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Non-Refoulement, Withholding, and Private Persecution

Dyllan Moreno Taxman

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"Well, I'm livin' in a foreign country, but I'm bound to cross the line
Beauty walks a razor's edge, someday I'll make it mine
If I could only turn back the clock to when God and her were born
Come in, she said, I'll give ya
Shelter from the storm."[1]

INTRODUCTION

Many American hearts swell proud at the thought of Emma Lazarus's 1893 sonnet: "Give me your tired, your poor, your huddled masses yearning to breathe free . . . ."[2] Reading those lines evokes images of its words emblazoned on the Statue of Liberty as boats holding Irish, Italian, German, and Polish immigrants float steadily toward Ellis Island, toward promise and toward prosperity. If that period of history is best captured by Emma Lazarus, the modern American immigration story more closely follows the narrative of Bob Dylan's 1975 *Shelter from the Storm*. Dylan tells of a wayward traveler who finds refuge from a raging storm in the arms and home of a charitable companion. But by the end of the song their relationship has soured and Dylan pines, alone in a foreign wilderness: "If I could only turn back the clock to when God and her were born."[3] If Lazarus's vision of generosity defined the era of twentieth-century European immigration, Dylan's longing and regret for promises unkept embodies the plight of the contemporary refugee from Africa, the Middle East, Central and South America, and Mexico.

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* Lieutenant, Judge Advocate General's Corps, U.S. Navy; J.D., Georgetown University Law Center; B.A., University of Wisconsin-Madison; Lieutenant Taxman is currently serving as an Assistant Station Judge Advocate for Naval Station Mayport, FL. The views expressed in this Article are the author's own and do not reflect the views or opinions of the United States Government, Department of Defense, Department of the Navy, or Navy Judge Advocate General's Corps. The author would like to thank Katlyn Plogger for her support, without which this Article could never be. The author would also like to acknowledge the *Louisiana Law Review* team for their thoughtful edits and contributions.

1. BOB DYLAN, *Shelter from the Storm*, *on* BLOOD ON THE TRACKS (A&R Recordings 1975).

2. Emma Lazarus, *The New Colossus* (1883), *reprinted in* EMMA LAZARUS: SELECTED POEMS AND OTHER WRITINGS (Gregory Eiselein ed., 2002).

3. DYLAN, *supra* note 1.

Modern American immigration law and policy is one of the most complex and politicized areas of contemporary civic debate.[4] But its aims and mission were simpler in the mid-twentieth century domestic and international landscape: provide a refuge for those yearning to breathe free; provide a shelter from the storm. American diplomats and policymakers were key trailblazers in the international community's response to budding refugee crises: the United States was one of a few nations comprising the Ad Hoc Committee precursing the United Nations' 1951 Convention Relating to the Status of Refugees ("1951 Refugee Convention" or "the Convention") and 1967 Protocol Relating to the Status of Refugees ("1967 Protocol" or "the Protocol").[5] The United States signed and ratified the 1967 Protocol adopting relevant substantive provisions of the Convention,[6] and accompanying international documents demonstrate an America singularly focused on protecting refugees from persecution.[7] The Immigration and Nationality Act ("INA") and Refugee Act of 1980 independently adopted the Convention and Protocol as binding domestic statutory law.[8]

If international refugee law is a house the United States helped build, the cornerstone of that house is the principle of *non-refoulement*.[9] In application, *non-refoulement* can be extremely complicated, but its premise is fairly simple: a state shall not return a refugee to a state where the refugee will face persecution.[10] In international law, *non-refoulement*

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4. *See, e.g.*, Claire Felter, Danielle Renwick & Amelia Cheatham, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN RELS. (Aug. 31, 2021, 8:00 AM), https://www.cfr.org/backgrounder/us-immigration-debate-0 [https://perma.cc/R3BK-HVWV].

5. Report of the Ad Hoc Committee on Refugees and Stateless Persons, U.N. Doc. No. E/1850 E/AC.32/8, at 3–4 (Aug. 25, 1950) [hereinafter Ad Hoc Committee].

6. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, 197 [hereinafter 1951 Refugee Convention]; Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol].

7. U.N. High Comm'r for Refugees, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (1990), https://www.unhcr.org/en-us/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html [https://perma.cc/W8NC-WQBB] [hereinafter Travaux Préparatoires].

8. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

9. *See, e.g.*, Travaux Préparatoires, *supra* note 7, at 9 ("This is a statement of the principle of non-refoulement, the cornerstone of refugee protection.").

10. 1951 Refugee Convention, *supra* note 6, at 176.

is embodied in Article 33 of the 1951 Refugee Convention as adopted by the 1967 Protocol.[11] In U.S. domestic law, *non-refoulement* is mandated by § 241(b)(3) of the INA through a process called "withholding of removal," or simply "withholding."[12] The INA's withholding provision mandates that the Attorney General ("AG") may not remove an immigrant to a state in which the immigrant is likely to face persecution.[13]

Though *non-refoulement* is the central tenet of international and domestic refugee law, withholding has become a secondary, oft-forgotten and seldom-discussed or -granted form of relief for the modern refugee in America. Instead, immigration judges, the Board of Immigration Appeals ("BIA"), federal courts, and the academic world have focused almost singularly on asylum in refugee claims. Asylum is a discretionary form of relief in which the Attorney General may allow a refugee to remain in the United States indefinitely.[14] Asylum comes from Article 34 of the 1951 Refugee Convention as adopted by the 1967 Protocol, which requires signatories to attempt to integrate certain refugees into their citizenry.[15] Asylum so dominates the legal discussion that it has become common for federal judges to deny an applicant's claim for asylum and then deny withholding with one sentence: the applicant did not meet the standard for asylum, so they did not meet the standard for withholding. Examples of these holdings are included in Part IV, *infra*.

This Article argues that current withholding practice fails to meet the binding international and domestic standards for *non-refoulement*. Specifically, this Article examines refugee claims involving persecution by private actors and the dearth of withholding analysis by U.S. Circuit Courts of Appeals in those claims. Private-persecution claims provide a vantage point to examine America's failure to uphold *non-refoulement* through withholding. Recent BIA and AG decisions have narrowed applicants' avenue to asylum in cases of private persecution. Though the AG does not retain discretion to determine standards for withholding, withholding and asylum have become so conflated—and the former so oft subjugated to the latter—that federal courts regularly apply heightened asylum standards to withholding claims, solidifying a heightened withholding standard into American law that violates international and

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11. *Id.*; 1967 Protocol, *supra* note 6.

12. 8 U.S.C.§ 1231(b)(3).

13. *Id.*

14. 8 U.S.C. § 1158; *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987) (stating asylum "is a discretionary mechanism").

15. 1951 Refugee Convention, *supra* note 6, at 176; *see also Cardoza-Fonseca*, 480 U.S. at 441 (stating asylum "corresponds to Article 34" of the 1951 Refugee Convention as adopted by the 1967 Protocol).

domestic refugee law. While the most recent AG decision raising the standard for private persecution has been vacated, its impact on the federal courts remains problematic and the future of private persecution standards is unclear. This Article seeks to demonstrate that American courts' failure to properly consider withholding claims causes a break from the international principle of *non-refoulement* and withholding at international and domestic law.

Part I of this Article provides a basic description of the structure and functions of U.S. refugee law. Part II discusses the 1951 Refugee Convention and 1967 Protocol, the foundational pillars of international refugee law. Part III introduces the Immigration and Nationality Act and Refugee Act of 1980, statutory withholding and asylum, and the U.S. Supreme Court's analysis of statutory withholding as the domestic adoption of international refugee law and *non-refoulement*. Part III's analysis demonstrates U.S. refugee law's roots in international refugee law.

Part IV discusses international refugee law's interpretation of *non-refoulement* in claims of private persecution, concluding that refugees suffering private persecution are entitled to *non-refoulement* unless their home state can effectively protect them. Part IV then examines U.S. treatment of withholding claims for victims of private persecution. First, this Part examines Executive Office of Immigration Review data on withholding grants generally over the past 22 years. This Part then examines all published U.S. Courts of Appeals cases from January 1, 2015, to June 30, 2020, in which private persecution was central to the court's withholding disposition. The agency data and caselaw clearly demonstrate both a lack of consideration of withholding claims in private-persecution cases and an impermissible application of heightened asylum standards to withholding claims.

Part V concludes that the U.S. has failed to adhere to international and domestic refugee law and proposes a remedy in the form of a separate withholding analysis in all refugee claims. To comply with international and domestic law, U.S. administrative agencies and courts must engage in a separate withholding analysis in private-persecution cases in order to determine whether the home state can offer effective protection. This Article proposes that our nation's immigration system do for the refugee what Dylan's weary traveler could not: "turn back the clock" to a time when our domestic withholding practice complied with the binding principal of *non-refoulement*.

I. U.S. REFUGEE LAW AT A GLANCE

U.S. immigration law can be daunting. For lawyers and non-lawyers alike, it can be as administratively and legally complex as it is emotionally and politically wrought. This Article is not a treatise on immigration law, nor is it a comprehensive examination of immigration law or even refugee law generally. Rather, this Part seeks to provide a basic understanding of some typical refugee claims and the manner in which those claims might be processed and decided within the United States. A more comprehensive description of the INA and its relevant provisions will be provided in Part II. Part I aims to provide a sufficient base for the reader to understand the analysis in Parts II, III, IV, and V.

A. Forms of Refugee Relief: Asylum, Withholding, and CAT Relief

When an alien enters the United States illegally and is apprehended, the Department of Homeland Security will generally initiate removal proceedings.[16] If the alien is found removable and does not raise a claim for relief, the alien will be forcibly removed to the nation of origin or citizenship.[17] Aliens may contest removability, or they may concede removability and claim some form of refugee protection entitling them to either remain in the United States or be removed somewhere other than the nation of origin or citizenship.[18]

The three major forms of refugee protection are asylum, withholding of removal, and relief under the U.N. Convention Against Torture ("CAT relief").[19] Asylum and withholding will be discussed in greater detail throughout this Article, but a brief description in this Part is warranted. Withholding does not entitle a refugee to remain in the United States but prohibits the AG from removing the alien to a state where it is *more likely than not* that the alien will suffer persecution.[20] Withholding requires the applicant to meet a higher likelihood-of-harm standard than asylum,[21] which only requires an alien to demonstrate a *well-founded fear* of persecution upon return to the nation of origin.[22] A grant of asylum permits

16. 8 U.S.C. § 1182(a); *id.* § 1225(b)(1)(A)(i).
17. *Id.* § 1225(b)(1)(A)(i).
18. *Id.*
19. *Id.* § 1231(b)(3); *id.* § 1158; 8 C.F.R. § 208.18 (2021).
20. 8 U.S.C. § 1231(b)(3).
21. *Id.*
22. *Id.* § 1158; *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 428–34 (1987) (discussing different likelihood-of-harm standards for withholding and asylum).

a refugee to remain in the United States indefinitely.[23] Finally, CAT relief prohibits the AG from returning a refugee to a state in which the refugee will face torture.[24]

Typically, aliens with viable refugee claims will apply for all three forms of relief.[25] Upon apprehension, such aliens might generally concede removability and argue that they are entitled to asylum, withholding, and CAT relief.[26] In these claims, the aliens are not denying that they are in the United States illegally and subject to removal, but instead argue that they should remain in the United States or not be removed to a particular country because they are refugees.[27] An immigration judge ("IJ") will first rule on the application, granting or denying in whole or in part.[28] Both the alien applicant and the Department of Homeland Security may appeal the IJ's decision to the Board of Immigration Appeals.[29] The BIA will affirm or overturn the IJ's decision.[30] The BIA reviews the IJ's legal conclusions *de novo* and its factual conclusions for clear error.[31] U.S. Circuit Courts of Appeals are then statutorily authorized to review the BIA's legal conclusions *de novo*, but factual determinations may only be reviewed under a highly deferential substantial-evidence standard.[32] A circuit court may not overturn a factual determination, such as whether a particular applicant suffered past persecution, "unless any adjudicator would be compelled to conclude to the contrary."[33]

B. Attorney General Discretion in Asylum Cases

Understanding the AG's discretion in asylum cases and lack thereof in withholding cases is important to this Article's analysis. Whereas withholding is a mandatory form of relief for eligible refugees, the AG has

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23. *Id.* § 1158.
24. 8 C.F.R. § 208.18 (2021).
25. *See, e.g.*, Prieto-Pineda v. Barr, 960 F.3d 516, 516–17 (8th Cir. 2020) (involving alien conceding removability and applying for asylum, withholding, and CAT relief).
26. *See, e.g.*, *id.*
27. *See, e.g.*, *id.*
28. 8 C.F.R. § 3.0 (2021).
29. 8 C.F.R. § 1003.1 (2021).
30. *Id.*
31. *Id.*
32. 8 U.S.C. § 1252(b)(4)(B).
33. *Id.*; *see also* NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939) (describing "substantial evidence" as merely "more than a scintilla").

discretion to grant or deny asylum to applicants.[34] Essentially, the AG may deny an otherwise eligible asylum applicant's petition for asylum based on any number of reasons.[35] It arguably follows that the authority to deny claims outright necessarily entails the authority to raise standards for grants of asylum generally: the AG could raise asylum eligibility standards based on the justification that he or she is denying all claims below that heightened standard as a matter of discretion. But this is not the case for withholding, which is a *mandatory* form of relief.[36] Because the AG does not retain discretion to deny otherwise meritorious withholding applications,[37] it does not follow that he or she may raise the standard for grants of withholding. This distinction is central to this Article's point: withholding and asylum are so conflated in U.S. practice—and withholding analysis so often bootstrapped to asylum analysis in one sentence, if not completely neglected—that federal courts impermissibly apply standards for asylum, heightened under the AG's discretion, to withholding claims.

C. Refugee Definitions and Persecution

For an alien to receive refugee protection, the alien must be determined to be a "refugee."[38] In U.S. domestic law, a refugee is an alien who is unable or unwilling to return to his or her home nation due to a well-founded fear of future persecution.[39] If an alien can demonstrate past

34. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 429, 441 (1987) ("Thus, as made binding on the United States through the Protocol, Article 34 provides for a precatory, or discretionary, benefit for the entire class of persons who qualify as 'refugees,' whereas Article 33.1 provides an entitlement for the subcategory that 'would be threatened' with persecution upon their return.").

35. 8 C.F.R. § 1003.1(h)(1) (2021); *see also* Caroline Holliday, *Making Domestic Violence Private Again: Referral Authority and Rights Rollback in* Matter of A-B-, 60 B.C. L. REV. 2145, 2157 (2019) ("In line with this broad authority, the Attorney General has the ability to refer cases issued by the BIA to himself for review and adjudication. The regulations do not specify any limits on the kinds of cases the Attorney General can review, and they do not mandate specific referral procedures.").

36. 8 U.S.C. § 1231(b)(3); *Cardoza-Fonseca*, 480 U.S. at 441.

37. 8 U.S.C. § 1231(b)(3); *Cardoza-Fonseca*, 480 U.S. at 441.

38. 8 U.S.C. § 1231(b)(3); *id.* § 1158; 8 C.F.R. § 208.18 (2021); *see also* INS v. Stevic, 467 U.S. 407, 425–30 (1984) (discussing relief as applicable to refugees).

39. 8 U.S.C. § 1101(a)(42).

persecution, there is a presumption that the alien has a well-founded fear of future persecution.[40]

"Persecution" is vaguely defined both at international and U.S. domestic law.[41] Drafters of the 1951 Refugee Convention and 1967 Protocol declined to provide a clear definition or framework for determining persecution.[42] U.S. federal courts have recognized it as "ill-defined," "elusive," and "protean"[43] and have either struggled or declined to adopt a unified voice in describing persecution.[44] For purposes of this Article, whether a particular harm or threat constitutes persecution can be broken down into three criteria: (1) severity of harm, (2) protected category and nexus, and (3) government involvement.

The first criterion asks whether *the harm suffered or feared is severe enough to constitute persecution.* This Article is not primarily concerned with the ongoing debate seeking to pinpoint the threshold for severity of harm,[45] and selected case studies in Part IV do not turn on severity of harm.

The second criterion, protected category and nexus, is a frequently scrutinized, dispositive, and controversial element in determining whether an alien has suffered persecution, particularly so in cases of aliens fleeing domestic or gang violence at the southern border.[46] In order to qualify for refugee protection at international law, an alien must suffer persecution

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40. 8 C.F.R. § 1208.13(b)(1) (2021); *id.* § 1208.16(b)(1) (2021).

41. *See, e.g.*, Scott Rempell, *Defining Persecution*, 2013 UTAH L. REV. 283, 284 (2013) (discussing difficulty defining "persecution" in law and scholarship) [hereinafter Rempell, *Defining Persecution*].

42. *See* 1951 Refugee Convention, *supra* note 6 (failing to include definition of refugee).

43. Rempell, *Defining Persecution*, *supra* note 41, at 284 (first quoting Haile v. Gonzales, 421 F.3d 493, 496 (7th Cir. 2005); then quoting Pathmakanthan v. Holder, 612 F.3d 618, 622 (7th Cir. 2010); and then quoting Bocova v. Gonzales, 412 F.3d 257, 263 (1st Cir. 2005)).

44. *See, e.g.*, Scott Rempell, *Asylum Discord: Disparities in Persecution Assessments*, 15 NEV. L.J. 142, 145–49 (2014) (discussing differences in persecution analysis across federal courts).

45. *See, e.g.*, Rempell, *Defining Persecution*, *supra* note 41, at 300–18 (examining severity of harm in determining persecution generally).

46. *See, e.g.*, Theresa A. Vogel, *Critiquing* Matter of A-B-*: An Uncertain Future in Asylum proceedings for Women Fleeing Intimate Partner Violence*, 52 U. MICH. J.L. REFORM 343, 383–96 (2019) (discussing the impact of particular-social-group analysis on refugee claims for those fleeing domestic violence); Benjamin H. Harville, *Ensuring Protection or Opening the Floodgates?: Refugee Law and Its Application to Those Fleeing Drug Violence in Mexico*, 27 GEO. IMMIGR. L.J. 135, 151–57 (2012) (discussing impact of particular-social-group analysis on claims for those fleeing gang violence in Mexico).

"on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."[47] In the United States, "on account of" has been interpreted to mean that race, religion, nationality, membership in a particular social group, or political opinion must be at least *one central reason* for the infliction of harm.[48] This criterion, and principally what constitutes a "particular social group," is subject to considerable scholarly debate.[49] However, this Article is not primarily concerned with protected-category-and-nexus analysis as it relates to grants of withholding.

Finally, and central to the analysis in this Article, is the criterion of government involvement. International and domestic refugee law offers protection only to those aliens fleeing harm inflicted by government actors or by private actors that the alien's home government cannot or will not control.[50] In cases of non-governmental persecution, the alien must prove additional arguments to be entitled to refugee relief: in order for private conduct to constitute persecution entitling an alien to refugee relief, the alien's home state must be unwilling or unable to offer protection.[51]

Whether an applicant's home government is unwilling or unable to protect the applicant from a particular harm can be central to a grant or denial of refugee relief: an otherwise eligible alien who shows severity and nexus but cannot demonstrate that the applicant's home state is unable or unwilling to protect him or her will not be entitled to refugee relief and will be removed.[52] The significance of private-persecution analysis has grown and will continue to grow with the rising rates of persecution claims based on domestic and gang violence in South and Central America and

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47. 1951 Refugee Convention, *supra* note 6, at 176; 8 U.S.C. § 1101(a)(42).

48. 8 U.S.C. § 1158(b)(1)(B); *see also* 8 C.F.R. §§ 208.13(a), 208.16(b), 1208.13a, 1208.16(b), 1240.11(c)(3)(iii), 1240.33(c)(3), 1240.49(c)(4)(iii) (2021).

49. *See, e.g.*, Vogel, *supra* note 46, at 383–96.

50. *See, e.g.*, Grace v. Barr, 965 F.3d 883, 889 (D.C. Cir. 2020) (citing Bringas-Rodriguez v. Sessions, 850 F.3d 1051, 1060 (9th Cir. 2017) (en banc)) ("In order to obtain asylum [or withholding] based on persecution by non-state actors, applicants must show that their governments were 'unable or unwilling to control' the persecutors"); *see also* Elsa M. Bullard, *Insufficient Government Protection: The Inescapable Element in Domestic Violence Asylum Cases*, 95 MINN. L. REV. 1867, 1889–91 (2011) (discussing unwilling-or-unable standard in American, Canadian, and British courts).

51. *See, e.g.*, *Grace*, 965 F.3d at 889.

52. *See, e.g.*, K. H. v. Barr, 920 F.3d 470, 479 (6th Cir. 2019) (denying petition for review based on finding that Guatemalan government was not unwilling or unable to protect applicant).

Mexico.[53] Many of the claims arising from these countries involve aliens fleeing private persecutors, either domestic partners or members of local or national gangs operating in a culture or climate of government inaction rather than participation.[54]

The unwilling-or-unable standard evades uniform definition: in 2018, the Attorney General defined the unwilling-or-unable standard to require "that the government condoned the private actions 'or at least demonstrated a complete helplessness to protect the victims.'"[55] Though the 2018 AG decision has since been vacated,[56] some circuits have adopted this heightened standard, ruling it to be a reasonable definition, and continue to apply the heightened standard as precedent.[57] The international community and other circuits have set a lower unwilling-or-unable

53. Of the 30 cases in the dataset discussed in Part IV, *infra*, 17 involve applicants fleeing domestic abuse or gang violence in Central and Southern America or Mexico: Galloso v. Barr, 954 F.3d 1189 (8th Cir. 2020) (domestic violence in Mexico); Hernandez-Chacon v. Barr, 948 F.3d 94 (2d Cir. 2020) (gang violence in El Salvador); Prieto-Pineda v. Barr, 960 F.3d 516 (8th Cir. 2020); Orellana v. Barr, 925 F.3d 145 (4th Cir. 2019) (domestic violence in El Salvador); Gonzales-Veliz v. Barr, 938 F.3d 219 (5th Cir. 2019) (domestic violence in Honduras); Juarez-Coronado v. Barr, 919 F.3d 1085 (8th Cir. 2019) (domestic violence in Guatemala); Martin Martin v. Barr, 916 F.3d 1141 (8th Cir. 2019) (gang violence in Guatemala); Villalta-Martinez v. Sessions, 882 F.3d 20 (1st Cir. 2018) (gang violence in El Salvador); Olmos-Colaj v. Sessions, 886 F.3d 168 (1st Cir. 2018) (gang violence in Guatemala); C.J.L.G. v. Sessions, 880 F.3d 1122 (9th Cir. 2018) (gang violence in Honduras); Justo v. Sessions, 895 F.3d 154 (1st Cir. 2018) (gang violence in Mexico); Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017) (gang violence in El Salvador); Morales-Morales v. Sessions, 857 F.3d 130 (1st Cir. 2017) (gang violence in Guatemala); Vega-Ayala v. Lynch, 833 F.3d 34 (1st Cir. 2016) (domestic violence in El Salvador); Cinto-Velasquez v. Lynch, 817 F.3d 602 (8th Cir. 2016) (gang violence in Guatemala); Saldana v. Lynch, 820 F.3d 970 (8th Cir. 2016) (gang violence in Mexico); Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015) (gang violence in El Salvador).

54. *See* cases cited *supra* note 53.

55. Matter of A-B-, 27 I. & N. Dec. 316, 337 (2018) (internal citation omitted).

56. *Matter of A-B-*, 27 I. & N. Dec. 316.

57. *See, e.g.*, *Gonzales-Veliz*, 938 F.3d at 223–24 (applying and adopting standard from *Matter of A-B-*); *see also* Ramirez-De Requeno v. Garland, No. 19-3201, 2022 U.S. App. LEXIS 4083, at *4 (Feb. 15, 2022) (continuing to adhere to *Matter of A-B-* heightened standard as precedent for its continued application in the Second Circuit after vacation of the *Matter of A-B-* decision).

standard, focusing instead on whether the alien's home state is actually able and willing to offer real, effective, and meaningful protection.[58]

D. Withholding and Private Persecution: A Distinct Vantage Point

The application of multiple standards for private persecution is a key focus of this Article. Differing standards for private persecution in American law can be inherently problematic and unfair: if two aliens flee identical circumstances but are apprehended in different regions of the country, one may be returned to face death or injury while the other is allowed to remain in the United States. But this Article will focus on the problematic application of heightened standards across multiple forms of refugee claims for relief.

As discussed in Section C of Part IV, the AG may have authority to raise the standard for private persecution in asylum claims. Whatever disparate and unfair outcomes arise from differing and heightened standards for private persecution in asylum claims, the AG has discretion to grant or deny asylum, and it arguably follows that he or she may raise the standard for entitlement to asylum. But eligible refugees are *entitled* to withholding of removal by statute, and the AG does not have discretion to grant or deny withholding or determine standards for withholding.[59] When IJs, the BIA, and federal courts deny private-persecution claims for withholding based on a heightened condoned-or-complete-helplessness discretionary standard that the AG has mandated for asylum claims, they deny withholding claims that should be entitled to relief. As will be discussed throughout this Article, withholding of removal is the domestic embodiment of *non-refoulement*, so the misapplication of a heightened standard for asylum to withholding claims violates the United States' statutory and constitutional treaty obligations under the 1951 Refugee Convention, the 1967 Protocol, the Immigration and Nationality Act, and the Refugee Act of 1980.

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58. *See, e.g.*, U.N. High Comm'r. for Refugees, United Nations Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, ¶ 65, U.N. Doc. HCR/IP/4/Eng/Rev.4 (Feb. 2019), https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html [https://perma.cc/4NV9-5LDK] (requiring government to provide "effective protection" at international law) [hereinafter U.N. Handbook]; Antonio v. Barr, 959 F.3d 778, 793 (6th Cir. 2020) (finding persecution where applicant cannot "reasonably rely" on effective protection from government).

59. 8 U.S.C. § 1231(b)(3); INS v. Cardoza-Fonseca, 480 U.S. 421, 441 (1987).

Standards for asylum and withholding are conflated generally,[60] not just in private-persecution cases. But private-persecution claims provide a particularly effective vantage point to examine improper withholding analysis because the AG's 2018 *Matter of A-B-* decision clearly raised the unwilling-or-unable standard for private persecution.[61] Though the AG's authority to raise the unwilling-or-unable standard is, at most, limited to asylum claims, this Article tracks courts that have adopted the standard and impermissibly applied it to withholding.[62] Though the current AG vacated *Matter of A-B-* on June 16, 2021,[63] some circuits continue to adhere to a heightened standard either by having adopting the *Matter of A-B-* standard into circuit canon or through independent, sometimes pre-existing jurisprudence.[64] The AG opinion vacating *Matter of A-B-* bases its decision in part on forthcoming agency rules establishing uniform standards for private persecution claims,[65] and it is unclear if those rules will mirror the standard for *non-refoulement*.

II. INTERNATIONAL REFUGEE LAW AND U.S. TREATY OBLIGATIONS

As discussed in Part I, this Article does not discuss all or most aspects of refugee law but provides a foundation to discuss the discrete issue of *non-refoulement* and the failure of the American immigration system to adhere to its international and domestic obligation to properly analyze refugee claims for withholding eligibility. Part II provides a general outline of international refugee law as created by the 1951 Refugee Convention and the 1967 Protocol. It specifically examines Articles 33 and 34, which provide the bases for withholding and asylum respectively. Finally, this Part briefly discusses the constitutionally binding nature of treaty obligations at domestic law.

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60. *See infra* note 253 (discussing one-line rejection of withholding claims in claims where asylum is denied in American jurisprudence).

61. *Matter of A-B-*, 27 I. & N. Dec. at 337.

62. *See infra* note 253.

63. Matter of A-B-, Respondent, 28 I. & N. Dec. 307 (2021).

64. *See, e.g.*, Scarlett v. Barr, 957 F.3d 316, 331–34 (2d Cir. 2020); *see also* Ramirez-De Requeno v. Garland, No. 19-3201, 2022 U.S. App. LEXIS 4083, at *4 (continuing to apply the heightened standard after *A-B-*'s vacation); *see* also Olmos-Colaj v. Sessions, 886 F.3d 168, 176 (1st Cir. 2018) (independently raising standard for private persecution); Saldana v. Lynch, 820 F.3d 970, 977 (8th Cir. 2016) (independently raising standard for private persecution); Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000) (independently raising standard for private persecution).

65. *Matter of A-B-, Respondent*, 28 I. & N. Dec. at 308.

A. The 1951 Refugee Convention and the 1967 Protocol Generally

International refugee law is a product of the post-World War II international landscape, in which the United Nations recognized an emerging set of primarily-European refugee crises and developed a regime to meet the challenge.[66] The first step in developing an international refugee-law framework was the 1950 Ad Hoc Committee on Refugees and Stateless Persons ("Ad Hoc Committee").[67] The Ad Hoc Committee included members from Belgium, Brazil, Canada, China, Denmark, France, Israel, Turkey, the United Kingdom, the United States, Venezuela, Italy, Switzerland, and various non-governmental organizations.[68] Understanding the need to combat refugee crises, but also the unique burdens that might be placed on certain countries without international cooperation, the Ad Hoc Committee called upon members of the international community to create an interconnected framework for combatting refugee crises.[69] The Ad Hoc Committee also developed a definition of "refugee" that was adopted in major part by the subsequent Convention and Protocol:

> For the purposes of this Convention, the term "refugee" shall apply to any person . . . who has had, or has, well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion . . . or circumstances directly resulting from such events, and owing to such fear, has had to leave, shall leave, or remains outside the country of his nationality . . . and is unable, or owing to such fear or for reasons other than personal convenience unwilling, to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, has left, shall leave, or remains outside the country of his former habitual residence.[70]

Articles 28 and 29 of the Ad Hoc Committee's report served as precursors to the *non-refoulement* and naturalization provisions of Articles 33 and 34 of the 1951 Refugee Convention. Article 28 states, "No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened

66. Travaux Préparatoires, *supra* note 7, at Foreword.
67. Ad Hoc Committee, *supra* note 5.
68. *Id.* at 3–4.
69. *Id.* at 6–7.
70. *Id.* at 8.

on account of his race, religion, nationality or political opinion."[71] Article 28 demonstrates that refugee law was founded on a broad vision of *non-refoulement*: from its earliest days, refugee law contemplated that states refrain *in any manner whatsoever* from returning refugees to face the threat of death or injury.[72] Article 29 states, "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."[73] This is the precursor to naturalization protections at international law and asylum at U.S. domestic law.[74]

One year later, a group of 20 nations signed the 1951 Convention on Refugees, codifying international refugee protections, including the principles of *non-refoulement* and naturalization.[75] The Convention itself cites back to the Ad Hoc Committee as forming the "basis of its discussions in the draft Convention."[76] The broad aims of the Convention are spelled out explicitly in its opening:

> The Conference . . . [r]ecommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement. The Conference [e]xpresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.[77]

This language clearly establishes the 1951 Refugee Convention as a baseline and sets the expectation that all nations grant refugee claims "as far as possible to persons in their territory . . . who would not be covered by the terms of the Convention . . . ."[78] Of course this is important because the foundational instrument establishing modern international refugee law interprets itself as necessarily being subject to growth and expanded

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71. *Id.* at 25.
72. *See id.*
73. *Id.* at art. 29.
74. *Compare id.*, *with* 1951 Refugee Convention, *supra* note 6, at 176.
75. 1951 Refugee Convention, *supra* note 6, at 186–97.
76. *Id.* at 142.
77. *Id.* at 148.
78. *Id.*

protections. In another relevant sense, when this Article discusses the failure to comply with the principle of *non-refoulement* or other key provisions of the Convention and Protocol, this language demonstrates just how clearly violative of international law that failure is: if the Convention and Protocol are absolute baselines for compliance with international law, there is little room for doubt that violation of its provisions or failure to live up to the principles it announces are clear violations.

The 1951 Refugee Convention defines "refugee" with substantial similarity to the Ad Hoc Committee, as any person who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[79]

The 1951 Refugee Convention definition is perhaps even broader than the Ad Hoc Committee's, removing the limitation that the refugee's inability or unwillingness to return not be caused by "personal convenience."[80] The *Travaux Préparatoires*, supporting papers that document the drafters' intent in an international legal document,[81] do not directly address this minor change in the definition of "refugee,"[82] but removing criteria for eligibility without other change necessarily broadens the scope of the definition and entitlement to protection.

However, the 1951 Refugee Convention limited its definition of "refugee" to those whose refugee status resulted from events occurring before January 1, 1951.[83] Perhaps due to a singular focus on post-WWII refugee crises rather than addressing refugee claims arising in the future, the 1951 Refugee Convention alone was insufficient to create a comprehensive refugee-law scheme for future claims.[84] Therefore, the international community, seeking to establish such a scheme, developed

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79. *Id.* at art. 1.

80. *Id.*; *compare* 1951 Refugee Convention, *supra* note 6, *with* Ad Hoc Committee, *supra* note 5, at Ch. II, ¶ A.

81. Travaux Préparatoires, *supra* note 7.

82. *Id.* at art. 1.

83. 1951 Refugee Convention, *supra* note 6, at art. 1.

84. 1967 Protocol, *supra* note 6, at 268.

the subsequent 1967 Protocol Relating to the Status of Refugees.[85] The 1967 Protocol eliminated the "before January 1, 1951" language from the definition of "refugee," which extended protections for claims after January 1, 1951, and encompassed prospective claims for refugee relief.[86] The 1967 Protocol incorporates Articles 2 through 34, applying those articles' protections to all meritorious refugee claims.[87]

B. Articles 33 and 34: Non-refoulement and Naturalization

Articles 33 and 34 of the 1951 Refugee Convention and 1967 Protocol establish the international principles of *non-refoulement* and naturalization.[88] *Non-refoulement* is both the principle of international law most central to this Article and the foundational element of international refugee law generally.[89] It is the key protection afforded to refugees and the foundation for withholding of removal at U.S. domestic law.[90] Naturalization is far more aspirational in language and requires good-faith efforts from states to naturalize refugees.[91] Naturalization provides the foundation for asylum at U.S. domestic law.[92] The relationships between *non-refoulement*, naturalization, withholding of removal, and asylum are discussed at greater length in Part III.

Article 33 codifies *non-refoulement*: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[93] The definition is identical to its Ad Hoc Committee precursor with the addition of the particular-social-group protected

85. *Id.*
86. *Id.* at art. I.
87. *Id.*
88. 1951 Refugee Convention, *supra* note 6, at art. 33, 34.
89. *See, e.g.*, Travaux Préparatoires, *supra* note 7, at Introduction ("This is a statement of the principle of non-refoulement, the cornerstone of refugee protection."); INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (stating that withholding corresponds to *non-refoulement*).
90. *Id.*
91. *See* 1951 Refugee Convention, *supra* note 6, at art. 34 ("The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees.").
92. *See, e.g.*, *Cardoza-Fonseca*, 480 U.S. at 441 (stating that asylum is derived from art. 34 naturalization).
93. 1951 Refugee Convention, *supra* note 6, at art. 33.

characteristic.[94] Notably retained in the definition is the "in any manner whatsoever" language emphasizing the broad scope of *non-refoulement*.[95] Article 33 requires states party to the 1951 Refugee Convention or the 1967 Protocol to refrain from returning refugees to any nation where they are likely to face persecution.[96] Article 34 codifies naturalization at international law, with no change in language from the Ad Hoc Committee's definition a year earlier.[97]

Part III of this Article will discuss the relationship between *non-refoulement* and withholding as well as naturalization and asylum at greater length. Part IV will address the scope of *non-refoulement*, its centrality to the international refugee law regime, and its applicability to private persecution.

C. U.S. Treaty Obligations

Article VI, the Supremacy Clause of the United States Constitution, dictates that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[98] Treaty obligations, along with provisions of the U.S. Constitution and federal statutes, are domestically binding and superior in authority to state or local law.[99] Because the United States signed and ratified the 1967 Protocol,[100] its provisions, which incorporate Articles 33 and 34 of the 1951 Refugee Convention, are binding domestic law.[101] Federal agencies and courts are constitutionally bound by treaty provisions to which the United States has acceded through ratification, including the principle of *non-refoulement* as established by Article 33 of the 1951 Refugee

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94. *Id.*; *compare* 1951 Refugee Convention, *supra* note 6, at art. 33, *with* Ad Hoc Committee, *supra* note 5, at art. 28.

95. *See id.*; *see also*, Diane Uchimiya, *Falling Through the Cracks*, 23 BERKELEY LA RAZA L.J. 109, 132 (2013) ("Keeping in mind refugee protection as the Convention's objective, a liberal interpretation of the criteria and a strict application of the limited exceptions are called for." (internal quotation marks omitted)).

96. 1951 Refugee Convention, *supra* note 6, at art. 33.

97. *Id.* at art. 34.

98. U.S. CONST. art. VI, cl. 2.

99. *Id.*

100. Protocol Relating to the Status of Refugees, S. TREATY DOC. No. 90–27 (1968).

101. *See* U.S. CONST. art. VI, cl. 2.

Convention and 1967 Protocol.[102] Failure to uphold the principle of *non-refoulement* is a violation not just of international law, but of the U.S. Constitution.

As Parts III, IV, and V discuss the U.S. immigration system and federal courts' failure to properly apply the principle of *non-refoulement* through improper or insufficient application of withholding analysis, it is necessary to understand the importance of treaty obligations at U.S. law. International law's place, impact, and force at U.S. domestic law can be controversial, dynamic, and uncertain: one hundred scholars might provide one hundred different opinions on the force and effect of international law on domestic law. However, when the United States has signed and ratified a treaty, its provisions are binding under the Constitution.[103] When subsequent Parts of this Article discuss failure to uphold the principle of *non-refoulement*, the failure to adhere to the 1951 Refugee Convention and the 1967 Protocol is a violation of the U.S. Constitution.

III. THE INA AND INTERNATIONAL ROOTS OF DOMESTIC REFUGEE LAW

While Part II touched on U.S. constitutional treaty obligations to adhere to *non-refoulement*, this Part examines the legislative implementation of that requirement through passage of the Immigration and Nationality Act and the Refugee Act of 1980. Part III also analyzes the close connection to U.S. refugee legislation and its international foundation, as viewed through the lens of legislative history, executive agency practice, and Supreme Court precedent.

A. The INA: Refugees, Withholding, and Asylum

Bound to provisions of the 1951 Refugee Convention through ratification of the 1967 Protocol, the U.S. brought its refugee-claim-adjudication system into conformity with binding treaty law through the Immigration and Nationality Act of 1952[104] and the Refugee Act of 1980.[105] The Refugee Act of 1980 was an important amendment to the

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102. *Id.*

103. *Id.*

104. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

105. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103; *see also* Maddie Boyd, *Refuge from Violence: A Global Comparison of the Treatment of Domestic Violence Asylum Claims*, 29 BERKELEY LA RAZA L.J. 1, 4 (2018) ("Many States that have ratified the Convention have included the Convention's

INA, establishing permanent procedures and offices to administer refugee claims and bringing the INA into greater compliance with international law.[106] This Article's references to the INA are to the modern INA, as amended by the Refugee Act of 1980. The INA codified the major protections of the 1951 Refugee Convention, including the Convention's definition of "refugee," the principle of *non-refoulement*, and naturalization aims.[107]

The INA adopts a definition of "refugee" substantially similar to the 1951 Refugee Convention and 1967 Protocol.[108] Section 241(b)(3) incorporates *non-refoulement* into the United States Code in the form of withholding of removal.[109] Subject to limited exceptions,[110] "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[111] Applications for withholding of removal "*shall* be granted if the applicant's eligibility for withholding is established."[112] Withholding is a mandatory form of relief for eligible applicants, and the AG does not retain discretion to deny

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definition of a refugee within their own legal systems. For example, the U.S. Congress passed the Refugee Act in 1980, which incorporated the U.N. definition of a refugee into the Immigration and Nationality Act").

106. *See* Refugee Act of 1979, Pub. L. No. 96-212, 94 Stat. 102, at Title I—Purpose.

107. 8 U.S.C. §§ 31, 32; *see also* Boyd, *supra* note 105, at 4.

108. 8 U.S.C. § 1101(a)(42):

> [A]ny person who is outside any country of such person's nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

109. *Id.* § 1231(b)(3).

110. *Id.* § 1231(b)(3)(B) describes some exceptions to eligibility for withholding. Excepted aliens who may not receive withholding include: (1) an alien who has participated in Nazi persecution, genocide, extrajudicial killings, or torture; (2) aliens who have themselves assisted or committed acts of persecution based on a protected ground; (3) aliens convicted of serious crimes within the United States; (4) aliens who have committed serious nonpolitical crimes outside the United States; and (5) aliens who present a national security risk.

111. *Id.*

112. 8 C.F.R. § 208.16(d)(1) (2021) (emphasis added).

withholding to an applicant meeting the statutory and international law standards for withholding and *non-refoulement*.[113]

The INA also codifies Article 34's naturalization provision as domestic asylum.[114] Section 208 states:

> The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.[115]

Any refugee is eligible for asylum as a general matter, but certain substantive and procedural exceptions apply: refugees who may be safely removed to a third country, who have committed aggravated felonies, who fail to apply for asylum within one year of arrival to the United States, and who have previously been denied asylum—absent changed circumstances—are not eligible for asylum relief.[116] Aliens carry the burden of demonstrating that they are refugees entitled to asylum.[117] In addition to the "may grant" language demonstrating AG discretion in asylum application determination, the INA specifically grants the Attorney General authority to "establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum."[118]

B. International Roots of Domestic Refugee Law: Executive Agencies

Scholars, federal judges, and the BIA acknowledge that the American system of refugee relief is intended to implement and comply with internationally recognized human rights and refugee protections established at international law.[119] As discussed in Section C, the U.S.

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113. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(d)(1) (2021); INS v. Cardoza-Fonseca, 480 U.S. 421, 480 (1987).

114. 8 U.S.C. § 1158; *Cardoza-Fonseca*, 480 U.S. at 441.

115. 8 U.S.C. § 1158(b)(1)(A).

116. *Id.* § 1158(a)(2), (b)(2)(B)(i).

117. *Id.* § 1158(b)(1)(B)(i).

118. *Id.* § 1158(b)(2)(C).

119. *See, e.g.*, Katelyn Massetta-Alvarez, *Tearing Down the Wall Between Refuge and Gang-Based Asylum Seekers*: *Why the United States Should Reconsider Its Stance on Central American Gang-Based Asylum Claims*, 50 CASE W. RES. J. INT'L L. 337, 386–87 (2018) (first citing Mirdita v. Gonzales, 237 F. App'x 691 (2d Cir. 2007); then citing Pieschacon-Villegas v. Att'y Gen. of the

Supreme Court has explicitly stated that the withholding and asylum provisions of the INA embody Articles 33 and 34 of the 1951 Refugee Convention and 1967 Protocol. The Department of Justice and the Department of State also acknowledge that international law forms both the foundation for U.S. refugee law and serves as a guide for interpreting refugee claims.[120]

The BIA considers State Department country reports as evidence of country conditions and past persecution, and those reports are based in part on standards from the Universal Declaration of Human Rights and other international human rights treaties.[121] The AG requires U.S. Citizenship and Immigration Services ("USCIS") officers to receive training in international human rights law,[122] and USCIS considers international law in resolving refugee claims.[123] The USCIS training manual states that international humanitarian law provides guidance in determining whether harms amount to persecution.[124]

C. International Roots of Domestic Refugee Law: Stevic *and* Cardoza-Fonseca

If the constitutional authority of treaty obligations, federal statutes incorporating international refugee law, and agency reliance on international law leave room for debate over the foundational impact and binding nature of the 1951 Refugee Convention and 1967 Protocol on U.S. law, two U.S. Supreme Court cases definitively resolve the issue. The Supreme Court's 1984 decision in *INS v. Stevic* resolved the likelihood-

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U.S., 671 F.3d 303, 313 (3d Cir. 2011); then citing Galina v. INS, 213 F.3d 955, 957 (7th Cir. 2000); then citing Perkovic v. INS, 33 F.3d 615, 623 (6th Cir. 1994); and then citing *In re* Kasinga, 21 I. & N. Dec. 357, 377 (B.I.A. 1996)).

120. *Id.* at 387.

121. *Id.* (first citing Matter of A-R-C-G- et al., 26 I. & N. Dec. 388, 393–94 (B.I.A. 2014); then citing Sadik v. Gonzales, 172 F. App'x 694 (8th Cir. 2006); then citing *Country Reports on Human Rights Practices for 2015—Secretary's Preface*, U.S. DEP'T OF STATE (2015), https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper [https://perma.cc/8R7J-BUH5]; and then citing *USCIS to Take Action to Address Asylum Backlog*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Jan. 31, 2018), https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog [https://perma.cc/K5AS-MU9E]).

122. *Id.*

123. *Id.* at 387–88 (citing 8 C.F.R. §208.1(b) (2021)).

124. *Id.* (citing U.S. Citizenship and Immigr. Serv.*, Asylum Officer Basic Training Course: International Human Rights Law*, AMERICAN IMMIGR. LAW. ASS'N (Mar. 1, 2005), https://www.aila.org/infonet/aobtc-international-human-rights-law [https://perma.cc/U7JR-CVH4]).

of-harm standard for withholding cases and acknowledged withholding as a domestic adoption of Article 33 *non-refoulement*.[125] Three years later, the Supreme Court revisited withholding and *non-refoulement* in *INS v. Cardoza-Fonseca*.[126] *Cardoza-Fonseca* involved a much greater analysis of withholding as the adoption of *non-refoulement*, the binding nature of *non-refoulement*, and the INA as adherence to the 1951 Refugee Convention and 1967 Protocol.[127]

Stevic involved a Yugoslavian alien who entered the United States in 1976 to visit family and overstayed his six-week period of admission.[128] After the INS initiated removal proceedings, the alien conceded removability and sought withholding of removal.[129] The IJ denied relief, and the BIA, relying on a pre-Refugee Act of 1980 withholding provision, upheld the IJ's decision.[130] The Second Circuit reversed and remanded, requiring the BIA to use the proper standard for withholding.[131] The Supreme Court granted certiorari to clarify the standard for withholding under the INA.[132] The question before the Court was whether a lower likelihood-of-harm standard for asylum cases also governs applications for withholding.[133]

The Court's analysis began with a discussion of the United States' accession to the 1967 Protocol, which the Court explained "bound parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees."[134] The Court then produced the 1951 Refugee Convention and 1967 Protocol's definitions of refugee, *non-refoulement*, and naturalization as expressed in Articles 1, 33, and 34[135] before describing those provisions as consistent with U.S. standards and laws for refugee claims:

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125. INS v. Stevic, 467 U.S. 407 (1984).
126. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
127. *Id.* at 436–41.
128. *Stevic*, 467 U.S. at 409.
129. *Id.* at 409–10. The Respondent in *Stevic* initially agreed to depart voluntarily but moved to reopen deportation proceedings and claim refugee relief after his American wife was killed in a car accident. The Respondent's first petition for withholding was denied, but he reopened proceedings again after the Refugee Act of 1980 amended the withholding provision of the INA. *Id.* at 409–11.
130. *Id.* at 411–12.
131. *Id.* at 412.
132. *Id.* at 413.
133. *Id.* at 409.
134. *Id.* at 416.
135. *Id.* at 416–17.

> The President and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol. And it was '"absolutely clear" that the Protocol would not "require[e] the United States to admit new categories or numbers of aliens." It was also believed that apparent differences between the Protocol and existing statutory law could be reconciled by the Attorney General in administration and did not require any modification of statutory language.[136]

But, as the Court recalled, within five years of acceding to the 1967 Protocol, basic controversies over U.S. withholding practices and international standards for Article 33 *non-refoulement* created persistent legal challenges by alien claimants.[137] The *Stevic* Court explained that "the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33 of the United Nations Protocol."[138]

The *Stevic* decision establishes three significant principles: (1) in ratifying the 1967 Protocol, the United States felt its provisions and definitions—including the principle of *non-refoulement*—were wholly consistent with U.S. law and practice; (2) the United States' binding obligation to the principle of *non-refoulement* necessitated the Refugee Act of 1980's amendment to the language of the INA to conform with international law; and (3) U.S. law and practice frequently conflates asylum and withholding of removal standards and analysis.[139] The first two *Stevic* principles point toward the unavoidable conclusion that the United States has a binding obligation to adhere to the principle of *non-refoulement* as expressed in international law, while the third illustrates U.S. failure to meet that obligation.

The Supreme Court's next major refugee-law case, *Cardoza-Fonseca*, involved a 38-year-old Nicaraguan respondent who entered the United States in 1976 as a visitor and stayed past her permitted timeframe.[140] Removal proceedings ensued, with the alien conceding removability and

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136. *Id.* at 417–18 (internal citations omitted) (citing S. EXEC. REP. NO. 90-14, at 4 (1968) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"); and then citing S. EXEC. REP. NO. 90-14, at 6, 7 (1968) ("the United States already meets the standards of the Protocol")).

137. *Id.* at 418.

138. *Id.* at 421.

139. *See id.* at 417–22.

140. INS v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987).

applying for asylum and withholding.[141] The IJ applied the same "more likely than not" likelihood-of-harm standard to deny claims for both asylum and withholding.[142] The BIA affirmed, and on review the Ninth Circuit reversed and remanded for reconsideration of the asylum claim because both the IJ and BIA had applied the higher likelihood-of-harm standard for withholding to the applicant's claim for asylum.[143] The Supreme Court granted certiorari to resolve a then-existing circuit conflict over whether the likelihood-of-harm standard for withholding claims applied to asylum.[144]

The Court again turned to international law and an analysis of the 1951 Refugee Convention and 1967 Protocol—with a particular emphasis on the definition of "refugee," Article 33 *non-refoulement*, and Article 34 naturalization—to resolve conflicts within U.S. withholding and asylum standards.[145] Perhaps most significant to the binding nature of international refugee law on U.S. practice is the Court's almost-exclusive reliance on international law and legislative history to determine proper interpretations of the INA.[146] In determining "[t]he message conveyed by the plain language of the [INA]," the Court considered "the abundant evidence of an intent to conform the definition of 'refugee' and our asylum [and withholding] law to the United Nation[s'] Protocol to which the United States has been bound since 1968."[147] Even the Court's examination of the legislative history surrounding the U.S. system for processing refugee claims confirmed the binding nature of international refugee law on U.S. law and practice:

> If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968.[148]

To determine the proper standards for withholding, the Court looked to "Article 33.1 of the Convention, which is the counterpart of § 243(h) of

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141. *Id.*
142. *Id.* at 425.
143. *Id.* at 425–26.
144. *Id.* at 426.
145. *Id.* at 432–50.
146. *See id.*
147. *Id.* at 432–33.
148. *Id.* at 436–37 (internal citations omitted).

our statute."[149] In fact, the *Cardoza-Fonseca* Court describes withholding as simply another name for *non-refoulement* in reference to *Stevic*: "In *Stevic*, we dealt with the issue of withholding of deportation, or *nonrefoulement*, under § 243(h). This provision corresponds to Article 33.1 of the Convention."[150] The *Cardoza-Fonseca* Court also acknowledged that the right to asylum for eligible refugees was "made binding on the United States through the Protocol, Article 34."[151] The Court looked to additional international-law interpretations, relying on the U.N. High Commissioner for Refugees' Handbook to elucidate the proper standards for asylum and withholding claims respectively.[152] The *Cardoza-Fonseca* opinion provides no room for doubt as to the binding nature of international refugee law on domestic law and practice, including that of *non-refoulement* on U.S. withholding-of-removal analysis and dispositions. It also once again highlights the issue of U.S. conflation of withholding and asylum analyses.

IV. MODERN WITHHOLDING AND PRIVATE PERSECUTION: UNLAWFUL FAILURE TO ADHERE TO *NON-REFOULEMENT*

Parts II and III provided a base upon which to analyze this Article's central proposition: that modern American withholding-of-removal law and practice violates international and domestic law. That base discussion demonstrates the centrality of *non-refoulement* to the refugee-law regime, its binding nature at international and domestic law, and withholding as the American application of *non-refoulement*. Part IV discusses U.S. failure to adhere to that binding principle.

Part IV will first examine international law's treatment of *non-refoulement* claims involving private persecution—harm inflicted by non-state actors—finding that *non-refoulement* encompasses a broad interpretation of the unwilling-and-unable standard for private-persecution claims at international law when an alien's home state cannot provide effective protection. Turning to domestic treatment of *non-refoulement* claims in the form of withholding dispositions, this Part analyzes data from the Executive Office of Immigration Review Statistical Yearbooks and

149. *Id.* at 429 (internal citations omitted).

150. *Id.* at 440.

151. *Id.* at 441.

152. *See id.* at 438–39 ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status").

finds a disproportionally low rate of withholding grants both generally and as a percentage of total refugee-claim grants.

Next, this Part analyzes *Matter of A-B-*, a controversial case in which the AG raised the standard for private persecution in both asylum and withholding claims, contrary to the established principle that the AG lacks discretion to determine withholding criteria. Though the current AG vacated *Matter of A-B-*, its impact on jurisdictions that adopted its heightened standard as reasonable remains in effect and it is unclear whether new agency rules for private persecution will adhere to *non-refoulement* standards. Finally, this Part analyzes a dataset of all published U.S. Circuit Courts of Appeals cases from 2015–2020 in which the unwilling-or-unable standard was dispositive in a withholding determination. That analysis shows that: (1) asylum and withholding analyses are almost always conflated in American law, with a generally low rate of actual analysis dedicated to resolving withholding claims; (2) *Matter of A-B-*'s misapplied and unlawful standard for withholding in private-persecution cases has been adopted into caselaw in some U.S. jurisdictions, persisting past its vacation; and (3) some U.S. jurisdictions determine whether a government is unable or unwilling to protect an applicant without considering whether that government offers effective protection, contrary to international law. These findings demonstrate that American withholding practice fails to adhere to the binding principle of *non-refoulement*.

C. International Law, Non-refoulement*, and Private Persecution*

A primary and essential question in this Article's analysis must be: does *non-refoulement* apply to private persecution, and if so, what constitutes private persecution entitling a refugee to withholding of removal at international and U.S. law? The *Travaux Préparatoires* to the 1951 Refugee Convention and U.N. Handbooks clearly point to a broad definition of *non-refoulement* that encompasses private conduct when a government is unwilling or unable to effectively protect an applicant for withholding.[153]

153. Travaux Préparatoires, *supra* note 7, at art. 33; U.N. Handbook, *supra* note 58; U.N. High Comm'r for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, (Mar. 31, 2010), https://www.refworld.org/docid/4bb21fa02.html [https://perma.cc/GVL5-8838] [hereinafter UNHCR Gang Guidance]; U.N. High Comm'r for Refugees, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01 (May 7, 2002) https://www.unhcr.org/en-

Travaux Préparatoires offer a unique look at an international agreement. Literally translated to "preparatory activities" or "preparatory works," these documents are a behind-the-scenes record of the conversations, concerns, and input of various parties over the course of drafting a treaty.[154] The *Travaux Préparatoires* to the 1951 Refugee Convention demonstrate that the states party to the Convention intended *non-refoulement* under then-Article 28 of the Ad Hoc Committee's report to be: (1) essentially without exception,[155] (2) foundational to international refugee law,[156] (3) extremely broad and far-reaching under the new Article 33,[157] and (4) requiring evaluation of *effective* protection, not just a good-faith effort by the home state.[158] In discussions of possible exceptions to Article 33, the United States delegation felt that no exceptions to *non-refoulement* could or should exist, "even [in] highly exceptional cases."[159] Indeed, the *Travaux Préparatoires* demonstrate that the Executive Committee felt *non-refoulement* should apply to "persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees."[160] Notably absent from the *Travaux Préparatoires* Article 33 is any language requiring state acts, though this should not surprise given that the 1951 Refugee Convention itself also does not include such language.[161]

U.N. Handbooks and Guidelines are helpful aids to understanding *non-refoulement* and private persecution, with three directly on point:

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us/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html [https://perma.cc/7GXB-ZH36] [hereinafter UNHCR DV Guidance].

154. *Travaux Préparatoires*, BLACK'S LAW DICTIONARY (11th ed. 2019).

155. *See* Travaux Préparatoires, *supra* note 7, at art. 33 ("While some question was raised as to the possibility of exceptions to Article 28, the Committee felt strongly that the principle here expressed was fundamental and that it should not be impaired.").

156. *Id.*

157. *See id.* ("The Executive Committee . . . *[e]xpressed* deep concern at the information given by the High Commissioner that, while the principle of non-refoulement is in practice widely observed, this principle has in certain cases been disregarded; [The Executive Committee *r]eaffirms* the fundamental importance of the observance of the principle of non-refoulement - both at the border and within the territory of a State – of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.").

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*; 1951 Refugee Convention, *supra* note 6, at art. 33.

(1) the U.N. Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ("U.N. Handbook");[162] (2) the U.N. High Commissioner for Refugees Guidance Note on Refugee Claims Relating to Victims of Organized Gangs ("UNHCR Gang Guidance");[163] and (3) the U.N. Refugee Agency's Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ("UNHCR DV Guidance").[164]

The U.N. Handbook was born from the U.N. Executive Committee of the High Commissioner's Programme's request and is meant to be a guideline for government officials determining refugee claims.[165] The U.N. Handbook is continually updated to address new and emerging refugee issues.[166] It contains clear and direct guidance for determining viable private-persecution claims:

> Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.[167]

The U.N. Handbook's definition of private persecution entitling a refugee to relief reveals two important principles of *non-refoulement* at international law: (1) private parties who violate human rights may commit persecution entitling their victims to relief;[168] and (2) *non-refoulement* is required unless the home state offers effective protection.[169] The U.N. Handbook states that "laws of the country of origin, and

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162. U.N. Handbook, *supra* note 58.
163. UNHCR Gang Guidance, *supra* note 153.
164. UNHCR DV Guidance, *supra* note 153.
165. U.N. Handbook, *supra* note 58, at Foreword.
166. *Id.*
167. *Id.* at ¶65.
168. *See id.*
169. *See id.*

particularly the manner in which they are applied, will be relevant" to claims for withholding or *non-refoulement*.[170]

These passages from the U.N. Handbook describe a broad class of refugees entitled to *non-refoulement* due to private persecution, whether the private actor is unconstrained due to the absence of state laws prohibiting human rights violations,[171] disregards those laws,[172] or is merely met with ineffective state intervention.[173] In no uncertain terms, the Handbook not only recognizes a broad interpretation of private persecution, but clearly adopts a standard requiring *effective* state protection, not merely a good-faith state effort.[174]

The UNHCR Gang Guidance provides guidance on how the U.N. Handbook's principles operate in a real-life example: refugees fleeing violence by private gangs in nations unwilling or unable to offer effective protection from those gangs.[175] The UNHCR Gang Guidance cites the U.N. Handbook's provision on private persecution, again demanding that state protection must be *effective* to preclude a successful *non-refoulement* claim for private persecution:

> In most gang-related claims, the persecution emanates from the criminal gangs and other similar non-State groups. As stipulated by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, persecution may "emanate from sections of the population that do not respect the standards established by the laws of the country concerned . . . [and when] discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection." After determining whether the harm feared can be considered persecution in the sense of the 1951 Convention, it is necessary to establish whether the State is *unwilling* or *unable* to provide protection to victims of gang-related violence. The authorities may be unwilling to protect a particular individual, for instance, because of their own financial interest in the gang activities or because they consider the person associated with or targeted by the gangs unworthy of protection. The State could prove unable to provide effective protection,

170. *See id.* at ¶43.
171. *See id.*
172. *See id.* at ¶65.
173. *See id.*
174. *See id.* at ¶43, ¶65.
175. UNHCR Gang Guidance, *supra* note 153, at 8–9.

> especially when certain gangs, such as the Maras, yield considerable power and capacity to evade law enforcement or when the corruption is pervasive. . . . A State is not expected to guarantee the highest possible standard of protection to all its citizens all the time, but protection needs to be real and effective.[176]

The UNHCR Gang Guidance also provides examples of factors indicating a state's unwillingness or inability to offer effective protection:

> lack of measures to ensure security to individuals at risk of harm by gangs; a general unwillingness on the part of the public to seek police or governmental assistance because doing so may be perceived as futile or likely to increase risk of harm by gangs; a prevalence of corruption, impunity and serious crimes, such as extrajudicial killings, drugs and human trafficking, implicating government officials, police and security forces.[177]

The UNHCR DV Guidance provides a similar reference to the U.N. Handbook's private-persecution section to support a requirement that governments provide *effective* protection against private persecution.[178] The UNHCR DV Guidance leaves no doubt that persecutory gender-related claims may be "perpetrated by State or private actors."[179] The UNHCR DV Guidance's acceptance of the *effective*-protection standard for unwilling-and-unable claims is unwavering:

> Even though a particular State may have prohibited a persecutory practice . . . the State may nevertheless . . . not be able to stop the practice effectively. In such cases, the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee

176. *Id.* at 9.

177. *Id.* at 9–10.

178. UNHCR DV Guidance, *supra* note 153, at ¶19 ("There is scope within the refugee definition to recognise both State and non-State actors of persecution. While persecution is most often perpetrated by the authorities of a country, serious discriminatory or other offensive acts committed by local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.") (citing U.N. Handbook, *supra* note 58, at ¶65).

179. UNHCR DV Guidance, *supra* note 153, at ¶ 9.

status is not valid.[180]

The UNHCR DV Guidance cites examples of states that expressly prohibit female genital mutilation or do not criminalize homosexuality but fail to offer effective protection from genital mutilation or homophobic violence.[181]

The U.N. Handbook and UNHCR guides are compelling, but not dispositive, in their interpretation of private-persecution standards at U.S. law.[182] However, when the explicit language of the U.N. Handbook and UNHCR guides are paired with the broad, exception-free[183] mandate of *non-refoulement* as expressed in the *Travaux Préparatoires* to the 1951 Refugee Convention—and the Convention *is* binding and dispositive on U.S. law through ratification of the Protocol—it is clear that (1) the definition of persecution must encompass private behavior when the home state is unwilling or unable to offer protection and (2) that protection must be *effective*. Where a home state is unwilling or unable to provide *effective* and meaningful protection, the principle of *non-refoulement* entitles a refugee to withholding of removal at international and U.S. law.

B. Agency Data on Withholding Grant Rates Generally

Having extensively discussed *non-refoulement* at international law, this Article now turns to American implementation of *non-refoulement* through withholding of removal. The previous analysis has shown that withholding and *non-refoulement*: (1) are meant to be identical or nearly identical to one another in significant part;[184] (2) comprise the fundamental cornerstone of refugee law;[185] (3) are essentially without exception at international law, by the U.S. delegation's own admission and

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180. *Id.* at ¶11 (emphasis removed).

181. *Id.* at ¶11, 17.

182. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 438–39 (1987) ("In interpreting the Protocol's definition of 'refugee' we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Geneva, 1979)."); *but see* INS v. Aguirre-Aguirre, 526 U.S. 415, 427–28 (1999) ("The U.N. Handbook may be a useful interpretive aid, but it is not binding on the Attorney General, the BIA, or United States courts.").

183 Art. 33(2) contains an exception for aliens who present national security risks or commit particularly serious crimes. The term "exception-free" in this article refers to the international community's rejection of any exception outside the text of the article itself.

184. *Cardoza-Fonseca*, 480 U.S. at 440.

185. Travaux Préparatoires, *supra* note 7, at Introduction.

leadership;[186] (4) are binding U.S. law through the treaty provision of the Constitution and the implementation of the INA;[187] (5) encompass claims based on private persecution when a home government is unwilling or unable to protect the refugee;[188] and (6) require that a home government provide *effective* protection against persecution.[189] This Section addresses the first four principles above, examining whether American jurisprudence has treated withholding generally as a foundational and near-absolute form of relief reflective of its status as the binding domestic version of *non-refoulement*. The rest of this Article will examine the final two principles to determine whether the United States has failed to fulfill its obligation to uphold *non-refoulement*.

To examine general withholding-of-removal trends in the United States, this Section turns to the Department of Justice's Executive Office of Immigration Review ("EOIR") agency data. Each Fiscal Year ("FY") from 2000 through 2018, the EOIR kept a Statistics Yearbook encompassing statistics and trends for that year and over the preceding four-year period.[190] Because each Statistics Yearbook reports data for the four years prior to its publishing, the agency data includes 22 years' worth of trends on asylum and withholding of removal dispositions, among other agency statistics.[191] However, the Fiscal Yearbooks did not track withholding, except as a subset of Convention Against Torture relief, until FY05, giving withholding data only from FY01–FY18.[192] This is perhaps the first indicator that American law and practice conflates withholding and other forms of refugee relief, neglecting withholding analysis and failing to recognize the binding nature of *non-refoulement*.

The EOIR Statistics Yearbooks portray withholding as a seldom-implemented form of relief at American law. Withholding is granted at a fraction of the rate at which asylum is granted. Grant rate alone does not explain *why* withholding is so rarely granted, nor does it explicitly show that American courts and administrative agencies are applying improper

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186. *Id.* at art. 33.

187. U.S. CONST. art. VI, cl. 2.; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

188. *See, e.g.*, Grace v. Barr, 965 F.3d 883, 889 (D.C. Cir. 2020).

189. U.N. Handbook, *supra* note 58, at ¶55.

190. *See, e.g.*, *Stat. Y.B. Fiscal Year 2018*, U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., 26–27 (2019) [hereinafter FY18 Yearbook].

191. *Compare* FY18 Yearbook, *supra* note 190, at 26–27, *with FY 2005 Stat. Y.B.*, U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., K2, K5 (2005) [hereinafter FY05 Yearbook].

192. *See* FY05 Yearbook, *supra* note 191, at K5.

standards or insufficient analyses to withholding claims. However, it clearly shows that whatever analysis American courts do use tends to result in a denial of withholding of removal at a disproportionately high rate to that of asylum. This Section contains charts and graphs displaying the data discussed. Figure 1 is a graph depicting asylum grant rates and asylum grants from FY01–FY18, while Figure 2 shows the same data for withholding. A chart displaying the raw data from the EOIR Statistic Yearbooks is displayed in Figure 3.

From FY01–FY18 the average annual grant rate for claims of withholding of removal in the United States was 12.249%.[193] Meanwhile, the average grant rate for asylum claims in that same timespan was 43.303%.[194] Because the analysis in Section D of this Part will focus on caselaw from 2015 to 2020, an examination of grant rates generally from 2015 on, in this case from FY14 (2015) to FY18 (2019), is appropriate. During this period, refugee claims were less successful generally, but the decline in granted refugee claims was more pronounced for withholding than asylum.[195] The average withholding rate from FY14–FY18 drops to 9.025%, which is 26% lower than the average withholding rate from FY01–FY18. By contrast, average asylum grant rates from FY14–FY18 decreased by less than 5% as compared to the total average asylum grant rate from FY01–FY18, retaining a substantially similar 42.189% average.[196] Both withholding and asylum grant rates dropped significantly within the FY14–FY18 time period as well, but the drop in grant rate was more substantial for withholding claims: withholding grant rates decreased 53% in that five-year span,[197] while asylum grant rates only decreased by 32%.[198]

From as early as FY01, withholding has been granted at a rate fractional to that of asylum. The author has calculated a value, *w/a*, which represents the withholding grant rates as a ratio of asylum grant rates for a given year. From FY01–FY15, *w/a* was relatively constant at an average

193. *Id.*; *FY 2010 Stat. Y.B.*, U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., K5 (2011) [hereinafter FY10 Yearbook]; *FY 2014 Stat. Y.B.*, U.S. DEP'T OF JUST. EXEC. OFF. FOR IMMIGR. REV., K5 (2015) [hereinafter FY14 Yearbook]; FY18 Yearbook, *supra* note 190, at 27.

194. FY05 Yearbook, *supra* note 191, at K5.

195. FY14 Yearbook, *supra* note 193, at K1, K5; FY18 Yearbook, *supra* note 190, at 26–27.

196. *Id.*

197. *Id.*

198. *Id.*

of 29.513.[199] That is to say that on average, withholding was granted less than one-third as often as asylum over the past 20 years. To demonstrate the level of consistency over that period, FY01 had a *w/a* of 29.469,[200] no year in that timeframe has a *w/a* above 35.119,[201] and only FY15 had a *w/a* as low as 23.363.[202]

But in FY16–FY18 there was a marked drop in withholding grant rate, asylum grant rate, and *w/a*. Withholding grant rates decreased from 11% in FY15 to 8.030% in FY16, 7.000% in FY17, and 6.094% in FY18.[203] Asylum rates also decreased, from 48.000% in FY15 to 42.776% in FY16, 38.000% in FY17, and 33.172% in FY18.[204] These numbers seem small at first, but with context they are significant: the average grant rate for withholding in FY16–18 was almost half the average rate in the preceding 16 years;[205] the asylum grant rate in FY16–18 was 14% less than the average rate in the 16 years prior.[206] That withholding grant rates were disproportionately affected by the drop in FY16–18 is reflected in *w/a*, which decreases to less than half its average value in the preceding years: the average *w/a* for FY16–FY18 was only 18.290, compared to the prior average of 29.880% for FY01–FY15.[207] The drop in *w/a* at this time means that not only were refugee claims generally being granted less frequently after FY16, but withholding grant rates were disproportionately impacted.

This data paints a picture of withholding as infrequently and decreasingly granted, both generally and in proportion to asylum grant rates. Though this data alone does not provide an explanation for both the low rate of withholding grants and the discrepancy between withholding and asylum grant rates, it does show withholding's place in American

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199. FY05 Yearbook, supra note 191, at K1, K5; FY10 Yearbook, supra note 193, at K1, K5; FY14 Yearbook, supra note 193, at K1, K5; FY18 Yearbook, supra note 190, at 26–27.

200. FY05 Yearbook, supra note 191, at K1, K5.

201. *Id.*; FY10 Yearbook, supra note 193, at K1, K5; FY14 Yearbook, supra note 193, at K1, K5; FY18 Yearbook, supra note 190, at 26–27.

202. FY18 Yearbook, supra note 190, at 26–27.

203. *Id.* at 27.

204. *Id.* at 26.

205. *Compare* FY18 Yearbook, supra note 190, at 27, *with* FY14 Yearbook, supra note 193, at K5, FY10 Yearbook, supra note 193, at K5, *and* FY05 Yearbook, supra note 191, at K5.

206. *Compare* FY18 Yearbook, supra note 190, at 26, *with* FY14 Yearbook, supra note 193, at K1, FY10 Yearbook, supra note 193, at K1, *and* FY05 Yearbook, supra note 191, at K1.

207. *Compare* FY18 Yearbook, supra note 190, at 26–27, *with* FY14 Yearbook, supra note 193, at K1, K5, FY10 Yearbook, supra note 193, at K1, K5, *and* FY05 Yearbook, supra note 191, at K1, K5.

jurisprudence. That withholding is rarely granted, decreasingly granted, and granted at a disproportionately lower rate than asylum does not reflect the broad definition of *non-refoulement*, its binding impact on U.S. law, and its foundational relationship to refugee law.

Figure 1. Asylum Grants and Grant Rates from FY01–18

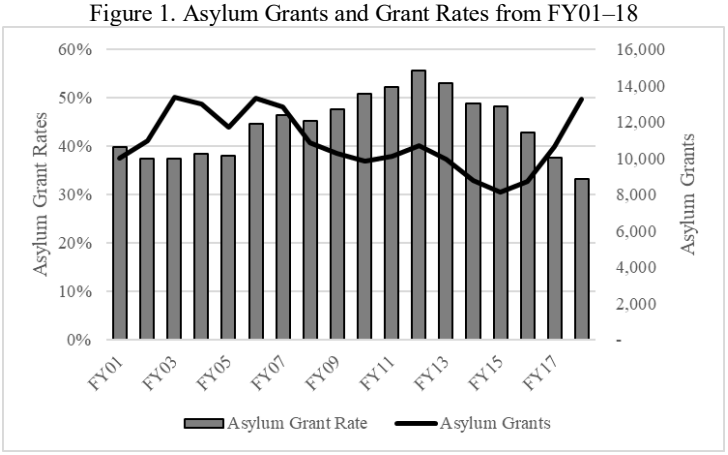

Figure 2. Withholding Grants and Grant Rates from FY01–18

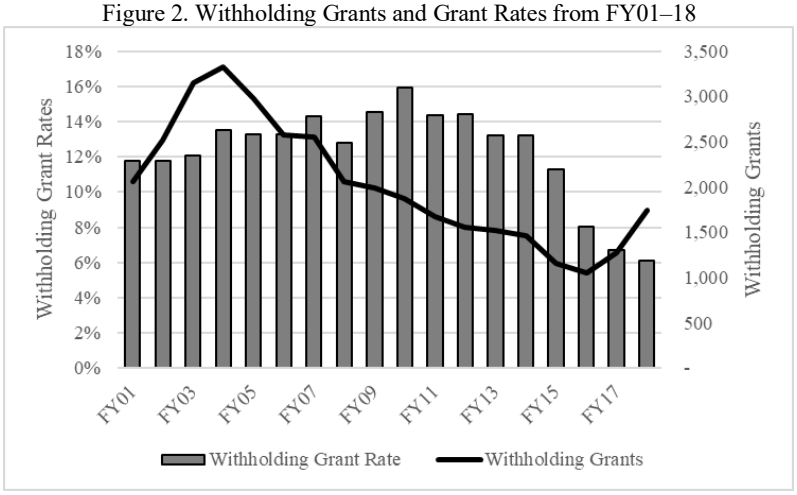

Figure 3. EOIR Statistic Yearbooks Raw Data

	Asylum Grants	Asylum Denials	Asylum Grant Rate	Withholding Grants	Withholding Denials	Withholding Grant Rate	w/a	Data Source
FY01	10,000	15,037	40%	2,056	15,412	12%	29.4688	FY05
FY02	10,977	18,389	37%	2,513	18,820	12%	31.5139	FY05
FY03	13,376	22,415	37%	3,151	22,937	12%	32.3188	FY05
FY04	13,015	20,867	38%	3,323	21,310	13%	35.1187	FY05
FY05	11,737	19,166	38%	2,978	19,486	13%	34.9045	FY05
FY06	13,304	16,477	45%	2,571	16,778	13%	29.7441	FY10
FY07	12,859	14,874	46%	2,554	15,343	14%	30.7773	FY10
FY08	10,881	13,167	45%	2,055	14,013	13%	28.2657	FY10
FY09	10,298	11,334	48%	1,984	11,680	15%	30.5005	FY10
FY10	9,869	9,554	51%	1,874	9,894	16%	31.3408	FY10
FY11	10,137	9,280	52%	1,670	9,943	14%	27.5451	FY14
FY12	10,715	8,503	56%	1,552	9,204	14%	25.8796	FY14
FY13	9,945	8,826	53%	1,518	9,986	13%	24.9061	FY14
FY14	8,775	9,222	49%	1,464	9,639	13%	27.0429	FY14
FY15	8,168	8,727	48%	1,153	9,055	11%	23.3631	FY18
FY16	8,728	11,676	43%	1,056	12,094	8%	18.7732	FY18
FY17	10,663	17,641	38%	1,274	17,738	7%	17.7873	FY18
FY18	13,248	26,689	33%	1,746	26,906	6%	18.3702	FY18

The author predicts the following criticism of this Section's analysis: because asylum has a lower requirement for likelihood of harm, is it not possible that the low and decreasing rate of withholding grants is due to refugees being granted asylum at an increasing rate? After all, if applicants are able to demonstrate a well-founded fear of persecution, but not a likelihood of persecution—two standards that the Supreme Court has found are different[208]—the claimant would be granted asylum and denied withholding. If more applications are being granted based on meeting the likelihood-of-harm standard for asylum, but not withholding, then low rates of withholding, and even *w/a* values showing disproportionately low withholding grant rates, could be reasonable.

This proposition fails for two reasons, one data-driven and the other based on legal principles. First, asylum rates have declined alongside both withholding grant rates and *w/a*.[209] The data does not support an increase in asylum grant rates to compensate for the disparity in withholding grant rates: grant rates for both asylum and withholding declined from FY16–18, with asylum grant rate decreasing by 22.452% and withholding grant rate decreasing by 24.120%.[210] The data does not support a conclusion that

208. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 423–24 (1987).

209. *Compare* FY18 Yearbook, supra note 190, at 26, *with* FY14 Yearbook, supra note 193, at K1, FY10 Yearbook, supra note 193, at K1, *and* FY05 Yearbook, supra note 191, at K1.

210. *Compare* FY18 Yearbook, supra note 190, at 26–27, *with* FY14 Yearbook, supra note 193, at K1, K5, FY10 Yearbook, supra note 193, at K1, K5, *and* FY05 Yearbook, supra note 191, at K1, K5.

the decrease in withholding grant rate is due to more applicants succeeding on asylum claims based on the lower likelihood-of-harm standard. Next, U.S. caselaw does not require IJs, the BIA, or circuit courts to consider claims that are not necessary to granting or denying relief.[211] If an applicant meets the criteria for asylum, but would not meet the criteria for withholding because of its higher likelihood-of-harm standard, the disposition authority would not reach the issue of withholding, as it would no longer be necessary for disposition.[212] Because withholding rates were calculated using grants as a percentage of grants and denials only, they do not include cases in which withholding was not reached. Therefore, the withholding grant rate figures above do not include cases in which asylum was granted based on the likelihood-of-harm standard and withholding was denied on the same grounds.

This data shows that withholding is granted at both a low rate and a disproportionately lower rate than asylum in American law and practice. Withholding-grant-rate data suggests, but does not definitively demonstrate, that withholding practice does not meet the foundational, broad-reaching mandate of *non-refoulement*. The sharp decrease in withholding grant rates, both generally and as a percentage of asylum rates (*w/a*) at FY17 does, however, correlate to an increase in standards for asylum in the AG's 2018 decision *Matter of A-B-*.[213] It bears remembering that *Matter of A-B-* temporally coincides with a marked decrease in withholding grant rates, both generally and as a fraction of asylum rates. Though the Fiscal Yearbook data does not and cannot explain exactly *why* withholding grant rates fall disproportionately in FY17, the following Sections posit that misapplication of heightened asylum standards to withholding claims at that time could logically be a significant contributing factor.

C. Matter of A-B- *and Attorney General Discretion*

Having established that withholding is granted at a lower rate than would be expected in order to uphold the principle of *non-refoulement*, the next question may be: *why*? Why does American law and practice apply a foundational concept of refugee law with such irregularity and infrequency? Is this a coincidental correlation? Or can we track a specific practice or legal principle to explain the break from international law? This Article's general argument is that American law and practice does not

211. INS v. Bagamasbad, 429 U.S. 24 (1976) (per curiam).

212. *See, e.g.*, Prieto-Pineda v. Barr, 960 F.3d 516, 522 (8th Cir. 2020) (finding BIA did not need to rule on matters unnecessary to its final disposition).

213. Matter of A-B-, 27 I. & N. Dec. 316 (2018).

comply with the binding principle of *non-refoulement*. There could be other points of divergence from which American law fails to adhere to binding international and domestic refugee law principles, but this Article's discrete vantage point is the misapplication of AG discretion to withholding in private-persecution claims, which has been adopted by some U.S. circuit courts. That misapplication is most significantly embodied in the now-vacated, but still impactful 2018 AG decision *Matter of A-B-*.[214]

The AG has the authority to review and dispose of BIA cases.[215] This review authority permits the AG to proclaim standards and issue opinions deciding issues of immigration and refugee law.[216] Cases are referred to the AG either at the request of the AG him or herself, by the BIA, or by the Secretary of Homeland Security.[217] There is no discernable standard, limitation, or uniform procedure for the types of cases or issues the AG may refer to him or herself.[218] There is no comment or review period before enacting unilateral AG-mandated rulings.[219] The authority, though controversial, is rarely invoked.[220] AGs have used referral authority sparingly to settle disputed issues of law or policy and referred cases have tended historically to result in negative dispositions for refugee applicants.[221] This authority has been invoked more frequently after 2016 than ever before.[222]

On March 7, 2018, the AG directed the BIA to refer *Matter of A-B-*, a case in which the BIA had granted asylum.[223] The AG self-referred the case to determine "whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal."[224] Though *Matter of A-B-* was referred for disposition on this issue, the opinion also goes on to establish new standards for private

214. *See id.* at 337 (announcing new standard for private persecution contrary to international law).
215. 8 C.F.R. §1003.1(h)(1)(i) (2021).
216. *Id.*
217. *Id.*
218. Holliday, *supra* note 35.
219. *Id.* at 2158–59.
220. *Id.* at 2159.
221. *Id.* at 2159–60.
222. *See id.* at 2161 ("Comparatively, Attorneys General under the Trump Administration have already used the referral authority more frequently than previous administrations, invoking it four times in 2018 alone.").
223. Matter of A-B-, 27 I. & N. Dec. 316 (A.G. 2018).
224. *Id.* at 317.

persecution generally, including redefining the unwilling-or-unable standard.[225]

Matter of A-B- contains only a one-sentence factual background: "The respondent asserted that her ex-husband, with whom she shares three children, repeatedly abused her physically, emotionally, and sexually during and after their marriage."[226] In reality the respondent, Ms. A-B-, was married to a serial abuser and monster by any standard: he raped and beat her consistently for 15 years, threatened to kill her with a loaded gun, and threatened to hang her while she was pregnant with his child.[227] Ms. A-B- could not secure effective protection from police because her husband's brother was a local police officer.[228] The local El Salvadoran court issued two protective orders against Ms. A-B-'s husband, but the police refused to enforce the orders and made Ms. A-B- personally serve them on her husband, exposing her to risk of further abuse and undermining the façade of protection.[229] When Ms. A-B- moved two hours away, her abuser found her.[230] After divorcing her husband, Ms. A-B- was confronted by his brother, the police officer, who threatened to kill her.[231]

Despite these circumstances, the AG vacated the BIA's grant of relief and denied withholding and asylum to Ms. A-B-.[232] In doing so, the opinion codified a heightened standard for the third prong of persecution, government involvement:

> An applicant seeking to establish persecution based on violent conduct of a private actor "must show more than 'difficulty . . . controlling' private behavior." The applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims."[233]

Of note, the AG in *Matter of A-B-* levied this heightened standard for persecution to both asylum and withholding claims, since the standard was expressly and intentionally applied to a claim for both in the case.[234]

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225. *Id.* at 337.

226. *Id.* at 321; *see also* Vogel, *supra* note 46, at 379 ("In his decision, the Attorney General referenced the facts asserted by Ms. A-B- in one sentence").

227. Vogel, *supra* note 46, at 379.

228. *Id.* at 379–80.

229. *Id.* at 380.

230. *Id.*

231. *Id.*

232. Matter of A-B-, 27 I. & N. Dec. 316, 346 (2018).

233. *Id.* at 337 (internal citations omitted).

234. *See id.* at 317 ("Specifically, I sought briefing on whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable

Whatever a condones-or-complete-helplessness standard entails, it is clearly higher than a standard requiring that protection be effective:[235] a government, like in *Matter of A-B-*, may be unable to offer effective protection but, through either a good-faith but ineffective effort or only near-complete helplessness, might be considered willing and able to protect a refugee claimant. In such cases, the standard of persecution for withholding of removal in private-persecution claims is higher than *non-refoulement*, though these forms of relief are meant to mirror one another.[236]

On June 16, 2021, the current AG exercised his discretion to certify *Matter of A-B-* to himself and vacate the 2016 decision.[237] The new AG decision cites confusion among U.S. courts in applying the standards laid out in *Matter of A-B-* and the need for promulgation of unified agency regulations for private persecution claims.[238] *Matter of A-B-*'s vacation is a step toward aligning withholding practice with the requirements of *non-refoulement*, but serious concerns about American practice remain unaddressed.

The decision vacating *Matter of A-B-* does not mention *non-refoulement*, the 1967 Protocol, Article 33, or international refugee law at all.[239] That the current AG recognizes the impropriety of *Matter of A-B-*'s standard corrects in part the latest deviance from *non-refoulement* standards, but it is unclear whether *non-refoulement* will be considered in the new agency rules or any further BIA or AG decisions defining private persecution standards.

Matter of A-B-'s impact on circuit canon is still palpable despite its vacation. Circuit courts that have adopted *Matter of A-B-*'s private persecution standard as reasonable are still bound by precedent to adhere

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'particular social group' for purposes of an application for asylum or withholding of removal."); *see also id.* at 320 ("While I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application . . . in practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address.").

235. *See, e.g.*, Grace v. Barr, 965 F.3d 833, 898–99 (D.C. Cir. 2020) ("A government that 'condones' or is 'completely helpless' in the face of persecution is obviously more culpable, or more incompetent, than one that is simply 'unwilling or unable' to protect its citizens.").

236. *Compare id.*, *with* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (stating that withholding is meant to embody *non-refoulement*) (emphasis added).

237. Matter of A-B-, Respondent, 28 I. & N. Dec. 307, 308–09 (2021).

238. *Id.*

239. *Id.* at 307–09.

to that standard for private persecution claims.[240] Even post-*Matter of A-B-*, those courts can and do continue to apply the heightened standard as a matter of precedent and circuit canon.[241] Of equal, continued concern are lines of circuit precedent that adopted a heightened standard for private persecution claims entirely independently of *Matter of A-B*.[242] For both of these types of cases, *Matter of A-B-*'s vacation does not mitigate its impact on the law. Circuit caselaw both adopting *Matter of A-B-*'s standard as reasonable and establishing heightened standards for private persecution are discussed in greater detail Section D.

As discussed in this Section, this exercise of AG discretion in unilaterally assigning standards to refugee claims may be appropriate in asylum cases, but it is not appropriate in resolving withholding claims.[243]

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240. *Compare* Scarlett v. Barr, 957 F.3d 316, 331–34 (2d Cir. 2020) (adopting *Matter of A-B-*), *with* Ramirez-De Requeno v. Garland, No. 19-3201, 2022 U.S. App. LEXIS 4083, at *4 (Feb. 15, 2022) (continuing to adhere to the *Matter of A-B-* heightened standard and citing *Scarlett v. Barr* as precedent for its continued application in the Second Circuit even after *Matter of A-B-*'s vacation).

241. *Compare* Scarlett, 957 F.3d at 331–34, *with* Ramirez-De Requeno, 2022 U.S. App. LEXIS 4083, at *4.

242. *See, e.g.*, Olmos-Colaj v. Sessions, 886 F.3d 168, 176 (1st Cir. 2018); Saldana v. Lynch, 820 F.3d 970, 977 (8th Cir. 2016); Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000).

243. *See, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 420 (1999) ("[W]hereas withholding is mandatory unless the Attorney General determines one of the exceptions applies, the decision whether asylum should be granted to an eligible alien is committed to the Attorney General's discretion."); *but see id.* at 424–25 ("It is clear that principles of *Chevron* deference are applicable to this statutory scheme. The INA provides that '[t]he Attorney General shall be charged with the administration and enforcement' of the statute and that the 'determination and ruling by the Attorney General with respect to all questions of law shall be controlling.' Section 1253(h), moreover, in express terms confers decisionmaking authority on the Attorney General, making an alien's entitlement to withholding turn on the Attorney General's 'determin[ation'] whether the statutory conditions for withholding have been met.") (internal citation omitted).

That *Chevron* deference applies to the INA does not excuse the United States from complying with its constitutional requirement to adhere to *non-refoulement* treaty obligations. While some decision-making authority rests with the Attorney General to determine whether "statutory standards" for withholding are met in a particular case, *Chevron* does not give the Attorney General authority to determine what those "statutory standards" are, particularly where legislative intent is clear in regard to withholding of removal standards. The clear legislative intent of the INA, as explicitly acknowledged by the Supreme Court in *Stevic* and *Cardoza-Fonseca* to comply with the 1951 Refugee Convention and 1967 Protocol leave no room for ambiguity in determining or administering

While the AG has authority to self-refer cases involving applications for withholding, his or her authority is only to resolve those cases according to statutory standards,[244] not to develop higher standards for private persecution. Because asylum is granted at the AG's discretion,[245] it is only logical that the AG can raise standards for asylum grants: doing so is essentially stating *in my discretion, I will not grant any asylum claim that does not reach this new standard*. The same cannot be said for withholding because the AG *must* grant withholding to a meritorious applicant, whose merit is determined by statutory criteria,[246] a principle established by international law,[247] U.S. treaty and constitutional obligations,[248] and Supreme Court precedent.[249] The AG's declaration of a higher unwilling-or-unable standard for withholding applicants in *Matter of A-B-* was an inappropriate overextension of authority to an area in which the AG does not have discretion. That overextension violated international and domestic principles of *non-refoulement* and the statutory purpose and mechanics of the INA.[250]

The decision vacating *Matter of A-B-* does not address the AG's lack of authority to unilaterally raise withholding standards.[251] Not once does the decision vacating *Matter of A-B-* differentiate between AG discretion in asylum cases and a lack of discretion in withholding claims.[252] Vacating *Matter of A-B-* is a positive and major step in reevaluating U.S. refugee practice, but it provides no indication that the misapplication of AG discretion to withholding claims will be recognized or addressed without further development in U.S. refugee law and practice.

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withholding standards for private persecution, precluding the Attorney General from changing standards for withholding under the guise of *Chevron*.

244. *See id.* at 424–25.

245. *See id.* at 420; 8 U.S.C.§ 1158.

246. 8 U.S.C. § 1231(b)(3); INS v. Cardoza-Fonseca, 480 U.S. 421, 444 (1987).

247. *See, e.g.*, 1951 Refugee Convention, *supra* note 6, at 176; Travaux Préparatoires, *supra* note 7, at art. 33; U.N. Handbook, *supra* note 58, at 65.

248. 1967 Protocol, *supra* note 6; U.S. CONST. art. VI, cl. 2.

249. *Aguirre-Aguirre*, 526 U.S. at 420; *Cardoza-Fonseca*, 480 U.S. at 444.

250. *See* INS v. Stevic, 467 U.S. 407, 421 (1984) (describing INA as amended by Refugee Act of 1980 as coming into compliance with Art. 33).

251. *See id.*

252. *See id.*

D. Circuit Caselaw Analysis of Withholding in Cases of Private Persecution

Having established the binding nature of *non-refoulement* and withholding, their broad applicability to private-persecution claims, and the heightened withholding standard from the now-vacated *Matter of A-B-* decision, this Article next analyzes how that standard has been incorporated into U.S. law and policy through U.S. Circuit Courts of Appeals decisions. The caselaw shows that American courts conflate asylum and withholding, with analysis generally dedicated to the asylum claim while the withholding claim is frequently dismissed in a single sentence with no original analysis. While some circuits have rejected the *Matter of A-B-* standard as unlawful, others have adopted it as reasonable and solidified its place as circuit precedent. In the most troubling cases, there is a combination of heightened standards and no consideration for withholding: the *Matter of A-B-* standard is applied to an asylum claim and the withholding claim is dismissed in one sentence because the applicant was not granted asylum. The result is that the circuit court intentionally or unintentionally applies an unlawful standard to withholding claims by failing to engage in a separate withholding analysis.

1. Data Criteria

The circuit caselaw dataset was selected by relevance, date, and impact on the law. The first and most important criterion for selection was that a case's withholding disposition must in significant part turn on private persecution and the unwilling-or-unable standard.[253] The dataset

253. The author pulled every case from the selected time period that included the phrase "unwilling" or "unable" within one sentence of "protect" or "control." This produced hundreds of cases. The author then refined to 43 cases involving a claim for withholding of removal. Finally, the author reduced those cases to those in which the unwilling-or-unable analysis materially impacted the court's disposition. The result was 30 cases: Bringas-Rodriguez v. Sessions, 850 F.3d 1051 (9th Cir. 2017) (en banc); Grace v. Barr, 965 F.3d 833 (D.C. Cir. 2020); Hernandez-Chacon v. Barr, 948 F.3d 94 (2d Cir. 2020); Doe v. Att'y Gen. of the U.S., 956 F.3d 135 (3d Cir. 2020); Scarlett v. Barr, 957 F.3d 316 (2d Cir. 2020); Prieto-Pineda v. Barr, 960 F.3d 516 (8th Cir. 2020); Galloso v. Barr, 954 F.3d 1189, 1193 (8th Cir. 2020); Antonio v. Barr, 959 F.3d 778 (6th Cir. 2020); Gonzales-Veliz v. Barr, 938 F.3d 219 (5th Cir. 2019); Juarez-Coronado v. Barr, 919 F.3d 1085, 1089 (8th Cir. 2019); Martin Martin v. Barr, 916 F.3d 1141 (8th Cir. 2019); Orellana v. Barr, 925 F.3d 145 (4th Cir. 2019); K.H. v. Barr, 920 F.3d 470 (6th Cir. 2019); C.J.L.G. v. Sessions, 880 F.3d 1122 (9th Cir. 2018); Sama v. Att'y Gen. of the U.S., 887 F.3d 1225 (11th Cir. 2018); Tilija v. Att'y Gen. of the

only includes cases in which the court analyzed whether a government was unable or unwilling to protect a withholding applicant from private persecution and that determination played a significant part in the grant or denial of withholding of removal. The cases selected span from January 1, 2015, to December 31, 2020.[254] Only published U.S. Courts of Appeals cases were considered. The results include cases from each U.S. circuit court. Many involve claims for withholding due to gang violence or domestic abuse.[255] While some courts devote calculated analysis to withholding claims in these circumstances, others troublingly dismiss withholding claims in one sentence without analysis. While some reject the heightened *Matter of A-B-* standard, others expressly adopt it.

2. Results

An examination of caselaw from each U.S. circuit makes four principles clear: (1) courts conflate asylum and withholding and frequently dismiss withholding claims with little or no analysis; (2) there is little uniformity among circuit dispositions on private-persecution standards, with some adopting a heightened standard while others adhere to the effective-protection standard; (3) few circuits have confronted the *Matter of A-B-* standard, and there is little unity among those who have; and (4) circuit decisions, unlike those of the Supreme Court, tend not to reference *non-refoulement* and the international foundations of U.S. refugee law.

Of the 30 cases in the dataset, nearly half dispose of an entire withholding claim in one sentence or less with no individual analysis.[256]

U.S., 930 F.3d 165 (3d Cir. 2018); Olmos-Colaj v. Sessions, 886 F.3d 168 (1st Cir. 2018); Villalta-Martinez v. Sessions, 882 F.3d 20 (1st Cir. 2018); Justo v. Sessions, 895 F.3d 154 (1st Cir. 2018); Edionseri v. Sessions, 860 F.3d 1101 (8th Cir. 2017); Morales-Morales v. Sessions, 857 F.3d 130 (1st Cir. 2017); Silais v. Sessions, 855 F.3d 736 (7th Cir. 2017); Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017); Kamar v. Sessions, 875 F.3d 811 (6th Cir. 2017); Mendoza-Ordonez v. Att'y Gen. of the U.S., 869 F.3d 164 (3d Cir. 2017); Cinto-Velasquez v. Lynch, 817 F.3d 602 (8th Cir. 2016); Saldana v. Lynch, 820 F.3d 970 (8th Cir. 2016); Vega-Ayala v. Lynch, 833 F.3d 34 (1st Cir. 2016); Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015); Pan v. Holder, 777 F.3d 540 (2d Cir. 2015); Ritonga v. Holder, 633 F.3d 971 (10th Cir. 2011).

254. In the five-year timespan from January 1, 2015, to December 31, 2020, there were no relevant cases from the U.S. Court of Appeals for the Tenth Circuit. To encompass Tenth Circuit precedent, the author generated another search from January 1, 2010, to December 31, 2020, to capture relevant Tenth Circuit posture.

255. *See* Ad Hoc Committee, *supra* note 5.

256. *See Galloso*, 954 F.3d at 1193 (denied because asylum denied); *Gonzales-Veliz*, 938 F.3d at 224 (denied because asylum denied); *Juarez-*

Some that address withholding in greater detail note that the IJ or BIA dismissed a withholding claim in one sentence without analysis because asylum was denied; none find error in this cursory analysis.[257] A typical one-sentence withholding dismissal is as follows: "And because [the applicant] cannot satisfy the lower burden of proof required to establish eligibility for asylum, it follows that she cannot establish eligibility for withholding of removal."[258] Because withholding requires that persecution is "likely" whereas asylum only requires a "well-founded fear" of persecution, the standard for likelihood of harm in withholding cases is more difficult to meet.[259] It follows that a withholding claim can be dismissed without separate analysis in those cases where a particular harm *qualifying or failing to qualify as persecution both for purposes of asylum and withholding* does not meet the well-founded-fear likelihood standard. Such a claim would automatically fail to meet the "likely" standard for withholding.

But likelihood of harm is just one of three criteria for determining persecution. The AG has exercised arguably lawful discretion to raise standards for government involvement, another criterion for persecution, in asylum applications involving private persecution. As discussed in the previous Section, that discretion does not extend to withholding claims. Because the higher unwilling-or-unable standard from *Matter of A-B-*, prior to its vacation, was lawfully applied to asylum but not withholding, opinions denying asylum due to an applicant's failure to meet that standard for government involvement should not automatically deny a withholding claim without separate analysis. Yet federal courts *do* in fact dismiss withholding claims based on a one-sentence withholding disposition bootstrapped to an asylum claim involving application of a heightened

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Coronado, 919 F.3d at 1089 (denied because asylum denied); *Martin Martin*, 916 F.3d at 1145 (denied because asylum denied); *C.J.L.G.*, 880 F.3d at 1151 (denied because asylum denied); *Sama*, 887 F.3d at 1232 (denied because asylum denied); *Edionseri*, 860 F.3d at 1105 (denied because asylum denied); *Morales-Morales*, 857 F.3d at 136 (denied because asylum denied); *Cinto-Velasquez*, 817 F.3d at 607 n.1 (waived); *Saldana*, 820 F.3d at 978 (denied because asylum denied); *Vega-Ayala*, 833 F.3d at 40 (denied because asylum denied); *Hernandez-Avalos*, 784 F.3d at 953 n.11 (denied because asylum denied); *Pan*, 777 F.3d at 545 (describing withholding denial as "derivative" of asylum); *Ritonga*, 633 F.3d at 978 (denied because asylum denied).

257. *See, e.g.*, *Antonio*, 959 F.3d at 798 (noting that BIA denied because asylum denied without finding error in failure to separately analyze withholding).

258. *Galloso*, 954 F.3d at 1193 (citation omitted).

259. INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

asylum standard for private persecution. Take the following hypothetical example:

An alien is apprehended inside of the United States after illegally entering the country. She is fleeing Honduras, where she believes her life was threatened because of her abusive husband. She concedes removability and applies for asylum and withholding. The IJ determines that the feared harm does not constitute persecution because the government of Honduras is not unwilling or unable to protect the alien from the threatened harm. The BIA affirms, and the case is reviewed by the U.S. Court of Appeals for the Fifth Circuit. In this scenario, the Fifth Circuit applies the condones-or-complete-helplessness standard from *Matter of A-B-*, which has been adopted as circuit precedent. The court upholds the denial of asylum because the Honduran government did not condone or was not completely helpless to protect the alien, though perhaps they were unable or unwilling to offer *effective* protection. The court then denies the withholding claim because the alien failed to meet the burden for asylum and withholding requires meeting a higher standard for likelihood of harm.

What is wrong with that scenario? To begin with, there is not a higher standard for the criterion of government involvement in withholding cases, so any asylum disposition based on government involvement cannot logically preclude withholding eligibility, unless the standards are identical. But as discussed throughout this Article, they are not: withholding is the codification of *non-refoulement*, which requires that governments provide *effective* protection against private persecution, not merely a lack of helplessness or condonation. When an asylum claim is denied because the court applies the *Matter of A-B-* condones-or-complete-helplessness standard, the court must apply a separate unwilling-or-unable standard examining effective protection to the withholding claim in order to comply with international refugee law, constitutional treaty obligations, and the purpose of the INA. By denying asylum based on a failure to meet a heightened standard for government involvement and denying withholding without further analysis based solely on the denial of asylum, the court in this scenario fails to adhere to the binding principle of *non-refoulement*.

What else is wrong with that scenario? *It is real*. In *Gonzales-Veliz*, the Fifth Circuit reviewed an application for asylum and withholding from a Honduran alien fleeing domestic violence.[260] The court applied the *Matter of A-B-* standard that "[t]he applicant must show that the government condoned the private actions 'or at least demonstrated

260. *Gonzales-Veliz*, 938 F.3d at 223–24.

complete helplessness to protect the victims'" and denied the applicant's asylum claim.[261] The *Gonzales-Veliz* court summarily denied the withholding-of-removal claim based on the *Matter of A-B-* asylum standard, stating, "If an applicant does not carry his burden for asylum, he will not qualify for withholding of removal."[262] The Fifth Circuit's denial of withholding—based on an unlawful application of the *Matter of A-B-* standard without engaging in a separate withholding analysis—violates the principle of *non-refoulement*.

The Fifth Circuit is not alone in misapplying *Matter of A-B-* to dismiss withholding claims. The Second Circuit applied *Matter of A-B-*'s condones-or-complete-helplessness standard to withholding in its 2020 *Scarlett v. Barr* decision.[263] *Scarlett* involved a Jamaican former police officer who outstayed his B-2 non-immigrant visa.[264] The alien in the case conceded removability and applied for asylum, withholding, and CAT relief based on threats he received from corrupt police officers with whom he had worked in Jamaica.[265] The *Scarlett* court engaged in an in-depth recapitulation of the *Matter of A-B-* standard before accepting it into Second Circuit canon.[266] Unlike the Fifth Circuit in *Gonzales-Veliz* and other cases with one-sentence derivative withholding denials, the *Scarlett* court engaged in an extensive withholding analysis.[267] But this analysis misapplied *Matter of A-B-*'s condones-or-complete-helplessness standard to withholding rather than asking whether the Jamaican government could offer *effective* protection, as is required to uphold *non-refoulement* and lawfully administer withholding at international and domestic law.[268] Both the Second and Fifth circuits continue to adhere to the *Matter of A-B-* standard as precedent despite its vacation.[269]

Three other circuit courts have adopted or referenced the condones-or-complete-helplessness standard, even before *Matter of A-B-*, by

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261. *Id.* at 231 (quoting Matter of A-B-, 27 I. & N. Dec. 316, 337 (2018)); *see also id.* at 234–35 (discussing and approving the *Matter of A-B-* standard).

262. *Id.*, 938 F.3d at 224 (quoting Ghotra v. Whitaker, 912 F.3d 284, 288 (5th Cir. 2019)).

263. Scarlett v. Barr, 957 F.3d 316, 331–34 (2d Cir. 2020).

264. *Id.* at 321.

265. *Id.* at 322.

266. *Id.* at 331–34.

267. *See id.*

268. *See id.*

269. *See, e.g.*, Ramirez-De Requeno v. Garland, 2022 U.S. App. LEXIS 4083, at *4 (Feb. 15, 2022); Perez-Ramirez v. Garland, 2022 U.S. App. LEXIS 262, at *2 (Jan. 5, 2022).

adopting BIA rulings applying that standard.[270] It is appropriate to begin with the Seventh Circuit, whose now-21-year-old opinion in *Galina v. INS* is cited by *Matter of A-B-* for its heightened standard.[271] *Galina* involved a Russian-Jewish immigrant who suffered ethnicity-based persecution in her native Latvia, conceded removability, and sought asylum in the United States.[272] *Galina* did not involve a claim for withholding of removal.[273] *Matter of A-B-* cited *Galina* for the proposition that an "applicant must show that the government condoned the private actions 'or at least demonstrated a complete helplessness to protect the victims.'"[274] *Matter of A-B-* quoted *Galina* out of context. The *Galina* court *actually* said: "a finding of persecution *ordinarily* requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, condoned it or at least demonstrated a complete helplessness to protect the victims."[275] Moreover, *Galina* was a case in which the Seventh Circuit reversed the BIA's denial of asylum and chastised the BIA for denying meritorious claims based on a "woefully inaccurate" understanding of refugee law.[276] In examining the government-involvement criterion for persecution, the full quote from which *Matter of A-B-* pulled select words is as follows:

> The fact that the police had responded to Mr. Galin[a]'s call in 1993 or 1994 might be a reason to find that his wife had not been a victim of persecution after all, since a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, condoned it or at least demonstrated a complete helplessness to protect the victims. But the Board found that Galina had been a victim of persecution notwithstanding the police response to her husband's call, and this implies that if she were returned to Latvia and subjected to the same treatment (or worse–since her persecutors wanted her out of Latvia, and so may kill her if they can't keep her out of the country), it would still be persecution, even if the

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270. *See, e.g.*, Olmos-Colaj v. Sessions, 886 F.3d 168, 176 (1st Cir. 2018); Saldana v. Lynch, 820 F.3d 970, 977 (8th Cir. 2016); Galina v. INS, 213 F.3d 955, 958 (7th Cir. 2000).

271. Matter of A-B-, 27 I. & N. Dec. 316, 337 (2018).

272. *Galina*, 213 F.3d at 955–56.

273. *See id.*

274. *Matter of A-B-*, 27 I. & N. Dec. at 337 (quoting *Galina*, 213 F.3d at 958).

275. *Galina*, 213 F.3d at 958 (emphasis added).

276. *See id.* at 956 (internal citations omitted).

police might take some action against telephone threats.[277]

The *Galina* court's reference to the condones-or-complete-helplessness standard is irrelevant to the ultimate holding reversing the BIA and granting asylum.[278] Indeed, the court's ultimate holding is that the Latvian government's response *met* the unwilling-or-unable standard.[279] Examining *Galina* demonstrates several principles relevant to both Seventh Circuit posture and *Matter of A-B-*: (1) the opinion is 21 years old, with no Seventh Circuit case in the past five years using the heightened standard to determine disposition on a withholding case;[280] (2) the *Galina* opinion reverses the BIA, granting asylum and criticizing the BIA's refusal to accept meritorious claims;[281] (3) *Galina* and its reference to a condones-or-complete-helplessness standard were not applied to withholding of removal, only asylum;[282] (4) the *Galina* court's reference to the heightened standard was dicta;[283] and (5) the *Galina* court upheld the BIA's determination that the government involvement in the case met the unwilling-or-unable standard for private persecution.[284]

The First and Eighth circuits adopted, at least in part, a condones-or-complete-helplessness standard for private persecution by affirming BIA decisions applying that standard prior to *Matter of A-B-*.[285] The Eighth Circuit adopted the condones-or-complete-helplessness standard in *Saldana v. Lynch*, affirming the BIA's decision denying asylum, withholding, and CAT relief to applicants fleeing gang violence in their native Mexico.[286] The *Saldana* court proclaimed that "an applicant must show that the government either condones the conduct or is unable to protect the victims" and that "unable" means "complete helplessness."[287] Like *Matter of A-B-*, the *Saldana* court cited *Galina* for the complete-helplessness standard.[288] In *Olmos-Colaj v. Sessions*, the First Circuit affirmed a BIA decision denying asylum, withholding, and CAT relief to

277. *Id.* at 958 (internal citations omitted).
278. *See id.*
279. *See id.*
280. *See, e.g.*, Silais v. Sessions, 855 F.3d 736 (7th Cir. 2017) (denying petition without using heightened standard).
281. *See Galina*, 213 F.3d at 955–56.
282. *See id.*
283. *See id.*
284. *See id.*
285. *See, e.g.*, Olmos-Colaj v. Sessions, 886 F.3d 168, 176 (1st Cir. 2018); Saldana v. Lynch, 820 F.3d 970, 977 (8th Cir. 2016).
286. *Saldana*, 820 F.3d at 973.
287. *Id.* at 976–77 (citations omitted).
288. *Id.* at 977.

applicants fleeing private violence following the Guatemalan Civil War.[289] The *Olmos-Colaj* court found, without citing any authority for a "condones" standard, that

> "[a] petitioner must . . . show that the persecution is the direct result of government action, government-supported action, or government's unwillingness or inability to control private conduct." Petitioners claim that "[p]ervasive discrimination exists in all aspects of Guatemalan society [and that] [t]he government cannot protect Ms. Yolanda and Ms. Consuelo." However, substantial evidence supports the BIA's finding that petitioners "did not show that the government of Guatemala condoned the actions of the people that mistreated petitioners or that the Guatemalan government is unable or unwilling to protect petitioners from the people that they fear."[290]

Each of these decisions is problematic. The *Saldana* court's complete-helplessness standard is drawn from a misunderstanding of *Galina*[291] and has since been adopted into a distinct line of Eighth Circuit caselaw.[292] The *Olmos-Colaj* court merely recites the BIA's application of a "condones" standard without any authority to support that standard's reasonableness or precedent.[293]

Even in circuits that have not adopted *Matter of A-B-* or some other iteration of the condones-or-complete-helplessness standard, some require a home state to do less than provide effective protection: in the Ninth Circuit, withholding has been denied by a showing that the police did "anything" to protect an applicant;[294] a separate line of Eighth Circuit cases has applied heightened standards requiring only that the home nation is "aggressively combatting" private violence in general, without regard to whether the state effectively protected a particular withholding applicant;[295] the First Circuit has denied withholding claims by conflating

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289. *Olmos-Colaj*, 866 F.3d at 171.

290. *Id.* at 176 (internal citations omitted).

291. *See Saldana*, 820 F.3d at 977.

292. *See, e.g.*, Galloso v. Barr, 954 F.3d 1189 (8th Cir. 2020); Edionseri v. Sessions, 860 F.3d 1101 (8th Cir. 2017).

293. *See Olmos-Colaj*, 866 F.3d at 171.

294. *See, e.g.*, C.J.L.G. v. Sessions, 880 F.3d 1122, 1143 (9th Cir. 2018) (finding Honduran government not unwilling or unable "because the [country conditions] report does not support C.J.'s subjective statement that the police 'couldn't do anything'").

295. *See, e.g.*, Martin Martin v. Barr, 916 F.3d 1141, 1144 (8th Cir. 2019) (quoting Cinto-Velasquez v. Lynch, 817 F.3d 602, 605–06 (8th Cir. 2016)).

the "acquiescence" standard for CAT relief and finding difficulty preventing actual harms insufficient;[296] the Tenth Circuit's only case in the last ten years determining a withholding claim based on government inability or unwillingness to protect an applicant from persecution involved an examination of Indonesian policy aims rather than ability to effectively protect an applicant from private religious persecution;[297] the Eleventh Circuit has found that the Cameroonian government was not unwilling or unable to protect a gay applicant from private homophobic persecution even though the government itself outlawed homosexuality as a crime.[298] Each of these lines of caselaw fails to apply the international standard of effective protection for *non-refoulement*, violating international law, U.S. constitutional treaty obligations, and the purpose of the INA.

At the same time, two circuits have expressly considered and rejected *Matter of A-B-* as unreasonable.[299] The D.C. Circuit in *Grace v. Barr* held that the *Matter of A-B-* standard was more difficult to meet than the statutorily established unwilling-or-unable standard.[300] The Court found that the AG's announcement of a new, heightened standard for refugee claims permitted IJs to choose between application of two unequal standards based on no discernible criteria whatsoever, and was therefore, "arbitrary and capricious."[301]

The Sixth Circuit considered and rejected the *Matter of A-B-* standard in *Antonio v. Barr*.[302] The *Antonio* court stated:

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296. *See, e.g.*, Morales-Morales v. Sessions, 857 F.3d 130, 136 (1st Cir. 2017) (finding an applicant's fear that police action may not effectively deter harm insufficient) (citing Ortiz-Araniba v. Keisler, 505 F.3d 39, 42 (1st Cir. 2007) ("An applicant must show the government's acquiescence in the persecutor's act or its inability or unwillingness to investigate and punish those acts, and not just a general difficulty preventing the occurrence of particular future crimes.").

297. Ritonga v. Holder, 633 F.3d 971, 977–78 (10th Cir. 2011) (finding that "[i]t is true that [the applicant] submitted voluminous documentation of violence against Christians in various parts of Indonesia over the years. . . . Indeed, the State Department International Religious Freedom Report 2007 on Indonesia documents that the Indonesian government 'sometimes tolerated discrimination against and the abuse of religious groups by private actors and often failed to punish perpetrators'" but denying withholding based on Indonesian policy efforts to minimize religious persecution generally).

298. Sama v. U.S. Att'y Gen., 887 F.3d 1225, 1230 (11th Cir. 2018).

299. Grace v. Barr, 965 F.3d 833, 900 (D.C. Cir. 2020); Antonio v. Barr, 959 F.3d 778, 793, 795 (6th Cir. 2020).

300. *Grace*, 965 F.3d at 898–900.

301. *Id.* at 899–900.

302. *Antonio*, 959 F.3d at 793, 795.

> When an asylum claim focuses on non-governmental conduct, the applicant must show that the alleged persecutor is either aligned with the government or that the government is unwilling or unable to control him. An applicant meets this burden when she shows that she cannot reasonably expect the assistance of the government in controlling her perpetrator's actions.[303]

The *Antonio* court then analyzed the government's response to domestic violence in Guatemala, finding its efforts ineffective and reversing the BIA's denial of asylum and withholding.[304] In its analysis, the court briefly considered and rejected the *Matter of A-B-* standard in favor of an effective protection standard.[305]

That the D.C. and Sixth circuits have rejected *Matter of A-B-* shows that not all courts have adopted a heightened condones-or-complete-helplessness standard into their caselaw. However, it is noteworthy that both of these decisions reject the heightened standard as arbitrary and capricious *as applied to asylum*.[306] Neither of these cases address the AG's lack of discretion in withholding claims, *non-refoulement*, or the conflation of asylum and withholding at U.S. law. Indeed, none of the circuit court cases from the dataset discuss the international law foundation of withholding and U.S. refugee law generally. None discuss *non-refoulement* or Article 33. *Grace v. Barr* discusses the applicant's reliance on the U.N. Handbook, only to reject this reliance because it is not a dispositive authority.[307] It appears that even circuits rejecting the *Matter of A-B-* standard overlook withholding's connection to the foundational principle of *non-refoulement* and its place in the international and domestic refugee-law framework.

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303. *Id.* at 793.

304. *Id.*; *see also id.* at 798 ("Here, the immigration judge and Board relied solely on their findings regarding asylum to determine that Maria did not meet the more demanding standard of withholding of removal. Thus, because we remand for the agency to reconsider Maria's asylum claim, the Board should also consider 'whether [Maria is] entitled to withholding of removal based on all of the evidence on record.'").

305. *See id.* at 797 (citiation omitted) ("Further, the Board's conclusion that Maria did not meet her burden of showing that the Guatemalan government was 'helpless' relies on a standard that has since been deemed arbitrary and capricious.").

306. *See Grace*, 965 F.3d at 899–900 (discussing only asylum); *Antonio*, 959 F.3d at 793, 797–98 (discussing asylum only and remanding for consideration of asylum and withholding).

307. *Grace*, 965 F.3d at 897–98.

V. CONCLUSIONS, CRITICISMS, AND RECOMMENDATIONS

From mid-twentieth-century multinational treaties to U.S. circuit court opinions of the past year, this Article has traced *non-refoulement* and withholding from its broad principles to its discrete applications and standards at U.S. law. What have we discovered? First, that *non-refoulement*, as established in Article 33 of the 1951 Refugee Convention and 1967 Protocol, prohibits states from returning refugees to places where they will likely face persecution. That principle of *non-refoulement* is foundational to the international refugee regime and binding upon the United States at both international law and U.S. constitutional law after the ratification of the 1967 Protocol. The United States enacted the INA and the Refugee Act of 1980 to ensure effective compliance with international refugee law, including *non-refoulement*. The INA established withholding of removal as the domestic equivalent of *non-refoulement*. *Non-refoulement* and withholding entitle a refugee to relief when the refugee's home state fails to offer effective protection against private persecution. The AG has discretion to determine asylum standards, but not withholding. The AG raised the standard for private persecution in asylum claims and misapplied his authority by announcing the same heightened standard for withholding. Federal courts often conflate asylum and withholding, neglecting to engage in separate withholding analysis. As a result, several circuits have adopted the AG's unlawful heightened standard for private persecution to apply to withholding claims. Even after the AG decision raising private persecution standards was vacated, circuits that adopted the heightened standard continue to apply it as precedent.

These facts amount to violations of international law, the INA, and the U.S. Constitution. The 1951 Refugee Convention and 1967 Protocol, the *Travaux Preparatoires* to the 1951 Refugee Convention, and U.N. guidance clearly mandate a broadly applicable principle of *non-refoulement*, essentially without exception, requiring effective protection against private persecution. The Supreme Court has stated multiple times that the INA's purpose is to bring the United States into compliance with those principles of international law. Furthermore, because the United States has ratified the 1967 Protocol, the Supremacy Clause establishes its principles, including and especially the foundational principle of *non-refoulement*, as the supreme law of the land.[308]

At one level, the issue this Article raises is the misapplication of a heightened condones-or-helplessness standard to private-persecution withholding claims. Domestic and international law authorities clearly

308. U.S. CONST. art. VI, cl. 2.

prohibit this standard, which can and does result in denials for meritorious withholding applications. But this is merely one vantage point from which to acknowledge the United States' failure to uphold *non-refoulement* by its treatment of withholding relief more generally. The EOIR Fiscal Yearbooks and one-line dismissals in federal court paint a clear picture: withholding is the forgotten form of relief in American refugee law. In some ways this makes sense: asylum provides a greater form of relief (naturalization), and its threshold for likelihood of harm is lower. And yet, withholding is the American enactment of the most core principle of refugee law. It is the central promise of international and domestic refugee law: provide refuge, provide shelter from the storm.

Some may argue that as widespread domestic and gang violence continues in Central and South America and Mexico, requiring effective protection from governments struggling to control private violence will result in a rash of successful withholding claims. Would applying the condones-or-complete-helplessness standard not: (1) provide a more realistic expectation for those governments to control private violence and (2) help defend against a flood of immigration? These arguments fail.

First, refugee law requires that states actually protect their citizens from persecution. Requiring nothing more than a good-faith effort, due to particular circumstances within a nation or group of nations, is wholly inconsistent with any interpretation of *non-refoulement*. Regarding floods of immigration, the constitutional requirement to observe treaty provisions does not fluctuate with social convenience. It would provide an objectively practical safety advantage in combatting gun violence to outlaw all firearms in our country, but the Second Amendment does not disappear due to social convenience. Similarly, as socially pragmatic as some may find denying a greater number of refugee claims, the Constitution mandates that we adhere to *non-refoulement*. What is more, the entire refugee law regime was built to address mass refugee crises in mid-twentieth-century Europe. Rejecting internationally established standards for *non-refoulement* and withholding of removal due to practical concerns about floods of refugees stands in sharp contrast to the concerns and aims from which this area of law was born.

In *Shelter from the Storm*, a wistful Dylan laments "if only I could turn back the clock to when God and her were born."[309] So how can we turn back the clock to when *non-refoulement* was born as a lawful and adhered-to principle of international and domestic law? The answer is fairly straightforward: a separate withholding analysis applying the effective-protection standard for every private-persecution withholding claim across

309. DYLAN, *supra* note 2.

every U.S. jurisdiction. In doing so, American courts would respect constitutional treaty obligations and the INA by evaluating withholding claims under international standards. Evaluating all withholding claims under the internationally recognized standard for private persecution would help to alleviate disparities and inconsistencies across U.S. jurisdictions and clarifies international standards for protecting citizenry from private persecution. Syncing domestic practice with international law can also help the United States resume its place as a leader in the international human rights community: as the delegation arguing for the strongest possible principle of *non-refoulement* in 1951 and the land Emma Lazarus described in 1893.