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INTRODUCTION

This Article is about consistency in adjudication. With the United States asylum system as a backdrop, I explore why consistency matters, what its determinants are, and whether it can be substantially achieved at a price that is worth paying.

This Article is also about the United States asylum adjudication system. Asylum challenges the national conscience in distinctive ways. It generates hard questions about our moral responsibilities to fellow humans in distress; the recognition of human rights and our willingness to give them practical effect; the extent of our obligations to those who are not U.S. citizens; U.S. legal and moral obligations to the international community; the roles of state sovereignty and borders; foreign relations; allocation of finite national resources; and racial, religious, linguistic, and ideological pluralism.

Into this emotional and political fray, one often better known for polemic than for hard data, recently ventured Professors Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag. Through painstaking and thoughtful empirical research, they collected massive data from several different federal bureaucracies and shed important light on the results asylum adjudicators reach. Their impressive study, *Refugee Roulette: Disparities in Asylum Adjudication* (Asylum Study),[1] serves two crucial functions. Most relevant to the present Article is the first function, which is to highlight the striking disparities in asylum approval rates from one adjudicator to another at various

1. 60 Stan. L. Rev. 295 (2007) [hereinafter Asylum Study].

stages of the process.[2] As the authors convincingly demonstrate, asylum outcomes often depend as much on the luck of the draw as on the merits of the case.[3] The Asylum Study also identifies some of the external variables that correlate with positive or negative outcomes in asylum cases. Those variables will be considered here as well, but only insofar as they either help flesh out the forces that drive consistency levels or suggest normative policy responses to the disparities in asylum outcomes.

The present Article similarly has two aims. The first, which is asylum-specific, addresses the "so what" question. What are the normative implications of the findings reached in the Asylum Study? What problems have the sharp disparities in asylum approval rates caused, and what, if anything, should we do about them? To answer those questions, the Article sets a second objective—to examine, more generically, the role that consistency should play in any justice system. What, exactly, is the relationship between consistency and justice? What forces influence consistency? What instruments might enhance it? And what trade-offs do those instruments present?

Many readers will find the patterns revealed by the Asylum Study shocking. One's visceral reaction might be that we need to "rein in" the adjudicators. Perhaps, one might think, the answers lie in terminating or demoting the outliers, or subjecting all adjudicators to performance evaluations, or making vastly increased use of agency head review of adjudicators' decisions, or even imposing mandatory minimum and maximum approval rates.

I argue here that these impulses should be resisted. There are times when we simply have to learn to live with unequal justice because the alternatives are worse. Disparities in asylum approval rates just might be one of those instances. As long as adjudicators are flesh-and-blood human beings, as long as the subject matter is ideologically and emotionally volatile, and as long as limits to the human imagination constrain the capacity of legislatures to prescribe specific results for every conceivable fact situation, there will be large

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2. As far as I am aware, the Asylum Study is the first attempt to examine all four major levels of asylum adjudication—asylum officers, immigration judges, the Board of Immigration Appeals, and the courts of appeals—and certainly the most ambitious empirical study of this process ever undertaken. One prior study usefully compiles immigration judge asylum approval rates for fiscal years 2000-2004. *See* Asylumlaw.org, U.S. Immigration Judge Decisions in Asylum Cases, Jan. 2000 to Aug. 2004, http://www.asylumlaw.org/legal_tools/index.cfm? fuseaction=showJudges2004. Because that compilation does not organize the immigration judges by court, and because the mix of asylum cases by country of origin varies from one immigration court to another, the approval rates do not fully capture the propensities of individual immigration judges. Another recent study, also confined to immigration judges, does segregate data by court. Like the Asylum Study, it finds great variation in asylum approval rates as among immigration judges in the same courts. *See* TRAC Immigration, Asylum Disparities Persist, Regardless of Court Location and Nationality (2007), http://trac.syr.edu/immigration/reports/183.

3. For an analogous study that exposed dramatic inconsistencies in the adjudication of social security disability benefits by administrative law judges, see JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS (1978).

disparities in adjudicative outcomes and justice will depend, in substantial part, on the luck of the draw.

This is not to suggest that inconsistent outcomes are harmless; they impede justice in several ways that will be explored below. Nor is this a call for complacency; there are several ways to mitigate the problem at the margins, and they too will be considered in this Article. But more dramatic inroads into adjudicative inconsistency bear costs that, in my view, are socially unacceptable. The major cost is the erosion of decisional independence, but there are others as well.

Part I of this Article provides basic background information on the asylum adjudication process and then summarizes the relevant empirical findings of the Asylum Study. Part II examines why consistency matters. It considers the costs of unequal justice. Part III identifies the determinants of consistency. These are the forces that influence the degree of inconsistency one might expect from a given adjudicative process. Part IV then surveys the policy options—both those that would enhance consistency at the margins and those that might well bring more dramatic uniformity gains but that would be bad ideas nonetheless.

I. THE BACKGROUND

A. *A Summary of the Asylum Process*

With some exceptions, any person who is "physically present" in the United States—whether at a port of entry or in the interior—may apply for asylum.[4] To succeed, the person must meet the statutory definition of "refugee," must not fall within any of the statutory disqualifications, and must receive the favorable exercise of discretion.[5] The "refugee" definition, in turn, requires "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[6] Upon receiving asylum, the person may remain in the United States, may work, may bring in certain qualifying family members, and may eventually acquire permanent residence.[7]

There is an elaborate administrative machinery for the filing and adjudication of asylum claims. The Asylum Study provides a succinct

4. The Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 208(a), 66 Stat. 163 (1952). (The INA is codified as amended at 8 U.S.C.A. §§ 1-1178 (West 2007). For ease of reading, citations in this Article will be directly to the INA section.) Refugees who are still overseas might qualify for admission under a separate program not relevant here. INA § 207.

5. INA § 208(b). The exceptions are for those who were "firmly resettled" elsewhere before arriving in the United States and for those who have engaged in specified misconduct. INA § 208(b)(2)(A)(vi).

6. INA § 101(a)(42).

7. INA §§ 208(b)(3), 208(c)(1)-(2), 209(b).

summary;[8] here it is enough to highlight a few points essential to understanding the remainder of this Article.

The Department of Homeland Security (DHS) may initiate "removal proceedings" to determine whether a noncitizen has the right to remain in the United States, rather than be turned back at a port of entry or expelled from the interior.[9] In a removal proceeding an officer known as an "immigration judge" presides over an evidentiary hearing.[10] There are more than two hundred "immigration judges" sitting in fifty-four "immigration courts" dispersed throughout the United States.[11] The immigration judges are part of an agency called the Executive Office for Immigration Review (EOIR) in the Department of Justice.[12]

A person against whom removal proceedings have been instituted may file an asylum application with the immigration judge as a defense.[13] Either the applicant or the government may appeal the immigration judge's removal decision (which will include the asylum determination) to the Board of Immigration Appeals (BIA).[14] The BIA, a nonstatutory body created by the Attorney General,[15] is now also part of EOIR.[16] It currently has fifteen members.[17] The Attorney General may review BIA decisions[18] but in practice does so only sparingly.[19] Generally in asylum cases, a noncitizen can obtain judicial review of either the BIA or the Attorney General decision by filing a petition for review in the U.S. court of appeals for the circuit in which the removal hearing was held.[20]

There are two major exceptions to the availability of judicial review in asylum cases. Certain individuals who apply for asylum at U.S. ports of entry (and a few others) are subject to a special abbreviated procedure that bars judicial review.[21] Moreover, to file an asylum claim, one must prove by "clear

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8. Asylum Study, *supra* note 1, at 305-10.

9. INA §§ 239, 240.

10. INA § 240.

11. *See* Office of the Chief Immigration Judge, U.S. Dep't of Justice, http://www.usdoj.gov/eoir/ocijinfo.htm.

12. 8 C.F.R. § 1003.0(a) (2007).

13. 8 C.F.R. § 208.4(b)(3) (2007) (discussing the filing of the application, but not the purpose for which it is filed, i.e., a defense.)

14. 8 C.F.R. § 1003.1(b)(3) (2007).

15. Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502 (Sept. 4, 1940).

16. 8 C.F.R. § 1003.0(a) (2007).

17. 8 C.F.R. § 1003.1(a)(1) (2007).

18. 8 C.F.R. § 1003.1(h) (2007).

19. Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas*: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 290 & n.104 (2002).

20. *See* INA §§ 242(a)(1), 242(a)(2)(B)(ii) (exempting asylum from the bar on judicial review of discretionary decisions), 242(b)(2).

21. INA §§ 235(b)(1), 242(a)(2)(A).

and convincing evidence" that the application was filed within one year of arrival, that there were "changed circumstances which materially affect the applicant's eligibility for asylum," or that the delay can be explained by other "extraordinary circumstances."[22] Asylum denials based on failure to make one of those showings are not subject to judicial review.[23]

A person who is not in removal proceedings may take the initiative and file an affirmative asylum application with the appropriate regional asylum office of United States Citizenship and Immigration Services (USCIS), a bureau of DHS.[24] The asylum officers are specially trained in international human rights law, asylum law, and country conditions.[25] They currently number 141[26] and are based in eight regional offices.[27] After a nonadversarial interview,[28] the asylum officer either grants the application or (assuming the person is otherwise inadmissible or deportable) refers the asylum application to an immigration judge.[29] In the latter event, the immigration judge decides the asylum application[30] and the EOIR procedures described earlier kick in.

Together, these various actors handle a large and rapidly growing caseload. The authors of the Asylum Study found that in the year 2005 asylum officers decided 28,305 asylum cases on the merits, immigration judges 30,903, the BIA 15,646, and the courts of appeals 2163, for an approximate total of 77,000 asylum decisions by all the adjudicators combined.[31]

In 2002 and 2003, Attorney General John Ashcroft fundamentally altered the character of this administrative structure. The changes extend to removal proceedings generally and have profoundly affected asylum adjudication in particular.

The most visible changes were those designed to "streamline" the BIA in order to reduce its large backlog of cases.[32] Until 2002, the vast majority of the Board's decisions were the product of three-member panels and were accompanied by reasoned written opinions.[33] The new regulation made single member "affirmance[s] without opinion" (AWOs) the norm, prohibiting three-

22. INA § 208(a)(2)(B), (D).

23. INA § 208(a)(3).

24. 8 C.F.R. § 208.4(b)(2) (2007).

25. 8 C.F.R. § 208.1(b) (2007).

26. E-mail from Joanna Ruppel, Deputy Dir., Asylum Div., U.S. Citizenship & Immigration Servss, U.S. Dep't. of Homeland Sec., to author (Sept. 6, 2007) (on file with author).

27. Asylum Study, *supra* note 1, at 310.

28. 8 C.F.R. § 208.9(b) (2007).

29. 8 C.F.R. § 208.14(b), (c)(1) (2007).

30. 8 C.F.R. § 208.14(c)(1) (2007).

31. Asylum Study, *supra* note 1, at 301-02 n.10. The courts of appeals figures are for calendar year 2005; all the other figures are for fiscal year 2005. *Id.*

32. Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878-79 (Aug. 26, 2002) (to be codified at 8 C.F.R. pt. 3).

33. *Id.* at 54,879.

member panels and reasoned written opinions except in certain designated categories of cases.[34]

During roughly the same time period, despite the stated priority on backlog reduction, the Attorney General announced his intention to reduce the membership of the BIA from twenty-three to eleven.[35] Approximately one year after this announcement, the Attorney General reassigned five BIA members to either nonadjudicative or lower adjudicative positions within the Justice Department; vacancies and voluntary resignations accounted for the rest of the reduction.[36] An empirical study has since demonstrated that several particular BIA members became markedly less sympathetic to noncitizens during the one-year interval between the Attorney General's original announcement and his decision as to which members would be reassigned.[37] The same study showed that all five of the BIA members who were ultimately reassigned were among the few whose voting records had been most favorable to noncitizens.[38] Although the ideology-based purge has obvious implications for the decisional independence of the BIA, the tone and the broad language of the new regulations has left the future decisional independence of the immigration judges in similar doubt.[39]

The quantifiable consequences of these various changes have been dramatic, though it is impossible to tell which results are attributable to the streamlining and which can be traced to the loss of independence. Not surprisingly, the Asylum Study documented a very large drop, immediately following the changes, in the BIA's use of three-member panels.[40] An earlier

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34. *Id.*

35. For the original announcement, see Procedural Reforms to Improve Case Management, 67 Fed. Reg. 7309, 7310 (proposed Feb. 19, 2002) (to be codified at 8 C.F.R. pts. 3, 280). The decisions to reduce the size of the Board and to streamline its procedure were later incorporated into the same final rule. Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,879, 54,893.

36. *See* Peter J. Levinson, *The Facade of Quasi-Judicial Independence in Immigration Appellate Adjudications*, 9 BENDER'S IMMIGR. BULL. 1154, 1155 (2004).

37. *Id.* at 1159.

38. *Id.* at 1159-60.

39. The final regulation implementing the streamlining and size reduction of the BIA said, "All attorneys in the Department [of Justice] are excepted employees, subject to removal by the Attorney General, and may be transferred from and to assignments as necessary to fulfill the Department's mission." Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,893. For other warning signs, see Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372-75 (2006), and Levinson, *supra* note 36, at 1161.

40. Unfortunately, the BIA was not able to supply breakdowns on single-member decisions versus panel decisions for the crucial fiscal years 2001 and 2002, Asylum Study, *supra* note 1, at 354, but the data that compare the pre-2001 experience with the post-2002 experience reveal sharp drops in the use of three-member panel decisions, *id*. at 357-58 & figs.40 & 41. Former Attorney General Alberto Gonzales pledged to "drastically" reduce the BIA's reliance on "summary one-line decisions," but indicated no analogous intentions with respect to single-member decisions. *Oversight of the U.S. Department of Justice: Hearing*

study had found that after 2002 the percentage of removal cases in which the BIA found error and therefore remanded to the immigration judges also dropped substantially.[41] The Asylum Study found that the same is true for the asylum cases specifically; from 2001 to 2005, the overall rate at which the BIA remanded cases to the immigration judges fell from thirty-seven percent to eleven percent.[42] And the number of BIA decisions for which judicial review was sought surged astronomically after 2002.[43]

Numbers aside, the courts of appeals' recent comments on the quality of immigration judge and BIA opinions and the professional behavior of a few particular immigration judges have been prolific and scathing.[44] As the criticisms mounted, then-Attorney General Alberto Gonzales assembled a team to review the immigration courts; at the same time, he sent a public memorandum to the immigration judges and the BIA communicating his expectations concerning both quality and respect.[45] He would not release his review team's findings, but he did announce a series of steps to enhance the professionalism of the adjudicators.[46] One of those measures was the issuance of Codes of Conduct for immigration judges and BIA members.[47] While otherwise generally positive, each Code further erodes the adjudicators'

Before the S. Comm. on the Judiciary, 110th Cong. 22 (2007) (statement of Alberto R. Gonzales, Att'y Gen.), *available at* http://lawprofessors.typepad.com/immigration/files/gonzales_testimony_72407.pdf.

41. Asylum Study, *supra* note 1, at 353 & n.111 (citing an independent study but acknowledging that the BIA Chair dismissed that study as "outdated and unsubstantiated").

42. *Id.* at 358-59 & figs.42 & 43.

43. The leading empirical study is John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005). *See also* Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37 (2006-2007); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13 (2006-2007).

44. The Seventh Circuit has been exceptionally blunt. *See, e.g.*, Pramatarov v. Gonzales, 454 F.3d 764, 765 (7th Cir. 2006) (citing numerous examples of sloppy decisions and verbal abuse of asylum applicants and finding "factual error, bootless speculation, and errors of logic" to be "common failings in recent decisions by immigration judges and the Board"); Zhen Li Iao v. Gonzales, 400 F.3d 530, 533-35 (7th Cir. 2005) ("We close by noting six disturbing features of the handling of this case that bulk large in the immigration cases that we are seeing"). In *Zhen Li Iao*, the court speculated that caseload and resource pressures might mean that "nothing better can realistically be expected." *Id.* at 535; *see also* Recinos de Leon v. Gonzales, 400 F.3d 1185, 1187, 1191, 1193-94 (9th Cir. 2005) (excoriating the immigration judge for an "indecipherable" and "literally incomprehensible" opinion and the BIA for affirming the decision without an opinion, and similarly wondering whether unrealistic caseloads were to blame).

45. 83 INTERPRETER RELEASES 122 (Jan. 17, 2006).

46. 83 INTERPRETER RELEASES 1725 (Aug. 14, 2006).

47. Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510 (June 28, 2007).

decisional independence by expressly authorizing their ex parte communications with Justice Department personnel concerning pending cases.[48]

B. *The Asylum Study—Disparities in Asylum Adjudication*

The Asylum Study examined some 60,000 asylum decisions rendered by the four major sets of adjudicators—asylum officers, immigration judges, members of the BIA, and judges of the United States courts of appeals.[49] Among other things, the Asylum Study exposed "disconcerting variability" in asylum approval rates from one adjudicator to the next, in at least three of the four major layers of the asylum process.[50] The authors were careful to control for confounding variables. Thus, as will be shown presently, they controlled for country of origin on the reasonable assumption that the mix of cases by country of origin is likely to vary considerably from one immigration court, asylum office or court of appeals to another. They also excluded all cases in which the asylum applicants were detained pending the proceeding, because the applicants' lack of access to counsel would be expected to lower their chances of success and because some immigration judges handle all, or almost all, detained cases.[51] For similar reasons, the authors excluded purely "defensive" cases in which the asylum claims were raised for the first time during removal hearings; those applicants were disproportionately likely to be detained.[52]

At the asylum officer level, the study identified fifteen "asylee-producing countries," which it defined as countries that in fiscal year 2004 had at least five hundred asylum claims before either asylum officers or immigration judges

48. The relevant language is in Canon XV of each of the two Codes. *Id*. at 35,511, 35,512.

49. Asylum Study, *supra* note 1, at 397.

50. *Id.* at 303. Because the government does not keep track of the asylum approval rates of individual BIA members, the authors of the Asylum Study could not ascertain the degree of variance within that institution. *Id.* at 359. *But cf*. Levinson, *supra* note 36 (studying the much smaller sample of BIA decisions in closely contested en banc cases). Nonetheless, it seems likely that the high rates of inconsistency demonstrated within each of the other groups of adjudicators—asylum officers, immigration judges, and court of appeals judges—afflict the BIA as well. First, Part III of this Article compiles the factors that would be expected generally to drive consistency rates, and each of those factors has as much logical applicability to the BIA as it does to the other three adjudication levels. Second, there is no apparent positive reason to expect BIA members to be uniquely immune to those factors. Third, based on the previously discussed patterns of Attorney General reassignment of particular BIA members, *see supra* notes 33-37 and accompanying text, it seems clear that the Attorney General, at least, believes that BIA members vary considerably in their preferred outcomes. Fourth, although based on a much smaller sample and prepared for the different purpose of measuring changes in the asylum approval rates of particular BIA members, the Levinson data are consistent with the assumption of substantial variability within the BIA.

51. Asylum Study, *supra* note 1, at 395.

52. *Id.* at 397.

and had nationwide approval rates of at least thirty percent.[53] For each of those countries the authors found large differences in overall asylum approval rates among the eight regional asylum offices.[54] When the fifteen asylee-producing countries are combined, variability of a similar magnitude is observed.[55] The authors also detected great disparities in the asylum approval rates of individual asylum officers *within* some of the regional offices. Since there is no reason to assume that asylum officers within the same office would have appreciably different mixes of cases by nationality, and since similar results were observed in some of the regions when the authors compared only one nationality at a time, the inconsistencies are significant.[56]

Similarly, the asylum approval rates for particular countries of nationality vary greatly from one immigration court to another. Within most of the immigration courts, where there is no reason to expect substantially different mixes of cases by country of origin from one immigration judge to another, there were also great disparities in asylum approval rates among the various immigration judges. The latter differences became especially dramatic when differentiated by country of nationality.[57] The data on immigration judges also reveals some of the variables that appear to influence asylum grant rates.[58]

At the court of appeals level, the Asylum Study found stunning variability from one circuit to another. Overall remand rates ranged from under two percent in the Fourth Circuit—generally regarded as the most conservative circuit—to over thirty-six percent in the Seventh Circuit.[59] That differential lessens, but only slightly, when the comparison is confined to cases from the asylee-producing countries.[60] In that control group, the three southern circuits—the Fourth, Fifth, and Eleventh—continue to display far lower remand rates than the other circuits.[61] When the control group is further limited to asylum cases brought by nationals of China—the largest producer of asylum claims—the range of remand rates was similarly broad, from zero percent in the Fourth Circuit to more than twenty percent in six circuits.[62] The Asylum Study examined individual judges' voting records in only two circuits, finding large judge-to-judge disparities in remand rates within the Sixth Circuit but

53. *Id.* at 311.

54. *Id.* at 313-25.

55. *Id.* at 316 & tbl.1.

56. *Id.* at 317-25.

57. *Id.* at 336-39.

58. Representation by counsel is the strongest indicator of success. *Id.* at 339-40. Asylum applicants who have dependents also do disproportionately well. *Id.* at 341. Various adjudicator characteristics—gender, type of prior work experience, and the administration that appointed the person—also influence asylum approval rates. *See also infra* Part III.B.1.

59. Asylum Study, *supra* note 1, at 363.

60. *Id.* at 366.

61. *Id.*

62. *Id.* at 367 & tbl.3.

only small differences within the Third Circuit.[63] In the Sixth Circuit, judges appointed by Democratic Presidents had significantly higher remand rates than those appointed by Republican Presidents; in the Third Circuit, in contrast, there was no correlation between remand rates and the party of the appointing President.[64]

II. WHY CONSISTENCY MATTERS

> Now, what goes into the definition of justice? . . . We try to be fair. And fair to me is consistency.[65]

> A foolish consistency is the hobgoblin of little minds . . . .[66]

Which is it? On the scale from innocuous to intolerable, where does inconsistency rank? The answer, of course, depends on the context, and the present context encompasses case-by-case adjudication generally and the asylum process specifically. The concern here is with inconsistent outcomes, not with inconsistent procedures or inconsistent adjudicator credentials (except to the extent they in turn generate inconsistent outcomes).[67] Nor is this Article confined to the specific problem of systematic discrimination against particular groups, such as those defined by race, religion, gender, country of nationality, or the like. My concern here is more mundane—disparate outcomes, whether conscious or unconscious, for individuals who are similarly situated in all legally relevant respects.

These inconsistencies are of several types. As the Asylum Study dramatically illustrates, outcomes might vary systematically from one court or tribunal to another, or from one adjudicator or panel to another within the same court or tribunal. Even the body of decisions by a single adjudicator might be

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63. *Id.* at 368-71.

64. *Id.*

65. Kenneth R. Feinberg, Special Master, September 11th Victim Compensation Fund, Lecture at the University of Alabama School of Law (Apr. 8, 2004), *in* 56 ALA. L. REV. 543, 553 (2004).

66. RALPH WALDO EMERSON, *Self-Reliance*, *in* THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON 145, 152 (Brooks Atkinson ed., 1940).

67. Inconsistent procedures and inconsistent employment criteria for adjudicators were among the problems that inspired the Administrative Procedure Act. For an insightful description, see Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 65-68 (1996). These problems were also the focus of a superb consultants' report prepared for the Administrative Conference of the United States. PAUL R. VERKUIL ET AL., REPORT FOR RECOMMENDATION 92-7: THE FEDERAL ADMINISTRATIVE JUDICIARY, *in* 2 ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 777 (1992); *see also* Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310) (recommending many of the reforms urged by the consultants' report).

internally inconsistent. An adjudicator might forget having reached a prior decision, erroneously find a prior case distinguishable, change his or her view, or even decide the two cases differently for reasons that the adjudicator knows to be improper.[68]

Inconsistencies also vary by type of issue. The issue might be one of law, one of fact, one of discretion, or one with a mix of ingredients. An interpretation of law might be one of "pure" law—either a broad question like the meaning of the statutory term "particular social group" or a narrower question such as whether female genital mutilation is "persecution" or whether the husbands of women who have been forcibly sterilized qualify under the "refugee" definition.[69] Or the decision might require the application of a broad term to specific facts, such as whether a given instance of physical abuse was severe enough to be "persecution."[70] Similarly, a finding of fact might be one of historic fact, requiring the adjudicator to determine what actually happened. It might be one of predictive fact, such as how likely it is that the feared persecution will occur in the future. Or it might be an assessment of the asylum seeker's credibility, including whether the person is truthful, reliable, and perceptive. Even discretionary judgments can vary from open-ended determinations of whether an individual who is statutorily eligible for asylum should receive it,[71] to a more structured discretionary decision, such as whether the hardship a person will experience can be described as "exceptional and extremely unusual."[72]

Precisely how harmful inconsistencies are might well depend on which of these types they are. The degree of harm might depend also on whether the inconsistencies emerge during the initial stages or the appellate stages of the adjudicative process. These variables will be introduced below whenever they are thought relevant.

Two last preliminary observations: balance is not the same as, and does not promote, consistency. At best, balance prevents *asymmetric* inconsistency. An immigration judge corps that comprises one hundred anti-immigrant zealots and one hundred pro-immigrant zealots would be "balanced" in some sense, but in such a corps the outcomes would be more likely to diverge, not less. Second, inconsistency is a two-edged sword. It can result in an outcome favorable to the asylum seeker when another adjudicator would have reached a different result, or vice-versa. Consequently, neither one's general ideology nor one's specific preferences on immigration or asylum should drive one's degree of tolerance for inconsistent outcomes.

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68. The reasoning of even a single opinion in a single case by a single adjudicator might be internally inconsistent, but that problem is beyond the scope of this Article.

69. INA § 101(a)(42).

70. *Id.*

71. INA § 208.

72. INA § 240A(b)(1)(D).

With those introductory caveats, it is possible to examine the reasons that we value consistency in adjudication. At first blush, consistency might seem like a good proxy for accuracy. If, for example, sixty percent of a group of decisions go one way and the remaining forty percent the opposite way, and the facts are similar enough that the two sets of outcomes cannot be reconciled, it might initially appear that at least forty percent of the decisions—and perhaps sixty percent—were wrong. For at least two reasons, that assumption should be resisted.

First, some issues do indeed lend themselves to what our legal system regards as uniquely correct results. A particular question of fact might present a dichotomy, and the appellate authority might rule that the evidence did not permit the initial decision maker's finding. In such a case the finding is "wrong" as a matter of law. Similarly, even if the dichotomous issue was discretionary, an appellate authority might conclude that the initial decision maker's determination was an abuse of discretion. But even if we assume the existence of issues that lend themselves to only one legally correct answer, the assumption that consistency is congruent with accuracy breaks down with respect to the many other issues on which the law recognizes that reasonable minds might disagree. In those cases, the outcomes simply cannot be classified as "right" or "wrong."

Moreover, even in cases where there is truly only one legally correct answer, consistency does not necessarily indicate a low error rate. One hundred percent consistency might mean that all the decisions were right, but it could also mean that all the decisions were wrong.

I concede, however, that rational human choice is still more likely than random selection to produce correct outcomes. On that assumption, a high degree of consensus makes the hypothesis of everyone being right more likely than the hypothesis of everyone being wrong. There is some reason, therefore, to assume that consistency correlates positively with accuracy. Still, correlation is not causation. Even if consistency provides some *evidence* of accuracy, it does not follow that consistency *promotes* accuracy. Unless there is some other basis for assuming that consistency generates accuracy, then reasons to promote consistency—or, more realistically, reasons to sacrifice other interests for the sake of attaining consistency—remain to be identified.

As it turns out, reasons to strive for consistency are plentiful. Probably the most intuitive is the principle of equal treatment—the notion that inconsistent outcomes are substantively unfair. When two people are situated identically in all legally relevant respects, the law should treat them the same. To the extent reasonably avoidable, the outcomes should not hinge on the biases of whichever adjudicator the individual had the good or bad luck to draw.[73]

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73. *See* Asylum Study, *supra* note 1, at 305; *see also* Stephen H. Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1313-14 (1986) [hereinafter Legomsky, *Forum Choices*]. The fairness

Certainty, and the predictability that it brings, are commonly cited as a second set of reasons to strive for consistent adjudication.[74] Conflicting results breed uncertainty in two ways. They do so directly, by preventing the parties from predicting how their dispute is likely to be resolved. These conflicts seem especially significant when the issues are legal, since by definition legal rules are norms of general applicability. Yet, uncertainty can also result from conflicting conclusions on questions of fact or discretion if the issues are recurring. Even when the facts differ in important respects, as when different asylum applicants allege different harms, one adjudicator's finding that a given harm is not severe enough to be classified as "persecution" might have an *a fortiori* effect, signaling the same result for cases in which the harm is even less severe. The impact of consistency on certainty and predictability might also vary as between inter-tribunal and intra-tribunal conflicts. Inter-tribunal conflicts might be less serious, at least in cases where the rules of jurisdiction and venue constrain the parties' choices, since consistency within the applicable tribunal at least helps the parties predict how their particular cases will be decided. Inconsistent outcomes within a tribunal, in contrast, do not permit even that.

As I have suggested elsewhere, consistency might also contribute to certainty and predictability in a more indirect way:

> One benefit of consistency is enhanced stability. Conflicts among equally authoritative bodies have ways of being reconciled eventually, either by gradual evolution or by pronouncements from above. The mere presence of a momentary conflict, therefore, can create at least the perception of imminent change, leaving affected sectors of the population uncertain how to plan for the future. Consistency reduces this uncertainty.[75]

Inconsistency can also impair efficiency. The very fact that two decisions are inconsistent means that the second adjudicator had to duplicate the analytical efforts of the first one rather than simply adopt the first adjudicator's reasoning and result. It also means that, at some point, some government actor will have to step in to resolve the issue definitively. Moreover, the resulting uncertainty leaves the parties less incentive to accept the first ruling in their case and more incentive to appeal it. The fact that they cannot predict the result might also discourage future parties from settling. Apart from conserving judicial and administrative resources, encouraging litigation and appeals rather than settlements and acceptance of initial decisions prolongs the waiting

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rationale assumes additional importance when the regulated actors are competing for a scarce good. *See* STEPHEN H. LEGOMSKY, SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION 28-29 (1990) [hereinafter LEGOMSKY, SPECIALIZED JUSTICE]. Since there is no numerical limit on asylum grants, that rationale need not be explored here.

74. Asylum Study, *supra* note 1, at 299; *see also* VERKUIL ET AL., *supra* note 67, at 991.

75. Legomsky, *Forum Choices*, *supra* note 73, at 1313.

times—a key consideration for both the applicant and the government in asylum cases.

A final benefit of consistency is acceptability to both the parties and the general public, a central concern of every adjudication process.[76] The public has a direct interest in consistency, since uncertainty can be problematic for the reasons already given. In addition, there is ample evidence that the public simply perceives inconsistent outcomes to be unfair. As the authors of the Asylum Study observe, we inscribe the equal justice admonition at the entrance to the Supreme Court building, follow stare decisis, promulgate uniform federal sentencing guidelines, employ pattern jury instructions, and allow judges to modify civil verdicts that veer too far from the norm.[77]

The fact that inconsistency encourages forum shopping when the venue rules permit it might be viewed as an additional reason to minimize inconsistent outcomes. But that assertion would simply beg the question, "What's wrong with forum shopping?" The answers to that question, in turn, can probably be subsumed within the rationales already described above. The mere possibility that an opposing party will shop for a favorable forum can reduce the predictability of the outcome. Actual resort to forum shopping can alter the probability of success, thus biasing the result. Forum shopping might also be thought to impede efficiency, both by forcing the opposing party into a more distant or otherwise less convenient forum and by raising the possibility of a dispute over the forum issue itself. If it becomes prevalent, forum shopping might also diminish public confidence in the fairness of the system, thereby damaging the acceptability of the process.

All else being equal, therefore, it is hard to be against consistency. Indeed, fidelity to the rule of law demands *attention* to consistency. But all else is seldom equal. Since strategies that enhance consistency can have costs, the real question is how much cost should be accepted in return for whatever amount of increased consistency it will purchase. For one thing, conflicts can have positive effects of their own. As others have observed, a judicial conversation that includes differing views expressed over a reasonable time period can be part of a healthy maturation process that ultimately aids the thoughtful resolution of a difficult issue.[78] In addition, even when the net impact of conflicts is negative (as I assume to be the norm), some solutions might be too costly. Strategies like reductions in adjudicators' decisional independence, broader or more frequent agency head review of adjudicators' decisions, heightened judicial deference to administrative tribunals, or even elimination of judicial review of the decisions by centralized tribunals, for example, might

76. *Id.*; *see also* Roger C. Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings*, 16 ADMIN. L. REV. 108, 112 (1964).

77. Asylum Study, *supra* note 1, at 299.

78. *See, e.g.*, HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 186-87 (1973); Samuel Estreicher & Richard I. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 736-37 (1989).

well enhance consistency, but at a price that this Article argues would be excessive.

III. THE DETERMINANTS OF CONSISTENCY

What factors drive consistency? I suggest in this Part that there are at least fifteen. Some relate to numbers—the number of people who decide each case, the total number of adjudicators or panels in the entire system, and the number of cases. Some of the other determinants relate to the attributes of the adjudicators, including the criteria and procedures for appointing them and their post-appointment training and guidance. Still others relate to the adjudicators' roles—their degree of independence, the level of deference they are expected to give to other decision makers, and their obligations with respect to the preparation of reasoned opinions and the use of stare decisis. Finally, I suggest that the level of consistency reflects the nature of the subject matter—in particular, how specialized, complex, dynamic, ideologically charged, and determinate the concepts are. While these categories can overlap, they serve a useful organizing function.[79]

One last caveat is that this Part explores only the impact of particular variables on consistency; it does not offer normative judgments about how heavily those variables should dictate or even inform policy responses. The latter inquiry is undertaken in Part IV.

A. *Numbers*

1. *The number of decisional units*

All else being equal, one can assume that the fewer "decisional units" there are at a given adjudication level, the more consistent the outcomes should be. By "decisional unit," I mean the person or group of people who decide a single case. Thus, the decisional unit might be one adjudicator (in the case of asylum, for example, a USCIS asylum officer, an immigration judge, a single member of the BIA, or the Attorney General), a panel that consists of more than one adjudicator but less than the entire tribunal (a three-member BIA panel, a three-

79. The magnitude of the interests at stake is not among the factors considered separately here. A great impact on either the individual parties or the general public might induce policymakers to invest greater resources, or to guarantee broader procedural safeguards, and it might make the subject matter more ideologically or emotionally charged—all factors that in turn can affect consistency and are therefore taken up separately below. But I cannot think of ways in which the magnitude of the interests influences the likelihood of consistency independently of these other factors. Obviously, the magnitude of the interests at stake will affect the degree of harm *caused* by inconsistency, since most of the benefits of consistent adjudication—equal justice, predictability, and acceptability to the public—assume greater importance when the interests at stake are substantial. This Part, however, focuses on the causes of consistency, not its effects.

judge court of appeals panel, or a limited en banc court of appeals panel), or the full tribunal sitting en banc (the BIA or a court of appeals).[80] It is easier to monitor and conform to the decisions of one's colleagues when they are few in number than it is when they are many.

In the asylum context, I submit, it is the number of decisional units—not the number of tribunals—that should be expected to correlate more closely with consistency. There is only one BIA, for example, but even a single-member decision becomes the official decision of the BIA unless a panel later takes up the case. Thus, the degree of consistency within the BIA has to reflect the fact that almost all its decisions are rendered by either single members or three-member panels. Functionally, therefore, we can think of the BIA as a collection of single-member and three-member decisional units rather than as one large decisional unit. Analogous statements could be made about court of appeals decisions; the degree of consistency they can be expected to display must similarly take into account that decisions are normally made by three-judge panels.

I do not want to overstate this point. The fact that BIA members and panels, as well as court of appeals panels, are each part of a single tribunal does have significance. Some cases—a small minority—will be decided en banc. More important, designating selected decisions as precedent can serve as a unifying force by constraining future individual adjudicators or panels. When cases are decided either en banc or by reference to the tribunal's own precedents, the entire tribunal can be thought of as the decisional unit. That subject is taken up separately below.[81] But since not all cases are precedents, and since even precedents can lend themselves to differing interpretations, the degree of consistency one can expect from even a collegial body like the BIA or a court of appeals is reduced when the bulk of that body's decisions are made by less than its full membership.

These considerations are important, because it is often assumed or asserted that centralizing a review function in a single tribunal should improve the consistency of the resulting decisions.[82] One who accepts that assertion might, for example, applaud the BIA as an instrument for bringing consistency to the decisions of the immigration judges, or even advocate substituting a single specialized immigration court or asylum court for the current regime of judicial review of BIA decisions by the twelve courts of appeals of general jurisdiction

80. This Subpart considers only the *number* of decisional units; the *size* of a single decisional unit is a separate variable and is examined next.

81. *See infra* Part III.A.2.

82. *See, e.g.*, FRIENDLY, *supra* note 78, at 183 (suggesting that a national administrative court would improve uniformity); Peter J. Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644, 653 (1981); Maurice A. Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1, 13-14, 19-20 (1980).

(not advocated here).[83] But the assertion that centralization itself enhances consistency rests on at least one of two assumptions. One assumption is that a fixed number of decisional units will be more consistent if they are in the same tribunal than they will be if they are in different tribunals. An alternate assumption might be that centralization itself will permit a reduction in the total number of decisional units.

The first assumption *might* be true, but only if there are institutional constraints that cause decisional units to converge and that would not exist if the decisional units were in different tribunals. That will be the case if all the decisional units within the centralized tribunal are bound to follow that tribunal's precedents but not those of parallel tribunals. Panels of the U.S. courts of appeals, for example, must follow the precedents of their respective courts, but need not follow the precedents of other courts of appeals.[84] Again, however, stare decisis constraints govern only questions of law, not those of fact and discretion, and then only in cases where the prior decisions have been designated as precedents and are indistinguishable. Only in cases where all these conditions are met—question of law, designated as precedent, and indistinguishable on the facts—does centralization alone yield improved consistency.

The alternate assumption would be that centralization permits a reduction in the total number of decisional units for a particular class of cases. Again, an example might be transferring the judicial review function in asylum cases from the general courts of appeals to a single specialized court. Under those circumstances, if the judges of the new specialized court were to decide asylum cases and no others (and assuming they continue to decide cases in three-judge panels), then each of those judges could decide more asylum cases, and fewer judges would thus be needed to decide the entire class of asylum cases. To the extent that the smaller pool of judges improves consistency, however, it is because the specialization enables them to be fewer in number, not because they are centralized within a single tribunal.[85] To confirm that this is so, imagine a transfer of the judicial review function to a single centralized court whose judges continued to decide not only asylum cases but also the same general mix of cases—for example, reassigning all judicial review of immigration cases to the U.S. Court of Appeals for the D.C. Circuit or the Federal Circuit. Such a system would be centralized but not specialized, and there would be no reason to think fewer judges could handle the same asylum caseload.

The assertion that reducing the total number of decisional units should generally enhance consistency is subject to one final caveat. If the caseload

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83. *See infra* Part IV.B.4.

84. *See* United States v. Smith, 354 F.3d 390 (5th Cir. 2003).

85. The specialization variable has other effects as well, both positive and negative. *See infra* Parts III.E.1, IV.B.4.

remains constant, and the number of decisional units is reduced, possibly as a fiscal measure, it might initially appear that consistency will improve simply because there are now fewer decisional units whose outcomes have to be reconciled. All else equal, however, the reduction in the number of decisional units will mean less time and less attention per case. The reduced resources for each case, in turn, might well impair the ability of the decisional units to assure consistent results. Consequently, with a given caseload, a change in the number of total decisional units should have a mixed impact on consistency.

2. *The size of the decisional units*

As noted earlier, different tribunals employ decisional units of different sizes, ranging from single-member decisions to panels of less than full membership, to en banc decisions. Generally, increasing the size of the decisional unit should increase the consistency of the decisions both within the tribunal and among tribunals. The larger group diffuses the effects of personal values and subjective biases, thus diminishing the impact of the extremists and pushing the results closer to the middle of the spectrum. To use a simplistic illustration, suppose a tribunal had six members, of whom two always approved the applicants' claims, two always denied them, and the other two approached all cases with complete objectivity. Assume further that the applicant's case is a strong one which an objective adjudicator is almost certain to approve. Thus, four of the six members would be inclined to approve this person's claim and two would be inclined to deny it. If the tribunal decides all its cases by single members, then the chance of the applicant succeeding would be four out of six, or two-thirds. If the tribunal decides all its cases by majority votes of randomly selected three-member panels, the same applicant's chance of success rises to four-fifths.[86] If it decides all its cases en banc, the chance of success becomes one hundred percent. If instead the applicant has a weak case that an objective adjudicator is almost certain to deny, then the same reasoning applies in reverse.

But it is not just a question of mathematics. A panel decision, unlike that of a single member, can be deliberative. There is an opportunity for the various members to persuade one another, thus adding a further check on ill-considered decisions that might otherwise have led to inconsistent rulings.

86. In order *not* to succeed, this applicant would have to draw both of the automatic deniers out of a panel of three. If the panel members are selected at random, the chance that the first pick will be an automatic denier is 2/6; if that happens, the chance that the second denier will be the one chosen from the remaining five will be 1/5; and thus the chance that the first two picks will be the two deniers will be 2/6 times 1/5, or 1/15. Since there are three ways in which those two members could be drawn (picks 1 and 2, picks 1 and 3, and picks 2 and 3), the probability of drawing both of them will be 3/15, or 1/5. Thus the probability of *not* drawing both of them will be 4/5.

Moreover, even if an extreme panelist is not actually persuaded, he or she might go along with the decision of more moderate colleagues, either to avoid embarrassment or to present a united front. That check is absent when decisions are made by single members.

Of course, even the use of multi-member panels does not guarantee a high degree of consistency. The courts of appeals, for example, decide cases in three-member panels; yet, as the Asylum Study demonstrates, there is a high rate of inconsistency from one circuit to another.[87] Generally, however, utilizing larger decisional units at least helps to bring the results closer to a comfortable center. The added members might outvote or persuade an extremist or produce compromise.

One caveat is that this analysis assumes a constant ratio of cases to decisional units. Suppose instead that the total number of adjudicators stays the same while the size of the decisional unit increases—for example, a tribunal shifts from single-member decisions to panel decisions without adding any adjudicators. Each adjudicator will then have to participate in more cases. The effect could be less attention per case and thus a *higher* incidence of inconsistent results.

Finally, in addition to the absolute size of the decisional unit, its size as a percentage of the total tribunal can affect the degree of consistency. Whatever the size of a tribunal or the percentage of its membership that constitutes a decisional unit, inconsistencies will occur when adjudicators change their minds or when personnel are replaced. But if, for example, a ten-member tribunal renders only single-member decisions, then an additional source of inconsistency will be the differing views of the ten adjudicators. At the other end of the spectrum, if the same tribunal decides all its cases en banc (i.e., the decisional unit comprises one hundred percent of the tribunal), then at least the latter source of inconsistency is excluded.

3. *The number of cases*

The total caseload of all decisional units combined can also affect consistency. It is easier to reconcile two cases than to reconcile 2000. Moreover, for any given subject matter, increasing the number of cases increases the number of variations on particular issues, and those variations might require judgment calls as to whether particular cases are similar enough to dictate similar results. Judgment, in turn, invites inconsistency. Finally, when an increase in the total number of cases is not accompanied by a corresponding increase in the number of decisional units, the change in the average caseload of a decisional unit can have additional effects on consistency.[88]

87. Asylum Study, *supra* note 1, at 361-71.

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

B. *Attributes of Adjudicators*

1. *Appointment patterns*

There is ample evidence that the demographics and prior work experiences of adjudicators can have significant effects on their decisions. The adjudicator's gender, for example, has been found to correlate with particular outcomes in a variety of settings.[89] The Asylum Study reveals that female immigration judges had far higher asylum approval rates than their male counterparts (54% versus 37%), although no significant gender difference existed among asylum officers' decisions.[90] The authors also found that those immigration judges who had previously worked in the private sector—especially those who had worked in academia, for other non-profit organizations, or for private law firms—had significantly higher asylum approval rates than those immigration judges who had previously worked for the federal government, particularly those who had worked in a law enforcement capacity for DHS or its predecessor agency, or in the military.[91] In fact, the longer an adjudicator's prior government service, the lower their asylum approval rates have been.[92] These two variables—gender and prior work experience—might themselves be causally related, since the Asylum Study shows that women have more experience in occupations likely to make them sympathetic to asylum seekers, while men have more experience in positions adversarial to asylum seekers.[93]

At the court of appeals level, the Asylum Study found that judges appointed by Democrats appear to vote in favor of asylum applicants at much higher rates than do judges appointed by Republicans.[94] Given these patterns, the diversity of appointees might well contribute to the differing outcomes.

2. *Training and policy guidance*

The quality of both the initial and the ongoing training and policy guidance received by adjudicators can similarly affect consistency in at least two ways. To the extent that training enhances the quality of the decision making, it reduces that component of inconsistency attributable to sloppiness or simple inadvertence. If the training and any other substantive guidance provided along

89. See the sources summarized by the Asylum Study, *supra* note 1, at 343-44, especially the classic work of Carol Gilligan, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

90. Asylum Study, *supra* note 1, at 343-44. The authors also speculate about possible reasons for the gender difference in immigration judge decisions. *Id.*

91. *Id.* at 345-46.

92. *Id.* at 347.

93. *Id.* at 344-45.

94. This was true in two of the three circuits studied, the Sixth and the Ninth. *Id.* at 371 & n.136. In the Third Circuit there was no appreciable difference. *Id.* at 369.

the way also impart the agency's views on particular policy issues that are likely to come before the adjudicators, then it can be assumed that those communications will tend to drive the decisions toward some common ground. The magnitude of that effect might well hinge on the adjudicators' degree of independence and, in particular, their job security.[95]

For those reasons, the training and policy guidance received by both asylum officers and immigration judges are important. The Asylum Office carries out a multi-step training program that has been more successful in some regional offices than in others.[96] As measured by the levels of consistency achieved, the immigration judge training program has been less successful, although the Attorney General has recently pledged to improve it.[97]

C. *The Roles of the Adjudicators*

1. *Decisional independence*

Decisional independence means many things to many people. I am using the term here to describe an adjudicator's freedom to reach the decision that he or she honestly believes the evidence and the law require, without fear of adverse personal consequences. Under that definition, an adjudicator whose job or compensation is at risk when the outcome of a case displeases his or her superiors is not independent.[98] So defined, the same term does not address other forms of intervention, such as attempts by politically accountable superiors to influence decisions by issuing general statements of agency policy through regulations, policy guidelines, and the like. Nor is decisional independence compromised by agency head or other review of adjudicators' decisions. Both of the latter subjects are considered separately below.[99]

A series of developments in 2002 and 2003 have profoundly drained the decisional independence of immigration judges and BIA members. The selective "reassignments" of the generally liberal BIA members, combined with other regulatory actions that used language broadly applicable to both

95. VERKUIL ET AL., *supra* note 67, at 993-94.

96. Asylum Study, *supra* note 1, at 311.

97. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, *supra* note 40, at 22.

98. Elsewhere I have attempted to flesh out more comprehensively the various theories of decisional independence and their application to immigration judges, the BIA, and court-stripping legislation. *See* Legomsky, *supra* note 39. In particular, decisional independence differs from institutional independence, which focuses on the independence of the entire judiciary as an institution rather than on attempts to influence the outcomes of particular cases. *Id.* at 386-87. Examples of systems that raise issues of institutional independence would include leaving the resource or staffing levels of adjudicative tribunals or courts to the discretion of political officials, or stripping tribunals or courts of their jurisdiction over selected classes of cases. *Id.*

99. *See supra* Part III.B.2, *infra* Parts IV.A.1, IV.B.2.

immigration judges and BIA members, have sent the clear signal that the Justice Department regards these adjudicators as simply Department attorneys whose tenure is subject to the unfettered discretion of the Attorney General. These developments are summarized above and detailed elsewhere.[100] More recent developments raise further doubts about the decisional independence of the immigration judges and BIA members. In June 2007, the Attorney General responded to courts' and others' complaints by issuing codes of conduct for immigration judges and BIA members. For the most part, the codes are meant to improve the quality of these adjudicators' decision making and the professionalism of their conduct. But one provision of both codes, while prohibiting most forms of ex parte communications, expressly allows an exception for "communications with other employees of the Department of Justice."[101] Combined with the earlier events, this explicit authorization to communicate ex parte concerning pending cases with, among others, Justice Department superiors, further narrows the adjudicators' decisional independence.

At first blush, independence would seem to be at war with consistency. Allowing adjudicators the freedom to sort out the evidence, interpret the law, and even exercise a statutory discretion as they see fit might strike one as a recipe for divergence. The distinguished authors of a major study for the Administrative Conference of the United States on the federal administrative judiciary, for example, saw it that way. They noted the large disparities in the decisions by administrative law judges (ALJs) in social security disability cases, ascribed the disparities to the differing personal philosophies of the ALJs, and lamented the fact that ALJ independence hindered efforts by the Social Security Administration to generate greater uniformity.[102] The unspoken assumption was that agency intervention would have caused more of the adjudicators' decisions to converge around a common agency position.

But the net impact of independence on consistency is not quite so obvious.[103] If adjudicators perceive their politically accountable superiors as threats to their job security, they might indeed be influenced to reach the agency's preferred outcome, but to varying degrees. Adjudicators will surely differ in the extent of their willingness to risk the displeasure of their superiors. They might have different family or other personal circumstances; different career aspirations; different levels of integrity, courage, or pride; and differing perceptions of how much their superiors care about a particular issue or even

100. *See* Legomsky, *supra* note 39, at 372-85; *supra* notes 35-39 and accompanying text.

101. Codes of Conduct for the Immigration Judges and Board Members, 72 Fed. Reg. 35,510, 35,511 (June 28, 2007).

102. VERKUIL ET AL., *supra* note 67, at 992 & nn.1138-41.

103. Independence also has other effects, some of them benefits and some of them costs. *See* Legomsky, *supra* note 39, at 385-403. The present discussion is confined to the effect of independence on consistency.

what their superiors' preferred outcome would be. Whether these sources of divergence are strong enough to offset the convergence produced by gravitation toward a common agency position is an empirical question that remains to be answered.

2. *Deference and scope of review*

Appellate review can either enhance or diminish consistency. It can reduce the consistency of the outcomes when several horizontal tribunals, such as the U.S. courts of appeals, and review the decisions of a centralized decision maker like the BIA. In that scenario, absent Supreme Court review, consistency is diminished simply because the final say is lodged in twelve different tribunals and more decisional units at the court of appeals level, rather than in one BIA and fewer decisional units. Conversely, review can enhance the consistency of the outcomes when a single centralized authority like the BIA or the Attorney General reviews the decisions of decentralized decision makers, such as the immigration judges.

Appellate review can have these effects for a second reason. Review serves not only a retrospective "error-correcting" function concerned with the outcome of the particular dispute, but also a prospective "guidance" function concerned with the future development of the law.[104] If the appellate tribunal has the power to designate selected decisions as binding precedent, then those precedents further increase or decrease consistency, depending again on whether it is a single centralized review body binding numerous decentralized adjudicators or vice-versa. The effects of stare decisis on consistency are taken up separately below.[105]

If those are the effects of appellate review on consistency, then anything that tempers the impact of appellate review should have precisely the reverse effect on consistency. One instrument that tempers the impact of appellate review is a narrow scope of review. In the removal context, which includes asylum, the BIA reviews immigration judges' decisions de novo with respect to conclusions of law and the exercise of discretion. Since 2002, however, it may reverse findings of fact—specifically including the credibility determinations that play particularly crucial roles in asylum cases—only under the "clearly erroneous" standard.[106] Thus, while BIA review of immigration judge decisions should generally enhance consistency for the reasons given above, the degree of enhancement is constrained on fact questions by the narrow scope of review.

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104. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 2-3 (1976); David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 299-303 (1984).

105. *See infra* Parts III.C.3, IV.A.10.

106. 8 C.F.R. § 1003.1(d)(3) (2007).

As for judicial review of agency decisions, the Administrative Procedure Act generally limits the court to "substantial evidence" review of findings of fact and the "arbitrary, capricious, an abuse of discretion" standard for the review of agency discretion.[107] Courts reviewing removal decisions (again, including asylum denials) employ roughly similar standards.[108] And on questions of law, judicial review is constrained by *Chevron* deference to the agency's interpretations of the laws they administer.[109] Thus, while review of BIA decisions by the twelve courts of appeals should generally reduce consistency for the reasons given above, the degree of reduction is itself constrained by the combination of *Chevron* deference on questions of law and a narrow scope of review on questions of fact or discretion.

3. *Reasoned opinions and stare decisis*

The practice of explaining one's decision in a reasoned, written opinion has to have a positive impact on both the internal consistency of one adjudicator's decisions and the external consistency of the collection of decisions by multiple adjudicators. For one thing, having to offer reasons for the decision forces the adjudicator to put more thought into the issue before reaching a conclusion. Even after reaching a tentative conclusion, the discipline of providing a convincing reasoned explanation forces the adjudicator to assure that it is defensible. Most relevant here, if one possible outcome would potentially conflict with another decision, the adjudicator has to decide consciously whether the two outcomes would be reconcilable. Without a reasoned written opinion, there is more room for gut instinct and visceral reactions based on personal or political outlook. Since those outlooks, in turn, will vary from one adjudicator to another, reasoned written opinions should, all else equal, enhance consistency.

As noted earlier, regulations issued in 2002 dramatically expanded the categories of BIA cases that require affirmances without opinion.[110] In those cases, as the name implies, BIA members are *prohibited* from writing reasoned

107. 5 U.S.C. § 706(2)(A), (E) (2000).

108. In removal cases, the statute makes findings of fact "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." INA § 242(b)(4)(B). Analytically, this standard is hard to distinguish from the traditional "substantial evidence" test, since the latter has generally been interpreted to require "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966) (citation omitted). The immigration statute does not specify a general standard of review for discretionary decisions, most of which have been made unreviewable, *see* INA § 242(a)(2)(B), except that discretionary *asylum* denials are "conclusive unless manifestly contrary to the law and an abuse of discretion," INA § 242(b)(4)(D).

109. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

110. *See supra* notes 32-34 and accompanying text.

opinions to explain their decisions; instead, they must dispose of the cases with a single boilerplate paragraph contained in the regulations. Under those circumstances, producing accurate and consistent outcomes becomes problematic. Happily, the Attorney General has recently announced that the BIA will be "drastically decreasing its reliance on summary one-line decisions."[111]

Reasoned opinions are a prerequisite to another practice that promotes consistency—stare decisis. On questions of law, the institution of stare decisis encourages adjudicative bodies to strive for consistent outcomes. While commonly associated with the judicial setting, stare decisis also applies to the BIA. Those decisions that the BIA chooses to designate as precedent are binding on immigration judges and on all employees of the Department of Homeland Security.[112] The Attorney General has recently pledged that the BIA will make greater use of its power to designate decisions as binding precedent.[113]

D. *Resources*

1. *Fiscal resources*

Generally, one can assume that the fiscal resources invested in an adjudicative process, relative to the nature and the size of the caseload, will influence the consistency of the outcomes. The number of adjudicators can cut both ways, for the reasons already discussed.[114] On the one hand, more adjudicators means more sets of potentially conflicting viewpoints to reconcile. On the other hand, for a given caseload, more adjudicators also means more time per case per adjudicator. The latter, in turn, can mean more careful hearings, more thorough review of the evidence and the law, more opportunity to find and consider potential precedents, more thoughtful consideration of the evidence and the arguments on appeal, and more careful drafting of the final opinion.

Resources are about more than the number of adjudicators. The support staff can help to attain both accuracy and consistency through research, analysis, and drafting of memoranda and opinions. Thus, the size, quality, training, and use of the support staff can all affect the degree of consistency. For the same reasons, the pay scales for both the adjudicators and the support staff become determinants of consistency as well. The availability and quality

111. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, *supra* note 40, at 22.

112. 8 C.F.R. § 1003.1(g) (2007).

113. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, *supra* note 40, at 22.

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

of a documentation center—particularly in asylum cases, where current and comprehensive information on country conditions is critical—is another key fiscal resource. So too is access to all the other information needed to assure accurate and consistent outcomes, such as a good system for cataloguing and retrieving both prior and currently pending cases that present roughly similar issues.

2. *Procedural resources*

The various procedural safeguards built into the adjudicative process have equally obvious effects on the adjudicators' ability to achieve consistency. Practical access to competent counsel—attorneys or other qualified representatives—has repeatedly been shown to be one of the highest correlates of asylum approval rates.[115] As the authors of the Asylum Study acknowledge, some component of that positive correlation undoubtedly reflects sampling bias, since pro bono and other attorneys are less likely to spend their time on cases that have little chance of succeeding.[116] But the complexity of the cases and the amount of corroborating evidence and other preparation required to win an asylum case make it highly likely that representation clarifies the issues and presents the adjudicator with critical information. On that assumption, practical access to counsel at least improves the probability that the adjudicators will reach more informed decisions, thus reducing whatever portion of the inconsistency is otherwise traceable to lack of information or analysis.

Investing in a right of appeal should have similar positive effects on consistency, subject to the caveat that multiple horizontal reviewers of a single tribunal with fewer decisional units (for example, court of appeals review of the BIA) can have countervailing effects. As the Asylum Study demonstrates, that caveat is important in the asylum context, as the various courts of appeals have indeed reached disparate results.[117] Subject to that qualification, however, a right of appeal should generally enhance consistency, depending on both the accessibility and the efficacy of the appeal. The appellate authority is able to take a second look at a case, with a special eye on those aspects of the decision that the opposing counsel have identified as problematic.

115. *See* Asylum Study, *supra* note 1, at 340-41, and sources cited therein.
116. *Id.* at 341.
117. *Id.* at 362-63.

E. *The Nature of the Subject Matter*

1. *Degree of specialization*

Specialized adjudication has a whole range of benefits and costs that I have discussed more comprehensively elsewhere.[118] The final part of this Article will revisit that discussion in the specific context of asylum. One of the benefits has long been assumed to be consistency. Indeed, the desire for uniform outcomes was one of the driving forces behind the establishment of the multiple-specialty United States Court of Appeals for the Federal Circuit.[119] Over the years, others have put forward similar rationales in support of a specialized immigration court[120] or a specialized administrative law court.[121]

I would suggest that the road from specialization to consistency takes two different routes. One route leads from specialization to expertise to consistency. The other route leads from specialization to fewer adjudicators to consistency.

The link between specialization and expertise has several components. Members of specialized tribunals can be chosen because of their pre-existing experience and expertise. Once on board, their expertise grows. As others have observed, the growth results both from their frequent contacts with the governing legislation and from their exposure to the practical results of their decisions through immersion in the overall statutory scheme.[122] If equipped with a specialized support staff and other specialized resources, and if their specialization allows them the time to participate in specialized professional associations and other forms of continuing professional development, then their specialized knowledge will expand further. That expertise, in turn, should aid them in achieving consistent outcomes. Familiarity with the issues should alone reduce the incidence of inadvertent deviations from established law and practice. Familiarity with one's own prior decisions and the prior decisions of colleagues is an additional avenue for uniformity.

Specialization also permits a reduction in the number of adjudicators who decide the particular class of cases. Suppose, for example, a given court has jurisdiction over ten unrelated subjects. Assume that in a typical month the court receives twenty new case filings for each of these subjects, for a total of two hundred cases per month, and that each case is equally labor-intensive. Assume further that all the court's decisions are by single members, that one adjudicator can reasonably average ten dispositions per month, that the cases

118. LEGOMSKY, SPECIALIZED JUSTICE, *supra* note 73, at 7-32.

119. *See* S. REP. No. 97-275, at 5-6 (1981), *as reprinted in* 1982 U.S.C.C.A.N. 11, 15-16.

120. *E.g.*, Levinson, *supra* note 82, at 653; Roberts, *supra* note 82.

121. Glen O. Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947 (1971).

122. *See* David R. Woodward & Ronald M. Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 ADMIN. L. REV. 320, 329, 332 (1979).

are randomly assigned, and that in a typical month, therefore, each adjudicator decides an average of one case from each of the ten subjects. On those assumptions, it will take twenty adjudicators to staff the court. Now suppose that one of the ten subjects the court handles is transferred to a specialized court that hears only those cases. Since that new court will receive only twenty cases per year, two adjudicators can staff it.[123] Without minimizing the possibility that the two adjudicators might have vastly different ideologies and judicial philosophies, one can still assume that it will be easier for two adjudicators to keep track of each other's decisions than it was when there were twenty.

2. *Complexity*

Statutory schemes can be complex for many reasons. Size alone can make a statutory regime complex; the Immigration and Nationality Act[124] now spans more than five hundred pages[125] and is supplemented by hundreds of pages of administrative regulations issued by the Departments of Homeland Security, Justice, Labor, and State,[126] among others, as well as thousands of administrative and judicial decisions. Perhaps more important, it is organizationally intricate. Passed in 1952 and amended countless times, the Act is "a hideous creature" whose "excruciating technical provisions . . . are often hopelessly intertwined."[127] It is not unusual for one provision to be qualified by other provisions located in distant reaches of the same statute.[128]

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123. The expertise itself might also prove efficient, so that each adjudicator's caseload could increase and fewer than two would now be needed. The point made in this paragraph, however, will be true even without assuming added efficiency. On the other hand, while specialization tends to promote consistency within the particular specialized field, participation in a more generalized tribunal might foster consistency as among analogous broad principles across subject matter lines. The latter type of consistency will not be explored here, since the present concern is with consistent outcomes in cases that present similar facts.

124. Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C.A. §§ 1-1178 (West 2007)).

125. *See id.*; *see also* IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES: SELECTED STATUTES, REGULATIONS AND FORMS 1-524 (Thomas Alexander Aleinikoff et al. eds., 2005) (containing selected excerpts).

126. *See* 6 C.F.R. §§ 5.1-1000.11 (2007); 8 C.F.R. §§ 1.1-1337.10 (2007); 20 C.F.R. §§ 1.1-1005 (2007); 22 C.F.R. §§ 1.1-1701.999 (2007).

127. STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1 (4th ed. 2005).

128. For example, INA § 208(b)(1)(A) makes "refugee" status a prerequisite to asylum. "Refugee," in turn, is defined in INA § 101(a)(42). The grounds on which a noncitizen can be found deportable are listed in INA § 237(a), but many of the provisions for discretionary relief in such cases are scattered throughout the statute. *See, e.g.*, INA §§ 212(h), 240A, 240B, 241(b)(3), 245, 249. The main requirements for the various classes of "nonimmigrant" temporary visitors are laid out in INA § 101(a)(15), but a long series of other limitations appears in INA § 214.

The complexities that result from both size and organizational intricacy can give rise to inconsistent outcomes. With increased complexity comes a greater risk that the adjudicator will simply miss an important provision. There is a heightened potential for logic errors. There is greater potential for reading particular provisions in ways that create conflicts with others. Reconciling those conflicts might require consideration of broader goals and contexts, and those sorts of judgments might vary from one adjudicator to the next. Technical complexity can generate textual ambiguity, with the attendant need to resort more frequently to legislative history. The latter, in turn, can breed further inconsistencies, as adjudicators differ not only in the ways in which they interpret various expressions of legislative intent, but also in the weight they place on different sources.

3. *Dynamism*

All else equal, one would expect a rapidly changing subject matter like immigration—particularly asylum—to produce a good deal of inconsistency along the way. It is hard for one adjudicator to stay even internally consistent, much less maintain consistency with one's colleagues, when the goal line keeps moving. The changes might stem from new statutes, new regulations, new case law, or new developments elsewhere in the law. Whatever the source of the changes, dynamism makes it more likely that even experienced adjudicators will simply miss new developments entirely. The changes might render precedents—one of the key instruments for consistency—outdated. They might raise doubts—and therefore judgments that differ from one adjudicator to another—about whether existing precedents are still in effect or whether they have been superseded by new case law, new regulations, or new statutory provisions. And the changes can raise whole sets of new issues that have to be decided without the aid of precedent, an additional recipe for inconsistent outcomes.

4. *Emotional or ideological content*

Some subjects generate more heat than others. Those subjects that inspire ideological or emotional fervor would seem to have the greatest potential for disparate outcomes, since the flesh-and-blood adjudicators who decide the cases will have extra reason to resolve the more indeterminate questions by resort to visceral beliefs and emotional impulses.

Asylum is such a subject. Both genuine refugees and those asylum seekers who are seen as abusing the system trigger strong emotions. Refugees present compelling cases for protection. They might be fleeing unspeakable atrocities and might be traumatized by their experiences. They are unusually vulnerable and, through no fault of their own, must depend on a foreign state for their most basic needs. For some adjudicators, those factors are paramount. For others,

different priorities dominate. Some adjudicators might see their main mission as weeding out fraudulent or other legally insufficient asylum claims in order to prevent illegal immigration generally or asylum abuse in particular. Since asylum adjudication tends to be high-volume and administrative resources are finite, adjudicators will also differ in the trade-offs they make between productivity and accuracy. They will have differing attitudes toward human rights, the role of international law, and perhaps even race, ethnicity, gender, and class.

5. *Spectrum of choice*

Some subjects provide more than the usual leeway to adjudicators. Statutory language might contain differing degrees of specificity, and regulations and case law might or might not fill in the gaps. The more latitude there is for basic fact-finding, the more open-textured the statutory and other relevant law, and the broader the area of delegated discretion, the more judgment the adjudicator will have to exercise, and, therefore, the more room there will be for the ideological and emotional factors discussed above to operate.

The choices, of course, will never be boundless. They will always be constrained by the classic "steadying factors" that Karl Llewellyn assembled as a response to what he perceived as the excesses of legal realism.[129] The professional office occupied by the adjudicator, and the pride and responsibilities that go with it, will surely be among the most important of these constraints. But the points here are that these steadying factors still leave ample margin for variation from one adjudicator to another and, more important, that the size of that variance will itself vary from one area of law to another.

That brings us to asylum. In this field, the spectrum of choice is exceptionally broad. First, asylum claims require determinations of whether individual claimants meet the definition of "refugee."[130] That definition in turn necessitates applications of such broad statutory terms as "persecution," "well-founded" fear, and "social group."[131] Moreover, since asylum claimants can rarely escape their countries of origin with official documentation of the persecution that awaits them if they return, their own testimony assumes special importance. For that reason, claims frequently, if not usually, turn on whether the adjudicator finds their stories credible. Although Congress has provided some specific guidance on how to assess credibility and on when to insist on corroborating evidence of even credible stories, myriad factors and the absence of guidance as to the weight those individual factors should command leave

129. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19-61 (1960).

130. *See* INA § 208(b)(1).

131. *See* INA § 101(a)(42).

credibility highly indeterminate.[132] Finally, the requirement that the fear of persecution be "well-founded" requires the adjudicator not only to find historic facts, but also to make predictions about the treatment an applicant will receive if returned to the country of origin. The latter requires an uncommon degree of judgment and therefore spawns an unavoidably high degree of variance among adjudicators.

IV. THE POLICY OPTIONS

> God, grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference.[133]

The authors of the Asylum Study have demonstrated a high rate of variance in asylum outcomes. They have exposed disparities at all levels of the system—from asylum officers and immigration judges to the U.S. courts of appeals. Differences in the asylum seekers' countries of origin do not explain these results, because the authors were careful to control for that variable. Moreover, the Asylum Study revealed specific patterns to the variances, not just random distributions that might otherwise have been the simple result of high numbers of adjudicators or cases. As the study demonstrated, some adjudicators are generally much more inclined to grant asylum than others are. Moreover, the approval rates vary by the genders of the adjudicators, their prior work experience, and, at least on some courts of appeals, the administration that appointed them.

Of the variables identified in the preceding Part, which ones might account for the disparate outcomes observed in the asylum setting? Under the circumstances just noted—the persistence of large variances at all levels, the elimination of country of origin as an explanatory factor, and the adjudicator-specific patterns—it seems easy to identify the principal contributors. They include the adjudicators' differing ideologies and attitudes, which affect their preexisting *inclinations* to grant or deny asylum,[134] and the subject matter, which is indeterminate enough, complex enough, and dynamic enough to give adjudicators relatively broad *freedom* to reach the outcomes they desire. The attitudes that asylum adjudicators inevitably bring to their work include not only their general philosophies about asylum or immigration, but also their normative conceptions of the adjudicative role, their levels of suspicion about

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132. *See* INA § 208(b)(1)(B)(ii)-(iii).

133. This prayer, modified by Alcoholics Anonymous, is generally attributed to Rheinhold Niebuhr. *See* The Origin of Our Serenity Prayer, http://www.aahistory.com/prayer.html.

134. The authors of the Asylum Study similarly attribute the disparities largely to the "officers' or judges' different degrees of skepticism about the veracity of applicants, or the adjudicators' different political philosophies or personal backgrounds." Asylum Study, *supra* note 1, at 379.

the credibility of the applicants, and the weights they attach to erring on the side of either the individual or the government.

That is unequal justice to be sure, but the basic thesis of this Article is that *for the most part* we shall have to live with it. Unless the adjudicators can be made ideologically homogeneous—a goal I find neither desirable nor achievable—there will always be substantial asylum approval rate disparities and many outcomes will reflect the luck of the draw. That is just the way it is.

This is not, however, a call for complacency. Consistency is a positive virtue for all the reasons offered in Part II of this Article, and this Part will consider steps that can be taken to enhance it at the margins. The key is to aim low and to settle for treating the symptoms.

More substantial fixes are possible to theorize. Some will respond to the Asylum Study by calling for dramatic measures that would infuse the asylum process with greater uniformity. Most of those solutions would likely require more centralized control over the adjudicators. These might include terminating the appointments of the true outliers or otherwise penalizing them for extreme decisional patterns, imposing minimum or maximum asylum approval rates, or more muscular review of adjudicative decisions by an agency head or other politically accountable officials. In the discussion that follows, I argue against all of those options.

The remaining discussion, then, will consider the policy alternatives. They will be broken down into three groups—measures that would probably enhance uniformity, albeit only marginally, and that are worth trying; measures that might improve uniformity, again only marginally, but that should be resisted; and measures that might well improve uniformity significantly and maybe dramatically, but that should be vigorously resisted nonetheless.

A. *Worthwhile but Marginal Improvements*

1. *More detailed statutes, regulations, and informal instruments*

As many have noted over the years, the law contains no comprehensive definition of "persecution" that would be concrete enough to offer adjudicators any meaningful guidance.[135] That gap is understandable. It would be hard to anticipate every conceivable means of persecution that "an imaginative despot might conjure up."[136] It would be possible, however, for Congress to express its judgment on a few commonly recurring issues. Similarly, either the Department of Justice or the Department of Homeland Security could issue interpretative regulations or provide other informal policy guidance that adjudicators could

135. *See, e.g.*, *id.*; *see also* T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5 (1991).

136. Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 45 (1983).

consult in relevant cases.[137] Congress, for example, has specifically made subjection to forced abortions or forced sterilizations a basis for refugee status.[138] The former INS issued informal gender guidelines to aid asylum officers in their evaluation of gender-related asylum claims.[139]

The authors of the Asylum Study expressed little enthusiasm for more substantive guidance, not because they identified any affirmative harms, but because of the lack of "evidence that disagreements about substantive law account for the disparities in grant rates."[140] I agree with the authors that the bulk of the explanation lies elsewhere, but policy guidance on a few specific key issues might help at the margins.

2. *More adjudicators*

Increasing the total number of adjudicators at each level—asylum officers, immigration judges, BIA members, and court of appeals judges—would have mixed effects on consistency. As discussed earlier, it might seem counter-instinctive to expect greater consistency when there are more human beings whose decisions have to be reconciled.[141] Again, however, increasing the number of adjudicators at a particular level permits either the use of larger decisional units (explored next) or more decisional units. The latter, in turn, allows a decrease in the caseload of the average decisional unit and, therefore, an increase in the amount of time and attention that each decisional unit can devote to the average case. That extra time and attention should ultimately enhance consistency for all the reasons given earlier.

The Asylum Study quotes an important observation made by Chief Judge John Walker of the Court of Appeals for the Second Circuit, in his recent testimony before the Senate Judiciary Committee:

> The 215 Immigration Judges are required to cope with filings of over 300,000 cases a year. With only 215 Judges, a single Judge has to dispose of 1,400 cases a year or nearly twenty-seven cases a week, or more than five each business day, simply to stay abreast of his docket. I fail to see how Immigration Judges can be expected to make thorough and competent findings of fact and conclusions of law under these circumstances.[142]

For those who are familiar with the meticulous fact-finding, translation problems, and procedural issues that modern asylum hearings entail, the average of five cases per day will rightly seem unreasonably ambitious.

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137. *See* 5 U.S.C. § 553(b)(3)(A) (2000).

138. INA § 101(a)(42).

139. Memorandum from Phyllis Coven, Office of Int'l Affairs, U.S. Dep't of Justice, to All INS Asylum Office/rs and HQASM Coordinators (May 26, 1995), *reprinted in* 72 INTERPRETER RELEASES 781 (1995).

140. Asylum Study, *supra* note 1, at 379.

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

142. *See* Asylum Study, *supra* note 1, at 383.

Practitioners report analogous problems faced by the asylum officers, whose caseloads are also thought by many to preclude adequate time for accurate decision making.[143]

Of course, expanding the number of adjudicators would cost money, not only for the adjudicators themselves but also for the additional support staff and infrastructure that the expanded adjudicator corps would require. Ultimately, the gains in accuracy and consistency have to be balanced against those increased costs in the light of the vital interests at stake in asylum cases.

3. *Larger decisional units*

All else equal, expanding the size of the decisional unit—changing from mainly single member BIA decisions to panel decisions, for example—should improve the consistency of the outcomes for numerous reasons considered earlier.[144] Among other things, enlarging the decisional unit diminishes the impact of the extremists by diffusing their subjective biases, permits deliberation, and encourages consensus through moderation.

In theory, these forces apply not only to appellate authorities like the BIA and the courts of appeals, but also to the asylum officers and immigration judges who render the original decisions. In practice, it is hard to imagine the infusion of enough additional resources to enable the asylum officers and the immigration judges to commit multi-member panels to the tens of thousands of cases that come before them annually. Realistically, therefore, the possibility of larger decisional units in asylum adjudication is an appellate issue.

Until 1988, the BIA—then composed of five members—decided every case en banc.[145] The Justice Department, in fact, initially opposed a 1985 recommendation by the Administrative Conference of the United States that it move to a system of three-member panels.[146] Only three years later, faced with a rapidly growing backlog, did the Justice Department acquiesce in that recommendation.[147] Ironically, the same Department that had once staunchly resisted shifting from en banc to three-member panels has now gone to the other extreme, with dramatically increased resort to single-member decisions.[148]

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143. *See* LEGOMSKY, *supra* note 127, at 1089-90.

144. *See supra* Part III.A.2.

145. *See* LEGOMSKY, *supra* note 127, at 717.

146. *Id.* The details appear in the consultants' report on which the Administrative Conference recommendations were based. *See* Legomsky, *Forum Choices*, *supra* note 73, at 1370-74.

147. Executive Office for Immigration Review; Board of Immigration Appeals; Designation of Judges, 53 Fed. Reg. 15, 659, 15,660 (May 3, 1988) (codified at 1 C.F.R. pt. 3 (1988)).

148. *See supra* notes 32-34 and accompanying text.

Because the BIA does not keep the statistics that would have made comparison possible, the authors of the Asylum Study were not able to confirm empirically that BIA members have been prone to the same sorts of inconsistency as the asylum officers, immigration judges, and court of appeals judges. But the main sources of the inconsistencies among the latter three groups—differing ideologies and attitudes combined with complex, dynamic, and open-textured subject matter—are equally present for BIA members. Thus there is no reason to expect their decisional patterns to vary any less. Moreover, although based on a much smaller data sample, the Levinson study that was noted earlier certainly suggests similar patterns among BIA members.[149]

On those assumptions, the authors of the Asylum Study urge the BIA to assign *all* asylum cases to multi-member panels.[150] They point out that three-member panels might not be necessary; possible instead, they observe, would be two-member panels, with either the subsequent addition of a third member or remand to the immigration judge in cases of tie votes.[151] Given both the magnitude of the opposing parties' interests and the high degree of variance displayed in asylum adjudication generally, that suggestion makes eminent sense. A compromise would be to allow single members to screen out cases found to be "manifestly unfounded." Whether that standard would adequately protect against precipitous affirmances of meritorious cases and whether it would be cost-effective (because it would require two levels of BIA review of all cases that are screened in) are open questions. One variation would be to provide that the member who screens the case in would be one of the two panel members who then decide it on the merits, thus minimizing the number of members who need to study each case.

Moving to more routine use of multi-member panels would involve at least two policy trade-offs. The most obvious is the additional fiscal cost. If the number of decisional units is held constant, then it would take more adjudicators and more support staff to handle the same caseload. Two-member panels would not cost twice as much as single-member panels, because part of the work is the writing of the opinion, which would presumably be assigned to a single member at any rate. But they would certainly cost more. The extra expenditures would have to be balanced against the enhanced accuracy and consistency that those resources permit. The less obvious trade-off is the opportunity cost. The extra resources, instead of being allocated to increasing the size of the decisional unit, could instead have been used to increase the total number of decisional units. The latter strategy would cut each BIA member's caseload and thus permit each member to devote more time and attention to

149. Levinson, *supra* note 36 (describing BIA decisional patterns immediately following the Attorney General's announcement of forthcoming selective reassignments of BIA members).

150. Asylum Study, *supra* note 1, at 384.

151. *Id.* at 385 n.160.

each case. Which approach would ultimately yield the greater improvement in accuracy and efficiency is another unanswered empirical question.

Finally, the BIA could make more liberal use of en banc decisions when the issues are commonly recurring, otherwise important, or simply difficult. The regulations currently permit en banc BIA hearings in selected cases.[152] Also possible, however, would be a system of limited en banc decisions in which a majority of the BIA members, but not all, are randomly assigned to a case that warrants more than a two-member panel. Those U.S. courts of appeals that have more than fifteen active judges are authorized to do precisely that.[153] If a substantial increase in BIA en banc decision making were felt to be worthwhile but otherwise too costly, the BIA could adopt a similar practice.

4. *Strengthening the support staff*

The Asylum Study identifies some basic gaps in the support resources for asylum adjudicators—very few law clerks even for immigration judges, no stenographers, and interpreters of uneven quality.[154] Improving the quality of the interpreters would have obvious implications for both the time that hearings take and the reliability, and therefore consistency, of the outcomes. Investing in more law clerks for immigration judges might be more important still. Law clerks can do much of the research, aid with the analysis through carefully written bench memoranda, and draft opinions for the immigration judge to consider. Their work would improve the quality of the decision making not only directly, but also indirectly, as it would free up more hearing time for the immigration judges.

5. *Providing counsel*

The immigration laws give every person in removal proceedings the right to counsel, but not at government expense.[155] The preclusion of government-funded counsel has been problematic, because many of the individuals in removal proceedings are unable to afford counsel and because counsel materially increases the likelihood of success, especially in asylum cases.[156]

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152. 8 C.F.R. § 1003.1(a)(5) (2007).

153. Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978); *see also* FED. R. APP. P. 35(a) (allowing a majority of active judges of any court of appeals to go en banc when "necessary to secure or maintain uniformity of the court's decisions").

154. Asylum Study, *supra* note 1, at 383.

155. INA §§ 240(b)(4)(A), 292.

156. Asylum Study, *supra* note 1, at 340; Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 743-46 (2002); Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, IMMIGR. BRIEFINGS, June 2004, at 1, 5-7, apps. I & II, *available at* http://www.cliniclegal.org/Publications/ArticlesbyCLINIC/charitablelegalprograms.pdf.

The authors of the Asylum Study found representation by counsel to be "the single most important factor affecting the outcome of [an asylum] case." There are ways for indigent noncitizens in removal proceedings—including asylum applicants—to obtain counsel, but they are very limited.[157]

For these reasons, the authors of the Asylum Study recommend the appointment of counsel for every indigent asylum seeker in removal proceedings. Without counsel, they point out, it is difficult to produce the affidavits and other documents asylum seekers need in order to establish their claims and nearly impossible to make the technical legal arguments often required. Combining the incalculable harm of erroneous denials with the substantial probability that counsel can help avoid such errors, they argue, the government should provide counsel to indigent asylum seekers when they find themselves in the quasi-legal setting of a removal hearing.[158]

The authors make a strong case. And if representation by counsel increases the asylum approval rate, then assuring that *all* asylum applicants have access to counsel has the additional effect of evening the playing field, thereby enhancing the consistency of the outcomes. Accuracy and consistency aside, counsel benefits not only the clients, but also the immigration court. Counsel can help speed the hearings by focusing the issues,[159] preparing the testimony, assembling the documents, and doing the necessary legal research.

In the present political climate, furnishing counsel for all indigent asylum seekers in removal proceedings seems unrealistic. Some will particularly object to devoting public resources to those applicants whose claims are frivolous or in bad faith. There might even be a fear that the availability of appointed counsel for asylum applicants would create a perverse incentive for individuals in removal proceedings to file frivolous claims merely to get free legal advice. A compromise, therefore, would be to borrow one feature from the otherwise much maligned expedited removal program. Congress could require the appointment of government counsel once an asylum applicant makes threshold showings of indigence and a "credible fear of persecution,"[160] to be determined by the immigration judge. While perhaps still politically unrealistic, the compromise version would at least address the objection to rewarding frivolous claims.

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157. These include the theoretical possibility of persuading a court that due process demands the appointment of counsel in a particular case, Aguilera-Enriquez v. INS, 516 F.2d 565, 568-69 (6th Cir. 1975), legal services providers that accept no funding from the Legal Services Corporation, and pro bono legal services delivered by individual practitioners or charitable organizations. *See generally* LEGOMSKY, *supra* note 127, at 653-67.

158. Asylum Study, *supra* note 1, at 384.

159. *Id.*

160. *See* INA § 235(b)(1)(B)(ii), (iii), (v). Credible fear requires "a significant possibility . . . that the alien could establish eligibility for asylum." INA § 235(b)(1)(B)(v).

6. *Quality control in hiring*

Previous discussion has considered the roles played by ideology and attitude in the disparate outcomes that the Asylum Study observed. One question is what normative implications those patterns have for the criteria and procedures for hiring asylum adjudicators.

Whatever the hiring system, of course, adjudicators will arrive with biases. Anyone with specialized experience is likely to have thought about the issues and formed opinions, and in that sense, at least, will have a preexisting bias. Therefore, as long as immigration experience is valued as one of the hiring criteria, there will be biases. Further, even if prior specialized experience is discounted as a hiring factor, the adjudicator who arrives with no such experience will still have been exposed to the immigration debate and likely to have *some* predisposition on the more controversial issues. Indeed, the chance of appointing a qualified asylum adjudicator who truly has no opinion on the subject is about the same as that of finding a qualified O.J. Simpson juror who had never before heard of the case. And if such a person could be found, one would have other reasons to worry. Finally, even a person who arrives without any preformulated views on the issues will form them soon enough after hearing a fair number of cases.

Personal ideology, therefore, will always be part of what an asylum adjudicator brings to the job or at least soon develops. Consequently, the objective should not be to avoid hiring anyone with a preexisting ideological bias, but simply to avoid affirmatively factoring a candidate's ideology into the hiring decision.

That conclusion might be less obvious than it seems. Since asylum has substantial policy implications, a politically accountable official might assert the legitimacy of hiring adjudicators who share his or her world view. There are two arguments for doing so. One is that the official is part of an administration that was elected or appointed through democratic processes and remains accountable to the people. Thus, the argument would run, the official has the right, if not the duty, to appoint people who will effectuate his or her policy goals. The second argument would be that only by appointing ideologically similar personnel can the official hope to achieve outcomes compatible with each other and with the policy decisions that that official makes in his or her rulemaking or other political capacities. Persuasive as those arguments would be with respect to the appointments of political subordinates, however, they seem unconvincing with respect to adjudicative positions, where the job duties consist of finding facts and interpreting law. Even the then embattled Attorney General, Alberto Gonzales, conceded as much. He said, "I believe very strongly that there is no place for political considerations in the hiring of our career employees or in the administration of justice."[161]

161. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the*

At least two questions then arise: what should the hiring criteria be for asylum adjudicators, and who should make the hiring decisions? On the first question, the authors of the Asylum Study urge more rigorous hiring criteria. They say:

> [An immigration judge] should have to demonstrate that he or she is sensitive to cultural differences and likely to treat all parties respectfully; capable of managing a large docket without becoming impatient; predisposed to be very careful in judging the credibility of people who claim to be victims of trauma or torture; and able to produce well-reasoned decisions that take into account all of the evidence and arguments presented by the parties.[162]

Yet the two questions—what the criteria should be and who should make the hiring decisions—are hard to separate. Mr. Gonzales's publicly stated position notwithstanding, the authors of the Asylum Study point out that between 2004 and 2007 the Attorney General bypassed the formal competitive vetting procedures used by the Chief Immigration Judge, instead hiring his own preferred candidates in "the overwhelming majority" of cases.[163] When political officials make the hiring decisions, the temptation to prize ideological and partisan political preferences over judicial aptitude and temperament becomes clear. In the final days of his tenure at the Justice Department, the Attorney General told the Senate Judiciary Committee that he had instituted new hiring procedures by which "the *initial* vetting, evaluation, and interviewing functions have been placed within the Office of the Chief Immigration Judge and within the Executive Office for Immigration Review as a whole."[164] The qualifier "initial" leaves it open to the Attorney General to appoint his or her preferred candidates for ideological or partisan reasons.

It does not have to be that way. The administrative law judges (ALJs) employed in a variety of other adjudicative settings are hired (and retained, a point taken up presently) through procedures that leave far less control in the hands of the agencies whose decisions they will be reviewing.[165] As discussed below, immigration judges could be made ALJs and appointed in the same way.[166]

As for the appellate stage, the authors of the Asylum Study, like several who have gone before them, recommend replacing the BIA with an Article I

Judiciary, *supra* note 40, at 24.

162. Asylum Study, *supra* note 1, at 380. Whether demographic characteristics such as gender, ethnicity, and the like should also be part of the hiring equation is examined *infra* Part IV.B.1.

163. Asylum Study, *supra* note 1, at 380 n.146 (quoting Emma Schwartz & Jason McLure, *DOJ Made Immigration Judgeships Political*, LEGAL TIMES, May 30, 2007, at 12).

164. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, *supra* note 40, at 22 (emphasis added).

165. Lubbers, *supra* note 67, at 73, 77. For that reason, among others, agencies have been increasingly hesitant to assign adjudicative functions to ALJs. *Id.* at 70-74.

166. *See infra* Part IV.C.2.

immigration court.[167] Probably the most important consequence of this approach would be the restoration of decisional independence, a point considered separately below.[168] The creation of such a court would also alter the appointment process. Some, including the authors of the Asylum Study, have argued for appointment by the President and confirmation by the Senate, much like the process in place for the U.S. Parole Board.[169] Others prefer the current model of Attorney General appointments.[170]

While the current model has the advantages of relative speed and philosophical compatibility between the Attorney General and the adjudicators, I continue to believe that presidential appointment followed by Senate confirmation would make eminent sense for the BIA. The increased stature of a presidential appointment might help to attract the strongest candidates. The Senate confirmation process would increase the chance of exposing ideologues whose decisions can generate the very disparities that the Asylum Study revealed.

7. *Professional development*

The earlier discussion of training illustrates the ways in which thoughtful professional development—both upon appointment and at regular intervals thereafter—can promote accuracy and consistency in adjudicative outcomes. For all those reasons, the authors of the Asylum Study recommend more intensive training on asylum issues, particularly for immigration judges.[171] They also advocate regular meetings between adjudicators with unusually high asylum approval rates and those with unusually low rates, in the hope that some common ground can be located.[172] Both recommendations are sensible, and both have the potential to make modest inroads into the disparities in asylum approval rates.

8. *Dissemination of asylum approval rates*

The authors of the Asylum Study were able to dig up large amounts of information on the asylum approval rates of asylum officers, immigration judges, and selected court of appeals judges, but they could not obtain

167. Asylum Study, *supra* note 1, at 386-87; *see also* Levinson, *supra* note 82; Roberts, *supra* note 82.

168. *See infra* Part IV.C.2.

169. *See* Asylum Study, *supra* note 1, at 386; *see also* Legomsky, *Forum Choices*, *supra* note 73, at 1378-80; Levinson, *supra* note 82, at 650-51; Maurice A. Roberts, *The Board of Immigration Appeals: A Critical Appraisal*, 15 SAN DIEGO L. REV. 29, 44 (1977).

170. See the sources cited in Legomsky, *Forum Choices*, *supra* note 73, at 1379 n.483.

171. Asylum Study, *supra* note 1, at 381-82.

172. *Id.* at 382.

analogous information on members of the BIA. They urged the BIA to begin compiling and publishing those data.[173]

There is a fine line between putting peer pressure on individual adjudicators to reach particular outcomes and simply alerting them to information that their decisional patterns are out of step with those of their colleagues. Both actions run the risk of compromising the adjudicators' independent judgment, but there are differences in degree. The latter action provides information that might be more welcome than threatening. If the adjudicators' job security is adequately safeguarded—a critical point discussed separately in Part IV.C.2 below—then it is hard to argue against providing adjudicators with information they might find helpful. The only concern would be that the peer pressure from one's colleagues upon receipt of this same information might induce some adjudicators to go against their better judgment in a certain number of asylum cases in order to bring their overall rates closer to the norm. That possibility seems difficult to eliminate entirely, but my view is that it does not outweigh the value of adjudicators being able to discover whether their decisional patterns are at a relative extreme. I therefore endorse the authors' suggestion that the BIA compile and regularly disseminate the asylum approval rates of each member. I would recommend further that the Asylum Office and the Office of the Chief Immigration Judge schedule similar disseminations, at regularly scheduled intervals, to their respective adjudicators.

9. *Expanding the BIA's scope of review*

Earlier discussion explained how appellate review can either increase or decrease the consistency of the outcomes, depending principally on whether the appellate authority has more or fewer decisional units than the original decision maker. The same discussion then observed that narrowing the scope of appellate review tempers the effect of the appellate review on consistency.[174] As also discussed earlier, the BIA reviews immigration judges' legal and discretionary decisions de novo but, since 2002, reviews their findings of fact only under the more deferential "clearly erroneous" standard.[175]

Even with its increased reliance on single-member decisions, the BIA has far fewer decisional units than the immigration judges. In theory, therefore, BIA review is a unifying force, promoting consistent outcomes. In practice, the narrow scope of review on fact questions lessens that positive effect for all the reasons given earlier. Thus, one way to promote consistency would be to restore de novo BIA review of immigration judges' findings of fact.[176]

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173. *Id.* at 384.

174. *See supra* Part III.C.2.

175. *See supra* Part III.C.2.

176. The analogous issue of court of appeals deference to the BIA is taken up

The main concern in doing so would probably relate to one particular fact question—the credibility of witnesses. Immigration judges, to be sure, have the advantage of face-to-face contact with any witnesses who appear at the hearings. They are therefore best positioned to observe the witnesses' demeanor. The BIA must rely on a cold transcript.

That difference, however, is easily exaggerated. Asylum hearings involve very few live witnesses other than the applicants themselves.[177] As to the applicant's testimony, Congress has recently laid out the specific factors on which the credibility determination may rest,[178] and the courts have insisted on tangible reasons before they will affirm the immigration judges' credibility judgments.[179] The requirement of concrete evidence makes it easier for the BIA to review credibility judgments. At any rate, myriad cultural signals can render demeanor evidence highly misleading.[180] My view is that any remaining marginal advantage of deferring to the immigration judges' opportunity to observe the witnesses' physical demeanor is outweighed by the BIA's ability to bring some measure of consistency to the now highly disparate immigration judge outcomes.

10. *Reasoned and binding opinions*

As earlier discussion explained, regulations introduced by the Attorney General in 2002 for the purpose of easing the BIA backlog greatly expanded the categories of cases in which the BIA is *prohibited* from giving reasons.[181] In a recent statement, the Attorney General, without mentioning the 2002 regulations, pledged to decrease the usage of these affirmances without opinion.[182]

The Attorney General's recent declaration is commendable, but the authors of the Asylum Study would prescribe stronger medicine. Echoing a recommendation of the U.S. Commission on Religious Freedom, they argue that *all* BIA asylum cases accompanied by written briefs deserve reasoned

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separately, in *infra* Part IV.B.3.

177. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1349 (1990).

178. *See* INA § 208(b)(1)(B)(iii), added by REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(3), 119 Stat. 231 (May 11, 2005).

179. *See, e.g.*, Osorio v. INS, 99 F.3d 928, 931 (9th Cir. 1996) ("The immigration judge 'must have a legitimate articulable basis to question the petitioner's credibility, and must offer a specific, cogent reason for any stated disbelief.'" (quoting Hartooni v. INS, 21 F.3d 336, 342 (9th Cir. 1994))).

180. See the classic article by Walter Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230 (1986).

181. *See supra* Parts I.B, III.C.3.

182. *Oversight of the U.S. Department of Justice: Hearing Before the S. Comm. on the Judiciary*, *supra* note 40, at 22.

dispositions that respond specifically to each of the arguments raised.[183] Put another way, the shift would be from an absolute prohibition on reasoned opinions to a positive obligation to provide them in the affected cases.

I fully concur. The ways in which written reasoned opinions promote consistency—both directly and by enhancing accuracy—have already been summarized.[184] Reasoned dispositions have side benefits too. They assure applicants, their counsel, and the general public that their arguments were actually heard and considered. Of course, depending on whether the extra work is accompanied by increased resources, there would presumably be either additional fiscal cost or a reduction in the speed with which the backlog is eliminated. But even from a purely fiscal standpoint, a requirement of written reasons might well pay for itself. As the authors of the Asylum Study point out, counsel can use the opinions to decide whether it is worthwhile to seek review from a court of appeals and, as a result, might opt for fewer appeals.[185]

That scenario seems plausible for several reasons. The writing of the opinions is likely to improve the quality of the decisions in the first place, both by reducing inadvertent error and by making it harder to deny relief for improper reasons. By knowing that their arguments were addressed, counsel will have less reason to seek review. After examining the reasons given, counsel in a certain number of cases will find the reasons unassailable in court. (Admittedly, flaws in the reasons might have the opposite effect in some cases, giving counsel grounds for review that otherwise might not have arisen or might not have crossed counsel's mind.) The courts in turn will have less frequent need to seek BIA clarification of its reasons, more confidence in BIA opinions, and consequently less frequent need to remand for further BIA consideration. Moreover, the reduced remand rate might itself discourage appeals in cases that counsel now know are unlikely to succeed. At any rate, whether a requirement of written reasons in BIA asylum cases would slightly increase or slightly decrease the overall fiscal costs, the magnitude of the interests at stake—life or death in some cases, as the authors note—is reason enough to err on the side of accuracy.

The Attorney General has also said that the BIA would increasingly use its power to designate selected decisions as precedents, which are binding on immigration judges and all DHS employees, including asylum officers.[186] For the reasons given earlier, that step too should promote consistency.[187] The BIA can, and should, adopt a system analogous to that of the courts of appeals. A court of appeals panel is absolutely bound by a decision of a prior panel of the same court; only the full court sitting en banc, or the Supreme Court, may

183. Asylum Study, *supra* note 1, at 384.
184. *See supra* Part III.C.3.
185. Asylum Study, *supra* note 1, at 384-85.
186. 8 C.F.R. § 1003.1(g) (2007).
187. *See supra* Part III.C.3.

overrule the court's own precedent.[188] A majority of the active judges of a court of appeals may order a case reheard en banc when "necessary to secure or maintain uniformity of the court's decisions."[189] The BIA could similarly make its precedent decisions binding on single members and on three-member panels while allowing either limited en banc panels or the full BIA en banc to overrule precedents.

B. *Possible Enhancements to Consistency but Bad Ideas Nonetheless*

1. *Demographic hiring criteria*

The Asylum Study demonstrated that certain demographic and work experience variables significantly correlate with adjudicators' asylum approval rates. In particular, the data revealed higher approval rates among women adjudicators than among men, higher approval rates among those with prior work experience in academia, other nonprofit organizations, and private law firms than among those with prior government employment, and particularly low approval rates for adjudicators with prior immigration law enforcement or military experience.[190] Should these demographics be consciously incorporated into the hiring decisions in order to enhance the consistency of the outcomes?

Although I raise the issue in the interest of completeness, I believe that the use of demographics for this purpose would be a bad idea.[191] First, as a strategy for promoting consistency, formal or informal caps on hiring former government employees, for example, would be a futile project if an administration is committed to hiring adjudicators with particular philosophies. There are enough immigration restrictionists in the private sector that no political official would have to favor former law enforcement or military personnel to achieve an ideological objective. Second, as discussed earlier, ideological balance does not preclude polarization; at most it prevents asymmetry.[192] Third, even if demographic hiring preferences enhanced consistency, they would have affirmative costs. Adjudicators should be appointed on merit. The goal should be to create colleagues, not warring camps.

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188. *See, e.g.*, United States v. Smith, 354 F.3d 390, 399 (5th Cir. 2003).

189. FED. R. APP. P. 35(a)(1).

190. *See supra* Part III.B.1.

191. I wish to distinguish traditional affirmative action policies, which generally aim to promote diversity or to offset some of the effects of past discrimination. The issue here is whether to employ demographics for the very different purpose of making the case outcomes more consistent.

192. *See supra* Part II.

2. *More frequent agency head review of BIA decisions*

Though the power is not exercised often, the Attorney General may review any BIA decision that he or she wishes.[193] This is not an unusual arrangement; Congress often authorizes agency heads to review adjudicative decisions that fall within their domains.[194] To reduce the approval rate disparities identified in the Asylum Study, one might be tempted to urge more frequent Attorney General review of BIA decisions.

Among the strongest defenses of agency head review were the 1992 Administrative Conference recommendations on the federal administrative judiciary and the comprehensive consultants' report on which they were based. Both documents repeatedly extolled the benefits of agency head review, portraying it as a way for agency heads to assure inter-decisional consistency and to maintain control over basic policy at the same time.[195] Agency control over policy, in turn, was said to be necessary for several reasons. The agency, it was argued, has more policy expertise than the adjudicators do, since the agency can solicit input from several officials with multiple specialties; the agency officials are politically accountable; and agency heads can better guarantee that the results of adjudicative decisions cohere with other expressions of agency policy.[196]

These arguments are not generically compelling, however, and they seem especially vulnerable in the asylum context. Inter-decisional consistency, while important for all the reasons acknowledged in Part II of this Article, does not require the agency head's intrusion into the adjudicative process. When there is a designated appellate authority such as the BIA, an en banc decision of that tribunal can yield the same consistency as agency head review. Congress could even authorize the agency head to require the appellate tribunal to go en banc in a particular case if there is a concern that an overworked adjudicative tribunal would not do so on its own.

The need for agency primacy over policy matters can be conceded, but again, agency head review is not essential to agency policy primacy. Rulemaking and other policy mechanisms are also available. The multiple experts from whom the agency head can distill advice and perspectives will be just as available in a rulemaking proceeding as they are in agency head review of adjudication. The agency head will be just as capable of asserting agency policy primacy via rulemaking as he or she would be via review of adjudication. And rulemaking will be just as effective in promoting agency

193. 8 C.F.R. § 1003.1(h)(1)(i) (2007).

194. VERKUIL ET AL., *supra* note 67, at 1004; *cf.* 5 U.S.C. § 557 (2000) (authorizing agency member decisions).

195. *See* Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759, 61,760 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310); VERKUIL ET AL., *supra* note 67, at 795-96, 986, 996.

196. VERKUIL ET AL., *supra* note 67, at 987-90.

policy coherence as review of an adjudicative decision would have been—more so, if anything, since the facts of a particular case will not constrain the reach of the rule. In the asylum context, the arguments based on agency policy coherence are particularly inapt, since the immigration judges and the BIA are within the Department of Justice while the analogous policymaking agencies are now located within the Department of Homeland Security. Agency policy coherence, therefore, is simply not an issue in this context.[197] Moreover, as Jeffrey Lubbers has observed, there is normally a lessened need for political control in "high-volume, fact-based" adjudication processes and those in which benefits are sought—a description that fits asylum.[198]

While I acknowledge that even adjudicative decisions will often require policy judgments—particularly if the decisions are designated as precedential—the basic functions of the adjudicators are, after all, to find facts, interpret law, and exercise specific statutory discretionary authority. Even when a case presents an important policy question, the agency head can supersede the decision by issuing a generally applicable regulation if he or she wishes—provided, of course, that Congress has delegated the relevant rulemaking authority to the agency head. If Congress has not done so, then Congress's inaction is itself a policy decision that requires respect.

Further, as the consultants' report for the Administrative Conference acknowledges, rulemaking has tremendous advantages over adjudication as a vehicle for policy formation. These advantages include broader public input, notice to Congress, avoidance of adjudicative hearings to resolve issues of legislative fact, avoidance of litigating the same issues repeatedly, more enforceable rules, clearer advance notice of allowable and prohibited conduct, fairer applicability of the rules to similarly situated individuals at different points in time, and the opportunity for affected individuals to make policy submissions before the rule is adopted.[199] The report recited these considerations as advantages of rulemaking over adjudication, but every one of them seems equally logical as a rationale for rulemaking over agency head review of adjudication.

The report goes on, however, to outline the shortcomings of notice-and-comment rulemaking and the reasons agencies frequently go to great lengths to avoid it. Sometimes the circumstances vary enough to make a rule of general applicability unworkable; in those cases, adjudication is superior. Notice-and-comment rulemaking can be slow and expensive. Some agencies are required to

197. If the arguments for agency head review of BIA decisions were otherwise found persuasive, then this last point might be a reason to move EOIR to the Department of Homeland Security and subject BIA decisions to review by the Secretary of Homeland Security rather than the Attorney General. I do not recommend such a transfer because, as the discussion explains, I do not find the arguments for agency head review of BIA decisions convincing in the first place.

198. Lubbers, *supra* note 67, at 78.

199. VERKUIL ET AL., *supra* note 67, at 998-1000.

allow opportunities for oral argument and even cross-examination. Courts have often interpreted the statutory requirement of a "concise general statement" of the basis and purpose of the rule as if it demanded something much more elaborate, necessitating long delays both from remands and from lengthy prophylactic measures to reduce the risk of remand. Review by the Office of Management and Budget adds further expense and delay.[200]

Those disadvantages seem surmountable or at least easily reducible. If the circumstances are too varied for a broad general rule, then a narrower rule tailored to the circumstances is indicated. And if the variances are indeed of such a nature as to preclude even a narrow general rule, then the argument that the agency head needs to review the decision in order to promote overall agency policy coherence will be correspondingly difficult to sustain.

As for the logistics, Congress does not have to require any agencies to provide oral argument or cross-examination. Even without them, it is true, the costs and delays can be substantial; they explain why agencies often prefer the alternative of agency head review of adjudication. But the costs and delays are less convincing as normative justifications. In enacting, implementing, and interpreting the notice-and-comment procedures, Congress, the President, and the courts understand that the procedure imposes fiscal costs and delays. Yet they have made the value judgment that, before an agency can issue binding legislative rules of general applicability with the force of law, it must follow this elaborate procedure, despite the costs and delays. Agency head review of policy components of adjudication thus enables agency heads to accomplish indirectly what they are prohibited from doing directly—impose binding substantive rules of general applicability, with the force of law, without the procedural safeguards that the law would otherwise require.

That the logistical difficulties are reasonably surmountable is apparent from the traditional legislative process. Congress itself ordinarily makes policy by legislating, not by adjudicating. Even with the constraints of notice-and-comment procedure, an agency, with its top-down hierarchy, should be able to issue rules at least as quickly as Congress, which requires a majority vote in both Houses followed by either presidential assent or a two-thirds override of a presidential veto.[201] Moreover, if a judicial interpretation of the resulting statute displeases Congress, it can supersede the court's decision by amending the statute. It is not clear why the analogous procedures have to be any more cumbersome for agencies than they are for Congress.

If on a given issue the agency feels that the notice-and-comment procedure still makes the issuance of a legislative rule too onerous, interpretative rules might be an alternative method of influencing adjudicative outcomes in ways that promote the agency's policy agenda. Interpretative rules do not bind the public, and it is not clear whether they can bind the adjudicators, but they can

200. *Id.* at 1000-04.

201. U.S. CONST. art. I, § 7, cl. 2.

be issued quickly and without the fiscal cost of notice-and-comment machinery.[202] And when "for good cause" an agency feels that the notice and comment procedure would be "impracticable, unnecessary, or contrary to the public interest," such as when the timing is urgent, the agency can issue an interim regulation.[203] For all these reasons, the need for agency head review is seldom pressing.

Moreover, the central rationale for agency head review—the agency's political accountability—is also precisely what makes agency head review affirmatively troublesome. The agency head and any subordinates to whom he or she delegates the review function are subject to popular and political pressures. On matters of policy that reality is not problematic; consideration of the public's preferences is at home in democratic theory. But the essence of the adjudicative function is to find facts and interpret the law, not to please the public. While policy admittedly is implicated in a certain number of cases, the adjudicative function generally requires independence, not political accountability, as discussed in more detail below.[204]

Agency head review has other costs as well. It permits a dangerous concentration of power in the hands of a single individual. When the decision being reviewed was rendered by a multi-member panel, agency head review entails the substitution of one person's judgment for the collective judgment of several adjudicators. And the probability that a strong ideological bias will influence the result is greater when one person is deciding than when the decision is rendered by a randomly selected multi-member panel, for the reasons discussed earlier.[205]

One caveat—both conceptual and semantic—is required. In a formal sense, BIA review of the immigration judges' decisions is itself a species of agency head review. That is because at present the BIA derives its authority solely from the Attorney General, who created it in 1940[206] and continues to define its jurisdiction by regulation.[207] Thus, when the BIA decides a case, it is acting as an agent of the Attorney General, in much the same way that an associate attorney general or other subordinate in the Department of Justice might be delegated the task of reviewing a BIA decision. In a functional sense, however, the two review processes are very different. The real question is not whether the reviewer is technically acting as the Attorney General's delegate, but whether the reviewer is politically accountable or free to exercise his or her independent legal judgment. While recent events have prompted me to question the current independence of the BIA, I do not deny that it enjoys more actual

202. 5 U.S.C. § 553(b)(3)(A) (2000); VERKUIL ET AL., *supra* note 67, at 1005-07.

203. 5 U.S.C. § 553(b)(3)(B) (2000).

204. *See infra* Part IV.C.2.

205. *See supra* Part III.A.2.

206. Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3502, 3503 (Sept. 4, 1940).

207. *See* 8 C.F.R. § 1003.1(b) (2007).

independence than any political appointees whom the Attorney General might enlist to review BIA decisions.[208] For that reason, this discussion of agency head review has been confined to Attorney General review of BIA decisions, not BIA review of immigration judge decisions.

To sum up: There is little need for agency head review. Decisional consistency can be achieved through a combination of the administrative appellate process, legislative rules (including interim rules when necessary), and interpretative rules. Rulemaking and other powers can also preserve agency policy primacy and agency policy coherence. Moreover, agency head review poses inherent dangers to the dispensation of justice, including especially the substitution of a political outcome for one based on an independent adjudicative tribunal's honest reading of the evidence and the law. All of these considerations have special force in the asylum context, where the stakes are high and the potential for inappropriate political and ideological influence has been amply demonstrated.

3. *More restrictions on judicial review*

As developed earlier, appellate review can either increase or decrease the consistency of adjudicative outcomes, depending partly on whether the appellate reviewer has more or fewer tribunals and more or fewer decisional units than the original decision maker.[209] Since the twelve general courts of appeals collectively have far more decisional units than the one BIA, judicial review of asylum decisions can be assumed to have some centrifugal effects, exacerbating the disparate outcomes reached by the BIA.

The courts are already forbidden to review at least two important categories of asylum denials—those reached in expedited removal proceedings and those based on findings that failure to file the claim within the one-year deadline was not attributable to changed or extraordinary circumstances.[210] Nonetheless, for the stated purpose of reducing asylum approval rate disparities, some might be tempted to advocate further restrictions on judicial review of asylum denials. Those restrictions could conceivably include barring judicial review of other selected subcategories of asylum cases, making judicial review discretionary, or narrowing the scope of review.[211]

There are other costs of judicial review of administrative decisions. Collected elsewhere, these costs include judges' lack of political accountability,

208. *See* Legomsky, *supra* note 39, at 375-79.

209. *See supra* Parts III.C.2, IV.A.9.

210. *See* INA §§ 208(a)(2)(B), (a)(2)(D), (a)(3), 242(a)(2)(A).

211. *See* Jill E. Family, *Stripping Judicial Review During Immigration Reform: The Certificate of Reviewability*, 8 NEVADA L.J. (forthcoming 2007).

the risk of error when non-experts review the decisions of experts, the fiscal expense, and the delays.[212]

In my view, however, the benefits of judicial review overwhelm its costs, particularly in the asylum context. Those benefits too have been explored elsewhere and need only be summarized here.[213] Probably the most obvious are the independence that judges bring to their work and the corresponding appearance of justice. Judicial independence, in turn, is beneficial for several reasons that are explored below and assumes special importance in asylum cases because of the recent threats to the independence of the immigration judges and the BIA members.[214] Judicial review also adds the perspective of generalist judges to the existing perspectives of the specialists whose decisions are being reviewed.[215] It provides a regime in which legal doctrine can evolve gradually, step by step, informed by the judicial conversation that multiple courts of appeals can supply. And the mere prospect of judicial review should add an incentive for the original decision makers to reach their conclusions thoughtfully and explain them carefully. Given all the recent criticism of the haste with which asylum claims are denied, any sobering effect of judicial review on the administrative adjudicators should be savored.

Despite the inconsistencies that judicial review of asylum claims inevitably introduces, and despite its other costs, any calls for further restrictions on judicial review of asylum claims should be vigorously resisted. To the contrary, the existing restrictions should be repealed. The Asylum Study demonstrates beyond doubt that ideology explains a large part, if not most, of the striking disparities in asylum adjudication. There is simply no reason to assume that the same biases are strangely absent when the asylum decisions are rendered in expedited removal proceedings or on the basis of no "changed circumstances" or no "extraordinary circumstances." Nor is there any reason to assume that in these cases the consequences of error are any less grave.

By the same token, there is no convincing reason to narrow the scope of review. It is narrow enough already. As in other removal cases, the court may set aside a finding of fact only if "any reasonable adjudicator would be compelled to conclude to the contrary."[216] The authors of the Asylum Study have urged Congress to substitute the "substantial evidence" test routinely prescribed for judicial review of most other formal administrative findings of fact.[217] I endorse that suggestion but would add that it is open to a court to interpret the existing language as a substantial evidence test, since the Supreme

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212. Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1211-16 (1989).

213. *Id.* at 1209-11.

214. *See supra* Part I.B and *infra* Part IV.C.2.

215. The benefits of that generalist perspective are further broken down in *infra* Part IV.B.4.

216. INA § 242(b)(4)(B).

217. Asylum Study, *supra* note 1, at 388-89.

Court has construed the latter test as similarly requiring a showing of reasonableness.[218]

Asylum denials are specifically exempted from the general statutory bar on judicial review of discretionary decisions, but the statute prescribes a needlessly and unusually narrow standard of review.[219] The usual standard of review of agency discretion is the familiar formulation "arbitrary, capricious, an abuse of discretion, *or* otherwise not in accordance with law."[220] If asylum is denied in the exercise of discretion, however, the court may reverse only if the decision was "manifestly contrary to the law *and* an abuse of discretion."[221] Precisely what the phrase "manifestly contrary to the law" is thought to add, and what reasons there might be for narrowing the standard of review in asylum cases, are not clear.

On questions of law, I am aware of no evidence that *Chevron* deference affects judicial review of asylum decisions any more or less than it affects interpretations in other administrative contexts. An argument can be made, however, that deference has less justification in asylum cases than in other areas. To the extent that judicial deference reflects recognition of the agency's special expertise, the ideological biases that so clearly explain much of the disparity in asylum outcomes sap much of the raison d'être for deference.[222] Courts are of course bound by the Supreme Court's holding in *Chevron*, but determining whether a particular agency interpretation is "permissible" or "reasonable" still leaves them with a good deal of leeway.[223] When the reasons for deference are as compromised as they are in the asylum context, courts should use that leeway to give the statute what they believe to be its intended meaning, to the extent *Chevron* permits.

4. *Transferring judicial review to a specialized immigration court*

Earlier discussion described the ways in which specialized adjudicators can promote decisional consistency within the specialized subject area.[224] Some of the reasons fall under the heading of improved expertise, while others arise

218. *See* Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 619-20 (1966) ("We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'" (quoting Consol. Edison Co. of New York v. NLRB, 305 U.S. 197, 229 (1938))).

219. *See* INA § 242(a)(2)(B)(ii).

220. 5 U.S.C. § 706(2)(A) (2000) (emphasis added).

221. INA § 242(b)(4)(D) (emphasis added).

222. *See, e.g.*, Woodward & Levin, *supra* note 122, at 332. Admittedly, expertise is not the only rationale for judicial deference to agencies. Deference also reflects the courts' recognition of Congress's assumed intention to delegate the interpretive function to the agency.

223. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

224. *See supra* Part III.E.1.

simply because specialization reduces the total number of different adjudicators who will be needed to handle a given caseload. Given these effects, some might advocate greater specialization as a way to address the sharp disparities revealed by the Asylum Study. For reasons that go beyond the pursuit of consistency, several commentators over the years have advocated replacing the BIA with a statutory, specialized immigration court.[225]

Specialized justice can take any number of forms. One variable is the degree of specialization. In the current regime, the degree of specialization diminishes steadily as a case progresses from initial decision to final review. As explained in Part I, asylum officers do asylum cases; immigration officers and BIA members decide a range of immigration cases, including but not limited to asylum; and the judges of the courts of appeals, of course, decide cases that span the whole range of federal law. In some subject areas, in the United States and elsewhere, there are tribunals situated somewhere between specialists and generalists; they might be assigned multiple specializations, loosely related or unrelated, and nothing else.[226]

A second variable is what it is, exactly, that the specialized tribunal would replace. In the context of either immigration generally or asylum in particular, the options might include replacing the immigration judges and/or the BIA with asylum specialists who otherwise perform the same roles, establishing a single specialized court with a trial chamber and an appellate chamber to replace the immigration judges and the BIA, and substituting a single specialized immigration court for both the BIA and judicial review in the general courts of appeals.

There are additional variables. They include whether a new immigration or asylum court is of Article I or Article III stature. If an Article I court were created, other variables would include the party and procedure for appointing the judges, the durations of the judges' terms, and their job security (life, life until a fixed retirement age, a fixed term of years either with or without the possibility of renewal, etc.). A new court could also be staffed by federal Article III judges who rotate in from other courts of appeals on temporary assignments or by specialist judges permanently assigned to the court. Or the current court structure could be retained but each court could designate a certain number of its judges to hear all the immigration (or asylum) cases, and only those cases. Still other variables might relate to the procedures of the specialized adjudicative body.

The combination of these and any other relevant variables will obviously affect the magnitudes of both the strengths and the weaknesses of any specialization arrangement. A more detailed catalog of the benefits and costs of

225. For the earlier calls for such a structure, see Levinson, *supra* note 82, at 653; Roberts, *supra* note 82.

226. *See* LEGOMSKY, SPECIALIZED JUSTICE, *supra* note 73, at 33-42.

specialization is the subject of a much longer writing; here I simply summarize them and identify their specific applicability to asylum.[227]

In addition to the implications for consistency, specialization has mixed effects on the quality of the resulting decisions. The specialized expertise that the adjudicators bring or acquire lessens their dependency on counsel and staff for basic information. For the same reason, it reduces the chance that a party will win or lose because of an imbalance in the skills or efforts of the opposing attorneys. It certainly reduces the chance that an unrepresented lay party will lose because of lack of familiarity with the law. The adjudicators will also generally have other specialized colleagues to consult, perhaps specialized books and other resources, and a specialized support staff. Specialized adjudicators might be better able to figure out what questions to ask, more likely to know the governing statute and the case law, and more familiar with recurring legislative facts such as, in the asylum context, country conditions. Their knowledge of related statutory provisions might leave them better situated to adopt a contextual approach to statutory interpretation. And their expertise might help them avoid unduly broad or misleading language in their opinions. Conversely, it might enable them to add helpful dicta when they spot related problems.

On the other hand, the need for these extra aids is reduced if there is an adversarial procedure in which counsel are expected to supply the basic evidence and argumentation. At any rate, these advantages might carry less weight at the appellate stage because even generalist appellate adjudicators will still have the specialized decision—especially valuable if accompanied by a reasoned opinion—as a starting point. Moreover, the typically narrow scope of review on questions of fact and discretion enables them to confine themselves to searching the record for supporting evidence and reasons. Even on questions of law, the usual deference to the agency decisions minimizes the need for preexisting knowledge of the relevant law. Moreover, the price that specialized tribunals pay for the added expertise is a loss of the generalist perspective, which enables the judge to receive guidance from other subject areas and to approach the specialty area with fewer preconceptions or biases. A diet of specialized cases might also make the positions less attractive to potential adjudicators and staff, thus hampering both recruitment and retention of the most talented personnel. Specialization might render the appointment process more susceptible to lobbying pressures, and it might cause the adjudicators to become too cozy with the litigators who appear before them regularly.

Efficiency is also a factor. On the one hand, specialized adjudicators will not need as much background information from counsel. The time and resources of both the tribunal and the parties can be allocated to less repetitive and more productive tasks. Specialization also reduces the total number of

227. *See id.* at 7-19.

people who have to grapple with the same issues, and it permits a tribunal to tailor its procedures to the particular subject matter.

Then again, if specialization results in fewer tribunals hearing the same subject matter, they will be more centralized. In that event, either the adjudicators and perhaps their staff will have to ride circuit, or the litigators and the parties will incur greater travel time and expense. Alternatively, oral argument will have to be foregone, or greater use of video or other technology will be required. In addition, fluctuations in the specialized caseload will invariably leave some adjudicators too busy and others too idle, at least for short periods.

Finally, specialization has mixed effects on acceptability. On the one hand, perhaps the parties and the general public will have greater confidence in experts. On the other hand, specialization might render the positions less prestigious in the eyes of potential candidates and less respected in the public eye. Further, if the specialists are selected partly on the basis of their prior experience, their former employment in either the government or the private sector might generate public perceptions of bias.

As the foregoing discussion illustrates, the arguments for specialization seem strongest at the original hearing stage and less so at the appellate stage, where the tribunal can receive the benefits of the original decision maker's insights. The pros and cons of specialization also depend on which combination of variables it incorporates.

Perhaps most important, however, the cost-benefit analysis is subject-matter specific. In the specific context of asylum, several attributes are relevant. Asylum cases typically present difficult questions of fact that specialized familiarity can help adjudicators sort out. This is particularly so on issues of credibility, where sensitivity to distinctive cultural practices can be crucial to evaluating demeanor. At the appellate stage, where the adjudicator reviews a written record, generalist experience might be more valuable.

Asylum cases can be technically complex and esoteric. The long statute and the voluminous regulations, combined with the high degree of connectivity and the dynamic nature of immigration and asylum law, again make specialized expertise particularly useful. That value applies at both the hearing stage and the appellate stage, but it is less necessary at the appellate stage because—if a decent reasoned opinion has been prepared—the appellate adjudicators will have a useful starting point. Moreover, asylum applicants frequently appear before asylum officers and immigration judges without counsel, thereby magnifying the need for the adjudicator to spot issues sua sponte; counsel is more likely to appear at the appellate stages. In addition, while each asylum case turns on its own unique facts, there are frequent similarities, particularly among the cases of applicants from the same source country. Experience with those similar cases enables the adjudicators to proceed more knowledgeably and more efficiently. And the caseload is large enough to simultaneously

sustain full-time operations at several asylum offices and immigration courts nationwide, thus keeping the adjudicators continuously engaged.

Because most of these factors are of greater significance at the hearing stage than at the appellate stage, there is much to be said for the present system. The key elements of that system are reliance on immigration specialists and asylum sub-specialists at the hearing stage, followed by review by immigration generalists (perhaps the optimal degree of specialization) at the administrative appellate stage, and finally judicial review by legal generalists. Replacing the courts of appeals with a specialized immigration court might marginally improve the consistency of some of the outcomes, particularly if the latter were a single centralized tribunal, but it is not recommended here. The advantages of generalist review, especially in an area in which fundamental liberty interests are at stake, are in my view enough to outweigh any marginal consistency gains from specialization.

C. *Potentially Dramatic Gains in Consistency, but Especially Bad Ideas*

1. *Quotas or other direct controls on outcomes*

The authors of the Asylum Study briefly consider, but rightly reject, the strategy of policymakers imposing direct numerical controls on the outcomes of asylum cases. Suppose, they ask rhetorically, there were a rule that required every asylum officer to approve thirty-five to forty percent of his or her claims, and every immigration judge forty to forty-five percent.

Such a rule would undoubtedly reduce the disparities in asylum approval rates, but the authors identify several obvious problems: there is no way to locate either the "right" percentages or the "right" range; any figures would be arbitrary. Besides, they point out, rapid changes in human rights conditions would render the announced percentages continually obsolete. In addition, most source countries have too few asylum applicants to provide a statistically significant sample.[228]

Other objections might be added. The argument that statistically reliable percentages would be too hard to fashion for many countries assumes a system in which each source country is allotted a different approval rate range. That feature would itself be problematic, reminiscent of the discredited national origins quota system in place from 1921 to 1965.[229] Yet, without such differentiation, the combination of drastically different human rights conditions from one source country to another and different mixes of cases by source country from one asylum office or immigration court to another would cause outcomes to hinge needlessly on the particular office or court in which the

228. Asylum Study, *supra* note 1, at 379.

229. *See* 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.02 (2007).

cases are filed. The end result would be less consistency, not more. Finally, numerical controls would require adjudicators to rank asylum claims. There is no uniquely correct way to do so. Some might base their rankings on the probability of persecution, others on the severity of the alleged persecution, still others on the quality of the nexus between the persecution and one of the protected groups. The range of choices would introduce another element of inconsistency, as different adjudicators would attach different weights to different factors and might even misuse that freedom to reintroduce ideology.

Among students and academics who read this, some will immediately think of the mandatory grading constraints—mandatory medians, means, or distributions—that are in place in some U.S. law schools or other educational institutions. But this is different. In both settings, it is true, constraints are imposed because equal treatment is an inherent element of substantive fairness. Whatever one's ultimate view of mandatory grading curves or other restraints, however, the fact remains that each person's grade point average affects every other student's class rank. Asylum, in contrast, is not—or at least should not be treated as—a zero-sum game. Successful asylum applicants are not subsequently ranked in the way that employers and others might consider a student's class rank. Thus, the arguments in favor of mandatory grading restraints simply have no logical applicability to asylum claims.

Perhaps I am protesting too much. I am not aware of any specific proposals for the kinds of mandatory approval ranges that the authors of the Asylum Study convincingly reject. But similar, less radical strategies, such as pressuring adjudicators not to exceed or fall beneath what the political officials unofficially regard as an acceptable approval rate, seem more politically feasible. In the interest of completeness, like the authors of the Asylum Study, I consider but would reject mandatory ranges and analogous strategies.

2. *Punishing wayward adjudicators*

I have saved my most serious worry for last. Given the glaring disparities in the asylum approval rates from one adjudicator to another, one temptation might be to "rein them in." This could be done by taking wayward adjudicators aside, quietly "encouraging" them to increase or decrease their approval rates, and then, after a decent interval, terminating or reassigning those who remain recalcitrant. Performance reviews that take approval rates into account and serve as a criterion for retention or promotion might be another device for eliminating adjudicators who veer too far from the mean.[230]

230. These are favored by several respected commentators. *See, e.g.*, Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310); Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. UNIV. 589 (1993).

Any of these strategies might well reduce the disparities in asylum approval rates. As discussed earlier, however, threats to adjudicators' job security inherently compromise their decisional independence.[231] As the same discussion explained, the actions of attorneys general over the past five years have already dangerously sapped the independence of the immigration judges and the BIA.

In a previous article I explored the implications of decisional independence more generally; here, they will be just briefly recounted. Decisional independence has costs that have to be acknowledged.[232] Probably the most controversial cost is that, by definition, decisional independence eliminates the adjudicator's political accountability. When the decision has broader policy implications, as is especially likely when it is designated as binding precedent, that consequence can be viewed as a cost to the democratic process. It is a cost that we readily accept when courts interpret an entrenched Constitution, use judgment in interpreting ambiguous statutory language, or make common law. It is a cost nonetheless.

Some might feel that decisional independence erodes agency policy primacy. The earlier discussion on agency head review of adjudicative decisions, however, showed how agency policy primacy can be maintained through rulemaking and other devices.[233] The admittedly substantial logistical constraints can be minimized. But whether or not one shares that assessment, the point here is that even a passionate advocate of agency head review can applaud decisional independence. As the Administrative Conference report emphasizes, precisely that combination—adjudicator independence in reaching the decision but agency head authority to reverse it—lies at the heart of the compromise philosophy enshrined in the Administrative Procedure Act.[234]

In the administrative context, a further cost, many would argue, is the kind of decisional inconsistency exposed by the Asylum Study.[235] Earlier discussion suggested that decisional independence might have mixed effects on decisional consistency, but let us assume arguendo that the net effect is negative.[236] There is also the related problem of assuring that adjudicative decisions cohere with other expressions of agency policy.

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231. *See supra* Part III.C.1.

232. Legomsky, *supra* note 39, at 385-401.

233. *See supra* Part IV.B.2.

234. *See* VERKUIL ET AL., *supra* note 67, at 795-96, 986-87. As for ALJs, see *infra* text accompanying notes 243-44.

235. The report in VERKUIL ET AL., *supra* note 67, at 1007-10, lamented the inability of the Social Security Administration to prevent large inconsistencies in the rates at which ALJs granted or denied social security disability benefits. Still, the report strongly favored increased use of ALJs, in large part precisely because of the independence they enjoy. *Id.* at 1058.

236. *See supra* note 103 and accompanying text.

Decisional independence might also impair good faith measures to boost adjudicators' productivity. While there might be ways for agencies to impart productivity expectations to adjudicators without threatening their independence, the key variable is the consequence of failure to meet those expectations.[237] If the consequences are significant enough to alter the adjudicators' behavior—and communicating expectations would be useless if they are not—then they will necessarily give adjudicators an incentive to trade off care and quality for quantity. Only the latter can be statistically compiled. For that reason, independence and productivity will always be in tension.

In an adjudicative setting, however, my view is that decisional independence, despite these potential costs, is critical to the rule of law and to the dispensation of justice. The most familiar benefit of decisional independence is procedural fairness—minimizing adjudicative bias. An adjudicator should decide each case based on his or her honest reading of the evidence, interpretation of relevant legal sources, and exercise of any delegated discretion—not by choosing whichever outcome seems most likely to please the officials who will control his or her professional future. Decisional independence can also discourage what I have called "defensive judging"—playing it safe by avoiding rulings that might prove controversial.[238] Decisional independence can be a vital safeguard for unpopular individuals, minorities, and political viewpoints, and is crucial to safeguarding constitutional rights against transient majoritarian preferences. And decisional independence is integral to at least the U.S. version of separation of powers.[239]

Apart from those rationales, which I have argued all derive ultimately from "fidelity to the rule of law," decisional independence has important side benefits.[240] They include maintaining public confidence in the integrity of the justice system, avoiding "reverse social Darwinism," in which the weakest adjudicators are the ones most likely to survive ideological purges, attracting and retaining adjudicator candidates, and facilitating the continuity of adjudicative outcomes from one administration to its successor.[241]

For all those reasons, further assaults on the decisional independence of the immigration judges and the members of the BIA would be regrettable.[242] To the contrary, their prior decisional independence should be restored and further safeguarded *despite* any possible negative effects on either decisional

237. VERKUIL ET AL., *supra* note 67, at 1021-23.

238. Legomsky, *supra* note 39, at 396.

239. For elaboration of these benefits, see *id.* at 396-98.

240. *Id.* at 398-401.

241. *Id.* at 401.

242. These comments are not meant to extend to the U.S. Citizenship and Immigration Services asylum officers. Many of the same considerations logically apply, but the decisional independence of asylum officers is less important. When they refer cases to immigration judges, the asylum claims can be renewed de novo in the resulting removal proceedings. For a description of the process, see *supra* Part I.A.

consistency or agency policy coherence. There are several possible, non-mutually exclusive ways to protect decisional independence, and it is not the purpose of this Article to advocate any particular strategy. The options can, however, be outlined briefly.

Immigration judges could be made administrative law judges (ALJs). Agencies have increasingly resisted relying on ALJs, because under the Administrative Procedure Act the agencies have relatively little control over ALJs' selection, performance, or duration of employment, which approaches life tenure.[243] Yet these are the very reasons that ALJs would be well suited to perform the functions of immigration judges. The Administrative Conference report on the federal administrative judiciary and the sophisticated consultants' report that preceded it both urged Congress to mandate the use of ALJs for hearings that are "likely to involve a substantial impact on personal liberties or freedom."[244] Asylum adjudication is such a setting.

Whether or not immigration judges are made ALJs, a further option for restoring and protecting the independence of both immigration judges and BIA members is to move them out of the Department of Justice. Over the years, many have recommended converting at least the BIA into an independent tribunal.[245] If either the immigration judges or the BIA or both were to become independent bodies, the new tribunals could be either specialized immigration tribunals of their own or parts of a more generic ALJ corps.[246] An independent tribunal could also be made into a specialized Article I or even Article III immigration court that would replace the current administrative machinery and,

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243. Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310); Lubbers, *supra* note 67, at 72-74.

244. Recommendations and Statements of the Administrative Conference, 57 Fed. Reg. 61,759, 61,759 (Dec. 29, 1992) (codified at 1 C.F.R. pts. 305, 310); *see* VERKUIL ET AL., *supra* note 67, at 1048 (recommending use of ALJs when "significant interests in freedom of action of particular individuals" is implicated); *see also id.* at 1049 (concluding that immigration judges should be ALJs).

245. *See* U.S. COMM'N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION AND IMMIGRANT POLICY 175 (1997); Levinson, *supra* note 36, at 1161-63; James J. Orlow, *Comments on "A Specialized Statutory Immigration Court,"* 18 SAN DIEGO L. REV. 47, 50-51 (1980); Leon Wildes, *The Need for a Specialized Immigration Court: A Practical Response*, 18 SAN DIEGO L. REV. 53, 62 (1980). I had once felt that taking the BIA out of the Justice Department was not necessary, Legomsky, *Forum Choices*, *supra* note 73, at 1377-78, but the Attorney General's recent assaults on the BIA's decisional independence forced me to eat my words twenty years later, Legomsky, *supra* note 39, at 404-05. There are existing examples of these "split enforcement" models, in which the adjudicative tribunal is organizationally independent of the policymaking and enforcement agencies, but they are controversial. For the opposing views, see VERKUIL ET AL., *supra* note 67, at 1040-41. For a discussion of a specialized immigration court, see *supra* Part IV.B.4.

246. The concept of an ALJ corps has also been highly controversial. For a thoughtful discussion of the pros and cons, see VERKUIL ET AL., *supra* note 67, at 1041-46. *See also* Lubbers, supra note 67, at 74-76 (expressing concern that an ALJ corps would exacerbate agencies' already strong reluctance to assign adjudication to ALJs).

depending on its attributes, the current system of judicial review as well.[247] Among the keys to any of these arrangements, I submit, is providing enough job security to make true decisional independence realistic.[248]

CONCLUSION

The hobgoblin of little minds it might well be, but consistency matters. The moral imperative of equal justice, the needs for certainty and predictability, the benefits of efficiency, and the objective of public acceptability all demand attention to consistency in any adjudicative framework. The Asylum Study—the product of a prodigious and highly successful effort by Professors Ramji-Nogales, Schoenholtz, and Schrag—has brought home the extraordinary extent to which the outcome of an asylum claim hinges on the particular adjudicators who are assigned the case.

But the forces that generate inconsistent adjudicative outcomes are not easy to constrain, at least not without costly trade-offs. Among the determinants are the number of decisional units; the size of the decisional units; the total caseload; the criteria and procedures for appointing adjudicators; the training and policy guidance they receive; their degree of decisional independence; the amount of deference and the scope of review on appeal; the prevalence of written reasoned opinions and the accompanying use of stare decisis; the fiscal resources devoted to the process; the procedural resources; the degree of specialization; and such subject-matter attributes as the degrees of complexity, dynamism, emotional or ideological content, and determinacy.

In asylum cases, the unavoidable abstractness, complexity, and dynamism of the relevant legal language make it inevitable that the human adjudicators will bring their diverse emotions and personal values to bear on their decisions. Under those circumstances, we should not expect anything but the sorts of disparate outcomes that the Asylum Study has documented.

There are ways to reduce the inconsistencies at the margins, to be sure. The strategies for doing so might include more detailed legal and policy guidance, more adjudicators, larger decisional units, bolstered support staffs, appointment

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247. *See, e.g.*, Asylum Study, *supra* note 1, at 386; *see also* Levinson, *supra* note 82; Roberts, *supra* note 82. For reasons discussed earlier, however, my view is that the elimination of generalist judicial review would be unwise. *See supra* Part IV.B.4.

248. The authors of the Asylum Study recommend an Article I immigration court in which the judges serve fixed terms of ten to fifteen years. Asylum Study, *supra* note 1, at 386. In my view, fixed terms would be problematic. Either members would have to be limited to one term each, in which case the country would be deprived of the continued service of a good and experienced adjudicator, or renewals would be permitted, in which case fears of non-renewal would simply replace fears of Attorney General "reassignment." There is no reason to expect the White House's renewal decisions to be any less political than the Attorney General's reassignment decisions. One also wonders how many talented lawyers will give up their existing practices for jobs that will leave them in limbo when their terms expire.

of counsel for indigent asylum applicants, improved quality controls at the hiring stage, beefed-up training for adjudicators and other professional development, dissemination of asylum approval rates at all stages of the process, enlargement of the scope of the BIA's review of immigration judges' decisions, and increased use of reasoned and binding opinions.

But any strategies that would shrink the inconsistencies more dramatically—and some that would not do even that—have costs that I argue are unacceptably high. These include more frequent agency head review of BIA decisions, additional restrictions on judicial review, transferring review to a specialized court, and punishing wayward adjudicators. Each of those devices would either severely compromise decisional independence or impose other excessive costs.

In the end, we shall have to learn to live with some measure of unequal justice. It is not ideal, but, as they say, it beats the alternatives.