demands for money. The Board wrote:

> Based on the finding that the respondent's father was killed on account of actual or imputed political opinion, we further find . . . the respondent adequately establishes a well-founded fear on his part of persecution . . . on account of this same perceived political opinion.[150]

The Board's decision to grant asylum in *Matter of Juan-Sebastian* is encouraging, but the ruling is also noteworthy for another reason. One Board member, concurring in the decision, criticized the articulated rationale as disingenuous. He characterized the whole notion of "imputed" political opinion as an ongoing and obfuscating effort to "pigeon hole" applications into one of the statutory categories in situations where the real grounds for fear of persecution lie in unrestrained and unregulated persecutor actions, not the applicant's "political opinion." He noted that where systematized violence prevails, people may become victims not because of their political beliefs but simply because they live in the midst of organized brutality.[151]

This suggestion with its emphasis on the vulnerable circumstances of particular victims poses a potentially explosive departure from traditional asylum analysis. The concurrence suggests a focus on the victimizer's behavior and political power over potential victims, rather than on the political attitudes of the abuser or the abused. Cases such as *Lazo-Majano, Desir, Pierre, Blanco-López* and *Juan-Sebastian* all suggest, at least implicitly, that "opinion" inquiry may function as a proxy for analyzing how political power may define certain people as "enemies." This proxy approach is desirable if one believes the essential function of asylum is to protect those in danger of being treated as political enemies without the benefit of due process or human rights norms, regardless of the reasons for such mistreatment.

The underlying problem impeding the realization of this approach is that the five statutory categories, promulgated in the 1980 Act and inherited from international humanitarian discourse may not—if construed literally—speak to the whole range of situations where politically-driven persecution takes place. Consequently, these statutory categories may place undue limitations on the fundamental idea of political asylum. Though *Cardoza-Fonseca* established a generous interpretation of the statutory fear requirement, its effects may easily be cramped by the confining framework of the five statutorily-rec-

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[150] *Id.* at 10.

[151] The concurrence stated that: "If the standard for deciding whether a person is subject to persecution is not the "motivation" of the person or group threatening the harm, but is rather the methods employed, then this should be stated openly." *Id.* at 4 (concurring and dissenting in part).

ognized bases for persecution. Alternatively, overly broad interpretations of the statutory grounds frequently produce tortured reasoning in an effort to accomplish worthy humane ends.

The *Juan-Sebastián* concurrence implicitly proposes disregarding the statutorily-specified bases of persecution, concentrating instead on the powers and procedures which make persecution possible. Taken to its ultimate extension, such a focus could potentially recognize an asylum right for anyone who lacks the protection of due process and who is subject to organized power. This approach would entail enormous repercussions for both immigration policy and foreign policy. A vast expansion in asylum eligibility would place an enormous strain on restrictive immigration policies in refugee-receiving countries. This might in turn induce those countries to pressure refugee-exporting countries into ensuring due process protections. This change might also lead recipient countries like the United States to re-examine policies of foreign assistance which may actually aid and abet rights-denying regimes. An in-depth discussion of these themes cannot be attempted here. Nevertheless, the time is ripe to rethink both the statutory language and the internationally recognized formulae, so as to address more adequately the contemporary varieties of persecution.

IV. Non-Compliance With Military Service

A common problem in asylum law is draft-age men seeking relief from compulsory military service or the subsequent punishment, which may be arguably classed as "persecution," for avoiding it. Developments in this area are worthy of examination, not only because military service cases are so common, but also because they implicate several statutory concepts, including "persecution," "political opinion," "religion," and "social group." Historically, the Board has taken a narrow view of resistance to compulsory military service as grounds for asylum.[152] In recent years, however, the Ninth Circuit has undertaken to broaden asylum availability for conscientious objectors.

A. *The Board's Traditional Position With Respect To Military Service Resisters*

In *Matter of Vigil*[153], a post-*Cardoza-Fonseca* Board decision, the Board followed its traditional narrow view. The Board concluded that the applicant could not qualify for asylum on grounds of belonging to a "social group" of young, male, unenlisted Salvadorans, exposed to the persecution of forced military service or to punishment for avoiding service. The Board defined "social group" for asylum purposes to be based on some characteristic which is "beyond the power of the individual to change" or proves "so fundamental to individual identity or conscience that it ought not to be required to be

[152] *See, e.g.* Vigil, 19 I & N Dec. 572 (BIA 1988); Matter of Lee, 13 I & N Dec. 236 (BIA 1969); Matter of Liao, 11 I & N Dec. 113 (BIA 1965).

[153] 19 I & N Dec. 572 (BIA 1988).

changed."[154]

The applicant also claimed asylum based upon neutrality for his refusal to serve either the government or the guerrillas in the Salvadoran civil war. The Board, rejecting the claim, reiterated pre-*Cardoza-Fonseca* requirements: that someone claiming asylum based on neutrality must show an articulate affirmative decision to remain neutral and that he might be "singled out" for persecution, disproportionate or unusual punishment, because of his neutrality.[155] The Board observed that both the guerrillas and the government have non-persecutory objectives — chiefly that of manning their forces — in forced recruitment of young males. Hence, an applicant may show persecution based on forced recruitment only by proving that he would experience "disproportionate punishment" for non-compliance.[156] These requirements represent standard Board positions.[157] Circuit court decisions since *Cardoza-Fonseca*, however, provide grounds for more favorable treatment of military service resisters.

A simple, yet powerful, tension confronts tribunals dealing with military-resistance claims. On the one hand, it may be overly broad to grant asylum to everyone seeking to avoid compulsory military service. Courts and the Board, therefore, take the position that sanctions against non-compliance with military obligations do not, in themselves, constitute "persecution." On the other hand, however, it may be appropriate to grant asylum to those who object to military service as a matter of conscience or religion. One might argue that compulsory service applied to conscientious objectors should generally be treated as "persecution" warranting asylum.[158] Perhaps driven by fears of mushrooming claims and of obscure or arbitrary credibility assessments, the system has sidestepped the problem by implicitly adopting a position based on a selective reading of the United Nations "Handbook".[159] The Handbook approach recognizes forced service or punishment for non-compliance as "persecution" when one of two circumstances exists: (1) non-compliance would subject someone to "disproportionately severe punishment," or (2) the military organization in question commits atrocities that are internationally condemned.[160] While the first situation speaks to extraordinary sanctions for *non-compliance*, the second speaks to extraordinary moral consequences of *compliance*.

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[154] *Id.* at 575.

[155] *Id.* at 576.

[156] *Id.* at 579.

[157] *See* Vigil, 19 I & N Dec. 572.

[158] Credibility assessments of conscientious claims would obviously be problematic, but the issue would be clear.

[159] UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR ESTABLISHING REFUGEE STATUS ("Handbook") paragraphs 168-171 (1979); *See, e.g.* Barraza-Rivera v. INS, 913 F.2d 1441 (9th Cir. 1990).

[160] *See* Barraza-Rivera, 913 F.2d 1441 (9th Cir. 1990); *See also* Handbook, paragraphs 169, 171.

B. *Novel Approaches To Military Service Resisters*

In several critical and ambiguous decisions since *Cardoza-Fonseca*, the courts have wrestled with various doctrinal approaches which might expand asylum protection for military service resisters beyond the boundaries traditionally enforced by the Board. Because of the large number of claims actually and potentially filed by military service resisters, doctrinal issues in this area may affect more individuals than any other asylum question. A detailed examination of the decisions affecting a grant of asylum to miliary service resisters is therefore warranted.

1. *Cañas-Segovia*: Military Service Resistance, Religion, Political Opinion, and Sincerity

The Ninth Circuit in *Cañas-Segovia v. INS*[161] expanded asylum availability by subtly side-stepping the Handbook's two-criterion framework for analyzing forced-service claims with respect to "persecution." In this case, the respondents were two Salvadoran brothers, who were Jehovah's Witnesses, and were therefore religiously prohibited from serving in the military in any capacity.[162] The Salvadoran draft law did not recognize conscientious objector status and offered no alternatives to military service.[163]

The asylum petitions submitted that: (1) forced conscription in violation of religious beliefs amounted to "persecution . . . on account of . . . religion"; (2) refusal to serve in the military could elicit extra-judicial sanctions including torture and death; and (3) refusal to serve in the military could elicit extra-judicial sanctions based on classification of the respondents as political enemies of the regime. In support of their claims, the respondents offered testimony of extra-judicial sanctions applied against military deserters in El Salvador.[164]

The Immigration Judge denied relief, ruling that El Salvador's mandatory conscription policy could not constitute "persecution" because it applied equally to all Salvadorans, regardless of their religious beliefs.[165] The Board affirmed, emphasizing that the claim could not succeed without proof that the Salvadoran government had manifested an intent to persecute the Jehovah's Witnesses in particular.[166]

On appeal, the Ninth Circuit overturned the Board. The court held that the Board accorded too much weight to the facially-neutral character of El Salvador's conscription policy.[167] Arguing by analogy to United States constitu-

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[161] 902 F.2d 717 (9th Cir. 1990).

[162] *Id.* at 720.

[163] Those who violate the draft law face sanctions of imprisonment for periods from six months to 15 years. *See id.*

[164] *Id.* at 727-29.

[165] *Id.* at 721.

[166] *Id.*

[167] *Id.* at 723.

tional law concerning the exercise of religious freedom, the court noted that "a facially neutral policy nonetheless may impermissibly infringe upon the rights of specific groups of persons." [168] The Court concluded:

> [T]he Board erred as a matter of law in determining that conscientious objectors who face punishment as a result of their refusal to perform military service cannot demonstrate persecution within the meaning of the INA.[169]

The court's conclusion relied heavily on a number of paragraphs in the Handbook[170] which provide that moral or religious objections to military service may qualify the objector for asylum relief.

The Board rejected applicability of the Handbook paragraphs on several grounds. First, the Board argued that the Handbook was not dispositive on issues under the 1980 Refugee Act, because it was published prior to the passage of the Act.[171] The Ninth Circuit rejected this argument, noting relevant legislative history and case law establishing the Handbook's authoritative status for implementing and interpreting the Act.[172]

The court also rebuked the Board for requiring applicants to prove that a victimizer had intent or motive to persecute in order to establish an asylum

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[168] *Id. See also* Thomas v. Review Bd., 450 U.S. 707 (1981); Wisconsin v. Yoder, 450 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

[169] *Id.* at 726.

[170] *See* Handbook, paragraphs 168-171.

[171] 902 F.2d at 721.

[172] *Id.* at 724 n. 13.

The court is on firm ground in citing Handbook paragraphs to support asylum relief for conscientious objectors. For example, paragraph 170 states:

> ...[t]he necessity to perform military service may be the sole ground for a claim to refugee status, i.e., when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience. *Id.* at 725.

Similarly, paragraph 172, states:

> Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by ... his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions.

Id.

The Board focused on the last sentence of paragraph 172, emphasizing that the applicants failed to demonstrate that they "encountered difficulties" due to their religious beliefs. As the court points out, the Board, in effect, treated the "encountered difficulties" language as a limiting requirement. A fair reading of the paragraph, however, suggests that proof of "difficulties" was intended to strengthen conscientious objector claims, not weaken them. *Id.* at 725.

claim.[173] The court emphatically insisted that proof of motive or intent to persecute is not an element requisite to asylum claims.[174]

Because no issues of fact were in dispute, the court chose to resolve the case. The court noted that the respondents had proved "genuine religious convictions" which prevented them from performing military service. According to the court, the respondents also proved that the Salvadoran government imposes imprisonment as a sanction for non-compliance with conscription, allowing no exemption for religious objectors. The facts indicated that the respondents would more likely than not suffer punishment due to their religious beliefs, and that this amounted to persecution for purposes of asylum relief.[175]

In its opinion, the court relied heavily on Handbook provisions suggesting that religious beliefs could be a basis for relief. Despite this reliance, it is striking that the court failed to mention the often cited BIA position[176] adds, also based on Handbook language, which confines the definition of persecution for conscientious objectors to situations involving either disproportionately severe punishment or atrocity-implicated military units. Curiously, the discussion is situated in the section analyzing "imputed opinion" rather than in the section analyzing "religion." Moreover, the court's analysis leads it to a position not fully consonant with the BIA's imparted framework. Specifically, the court seems to depart from the disproportionate punishment/military atrocity approach.

Perhaps more significant than the court's acceptance of religiously-grounded conscientious objection to forced military service as grounds for asylum are the additional bases for relief the court recognized. First, the court maintained that religious objection to military service is political opinion under the *Bolanos-Hernández* "neutrality" framework and thus qualified as grounds for asylum.[177] Since asylum would apparently have been granted anyway under the

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[173] The Board had written that:

> Since respondents have not shown that the Salvadoran government is inclined to persecute Jehovah's Witnesses or that the government is aware of the respondent's religious beliefs, the government would presumably punish the respondents just as it would punish any other Salvadoran who refused to comply with the conscription process . . . In this regard, the respondents have not demonstrated that the Salvadoran government would regard the fact that the respondents have religious reasons for their refusal to serve in the military as anything but a matter of conscience.

Id. at 726-27.

The Ninth Circuit interpreted these passages as establishing a motive or intent requirement because they suggested that the government must focus its repression on Jehovah's Witnesses, in general, or the respondents in particular in order to meet the criteria for persecution. *Id.* at 727.

[174] *Id.* at 727.

[175] *Id.* at 729.

[176] *See, e.g.*, Barraza-Rivera, 913 F.2d 1441 (9th Cir. 1990).

[177] *Id.* at 728.

religious persecution framework, the court's invocation of the "neutrality" framework is superfluous. The "neutrality" argument could prove significant, however, if widened to include conscientious objectors whose moral reasons for opposing military service are not specifically religious and therefore would not qualify for asylum based on religious persecution.

Second, the court maintained that conscientious objection may expose the objector to an "imputed" political opinion of hostility toward the government resulting in persecution.[178] Again the court's position, though perhaps superfluous for respondents who qualify for asylum based on religious grounds, may be significant for future applicants whose objections to military service are not specifically religious.

The Board had rejected the applicant's "imputed opinion" argument, citing *Matter of A-G*,[179] which had disallowed a comparable claim. The Ninth Circuit, however, attacked the Board's reasoning, and distinguished *A-G* on two grounds. First, the respondent in *A-G* had presented general evidence of torture and executions by Salvadoran death squads but no evidence specifically showing that such treatment might be visited upon those who refused military service. The applicants in *Cañas-Segovia*, in contrast, presented evidence directly linking episodes of mistreatment to their refusals or perceived refusals to perform military service.[180] The court's implicit ratification of the *A-G* requirement of evidentiary links between refusals of military service and violent misconduct in response to such refusals is unfortunate, since it requires applicants to muster evidence which may often be unavailable, even though violent reprisals have routinely followed upon refusals of military service. A better approach would allow the Board to assume that in a regime where violence is routinely inflicted on opponents to the government, those who resist forced military service will undoubtedly be exposed to similar acts of violence.

Second, the respondent in *A-G* had not shown that his punishment for non-compliance would be "disproportionately severe,"[181] a showing suggested by the Handbook and adopted by the Board. In *Cañas-Segovia*, however, the court found that the applicants would face "disproportionately severe" punishment if deported:

> A Salvadoran who prefers not to serve in the military for reasons not amounting to genuine reasons of conscience (for example, fear of combat) does not suffer disproportionately greater punishment when his will is overcome by being forcibly conscripted. By comparison, however, the Canases suffer disproportionately severe punishment when forced to serve in the military because that service would cause them to sacrifice their religion's fundamental principle of pacifism.[182]

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[178] *Id.* at 728-29.

[179] Matter of A-G, 19 I & N Dec. 502 (BIA 1987).

[180] 902 F.2d at 728.

[181] *Id.*

[182] *Id.*

This analysis and its conclusion is ambiguous and problematic in several respects. First, it is peculiar that the court focuses on the earnestness of an *actual* opinion, which it terms "genuine reasons of conscience," under the rubric of examining an *imputed* opinion. It would make sense to apply the disproportionate-punishment-by-compliance factor to contentions of actual neutral opinion, not just to the "imputed opinion" context *Cañas-Segovia* enunciates. The court, however, failed to address this issue.

Additionally, the analysis implicitly ratified the "disproportionately severe" requirement. Despite the BIA position, it is not clear why punishment for maintaining or being thought to maintain a moral stance should qualify as "persecution" only if "disproportionately severe" when compared to punishment for non-compliance which is *not* morally-motivated. It would make sense to identify situations as persecutory whenever punishment is triggered by a real or imagined moral stance. The BIA, by contrast, treats moral-stance punishments as persecutory only when it is more severe than punishments which would have been inflicted even absent any moral-stance dimension.[183]

Finally, the analysis is peculiar in its determination of what constitutes "disproportionately severe" punishment. The court does not focus on sanctions for non-compliance with forced service, but on the negative experience of compliance.[184] This approach departs from the Handbook position, which confines disproportionate-punishment analysis to non-compliance scenarios and requires military-atrocity analysis for compliance scenarios. The court crosses these categories by applying disproportionate-punishment analysis to compliance scenarios, thus releasing applicants from the burden of proving that the military in question committed atrocities.

In several respects it remains unclear how this purported "imputed opinion" analysis relates to "religion" analysis. First, the court's specific analysis of "religion" as grounds for relief for conscientious objectors fails to address the Handbook limitations on "persecution": disproportionate punishment or association with military atrocities. The court's lack of analysis may suggest that "persecution" can be established under the "religion" rubric without showings of disproportionate punishment or military atrocities. Alternatively, if the court maintains that disproportionate punishment is required under the "religion" rubric, *Cañas-Segovia* may suggest that disproportionate punishment inheres in *compliance*, an approach carried over from the court's "imputed opinion" analysis.

The opinion is unclear to the extent that the court's position on "imputed opinion" is tied to the articulated religious rationale. The court implies that by virtue of the Cañases's beliefs as Jehovah's Witnesses, the "punishment" of forced military service is worse for them than it would be for adherents of other religions. This is suggested by the court's reference to pacifism as a "fundamental principle" of the Cañases's religion.[185] This approach probably

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[183] *See, e.g.*, Barraza-Rivera, 913 F.2d 1441 (9th Cir. 1990).

[184] 902 F.2d at 728.

[185] *Id.*

should be avoided in the future. Asylum procedures should not become involved with inquiries into the comparative centrality of pacifist principles in various religions. Alternatively, *Cañas-Segovia* may suggest that forced service is "disproportionately severe" whenever the grounds for conscientious objection are explicitly "religious" rather than moral or political. This approach may also be problematic, however, because it might unjustifiably reify the distinction between "religious" and other forms of conscientious convictions. Furthermore, such a distinction, applied in the "imputed opinion" context as in *Cañas-Segovia* arguably renders the whole analysis superfluous, since it essentially recognizes "imputed opinion" as grounds for asylum only in situations where the conscientious objection is based on religion. In such cases, respondents could qualify for asylum under religious persecution analysis. Hence, the "imputed opinion" analysis would become superfluous for situations where there is danger of punishment for *non-compliance* and perhaps for "punishment" embodied in the experience of *compliance*.

If it is undesirable as a matter of asylum doctrine to distinguish religious from non-religious grounds for conscientious objection, a better approach would be to recognize "disproportionately severe" punishment whenever the resistance to service arises from "genuine reasons of conscience." This approach, however, makes the question of asylum based on "imputed opinion" turn precisely on the question of whether the potential victim *actually* held a conscience-based objection to military service. This approach renders superfluous the broadening effect of awarding asylum based on *imputed* opinion. It also returns the problem to a point that both the courts and the Handbook apparently seek to avoid: the finding of persecution whenever a conscience-based objection to military service is found.

Cañas-Segovia, perhaps unwittingly, restricts the broadening effect of the punishment-by-compliance approach by confining it both to an explicitly religious basis and to "imputed opinion" analysis. The rationale for limiting the punishment-by-compliance approach to these two situations is unclear. If the punishment-by-compliance approach is desirable, it is hard to see how it can reasonably be confined to the "imputed opinion" rubric, or why it should be narrowed by requiring a religious component. Nonetheless, without limitations there is nothing to keep the punishment by compliance notion from consuming the entire conscientious objector problem. A more rational limitation is to focus on sincerity of conscience as the key inquiry. This approach dissolves the apparently straightforward interpretation of "disproportionate punishment" as a prerequisite to relief. If "disproportionate punishment" may be implicated by compliance as well as by non-compliance, we are left with nothing but an inquiry into whether the asserted conscientious objection is deep and sincere.[186]

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[186] *Id.* At one point *Cañas-Segovia* takes precisely this clear position:

A conscientious objector is one whose actions are governed by conscience, and persecution arises whenever that conscience is overcome by force or punishment meted out for the refusal to betray it. We hold that punishment of a conscientious

2. *Maldonado-Cruz*: No Inquiry Into Motives For Resistance, No Open Articulation Requirement

In *Matter of Maldonado-Cruz*[187] the Board developed another mode of analysis to restrict the scope of asylum relief. Juan Maldonado-Cruz was an agricultural worker in El Salvador who had been forced to join the guerrillas. He subsequently escaped and fled to the United States. He claimed fear of persecution by both the guerrillas and the Salvadoran government. In this case, the Board explicitly focused on interpreting the term "persecution" and ruled that in the context of civil war, the victimizer's motive is key to determining whether mistreatment constitutes "persecution."[188]

The Board examined possible motives for this alleged persecution and held that a military or para-military organization, such as the guerrilla group, needed to control its members and to exercise discipline. Since punishment against deserters is an "essential" element of control, which may unravel if persons can simply decide to leave when they choose, the threat against Maldonado-Cruz was "neither an act of persecution nor evidence of persecution by the guerrilla organization against the respondent on account of his political opinion, or on any other ground set forth in the Refugee Act of 1980."[189] Turning to possible persecutory motives on the government side, the Board found no evidence that the Salvadoran government was not "duly constituted and functioning." Therefore, the Salvadoran government was found to have the "internationally-recognized right" to protect itself against insurgents.[190] Because it is not "persecution" for a government to investigate and detain individuals suspected of abetting guerrilla organizations, the respondent did not establish eligibility for asylum.

The Board's decision in *Maldonado-Cruz* was reversed by the Ninth Circuit.[191] The court held that Maldonado's fear of persecution was based on his political opinion rather than on criminal prosecution. The court, in harmony with *Bolanos-Hernández v. INS*,[192] observed that political neutrality may be "political opinion."[193] The Court found that Maldonado had expressed political neutrality by refusing to remain with the guerrillas. Surprisingly, the

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objector for refusal to comply with a policy of mandatory conscription may amount to persecution within the meaning of the INA, if the refusal is based upon genuine political, religious, or moral convictions, or other genuine reasons of conscience.

Id. at 726.

It is a sensible position, one which strangely renders much of the court's discussion superfluous, except perhaps as a camouflage for sidestepping precedent.

[187] Matter of Maldanado-Cruz, 19 I & N Dec. 509 (BIA 1988).

[188] *Id.* at 513.

[189] *Id.* at 516.

[190] *Id.* at 518.

[191] Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989).

[192] *See* 767 F.2d at 1286; *See also* 883 F.2d at 791.

[193] 883 F.2d at 791.

court seemed to treat Maldonado's *motives* for leaving as irrelevant.[194]

The *Maldonado-Cruz* position with respect to neutrality has been resisted by the Board and by several courts. Even if neutrality constitutes "political opinion," a view not uniformly embraced, resistance to military service may not be deemed an adequate assertion of such an opinion. Some decisions have insisted that neutrality be "openly articulated" before it can qualify as statutory "political opinion."[195] Under this approach, avoidance of military service alone does not suffice as an assertion of neutrality. Although the "open articulation" requirement may have the advantage of screening out exaggerated or false assertions of neutrality, the requirement is troubling because an open articulation of dissent may be precisely what people fear most in politically repressive situations. The "open articulation" approach would likely require affirmative and explicit exposure to danger as a precondition for asylum relief. It is difficult to imagine that this is the intent of the asylum statute. A better approach would be to screen exaggerated or false claims through credibility assessments, murky though these may be. *Maldonado* seems to edge toward this approach, though it does not adopt it explicitly.

The *Maldonado* court found "political opinion" in the respondent's mere refusal to serve. The court also found that guerrilla efforts to locate the respondent after his refusal to join them constituted "persecution."[196] Moreover, the court held that Maldonado warranted asylum based on his fear of persecution by the Salvadoran government due to false charges that he had been associating with guerrillas.[197] The court seems to conclude, although not explicitly, that the government had imputed subversive opinions to Maldonado based on his alleged guerrilla connections.

The court's treatment of the "persecution" question is of further significance because of its approach to "political opinion." The court has a low threshold for demonstrating that either actions or potential actions by the government or guerrillas constitute "persecution." There is no significant inquiry into the actions or motives of potential victimizers. Instead, the court rejects the Board's view that political-institutional motives by guerrillas or government cannot constitute "persecution" and focuses on the *power* of guerrillas or government to act in ways that may impact negatively on the respondent's freedom to adhere to political opinion.[198]

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[194] *Id.* at 791-92. The court simply observed that "The guerrillas are a political entity. Maldonado's refusal to join them was a manifestation of his neutrality which is a recognized political opinion." *Id.* at 791.

[195] This is sometimes called an "open advocacy" requirement. *See, e.g.*, Umanzor-Alvarado v. INS, 896 F.2d 14, 15 (1st Cir. 1990); Perlera-Escobar, 894 F.2d at 1298.

[196] 883 F.2d at 792-93.

[197] *Id.* at 792.

[198] *Maldonado-Cruz* may in part embody the power-centered focus discussed at the end of part III above. There it was suggested that a power-centered focus on persecution may render superfluous the inquiry into the five specific grounds of victim persecution. Here it seems that a power-centered focus on persecution renders superfluous the

3. The *M.A.* Cases: Disproportionate Punishment, Atrocity Analysis, Review Standards on Motions to Reopen

An especially rich and significant series of draft-resister rulings is represented in the cases culminating in the Fourth Circuit case *M.A. A26851062 v. INS.*[199] These cases raise the special problems that arise when a draft evader faces extra-legal punishments. The illegal sanctions could either weaken or strengthen the case for persecution. On the one hand, illegal sanctions do not carry official imprimatur, making it easier to consider them as something like vigilante violence rather than persecution. On the other hand, because illegal sanctions are not themselves part of a forced draft system, their use against draft evaders smacks of persecution, even if the draft system itself is not so regarded.

The petitioner in the *M.A.* cases sought asylum based on his principled objection to service in the Salvadoran military and his fear of severe penalties, including execution at the hands of death squads, for refusing service.[200] The petitioner argued that service in the Salvadoran army, which engages in systematic human rights violations, would violate his moral values.[201] The Board, finding an absence of *prima facie* eligibility, alluded to its "long-accepted position" that involuntary military service does not, in itself, constitute persecution. In terms reminiscent of the Handbook position, the Board assumed that asylum should be granted only where refusal to serve would result in "disproportionately severe punishment" or where service might involve conduct "condemned by the international community."[202]

In order to satisfy the "disproportionate punishment" standard, the applicant contended that the sanction for draft non-compliance in El Salvador might be torture and death at the hands of death squads. The argument focuses on the extraordinary nature of "punishment" for draft non-compliance

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inquiry into the motive of potential victimizers.

[199] 899 F.2d 304 (4th Cir. 1990).

[200] Matter of A-G, 19 I & N Dec. at 503. The petitioner had originally been ordered deported after conceding deportability in a prior proceeding. Subsequently, he filed a motion to reopen deportation proceedings because of ineffective assistance of counsel in the previous proceeding and also filed for asylum. His original motion to reopen was denied by the immigration judge. The Board affirmed the denial. The Fourth Circuit, however, reversed and remanded on grounds that the immigration judge abused his discretion in denying the petitioner's request for a reasonable time extension to augment the asylum claim accompanying the motion to reopen. On remand, the petitioner claimed asylum on the basis of his principled objection to service in the Salvadoran military and his fear of severe penalties, including death at the hands of death squads, for refusing service. The immigration judge denied the new motion to reopen on grounds that the petitioner had failed to establish *prima facie* eligibility for asylum, a prerequisite to reopening. The Board affirmed this ruling. M.A. A26851062 v. INS, 858 F.2d 210 (4th Cir. 1988).

[201] 19 I & N Dec. at 506.

[202] *Id.*

generally, not on the risk that the applicant will be punished more severely than other draft resistors. The Board rejected this argument, and observed that, although the applicant offered evidence of death squad murders for suspected anti-government sympathies, he had offered no evidence that draft non-compliance was the "kind of activity" which results in death squad violence.[203]

The Board also denied asylum claimed on the basis of conduct "condemned by the international community." To qualify for asylum under the rubric of international condemnation, the Board required the applicant to show: (1) that he himself would be forced to perpetrate atrocities if drafted, (2) that security force atrocities represented official policy in El Salvador, and (3) that the atrocities had received official international condemnation.[204] Though the applicant had submitted evidence of atrocities, including torture and maiming, routinely committed by Salvadoran security forces, the Board ruled that he failed under the criterion of "international condemnation to qualify for relief."[205]

On appeal ("M.A.I"), the Fourth Circuit reversed the Board.[206] Unlike the Board, the Fourth Circuit focused primarily on the "international condemnation" criterion, rather than on "disproportionate punishment". The court in *M.A.I*, relying heavily on the Handbook[207] position, held that a genuine principled objection to military participation is not by itself enough to warrant asylum.[208] Like the Board, the court posited that asylum should be granted only where military service would force a principled objector to associate with the commission of atrocities condemned by the international community.[209] The *M.A.I* court vehemently disagreed, however, with the Board's three-prong test for establishing asylum eligibility under the international condemnation criterion.

The first prong, the court observed, requires applicants to prove they *would* be compelled to commit atrocities, imposing a burden almost impossible to meet.[210] It is difficult to imagine what evidence an applicant could possibly present to definitively show that atrocities "would be required" of him. Moreover, the Board's "would be required" standard seems more stringent than the Handbook standard which, although it alludes to forced "participation" in

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[203] 858 F.2d at 217. This is not an overwhelmingly cogent response to the problem. If death squad actions notoriously target dissenters in general, it borders on mean-spiritedness to require an affirmative showing that draft resisters are specifically at risk. It is alarming to contemplate a Board which may be so uninformed about conditions in El Salvador as not to understand that military noncompliance may readily be interpreted as manifesting anti-government sympathies.

[204] *Id.* at 218.

[205] *Id.* at 219.

[206] 858 F.2d 210.

[207] *See* M.A. I, 858 F.2d at 214, 215, 218-19.

[208] *Id.* at 215.

[209] *Id.*

[210] *Id.* at 218.

atrocities, emphasizes that the specter of being "associated" with atrocities is enough to warrant asylum.[211] *M.A.I* endorses the Handbook position, requiring only that the applicant show a likelihood of being forced to associate with atrocities.[212] Because this likelihood rises with the number of atrocities actually committed, *M.A.I* concluded that the inquiry should focus on the "pervasiveness" of atrocities.[213] This test is striking in that it allows tribunals to consider the atrociousness of a regime's human rights record as an explicit factor in weighing asylum eligibility. The potential implications are large for countries like El Salvador. Despite the Salvadoran military's terrible human rights record, draft-age Salvadoran men have typically had tremendous difficulty securing asylum. *M.A.I*'s ruling, if widely adopted, could help make asylum easier to attain.

M.A.I also rejects the Board's second prong, which required proof that security force atrocities embody official policy. *M.A.I* held that draft evaders need prove only that official authority is "unwilling or unable" to control security force crimes.[214] This position is far more sound than that taken by the Board, which did not explain how a typical applicant could ever establish that human rights violations represent government "policy."[215]

Comparatively few human rights violations are perpetrated under commands or orders that are easily identified as "policy." For those few violations identifiable as policy, applicants rarely have access to the relevant information. Hence, the "policy" requirement narrows to virtue nothingness the possibility of securing asylum based on military human rights violations.

It may be possible to read the Board's position as allowing government "policy" to be inferred from pervasive human rights violations committed by a particular military. If so, this prong then seems duplicative of the "pervasiveness" inquiry *M.A.I* endorsed in place of the Board's participation requirement. It is difficult to see how the Salvadoran military could escape condemnation under such a standard.

The Fourth Circuit also rejected the Board's third prong, which required draft evaders to prove official international condemnation of the atrocities. *M.A.I* observed that the Board has ample access to information that can be used to judge a regime's human rights record.[216] The court advised the Board to use the various Geneva Conventions, which already embody the international consensus on "minimum standards" for military behavior, to help determine the extent to which various regimes countenance atrocities.[217] To buttress its position, the court might well have stressed how rare it is that

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[211] Handbook, paragraphs 170-71.

[212] 858 F.2d at 218.

[213] *Id.*

[214] *Id.*

[215] *Id.* The applicant's claim fell short for failure to show that security force atrocities represent the Salvadoran governmental policy.

[216] *Id.* at 218-19.

[217] *Id.*

international entities officially condemn regimes for human rights atrocities. It is questionable whether relief for conscientious objectors should be limited to such rare instances.

Following a rehearing *en banc*, the Fourth Circuit in a 6-5 decision[218] ("*M.A.II*") reversed *M.A.I* and reinstated the Board's denial of asylum eligibility. The majority opinion is remarkable in several respects.

Technically, *M.A.II* held that courts should apply an abuse of discretion standard when reviewing Board decisions on *prima facie* asylum eligibility in the context of a motion to reopen deportation proceedings.[219] The court then concluded that the Board did not abuse its discretion when it found that the respondent failed to establish *prima facie* eligibility.[220] According to *M.A.II*, *M.A.I* erred in applying *de novo* review to the Board's assessment of *prima facie* statutory eligibility and for ruling that respondent qualified for asylum.[221] The linchpin of *M.A.II* is its insistence on the abuse of discretion standard for review of Board decisions on *prima facie* eligibility in the context of motions to reopen. The case's more general significance, however, lies in its discussion of essential criteria of *prima facie* eligibility for resisters to military service. Before focusing on that more general significance, however, it is worthwhile to take a close look at the court's argument for an abuse of discretion standard on *prima facie* eligibility in motions to reopen.

The relief of reopened procedures is not provided statutorily. Congress, through the immigration statutes, granted the Attorney General discretion to reopen asylum hearings for deserving applicants.[222] Motions to reopen are appropriate where new developments relating to a case warrant rehearing the merits of a claim. The regulations themselves do little to establish the factors to be weighed or standards to be applied in assessing motions to reopen. *M.A.II* relied heavily on the Supreme Court's decision in *INS v. Abudu*,[223] which held that a motion to reopen an asylum claim may be denied on any of the following three grounds: (1) the movant has not established *prima facie* statutory eligibility, (2) the movant has not introduced previously unavailable material evidence or has not reasonably explained an initial failure to apply for asylum, or (3) the movant would not be entitled to discretionary relief, even if threshold statutory eligibility were established.[224]

Abudu ruled that abuse of discretion is the proper standard of review for the second and third of these grounds,[225] but left open the question of the appropriate review standard for the first ground (lack of *prima facie* statutory eligibility). *M.A.II* held that the abuse of discretion standard, rather than *de*

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[218] 899 F.2d 304.
[219] *Id.* at 307.
[220] *Id.* at 311.
[221] *Id.* at 310.
[222] *Id.* at 307.
[223] 485 U.S. 94 (1988).
[224] *Id.* at 104-05.
[225] *Id.* at 105.

novo review, should apply to the first ground as well.[226]

As the *M.A.II* dissent stressed, the first ground for denial of reopening differs qualitatively from the second and third, in that it entails application of a statutory standard, rather than an inherently factual or discretionary judgment. Though an abuse of discretion standard may be appropriate where a court reviews either of the latter sorts of judgment, different considerations apply in reviewing possible errors of law in statutory interpretation. Errors of law in appellate scrutiny are normally reviewed *de novo* rather than under an abuse of discretion standard.

M.A.II offers essentially two distinct arguments that the abuse of discretion standard should apply. The first argument is that reopening is an extraordinary remedy, on which broad deference to the Board is warranted, especially in light of the interest of finality in administrative proceedings.[227] This is an argument *Abudu* found powerful with respect to the second and third grounds for denials of motions to reopen. This deference argument is far less powerful, however, when relief has been denied based on an erroneous ruling of *prima facie* statutory ineligibility. In the context of a motion to reopen, the purpose of the statutory eligibility test is simply to perform a screening function: to avoid granting motions to reopen in situations where the movant, though capable of demonstrating new developments since earlier hearings, nevertheless remains statutorily ineligible for asylum. Statutory eligibility does not by itself serve as grounds for reopening. Under the INS regulations, the movant must also show the existence of previously unavailable evidence or a sound reason for having previously failed to file for asylum.[228] In addition, the movant must show a reasonable likelihood of warranting asylum under discretionary considerations.[229] If these determinations are treated under an abuse of discretion standard, the remedy of reopening remains at all times an extraordinary form of relief, even if *prima facie* statutory eligibility is reviewed *de novo*.

A motion to reopen would never be granted to rectify a denial of relief due to statutory ineligibility. Such a denial could be challenged only through an appeal, in which *de novo* review of the statute would arguably apply, since the issue of interpreting the standard could be classified a matter of law. Where previous denials of relief were based on factors other than improper application of the standard, however, the *prima facie* eligibility requirement is irrelevant to the motion to reopen, except as a device for avoiding wasteful grants of reopening where the case is doomed anyway because of statutory ineligibility. There is no reason that the statutory eligibility standard should be interpreted differently in this screening role than it is in more routine eligibility rulings. Hence, there is no reason for a ruling of *prima facie* ineligibility, under this screening function, to receive more deference in appellate review than it would receive in a straight-forward appeal for an erroneous ruling of *prima facie*

[226] 899 F.2d at 308-10.

[227] *Id.* at 307-09.

[228] *Id.* at 308 (citing Abudu, 485 U.S. at 105).

[229] *Id.*

ineligibility.

Though a motion to reopen could never be granted upon a mere finding of *prima facie* eligibility, it can be denied, as the Board did in *M.A.II*, upon a finding of *prima facie* ineligibility. The Board essentially ruled that, despite whatever previously unavailable evidence or sound reason for failing to file for asylum the movant might present, the case should be "screened out" from reopening if the movant failed to meet the statutory requirements for asylum relief. This ground for denying the motion to reopen makes the situation identical to the one where an applicant, with all the evidence available, is denied asylum due to statutory ineligibility. A ruling of this latter sort would be subject to *de novo* review on appeal, yet the court chose a more deferential review standard for the identical ruling in the motion to reopen context.

M.A.II gave great weight to the fact that motions to reopen are not required by the statute, but are considered pursuant to regulations enacted by the "grace" of the INS.[230] The court, rejecting *de novo* review, argued that:

> In the reopening context the statutory language is *not* used to determine statutory eligibility for asylum, the purpose for which Congress enacted the "well-founded fear" standard. Instead, the immigration authorities have interpreted their reopening regulations to incorporate statutory language for a purpose specific to the regulations themselves, namely, the determination of whether new claims are sufficiently meritorious to warrant reconsidering a completed case.[231]

The court's argument, although superficially compelling, turns on a vague and careless characterization of the purpose of incorporating statutory language into rulings on motions to reopen. It is obfuscating to characterize that purpose as one of determining whether new claims are "sufficiently meritorious" to warrant reopening a case. The statutory language comes into the motion to reopen context for the much more precise purpose of preventing the reopening of claims doomed to fail specifically on grounds of statutory ineligibility.

The Fourth Circuit revealed the weakness of its position when it attempted to enrich it. The court cited an argument from previous decisions holding that the purpose of the *prima facie* test is different in the reopening context than in an original proceeding. The different purposes make *prima facie* eligibility in reopening situations more difficult to satisfy than "statutory eligibility." The quote on which the court relied is the following:

> The *prima facie* showing [in the reopening context] includes not only that there is a reasonable likelihood that the statutory requirements for the relief sought are satisfied, *but also a reasonable likelihood that a grant of relief may be warranted as a matter of discretion.*[232]

The court's reliance on this passage is misplaced. According to this passage one who petitions for reopening must demonstrate statutory eligibility, just as

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[230] *Id.* at 307.

[231] *Id.* at 309-310.

[232] *Id.* at 310 (citations omitted).

an original petitioner must do. Additionally, such a petitioner must demonstrate a reasonable likelihood of warranting relief as a matter of discretion, which an original petitioner need not show to establish *prima facie* eligibility. Therefore, the applicant's overall *prima facie* burden is heavier in the motion to reopen context. The passage has no connection with the court's notion that statutory eligibility itself should be construed differently in the two different contexts. One reason for the court's erroneous reliance on the passage may be that the court confuses two distinct senses of the term *prima facie*: one refers to simple statutory eligibility; the other refers to a more complex eligibility, occuring when considering motions to reopen, which includes statutory eligibility plus other factors. Failure to appreciate this distinction leads the court to misread the quoted passage to imply that *prima facie* eligibility in the reopening context is more difficult to show, not because factors in addition to statutory eligibility must be considered, but because statutory eligibility itself is to be measured by a more stringently.

The court's second stated reason for rejecting *de novo* review is the "inherently political nature" of deportation decisions which, because they implicate "questions of foreign relations," warrant special deference.[233] The court failed to explain why—if political sensitivity is an appropriate consideration at all—it applies more forcefully in the motion to reopen context than elsewhere. Of even greater significance is the court's decision to highlight the issue of politics at all in the asylum context. As the dissent stressed, it is alarming that the court abets the Board in making asylum rulings by light of political considerations, because one of the clear legislative purposes of the 1980 Act had been precisely to expunge political considerations from asylum rulings.[234] Considering the legislative intent, the court's defense of Board tendencies to weigh political factors is astonishing.

After establishing abuse of discretion as the appropriate standard of review, the court applied this standard to the Board's denial of statutory eligibility. As a result, the court reinstated the Board's ruling denying relief.[235]

Next, the court articulated a standard to determine *prima facie* eligibility for asylum claims based on objection to military service. The court utilized the Board's three-criteria requirement and seemed to cast the *M.A.I* approach aside.[236] *M.A.II*'s purported reinstatement of the Board approach is of questionable significance. Technically, *M.A.II* held only that the Board's construction of the statute was *not mistaken* to the point of abuse of discretion. *M.A.II* did not rule that *M.A.I's* more generous statutory construction was mistaken. The court made little of this and proceeded to treat the Board approach as the legally appropriate construction of statutory eligibility. Because *M.A.II* did not technically overrule *M.A.I*, however, *M.A.I*'s more generous interpretation of statutory eligibility remains legally permissible.

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[233] *Id.* at 309.

[234] *Id.* at 319-21.

[235] *Id.* at 311-14.

[236] *Id.* at 311-16.

M.A.II's discussion does not apply to conscientious objector claims based on opposition to *all* military service, but only to claims based on objection to a *particular* military force involved in human rights abuses. The court emphasized several elements which make it difficult for objectors in this latter category to establish *prima facie* eligibility. The court first indicated that a petitioner must show that the objectionable atrocities represent a policy of the government or force in question.[237] The dissent criticized this approach, observing that political entities rarely set out an identifiable "policy" of human rights abuses.[238] Therefore, the court's requirement can never be satisfied.[239]

The majority argued that without this "policy" requirement virtually any male of draft age from a country experiencing civil conflict could qualify for asylum.[240] As the dissent pointed out, however, this scenario is exaggerated. There are several other requirements that applicants claiming asylum based on conscientious objection must meet. The applicant would still need to show the following: (1) that the government could not curb the military's human rights abuses; (2) that the military group the applicant wishes to avoid serving has been implicated in atrocities condemned by the international community; and (3) that people holding the applicant's views are likely to be targeted for persecution.[241] Taken together, these requirements would prevent the whole sale asylum grants feared by the majority.

Second, the court seems to agree with the Board that asylum eligibility for conscientious objectors requires that the military force in question be condemned by "recognized international governmental bodies." The court does not clearly state whether international governmental condemnation is an absolute requirement. The court posits that absence of such official condemnation will not "invariably defeat each and every claim for political asylum,"[242] thereby implying that the rule is not absolute.[243] The grudging character of this concession, however, suggests that the court thinks exceptions to this rule should be rare.

The dissent pointed out that the Handbook's idea of condemnation by the "international community" need not be narrowly confined to instances of condemnation by international governmental bodies.[244] As an alternative there exists in the world community a body of articulated and consensual norms as to practices deemed violative of basic human rights. United States courts and the Board have access to those articulated norms and nothing in the Handbook's notion of international condemnation forbids deployment of such norms in the disposition of asylum claims. Indeed, the language and spirit of the

[237] *Id.* at 312.
[238] *Id.* at 322.
[239] *See supra* notes 213-15 and accompanying text.
[240] *Id.* at 312.
[241] *Id.* at 322.
[242] *Id.* at 314.
[243] *Id.* at 314.
[244] *Id.* at 321-23.

Handbook seem to recommend the incorporation of these worldwide norms into asylum analysis.[245]

Along these lines, the dissent argued that evaluations by nongovernmental organizations, such as Amnesty International and Americas Watch, with broad experience and expertise on human rights and international law, should be recognized as valid indices of condemnation by the international community.[246] The majority, however, rejected the use of evaluations by nongovernmental organizations as an index of international condemnation.[247] Unfortunately, this position renders the Handbook's endorsement of relief for qualified conscientious objectors virtually nugatory.

The majority seemed concerned that a non-restrictive approach to the notion of international condemnation would make asylum too easy to obtain. The court speculated that, "if any private organization condemns the acts of some members of the military in a country at war, these condemnations would serve as the basis for asylum eligibility."[248] The court implied that the dissent's approach would *require* asylum whenever "any private organization" condemns the acts of the military force in question. But such is not the dissent's position. The dissent argued only that evaluations made by nongovernmental organizations with expertise should be weighed as indices of international condemnation.

The majority is actually equivocal on whether condemnations by nongovernmental organizations should count as a factor to be weighed. The court impugns the integrity of nongovernmental human rights organizations, which "may have their own agendas and concerns" and whose condemnations are "virtually omnipresent."[249] Despite these aspersions, the court seemed ambivalent in rejecting the use of nongovernmental organization reports. The majority wrote not only that it was "not about to use these reports" as a basis for granting asylum, but stated that the Board could "consider" them.[250] The court seems grudgingly to allow use of the reports, while attacking their integrity.

In context, the court's comments may be interpreted to mean that the Board itself should be allowed to consider such reports, but that courts should never consider them as a basis for overturning Board denials of asylum. This interpretation may make some limited sense where an abuse of discretion standard of review is operative. In those contexts, *M.A.II* could be construed to intend a *per se* rule that exclusion of non-governmental organization reports shall not constitute abuse of discretion. Such an approach, though

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[245] Handbook, paragraph 171.

[246] *Id.* at 322-23. Evidence of Amnesty International and Americas Watch condemnation of Salvadoran military practices were part of the petitioner's evidence in the case.

[247] *Id.* at 312-13.

[248] *Id.* at 313.

[249] *Id.*

[250] *Id.* at 313 n.6.

logically consistent, has little else to recommend it. If nongovernmental organization reports can be considered, why should it never constitute abuse of discretion to ignore them? The approach makes even less sense for the more usual situation of *de novo* appellate review on rulings of *prima facie* ineligibility. It seems strange for courts charged with appellate review of Board statutory interpretations to screen themselves from weighing factors that the Board itself is allowed to weigh.

In sum, the court's position on use of nongovernmental reports is unclear, and possible interpretations of the court's ambivalence do not represent sound jurisprudence. The court's apparent bottom line is extremely hostile to the use of nongovernmental organization reports for demonstrating international condemnation of military atrocities. The court seems to fear that a more receptive position would result in courts finding "that a government whose actions have not been condemned by international governmental bodies engages in persecution against its citizens."[251] We might well ask what would be so terrible about that. Other than the supposed problem of "standardlessness,"[252] the court has only one explicit answer: foreign policy. For United States courts to recognize certain governments as human rights abusers would be to undermine the authority of the political branches to make foreign policy.[253]

The court couched its anxiety in terms of "constitutional" dimensions concerning "separation of powers" principles.[254] An asylum standard that considers non-governmental organization reports would be virtually "non-justiciable." The court failed to explain why supposed separation of powers problems pose more serious difficulties when non-governmental organization reports are considered in asylum review than when they are not. Because rights abusing foreign governments may be implicated by asylum rulings not based on non-governmental organization reports, it is hard to see how the non-governmental organization reports raise any new separation of powers problems in the sphere of foreign policy. The court's constitutional argument is even more puzzling because, as indicated above, it does not take the position that non-governmental organization reports can *never* be considered. A cynic might suggest that the court is worried that frequent favorable asylum decisions might make it harder for Congress and the President to ignore human rights abuses by governments receiving massive United States aid as part of foreign policy.[255] There is nothing new in this, however, since favorable asylum rulings have always potentially carried such consequences. In any case, the court's concern about a judicial invasion of the foreign policy prerogatives of the political branches seems misplaced, because there is no suggestion that the courts are about to inject themselves into actual foreign policy decisions. The court's anx-

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[251] *Id.* at 313.

[252] *Id.* at 313 n.6.

[253] *Id.* at 313-14.

[254] *Id.* at 313.

[255] The longstanding United States relationship with El Salvador springs prominently to mind, though many such problematic relationships could be cited.

iety therefore boils down to a concern that the political branches not be confronted by the judiciary with the human rights implications of foreign policy decisions. The court demonstrates a willingness to abandon judicial responsibility in appellate statutory review, for the sake of making it easier to set foreign policy without concern for human rights issues.

When assessing the petitioner's specific situation, the court continued to repudiate *M.A.I* and endorse the Board's restrictive approach. The court applauded the Board's ruling that the petitioner failed to present adequate evidence that he would suffer persecution for refusal to serve in the army. Though he presented evidence of death squad murders of people suspected of anti-government sympathies, he did not present evidence that refusal to serve in the military is the "kind of activity" which draws the attention of such killers.[256] One wonders how the court could imagine that resisters of military service would *not* be suspected of anti-government sympathies.

The court endorsed, in effect, the Board's longstanding and puzzling position that, in order to qualify for asylum, a draft resister must show that his punishment for non-compliance would be "disproportionately severe." The court argued that the petitioner's fear is based on nothing more than El Salvador's "generally violent conditions." Strikingly, the court found the petitioner's claim *weakened* by the fact that his relatives had been threatened by *both* the army and the guerrillas in El Salvador. The court argued that the threats feared by the petitioner are "endemic" to the Salvadoran population, not "specific" in being directed against him in particular. The court ruled that asylum was therefore unwarranted.[257] The dissent argued that the petitioner had ample reason to fear violence directed at him specifically, thus arguably bringing petitioner into the "disproportionately severe" category.[258]

One issue not fully addressed by either the majority or the dissent, is the relationship between the "disproportionately severe" punishment requirement for military service resisters and the Board's long-standing requirement that a petitioner show that he may be "singled out" for persecution, rather than a showing that generalized repression is likely to affect him. Both notions are in themselves problematic, as are the similarities, differences, and relationships between them. The dissent does not distinguish the two notions and conceptual

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[256] *Id.* at 314.

[257] *Id.* at 315.

[258] *Id.* at 324-25. As the dissent noted, the petitioner's claim detailed how his cousin was killed after participating in an anti-government rally, how his wife's relatives were killed by the government after speaking about joining the guerrillas, and how another relative was killed after having fed guerrillas in his home. The petitioner had himself been beaten twice by National Guardsmen, at least once under suspicion of covert political activity, and had ceased attending meetings designed to recruit and train him as a spy for the military. Moreover, he had submitted Amnesty International and Americas Watch reports validating his fears that non-service in the military would subject him to danger and that military service would potentially involve him in the commission of atrocities. *Id.* at 325.

confusion could easily affect the reasoning of future decisions.

4. *Zacarias*: Government Preference in Forced Conscription Cases?

Further perspectives on the military avoidance issue have emerged in two interesting decisions announced since *M.A.II.* In *Zacarias v. INS*,[259] the Ninth Circuit reversed a Board denial of asylum to a Guatemalan applicant who feared conscription by anti-government forces. The Ninth Circuit indicated that though forced conscription by a government may not consitute "persecution," conscription by non-government groups is "tantamount to kidnapping" and consitutes persecution.[260] The Supreme Court recently reversed the Ninth Circuit's grant of asylum, but on grounds that failed to address the distinction between government and non-government forces.[261] The Ninth Circuit's suggested distinction between government and non-government entities seems illogical. The distinction rests on the notion that governmental conscripsion is inherently legitimate, while non-government conscription is inherently illegitimate. In a typical civil war situation, however, legitimacy is precisely the issue over which the two sides are fighting. Challenges to an existing government may amount to a claim that the government's use of coercive force is *not* legitimate, while the opposition's *is*. To treat one side's coercion as inherently more persecutory than the other's is to take sides in the underlying fight. This is not a proper role for the asylum process.

The Ninth Circuit may have supported the applicant's claim out of generous motives. It may also have wished to avoid taking a controversial position on the governmental conscription issue, since that issue was arguably superfluous to the case at hand. The court's purported rationale, however, embodies a decidedly unsound principle. The court should have stood by the more forthright, albeit controversial, position that governmental conscription *may* constitute persecution in certain circumstances just as may non-governmental conscription. In one ambiguous passage the court seemingly endorses even-handed treatment of actions by government or anti-government agents. Whenever a group member makes a threat, the court argues, a presumption arises as to persecution by that member's group, unless personal motives for the threat are evident.[261] Though the logic of this position seems to affect both government and non-government entities equally, the court shrinks from articulating an explicit norm of equal treatment. It may be hoped that future decisions do not fall into the government-preference trap laid by *Zacarias*.

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[259] 908 F.2d 1452 (9th Cir. 1990).

[260] *Id.* at 1456.

[261] INS v. Elias-Zacarias, 60 U.S.L.W. 4130 (The Supreme Court reversed on two grounds: 1) that the persecutor's political opinion as a motive for mistreatment should not count as ground for asylum, and 2) that the evidentiary standards for reversing the Board and for finding "well founded" fear due to a "political opinion" held by the applicant had not been satisfied).

[262] *Id.* at 1457.

5. *Barraza Rivera*: Focusing Inquiry on Specific Atrocities?

Barraza Rivera v. INS,[263] concerned an applicant who had been drafted and trained by the Salvadoran military, but who had deserted on conscientious grounds when a superior officer told him he would be ordered to carry out an assassination. The officer indicated that Barraza would be killed if he did not cooperate. Barraza claimed to fear persecution on two grounds: 1) punishment for non-cooperation with the assassination, and 2) punishment because he would be suspected of operating as a guerrilla informant. The Board denied asylum. On appeal the Ninth Circuit reversed the Board and found Barraza eligible for asylum on the first ground. [264]

The court followed the Handbook's division of valid conscientious objector claims into two categories: disproportionate punishment claims and condemnable atrocity claims. Though fear of punishment was an issue, the court explicitly focused its analysis on the condemnable atrocity issue, that is participation in an assassination. The court avoided *Cañas-Segovia's* idiosyncratic blurring of the Handbook categories in treating the forced association itself as "disproportionate punishment."

Cañas-Segovia's peculiar approach may have stemmed from skittishness about recognizing conscientious objector claims based on the general atrociousness of a particular military group's human rights record. Though the Handbook clearly legitimizes such claims, U.S. tribunals seem reluctant to recognize them, perhaps because too many successful claims might then arise or perhaps because such claims might routinely involve evidence of atrocities perpetrated by regimes receiving U.S. aid or support. So far, only *M.A.I* comes close to recognizing the pervasiveness of a particular military's atrocities as an explicit issue.

Other decisions have found ways of avoiding the path to which *M.A.I* beckons.[265] *Cañas-Segovia* granted asylum and avoided the *M.A.I* path by ambiguously and with dubious legitimacy highlighting special properties of the Jehovah's Witness faith which cause "disproportionate punishment" by compliance. By blurring the two Handbook categories of disproportionate punishment and condemnable atrocities, *Cañas-Segovia* makes the Jehovah's Witnesses focus decisive. Because, Jehovah's Witnesses object to military service of *all* kinds, the court manages to avoid basing its decision on the Salvadoran military's particular record. *Barraza* finds a different way to avoid the *M.A.I.* path by focusing on the specific atrocity of a particular proposed assassination, rather than on the Salvadoran military's general record.

Barraza applied the "substantial evidence" test for its review, apparently treating the Board ruling as grounded in issues of fact. The Board had denied Barraza's claim in part because he had not adequately shown that the assassi-

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[263] 913 F.2d 1443 (9th Cir. 1990).

[264] *Id.* at 1454.

[265] *M.A.II*, of course, repudiates *M.A.I* outright with its dicta reinstating the Board's restrictive criteria for assessing condemnable atrocity claims.

nation in question was sanctioned by the Salvadoran government or military. The court held that Barraza's claim was adequately established by testimony that the assassination order and the threat over non-compliance came from a military officer and by documentary evidence implicating the Salvadoran military with death squad killings.[266] In ruling this evidence sufficient, the court subtly repudiates *M.A.II*'s position that conscientious objectors must show that objectionable atrocities constitute government *policy*, in order to qualify for asylum.

Barraza took pains to distinguish *M.A.II*'s negative ruling, on two grounds: (1) Barraza, unlike the *M.A.II* petitioner, had been subjected to an explicit threat; and (2) the *Barraza* claim was based on objection to a specific act which fell clearly within the category of "internationally condemned inhuman acts." Conversely, the *M.A.* claim was based on a *general* opposition to service with a military implicated *generally* in atrocities. Despite carefully distinguishing *M.A.II*, the court went out of its way to "express no opinion" on *M.A.II*'s handling of the "general conscientious objector" problem. This gratuitous effort to "express no opinion" seems to suggest reproval of *M.A.II*'s narrowing approach.

CONCLUSION

As this article illustrates, the courts face the ongoing difficulty of monitoring Board compliance with *Cardoza-Fonseca's* generous interpretation of the "well founded fear" standard. One attempt to establish a methodology for this monitoring task, the *Rodriguez-Arteaga* factor-comparison approach, has met with an uncertain reception.

Some courts have shown greater willingness than the Board to grant asylum, especially for those claiming asylum based on "political opinion." The courts have in some instances recognized broad interpretations of what constitutes persecution based on political opinion. The following is a short-hand list of the more expansive approaches currently available: (1) neutrality-as-opinion, with or without "open advocacy"; (2) imputed opinion; (3) opinion imparted falsely by prosecutor to legitimate personal behavior; (4) power to define political enemies. A more radical stance suggests that even this broadened analysis of political opinion should be transcended, so as to recognize political persecution wherever serious harm is inflicted without due process. One additional expansive interpretation, one focusing on the prosecutor's political opinion, has recently met with rejection by the Supreme Court

There are other possible expansive steps that courts hesitate to take, although they would comport well with the underlying humane purposes of asylum relief. As some of the cases discussed above suggest, however, the courts may hesitantly begin to deal more generously with religious opposition to *all* military service. There are also signs that eventually, and even more hesitantly the courts may begin to extend this protection further to cover prin-

[266] 913 F.2d at 1453 n.14.

cipled but non-religious grounds. Although the courts seem reluctant to recognize claims based on objections to service with particular military forces on the basis of their human rights record, they may be more generous with such claims if they can grant asylum on some narrow decisional ground that avoids placing the atrociousness of a particular military's record squarely at the center of the issue.