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Reporters as Refugees: Applying United States Asylum Laws to Persecuted Journalists in Mexico

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Reporters as Refugees: Applying United States Asylum Laws to Persecuted Journalists in Mexico

By Katy Mann*

I. Introduction .................................................................................................................................................. 150
II. Drug Violence in Mexico: the Power of the Cartels in Mexico and United States Responses ................................................................. 151
   A. Drug Cartels and Police Cooperation ................................................................................................. 151
   B. Mexico’s Response to the Drug Violence ....................................................................................... 152
   C. The United States Response to Drug Violence in Mexico ......................................................................................... 153
III. The Impact of Cartel Violence and Mexico’s Enforcement Policies on Mexican Journalism ........................................................................................................ 154
IV. Background on International Refugee Treaties and United States Asylum Laws ........................................................................................................ 156
V. Journalists and the Refugee Definition ........................................................................................................... 157
   A. Journalists and Political Opinion .................................................................................................... 158
   B. Journalists as Members of a Particular Social Group ........................................................................ 161
      1. The Immutable or Fundamental Requirement .............................................................................. 162
      2. The Social Visibility and Particularity Requirements ..................................................................... 162
V. Applying the Particular Social Group Definition to Journalists in Mexico ................................................................. 164
   A. Immutability ........................................................................................................................................ 164
   B. Fundamental ......................................................................................................................................... 165
      1. Freedom of the Press as Fundamental Under United States Law .................................................. 165
      2. Freedom of Expression and International Human Rights Law ..................................................... 167

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I. Introduction

In 2008, Jorge Luis Aguirre was attending the funeral of a colleague when he received a threatening call on his cell phone.1 “You’re next,” the caller warned. Aguirre, who was the editor of the Mexican news site LaPolaka.com, knew too well what this meant. His colleague had been slain for covering the drug violence in the region, and Aguirre himself had received several threats to his life for his own reporting in Ciudad Juarez.2 Faced with the likelihood of becoming the next casualty in the brutal drug violence in Ciudad Juarez, Aguirre fled to El Paso, Texas, where in September 2010 he became the first known journalist from Mexico to receive asylum in the United States.3

If Aguirre’s case represents a shift in the United States resistance toward granting asylum to journalists from Mexico, or the larger trend against granting asylum to journalists in general, the change is a welcome and necessary one. Since Felipe Calderon assumed the presidency in Mexico in December 2006, more than thirty journalists in the country have been murdered or have disappeared.4 The violence and threats of violence come from the drug cartels who dominate the region, as well as the police, soldiers, and government officials who cooperate with the cartels.5 To protect themselves, many journalists and news outlets have stopped reporting on the drug war altogether.6

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2. Id.
3. Id. The asylum process in the United States is not public record, and opinions are not published unless the initial decision is appealed. Therefore, this data is based on published appeals and what asylum-seekers themselves have made public in the past. Id.
4. COMMITTEE TO PROTECT JOURNALISTS, Silence or Death in Mexico’s Press: Crime, Violence, and Corruption are Destroying the Country’s Journalism 1 (Bill Sweeney et al. eds., 2010).
5. Id.
6. Id. at 6.
Although the United States asylum system has historically failed to protect journalists facing persecution, this Note will argue that United States asylum laws can and should provide relief for threatened journalists in Mexico, either under the “political opinion” or “particular social group” category, which are two of the five grounds under which a person can gain asylum or withholding of deportation under the refugee definition.\(^7\) Part II of this Note provides a background on the current violence in Mexico, while Part III further examines how this violence has devastated the journalism profession in the region. Part IV discusses the requirements for asylum and Part V examines how journalists have fared under these requirements in the past, specifically under the political opinion and particular social group grounds for asylum. Finally, Part VI examines current United States interpretations of and requirements for the “particular social group” category for asylum, and argues that this category can and should be used to grant asylum to threatened journalists from Mexico. This Note concludes that granting asylum to journalists facing a well-founded fear of persecution is consistent with the language of the Refugee Act, as well as the humanitarian purposes of refugee protection, and is in the best interest of the United States in its quest to end the drug violence in Mexico.

II. Drug Violence in Mexico: the Power of the Cartels in Mexico and United States Responses

A. Drug Cartels and Police Cooperation

According to an October 2007 Congressional Research Service (CRS) report for Congress, Mexico is a main foreign supplier of marijuana, methamphetamine, heroin, and cocaine for the United States.\(^8\) The cartels in Mexico who control the trafficking of these narcotics have gained power following the demise of the major Columbian drug cartels in the 1990s.\(^9\) CRS reported that, as of 2007, there were currently seven drug cartels operating in Mexico, the most pervasive ones being the Gulf, Sinaloa, and Juarez cartels.\(^10\) These major cartels employ enforcer gangs, known as sicarios, to help control trafficking routes and defend cartel territory by collecting

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8. COMMITTEE RESEARCH SERVICE, RL34215, Mexico’s Drug Cartels 2 (2007).
9. Id.
10. Id. at 4.
payments and transporting arms, as well as by carrying out kidnappings and assassinations.\footnote{Id. at 9-12.}

The cartels also seek the assistance of local law enforcement to protect their territory and advance their operations.\footnote{Id. at 12.} The CRS reported that police in the city of Nuevo Laredo have been involved in kidnapping competitors of the Gulf cartel, and that in the first half of 2007, over 100 state police officers and 284 federal police commanders were dismissed for suspected corruption.\footnote{Id. at 12-13.}

\textbf{B. Mexico’s Response to the Drug Violence}

President Felipe Calderon made combating drug violence his top priority when he assumed office in December 2006.\footnote{Id. at 16.} Aside from purging corrupt local and federal police from the force, Calderon also deployed 24,000 soldiers and federal police to nine states to fight the cartels.\footnote{Id.} As part of this operation, soldiers and federal officers began performing duties that had previously fallen on local police, such as manning checkpoints on highways and roads, searching homes and neighborhoods, and detaining suspicious individuals.\footnote{Stephanie Erin Brewer, \textit{Structural Human Rights Violations: The True Face of Mexico’s War on Crime}, 16 CENT. FOR HUM. RTS. & HUMANITARIAN L. 7, 7 (2009).} In an attempt to ward off police corruption, Calderon also ordered a battery of screening tests to be conducted for new officers, including financial checks, drug tests, and medical and psychological evaluations, which are then repeated at regular intervals throughout each officer’s employment period.\footnote{COMMITTEE RESEARCH SERVICE, \textit{supra} note 8, at 13.} The president also raised salaries for troops involved in anti-cartel operations by fifty percent.\footnote{Id. at 16.}

Despite these efforts, drug violence in the region continues. Critics of the president’s efforts maintain that drug violence has simply shifted to new areas,\footnote{Id. at 16.} while reports indicate that killings associated with organized crime tripled within the first three years of Calderon’s presidency.\footnote{Brewer, \textit{supra} note 16, at 7.} Furthermore, it has been widely reported...
that the military itself has brought new troubles to the region by committing numerous human rights violations, including torture, warrantless searches, excessive force, arbitrary detentions, and sexual assault.  

C. The United States Response to Drug Violence in Mexico

During his first few months as president, Calderon also sought the cooperation of then-President George W. Bush to help combat cartel violence. 22 It was considered unusual for a Mexican president to seek American help so early in his term; 23 the United States, however, had good reason to cooperate. Aside from contributing to America's ongoing drug problem, drug violence in Mexico takes place largely along the United States-Mexico border, threatening the safety of border towns. 24

As a result of this cooperation, Congress passed the Mérida Initiative in October 2007, which ultimately set aside more than $1.4 billion dollars between 2007 and 2010 to provide equipment and training to Mexico and Central America to help combat criminal activity, over $1.1 billion of which was designated for aid to Mexico. 25 The initiative supplied Mexico and Central American countries with noninvasive inspection equipment, secure communications technologies, technical training to improve police investigations, witness protection programs, and handling police complaints, and helicopters and surveillance aircraft. 26 These provisions were intended to help the region break the power of criminal organizations, assist with border control, improve the ability of the justice systems to prosecute criminals, and curtail gang activity. 27

While the United States has been praised by some for its willingness to cooperate with Mexico in combating the ever-growing drug problem, critics of the plan are concerned that it inadvertently

21. Id. at 8.


23. Id. at 109.

24. Id. at 107.

25. Id. at 108, 112. See also The Mérida Initiative, BUREAU OF INTERNATIONAL AND LAW ENFORCEMENT AFFAIRS, U.S. DEP’T OF STATE (June 23, 2009), http://www.state.gov/p/inl/rls/fs/122397.htm [hereinafter The Mérida Initiative].


27. Hendrix, supra note 22, at 112.
provides aid to the cartels themselves, by funneling the provisions through the still-corrupt military and law enforcement agencies in Mexico. 28 Furthermore, although it is arguably too early to determine if the cooperative efforts will make a lasting impact, there has actually been a spike in violence since the initiative was passed, reportedly due to the breakup of criminal organizations and to the cartels’ increasingly violent response to the crackdowns and border security measures. 29 It has been reported that over 9,000 people were killed along the United States-Mexico border between 2007 and 2009. 30

III. The Impact of Cartel Violence and Mexico’s Enforcement Policies on Mexican Journalism

Despite the cooperative efforts of Mexico and the United States, the impact of the drug violence continues to devastate journalists in the region. According to a September 2010 report by the Committee to Protect Journalists, twenty-two journalists have been murdered since Calderon took office, at least eight of whom were killed as a direct result of their crime and corruption reporting. 31 Facing these threats, many news outlets in Mexico have stopped reporting on the drug trade or government corruption; others have been forced to suspend publication altogether. 32 Those publications that do continue reporting on drug crimes are often controlled by the drug cartels, which intimidate and bribe news outlets to report only pre-approved news items. Many papers refrain from listing the names of the cartels in the paper and from reporting on any activity that would draw attention to the drug marketplace. 33 Furthermore, cartels use newspapers to damage their rivals by reporting on government officials who are cooperating with the enemy cartels. 34 As a result of this silencing and manipulation of the press, Mexican citizens receive an incomplete or inaccurate picture of the cartel violence and

28. Id. at 115. See also Brewer, supra note 16.
29. Hendrix, supra note 22, at 118. See also COMMITTEE TO PROTECT JOURNALISTS, supra note 4, at 5.
31. COMMITTEE TO PROTECT JOURNALISTS, supra note 4, at 3.
32. Id. at 6.
33. Id. at 16-17.
34. Id. at 1.
pervasive government corruption, affecting both their safety and ability to affect change in their communities. Journalists who are privy to information on upcoming or ongoing violence are faced with the dilemma of trying to warn their audience without putting their own lives in danger.  

Journalists and publications that continue to report on the drug war also face threats from corrupt government officials and law enforcement. In fact, Jorge Luis Aguirre, whose asylum case is discussed in Part I, believes that he was targeted by state officials for his criticism of a prosecutor.  

Emilio Gutierrez Soto is another Mexican journalist whose published criticism of Mexican officials has forced him to seek asylum in the United States. In 2005, Gutierrez wrote a series of short pieces about the Mexican military’s abuses of civilians. Shortly thereafter, a military colonel and general approached him, threatening to take his life and warning that he was being watched. The police investigation into the threats went nowhere and thus Gutierrez lived in fear for several years, cautiously publishing any stories on military abuses in veiled terms and without bylines. Despite Gutierrez’s effort to keep a low profile, soldiers raided his home in May 2008 and threatened him and his eleven-year-old son. They also began watching him, as previously promised, keeping a soldier parked outside his home. Knowing he and his son would face almost certain harm if they stayed, Gutierrez fled to the United States, where he and his son were immediately captured by Immigration and Customs Enforcement and held in an El Paso detention facility. Gutierrez applied for asylum but remained in detention for over six months, until he was suddenly released in January 2009. To date, Gutierrez’s asylum application remains pending.

35. Id. at 18.
36. CBSNEWS.COM, supra note 1.
37. Charles Bowden, We Bring Fear, MOTHER JONES (July-Aug. 2009), at 29-43.
38. Id. at 37-38.
39. Id. at 37-39.
40. Id. at 39.
41. Id. at 41.
42. Id. at 42. While no reason was given for Gutierrez’s sudden release from detention, the fact that it occurred a mere nine days after President Obama was sworn into office was a hopeful sign to Gutierrez. Id.
43. CBSNEWS.COM, supra note 1.
Despite the apparent horror Gutierrez has faced due to his prior coverage of the drug war, his chances of gaining asylum in the United States are far from certain. Before discussing the difficulties that threatened journalists have historically faced when seeking asylum, this Note will offer a brief background into the history of international refugee norms and treaties and United States asylum laws.

IV. Background on International Refugee Treaties and United States Asylum Laws

The UN General Assembly created the office of the United Nations High Commissioner for Refugees (UNHCR) in December 1950 to help assure the resettlement of Europeans who were displaced by World War II. The following year, the 1951 Convention Relating to the Status of Refugees (the Convention), which became the controlling statute governing UNHCR's work, adopted a definition of "refugee" and prohibited contracting states from returning refugees to a territory where their life or freedom would be threatened for reasons of "race, religion, nationality, membership of a particular social group, or political opinion." Although the protections of the original Convention were limited to those displaced before January 1, 1951, the time restrictions were lifted with the 1967 Protocol Relating to the Status of Refugees (the Protocol), as the international community recognized that refugee situations had and would continue to arise outside of the post-World War II context.

The United States ratified the 1967 Protocol in 1968 but did not make any changes to its domestic law or policy regarding refugees until 1980, when Congress passed the Refugee Act. The Act defines a refugee as an individual outside his country of nationality facing "persecution or well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."


46. Convention, supra note 45, at 6, 51.

political opinion," and who is unwilling or unable to avail himself to that country's protections.\textsuperscript{48} Individuals in the United States may apply for asylum by affirmatively submitting an application, or they may raise an asylum claim to resist removal if they are apprehended and placed in removal proceedings while living in the United States without legal status.\textsuperscript{49}

After the enactment of the Refugee Act, courts grappled with applying the refugee definition to asylum-seekers. A key issue that has emerged in refugee law jurisprudence is the interpretation of the Act's "on account of" language.\textsuperscript{50} In 1992, the Supreme Court made a landmark decision on this topic in \textit{INS v. Zacarias}.\textsuperscript{51} In this decision, the Court denied asylum to a Guatemalan citizen who claimed persecution on account of political opinion for his refusal to join the guerrillas in his home country.\textsuperscript{52} The Court denied the application in large part because Zacarias could not show that his persecutors threatened him specifically due to his political opinion and not for some other reason.\textsuperscript{53} This decision undoubtedly increased the burden of proof for asylum-seekers in the United States, as applicants would now not only need to show that they faced a well-founded fear of persecution on account of one of the five statutory grounds, but also to provide evidence of their persecutor's motivation.\textsuperscript{54} This evidentiary burden has proven to be one of the most significant obstacles to obtaining refugee protection in the United States.

\textbf{V. Journalists and the Refugee Definition}

Like many other persecuted groups seeking United States asylum, journalists have historically struggled to show that they face a

\textsuperscript{48} 8 U.S.C. § 1101(a)(42)(A). Note that the United States definition of a refugee is largely identical to the definition set forth in the Convention. One noticeable difference is that the Convention states that the persecution must be "for reasons of" one of the five protected grounds, while the United States statute uses the phrase "on account of." \textit{Id. See also Convention, supra note 45. While it can be debated that the textual nuance had led to different legal obligations, such a discussion is outside the scope of this paper.}


\textsuperscript{52} \textit{Id.} at 479-83.

\textsuperscript{53} \textit{Id.} at 483.

\textsuperscript{54} Musalo, supra note 50, at 1181-82.
fear of persecution that was motivated by one of the five statutory grounds for asylum. A recent study conducted by Edward L. Carter and Brad Clark examined a total of thirty asylum cases that were brought by journalists before United States Courts of Appeals between 1992 and 2006, finding that only about twenty percent were successful. While many cases were denied because the courts did not believe that the applicants were credible, many others were denied because the applicants could not prove that they were persecuted on account of their race, religion, nationality, membership in a particular social group, or political opinion.

For example, the Ninth Circuit denied asylum to a Russian journalist who claimed to be threatened by an anti-Semitic political organization, finding “no nexus” between the applicant’s views and his attacker’s motives. Instead, the court found that the persecutors were likely motivated by a desire to keep the applicant from publishing the contents of an incriminating videotape. This case highlights the major difficulty journalists face when trying to meet the “on account of” requirement for asylum – the fact that their persecution may always be motivated in part to suppress information.

A. Journalists and Political Opinion

According to Carter and Clark’s study, five of the six journalists who were granted asylum on appeal during the studied time period were found to have been persecuted on account of their political opinion. For example, in Hussain v. INS, an unpublished opinion, the Ninth Circuit granted asylum to a Pakistani reporter who was attacked by a political group that believed Hussain to be a supporter of a rival political organization. The court found that, whether or not Hussain actually held the political beliefs imputed to him by his persecutors, the fact that his persecutors believed his journalistic choices were motivated by his politics meant he was being persecuted.

56. Id. at 298-301.
57. Bortnikov v. INS, 63 F. App’x. 287, 288 (9th Cir. 2003).
58. Id. at 288-89.
59. Carter & Clark, supra note 55, at 306. The sixth case involved a journalist who was persecuted on account of his race. Id.
on account of his political opinion. The court even added "journalism is a work that overtly manifests a political opinion." Such a ruling would seem to open the door – widely – for journalists seeking asylum under the political opinion theory.

The Ninth Circuit reached a similar holding in *Hasan v. Ashcroft*, a 2004 case that involved a female reporter from Bangladesh who was persecuted after publishing an article on a prominent government official’s alleged criminal activity. The court likened Hasan’s actions to whistle-blowing, which the court had previously held necessarily constitutes political opinion if “the alleged corruption is inextricably intertwined with governmental operation.”

The *Hasan* case is especially similar to the current plight of journalists in Mexico. For example, although there was no written opinion in Aguirre’s asylum case, as it was not brought to appeal, his contention that he was threatened by Mexican officials for his criticism of a prosecutor mirrors the threats received by Hasan. This makes it likely that Aguirre obtained asylum on account of imputed political opinion.

If these decisions represent a trend towards granting asylum to journalists who present credible cases of being persecuted on account of exposing government corruption, it would be a welcome sign for the many other Mexican journalists who are in similar situations, such as Gutierrez (discussed in Part III above). The unpredictable nature of the Board of Immigration Appeals (BIA), or the Board, and circuit courts’ decisions, however, should caution against excessive optimism.

61. *Id.* at *2.
62. *Id.*
63. 380 F.3d 1114, 1118-23 (9th Cir. 2004).
64. *Id.* at 1120 (citing *Grava v. INS*, 205 F.3d 1177, 1118 (9th Cir. 2000)). The Board has recently questioned the applicability of this holding for cases filed after the passage of the Real ID Act of 2005, which held that a protected ground must be “one central reason” for the persecution in order for an applicant to be eligible for asylum. Matter of *N-M-*, 25 I. & N. Dec. 526 (BIA 2011). Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302 (“Real ID Act”). In this case, the Board of Immigration and Appeals, or the Board, held that speaking out against a government entity did not automatically constitute persecution on account of political opinion, but that the Immigration Judge should also consider the extent to which the whistle-blowing actually expressed anticorruption beliefs, and the evidence that the persecutor was motivated by such beliefs when attacking the asylum-seeker. Matter of *N-M-* at 530-34.
In fact, whistleblower cases have generally yielded particularly inconsistent decisions from the circuit courts within the past several years.

In Pavlyk v. Gonzales, the Seventh Circuit held that a Ukranian prosecutor who was subject to threats after investigating police corruption was not expressing a political opinion, but merely performing the duties of his position. While a journalist’s role is significantly different from a prosecutor’s, exposing government corruption is also arguably a basic function of a journalist’s job duties. Although no court has held that a journalist exposing government corruption was merely doing his job, a decision like Pavlyk presents the possibility that a court will not see such reporting as expressing a personal political opinion.

In another whistleblower case, Castillo-Arias v. U.S. Attorney General, the Eleventh Circuit held that a citizen who informed a police officer about the corrupt actions of a fellow officer was not persecuted on account of political opinion. This decision casts further doubt on the availability of asylum to journalists, as their persecutor’s actions could also easily be characterized as retaliation in response to the journalist’s exposure of a scandal or publishing of an incriminating piece.

By contrast, the Ninth Circuit has recently issued a decision that may prove particularly helpful for applicants bringing whistleblower claims, particularly for those who do not expose government corruption directly. In Antonyan v. Holder, the court held that an applicant’s whistle-blowing against a powerful drug dealer, who was connected to and protected by corrupt police and government officials, was an expression of a political opinion, even if she was not initially aware of her persecutor’s government ties. This decision may prove especially helpful for reporters in Mexico who may only indirectly expose government corruption by publishing stories on the cartels that are connected to and protected by the corrupt officials. However, given the inconsistency of circuit court decisions in this area of asylum law, it is difficult to predict how any one case will affect future claims by persecuted journalists.

66. 469 F.3d 1082, 1089 (7th Cir. 2006).
67. 446 F.3d 1190, 1193 (11th Cir. 2006) (citing the court’s own prior unpublished decision in the matter, Castillo-Arias v. U.S. Att’y Gen., 82 Fed.App’x. 221 (11th Cir. 2003)).
68. 642 F.3d 1250, 1255 (9th Cir. 2011).
B. Journalists as Members of a Particular Social Group

Even if asylum based on political opinion were a reliable option for journalists who expose corrupt government officials, either directly or indirectly, it would not help many of the journalists in Mexico who face harm for refusing to comply with the wishes of the cartels, or who cannot prove that government officials have acted in collusion with the cartels to promote or allow such persecution. Unlike the Hasan case, in which the court held that exposure of government corruption is akin to whistleblowing that necessarily constitutes a political opinion, exposing the activities of non-governmental actors such as cartels does not invoke the same presumption of political activity. This is particularly true if there is no evidence that the private actors were protected by or connected to police officers or government officials. Likewise, a court would likely not interpret the pressure by the cartels to report certain news items, and leave others out of the press, as being motivated by hostility toward a journalist’s political opinion since the cartels are not government actors or an opposing political group. Although the Hussain case (discussed in Part V. A. above), involved a journalist who refused to let his reporting be dictated by his persecutors, the attackers in that case were a political party. That court’s language connecting journalism to political opinion, therefore, cannot be presumed to apply to cases where the persecutor is a group of private, nonpolitical actors, such as the cartels.

Given the uncertainty of the political opinion category, particularly to journalists who cannot show government involvement, many journalists have tried to gain asylum by arguing that they were persecuted on account of their membership in a particular social group. Unfortunately, this route has proven to be, thus far, almost completely unsuccessful. In the study conducted by Carter and Clark (discussed in Part V. A. above), no cases were found that granted asylum to journalists on membership in a particular social group grounds. This lack of success is partially a result of the restrictive

69. Hasan, 380 F.3d at 1120.
70. 2000 WL 1523100, at *1.
71. Id.
72. See, e.g., Bortnikov, 63 F. App’x. at 288.
73. Carter & Clark, supra note 55, at 301. Shortly before this article went to press, however, it was reported that another journalist from Mexico was granted asylum apparently based partially on his membership in a particular social group.
definition of “particular social group” that has evolved out of cases decided by the BIA over the years.

1. The Immutable or Fundamental Requirement

Until recently, the leading case on the social group definition was Matter of Acosta, in which the Board defined a particular social group as one whose members share a common characteristic that either cannot be changed or is so fundamental to an individual’s identity that he or she should not be required to change it.\(^7\) Applying this definition, the Board in Acosta determined that a taxi driver cooperative in El Salvador did not qualify as a particular social group.\(^7\) Although the group was being targeted by an anti-government guerrilla group for refusing to participate in work stoppages, the Board held that the common trait of the group – taxi drivers who refused to participate in work stoppages – was not immutable, as the drivers could change jobs or agree to participate to avoid persecution.\(^7\) Furthermore, the Board held that the international rights governing refugee law did not guarantee the right to work in the job of one’s choice, so the trait was not fundamental.\(^7\) This holding clearly creates an obstacle for journalists attempting to claim asylum as part of a particular social group, as their social group is similarly defined by their chosen profession.

2. The Social Visibility and Particularity Requirements

In a pair of recent cases, the Board expanded on this definition by adding social visibility and particularity requirements. In In re C-A-, the Board held that members of a particular social group must

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\(^7\) The Texas Tribune reported that Alejandro Hernandez Pacheco was granted asylum both for “being a journalist” and for expressing a political opinion. However, as this was a grant of affirmative asylum, which does not entail a written opinion that is available to the public, it is difficult to speculate how the particular social group was characterized, how it factored into his case, or how this will affect future asylum claims by Mexican journalists. Julian Aguilar, Mexican Journalist Wins Asylum in Texas, Texas Tribune, Sept. 1, 2011, http://www.texastribune.org/immigration-in-texas/immigration/mexican-journalist-wins-asylum-texas/?utm_source=texastribune.org&utm_medium=alerts&utm_campaign=News%20Alerts; %20Subscriptions.

75. Id. at 234.
76. Id.
77. Id.
also be socially visible, or recognizable as part of the group.\footnote{78} The Board clarified the social visibility requirement a few months later, as well as the requirement of particularity.\footnote{79} The Board explained that the social visibility requirement must be considered within the context of the applicant’s home country, using country condition resources to determine if the group is one that would be recognized as being at a higher risk than a non-group member in that country.\footnote{80} The Board also held that a social group must be “particular,” or well-defined enough to “provide an adequate benchmark for determining group membership.”\footnote{81} Applying this definition, the Board held that wealthy Guatemalans were not a particular social group, as there was no indication that they were at a greater risk than the rest of society, and because the concept of wealth was too ill-defined to constitute a particularized group.\footnote{82}

Although these factors remain part of the existing definition of a particular social group in cases before the Board and most circuit courts, these requirements have sparked much debate and criticism as to when and how the factors should be applied. This is especially true for the social visibility factor. In fact, the Seventh Circuit rejected the social visibility requirement in a 2009 case, stating that literal visibility does not bear on whether persecution occurs on account of group membership.\footnote{83} The court stated that membership of a particular social group does not require that one would be recognized as such by complete strangers.\footnote{84}

Notwithstanding the Seventh Circuit’s rejection of the social visibility requirement, the other circuit courts have integrated this factor into their analysis of particular social group claims. Thus, the social visibility and particularity requirements present additional obstacles for most asylum-seekers. (This Note will further discuss these requirements as pertaining to journalists in Parts VI. C.-D.)

\footnote{78}{23 I. & N. Dec. 951, 959 (2006). This case involved the same applicant as in Castillo-Arias, 446 F.3d 1190. The Eleventh Circuit had previously remanded the case to the Board to determine if noncriminal informants were a particular social group. The Board decided that they were not and sent the case back to the Eleventh Circuit for its final decision. 23 I. & N. Dec. 951-52, 961; 446 F.3d 1190.}

\footnote{79}{24 I. & N. Dec. 69 (2007).}

\footnote{80}{Id. at 74-75.}

\footnote{81}{Id. at 76.}

\footnote{82}{Id.}

\footnote{83}{Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).}

\footnote{84}{Id.}
V. Applying the Particular Social Group Definition to Journalists in Mexico

As discovered by Carter and Clark in their study, the increasingly restrictive definition of particular social group has proven to be a significant roadblock to journalists seeking asylum. In fact, Carter and Clark contend that journalists “clearly” do not constitute a particular social group under existing judicial tests. The Sixth Circuit seems to confirm this assertion in a recent unpublished decision, *Dubal v. Mukasey*, which rejected the argument that a group of outspoken Ethiopian journalists constituted a particular social group for asylum purposes. Given the historical importance of the free press in United States and international law, however, there is room to include journalists, and particularly the threatened journalists in Mexico, under the particular social group definition.

A. Immutability

Concededly, it is difficult to argue that status as a journalist is an immutable characteristic, given judicial interpretations of this requirement. In *Acosta*, the court rejected the idea that membership in a taxi cooperative was an immutable characteristic, as members could either change professions or agree to the work stoppages. This reasoning was echoed in *Dubal*, as the court referred to this language in *Acosta* when denying the Ethiopian journalist’s asylum claim. A court could use the same reasoning against journalists in Mexico, finding that they could either change careers or agree to report news items as dictated by the cartels.

Some journalists in Mexico, however, cannot simply avoid persecution by changing their job or their offensive behavior, as the BIA suggests would be true of the taxi drivers in *Acosta*. As seen with Gutierrez (discussed in Part III), some journalists who are now “playing by the rules” may still not be safe from harm if they have

86. Id.
87. 257 F. App’x. 875, 878 (6th Cir. 2007).
89. *Dubal*, 257 F. App’x. at 878.
published pieces against cartels or the military in the past. Such circumstances were not discussed in Dubal, as the applicant in that case did not claim to have curtailed her offending behavior. Gutierrez, however, stopped publishing critical pieces once it became clear that the police were not going to protect him. Nonetheless, he was harassed again more than three years after the initial article was published. Accordingly, some journalists can argue that they do possess an immutable characteristic — their identity as a once-uncooperative journalist.

B. Fundamental

Even if one’s status as a journalist would not be considered immutable, it should be considered “so fundamental” that a persecuted journalist should not be required to change it. When determining if a characteristic is sufficiently fundamental to one’s identity for particular social group purposes, courts look at the nature of the right being infringed. The court in Acosta conceded that it would be “unfortunate” for Acosta to have to change careers or cooperate with the guerrillas to avoid persecution, but that the “concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.” The court in Dubal also used this language against the journalist applicant without addressing whether the “fundamental” requirement for social group evaluation should treat employment as a journalist differently than employment as a taxi driver. Considering the international and domestic importance placed on freedom of speech and freedom of the press, however, the right to report the news in an ethical and uncorrupted way is more “fundamental” than the right to pursue other types of employment.

1. Freedom of the Press as Fundamental Under United States Law

As explicitly protected constitutional guarantees under the First Amendment, freedom of speech and freedom of the press are fundamental rights for persons within the United States. These rights have been fiercely defended and enduringly upheld in United

91. Bowden, supra note 37, at 39.
92. Dubal, 257 F. App’x. at 877-78.
93. Bowden, supra note 37, at 39.
94. Id.
95. Dubal, 257 F. App’x. at 878.
96. U.S. CONST. amend. I.
States courts throughout history. Although United States constitutional rights do not extend to individuals beyond its borders, courts have relied on constitutional jurisprudence when examining the fundamental nature of certain rights for particular social group analysis. In Karouni v. Gonzales, the Ninth Circuit cited the Supreme Court’s decision in Lawrence v. Texas, which held that Texas’s law against homosexual acts of sodomy was unconstitutional, in reaching its conclusion that homosexuals constituted a particular social group for refugee status purposes. The court used the logic and language of Lawrence to determine that a homosexual should not have to choose between living a life of celibacy or certain persecution for his future homosexual acts. This reliance on United States constitutional law to determine what is “fundamental” for the purposes of social group analysis shows that there is a connection between fundamental American values and the protections we are willing to offer those persecuted outside of our borders.

Based on this reasoning, the persecution faced by journalists should be treated differently than persecution faced by members of other professions, such as the applicant in Acosta. The economic and employment rights asserted by Acosta have not been recognized as fundamental by the Supreme Court, while freedom of the press is expressly protected in our Constitution.

Furthermore, the United States has stressed the importance of freedom of the press within the international community. In her closing remarks for World Press Freedom Day on May 3, 2010, Secretary Clinton stated: “The United States is committed to working in partnership with members of the media . . . to defend freedom of expression and the brave journalists who are persecuted for exercising it on the challenging new terrain of the 21st century.”

97. See, e.g., Cohen v. California, 403 U.S. 15 at 24 (1971) (“The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion . . . in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.”).

98. Karouni v. Gonzales, 399 F.3d 1163, 1173 (9th Cir. 2005) (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003) (“[W]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”)).

99. Karouni, 399 F.3d at 1172-73.

100. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Slaughter-House Cases, 83 U.S. 36 (1873).

Additionally, the Department of State explicitly looks at the status of free media in nondemocratic countries when evaluating these countries' progress toward democracy and human rights goals, as shown in the Department's Advancing Freedom and Democracy Reports. By including freedom of the press as one of the cornerstones of democratic governance, and by promising to support this freedom in the international community, the United States is arguably elevating this right to "fundamental" status for asylum evaluation purposes, making it something an individual should not have to surrender to avoid persecution.

2. Freedom of Expression and International Human Rights Law

Freedom of the press is also advanced in international human rights law. The Universal Declaration of Human Rights recognizes the right to "freedom of opinion and expression.\textsuperscript{103} The International Covenant on Civil and Political Rights (ICCPR) expands on this by adding the "freedom to seek, receive and impart information and ideas of all kinds . . . in writing or in print."\textsuperscript{104}

Moreover, based on their guidelines, it is likely that UNHCR intends for such freedoms to be covered by the definition of particular social group. In 2002, UNHCR issued guidelines on social group claims, seeking to reconcile various approaches to the social group category, and to prevent "protection gaps" for refugees worldwide.\textsuperscript{105} UNHCR proposed the following definition of particular social group: "group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."\textsuperscript{106} As an "inalienable" right under the ICCPR, freedom of written expression

\textsuperscript{102} Department of State, Advancing Freedom and Democracy Reports, pmbl. (May 2010).


\textsuperscript{105} See Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, § II(B)(10), U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter Guidelines].

\textsuperscript{106} Id. § II (B)(11) (emphasis added).
is undoubtedly one of the human rights included in the above description.\textsuperscript{107}

As discussed above, the United States definition of particular social group does not explicitly include protection for the exercise of one’s human rights. It is true that the United States is not bound by UNHCR interpretations of the Protocol, and has in fact ignored several key UNHCR interpretations in the past.\textsuperscript{108} United States courts, however, have repeatedly referred to UNHCR guidance when deciding cases, citing Congress’s original intention to bring United States asylum law into conformity with the Protocol.\textsuperscript{109} Given this stated objective of conforming to international standards, United States courts should look to the UNHCR guidelines for direction as our definition of “particular social group” continues to evolve. The United States would take a significant step toward conforming to UNHCR guidelines by recognizing the right of free expression as a characteristic so fundamental that an individual should not be forced to surrender it.

\textbf{C. Social Visibility}

The social visibility prong of the United States’s particular social group definition should be somewhat easier for journalists in Mexico to satisfy, relative to other types of groups, given the public nature of journalists’ work. When a journalist prints his name in the byline of a published piece, he is essentially announcing his membership in a group of journalists, making him visible to society. While some recent decisions have determined that \textit{particular} journalists were not visible or well-known enough to support a well-founded fear of persecution,\textsuperscript{110} the Board and circuit courts have not addressed this requirement for journalists as a group since the social visibility

\textsuperscript{107} ICCPR, \textit{supra} note 105, pmbl.
\textsuperscript{108} For example, UNHCR has explicitly rejected the notion that asylum seekers must prove that their persecutors were \textit{motivated} to harm them on account of race, religion, nationality, membership in a particular social group, or political opinion, as long as \textit{effect} of the harm is persecution on account of one of these five grounds. The United States, however, continues to require some evidence of the persecutor’s motivation when considering an individual’s eligibility for asylum. \textit{See Written Submission on Behalf of the U.N. High Comm’r for Refugees in the Court of Appeal in Yasin Sepet and Erdem Bulbul v. Secretary of State for the Home Department, VII.48, Dec. 21, 2000, No. C2000/2777; Bortnikov}, 63 F. App’x. at 289.
\textsuperscript{109} \textit{See}, \textit{e.g.}, Rodriguez-Roman v. I.N.S., 98 F.3d 416, 425 (9th Cir. 1996); Pitcherskaia v. I.N.S., 118 F.3d 641, 648 (9th Cir. 1997).
\textsuperscript{110} \textit{See}, \textit{e.g.}, Louis v. U.S. Atty Gen., 286 F. App’x. 668 (11th Cir. 2008).
requirement was set forth in *In Re C-A.*

Although a journalist is clearly not recognizable as such by sight alone, the court in *Benitez Ramos v. Holder* made it clear that this type of literal social visibility should not be required, only that society recognize a certain group of people as sharing a common characteristic. Individuals sharing a common profession, particularly one that typically necessitates regular public exposure, should easily fit under this definition.

Additionally, the Board has recognized that “social visibility” must be evaluated within the “context of the country concerned.” In Mexico, cartels recognize the power of the press to help or hurt their operations and accordingly single out journalists to compel cooperation under threat of violence. In fact, Mexico’s National Human Rights Commission has even proposed making journalists a protected class in the country, given the dangers faced by all members of the profession. This focused persecution and effort at group-based protection is evidence that journalists are a cognizable group, sharing a common characteristic, in Mexico.

Lastly, it is worth noting that UNHCR considers “social perception” of a group to be an alternative means of recognizing a particular social group in cases where the immutable or fundamental requirements are not clearly met. Thus, UNHCR proposes that members of certain professions might constitute a particular social group “if in the society they are recognized as a group which sets them apart.” Considering how cartels in Mexico single out journalists for persecution and coercive tactics, the journalists are “set apart” from the rest of society based on their ability to convey (or not convey) certain information to the public. Following UNHCR guidance, then, this social perception of the journalists as a group could make up for any shortcomings in the immutable or fundamental requirements. Of course, the United States has not adopted the UNHCR’s approach to the social group definition (as discussed in

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112. *Benitez-Ramos,* 589 F.3d at 430.
114. *See Committee to Protect Journalists,* supra note 4, at 15-18.
117. *Id.*
Part VI. B. above). Despite such resistance to adopting this definition, United States courts should consider UNHCR's guidance in order to fulfill the congressional intent of bringing United States asylum law into compliance with the Protocol.\footnote{118}

\section*{D. Particularity}

Like social visibility, particularity should be easy to establish for journalists. It is true that new media has made the definition of journalists more complex, with questions arising as to whether bloggers and other internet reporters are considered worthy of the protections offered to other members of the press. These semi-flexible boundaries, however, do not make the entire category of journalists too amorphous to determine group membership. In \textit{In Re A.M.E.}, the Board explained that wealthy Guatemalans were not a particular social group, in part because the category was too indeterminate.\footnote{119} The court distinguished this finding of non-particularity with groups that are merely indeterminate at the "margins," which it conceded would often be the case for social groups.\footnote{120} Journalists would fall under this latter category, and individuals in those margins can be evaluated on a case-by-case basis without destroying the particularity of the group as a whole.

\section*{E. Motivation of the Persecutor}

Even if journalists in Mexico are successfully recognized as a particular social group, each individual applicant will still need to establish that he was persecuted \textit{because} of his status as a journalist, and not merely because his persecutor wanted to keep him quiet.\footnote{121} As discussed above, this can be especially difficult for journalists to establish, considering that their attackers are likely to be motivated at least partly by self-preservation. However, there is evidence that cartels go after the press even before the reporters publish incriminating stories. Journalists in the Mexican city of Reynosa have (anonymously) stated that cartels continuously maintain press censorship in the area through a combination of "threats, attacks, and bribery."\footnote{122} This shows that cartels are not merely going after certain

\begin{footnotes}
\item[118] See, e.g., Rodriguez-Roman, 98 F.3d at 425; Pitcherskaia, 118 F.3d at 648.
\item[119] \textit{In re A.M.E.}, 24 I. & N. Dec. 69 at 76.
\item[120] \textit{Id.}
\item[121] See, e.g., Bortnikov, 63 F. App'x at 288.
\item[122] COMMITTEE TO PROTECT JOURNALISTS, \textit{supra} note 4, at 16.
\end{footnotes}
Reporters as Refugees

Reporters who they believe have or will publish something incriminating about them, but that they are preemptively targeting press outlets as a whole to assure that the press works for them, rather than against them. Also, Gutierrez had already ceased reporting his controversial pieces on the military when he was harassed for the last time in 2008.¹²³ This shows that cartels, and the government officials who collaborate with them, are not satisfied once they have succeeded in silencing a reporter. They actively seek out members of the press who they fear may harm their operations in the future, based solely on the journalists' status and unique ability to relay information to the public.

VII. Conclusion

Considering the ongoing threats against them, and their unique status as members of a group that could threaten cartels' power, journalists in Mexico should be offered asylum in the United States when faced with persecution or legitimate threats of persecution. It is a hopeful sign that Jorge Luis Aguirre was granted asylum in September 2010, but there are many others in need of the same protection, including Emilio Soto Gutierrez, whose application remains pending.

Aguirre's case is a good sign that asylum officers are considering journalists who expose government corruption in Mexico to be persecuted on account of their political opinion, consistent with earlier circuit court decisions regarding journalists. This protection, however, does not go far enough. Many journalists in Mexico are persecuted by cartels, so the protection on account of political opinion would not likely be offered to them. To protect these individuals, the definition of "particular social group" should be interpreted to include threatened journalists. While status as a journalist may not be immutable, it should be recognized as a characteristic that is so fundamental an individual should not be required to change it. This interpretation would be consistent with both the United States constitutional right of freedom of the press, as well as international treaties protecting freedom of written expression. Furthermore, by including individuals who are persecuted for exercising their human rights, the United States will be in accord with UNHCR's definition of particular social group.

¹²³. Bowden, supra note 37, at 39.
Given the current political climate, it is likely that many United States citizens and political actors will oppose the idea of allowing a new category of individuals from Mexico to gain legal status in the United States. However, as refugee law is intended to provide humanitarian aid, this fear of the "floodgates" opening at the United States border should not be a factor in considering asylum claims from Mexican nationals. As established in *American Baptist Churches v. Thornburgh*, "foreign policy and border enforcement considerations are not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution."  

Moreover, it is in the best interest of the United States to do what it can to foster freedom of the press in Mexico. Faced with threats to their lives, many journalists have decided to work for the cartels, thus aiding the violence rather than using their power to help combat it.  

With the Mérida Initiative, the United States has already invested significant resources to fight the violence across the border. Offering aid to journalists may encourage those in the profession to resist the control of the cartels and report on the true conditions of the region. This would not only help protect Mexican citizens, providing them access to much-needed information, but it may also incite more Mexicans to take action, as well as help the Mexican government discover and weed out corrupt officials, police officers, and members of the military.

Considering these factors, offering asylum to persecuted journalists in Mexico is consistent with United States law, international norms, and in the practical interest of both countries.

125. See COMMITTEE TO PROTECT JOURNALISTS, *supra* note 4, at 15-18.