

Winter 1992

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Recommended Citation

Cavosie, J. Michael (1992) "Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law," *Indiana Law Journal*: Vol. 67: Iss. 2, Article 8.

Available at: <http://www.repository.law.indiana.edu/ilj/vol67/iss2/8>

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Defending the Golden Door: The Persistence of Ad Hoc and Ideological Decision Making in U.S. Refugee Law

J. MICHAEL CAVOSIE*

INTRODUCTION

The United States is a nation of immigrants and refugees,¹ yet it has historically and paradoxically viewed newcomers distrustfully and sought to limit their numbers.² This bipolarity³ has become more distinct as immigration and refugee levels have risen⁴ and is perhaps most acute in the area of

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1. In fact, "[o]ur history is largely the story of immigration." COMMITTEES ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST I (Joint Comm. Print 1981). Welcoming homeless refugees is "one of the oldest themes in America's history." S. REP. NO. 256, 96th Cong., 1st Sess. 1 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 141, 141. Approximately seven percent of the current United States population was born in another country. Biskupic, *Sweeping Changes Abroad Confound U.S. Policy*, 1990 CONG. Q. WEEKLY REP. 592.

2. Congress first began regulating the influx of immigrants over a century ago. See, e.g., Act of Mar. 3, 1875, ch. 141, § 3, 18 Stat. 477, 477 (proscribing, among other things, "the importation into the United States of women for the purposes of prostitution"); Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 58 (the first of the so-called Chinese Exclusion Laws, suspending for ten years the "coming of Chinese laborers to the United States"); Act of Aug. 3, 1882, ch. 376, §§ 1-2, 22 Stat. 214, 214 (imposing a 50¢ duty on every immigrant and prohibiting the entry of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge").

3. One commentator has observed that "[h]istorically, the United States has led the world in willingness to admit immigrants. Yet for at least one hundred years that willingness has competed with widespread public sentiment in favor of limiting immigration flow." Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 619 (1981) (footnotes omitted). This contrast was vividly illustrated during the debates culminating in the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.). For example, Senator Simpson stated that the United States should accept "the hideous reality that there are many more people who want to come here than there is room or intent to accommodate them." Biskupic, *Senate Votes 81-17 to Revamp U.S. Visa-Allocation System*, 1989 CONG. Q. WEEKLY REP. 1785, 1786. Conversely, Senator Kennedy argued that "[w]e can't afford to put a sign on the Statue of Liberty that says, 'No Vacancy.'" *Id.* at 1785.

4. Asylum Adjudications Procedures, 1 C.F.R. § 305.89-4 (1990). The waiting list for United States immigrant visas comprises nearly 2.5 million people. See Biskupic, *supra* note 1, at 592. Asylum applications rose from roughly 2000 in 1970 to nearly 60,000 in 1988. Asylum Adjudication Procedures, *supra*. Globally, the number of refugees exceeds 15 million. Proclamation No. 6219, 3 C.F.R. 239-40 (1990) (President Bush proclaiming Refugee Day, 1990).

United States refugee and asylum policy.⁵ Indeed, this policy may be perceived as mirroring the dichotomy. On one hand, since World War II the United States has admitted hundreds of thousands of refugees;⁶ the existence—if not the depth—of humanitarian motivation is beyond dispute.⁷ But just as certainly there have been less praiseworthy practices. These refugee admissions generally were not pursuant to consistent and structured programs but rather were sporadic and ad hoc, the result of domestic and geopolitical exigencies.⁸ Even more damning is the strong undercurrent of ideology characterizing these decisions. Bluntly put, refugees from countries hostile to the United States have invariably been accorded United States protection while equally worthy refugees from friendly countries have met with far less success.⁹

The Refugee Act of 1980¹⁰ purported to end this disparity by establishing a prospective, nonideological framework for refugee admissions.¹¹ However, two recent developments in United States refugee law suggest a resurgence of the old practices. One is the ad hoc revision of the definition of a refugee

5. See T. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 616 (1985). The authors contend that

there is an inherent tension that runs through all political and legal decisionmaking on refugee and asylum questions in the United States. The notion of refugee evokes sympathy. The possibility of resulting privileges, especially a potential right to resettle indefinitely, evokes suspicion that the unworthy are trying to claim that status.

Id.; see also G. FOURLANOS, *SOVEREIGNTY AND THE INGRESS OF ALIENS* 120 (1986) (characterizing such tension as a "competition of principles: on the one hand sovereignty and its related concepts (territorial supremacy, self-defence, self-preservation), and, on the other hand, humanitarian principles deriving from both general international law and from treaties" (footnote omitted)). *But cf.* Lopez, *The Moral Basis of Immigration Policy*, in *THE REPORT OF THE U.S. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY: A CRITICAL ANALYSIS* 29-31 (1980) (arguing on moral grounds against the sovereign right to exclude).

This phenomenon is not limited to the United States. In fact, "[s]tates the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory, and given a right to settle there." Hyndman, *Refugees Under International Law with a Reference to the Concept of Asylum*, 60 *AUSTRALIAN L.J.* 148, 153 (1986).

6. D. CARLINER, L. GUTTENTAG, A. HELTON & W. HENDERSON, *THE RIGHTS OF ALIENS AND REFUGEES* 46 (1990).

7. See Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 *J.L. REFORM* 243, 243 (1989) ("The United States has traditionally had one of the most generous and compassionate refugee programs."); Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 *U. MIAMI L. REV.* 819, 847 (1982) ("The basic foreign policy considerations in refugee admission have always been leavened with genuine humanity.').

8. Scanlan, *supra* note 7, at 847.

9. That political ideology permeated United States refugee law, at least until 1980, is a well-established theme. S. REP. NO. 256, *supra* note 1, at 4, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 144. See generally Kurzban, *A Critical Analysis of Refugee Law*, 36 *U. MIAMI L. REV.* 865 (1982) (article devoted to the role of ideology in United States refugee law).

10. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

11. Helton, *supra* note 7, at 250.

to grant special status to certain ideologically favored groups.¹² Another is a provision in the Immigration Act of 1990 which addresses the adjustment to permanent resident alien status of a select few aliens.¹³

Part I of this Note will discuss the concept of the refugee under international law for, insofar as the United States has bound itself by international treaties,¹⁴ any discussion of United States law must be informed by principles of international law. Part II will relate the history of United States refugee and asylum law and the patchwork attempts to fulfill international obligations. It is in this section that the ascendancy of ideology becomes apparent. Part III will consider the new developments and explain how they continue, rather than ameliorate, those propensities. Finally, Part IV will propose measures more consistent with a nondiscriminatory, forward-looking policy.

I. THE REFUGEE UNDER INTERNATIONAL LAW

The international community has developed a significant body of refugee law during the twentieth century.¹⁵ Initially these agreements, usually in the form of conventions, were in response to specific international crises;¹⁶ refugees thus were defined situationally rather than generally.¹⁷ Over time a more general definition emerged.¹⁸ Currently the definition, as well as an enumeration of refugee rights,¹⁹ is contained in the 1951 Convention Relating to the Status of Refugees (Convention)²⁰ and its supplementary Protocol.²¹

12. See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1990, Pub. L. No. 101-167, § 599(D), 103 Stat. 1195, 1261-62 (1989).

13. Immigration Act of 1990, Pub. L. No. 101-649, § 104, 104 Stat. at 4985 (codified at 8 U.S.C. § 1255).

14. Treaties entered into by the United States become part of "the supreme Law of the Land." U.S. CONST. art. VI, § 2; see also L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 156-67 (1972) (section entitled "Treaties as Law of the Land").

15. A discussion beyond these relatively recent developments is outside of the scope of this Note. For a more lengthy treatment of the history of international refugee law, see A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW §§ 9-20 (1966).

16. Hyndman, *supra* note 5, at 148.

17. *Id.* Examples include the Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, May 12, 1926, 89 L.N.T.S. 2004 (defining as a refugee "any person of Russian origin who does not enjoy . . . the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality"), and the Arrangement Concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 2006 (extending refugee status to Assyrians, Assyro-Chaldeans, and persons of Syrian, Kurdish, or Turkish origin).

18. *Cf.* Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 3663.

19. Refugees' rights under international law are discussed in Part I.B. of this Note.

20. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 2545 [hereinafter Convention].

21. Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791 [hereinafter Protocol]. The Protocol incorporates by

A. *The Convention/Protocol Definition of a Refugee*

As modified by the Protocol,²² the Convention defines as a refugee any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."²³

As the definition indicates, four elements are required for a person to be declared a refugee: (1) the person must be outside the country of his nationality; (2) the person must be unable or unwilling to seek the protection of that country; (3) this inability or unwillingness must stem from a well-founded fear of persecution; and (4) the feared persecution must derive from

reference the substantive terms of the Convention. *Id.* art. I, para. 1. Thus, a State may bind itself to the terms of the Convention by signing either the Convention or the Protocol. This Note will frequently refer to the two treaties jointly as the Convention/Protocol since the two effectively are one.

22. The Protocol deleted phrases in the Convention's refugee definition limiting the determination of refugee status to events occurring before January 1, 1951. *Id.* art. 1(2). This modification explicitly acknowledged the continuing creation of new refugee groups. Sexton, *Political Refugees, Nonrefoulement and State Practice: A Comparative Study*, 18 VAND. J. TRANSNAT'L L. 731, 736 (1985).

23. Convention, *supra* note 20, art. 1(A)(2). Additionally, article 1(A)(1) expressly incorporates within the Convention persons declared refugees under certain previous international arrangements ("statutory refugees"), namely "the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization." *Id.* art. 1(A)(1) (footnotes omitted). Since the most recent of these would have pertained to situations occurring over sixty years ago, it seems doubtful that many statutory refugees remain.

The Convention definition is certainly no panacea and fails to address persons many people would probably consider "refugees." Most notably, persons fleeing natural disasters, war, and starvation are not encompassed within the definition. T. ALENIKOFF & D. MARTIN, *supra* note 5, at 615. Another writer, although generally praising the definition, comments that it nevertheless "is inadequate to cover various categories of refugees that have come under attention since . . . 1967." Stärke, *Refugee Status Under International Law*, 64 AUSTRALIAN L.J. 88, 88 (1990).

Although the Convention/Protocol definition of a refugee may predominate in international law, *see infra* notes 78-79 and accompanying text, alternative definitions have been advocated. For example, the Organization of African Unity definition reflects the United Nations persecution approach, but adds that

the term "Refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of [sic] the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. No. 14691; *see also* Shacknove, *Who is a Refugee?*, 95 ETHICS 274, 284 (1985) (defining as refugees those "persons whose government fails to protect their basic needs, who have no remaining recourse other than to seek international restitution of these needs, and who are so situated that international assistance is possible").

being a member of a certain race, religion, nationality, or particular social group or from holding a particular political opinion.²⁴

“Nationality” is synonymous with “citizenship.”²⁵ Thus, to seek refugee status one cannot be within his or her country of citizenship: “International protection cannot come into play as long as a person is within the territorial jurisdiction of his home country.”²⁶

“Unable” and “unwilling” denote different scenarios. A person is *unable* to seek his country’s protection if that country cannot extend it—as in a country torn by civil war—or refuses to extend it—as in a classic case of persecution.²⁷ To be *unwilling* to seek national protection, on the other hand, one must be motivated by a “well-founded fear of persecution”;²⁸ an irrational or unfounded fear of seeking help would be insufficient to warrant international concern.²⁹

The phrase “well-founded fear of being persecuted” is the cornerstone of the definition and embodies the distinguishing characteristic of a refugee.³⁰ “Fear” is a state of mind and, therefore, subjective.³¹ It is qualified, however, by “well-founded,” apparently dictating an objective determination.³² Accordingly, “[t]he term ‘well-founded fear’ . . . contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.”³³ A determination of the applicant’s *subjective* state of mind necessarily hinges upon his or her personality and credibility.³⁴ In discerning the *objective* element, the conditions prevalent in the applicant’s home country must be considered.³⁵ Grahl-Madsen advocates finding a well-founded fear whenever “a reasonable person would draw the conclusion from external facts that he would be subject to persecution in his home country.”³⁶ “Persecution,” although seemingly incapable of a precise and universal definition,³⁷ certainly exists whenever there is a threat

24. Convention, *supra* note 20, art. 1(A)(2); G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 13 (1983).

25. OFFICE OF UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* para. 87 (1979) [hereinafter U.N. REFUGEE HANDBOOK].

26. *Id.* para. 88.

27. *Id.* para. 98.

28. *Id.* para. 100.

29. *Id.*

30. *Id.* para. 37. Grahl-Madsen uses the descriptive phrase “essence of refugeehood.” A. GRAHL-MADSEN, *supra* note 15, § 35, at 74.

31. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 37; A. GRAHL-MADSEN, *supra* note 15, § 76, at 173.

32. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 38.

33. *Id.* para. 38.

34. *Id.* para. 40-41.

35. *Id.* para. 42.

36. A. GRAHL-MADSEN, *supra* note 15, § 76, at 174 (citation omitted).

37. See U.N. REFUGEE HANDBOOK, *supra* note 25, para. 51; A. GRAHL-MADSEN, *supra* note 15, § 82.

to life or freedom and may also be found in the presence of other, less ominous, governmental actions and threats.³⁸

Finally, to qualify the individual as a refugee, this feared persecution must be directed at him for one of five enumerated reasons: race, religion, nationality, membership in a particular social group, or political opinion.³⁹ "Race" is to be interpreted expansively, encompassing ethnic groups commonly referred to as races.⁴⁰ "Religion" includes the right of public or private observance⁴¹ as well as action or inaction motivated by religion.⁴² "Nationality" in this context includes not only citizenship⁴³ but may also embrace ethnic or linguistic groups (and to this extent may be coterminous with "race").⁴⁴ A "social group" is defined more broadly than race, religion and nationality;⁴⁵ it may include, for example, "nobility, capitalists, land-owners, civil servants, businessmen, professional people, farmers, workers, members of a linguistic or other minority, even members of certain associations, clubs or societies."⁴⁶ Persecution based on "political opinion" is perhaps less readily definable than that based on any of the previous

38. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 51-53. Goodwin-Gill illustratively notes that

[t]he core meaning of persecution readily includes the threat of deprivation of life or physical freedom. In its broader sense, however, it remains very much a question of degree and proportion; less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship, or freedom of movement.

G. GOODWIN-GILL, *supra* note 24, at 38-39 (footnotes omitted).

39. Convention, *supra* note 20, art. 1(A)(2); U.N. REFUGEE HANDBOOK, *supra* note 25, para. 66; see also A. GRAHL-MADSEN, *supra* note 15, § 88 (separating these provisions into two categories: (1) reasons which are beyond the control of the individual—race, nationality, membership of a particular social group and, perhaps, religion; and, (2) reasons constituting an individual's character—political opinion and active religion).

40. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 68. Grahl-Madsen has explained that "the term 'race' . . . is a social more than an ethnographic concept, and is applicable whenever a person is persecuted because of his ethnic origin." A. GRAHL-MADSEN, *supra* note 15, § 89, at 218.

41. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 71. These rights have as their genesis article 18 of the Universal Declaration of Human Rights which states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

42. A. GRAHL-MADSEN, *supra* note 15, § 89, at 218.

43. A country persecuting its citizens for their citizenship seems a rather absurd proposition. See G. GOODWIN-GILL, *supra* note 24, at 29.

44. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 74; A. GRAHL-MADSEN, *supra* note 15, § 89, at 218-19; G. GOODWIN-GILL, *supra* note 24, at 29.

45. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 77. A "social group" thus may have substantial overlap with race, religion and nationality. See Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39 (1983).

46. A. GRAHL-MADSEN, *supra* note 15, § 89, at 219.

categories.⁴⁷ At a minimum, a person must adhere to a political opinion forbidden by the government;⁴⁸ publication of this opinion is not required if the opinion is of such a character that it will probably come to the attention of the government.⁴⁹ An important distinction must be drawn between political opinions—for which punishment constitutes persecution—and political acts. Punishment for politically motivated acts may not entitle a person to refugee status if the punishment conforms to the law.⁵⁰

B. *The Refugee's Rights Under International Law*

Once a person qualifies as a refugee under the Convention, a signatory (or "Contracting State") to the Convention/Protocol is bound by its provisions. The refugee may then avail herself of certain statutory protections contained therein.

1. The Principle of Nonrefoulement

Article 33 of the Convention—"Prohibition of Expulsion or Return ('Refoulement')"⁵¹—is the keystone of the refugee's rights.⁵² The principle of nonrefoulement dictates that a state may not return a refugee within its borders, either legally *or* illegally, to her home country to face political persecution.⁵³ This is an established principle of international law, codified by the Convention.⁵⁴

47. See U.N. REFUGEE HANDBOOK, *supra* note 25, para. 81.

48. *Id.* para. 80.

49. *Id.* para. 82.

50. *Id.* para. 84.

51. Convention, *supra* note 20, art. 33(1). "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.* Article 42 provides that no Contracting State may make a reservation to article 33. *Id.* art. 42.

52. Sexton, *supra* note 22, at 739.

53. Convention, *supra* note 20, art. 33(1). This right is qualified by a proviso which states: The benefit of the provision may not, however, be claimed by a refugee whom there are reasonable reasons for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Id. art. 33(2).

54. Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999, 1013 (1985); Sexton, *supra* note 22, at 738. There is some disagreement over whether nonrefoulement is universally accepted under international law. See A. GRAHL-MADSEN, *supra* note 15, § 41, at 94-98. *But cf.* The Final Act of the U.N. Conference on the Status of Stateless Persons, Part IV, Sept. 28, 1954, 360 U.N.T.S. 117 (asserting the universality of nonrefoulement); G. GOODWIN-GILL, *supra* note 24, at 99 ("[N]o state today claims any general right to return refugees or bona-fide asylum seekers to a territory in which they may face persecution or danger to life or limb."); Helton, *supra* at 1013 ("[I]ndividuals are generally considered to have a right to nonrefoulement.").

Note, however, that while article 33 delineates the right not to be returned, it does not grant any right to remain in the country of refuge.⁵⁵ Accordingly, a Contracting State may, consistent with the Convention, remove the refugee to another country willing to accept and protect her.⁵⁶ In either instance, the refugee is guaranteed safe haven from the persecution of her home country, the overriding goal of the article.

2. The Right of Asylum

Asylum, in its contemporary context, is understood as "the protection a state may afford to an individual by letting him or her enter the territory of the state and allowing him or her to remain."⁵⁷ Although the concept of asylum is an ancient one,⁵⁸ there is no right to asylum in contemporary international law,⁵⁹ nor is the right embodied in international treaties⁶⁰ or the Convention.⁶¹ Rather, the right of asylum must be seen as the right of the state, as a sovereign entity, to grant asylum at its discretion.⁶²

Even in the absence of an international obligation to grant asylum, however, many states have statutorily provided for grants of asylum to refugees.⁶³ Indeed, "[i]n most countries, persons who are recognized as Convention refugees will also be entitled to asylum."⁶⁴

C. *The Change of Circumstances Doctrine*

Once declared a Convention refugee, a person may lose that status if he falls within the ambit of one of the Convention's cessation clauses.⁶⁵ These

55. Gross, Note, *The Right of Asylum Under United States Law*, 80 COLUM. L. REV. 1125, 1126 (1980).

56. *Id.*

57. Sexton, *supra* note 22, at 737 n.21.

58. Asylum law has as its antecedents the sanctuary practices of ancient Greece, imperial Rome, and early Christian civilizations. Goldman & Martin, *International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law*, 5 HUM. RTS. Q. 302, 309 (1983).

59. G. GOODWIN-GILL, *supra* note 24, at 52.

60. Hyndman, *supra* note 5, at 152.

61. Sexton, *supra* note 22, at 737.

62. *Id.* at 737-38 ("[T]he right to grant asylum remains within the unfettered discretion of a state as an incident of its sovereignty . . ."). A state's territorial integrity—its right to allow or refuse entrance—is "a pillar of international law." A. GRAHL-MADSEN, *TERRITORIAL ASYLUM* 23 (1980).

63. Sexton, *supra* note 22, at 738. Statutory provisions for asylum in the United States are discussed at notes 145-48 and accompanying text.

64. *Id.*

65. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 13. The cessation clauses—article 1(C)(1)-(6)—fall within two general categories: change of circumstances brought about personally by the refugee and those brought about by fundamental changes in the country from which the refugee fled. *Id.* para. 114-15. In the first instance, the refugee may have decided voluntarily to regain his nationality, resettle in his native country, seek the protection of his native country, or acquire a new nationality. *Id.* para. 114.

clauses provide for the revocation of refugee status upon the occurrence of certain events eliminating the need for such status, since "international protection should not be granted where it is no longer necessary or justified."⁶⁶ In particular, article 1(C)(5) states:

This Convention shall cease to apply to any person [who has previously qualified as a refugee] if: . . . [h]e can no longer, because the circumstances in [connection] with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality⁶⁷

The word "circumstances" refers to the extant political conditions in the refugee's home country.⁶⁸ If that country has experienced a fundamental political alteration, such as the replacement of an oppressive or despotic regime with a democratic one,⁶⁹ fear of persecution may no longer be well-founded.⁷⁰ In that case, the need for international protection disappears.

Care should be taken, however, to avoid revoking the status based on ephemeral or cosmetic changes in the refugee's country. The U.N. Refugee Handbook notes that "[a] mere—possibly transitory—change in facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances" should not result in the loss of refugee status.⁷¹ In other words, the refugee should not be compelled to justify his status upon each shift in the prevailing political winds of his country, for this would undermine the very sense of security for which he initially sought international aid.⁷²

Continued protection may occasionally be warranted even in light of a fundamental change in circumstances: The second paragraph of article 1(C)(5)—although explicitly addressing only statutory refugees⁷³—may also apply to Convention refugees.⁷⁴ It specifies that the change-of-circumstances doctrine shall not apply to a refugee "who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality."⁷⁵ This exception contemplates particularly atrocious forms of persecution not easily forgotten by the refugee,⁷⁶ and Goodwin-Gill argues that it should be liberally applied since

66. *Id.* para. 111.

67. Convention, *supra* note 20, art. 1(C)(5).

68. A. GRAHL-MADSEN, *supra* note 15, § 147, at 400.

69. G. GOODWIN-GILL, *supra* note 24, at 51.

70. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 135.

71. *Id.*

72. *Id.*

73. See *supra* note 23.

74. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 136; G. GOODWIN-GILL, *supra* note 24, at 52.

75. Convention, *supra* note 20, art. 1(C)(5).

76. U.N. REFUGEE HANDBOOK, *supra* note 25, para. 136.

refugees frequently suffer ongoing distress as a result of their persecution.⁷⁷ At a minimum, the provision seems to preclude a blanket revocation of status and to insist upon individual reevaluations of that status whenever fundamental changes have occurred.

Unquestionably, the Convention is a "milestone in the field of refugee international law":⁷⁸ fully 107 countries have acceded to its terms, either directly or through the Protocol. The United States acceded to the Protocol, and hence to the substantive terms of the Convention, in 1968. In spite of its age, the Convention seems as timely today as four decades ago and still "represents existing international law in force on the subject."⁷⁹

II. THE REFUGEE UNDER UNITED STATES LAW

The United States has a rather checkered history—both before *and* after its accession to the Protocol—of meeting international refugee standards. This is best demonstrated by analyzing contemporary United States refugee law⁸⁰ through two eras: the period from 1952 to 1980, during which refugee determinations were made under the Immigration and Nationality Act of 1952 (INA)⁸¹ and certain amendments thereto; and the period from 1980 to the present, when these determinations were made pursuant to the Refugee Act of 1980,⁸² which significantly amended the INA.

A. *United States Refugee and Asylum Law from 1952 to 1980*

Prior to the Refugee Act of 1980, United States law contained no general definition of a refugee;⁸³ instead, that term was defined operationally as a function of refugee procedures established by the INA.⁸⁴ With the growing awareness that these procedures were being used discriminatorily and to effectuate ideological goals came pressure for a more comprehensive policy.⁸⁵

77. G. GOODWIN-GILL, *supra* note 24, at 52.

78. Sexton, *supra* note 22, at 735.

79. Starke, *supra* note 23, at 88.

80. For a more detailed analysis of the history of United States immigration law, see R. DIVINE, *AMERICAN IMMIGRATION POLICY 1924-1952* (1972); M. MORRIS, *IMMIGRATION—THE BELEAGUERED BUREAUCRACY* 11-48 (1985) (chapter entitled "In Search of an Immigration Policy").

81. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1503 (1988)). The INA represented the convergence of a myriad of previously separate laws governing United States immigration. E. HARPER, *IMMIGRATION LAWS OF THE UNITED STATES* 21 (3d ed. 1975).

82. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

83. Kurzban, *supra* note 9, at 875. Nor were there any statutory provisions for asylum. The Immigration and Naturalization Service had promulgated asylum regulations, see 8 C.F.R. § 108 (1972), but these procedures were haphazardly applied. Kurzban, *supra* note 9, at 875 n.61.

84. See Helton, *supra* note 7, at 251 n.48.

85. See *infra* notes 110-17 and accompanying text.

1. Refugee Procedures Under the INA

The INA established three distinct procedures to grant refugee treatment to aliens: withholding of deportation, parole, and conditional entry. These mechanisms were, either explicitly or de facto, used primarily to admit aliens from countries hostile to the United States.

The INA's withholding provisions⁸⁶ delegated to the Attorney General the discretion to withhold the deportation of an otherwise deportable alien if she would face physical persecution upon repatriation.⁸⁷ This provision was a codification, albeit an inadequate one due to its discretionary nature and its focus on *physical* persecution, of the principle of nonrefoulement.⁸⁸ Under this discretionary authority, the INS promulgated a stringent standard, limiting "the favorable exercise of discretion to cases 'of clear probability of [physical] persecution of the particular individual petitioner.'"⁸⁹ After over a decade of criticism, the physical persecution standard was amended in 1965 in favor of one allowing withholding if an alien would face persecution "on account of race, religion, or political opinion,"⁹⁰ but it was not until well after the United States had acceded to the Protocol⁹¹ that withholding was made mandatory.⁹² Until that time, "aliens from noncommunist countries had to satisfy a rigorous burden and standard of proof to successfully petition the government to withhold their deportation."⁹³

The parole power⁹⁴ permitted the Attorney General to conditionally and temporarily admit aliens into the country. It was intended

to permit the Attorney General to parole inadmissible aliens into the United States in emergency cases, such as the case of an alien who

86. The 1952 version read: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason." Immigration and Nationality Act of 1952 § 243(h) (current version at 8 U.S.C. § 1253(h) (1988)).

87. *Id.*

88. See notes 51-56 and accompanying text. Note that the United States did not accede to the Convention (through the Protocol) and its mandatory nonrefoulement strictures until 1968. See *infra* text accompanying notes 102-09.

89. *In re Joseph*, 13 I. & N. Dec. 70, 72 (BIA 1968) (quoting *Lena v. INS*, 379 F.2d 536, 538 (7th Cir. 1967)).

90. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918.

91. Protocol, *supra* note 21.

92. See *infra* notes 131-32 and accompanying text.

93. *Kurzban*, *supra* note 9, at 874.

94. Immigration and Nationality Act of 1952 § 212(d)(5) (current version at 8 U.S.C. § 1182(d)(5) (1988)):

The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole

requires immediate medical attention . . . and in cases where it is strictly in the public interest to have an inadmissible alien present in the United States, such as, for instance, a witness or for purposes of prosecution.⁹⁵

However, due to the unlimited discretion granted to the Attorney General, parole came to be used far beyond the scope for which it was originally intended, and the Attorney General used it to admit hundreds of thousands of refugees.⁹⁶ Once again, those seeking refuge from communist countries were its prime—and nearly its sole—beneficiaries.⁹⁷

The final mechanism, conditional entry, was added to the INA in 1965.⁹⁸ This provision made ideological preferences explicit by addressing itself to persons who “have fled . . . from any communist or communist-dominated country or area.”⁹⁹ The number of conditional entrants was restricted to roughly 10,000,¹⁰⁰ and INS regulations limited the countries within which conditional entry applications could be processed.¹⁰¹

2. United States Accession to the Protocol

The United States acceded to the Protocol in 1968. Unfortunately, instead of bringing the United States into conformance with international law, the period following accession underscored the fundamental disarray of domestic refugee policy.

It is difficult to escape the conclusion that accession was perceived more as a symbolic gesture than as a serious commitment to conforming United States law to international law. President Johnson’s Letter of Transmittal to the Senate stated that accession “would . . . constitute a significant and symbolic element” in United States foreign policy, emphasizing that 1968 was the International Year for Human Rights.¹⁰² He assured the Senate that “[a]ccession to the Protocol would not impinge adversely upon established

shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

This section was amended by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(f), 94 Stat. 102, 107-08.

95. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 52, *reprinted in* 1952 U.S. CODE CONG. & ADMIN. NEWS 1653, 1706.

96. Kurzban, *supra* note 9, at 870-71; T. ALEINIKOFF & D. MARTIN, *supra* note 5, at 235.

97. Helton, *supra* note 7, at 246. Of roughly 233,000 parolees from 1952 to 1968, about 232,000—or well over 99% of them—were from communist countries. *Id.*

98. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913 (1965) (repealed 1980).

99. *Id.*

100. *Id.*

101. Those countries were Austria, Belgium, France, Germany, Greece, Hong Kong, Italy, and Lebanon. 8 C.F.R. § 235.9(a) (1980).

102. 114 CONG. REC. 27,757-58 (1968).

practices under existing laws in the United States."¹⁰³ Johnson was echoing the State Department's analysis of the treaty;¹⁰⁴ in particular, Secretary of State Rusk claimed that the INA withholding of deportation section¹⁰⁵ was already consistent with the nonrefoulement requirements of the Convention.¹⁰⁶

This theme was also trumpeted in the Senate. Senator Proxmire assured his compatriots that there was not "even the slightest possible conflict between Federal and State law and provisions of the Convention and protocol."¹⁰⁷ Accession, he concluded, was "the least the Senate can do during this year dedicated to internationalizing human rights."¹⁰⁸ Upon those reassurances, accession was approved.¹⁰⁹

As events unfolded, however, Congress became increasingly cognizant of serious inconsistencies between United States law and its obligations under international law. For example, as early as 1969, Senator Kennedy complained that the definition of a refugee remained rooted in a "cold war framework"¹¹⁰ and sought to conform this definition to the Convention/Protocol definition.¹¹¹ Yet immigration authorities remained intransigent, vexing Congress by "frustrating implementation of the Protocol and acting inconsistently with its generous underlying humanitarian philosophy."¹¹²

That Congressional concern was justified became readily apparent in November, 1970, in what has since come to be known as the Kudirka affair. A Lithuanian sailor aboard a Soviet fishing vessel managed to board a United States Coast Guard cutter and request asylum.¹¹³ Despite substantial evidence that Kudirka had faced, and would continue to face, persecution,¹¹⁴

103. *Id.* at 27,757.

104. *Id.* at 27,758 (Letter of Submittal from Secretary of State Dean Rusk). Laurence Dawson, Acting Deputy Director of the State Department's Office of Refugee and Migration Affairs, similarly assured the Senate that "the United States already meets the standards of the Protocol" and that accession was good for the United State's image. *Id.* at 27,844 (Letter of Laurence Dawson read into record by Sen. Proxmire).

105. Immigration and Nationality Act of 1952 § 243(h) (current version at 8 U.S.C. § 1253(h) (1988)).

106. 114 CONG. REC. 27,758 (1968).

107. *Id.* at 27,757. Two reservations to the Protocol dealt with unrelated matters. *Id.* at 27,758.

108. *Id.* at 27,757.

109. *Id.* at 29,607.

110. 115 CONG. REC. 36,966 (1969).

111. See S. 3202, 91st Cong., 1st Sess. § 6(a)(7)(B), 115 CONG. REC. 36,968 (1969) ("The term alien refugee means . . . any alien . . . who has fled or shall flee from and is unwilling to return to any country owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion . . .").

112. Helton, *supra* note 7, at 249.

113. N.Y. Times, Nov. 29, 1970, at 1, col. 2.

114. *Attempted Defection by Lithuanian Seaman Simas Kudirka: Hearings Before the Subcomm. on State Department Organization and Foreign Operations of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 154 (1970) [hereinafter *Kudirka Hearings*]. Kudirka claimed that he had been "ill-treated, denied his civic rights, discriminated against, relegated to menial jobs in the past, and denied the issuance of regular Soviet papers such as a passport or a mariner's certificate" for refusing a Soviet demand that he be an informer in Lithuania. *Id.*

he was returned to the Soviet ship where he was allegedly beaten unconscious.¹¹⁵ This action seemed clearly to contravene the implicit assumption of the Convention "that a reasonable inquiry be made to determine whether the defector is entitled to refugee status under the Convention and Protocol."¹¹⁶ The full-scale Congressional hearings which followed testify to Congressional outrage over the incident. For the remainder of the decade, Congress became increasingly impatient with Executive Branch recalcitrance to fulfill the spirit of the Protocol and sought to revise such practices.¹¹⁷

B. *The Refugee Act of 1980*

With the Refugee Act of 1980,¹¹⁸ Congress sought to bring United States law into compliance with the Convention/Protocol and to eliminate the previously piecemeal approach to refugee law.¹¹⁹ A comprehensive definition of a refugee was, for the first time, enacted into law.¹²⁰ Existing laws were amended to meet the dictates of the Convention/Protocol,¹²¹ and sections pertaining to refugee admission, asylum, and adjustment of status to permanent resident alien were added.¹²² However, an analysis of a decade of decision making under the Act compels the conclusion that ideological concerns continued to dominate refugee policy.

1. The Definition of a Refugee

Section 101(a)(42)(A) of the Refugee Act of 1980 defines as a refugee

any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹²³

Legislative intent was twofold: to bring United States law into accord with the Convention/Protocol definition¹²⁴ and to remove ideological biases.

115. J. GOWA, OBLIGATIONS UNDER INTERNATIONAL LAW GOVERNING THE STATUS OF REFUGEES AND THE GRANTING OF ASYLUM: THE CASE OF SIMAS KUDIRKA 5 (1975).

116. *Kudirka Hearings*, *supra* note 114, at 246.

117. *See, e.g.*, H.R. 981, 93d Cong., 1st Sess. § 5, 119 CONG. REC. 31,454-55 (1973); S. 2643, 93d Cong., 1st Sess. § 5, 119 CONG. REC. 35,734-35 (1973); S. 2405, 93d Cong., 1st Sess. § 5, 119 CONG. REC. 29,946, 29,948 (1975) (all explicitly embracing the definition of refugee contained in the Convention/Protocol).

118. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

119. *INS v. Stevic*, 467 U.S. 407, 425 (1984).

120. *See infra* notes 123-26 and accompanying text.

121. *See infra* notes 130-36 and accompanying text.

122. *See infra* notes 137-55 and accompanying text.

123. Refugee Act of 1980 § 101(a)(42)(A) (codified at 8 U.S.C. § 1101(a)(42)(A)).

124. *See supra* text accompanying note 23.

That the definition substantially resembled the Convention/Protocol definition was no accident. Both houses of Congress explicitly alluded to the Protocol during hearings on the bill: The Senate noted that "the new definition will bring United States law into conformity with our international treaty obligations under the [Protocol],"¹²⁵ and the "House amendment incorporated the U.N. definition."¹²⁶

Similarly, Congress intended, by adopting the Convention/Protocol definition, to eliminate the ideologically biased approach that had previously characterized refugee determinations.¹²⁷ In doing so, it gave notice to immigration authorities that their compliance would be closely monitored;¹²⁸ however, this threat was ineffective at significantly reducing ideological decisions.¹²⁹

2. Withholding, Parole, and Conditional Entry

The Refugee Act of 1980 significantly altered the tripartite treatment (withholding, parole, and conditional entry) accorded refugees under the earlier version of the INA. Conditional entry, with its explicit ideological quotas, was repealed,¹³⁰ and withholding and parole were amended.

The withholding provisions of INA, which had been discretionary, were made mandatory. As amended, that section now reads:

The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.¹³¹

This revision seemingly brought United States law into accord with the mandatory nonrefoulement provisions of the Convention/Protocol.¹³²

125. S. REP. NO. 256, *supra* note 1, at 4, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 144.

126. H.R. CONF. REP. NO. 781, 96th Cong., 2d Sess. 19 reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 160; see also SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 96TH CONG., 2D SESS., SECOND SEMI-ANNUAL REPORT TO CONGRESS 18 (Joint Comm. Print 1980) ("[T]he definition of refugee under the Refugee Act of 1980 increased U.S. compliance with the U.N. Protocol on Refugees.").

127. Helton, *supra* note 7, at 251-52; Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 LAW & CONTEMP. PROBS. 163, 173 (1982).

128. Helton, *supra* note 7, at 252.

129. See *infra* notes 156-83 and accompanying text.

130. Refugee Act of 1980 § 203, 94 Stat. at 107.

131. Immigration and Nationality Act of 1952 § 243, 8 U.S.C. § 1253(h).

132. *Stevic*, 467 U.S. at 421. Mandatory withholding under § 243(h) is not without its qualifications. Section 243(h)(2) exempts from its provisions aliens who themselves participated in proscribed persecution, have been convicted of certain crimes, are threats to the security of the United States, or may have committed a serious nonpolitical crime. These qualifications arguably are broader than those allowed under article 33 of the Convention. See *supra* note 53.

Parole was amended to harness the nearly absolute discretion previously enjoyed by the Attorney General.¹³³ As amended, the Act circumscribes the exercise of parole by declaring:

The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest *with respect to that particular alien* require that the alien be paroled into the United States rather than be admitted as a refugee¹³⁴

By limiting parole to this case-by-case determination, Congress sought to reduce its incidence¹³⁵ and to close "the loophole under which large numbers of people had been admitted to the United States."¹³⁶

3. Refugees, Asylees, and Permanent Resident Aliens

These previously ad hoc determinations were superseded by two comprehensive programs: the overseas refugee program¹³⁷ and the asylum program.¹³⁸ Both of these provide a mechanism for the eventual adjustment of the alien's status from refugee to permanent resident alien.¹³⁹

The overseas refugee program¹⁴⁰ addresses aliens applying for admission from outside United States territory. It grants to the Attorney General the authority to admit, within numerical limits set by the President in consultation with Congress,¹⁴¹ "any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible . . . as an immigrant under this Act."¹⁴² To qualify for admission, the alien must adduce that she is a refugee as defined by section 101(a)(42)(A);¹⁴³ having done so, she is then admitted to the United States as a "refugee."¹⁴⁴

133. See *supra* notes 94-97 and accompanying text.

134. Refugee Act of 1980 § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B) (emphasis added).

135. H.R. CONF. REP. NO. 781, *supra* note 126, at 20, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 161; Kurzban, *supra* note 9, at 878-79.

136. Scanlan, *supra* note 3, at 633.

137. Immigration and Nationality Act of 1952 § 207, 8 U.S.C. § 1157.

138. *Id.* § 208(a), 8 U.S.C. § 1158.

139. *Id.* § 209, 8 U.S.C. § 1159. These provisions are thus unlike withholding under § 243(h), which is a temporary measure and from which an alien may not be granted permanent residence.

140. *Id.* § 207, 8 U.S.C. § 1157.

141. Section 207(e) of the INA dictates the form of those consultations and requires "Cabinet-level representatives" to meet with the Committees on the Judiciary of both houses. *Id.* § 207(e), 8 U.S.C. § 1157(e). These limitations are then issued in Presidential Determinations and printed in the Federal Register.

142. *Id.* § 207(c)(1), 8 U.S.C. § 1157(c)(1). Refugees are also exempted from certain exclusion provisions of § 212 pertaining to normal immigrants. *Id.*

143. See *supra* text accompanying note 123.

144. T. ALEINIKOFF & D. MARTIN, *supra* note 5, at 625.

In spite of the perhaps archetypal American belief in the right of political asylum,¹⁴⁵ the Refugee Act of 1980 for the first time enacted asylum procedures into law.¹⁴⁶ Section 208(a) provides as follows:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry . . . to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).¹⁴⁷

A person admitted under this section is referred to as an "asylee." Asylum may be terminated if an alien loses her refugee status due to a change of circumstances in her home country.¹⁴⁸

Section 209¹⁴⁹ outlines the steps whereby refugees and asylees may adjust to permanent resident alien status.¹⁵⁰ Refugees may adjust under section 209(a) provided that certain minimal criteria are met.¹⁵¹ There are no numerical

145. See, e.g., *Immigration Reform: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 621 (1981) ("[T]he right of asylum is in many ways the most basic of all human rights. This country was founded and was build (sic) on a promise to open doors to those who seek to escape persecution . . .").

146. S. REP. No. 256, *supra* note 1, at 9, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 149-50.

147. Immigration and Nationality Act of 1952 § 208(a), 8 U.S.C. § 1158(a). While the overseas refugee program addresses aliens outside of the United States, asylum concerns those already "physically present" and thus to some extent overlaps with withholding of deportation. In fact, INS regulations provide that a request for withholding is also to be treated as a request for asylum. 8 C.F.R. § 208.3(b) (1990). *But see infra* notes 156-83 and accompanying text (discussing the divergent development of the two).

148. Immigration and Nationality Act of 1952 § 208(b), 8 U.S.C. § 1158(b), stipulates that "[a]sylum granted under subsection (a) may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 101(a)(42)(A) owing to a change in circumstances in the alien's country of nationality." See *supra* notes 65-77 and accompanying text (discussing the change of circumstances doctrine under international law).

149. Immigration and Nationality Act of 1952 § 209, 8 U.S.C. § 1159.

150. Permanent resident alien status is for the most part self-explanatory. The permanent resident alien remains an alien (that is, not a citizen) but is allowed to remain permanently in the United States. He enjoys most of the advantages of citizenship, such as constitutional protections and the unrestricted ability to work, and shoulders most of its burdens, such as taxes and military conscription; he is not, however, allowed to vote or to hold elective office, privileges enjoyed solely by citizens. D. WEISSBRODT, *IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL* § 10-1, at 274, § 10-3, at 276 (1989).

151. Immigration and Nationality Act of 1952 § 209, 8 U.S.C. § 1159:

(a)(1) Any alien who has been admitted to the United States under section 207—

(A) whose admission has not been terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe,

(B) who has been physically present in the United States for at least one year, and

(C) who has not acquired permanent resident status, shall, at the end of such year period, return or be returned to the custody of the Service for inspection and examination for admission to the United States as an

limitations and adjustment is, for the most part, routine.¹⁵² Asylee adjustments are governed by section 209(b), and that privilege is far more attenuated for asylees than for refugees.¹⁵³ For example, there is a numerical limit on the number of adjustments,¹⁵⁴ and the asylee must be able to demonstrate that he remains a "refugee," which exposes him to loss of that status through a change of circumstances. No such provision attaches to refugees.¹⁵⁵

4. Determinations Under the Refugee Act of 1980

The decade since the passage of the Refugee Act of 1980 demonstrates that it is not the apotheosis envisioned by its drafters.¹⁵⁶ Two main developments substantiate this contention. The first is the administrative and judicial divergence of withholding and asylum, and the second is the continuing role of ideology.

Congress "clearly intended that no substantive distinction be made under the 1980 Act in determining eligibility for [withholding of deportation and

immigrant

(2) Any alien who is found upon inspection and examination by an immigration officer pursuant to paragraph (1) or after a hearing before a special inquiry officer to be admissible . . . as an immigrant under this Act . . . shall, notwithstanding any numerical limitation specified in this Act, be regarded as lawfully admitted to the United States for permanent residence as of the date of such alien's arrival into the United States.

152. T. ALEINIKOFF & D. MARTIN, *supra* note 5, at 625-26.

153. Immigration and Nationality Act of 1952 § 209(b), 8 U.S.C. § 1159(b) (amended 1990): Not more than five thousand of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General, in the Attorney General's discretion and under such regulations as the Attorney General may prescribe, to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum who—

- (1) applies for such adjustment,
- (2) has been physically present in the United States for at least one year after being granted asylum,
- (3) continues to be a refugee within the meaning of section 101(a)(42)(A) or a spouse or child of such a refugee,
- (4) is not firmly resettled in any foreign country, and
- (5) is admissible . . . as an immigrant under this Act for . . . adjustment of such alien.

Upon approval of an application under this subsection, the Attorney General shall establish a record of the alien's admission for lawful permanent residence as of the date one year before the date of the approval of the application.

154. The number was increased from 5,000 to 10,000 by the Immigration Act of 1990, Pub. L. No. 101-649, § 104(a)(1), 104 Stat. at 4986.

155. Refugee status is revocable if "the Attorney General determines that the alien was not in fact a refugee within the meaning of section 101(a)(42)(A) at the time of the alien's admission." Immigration and Nationality Act of 1952 § 207(c)(4) (codified at 8 U.S.C. 1157(c)(4)) (emphasis added). Thus, a refugee appears virtually immune to revocation due to a change of circumstances in his home country. T. ALEINIKOFF & D. MARTIN, *supra* note 5, at 641.

156. See S. REP. NO. 256, *supra* note 1, at 1, reprinted in 1980 U.S. CODE CONG. & ADMIN.

asylum].”¹⁵⁷ Nevertheless, two important distinctions have emerged. The first distinction is the development of separate evidentiary standards for the two. Section 243(h) defines as eligible for withholding an alien whose “life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁵⁸ In applying this standard, the Board of Immigration Appeals (BIA) had since the 1950s required applicants for withholding under section 243(h) to adduce a “clear probability of persecution.”¹⁵⁹ Alternatively, the more recent asylum section internalized the Convention/Protocol refugee definition in section 101(a)(42)(A), with its “well-founded fear” standard.¹⁶⁰ Some circuit courts of appeals maintained that this also effectuated a loosening of the clear probability standard under section 243(h),¹⁶¹ while others insisted that the previous standard was unaffected.¹⁶² The Supreme Court granted certiorari to consider the issue in *INS v. Stevic*.¹⁶³ It held that “the ‘clear probability of persecution’ standard remains applicable to § 243(h) withholding of deportation claims,” but it declined to explicate the “well-founded fear” asylum standard,¹⁶⁴ thus leaving unresolved the distinction, if any, between the two.

That issue was finally resolved by the Court in *INS v. Cardoza-Fonseca*.¹⁶⁵ In that case, the INS argued that the standards were identical and both subject to a “more likely than not” test,¹⁶⁶ but the Court disagreed. It “concluded that Congress did not intend the two standards to be identical.”¹⁶⁷ The Court indicated that the asylum standard¹⁶⁸ was less onerous since its

NEWS 141, 141:

The Refugee Act of 1979 establishes for the first time a comprehensive United States refugee resettlement and assistance policy. It reflects one of the oldest themes in American history—welcoming homeless refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns, not reflected in the Immigration and Nationality Act of 1952, as amended. And it places into law what we do for refugees now by custom, and on an *ad hoc* basis

157. Scanlan, *supra* note 3, at 625.

158. Immigration and Nationality Act of 1952 § 243(h)(1), 8 U.S.C. § 1253(h)(1).

159. T. ALENIKOFF & D. MARTIN, *supra* note 5. This interpretation persisted notwithstanding accession to the Protocol. See *In re Dunar*, 14 I. & N. Dec. 310, 320-21 (BIA 1973).

160. See *supra* notes 22-50 and accompanying text (discussing the Convention/Protocol definition); see also *supra* notes 123-26 and accompanying text (discussing this definition in United States law).

161. See *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *rev'd and remanded*, 467 U.S. 407 (1984).

162. See *Rejaie v. INS*, 691 F.2d 139, 146 (3d Cir. 1982).

163. 467 U.S. 407 (1984).

164. *Id.* at 430.

165. 480 U.S. 421 (1987).

166. *Id.* at 431.

167. *Id.* at 446.

168. Immigration and Nationality Act of 1952 § 208, 8 U.S.C. § 1158.

focus is the applicant's subjective mental state;¹⁶⁹ that the fear must additionally be "well-founded" does not "transform the standard into a 'more likely than not' one."¹⁷⁰ Once again, however, the Court declined to illuminate further the "well-founded fear" standard.¹⁷¹

In a case decided after *Cardoza-Fonseca*, however, the BIA interpreted that standard as implying a reasonable person test; that is, "an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution."¹⁷² The court held that a reasonable person may be said to fear persecution if

(1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could . . . become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.¹⁷³

The second main distinction between withholding and asylum is the increasing emphasis placed on the discretionary aspect of asylum.¹⁷⁴ Although the text of section 208 allows for discretion,¹⁷⁵ it was not until the 1982 decision in *In re Salim*¹⁷⁶ that the BIA considered a discretionary denial of asylum to an alien who had established a likelihood of persecution. Salim had fraudulently purchased another person's passport to gain entrance to the United States and was ordered deported by an immigration judge.¹⁷⁷ The Board found that he had established a probability of persecution and ordered a temporary withholding¹⁷⁸ but upheld the discretionary denial of asylum, concluding that it was justified by Salim's fraud.¹⁷⁹ Since *Salim*, asylum

169. See *supra* notes 31-34 and accompanying text (discussing the subjective element of the refugee definition).

170. *Cardoza-Fonseca*, 480 U.S. at 431.

171. *Id.* at 448.

172. *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987). This interpretation appears consistent with that advocated by Grahl-Madsen. See *supra* text accompanying note 36.

173. *Mogharrabi*, 19 I. & N. Dec. at 446 (quoting and modifying *In re Acosta*, 19 I. & N. Dec. 211 (BIA 1985)).

174. In contrast, withholding is mandatory if the criteria are met. See *supra* notes 131-32 and accompanying text.

175. "[T]he alien may be granted asylum in the discretion of the Attorney General" Immigration and Nationality Act of 1952, § 208(a), 8 U.S.C. § 1158(a).

176. 18 I. & N. Dec. 311 (BIA 1982).

177. *Id.* at 312.

178. *Id.* at 313.

179. In reaching its decision, the Board placed a great deal of emphasis on the fraud: This Board finds that the fraudulent avoidance of the orderly refugee procedures that this country has established is an extremely adverse factor which can only be overcome with the most unusual showing of countervailing equities. This case before us does not present such equities. Consequently, the application for asylum relief will be denied as a matter of discretion.

Id. at 316.

applicants have "with increasing frequency [been] denied asylum as a matter of discretion."¹⁸⁰

The net effect of these developments has been the continuing dominance of ideology—a legacy of cold-war mentality.¹⁸¹ An alien fleeing communist-dominated regimes or other regimes the United States opposes is still far more likely to be granted refugee status or asylum than aliens fleeing friendly countries. In fact, "[s]ince passage of the Act, persons from 'hostile' countries are favored in refugee/asylee admissions to the same extent as prior to passage of the Act."¹⁸² As one commentator caustically wrote: "Eight years after the passage of the Refugee Act of 1980, its mandate that uniform and neutral standards be utilized in conferring refugee protection remains unfulfilled. Rather, the Act's mandate is subservient to foreign and domestic policy considerations which continue to dominate protection determinations."¹⁸³

III. RECENT DEVELOPMENTS IN UNITED STATES REFUGEE LAW

Two recent legislative initiatives similarly reveal the persistence of this ad hoc and ideological decision making. The first is a provision in the Foreign Operations, Export Financing and Related Programs Appropriations Act of 1990 (Foreign Operations Act)¹⁸⁴ relaxing the refugee standard for a select group of aliens. The second initiative concerns a provision in the recently enacted Immigration Act of 1990¹⁸⁵ providing favored treatment to certain asylees.

A. Preferential Refugee Treatment

Congress seemingly abandoned its commitment to a nondiscriminatory refugee standard with the passage of the Foreign Operations Act. A provision in that bill resurrected a double standard in refugee determinations.

After the enactment of the Refugee Act of 1980, aliens seeking refugee status had to prove an individualized well-founded fear of persecution.¹⁸⁶ Section 599(D) of the Foreign Operations Act, however, establishes a different standard for some aliens:

180. Helton, *supra* note 54, at 1000.

181. Stepick, *supra* note 127, at 172.

182. B. YARNOLD, UNITED STATES REFUGEE AND ASYLUM POLICY: FACTORS THAT IMPACT LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL DECISIONS 118 (1988) (citations omitted). For her doctoral dissertation, Yarnold conducted an exhaustive statistical study of post-1980 refugee and asylum policy. She concluded that, at least through 1985, decision makers "were overwhelmingly influenced by one variable: whether an alien is from a 'hostile' country of origin, defined as a country with a communist, socialist, or leftist form of government." *Id.* at xix.

183. Helton, *New Asylum Rules: The Need for Reform in Asylum and Refugee Protection in the United States*, in XI IN DEFENSE OF THE ALIEN 115, 115 (1989).

184. Pub. L. No. 101-167, 103 Stat. 1195 (1989) [hereinafter Foreign Operations Act].

185. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

186. See *supra* note 123 and accompanying text.

In the case of an alien who is within a category of aliens established under subsection (b), the alien may establish, for purposes of admission as a refugee under section 207 of the Immigration and Nationality Act, that the alien has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion by asserting such a fear and asserting a *credible basis for concern about the possibility of such persecution*.¹⁸⁷

This section applies to Soviet Jews or Evangelical Christians, those active in the Ukrainian Catholic Church or Ukrainian Orthodox Church, and selected Vietnamese, Laotians, and Cambodians.¹⁸⁸ As the italicized clause indicates, a credible fear of persecution—instead of a well-founded fear—suffices to qualify these persons as refugees.

This legislation was clearly intended to bestow preferential treatment. The distinction between the “well-founded fear” standard and the “credible basis for concern” standard is apparent in the conference report on the bill: A “credible basis of concern” is established if the alien asserts that a “similarly situated individual[] in his or her geographic locale” has been persecuted or the alien has “knowledge, either from having read of or heard of . . . [persecution] as affecting persons in the same category residing elsewhere in the home country.”¹⁸⁹ The results speak for themselves: denial rates dropped from a high of more than 30% to less than 10%.¹⁹⁰

B. Preferential Asylee Treatment

An eleventh hour addition to the Immigration Act of 1990 also illustrates the continuing interrelationship between ideology and refugee law. The amendment was the product of political exigencies resulting from the democratic revolutions experienced by a number of countries in 1990 and grants favorable treatment to certain groups of asylees.

187. Foreign Operations Act, *supra* note 184, § 599(D) (emphasis added). Perversely, the new standard was precipitated by the Attorney General's attempt to conform the Soviet Refugee Program to the nonideological dictates of the Refugee Act of 1980. Prior to 1988, Soviet citizens were allowed a nearly presumptive refugee status. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS, SOVIET REFUGEES: PROCESSING AND ADMITTANCE TO THE UNITED STATES, 136 CONG. REC. S6841-42 (daily ed. May 23, 1990) [hereinafter GAO REPORT]. In August of 1988 the Attorney General altered this approach by requiring a case-by-case adjudication—“like all other refugee applicants”—of Soviet citizens. *Id.* at S6841. As a result, refugee status was increasingly denied to Soviets who could not meet the standard required of everybody else: denial rates increased from 6.7% in December, 1988 to 36.5% by March, 1989. *House Votes Refugee Status for Soviet Jews, Others*, 1989 CONG. Q. WEEKLY REP. 1788.

188. Foreign Operations Act, *supra* note 184, § 599(D)(b)(2)(A)-(C). The Attorney General may also establish other “categories of aliens who are or were nationals and residents of [the Soviet Union, Vietnam, Laos or Cambodia]” and “who share common characteristics that identify them as targets of persecution.” *Id.* § 599(D)(b)(1)(A)-(B).

189. H.R. CONF. REP. No. 344, 101st Cong., 1st Sess., 135 CONG. REC. H8495, H8515 (daily ed. Nov. 13, 1989). Compare this to the well-founded fear standard, described in the text at note 123.

190. GAO REPORT, *supra* note 187, at S6842.

In 1989, the Senate approved major revisions to United States immigration levels and criteria;¹⁹¹ the House began consideration of a similar bill later that year. In the course of this process, several countries experienced significant changes of government, evolving from totalitarian to democratic systems seemingly overnight.¹⁹² As a consequence, asylees from those countries were threatened with revocation of their refugee status and a concomitant loss of the opportunity to adjust to permanent resident alien status due to a change in circumstances.¹⁹³ The INS particularly identified Poland, Hungary, Panama, and Nicaragua as having experienced fundamental changes and advanced a policy of denying adjustment to asylees from those countries.¹⁹⁴ Approximately 11,000 asylees were at risk of losing their status.¹⁹⁵

In response, Representatives Lipinski and Rostenkowski proffered an amendment entitled "Opportunity for Adjustment of Status Before Termination of Asylum Status" to the House bill.¹⁹⁶ Although certainly motivated by concern for Lipinski's and Rostenkowski's Polish constituents, the Lipinski amendment sought to accomplish more than just to remedy the then current circumstances and addressed itself to the possibility of similar problems in the future. The amendment appended to the asylum termination section of the INA¹⁹⁷ the following:

The Attorney General may not terminate such [asylum] status on the basis that the alien is no longer a refugee unless the alien has been provided notice of such termination and the right to apply for adjustment of status under section 209(b) and an opportunity (of not less than 90 days beginning one-year after the date the alien is granted asylum) to file an application for adjustment of status under such section to that of an alien lawfully admitted for permanent residence.¹⁹⁸

Additionally, the adjustment of status provisions were brought into conformity by removing the requirement that an asylee continue to be a refugee to adjust to permanent resident alien status.¹⁹⁹

191. S. 358, 101st Cong., 1st Sess., 135 CONG. REC. S8639 (daily ed. July 24, 1989).

192. See generally Wash. Post, Sept. 20, 1990, at A33, col. 5 (discussing Polish democratization); Wash. Post, Mar. 4, 1990, at C7, col. 3 (discussing Nicaraguan democratization); Wash. Post, Jan. 5, 1990, at A1, col. 4 (discussing Panamanian democratization); Christian Sci. Monitor, Oct. 25, 1989, at 3, col. 2 (discussing Hungarian democratization).

193. See *supra* notes 65-77, 148 and accompanying text (discussing the change of circumstances doctrine).

194. 136 CONG. REC. H8689 (daily ed. Oct. 2, 1990) (statement of Rep. Rostenkowski).

195. These asylees comprised approximately 9000 Nicaraguans, 1000 Poles, 450 Hungarians, and 350 Panamanians. *Id.* (statement of Rep. Lipinski).

196. *Id.* "Adjustment of Status" in this context means that the refugee may adjust to permanent resident status and thus may remain permanently in the United States regardless of conditions in his country of origin. See *supra* note 150.

197. Immigration and Nationality Act of 1952 § 208(b), 8 U.S.C. § 1158(b). See *supra* note 148.

198. 136 CONG. REC. H8688-89 (daily ed. Oct. 2, 1990) (amendment offered by Rep. Lipinski).

199. *Id.* at H8689.

The amendment effectively granted to *all* asylees whose home countries had experienced significant improvements in government the opportunity to adjust their status regardless of those changes. Underlying the amendment was a normative judgment that those who uprooted themselves to flee persecution and seek asylum in the United States should not be forcibly uprooted yet another time.²⁰⁰ This provision was thus designed to affect not only current Polish and other similarly situated asylees, but also to prevent the recurrence of such a dilemma in the future.

The House of Representatives passed the Lipinski amendment and incorporated it into the bill.²⁰¹ Subsequently, the Senate and House sent their differing versions of the bill to conference to resolve the disagreements.²⁰² What emerged from the conference and ultimately became law in the Immigration Act of 1990,²⁰³ however, was an asylee adjustment provision quite different from the Lipinski amendment.

The Act contained two future-oriented provisions,²⁰⁴ but additional provisions reveal yet another instance of patchwork lawmaking. Section 104(d) of the Act establishes the mechanics for "Adjustment of Certain Former Asylees":

[T]he provisions of section 209(b) of the Immigration and Nationality Act shall also apply to an alien—

(A) who was granted asylum before the date of the enactment of this Act (regardless of whether or not such asylum has been terminated under section 208(b) of the Immigration and Nationality Act),

(B) who is no longer a refugee because of a change in circumstances in a foreign state, and

(C) who was (or would be) qualified for adjustment of status under section 209(b) of the Immigration and Nationality Act as of the date of the enactment of this Act but for paragraphs (2) and (3) thereof and but for any numerical limitation under such section.²⁰⁵

The myopic quality of this provision is apparent: it has no prospective utility. For those aliens who become asylees after the Act's enactment,

200. Representative Rostenkowski explained:

[T]he asylees have begun to set down roots here in the United States. They have homes, and jobs. Their children are in our schools. They have joined American organizations, learned our language, and even taken an intense interest in our domestic and international affairs. Notably, they have also given us the benefit of their energy and their fresh outlook on our own dedication to democracy and freedom.

Id.

201. H.R. 4300, 101st Cong., 2d Sess. § 328, 136 CONG. REC. H8737 (daily ed. Oct. 3, 1990).

202. 136 CONG. REC. H9995 (daily ed. Oct. 17, 1990) (House); 136 CONG. REC. S16,536 (daily ed. Oct. 23, 1990) (Senate).

203. Pub. L. No. 101-649, 104 Stat. 4978 (codified in scattered sections of 8 U.S.C.).

204. The ceiling on asylee adjustments was raised from 5,000 to 10,000, and the President was asked to enumerate annually to Congress the number of aliens granted refugee status who were also granted asylum. *Id.* § 104(a)-(b).

205. *Id.* § 104(d), 104 Stat. at 4985.

nothing has changed; they must continue to meet the criteria of section 209(b) to adjust and are subject to its change of circumstances measures. By contrast, those aliens who are no longer asylees due to a change of circumstances (namely certain Poles, Panamanians, Nicaraguans, and Hungarians) are accorded both the right to adjust and the additional benefit of being immune to any numerical limitation on adjustment.²⁰⁶ A hypothetical example serves to illustrate the point. Under section 104(d) of the Immigration Act of 1990, a Panamanian granted asylum shortly before Panama's overnight democratization, who most certainly would be susceptible to revocation of asylee status due to a change of circumstances—and *who may actually have had that status revoked*—is nevertheless permitted the opportunity to remain permanently in the United States. Yet an alien granted asylum on November 30, 1990—one day after the enactment of the Act—whose country later experiences fundamental changes and who is thus situated precisely as the Panamanian was, may well lose his asylee status and face repatriation. Such disparate treatment appears unjustifiable. So without mentioning ideology or country names, Congress nevertheless has once again demonstrated a preference for those who have fled states hostile to the United States.

IV. RECOMMENDATIONS

The philosophic underpinning of the Refugee Act of 1980²⁰⁷—that all refugees should be treated equally—is ill-served by these recent laws. An egalitarian refugee policy need not, however, be a chimerical pursuit. The following two recommendations should suffice to bring United States policy at least somewhat closer to this goal.

My first recommendation is that the United States should refrain from manipulating its refugee law—as in, for example, selectively relaxing refugee standards—to accommodate certain groups for ideological reasons. Such a practice violates article 3 of the Convention, which dictates that “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to . . . country of origin.”²⁰⁸ Granting special consideration to aliens from hostile countries, especially when it appears that

206. Section 104(c) contains a “Waiver of Numerical Limitation for Certain Current Asylees”:

The numerical limitation on the number of aliens whose status may be adjusted under section 209(b) of the Immigration and Nationality Act shall not apply to an alien described in subsection (d) or to an alien who has applied for adjustment of status under such section on or before June 1, 1990.

Id. § 104(c).

207. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

208. Convention, *supra* note 20, art. 3; *see also* UNITED NATIONS, THE UNITED NATIONS AND HUMAN RIGHTS 57 (1978), reprinted in Goldman & Martin, *supra* note 58, at 310 (The Convention is based on the principle “that there should be no discrimination based on . . . country of origin among refugees.”).

they may not even qualify as refugees, certainly constitutes discrimination based on nationality. The problem is exacerbated by the fact that refugee levels are subject to numerical ceilings. Granting special status to less deserving aliens may ultimately have the indefensible effect of excluding deserving aliens.

On a more fundamental level, and perhaps more importantly, such a practice cheapens the United States' commitment to human rights. President Bush recently wrote:

Ever since the first Europeans came to this country in search of freedom and opportunity, America has been viewed as a safe haven and a source of hope for millions of people around the globe. We take tremendous pride in our leading efforts to assist refugees, and we continue to cherish the great and generous spirit embodied by our magnificent Statue of Liberty. As Emma Lazarus wrote in her timeless sonnet to the famed Mother of Exiles, "from her beacon-hand glows worldwide welcome."²⁰⁹

These are grand and, to a large extent, true words. Yet, in allowing ideology to creep into refugee considerations, the United States undermines them. For at its most elementary level, refugee law reflects the noblest of humanitarian instincts: to help those who need it. Ideology simply has no part in these determinations; it is as irrelevant as the color of a refugee's eyes.

The use of ideology is frequently rationalized by arguing that since far more aliens apply for refugee status than can possibly be admitted such an additional selection criterion is necessary to narrow their numbers. For example, consider this statement by Representative Morrison:

The people who can come here are a trickle [compared to those who want to come]. Therefore, there is an impossible picking and choosing. By the very nature of things, there has to be a reason for why we take a particular person. And that gives rise to politics, not in a corrupt sense, but in a sense of identifying American interests.²¹⁰

However, an ideological criterion is purely arbitrary and has nothing to do with discerning who is *worthy* of protection. "American interests" are not the issue; humanitarian interests are. If a limiting criterion is necessary, then at the very least it should be tied to humanitarian, not political, considerations.

Furthermore, at least when applied to justify the double-standard refugee definition of the Foreign Operations Act,²¹¹ such an argument assumes what

209. Proclamation No. 6219, *supra* note 4.

210. Biskupic, *supra* note 1, at 594. Rep. Morrison's underlying claim, that applications outstrip openings, is true. For example, President Reagan authorized the admission of 72,500 refugees for 1988. Pres. Determination No. 88-01, 52 Fed. Reg. 42,073 (1987). There were 125,176 refugee applications that year; 80,282 were ultimately approved. IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEPT. OF JUSTICE, 1988 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 49 (Table 24). Few would advocate allowing all of the estimated 15 million current worldwide refugees to enter the United States. See *supra* note 4.

211. See *supra* Part III.A.

it seeks to prove. Select Soviet groups receive the benefit of a relaxed standard, so that argument goes, because there has to be some way to choose from among the overwhelming number of refugees needing protection. But this begs the question, for it presupposes that those groups were entitled to protection in the first place. The fact that denial rates were high when the normal refugee standard was applied indicates that such an assumption is questionable at best.

Accordingly, the refugee standard should be consistently and even-handedly applied to all applicants irrespective of their country of nationality. Only by doing so can the United States meet its humanitarian and international law obligations.

My second recommendation is that asylees should be given the opportunity to adjust to permanent resident alien status. To this extent, the asylee adjustment provisions of the Immigration Act of 1990²¹² should be repealed and replaced by provisions more closely resembling the Lipinski amendment.²¹³ A number of observations justify this conclusion.

First, there is no compelling reason for distinguishing between refugees and asylees for purposes of adjustment to permanent resident alien status. Currently, the former are seemingly immune to the change-of-circumstances doctrine and are allowed adjustment virtually as a matter of course while the latter are required to prove continuing refugee status.²¹⁴ Both have met the burden of adducing their recognition as refugees. The only distinction between them is that asylees applied for protection from within the United States while refugees applied from outside the United States.²¹⁵ Asylum seekers who abuse this process (by fraudulently entering the country, for example) may justly be denied asylum as a matter of discretion.²¹⁶ Thus aliens granted asylum are, practically by definition, refugees whose presence in the United States is not problematic. Why treat them differently?

Second, this approach would provide a measure of protection against hasty conclusions that a person's home country has undergone fundamental political changes. The road leading from a repressive government may not be straight; there may be occasional setbacks. Allowing the asylee the opportunity to adjust to permanent resident alien status would protect her from repatriation to a country experiencing perhaps only short-term changes.²¹⁷

212. Immigration Act of 1990, Pub. L. No. 101-649, § 104, 104 Stat. 4978, 4985.

213. See *supra* notes 196-200 and accompanying text.

214. See *supra* notes 149-55 and accompanying text.

215. See IMMIGRATION AND NATURALIZATION SERVICE, *supra* note 210, at xxvii ("The definition of an asylee conforms to that of a refugee. The only difference is the location of the alien upon application; the asylee is in the United States or at a port of entry and the refugee is outside the country.").

216. See *supra* notes 174-180 and accompanying text. These aliens may still qualify for withholding of deportation, from which there are no adjustment provisions.

217. For a discussion of how ephemeral changes in a refugee's home country do not constitute a change of circumstances, see notes 71-72 and accompanying text.

Finally, even if the asylee's country has experienced a lasting change of circumstances and the asylee no longer faces persecution, the effects of that persecution may linger. Refugees may flee their home country with little more than the clothes on their backs²¹⁸ and may have no real family, job, or home to which to return. Compelling repatriation in such circumstances, especially when the asylee may already have established significant ties to the United States, may be nearly as traumatic as fleeing persecution in the first place.²¹⁹

Such a provision ultimately may have the effect of chilling the favorable exercise of the discretion to grant asylum. But such an argument seems tenuous, because it assumes that these decision makers can portend fundamental changes in an applicant's home country. Otherwise, arbitrary denials will be subject to reversal. Furthermore, even assuming a chilling effect, the refugee who is denied asylum is no worse off than an asylee whose status is later revoked. Since the refugee in the first instance will still qualify for withholding of deportation, both will be repatriated when the circumstances change in their home country. At least the withholder will know all along that her status is strictly temporary.

CONCLUSION

The Refugee Act of 1980 was, on its face, a significant step toward abandoning the ideological preferences which had marked United States refugee law for over fifty years. Unfortunately, the practice has not lived up to the theory. Discrimination has been reinserted into refugee decisions, and no practical distinctions between pre-1980 and post-1980 determinations are apparent.

In addition, more recent developments in United States refugee law indicate that the nonideological mandates of the Refugee Act of 1980 and the Convention Relating to the Status of Refugees have been further subverted. By establishing ad hoc standards that favor certain groups over others, Congress has reverted to a practice that it had professedly sought to eliminate. As a consequence, the ideologically favored refugees of the past four decades remain the ideologically favored refugees of the 1990s.

With the demise of communist hegemony in Eastern Europe and the disintegration of the Soviet Union itself may come a tendency to dismiss such practices as relics of the past. Such a response is undoubtedly premature. In the first place, it ignores the very real possibility that past ideologically influenced decisions may have skewed the plurality politics of refugee law

218. LaPointe, Note, *Discrimination in Asylum Law: The Implications of Jean v. Nelson*, 62 IND. L.J. 127, 141 (1986).

219. This argument is analogous to § 1(C)(5) of the Convention. See *supra* notes 73-78 and accompanying text.

by creating and empowering cohesive and vociferous refugee lobbying groups.²²⁰ If so, it is the legacy of ideological preferences, rather than continuing ideological preferences, that must be redressed. Furthermore, there remains the likelihood that the United States, having lost the Soviet Union as an adversary, may turn its attention to, and consequently favor, refugees from other hostile countries. Only by adopting and adhering to nondiscriminatory refugee legislation will the United States fulfill its international and humanitarian obligations.

220. See Biskupic, *supra* note 1, at 594 (statement of Rep. Lamar Smith: "I sometimes get the feeling that our refugee policy is determined by how long the line is outside some congressman's office . . .").

