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REFORMING ASYLUM ADJUDICATION: ON NAVIGATING THE COAST OF BOHEMIA*

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† Professor of Law, University of Virginia. This Article is a revised and abbreviated version of a consultant's report that I presented to the Administrative Conference of the United States in May 1989. The views expressed here are my own and do not necessarily reflect the views of the Conference or of its committees. The formal recommendation adopted by the Conference on the basis of the report was published at 54 Fed. Reg. 28,964, 28,970-72 (1989) (codified at 1 C.F.R. § 305.89-4 (1990)). I have expanded my treatment of these issues, and have incorporated considerable additional information on the asylum adjudication systems of several European countries and Canada, in a book to be published by Yale University Press.

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Over the last decade, sharply rising numbers of asylum seekers have placed great strains on the Western democracies' venerable practice of granting political asylum. In part, the new difficulties derive from the growing penetration of law into what once had been a largely discretionary practice; in part, they result from improved global mobility and communications. None of the challenged adjudication and protection systems have responded well, and some have responded abysmally.

Critics abound, offering widely variant views on what are the most serious problems besetting these systems. Some find the major problem to be that "economic migrants" or "false refugees" are able to gain years of delay, no matter how weak their asylum claims, by abusing the asylum process's abundant procedural protections, adopted to ensure against returning someone to immediate persecution. Others find the most serious failings to lie in governments' reflexively negative reactions to new arrivals, at least if they are of the wrong ideological stripe. Overly restrictive legal doctrine, impossibly demanding standards for factual proof, and a proliferating array of barriers and deterrents are seen as the major problems.¹

In this country, controversy over political asylum waxed and waned throughout the 1980s. The decade opened with bitter contention, when the 1980 boatlift of 125,000 Cubans from the port of Mariel coincided with high levels of asylum applications from Haitians, Nicaraguans, and Iranians. In the succeeding years, the Reagan Administration implemented new restrictive policies, including detention of many asylum applicants and the interdiction on the high seas of boats coming from Haiti. It thereby managed, through the middle of the decade, to keep application levels relatively modest and to relegate asylum to the shadows occupied by low-priority political issues. Refugee advocacy groups nonetheless kept up a volley of denunciations aimed at the new restrictions. They charged that these policies, and the low acceptance rates of applicants from Central America and the Caribbean, reflected political manipulation or racism or simple heartlessness. These groups complained that the government's practices violated legal obligations founded in statute and treaty.² In a pattern that has been long familiar in American asylum policy, several rounds of relatively unproductive litigation

¹ See generally Martin, *The New Asylum Seekers*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s* 1 (D. Martin ed. 1988) (tracing the history of refugee protections from World War II to the present, highlighting new problems, and suggesting solutions).

² See, e.g., G. LOESCHER & J. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* 170-208 (1986) (recounting controversies over asylum policy that brought into question the Carter and Reagan Administrations' commitment to the ideological neutrality of the 1980 Refugee Act); Meissner, *Reflections on the Refugee Act of 1980*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s* 63-64 (D. Martin ed. 1988) (criticizing the failure "to administer a judicious political asylum policy" for Salvadoran refugees, as prescribed by the 1980 Refugee Act); Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 620-23 (1981) (discussing alleged violations of treaty).

resulted, frequently marked by interventionist judicial rulings and unwise government reaction.³

In late 1988, these controversies returned to the front pages. Whereas this country received about 3000 asylum applicants per year in the 1970s, by December 1988, the Immigration and Naturalization Service (INS) was receiving 2000 applicants per week in South Texas alone, nearly all of them from Central America. Neither the basic paperwork nor even minimally decent food and shelter could keep pace. Some commentators concentrated on the humanitarian plight of the individuals. Others worried about the burdens placed on state governments and local communities, especially since they

³ Class-action suits over Haitian asylum seekers presented the first major challenges to the government's procedures for asylum adjudication and ultimately resulted in years of litigation, blocking return of nearly all affected persons. The first round, begun in 1975, focused on procedures for considering asylum claims lodged by excludable aliens. (Excludable aliens are those apprehended at the border before making an entry into the United States. When the government seeks to remove aliens who have entered, it must do so through deportation rather than exclusion proceedings.) The litigation history, including citations to the several reported decisions that resulted, is summarized in *Sannon v. United States*, 631 F.2d 1247, 1249-50 (5th Cir. 1980). The second round derived from a 1977-78 campaign by the Immigration and Naturalization Service (INS) to hasten removals of Haitian asylum applicants. Ultimately this "Haitian Program" was declared unlawful, and the court ordered INS to reprocess all class members' asylum claims. See *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. Unit B 1982). Moreover, the plaintiffs received a major attorneys' fee award under the Equal Access to Justice Act. See *Haitian Refugee Center v. Meese*, 791 F.2d 1489 (11th Cir.), *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986).

In 1981, the Administration embarked on a new detention policy meant largely to deter asylum applications. See T. ALEINIKOFF & D. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 722-24 (1985). Litigation challenging the detention policy went all the way to the Supreme Court in *Jean v. Nelson*, 472 U.S. 846 (1985). Although the government won some important victories with regard to legal doctrine, the plaintiffs prevailed sufficiently on their statutory and regulatory claims to delay asylum processing for lengthy periods, see, e.g., *Louis v. Meissner*, 532 F. Supp. 881, 883-84, 889 (S.D. Fla. 1982) (refusing to dismiss refugees' claim that they were denied access to counsel contrary to INS regulations); *Louis v. Nelson I*, 544 F. Supp. 973, 993-96 (S.D. Fla. 1982) (holding that detention policy was illegal because it was a substantive rule that was not promulgated as required by the Administrative Procedure Act); *Louis v. Nelson II*, 544 F. Supp. 1004 (S.D. Fla. 1982) (holding that detained Haitians were entitled to release on parole pending determination of their claims for admission), and ultimately to gain a sizable attorneys' fee award. See, e.g., *Jean v. Nelson*, 863 F.2d 759, 769-80 (11th Cir. 1988), *cert. granted sub nom. INS v. Jean*, 58 U.S.L.W. 3467 (U.S. Jan 23, 1990) (No. 89-601). Similar challenges to INS handling of Salvadoran and Guatemalan claims have likewise won initial successes. See, e.g., *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1511 (C.D. Cal. 1988) (granting permanent injunction); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 380 (C.D. Cal. 1982) (granting preliminary injunction); *Nunez v. Boldin*, 537 F. Supp. 578, 587 (S.D. Tex.) (also granting preliminary injunction), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982).

believed that most of the applicants were abusing the system and that their success would only encourage more to come.⁴ In response, INS quickly sought ways to deter new arrivals. Despite lawsuits and temporary restraining orders, by early spring 1989, INS implemented a policy providing for initial asylum decisions within one day of application, coupled with detention of all unsuccessful applicants in South Texas.⁵

This action sharply reduced the concentrated influx, eased local alarms, and thereby succeeded in draining off much media interest. One might almost have thought that the annual application level dropped back to the politically tolerable mid-decade rate of around 20,000 per year. It did not. The inflow remained exceptionally high, but simply spread more widely throughout the country. In fiscal year 1989, the district offices of INS received over 100,000 applications—a record—and many thousands more were filed before immigration judges.⁶ This pace continues. It would not be surprising to find the issue bursting into prominence again in the early 1990s, as the full extent of the new asylum caseload becomes apparent.

In nearly all Western countries, the asylum adjudication systems now employed were cobbled together in an era that permitted leisurely consideration of modest caseloads. In general, they have adapted poorly to an era when claims are numerous and subject to sudden escalation. Moreover, because most Western adjudication systems were built on the rough assumption (a product of the Cold War) that few claimants would be rejected, they avoided difficult questions about effective information-gathering and evaluation. Today's dilemmas require instead a sustained and sophisticated capacity to screen out unqualified applicants; hence, the difficult, previously latent questions have become inescapable. If adjudication

⁴ See, e.g., Suro, *Aliens Say New Curbs Won't Halt Them at Border*, N.Y. Times, Feb. 27, 1989, at A14, col. 1; Suro, *U.S. Set to Detain Refugees in Tents Beginning Today*, N.Y. Times, Feb. 21, 1989, at A1, col. 4; Schmalz, *Miami, Saying It's Overburdened, Tells Nicaraguans to Stay Away*, N.Y. Times, Jan. 14, 1989, at A1, col. 3; Applebome, *South Texans Fear an Influx of Aliens*, N.Y. Times, Dec. 16, 1988, at A22, col. 1.

⁵ See, e.g., *South Texas Asylum Applicants Face Detention Under New INS Policy*, 66 INTERPRETER RELEASES 217 (1989); Frelick, *South Texas Detention Plan Goes Forward*, REFUGEE REPORTS, Feb. 28, 1989, at 1 (discussing the new INS plan to restrict allegedly frivolous asylum claims and the resulting criticism from private agencies); Applebome, *Judge Halts Rule Stranding Aliens in Rio Grande Valley*, N.Y. Times, Jan. 10, 1989, at A14, col. 1; Applebome, *Suit Attacks Policy That Keeps Aliens in Texas*, N.Y. Times, Jan. 7, 1989, at 1, col. 3.

⁶ See *infra* Table I following note 150. Immigration judges, originally known as special inquiry officers, are the federal officials who preside over deportation and exclusion proceedings. See T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 87-91.

systems are to say no to large numbers of applicants—as virtually all Western countries are now doing—they must either cultivate callousness to the risk of returning true refugees, or else demand assurance that their outcomes are precise and reliable.

The search for effective reforms continues, but in a highly polarized environment. In this Article, I attempt to advance that search, with special attention to the political asylum adjudication system of the United States. The analysis and recommendations offered here are based on several years of research and observation in the United States, Canada, and several European countries—including attendance at numerous hearings and extensive interviewing of participants in asylum processing systems, principally government officials, private attorneys, and other workers with refugee assistance and advocacy organizations.⁷

I open with a general look at the basic legal standards and then at the highly charged policy context in which all asylum decisions are currently made. To lay a foundation for the recommendations at the end, there follows an overview of the United States' current, tangled adjudication procedures and a brief history of past procedures, explaining how the present system evolved. I conclude by suggesting numerous changes in structure and process, some of them quite ambitious, while rejecting others that have been prominently advocated. I offer these proposals with the conviction that a well-functioning adjudication process provides the indispensable ingredient for alleviating the many ills now attributed to the system, even though the various participants in the current debate tender widely differing diagnoses of what are the most serious ailments.

I. THE SUBSTANTIVE LEGAL FRAMEWORK

A. *International Provisions*

Classically, the right of asylum under international law belonged to states and not to individuals.⁸ Sovereigns were considered to have the right or prerogative to grant protection against return to

⁷ The longer version of this study, forthcoming from the Yale University Press, contains considerably more detail on the Canadian and European systems. *See supra* note †. I will refer directly to those systems only occasionally here, but the suggestions I make draw in large measure on what I learned in studying them.

⁸ *See* G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 101-02 (1983); 2 A. GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 6 (1972); Melander, *Refugees and International Cooperation*, 15 INT'L MIGRATION REV. 35, 35 (1981).

those they chose to shelter. This framework shamed itself in the world's woefully inadequate response in the 1930s and 1940s to those who were fleeing Nazi persecution. From the ashes of World War II arose an international structure that signalled a determination, measured but genuine, to do more for refugees.

Most enduring of the post-war measures were two instruments adopted under United Nations auspices. The first, accepted in late 1950, created a new post of UN High Commissioner for Refugees (UNHCR). Initially expected to be temporary, the Office of the UNHCR, staffed by approximately 2300 employees, has by now become a permanent fixture on the international scene.⁹ Under its original statute and subsequent General Assembly resolutions, the office bears responsibility for providing protection and material assistance to refugees throughout the world.¹⁰ In connection with its protection function, UNHCR monitors asylum adjudication systems worldwide, and occasionally plays a direct role in individual determinations.

The second legal instrument, the 1951 Convention Relating to the Status of Refugees,¹¹ remains of surpassing importance, for it established a definition that has become the centerpiece of most Western asylum adjudication systems, including that of the United States. Under that definition, as improved by the Convention's 1967 Protocol,¹² a refugee is a person outside her home country, unwilling or unable to return or otherwise claim that country's protection because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."¹³

⁹ See *Overview of UNHCR Activities: Report for 1987-88*, at 87, U.N. Doc. A/AC.96/709 (1988) (Table IX).

¹⁰ See *Statute of the Office of the UNHCR*, G.A. Res. 428, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950). Later changes in the scope of UNHCR responsibility are traced in Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 1976(I) RECUEIL DES COUES 287, 301-09.

¹¹ July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention] (adopted in Geneva).

¹² Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The 1951 definition covered only those persons who feared persecution "[a]s a result of events occurring before 1 January 1951." 1951 Convention, *supra* note 11, art. 1(A)(2), 189 U.N.T.S. at 152. The main function of the 1967 Protocol was to remove this dateline. The United States became a party to the Protocol in 1968, thereby becoming derivatively bound by all the significant operative provisions of the 1951 Convention. See 1967 Protocol, *supra*, art. I(1), 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 2, 606 U.N.T.S. at 268.

¹³ 1951 Convention, *supra* note 11, art. 1(A)(2), 189 U.N.T.S. at 152. The

The 1951 Convention, a cautious and more limited treaty than is often appreciated,¹⁴ provides relatively few actual guarantees to refugees illegally present in the country of haven (as most asylum seekers now are).¹⁵ In particular, it does not guarantee asylum, in the sense of a durable lawful residence status, even for those duly adjudged to be refugees under its provisions. Thus even today there is no individual right of asylum under international law.¹⁶ What the 1951 Convention does require, however, even for refugees illegally present, is *nonrefoulement*—a technical term for protection, deriving from Article 33 of the Convention, against return to a country “where [the refugee’s] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁷ Article 33 affords a limited and country-specific protection, and the receiving nation technically

definition also contains “cessation” and “exclusion” clauses that remove certain persons, such as those guilty of war crimes, or those who have taken on a new nationality, from the Convention’s coverage. See *id.* art. 1(C)-(F), 189 U.N.T.S. at 154-56.

¹⁴ See *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 840-41 (D.C. Cir. 1987) (Edwards, J., concurring and dissenting) (concluding that the Refugee Act’s applicability to aliens in both exclusion and deportation proceedings is more generous than required by the 1951 Convention and 1967 Protocol).

¹⁵ The 1951 Convention does provide a host of impressively detailed guarantees for refugees lawfully present, but a decision that the person is a Convention refugee does not ipso facto result in lawful presence. See *Report of the Ad Hoc Comm. on Statelessness and Related Problems* 47, U.N. Doc. E/1618/Corr. 1; E/AC.32/5/Corr.1 (1950). See generally Weis, *The International Protection of Refugees*, 48 AM. J. INT’L L. 193, 193-207 (1954) (outlining the protection provisions of the 1951 Convention). The major purpose of the Convention, as the name suggests, was to clarify questions of status for the World War II refugees already in place. As Professor Goodwin-Gill has explained:

The 1951 Convention was originally intended to establish, confirm or clarify the legal status of a known population of the displaced. This met the needs of the time, and most provisions focus on assimilation, or are premised on lawful residence or tolerated presence. There is nothing on asylum, on admission, or on resettlement.

Goodwin-Gill, *The Future of International Refugee Law*, REFUGEES, Oct. 1988, at 27, 28.

¹⁶ An abortive effort was made in the 1970s to draft a convention that would go further toward international legal guarantees of political asylum for refugees. This effort was abandoned when a 1977 conference of government representatives appeared likely to weaken even those minimal guarantees derived from the 1951 Convention and the 1967 Protocol. See Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 BRIT. Y.B. INT’L L. 151, 159, 169-71 (1979).

¹⁷ 1951 Convention, *supra* note 11, art. 33(1), 189 U.N.T.S. at 176. Paragraph (2) of this article authorizes narrow exceptions to the nonreturn obligation, essentially for spies and dangerous criminals.

remains free to send a refugee on to other countries, rather than granting asylum on its soil.¹⁸

Nevertheless, since 1951 most Western countries, to their credit, have set up asylum claims systems that essentially combine the determination of refugee status under the 1951 Convention definition with the discretionary act of providing durable status, or asylum. An affirmative refugee status determination thus routinely leads not only to the limited protection against return contemplated by Article 33, but also to the full range of protections embraced within the notion of asylum.¹⁹ In this sense, we have come close to a system that guarantees an individual right of asylum to those who somehow establish physical presence on the soil of such Western countries and also prove that they satisfy the 1951 Convention definition.

¹⁸ See Melander, *supra* note 8, at 36. The country is also free, of course, to grant asylum to others it deems worthy, even if they do not satisfy the 1951 Convention definition. Western European countries have done this more extensively than the United States, through so-called "B-status" refugee provisions or the acceptance of "de facto refugees." See generally D. GALLAGHER, S. MARTIN & P. FAGEN, *TEMPORARY SAFE HAVEN: THE NEED FOR NORTH AMERICAN-EUROPEAN RESPONSES* (Refugee Policy Group 1987). The United States occasionally provides such protection, without a determination of refugee status, through the use of "extended voluntary departure" (EVD). See generally T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 726-43 (explaining EVD protection and the debates surrounding it); Note, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, 28 VA. J. INT'L L. 509, 512 (1988) (arguing for the adoption of alternative methods of offering a temporary safe haven rather than the currently inadequate EVD system). Under current law, EVD is provided as a matter of grace by the political branches, according to ad hoc criteria that are essentially beyond the reach of judicial review. See *Hotel and Restaurant Employees Union Local 25, v. Smith*, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); see also Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 902, 101 Stat. 1331 (1987) (establishing limited procedure for eventual permanent resident status for certain beneficiaries of EVD for the years 1982-87).

Although I believe that this country should extend such protection on carefully chosen occasions to potential victims of civil strife or human rights violations, I do not address here either the standards or procedures for such decisions. This study focuses instead on what are supposed to be nonpolitical procedures for implementing binding, neutral criteria adopted to shield those most seriously jeopardized by granting them full asylum or, at a minimum, *nonrefoulement*.

¹⁹ See Hofmann, *Asylum and Refugee Law*, in *THE LEGAL POSITION OF ALIENS IN NATIONAL AND INTERNATIONAL LAW* 2045, 2058-59 (J. Frowein & T. Stein eds. 1987). In fact, Western nations (with a few exceptions, like Austria, traditionally viewed as transit countries) rarely find third countries willing to take refugees off their hands. Given that the refugees are present and, under Article 33, cannot be sent to the only country normally obligated to take them (the country of nationality), it is clearly better if they quickly attain a secure new status that allows them to rebuild normal lives. See Martin, *supra* note 1, at 18 n.26.

That these admirable features of the system go beyond the strict requirements of international law, however, should remind us of their fragility. They cannot be taken as inevitable constants. Instead, it must be an ever-present concern of wise policy to shape asylum measures, including adjudication systems, so as to maximize continued domestic support. The systems' inability to cope effectively with growing numbers of asylum seekers over the last decade now threatens that foundation.²⁰

B. *American Legal Provisions*

The American legal framework follows these general outlines, but the details require some additional attention. Although the United States played a significant role in the conferences that led to adoption of the final text of the 1951 Convention, this country never became a party to that treaty. During that era, bitter battles over the Genocide Convention and the Bricker Amendment had resulted in ill-considered executive promises against sending any human rights treaties to the Senate for ratification.²¹ Nevertheless, the United States regarded itself as a leading player in finding solutions to refugee problems. From the end of World War II, under a variety of

²⁰ A recent book by a former UN Deputy High Commissioner for Refugees underscores these risks. Richard Smyser writes:

The structure of refugee law and care, which has been generously assembled since the dawn of our culture and particularly in the twentieth century, cannot remain in place if it is abandoned by political and popular opinion. If the people of the world decide that they no longer wish to receive and help refugees, all the international conventions and organizations will be rendered useless and will prove unequal to the task of saving even a single life. That is a danger that must be averted.

W. SMYSER, *REFUGEES: EXTENDED EXILE* 2 (1987); see also Martin, *supra* note 1, at 11-15 (noting that "[p]olicy initiatives that will impose costs and difficulties on those publics in a highly visible way must ultimately be grounded in a widespread public acceptance of the need for that policy").

²¹ See generally Kaufman & Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUMAN RIGHTS Q. 309, 310-12 (1988) (discussing the Bricker Amendment and the executive branch's response). Public explanations of the U.S. position regarding the refugee treaty usually focused, with some justification, on how the 1951 Convention better fit European legal systems, where the status of an alien depended on reciprocity—unlike the United States, where refugees received a status equivalent to other permanent resident aliens. See Hoffman, *UN Refugee Code Near Completion: Watered-Down Bill of Rights Applies Mainly to Europe—Some Basic Gains Made*, N.Y. Times, July 21, 1951, at 4, col. 2. At other times American spokesmen stated that this country would not adhere because the treaty touched largely on matters within the jurisdiction of the states rather than the federal government. See *Eleven Nations Sign Refugee Rights Act*, N.Y. Times, July 29, 1951, at 15, col. 3.

statutory and administrative schemes, it had generously resettled hundreds of thousands of the displaced persons uprooted by that conflict.²² That experience imprinted on American policy debates a distinctive perspective that predominated until quite recently: Responding to refugees meant resettling displaced persons from refugee camps overseas, rather than dealing with populations already on national territory.²³

Even during this period, however, some provision was made for the handful of individuals who somehow made it to American territory on their own and then asked not to be returned to face persecution. Congress enacted the first express statutory provision in 1950,²⁴ directing the Attorney General not to deport aliens to countries where they "would be subjected to physical persecution."²⁵

In a more explicitly discretionary form, this provision was incorporated as section 243(h) of the newly codified Immigration and Nationality Act (INA) in 1952. It granted the Attorney General the discretion to "withhold deportation" of persons who would be subjected to physical persecution upon return.²⁶ In 1958, the Supreme Court ruled that this statutory provision applied only to deportation and was not available to aliens in exclusion proceedings,²⁷ but the INS made equivalent protections available to excludable aliens

²² A comprehensive account appears in CONGRESSIONAL RESEARCH LIBRARY FOR THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES, 96TH CONG., 2D SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES (Comm. Print 1980). For a more critical review, see G. LOESCHER & J. SCANLAN, *supra* note 2, at 1-67.

²³ See Meissner, *Reflections on the Refugee Act of 1980*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 57, 60 (D. Martin ed. 1988). Sharply different policy constraints operate in the two settings, despite similarities in the governing threshold standards. See *infra* note 38.

²⁴ Related provisions had appeared, however, since 1875. They provided an exception to exclusion based on pre-entry conviction of a criminal offense, if the crime constituted a political offense. See T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 638 & n.13.

²⁵ Subversive Activities Control Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 (repealed 1952).

²⁶ Immigration and Nationality Act, ch. 477, § 243(h), 66 Stat. 163, 214 (1952) (codified at 8 U.S.C. § 1253(h) (1988)). In 1965, Congress deleted the reference to "physical persecution," replacing it with "persecution on account of race, religion, or political opinion." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918. The Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107, gave the section its present shape, more closely tracking the language of Article 33 of the 1951 Convention.

²⁷ See *Leng May Ma v. Barber*, 357 U.S. 185 (1958).

through the use of the parole power, likewise an expressly discretionary remedy.²⁸

By 1968, the earlier resistance to human rights treaties had softened sufficiently for the Johnson Administration to send the 1967 UN Protocol to the Senate, where it secured speedy ratification. Because the 1967 Protocol incorporates by reference all of the important operative provisions of the 1951 Convention, with one important modification in the definition of "refugee,"²⁹ ratification was tantamount to acceding to the earlier instrument. But this somewhat circuitous route toward accepting the 1951 obligations apparently helped avoid reopening any of the previous decade's treaty-power battles.

The Administration had promoted the 1967 Protocol primarily as a way of signalling U.S. leadership on worldwide refugee issues and encouraging other nations, regarded as less supportive of refugees, to improve protections. For that reason, political asylum issues drew little attention during the Senate's brief deliberations on the treaty.³⁰ An unexamined assumption that U.S. practices conformed fully to the 1951 Convention's requirements permeated the proceedings, and executive spokespersons assured the Senate that the 1967 Protocol could be implemented without changes in the statutes. Although this was true, the record suggests that the Senate probably did not fully appreciate the significance of the treaty with respect to the withholding of deportation. After accession to the 1967 Protocol, the United States came under a firm legal obligation to implement § 243(h), a discretionary provision, so as not to conflict with the mandatory requirements of Article 33 of the 1951 Convention, the *nonrefoulement* provision. In any event, the treaty deliberations clearly did not provoke consideration of any difficult issues concerning the substantive legal provisions or the adjudication procedures that would be used to implement them. No changes were made at the time in the substantive statutory requirements affecting political asylum.

There matters stood until Congress considered the bills that

²⁸ See, e.g., 8 C.F.R. §§ 236.3(e), 253.1(f) (1978) (referring to limited circumstances in which otherwise excludable refugee aliens may benefit from parole). The general authorization for parole appears in INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1988). See generally T. ALEINIKOFF & D. MARTIN, *supra* note 3, 232-36.

²⁹ See *supra* note 12.

³⁰ See S. EXEC. DOC. K, 90th Cong., 2d Sess. (1968) (transmittal materials from executive branch); S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. (1968) (Committee report on the 1967 Protocol, including a transcript of the hearings).

were to become the Refugee Act of 1980. The political branches took up refugee issues at that time primarily because of the difficulties encountered in coping with the massive refugee outflows from Indochina—classic overseas refugee issues.³¹ Even though asylum applications were increasing throughout the period of legislative deliberation and a significant political and judicial controversy was brewing in Florida regarding Haitian asylum seekers, asylum was again largely a legislative afterthought. Nevertheless, Congress made some important improvements in the asylum realm, urged on by UNHCR and by activists who were becoming more vocal about domestic asylum issues. First—a matter of particular UNHCR concern—Congress changed INA § 243(h) to a mandatory form, leaving no doubt about the obligatory character of the *nonrefoulement* provisions in domestic law, and specifying that the provision applies to both exclusion and deportation.³² Second, Congress finally added an express “asylum” provision to the INA, in the form of a new § 208.³³ It replaced earlier haphazard administrative practice with a new, express, and clarified immigration status for those recognized as refugees after applications filed in this country.

Section 208 states that the Attorney General has discretion to grant asylum to aliens who meet the definition of refugee provided in the new INA § 101(a)(42)(A).³⁴ That section, in turn, tracks the 1951 Convention definition; the central qualification is a “well-founded fear of persecution” on account of the same five factors listed in the Convention.³⁵ The new immigration status, called “asylee” in the regulations, clarifies the alien’s entitlements to certain benefits in this country. It also enables him, after a minimum of one year as an asylee, to obtain full lawful permanent resident status

³¹ See Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 30 (1981); Martin, *The Refugee Act of 1980: Its Past and Future*, in MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES: TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91, 92-96 (1982).

³² It now provides: “The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1253(h)(1) (1988).

³³ See 8 U.S.C. § 1158 (1988).

³⁴ See *id.*; see also 8 U.S.C. § 1101(a)(42) (1988) (for the new INA § 101(a)(42)(A)).

³⁵ See *id.*

through a statutorily authorized adjustment procedure.³⁶ No such regular adjustment procedure for asylees existed theretofore.³⁷

Again Congress paid little attention to details of adjudication procedures or substantive standards,³⁸ but one theme is clear from

³⁶ See 8 C.F.R. pts. 208, 209 (1989). The statute imposes an annual ceiling of 5000 on adjustments of asylees to permanent resident status. See 8 U.S.C. § 1159(b) (1988). This is a ceiling on adjustments only; it does not limit the number of people who may receive asylum in a given year. See generally Martin, *supra* note 31. Because asylum grants have run considerably above 5000 for the last several years, a backlog has developed and asylees must now wait much longer than one year before adjusting and thus receiving a "green card." See *December Visa Numbers Move Only Slightly*, 66 INTERPRETER RELEASES 1269-70 (1989).

³⁷ This statement must be qualified in one minor respect. The principal provision expressly meant for refugees from 1965 to 1980 was INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976). It allowed the use of six percent of the "preference" admission spaces each year for people who fled persecution in communist countries or the general area of the Middle East. The overwhelming majority of these refugee spaces (a total of 17,400 annually in the late 1970s) were used for overseas refugee programs, principally for the admission of Eastern Europeans selected in Western Europe, and in the late 1970s for Indochinese processed in Southeast Asia. See T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 620-23.

A statutory proviso to § 203(a)(7), however, permitted use of a portion of these admission spaces to grant permanent resident status to aliens who met the basic requirements but had been physically present in the United States for at least two years before applying for such adjustment of status. See 8 C.F.R. § 245.4 (1971). For example, a Polish national who overstayed a nonimmigrant visa could receive this status through a petitioning process carried out entirely in this country, if she proved the requisite two years' presence and flight from persecution. In a sense, she thus could be considered an asylee who graduated to full immigrant status under a permanent legislative provision. But the term "asylee" was never formally applied to the status of those who benefited from this proviso, and successful applicants moved directly to permanent resident status, usually from some sort of irregular status. Moreover, the qualifying standards departed somewhat from the provisions of the 1951 Convention (most graphically in the geographic limitations).

³⁸ Congress also applied the UN refugee definition to overseas refugee programs under INA § 207, 8 U.S.C. § 1157 (1988), which usually operate by way of INS interviews and screening in refugee facilities in third countries, such as Thailand or Austria. Because of this similarity in qualifying standards, one might assume that the system proposed here for asylum adjudications should therefore be applied to "refugee" adjudications in the overseas program. I would argue against such a conclusion. The widely different functional constraints operative in the overseas program counsel against identical determination systems.

First, simply because of physical location, the United States is able to apply numerous other screening criteria, as well as numerical ceilings, before deciding which refugees will be offered resettlement in the United States as part of the overseas programs. Historically, screening and selection for these programs have been based most importantly on these other criteria, such as family or other ties in the United States, rather than on satisfaction of the refugee definition. Therefore, pouring extensive resources into the adjudication of the latter issue often is not advisable. Second, in most such overseas circumstances, a decision to exclude certain applicants from the U.S. refugee program, on whatever grounds, does not necessarily mean return to their home country. Typically, such persons remain the

the legislative history. Congress intended the refugee standards to be applied neutrally and without ideological bias, in contrast to certain repealed refugee provisions that had made special provision for persons fleeing Communist countries.³⁹ Although occasional arguments have appeared, particularly during the Reagan Administration, for a more overtly political selection system,⁴⁰ neutral application represents by far the fairer and wiser policy. In the long run, favoring some groups in the asylum process only increases the political costs of returning other individuals, even when their claims are *accurately* rejected under an appropriately demanding application of the governing standards. Full consideration of this complicated

responsibility of the first-asylum country, which may be able to find other resettlement opportunities for them.

The procedures suggested here are crafted for the sharper choices faced in U.S. asylum processing, wherein the government has essentially only two options once a person is adjudged a refugee, owing to the person's presence on U.S. territory and the usual unwillingness of third countries to contribute resettlement spaces: grant asylum (or at a minimum *nonrefoulement*) and allow indefinite stay here or deny protection and return the applicant to the home country. In that setting, greater assurance of accuracy and professionalism in applying the refugee definition is essential. I have elaborated on these distinctions in Martin, *supra* note 31, at 111-14.

³⁹ See Anker & Posner, *supra* note 31, at 12, 14-18, 41-43, 60, 64. Most of the congressional statements criticizing the earlier "discriminatory" provisions specifically addressed the overseas refugee program, because asylum provisions received little attention. There is no reason to doubt, however, that Congress expected the same neutral application in asylum processing, where the case for strict but evenhanded application of the refugee definition is probably far stronger. See Martin, *supra* note 31, at 113-14.

⁴⁰ In 1986, the Justice Department under Attorney General Meese was reportedly drafting new asylum regulations that would have established a presumption in favor of those fleeing "totalitarian" countries—apparently including all Communist countries. See Pear, *Plan to Give More Poles Asylum is Under Study by Administration*, N.Y. Times, Mar. 30, 1986, § 1, at 1, col. 4. No such regulations ever appeared. In 1987, Mr. Meese did announce a set of steps relating to Nicaraguans. Although he was under pressure from some conservative circles hostile to the Sandinista government to grant blanket permission to stay ("extended voluntary departure") to all Nicaraguans, his announcement nominally only restated established standards for ordinary asylum determinations. In practice, however, that statement encouraged more Nicaraguans to come forward and apply, and it has led to a far higher grant rate for Nicaraguans applying for asylum in INS district offices. Special review by the central office in Washington was also required before any Nicaraguan was deported. As a result, such deportations became extremely rare, even when asylum was denied. See REFUGEE REPORTS, July 10, 1987, at 7-8; REFUGEE REPORTS, Aug. 14, 1987, at 8-10.

For broader consideration of the merits of a more expressly political refugee program (arguments that carry more weight with respect to an overseas refugee program rather than an asylum system), see M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 49-50 (1983); Suhrke, *Global Refugee Movements and Strategies of Response*, in U.S. IMMIGRATION AND REFUGEE POLICY: GLOBAL AND DOMESTIC ISSUES 157, 157-62 (M. Kritz ed. 1983).

debate is beyond the scope of this study. Nevertheless, the study is premised on the assumption that Congress's 1980 approach is to be continued. It concentrates on finding effective ways to implement a neutral system meant to protect those most seriously at risk of persecution, whatever the political orientation of the home-country government.

In the early years of asylum adjudication under the Refugee Act, immigration authorities and refugee advocates alike assumed that the threshold standard for applying sections 208 and 243(h) was identical.⁴¹ But the Act revived litigation over the precise understanding of that standard. The Board of Immigration Appeals (BIA), the body that hears appeals from immigration courts,⁴² had traditionally required the applicant to show "a clear probability of persecution" in order to gain withholding of deportation under the pre-1980 version of § 243(h), whereas refugee advocates had consistently urged the adoption of some more generous standard.⁴³ When the Board declined to change its "clear probability" formula after enactment of the Refugee Act, numerous applicants challenged the rulings in the appellate courts.⁴⁴ The circuits divided on the question, and the issue reached the Supreme Court in 1984 in *INS v. Stevic*.⁴⁵ That Supreme Court ruling unexpectedly split the qualifying standards. It ruled that the Board's traditional "clear probability" test still governs in order to claim the mandatory protection of § 243(h), while hinting, without expressly ruling, that some easier standard might apply under § 208.⁴⁶ *Stevic*, however, did provide a softening gloss on the Board's "clear probability" test, reading it to require a showing only that persecution is "more likely than not."⁴⁷

⁴¹ See, e.g., Helton, *INS v. Cardoza-Fonseca: The Decision and its Implications*, 16 N.Y.U. REV. L. & SOC. CHANGE 35, 39 n.31 (1987-88); Scanlan, *supra* note 2, at 625.

⁴² See *infra* notes 171-174 and accompanying text (discussing the Board of Immigration Appeals).

⁴³ See, e.g., *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971) ("The burden was . . . to prove that there is a clear probability that she will be subjected to persecution if deported."); *Cheng Kai Fu v. INS*, 386 F.2d 750, 753 (2d Cir. 1967) (stating that "only where there is a clear probability of persecution . . . is this discretion to be favorably exercised"), *cert. denied* 390 U.S. 1003 (1968); *In re Dunar*, 14 I. & N. Dec. 310, 318-19 (1973) (reaffirming "clear probability of persecution" standard after the U.S. became a party to the 1967 Protocol).

⁴⁴ See, e.g., *In re McMullen*, 17 I. & N. Dec. 542, 544 (1980) (reiterating the "clear probability of persecution" standard).

⁴⁵ 467 U.S. 407 (1984).

⁴⁶ See *id.* at 430.

⁴⁷ *Id.* at 429-30.

Three years later, in *INS v. Cardoza-Fonseca*,⁴⁸ the Court finally ruled squarely on the threshold standard determining eligibility for a discretionary grant of asylum under § 208. The majority overruled the BIA's continued assertion that the two standards remained identical, and forcefully stated that the § 208 test is more generous than the standard for § 243(h).⁴⁹ The Court declined, however, "to set forth a detailed description of how the well-founded fear test should be applied," leaving that term to acquire "concrete meaning through a process of case-by-case adjudication."⁵⁰ The § 208 test that has come to govern in the wake of *Cardoza-Fonseca* is most helpfully phrased as requiring "a reasonable possibility of persecution," or a showing of a "good reason to fear persecution"—but even these standards leave much leeway for application to the evidence presented in a particular case.⁵¹

These two Supreme Court cases bring curious results, to say the least. To my knowledge, no other country draws this sort of distinction between the substantive standards for determining refugee status, on the one hand, and *nonrefoulement* on the other.⁵² Where there are distinctions, they typically run in the opposite direction: toward shielding *more* people against return, even if they do not strictly meet the refugee definition and will not be granted the full range of bene-

⁴⁸ 480 U.S. 421 (1987).

⁴⁹ See *id.* at 423-24.

⁵⁰ *Id.* at 448.

⁵¹ See *In re Mogharrabi*, Interim Dec. No. 3028, slip op. (BIA June 12, 1987) (implementing the *Cardoza-Fonseca* ruling and spelling out new guidelines for asylum cases). Unfortunately, however, *Mogharrabi* followed the lead of a Fifth Circuit case, *Guevara-Flores v. INS*, 786 F.2d 1242 (5th Cir. 1986), and restated the standard as follows: "[A]n applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." *Mogharrabi*, slip op. at 9.

This formulation is misleading and unhelpful. If there is any significant level of persecution in a country, a reasonable person would fear becoming its victim, simply because of residence in that society, even if the abuses, to date, have never been directed at him or persons like him. He may recognize that the chances of actually being persecuted are slim, but we surely would not count him out of the realm of reasonable persons if he harbors a fear of persecution. In short, a "reasonable person" would fear persecution well before the time when we would consider that the persecution has become a "reasonable possibility."

The Board continues to invoke the "reasonable person" standard but appears in practice to look for a "reasonable possibility of persecution"—a more objective inquiry—before granting asylum. It would promote greater candor in adjudication to revert to exclusive use of the "reasonable possibility" formulation, which is, after all, the precise wording used by the Supreme Court in dictum in *Stevic* and *Cardoza-Fonseca*.

⁵² See Helton, *supra* note 41, at 39, 53.

fits that come with formal asylum.⁵³ Moreover, this American bifurcation is subject to substantial objection on policy grounds. It would permit American immigration authorities to deny asylum, perhaps quite frequently, in the exercise of discretion. Indeed, the Supreme Court in *Cardoza-Fonseca* went out of its way to emphasize that the Attorney General has discretion over these matters, and it plainly considered that the holding would increase his "flexibility" in responding to refugee crises.⁵⁴ Ostensibly this means that the Justice Department could even deport to their home country persons already judged to be "refugees" under the *Cardoza-Fonseca* standard, if they fall short of the showing required to claim the mandatory *nonrefoulement* protection, as interpreted in *Stevic*.⁵⁵

To their genuine credit, the immigration authorities to date have avoided any such draconian use of the flexible discretion the Supreme Court ratified in *Cardoza-Fonseca*. The BIA has even moved, quite wisely, to limit discretionary denials of asylum and thus provide the more complete protection of asylee status for nearly all who meet the lower § 208 threshold.⁵⁶ As a result of this administrative practice, the only important test, in the vast majority of today's asylum cases, is the more generous § 208 standard, the "well-founded fear of persecution" test. If the alien meets this threshold qualification, and is also found worthy of the relief as a matter of discretion (as now usually happens), then there is no reason to consider the issues raised by § 243(h), because asylum status, by definition, carries with it protection against deportation or exclusion.⁵⁷

⁵³ See, e.g., Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 900-02 (1986) (describing these practices).

⁵⁴ See 480 U.S. at 444-45, 449-50.

⁵⁵ These points are developed at greater length in T. ALENIKOFF & D. MARTIN, *supra* note 3, at 664-67; *id.* at 79-80 (Supp. 1987).

⁵⁶ See, e.g., *In re Pula*, Interim Dec. No. 3033, slip op. (BIA Sept. 22, 1987) (holding that in the absence of adverse factors, asylum should generally be granted in the exercise of discretion). For a comprehensive review of these issues, urging that discretionary denials of asylum be used rarely if the individual is found to be a refugee (an approach quite similar to that ultimately adopted in *Pula*), see Anker, *Discretionary Asylum: A Protection Remedy for Refugees under the Refugee Act of 1980*, 28 VA. J. INT'L L. 1 (1987). See also Anker & Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca*, 1 INT'L J. REFUGEE L. 67 (1989); Anker & McGrath, *The New Battleground of Asylum Eligibility*, in WORLD REFUGEE SURVEY—1988 IN REVIEW 29 (1989) (arguing that the BIA has begun to take a narrower view of what constitutes persecution and has thus made it more difficult for refugees from countries in the midst of civil war to gain refuge in the U.S.); Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 SAN DIEGO L. REV. 999 (1985) (discussing the recent expansion of administrative discretion and limits, both domestic and international, on the exercise of that discretion).

⁵⁷ See *In re Mogharrabi*, Interim Dec. No. 3028, slip op. at 3 (BIA June 12, 1987).

Even if the bifurcation of standards someday becomes more important in the administrative scheme, it will have no significant bearing on the issues of procedural design considered in this study. As the Board has recognized, "the core of evidence and testimony presented in support of the asylum and withholding applications will in almost every case be virtually the same."⁵⁸ Consequently, the basic process of information gathering and evaluation will not differ, whatever the final calibration of the substantive legal standard. In principle, adjudicators must in either case first reach a judgment about the level of danger faced by the applicant in the home country. Only after making that combined factual and predictive assessment will they apply the respective legal test in order to determine whether to say yes or no to the application for the precise protection at issue. In what follows, therefore, reference to "asylum" determinations should be taken to encompass the adjudication process necessary to apply the *nonrefoulement* standards as well.

II. THE POLICY CONTEXT

A. *Angles of Vision*

1. The Asylum Tradition

The commitment to affording asylum to the persecuted is deeply rooted in American experience and tradition. The Statue of Liberty is a treasured icon, perhaps the purest single symbol, in a richly diverse nation, of our national self-identity. Furthermore, awareness of the grave consequences that may await a refugee wrongfully returned to the home country plainly deepens this commitment. No successful policy can ignore the instinctively favorable reaction that refugees evoke from the American public, politicians, and even (or especially) judges. Refugee advocacy groups know that they have a ready hold on public imagination, provided only that they can persuade their listeners that the objects of their advocacy are indeed refugees. This is as it should be. It is a proud tradition, one that should be preserved and strengthened.

Unfortunately, the very vigor of this tradition carries the seeds of difficulty once it is translated into administrative operation. As will be seen, accurate asylum determinations require the careful application of expertise to a body of information about the individual asylum seeker that is, at best, difficult to marshal. But few Americans

⁵⁸ *Id.* at 12.

think of this as a job for experts. Few are disposed to defer to the judgments of the agency primarily responsible for these decisions,⁵⁹ if the outcomes conflict with their own sense of obligation to America's heritage. This attitude accounts, perhaps, for the ambitious interventionist stance sometimes taken by judges,⁶⁰ and for the impulse toward sudden swings in policy that can come when a new set of executive branch officials becomes involved in the process.⁶¹ It also means that debates on asylum issues often become bitterly polarized, for those who oppose deportation of unsuccessful asylum applicants often see the matter as a life-or-death issue.

These attitudes have an important operative significance for asylum adjudication reform. Any reforms seen as substantially more restrictive will face a heavy burden of proof in the public, the media, and Congress. Numerous earlier reform efforts have been defeated by resistance rallied in those forums by advocacy groups skillfully drawing on the Statue-of-Liberty tradition. If stalemate or retrenchment is to be avoided, reforms cannot be done on the cheap. They must include ample protections designed to win the support of relevant domestic audiences (including judges) by giving assurance that any new restrictions will not fall unjustly on deserving asylum seekers.

2. The Need for Control; Asylum as a Loophole

There is, however, another important angle of vision on the promise of asylum, and it prevails with some domestic constituencies. This outlook derives from the singular trumping power of a successful asylum claim. Such a claim overcomes virtually all the other qualifying requirements for immigration to the United States. It also moves the applicant to the head of the line for early perma-

⁵⁹ This reaction is no doubt fortified by the low esteem that immigration agencies usually enjoy within the bureaucratic hierarchy. See M. MORRIS, IMMIGRATION—THE BELEAGUERED BUREAUCRACY 87-94 (1985). Sometimes this attitude bursts forth in startling fashion. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 451-52 (1987) (Blackmun, J., concurring) (leveling harsh criticism at INS—the wrong agency (it was the BIA)—in an opinion that takes little account of the complexity of the issues at stake).

⁶⁰ See, e.g., *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442, 455 (S.D. Fla. 1980), *modified sub nom.* *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

⁶¹ For example, in his early months as Attorney General, Edwin Meese reportedly sought ways to change asylum policy and make asylum more nearly automatic for those fleeing Communist countries, as distinguished from those fleeing "authoritarian" countries. See N.L. ZUCKER & N.F. ZUCKER, *THE GUARDED GATE: THE REALITY OF AMERICAN REFUGEE POLICY* 143 (1987); *supra* note 40.

nent residence rights, even if he first established his presence in the territory in knowing violation of the regular provisions of the immigration laws. Viewed in narrow compass, this too is as it should be. Those who have been victimized by persecution should indeed receive, early on, a secure new status that will allow them to rebuild a new life in a new homeland, without undue insistence on the bureaucratic niceties of ordinary immigration law.

There are millions of people around the world, however, who face no substantial threat of persecution but who would value such a chance at permanent residence in a stable and wealthy nation.⁶² In an apt simile, Michael Walzer has compared the affluent Western democracies to "élite universities, besieged by applicants."⁶³ Lacking family ties or scarce job skills, most of these "applicants" have no real prospect of success through any ordinary legal channel. It should not be surprising, then, that those who learn about the power of a claim to refugee status might choose to try their luck with an asylum application. After all, the only clear requisites for such a filing are physical presence on the soil of a Western democracy and persistence in asserting the claim. The potential is so promising that it has called into being a new class of entrepreneur, "travel agents" who arrange for transportation and also instruct their clients on how to file for asylum once they encounter officials in the targeted Western country.⁶⁴ Seen in this light, asylum becomes a major loophole

⁶² Lest this sentence be thought unduly ethnocentric or alarmist, one should add an important qualification. For most such people, their first choice would surely be to enjoy stability and prosperity at home, in a political and cultural environment with which they are familiar. Indeed, such attachments to home will doubtless always hold most of the population there, even if Western countries suddenly become much more hospitable to asylum claims. Alarmist cries suggesting that liberal asylum policies may cause whole countries to empty out into a migrant stream to the North are thus clearly exaggerated. Cf. Rudge, *Don't Blame the Victim*, WORLD LINK, May 1988, at 68 (warning against "the apocalyptic scenario suggesting the whole world plans to seek asylum" in the West). But, given that stability and prosperity are not realistic medium-term prospects in many developing nations, it is quite natural that some proportion of the population will begin looking elsewhere. And even if the proportion is low relative to total home-country population, the absolute numbers of migrants can become sufficiently high to pose a major political problem in the receiving state.

⁶³ See M. WALZER, *supra* note 40, at 32.

⁶⁴ See, e.g., E. RATUSHNY, A NEW REFUGEE STATUS DETERMINATION PROCESS FOR CANADA 20 (1984) (a report to the Minister of Employment and Immigration, noting reports of such agents making arrangements for "multiple claimants who have read in local newspapers of the ease of claiming refugee status in Canada"); Arbenz & Zürcher, *The Co-ordination of the Asylum Policies of the European States*, in THE LAW OF ASYLUM AND REFUGEES: PRESENT TENDENCIES AND FUTURE PERSPECTIVES 126, 127 (Council of Europe 1987) (reporting on travel agents taking asylum seekers to

that gravely threatens the overall structure of deliberate control over immigration—control that is also highly valued by the public, and by politicians and judges.⁶⁵

Two public values, not often well articulated or conscious, but nonetheless strongly held, thus come into conflict in the asylum program.⁶⁶ On the one hand stands the promise of refuge to the persecuted, on the other the demand for reasonable assurance of national control over the entry of aliens. If events force confrontation and a stark choice between the two, it seems likely as a matter of practical politics that the control principle would win over the refuge principle.⁶⁷ Refugee advocates should take this danger to heart. They too have a major stake in minimizing the tension between the two goals by helping to structure a workable and reassuring asylum system. As a former UN Deputy High Commissioner, Richard Smyser, recently observed in a perceptive book: "The public will not allow govern-

Europe in the guise of tourists); Teitelbaum, *Political Asylum in Theory and Practice*, 76 PUB. INT. 74, 79 (1984); *Welcome and Goodbye*, ECONOMIST, Jan. 7, 1989, at 35; Applebome, *Rings Smuggling U.S. Aliens Gain Sophistication*, N.Y. Times, Mar. 2, 1989, at A23, col. 1. Most officials and a few private attorneys interviewed for this study also had tales about the schemes carried out by arrangers or organizers.

⁶⁵ See, e.g., *Jean v. Nelson*, 727 F.2d 957, 975 (11th Cir. 1984) (expressing concern that plaintiff's position "would ultimately result in our losing control over our borders"), *modified*, 472 U.S. 846 (1985); T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 723 (quoting Attorney General Smith as stating that we, as a nation, had "lost control of our borders"); *Public Opinion Poll Reveals Support for Border Security*, IMMIGR. POL. & L., Apr. 20, 1989, at 5; see also Reitz, *The Institutional Structure of Immigration as a Determinant of Inter-Racial Competition: A Comparison of Britain and Canada*, 22 INT'L MIGRATION REV. 117, 131 (1988) (discussing the importance of sustaining public perception of control over immigration).

⁶⁶ See E. HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 10-15 (1986) (poll findings reflecting ambivalence on the part of Americans regarding immigration control); Pear, *New Restrictions on Immigration Gain Public Support, Poll Shows*, N.Y. Times, July 1, 1986, at A1, col. 5 (reporting polls indicating "that Americans have contradictory, ambivalent feelings about immigration"). Even more debilitating, each of the respective attitudes is likely to prevail at different points in the policy process: Restrictionism in the early stages of a perceived massive influx can be replaced by doubt and generosity as the time nears for placing identifiable individuals on a plane home. This is a recipe for stalemate. See Martin, *supra* note 1, at 12-13.

⁶⁷ In 1986, for example, the Swiss Parliament modified its law on asylum in response to the substantial increases in asylum applications that country was experiencing. In addition to enacting various procedural changes, Parliament made it easier for the Federal Council to derogate from the ordinary statutory guarantees of asylum. Theretofore such derogation was permissible only in times of armed conflict; since the 1986 law, derogation is also authorized in peacetime when there is an "extraordinary" influx of asylum seekers. See *Loi sur l'asile du 5 octobre 1979*, Recueil officiel des lois et ordonnances de la Confédération suisse [RO] 1980 at 1717, *amended* Modification du 20 juin 1986, art. 9(1), RO 1987 at 1674 (codified at Recueil systématique du droit fédéral [RS] 142.31).

ments to be generous if it believes they have lost control.”⁶⁸ Asylum will always be an inherently unruly component in an immigration system that usually functions with tidy categories and elaborate advance screening. But its unruliness can be curbed, and public support thereby increased, if we can create a system capable of saying “no” to the unqualified—fairly, but firmly and expeditiously—while promptly welcoming the meritorious applicant.⁶⁹

B. *Factual Issues*

In principle, it should be possible to distinguish between genuine refugees and those who do not qualify, thereby both honoring the asylum tradition and closing the loophole to those whose claims are meritless. But, for several important reasons, that task is far more difficult than it might initially appear.

1. Lack of Clarity Concerning the Substantive Legal Standard

Although Americans (along with most of the Western world) are virtually united in a commitment to protect refugees, they are far from united in a common conception of “refugee.” Everyday parlance tends to treat anyone fleeing life-threatening conditions as a refugee, whether the source of the threat be natural disaster, foreign invasion, civil unrest, or deliberate persecution.⁷⁰ The legal framework employs a narrower concept than this journalistic usage, and the 1951 Convention definition might be expected to provide the basis for a unified common understanding, built around the phrase “well-founded fear of persecution.” But this phrase can also take on a variety of shapes, from highly expansive to narrowly crabbed, often depending, it seems, on whether the speaker wishes to include or exclude a particular group of claimants.⁷¹

One common mistake, made by both the left and the right, is to assume that the existence of serious human rights problems in a country should translate into a finding that virtually all emigrés from

⁶⁸ W. SMYER, *supra* note 20, at 119.

⁶⁹ See also THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT 165 (1981) [hereinafter SELECT COMMISSION] (reaching similar conclusions).

⁷⁰ See generally Shacknove, *Who is a Refugee?*, 95 ETHICS 274 (1985) (discussing the various conceptions of “refugee” held by society and selected international organizations).

⁷¹ See C. KEELY, GLOBAL REFUGEE POLICY: THE CASE FOR A DEVELOPMENT-ORIENTED STRATEGY 6-11 (1981).

that country are refugees.⁷² Indeed, the language of the 1951 Convention can be made to fit this conception: If persecution occurs in the home country, any expatriate's claimed fear of it upon return is well-founded. The fear is not fanciful; it is based upon proven fact. If the legal standards conformed to this conception, adjudication would be greatly simplified, for it could then be based on sweeping categorical judgments that would be easy to pronounce and administer.

The case law makes clear, however, that the "well-founded fear" standard sets a higher threshold and ordinarily requires a far more individualized inquiry.⁷³ Partisans in the debate over legal doctrine usually accept this narrowing gloss,⁷⁴ even if it does not always pene-

⁷² Such a reading underlies oft-heard complaints that our asylum policy is "out of sync" with our human rights policy, or more broadly, with our foreign policy. See, e.g., Dreifus, *No Refugees Need Apply*, ATLANTIC, Feb. 1987, at 32, 35 (quoting INS General Counsel Inman to this effect); Pear, *supra* note 40 (quoting an unnamed Reagan Administration official stating that deporting Nicaraguans was inconsistent with the lobbying effort to win support for the contras); Hansen, *No Way to Treat Solidarity Refugees*, N.Y. Times, Apr. 1, 1985, at A21, col. 1 (arguing that INS denials of asylum to Poles undercut the credibility of our foreign policy).

⁷³ See, e.g., Vilorio-Lopez v. INS, 852 F.2d 1137, 1141 (9th Cir. 1988) (holding that there must be "specific evidence . . . to support the alien's claim that persecution likely would be directed toward him as an individual" (quoting Platero-Cortez v. INS, 804 F.2d 1127, 1130 (9th Cir. 1986))); Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (holding that an applicant must "present specific facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear that he or she will be singled out for persecution . . ."); *In re Mogharrabi*, Interim Dec. No. 3028, slip op. at 4 (BIA June 12, 1987) ("It is clear that to a large degree the meaning of 'well-founded fear' can in fact only be determined in the contexts of individual cases").

⁷⁴ Some authors argue that protection of a wider range of endangered asylum seekers, such as those fleeing civil war, is now required as a matter of customary international law. See, e.g., Goodwin-Gill, *supra* note 53, at 902 (1986) (arguing that customary international law incorporates this mandate as a component of *nonrefoulement*); Perluss & Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 554-55 (1986) (arguing on the basis of an alleged "customary norm of temporary refuge"); see also Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, art. 1, 1001 U.N.T.S. 46, 47 (This treaty's definition of "refugee" includes those covered by the definition of the 1951 Convention definition as well as those who flee "external aggression, occupation, foreign domination or events seriously disturbing public order"). But these authors generally do not dispute the conclusion stated in the text concerning the application of the 1951 Convention definition. See Hailbronner, *Non-refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857, 880-87 (1986) (arguing that even states with expansive refugee policies have not surrendered the discretion to retreat to the narrower 1951 Convention standards). For a brief discussion of American practice in this regard, using the device of "extended voluntary departure," see *supra* note 18.

trate into public debate on the issue. Because legal standards demand individualized scrutiny, adjudication obviously requires a more sophisticated and difficult factual inquiry. The inquiry must first strive to assure the marshalling of all accessible information that might bear on the individual's circumstances and the conditions of the country. But just gathering that information is not sufficient, for in this contentious sphere, both governments and exiles may have significant reasons to distort their accounts of the facts or manufacture them from whole cloth. Crucially, asylum adjudication must therefore include the capacity to evaluate the assembled information in order to decide which is trustworthy and which is doubtful. Adjudicators must have the authority, and the confidence, simply to reject some of the information tendered to them.

The legal standards thus require that applicants show something more than simply that human rights abuses occur in the home country.⁷⁵ That "something more" is usually understood as a showing that the applicant is likely to be targeted by the persecutors upon return. Even after the Supreme Court's *Cardoza-Fonseca* decision, there remains considerable room for dispute over just how much more of a showing this entails. Must the claimant show she would be "singled out" by the persecutors? How sharply focused must the threat be? What is relevant and probative evidence of such a threat? Must the applicant's testimony be corroborated? And further, what exactly is "persecution"? Is sustained discrimination sufficient, or is something more such as a threat to life or freedom required?⁷⁶

These disputes continue in the literature, in public debate, and in American and foreign case law. Although some progress has been made in refining the standards and achieving a more unified conception, large differences of view abide. Ideally, the Board of Immigration Appeals, the principal specialized custodian of legal doctrine in this field, would develop a body of doctrine that would refine and unify the understandings of the standard. The Board, however, has had difficulty playing this role, in part because it receives little deference from the reviewing courts in this field. Hence, splits among the

⁷⁵ See, e.g., *Martinez Romero v. INS*, 692 F.2d 595, 595-96 (9th Cir. 1982) (holding that the reported anarchy in El Salvador, without other special circumstances, is insufficient to preclude return of an alien to that country by the INS).

⁷⁶ For a thorough exploration of the case law on these issues, see Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327 (1986).

circuits develop and persist,⁷⁷ and the Supreme Court is not in a position to resolve more than a handful of such disputes.

2. , The Coast of Bohemia

Compounding this substantive legal problem are the images we (both citizens and government officials) bring to judgments about asylum policy. The legal standard looks, in most cases, toward a finely calibrated individualized judgment of the risk of persecution the applicant would face in the homeland. The judgment must be based, to some extent, on general information about human rights conditions in the home country. But the primary reliance will fall, most of the time, on information specific to that individual.⁷⁸

Public debate on asylum policy, however, proceeds in cruder terms. Partisans are often ready to make sweeping judgments, by nationality, about the merit of large groups of asylum seekers. Two leading schools of thought have been prominent in the debate. The first, which has long dominated actual outcomes, assumes that virtually anyone from a Communist country would face persecution upon return. Holders of this view find it nearly unthinkable that the government could contemplate deportation.⁷⁹ A second school makes

⁷⁷ For example, there is currently a circuit split as to the meaning of persecution on account of a political opinion. *Compare* Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir.) (requiring personally-held political opinion to qualify for asylum), *cert. denied*, 484 U.S. 826 (1987) with Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987) (allowing personal reasons to qualify the applicant for asylum). There is also a split as to the circumstances under which threats by guerrillas are sufficient to establish a "well-founded" fear. *Compare* Arteaga v. INS, 836 F.2d 1227, 1233 (9th Cir. 1988) (finding well-founded fear) with Rodriguez-Rivera v. INS, 848 F.2d 998, 1006 (9th Cir. 1988) (failing to find a well-founded fear).

⁷⁸ This statement must be qualified when the asylum claim is based on group characteristics, such as persecution directed at all members of a religious minority, or perhaps persecution that is so indiscriminate that virtually all who manage to escape should be recognized as refugees (I have in mind Pol Pot's Cambodia). For a helpful rethinking of definitional issues, see A. ZOLBERG, A. SUHRKE, & S. AGUAYO, *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 25-33, 269-75 (1989). The authors break down the sociological concept of refugees into three subgroups: (1) activists, whose political actions draw the wrath of the government; (2) targets, whose group affiliation (ethnicity, race, religion) is the reason for their oppression; and (3) victims, who are caught in a civil war's crossfire or are exposed to generalized social violence. *See id.* Only the first two readily fit into the legal definition derived from the 1951 Convention.

⁷⁹ *See, e.g.,* Pear, *supra* note 40 (reporting that rules being considered by the Reagan Administration "would establish a presumption that aliens fleeing [communist] countries had 'a well founded fear of persecution' and therefore met the statutory standard for obtaining asylum in this country"); Hansen, *supra* note 72 (suggesting that virtually all Polish nationals should qualify for asylum).

similar assumptions about Central American countries, particularly El Salvador and Guatemala.⁸⁰

a. *The Essential Problem*

This kind of stereotyping or oversimplification is unfortunately commonplace—and to a significant extent inevitable—in public debate and policy decisions. In a classic work, Walter Lippmann explored comprehensively the influence on policy of these “pictures in our heads.”⁸¹ In explaining how easily policymakers can err by relying on their own misconceptions about foreign lands, he wrote:

[T]he real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations. And although we have to act in that environment, we have to reconstruct it on a simpler model before we can manage with it. To traverse the world men must have maps of the world. Their persistent difficulty is to secure maps on which their own need, or someone else's need, has not sketched in the coast of Bohemia.⁸²

The “coast of Bohemia” problem bedevils both public debate and adjudication in the asylum field.⁸³ But perhaps the image for our purposes should be shifted from the littoral to the physiographical. Few nations enjoy a political geography characterized by a reliably fertile plain of steady human rights observance. Outcroppings of abuses appear, sometimes intermittent hills, sometimes whole mountain ranges of severe persecution. The partisans in refugee debates—as well as adjudicators and judges under the current system—are too often inclined, in looking at nations to which they are favorably disposed, to mistake mountains for hills—or plains. The same people, in looking at nations to which they are hostile or for

⁸⁰ See, e.g., Barker, *New Wave of Salvadoran Immigrants Revives Call for Refugee Status*, Wash. Post, Feb. 18, 1989, at B3, col. 1. (indicating that the flood of refugees is caused by human rights violations).

⁸¹ W. LIPPMANN, PUBLIC OPINION 3 (1960).

⁸² *Id.* at 16. For those who are rusty on their Eastern European geography, Bohemia is located in western Czechoslovakia. It has no coast.

⁸³ The problem has been noted in a few cases, although not in these terms. See, e.g., *Perez-Alvarez v. INS*, 857 F.2d 23, 24 (1st Cir. 1988) (quoting from dissenting opinion of BIA Member Heilman, warning immigration judges against “assumptions regarding the way other societies operate,” for they are often “proven to be totally wrong” upon a full hearing); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1496-97 (C.D. Cal. 1988) (finding that “impressions of INS agents and officials that Salvadorans come to the United States solely for economic gain” created barriers to the development of full and accurate information).

whose exiles they have (understandably) developed sympathy, often picture mountains where they should see hills, and then rush to the conclusion that the nation's exiles are refugees. Whatever the actual geography, it is also easy to forget that many people in those distant nations continue to inhabit the valleys even when the mountains loom large and forbidding.

b. *Boxes vs. Spectrums*

A related and persistent misunderstanding compounds the difficulties in achieving a sensible and widely supported asylum policy, and also occasionally complicates adjudication. Much of the debate proceeds as though there are two sharply different categories of persons who find their way into the asylum adjudication system in this country: refugees, on the one hand, and economic migrants (or simply "illegal aliens") on the other. A recent book on U.S. refugee policy (in other respects quite thorough and insightful) reflects this attitude:

Refugees are neither immigrants nor illegal migrants, although, like immigrants, they have forsaken their homelands for new countries and, like illegal migrants, they may enter those new countries without permission. But a refugee is, in the end, *unlike either*. Both the immigrant and the illegal migrant are drawn to a country. *The refugee is not drawn but driven*; often, he seeks not to better his life but to rebuild it, to regain some part of what he has lost.⁸⁴

Even if this sharply dichotomous view might, at one time, have captured the realities of refugee flows, it does not offer a helpful approach to today's asylum caseload. Today's dilemma is both tragic and surpassingly difficult precisely because, among current asylum applicants, refugees are so much like illegal migrants. Only an indistinct and difficult line separates those who should succeed on their asylum applications from those who should not. That is, most of those applying in the United States today were both drawn and driven, and they chose to come in response to a complex mix of political and economic considerations. Asylum seekers are not so different from the rest of us. We have a hard time deciding, particularly when we make difficult, life-altering decisions, and when we finally do choose a course of action, we act from a mix of motives.

Take the case of a hypothetical Haitian farmer. For years he has

⁸⁴ N.L. ZUCKER & N.F. ZUCKER, *supra* note 61, at xiv (emphasis added).

been anguished by the unbridled power that local officials, supported by militia units or bands of thugs, wield in the community. He knows of occasions on which they have terrorized those who resist their decrees, by burning a hut or killing a farm animal. But he also realizes that most people, who remain quiet, pay an occasional tribute, and raise no opposition, will be left alone. He endures this situation for many years, although he is more vocal than most of his neighbors about the community's problems. One year, his meager corn crop fails owing to the worst drought of the decade. He worries how he will feed his children, already showing initial signs of malnutrition. Shortly thereafter, he learns from friends about a boat that is about to depart for Miami, where, it is said, jobs are available and each day's pay exceeds a month's earnings in Haiti. They urge him to come along.

The choice is not an easy one. He consults with his family, and they talk about the crop failure and the political miseries of the region. They discuss the pain that would come from lengthy separation. They wonder whether the stories can be true about the jobs in Miami. Then they learn of a new episode of retribution visited on a farmer in a nearby valley, who apparently ran afoul of the local hierarchy and was left maimed by a nighttime attack. Some family members believe that this episode presages another serious outbreak of official violence; others think it is isolated and that things will quiet down as before. Pondering all of these factors, at first he is sure he will stay. Then, after a child endures a week of persistent illness, he decides that he should leave, in an effort to earn enough to pay for medical care and food for his offspring. The family ultimately concurs, even though it means scraping together nearly all their savings to meet the boat captain's fee for the journey. No thought is given to moving the whole family; they could not possibly afford the captain's charge.

Once this person arrives in Miami, should he be seen as a "drawn" economic migrant or a "driven" refugee? He did not lack choice. Although many considerations strongly pointed toward leaving, he weighed a variety of difficult factors and chose at this time to travel to Miami. He could have stayed and remained subject to the same range of political and economic risks, uncertainties, and privations. In fact, he was both drawn and driven, and the factors he considered were both economic and political.⁸⁵ Does the presence of

⁸⁵ Further evidence of the mix of motives appears, for example, in an extensive survey relating to Salvadorans in the United States. See S. MONTES MOZO & J.

economic considerations undercut his refugee claim? Or should we try to assess which was his primary or dominant motivation for leaving?⁸⁶ Or perhaps adjudication might center on the fact that the need to earn money for medical care—an economic consideration—was the immediately precipitating factor.

Each of the perspectives implicitly underlying these questions is misleading. We do not need to find that he was only driven, nor assess what his primary motivation was, nor the immediately precipitating event. The best way to understand asylum adjudication is to focus on the degree of risk he would face when he returns. If the risk of persecution is sufficiently substantial, his fear is well-founded, even if it was his need for funds to feed his children that sent him on the particular boat trip at the particular time. That he stayed home until economic considerations tipped the balance in his decision may be relevant—but only for the light it casts on the separate question concerning the degree of risk he truly faces. His refugee claim is not forever tainted because he thought about jobs in Miami or the need for money to feed his family.⁸⁷ Indeed, this would be abundantly clear if one could establish that shortly after his departure, which was precipitated, let us stipulate, by economic concerns, the local authorities expanded their violent suppression and actually began killing or jailing anyone who had ever publicly opposed the government or the local leaders.

The 1951 Convention definition best translates into workable adjudicative guidance only in this light. It does not ask how much of a role economics played in the decision to leave; it asks about risk levels upon return. The economic migrant/political refugee distinction, however phrased, is misleading and unnecessary.⁸⁸

VASQUEZ, SALVADORAN MIGRATION TO THE UNITED STATES: AN EXPLORATORY STUDY 11-14 (1988) (28.5 percent of Salvadorans surveyed said they emigrated exclusively for political reasons; 20.6 percent claimed both political and economic reasons; apparently the rest spoke only of economic or other nonpolitical reasons).

⁸⁶ See Anker & Posner, *supra* note 31, at 68 (suggesting—erroneously, in my view—that the applicant is a “refugee only if his ‘primary motivation’ is political”).

⁸⁷ See *United States v. Santos-Vanegas*, 878 F.2d 247, 252 (8th Cir. 1989).

⁸⁸ The majority opinion in *Cardoza-Fonseca* states that the definition “makes the eligibility determination turn to some extent on the subjective mental state of the alien,” and it later refers to “the obvious focus on the individual’s subjective beliefs.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987). Other commentary on the 1951 Convention also claims equal status for “subjective” factors. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 11-12 (1979)[hereinafter UNHCR HANDBOOK]. But no asylum adjudication system visited in the course of this study devotes any significant resources to inquiries into the applicant’s subjective state of mind; the fact of application for asylum is taken as sufficient indication that the

If all asylum applicants did fit neatly into one of two boxes—refugee or economic migrant—the adjudicative task would certainly be simplified. The job would simply be to unmask the impostors, those economic migrants who are base enough to pose as something they are not. Unfortunately, some people with authority over asylum decisions in Western countries sometimes speak of adjudications as though they did present such a morality play. They hasten to label as abusive, frivolous, or lawless those claims that simply fall short of the necessary showing.⁸⁹

But the world is not that simple. Asylum adjudication, it must be recognized, is at best a crude and incomplete way to respond to the complex realities that the world presents.⁹⁰ Our legal structure, for ultimately sound reasons, demands a simple yes or no answer to the asylum claim. But the dichotomous character of the results should not obscure the complexity onto which that yes-or-no grid is forced. Asylum seekers present a spectrum of situations, with only subtle shadings distinguishing the risk levels they face.⁹¹ Adjudication must draw a line at some point on that spectrum. Furthermore, it must do so with care, so that it protects those whose risks exceed the threshold, even if they happen to have joined a migration stream

applicant holds a subjective fear of return. Moreover, the central holding of *Cardoza-Fonseca* clearly contemplates primary inquiry into the probability of persecution—an objective determination. See Gibney, *A "Well-Founded Fear" of Persecution*, 10 HUMAN RTS. Q. 109, 110 (1988). A British court's effort to import a greater role for subjective fears (even if they could be shown objectively to be exaggerated) was overruled by the House of Lords in *R. v. Sec'y of State for the Home Dept. ex parte Sivakumaran*, 1 All E.R. 193 (H.L. 1988).

⁸⁹ For example, in a 1988 article, the then Minister of the Interior for the Federal Republic of Germany noted that only 9.3% of asylum seekers in 1987 were recognized as refugees. He then commented: "This implies that 90.7% of all those seeking asylum in West Germany *unlawfully claimed* to be politically persecuted." Zimmermann, *View From West Germany*, WORLD LINK, May 1988, at 65 (emphasis added); see, also *INS Responds to Central American Influx*, 65 INTERPRETER RELEASES 1311-1312 (1988) (comments by INS Commissioner Nelson suggesting that unsuccessful asylum claims are "abusive"). A perceptive critique of such attitudes appears in 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, 191-93 (1984).

⁹⁰ A pithy and revealing illustration of these complications, and of the effect of the pictures inside immigration judges' heads, appears in Neier, *Closing Remarks*, 16 N.Y.U. REV. L. & SOC. CHANGE 157 (1987-88) (recounting experiences of the author, vice-chairman of Americas Watch, as an expert witness in asylum cases in which similar home-country consequences were seen as economic phenomena in Central America and political phenomena in Eastern Europe).

⁹¹ See N.L. ZUCKER & N.F. ZUCKER, *supra* note 61, at 149 (recognizing this feature of much of refugee migration).

made up principally of those less severely threatened, who therefore lack, in this technical sense, a well-founded fear of persecution.

c. *Lessons*

These observations suggest two lessons with respect to asylum. The first focuses on the nature of public debate. Every effort should be made to avoid the use of dichotomous images and to break the ready links people rush to forge between human rights policy and asylum determinations. Obviously, an important relationship exists between human rights abuses in the home country and the merits of asylum claims by that country's nationals. But it is hardly a one-to-one correlation. Returning a high percentage of asylum seekers to a certain country is not necessarily inconsistent with a vigorous human rights diplomacy. Return pronounces no blessing on the home government's overall practices; it simply indicates that these particular applicants did not make the requisite showing of the risk of persecution. Similarly, granting asylum is not inconsistent with a policy of alliance and support for a democratically elected government. Many such regimes, particularly when newly installed, are only beginning a difficult process of curbing human rights abuses committed by the military, the police, or nongovernmental factions. We can support these efforts while still shielding the truly jeopardized targets of those incompletely controlled elements.

Second, and more important for the immediate object of this study, the adjudication process must be shaped with attention to the "coast of Bohemia" problem. Asylum adjudicators are given an extremely difficult job, particularly in light of the inaccessibility of the facts they must develop, the potential consequences of their judgments, and the public ambivalence concerning their task. No wonder they may be tempted to retreat into categorical images about safety and danger in foreign countries that will make the sorting process easier.⁹² Asylum reforms must therefore make allowance for this phenomenon and afford every opportunity, through initial training, continuous supply of reliable information, and well-crafted monitoring, for a redrawing of the pictures inside the adjudicators' heads to conform more closely to the reality of political life in the home countries.

⁹² See W. LIPPMANN, *supra* note 81, at 73-74.

3. Limited Accessibility of the Facts on Which to Base an Adjudication

Little has been done to analyze carefully the various elements that go into the difficult determination of whether an asylum seeker has a well-founded fear of persecution, but such analysis is integral to designing an effective adjudication structure. In rough fashion, the determination may be broken down into three parts: (1) classical retrospective factfinding about past events specific to the claimant—adjudicative facts, in the terminology of Professor Kenneth Culp Davis;⁹³ (2) broader determinations about the practices of the government or other alleged persecutors in the home country (often referred to as “country conditions”)—legislative facts; and finally (3) an informed prediction (not truly a finding)⁹⁴ about the degree and type of danger the particular applicant is likely to face upon return, a prediction based on a combination of the first two elements. These are not three separate steps performed sequentially. They are closely interwoven, and it will appear that acquaintance with the second element is especially helpful in performing the first task effectively. Each step presents unique challenges, unlike those faced in other administrative adjudications. Indeed, of all such adjudications, asylum may rest on uniquely elusive factual foundations.

a. *Adjudicative Facts*

To begin with, applicants typically base their claims on events in a distant land about which the U.S. government may have no independent information—matters such as their own past political activities, or specific abuses or threats directed at them or their families and friends. Of course, it is theoretically possible for the government to develop more information in an individual case, particularly once the applicant provides details, by assigning diplomatic person-

⁹³ See 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 15.2, at 138-42 (2d ed. 1980); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942). This framework has been criticized, particularly because in some circumstances it may be difficult to tell whether specific matters constitute adjudicative or legislative facts. See, e.g., Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536-37 (1970). Nevertheless, the distinction is sufficiently crisp to be quite illuminating in this setting. Judge Friendly used Davis's framework to make sense of the asylum adjudication process, and also to set forth limits on the appropriate use of State Department information in *Zamora v. INS*, 534 F.2d 1055, 1062-63 (2d Cir. 1976).

⁹⁴ See *Washington Post Co. v. United States Dept. of State*, 840 F.2d 26, 40-41 (D.C. Cir. 1988) (Bork, J., dissenting).

nel posted to that country to investigate. But sheer expense precludes such an effort except in a handful of cases, and the State Department freely admits that it rarely resorts to field checking. Such checking makes sense only where the information is likely to be reasonably accessible: for example, when it involves a well-known figure or relates to a large-scale event, such as a claimed political demonstration in the capital city, which can be readily confirmed or disproved. Moreover, even if the U.S. government would decide to dedicate greater resources to investigating more such cases, the investigations might yield little reliable information. If an ongoing threat of persecution truly exists, persons interviewed in the home country can hardly be expected to speak with candor to an unknown foreigner about such sensitive and dangerous matters.

In short, even the straightforward retrospective factfinding involved in asylum determinations is difficult to accomplish. Bona fide applicants are unlikely to have left their homelands with corroborating documentation or with eyewitnesses to critical events. On the other hand, fraudulent applicants can probably count on the government's inability to produce evidence disproving their stories.⁹⁵

Asylum determinations thus often depend critically on a determination of the credibility of the applicant, for he will usually be the only available witness to the critical adjudicative facts of the case.⁹⁶ Because that person also has substantial incentives to lie or to embroider the truth (and few disincentives),⁹⁷ this makes for a sys-

⁹⁵ At one time, administrators and courts tended to react to this problem with a dogmatic insistence on detailed corroboration of the applicant's claims. See *Nasser v. INS*, 744 F.2d 542, 544 (6th Cir. 1984); *Shoae v. INS*, 704 F.2d 1079, 1084 (9th Cir. 1983); *Kashani v. INS*, 547 F.2d 376, 379-80 (7th Cir. 1977). Wisely, most U.S. authorities now recognize that the individual's own account may be the only available evidence regarding his own situation and that it should be accepted if reasonably detailed and consistent. See, e.g., *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987); *Ananeh-Firemping v. INS*, 766 F.2d 621, 628 (1st Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984); *In re Mogharrabi*, Interim Dec. No. 3028, slip op. at 10 (BIA June 12, 1987) (stating that often the only evidence available is the applicant's own testimony, which is to be credited if it is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear").

⁹⁶ See generally Watkins, *Credibility Findings in Deportation Proceedings: "Bear[ing] Witness Unto the Truth*, 2 GEO. IMMIGR. L.J. 231 (1987) (the author is an immigration judge in San Diego).

⁹⁷ In principle those who falsify their applications are subject to criminal prosecution under statutes punishing false statements. But the inaccessibility of the factual information obviously makes proof of knowing falsehood quite difficult, and prosecutions are rarely, if ever, brought. The only sanction, then, is expulsion from

tem vulnerable to manipulation. I was struck, however, by the frequent comments from several participants I interviewed, particularly government decisionmakers and INS trial attorneys, indicating that the asylum system is saved from complete collapse largely by the admirable honesty of most of the applicants.

Again and again in the course of the interviews carried out for this study, participants in the process, on all sides of the issue, emphasized one fact: In the vast majority of cases, the only useful detailed evidence respecting adjudicative facts comes from the mouth of the applicant. This feature must therefore figure prominently in any serious effort at procedural and structural reform. The system must be designed to mine as much useful information as possible from the limited vein provided by the applicant's own testimony and his availability for questioning during any interview or hearing.⁹⁸

b. *Legislative Facts*

The second critical element of factfinding requires determinations about broader patterns of governmental behavior in the home country. For example, the asylum applicant may prove to the factfinder's satisfaction, through his own detailed testimony, that he was active as a union organizer for two years before leaving for the United States and that he heard stories of arrests of organizers in nearby towns before he left. But in order to assess the risk that the individual would face on return, the adjudicator must also learn from some source about relevant legislative facts. Does the government regard union organizers as opponents, subject to suppression? If so, what forms does the suppression take? Loss of a job or limitation of schooling options for organizers' children might not amount to persecution (even though it would constitute a human rights violation), but beatings, jailings, or killings in reprisal for peaceful union activity certainly would. If there have been some reports of such violence, how widespread are the abuses? Were they based on the victim's union affiliation or on some other characteristic? In other words, is the current applicant relevantly similar to other persecution victims? And has there been a material change in the country since those events, such as a complete revamping of the police forces

the country following denial of the asylum claim—the same consequence faced if asylum had never been sought.

⁹⁸ The BIA in essence recognized the importance of this process in a recent precedent decision that requires the asylum applicant to testify under oath at the hearing before the immigration judge; he cannot simply rest on the papers presented. See *In re Fefe*, Interim Dec. No. 3121, slip op. (BIA Aug. 1, 1989).

responsible for the earlier abuses, including reliable disciplining of the violators?

Each of these questions will be difficult to answer, both because such patterns change over time, sometimes quite quickly, and because persecutors do not spell out the range of characteristics they seek in their victims. If the available information shows any substantial level of persecution of union activists, then uncertainties should be resolved in the individual's favor. Thus, the claimant should receive the "benefit of the doubt" commonly prescribed in works on refugee law.⁹⁹ But the benefit of the doubt is hardly a magic formula, somehow dispensing with a need to reach a judgment about country conditions.¹⁰⁰

The individual applicant will not necessarily be in a position to provide insight on these wider matters, although the process should certainly allow for whatever assistance he or his counsel can provide. Most Western countries therefore support their adjudicators with well-supplied documentation centers staffed by professionals in information science. Fortunately, the last twenty years have seen a welcome proliferation of human rights reporting, both by governments¹⁰¹ and private human rights organizations,¹⁰² as well as

⁹⁹ See UNHCR HANDBOOK, *supra* note 88, at 48.

¹⁰⁰ The UNHCR Handbook, for example, at one point states that adjudicators "are not required to pass judgment on conditions in the applicant's country of origin," although it does suggest that some such knowledge may help in the assessment of the applicant's credibility. *Id.* at 12-13. This is simply wrong. Such knowledge is useful, to be sure, in the latter setting. But the adjudicator cannot avoid passing judgment more broadly on country conditions as an unavoidable part of the ultimate decision on the merits. In the example in text, the applicant's credibility may be relevant only in deciding whether in fact he engaged in the union organizing activities he claims. The adjudicator might then proceed to recognize him as a refugee because he credits, wholly apart from anything the applicant says, numerous human rights reports describing a campaign of persecution directed against union leaders.

¹⁰¹ The most comprehensive is the annual series of human rights country reports prepared by the U.S. State Department. See, e.g., SENATE COMMITTEE ON FOREIGN RELATIONS AND HOUSE COMMITTEE ON FOREIGN AFFAIRS, 101ST CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988 (Comm. Print 1989).

¹⁰² In addition to comprehensive annual volumes published by Amnesty International covering most countries of the world, see, e.g., AMNESTY INTERNATIONAL, 1988 ANNUAL REPORT, many organizations publish topical reports on conditions in a single country or region as the need arises. See, e.g., AMNESTY INTERNATIONAL, BURMA: EXTRAJUDICIAL EXECUTION AND TORTURE OF MEMBERS OF ETHNIC MINORITIES (1988); INTERNATIONAL LEAGUE FOR HUMAN RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW GROUP, A REPORT ON HUMAN RIGHTS IN THE REPUBLIC OF KOREA 1980-1985 (1985); LAWYERS COMMITTEE FOR HUMAN RIGHTS, EL SALVADOR: HUMAN RIGHTS DISMISSED—A REPORT ON 16 UNRESOLVED CASES (1986); ROTH, REPRESSION

increasingly sophisticated efforts to systematize the information-gathering process and facilitate sharing.¹⁰³ To minimize distortions in decisions about country conditions wrought by the needs of diplomacy, many countries assure clear separation of adjudicators from their foreign ministries, so that diplomats become only one source of input.¹⁰⁴ Of course, such systems presuppose that adjudicators are equipped to sort through competing accounts and reach their own judgments about country conditions.

Legislative facts should not be regarded, however, as simply something the adjudicator looks up or examines *after* he has completed the proceedings addressed to finding the adjudicative facts, even though much of his knowledge about country conditions will doubtless come from documentary sources rather than live testimony. Knowledge of political developments and patterns of persecution contributes toward making the final predictive judgment about risks faced if the individual returns home, but perhaps more importantly, such knowledge can also play a useful role in developing and assessing the adjudicative facts themselves.

This second use of knowledge about country conditions is often overlooked, but it remains crucial. An adjudicator thus equipped can better pick out those parts of the applicant's story that are most relevant, and can ask specific questions that will flesh out the testimony in the most helpful fashion.¹⁰⁵ Such expert questioning can also help expose inconsistencies and falsehoods more effectively. Since there are so few other checks on the asylum seeker's story (given that he is likely to be the only available witness to the key events), the system badly needs to make use of whatever other tools might be available for such assessment. But equipping adjudicators with such expertise is not just a device for spotting weaknesses or magnifying contradictions. Properly applied, it can also assist confused or inar-

DISGUISED AS LAW: HUMAN RIGHTS IN POLAND (Lawyers Committee for Human Rights 1987).

¹⁰³ See, e.g., Thoolen, *Refugees and Information Technology*, REFUGEES, OCT. 1988, at 34. Nongovernmental organizations have taken the lead in this sharing process with the active cooperation of the UNHCR, which has recently become the focal point for an international network. See Int'l Refugee Documentation Network, Circular No. 3 (Mar. 1989) (reporting, inter alia, on recent efforts to strengthen the network, including training courses for documentalists and an internship program at UNHCR's Centre for Documentation on Refugees (CDR) in Geneva).

¹⁰⁴ See Aleinikoff, *supra* note 89, at 234.

¹⁰⁵ See Martin, *Comparative Policies on Political Asylum: Of Facts and Law*, in 9 IN DEFENSE OF THE ALIEN 105, 109-11 (1987); Martin, *The End of De Facto Asylum: Toward a Humane and Realistic Response to Refugee Challenges*, 18 CAL. W. INT'L L.J. 161, 167-69 (1987-88) [hereinafter Martin, *The End of De Facto Asylum*].

ticulate applicants in presenting fully the particularized information that will cast positive light on their claims. All this argues for making sure, to the maximum extent possible, that the adjudicators are themselves highly knowledgeable about country conditions.

c. *Predictive Judgment*

Finally, the information on the adjudicative and legislative facts must somehow be put together to reach a judgment as to the likely threat to the particular individual. For most of the countries from which current applicants come, it will be clear that persecution occurs at the hands of the government or societal elements beyond fully effective control of the government. But what is the threat to this particular individual upon return? One must venture into the realm of prediction to decide. Cumulative expertise would also be of assistance here; such a judgment is not something that emerges routinely from the evidence placed on record in the case before a passive adjudicator.

It is also clear, however, that room for controversy will almost always remain. This is not a scientific prediction based on regular laws or formulas; it is an assessment that should be based, as much as possible, on conscientious attention to country condition information and individual facts. As a result, the measure of an adjudication system's success cannot be the attainment of nearly universal acceptance of the rightness of the results, particularly negative results leading to deportation from the country. Success consists instead in achieving sufficient acceptance of the process, including respect for the judgment and fairness of the decisionmakers, so that final grants and denials are regarded as authoritative.

4. Difficulties of Cross-Cultural Communication

One final complication deserves emphasis. As is apparent, much of the adjudication process will turn on assessment of the credibility of the applicant. Ordinarily, a decisionmaker judges credibility by probing the internal consistency and detail of the testimony about past events, observing the demeanor of the witness, and comparing the testimony to that person's earlier accounts or to other evidence regarding the events described. But because asylum applicants usually come from cultures sharply different from that of the United States, these ordinary guideposts to decision may not work well—or at least they must be applied with considerable allowance for cross-

cultural complications.¹⁰⁶ These complications have been ably catalogued and illustrated in a helpful article by Professor Kälén that should be read by all asylum adjudicators.¹⁰⁷ Persons interviewed for this study, particularly UNHCR personnel and attorneys for asylum applicants, frequently stressed that adjudicators must have the capacity to refrain from immediately applying tests and expectations derived solely from the culture of the haven state.¹⁰⁸

Many asylum seekers come from societies where the population inherently distrusts or fears government officials (and often lawyers). Nothing in their past experience prompts them to open up readily to strangers, particularly when speaking of highly sensitive events. Thus, it is not surprising that in their first hours or even weeks or months in the United States they might fail to appreciate the new climate here that allows them to speak more freely and assertively. Many private attorneys interviewed for this study reported their own difficulties in winning trust and thus gaining candid accounts from their own clients. One experienced asylum attorney provided a graphic example. He reported that after spending nearly thirty hours with a reticent client, a Haitian asylum seeker, he believed he was prepared for a hearing. The day before the hearing, the client supplied some new information that revealed an entire new dimension to the story that she had been afraid to discuss earlier. Many more hours of patient interviewing were required to piece together the newly revealed true story, and concomitantly to bolster the client's trust in the attorney that would be needed for effective direct examination.

Furthermore, psychological studies indicate that some of the strongest candidates for asylum may be those applicants with the greatest difficulties presenting their cases. Those who have been tortured or have witnessed the brutal slaying of friends or loved ones may have great difficulty retelling the key elements of their accounts.

¹⁰⁶ See generally Note, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 TEX. INT'L L.J. 139, 142-43 (1988).

¹⁰⁷ See Kälén, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230 (1986).

¹⁰⁸ A UNHCR officer in Canada suggested that the most important quality to be sought in an adjudicator is empathy: "Can this person understand what real refugees go through?" He emphasized, however, that people with this quality "can still be firm in saying no" when that is warranted; failure to reject the unqualified, she stressed, also "screws up the system." Interview with Paul LaRose Edwards, in Ottawa, Canada (Dec. 20, 1988).

At times, post-traumatic stress disorder may even block consistent memory of past events.¹⁰⁹

American decisionmakers unaware of these complications are likely to seize upon inconsistency and reticence (particularly about matters that most Americans would regard as of the greatest importance) as evidence of dissembling—for reasons that usually hold good within our own cultural context. These actions are not such ready signals of dissembling, however, when the individuals involved come from sharply different cultural backgrounds. A reformed system must equip its decisionmakers to avoid snap judgments and make adequate allowance for cross-cultural difficulties. But such awareness must also be employed with care. Some of the writings about cross-cultural sensitivity seem almost to assume that there is an innocent explanation for any stumble, vagueness, or change of story.¹¹⁰ This is not necessarily the case. A reformed system must also equip its adjudicators to sort through such phenomena and still be able to spot false tales—because sometimes inconsistency and reticence really do result from falsehood and not from more innocent explanations. The line to be walked is a fine one.

C. *The Imperative of Speedy Final Decisions*

The foregoing problems suggest genuine, indeed profound, difficulties in applying the legal standards with precision and fidelity. As long as these problems impair accurate decisionmaking, the system will have its own built-in magnet effect. When the process cannot reliably sort the qualified from the unqualified, asylum applicants drawn to the system will include not only those with a reasonable chance of qualifying, but also others whose claims are marginal or nonexistent. They will come hoping to take advantage of these very weaknesses to gain an undeserved benefit, namely, the award of asylum status and possibly eventual permanent residence.

In later sections, I propose measures to make the maximum use

¹⁰⁹ See, e.g., Allodi, Randall, Lutz, Quiroga, Zunzunegui, Kolff, Deutsch & Doan, *Physical and Psychiatric Effects of Torture: Two Medical Studies*, in *THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS* 58, 65-72 (E. Stover & E. Nightingale eds. 1985); Note, *supra* note 106, at 148-50; Rovner, *The Torture of the Refugee: Why Judges Don't Believe*, Wash. Post, Sept. 2, 1986 (Health Section), at 10, 11.

¹¹⁰ For a court decision that verges on this approach, rejecting the immigration judge's negative credibility finding and asserting that earlier untrue statements and changed stories actually *supported* the persecution claim, see *Turcios v. INS*, 821 F.2d 1396, 1400 (9th Cir. 1987).

of the available information sources in service of the goal of accuracy. One might think that such an achievement would suffice to accomplish the fundamental objectives of our asylum program and also curb the magnet effect—by providing asylum to the persecuted and saying “no” to those who seek to use asylum mainly as a loophole. If accuracy were all we had to accomplish, we could embrace elaborate schemes that promise to serve that goal, even if they consumed a large amount of time to reach final decisions and employed multiple layers of administrative and judicial consideration as a check against error. Unfortunately, however, the magnet problem is more complex, in ways that demand an end to undue layering so as to preserve the capacity for speedy final and enforceable determinations.

1. The Scope of the Magnet Effect

The magnet effect is not solely the product of perceived chances to gain full asylum despite a weak case. Benefits that applicants can expect to enjoy *before* a final ruling is issued in the case—a period that now can stretch for months, and usually lasts years—also contribute importantly to that phenomenon. Of course, to some extent both accuracy and speed are goals of any administrative adjudication system. But the need for expeditious finality is more intense here. In other adjudication processes, such as those governing disability claims or public welfare or licensing, the applicant ordinarily does not enjoy the benefit sought until there has been a determination on the merits that he fully qualifies. Nothing in the application and waiting process itself tempts the unqualified to clog the system. With political asylum, in contrast, the simple act of applying has usually brought important benefits that magnify the attractions, whatever the ultimate determination on the merits. With a few recent exceptions, the very act of applying for asylum has resulted, after a brief delay, in the issuance of preliminary papers that both authorize employment and permit free movement within U.S. territory. These two features comprise the bulk of the main benefits expected from asylum itself, particularly for those who know they have at best weak claims.¹¹¹

The longer the period of enjoyment that comes simply from the

¹¹¹ To be sure, the uncertainty about the duration of such benefits is a disadvantage. But it is a disadvantage that is doubtless felt more acutely by true refugees for whom there are genuinely grave risks if they return. Those who know they face little risk at home harbor fewer concerns about what will transpire once the asylum-seeker stage ends. In the meantime, they have nearly complete access to the job market and the other features of life in a stable, wealthy, and free society.

act of applying for asylum, obviously the greater the attraction in filing a marginal claim. When word gets back to the home countries of those who initially benefit from such arrangements during the asylum-application stage, more and more people with marginal or non-existent claims are likely to come, hoping to achieve at least the benefits of years of productive working life in a wealthy country, whatever the ultimate outcome.¹¹² A successful asylum system must thus place a high priority on speed in adjudications (including all stages of review) in order to avoid these incentives for marginal asylum seekers.

2. The Alternative of Deterrent Measures

Of course, speedier final decisions are not the only way to eliminate the artificial attractions of the asylum-seeker stage. One could simply end the provision of free movement and work authorization during this period. Many Western countries have been moving in this direction, imposing a variety of restrictions and deterrents that have raised the concern of UNHCR and provoked harsh condemnation from the nongovernmental organizations (NGOs) that support asylum seekers and advocate refugee causes. These restrictive practices include denials of work authorization, enforced housing in austere communal facilities, other limits on freedom of movement, and sometimes full-scale detention in jail-like facilities.¹¹³

¹¹² Canada, for example, experienced an exponential growth in asylum claims filed by nationals of Trinidad and Tobago throughout 1987-88 (reaching 2739 such applications in 1988). Once its new system was implemented on January 1, 1989, promising swift rejection of manifestly unfounded claims, applications from Trinidad dropped to 15 in the first quarter of the year. See 63 DOCUMENTATION-RÉFUGIÉS 1, 6 (Jan. 25-Feb. 3, 1989); Refugee Determination in Canada: First Quarter Review 9 (Apr. 25, 1989). For a more complete description of the new Canadian adjudication system, which appears to hold considerable promise, see the expanded version of this study (forthcoming Yale University Press). See also Blum & Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy*, 16 N.Y.U. REV. L. & SOC. CHANGE 55 (1987-88); Hathaway, *Postscript*, 34 MCGILL L.J. 354 (1989); Hathaway, *Selective Concern: An Overview of Refugee Law in Canada*, 33 MCGILL L.J. 676 (1988); Rusu, *The Development of Canada's Immigration and Refugee Board Documentation Center*, 1 INT'L J. REFUGEE L. 319 (1989).

¹¹³ See generally Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*, 29 VA. J. INT'L L. 35 (1988); Martin, *supra* note 1. The United States has also employed Coast Guard interdiction of vessels coming from Haiti. Although the interdiction process is designed to include screening to permit persons with valid refugee claims to come to the United States, interdiction has evoked severe criticism. See T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 724-26; Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 254-56 (1984).

Considerable misunderstanding has arisen regarding the use of deterrent measures and restrictive practices. NGOs sometimes act as though any deterrent steps are illegitimate—sheer vindictiveness visited upon innocents, many of whom may prove to be bona fide refugees. Some perspective is needed. Designing policy to discourage the unqualified from even applying for a benefit is a perfectly legitimate policy objective, particularly when existing statistics demonstrate that a high percentage of applications lack merit.¹¹⁴ To the extent that current measures are meant to encourage self-selection, so that only those with strong cases bother to leave their home countries, they address an unimpeachable administrative aim. In design, at least, these restrictive practices are meant to send a “general deterrence” message to persons still in the home country.

The message grows more complex in practice. At this preliminary stage, deterrent measures almost inevitably apply to all asylum applicants, whatever the strength or weakness of their claims. (To sort the strong from the weak at this stage—save for screening out wholly frivolous applications—would simply be too cumbersome, because of all the factual difficulties canvassed in the previous section.) Thus, the burdens of these measures often fall on genuine refugees.¹¹⁵ It is not wholly surprising, then, that some judges might view these measures as penalties for filing an asylum claim, or as coercion meant to force current applicants to withdraw their applications and return home, rather than as deterrents addressed to those still in the home country, designed to convince them (if they are not substantially threatened) to decide against coming to the United States. If they see such measures this way, courts are likely to declare the deterrents invalid for conflicting with the statutory right to apply for asylum.¹¹⁶

¹¹⁴ Naturally, a major part of the NGO criticism stems from a belief that existing grant rates are woefully inadequate. But unless the grant rate should approach 100 percent, encouraging self-selection remains a legitimate aim.

¹¹⁵ Some interviewed for this study, however, who advocated the detention of asylum seekers, argued (with some measure of plausibility) that the true refugee should be the least affected by such deterrents. They should see humane detention in the United States, for a limited period that will definitely end with a final adjudication, as a small price to pay to escape from actual persecution in the homeland. True refugees, such persons argued, would not begin to think about withdrawing the application and returning home, for the fate there is clearly worse. Only those facing little real risk at home might be tempted (“coerced,” as the other camp would describe it) to withdraw an application in order to end the detention. If the fate at home is that much less intimidating than a few months in detention here, detention advocates argue, then such persons do not merit asylum in any event.

¹¹⁶ See, e.g., *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1510 (C.D. Cal.

The basic problem is that these deterrent measures and restrictive practices are indiscriminate in their impact. By their very nature, they fall equally on deserving refugees and the most flagrant abusers during the asylum application stage. A case could even be made that they fall with more debilitating effect on true refugees, because lengthy uncertainty over their ultimate fate, coupled with enforced idleness and perhaps prison-like detention, will carry the most severe psychological impact for those who know with substantial assurance that persecution awaits them at home. (It may be even more devastating for those who have already been tortured or severely mistreated.) For these reasons, such deterrents plainly should be avoided if workable alternatives are available.¹¹⁷ At best these deterrent measures are crude tools, meant to send a message to marginal applicants discouraging them from leaving the home country, but capable of implementation only by imposing harshness on true refugees as well, those who will ultimately be found to merit asylum.

3. Toward a Better-Targeted Deterrent

We need instead a discriminate deterrent, more precisely focused on the marginal cases, and one that takes away the artificial attractions of the asylum applicant stage of the proceedings. Such a deterrent is available, *if* we can change the adjudication system to achieve one crucial result: the prompt reappearance in the home village of applicants whose cases were at best marginal. Such an event makes apparent to others similarly situated that such a trip is not worthwhile; they will not be able to work long enough even to repay the "travel agent's" fee.¹¹⁸ Speedy finality is the essential precondition

1988) (granting injunction because INS practices and procedures at detention centers "discourage class members from exercising and pursuing asylum"); *Nunez v. Boldin*, 537 F. Supp. 578, 586 (S.D. Tex.) ("The present procedures do not sufficiently assure that genuine asylum claims will be heard . . ."), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). Other courts, however, have been more willing to sustain detention schemes, including their use for explicit deterrent purposes. *See, e.g., Amanullah v. Nelson*, 811 F.2d 1, 15 (1st Cir. 1987); *Singh v. Nelson*, 623 F. Supp. 545, 556-61 (S.D.N.Y. 1985). *See generally* Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353 (1986); Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305, 329-33 (1987) (discussing detention of asylum applicants).

¹¹⁷ For an elaboration of these points, see Martin, *supra* note 1.

¹¹⁸ Some critics of an earlier version of this study made much of the lack of proof that such returns would really deter other migrants. It is true that no empirical studies support this claim. Nor are there any, to my knowledge, that disprove it. Reliable testing procedures would be difficult to develop.

Suggestive support can be found, however, in much recent social science

tion of this deterrent. The message is lost if two or three years pass between departure and return, particularly if the applicant has been working while the application was pending.

How much speed is necessary? We lack empirical data to calculate the outside limits with any kind of accuracy (and anyway the calculations would vary by country and by travel agent). But if all but the most complicated cases could reach finality within six to nine months, including all the stages of consideration and review, little in the application process would add artificially to the attractions of the asylum system.

NGOs that strongly oppose indiscriminate deterrent practices—for good and worthy reasons—should remember that the best way to help avoid them, or reduce their harmful impact, is to cooperate with the government in fashioning a speedy and accurate system that can accomplish *discriminate* deterrence. This point cannot be overemphasized. In the absence of the capacity to make final decisions quickly, officials have no way to respond to legitimate public concerns over massive influxes, unless they turn to the deterrent measures and restrictive devices that NGOs and the UNHCR condemn. To defeat prudent streamlining of the adjudication process is to invite reliance on cruder measures of deterrence. Mere nominal acceptance of the need for expeditious proceedings is not enough. Refugee advocates

literature. Criticizing simplistic “push-pull” models of migration, these works emphasize the role of social networks in encouraging and sustaining migration. That is, if the first emigrants from a particular community succeed in establishing themselves in a new country, their experience, communicated homeward (often along with significant remittances), encourages others from the same locale to make the trip. Moreover, their presence in the target city or town within the new country helps others during the difficult early months. See, e.g., Boyd, *Family and Personal Networks in International Migration: Recent Developments and New Agendas*, 23 INT’L MIGRATION REV. 638 (1989); Massey, *Understanding Mexican Migration to the United States*, 92 AM. J. SOC. 2 (1987); Portes & Böröcz, *Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation*, 23 INT’L MIGRATION REV. 606 (1989).

Although such studies generally address “guest workers” and similar economic migration and do not focus on asylum-seeker networks, there is no reason to believe that this phenomenon would fail to operate in the latter context. Much anecdotal evidence about the role of asylum “travel agents” and similar entrepreneurs fits readily within these network theories. See *supra* note 64 and accompanying text. Moreover, the disparate caseload patterns in adjoining asylum countries also suggest a network effect. In 1989, for example, Canada received 1,966 Sri Lankan asylum seekers, see [Canadian] Immigration and Refugee Board, News Release of Jan. 19, 1990, at 4; the United States only 40. See INS, ASYLUM CASES FILED WITH DISTRICT DIRECTORS, FISCAL YEAR 1989 THROUGH SEPT. 1989 (CORAP table). Swift deportation of unsuccessful asylum seekers would seek to break that chain and would be designed to send a very different message back to the source communities.

will have to join in making difficult decisions about the trimming of certain procedures (which will undeniably carry some costs to the goal of accuracy) in order to achieve truly speedy determinations.

A second point concerning restrictive measures and deterrents may be more immediately relevant. From the government's standpoint, most of these other restrictions do not eliminate the priority for speed; they simply create other reasons for embracing it as a vital goal. The U.S. government probably cannot simply deny work authorizations (now seen by some as a major contributor to an artificial magnet effect) to asylum applicants without establishing some other public scheme to provide for the subsistence needs of the idled asylum seekers until they are either recognized as refugees or removed from the country. Whether such provision is made in communal facilities or in actual detention centers, it will still require a substantial commitment of public resources. Every day of added delay, therefore, compounds the expense imposed on the public treasury.¹¹⁹

There is a final reason for embracing speedy procedures, derived from the perspective of the legitimate and meritorious claimant—for whose benefit, after all, asylum protections were initially adopted. *Initial* decisions in many district offices now take six to eight months, largely because of backlogs created by the overload of asylum applications. Bona fide applicants with qualifying cases should not have to wait so long to have the burden of uncertainty lifted from their shoulders. As indicated, their primary need is to find the calm and security that will enable them to rebuild some semblance of a normal life. They are much more likely to make a successful transition (including recovering from past episodes of torture or other traumatic mistreatment) if security, in the form of a settled and reasonably permanent immigration status, comes quickly after arrival.

¹¹⁹ See Appendix (for cost estimates). In fact, truly expeditious and accurate procedures might further support the use of detention or enforced housing arrangements and denial of work authorization during the asylum-seeker stage. The main objection to these measures has been their baleful impact on bona fide claimants. But if most bona fide claimants can be recognized in the first-round proceeding and thus need wait only a short period (say two to three months) in such a setting, much of the unintended coercive impact disappears. The Select Commission on Immigration and Refugee Policy in fact recommended such arrangements, focusing on accommodation in "federal asylum processing centers" in its recommendations for coping with "asylum emergencies." These recommendations appear to have presupposed speedy determinations. See SELECT COMMISSION, *supra* note 69, at 165-68.

Speedy finality is imperative. It must not be achieved at the complete expense of either accuracy in outcomes or fairness in the process, but some tradeoffs will be necessary. Speed here is not simply the kind of virtue it may be in some other administrative settings—desirable but optional, a pleasing accomplishment if achievable, but not gravely damaging if other aims preclude its attainment. Speedy denials of unworthy asylum applications, followed by prompt deportation, are indispensable if we are to implement the only really humane deterrent available to the system. In time of large-scale influx, the inability to deport the unqualified in fairly short order will lead governments to resort to other costly and troublesome deterrents which indiscriminately burden genuine refugees.

III. THE AMERICAN ADJUDICATION SYSTEM

A. *Historical Background*

The earliest American regulations establishing procedures for asylum and related adjudications appeared in 1953, implementing the 1952 version of § 243(h) of the Immigration and Nationality Act (INA).¹²⁰ They provided for "interrogation under oath by an immigration officer" to examine the claim that the alien would be subject to physical persecution if deported. The regulations permitted the presence of an attorney, at the alien's expense, but said nothing more about the attorney's role during the interrogation. Final decisions, presumably based on the record of the interview, were to be rendered by the Commissioner or Assistant Commissioner—a cumbersome requirement changed a year later to vest that authority instead in regional commissioners of the Immigration and Naturalization Service (INS).¹²¹

In 1962, new regulations took effect establishing different arrangements for persecution claims in deportation proceedings. They established specific procedures for the immigration judge (then called a special inquiry officer) to designate an alternate country of deportation, in case the country the alien chose refused to accept him, and they required the judge then to advise of the possibility, under § 243(h) (which was then still a discretionary provision), of withholding deportation to that country. If the alien chose to claim that protection, he received ten days to file an application docu-

¹²⁰ See 18 Fed. Reg. 4925 (1953) (adding 8 C.F.R. § 243.3(b)(2)).

¹²¹ See 19 Fed. Reg. 9172, 9179 (1954) (amending 8 C.F.R. § 243.3(b)(2)).

menting his persecution claims, after which he would be examined under oath on these issues as in a deportation proceeding.¹²² Later amendments made clear that an INS trial attorney could also introduce evidence bearing on the persecution claim.¹²³

By 1962, then, the two basic patterns for asylum and related adjudications that our system has known had already emerged. On the one hand, INS made some determinations based on a nonadversarial interview or interrogation carried out by an immigration officer. In other settings, immigration judges decided whether to provide relief from deportation after more formalized trial-type proceedings. In succeeding years, INS refined the nonadversarial procedures, vesting the ultimate decisionmaking authority not in the regional commissioners or higher officials, but in the district directors, who of course relied in practice, most of the time, on the immigration officer who conducted the interview. As INS discovered more and more settings (outside the deportation procedure) in which persecution claims might arise, it adopted a variety of new regulations and instructions specifying that district directors, rather than immigration judges, were to hear and determine those matters. For example, district directors received authority to make final decisions on persecution claims by alien crewmen,¹²⁴ excludable aliens,¹²⁵ and applicants for the special benefits of INA § 203(a)(7) who were already in the United States.¹²⁶

¹²² See 26 Fed. Reg. 12,110, 12,112 (1961). With a few modifications, this provision, 8 C.F.R. § 242.17, remains in the regulations and affords one avenue for consideration of withholding by the immigration court. Most applicants today, however, affirmatively apply for asylum much earlier in the immigration court proceedings, under other regulations.

¹²³ See 39 Fed. Reg. 25,642 (1974) (amending 8 C.F.R. § 242.17(c)).

¹²⁴ See 32 Fed. Reg. 4341, 4342 (1967) (amending 8 C.F.R. § 253.1(f)). This assignment of authority to the district directors, to the exclusion of special inquiry officers (now called immigration judges), was approved, over vigorous dissent, in *INS v. Stanisic*, 395 U.S. 62 (1969). Interestingly, this provision, which provides protections only to those fearing persecution in Communist countries, was not amended in the wake of the Refugee Act of 1980, which mandated neutral and apolitical standards in refugee matters. It survives as a kind of dinosaur in the Code of Federal Regulations. Crewmen from other countries, however, may still claim asylum under other provisions.

¹²⁵ This was initially established in the less formal "Operations Instructions," and enshrined in the regulations only in 1974. See *Pierre v. United States*, 547 F.2d 1281, 1285 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977).

¹²⁶ See 30 Fed. Reg. 14,772, 14,779 (1965) (adding 8 C.F.R. § 245.4), *amended*, 34 Fed. Reg. 19,799 (1969). INA § 203(a)(7) was enacted primarily to authorize overseas refugee programs for the resettlement of persons who fled persecution in Communist countries or countries "within the general area of the Middle East." See 8 U.S.C. § 1153(a)(7) (1976). But a proviso allowed for adjustment of status to

In 1970, a Lithuanian seaman named Simas Kudirka was forcibly returned to a Russian vessel a few hours after he had escaped to a U.S. Coast Guard cutter. Although INS had not been involved in this extraordinary incident, the ensuing outcry launched a complete review of asylum procedures used by all agencies.¹²⁷ Eventually INS promulgated new asylum regulations, permitting both excludable and deportable aliens to apply to the district director for asylum on a new form, Form I-589. These 1974 regulations also made specific provision for a practice that had already taken root. They required the district director to seek the views of the State Department on an asylum claim, while also giving the alien an opportunity to explain or rebut any State Department comments before a decision could be based thereon. Such comments were not binding on the adjudicator, but if the district director decided to deny an application despite a favorable State Department letter, he had to certify his ruling to the regional commissioner for final decision.¹²⁸

Under the 1974 regulations, any deportable alien denied asylum could, in essence, renew the claim in deportation proceedings by applying to the immigration judge for protection under § 243(h). For excludable aliens, however—those aliens apprehended at the border before making an entry into the United States—the district office remained the only venue for an asylum claim. Within a few years, excludable Haitians challenged, on due process grounds, the regulations' failure to permit an "evidentiary hearing" (of the type provided in immigration court proceedings) when so much was potentially at stake.¹²⁹ District courts split on the issue, but the Fifth Circuit eventually ruled for the government, approving the regulations.¹³⁰ While the asylum seekers' certiorari petition was pending in the Supreme Court, however, the newly installed Carter Adminis-

permanent resident of those who had been physically present in the United States for two years and could prove that they qualified. See generally T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 622-23 (discussing this version of INA § 203(a)(7)).

¹²⁷ The State Department's resulting policy was announced in 1972 and remains in force today with slight changes. See Public Notice 351, Request for Asylum—Policy and Procedures, 37 Fed. Reg. 3447 (1972), *modified*, Public Notice 728, Requests for Asylum, 45 Fed. Reg. 70,621 (1980).

¹²⁸ See 39 Fed. Reg. 41,832 (1974) (adding 8 C.F.R. pt. 108), *amended*, 40 Fed. Reg. 3407, 3407-08 (1975).

¹²⁹ This had long been a matter in contention; it was the central dispute between the majority and dissent in a Supreme Court case construing the regulations governing asylum claims filed by alien crewmen. See *INS v. Stanisic*, 395 U.S. 62 (1969).

¹³⁰ See *Pierre v. United States*, 547 F.2d 1281, 1290 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977).

tration decided to accede to the plaintiffs' demands, finding merit in the due process concerns and seeing no major costs if the change were made.¹³¹

In considering new regulations to implement that 1977 concession, INS attempted to take to heart the vigorous objections to district director adjudications that had been voiced throughout the earlier litigation—assertions which made it sound as though such a setting could never provide justice in asylum cases.¹³² In consequence, the agency promulgated regulations in 1978 that would have made the immigration court, with very limited exceptions, the only forum for consideration of such asylum claims, for either excludable or deportable aliens.¹³³

To INS's legitimate surprise, refugee advocates suddenly displayed a change in perspective. They filed comments on the regulations, as well as briefs in litigation, that revealed a remarkable rediscovery of the virtues of nonadversarial proceedings before the district directors, exactly the officials whose decisions had been so heavily criticized in the course of the earlier litigation. Nonadversarial hearings in the district office, it was asserted, would be less frightening for the applicants, particularly those with meritorious cases who were probably the most easily intimidated. Such proceedings would also allow for swift grants when they were warranted.¹³⁴

¹³¹ See Memorandum of Solicitor General Suggesting Mootness, *Pierre v. United States*, 434 U.S. 962 (1977) (No. 77-53).

¹³² See, e.g., Petition for Certiorari at 18-22, *Pierre v. United States*, 434 U.S. 962 (1977) (No. 77-53).

¹³³ See 43 Fed. Reg. 40,801, 40,802 (1978) (amending 8 C.F.R. pts. 108 and 236) (affecting excludable aliens and intended to take effect immediately), *modified*, 43 Fed. Reg. 48,620 (1978) (in response to litigation, INS stayed the initial rulemaking to allow public notice and comment). Also, at the time of the first rulemaking, INS promulgated proposed rules intended to work the same changes for deportable aliens; that is, to make the immigration court the only venue for asylum claims. See 43 Fed. Reg. 40,879 (1978).

¹³⁴ See, e.g., 44 Fed. Reg. 21,253-56 (1979) (summarizing comments received on 1978 proposed rules). Similar sentiments were expressed with regard to the 1980 interim rules:

A number of commenters suggested that all applications for asylum, whether filed before or after the institution of exclusion or expulsion proceedings, should be decided by the district director. Proceedings before the district directors were viewed as less adversarial in nature and were providing the applicants with a freer atmosphere within which to present their claims. It was pointed out that many applicants have fled from countries where the judicial process is suspect and feared by them and, they would not feel free to present their claims with the same candor that they could in a proceeding before a district director.

48 Fed. Reg. 5885 (1983).

Feeling somewhat blindsided, the agency nonetheless largely acquiesced. The final rules retained the same two-tier *de novo* consideration for deportable aliens, although the rules did insist on channeling all claims by excludable aliens into the immigration courts.¹³⁵

Refugee advocates were not entirely satisfied. Because legislation that became the Refugee Act of 1980 was then proceeding through Congress, hearings on that bill provided a forum to continue the pressure for a more extensive role for the district directors in considering asylum claims. Eventually, their lobbying secured a measure of congressional support for such changes.¹³⁶ INS paid heed to these messages, and its interim rules implementing the asylum provisions of the Refugee Act granted both excludable and deportable aliens an opportunity to be heard first in nonadversarial proceedings before the district director, provided no charging document had yet issued.¹³⁷ If unsuccessful, the claimants retained the right to renew their asylum claims before the immigration judges in exclusion or deportation proceedings.¹³⁸ With minor changes, these interim asylum rules were made final in 1983, retaining the opportunity for two rounds of *de novo* consideration.¹³⁹

B. *The Current System*

Current regulations thus establish a complex system—rendered even more intricate when one takes account of all the layers of review, both mandatory and advisory. The following description,

¹³⁵ See 44 Fed. Reg. 21,253, 21,258 (1979). These provisions adopted final rules requiring that asylum claims by excludable aliens be heard exclusively by immigration judges, but permitted deportable aliens not yet in proceedings to file before the district director, without prejudice to later consideration of the claim by the immigration judge. If an order to show cause had already issued, however, asylum and related claims could be heard only by the immigration judge. See *id.*

¹³⁶ See, e.g., *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess., 89-93 (1979) (testimony of Dale F. Swartz, Director of the Alien Rights Law Project of the Lawyers' Comm. for Civil Rights Under Law); S. REP. NO. 256, 96th Cong., 1st Sess. 9 (1979) (stating Senate Committee's preference for allowing asylum applicants the opportunity to have their claims considered outside exclusion or deportation proceedings, provided no order to show cause had issued).

¹³⁷ See 45 Fed. Reg. 37,392 (1980) (interim regulations adding, *inter alia*, a new 8 C.F.R. pt. 208 governing asylum).

¹³⁸ See 45 Fed. Reg. 37,392, 37, 395 (1980) (codified 8 C.F.R. § 208.9 (1989)).

¹³⁹ See 48 Fed. Reg. 5885 (1983) (codified 8 C.F.R. § 208.1(b) (1989)) (final rule amending the earlier regulations to make clear that jurisdiction vests in the immigration judge once a charging document is served, even if the asylum claim was already pending in the district office).

which draws heavily upon the interviews and field observations conducted for this Article,¹⁴⁰ sketches the stages of consideration through which an asylum application can proceed.

1. District Office

Spontaneous asylum claims, often called "walk-ins" by INS officers, receive initial consideration in the district office. To start the process, the asylum seeker files the basic application form, Form I-589, along with any supporting documents. The four-page form asks numerous questions, including queries about past political activities, membership in organizations, current whereabouts and status of family members, and the applicant's reasons for fearing persecution. Officials sometimes complain that many completed forms provide only the scantiest information or seem to follow formulaic patterns.¹⁴¹ Other applications, usually prepared with the assistance of counsel, are accompanied by stacks of documents, including both affidavits and more generalized information such as news accounts and reports from human rights organizations. INS charges no fee for filing the I-589.

All district offices provide for an interview by an examiner, but they vary in the precise arrangements. INS places some emphasis on having the interviews conducted by experienced examiners (usually at the GS-11 grade or higher), who have received special training for this task.¹⁴² Offices with heavy walk-in traffic have several such

¹⁴⁰ Interviews were conducted with: INS Central Office officials (Sept. 1985, July 1988, and Aug. 1988); with personnel of the Executive Office of Immigration Review (EOIR—the unit of the Justice Department that includes the BIA, immigration judges, and certain administrative law judges) in Falls Church, VA (Aug. 1988); with other Justice Department officials and State Department officials (July 1988 and Aug. 1988). I also interviewed immigration judges, INS district office officials, private attorneys and voluntary agency representatives, at the following locations: Miami (Nov. 1985); San Diego (Feb. 1987); Washington (Oct. 1988); New York (Nov. 1988). These visits were supplemented by telephone conversations at various times to clarify matters, by conversations at numerous immigration-law conferences, and by telephone conversations with officials and attorneys in other locations.

¹⁴¹ See Dietrich, *United States Asylum Policy*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s* 67, 70 (D. Martin ed. 1988); P. Fagen, *Applying for Political Asylum in New York: Law, Policy and Administrative Practice* 31 (Occasional Paper No. 41, New York Research Program in Inter-American Affairs 1984).

¹⁴² The training program has recently been refined under the guidance of a new officer in the INS Central Office who formerly worked with the UNHCR. The program now includes sessions on the legal provisions and country conditions, and usually permits trainees to conduct simulated interviews, followed by critique. These measures represent a considerable improvement over earlier practices, when asylum

examiners, who do nothing but asylum and related refugee work during their rotation into this assignment (lasting twelve months or more). Smaller offices, however, may of necessity assign these functions to an examiner who has not had the special training and who may devote as little as twenty-five percent of her time to asylum.

Some districts hold the interview at the time of the filing, but most offices with a high volume of asylum traffic schedule interviews some weeks or months after receiving the application. New York is typical of the latter. When visited for this study in November 1988, the New York office had one supervisor and four experienced examiners who had been doing this work for several years. A fifth examiner in the Refugee, Asylum and Parole section had less experience and so was usually assigned to more routine functions, such as processing renewals of asylum status or adjustments to permanent residence of persons admitted through the overseas refugee program. The office ordinarily had been able to schedule asylum interviews within sixty days of filing (a date that has significance for work authorization purposes),¹⁴³ but recent increases in applications had jeopardized that timing. In an effort to keep up with applications, the office began scheduling twenty interviews per day per available examiner, although not all of the scheduled applicants were expected to show up. The press of business eliminated any opportunity for examiners to specialize by region of origin of the applicants; when one interview was finished, the examiner simply proceeded to a central table and picked out the file of the person who had been waiting the longest. This caseload permitted only about twenty minutes per interview, although examiners had discretion to take more time if the case required it.

The interviews usually concentrate on filling in any gaps in the

training was minimal and examiners had to rely on "on-the-job learning." See IMMIGRATION & NATURALIZATION SERVICE, ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 33 (June 1982) [hereinafter ASYLUM ADJUDICATIONS] (a quasi-official internal INS study). This 1982 internal study recounted one almost touching vignette that indicates the inadequacies that have beset INS adjudications: "One officer said that when she was assigned to asylum work, she bought a subscription to *Newsweek* magazine to 'learn more about' countries overseas." *Id.* at 33 n.*. The officer's initiative is to be applauded. But the fact that asylum adjudication might be assigned to someone who does not already keep up with international affairs at a level represented by weekly general circulation magazines is disheartening. That she had to pay for her own *Newsweek* is perhaps even more revealing.

¹⁴³ See 8 C.F.R. § 274a.13(d) (1989) (requiring adjudication of an application for employment authorization within 60 days or else interim employment authorization, good for 120 days, is to be granted).

information presented on the I-589, primarily with a view toward transmitting it all to the State Department for its advisory opinion. Typically, the examiner records right on the form in red pen any supplementary information developed, although some examiners also write out a few sentences of interview notes on a separate sheet as well. There is considerable variety in the conduct of the interview, depending on the style of the examiner, availability of interpreters (or examiners with foreign language skills), and related factors. INS, of course, assumes responsibility for making translation available, but the interpreter for a particular language may be tied up in immigration court when needed for an asylum interview in the district office. For that reason, INS occasionally relies on family members or friends of the applicant for these purposes. Interviews also vary considerably in thoroughness. One examination I attended in Miami in late 1985 (when caseloads were less demanding) lasted nearly an hour. The examiner spoke fluent Spanish and was trying with some creativity to flesh out the full dimensions of the story told by the Nicaraguan applicant. But another examiner in the same office engaged in only perfunctory questioning, concentrating on the applicant's manner of entry and other administrative details, rather than on the persecution claim. He completed his sessions in about fifteen minutes.

In Miami, at that time, few applicants appeared with counsel. In New York in 1988, however, the asylum supervisor estimated that perhaps eighty percent of applicants were represented, although asylum attorneys in New York thought that number a bit high. Attorneys usually play only a bystander's role, partly because examiners wish to hear directly from the applicant, and partly because, as one attorney explained it, not much happens: The interview is "an untaxing experience." Although relations with attorneys appear to be satisfactory much of the time, most attorneys interviewed recalled particular instances where they were thwarted from playing a needed role, or occasionally where the examiner was abusive or hostile in dealings with the applicant.¹⁴⁴

The regulations mandate issuance of work authorization to "nonfrivolous" asylum applicants, and require that such authorization be provided during all stages of administrative and judicial

¹⁴⁴ The American Immigration Lawyers Association (AILA) collected affidavits recounting some of these complaints and filed them as part of their opposition to the proposed regulations promulgated in August 1987, described *infra* notes 194-99 and accompanying text (affidavits on file with the *University of Pennsylvania Law Review*).

review.¹⁴⁵ Many attorneys expressed frustration, however, that INS rarely issues such authorization at the time of filing, no matter how solid the case.¹⁴⁶ Instead, the applicant almost always must wait until the interview, which may be sixty days away.¹⁴⁷ A substantial portion of the interview time is therefore consumed with work authorization, including the rather cumbersome physical process required to replace the old I-94 form in the applicant's passport with a new one stamped "employment authorized." Obviously, this pre-occupation further impairs the opportunity to use the interview to examine in detail the particulars of the applicant's persecution claim—one important reason why the interviews are often "untaxing."

Not infrequently, applicants receive no ruling on their asylum applications by the time the original employment authorization period expires. They may then have considerable difficulty gaining extensions, for few district offices have clear channels for making such decisions. Under the prodding of the immigration bar, INS is now trying to improve arrangements for such extensions, as well as for work authorizations for denied applicants who wish to renew their applications in immigration court proceedings.¹⁴⁸ The fruits of the interview—the annotated I-589 with attachments plus any sepa-

¹⁴⁵ See 8 C.F.R. §§ 274a.12(c)(8), 274a.13(a) (1989).

¹⁴⁶ See Memorandum from Richard E. Norton, INS Associate Commissioner for Examinations (July 9, 1987), reprinted in 64 INTERPRETER RELEASES app. III, at 886, 886-87 (1987) (setting forth standards for deciding on "frivolity"). In December 1988, in an apparent attempt to curb the attraction of asylum filings, INS issued instructions to field offices stating that the I-589 was not to be taken per se as a work authorization request; a separate application would have to be filed. See *INS Clarifies Work Authorization Procedures for Asylum Applicants*, 66 INTERPRETER RELEASES 130, 131 (1989). INS has also clarified the steps necessary to continue work authorizations if the alien wishes to renew the asylum claim in immigration court proceedings. See *INS Advises on Work Authorization for Denied Asylum Applicants*, 65 INTERPRETER RELEASES 718 (1988).

¹⁴⁷ Some offices fell much further behind in scheduling interviews and issuing work authorizations, prompting litigation seeking, among other things, to mandate compliance with the 60-day limit in the regulations. See *Mendez v. Thornburgh*, No. 88-04995 JJH (C.D. Cal. amended complaint filed Jan. 30, 1989), summarized in *Asylum Litigation Update*, 66 INTERPRETER RELEASES 151, 152 (1989).

¹⁴⁸ See *INS Advises on Work Authorization for Denied Asylum Applicants*, 65 INTERPRETER RELEASES 718 (1988); see also *Alfaro-Orellana v. Ilchert*, 720 F. Supp. 792, 798 (N.D. Cal. 1989) (finding that work authorizations granted to nonfrivolous asylum applicants do not terminate upon district office denial of asylum, but continue during the entire time that applications are being pursued, up until either abandonment or final adverse decision); *Doe v. Meese*, 690 F. Supp. 1572, 1577 (S.D. Tex. 1988) (requiring INS to grant to alien interim employment authorization where agency had failed to complete action on his request for work authorization within period specified by its own rule); *Diaz v. INS*, 648 F. Supp. 638, 656 (E.D. Cal. 1986).

rate interview notes—are collected for transmission to the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA), under a standard cover sheet containing blanks that allow the examiner to provide some additional insights. For example, the examiner is asked to characterize the verbal testimony (convincing, unconvincing, specific, generalized, etc.) and to provide a preliminary assessment (grant, deny, non-committal). State Department officers said that examiners often fail to fill out these portions of the form.

After the State Department's views are returned to INS, the applicant receives some form of notice, depending on what the district office intends to do with the case. If asylum is to be granted, the applicant receives a letter calling him in to complete the paperwork for asylee status. If denial is indicated, the applicant receives notice of intent to deny, along with a copy of the State Department letter. The applicant then has 15 days to rebut or supply additional information.¹⁴⁹ "Eager young lawyers," one examiner told me, sometimes treat this notice as an invitation to provide several pounds of additional material. On rare occasions the new information is returned to the State Department for further review, but usually the matter is simply scheduled for final consideration by an examiner after the rebuttal period has passed. In New York, this whole process can last seven or eight months from the time of the interview; the process almost surely will require at least four months. For this reason, no effort is made to return the file to the original interviewer. In any event, he probably would have no independent recollection of the case. Several examiners told me that the State Department views "count for a lot,"¹⁵⁰ although all were aware that they were not bound by the Department's position.

(granting preliminary injunction to aliens prohibiting revocation of work authorization until adjudication process for asylum claim had been completed).

¹⁴⁹ Under a recently implemented procedure described below, if State responds with a preprinted sticker indicating simply that it has nothing to add, the district office may proceed to a negative decision without issuing a notice of intent to deny. See *Don't Deny Asylum Cases Just Because of BHRHA "Sticker" Responses*, INS Says, 66 INTERPRETER RELEASES 351 (1989).

¹⁵⁰ An internal study of INS asylum procedures confirms the great weight carried by State Department letters. See ASYLUM ADJUDICATIONS, *supra* note 142, at 57-64. A GAO study based on 1984 advisory opinions found that the Justice Department's final decision agreed with the State advice in 96 percent of the cases worldwide. See GENERAL ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 22, 42 (1987).

TABLE I
ASYLUM CASES FILED IN INS DISTRICT OFFICES

<u>Fiscal year</u>	<u>Total received</u>
1984	24,291
1985	16,622
1986	18,889
1987	26,107
1988	60,736
1989	101,679

Source: Immigration and Naturalization Service.

Table I provides statistics on the rising caseloads of the district offices, and Table II shows approval rates by nationality for fiscal year 1988 and cumulatively for the last five years. The statistics show the number of "cases." Because a case may represent applications for several members of a nuclear family, who are treated together in accordance with INA § 208(c), actual numbers of asylum seekers are higher than what is shown in the Tables. Moreover, the tables do not include applicants who apply only before the immigration judges.

TABLE II
GRANTS AND DENIALS BY NATIONALITY
ASYLUM APPLICATIONS FILED IN INS DISTRICT OFFICES

Country	June 1983-September 1988			Fiscal year 1988			
	Cumulative ^a						
	Approval Rate for Cases Decided	Cases Granted	Cases Denied	Approval Rate for Cases Decided	Cases Granted	Cases Denied	Cases Pending
TOTAL ^b	27.8%	28,416	73,753	39.1%	5,531	8,582	73,109
Iran	61.7%	12,459	7,727	75.0%	764	254	1,373
Romania	61.4%	895	562	82.9%	345	71	341
Czechoslovakia	44.7%	123	152	44.8%	13	16	72
Syria	39.4%	186	285	65.7%	25	13	100
Ethiopia	39.0%	1,340	2,089	77.0%	441	131	525
Poland	38.0%	2,686	4,365	53.7%	433	373	2,099
Afghanistan	37.0%	402	684	39.5%	36	55	91
China	32.6%	167	345	69.7%	60	26	142
Vietnam	31.3%	68	149	80.0%	8	2	9
Hungary	30.0%	175	407	28.9%	24	59	172
Nicaragua	27.9%	7,255	18,688	53.1%	2,786	2,455	21,054
Uganda	26.0%	91	258	51.7%	15	14	34
Somalia	24.1%	143	449	67.9%	55	26	122
Philippines	18.0%	82	372	10.0%	4	36	94
Cuba	13.3%	321	2,080	31.9%	30	64	13,873
Yugoslavia	13.3%	53	344	9.2%	6	59	176
Pakistan	13.0%	63	420	57.8%	33	24	89
Liberia	10.5%	30	255	15.0%	3	17	32
Lebanon	7.0%	113	1,499	36.6%	56	97	222
Honduras	4.3%	18	398	7.4%	10	125	512
El Salvador	2.7%	667	23,805	2.7%	110	3,822	24,375
Guatemala	2.1%	45	2,086	5.0%	24	447	6,191
Haiti	2.0%	36	1,713	31.5%	6	13	399
Egypt	1.0%	8	754	0.5%	1	19	32
India	1.0%	4	379	15.0%	3	17	29
Bangladesh	0.2%	1	416	16.6%	1	5	10

^a Since May 1983, INS has kept asylum statistics by number of cases; each case, or application, may include more than one individual. The table cumulates the data only from the time this statistical uniformity was established.

^b The total includes all nationalities, not only those designated here.

Source: Immigration and Naturalization Service, as compiled in REFUGEE REPORTS, Dec. 16, 1988, at 14.

2. Immigration Court

Claimants whose applications were denied in the district office

may renew their asylum applications before the immigration judges when deportation or exclusion proceedings begin. If the alien applies for asylum only after those proceedings have been initiated, immigration court will provide the only available forum.¹⁵¹ In either case, the process is virtually identical. It is initiated by filing Form I-589, along with any accompanying documents, with the docket clerk.¹⁵² The clerk then forwards a copy to the State Department. Although the regulations seem to preclude (with limited exceptions) State Department referral if the district office earlier received an advisory letter,¹⁵³ docket clerks now routinely transfer the files without checking for earlier letters. Not only is this arrangement less cumbersome for the clerk, but it also fits better with the desire of the Executive Office of Immigration Review (EOIR) to assure the independence of the present proceedings from earlier INS consideration. State Department officers reported that they received less complete files from the immigration courts, perhaps because some docket clerks resist mailing lengthy documentary attachments. In any event, State clearly receives nothing equivalent to the district office examiner's notes. Some judges even provide a cover sheet pointedly stating that no assessment of credibility or other review has been performed before transmission to the State Department.

¹⁵¹ See 8 C.F.R. §§ 208.3(b), 208.9 (1989). Many aliens first express a wish to apply for asylum when the case comes before the immigration judge on "master calendar," a short while after the order to show cause (which initiates deportation proceedings) has been served on the alien. At the master calendar hearing, the alien pleads to the order to show cause and makes known any defenses or applications for relief from deportation. The overwhelming majority of asylum applicants admit deportability; asylum is then usually the only issue in the deportation proceeding.

¹⁵² Technically, an applicant in the immigration court is seeking the benefits of both asylum under INA § 208 and withholding under § 243(h), whereas examiners in the district office can award only asylum under § 208. This distinction makes virtually no practical difference, and Form I-589 is identical in both settings.

It is also possible that an asylum claim will be lodged later in the process. For example, the regulations still provide that an alien be expressly advised of his right to apply for withholding at the time the immigration judge designates a country of deportation. See 8 C.F.R. § 242.17(c) (1989). The alien can then receive 10 days to fill out the I-589 and thereby initiate consideration of a persecution claim. See *id.* An alien can also apply for asylum after the issuance of a deportation order by filing a motion to reopen, but the alien then carries the additional burden of explaining the failure to apply earlier. See 8 C.F.R. § 208.11 (1989). This burden can be substantial. See, e.g., *INS v. Abudu*, 485 U.S. 94, 109-110 (1988) (analogizing a motion to reopen to a motion for a new criminal trial on the basis of newly discovered evidence—a motion in which the moving party "bears a heavy burden"). If reopening is granted, the matter will return to the immigration judge for consideration. See 8 C.F.R. §§ 103.5, 242.22 (1989).

¹⁵³ See 8 C.F.R. §§ 208.7, 208.10(b) (1989).

After State's views are received, the case can be calendared for a hearing. The timing varies depending on caseload, but delays of a year are not unknown. Asylum cases receive no priority in calendaring unless the applicant is detained, in which case the judges place a high priority on prompt adjudication. Detention is more likely in exclusion cases than in deportation.¹⁵⁴ The immigration court in New York has worked out arrangements with attorneys to permit time for interviews with clients when the clients are brought in to the court facility in Brooklyn, thus obviating frequent trips to the remote detention facility.¹⁵⁵

Procedure in court conforms, by and large, to a standard adversarial model of a trial-type proceeding. Most asylum seekers, at least in the districts with high volume, are now represented in immigration court by counsel or accredited nonattorney representatives.¹⁵⁶ The burden of proof is on the alien. Counsel will usually elicit the key particulars of the story from the client on direct examination and will also offer available supporting materials, often derived from the reports of human-rights NGOs such as Amnesty International, Americas Watch, or the International Commission of Jurists.¹⁵⁷ The

¹⁵⁴ See 8 C.F.R. §§ 212.5, 235.3 (1988). The background of the detention policy is set forth in T. ALENIKOFF & D. MARTIN, *supra* note 3, at 722-24. See also *Amanullah v. Nelson*, 811 F.2d 1, 4-8 (1st Cir. 1987); *Singh v. Nelson*, 623 F. Supp. 545, 556 (S.D.N.Y. 1985) (generally upholding detention of asylum seekers, in part as a deterrent measure). For critiques of detention of asylum seekers, see Helton, *supra* note 116; Levy, *Detention in the Asylum Context*, 44 U. PITT. L. REV. 297 (1983).

¹⁵⁵ Detention arrangements bring frequent complaints from applicants' attorneys, particularly when detention is carried out by private contractors, as has sometimes been the case, for example, in New York City. I was told that "these are guys who usually guard construction sites," that some of them "know nothing" about American Correctional Association accreditation standards, and that they often make life quite difficult for attorneys who are simply seeking access to their clients. Interview with Arthur Helton, John Assadi, and Jeff Heller, Attorneys with the Lawyers' Comm. for Human Rights, in New York City (Nov. 15, 1988); see also GENERAL ACCOUNTING OFFICE, CRIMINAL ALIENS—INS' DETENTION AND DEPORTATION ACTIVITIES IN THE NEW YORK CITY AREA 24-27 (1986).

¹⁵⁶ See 8 C.F.R. § 292.2 (1988) (providing for accreditation of such representatives). Part 292a requires district directors to maintain a list of free legal services programs available in the area. These lists can be somewhat misleading, both because the lists get out of date and because some of the organizations listed have in recent years become more selective in accepting cases.

¹⁵⁷ The closest analogues in this country to the documentation centers used by European adjudicators are the private documentation centers put together by refugee advocacy organizations. Many specialize by region. See, e.g., *New Documentation Center Announced for Salvadoran Asylum Cases*, 60 INTERPRETER RELEASES 975 (1983) (reporting on new center, established by the American Civil Liberties Union Fund of the National Capitol Area and the Center for National Security Studies, gathering information on El Salvador). At least one commercial

INS trial attorney then cross-examines. In busy districts, trial attorneys have little time to prepare the cases. Sometimes they are only able to review the file for the first time while direct examination is proceeding. Moreover, trial attorneys are not generally expected to develop extensive additional information or other sources of evidence.

This insufficiency in preparation time and resources results in several disadvantages, which are compounded by the failure to assign clear responsibility for the development of other sources of information. Cross-examination is impoverished under these circumstances. One trial attorney stated ruefully during his interview that he necessarily does what he was always taught in law school not to do: He asks questions when he has no idea where the answers might lead. Sometimes a useful line of inquiry develops. Often it does not. All he can do is probe apparent soft spots and inconsistencies in the story. Given so little to work with, his incentives are to magnify the weaknesses in the testimony even if there might be an innocent explanation.

Second, an early review of the file might have revealed the need for additional and specific information on country conditions. Review on the day of the hearing will be too late, even if the information would have been relatively accessible. An example may be helpful in illustrating this point. Suppose the applicant claims that he fled to avoid forced conscription into the army or a guerrilla unit. Cross-examination can do little to explore whether such dragooning really takes place; it can only probe the wellsprings of this particular alien's belief. If the State Department response said nothing about the issue (perhaps because the initial papers did not make sufficiently clear that this was the basis of the claim), the record may contain no useful general information on this crucial question. The applicant's assertions will therefore stand "uncontroverted," whatever may be the real state of affairs in the home country. BIA member Michael Heilman expressed particular concern about this inadequacy, especially given the Board's strict adherence to the requirement that decisions be based on evidence of record in the particular proceeding.¹⁵⁸

organization has become involved. The Data Center in Oakland, California recently mailed a brochure to members of the American Immigration Lawyers Association advertising its Political Asylum Documentation Service, available for \$50 per hour of search time, plus photocopying and postage.

¹⁵⁸ Telephone interview with Michael Heilman, Member, Board of Immigration Appeals (Sept. 22, 1988).

Some trial attorneys also reflected thoughtfully on the wider implications of applying the adversarial system to these matters. The government's real interest will not always be to oppose the claimant; some of the applicants deserve asylum. But the INS attorney may have little idea which type of case is before him until well into the proceedings. Moreover, as one attorney told me, even when it appears to be a strong case, his instincts (and perhaps his inevitable role under this structure) lead him to react in a particular way: "When it's there in the courtroom, I'm 'agin' it."¹⁵⁹

There are currently seventy-five immigration judges. As Table III indicates, asylum cases have risen from ten percent of immigration court caseload in 1985 to over thirteen percent in 1988. Because asylum cases tend to present the most difficult and challenging issues appearing in a judge's caseload, however, they occupy a much higher percentage of actual work time. Statistics on dispositions have only recently been maintained. In fiscal year 1988, immigration judges received 11,025 new asylum cases and disposed of them as follows: 1,647 cases were granted (representing 2,276 individuals); while 5,626 were denied. The overall grant rate was twenty-three percent. A total of 4,364 cases were pending in immigration courts at year's end.¹⁶⁰

¹⁵⁹ Interview with former trial attorney, in New York City (Nov. 14, 1988).

¹⁶⁰ EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR), ASYLUM STATISTICS [IMMIGRATION JUDGES] FOR PERIOD 10/1/87-10/1/88. The slight discrepancy between these numbers for asylum cases received and those in Table III is unexplained. Until very recently, EOIR published only limited statistics on asylum cases and did not reveal grant and denial rates by nationality. In the spring of 1989, however, it decided to compile such figures and make them available to the public. They show, for example, a noticeably higher grant rate for Salvadorans (12 percent) and a lower one for Nicaraguans (37.4 percent) than the comparable rates in the INS district offices, which are shown *supra* Table II following note 150. The complete set of EOIR statistics, with details by nationality, appears in REFUGEE REPORTS, May 19, 1989, at 5.

TABLE III
CASES RECEIVED, IMMIGRATION JUDGES

Fiscal Year	Deportation	Exclusion	Motion to Reopen	Total ^a	Asylum Cases ^b	Percent Asylum
1985	102,044	9,122	3,521	114,687	11,663	10.2%
1986	89,680	9,576	3,555	102,811	11,156	10.9%
1987	64,133	9,178	2,711	76,022	8,659	11.4%
1988	71,308	10,167	2,387	83,862	11,200	13.4%
1989	118,906	14,020	2,398	135,324	20,331	15.0%

^a Immigration judges also hear a fourth category of cases, involving release on bond. But because asylum is not an issue in such proceedings, these totals omit that category in order to obtain a meaningful base for comparison.

^b EOIR does not break down asylum receipts according to the type of procedure (deportation, exclusion, motion to reopen) in which the application is received. The percentage is therefore stated as a portion of total combined caseload in those three categories for the year.

Source: Telephone interviews with Gerald Hurwitz, Counsel to the Director, EOIR (Mar. 8, 1989, Mar. 28, 1990).

3. State Department Role

The State Department is required by statute to publish annual reports on human rights conditions in all foreign countries.¹⁶¹ This requirement derived from congressional efforts to strengthen human rights policy during the Kissinger era at the State Department, rather than from any concern for asylum proceedings. Nevertheless, the reports have proven to be extremely useful in asylum adjudications, both in the United States and around the world. Every district office asylum unit and every immigration judge receives a copy, and I have seen well-thumbed issues in the offices of asylum adjudicators in Western Europe and Canada—and indeed in the offices of UNHCR and refugee advocacy organizations.

The controversial portion of the State Department's role relates to its preparation of advice letters in individual asylum cases. The Bureau of Human Rights and Humanitarian Affairs (BHRHA) performs the central functions in the asylum advice process. Its asylum unit, headed by a career foreign service officer, is largely staffed by retired foreign service officers, doing part-time work under contract. Such officers are able, to a considerable extent, to specialize by region of origin. In the summer of 1988, for example, one officer assumed responsibility for claims from Eastern Europe and some

¹⁶¹ See 22 U.S.C. § 2151n(d) (1988).

East Asian countries. Another concentrated on the Near East and South Asia. Three officers were responsible for Central and South America.

When files arrive from either district offices or immigration courts, they are logged into a central bureau computer and assigned to the appropriate officer for review. Until early 1988, BHRHA returned an opinion letter in each case, many of them standard form letters, announcing whether the Department believed that the particular applicant had a well-founded fear of persecution.¹⁶² In almost all cases, BHRHA officers have initially drafted the letters after simply reading through the file. Very few cases have stimulated further specific research. After drafting, the letter is cleared with the appropriate country desk in the regional bureaus of the State Department. Critics have sometimes targeted the regional bureaus as the source of political bias in the letters. State Department officials, however, deny that diplomatic commitments to other nations have ever entered into the advice-letter process.¹⁶³ Moreover, as the number of cases has expanded, the regional bureau clearance process has become more and more routine. Apparently, regional bureaus often grant blanket clearances, relying on the BHRHA officer to bring any unusual cases requiring more thorough scrutiny to their attention.

In February 1988, State introduced a new system. INS and EOIR still send all files to State as before, but the Department no longer invariably returns an advice letter. Instead, its response takes one of three forms. First and most common, a sticker is affixed to the returning papers, stating that the Department has nothing to add and referring generally to the latest human rights country reports.¹⁶⁴ Second, the officer might return the file without an individualized communication, but instead with a general update sheet. Those sheets report, for example, a change of government since the last country report was written, or provide more detailed information

¹⁶² Form letters have often drawn criticism, but volume made such an approach virtually unavoidable. See generally *In re Vigil*, Interim Dec. No. 3050, slip op. at 12 (BIA Mar. 17, 1988) (finding form deportation letter not to constitute an error because it is not binding and immigration judge may determine weight it deserves).

¹⁶³ See Burke, *Compassion versus Self-Interest: Who Should Be Given Asylum in the United States?*, 8 FLETCHER FORUM 311, 320-22 (1984); Dietrich, *supra* note 141, at 67-72.

¹⁶⁴ The text of the sticker is reprinted in 8 AILA MONTHLY MAILING 118 (1989) (reporting further on INS cable clarifying that no "notice of intent to deny" is necessary when the State Department responds with a sticker). Because examiners apparently tended to treat stickers as negative opinions, INS recently had to send further guidance to its offices emphasizing that stickers are not to be considered as "adverse evidence." 66 INTERPRETER RELEASES 351 (1989).

than the country report about specific issues (such as the treatment of a particular religious group or punishments for those who left the country without exit permission). Third, the Department still sometimes returns a more detailed advisory letter in cases where it has something specific to add.¹⁶⁵

The new sticker system has received mixed reviews. Several people interviewed, including William Robie, the Chief Immigration Judge, find the change a big improvement.¹⁶⁶ The stickers make it clearer than the old form letters did that the Department has nothing to add. It is then more clearly left to the immigration judge to decide based on the record—which can include the annual State Department country report and any generic update sheets that are available. Others, especially district office examiners, but also some immigration judges, regard the stickers as a dereliction of duty; they want more guidance from State. One State Department officer (who also dislikes the sticker system) reported frequent receipt of files from district offices with a marking on the cover sheet: “No sticker.”¹⁶⁷

Asylum applicants have frequently challenged the use and accuracy of State Department letters, or have sought access to their authors for cross-examination. Although some letters have drawn sharp judicial criticism,¹⁶⁸ by and large the courts have approved the practice, even in the immigration court setting.¹⁶⁹ In one such case, Judge Henry Friendly, in dictum, advised certain changes that would minimize any due process problems arising from introduction of the letters without making their authors available for cross-examination. In the future, he recommended, such letters should be confined to dealing with “legislative facts” such as the extent of persecution in the home country, and refrain from recommending an outcome in the specific case. If so modified, Judge Friendly suggested, they would deal with matters “on which the safeguards of confrontation and cross-examination are not required and on which the IJ needs all

¹⁶⁵ See 53 Fed. Reg. 2893 (1988) (notice announcing the new system).

¹⁶⁶ Interview with William Robie, in Falls Church, Va. (Aug. 12, 1988).

¹⁶⁷ Interview with Christopher Squier, in Washington, D.C. (Aug. 12, 1988).

¹⁶⁸ See, e.g., *Paul v. INS*, 521 F.2d 194, 199-200 (5th Cir. 1975); *Kasravi v. INS*, 400 F.2d 675, 676-77 & 677 n.1 (9th Cir. 1968).

¹⁶⁹ See, e.g., *McLeod v. INS*, 802 F.2d 89, 95 n.8 (3d Cir. 1986); *Hotel and Restaurant Employees Union, Local 25 v. Smith*, 594 F. Supp. 502, 510-14 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988). For BIA descriptions of the appropriate use of State Department advice, see *In re Vigil*, Interim Dec. No. 3050, slip. op. at 12 (BIA Mar. 17, 1988); *In re Exilus*, 18 I. & N. Dec. 276, 278-80 (1982).

the help he can get.”¹⁷⁰ For roughly 13 years after Judge Friendly’s admonition, the Department persisted in sending letters that commented on the specific case, i.e., on adjudicative facts. The new sticker system (ironically, adopted primarily for budgetary reasons) now brings practice more in line with the scheme Judge Friendly envisioned.

4. Administrative Review

a. *The Board of Immigration Appeals*

There is no appeal from the district office decision, although renewal in immigration court obviously provides an opportunity to secure relief if the original denial was unjustified. Decisions in immigration court, however, are appealable to the Board of Immigration Appeals (BIA), under the standard procedures allowing review of decisions in exclusion and deportation cases. Both the applicant and the INS can appeal, although appeals by the latter are far less frequent.

The Board, created by Justice Department regulations rather than by statute, consists of five members and conducts business at its headquarters in Falls Church, Virginia. It hears appeals in exclusion and deportation cases, and also reviews a variety of other immigration-related decisions.¹⁷¹ Exact statistics are unavailable, but informed guesses place asylum at about one-quarter of the BIA’s caseload. Owing to their greater complexity, however, asylum cases occupy about half its work-time.

To cope with a rising workload, new regulations, enacted in 1988, authorized temporary assignments of immigration judges to sit with the Board, and for the first time allowed consideration of cases by three-member panels.¹⁷² Oral argument is possible if the Board approves, but such approval remains rare. It is far more common for the Board to consider the matter on the briefs alone. Each appeal is decided by opinion, but only a small fraction of those opinions are published as precedent decisions.¹⁷³ The BIA appeal process can consume considerable amounts of time, although precise statistics

¹⁷⁰ *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976).

¹⁷¹ See Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 IOWA L. REV. 1297, 1302-10 (1986).

¹⁷² See 53 Fed. Reg. 15,659 (1988) (codified at 8 C.F.R. § 3.1(a)(1) (1989)).

¹⁷³ For a useful look at BIA practice, see Note, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals’ Actions in Asylum Cases*, 75 VA. L. REV. 681 (1989).

are not maintained. The greatest delays derive from backlogs in typing the transcript of the hearing; periods of eight to twelve months are not uncommon. The Board then requires several additional weeks or months before issuing a decision.¹⁷⁴ Cases involving an applicant in detention, however, receive priority. In these instances, the transcript can be prepared in a matter of weeks, and the Board will also expedite its own decision process.

TABLE IV
CASES RECEIVED, BOARD OF IMMIGRATION APPEALS

<u>Fiscal Year</u>	<u>Total Cases</u>
1985	4,911
1986	8,608
1987	8,204
1988	10,191
1989	11,186

Note: The EOIR computer system did not separately code asylum appeals before 1989, but observers agreed that asylum cases are appealed more often than other decisions by immigration judges. The percentage of asylum cases should thus be considerably higher than the percentage of receipts for immigration judges, *supra* Table III following note 160.

Source: Telephone interviews with Gerald Hurwitz, Counsel to the Director, EOIR (Mar. 8, 1989, Mar. 28, 1990).

b. *The Asylum Policy and Review Unit*

The Asylum Policy and Review Unit (APRU) was established in the Office of Legal Policy of the Department of Justice in 1987, at least partly in response to the Medvid incident (the forcible return of a Ukrainian seaman to a Soviet ship docked in Louisiana).¹⁷⁵ Its genesis also reflects the dissatisfaction of the Justice Department under Attorney General Meese with the tenor of the handling of certain cases by the State Department and INS. An APRU official complained, for example, that State failed to stay sufficiently "up to date"

¹⁷⁴ See Legomsky, *supra* note 171, at 1331 (reporting rough estimate of three months' mean for BIA disposition—presumably from the time the BIA actually receives the case; that is, after the transcript and briefs are received). Transcript delays are so costly that the system should explore other means of presenting an adequate record on appeal. For an innovative suggestion of using videotapes for these purposes in asylum cases, see E. RATUSHNY, *supra* note 64, at 57-58.

¹⁷⁵ The regulation officially establishing the Unit appears at 52 Fed. Reg. 11,043 (1987) (codified at 28 C.F.R. § 0.23b (1989)). See also *New Asylum Policy and Review Unit Created*, 64 INTERPRETER RELEASES 439-40 (1987); *Attorney General Announces New Asylum Policy Unit*, 64 INTERPRETER RELEASES 472-73 (1987).

on developments in some countries.¹⁷⁶ Critics of APRU provide a harsher assessment of its origin. They believe it was created to assure a higher grant rate for persons fleeing Eastern Europe or other Marxist countries—apparently a matter of strong concern to the Department under Mr. Meese.¹⁷⁷

APRU receives the whole file in every case denied in the district offices, and a copy of the approval letter in granted cases. Either way, APRU almost always receives the material after the alien has been notified of the result. The office carefully keeps its distance from cases being considered in EOIR (by the immigration judges or the BIA), in order to honor the latter's quasi-judicial independence. In a handful of cases, apparently, an applicant rejected in EOIR has been given a new round of review in the district office as a result of APRU concern. APRU is not strictly an appellate body. Asylum applicants do not initiate its consideration, although knowledgeable lawyers are now becoming more aware of the office's role and of course cannot be prevented from writing with concerns about allegedly unjustified denials.

Most of APRU's review work is performed by three attorneys in the office. If they believe an application was improperly denied, or spot trends indicating undue restrictiveness with respect to certain groups, APRU makes its concerns known to the Central Office of INS. Sometimes this results in reopening and correction in the district office. At the time of interviews (July 1988), however, the Deputy Director expressed concern about whether messages communicated in this way adequately get through to the districts. He further described APRU's role as a "safety valve," assuring that persons at risk are not wrongfully sent home; the office's individual case review serves mainly to spot egregious cases. About forty such cases had been pursued with vigor in the district offices.¹⁷⁸ INS, however, believes that APRU's functions are duplicative, and INS

¹⁷⁶ Interview with Robert Charles Hill, Deputy Director, APRU, in Washington, D.C. (July 28, 1988).

¹⁷⁷ See, e.g., Pear, *supra* note 40 (reporting on the consideration of regulations that would provide a presumption favoring asylum for persons from "totalitarian" but not from "authoritarian" countries; the proposal later drew considerable criticism and was never officially made public).

¹⁷⁸ Interview with Robert Charles Hill, Deputy Director, APRU, in Washington, D.C. (July 28, 1988). As of April 5, 1989, the Director reported: "APRU has worked with INS to obtain the reversal on approximately 40 cases. In another approximately 40 cases, no agreement could be reached with INS, and APRU recommended, and the Deputy Attorney General approved, grants of asylum. In addition, approximately 50 cases are currently being discussed by APRU with INS." Letter from Henry L. Curry to David A. Martin (Apr. 5, 1989).

Commissioner Nelson urged Attorney General Thornburgh to abolish the office, allowing INS to allocate APRU's annual budget to other parts of the adjudication system.¹⁷⁹

5. Judicial Review

Applicants ordinarily secure judicial review of asylum denials in accordance with the regular arrangements for review of exclusion or deportation orders under INA § 106.¹⁸⁰ Exclusion cases therefore proceed to district court on a habeas corpus petition; deportation cases are heard in the court of appeals based on a petition for review. In practice, this distinction makes little or no difference in the operative scope of review. Courts review denials of the mandatory protections of § 243(h) to check that the ruling was based on "substantial evidence."¹⁸¹ Denials of asylum under § 208 are subject to a bifurcated standard of review. The "substantial evidence" test applies to factual determinations that underlie the judgment as to whether the person has a well-founded fear of persecution, but if asylum is denied in the exercise of discretion, that denial is reviewed only for "abuse of discretion"—intended as a more deferential standard.¹⁸² Whatever the precise formula, the actual vigor of scrutiny covers a wide range, from highly deferential to highly demanding.¹⁸³

Deportation is automatically stayed once a petition for review is served on INS.¹⁸⁴ Stays are not automatic in exclusion cases or while

¹⁷⁹ See 66 INTERPRETER RELEASES 3 (1989) (asserting that from Apr. 1987 through Dec. 1988, APRU cost the INS appropriation \$750,000).

¹⁸⁰ 8 U.S.C. § 1105a (1988). Some cases appear to hold open the possibility of judicial review in district court under the Administrative Procedure Act (APA) of denials in the district office, but the better view postpones court consideration until immigration court and BIA remedies have been exhausted. See, e.g., *Chen Chaun-Fa v. Kiley*, 459 F. Supp. 762, 765 (S.D.N.Y. 1978).

¹⁸¹ See, e.g., *Chavarria v. Department of Justice*, 722 F.2d 666, 670 (11th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1316-17 (9th Cir. 1981). But see *Marroquin-Manriquez v. INS*, 699 F.2d 129, 133 (3d Cir. 1983) (stating that an "abuse of discretion" standard should be used, because of the "necessary application of expertise in the determination that a fear of persecution is well-founded"), *cert. denied*, 467 U.S. 1259 (1984).

¹⁸² See, e.g., *Cruz-Lopez v. INS*, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); *Vides-Vides v. INS*, 783 F.2d 1463, 1466 (9th Cir. 1986); *Carvajal-Munoz v. INS*, 743 F.2d 562, 567-68 (7th Cir. 1984).

¹⁸³ Compare *Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987) and *Damaize-Job v. INS*, 787 F.2d 1332, 1338 (9th Cir. 1986) (close review of immigration judge's credibility rulings) with *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986) and *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (great deference to agency's credibility determinations).

¹⁸⁴ See INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1988).

a motion to reopen is pending, but in light of the possible effects of an erroneous removal, district courts have been quite hospitable to the issuance of a stay.¹⁸⁵ Given federal court caseloads, pursuing judicial review can considerably lengthen an applicant's stay in the United States. But as Table V indicates, only a small proportion of asylum applicants pursue direct review in court. The information in the Table is somewhat misleading, however, as class actions or other suits seeking broadly applicable injunctive relief, rather than direct review in single cases, have provided the setting for some of the most important judicial rulings on asylum processing.¹⁸⁶ Some of these cases have resulted in multi-year stays of removals and in orders necessitating reopening of hundreds of proceedings. The Director of the Justice Department's Office of Immigration Litigation reports that asylum issues "take a huge portion of our time."¹⁸⁷

¹⁸⁵ See, e.g., *Bazrafshan v. Pomeroy*, 587 F. Supp. 498, 501 (D.N.J. 1984) (stating that we "cannot let the rigors of administrative procedure reshape our ideas about life and death").

¹⁸⁶ See cases cited *supra* note 3.

¹⁸⁷ Telephone interview with Robert Bombaugh, Director of the Justice Department's Office of Immigration Litigation (Mar. 8, 1989).

TABLE V
DIRECT REVIEW IN FEDERAL COURT

<u>Fiscal year</u>	<u>Total applications for review</u>	<u>No. presenting asylum issue</u>	<u>Percent asylum</u>
<u>Deportation^a</u>			
1984	425	116	27.3%
1985	427	116	27.2%
1986	396	115	29.0%
1987	161	43	26.7%
1988	179	49	27.4%
1989	275	120	43.6%
<u>Exclusion^b</u>			
1984	18	3	16.7%
1985	25	19	76.0%
1986	19	7	36.8%
1987	18	6	33.3%
1988	12	9	75.0%
1989	66	57	86.4%

^a These statistics probably undercount asylum cases. Petitions for review are logged in on the Office of Immigration Litigation (OIL) statistical system at the time of filing, but it may not be apparent until later stages that an asylum issue is presented. An effort is made to go back and correct or amplify the entries, but a few cases are overlooked in the process. That correction process is still underway for the most recent fiscal years; it is therefore likely that those years' asylum statistics will rise, perhaps substantially.

^b Exclusion cases are almost certainly undercounted. Review is obtained by petition for habeas corpus in the district courts, and the local U.S. Attorney's office represents the government. Not all such offices report full statistics to OIL.

Source: Telephone interviews with Robert Bombaugh, Director of the Office of Immigration Litigation, Dept. of Justice (Mar. 8, 1989, May 10, 1990).

6. Actual Deportations

It is difficult to obtain precise information on actual removals of unsuccessful asylum seekers, but by all accounts, the numbers are quite low. A 1984 GAO study found final deportation orders issued in only 3.5 percent of cases of persons initially denied asylum, and over half of those individuals apparently had not yet been removed. Another one percent had left on their own. Although a very high percentage of the sample of 21,032 aliens were in an uncertain status (and some might have left), these numbers are disturbing, particularly because actual deportations are essential to send any kind of

deterrent message to persons in the home countries contemplating a journey to the United States to apply for asylum.¹⁸⁸

Deportations falter at two stages. First, applicants denied asylum in the district office will receive orders to show cause (thus initiating deportation proceedings) only if the investigations section completes the paperwork. These sections are overburdened, and failed asylum applicants do not occupy a high enforcement priority. Second, when a deportation order becomes final, the respondents are usually promptly served with a notice to leave the country. But if they fail to do so, enforced deportation will occur only if INS takes the initiative to locate and apprehend the person. Again, failed asylum seekers occupy a low enforcement priority.¹⁸⁹

There are exceptions to these patterns. If the individual is held in detention, a final deportation or exclusion order will almost always result in prompt removal. Moreover, several officers in district offices reported to me that voluntary surrender for deportation picks up just before holidays. Apparently, the individuals are ready to go home, and they present themselves to INS because the agency is likely then to pay the costs of transportation. It is not surprising that such behavior by unsuccessful asylum applicants evokes cynicism on the part of the officers.¹⁹⁰

7. The Role of the UNHCR

In the late 1970s, the State Department made arrangements with UNHCR for its review of all Haitian asylum applications, then the most controversial portion of its caseload. If UNHCR disagreed with a draft State advice letter, it raised its concerns with BHRHA

¹⁸⁸ See GENERAL ACCOUNTING OFFICE, *supra* note 150, at 25; P. Fagen, *supra* note 141, at 54-55. The problem is by no means confined to asylum cases. Other studies have noted the general inability of the INS system to secure actual deportations. See E. HARWOOD, *supra* note 66, at 41-46. In 1986, INS also changed the regulations to eliminate the 72-hour advance notice to surrender for deportation given to aliens already subject to a final deportation order, in part because an INS study found that more than 76 percent of recipients absconded after receiving such letters (often known familiarly as "bag and baggage" letters or, even more familiarly, as "run letters"). See 51 Fed. Reg. 3471 (1986) (to be codified at 8 C.F.R. § 243.3) (proposed Jan. 28, 1986); *id.* at 23,041-42 (1986) (codified at 8 C.F.R. § 243.3 (1989)).

¹⁸⁹ See generally E. HARWOOD, *supra* note 66, at 30, 122-30, 184 (discussing enforcement practices).

¹⁹⁰ See *id.* at 41-46 (reporting the same phenomenon). Harwood recounts the story of one alien who showed up two days before the date shown on his "bag and baggage" letter for deportation to El Salvador. The INS office made him wait. One officer explained: "What they have to realize is that deportation is a privilege, not a right." *Id.* at 46.

and a negotiating process ensued before the final letter was sent. Sometimes the Bureau persuaded UNHCR to change its views. In all other cases of initial disagreement, the State Department accepted the UNHCR position.¹⁹¹

Although there have been frequent calls for expanding this practice to cover all asylum cases, during the 1980s the trend went in the opposite direction. The Reagan administration took a more skeptical stance toward international organizations (to put it mildly), and UNHCR's access declined.¹⁹² Although the Washington office retains some contact with State and INS to communicate its general views on, for example, proposed regulations, its role as systematic reviewer of individual cases has long since ended. It now performs three other functions: (1) helping asylum seekers, on occasion, to locate pro bono counsel; (2) filing amicus curiae briefs in cases (usually class actions) likely to have wide impact on asylum processing; and (3) sending a letter to applicant's counsel expressing UNHCR views on the particular application. UNHCR receives far more requests for the last service than it can possibly meet. It tries to be selective and write such a letter only in strong cases, and only at the stage when the matter is already before an immigration judge. It is then up to counsel to introduce the letter in an appropriate manner into the immigration court proceedings.¹⁹³

8. The August 1987 Proposed Regulations

Throughout the 1980s, INS has been considering further reforms to the asylum process to make it more expeditious and effective. The most thorough effort at crafting reforms was built upon an internal study carried out by Richard Spurlock, a retired district director hired as a consultant for these purposes in 1985. Because of the sensitivity of the issues, the potential costs, and the multiple agencies involved, each with its own particular angle of vision and

¹⁹¹ See *U.S. Refugee Programs: Hearing before the Sen. Comm. on the Judiciary*, 96th Cong., 2d Sess. 15 (1980) (testimony of Cyrus Vance, Secretary of State). Secretary Vance expressed satisfaction with this arrangement and stated: "[t]his doublecheck which we have developed by working with the U.N. High Commissioner is a sensible and wise way of checking our standards and seeing that they are being fairly applied." *Id.*

¹⁹² See Burke, *supra* note 163, at 325 (presenting argument of one official of the Reagan Administration against UNHCR participation in asylum adjudication because determining who may stay "is a fundamental attribute to sovereignty").

¹⁹³ An example of such a letter may be found in *Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988).

bureaucratic turf to protect, the proposals did not result in formally promulgated draft regulations until August 1987.¹⁹⁴

Those proposed rules ranged widely and contained some improvements broadly supported. But the central change touched off a storm of controversy. The regulations proposed to establish a new corps of asylum adjudicators in INS, responsible to the Central Office's Office of Refugee Asylum and Parole, which would consider all asylum issues, no matter at what stage of the proceedings the asylum claim was filed.¹⁹⁵ The immigration judges would have been removed from asylum issues altogether, thus ending the provision of two possible rounds of *de novo* consideration.

If the alien were already in deportation or exclusion proceedings at the time of the asylum claim, those proceedings were to be adjourned to permit consideration of the case by the new adjudicators. The State Department was to receive a copy of all asylum applications and retained the option of communicating its views to the adjudicators, but the proposal probably would have led to a reduced role for the Department. If asylum was denied, the matter would return to the immigration court for consideration of any other defenses, and for issuance of a final deportation or exclusion order. Under the proposed regulations, the immigration judge had no authority to reconsider the asylum claim. The alien could still appeal to the BIA, however, and the Board retained authority to review the adjudicator's asylum decision.

These regulations evoked a strong reaction from refugee advocates. Although some had earlier expressed openness to the idea of a single corps of expert adjudicators, all were deeply concerned about the adjudicators' lack of independence under the August draft. The asylum office was to remain in INS, instead of being moved to EOIR or a wholly new independent agency. Moreover, initial indications about staffing and training held little promise of significant upgrading in the quality of personnel or procedures over that already in the district offices.¹⁹⁶

Although some comments filed in response to the rulemaking suggested measures that would address these concerns directly,

¹⁹⁴ See 52 Fed. Reg. 32,552 (to be codified 8 C.F.R. pts. 3, 208, 236, 242, 253) (proposed Aug. 28, 1987).

¹⁹⁵ See *id.* Although the regulations did not so state, INS initially envisioned stationing these officers in seven or eight cities throughout the country, with some provision for "circuit riding" to hear claims lodged in more remote locations.

¹⁹⁶ See Helton, *The Proposed Asylum Rules: An Analysis*, 64 INTERPRETER RELEASES 1070, 1073-74 (1987).

while retaining the basic idea of a single round of adjudication before a specialized set of adjudicators, NGO opposition soon focused with vigor on one particular cure: reinstatement of the opportunity for de novo consideration by the immigration judges. The campaign was so intense that the matter moved directly to the desk of the Deputy Attorney General, who decided to accede to the NGO position. On the day the comment period closed, the Justice Department told the press that new regulations would issue reinstating the judges in the process.¹⁹⁷ Finally, in April 1988, new proposed regulations appeared, implementing this decision, but continuing with plans for a centralized corps of adjudicators to replace the district office examiners.¹⁹⁸ To date, continuing internal disputes have prevented final promulgation.¹⁹⁹

C. *Evaluation*

Almost no one regards the current asylum adjudication system as an effective and efficient scheme for deciding on what Judge Kenneth Starr (now Solicitor General) has called "this most sensitive of human claims in the international community."²⁰⁰ If accuracy, speed, and fairness are the key objectives in asylum adjudications, the current system achieves them in only a small portion of cases.

1. Speed and Fairness

a. *Two Bites at the Apple*

Despite nominal agreement on all sides that expeditious proceedings are needed, the current system rarely achieves prompt finality. The most obvious culprit is the wasteful provision of two venues for de novo rulings in asylum—exactly the problem targeted in the August 1987 proposed rules.²⁰¹ Those rules, of course, met

¹⁹⁷ See Arocha, *Political Asylum Revision Dropped*, Wash. Post., Oct. 30, 1987, at A23, col. 1. This was followed by a formal announcement to this effect in the Federal Register in December. See 52 Fed. Reg. 46,776 (to be codified 8 C.F.R. pts. 3, 208, 336, 242, 253) (proposed Dec. 10, 1987).

¹⁹⁸ See 53 Fed. Reg. 11,300 (to be codified 8 C.F.R. pts. 3, 208, 236, 242, 253) (proposed April 6, 1988); Helton, *Asylum Rules Revisited: An Analysis*, 65 INTERPRETER RELEASES 367 (1988).

¹⁹⁹ See, e.g., 66 INTERPRETER RELEASES 3 (1989) (suggestion by INS Commissioner that asylum adjudication function should remain in the district offices as before).

²⁰⁰ Reyes-Arias v. INS, 866 F.2d 500, 504 (D.C. Cir. 1989).

²⁰¹ See Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 98, 111-12 (1981).

with such strong opposition that the Justice Department beat a hasty retreat and reinstated the role of the immigration judges in revised proposed regulations issued in April 1988. But the nature of the objections, the proposed remedy of the NGOs, and the Administration's ultimate response merit further inquiry.

Most of the opposition to the August 1987 proposed rules derived not from a belief that the immigration court provides the ideal setting for consideration of asylum claims. Indeed, the judges are often criticized in other venues, on a variety of grounds, by the same people who attacked the 1987 proposal. The opposition derived instead from concern about the quality of decision-making that could be expected under the precise form of unification that was proposed. The centralized corps of asylum adjudicators, who would have become the sole arbiters, would not likely have been much different, in training, background, or outlook, from the current examiners who make the decisions in the district offices. Opponents of the new regulations were able to collect affidavits with numerous stories of brusqueness, mishandling, errors, and apparent bias on the part of some of those officials.²⁰²

Early internal versions of what became the 1987 proposed regulations had considered assigning the newly centralized adjudication function to a different set of officials—attorneys at a higher civil service rank. But the Administration ultimately chose instead a version that would keep the position one for journeyman immigration examiners, and OMB initially assigned to the new positions a relatively low grade (relative, that is, to the magnitude and challenge of the adjudication required) of GS-11 and GS-12 for supervisors. The administration decided, in short, to attempt reform on the cheap, by shifting boxes on the organization charts rather than investing adequately in a new system and new personnel that might break through the established, and destructive, patterns of polarization and distrust that have paralyzed effective reform for years. The vigorous reaction from the NGO community should not have been a surprise, given that the adversarial forum was being replaced with such a stingy alternative.

Some old government hands in the immigration field, familiar with the shifting patterns of NGO advocacy over the last fifteen

²⁰² See *supra* note 144; see also Note, *Asylum Adjudication: No Place for the INS*, 20 COLUM. HUM. RTS. L. REV. 129, 143-44 & n.104 (1988) (arguing that "[t]he impartiality of the INS as an adjudicatory authority is compromised by the emphasis on enforcement which pervades the entire agency and by the direct effect this mentality has on decision-making").

years—sometimes favoring nonadversarial procedures, sometimes treating the immigration judges as indispensable—conclude that the position of the NGOs is always and only a tactical one, meant to preserve “two bites at the apple” whatever the proposal on the table. But to be fair, there is no inherent inconsistency in the advocates’ position. If speed were no concern, it might well be that the best possible system does involve two rounds of *de novo* consideration in different institutional settings: first a nonadversarial hearing to foster responses from hesitant or fearful applicants, followed by an adversarial, trial-type hearing that we traditionally identify as the best way to honor due process when the stakes for the individual are high.²⁰³ Arthur Helton, a leading figure in the asylum debates, stated forcefully during her interview for this study that the fight over the 1987 regulations has left the NGO community deeply committed to “bifurcated proceedings,” that is, to a system that allows two separate forums for initial, *de novo* consideration.²⁰⁴ NGOs will probably resist stoutly any departure from the victory they feel they justifiably won in October 1987.

But here is the rub: Speed is a concern, a vital concern. It must come to be seen as such by the NGOs as well as government officials, including high level Justice Department officials who step in on immigration matters only when political controversy burns high. Without speedy denials, the system will either attract large numbers of marginal claimants or else force resort to other costly and troublesome deterrents which indiscriminately burden genuine refugees. Restoring the “two bites” system thus implicated far greater costs than were appreciated in October 1987, by either the NGOs or the Justice Department.

b. *Administrative and Judicial Review*

Delay also derives from the clogged dockets of the immigration courts and from backlogs at the BIA. Shortening those delays requires additional resources, rather than major institutional redesign,²⁰⁵ and remains within the general control of the Justice Department, provided, of course, it receives adequate appropriations.

²⁰³ See Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1145 (1984) (identifying *Goldberg v. Kelly*, 397 U.S. 254 (1970), which imposed extensive requirements for trial-type hearings, as the “high watermark of procedural due process in the administrative setting”).

²⁰⁴ Interview with Arthur Helton, in New York City (Nov. 15, 1988).

²⁰⁵ The recent rules changes allowing the BIA to sit in panels of three should help reduce that backlog. See 8 C.F.R. § 3.1(a)(1) (1989).

(This is a powerful proviso, of course, in these days of Washington lip-reading.) One particularly important element in the delay, however, derives from the lengthy period of time required to obtain transcripts of immigration court proceedings. That period can now run eight months or more, although cases involving detained aliens are given priority and can be processed within a matter of weeks. If expeditious final rulings are to be received, EOIR must either arrange for a quicker turnaround of transcripts or else experiment with alternatives to full transcription of each hearing.²⁰⁶

Major delay also potentially derives from the provisions for judicial review, although this does not appear to affect a significant proportion of cases at present. Several refugee attorneys stressed during interviews that judicial review is sought only if the case appears particularly strong—in part because of the pro bono nature of the representation, and in part because such attorneys worry about developing bad law that would serve to undermine stronger cases later. This practice thus contrasts importantly with the use of other stages of the process, because immigration attorneys, I was told, consider renewal of asylum cases in immigration court and administrative appeals to the BIA to be routine steps in all but the most farfetched cases.

Changes to the judicial review provisions would therefore not appear to be warranted at this time. If these patterns change, and judicial review someday comes to cause delay in a far higher percentage of cases, then reform could be considered at that point. Statutory changes would then be needed. Other nations confronting the problem of judicial delay have tried two approaches: (1) by speedily identifying a class of applications adjudged “manifestly unfounded” and strictly limiting judicial review for that class; and (2) more ambitiously, by limiting the scope of judicial review in virtually all asylum cases to a summary proceeding that is highly deferential to the administrative outcome, but affords some opportunity for judicial correction of gross error or abuse. These approaches will receive greater, albeit preliminary, attention below in connection with proposed reforms.

c. *Is Delay Really a Problem?*

Before turning to the alternative approaches, however, one fur-

²⁰⁶ A Canadian study has recommended the use of videotapes, with briefs citing the location on the tape where crucial matters appear. See E. RATUSHNY, *supra* note 64, at 57-58.

ther set of objections to the above evaluation should be aired. Refugee advocates sometimes argue that the problems of administrative and judicial delay are exaggerated. They agree that the current system allows, at least theoretically, for six layers of consideration (three administrative and three judicial) in exclusion cases, and five in deportation cases, but they point to the absence of statistics showing that many asylum seekers actually avail themselves of all these opportunities.²⁰⁷

It is certainly true that the case for administrative simplification cannot be made convincingly on the basis of currently available statistics. EOIR maintains and releases only limited statistics on asylum caseloads, and it is impossible to tell how many of its asylum cases represent renewals of applications initially rejected in the district offices.²⁰⁸ The GAO study based on 1984 applications found that only seven percent of applicants denied in the district office renewed their claims before the immigration judges.²⁰⁹ But this statistic is suspiciously low, and may be attributable to the fact that time limitations on the study precluded the GAO from tracking all of the cases initially denied through to the applicants' actual removal from the country or to some other resolution of their status. It would be entirely possible that many aliens involved simply were not processed for deportation until after the study period ended, particularly because the study found a low INS priority on initiating such deportation cases.²¹⁰ Everyone interviewed for the present study—including immigration lawyers—thought that the seven percent figure was too low, although most placed their rough guesses of actual renewals in the 20-30 percent range, an estimate still not terribly high. Similarly, judicial statistics (again limited) do not show massive court litigation over asylum.²¹¹

These statistics, however, almost certainly tell a dated story. Before the full implementation, in 1988, of sanctions on employers

²⁰⁷ See, Kurzban, *supra* note 201, at 96-97.

²⁰⁸ It may be that the more complete EOIR statistics being released as a result of a policy change in early 1989 will someday provide greater insight into these issues. See *supra* note 160.

²⁰⁹ GENERAL ACCOUNTING OFFICE, *supra* note 150, at 20, 33. At the time of the study, 77 percent of the claims had been filed only in district offices and 16 percent only in immigration court.

²¹⁰ See *id.* at 27-29 (describing methodology), *id.* at 38 (showing that for 81 percent of the cases INS had taken no "deportation action" by the close of the study period).

²¹¹ See *supra* Table V following note 187.

who hire undocumented aliens,²¹² persons denied asylum in the district office had little incentive to pursue matters further. Most could probably find work and enjoy the benefits of a "de facto asylum" that carried few risks, despite their undocumented status.²¹³ Such aliens had no reason to rush further review, because they always retained the option of renewing the asylum application in immigration court if and when the INS caught up with them and initiated deportation proceedings. Moreover, because of enforcement priorities, deportation has not been an imminent threat.

Since Congress's adoption of employer sanctions, all of this has changed, although it is still too early for reliable statistics. The "walk-in" rate is up considerably in the district offices, and evidence suggests that, unlike in earlier years, many people now choose to file affirmatively for asylum in order to receive work authorization.²¹⁴ Once denied, they then have incentives to press INS to initiate deportation. In a striking role reversal, the immigration bar and refugee support groups have been urging INS to *hasten* arrangements for the issuance of orders to show cause in these circumstances, in order to assure an early forum for rearguing the asylum claim and, by no means incidentally, to renew work authorizations.²¹⁵ Past statistics thus furnish no reliable guide as to the magnitude of the delay problem under the present multilayered administrative system, given the new employer sanctions.

d. *Rights to Counsel*

One further element of possible delay lurks in the current system, owing to a major feature meant to enhance fairness to the applicant. Statute and regulation provide a right to counsel in the immigration court proceeding, although at no expense to the gov-

²¹² The employer sanctions scheme, INA § 274A, 8 U.S.C. § 1324a (1988), was enacted as part of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

²¹³ See generally Martin, *The End of De Facto Asylum*, *supra* note 105, at 163-64 (1987-88).

²¹⁴ See B. Frelick, *The Back of the Hand: Bias and Restrictionism Towards Central American Asylum Seekers in North America* 17 (U.S. Comm. for Refugees 1988).

²¹⁵ See Memorandum from Ignatius Bau and Robert Rubin (July 13, 1987), reprinted in 64 INTERPRETER RELEASES app. II at 882, 886 (1987); see also *INS Advises on Work Authorizations for Denied Asylum Applicants*, 65 INTERPRETER RELEASES 718 (1988). Similar incentives may someday operate at the judicial review stage, at least as long as the work authorization regulation remains unchanged, but that appears a more remote prospect, given the reluctance of most experienced asylum attorneys to take a weak case to court. See *supra* text following note 206.

ernment. They also mandate the provision of a list of pro bono counsel available in the area.²¹⁶ When asylum claims rise numerically, the limited numbers of pro bono attorneys are easily swamped.²¹⁷ This situation places immigration authorities in a difficult position as they try to keep pace with rising intake—a perfectly legitimate and praiseworthy bureaucratic objective. Inevitably, they have incentives to press for waivers of counsel or else to deny repeated continuances requested because of free counsel's limited availability. Recent court decisions, however, are imposing increasingly demanding requirements to assure a knowing waiver of counsel rights. Concomitantly, courts are increasingly insistent that the immigration judges allow continuances until pro bono counsel becomes available.²¹⁸ Obviously, in times of major influx, or in areas where counsel is limited, this stance can cause backlogs to increase substantially.

Court reversals for failure to honor these (qualified) counsel rights are particularly demoralizing to the system, for such reversals inevitably come months or years after the initial proceedings and all later phases of administrative consideration, at a time when the deportation or exclusion order is administratively final. Moreover, such reversals plainly require complete rehearing in the immigration court, possibly followed again by administrative and judicial review.²¹⁹ If the system is to be prepared reliably for speedy determinations despite a fluctuating caseload, the problem of counsel must be solved, either by wider provision of government-paid counsel²²⁰ or by assuring fairness to the applicant even in the absence of counsel.

²¹⁶ See INA §§ 242(b), 292, 8 U.S.C. §§ 1252(b), 1362 (1988); 8 C.F.R. pts. 292, 292a (1989).

²¹⁷ For an example of these complications, see *Maldonado-Perez v. INS*, 865 F.2d 328, 329-32 (D.C. Cir. 1989).

²¹⁸ See, e.g., *Baires v. INS*, 856 F.2d 89, 92-93 (9th Cir. 1988); *Castro O'Ryan v. INS*, 847 F.2d 1307, 1312-13 (9th Cir. 1988); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1031 (5th Cir. 1982). Some cases are more tolerant of the agencies' efforts to process cases in this manner. See, e.g., *Committee of Central American Refugees v. INS*, 682 F. Supp. 1055, 1065 (N.D. Cal. 1988); *Vides-Vides v. INS*, 783 F.2d 1463, 1470 (9th Cir. 1986).

²¹⁹ Class actions challenging broad features of asylum processing can likewise lead to this result. See *supra* note 3.

²²⁰ At least one commentator regards the Equal Access to Justice Act (EAJA) as a possible solution to these problems. See Note, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459 (1988). But EAJA is at best a half-measure that affords only marginal relief, because attorneys and agencies cannot know up front whether or not they will actually be compensated from the public treasury. It may be years before the fee question is settled. At best EAJA may attract a few more

The reforms proposed below center on a nonadversarial model that could provide a full and fair opportunity to present an asylum claim, even if the individual is unrepresented. Although efforts would be made to accommodate counsel's schedule, the proposed system is designed to proceed with fairness on a fairly prompt timetable, even if the applicant expresses a desire for pro bono counsel but insufficient numbers of counsel are available to meet the demand. It must be acknowledged that such a proposal will be highly controversial. Due process, at least when the stakes are high, is often closely associated with adversarial trial-type proceedings, which usually require professional counsel.

If the nonadversarial model is not accepted as the way of providing fairness to unrepresented asylum applicants, some carefully crafted alternative is imperative. It is essential to maintain the system's capacity for expeditious processing, without the risk that a court will send the case back to square one months or years later. The best alternative is probably for Congress to amend the statutes to eliminate the ban on government-paid counsel—not for all immigration matters but only for nonfrivolous asylum cases.

Because of unpredictably fluctuating caseloads, it would probably be best, if such a course is chosen, to follow a public defender model, assigning the representation responsibility to a permanent staff of government-paid attorneys.²²¹ Such a staff would provide other advantages as well, because of the expertise they could develop concerning country conditions over the course of litigating numerous cases. Naturally, applicants could still retain private counsel or engage unaffiliated pro bono attorneys when available, but the pace of proceedings would no longer be so dependent on private charity.²²² Obviously, the cost of such a system would be substantial, and

attorneys into initially pro bono representation, and groups currently providing assistance may be able to expand their staffs using EAJA awards from past cases. But unless the expansion far exceeds expectation, pro bono attorneys are still unlikely to be able to keep pace with new arrivals in times of large influx. Either delays will continue or many applicants will remain without representation—again risking judicial remand many months hence.

²²¹ Arrangements could be made for adequate insulation of these officers to assure an independent litigation posture, or perhaps the function could be performed under contract with a nongovernmental organization that would agree to maintain an adequate legal staff at the necessary locations, paid from government grants. Britain has arrangements of roughly this sort with the United Kingdom Immigrants Advisory Service (UKIAS), although not all of UKIAS's representatives are lawyers. See generally *EUROPEAN CONSULTATION ON REFUGEES AND EXILES, ASYLUM IN EUROPE: A HANDBOOK FOR AGENCIES ASSISTING REFUGEES* 371 (3d ed. 1983).

²²² As an added benefit, NGOs might then find it easier to target their own

the visibility of an appropriation for such purposes, at a time of extreme budgetary stringency, makes this course politically unlikely. But the current statutes (allowing counsel only "at no expense to the government") provide only illusory cost savings. Although no money goes directly to the applicant's counsel, the government incurs substantial expenses, primarily from detention prolonged by the period necessary to wait for the pro bono counsel to become available. Other indirect costs are harder to quantify but probably more substantial—for example, the burdens on local services caused by massive influxes of asylum seekers.²²³ A speedy system is imperative if such burdens and costs are to be reduced.

2. Accuracy

a. *Diffusion of Responsibility*

The current system fails to focus responsibility for this difficult and challenging decisionmaking on one set of officials. It thus enhances the risk of improper denials of asylum, even if all officials act in good faith. Over the years, INS spokespersons have sometimes responded to complaints about asylum denials by pointing out that all cases are checked with the State Department, which has expertise concerning these matters, and that INS almost always follows the Department's lead.²²⁴ At the same time, however, State Department officials have often felt that it was INS or the immigration judges who really performed the important part of asylum decisionmaking. Department officials, after all, see only the printed page. Much of the adjudication must turn on credibility judgments—clearly a task principally for Department of Justice adjudicators, who see the applicants in person and can test the stories through direct questioning.²²⁵ The system thus courts the risk that a negative State Department opinion will induce some relaxation in Justice Department care in examining individual cases. Yet that

scarce resources on cases they regard as most deserving, or as critical for establishing an important factual or legal precedent.

²²³ See Appendix (for rough cost estimates).

²²⁴ See generally *ASYLUM ADJUDICATIONS*, *supra* note 142, at iii, 61-64. Similarly, a 1983 study of asylum processing in New York noted "a certain discomfort with asylum cases" among immigration judges that led to heavy reliance on State Department views and some disavowal of responsibility. See P. Fagen, *supra* note 141, at 16.

²²⁵ See *ASYLUM ADJUDICATIONS*, *supra* note 142, at 60. I also encountered this attitude with some frequency during my own service in BHRHA (known simply as HA in State Department lingo) from 1978 to 1980.

opinion may have been issued in recognition that a cold record is not fully revealing, and in anticipation that the alien will have another chance to bolster his case before an adjudicator he will see in person.

It is not an easy thing to send a person back to a land where he claims he faces persecution. Unsurprisingly, officials may therefore seek at times to minimize their own role in such results. But arrangements that unintentionally help to meet that psychological need may entail systemic costs. A system that provides undue comfort in going along with negative results may fail to create adequate incentives for the care needed to spot the truly meritorious case.²²⁶

The reduced role for the State Department under the new sticker system should ameliorate this problem. A more complete focusing of the decision on a single set of adjudicators would provide even greater assurance. It would also give applicants the opportunity to make their cases in person to the official who will be responsible for all phases of the decision.

b. *Political Bias*

For decades the asylum adjudication system has been attacked for the bias of its results.²²⁷ No completely reliable scientific test of these claims is possible, and a GAO study chartered to discover whether asylum applications were given neutral consideration could only conclude that the matter was "uncertain."²²⁸ Nevertheless, even a quick glance at the statistics in Table II raises serious questions about the high grant rates for applicants from communist countries (particularly Poland, where political activity became much freer after the lifting of martial law in 1984), and the strikingly low rates for El Salvador and Guatemala. Moreover, testimony about bias comes in highly persuasive form from published accounts by INS insiders as well as from INS's critics.²²⁹

²²⁶ See Anker & Posner, *supra* note 31, at 76; Aleinikoff, *supra* note 89, at 193-94.

²²⁷ See, e.g., G. LOESCHER & J. SCANLAN, *supra* note 2, at 170-219; N. L. ZUCKER & N. F. ZUCKER, *supra* note 61, at 142-76; Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 260-62 (1984); Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 876-78 (1982); Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMMIGR. L.J. 495 (1986) [hereinafter *Political Bias*]; Note, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107, 107-09, 124-26 (1978).

²²⁸ See GENERAL ACCOUNTING OFFICE, *supra* note 150.

²²⁹ See ASYLUM ADJUDICATIONS, *supra* note 142, at 59 n.*; Meissner, *supra* note 2, at 57, 63 (describing the pressures that skewed decisionmaking, with special attention to Poland and El Salvador; the author was Acting Commissioner of Immigration from 1981-83 and Executive Associate Commissioner from 1983-86). In unguarded

Much of the outsiders' criticism blames bias on the role of the State Department (recently modified) in providing advisory letters on every case considered in the district offices and immigration courts.²³⁰ Clearly that practice provides an opportunity for diplomatic considerations to intrude on what the statute ordains should be neutral, case-by-case decisionmaking.²³¹ For this reason, it would be far better to remove the Department from any substantial role in the decisionmaking system.²³² No matter how conscientious the State Department may be in performing this function, the aura of distortion is bound to linger. Moreover, the Department itself would benefit from such separation. When the home-country government is angered by an asylum grant, its ire can be more easily deflected by our diplomats if the Department can credibly state that it had no role in the decision.²³³

Removing the State Department from asylum processing has

moments, some Reagan Administration spokespersons also revealed that they regarded asylum adjudications as inherently political. For example, in arguing (unsuccessfully) for extradition reform legislation that would have transferred from the courts to the State Department the authority to decide whether a particular offense was "political" and hence non-extraditable, the Deputy Legal Adviser stated: "[A] decision on the 'political offense' exception is (as the name suggests) *inescapably political* in nature, and inextricably intertwined with the conduct of foreign relations. It is an issue best left to the Executive branch to decide—*much as the decision to offer political asylum is an executive decision.*" *Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 32 (1982) (prepared statement of Daniel W. McGovern) (emphasis added).

²³⁰ See, e.g., Posner, *Comments and Recommendations on Proposed Reforms to United States Immigration Policy*, 36 U. MIAMI L. REV. 883, 887 (1982) ("[O]ne of the most troubling problems with the current immigration system is the State Department's involvement in the decisionmaking process."); *Political Bias*, *supra* note 227, at 537 ("The chief problem concerning residual political bias in asylum adjudications is the critical role that the State Department plays in assessing asylum claims.").

²³¹ See, e.g., *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir. 1976) (noting "some likelihood of the Department's tempering the wind in comments concerning the internal affairs of a foreign nation"); *Kasravi v. INS*, 400 F.2d 675, 677 n.1 (9th Cir. 1968) ("A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations . . ."); Aleinikoff, *supra* note 89, at 194, 234-35.

²³² For an argument that the State should retain its role, see Burke, *supra* note 163, at 325.

²³³ Some system should still be worked out for regularly notifying the State Department of cases received, to help prepare it for cases that will spark political controversy with the home government, to assure identification of any asylum seekers who may prove to be defectors with sensitive information, and perhaps to allow for the Department or the intelligence agencies to introduce confidential information bearing on the claim, pursuant to procedures permitting use of such information in limited circumstances. See, e.g., 8 C.F.R. § 208.10(c), (d) (1989) (setting forth procedures for disclosure of non-record evidence). Each eventuality is rare in asylum cases.

been advocated for years. But many critics fail to think through carefully the continuing risks of political bias even then, unless other important changes are made as well. The "coast of Bohemia" problem would still be present.²³⁴ Indeed, it would probably be aggravated. As Lippmann observed in his classic study, those who know less about the realities of an issue or a far-away land are more likely to rely on the "pictures in their heads" to cope with a challenging and complex mass of data.²³⁵ Without State Department advice, nonexpert adjudicators will be confronted with just such a dilemma.

A 1986 episode, widely reported in the newspapers, reflects the impact of such stereotyped thinking. The district director in Miami decided in April of that year to end all returns of aliens to Nicaragua from his district, because of concern that they might be persecuted by the Sandinista government. He was quoted as saying: "I would personally—not just as a Government official, but personally—have trouble sending people from a Communist country back to that country."²³⁶ Although this position was at odds with State Department information (as reflected in the annual country reports and in the fact that numerous advisory letters for Nicaraguans were still negative), and contravened Congress's explicit decision in 1980 to adopt a neutral standard to replace former provisions that expressly favored refugees from Communist countries, the Justice Department apparently made no effort to discipline the district director or otherwise bring his actions back into line.²³⁷

The phenomenon is not confined to the district offices. Some immigration judges also volunteered to me during office interviews that they considered a certain country (usually a Communist country) too dangerous for return, although none offered very complete or convincing reasons for this judgment. Certainly they did not claim that it was based on State or Justice Department policy or on country guidelines or across-the-board authoritative findings. It was

²³⁴ Even today, the State Department's advice is not always followed. Some impressionistic evidence, however, suggests that the failure to follow the advice has its own bias that compounds the favoritism for those who flee Communist countries. See T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 705.

²³⁵ W. LIPPMANN, *supra* note 81, at 30-49.

²³⁶ Pear, *Key Federal Aide Refuses to Deport any Nicaraguans*, N.Y. Times, Apr. 17, 1986, at A1, col. 1.

²³⁷ See *id.*; Dreifus, *supra* note 72, at 35. It appears likely that this action, along with other Department leniency toward Nicaraguans over the last two years, became well-known back in Nicaragua and played a role in eventually encouraging large numbers of people there to think about migration to the United States. The fruits of that encouragement were felt in the Harlingen district, at a rate of several thousand marginal applications for asylum each month during the winter of 1988-89.

simply based on their views about current world conditions. In the context of the conversations, I would not regard these comments as deliberate bias; they were meant as sincere efforts to implement the statute's commands in light of that person's understanding of home-country conditions. But especially when matched up with competing stereotypes that may lead to great skepticism of claims from Central Americans other than Nicaraguans, the potential for inaccurate results and for unfairness is manifest.²³⁸

Most immigration judges, it should be stressed, strive conscientiously to apply the legal standards fairly based on the records before them. But the potential for improvement remains. Some better way should be found to correct as much as possible for the unintended bias that derives from the adjudicators' inevitable creation of internal maps, particularly if the State Department is to be removed from routine involvement. Systematic effort should be undertaken to replace stereotypes with detailed and accurate information, helpfully digested. The "coast of Bohemia" problem can never be eliminated, but it can be minimized.

c. *Inadequate Use of Existing Expertise*

The immigration judges' role is firmly anchored in the adversarial model; by and large, they are expected to remain as passive arbiters ruling on records developed by the parties.²³⁹ Initiative by the judges to learn more about country conditions is not officially encouraged. EOIR Chairman Milhollan has specifically rejected an AILA suggestion that judges should receive more training on country conditions, and reaffirmed the traditional adversarial model.²⁴⁰

²³⁸ See P. Fagen, *supra* note 141, at 21 (finding that presumptions based on national origins distorted asylum adjudications).

²³⁹ In this respect, of course, EOIR is simply trying conscientiously to move away from a problematic past, when immigration procedures were harshly criticized for their inquisitorial character and for the mixture of enforcement and adjudicative roles for the special inquiry officers. See T. ALENIKOFF & D. MARTIN, *supra* note 3, at 87-91. This effort is praiseworthy in most immigration-law settings, but certain elements fit uneasily in the asylum proceeding. Most troublesome is the assumption that the judge is a kind of blank slate at the beginning of each new case. See generally S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2-3 (1988) (identifying a "neutral and passive decision-maker" as a key element of the adversarial model). This specialized kind of adjudication, unlike most other matters within the immigration courts' jurisdiction, cannot be performed well unless the adjudicator brings to the case cumulative expertise concerning country conditions. See E. RATUSHNY, *supra* note 64, at 15-18, 51.

²⁴⁰ New immigration judges, however, are given specific training on asylum matters as part of their standard two-week training course, including presiding over a

He stressed "that it was the attorney's responsibility to offer whatever evidence he or she deems appropriate to meet the alien's burden of proof in asylum cases."²⁴¹

Officially, therefore, immigration judges and the Board of Immigration Appeals must decide asylum cases based only on the record created in the specific case.²⁴² In reality, particularly when numerous cases are received from the country involved, the judges and the Board cannot help but remember, and, to some extent, use information learned in other cases. In fact, some immigration judges have become quite knowledgeable about conditions in those countries, especially in Central America, whose nationals account for a high percentage of asylum claims. Indeed, this is a praiseworthy practice that probably helps improve the quality of decisionmaking, even though it violates the formal requisites of the adversarial model.

One immigration judge I interviewed had in his office an impressive array of books, including biographies and recent nonfiction best-sellers, that reflected some of the political developments in foreign countries whose nationals were sometimes encountered in the courtroom. He said he tries to do a fair amount of such reading, in order to have a better "feel" for the cases that come before him. I worried a bit about the evenhandedness of the readings; most dealt with the victims of Marxist regimes, and the judge's readings seemed to have led to a special reluctance to return anyone to such countries. Nevertheless, this extracurricular reading program is admirable—far preferable to the attitude encountered in some decisionmakers who rested content with whatever information the parties happened to add to the record. But such helpful approaches should not be left to the initiative and energy of individual adjudicators. We should instead devise a system that provides more systematically and honestly for such learning, and also gives assurance that adjudicators develop as balanced a picture as possible from their readings.

simulated deportation case wherein asylum is the chief issue. But this training can only be scheduled when there are enough new judges (about eight) to justify the session. Therefore some judges may hear numerous cases before attending the sessions. In addition, annual conferences of the judges usually offer some program on asylum, at times including presentations by refugee advocacy groups and human rights organizations.

²⁴¹ *Report of Meeting Between American Immigration Lawyers Association and Executive Office for Immigration Review Department of Justice*, 65 INTERPRETER RELEASES app. III at 743, 749 (1988) (reporting on AILA-EOIR meeting).

²⁴² See *In re M—*, 7 I. & N. Dec. 222, 225-26 (1956).

3. Consistency and Quality Control

An important component of fairness is consistency of outcomes among decisionmakers.²⁴³ If judged only by asylum decisions in the immigration courts, the consistency goal would appear to be well-served, primarily through the mechanism of BIA review. Even now when the Board ordinarily sits in two panels, it remains a sufficiently small and cohesive body that it can reasonably assure similar outcomes for similarly situated aliens. Moreover, because both INS and the applicant can appeal to the BIA, the Board is in a position to police against both false positives and false negatives.²⁴⁴

A substantial body of asylum claims, consisting of the applications that are granted in the district office, however, escapes this checking process. These applications amounted to 39.1 percent of cases decided there in FY 1988, and 27.8 percent as a cumulative percentage for cases decided over the past five years.²⁴⁵ Of course, anyone unfairly *denied* asylum in the district office may renew the application in immigration court, where consistent results are more likely. The problem thus is one of inconsistent positives—a less disturbing result, perhaps, than inaccurate negatives resulting in return to the home country of a truly deserving asylum-seeker. One might possibly argue that false positives are not a genuine problem, that they reflect merely the system's commitment toward giving asylum seekers the benefit of the doubt.

Such a view should be resisted. False positives, in the long run, also harm the system, in two ways. First, the general patterns in asylum cases are communicated back to the home country.²⁴⁶ An exces-

²⁴³ In a well-functioning system, consistency should also go far toward serving the goal of accuracy. The claim here is more modest, because of doubts about the validity of some of the BIA's doctrines, making it too hard for some nationalities to win asylum and too easy for others. See, e.g., *In re Fuentes*, Interim Dec. No. 3065, slip op (BIA Apr. 18, 1988); *In re Maldonado-Cruz*, Interim Dec. No. 3041, slip op. (BIA Jan. 21, 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989). Nevertheless, even within such a framework, the value of fairness would be served by assuring that Nicaraguans in Miami receive the same consideration as Nicaraguans in Nebraska, and that Salvadorans in Texas are treated no more harshly than Salvadorans in California.

²⁴⁴ This BIA capacity, however, is unfortunately undercut to a certain extent by APRU's role. Although APRU is scrupulously careful not to intervene in the quasi-judicial proceedings before the immigration judges and the Board, it does occasionally reopen discussion with INS on the merits of a case *after* a deportation order is administratively final. To the extent that this leads to a later grant despite the EOIR denial, it undermines some of the consistency the BIA attempts to obtain.

²⁴⁵ See *supra* Table II following note 150.

²⁴⁶ See *supra* note 118 (discussing sociological studies of the role of social networks in stimulating or facilitating migration).

sive pattern of false positives can thus help stimulate a larger flow of marginal asylum applicants. Such a communication process appears to have played a role in the surge of Nicaraguan applications in Texas in the winter of 1988-89.²⁴⁷ Second, when the false positives are systematically biased in favor of certain groups, as appears to be the case at present, they undermine public confidence in the system and perhaps increase the chances that courts will be tempted to overturn accurate denials of other nationalities in an attempt to restore some rough parity. False positives, when systematically favoring certain groups, also violate the underlying premises of the system. Those premises require neutral adjudication, committed to providing asylum to those, and only those, sufficiently at risk of persecution in the home country.²⁴⁸

The 1980 regulations were crafted with some attention to the problem of false positives. Some advocates had urged that the regulations allow prompt grants of asylum by district directors in meritorious cases, without referral to the Department of State. The Justice Department decided against this approach, in part to assure greater consistency by checking overhasty grants by examiners.²⁴⁹ But this limited check never worked with great efficiency, because State had no way to follow up on cases in which asylum was granted by the examiner in spite of a negative advisory letter. In any event, this consistency check has virtually evaporated now, when the majority of referred cases come back with a sticker that simply indicates that State has nothing to add.

²⁴⁷ See Frelick, *INS Seeks Tougher Approach on Asylum, Work Authorization, But Faces Legal Challenge*, REFUGEE REPORTS, Jan. 27, 1989, at 1, 2 (reporting that Associate Attorney General seeks to rescind earlier Meese policy that was quite generous to Nicaraguans, viewing it as "a contributing factor to the current situation" in South Texas).

²⁴⁸ See generally Kurzban, *supra* note 201, at 115. This careful insistence on neutrality and consistency in ruling on asylum applications under INA §§ 208 and 243(h) would not preclude the granting of temporary residence rights to specific groups chosen by the political branches, based on a combination of political and humanitarian factors, through EVD or special legislation, for example. But decisions of that sort, to shelter a wider category of needy individuals, should be clearly seen as such—political decisions rather than quasi-entitlements. Such clarity both avoids distortion of asylum adjudication and focuses appropriate responsibility for such safe-haven decisions in the political branches.

²⁴⁹ This theme was voiced frequently in internal government meetings in which the author, then a State Department official, participated in 1980. See generally Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974) (describing elaborate quality control systems, based on sampling and follow-up, used by some social-welfare adjudication systems).

Finally, it could be that the Asylum Policy and Review Unit was meant to bring greater consistency to this body of decisions. APRU's method of operation and limited staffing, however, force APRU to place its greatest emphasis on cases in which asylum was denied in the district offices rather than when it was granted. In doing so, APRU unnecessarily duplicates the roles played by other units involved in the process. Indeed, the Asylum Policy and Review Unit is hard to justify under any vision of sound asylum adjudication process. It adds a layer of procedure, and it seems likely only to confuse the guidance that INS examiners attempt to follow in adjudicating cases, heightening the risks of inconsistency. After all, those examiners already are mandated to consider the views of the State Department, and they are bound to follow the legal doctrine developed by the BIA.

Why was APRU created? If inadequacies in State Department information led to this step, obviously it would be more effective to address the specific deficiencies at State—or else to replace that Department with another method of providing up-to-date information. If, instead, direct review through the normal channels (involving the immigration judges and the BIA) was failing to assure proper outcomes, it would have been far better to address those deficiencies directly, rather than by throwing another agency at the problem.

IV. PROPOSED REFORMS

A. *Specialized Adjudicators*

Any cure, short- or long-term, for the ills afflicting our present asylum adjudication system should build upon one central change. The United States should create a corps of specialized, well-trained professional adjudicators²⁵⁰ to preside at the asylum adjudication proceedings and to make the initial determinations in a single, unified procedure, replacing the two wasteful rounds of wholly separate, *de novo* consideration now available. The adjudicators should have no other function in the immigration system, nor should they rotate to this post from other enforcement responsibilities. This change

²⁵⁰ Similar suggestions have been made for many years. See, e.g., Anker & Posner, *supra* note 31, at 74 ("To insure that applicants receive the sympathetic assistance necessary to a fair resolution of their claims, asylum cases should be separated out from routine immigration cases and handled by specially trained officials."); SELECT COMMISSION, *supra* note 69, at 173-74. For a sensitive discussion of the risks and advantages of specialized adjudication systems, see S. LEGOMSKY, *SPECIALIZED JUSTICE* (forthcoming Oxford University Press 1990).

would greatly improve the system's accuracy, fairness, and speed, whatever other reforms might ultimately be adopted. The change would better equip us to welcome refugees promptly, as our tradition demands, as well as to deport unqualified applicants expeditiously. Nearly all other Western countries have built their systems around such specialists. It is high time that the United States joined their ranks.

To attract high-quality professionals, the new office should set the grade and salary of the adjudicator's position at a level equivalent to that enjoyed by immigration judges.²⁵¹ Asylum adjudicators make decisions every bit as complicated and challenging—and as important to the government and the litigants—as other cases that fall within present EOIR caseload. This means that costs for the new system, at least for the first several years, will run considerably above the recent experience under the current system, particularly because several dozen adjudicators will be needed.²⁵²

We must develop the capacity, however, to accept short-term expenditures in order to avoid larger long-term societal costs, costs that are unavoidable as long as we remain vulnerable to influxes of marginal asylum applicants. The new system, if effectively implemented, should finally straighten the many kinks that now prevent or greatly delay actual deportation of unsuccessful applicants. Once it becomes widely known that the system has that capacity, future influxes should decline significantly (barring major outbreaks of persecution in this hemisphere). Such results are, doubtless, years away. Expending enough now to do the job right, however, is an indispensable investment.

Canada's recent experience reveals the need to consider the long-range effects of the expenses. In January 1989, Canada implemented a promising new system, built around a corps of independent, professional, full-time adjudicators supported by its own documentation center.²⁵³ At that time, the system was confronted with a backlog of 85,000 cases and an intake level that had run to 45,000 in 1988. To deal with this task, by the summer 1989, the new Immigration and Refugee Board had hired not only the sixty-five

²⁵¹ Early internal papers that ultimately led to the August 1987 proposed rules discussed an option of making the new adjudicators "attorney examiners" with the higher rank that classification carries. Unfortunately, INS chose the cheaper option, making the asylum adjudicator's position a journeyman-examiner position, at the GS 11 or 12 grade.

²⁵² See Appendix (for the cost estimates).

²⁵³ See sources cited *supra* note 112.

permanent full-time members authorized by statute for its refugee division, but also an additional eighty or more members with two- or three-year terms. It also planned to add another fifty or more over the next year to help eliminate the backlog. All such officials were hired at a high rank, with a salary in the range of \$50,000 to \$60,000. Canada expected to spend over \$70 million in 1989 on asylum adjudications.²⁵⁴ This outlay is considerable. The proposal offered here differs from the Canadian model in several important particulars, partly in order to develop a less costly system. Significant expense, however, cannot be avoided.

The most important qualifications to be sought in recruiting and selecting asylum adjudicators are interest in international affairs and demonstrated awareness of and sensitivity to life in other cultures.²⁵⁵ Although current adjudicators could, of course, apply for such positions, an effort should be made to assure a wide diversity of backgrounds among those hired, both to provide the necessary cross-cultural sensitivity and to signal that the new system marks a clean break from a problematic past.²⁵⁶

²⁵⁴ Interview with Jerry Robbins, Director General, Operational Policy and Planning, Immigration and Refugee Board, in Ottawa, Canada (Dec. 19, 1988). The figures are translated into US dollars.

²⁵⁵ Several persons interviewed for the study (most of whom were from countries other than the United States) stated that characteristics other than legal training may be most important in identifying good asylum adjudicators. They urged that serious thought be given to hiring nonattorneys. Canada has taken this approach for the majority of the adjudicators (Immigration and Refugee Board members) recruited for its new system, even though the position carries a salary that would be sufficient to attract attorneys. *See supra* note 254 and accompanying text. In an early draft of this study, I thus suggested recruitment among nonattorneys with the requisite international experience and sensitivity, without, of course, precluding lawyers. This suggestion, however, drew a strongly negative reaction, from government officials and refugee advocates alike. Not only will the adjudicators have to follow fairly complicated developments in the burgeoning American case law on asylum, but also, and perhaps more importantly, they will very often be dealing with lawyers for the applicants, in the course of conducting the proceedings and constructing the factual record. That record, in turn, is meant to be the basis for both the initial decision and further review, which will be entirely under the stewardship of lawyers. I have therefore withdrawn the suggestion. At least for the American administrative context, dominated as it is by lawyers and infused with the American cultural preference for an adversarial form of justice, asylum adjudicators should be trained attorneys.

²⁵⁶ A provision in an early Simpson-Mazzoli immigration reform bill would have created a separate unit of immigration judges to decide asylum cases after special training, but, in an extraordinary measure apparently meant to demonstrate a complete break with the past, it provided that no one who had served as an immigration judge before the date of enactment could hear asylum cases. *See* S. 2222, 97th Cong., 2d Sess. § 124(a)(2), 128 CONG. REC. 21,671, 21,675 (1982) (proposing new Immigration and Nationality Act § 208(a)(2)). The 1983 version of the bill

A demonstrable change from the past, fortified by a visible commitment of added resources to assure professionalism, would also serve other useful functions. First, such a change would maximize the chances of gaining the support, or at least the acquiescence, of refugee advocacy groups. (Indeed, a major effort should be undertaken to encourage NGO participation in shaping the final details of any such plan.) The August 1987 proposed regulations foundered, in part, because they did not sufficiently indicate a genuine departure, nor did they reflect any real commitment of new resources.

Second, a major shift to an impressively professional group of adjudicators might also send an important message to the courts. The shift would show that the new system was not cobbled together solely as a hasty reaction to the recent rise in the numbers of asylum seekers, but that the reform attended to the needs of asylum seekers truly in danger of persecution at home. The history of dealings between agencies and courts in the asylum field suggests that a fresh start is well-advised.²⁵⁷ The object of these reforms is not to launch a system that will work only after years of paralysis resulting from test cases. The object is to create a system that can work fairly and efficiently after only a brief start-up period, and that can actually lead to swift grants and denials—the latter leading to prompt deportation. This objective cannot be achieved unless the courts are prepared to defer to the agency in the vast majority of cases.²⁵⁸

Many Western countries have developed adjudication staffs whose members specialize by region or even by country of origin. Such specialization would be ideal, for it would improve still further the development of expert and detailed knowledge to be brought to

eased this restriction, however, simply preventing such service until the judges received special training in international relations and international law. *See* S. 529, 98th Cong., 1st Sess. § 124 (a)(1), 129 CONG. REC. S6970, S6975 (daily ed. May 18, 1983).

²⁵⁷ *See* cases cited *supra* note 3 (describing the years of litigation which resulted when Haitian asylum seekers initiated the first major challenge to the government's procedures for asylum adjudication). In the *Haitian Refugee Center* litigation, the element most damaging to the government's case may have been the revealing fact that INS tally sheets for reports on the "Haitian program" contained room only for the number of denials; it had no line for reporting on grants of asylum. *See* *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1031-32 (5th Cir. Unit B 1982). Not surprisingly, the courts concluded that the effort was meant to clear dockets without attention to the merits of individual cases. *See id.* at 1040.

²⁵⁸ *See, e.g.,* Mashaw, *supra* note 249, at 806-07 (suggesting that an important factor determining whether a reviewing court will take an interventionist or a deferential stance is the court's "confidence or lack of confidence in the integrity of the underlying administrative process").

bear in the cases.²⁵⁹ Nevertheless, such a system is probably not fully attainable in this country, owing primarily to geography. In Switzerland, for example, the full federal government adjudication staff can remain in Berne. Applicants simply come to the capital via an inexpensive train ride for their interviews with the appropriate country specialist. The United States is too vast for such a system. Nevertheless, there may be some chance for a limited specialization in various locations where particular nationalities have congregated (such as Poles in Chicago or Nicaraguans in Miami). In any event, most current asylum seekers come from Central America and the Caribbean. Recruitment efforts should therefore focus on persons already familiar with the cultures of that region, and all adjudicators should receive training and ongoing information on country conditions there.

The new system should be expressly based on an understanding that these adjudicators will develop expertise about country conditions over time and may apply their cumulative learning to each case they encounter. As developed above, such expertise will help serve several important objectives. It will facilitate adequate questioning at the hearing to cover all necessary details, help in assessing credibility, and undergird the ultimate evaluation of the risk the applicant would face if returned. Training must emphasize that the adjudicator's mission is as much to help substantiate meritorious claims as it is to issue prompt denials when the claimant is unqualified.

Other elements, some detailed in succeeding sections, would also serve to develop and preserve the needed expertise. Perhaps most important would be a well-staffed documentation center, independent of the State Department. The task of this documentation center would be to amass unclassified information on country conditions from a wide range of sources, including both the State Department and private human rights organizations, in order to make this information available in as accessible a form as possible. Many other nations have devoted resources to official documentation centers of this type. Canada, in particular, has pioneered several innovative and useful techniques, including frequently updated

²⁵⁹ See, e.g., Aleinikoff, *supra* note 89, at 234 (advocating a system where decisionmakers can improve their ability to judge the credibility of an application by becoming "thoroughly familiar with conditions, events, political parties, and social groups" in particular countries); Kälin, *supra* note 107, at 239 (recommending that officials be knowledgeable of the particular cultural background of the asylum-seekers whose cases they decide, in order to prevent cross-cultural miscommunication and impaired decisionmaking).

country profiles and background information on all significant source countries.²⁶⁰ In addition to assuring that they remain current on developments in source countries, adjudicators should be able to use the center, with the help of its staff, to search for information about particular legislative facts. For example, if the claimant asserts that he was involved in a major demonstration in November 1983 in the capital city and that the demonstration was violently suppressed by the police, an adjudicator could seek confirmation of such an event from the center. Or, if the claimant asserts that government soldiers forcibly impress young men into the armed forces, the adjudicator could ask the documentation center staff to provide whatever information is available from its database on such matters. (Fairness constraints on the use of such information are discussed below.) The center's resources should also be open, of course, for use by asylum seekers and their counsel.²⁶¹

Because this new system would develop its own capacity for obtaining and evaluating a wide range of country condition information, routine referral of cases to the State Department should be eliminated.²⁶² Individual adjudicators might still refer a particular matter when it appears likely that State Department information, not otherwise available through the documentation center, would be particularly helpful. But solicitation of State Department views should be the exception, not the rule.

There remains the "coast of Bohemia" problem. Indeed, when I described early versions of this proposal to some private attorneys, they expressed deep concern that expert adjudicators of the sort proposed here might become overly dogmatic in their own distinctive views of conditions in the home country. And with the removal of any second-round *de novo* consideration before the immigration

²⁶⁰ See Rusu, *supra* note 112. See generally Rudge & Kjaerum, *The Information Aspects of Refugee Work—Time for a Full-Scale Information Strategy*, REFUGEE ABSTRACTS, Dec. 1988, at 1; Thoolen, *Refugees and Information Technology*, REFUGEES, Oct. 1988, at 34, 36 (advocating an international refugee documentation network).

²⁶¹ Ideally, the new system would follow a practice carefully adhered to in Switzerland. The Swiss system specifically provides that 10 percent of each officer's work week be set aside for keeping current on the latest information received in the center regarding countries for which she has responsibility.

²⁶² Arrangements should still be made for referral of "urgent action cases," such as those involving defectors and diplomats, to the State Department so that it may handle the immediate diplomatic consequences. Or perhaps only basic biographic data on each applicant could be provided to the State Department, solely for the purpose of screening by the national security agencies, rather than generating a letter containing State Department views on each application.

judges, advocates would lose at least one important opportunity to correct for such bias.

No system can be designed that escapes this problem altogether. But it hardly seems prudent to retain multiple layers of *de novo* consideration on the chance that the pictures inside the head of the second adjudicator will cancel out those inside the head of the first. Such a system is a recipe for stalemate or confusion, even though fewer deportations may actually result while litigation drags on. A better approach, though hardly foolproof, is to craft a system candidly aware of the risk of such distortions and dedicated to avoiding them.

The best cure for dogmatic stereotyping is steady provision of reliable information—constantly forcing the participants to redraw the pictures inside their heads to conform more completely to the new, more detailed, and more accurate information.²⁶³ This kind of corrective is far more likely to be successful under the proposed system than under the present system, if only because the adjudicators will be confronting such information full time, rather than considering asylum cases as a fraction of their workload. Other strategies, such as weekly regional updates prepared by the documentation center staff, ongoing training procedures, and well-targeted monitoring, can offer further assurances, if pursued with sufficient determination by the agency.

B. *Organizational Location*

Who exactly would perform such monitoring and arrange for ongoing training? That is, where would this new office be located, and what would be its lines of accountability? Earlier studies have sometimes argued for a fully independent asylum adjudication office, headed, for example, by a multi-member board appointed by the President and removable only for cause.²⁶⁴ Independence would indeed carry perceptible advantages. Principally, it would help ensure reasonably neutral decision making, insulated from foreign policy influences and sheltered from dominance by an enforcement perspective.

But full independence of this sort might not provide adequate assurance to those who worry primarily about asylum as a loophole.

²⁶³ See W. LIPPMANN, *supra* note 81, at 402-405.

²⁶⁴ See Aleinikoff, *supra* note 89, at 234-35 & n.170; see also N.L. ZUCKER & N.F. ZUCKER, *supra* note 61, at 276-77 (citing numerous studies advocating a refugee authority independent of political considerations).

And, in any event, full independence is not likely to be politically acceptable. Traditionally, Congress has insisted upon keeping a wide range of functions and authorities in the immigration field, whether they relate to enforcement or adjudication, under the control of the Attorney General.

It remains possible, however, to achieve most of the objectives of independence while retaining general responsibility in the Attorney General. The obvious location for a new unit of this sort would be within the Executive Office of Immigration Review. Created in 1983, that Office has evolved over the last several years into a major subunit of the Justice Department concerned exclusively with adjudication and review, and freed of entanglement with enforcement functions. Although EOIR reports to the Attorney General, it is sufficiently removed from foreign policy and enforcement responsibilities to afford reasonable assurance of neutrality and independence in asylum adjudications.²⁶⁵ The August 1987 proposed regulations might have been more acceptable if they had placed their new corps of asylum adjudicators within EOIR, rather than keeping the unit in INS.

The proposal, therefore, could be framed in this way. Statute or regulation should create within EOIR a new Asylum Board, headed by a chairperson responsible directly to the Attorney General. The chair would supervise a staff of asylum adjudicators, hired as

²⁶⁵ As a practical matter, the Attorney General exercises his authority over EOIR decisions only through use of his "referral" power under 8 C.F.R. § 3.1(h) (1989)—for example, because it would set a wide-ranging precedent. Referrals are rare, and in any event they are publicly known and visible, thus minimizing the risk of improper invasion of adjudicative neutrality. *See also* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (limiting other opportunities for control by the Attorney General of Board of Immigration Appeals decisions). Similar procedures should likewise shield the determinations of the asylum unit.

Some commentators appear to assume that any adjudications still under the responsibility of the Attorney General will be inevitably tainted with an enforcement outlook. *See, e.g., Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1363-66 (1983) (asserting that the "implicit threat of abolition" of the Board of Immigration Appeals by the Attorney General "undermines the independence of the Board's judgment"). *See generally* U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 40-43 (1980) (citing several explanations for the emphasis on enforcement activities by the Immigration and Naturalization Service). This approach is too mechanical. Functional independence and neutrality grow from and are nourished by a far wider range of ties and reinforcements; judgments about independence based solely on inspection of an organization chart or tenure protection provisions are likely to be misleading. *See* J. MASHAW, BUREAUCRATIC JUSTICE—MANAGING SOCIAL SECURITY DISABILITY CLAIMS 41-44 (1983); T. ALENIKOFF & D. MARTIN, *supra* note 3, at 91, 451-53.

described above, who would probably be located in several offices distributed around the country as caseloads require. The chair would also be a member of any administrative appellate unit dealing with asylum (to be discussed below).

C. *Nature of the Proceedings*

Because the asylum adjudicators would lack jurisdiction over other immigration law issues, under this proposal, asylum determinations will obviously be separate from deportation or exclusion proceedings. Those who walk in to a district office to apply affirmatively for asylum should receive the necessary form and be given enough time to complete it and gather any desired supporting information. Once the form is returned, the case can be referred to an adjudicator. Denial by the adjudicator would foreclose future consideration of the issue in deportation proceedings. If the asylum issue is raised only after the alien is already in proceedings, the immigration judge should adjourn the hearing, pending a decision on the asylum claim by the specialized adjudicator.²⁶⁶ Alternatively, special arrangements could be made, particularly when the party concedes deportability and suggests no other relief from deportation, for speedy entry of a conditional deportation order—conditional on the outcome of the asylum adjudication. Careful thought should be given to streamlining these procedures so that, if the asylum claim is not accepted, a fully effective deportation order can take effect as soon as possible.

Other questions about the nature of the proceedings are more basic, for they go to the fundamentals of how evidence will be presented and tested, both in the interest of the applicant and in the interest of the government. Recommended here is a nonadversarial model that assigns to the adjudicator the major responsibility for developing the record, including the marshaling of both positive and negative information, and adds certain measures to assure fairness for the applicant and a complete opportunity to present her best case.

The choice of a nonadversarial model may seem surprising in

²⁶⁶ The August 1987 proposed regulations spelled out detailed arrangements for such a procedure. They also provided possible procedural models for consideration of asylum claims that arise only after deportation proceedings have ended, and for limited opportunities for reopening denied claims based on changed circumstances. See 52 Fed. Reg. 32,552, 32,554, 32,558-59 (to be codified at 8 C.F.R. pts. 208.3, 208.18) (proposed Aug. 28, 1987).

light of constitutional due process considerations.²⁶⁷ Under a *Mathews v. Eldridge*²⁶⁸ analysis, it is customary to consider that asylum seekers have a most vital private interest at stake. And, although the government's interests may also be weighty, particularly in light of the pressures created when asylum applications are numerous, it remains customary to think of adversarial trial-type proceedings as the best guarantees—perhaps indispensable guarantees—when individual stakes are high.²⁶⁹

But a closer look at the Supreme Court's procedural due process jurisprudence reveals that the Court does not prescribe adversarial procedures as a requirement in all settings where important interests are at stake.²⁷⁰ Fundamentally, due process requires the opportunity

²⁶⁷ See generally Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Immigration Legislation*, 44 U. PITT. L. REV. 261 (1983) (analyzing a number of constitutional difficulties with the changes proposed by the Senate version of the Simpson-Mazzoli "Immigration Reform and Control Act of 1981").

²⁶⁸ 424 U.S. 319 (1976). *Eldridge* established the Supreme Court's framework for resolving procedural due process issues. This framework requires courts to consider three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. This analysis has often been criticized as inadequate, primarily for focusing too much on accuracy and too little on the "dignitary" interests of the individuals involved. See, e.g., Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (asserting that "the failing of *Eldridge* is its focus on questions of technique rather than on questions of value"). Those critiques may have less weight in the immigration setting, but, in any event, *Eldridge* remains the governing standard.

²⁶⁹ See Mashaw, *supra* note 249, at 772, 775 (describing and criticizing this view). See generally Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983) (arguing for greater acceptance of nonadversarial procedures).

²⁷⁰ See, e.g., *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320-334 (1985) (finding that a veteran's difficulty in procuring legal representation for Veteran's Administration benefit claim procedures caused by a \$10 attorney's fee limitation does not violate due process requirements); *Parham v. J.R.*, 442 U.S. 584, 606-09 (1979) (holding that an adversary proceeding to determine the appropriateness of decisions to commit children to state mental hospitals is not required where an inquiry has been made by a staff physician); *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (stopping short "of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions [from public school] must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident"); *Richardson v. Perales*, 402 U.S. 389, 410 (1971)

to be heard "at a meaningful time and in a meaningful manner."²⁷¹ What is meaningful should be decided, not in the abstract, but only after careful attention to the specific adjudicative task at hand.²⁷² *Eldridge* is not to the contrary. In fact, the *Eldridge* analysis—and particularly its middle factor—asks us to move away from rigid reliance on the classical trial-type hearing model and to inquire instead into what makes the most sense for assuring fairness in the precise adjudication at issue. That middle factor invites us to undertake a careful comparative inquiry, weighing the relative merits of the adversarial and nonadversarial models in the *asylum context*. Viewed in this light, an adversarial asylum hearing, presided over by a passive judge who officially knows nothing about the relevant issues except what appears in the record, should be seen as a poor servant of either fairness or accuracy.

First, several of the basic assumptions that underlie our usual preference for trial-type procedure do not apply here. That preference derives from the view that rebuttal evidence, cross-examination, and confrontation provide "the best way to resolve controversies

(approving significant role for presiding administrative law judge in questioning applicant for social security disability benefits, as against claim that this practice unconstitutionally mixed the role of prosecutor and judge, and upholding use as evidence of written physicians' reports supporting nondisability, notwithstanding the reports' hearsay character, the absence of cross-examination, and the directly opposing testimony by claimant and his medical witness).

²⁷¹ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

²⁷² See, e.g., *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (noting that the due process clause is not necessarily violated when "some leeway for practical administration" of a statute is allowed). Many other writers, including two eminent federal judges, have urged that American due process inquiry expand its horizons and acknowledge that fairness can often be well served by procedures other than trial-type hearings. See, e.g., Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1052-55 (1975) (challenging the strictly adversarial nature of the U.S. legal system and suggesting more investigation into alternative systems of justice); Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1287-91 (1975) (advocating an investigatory model for administrative hearings under which an independent decision maker would have the responsibility for developing all the pertinent facts); Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 314-16 (1978) (explaining that much of U.S. criminal trial procedure, most notably the active roles of prosecution and defense counsel, is of only recent historical origin and peculiar to the American legal system); see also *Parham v. J.R.*, 442 U.S. 584, 606-09 & n.16 (1979) (approving nonadversarial procedures in the context of parental commitment of children to state mental institutions because "[t]he judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise"); O'Barr & Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 666-67 (1985) (criticizing the restraints placed on witnesses in formal adjudication).

involving disputes over adjudicative facts.”²⁷³ But cross-examination and confrontation are rarely among the tools used by an asylum seeker in an asylum proceeding, for a fundamental reason: The government offers its own witnesses only on rare occasions. In the overwhelming majority of asylum cases, the only witness actually testifying (as opposed to communicating in some fashion through documents) is the applicant himself, perhaps joined by family members. Therefore, the only cross-examination that takes place, most of the time, is that of the trial attorney who endeavors to expose inconsistencies or weaknesses in the applicant’s own account. It could hardly be thought unfair to the applicant to replace such interrogation (designedly adverse) with questioning done instead by an examiner who has been instructed that her role is to develop a full record and not to strive zealously for a negative outcome.

The other information in the record is usually documentary, such as newspaper accounts or human rights reports. Very little of it relates specifically to the individual; virtually all of it has to do with legislative facts.²⁷⁴ Reports concerning legislative facts may, of course, be rebutted, and occasionally it will be in the applicant’s interest to attempt to do so—for example, to challenge something

²⁷³ 3 K. DAVIS, *supra* note 93, § 15.3, at 144. Professor Davis amplifies those reasons as follows:

The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes over adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal’s attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal’s attention.

Id.

²⁷⁴ The only likely exception may be an account of earlier statements the individual applicant gave to immigration officials, usually at the time of apprehension. For example, the account may say that the applicant told the officers he came to find a job. If the applicant disputes the accuracy of that account, it may be necessary to call the recording official to the hearing. But most often, the applicant does not challenge the fact of the earlier statements; he challenges their significance or seeks to explain them because of his reluctance to touch on risky subjects in the presence of uniformed officers. Here, too, the applicant’s own testimony will be the relevant tool, not confrontation or cross-examination. For discussion of “legislative facts” see *supra* notes 93, 99-105 and accompanying text.

asserted in the State Department's human rights country report. But again, the usual adversarial tools are not necessarily of great assistance here. Rebuttal customarily takes the form of supplying competing documentary evidence that tends to controvert the asserted fact. The nonadversarial model proposed here makes full allowance for such submissions, along with argument based thereon. Moreover, unlike the present system that makes regular provision only for State Department input, the model here places responsibility on the adjudicator to consider not only State Department information, but also human rights reports from other reasonably available sources.

Second, an adversarial model functions well only when each of the three key roles (the judge plus the parties' representatives) is played by a professional who is well-equipped to deal with the subject matter and the techniques at hand. In asylum adjudication, satisfying this prerequisite is not simply a matter of assuring the presence of lawyers, for the ordinary generalist lawyer's tools often are insufficient to carry out an adequate inquiry, even into the immediate adjudicative facts. Substantial country expertise, supplemented by sensitivity to cross-cultural difficulties, is necessary even to perform an effective direct examination of one's own client. One manual for volunteer attorneys in asylum cases illustrates the need for such qualities: It recounts the story of "one lawyer who, upon hearing that his client had been chased by armed men in civilian clothing in El Salvador asked, 'Well, why didn't you go to the police?'"²⁷⁵

In short, the relevant expertise, detailed knowledge about conditions in source countries, is simply too scarce. One cannot expect three participants in the adversarial proceedings (two lawyers and one judge) to have this expertise except in rather unusual circumstances. Adopting a nonadversarial model would allow us to target resources on making sure that the one key participant, the adjudicator, is well equipped—equipped not only to make the final judgment, but also to frame questions throughout the hearing that will promote accurate understanding of the adjudicative facts at issue.

The nonadversarial procedures in asylum cases should thus proceed roughly as follows. The applicant would have the opportunity, as at present, to provide whatever information he wished when filing the Form I-589 (or preferably, a better designed application form). He might choose to supply lengthy answers to the form's questions,

²⁷⁵ COMM. FOR HEALTH RIGHTS IN CENT. AM. AND THE FATHER MORIARTY CENT. AM. REFUGEE PROGRAM, *POLITICAL ASYLUM: A HANDBOOK FOR LEGAL AND MENTAL HEALTH VOLUNTEERS* 44 (n.d.).

submit supplementary affidavits or accounts, or file general human rights information on country conditions. If the adjudicator is not already familiar with conditions in the source country, he will be responsible for establishing such acquaintance, with the aid of the documentation center, in advance of the proceedings. Such preparation would, of course, include review of all material supplied with the application.

At the actual hearing, the applicant should first be invited to recount the important elements of his case and to add anything he wishes. The adjudicator would then pose questions meant to flesh out the account as necessary, to test its consistency, and to home in on the issues that appear, under the facts of the particular case, to be crucial to the ultimate judgment about risks faced in the home country. No government counsel would appear. If it developed that further information had to be gathered to enable effective examination, the adjudicator could adjourn the proceeding. But such postponements should be rare. The proceedings should be recorded verbatim, as occurs now in immigration court.²⁷⁶

If the asylum seeker has a lawyer (for example, through the efforts of an NGO), counsel could of course be present to advise and reassure the applicant throughout the proceeding. Beyond this, counsel's role should supplement that of the adjudicator, by posing further questions to expand or clarify and to put on other evidence, in those cases where such evidence is available. Most of the time the case would focus only on the factual inquiry, but, in those cases where substantial legal issues arise, counsel could, of course, offer argument on points of law.

The proposal is designed for reasonably full and certainly fair development of the affirmative case, even for inarticulate asylum seekers who appear without counsel, or with counsel insufficiently familiar with asylum cases or home country conditions.²⁷⁷ The pro-

²⁷⁶ Eventually, however, it may be possible to find more expeditious ways to preserve the record for appeal. See *supra* note 174 (discussing use of videotapes).

²⁷⁷ The setting would thus bear many similarities to social security disability proceedings, where the presiding administrative law judge is under an affirmative duty to develop both sides of the case. See Mashaw, *supra* note 249, at 779-83. Courts have found ways to police this requirement, particularly in instances where the applicant appears *pro se*. See, e.g., *Bluvband v. Heckler*, 730 F.2d 886, 892, 895 (2d Cir. 1984) (finding that the administrative law judge presiding over the disability hearing failed to help the claimant ferret out all the relevant facts and adequately develop the record). Some 70 percent of the disability claimants are unrepresented. See 3 K. DAVIS, *supra* note 93, § 14:17, at 86; see also Mashaw, *supra* note 249, at 781-82. Nevertheless, the Supreme Court has specifically upheld this structure against

posal is therefore meant to enable speedy but fair decisions in a heavily burdened system, without being entirely dependent upon the availability of pro bono efforts from the private bar.²⁷⁸ If reasonably available, however, counsel's role should be welcomed, primarily for the way in which prehearing consultation can serve to sharpen the issues and especially to encourage reticent applicants to tell the whole story. The less the case has been developed beforehand by counsel, the more time the adjudicator will probably have to devote in order to identify the crucial factual elements on which the affirmative case rests. But clearly no adjudicator will be able to spend the thirty hours or more that private attorneys report spending, on occasion, to develop the full trust necessary to coax out the whole story. This deficiency must be acknowledged. But the system simply cannot be expected to go that far, on governmental resources, to help bring forth facts that are that elusive. Claimants bear the burden of coming forth with the evidence. The system cannot be designed for the chance (although it is admittedly real) that in a small percentage of the cases such delay and coaxing will unearth a meritorious case.

D. *Fairness and the Treatment of Legislative Facts*

The expert knowledge developed by the adjudicators would be used primarily to ask detailed and focused questions, to help evaluate the answers received, and to make the required predictive judgment about future risks the applicant would face in the home country. Using expertise in this manner should not present significant fairness difficulties; specialized adjudication is customarily assigned to administrative bodies specifically to take advantage of

due process challenge. See, e.g., *Richardson v. Wright*, 405 U.S. 208, 209 (1972); *Richardson v. Perales*, 402 U.S. 389, 410 (1971).

²⁷⁸ As a further measure of reassurance to unrepresented applicants, especially those from backgrounds that might make official proceedings intimidating, it might be possible to emulate a feature of the Swiss system. The Swiss government pays a small stipend to volunteers, recruited by an umbrella refugee assistance organization, who have a right, by statute, to attend each asylum adjudication interview. See *Loi sur l'asile* du 5 octobre 1979 § 3, *Recueil officiel des lois et ordonnances de la Confédération suisse* [RO] 1980, at 1717, 1718, *amended* *Modification* du 16 decembre 1983, RO 1985, at 1, *further amended* *Modification* du 20 juin 1986, RO 1987, at 1674 (taking effect Jan. 1, 1988) (codified at *Recueil systematique du droit fédéral* [RS] 142.31). They are there primarily as observers, and they clearly do not see their role as lawyer-substitutes for the applicant; they do not meet with the applicants beforehand. But their presence can serve as an additional guarantee of fairness, and they also are generally permitted to pose questions at the end of the procedure to clear up any confusion or ambiguities.

such cumulative learning and specialization.²⁷⁹ But if some facts developed by the expert adjudicators become central to particularized determinations crucial to the ultimate ruling, fairness may require additional steps before relying on this outside information. An example will help to clarify this point.

Suppose that the applicant claims he will be persecuted because he was a local organizer with the XYZ political party, a radical splinter group operative in a certain province of the home country. He offers evidence of a government crackdown on the organization, and indeed the country profile from the documentation center likewise reports the crackdown. But after examination, the adjudicator is prepared to rule as follows:

I find the asylum seeker not to be credible in his claim of involvement with the XYZ party. I reached this conclusion primarily on the basis of certain questions I posed to him. I asked him who A was and I asked him who B was, and he did not know. A and B are key leaders of the XYZ party in that region (citing the sources of this information). Anyone even minimally active with XYZ would have known that. Therefore, his testimony regarding involvement with that group is not worthy of belief. Because his claim rested solely on that ground, his application for asylum will be denied.

In Professor Davis's conceptual scheme, this information about A and B is a legislative fact because it is not a fact concerning the immediate party. Hence, it need not necessarily be placed on record by means of live testimony subject to cross-examination; official notice is appropriate.²⁸⁰ But because the information is being used

²⁷⁹ See, e.g., E. Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L. J. 1, 43 ("In reaching a conclusion, the examiner or agency may rely on its special skills . . . just as a judge may freely use his legal skills in reading statutes and applying decided cases in the preparation of his opinion."); W. Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEX. L. REV. 131, 136 (1941) ("The conventional process of proof presupposes, in the main, that each case is a separate entity, which the trier of fact approaches with a more or less blank mind. The hypothetical foundation for that conventional process is absent when the trier of fact is an experienced governmental agency.").

Supreme Court precedents also support this notion. See, e.g., *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978) (holding that because the determinations were "primarily of a judgmental or predictive nature," the agency could apply its expert knowledge; "complete factual support in the record [for the agency's conclusions] is not possible or required"); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348-49 (1953) (a board may use its "cumulative experience," which "begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated").

²⁸⁰ See 3 K. DAVIS, *supra* note 93, § 15.10, at 184. Some cases take a narrower

here as the crucial basis for a credibility judgment, fairness may demand specific notification to the individual, with an opportunity to rebut. The Administrative Procedure Act makes provision for such situations in adjudications covered by its terms. It provides: "When an agency decision *rests on* official notice of a material fact not appearing in evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."²⁸¹

A variant of a procedure now used in district offices, when the examiner is prepared to deny an asylum claim based on information received from the State Department, might be employed here to afford the party an opportunity to rebut. Under the reformed system, the adjudicator could simply issue a "notice of intent to deny," giving the reasons as described above and citing the source for the information about A and B. The asylum seeker would then have a specified period of time (district offices now allow fifteen days) to rebut the information, either by showing that the source was mistaken and that A and B were not involved with the XYZ party, or by providing other reasons why the asylum seeker could not be expected to know them. This procedure should be sufficient to satisfy due process requirements.²⁸²

It should be emphasized, however, that in most asylum adjudica-

view of official notice, apparently limiting it to the much smaller range of facts that may be judicially noticed—i.e., facts that are common knowledge or cannot reasonably be disputed. *See, e.g.,* *Sosna v. Celebrezze*, 234 F. Supp. 289, 290 (E.D. Pa. 1964) (holding that court's use of medical textbooks to bolster reports of examining physicians without notice to claimant was contrary to the Administrative Procedure Act); *Glendening v. Ribicoff*, 213 F. Supp. 301, 302 (W.D. Mo. 1962) (holding that the "consideration of . . . extra-record medical information was erroneous as a matter of law"). But the better authority is to the contrary, acknowledging that a wider scope for official notice is the concomitant of agency expertise. *See, e.g.,* *McLeod v. INS*, 802 F.2d 89, 92-93 (3d Cir. 1986) (approving use of official notice in asylum cases and emphasizing that it is a broader concept than judicial notice). Some cases taking a restrictive approach to official notice base their concern on the fact that such a practice may effectively shift the burden of proof from the agency to the individual. *See* *Dayco Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966); *cf.* *E. Gellhorn, supra* note 279, at 45. But in asylum cases, the individual clearly bears the burden of proof in any event. *Cf. Zamora v. United States*, 534 F.2d 1055, 1062 (2d Cir. 1975) (Friendly, J., dictum) (approving use of State Department information in asylum cases, without making drafter of State letter available for cross-examination, so long as letter speaks only to legislative facts).

²⁸¹ 5 U.S.C. § 556(e) (1988) (emphasis added). *See generally* 3 K. DAVIS, *supra* note 93, § 15.10, at 184; *E. Gellhorn, supra* note 279, at 42-49.

²⁸² It might be possible to justify the issuance of the hypothetical ruling in the text even without advance notice of intent to deny, so long as an administrative appeal system is available on terms that would permit the alien to file rebuttal information in that forum. In the analogous situation under the APA, § 556(e) requires only that the opportunity to rebut be made available "on timely request."

tions this procedure will not be necessary. Most decisions will not "rest on" official notice of specific legislative facts of this character. Instead, the adjudicator will simply employ her general knowledge in making the ultimate predictive judgment about the risks the applicant would face on return.

E. *Administrative Review*

The objective of expeditious proceedings demands that the system achieve final deportation orders quickly, primarily to serve as a deterrent against others in the home country with marginal cases who may be thinking of coming to the United States to file for asylum. Obviously, any provision for administrative or judicial review will undercut that objective to some extent. Yet to leave the decision in the hands of one official, without even a cursory review on the administrative record compiled at the initial stage, would be intolerable when so much is potentially at stake for the individual. Some sort of review is indispensable.

1. Administrative Review or Not?

Because of the habeas corpus clause in the Constitution,²⁸³ judicial review in some form appears inescapable. (Appropriately channeled judicial review is also highly desirable as an outside check on the administrative agency.) It is therefore tempting to consider eliminating administrative appellate review altogether, in the interest of speedy finality. After all, if judicial review must be available, then any administrative review simply adds a third layer of consideration.

Canada yielded to this temptation. The 1988 legislation establishing its new asylum adjudication system eliminates any centralized administrative review by a body equivalent to our BIA. If the United States should choose to follow that model (it is not the one favored here), it should at least take the other steps Canada pursued to minimize the risk of inconsistency and error despite the absence of administrative review. In Canada, proceedings on the merits of an asylum claim are invariably heard by a panel of two members of the Immigration and Refugee Board. The asylum seeker needs to persuade only one of them that the case is meritorious in order to achieve a favorable result.²⁸⁴

²⁸³ See U.S. CONST. art. I, § 9, cl. 2.

²⁸⁴ See [Canadian] Immigration Act §§ 46.02, 69.1(10), ch. 35, §§ 48.02, 71.1(10), 1988 Can. Stat. 903, 919, 938; see also sources cited *supra* note 112. A

Nevertheless, several people interviewed in Canada acknowledged that the new system remains vulnerable to the vice of inconsistency. For example, if it comes to the attention of the chairman of the Immigration and Refugee Board that a panel in Vancouver is granting asylum readily to members of a certain dissident group, but panels in Montreal are consistently denying asylum in such circumstances, the chairman has no direct measure available for achieving unified Board policy on the issue. Informal controls, primarily through the use of legal opinions or other advice from the Board general counsel's office, will probably ameliorate the inconsistency problem, but such measures are only advisory. Theoretically, consistency could be established in Canada through judicial review. But judicial review under these circumstances is heard in different courts at various levels and in various locations, rather than before a single tribunal. In this situation, consistency via the judicial route may take a long time to achieve.

In addition, centralized administrative review is desirable because of the difficult nature of the decisions that asylum adjudicators must make. This difficulty is best illustrated by use of a hypothetical. Assume that human rights reports reveal a gradually increasing pattern of government suppression of labor union activists in a Central American country. The first reports mention isolated arrests of certain leaders. Subsequent reports indicate that some of these detained leaders have been tortured. A few weeks later a wider circle of prominent union activists are arrested, although many still remain at large. At some point, the government's pattern of persecution crosses an important threshold, to the point where all union activists found in this country should be recognized as refugees based solely on their status as union activists. Determining when that line is crossed, however, is a difficult judgment call. In the midst of this evolving pattern, it would not be surprising for adjudicators initially to reach differing results. Consistency would be best served if a centralized forum exists for making a definitive and binding decision as to when the line is crossed—or at least for assuring that union activist asylum applicants in Miami are treated the same as their counterparts in California.

2. The Recommended Framework

A reformed U.S. asylum adjudication system therefore should

helpful codified and annotated version of the Canadian Act is *THE ANNOTATED IMMIGRATION ACT OF CANADA* (F. Marocco & H. Goslett eds. 1989).

retain an administrative appellate body, both to make such difficult judgment calls and to monitor for consistent implementation of the standards throughout the country. Its basic role would be to consider appeals from denials by the initial adjudicators; consideration would be based on the administrative record and briefs filed by the asylum seeker as appellant. The appellant should be allowed a limited time, perhaps ten days, for the filing of an appeal. Likewise, the time allowed for briefing should be subject to fairly strict limitations. Even if the initial stage before the adjudicator is not adversarial, it may be worthwhile to treat appeals in a more adversarial manner, using INS appellate attorneys (as under the current system) to represent the government's interest when the matter reaches the administrative appellate body.

For reasons sketched earlier, it might also be advisable for the appellate authority to perform some monitoring role with respect to *grants* of asylum. Although inaccurate grants provoke less concern than erroneous denials, a broad pattern of undeserved grants serves to undercut the public's confidence in the system's fairness. To guard against this phenomenon, the staff of the appellate body might regularly receive and review decisions in all asylum cases, appealed or not, to watch for aberrant patterns. (The staff at this level, being centralized in one location, could probably specialize by region or country.) In limited circumstances, the appellate body could then use the device of certification²⁸⁵ to bring an unappealed case, positive or negative, before it for further review. This sort of monitoring would provide a useful quality-control mechanism.

Thus, the appellate caseload would consist primarily of appeals initiated by denied claimants, supplemented by a handful of other cases brought before the body on its own initiative. Given adequate staffing, and assuming a solution to the transcript problem, this process of review—strictly on the record created below—should add only a few months to the overall delay, and then only in cases accepted for full appellate consideration.

There remains the question of the composition of the appellate body. Clearly the current Board of Immigration Appeals could perform this function; approximately half of the BIA's time is already devoted to asylum cases. Although the question is a close one, in the end, I recommend against assigning these functions to the BIA. Fairly or not, some NGOs identify the BIA as a significant source of

²⁸⁵ See 8 C.F.R. §§ 3.1(c), 3.7 (1989). A similar procedural mechanism provides for "referral" of cases to the Attorney General. See *id.* § 3.1(h).

the biased results that they believe the system has achieved over the past several years. Creation of a new Asylum Board would help signal the reality of a fresh start, making the more restrictive elements of the new scheme more acceptable. Moreover, asylum is likely to generate a substantial portion of contested cases under the immigration laws for the foreseeable future, thus justifying the creation of a new and permanent unit.

An Asylum Board, as a separate administrative appellate body focusing solely on asylum cases, also will have a better opportunity to develop the necessary expertise in the function, including detailed acquaintance with home country conditions.²⁸⁶ Members of the board should be attorneys, because difficult legal questions under the asylum provisions of the immigration laws will have to be settled in this forum.²⁸⁷ The Asylum Board should be located organizationally within EOIR, and as indicated earlier, the chairperson of the Asylum Board should have general oversight and administrative responsibility over the corps of adjudicators.²⁸⁸

3. Country Guidelines

Some earlier reform proposals have suggested country guidelines or profiles as a device that would help streamline the process and simplify the adjudicative task.²⁸⁹ For example, by 1981, it

²⁸⁶ In the press release announcing the creation of APRU, the Justice Department emphasized that asylum decisions are "distinct from the normal operation and administration of the immigration laws." *Attorney General Announces New Asylum Policy Unit*, 64 INTERPRETER RELEASES 472-73 (1987). A new Asylum Board would thus allow appropriate specialization on the part of the BIA.

²⁸⁷ Recent cases have presented the BIA, for example, with difficult legal questions concerning the appropriate standards for asylum claims by conscientious objectors, see *In re A.G.*, Interim Dec. No. 3040, slip op. (BIA Dec. 28, 1987), or by participants in a coup plot. See *Dwomoh v. Sava*, 696 F. Supp. 970 (S.D.N.Y. 1988).

²⁸⁸ The Asylum Board would also provide a logical centralized forum for receiving the views of the UNHCR (the Board being the rough equivalent of the State Department under the ad hoc arrangements worked out in the 1970s for UNCHR file review in Haitian cases, see *supra* note 191 and accompanying text). UNHCR officials stated to me that their preferred point of access is at the administrative appellate stage. Interview with Richard Stainsby, UNHCR Senior Legal Adviser, in Washington, D.C. (Oct. 1988). Several other countries have made arrangements for routine file review by UNHCR officials in this manner. Many NGOs place a high priority on a well-targeted UNCHR role, and its expertise could be of genuine assistance to the decisionmakers.

²⁸⁹ See, e.g., SELECT COMMISSION, *supra* note 69, at 169-171 (recommending that "group profiles should be developed and used by processing personnel and area experts to determine the legitimacy of individual claims" and expedite the process); Verkuil, *supra* note 203, at 1172 (suggesting that a list of countries with clear good or bad human rights records be prepared and updated); Scanlan, *supra* note 2, at 637-38

became clear that the regime in Iran had begun systematic persecution, often including summary execution, of adherents of the Baha'i faith. The State Department issued a policy statement announcing that Baha'is who escaped Iran should be considered refugees ipso facto.²⁹⁰ A similar firm guideline might have been possible in 1978, declaring that anyone who escaped the indiscriminately murderous policies of Pol Pot's Cambodian government should be considered to have a well-founded fear of persecution on return. With such a guideline in place, the adjudicators would be freed of responsibility for the ultimate predictive judgment about whether the threat level crossed the threshold leading to recognition of refugee status. Instead, adjudicators would be able to focus on a narrower and more easily ascertainable issue: whether the individual claimant was truly an Iranian Baha'i or a Cambodian (and possibly whether she fell within one of the exclusion or cessation clauses of the refugee definition).

With the removal of the State Department from any major role in refugee matters, responsibility for discerning such patterns and issuing appropriate guidelines to asylum adjudicators—if guidelines are to be used at all—would appropriately devolve on the Asylum Board. The Board would remain primarily an adjudicative body, but the guidelines could be viewed as a natural outgrowth of the regular monitoring of country conditions that the Board should perform anyway in discharging its adjudicative responsibilities.

A large dose of realism, however, should curb extensive expectations about the likely utility of country guidelines. First, in view of the current caseload, which comes predominantly from Central America and the Caribbean, appropriate occasions for their issuance are likely to be exceedingly rare. Clear patterns like those occurring in the Baha'i or Cambodia examples are unlikely to manifest themselves very often.²⁹¹ Guidelines are useful only when they can be

(suggesting similar country profiles). The comparison is often made to overseas refugee programs, where country guidelines (more in the nature of group presumptions of refugee status) are sometimes employed. But such an approach is not workable in asylum. Rougher judgments on refugee status are tolerable in overseas processing because other screening tools provide an enforceable cap on the number who will actually be admitted to the country, however many are initially adjudged to meet the refugee definition. *See supra* note 38.

²⁹⁰ *See State Dept. Reaffirms Policy on Asylum for Iranian Jews*, 62 INTERPRETER RELEASES 1000 (1985) (describing earlier policy announcements on Baha'is, as well as on Christians and Jews from Iran).

²⁹¹ Some European officials reported that clear patterns appear in a larger proportion of their caseload than occurs in the United States. They mentioned situations like that in Turkey, where opposition groups are highly organized and

based on particularized characteristics that sharply distinguish a certain group from the rest of the population. Most persecution in countries significantly represented in the current asylum caseload does not follow such crisp patterns. If guidelines can only say that "prominent" union activists or "visible" governmental opponents are likely to be persecuted, the subsequent adjudicative process will have to cover almost all the same ground it would cover in the absence of guidelines. The adjudicator would still have to pursue in detail the applicant's own personal history as a means of judging prominence or visibility based on his past activities and any threats made against him or his family or friends. Guidelines that must use such vague terms are probably worse than no guidelines at all, for they would impart an aura of misleading clarity, when the circumstances still require a highly individualized, contextual judgment.

Second, most guideline proposals envision the use of only affirmative guidelines—guidelines that lead to a grant of asylum if the individual matches the profile. Negative guidelines verge on denying individuals the right to demonstrate that their own personal threats are so great that they deserve recognition as 1951 Convention refugees regardless of the general state of human rights observance in the home country.²⁹² Although an approach relying only on affirmative guidelines is thus understandable, it obviously undercuts the utility of guidelines in streamlining adjudication. Moreover, the risk would persist that the absence of an affirmative guideline could be taken as an implicitly negative factor by an adjudicator.

There is a third limitation. Most proposals for the use of guidelines or profiles assume that they would be made public.²⁹³ But in nearly every country visited, asylum officials expressed great skepticism about the idea of published guidelines. One Swiss official commented: "The next week half the applications would match the guidelines." Published country guidelines might wind up simplifying the ultimate predictive judgment about danger levels at the cost of encouraging more sophisticated fraud, thus complicating adjudication over whether the applicant truly belongs to a class favored by the guidelines. Other profiles used for a variety of law enforcement

government response apparently correlates closely to the precise cell or splinter group to which the asylum seeker belongs.

²⁹² See N.L. ZUCKER & N.F. ZUCKER, *supra* note 61, at 272-73.

²⁹³ See Verkuil, *supra* note 203, at 1172. Verkuil goes further and suggests that guidelines be adopted through a notice-and-comment rulemaking proceeding. Such a process, however, would appear to be too cumbersome to keep up with necessary changes as country conditions evolve.

and administrative purposes usually remain a closely guarded secret.²⁹⁴ But if confidentiality is maintained (except to the extent that the underlying information is manifest in written decisions explaining individual grants and denials), the guidelines could be subject to the charge that they amount to a kind of secret and unaccountable decisionmaking.²⁹⁵

On balance, country guidelines probably would cause more problems than they would solve. They are by no means essential to a well-functioning system, and a reformed American structure probably should be designed without provision for them.

F. *Judicial Review*

Under current statutes, asylum determinations are fully reviewable in court, usually in connection with review of a deportation or exclusion order under INA § 106 (in the court of appeals for deportation, in the district court for exclusion). Courts apply either a "substantial evidence" or "abuse of discretion" test, depending on the precise issue.

Given overloaded court dockets, these avenues for review create significant potential for delay. If most denied applicants were to petition for judicial review after exhausting administrative remedies, delays would mushroom, negating any effective deterrent message that might derive from prompt returns. Although this appears an unlikely prospect at present, complete assurance against debilitating backlogs might someday require limitation or careful channeling of judicial review, which could be achieved only by statutory amendment.²⁹⁶ But any trimming will be highly controversial, both

²⁹⁴ See J. MONAHAN & L. WALKER, *SOCIAL SCIENCE AND LAW* 207-27 (1985).

²⁹⁵ This objection was voiced vigorously by the American Bar Association's Coordinating Committee on Immigration Law in its comments on a preliminary version of this study. Letter from Charles C. Foster to David A. Martin (Apr. 13, 1989).

²⁹⁶ Some proposals have been offered that would eliminate judicial review of asylum decisions as part of a package of reforms grafting several additional safeguards onto the administrative process. See, e.g., Scanlan, *Issue Summaries Submitted to the Select Commission on Immigration and Refugee Policies by the Center for Civil and Human Rights*, in SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, app. C to the Staff Report (Papers on Refugees) at 43, 67 (1981).

Short of emergency circumstances, attempts to eliminate judicial review are inadvisable for two reasons. First, carefully framed, such review plainly can serve a most useful checking function, assuring fulfillment of the protective purposes of our asylum laws. See generally Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1209-11 (1989). Second, complete denial of review may not be

because courts have performed a genuinely valuable service by correcting significant bureaucratic error or abuse in asylum processing, and because Americans generally hold the courts in high regard as guarantors of rights. Such changes therefore should be considered a last resort, to be employed only if the effectiveness of the administrative changes proposed above is badly undercut by the questionable use of judicial review for purposes of delay—abuse that is now rare. Thus, the discussion that follows should be taken only as a preliminary sketch of possible changes to judicial review—changes which, one hopes, will not be necessary.

Two primary aims, necessarily in tension, are generally accepted for judicial review in the asylum scheme. Judicial review should (1) play a limited but effective role in checking bureaucratic mistake or abuse, and (2) avoid imposing undue delay. With respect to the first goal, the court's checking function is necessarily limited; almost no one believes feasible a system in which the courts make *de novo* determinations of asylum. With respect to the second, obviously no one favors undue delay. Although views may differ on what delay is excessive, the discussion in earlier sections points out why expeditiousness is unusually important in the asylum setting. Delays tolerable in other administrative settings may become unacceptable here.

Should changes become necessary, close attention to these two aims suggests a reformed judicial review scheme that might maximize each. Deterrence of unworthy asylum seekers requires speed, but does not require the swift return of everybody who files an I-589. It requires swift return only of those whose cases are at best thin or marginal. In all likelihood, such cases constitute a substantial majority of the current caseload and of reasonably foreseeable caseloads in

constitutional under article I, § 9 of the Constitution, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. See generally *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1263-74 (1970). Aliens being removed from the country must necessarily be taken into custody, and it would not be difficult in many cases to allege colorable constitutional violations—the foundation for issuance of the Great Writ. In any event, absolute preclusion statutes tend to spring leaks. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 373 (1974) (holding that preclusion-of-review clause in veteran's benefits legislation does not bar judicial consideration of constitutional challenges to the legislation). A more productive course is to concentrate energies on channeling review into forms that will maximize effective judicial checks with minimum disruption. When substitute mechanisms are available for review in some form by Article III judges, restrictions on the availability of habeas corpus have been held valid. See, e.g., *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (the substitution of a new collateral remedy that is neither inadequate nor ineffective does not suspend the privilege of the writ of habeas corpus).

time of major influx.²⁹⁷ Obviously, those with clearly meritorious claims must be permitted to stay. But presumably these are the cases the new corps of specialists will readily grant, thus obviating judicial review.

This leaves a third category: difficult cases on the boundary, understandably requiring more thorough deliberation, research, and possible reconsideration. Provided such cases continue to constitute a fairly small percentage of the caseload, this category of cases could remain pending in the overall administrative-judicial system longer without much damage to the deterrent message.²⁹⁸ If this guess about proportions is roughly correct, the system could grant some form of access to Article III courts to all asylum seekers, provided that the mechanisms permit speedy termination of review unless a truly substantial question is raised.²⁹⁹

Canada's new system provides a potentially useful procedural model. Its legislation disallows judicial review of denied refugee claims unless the applicant first obtains "leave to appeal" from a specified court.³⁰⁰ This device is not familiar to U.S. lawyers. Our system ordinarily allows review liberally without prior screening, although meritless appeals may be disposed of summarily. Our nearest analogue may be the certiorari process in the Supreme Court, which is plainly a screening mechanism that we reserve for the highest levels of appellate consideration.³⁰¹ Applying such a device at the very threshold of judicial review is unlikely to win easy accept-

²⁹⁷ This guess would be changed if a Central American Hitler or a Caribbean Pol Pot came to power. But we would be in a much stronger position to rally political support for massive acceptance of refugees in such desperate circumstances if the system has won earlier public backing through clear demonstration of the capacity to refuse asylum when people do not qualify.

²⁹⁸ This threefold division of cases (unqualified, difficult borderline, meritorious) is in principle a clear one. In practice, of course, actual location of the boundaries will be much tougher. If administrators differ greatly from the courts on where those boundaries lie, the latter are bound to intervene more, creating delays in more cases and undermining the hoped-for humane and targeted deterrent.

²⁹⁹ For other proposals to curtail judicial review while maintaining needed safeguards, see Aleinikoff, *supra* note 89, at 236-38.

³⁰⁰ [Canadian] Immigration Act §§ 82.1-84.1, ch. 35, §§ 83.1-85.1, 1988 Can. Stat. 903, 946-49.

³⁰¹ Certificates of probable cause, needed under 28 U.S.C. § 2253 (1988) and FED. R. APP. P. 22(b) to appeal a district court's denial of habeas corpus to a state prisoner, bear some similarities to this scheme, but there are important differences. First, the threshold for issuance is lower than what is suggested here. See *Barefoot v. Estelle*, 463 U.S. 880, 885 (1983). Second, denial of the certificate is itself open for reconsideration by a judge of the appellate court, whereas Canada has precluded further review of denial of leave to appeal.

ance. Proponents would carry a heavy burden of persuading the relevant audiences (including the Congress) that a unique device of this type is needed because of the special requirements of an asylum system being challenged by steeply rising numbers of applicants.

Under the 1988 revisions to Canadian law, asylum applicants seeking court review on the merits (including review of assertions that natural justice has been violated—the equivalent of our constitutional due process claims) must file for leave within fifteen days of the administrative decision. The court will ordinarily make a determination on the application without a personal appearance. If leave is granted, the matter is scheduled for full hearing in the ordinary course. But if the judge is not persuaded that the case is worth considering, the matter goes no further; there is no appellate review of denial of leave. What makes a case worth hearing? Unfortunately, the Canadian legislation does not specify clearly, leaving it to the courts to develop precise standards.³⁰² Because the new Canadian scheme is still relatively new, it remains unclear just what operational tests will come to govern.

If this “leave to appeal” approach were to be adopted in the United States, the statute should clearly state the governing standard. The exact formulation requires further attention. But the basic idea, if both of the above stated goals are to be served simultaneously, would be to preclude full-fledged court review—with complete briefing and argument—unless there is a substantial likelihood of reversal of the administrative action.³⁰³ This is essential. For such a change to effect the desired results, Congress would have to signal clearly that it expects substantial deference on the part of the courts to administrative decisions, and hence expects leave to be

³⁰² See [Canadian] Immigration Act § 84.2, ch. 35, § 85.2, 1988 Can. Stat. 903, 949.

³⁰³ This standard comes close to the test applied when a single Justice of the Supreme Court considers an application for a stay pending the full Court's ruling on the petition for certiorari. See, e.g., *John Doe Agency v. John Doe Corp.*, 109 S.Ct. 852, 853-54 (Marshall, Circuit Justice, 1989) (granting stay, in part because there is a “fair prospect” that the full Court would find the decision below to be erroneous). Although this formulation makes general schematic sense, it has hardly been framed in language suitable for a statute. I am not quite sure what precise formulation should be used to get the job done. What is meant to be communicated is more a mood or a posture for the courts, rather than a precise schema. The standard should signal that most often the job of adjudication belongs to the agency; the courts should not intrude too deeply into precise development of substantive standards or their implementation in the particular case. Court review is to be used as an outside check, an occasional chastener and reminder that accountability also runs to persons outside the bureaucracy.

granted only in a small fraction of overall cases. (Moreover, court denials of leave to appeal should not themselves be appealable.) If the proportions do not work out as sketched above, however, and if most cases wind up being heard on the merits in the courts, then the "leave to appeal" arrangements, ironically, would actually serve to compound delays, by adding an additional round of paperwork. Full success depends on both an attitude of restraint by the courts and a dedication to high-quality professional adjudication by the agency, to reinforce the idea that judicial deference is fully merited.

If the scheme works as envisioned, all denied claimants would have access to an Article III judge; no bureaucratic decision could block that access. This fact is vital, for it preserves many of the incentives for agency self-policing that exist in more thorough schemes of judicial review. The officials involved in adjudication would know that in some cases (exactly which ones cannot be known in advance) the independent judicial branch will be reviewing their work. But the initial access to the courts would be of a strictly limited character. Within perhaps forty-five days, judicial review in a large majority of cases would be at an end, and the underlying deportation or exclusion order would become fully enforceable.³⁰⁴

G. *Deportation*

When the asylum claim is finally denied, the underlying deportation or exclusion order must be promptly executed. Prompt execution assures the only effective form of deterrent that does not depend on indiscriminate harshness meted out to all asylum seekers whatever the strength of their claim.³⁰⁵ Surprisingly few such deportations occur at present, however, unless the alien has remained in detention.³⁰⁶ The reason is simple. Asylum seekers occupy a low priority for use of scarce investigation and enforcement resources in the district offices. Those resources are targeted instead on criminal

³⁰⁴ A possible complication might arise under the proposal offered here because deportability and asylum would be decided in different venues. The Justice Department should be able to overcome this complication, however. In arranging for unified judicial review, following deportation proceedings, of denials of legalization under INA §§ 210(e), 245A(f), 8 U.S.C. §§ 1160(e), 1255a(f) (1989), despite an initial splitting of adjudication forums between Legalization Offices and immigration judges, the Justice Department is gaining valuable experience in working out such technical details. See Martin, *Judicial Review of Legalization Denials*, 65 INTERPRETER RELEASES 757, 761 (1988).

³⁰⁵ See Martin, *supra* note 1, at 12-13.

³⁰⁶ See *supra* notes 188-190 and accompanying text.

aliens and others apparently involved in major abuse of the immigration system.

If we were to look only at each individual category in isolation, this ranking of enforcement priorities makes sense. Criminal aliens do pose a greater threat to society than failed asylum applicants, who are largely harmless and law-abiding job-seekers. Nevertheless, enforcement priorities must be reoriented to consider more than just individual characteristics. They must also take full account of systemic impacts. The rest of this proposal painstakingly seeks every reasonable opportunity to streamline each stage of an inevitably complicated procedure. That effort is for naught—any achievements are rendered illusory—unless this last piece is resolutely inserted into the puzzle.

H. *Emergency Responses to Large-Scale Influxes*

This study was chartered at a time of relative stasis and calm within the asylum adjudication system. For years applications in the INS district offices had remained at an annual level of 20,000 to 30,000. Although these figures ran some ten times higher than annual statistics in the mid-1970s, the number appeared politically tolerable. There was no undue pressure for quick fixes or emergency solutions. It would have been an auspicious time to provide for a phase-in of the ambitious changes suggested here, allowing for careful restructuring of offices and processes, the recruitment and training of new officers, and the inevitable adjustments and modifications that will appear advisable as actual implementation reveals new problems and opportunities.

But now, toward the conclusion of the project, the political situation has altered considerably, and any changes will have to be implemented in much less favorable circumstances. Large influxes of Central Americans to Florida and Texas during the winter of 1988-89 strained arrangements even for basic provision of shelter and food. "False refugees" claimed the front pages again, and the potential for political backlash reappeared. Radical solutions have been tendered, sometimes reflecting little understanding of the international and domestic legal framework.³⁰⁷ Unfortunately, crisis is often necessary to generate the political will to make changes rather than to limp along under the old system. But patience for

³⁰⁷ For example, an internal draft of draconian legislation, entitled the "Asylum Anti-Abuse Act of 1989," has been circulated within INS. See 66 INTERPRETER RELEASES 478-79 (1989).

long-term solutions of the kind sketched here is in shortest supply at such times. And even if the political leadership remains committed to long term reform, political pressures may demand of the executive branch a showing of visible, immediate, and effective action that will stem the flow and dispatch pending cases quickly.

I will therefore offer a few suggestions, plus a few words of caution about some quick fixes that have been suggested. But above all, any crisis-driven requirement for prompt action must not divert attention from the need to start implementing the central reforms proposed here as soon as possible. Almost every conceivable (and certainly every reasonable) emergency response will be easier to implement, to sustain, and to render effective, if emergency measures are accompanied by the steady phase-in of a more reliable, high-quality, one-tier adjudication system staffed by a corps of true professionals, insulated from foreign policy concerns, sensitive to cross-cultural communication difficulties, and equipped to make effective use of the disparate array of information sources that must be employed.

1. Quick Denial of Manifestly Unfounded Applications

Several countries have made use of fast-track denials of "manifestly unfounded" asylum claims (what I will call here "MU procedures"), and in time of large-scale influx, such possibilities become attractive. A well-designed MU procedure could conceivably help amplify the qualified deterrent message that the United States now is trying to send to those in Central America who may be contemplating a trip northward.³⁰⁸ But its contributions to this end would be modest, and its complications may outweigh its advantages, at least under current conditions.

The UNHCR Executive Committee (a body in which the United States is a key participant) adopted a formal Conclusion in 1983 on "the problem of manifestly unfounded or abusive applications" for asylum.³⁰⁹ It gave cautious endorsement to the creation of an expe-

³⁰⁸ This proposal is necessarily founded on an assumption that a large majority of the recent Central American asylum seekers do not qualify for asylum under current legal standards. That assumption is debatable, on legal and factual grounds, but for reasons that cannot be elaborated here, I believe it to be defensible.

³⁰⁹ Conclusion No. 30 (XXXIV), 38 U.N. GAOR Supp. (No. 12A) at 25-26, U.N. Doc. A/38/12/Add.1 (1983). Conclusion No. 30 states in relevant part that the UNHCR Executive Committee:

(c) Noted that applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria

ditionous procedure for dealing with such applications, but it warned against over-use of such measures, particularly in view of the "grave consequences" of an erroneous determination.³¹⁰ It therefore emphasized that any interview used in such procedures should be conducted by a "fully qualified official" and that the decision should be made by the "authority normally competent to determine refugee status."³¹¹ The Executive Committee was primarily concerned that such responsibilities would devolve on border police,³¹² who would be ill-equipped to carry out the role and might have incentives to use MU procedures to exclude asylum seekers without an adequate effort

constitute a serious problem in a number of States parties to the 1951 Convention and the 1967 Protocol. Such applications are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees;

(d) Considered that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum;

(e) Recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees and therefore recommended that:

- (i) As in the case of all requests for the determination of refugee status or the granting of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status;
- (ii) The manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;
- (iii) An unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, Governments should give favorable consideration to their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.

Id.

³¹⁰ See *id.* paras. (d), (e), at 25.

³¹¹ *Id.* paras. (e)(i), (e)(ii), at 25.

³¹² See *id.* para. (e)(iii), at 25.

to find the facts. Thus, such decision authority should be given to the system's ordinary asylum adjudicators.

With these cautions in mind, MU procedures for the United States might be built on the following framework. Those persons apprehended by INS or "walking in" to INS offices who apply for asylum, or otherwise express fear of being returned to the home country, should be given the application form and told to complete and file it within a limited time period. Upon receipt of the form, an asylum adjudicator would go over the form and any other information in the alien's file to perform a preliminary screening. If the case clearly seems to have substance, it should simply be set for the regular interview or hearing procedure. If it looks as though the claim might be manifestly unfounded, it should be set for an early MU screening interview, which should be recorded verbatim.

If, during the MU screening interview, the applicant tenders a plausible basis for his asylum claim, the matter should be passed on to the next stage, the merits hearing, which would probably take place several weeks later. Access to the full merits hearing should be permitted even if the applicant's present account seems to contradict earlier statements given to the immigration officials. The individual may be pressed about seeming contradictions, but, unless the responses reveal clear and continuing fraud, the applicant should make it to the next stage in the process.³¹³ There are simply too many possible innocent explanations for inconsistent initial statements in these settings, owing to the manifest difficulties of cross-cultural communication and to the understandable reticence that truly persecuted people may feel upon their first encounter with uniformed American officials.

The MU procedure is not the forum for resolving such contradictions. To do so adequately would require expanding the procedure until it became virtually indistinguishable from the merits procedures.³¹⁴ This fact unavoidably limits the utility of MU proce-

³¹³ Apparently a high percentage of the current applicants say something about coming to the United States for a job during their first encounters with INS, and only later begin speaking of feared persecution. Because of cross-cultural differences, one cannot simply apply a presumption that the first statement is the more accurate or honest (even if such a presumption might make sense in dealing with American citizens in other contexts). It is entirely possible that the individual muttered a non-threatening response in the first encounter with uniformed officials only because his entire experience in his home country taught him to volunteer nothing to people in uniforms. The change of story, of course, should be explored fully in the merits hearing, but it cannot be treated as dispositive in the MU procedure.

³¹⁴ The Department of Justice actually drafted a kind of MU procedure, using

dures. If the individuals come from countries with known human rights problems (and this includes the Nicaraguans, Salvadorans, and Guatemalans who make up the bulk of the current influx), MU procedures will probably screen out only a handful of them. This handful would consist mainly of persons so poorly advised by friends or "travel agents"—or so honest—that they speak during the MU interview only about crop failures at home and job attractions here. But a more restrictive approach carries too high a risk of quick return of true refugees.

If the application is found to be manifestly unfounded, the consequence would be some truncation of normal procedures. Again, many variants are possible; the most effective would require statutory change. Possible limitation by regulation alone, however, might take the following shape: The MU determination should constitute a final negative ruling on the asylum and withholding claims, without the possibility of *de novo* consideration or further review in any administrative forum.³¹⁵

If statutory changes are deemed advisable, the MU determination could also serve to limit judicial review, but with safeguards. Limited judicial review would be possible, through a summary procedure like that suggested above for deciding on "leave to appeal." There would be one difference. If the court found the MU determination unsupported, it would not schedule full-fledged court review. It would simply remand the case for a full merits hearing before the

different terminology, in asylum regulations proposed in 1978. Those regulations allowed for "summary judgment" on a shortened timetable, in cases that appeared straightforward—i.e., that appeared to lack any genuine issues of material fact. *See* 43 Fed. Reg. 40,801 (1978). The 1978 proposal never made it into fully operative final regulations, however. The agency explained its abandonment of the idea as follows:

Critics cite as hardships [rendering the summary judgment procedure unfair] the circumstances of many newly arrived applicants for asylum who face a language barrier and suffer from a lack of education and limited financial resources

The objections to the summary judgment provisions have merit. Upon reconsideration, this type of motion appears to be rather sophisticated given the nature of the proceedings and situation of the individuals [Also, s]ince applications for asylum most frequently involve disputed facts a motion for summary judgment would rarely lie.

44 Fed. Reg. 21,254 (1979). These considerations have lost little force in intervening years and may still counsel against adopting such a procedure, under whatever name.

³¹⁵ An exception might be made for review solely on the initiative of the Chairperson of the Asylum Board, much as the Chief Administrative Hearing Officer may now arrange for review of certain administrative orders issued by Administrative Law Judges under 8 U.S.C. §§ 1324a, 1324b (1988) within thirty days of the order's issuance. *See* 28 C.F.R. § 68.52 (1988).

adjudicator. On the other hand, if the court approved the MU finding, the deportation order would become final and immediately enforceable, without the possibility for further judicial consideration.

Obviously the force given an MU determination cautions that MU procedures should not be used unless training and recruitment have proceeded to the stage that the Justice Department has substantial confidence in the officers doing the MU interviews. The ever-present temptation will be to overuse MU determinations. A report prepared by Professor A.M.J. Swart of the Netherlands for the Council of Europe found that exactly this sort of error was being committed. He reported that national authorities implementing MU procedures in several European countries

are inclined to want to judge the merits of a request fully in order to see whether it is abusive or unfounded [rather than 'clearly' abusive or 'manifestly' unfounded]. This means that criteria which have been developed to do no more than make a first, rough selection possible, become so important that the selection itself becomes the crucial moment in asylum procedure for all asylum seekers.³¹⁶

The lack of adequately trained and equipped personnel at present may pose a substantial obstacle to effective implementation of MU procedures as an immediate response to the current high application rate. Such a procedure would be far more reliable once a staff of independent and professional asylum adjudicators is in place—another reason to move quickly toward implementation of such a new administrative scheme. Still, MU procedures should not be expected to carry a heavy load. Even Germany, which has had several years to perfect its MU techniques, can dispose of only about twenty-five percent of its cases in this fashion, and Canada has eliminated only about ten percent this way under its new system.³¹⁷ A better solution, as the UNHCR's formal Conclusion on this issue

³¹⁶ Swart, *The Problems Connected With the Admission of Asylum Seekers to the Territory of Member States*, in *THE LAW OF ASYLUM AND REFUGEES: PRESENT TENDENCIES AND FUTURE PERSPECTIVES* 65, 80 (Council of Europe 1987).

³¹⁷ See von Pollern, *Die Entwicklung der Asylbewerberzahlen im Jahre 1988*, 1989 *ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK* (ZAR) 23, 26 (from 1982, when MU procedures were introduced in Germany, through 1988, 25.32 % of cases were denied as "manifestly unfounded;" for 1988, the figure was 26.38 percent); Refugee Determination in Canada: First Quarter Review 10 (Apr. 25, 1989) (noting that 89% of 2,037 claims concluded at the initial stage were referred for a full merits determination). A UNHCR study estimated that manifestly unfounded or abusive claims constituted 10 to 15 % of "unscheduled arrivals" in industrialized countries in 1984. See Jaeger, *Irregular Movements: The Concept and Possible Solutions*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s* 23, 31 (D. Martin ed. 1988).

ultimately suggests, may be instead to target resources towards assuring speedy completion of full merits hearings and all review stages.³¹⁸

2. Disqualification for Transit Through Third Countries

Some interest has also been expressed in new rules that might disqualify applicants from asylum or withholding of deportation if they have passed through other countries where they could have applied for asylum before reaching the United States. Because virtually all asylum seekers from Central America travel through Mexico, some regard this as a nifty device to deal with most of the current caseload.

This proposal, however, poses such serious legal and practical problems that it should be abandoned.³¹⁹ Suppose a Salvadoran files for asylum and is told that his claim will not be heard on the merits because he should have applied in Mexico. What exactly will be done with him? Presumably he could be sent to Mexico, if Mexico would agree to receive him, but the odds that Mexico would accept such a person, much less tens of thousands of needy Salvadorans, are almost nonexistent.³²⁰ The only country likely to accept him would be El Salvador, the country where he claims he would be persecuted. His transit through Mexico to the United States by no means proves that he had no legitimate fears in El Salvador. Both Article 33 of the

³¹⁸ In Conclusion No. 30, the UNHCR Executive Committee:

(f) Recognized that while measures to deal with manifestly unfounded or abusive applications may not resolve the wider problem of large numbers of applications for refugee status, both problems can be mitigated by overall arrangements for speeding up refugee status determination procedures, for example by:

- (i) Allocating sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously, and
- (ii) The introduction of measures that would reduce the time required for the completion of the appeals process.

Conclusion No. 30, *supra* note 309, para. f, at 26.

³¹⁹ Similar issues have been debated in Europe for years under the rubric of the "country of first asylum" doctrine, and the debate there suggests the legal and political intricacies that can be implicated. See generally Vierdag, *The Country of "First Asylum": Some European Aspects*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s* 73 (D. Martin ed. 1988); Conclusion No. 15(XXX), *Refugees Without a Country of Asylum*, 34 U.N. GAOR Supp. (No. 12A) at 17, U.N. Doc. A/34/12/Add.1 (1979).

³²⁰ See generally J. FRIEDLAND & J. RODRIGUEZ Y RODRIGUEZ, *SEEKING SAFE GROUND: THE LEGAL SITUATION OF CENTRAL AMERICAN REFUGEES IN MEXICO* 55 (1987); P. FAGEN & S. AGUAYO, *CENTRAL AMERICANS IN MEXICO AND THE UNITED STATES: UNILATERAL, BILATERAL, AND REGIONAL PERSPECTIVES* (1988).

1951 Refugee Convention and INA § 243(h) obligate the United States not to return him to El Salvador if his fears are well-founded.

In the end, therefore, a "transit" doctrine would not obviate a ruling on the merits, at least with respect to the *nonrefoulement* obligation. It would only delay such a ruling and, in the meantime, possibly complicate diplomatic relations with Mexico.

3. Ending Work Authorizations and Making Alternative Arrangements for Subsistence Pending Adjudication

Government policymakers may yet perceive a need for some decisive step to send a deterrent message at times of sudden influx. Many INS personnel interviewed for this study volunteered a ready solution along these lines: simply end the work authorizations that are now fairly automatic for asylum seekers during the pendency of their claims (both initially and on appeal).³²¹ Additional evidence also supports the theory that the recent rise in filings is at least partially linked to the work authorization issue.³²²

A simple end to work authorizations, however, or a raising of the threshold to qualify beyond the "nonfrivolous" standard now contained in the regulations,³²³ will neither fully solve the problem nor likely be sustained by the courts, unless other steps are also taken. Before the rules were amended in 1987 to make work authorization nearly automatic, district directors had considerable discretion in granting such permission. In *Diaz v. INS*, however, a district court issued a preliminary injunction against restrictive implementation, finding that a restrictive policy unduly burdened the alien's statutory right to apply for asylum and thereby frustrated the goals of the statute.³²⁴ The nondiscretionary 1987 regulations were issued at least in part to conform to *Diaz*.³²⁵

³²¹ See 8 C.F.R. §§ 274a.12(c)(8) (1989) (providing for employment authorizations in increments not exceeding one year for any alien who has filed a non-frivolous application); 8 C.F.R. § 274a.13(d) (1989) (requiring adjudication of the employment authorization application within 60 days, the failure of which will result in a grant of interim employment not to exceed 120 days). An INS memorandum elaborates on the standards used to determine frivolousness. See Memorandum from Richard E. Norton, *supra* note 146.

³²² See, e.g., B. Frelick, *supra* note 214, at 17.

³²³ See 66 INTERPRETER RELEASES 4 (1989); Memorandum from Richard E. Norton, *supra* note 146.

³²⁴ See *Diaz v. INS*, 648 F. Supp. 638, 651-53, 656 (E.D. Cal. 1986).

³²⁵ See Memorandum from Ignatius Bau and Robert Rubin, *supra* note 215, app. II at 882-86 (explanation of the significance of the 1987 regulations by the attorneys involved in *Diaz*).

Nothing has happened since then to undercut the court's reasoning. It is indeed quite plausible to read Congress's enactment of § 208 in 1980 as creating a right for persons physically present in the United States to have their asylum claims heard on the merits. If work authorization is now to be denied, any lawyer for the Department of Justice is bound to be asked in court how the government expects asylum seekers to survive during the months (and possibly years) until a final ruling is obtained on the application. Unless the government takes further steps to provide for such people during the pendency of the claim, the lawyer has no respectable answer.³²⁶ Courts might easily conclude that the government was trying to starve people out of pursuing a congressionally mandated right. And they would surely point out that a no-work-authorization policy falls as heavily on bona fide refugees as on the abusers who are the ostensible targets.³²⁷

At times of heavy influx, a policy of near-automatic work authorizations may well be ended, but the government must then provide alternative arrangements for feeding and housing the asylum seekers. Obviously, this course would be expensive, but it could be adopted in the hope that it would slow new arrivals and minimize overall long-term costs. If such a course is chosen, these alternatives could be provided in two ways. The first would be to detain asylum seekers physically under the relevant portions of the immigration statutes. Current regulations already provide for a presumption of detention for excludable aliens who arrive without documents.³²⁸ The bonding provisions governing deportation probably also allow the Attorney General sufficient discretion, particularly during what could plausibly be argued are emergency conditions, to arrange for

³²⁶ The problem is compounded because asylum seekers are not considered to be "permanently residing under color of law" (PRUCOL), which is a prerequisite to qualifying for most federally funded public benefit programs. See 20 C.F.R. § 416.1618 (1989); see also *Sudomir v. McMahon*, 767 F.2d 1456, 1466 (9th Cir. 1985); Wheeler, *Alien Eligibility for Public Benefits: Part I*, IMMIGR. BRIEFINGS, Nov. 1988, at 3-4; Stein & Zanowic, *Permanent Resident Alien Under Color of Law: The Opening Door to Alien Entitlement Eligibility*, 1 GEO. IMMIGR. L.J. 231 (1986). These federal statutory restrictions sharply distinguish U.S. practices from those of most European countries, which routinely provide subsistence allowances and other benefits for asylum seekers within the general schemes they have for public assistance. This difference helps explain European countries' more ready resort to denials of work authorization to asylum applicants, even though such denials clearly impose a larger burden on the taxpayers.

³²⁷ See *Diaz*, 648 F. Supp. at 655-56.

³²⁸ See 8 C.F.R. §§ 212.5(b), 235.3(b) (1989).

detention of a large proportion of those asylum seekers who have already made an entry into the United States.

The second framework would emphasize the voluntary nature of the communal shelter and feeding facilities. It would be set up primarily to assure that no asylum seekers go hungry while awaiting a ruling on their asylum claims. If they cannot provide for themselves through personal resources or the resources of friends and family, asylum seekers could move into the governmental facilities. For those who choose this course, some kind of daily check-in procedure might be used to verify identities and to maximize the chances that individuals can be located when a deportation order becomes final. Presumably, they could come and go at their discretion during the day. (West Germany uses such arrangements in the communal housing facilities it has established for asylum seekers.) This course of action would probably cost less in direct government payouts because a fair number of asylum seekers would prefer to move in with their families. Of course, many of those not in the government facility might well attempt to work surreptitiously or with false documents. Moreover, this course of action would probably also increase the absconding rate once final deportation orders begin to issue.

Under either course, there will obviously be a need to locate considerable government facilities for housing, but there is a well-worn path of experience here, extending back to the 1975 refugee emergency caused by the fall of Saigon and the 1980 Mariel boatlift. The current population of asylum seekers should, of course, be considerably easier to deal with than the Mariel population, which included some inmates fresh from Cuban jails. Steps should be taken to make the new facilities as comfortable as possible under the circumstances, and to minimize some of the pathologies that are generated when enforced idleness and close quarters continue for lengthy periods. For example, it would be advisable to keep families together and to provide access, whenever possible, to cooking facilities, so that the individuals could prepare their own meals. The detainees are not felons, and the government might garner wider public support for any such deterrence policy if it attempts to ameliorate camp conditions as much as possible.³²⁹

³²⁹ This policy appears consistent with what the Select Commission on Immigration and Refugee Policy had in mind when it proposed creation of asylum "processing centers." See SELECT COMMISSION, *supra* note 69, at 166-68. Moreover, the government gained some further experience in establishing facilities of this sort in South Texas in early 1989, as part of its response to the sharp increase in asylum seekers arriving there. While the Department of Justice detained many of these

Of course, one possible objection is that any steps to ameliorate conditions limit the deterrent impact. That risk is worth taking. The main deterrents will remain denial of work authorization (which should be widely publicized through available media in the region of origin), and new measures to hasten final decisions, which would accelerate both the return of the unqualified applicants to their homelands and the release of those who merit asylum.

In the end, the difficulties and disadvantages of any such policy should not be minimized. Outright detention clashes glaringly with the proud heritage symbolized by the Statue of Liberty. Less harsh communal housing, at public expense, is apparently hard to sustain politically, for it can be portrayed as a pure welfare program for illegal immigrants, fed and sheltered entirely at taxpayer expense. Either course makes sense only as a temporary palliative; it would be much better to avoid them altogether. Avoidance is possible, in the long run, if an effective and expeditious adjudication system, as sketched above, can be patiently implemented and sustained. That sort of system allows for deterrence through the prompt deportation of the unqualified, rather than through enforced idleness (at mounting governmental expense) while adjudication grinds slowly onward.

V. CONCLUSION

Government officials reading through all the proposals offered here may be struck by the apparent cost of the system envisioned, compared to what we seem to have today. Until now, asylum responsibilities have been assumed by a mere handful of harried examiners in district offices and by the surprisingly small corps of immigration judges who shoehorn asylum in among their many other responsibilities. The true costs of the present system, however, are much higher. They include not only the costs to localities in Florida, Texas, and California that are scrambling to meet the elemental needs of asylum seekers now applying in much higher numbers, but also the costs that are likely to accrue in the future as the magnet effect compounds.³³⁰ Absent effective adjudication reforms, we are

people in jail-like facilities, it also set up a more open Alien Shelter Care Program, available mainly to families and unaccompanied minors. See *Justice Department Announces Funding for Services for South Texas Aliens*, 66 INTERPRETER RELEASES 720 (1989).

³³⁰ See Appendix. See generally General Accounting Office Letter to Sen. Bob Graham (Feb. 23, 1989) (GAO/GGD-89-54FS) (recounting financial effects of asylum applicants on Miami); Schmalz, *Miami Pupils: Future Hope is Crisis Now*, N.Y. Times, Mar. 21, 1989, at A1, col. 2; McCoy, Christie & de Cordoba, *In Miami, Rivalries of*

unlikely to escape an expensive detention or government accommodation scheme whenever the flow reaches a high level, as the government's response to the spike in applications during the winter of 1988-89 demonstrated.³³¹

The costs required to implement the reformed system are worthwhile if the changes can break the vicious circle in which asylum policy now seems to be caught. Quicker, seemingly cheaper fixes are wholly illusory. They were tried in the Haitian Program of 1978. The result was only years of litigation, preliminary injunctions, remands, and duplicative reconsideration, topped off by a major award of attorneys' fees to the asylum seekers' counsel.³³² The courts have repeatedly shown that they will intervene unless the asylum "problem" is addressed by a comprehensive program that demonstrates adequate seriousness about our Statue of Liberty tradition. Such seriousness inevitably costs money.

Refugee advocates encountering these proposals will probably be struck instead by the possible removal of several layers of comforting checks and appeals. Those checks have probably been effective in assuring that bona fide refugees are not sent home, particularly if a skilled advocate makes full use of all possible avenues of attack. But the cost has been high. It has meant the creation of a system that has great difficulty actually sending *anyone* home. Now that this latter message has been received in Central America (and to some extent all over the globe), the flow will probably continue to rise, until political backlash imposes its own correctives—correctives likely to be far more draconian. The effort here is to find ways to minimize the magnet effect without impairing the quality of the judgment on the merits of the asylum claim. Indeed, the steps proposed here, if properly implemented and carefully monitored, should significantly improve the accuracy and fairness of decisionmaking, despite the streamlining of the system and the trimming of layers of review.

This proposed system, centered on a nonadversarial model of adjudication, obviously places great reliance on the role of the single adjudicator. One refugee lawyer, apprised of an early version of

Minority Groups Fan Riot's Flames, Wall St. J., Jan. 20, 1989, at 1, col. 4; Thompson, *Black Anger at Refugees Fed Riots*, Wash. Post, Jan. 20, 1989, at A3, col. 1; Applebome, *supra* note 4.

³³¹ In February 1990, in response to a new increase in applications, INS announced the resumption of more systematic detention of asylum applicants. See Suro, *U.S. Is Renewing Border Detentions*, N.Y. Times, Feb. 8, 1990, at A22, col. 1.

³³² See *supra* note 3.

these proposals, marveled: "You would really have to have trust" in the officials running the procedure. Exactly. Asylum adjudications have been conducted for years in such an atmosphere of profound and mutual mistrust that we may have great difficulty even conceptualizing such a system. But if we are to show true fidelity to the best of our asylum tradition, we have to find a way to create a system that merits our confidence. Other systems are too cumbersome to work effectively—at least when the asylum applicant intake reaches 100,000 per year.

Asylum determinations should be made by carefully chosen and well-trained specialists who possess focused responsibility for fulfilling our legal obligations and for implementing consistent, coherent, and accurate policy. Courts must develop a more deferential stance toward that expertise. It is time to create a system that will, at long last, merit such deference and trust, even on issues that will remain hotly controversial and about which we, as Americans, rightly care deeply.

APPENDIX

ASYLUM ADJUDICATION REFORM: COST ESTIMATES
(AS OF JUNE 1989)

I. COSTS OF THE PRESENT ASYLUM ADJUDICATION SYSTEM

A. *Adjudication Costs (in millions of dollars)*

Executive Office of Immigration Review (EOIR) (Includes immigration judges and Board of Immigration Appeals)	\$10.0
INS: Trial attorneys and support staff	4.0
District offices	3.0
Central office	0.5
Asylum Policy and Review Unit, Department of Justice	0.5
Asylum office, Department of State	0.5
TOTAL	\$18.5

Financial data for the various units of the Justice Department and State Department are not kept in a manner that readily permits identification of those costs associated with asylum adjudication. These figures therefore set forth rough, but probably conservative, estimates for costs attributable to asylum adjudication for FY 1988, when the system was equipped to handle approximately 20,000-30,000 applications, based upon telephone interviews with officials in each affected department.

NOTE: This list makes no provision for detention, deportation, Coast Guard interdiction, assistance to persons eventually granted asylum, or state and local government expenditures.

B. *Detention*

Detention costs \$30-35 per person per day. Therefore detention of 4500 individuals for one week costs the federal government \$1 million. During May 1989, INS was detaining an average of about 3700 asylum seekers in South Texas alone.¹ Other areas of heavy concentration of asylum seekers (notably metropolitan Miami and

¹ See REFUGEE REPORTS, May 19, 1989, at 8.

southern California) also give rise to substantial numbers of detainees.

C. *State and Local Government Costs*

The arrival of large numbers of asylum seekers in a concentrated period can have a considerable effect on local government expenditures for which there is no readily available federal reimbursement. No overall figures are available, but a GAO report examining the effect on the Miami-Dade County area of recently arriving Nicaraguans, who came in large numbers beginning in mid-1988, provides an illustrative picture of such local costs.²

GAO reported an estimated \$4 million in social services provided by Dade County to Nicaraguan asylum seekers in calendar 1988 (averaging over \$10,000 per day). This figure does not include educational expenses, which were expected to be high. In addition, the city of Miami reported spending \$4,000 a day on recent Nicaraguan arrivals. Thus, not counting educational costs, local government in the Miami area incurred expenses of over \$14,000 per day for Nicaraguan asylum seekers during the 1988-89 influx.³

II. ESTIMATED COSTS FOR REFORMED ADJUDICATION SYSTEM

Because the recommendation proposes that asylum adjudicators be equivalent in rank and salary to immigration judges, the following estimates for adjudicators are based on figures provided by EOIR for full costs of additional immigration judges and support personnel. It is estimated that thirty adjudicators would be needed to handle each increment of 10,000 asylum decisions⁴ per year (333 cases per adjudicator per year or approximately seven cases per week).

² GENERAL ACCOUNTING OFFICE, *POLITICAL ASYLUM APPLICANTS: FINANCIAL EFFECT ON LOCAL SERVICES IN THE MIAMI AREA* (1989).

³ This GAO report sets forth costs only for *Nicaraguans* in the Miami area, although Haitian and other asylum-seekers had been arriving in increasing numbers there. (The Miami district office of INS then ranked second in asylum application receipts among district offices, receiving 8,214 asylum applications in FY 1988 and an estimated 15,000 in 1989; the Los Angeles office was first with 28,491 applications in FY 1988 and an estimated 34,000 in 1989.)

⁴ Roughly 10 to 20 percent of asylum applications are withdrawn or abandoned before decision. Therefore 10,000 *decisions* should keep pace with 11,000 to 12,500 *applications*.

*Adjudication Costs (in millions of dollars) (for 30,000
decisions per year)*

General administration and program direction	\$1.0
Adjudication division	
Adjudicators	9.0
Support staff for adjudicators	7.5
Appellate division	
Board members and immediate staff	0.5
Staff attorneys and other support staff	4.5
Documentation center	<u>1.0</u>
TOTAL	\$23.5

The estimate assumes a capacity of 30,000 decisions per year, to show costs that would be comparable to the upper estimate of capacity for the current system as it operated in FY 1988. If the lower estimate were used instead for comparison (a caseload of 20,000 decisions), the reformed system would cost \$16.5 million.

Actual adjudication output requirements will surely be higher, at least in the early years, given the 1989 application rate. Once the new system is fully operational, however, it should reduce the number of asylum applications and diminish or eliminate the need for detention as a deterrent, thus saving substantial federal expenditures.