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PANEL ONE: RECENT DEVELOPMENTS IN REFUGEE PROTECTION

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**PANEL ONE: RECENT DEVELOPMENTS IN REFUGEE
PROTECTION**

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BUCKLER: I would like to introduce our first panel. Our moderator is Professor Lung-chu Chen, who teaches international law, constitutional law, and international human rights law. He has recently written a book, entitled *An Introduction to Contemporary International Law*. He has also written an award-winning book on nation building in Taiwan, which was originally published more than twenty years ago in the United States, but until last year was banned in Taiwan. I'll turn it over to Professor Chen.

LUNG-CHU CHEN: Thank you very much, Carol. Good morning. As moderator for this panel on recent developments in refugee protection, I would like to welcome you all to New York Law School.

The twentieth century has been called a century of refugees. Indeed, the problem with refugees is a worldwide phenomenon. At present there are some twenty million refugees who have fled their

countries of origin for one reason or another.¹ This ever increasing problem affects every country and every person. The United States, as the land of opportunity and a nation of immigrants, is not immune from the mass influx of aliens seeking refuge. People become refugees for a variety of reasons. Some become refugees due to national or international armed conflicts, disasters of one kind or another, or oppressive regimes. Others flee their countries because of intolerable political, ideological, religious, racial or social discrimination or other human rights deprivations.

Whatever the reason, the number of refugees in the world is increasing, and the crisis shows no sign of abating. Arthur Helton gave us some very vivid figures earlier. On the global level, from the League of Nations to the United Nations, continuous international efforts have been made to improve the status and treatment of refugees. Post-World War II efforts led not only to the establishment of the office of the United Nations High Commissioner for Refugees,² but also to the adoption of two important refugee treaties, namely the 1951 United Nations Convention and the 1967 United Nations Protocol, both relating to the status of refugees.³ Together, the 1951 Convention and the 1967 Protocol constitute the basis of contemporary international refugee law. They set forth, among other things, a technical definition of refugee and the principle of no forced return, commonly known as the principle of non-refoulement.⁴ This definition and this principle have come to be widely accepted at the national level.

In the United States, many attempts have been made to deal with the refugee problem. The ad hoc, haphazard approach of the

¹ See Stanley Meisler, *UN Reports Asylum Crisis for Refugees*, L.A. TIMES, Nov. 10, 1993, at A4.

² The United Nations General Assembly established the office of the High Commissioner for Refugees in January of 1951. See ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 65 (Clyde Eagleton & Richard N. Swift eds., 1951).

³ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268; see Lung-chu Chen, *The United States Supreme Court and the Protection of Refugees*, 67 ST. JOHN'S L. REV. 469, 470 (1993).

⁴ Convention Relating to the Status of Refugees, July 28, 1951, arts. 1A(2), 33(1), 189 U.N.T.S. 137, 152-54; Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268.

past has been replaced by a continuous, institutionalized approach, thanks to the enactment of the Refugee Act of 1980.⁵ The Refugee Act provides a comprehensive framework for the admission of refugees into the United States through an overseas refugee program, and asylum procedures for aliens already within the United States.⁶ The Refugee Act defines a refugee as any person who is outside his or her country of nationality or origin, who is unable or unwilling to return to that country due to persecution or a well-founded fear of persecution, suffered on account of the alien's race, religion, nationality, political opinion, or membership in a particular social group.⁷ The Refugee Act also includes a provision for the withholding of deportation if the Attorney General determines that the alien's life or liberty will be threatened on account of one of the five enumerated factors mentioned above.⁸ This is our version of non-refoulement.

One of these refugee definitions—a person who is unable or unwilling to return to a country due to persecution or a well-founded fear of persecution—is a broad one. This definition is also ambiguous, controversial, and has been the subject of intense debate and scrutiny in this country. Lately, the most heated debate appears to center on the interpretation of the definitions of well-founded fear. Other debates center on political opinion, membership in a particular social group, and non-refoulement in the context of the Act's refugee definition.

There have been many recent developments in United States law in an attempt to deal with these ambiguous terms, and also to deal with various questions raised by the Act. What are the main features of the Refugee Act of 1980? What practical obstacles do asylum-seekers encounter in seeking protection under the Refugee Act, and what efforts have been made to surmount these obstacles? What insights from foreign experience can be brought to bear in dealing with some of the difficulties we have encountered here in the United States? Finally, what are the constitutional implications of the

⁵ Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (1988)).

⁶ See Chen, *supra* note 3, at 472.

⁷ 8 U.S.C. § 1101(a)(42) (1988).

⁸ *Id.* § 1253(h).

recent developments in our refugee law, especially in terms of equal protection?

To address these questions, we are fortunate to have a group of distinguished speakers with us today. Arnold Leibowitz will start by outlining the distinctive features of the Refugee Act of 1980. Mr. Leibowitz is in private practice in Washington, D.C., and is Washington counsel for the Hebrew Immigration Aid Society. He was special counsel to the Select Commission on Immigration and Refugee Policy, and special counsel to the Senate Subcommittee on Immigration and Refugee Policy. He drafted the early version of the Immigration Reform and Control Act of 1986. He was editor of the *Federal Immigration Law Reporter* newsletter. He also edited the first case book on immigration and refugee policy entitled *Cases and Materials on Immigration and Refugee Policy*, published by Matthew Bender in 1983. It gives me great pleasure to present to you Mr. Leibowitz.

ARNOLD H. LEIBOWITZ: I looked around last night at the young students here, and I was made to feel my age. It reminded me of my first assignment, which I thought I would tell you about because, if you remember nothing else, this bit of advice may be useful. When I started out at the Foreign Aid Agency, I was given a file just as a meeting was about to take place dealing with convertible debentures in a Latin American country. I was told to sit in as the legal representative. The general counsel gave me the file, and told me who was going to be at the meeting, including the vice-president of Morgan Guaranty, and the political and economic counsel from the State Department, who dealt with Latin America. My concern was visible, and I really felt that nothing good would come of this. The general counsel immediately realized that this was my view. He told me that there is a simple way to handle such an assignment. First, you should bring the legal materials; the law and the contract. This sounds very simplistic, but just bring the law with you. At some point somebody will ask you about it. You should then just open to the appropriate section of the law or contract, and read it in as sententious and pompous a method as possible.

The second thing you should do, if at all possible, is to talk last, or as close to last as possible. Obviously, the decision-maker is going to talk last. If you're in a big meeting with enough people, it

should be crystal clear after a while what the decision-maker is likely to do. If you speak next to or close to last, you can make recommendations. Since the decision-maker is going to make the same recommendations, you'll look like a bloody genius for having done it first.

By the way, this system works. It's infallible. The only difficulty I have here is that somehow, although I actually had an option given to me by Professor Chen as when to speak, foolishly, I said that I would speak first. In sum, I'm not sure why I'm violating my own rule here.

I was asked to lay out the Refugee Act of 1980, and to explain where it stands now. When I joined the Senate Judiciary staff back in 1981, they were basking in the glow, or the afterglow, of the passage of the Refugee Act of 1980. The feeling was that, in effect, the problem had been solved. The Act had taken care of refugees, and now we were on to illegal immigration and then to legal immigration. This sounds, as everything sounds from a distance, foolish. But this was clearly the widely held view, especially in academia, who felt that the Refugee Act had accomplished something of major importance. Let me describe what was done. I'll then describe where these issues are now.

The Refugee Act did five things. First, it established, for the first time, that the United States would receive refugees on a continuing basis.⁹ As a country, we have received refugees in the past, but always in an ad hoc manner. There was the Displaced Persons Act of 1948.¹⁰ There was special legislation with respect to the Hungarian freedom fighters.¹¹ There was special legislation in 1953 with respect to people fleeing the Middle East.¹² If there was a crisis, Congress would pass special legislation letting people

⁹ See Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C. (1988)). The Act, by requiring the Attorney General not to return any alien to conditions of persecution, in effect established a new U.S. policy to continuously accept refugees. See Harold Hongju Koh, *The "Haiti Paradigm" in U.S. Human Rights Policy*, 103 YALE L.J. 2391, 2411 (1994).

¹⁰ Pub. L. No. 80-774, 62 Stat. 1009 (1948), amended by Act of June 16, 1950, ch. 262, 64 Stat. 219 (expired 1952).

¹¹ Act of July 25, 1958, Pub. L. No. 85-559, 72 Stat. 419 (1958) (repealed 1965).

¹² Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (1953) (expired 1956).

effected by the crisis into the country. Congress would then go on to the next crisis. For the first time, with the 1980 Act, we said that regardless of where the crisis is, we will accept refugees on a continuing basis.¹³

The second thing we did was to establish the international refugee definition as our own.¹⁴ The view before passage of the Act was that you were fleeing persecution if you came here from a communist country or from the Middle East. That's basically what the law was. Now, under the Act, a person is a refugee if he has a well-founded fear of persecution based on race, religion, nationality, membership in a social group, or political opinion.¹⁵ If you have a well-founded fear of persecution on the basis of one of these five items, then both our law and international law accord you refugee status. Because of this adoption of the international definition, we can now link into a variety of precedents in the international field. Both in the human rights and the international academic communities, this was considered to be a major accomplishment.

The third innovation was that we established the right of asylum in statutory law.¹⁶ We obviously already had a right of asylum established by sort of a common law interpretation.¹⁷ The Act, however, established a statutory basis for the right to asylum. This is how you get asylum under the Act: You come to the United States in some fashion, plead asylum, and, if you meet the refugee standard, you are accorded asylum status, a special status in the Act.¹⁸

The fourth innovation is a corollary of the first. If we are going to continue to take in refugees, then we have to provide for them. For the first time, we provided money for refugees on a

¹³ See 8 U.S.C. § 1158(a) (1988).

¹⁴ *Id.* § 1101(a)(42)(A); see *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1353 n.139 (1983) (discussing the international refugee definition).

¹⁵ 8 U.S.C. § 1101(a)(42)(A) (1988); see *Chen*, *supra* note 3, at 470.

¹⁶ 8 U.S.C. § 1158(a) (1988); see Sara Ignatius, *Recent Development: Restricting the Rights of Asylum Seekers: The New Legislative and Administrative Proposals*, 7 HARV. HUM. RTS. J. 225, 226 n.8 (1994).

¹⁷ See Beate A. Ort, Comment, *International and U.S. Obligations Toward Stowaway Asylum Seekers*, 140 U. PA. L. REV. 285, 360 (1991).

¹⁸ See 8 U.S.C. § 1158(a) (1988).

continuing basis.¹⁹ The feeling was that if people come to this country, they are entitled to some kind of special assistance, such as language training, job training, special cash, and medical assistance to tide them over.²⁰

Nobody pays much attention these days to the fifth and last innovation, the institutionalization of the refugee program. We established the Office of Refugee Resettlement in the Department of Health and Human Services.²¹ The Coordinator of Refugees was also established as an over-arching coordinator at the State Department.²² In addition, we established the Bureau of Refugee Programs, which is also in the State Department.²³ The Refugee Act made all of these institutional changes, at fairly high levels, to establish that we were seriously in the refugee accepting business.

All of these changes, done with tremendous effort, are now being challenged in one way or another. Let me take them one at a time. The first challenge is to the decision made by the United States to be a continuous receiver of refugees. Stated this way, there isn't much of an issue. The issue really is how many refugees should we accept, and from where should they come? The statute says that we should accept 50,000, or such other number that the President sets in consultation with Congress.²⁴ The way this works is that the Executive Branch puts forth a number.²⁵ The Congress then has consultations in relevant committees, both in the House and Senate,²⁶ and then the Executive Branch goes and does what it wants. At least, that is the congressional view of the system.

This procedure initially didn't raise a lot of problems because,

¹⁹ *Id.* § 1522(e).

²⁰ See Richard K. Preston, *Asylum Adjudications: So State Department Advisory Opinions Violate Refugees' Rights and U.S. International Obligations?*, 45 MD. L. REV. 91, 100 (1986).

²¹ 8 U.S.C. § 1521 (1988); see Daniel J. Steinbock, *The Admission of Unaccompanied Children Into the United States*, 7 YALE L. & POL'Y REV. 137, 154 (1989).

²² Pub. L. No. 96-212, Title III, § 301, 94 Stat. 102 (1980) (codified at 8 U.S.C. § 1525 (1988)), repealed by Pub. L. No. 103-326, § 202, 108 Stat. 409 (1994).

²³ See 22 U.S.C. § 2603 (1988).

²⁴ See 8 U.S.C. § 1157(a)(1) (1988).

²⁵ *Id.* § 1157(a)(2).

²⁶ *Id.* § 1157(e).

when the Act was passed, we admitted a very high number of refugees—217,000, more than we ever admitted before.²⁷ The Democrats assumed that they would continue in power and that, therefore, congressional participation would be generally a force for good. The Democrats also hoped they would continue in the White House, which would also make it a force for good. Everything would be just fine.

Unfortunately, the Republicans, as you know, captured both the White House and the Senate in 1980, and life suddenly changed. There was a very conservative view of the Refugee Act, and a feeling that one should manage down the numbers. And they did. Initially they had a certain consensus—217,000, based on very high numbers of refugees from Southeast Asia.²⁸ The Republicans continued to manage down the numbers, reaching perilously low figures by 1986.²⁹ The number selected by Congress was 85,000.³⁰ When I say managed down, I mean that the Executive Branch never reached whatever number was established. For example, if Congress set a limit of 100,000, only 95,000 refugees came in. At 85,000, which was the lowest number ever established, only 67,000 refugees came in.³¹ There were accurate charges that the Executive Branch was purposely doing this.³² The argument by the Executive Branch was that the number was not a quota that had to be met, but a ceiling.³³

Eventually, with the Senate back in the hands of Democrats, there was considerable resistance in the Congress to the numbers set by the President, and, as a result, the number began to creep back up. In 1987 and 1988, 85,000 began to be taken more seriously. Then in 1989, when the Soviet Union opened up, there was an

²⁷ See John A. Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. MIAMI L. REV. 819, 854-55 (1982).

²⁸ Presidential Determination No. 80-28, 45 Fed. Reg. 68,365 (1980).

²⁹ See Rone Tempest, *U.S. Opposes Forced Return of Viet Refugees; Geneva Talks Seek Way to Resettle 'Boat People'*, L.A. TIMES, June 14, 1989, § 1, at 5.

³⁰ See Presidential Determination No. 87-1, 51 Fed. Reg. 39,637 (1986).

³¹ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1993 11 (113th ed. 1993).

³² See, e.g., Arthur C. Helton, *Second Class Refugees*, N.Y. TIMES, Apr. 2, 1985, at A27 (claiming that the Executive Branch had an incentive to characterize the political climate in El Salvador as improving in order to keep refugee numbers down).

³³ See *id.*

increase of primarily Soviet Jewish refugees, and Soviet Pentecostals as well, so the numbers went up to about 120,000.³⁴ The latest number is 110,000.³⁵ The numbers have stayed between 110,000 and 120,000 for the last three or four years.³⁶

These numbers make an obvious point. They do not exist as abstractions. Decision-makers don't simply say, "Well, how many refugees should we choose to let in this year?" Every number comes with a refugee attached to it before the refugee even gets here. So if somebody decides, for whatever reason, that we should accept so many Southeast Asians, that gives you a number of 10,000, or, perhaps, 40,000. Then somebody else decides that we should accept Soviet refugees, that gives you another number. Somebody then wants Bosnians, you get still another number. You then add up all these numbers. This is how you get the total number of refugees admitted in a given year. If one of these numbers falls off the board, the corresponding refugees disappear. This is an important point in terms of how you build up the total number of refugees to be admitted.

Again the important questions are: How many refugees come in and from where should they come? The determination of answers to these questions often presents a considerable fight. Arthur Helton raised the related issue of whether the Cold War's immigration policies are still with us, or whether there are other reasons why we seek certain refugees and not others.³⁷

Now let me get back to the Act's refugee definition. The definition sounds good because it envisions a poor guy, who has been resisting oppressive totalitarianism on behalf of democratic forces in his home country. Unfortunately, most refugee situations do not come up this way—it's never that neat and clean. Usually the claimant is fleeing his country because it's just hellish. Stated this

³⁴ Presidential Determination No. 89-15, 54 Fed. Reg. 31,493 (1989).

³⁵ See IMMIGRATION & NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, 1992 81-82 (1993) [hereinafter STATISTICAL YEARBOOK].

³⁶ See, e.g., Presidential Determination No. 92-2, 56 Fed. Reg. 51,633 (1991); Presidential Determination No. 91-3, 55 Fed. Reg. 41,979 (1990); Presidential Determination No. 90-2, 54 Fed. Reg. 43,135 (1989).

³⁷ See *supra* pp. 460-61.

way, he doesn't qualify as a refugee. If he comes here and says, "Well, look, it was just awful in my country, I couldn't make a living, and the government was totalitarian," he will not qualify. Likewise, perhaps the claimant was not a real resistor. He will not qualify if he was a neutral. Another hard question is whether the claimant was a neutral in a country that doesn't accept neutrality—is he then a political resistor? What about a labor union guy from a country that doesn't like labor unions? What about a claimant who was in the middle of rival forces shooting at each other? Does he qualify?

Lawyers worry about these types of technical details. There are all sorts of very good cases. Arthur Helton, Maryellen Fullerton, and others have analyzed the social opinion issues.³⁸ As Arthur noted, politicians talk about the issues in a totally different manner. According to an *Atlantic* article about the State Department, people become refugees, not because of political persecution, but as a result of environmental change and degradation and overpopulation.³⁹ People have to worry about elephants—if the elephants run wild in your country, then you can become a refugee. That's what some people are saying now. Or, likewise, if there is just too much sex in your country, leading to overpopulation, then you can become a refugee as a result. Well, if this is true or if this becomes our view, then we are in sort of a Gilbert and Sullivan world where if everyone is somebody, then no one is anybody.⁴⁰

If we are now talking about extremely large numbers, then countries that are receiving refugees begin to feel besieged. They already feel besieged receiving twenty million refugees under the

³⁸ See, e.g., Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L. J. 505 (1993); 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, 39-52 (1983).

³⁹ Robert D. Kaplan, *The Coming Anarchy: How Scarcity, Crime, Overpopulation, Tribalism, and Disease Are Rapidly Destroying the Social Fabric of Our Planet*, ATLANTIC, Feb. 1994, at 44.

⁴⁰ "Now that's as plain as plain as plain can be; [t]o this conclusion we agree; [w]hen everyone is somebody; [t]hen no one's anybody!" WILLIAM S. GILBERT & ARTHUR S. SULLIVAN, *THE GONDOLIERS*, act II, in *THE FIRST NIGHT GILBERT AND SULLIVAN* (Reginald Allen ed., 1958).

United Nation's definition, which is regarded as being narrow.⁴¹ If you accept the suggestion put forth that there are really millions more unaccounted refugees,⁴² then how does the definition play out? Whether we should feel besieged or not is another question, but we feel it.

We also feel besieged by asylum-seekers. The World Trade Center bombing and the growing backlog of asylum cases suggests easy access to this country, via asylum, by criminal elements from abroad. In order to prevent this perceived siege of asylum-seekers, we have decided to first remove the magnet of work authorization. Under new regulations, asylum-seekers will not get work authorizations, unless they are determined to be bona fide asylees.⁴³ This is quite different than under the old regulations where one gets work authorization immediately upon claiming asylum status.⁴⁴ Secondly, we will facilitate the processing of asylum claims so that we can, in theory, remove people who are not really asylees.⁴⁵ The technical aspects of the asylum definition have engaged lawyers, while the tactical aspects of it are being challenged considerably, both here and in Europe. European countries also feel that they are under great strain from asylum-seekers.

There is also the money question, which has not been a big issue until now. If you feel rich, then providing some money for people who are unfortunate is hardly unworthy. But if you don't feel so rich, which is now the feeling in the United States apparently, then the questions are: Who are these refugees, and why should they get any money at all? Or maybe they should get money, but we should take in less refugees so that they fit within our pocketbook. Our view in the past has always been that our decision on how many refugees to take in should be unrelated to financial considerations. The decision has been related to either humanitarian or foreign policy

⁴¹ See *Why Cubans But Not Haitians?*, ST. LOUIS POST-DISPATCH, Jan. 2, 1993, at B2.

⁴² See *id.*

⁴³ 59 Fed. Reg. 62,884 (1994) (to be codified at C.F.R. pts. 208, 236, 242, 274a & 299); see Bill Miller, *INS Cracks Down on Immigration Fraud for Profit; Consultants Who Falsify Documents, Arrange Phony Marriages are Target for Federal Probes*, WASH. POST, Jan. 15, 1995, at A8.

⁴⁴ See Miller, *supra* note 43, at A8.

⁴⁵ See *id.*

considerations.⁴⁶

As an aside, my own view is that if we rely solely on humanitarian concerns, we will have many refugees admitted to this country. Fortunately, the new young people in Washington want to rely on humanitarian concerns. In my view, foreign policy considerations will give us 200,000 refugees. People say: "Well, if you talk about foreign policy as a reason for admitting refugees, you must be some kind of conservative power guy." This is not true. In reality, if you claim that foreign policy is a reason for admitting refugees, you sound like a person who is going to make sure that a lot of refugees keep coming in. If you say that you want refugees to be admitted out of the kindness of your heart, because you are really a good, humanitarian fellow, then you are being unrealistic. This is just a prediction, but I believe that the number of refugees being admitted is going to come down because we don't have enough money. If our decisions are based on humanitarian considerations, there is natural pressure to say, "Well, how many refugees can we excessively kind, good-hearted people afford?" This is one of the continuing debates between the State Department, the Department of Health and Human Services, and the Office of Management and Budget.⁴⁷

As I previously mentioned, the last of the Refugee Act's accomplishments was institutional. In this regard, I'll express my concern about something that happened under the new Clinton Administration. I may be the only person who felt that the Coordinator of Refugee Policy, who is based in the State Department,⁴⁸ should stay. I know that Arthur Helton, who played a leading role in the Clinton transition and who is usually a very wise hand, felt that the Coordinator's office should be eliminated. The Coordinator's office was occupied by eight people,⁴⁹ all of whom, it

⁴⁶ See Maria Puente, *Crazy Quilt Policy/Refugee Law Very Very Complicated*, USA TODAY, Aug. 25, 1994, at A1.

⁴⁷ See, e.g., Robert Pear, *U.S. Plans Big Rise in Quota for Asian Refugees*, N.Y. TIMES, Sept. 14, 1988, at A11.

⁴⁸ Pub. L. No. 96-212, Title III, § 301, 94 Stat. 102 (1980) (codified at 8 U.S.C. § 1525 (1988)), *repealed by* Pub. L. No. 103-326, § 202, 108 Stat. 409 (1994).

⁴⁹ Telephone interview with Pamela H. Lewis, Congressional Liaison, Bureau of Population, Refugees and Migration, United States Department of State in New York, N.Y. (Jan. 23, 1995).

is fair to say, had almost no influence at all. The issue, then, is why keep them? My own view is that they kept the weight of refugee policy in the State Department. Generally, in the past, the State Department has been in favor of refugee admissions.

Increasingly, the government, which controls money, has an important say in how many refugees we take in. Additionally, there is a reorganization of the State Department taking place under a new undersecretary.⁵⁰ The Bureau of Refugee Programs is currently established within a department that also deals with environmental and population issues.⁵¹ Refugee advocates are very concerned about this. We feel that our issues are going to get lost among those of the environmentalists and the population people. The environmentalists, in particular, are riding extremely high these days. They may not think so, but everybody is talking to them, even on matters such as the Foreign Aid Bill.⁵² Their vision has nothing to do with people or refugee protection. In the State Department world, their voice may become too strong.

CHEN: Thank you very much, Mr. Leibowitz, for outlining the major features of the 1980 Refugee Act for us.

Our next speaker is Dan Kesselbrenner, who is Director of the National Immigration Project of the National Lawyers Guild, co-author of *Immigration Law and Crimes*, and author of several articles on contesting deportability. For his role as a member of the legal team in *American Baptist Churches v. Thornberg*,⁵³ he received the American Immigration Lawyers Association's Jack Wasserman Award for excellence in litigation and the National Lawyers Guild's Carol King Award. He has served as a consultant to the Lutheran

⁵⁰ See Thomas Lippma, *Wharton Resigns at State Dept.; Deputy Secretary First Top Member to Quit Foreign Policy Team*, WASH. POST, Nov. 9, 1993, at A1.

⁵¹ The Bureau of Refugee Programs was established in 1962, and was placed within the State Department, which deals with a variety of issues, including those involving population and the environment. See Executive Order No. 11,077, 28 Fed. Reg. 629 (Jan. 22, 1963), as amended by Executive Order No. 11,922, 41 Fed. Reg. 24,573 (June 16, 1976); Executive Order No. 12,608, 52 Fed. Reg. 34617 (Sept. 9, 1987), reprinted in 22 U.S.C. § 2603 (1988).

⁵² See The Foreign Operations, Export Financing and Related Programs Appropriations Act of 1994, Pub. L. No. 103-87, 107 Stat. 931 (1993).

⁵³ 760 F. Supp. 796 (N.D. Cal. 1991).

Immigration Refugee Service and the United States Catholic Conference. He now serves on the board of directors of the National Network for Immigrant and Refugee Rights, the National Immigration Forum, and Centro Presente.

Mr. Kesselbrenner will elaborate on the practical obstacles asylum-seekers have encountered in the United States, and the efforts that have been made to overcome these obstacles.

DAN KESSELBRENNER: Thank you, Professor Chen. I would also like to thank the *New York Law School Journal of Human Rights* for sponsoring this symposium, and for inviting me to participate.

If my knowledge of asylum-seekers were limited to what I get from watching television and reading newspapers, I would say that there's a really serious problem with asylum-seekers flooding the United States. Since I have been working with asylum-seekers for the past fifteen years, I know that the media's characterization is inaccurate and misleading. First, I will discuss these media inaccuracies. Second, I will present data that the media are not mentioning. Third, I will offer a brief analysis of why this misinformation campaign is happening now. Finally, I will raise alternatives to problems that asylum-seekers face, which are rarely included in media accounts of the refugee situation.

I submit that what the INS has done would be an excellent model for a marketing case study. The INS has blamed the victim, hidden its own faults, and received favorable publicity. As a result, talk show hosts, editorial writers, and legislators are crying out for a solution to this so-called problem.

I will use an imaginary meeting of the Immigration and Naturalization Service officials as a vehicle to demonstrate the effectiveness of its marketing strategy. Again, I am not suggesting that this meeting actually took place, but I am using a hypothetical meeting as a device to illustrate what the INS has achieved. Such a meeting might proceed like this: "Gee, things have not been going too well for us here at the INS. We have just lost two major pieces of litigation. We have to re-interview 230,000 El Salvadorans and Guatemalans under the *American Baptist Churches* case.⁵⁴ We have 60,000 asylum applications lost out in space that we never entered in

⁵⁴ See *American Baptist Churches v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989).

the computer.⁵⁵ We lost 4,000 files in our Newark Asylum Office.⁵⁶ We have five different computer systems, none of which can communicate with each other, and the Inspector General said that we are completely incompetent."⁵⁷

Searing indictments. Yet in the introductory material to the proposed asylum regulations that were mentioned earlier, did we see word one about any of the aforementioned problems? No. Instead, the INS found a couple of situations that they could get *60 Minutes* or *Front Line* to cover, and other situations that op-ed pieces would be written about. This publicity augmented the efforts of groups who want to restrict people from coming to the United States, who may have their own agendas.

Now, I doubt this hypothetical meeting took place because I think that the INS lacks the foresight to engage in strategic planning. Since the INS "lacks the information to gather, verify, and assess data," the agency is in no position to know whether abuse drives the asylum system.⁵⁸ Fraud does exist. Plainly, the possibility for abuse exists any time the INS confers a benefit. I do not think that the fear of possible abuse by a distinct minority justifies lashing out at the overwhelming majority of innocent asylum-seekers.

The National Immigration Project of the National Lawyers Guild has a program to recruit law students to work with community organizations that represent Haitian asylum applications in Miami and around the country. The people with whom these law students work fled Haiti because they want democracy, and, as a result, are targeted by the country's military leaders. Haitians, who had real hope for

⁵⁵ See Complaint, *Merida v. Reno*, No. 94-5220 (C.D. Cal., filed Aug. 2, 1994) (on file with the *New York Law School Journal of Human Rights*).

⁵⁶ SARAH IGNATIUS, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 43 n.33 (Harvard Law School National Asylum Study Project, 1993) (citing Deposition of Marva McAlister, former Dir., Newark Asylum Office, INS, at 27, 108 (May 3, 1993) taken in *Najera-Borja v. Slattery*, Civ. No. 89-2320 (E.D.N.Y. Sept. 1993)).

⁵⁷ H.R. REP. No. 216, 103d Cong., 1st Sess. 18 (1993) (statement of Richard J. Hankinson, Inspector General, U.S. Department of Justice). In discussing the INS, the Inspector General said that it "lacks methods to collect information, to sort it, to verify it, and it lacks the coordinating and planning capabilities to use the information even if available." *Id.*

⁵⁸ *Id.*

the first time in their lives, who attended community meetings, or who had a picture of President Aristide hung up in their homes, are targets for the brutal military regime.

Political concerns interfere with asylum-seekers' right to protection. Our government does not want lots of poor black people coming to the United States—the terror this image fosters, drives our asylum policy. I think that humanitarian concerns and international law should be the driving forces behind United States asylum policies. The number of Haitians who should receive asylum, if the law were applied fairly, threatens our government. To qualify for asylum, an applicant need not show that her or his circumstances are unique.⁵⁹ If the applicant has a well-founded fear of persecution on account of one of the five grounds in the statute, then she or he is eligible for asylum.⁶⁰ The reality is that too many Haitians have legitimate claims for asylum.

Another example, to demonstrate the post-Cold War dynamic, is the work of attorneys and advocates who are trying to secure asylum protection for people from the Golden Venture and other boats, who were fleeing from forced sterilization and other oppressive family practice policies in China. The Deputy Associate Assistant Attorney General was quoted in the *New York Times* as saying that we've got to expedite these Golden Venture cases.⁶¹ The District Director of the New York District, Mr. Slattery, was on *McNeil-Lehrer* saying that none of these people have a claim.⁶² Are these the statements of a government that is making an even-handed, case-by-case determination of each claim that comes before it? By contrast, I have never heard a social security judge or the head of the Social

⁵⁹ See 8 C.F.R. § 208.13 (1994) (stating that an "[i]mmigration Judge shall not require the applicant to provide evidence that he would be singled out individually for persecution").

⁶⁰ 8 U.S.C. § 1101(a)(42) (1988) (stating that statutory grounds are race, religion, nationality, political opinion, and membership in a social group).

⁶¹ See Seth Faison, *U.S. Tightens Asylum Rules for Chinese*, N.Y. TIMES, Sept. 5, 1993, at A45. "We've made no secret of the fact that we asked that these cases be expedited." *Id.* (quoting Phyllis Coven, Special Assistant to Associate Attorney General, Webster L. Hubbel).

⁶² *The MacNeil/Lehrer News Hour: Persona Non Grata? Spanish Si—English No?*, (PBS television broadcast, July 5, 1993) (transcript on file with the *New York Law School Journal of Human Rights*).

Security Administration say that there is a lot of fraud in Social Security and SSI applications. It is unfair for a Department of Justice official to speak out publicly about expediting certain cases and about the quality of people's asylum claims before those claims are presented in front of an adjudicatory tribunal. Case law requires an even-handed adjudication on a case-by-case basis.⁶³

Another political obstacle to securing protection is that people who were fleeing communist countries or former communist countries, as late as 1992 or 1993, were granted asylum at a rate that was disproportionate to the level of persecution in those countries.⁶⁴ A higher percentage of claimants from Russia were granted asylum than claimants from Haiti during 1992.⁶⁵

Now, I'm not saying that people from the former Soviet Union or Russia do not have valid claims. Nevertheless, I do think it is odd that the rate of approval for people fleeing these countries is greater than the rate of people fleeing from Haiti. Once again, this appears to be a vestige of Cold War decision-making. In the near future, these numbers should change as decision-making increasingly reflects the post-Cold War approach. This is a process of transition from Cold War to post-Cold War. With the Golden Venture cases, we no longer see "anti-communism" as being the driving force behind negative asylum determinations. Open hostility towards immigrants, sometimes called "immigrant bashing" and "anti-terrorism," are replacing "anti-communism" as the ideological force influencing asylum determinations. The United States is becoming a more racially and ethnically diverse place. Instead of welcoming the benefits this change brings, many politicians are catering to fears about these changing demographics to foster anti-immigrant sentiment. Pandering to these fears makes the atmosphere less welcoming for immigrants, in general, and asylum applicants, in particular.

Persons fleeing from political turmoil in the developing world are not welcome in the United States. Often these refugees are labelled as "terrorists." Once the INS tags a group with the

⁶³ See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *American Baptist Churches v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989).

⁶⁴ See U.S. COMMITTEE FOR REFUGEES, *WORLD REFUGEE SURVEY* 152 (1993).

⁶⁵ See *STATISTICAL YEARBOOK*, *supra* note 35, at 85.

"terrorist" label, the asylum claims for members of the group will be denied *en masse*. The way the INS treats Sikhs is an example of this process. The Board of Immigration Appeals will not treat torture as persecution when the government justifies the torture as furthering "anti-terrorism."⁶⁶ The federal courts take a dim view of this interpretation.⁶⁷ The Board of Immigration Appeals' decisions reflect this subjectivity. For example, someone who is fleeing from military conscription in Afghanistan has an asylum claim, while someone who is fleeing from military conscription in Guatemala does not. Why? According to the Board, this different treatment of similarly situated claimants is justified because the government of Afghanistan is not legitimate, but is a puppet of the Soviet Union.⁶⁸ The government of Guatemala, on the other hand, receives lots of funds from the United States, and is within the United States's sphere of influence. The facts and the cases speak for themselves.

There are two ways to apply for asylum. One way is in front of the INS, and the other is in front of the Executive Office for Immigration Review.⁶⁹ There was a ninety-five percent coincidence between the Department of State recommendations, and the ultimate decision in a political asylum case in front of the INS. These statistics are for applications that were filed in front of the INS. The ninety-five percent coincidence, especially in El Salvadoran and Guatemalan claims, illustrates the disproportionate effect of the failure to make case-by-case adjudications. These statistics reflect an impermissible introduction of foreign policy concerns into what

⁶⁶ See *Matter of R., I. & N. Dec. 3195* (BIA 1992) (stating that mistreatment, not persecution on account of religion or political opinion, could occur when authorities are investigating terrorism).

⁶⁷ See, e.g., *Kaur v. INS*, No. C093-3005, 1994 U.S. Dist. LEXIS 2838, at *1 (N.D. Cal. Mar. 7, 1994) (reversing and remanding a Sikh's asylum case in which BIA relied on *Matter of R, I. & N. Dec. 3195* (BIA 1992)); *Singh v. Ilchert*, 801 F. Supp. 313, 319 (N.D. Cal. 1992) ("Punishment, even of those actually guilty of criminal acts, amounts to persecution if it is excessive and arbitrary and is inflicted with a political motive.").

⁶⁸ See *Matter of Izatula, I. & N. Dec. 3127* (BIA 1990).

⁶⁹ See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unrestricted Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 440 n.16 (1992/93).

Congress⁷⁰ and the Supreme Court⁷¹ have said should be case-by-case, individualized adjudications.

I think that was part of why we were successful in *American Baptist Churches v. Thornburgh*,⁷² which challenged the discriminatory treatment of El Salvadoran and Guatemalan asylum-seekers.⁷³ I think that the United States government did not want to be embarrassed by a trial that would put on display the bankruptcy of its asylum adjudicatory process. The veneer of fairness was so thin that the slightest touch would break it. I think that the *American Baptist Churches* settlement speaks volumes about the extent to which there was discriminatory treatment. The special treatment the Department of Justice gave to the Chinese from the Golden Venture reveals that this political intrusion continues to this day.

Asylum-seekers face other obstacles to receiving protection. The relative unavailability of legal representation is probably the greatest single impediment. An applicant has no right to counsel at government expense in asylum proceedings before the INS, or in proceedings in front of the immigration court, or the Executive Office for Immigration Review.⁷⁴ In fact, the majority of asylum claimants have been unrepresented.⁷⁵ Fewer than one in four people had legal assistance when they were presenting their asylum claim.⁷⁶ These numbers do not necessarily reflect rampant fraud. There may have been misinformation in the applications because the applications are not easy to understand. There may have been people who did not understand what they filed. In light of the level of formal education of the applicants, the complexity of the forms, and to be frank, the vagueness of the forms, it is certainly easy to understand how people with less formal education, and for whom English is not their first

⁷⁰ See 8 U.S.C. § 1258 (1988).

⁷¹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

⁷² 760 F. Supp. 796 (N.D. Cal. 1991).

⁷³ *Id.* at 799.

⁷⁴ 8 U.S.C. § 1362 (1988); see Elizabeth Glazer, *The Right to Appointed Counsel in Asylum Proceedings*, 85 COLUM. L. REV. 1157, 1177 (1985).

⁷⁵ Angie O'Gorman, *Yearning to Breathe Free*, ST. LOUIS POST-DISPATCH, May 23, 1994, at B17.

⁷⁶ See generally *id.* (stating that most asylum applicants do not have legal representation).

language, would misunderstand the information that is being sought.

The INS's current proposals are dangerous. In addition to charging a \$130 filing fee, the INS is proposing no work authorization for 180 days, and making interviewing a claimant discretionary.⁷⁷ Now, to me, this smacks of assembly line justice. Asylum officers have a certain quota to fill. They have specific performance or production goals. Since an asylum determination may be a life and death matter for the applicant, the INS is treating human lives as if they were widgets. Just as the thirtieth or the thirty-first of a month are the most likely days to get a speeding or parking ticket because enforcers have production quotas to meet, an asylum officer is unlikely to grant an interview on a day when he needs to get his numbers up.

What we have in the proposed regulations is no guidance to determine when to grant discretionary interviews for asylum-seekers. The INS does not discuss what factors an asylum officer should consider in reaching his or her determination. It seems to me that the failure to specify the criteria to interview allows the INS not to grant an interview for whatever reason they want. In fact, fulfilling production quotas is one of the most benign reasons that someone could choose not to conduct an interview. The proposed system would allow gender, national origin, or religious discrimination. I am not suggesting that people are making decisions based on these discriminatory factors, but the absence of criteria certainly reduces accountability. It is more likely that an officer would decide not to interview an applicant from a country with which she or he is not familiar. "Gee, do I really want to learn about what's happening in Rwanda?" an officer might think. The officer may never have heard of Rwanda. I cannot imagine anyone having confidence in a process where the adjudicator had never heard of one's home country.

Asylum officers have a very difficult job. As part of the *American Baptist Churches* settlement, I trained asylum officers. If the INS bases career advancement and performance on the number of applications one completes, then one has to choose between expediting justice and career advancement. People are not so altruistic as to forego a promotion or a salary increase to ensure that every asylum seeker has a proper interview.

⁷⁷ See O'Gorman, *supra* note 75, at B17.

The INS's use of detention poses another significant problem for asylum-seekers. The United States detains asylum-seekers in both deportation and exclusion proceedings. An asylum-seeker in deportation proceedings may be released on bond.⁷⁸ Since many asylum-seekers arrive penniless, release on bond is often not a meaningful option. In exclusion proceedings, parole is available in limited circumstances.⁷⁹ Accordingly, the INS detains many asylum-seekers who do not pose a threat, and who are not flight risks. These detainees are forced to weigh the likelihood of persecution against the certainty of deprivation of their liberty. Even applicants with legitimate fears might find conditions of confinement so onerous that they will examine whether prolonged detention is too high a price to pay for the possibility of protection. At the Varick Street center, INS detainees never get exercise. Joseph Doherty fought his deportation for eight years without getting outside. A detainee might say to him or herself, "Am I really going to be persecuted when I get back?" I submit that an asylum applicant should not be forced to endure such conditions for the opportunity to present her or his claim for asylum.

Even when the INS develops a good thing such as the Asylum Pre-Screening Program, which makes it easier for asylum-seekers in exclusion proceedings to be released pending their hearings, INS implementation is spotty, at best. In New York, a Chinese asylum-seeker, who travelled on the Golden Venture, applied for release under the program. The INS denied his request without even acknowledging the special program under which he applied. Fortunately, the applicant had excellent pro bono representation, and won his release by obtaining habeas corpus relief in federal court.⁸⁰ A different judge in the Southern District of New York denied habeas relief to another Golden Venture applicant who had identical facts.⁸¹ This illustrates the lawlessness connected with this agency, and it really goes to immigrants' relative lack of political clout. It also goes back to what I began my comments with—the whole notion of abuse in the system that's been fostered by a very effective anti-immigrant

⁷⁸ 8 U.S.C. § 1252(a)(1)(B) (1988).

⁷⁹ *See id.* § 1252(a)(1)(C).

⁸⁰ *Xin-Chang Zhang v. Slattery*, 859 F. Supp. 708 (S.D.N.Y. 1994).

⁸¹ *Chen v. Slattery*, No. CIV. 93-8163 (JFK), 1994 WL 4290 (S.D.N.Y. Jan. 4, 1994).

campaign. Perhaps thirty to forty million people watch *60 Minutes* every week. It's very difficult to get a forum where immigrants would have equal time. Obviously, that reflects the power of the dominant media. Unfortunately, this issue is being framed by people who are only providing one side of the issue. The television reports do not mention INS mismanagement. Such programs blame the victim, and fail to mention the INS's role. The people who come to the United States with torture marks, the people who are suffering from post-traumatic stress syndrome, the people who didn't understand the application, these people are not being mentioned. The people who attended their hearings aren't being mentioned. At the same time, we have the United States blocking Haitian refugees before they get to the United States's shores.⁸² As part of "Operation Blockade," asylum-seekers can not come to the United States through Mexico.⁸³ In the 1980s, the United States spent money to interdict Central American asylum-seekers before they got to the United States.⁸⁴ This is part of the increasing effort to build a wall around the United States. The attempt to build a wall around a nation in order to keep asylum-seekers out, as is done in Europe, is being duplicated here through the Haitian Interdiction Program.

There are examples of people who aren't accepting this current situation. I think that it's a difficult area, working for a just and equitable asylum policy. While you don't necessarily get much support from friends, who often ask why you are doing this or that, there certainly is a supportive community of people. You can certainly go to sleep at night, although tired, knowing that your hours were spent trying to do the right thing. President Aristide's abrogating of the treaty is another potential example of this. As Ira Kurzban observed in the *New York Times*, the continued interdiction after the abrogation of the treaty would constitute piracy.⁸⁵ In *Sale*

⁸² See *Don't Just Slam Decency's Door; How to Protect Haitian Refugees*, NEWSDAY, Apr. 22, 1994, at A50.

⁸³ See *Flow of Immigrants Diverted to Arizona*, SACRAMENTO BEE, June 5, 1994, at A22.

⁸⁴ See Bill Frelick, *No Central Americans Need Apply; Immigration: Asylum-Seekers Don't Get Even Close to Our Shores, Thanks to Mexico's Help*, L.A. TIMES, Jan. 25, 1991, at B7.

⁸⁵ See *Haiti Army is Said to Kill 23 Aristide Backers*, N.Y. TIMES, Apr. 26, 1994, at A7.

v. Haitian Center's Council,⁸⁶ the Supreme Court looked at the existence of an agreement between the United States and Haiti as the legal basis for the United States interdiction program.⁸⁷ Absent that treaty, the legal basis is no longer there. The United States indicated that it is going to continue to interdict people. Hopefully, President Aristide will get restored to power in Haiti. If that doesn't happen, it looks like we'll see the second round of *Haitian Center's Council*.

CHEN: Thank you very much, Mr. Kesselbrenner, for bringing to us a sense of realism about political structure and legal dynamics.

Our next speaker is Maryellen Fullerton, Professor of Law at Brooklyn Law School. She teaches a wide range of courses from federal courts and civil procedure to international litigation, international human rights law, and comparative refugee law. She is a prolific scholar, and has written about both international and procedural law. Her current scholarship focuses on refugee law. Her articles describing and analyzing asylum policy in several European countries have provided valuable new resources in English for refugee advocates and scholars. The significance of Professor Fullerton's research has been noted by many groups and organizations. Professor Fullerton is also noted as a professor, and has received many awards for her outstanding teaching.

Professor Fullerton will share with us her insights from studying refugee law and policy in several European countries.

MARYELLEN FULLERTON: Thank you. Members of the audience may be questioning the relevance of a European perspective to a discussion of American refugee and asylum law. I believe it is relevant. By looking at other countries, and how they deal with similar problems, there are things we can learn. We can learn approaches that we might want to try, and approaches that we definitely do not want to try in our own system. More than this, we can learn ways to re-examine our assumptions. Perhaps, this will trigger new ideas.

Political asylum is selling newspapers in the United States and Germany. Headlines feature small boats off the shores of Haiti, and

⁸⁶ 113 S. Ct. 2549 (1993).

⁸⁷ *Id.* at 2553.

large boats loaded with refugees running aground off Queens.⁸⁸ Pictures of asylum-seekers, fleeing through waves and sand, link up with ominous warnings of gangs of smugglers whose human cargo is desperate to reach the United States.⁸⁹ Similar headlines occur in the daily press in Germany, where warnings that refugees are flooding the country mix metaphors with assertions that "the boat is full." By examining the asylum realities behind these headlines in Germany and the United States, we can get a glimpse of dramatic changes in asylum policy and politics in the 1990s.

Asylum law and policy is much debated around the world. Throughout western Europe, the last five years have yielded increasingly restrictive asylum laws.⁹⁰ My focus here is on Germany because I believe that it has the most to teach the United States.

There are several obvious similarities between Germany and the United States that are important in the field of immigration and refugee law. First, both countries are industrialized democracies.

Second, both countries have had strong economies, which have been magnets for workers. On the continent, workers from within Europe have come to Germany as part of the European Community,⁹¹ and workers from outside Europe have come to Germany as guest-workers and in other statuses. In the United States, the immigration of workers from North America and elsewhere has been a major feature of our society for many decades,

⁸⁸ See, e.g., Robert D. McFadden, *Smuggled to New York: The Overview—7 Die as Crowded Immigrant Ship Grounds Off Queens; Chinese Aboard are Seized for Illegal Entry*, N.Y. TIMES, June 7, 1993, at A1; Malcolm Gladwell & Rachel E. Stassen-Berger, *Alien-Smuggling Ship Runs Aground; Hundreds of Chinese Swim onto N.Y. Beach; 7 Die in Frigid Ocean*, WASH. POST, June 7, 1993, at A1.

⁸⁹ See McFadden, *supra* note 88, at A1.

⁹⁰ See Dick Kirschten, *No Refugee*, 26 NAT'L J. 2068, 2068 (1994) (stating that western European governments are in the process of tightening political asylum laws).

⁹¹ The 12 Western European countries that currently comprise the European Community have agreed, by treaty, to allow nationals from member states to seek employment and establish offices in other member states. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 48, 52, 298 U.N.T.S. 11, 36-38. Consequently, nationals of 11 other western European states have the right to enter and reside in Germany. Four additional western European countries—Austria, Finland, Norway, and Sweden—are slated to become members of the European Community, now known as the European Union, in 1995. Craig R. Whitney, *Parliament Vote in Europe Shows Rightward Trend*, N.Y. TIMES, June 13, 1994, at A6.

and continues to be so today.⁹²

Third, in terms of political structure, both Germany and the United States are federal systems. This entails a certain tension between states' responsibilities, and the rights and role of the national government.

Fourth, a federal system also has a great impact on the legal structure, and frequently results in a fairly elaborate litigation scheme. Indeed, in both Germany and the United States, one of the concerns in the current asylum debate is the length of the litigation process, and the negative consequences this has on the asylum system itself.

Fifth, Germany and the United States share the same definition of a refugee. Germany has been a party to the Geneva Convention on Refugees⁹³ since the 1950s.⁹⁴ Germany is also a party to the Protocol of 1967,⁹⁵ as is the United States. These two instruments set forth the basic internationally accepted refugee definition, to which both countries adhere.

Although similarities exist, there are several ways in which Germany is fundamentally different from the United States with regard to immigrants and refugees. The most basic difference is that Germany does not view itself as a country of immigration. This self-perception is extremely important in terms of the legislative framework concerning immigration and asylum in Germany. In

⁹² See Tom Matthews & Anne Underwood, *America's Changing Face*, NEWSWEEK, Sept. 10, 1990, at 46.

⁹³ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. The Federal Republic of Germany formally signed the Convention on November 19, 1951, and ratified it on December 1, 1953. Article 1 of the 1951 Refugee Convention expressly refers only to refugees resulting from events that occurred prior to January 1, 1951. 189 U.N.T.S. at 152-56; Multilateral Treaties Deposited with the Secretary-General, U.N. Doc. ST/LEG/SER.E/6, 181 (1987).

⁹⁴ According to the enabling legislation, Gesetz vom 1.9 1953 [Law of September 1, 1953] Bundesgesetz [BGB1] II 559 (F.R.G.), the terms of the 1951 Refugee Convention came into force on April 22, 1954, pursuant to official notice given on April 25, 1954 (BGB1.II 619) by the Federal Minister of Foreign Affairs. See Fullerton, *supra* note 38, at 507 n.36 (1993) (citing REINHARD MARX ET AL., KOMMENTAR ZUM ASYLFAHRENGESETZ 15 (2d ed. 1987)).

⁹⁵ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Protocol was drafted to protect persons who become refugees as a result of events occurring after January 1, 1951. *Id.* art. 1.

contrast, the United States sees itself as a country of immigration. True, immigrants were not always welcomed. True, our melting pot mythology is under attack, and revisionist historians have put a new gloss on many of the ideas we learned in grade school. Nonetheless, in the United States, there is a basic sense that people will continue to immigrate here, and that people coming to our society from other lands will enrich us. That vision is not present in Germany. The difference in vision is emphasized by the lack of a basic immigration scheme in Germany. Americans are generally astonished to learn that Germany has no immigration legislation. German law provides no routine annual method that allows people from other countries to apply to become permanent residents.⁹⁶ This contrasts with an elaborate immigration law in the United States that authorizes approximately 800,000 new immigrants per year.⁹⁷

At the other end of the immigration process lies the citizenship or naturalization process. The German naturalization process is extremely lengthy and difficult.⁹⁸ This conveys the message that Germany is not a political community that views itself as enhanced and enriched on a regular basis by people from other countries and other backgrounds. Clearly, this is very different from the United States, where immigrants generally are eligible for citizenship after five years.⁹⁹

Another important difference is the constitutional dimension of asylum. In light of the German approach to immigration and naturalization, the fact that there is a right to asylum in the German Constitution may seem surprising. The United States Constitution makes no mention of asylum, but the German post-World War II Constitution enshrined a self-executing right to asylum. The 1949

⁹⁶ Although there is no immigration law in Germany, European Union law mandates that nationals of member states be allowed to seek work and reside in Germany. See Fullerton, *supra* note 38, at 515.

⁹⁷ In 1992, 973,977 immigrants were admitted into the United States. See STATISTICAL YEARBOOK, *supra* note 35, at 17.

⁹⁸ The naturalization applicant must complete a 59 page application, and show 10 years' residence in Germany, proof of adequate housing as well as language skills, and integration into German culture. See Jacqueline Bhaba, *Letter from London—Recent European Immigration Development*, 70 INTERPRETER RELEASES 1581, 1589 (Dec. 6, 1993).

⁹⁹ See 8 U.S.C. § 1427(a)(1) (1988).

Constitution defined this right in extremely broad terms. It provided asylum in Germany to all people who had been persecuted for political reasons.¹⁰⁰ It set no limits on the kind of persecution. It set no limits on the countries accused of persecuting. It set no limits on how long the refugees could stay. It permitted no discretion by the government regarding which or how many victims of persecution to accept. It was a simple blanket response to the Holocaust, World War II, and the uprooting of many groups after the war.

There is also another constitutional provision in Germany that is relevant to our discussions today. It too is a post-war response to the massive expulsion of groups of people, and to communities uprooted as boundaries and governments changed in the aftermath of World War II. This constitutional provision guarantees ethnic Germans admission to Germany.¹⁰¹ This provision protects people in eastern Europe, who have grown up in communities that consider themselves German, even though their forebears may have left Germany for the Volga or elsewhere hundreds of years earlier. Needless to say, there is no similar provision in U.S. immigration law.

With this background, the asylum debate in Germany becomes more comprehensible to Americans. Because there is no general immigration scheme, there is a great deal more pressure on the two routes by which people can legally enter Germany: The general constitutional right to asylum and the constitutional protection of ethnic Germans. Both routes have been criticized as subject to great abuse. One well-known joke in Germany is that individuals seeking to enter as ethnic Germans can establish their German heritage via the

¹⁰⁰ "*Politisch Verfolgte geniessen Asylrecht*" [Those persecuted on political grounds enjoy the right of asylum.]. GG [Constitution] art. 16, para. 2 (Federal Republic of Germany).

¹⁰¹ The Constitution states:

Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock or as the spouse or descendant of such person.

GG [Constitution] art. 16, para. 2 (Federal Republic of Germany).

German Shepherd dogs they formerly owned.¹⁰² This evidences the public perception that abuse exists in the admission process for ethnic Germans. The asylum system lacks a German Shepherd joke, but there is also a public perception of great abuse of the asylum process. The media and the government in Germany have very effectively conveyed the message that most asylum-seekers are not genuine asylum applicants, but rather economic migrants. This is a powerful message in a society that perceives itself to be not an immigration country.

In addition, the numbers of asylum-seekers have been daunting. There have been such large increases in the numbers of asylum seekers that many people in Germany are overwhelmed. In 1987, there was a lull—Germany received roughly 60,000 asylum-seekers that year.¹⁰³ In 1988, the number almost doubled, to a little over 100,000.¹⁰⁴ In 1989, the number of asylum-seekers increased to 121,000; in 1990, to 200,000; in 1991, to 250,000; and in 1992, to 435,000.¹⁰⁵ Talk about backlogs! There was no ability to process this magnitude of applicants quickly, and this intensified the popular sense of a process that was out of control.

This system, which was overwhelmed by sheer numbers, is a centralized one. The Central Federal Refugee Office has a large number of generally well-trained asylum officers.¹⁰⁶ The number of asylum officers approaches 3,500, which is more than ten times as many as in the United States.¹⁰⁷ German asylum officers are educated about specific countries of origin. Information about country

¹⁰² See AMITY SHLAES, *GERMANY, THE EMPIRE WITHIN* 23-24 (1990).

¹⁰³ See Jonathan C. Randal, *Bitter Asylum Fight Ends in Britain; Sri Lankan Deported Amid Criticism of Thatcher's Refugee Policy*, WASH. POST, Jan. 21, 1989, at A20 ("In 1987, West Germany received 57,000 applications for asylum . . .").

¹⁰⁴ See Gerald L. Neuman, *Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment*, 33 VA. J. INT'L L. 503, 513 (1993).

¹⁰⁵ See *id.*

¹⁰⁶ Fullerton, *supra* note 38, at 534 n.178. The official title of this agency is *Das Bundesamt für die Anerkennung Ausländischer Flüchtlinge* [Federal Office for Recognition of Foreign Refugees]. *Id.*

¹⁰⁷ See Ted Conover, *The United States of Asylum*, N.Y. TIMES, Sept. 19, 1993, § 6, at 56 (describing "[a] ballyhooed [United States] asylum corps of 150 specifically trained [asylum] officers (Germany has 3,000; Sweden, 800) [that] inherited a backlog of 114,000 cases the day they started work in 1991").

conditions is provided. There are several bibliographic resource centers to furnish further research capabilities. In contrast, the United States training programs for asylum officers are a recent development, as are the efforts to develop a resource information center upon which asylum officers can rely.¹⁰⁸

In addition to a centralized refugee processing system, Germany has a centralized system of assigning asylum-seekers to asylum centers located throughout the states in Germany.¹⁰⁹ Although sometimes described as detention camps, these facilities are not like the detention centers we know in the United States. In the German asylum camps, people are free to come and go within a certain area. There is some geographical restriction on movement, but asylum-seekers are not confined to the center itself. Nonetheless, the system of asylum centers presents real problems. These asylum-seekers by and large, are not allowed to work. As a consequence, there are hundreds of thousands of asylum-seekers in centers who cannot buy food, and therefore, must be supported by the state.¹¹⁰ This situation has led many Germans to conclude that asylum-seekers must be lazy because they do not work to support themselves. This, in turn, leads to a perception that hard-working Germans are supporting lazy foreigners who just sit around and file bogus asylum claims. Again, the approach in the United States is different. So long as they are deemed not to have filed a frivolous application for asylum, asylum-seekers receive authorization to work.¹¹¹ While there may be a public perception of some abuse in the asylum system, lazy asylum-seekers lolling about in camps is not an image that leaps to mind.

When approximately 435,000 people file asylum claims in one

¹⁰⁸ See Philip Bennett, *Short Comings are Found in Asylum Rules; 1990 Overhaul is Found Wanting*, BOSTON GLOBE, Dec. 14, 1992, at 3.

¹⁰⁹ See T. Alexander Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183, 232-33 (1984).

¹¹⁰ See Michael Devine, *German Asylum Law Reform and the European Community: Crisis in Europe*, 7 GEO. IMMIGR. L.J. 795, 806 (1993).

¹¹¹ Cf. Tim Weiner, *U.S. Plans to Delay Work Permits for Immigrants Who Seek Asylum*, N.Y. TIMES, Feb. 17, 1994, at A1.

year, as they did in Germany in 1992,¹¹² and they all need to be supported by the state during a lengthy asylum process, this creates an unhealthy situation. This situation is exacerbated by another factor that is a major difference between the United States and Germany—the cost of reunification. The burdens of unifying East and West Germany have been overwhelming the population.¹¹³ There has been a lot of anger about the rising taxes and the real burdens of trying to unify two countries. Indeed, this anger and resentment, combined with the negative stereotypes I described earlier, have encouraged some of the recent violent attacks by young neo-Nazis on asylum-seekers. This politically explosive atmosphere in Germany culminated in a constitutional amendment in 1993. After ten years of debate, Germany restricted the constitutional right to asylum.¹¹⁴

The recent history of the German asylum debate is instructive. During most of the past decade the Social Democrat Party (SDP) was not part of the governing coalition. The SDP, though, had enough members in Parliament to block a constitutional amendment.¹¹⁵ The SDP had previously worked to block various proposed constitutional amendments restricting asylum.¹¹⁶ The political climate changed dramatically as the number of asylum-seekers soared in the early 1990s.¹¹⁷

In the fall of 1992, the Social Democrats essentially decided they would never be elected to office anywhere in Germany again unless they adopted a more conservative, less pro-refugee approach on the asylum issue. Suddenly, there were real political negotiations about the kind of constitutional amendment the SDP would support.

¹¹² See Louis A. Wiesner & Steve Edminster, *Asylum Seekers, Other Foreigners, and New-Nazi Violence in Germany*, in U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 121 (1993).

¹¹³ See John Eisenhammer, *Social Democrats Mired in Wider German Crisis*, INDEPENDENT, Feb. 14, 1992, at 8.

¹¹⁴ See Marcus Kabel, *Germany Limits Asylum to Stem Foreign Refugee Influx*, Reuter Newswire, July 1, 1993, available in WESTLAW, INT-News File.

¹¹⁵ See Robin Gedye, *Europe: Social Democrats Block German Refugee Curbs*, DAILY TELEGRAPH, Oct. 16, 1992, at 12.

¹¹⁶ See *Do They Have to go on Paying the Pied Piper of East Berlin?*, ECONOMIST, Aug. 23, 1986, at 49.

¹¹⁷ See *German Right Attacks Refugee Hostel as Crowd Cheers*, Reuter Newswire, Aug. 23, 1992, available in LEXIS, News Library, Allnws File.

Politics was central to this asylum debate—there were many factors involved, but the political parties responded to the need to win elections. An asylum amendment was passed in May of 1993, and put into effect by July of 1993.¹¹⁸

The new constitutional amendment has now been in effect for three-quarters of a year. It provides that refugees who have been persecuted for political reasons still have the right to refuge in Germany, except in certain disfavored categories.¹¹⁹ The first disfavored category includes refugees who come to Germany through certain countries deemed safe.¹²⁰ The constitutional amendment itself states that all countries that belong to the European Community are

¹¹⁸ On May 26, 1993, the *Bundestag* [Lower House] passed the amendment by a vote of 521-132. Stephen Kinzer, *Bonn Parliament Votes Sharp Curb on Asylum Seekers*, N.Y. TIMES, May 27, 1993, at A1. On May 28, 1993, the *Bundesrat* [Upper House] passed the amendment. *Bonn Bars Asylum-Seekers*, N.Y. TIMES, May 29, 1993, § 1, at 3. The die had been cast six months earlier, in December of 1992, when the SDP agreed with the Christian Democratic Party, and its coalition allies on the terms of a constitutional amendment on asylum. *Compromise on Reform of Right of Asylum*, AGENCE EUROPE, Dec. 8, 1992, available in WESTLAW, INT-News File. Between December and May, there was wrangling about language, but the amendment itself was not in doubt due to the overwhelming support for it in the major political parties. See *Kohl Backs Down on Parliament Showdown Over Asylum*, Reuter Newswire, Jan. 14, 1993, available in WESTLAW, INT-News File; *Germany: Bonn Steps Up Pressure for Quick Asylum Reform*, Reuter Newswire, Jan. 12, 1993, available in WESTLAW, INT-News File.

¹¹⁹ By and large, the German courts have incorporated the refugee definition of the Geneva Convention into the constitutional right to asylum. Devine, *supra* note 110, at 795. This international definition, which encompasses persecution based on race, religion, nationality, and membership in a social group, as well as political opinion, has broadened the German constitutional protection of those persecuted for political reasons. *Id.*

¹²⁰ Article 16(a)(2) states:

Paragraph 1 [the right to asylum in Germany] cannot be invoked by those who travel from a member state of the European Communities or a third state in which the application of the Convention relating to the Status of Refugees and the [European] Convention for the Protection of Human Rights and Fundamental Freedoms is ensured. The states outside the European Communities that satisfy the criteria of sentence 1 shall be designated by a statute, which shall require the concurrence of the Bundesrat. In cases within sentence 1, deportation measures may be enforced despite the pendency of an appeal.

GG [Constitution] art. 16(a)(2) (Federal Republic of Germany).

deemed safe.¹²¹ In addition, Parliament can, by statute, list additional safe transit countries, so long as the countries are parties to and enforce the 1951 Geneva Convention of Refugees, the 1967 Protocol, and the European Convention on Human Rights.¹²² An asylum-seeker traveling to Germany through any of these countries, even if she is fleeing the worst persecution in the world, no longer has a constitutional right to asylum in Germany.

The German Parliament has enacted a list of safe transit countries.¹²³ In addition to the eleven other European Community countries, the safe transit countries include Poland, the Czech Republic, Austria, Switzerland, and the three Nordic countries—Norway, Sweden and Finland.¹²⁴ Think geographically for a moment. These countries surround Germany—a *cordon sanitaire*. Asylum-seekers who reach the border of Germany can still apply for asylum, but if they traveled through one of the safe-transit countries, they will almost certainly be rejected.¹²⁵

The second disfavored category of asylum-seekers includes those who come from homelands deemed safe.¹²⁶ These asylum-seekers face a rebuttable presumption that they have not been

¹²¹ GG [Constitution] art. 16(a) (Federal Republic of Germany); see Neuman, *supra* note 104, at 518-19; Sam Blay & Andreas Zimmermann, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT'L L. 361, 362-65 (1994).

¹²² GG [Constitution] art. 16(a)(3) (Federal Republic of Germany); see Neuman, *supra* note 104, at 518-19; Blay & Zimmermann, *supra* note 121, at 363.

¹²³ See Blay & Zimmermann, *supra* note 121, at 365.

¹²⁴ *Id.*

¹²⁵ See *id.* It should be emphasized that the constitutional amendment does not forbid asylum to anyone. Rather, it says that those who pass through a designated safe transit country have no right to demand asylum. Devine, *supra* note 110, at 6. The government can, as an act of grace, grant asylum to a person who traveled through a safe transit country on the way to Germany. *Id.*

¹²⁶ Article 16(a)(3) provides that:

States may be designated by a statute, which shall require the concurrence of the Bundesrat, in which, as a result of the legal rules, the application of laws and the general political conditions, it appears to be guaranteed that neither political persecution nor inhuman or degrading punishment or treatment occurs there. An alien from such a state shall not be regarded as politically persecuted, unless he presents facts from which it follows that he will be politically persecuted despite this presumption.

GG [Constitution] art. 16(a)(3) (Federal Republic of Germany).

persecuted for political reasons.¹²⁷ The burden of proof is on the asylum-seeker.¹²⁸ Again, the constitutional amendment gives Parliament the power to list, by statute, homelands that are deemed presumptively safe. Parliament's list includes Germany's eastern neighbors—the Czech Republic, the Slovak Republic, and Poland.¹²⁹ The list also includes Bulgaria and Romania to the south, and, then moving to a different continent, Ghana, Gambia and Senegal.¹³⁰ Parliament can change the list, and there is talk that it will be expanded.

A third noteworthy provision of the constitutional amendment allows Parliament to enact summary proceedings designed to make judicial review quicker, and to limit the number of appeals.¹³¹ Legislative proposals for expedited procedures are certainly familiar to us in the United States.

To summarize, during the past year political asylum has been a hot topic in Germany and the United States. Germany responded to the asylum debate by amending its constitution. The German asylum law changed from a broad universal approach to a narrow, special categories-based refugee scheme. Powerful political reasons and a chorus of newspaper headlines led to this change.¹³²

¹²⁷ See Devine, *supra* note 110, at 6.

¹²⁸ See *id.*

¹²⁹ See Blay & Zimmermann, *supra* note 121, at 373.

¹³⁰ See *id.*

¹³¹ Article 16(a)(4) states:

A court shall suspend the execution of deportation measures in cases under paragraph 3, and in other cases that are manifestly unfounded or are deemed to be manifestly unfounded, only if there is serious doubt about the legality of the measure; the scope of review can be limited and belated submissions can go unconsidered. The details shall be regulated by a statute.

GG [Constitution] art. 16(a)(4) (Federal Republic of Germany).

¹³² To an American lawyer, it seems strange that Germany amended the constitution to respond to the asylum debate. If the asylum process is overwhelmed, why not amend the process rather than the constitution? The answer to this question lies largely in politics. Amending the constitution was an important political statement. In addition, many German asylum law precedents arose in the context of interpreting Article 16 of the constitution. Blay & Zimmerman, *supra* note 121, at 362. There was some question about the extent to which procedures could be changed without infringing on the constitutional right of asylum under the 1949 Constitution. Neuman, *supra* note 104, at 521. Therefore, technical legal reasons, as well as political reasons, played a role in

What can we in the United States learn from this? I acknowledge the different political and social culture in Germany and the unique reunification burden there. Nevertheless, we can learn an important lesson from Germany. Education and public relations efforts are crucial. In Germany, the refugee community lost the fight to educate the public. Refugee advocates, non-governmental organizations, and academics—not to mention refugees—were marginalized. They were perceived as having special interests rather than the interests of the broader public at heart. We in the United States can learn from that. We should spend much more time and money in developing educational programs. This applies to academics, who can discover and analyze the useful and positive precedents in other countries, and can use these to attempt to move forward the immigration and asylum law in the United States.

But it is much more than an academic problem. We must identify various pro-refugee constituencies in the United States. Because we are a country of immigration, we have a lot of immigrant communities that are natural constituencies. There are also other powerful constituencies that we can educate. We must speak publicly about the benefits immigrants and refugees bring to the country in general. We must also continue to speak about our humanitarian and moral obligations to refugees.

In closing, I want to emphasize political strategy. There are always going to be political decisions; there are always going to be political motives. We want to stress humanitarian motives. We want to acknowledge that acting on humanitarian motives can yield substantial benefits that are not easily measured in economic terms. But we also want to stress the positive economic and social impact of refugees and immigrants on our society. We need to be clear about all these elements.

These are political decisions. We live in a democracy. We have to mobilize public opinion. The inability to do that was the basic problem in the asylum debate in Germany in the last few years. We can learn from that mistake and move forward to do a better job of motivating the United States to protect refugees.

CHEN: Thank you very much, Professor Fullerton, for sharing with

changing the constitution.

us your experience and for injecting a note of positive thinking.

Our final speaker is Hiroshi Motomura, Professor of Law at the University of Colorado School of Law in Boulder. He teaches immigration, refugees and asylum, civil procedure, and comparative law. Before entering academia, he was an attorney with Hogan & Hartson in Washington D.C. Professor Motomura has written and lectured extensively on a variety of immigration law topics. He is presently at work on a book concerning the role of constitutional principles in immigration law. He is also working on the revision of an immigration law casebook.

Building on the presentations of the previous speakers, Professor Motomura will lift our present refugee law discussion to the realm of constitutional law, with special emphasis on the principle of equality.

HIROSHI MOTOMURA: I guess I took Arnold Leibowitz's advice and asked to speak last. There is actually another reason why I asked to speak last, and that is that I wasn't sure on which panel I wanted to be. When I talked to the symposium organizers, I was interested in speaking on the refugee panel and also on the diversity panel. So the way I resolved that conflict was to agree to serve on the refugee panel, but to speak on a topic regarding diversity.

If you think very broadly about trends in refugee law over the last ten years, one of the major lines of argument for refugee advocates—in connection with legislation, regulation, and litigation—has been to urge the application of uniform neutral principles, unencumbered by foreign policy biases and other ad hoc considerations. Broadly conceived, I think that this is a call for equality. The Refugee Act of 1980 is probably the best example. On the other hand, you'll find numerous instances where refugee advocates have called for special treatment. The Lautenberg Amendment¹³³ is what I'm thinking of, as well as a country-specific temporary protected status for people fleeing El Salvador.¹³⁴

The question is whether these two lines of argument for

¹³³ Act of Nov. 21, 1989, Pub. L. No. 101-167, Title V, § 599D, 103 Stat. 1195, 1261-63 (1989) (current version at 8 U.S.C. § 1157 (Supp. IV 1992)).

¹³⁴ See Stephanie Griffith, *Festival Highlights INS Program for Salvadorans*, WASH. POST, June 23, 1991, at C7.

refugee advocates stand in any kind of tension or contradiction to each other. It's a very difficult question. It forces you to think about what "neutral principles" and "uniform principles" really mean in refugee law, and in immigration law generally. It forces you to think about what "equality" means in immigration law. And looking beyond that, it forces you to ask: If courts took seriously constitutional principles in immigration cases, what kind of statutes and regulations would pass constitutional muster? These are questions I'm not sure we've ever thought about, or, historically, have been in a position to think about.

Let me tell you how I came to this topic. I helped work on a brief involving a case arising under the Lautenberg Amendment.¹³⁵ That is an amendment which provides for something called "category aliens."¹³⁶ What it means essentially is that the normal refugee definition that applies throughout the world, and also to asylum in this country, is relaxed to a considerable extent for people who fit into certain categories.

This particular case involved Jews from the former Soviet Union. If they had applied for refugee status and refugee processing in the former Soviet Union, they would have been allowed to take advantage of this relaxed standard. The normal well-founded fear of persecution standard is lessened in the following way: The burden of proof may be met "by asserting [a well-founded fear of persecution] and asserting a credible basis for concern about the possibility of such persecution."¹³⁷ What happened in this particular case was that these individuals were in the United States raising an asylum claim. Their argument was that if they had been in the Soviet Union they could use a relaxed standard, so why should it be any harder for them to get asylum in this country? Their brief stated that "the bestowal of more procedural rights to individuals outside the United States than to those within U.S. borders not only violates long-standing U.S. immigration policy, but is clearly violative of the

¹³⁵ Respondents' Brief, In the Matter of A., (No. 70,524,846), and A., (No. 70,524,847), U.S. Dept. of Justice (on file with the *New York Law School Journal of Human Rights*).

¹³⁶ Act of Nov. 21, 1989, Pub. L. No. 101-167, Title V, § 599D, 103 Stat. 1195, 1261-63 (1989) (current version at 8 U.S.C. § 1157 (Supp. IV 1992)).

¹³⁷ *Id.* at § 599D(a).

Equal Protection clause because similarly situated people are being treated differently."¹³⁸

In other words, people within the former Soviet Union were treated better than people applying for asylum from within the United States. Their brief urged either directly striking down this distinction, or at least construing the statute to achieve that effect. The brief continued in the language of equal protection as follows: "[T]o avoid the serious equal protection question, this court should interpret [the regulation] to afford a Jewish asylum applicant from the former Soviet Union the same reduced evidentiary standard as his equivalent counterpart would be afforded under the Lautenberg Amendment."¹³⁹ The irony of this is that an equal protection argument is being urged under a statute which itself creates a different standard for a certain group of people. It's no small irony. The question is what to do about this, or if this is really a problem at all.

At this point, let me fill in what I think is the background of each of these two strands of thought. In 1984, Arthur Helton wrote that the 1980 Refugee Act, is "a mandate that uniform and neutral standards be utilized in the asylum adjudication process."¹⁴⁰ To put this in broader context, I think that it's consistent with the fact that over the last several decades, you have not only a greater call for equality in asylum policy and law at the statutory level, but also a growing trend toward constitutionalization of immigration, refugee, and asylum law. We've seen that in a number of recent cases, such as *Orantes-Hernandez*¹⁴¹—a 1980 nationwide class action that was filed on behalf of El Salvadoran refugees arguing for procedural due process.¹⁴²

In the gradual constitutionalization of immigration law, refugee advocates have had a lot more success in raising procedural

¹³⁸ Respondents' Brief, *supra* note 135, at 12.

¹³⁹ *Id.* at 19.

¹⁴⁰ Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 243 (1984).

¹⁴¹ *Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (preliminary injunction), *sub nom.* *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988) (permanent injunction), *aff'd sub nom.* *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).

¹⁴² *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1506 (C.D. Cal. 1988).

due process claims than in raising equal protection claims. But even in a case like *Orantes-Hernandez*, one of the major reasons that the procedural due process claim was so powerful was that the El Salvadorans were not getting the same procedural due process as other nationality groups. In other words, it was in many ways also an equal protection argument. Another case worth noting in this regard is *Jean v. Nelson*.¹⁴³ *Jean* was not a constitutional level decision, but it construed immigration statutes and INS regulations to bar race and national origin discrimination.¹⁴⁴ The constitutional idea of equality informed this interpretation of the statute. Thus, the call for equality in the 1980 Refugee Act resonates with larger trends in immigration law, including constitutional immigration law, that try to bring in not only procedural due process, but also the notion of equality.

On the other side of this tension is what we might call the urging of special treatment for certain groups. This is most evident in cases that try to stretch the definition of refugees beyond the traditional definition of "convention refugees," to extend it to people who some commentators might call "de facto refugees." These are people who seem deserving of refugee treatment, but who don't easily fit into the traditional categories.

The Lautenberg Amendment is also a good example of this. So is temporary protected status on a country-by-country basis. The statute itself mentions El Salvador.¹⁴⁵ What you have is a re-emergence, or perhaps a persistence of, ad hoc treatment of refugee situations.

There may be nothing wrong with this, but it raises the question of how to define "equality." So far, I've been looking at this in the context of the tension inside the refugee advocacy community. That's somewhat from my personal history because I had worked on this brief. I count myself in the group of refugee advocates, but I was taking a step back from what I was doing.

At the same time, the same thing can also be pointed out with respect to government advocates. It is a great irony that the

¹⁴³ 472 U.S. 846 (1985).

¹⁴⁴ *Id.* at 856.

¹⁴⁵ Immigration Act of 1990, Pub. L. No. 101-649 § 303, 104 Stat. 4978, 5036-38 (1990).

government or restrictionists, who have resisted the application of constitutional principles—including equal protection principles in immigration cases for 100 years—would suggest that application of the Lautenberg Amendment, in the way that we proposed, should not be allowed because it would violate equal protection.

Another example of the tension from the restrictionists' or the government's point of view has to do with something that Maryellen Fullerton talked about, and that is what is euphemistically called harmonization of immigration law between different countries of potential refuge. Those who argue in favor of one country being allowed to rely on another country's asylum determinations exhibit the same kind of contradiction. On the one hand, there is a strong recognition that asylum decisions inevitably have some kind of political justification on a country-by-country basis. Yet there are those who urge that one country can rely on another country's asylum determinations as if they were in some sense objective. It's a tension that exists on both sides, and it's a huge question. I'm not sure I have the answer to it, but I have some thoughts about how to approach that question. The question is: What is equal protection in immigration law? And in turn, what are uniform and neutral standards?

Stephen Legomsky, in a recent essay in the *Columbia Journal of Transnational Law*,¹⁴⁶ pointed out that you would not argue that there is unfair discrimination in the asylum statutes against Canadians just because very few Canadians qualify for refugee status.¹⁴⁷ It's obvious that equality in immigration law may not mean equal results, but, by the same token, the neutral rules can be discriminatory in fact. The problem is that there is an historical absence of serious consideration of equal protection in the immigration law context by virtue of the plenary power doctrine.¹⁴⁸ Courts have relied on this

¹⁴⁶ Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319 (1993).

¹⁴⁷ *Id.* at 333.

¹⁴⁸ See generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) ("[L]ittle constitutional immigration law has ever taken root. The primary reason has been the judicially created plenary power doctrine, under which Congress and the executive branch have broad and often exclusive authority in immigration matters."); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom*

doctrine to avoid these questions over the last 100 years, subject only to the gradual erosion in cases like *Orantes-Hernandez* and *Jean v. Nelson*, as I mentioned earlier.

But there are some other questions that need looking at. Would a court ever strike down an immigration statute, or refugee statute or refugee policy, on the ground that it constitutes national origin discrimination? I'm not sure. The next question is: When do you know when national origin discrimination is really racial discrimination? That's an issue that has come up, but has not been definitively addressed in the recent Haitian litigation.¹⁴⁹ Another question is: From whose perspective do we define equal protection? Part of the legacy of the plenary power doctrine is that we have looked at immigration issues as issues of national self-interest. Aliens trying to get in had no rights. The ground has shifted towards saying that maybe immigrants should have rights. But is that the right way to look at this question? An alternative would be to look at it from the point of view of people who are here, and who are not involved in exercising national self-definition. Perhaps it's not about immigrants' rights at all.

You can take this thought one step further, to this question: Is there anything unique about equal protection issues in immigration law by virtue of the fact that it is an exercise in national self-definition? If we look at issues of equal protection in immigration law from the point of view of those who are here and have an interest in having people of like mind, ethnicity or family join them, then maybe what we're looking at in mainstream equal protection jurisprudence is fundamental rights jurisprudence. If so, none of these immigration classifications can be looked at under traditional rational basis grouping analysis, but inherently require more.

Those are just some thoughts and a lot of questions. This is very much a work in progress. I don't know if it's a tension—maybe

Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545, 547 (1990) ("The plenary power doctrin[e] . . . declares that Congress and the executive branch have broad and often exclusive authority over immigration decisions. Accordingly, courts should only rarely, if ever, and in limited fashion, entertain constitutional challenges to decisions about which aliens should be admitted or expelled.").

¹⁴⁹ See *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549 (1993).

it's just an apparent linguistic problem. In deciding these questions, we need to think about some issues that are very difficult. I'm not sure we have any answers, but I think trying to get those answers will be quite worthwhile.

CHEN: Thank you very much, Professor Motomura, for bringing our refugee discussion into the realm of constitutional law and raising many issues for us to ponder.

Before we open the floor for audience participation, Mr. Leibowitz would like to say a few words about the Lautenberg case with which he is familiar.

LEIBOWITZ: I want to make a point here. I think Hiroshi Motomura has opened up a very important issue, which is the difference between uniform principles and ethnic pressures in a variety of situations. I just want to clarify the Jewish community's position on the Lautenberg Amendment because we obviously had a role in its passage. Our only concern was the protection of people in what we believed was an oppressive, hostile, and dangerous environment. That is quite different from concerns about refugees who are already in the United States. We have never taken the position that the Lautenberg Amendment applies to refugees already here. Some people say that it does, but I want to make it clear that the present environment in the United States concerning the asylum situation is different. Our concern is protection of refugees against hostile environments. This is what refugee protection is all about. It's not an issue of whether you have access to the United States. That is a different question. Equal protection, in the sense that we want people to be equally treated like other United States citizens, is not, at least in terms of refugee law, what we are about, although we understand that in other areas, other groups are very concerned about this.

Refugee policy is not an abstract question. As Dan Kesselbrenner noted, look at what's happening to the Chinese who are coming here—do we think that is fair? Look at what is happening to the Haitians who are coming here—do we think that's fair? Should refugee admission numbers be allocated to them? In considering these questions, one has to talk about individuals. It's very hard, and, in my view, impossible to talk about abstract numbers that exist

out there, without a country and human face connected to the numbers. Thank you.

CHEN: Thank you very much. Now the floor is open.

AUDIENCE MEMBER: I am a practicing attorney working in asylum and refugee law. I am happy that Professor Motomura raises a question regarding the application of the Lautenberg Amendment to asylum cases that are considered in the United States. In the opinion of the government, refugees mentioned in this category, mainly Jews, should be deported back to Russia or to the Ukraine, where they should ask for political asylum. I can give you a very simple case. A mother and one son were granted refugee status in Moscow when the Lautenberg Amendment was applied to them. There is another son who came by himself as a visitor. He applied for political asylum, and was refused because, according to the asylum officer who handled his case, conditions for the Jews in Russia drastically improved, and there is no danger for the second son in going back to Russia. I believe that this violates the constitutional principle of equal protection.

I want to raise another question. If we look at the rules and procedures, which were promulgated by the Attorney General, asylum can be granted even if the applicant claims that he was not singled out for persecution. It is enough that in his native country there is a practice and pattern of persecution, and he is included in the persecuted group. So how can we logically explain why one immigration officer sitting in the embassy in Moscow recognizes that there is a pattern of persecution of Jews in Russia, and another officer of the same immigration service in the United States, claims that there is no pattern of persecution of the same group?

LEIBOWITZ: The Lautenberg Amendment applies both to Jews and Pentecostals, who practice their religions in the Soviet Union.¹⁵⁰ In

¹⁵⁰ See John-Thor Dahlburg, *Soviet Jews, Caught in the Turmoil of Glasnost and Resurgent Anti-Semitism, Face the Decision of a Lifetime*, L.A. TIMES, Aug. 25, 1991, at 20.

addition, the Vietnamese are included under the Amendment.¹⁵¹ Basically, the issue in terms of the Lautenberg Amendment was how to weigh the historical experience of Jews in the Soviet Union. If you do not weigh history very heavily, and you claim that nothing has happened to Jews in the Soviet Union lately, then the decision that a Jew may not be persecuted, or does not have a well-founded fear of persecution, may make some sense. But if you consider history and the nearly 200 years of experience in the Soviet Union, which can give very modest official statements all sorts of overtones, you may conclude that there is a pattern of discrimination against Jews. Given the historical experience, which links into a whole series of past events, you get a different view of what a well-founded fear is.

We had a different view of how to weigh historical experience. Therefore, we went to Congress. They listened to us, and passed a bill that would weigh the historical experience, so that if there is a pattern of discrimination against ethnic minorities, they would have a right to be treated as refugees. Asylees are not covered.¹⁵² I want to make it clear that when a person is in the United States, and he is rejected for asylum status, he does not have to go back to the Soviet Union or the Ukraine.¹⁵³ Everybody knows this, and we should know it too. The Jewish refugee has the choice of going to Israel.¹⁵⁴ He is out of the oppressive environment about which we were concerned, and which the Lautenberg Amendment addressed. Now, it may be that the refugee has a good case for asylum, but maybe he doesn't. The operative force behind the Lautenberg Amendment was protection and concern about the oppression of people who are in a hostile environment where they can be arrested and killed with very little notice. This is not true in the United States. I don't worry a heck of a lot about whether the guy in the United States gets asylum or not. It might be interesting, it

¹⁵¹ See Tahl Tyson, Comment, *The Refugee Act of 1980: Suggested Reforms in Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 935 n.102 (1990).

¹⁵² See Geraldine Baum, *U.S. Eyes Limits on Immigration of Soviet Jews*, NEWSDAY, July 14, 1989, at 6.

¹⁵³ See *id.*

¹⁵⁴ See *id.*

might be desirable, it might even meet equal protection standards. But I do worry about the guy in Russia. I'm concerned about his access to the system. I want to give him as much access to the system as possible. That's not an unrealistic approach to the problem. We are dealing with a very difficult and fragile political situation in the Soviet Union.

MOTOMURA: I just want to add that in the case that I described, the judge agreed with our argument and, essentially, he used the Lautenberg Amendment to construe a regulation. It resulted in a grant of asylum.

AUDIENCE MEMBER: Professor Motomura, what is your outlook concerning the Supreme Court's immigration jurisprudence, and how do you look at some of the future constitutional issues? How are these issues going to be addressed in terms of equal protection? Do you see any way in which a door can be opened to allow greater equal protection and more procedural due process in this area? Do you see hope for the future? Do you see change? Do you see exciting directions?

MOTOMURA: Well, I'm not sure I'd have any kind of an answer that I would have great confidence in. One thing I see is that much of the infusion of constitutional principles into immigration law is coming in ways that are not very constitutional. I think that the procedural claims have been given a lot more weight. It would take a better court-watcher than I to make any more specific predictions about what will happen. One thing I see is that those who believe that constitutional principles of immigration law are important should come up with an alternative model. The questions that I raised today are an attempt to try to form an alternative model, one that says that allowing courts to scrutinize immigration decisions for constitutional defects has nothing necessarily to do with one's view on immigration policy. So I think that this is the most important thing. I think that if this type of jurisprudence can develop in the decisions, then I would be quite optimistic. If not, then I would not be.

KESSELBRENNER: I would like to add that some of this jurisprudence is related to changes in society. I think that what may

help to erode the plenary power doctrine is the notion of borders changing over time, along with new changes in international markets and trade. In terms of Europe's formal relaxation of borders, there have been some snags in the ability to travel freely, and to have one passport for the entire European community. The plenary power doctrine is really the inherent power of the sovereign to exclude. To the extent that the sovereign lets this power atrophy, there will be some exceptions from the power to exclude—for example, entry visas will not be checked in open border regions. I think that these kinds of changes in society, in addition to the political pressures from phenomena like the civil rights movement, will lead to changes in the Supreme Court's immigration jurisprudence. I think that if you look at most of the Court's major decisions, many of them are surrounded by social action and pressure in the particular area addressed by the Court. The Court reflects social activity rather than leading it or deciding its future course. For example, to the extent there is a change in the structure of world markets and the flow of goods, international arrangements, such as NAFTA, which should include the movement of people in addition to the movement of goods, could lead to the erosion of the inherent rights of sovereignty.

AUDIENCE MEMBER: I think that I agree with everything that you just said, except that a pessimistic side of your notion is that one of the consequences of the removal of borders within limited spheres is the enhancement of the supranational conception of sovereignty, which is what seems to be happening in Europe. For example, while it is much easier for Belgian nationals to move into Germany, it is becoming much harder for those who are outside of western Europe to come into this region. On a somewhat related point, I would like to bring Maryellen Fullerton back into the discussion of equal protection. I would like to hear Ms. Fullerton's opinion about one of the possible readings of the German situation. As law professors and lawyers, it might be instructive for us to call into question some of our natural tendencies that cause us to consider two things as necessarily good. One thing that we tend to think of as good is judicial review of immigration cases. The other is constitutionalization, or constitutional judicial review.

Perhaps one of the very ironic lessons from the German example is that the constitutional court, to a large degree, got way

out ahead of the German people in terms of constitutionalization. In fact, the constitutional discourse in Germany might provide something of a model for the sort of changes that you are trying to bring about here in the United States. But it was judicial review that was the problem in the development of German refugee law. I certainly agree that litigating refugee cases on equal protection grounds is a good thing. However, I wonder if there is a danger in deflecting our attention from the ground level political work that really has to be done. By shifting the refugee issue to the courts, we might be setting ourselves up for problems down the road.

FULLERTON: I essentially agree with you. I think that the German experience is instructive because the courts were way out in front. During the last few comments by the panelists, I kept thinking that we should not be focusing on the courts. We need to educate the public. We need to go to Congress. I spoke about the Germans' failure to do this. Although their structure is very different from ours, the German experience teaches us to take a two-tiered approach. We should have a litigation strategy devised from several different models. But that should not be all that we have. If we rely only on judicial protections, and not on congressional and public will, we won't have a politically legitimate response to the problems we are grappling with.

MOTOMURA: Yes, what I advocate is not to call upon the court as a savior in this regard. Rather, we should try to open up what I think is the normal process of dialogue with the courts. The other point is one that might usefully compare what is constitutional in Germany to what is constitutional here. This would be something to look at very carefully when talking about the United States and Germany in comparative terms.

AUDIENCE MEMBER: I would like to call attention to a premise relied upon by many of the speakers today, which I think is questionable. This premise is that in enacting the Refugee Act of 1980, Congress intended to establish neutral principles. I think that this is not the case. There is really no evidence for this premise, as a matter of fact, there is much evidence to the contrary. For example, asylum is made discretionary under the Act. Once statutory

eligibility for asylum is established, it is still open to the government to exercise its discretion in granting or denying asylum. On the refugee side, the statute obviously contemplates geographic discrimination, and the selection of a relatively small number from the millions of people who might possibly qualify as refugees.

Now, this does not include the constitutional question of whether a statute that envisions national origin discrimination would pass constitutional muster. But it does put a very different spin on the analysis of the role of neutral principles in asylum and refugee law, especially in light of the plenary power doctrine. So while many of us wish for a regime in which neutral principles apply, clearly the establishment of neutral principles was not what Congress intended, and it's not surprising that the courts have rejected this premise.

KESSELBRENNER: I'm not convinced that it's a false premise for the following reasons. Anker and Posner have looked at the history of immigration law more thoroughly than I. They have looked at the legislative history of the Refugee Act of 1980, and concluded that the establishment of neutral principles was the intent of Congress.¹⁵⁵ The language of the Refugee Act eliminated general references to the Middle East, and to people fleeing from communist-dominated countries. The Supreme Court—again, not that they're necessarily correct interpreters—said that this language shows Congress's intent to establish neutral principles.¹⁵⁶ The government itself—particularly the Bush Administration—as recently as the settlement agreement in *American Baptist Churches*, said that neutral principles shall apply to the determination of eligibility for asylum, and that the remaining retention of discretionary power with the Attorney General seemed to be more of a question of allowing diversity. But once the Attorney General establishes asylum status, there is no discretion whatsoever. I think that the retention of discretionary power was a way to pick and choose among the categories of people who demonstrate eligibility. I don't think that national origin discrimination was one of the things that was considered to be permissible, especially given

¹⁵⁵ Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

¹⁵⁶ See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *INS v. Stevic*, 467 U.S. 407, 422-23 (1984).

that, at the same time, Congress deleted the statute's prior language about the Middle East and people fleeing from communist-dominated countries.

LEIBOWITZ: I'm not sure that I agree with Dan. There was a lot of discussion about the Act's intent, and I think that if you look at the Anker and Posner article, there are really two schools of thought operating here. The key language that wound up in the statute is "special humanitarian concern." Most people clearly read this language as saying that we can discriminate. Why you would want to discriminate, I can't say. It is true that early works which discussed humanitarian concerns intended to create equal protection, and were arguably neutral. But the words "special humanitarian concern" were put in to the statute by people who had certain geographic interests. How you implement these interests is another question. However, I want to make another point about equal protection. We have focused on probably the most difficult areas to apply equal protection—the refugee-alien and refugee-asylum areas, where we're dealing with people who are frequently abroad, or with people who have foreign policy and national security concerns. The other issue which is still uncertain is the degree to which equal protection principles apply in an alien-citizen context. There are many questions about how you really implement equal protection in this area.

The most recent proposal dealing with equal protection in this context is the Clinton Administration's plan to impose a fee on asylum-seekers, in connection with welfare reform.¹⁵⁷ We take a legal inference and say that we have a welfare program that we've got to fund. We've got to find twenty billion dollars to pay for it. The way we've found this money is by denying access to various federal programs. This is how the Clinton Administration is coming up with the money. The Republicans also have written a bill that basically says the same thing in a variety of ways.¹⁵⁸ We are dealing with an area where, concededly, the Fourteenth Amendment applies, and the question is how do you apply it in these contexts? Should

¹⁵⁷ See *Making Refugees Pay*, N.Y. TIMES, Apr. 1, 1994, at A26.

¹⁵⁸ See Work First Welfare Reform Act of 1995, H.R. 315, 104th Cong., 1st Sess. (1995).

you apply it at all? There are normative aspects to this dilemma, and it seems to me that there are real questions here, dealing with both policy and constitutionality.

AUDIENCE MEMBER: I share the concerns expressed by many of you about the increased narrowing of asylum law, both in practice and in substance. I find this very troublesome. The media blitz is certainly feeding and enhancing this legal phenomenon. I want to bring out one area where there seems to be some hope in opening up the discussion about asylum law. This is the area of gender-based persecution.

In the United States, there has been a lot of movement to gain recognition of the acts of persecution that are specifically targeted at women. The courts are slowly starting to recognize that there may be legitimate claims in this area. The INS is beginning to listen to women's dialogue, and are beginning to engage in it. They are considering a number of approaches to enhancing their view of claims of persecution against women. On the policy level, many INS officers and immigration court officials are now starting to get training in this area. I see this as a way for women to get their feet in the door. I also see this as a way to engage in a broader dialogue about how we make our asylum and refugee laws reflect the changing international notions of human rights violations.

FULLERTON: I want to point out another somewhat optimistic trend along this line, which is that we are now seeing positive decisions in terms of asylum being granted based on gender and sexual orientation-based persecution.¹⁵⁹ I think that comparative work has really been helpful in this area. I think in particular that the Canadian Refugee Board's efforts to establish standards and guidelines for decision-makers concerning persecution based on gender and sexual orientation has already had an influence on the

¹⁵⁹ See, e.g., Ignatius, *supra* note 16, at 235 n.80 (citing Matter of T., (No. A72-093-558) (EOIR July 26, 1993)), an unpublished decision granting asylum to a Brazilian who feared persecution because of his homosexuality); see also Ellen Vagelos, Comment, *The Social Group that Dare Not Speak Its Name: Should Homosexuals Constitue a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on Re: Inaudi*, 17 FORDHAM INT'L L. J. 229, 230-31 (1993) (describing INS decisions recognizing gender persecution as a basis for granting asylum).

United States. Hopefully, we will continue to develop our own positive trends. Also, I hope that we will look elsewhere to see what we can learn from trends in other countries.

AUDIENCE MEMBER: I'm a little distressed to hear our Equal Protection clause extended to other parts of the world. I'm not sure this is really what we want to do. What I think may be at stake here, in terms of the Lautenberg Amendment and the motivation for it, is a very different right that is already recognized under international law—the right of people to leave a country to seek asylum elsewhere. What I would like to ask our distinguished panelists is if they can think of strategies that this government can follow, other than watering down our own refugee law provisions, which would enhance the ability of people to exercise this right.

LEIBOWITZ: Let me say that our goal in the Lautenberg Amendment was much less ambitious. We stayed within the Refugee Act, and just gave it an evidentiary chain, nothing more. However, your point is very well taken. The general issue of the ability to lead and the recognition of international law is very important. It involves a political and diplomatic relationship. At the international level, it also involves the question of whether people have the ability to leave. And, if they do, where should they go? The world is tightening up. We are building up supernational areas within the European and North American communities. It's easy to move within these areas, but it's getting harder and harder—or the goal is to make it harder and harder—to move into these areas. This has its own pain for people who are outside. Where you're born should have only certain limitations. But in a political structure, it's very, very difficult to do away with these limitations. In my view, the effort right now by the INS in changing the asylum regulations, was to maintain the criteria established by the Refugee Act. You still can apply for asylum anywhere in the United States, at any time, under the existing international criteria. This is a hard position to hold. The INS is holding it, but if you envision a much larger increase in asylum based on gender or whatever, then the German experience that Maryellen talked about may become very real here. We could also change the criteria, if the numbers got too great. It's not that we'll work out a legal process. We can't handle the legal process. For example, there

are bills that say we should restrict the time when people can apply for asylum.

MOTOMURA: I'm not urging that the extension of equal protection in immigration law would, or should, result in the striking down of many classifications in immigration law. Similarly, I don't think that the recognition of procedural due process as a value in immigration law means that a given visa will be granted or denied, but we need to develop a way of distinguishing those considerations on which valid classifications may be based.

KESSELBRENNER: Are you talking about having places within a country where people could go to be processed?

AUDIENCE MEMBER: No, my concern is that the emphasis should be on efforts to allow people to get out of countries to seek asylum.

KESSELBRENNER: Well, I think that the answer is changing public perceptions. A lot of what is happening amounts to so much whining. If you look at 150,000 asylum applications,¹⁶⁰ compared to 100,000,000 worldwide refugees,¹⁶¹ and you look at the burden that countries in the horn of Africa are bearing—countries that do not have a fraction of the wealth of the United States—it is plain that the United States complains more than most nations. I think that when an issue has grabbed this much political attention, a lot of what we see is political posturing, rather than a substantive discussion of the real issues. The issues are being debated on a level that is completely apart from their strategic or tactical importance in American life. Many people are hurting, and an easy response to this pain is to focus on the changing demographics of the United States. It's easier for certain people to say that it's the immigrants' fault that there is so much unemployment, rather than focusing on the structure of our society. This is really where the answers to the immigration questions lie because the numbers aren't really what the debate is

¹⁶⁰ See Marc Sandalow, *INS Drops Plan for Asylum Fee; Applicants Won't Have to Pay \$130.00*, S.F. CHRON., Oct. 19, 1994, at A3.

¹⁶¹ See Bob Sutcliffe & Maggie O'Kane, *The Tides of Humanity: 123 Million People on the Move; Immigration*, 41 WORLD PRESS REV. 8, 8 (1994).

about.

AUDIENCE MEMBER: Mr. Kesselbrenner, you spoke about eighty-four percent of asylum applicants showing up for interviews or hearings. Regarding the recent exchange concerning discretionary criteria, you suggested that the reason for discretion was to pick and choose among eligible people, but I believe that you said not on the basis of national origin. I'm wondering what basis you were referring to?

Also, you said that Haitians were being taken in to the United States in smaller numbers because they are black. I would like to raise the issue of whether discrimination against Haitians is due to race or poverty. More specifically, what is often perceived by members of the public is that black immigrants have more difficulty assimilating to the American economic system than Asians do. Is this perception true?

KESSELBRENNER: I'll answer the easy question first. The other considerations in terms of discretionary asylum determinations are whether the person exhibited minor criminal behavior, which did not rise to the level of statutory disqualification. If someone establishes eligibility, they should be granted relief, but a history of violations of the immigration laws, and certain other kinds of technical factors weigh into the denial of eligibility. The best example is minor criminal conduct, which does not rise to the level of disqualification.

In terms of the evidence of economic disparity among ethnic groups, I think that there are studies done in New York City concerning the jobs generated by Haitian entrepreneurs. If you use objective criteria, I do not think that there is any evidence that would suggest that Haitians assimilate worse than other nationalities. The reason I raise this study is because the imagery of African immigrants appeals to racism. A big part of this imagery is used to create the atmosphere that something is wrong with black immigrants. I don't disagree that fears of unemployment are a part of the perception, but it's significant that the only people who get interdicted systematically are those who are black. The United States has treated Haitians differently than it has treated refugees from other nations.

CHEN: Our discussions today certainly underscore the urgency and

the global nature of our refugee problems. How the common interest in dealing with refugees can be secured by taking into account political, legal, and humanitarian factors certainly presents a challenge to us all, and no doubt it would require concerted efforts at all community levels—global, regional, national, and local—to cope with this real issue.

I would like to thank our distinguished panelists for their excellent presentations and remarks. I also would like to thank our audience for your attention and lively participation. Thank you very much.

