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Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States

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ARTICLES

CLOSED BORDERS, CLOSED PORTS: THE PLIGHT OF HAITIANS SEEKING POLITICAL ASYLUM IN THE UNITED STATES[†]

*Janice D. Villiers**

Introduction	842
I. The Substantive Legal Framework of Refugee and Asylum Law	856
A. Relief Accorded Refugees Under Domestic Law	856
B. Relief Accorded Refugees Under Inter- national Law	871
II. Interdiction as a Deterrent	875
A. The Haitian Migrant Interdiction Program .	875
1. History of the Haitian Migrant Interdiction Program	876

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2.	Effectiveness of the Interdiction Program	882
B.	The Cuban Interdiction Program	884
C.	Legal Challenges to the Interdiction Program	887
1.	The Second Circuit's View	887
2.	The Supreme Court's View	890
III.	Disparate Treatment of Haitian Asylum Seekers	895
A.	Courts' Views on Discrimination	895
B.	Equal Treatment Under the Law	899
C.	Four Strikes Against Haitians—Racial, Class, Language and Cultural Biases	904
IV.	Potential Solutions to the Haitian "Crisis"	915
A.	Equal Treatment Under the Title VII Model	916
B.	Systemic Revisions	922
Conclusion	927

INTRODUCTION

The United States espouses fundamental principles of fairness in the treatment of refugees.¹ These principles reflect a humanitarian ideal which is perceived as being synonymous with the philosophy of the United States of America. This ideal, embodied in the image of the Statue of Liberty, offers liberty and safety to all who are persecuted, without regard to the victim's race, class, language or culture. Recent events have demonstrated, however, that these principles are abandoned, or at the very least undermined, when Haitians seek refugee status.

Although American military forces have occupied Haiti and the Clinton Administration has risked the lives of American servicemen and women to assist in the restoration of democracy in Haiti,² the U.S. policy towards Haitian refugees

¹ See Laura J. Dietrich, *United States Asylum Policy*, in *THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980'S* 67, 67 (David A. Martin ed., 1988) (stating that "America's openness to refugees—people fleeing from persecution in other parts of the world—is one of this country's cherished traditions, and it has been enshrined in our national law").

² The recent occupation of Haiti was a culmination of numerous diplomatic and economic measures to force the departure of the military government led by Lieutenant General Raoul Cedras. Diplomatic initiatives began with the imposition

of a trade embargo by the Bush Administration and the naming of former Argentine Foreign Minister Dante Caputo as mediator, in late 1992, to reconcile the differences between Cedras and President Aristide. After much negotiation, but little progress, a worldwide arms and oil embargo was imposed by the United Nations Security Council in June 1993. *See generally* Doyle MacManus, *Countdown to Haiti Compromise*, L.A. TIMES, Sept. 25, 1994, at A1; Tom Masland, *How Did We Get Here?*, NEWSWEEK, Sept. 26, 1994, at 26.

Progress seemed imminent when, in October 1993, Cedras traveled to New York and signed the Governor's Island Agreement calling for his departure from power and Aristide's return to Haiti by October 30, 1993. Masland, *supra*, at 27. The Agreement, reluctantly signed by Aristide due to concerns regarding its enforcement provisions, also included a general amnesty for individuals accused of human rights abuses. *See* Steven Greenhouse, *Mission to Haiti: The Aristide Camp*, N.Y. TIMES, Sept. 20, 1994, at A11. Believing that a resolution to the crisis was at hand, the United Nations terminated the sanctions against the military regime. The October deadline came and went, however, and Cedras did not leave.

In November 1993, armed Haitian civilians threatened and prevented the docking of 200 troops and engineers aboard the U.S.S. Harlan County. They had come as part of the settlement outlined in the Governor's Island Agreement to assist in the professionalization of the Haitian army and police. *See* Christopher Marquis, *U.S. Pushes for Haiti Peace Force*, MIAMI HERALD, May 19, 1994, at 1A. This rebuff damaged American credibility and perceptions of the Clinton Administration's resolve and perhaps allowed the Cedras regime to believe that enforcement was unlikely. *See* Christopher Marquis, *U.S. Faces Haiti Fiasco, Fired Envoy Warns*, MIAMI HERALD, May 3, 1994, at 10A (quoting Lawrence Pezzullo, former Haitian envoy, as saying "we were made to look like wimps"). As the U.S. efforts to reinstate Aristide faltered, the White House was also criticized for failing to seek worldwide sanctions at the United Nations in January after setting the January 15, 1994, deadline for the Haitian military to step aside. *Id.*

In what could be characterized as the genesis of a new "get tough" policy with Haiti, President Clinton removed Lawrence Pezzullo, special envoy to Haiti, from office on April 22, 1994. His removal was interpreted by one commentator as an attempt by the Administration to "move away from its policy of compromise with Haiti's military rulers, which drew heavy criticism from Haitian democracy activists and members of the Congress. . . . Pezzullo had spearheaded the administration policy of encouraging a broadening of the Haitian government to include opponents of Aristide's return. Aristide vehemently opposed the power-sharing scheme, suspecting he would be rendered powerless . . ." *Haiti Envoy Ousted as U.S. Prepares to Get Tougher*, MIAMI HERALD, May 27, 1994, at 10A. The move was applauded by Aristide and his supporters, who had always distrusted Pezzullo and who had been "angered by [Pezzullo's] insistence that Aristide himself [was] an obstacle to progress." *Id.* Pezzullo was replaced by former Congressman and Majority Whip William Gray, president of the United Negro College Fund.

On May 6, 1994, the United Nations voted, under Resolution 917, to impose a total worldwide embargo on Haiti to take effect on May 21st. *Clinton Issues Executive Order Implementing U.N. Haiti Embargo*, Int'l Trade Rep. (BNA) No. 11, at 752-53 (May 11, 1994). The embargo required all United Nations members to sever cargo and "noncommercial airlinks" with the country and to impose travel restrictions on members of the Haitian military and police as well as their employees. *See* Christopher Marquis, *UN Awaits Response from Haiti Sanctions*, MIAMI HERALD, May 22, 1994, at 1A.

Seeming to thumb their noses at the international community, the military junta in Haiti appointed Emile Jonassaint, former Supreme Court Justice of the Haitian Court and a drafter of its Constitution, as President. Jonassaint was placed in power under the authority of an article of the Haitian Constitution which permits Parliament to "select a provisional president when the office is vacated for 'whatever reason.'" Susan Benesch & Christopher Marquis, *A New "President" in Haiti: Appointment Illegal, U.S. Says*, *MIAMI HERALD*, May 12, 1994, at 1A, 11A.

Pursuing a military solution had few supporters on either the international or domestic fronts. See Christopher Marquis, *U.S. Finds Few Nations Back Haiti Intervention*, *MIAMI HERALD*, May 13, 1994, at 1A (stating that France and Canada refused to support or participate in a U.S.-led invasion, while English speaking states of Antigua, Barbuda and St. Lucia supported invasion). Nevertheless, on May 20, 1994, President Clinton explained why invasion might be necessary and articulated six reasons why U.S. intervention in Haiti was warranted: "First, it's in our backyard. Second, we've got a million Haitian Americans [in the United States]. Third, we've got several thousand Americans in Haiti. Fourth, we believe drugs are coming through Haiti to the United States . . . Fifth, . . . [there is a] continuous possibility of a massive outflow of Haitian migrants to the United States. . . . Sixth, Haiti and Cuba are the only two non-democracies left in our hemisphere, and unlike Cuba, Haiti at least had an election and voted overwhelmingly for democratic government, which has been denied." Christopher Marquis & Robert A. Rankin, *Clinton Lists Six Reasons Why U.S. Might Use Force in Haiti*, *MIAMI HERALD*, May 20, 1994, at 1A.

On July 31, 1994, the United Nations Security Council passed Resolution 940 which authorized a multinational force to use "all means necessary" to restore President Aristide to Haiti and implement the tenets of the Governor's Island Agreement. *U.N. Resolution for Invasion of Haiti*, *N.Y. TIMES*, Aug. 1, 1994, at A6.

On August 26, 1994, President Clinton gave final approval of the invasion plans, which the military had been drafting for months. See Elaine Sciolino, *On the Brink of a War, a Tense Battle of Wills*, *N.Y. TIMES*, Sept. 20, 1994, at A1, A13. Aides to President Clinton agreed that the rhetoric against the Haitian military leaders should be increased. Accordingly, the State Department prepared a report characterizing the military's human rights abuses as the worst in the hemisphere. *Id.* Journalists were invited by President Clinton to view and disseminate gruesome pictures of murdered Haitians, as the military build-up continued. *Id.*

On September 15, as a U.S. armada moved toward Haiti, President Clinton, in a nationally televised address, informed the nation, and undoubtedly, the Haitian military regime, that military force would be utilized to restore President Aristide. The President stated that, while the United States did not perceive itself as the world's policeman, U.S. interests in Haiti necessitated military intervention. See Kathy Lewis, *Clinton Says U.S. Obligated to Take Action in Haiti*, *DALLAS MORNING NEWS*, Sept. 16, 1994, at 1A.

Describing the atrocities and human rights abuses inflicted on the Haitian people by the military government, President Clinton stated that national interests are implicated "when brutality occurs close to our shores." William Neikirk, *Clinton Steps to Brink of Invasion: Cedras Vows He Will Not Leave Haiti*, *CHI. TRIB.*, Sept. 16, 1994, at 1. Economic interests were also implicated, he stated, by the possibility of a continued onslaught of refugees seeking to escape the military's grasp at a cost of "millions and millions of dollars" to American taxpayers. See Carla A. Robbins, *Clinton Is Likely to Face Tests in World Arena*, *WALL ST. J.*,

Sept. 20, 1994, at 10A. Equally important was the need to promote democracy and stability in the Western Hemisphere and to demonstrate U.S. reliability and resolve. See Neikirk, *supra*, at 1.

The following day, the President met with Aristide and representatives of the twenty-four countries that had agreed to participate in a multinational invasion force. Those countries, contributing a total of 2000 troops, included Antigua, Argentina, Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bolivia, Costa Rica, Dominica, Grenada, Guyana, Israel, Jamaica, Jordan, Netherlands, Panama, Poland, St. Kitts and Nevis, St. Lucia, St. Vincent, the Grenadines, Trinidad, Tobago, and the United Kingdom. See Helen Thomas, *Clinton Hosts Haiti Invasion Coalition Leaders*, U.P.I., Sept. 16, 1994. The gathering was characterized as an effort to "dispel widespread criticism of the planned operation by portraying it as an international mission, not just an American one; as a police action, not a war, and as an exercise that would put an end to a cycle of bloodshed and violence in Haiti, not prolong it." See Douglas Jehl, *Holding Off, Clinton Sends Carter, Nunn and Powell to Talk to Haitian Junta*, N.Y. TIMES, Sept. 17, 1994, at A1, A6.

With mounting evidence of congressional and domestic opposition, President Clinton engaged in a last-ditch attempt to avert an American invasion by sending a diplomatic corps consisting of former President Jimmy Carter, retired General Colin Powell, former Chairman of the Joint Chiefs of Staff, and Senator Sam Nunn, Chairman of the Senate Armed Services Committee, to meet with Haiti's military leaders and negotiate their departure. *Id.* at A1; see also Douglas Jehl, *Carter's Diplomatic Mission Was a Last-Minute Gamble*, N.Y. TIMES, Sept. 19, 1994, at A1. After 20 hours of intense negotiation between the American team and the Haitian leaders, former President Carter communicated to President Clinton that an agreement had been reached whereby the junta leaders would step down from power. Specifically, the Agreement stated that:

THE PURPOSE of this agreement is to foster peace in Haiti, to avoid violence and bloodshed, to promote freedom and democracy and to forge a sustained and mutually beneficial relationship between the governments, people and institutions of Haiti and the United States.

TO IMPLEMENT this agreement, the Haitian military and police forces will work in close cooperation with the U.S. military mission. This cooperation, conducted with mutual respect, will last during the transitional period required for insuring vital institutions of the country.

IN ORDER to personally contribute to the success of this agreement, certain military officers of the Haitian armed forces are willing to consent to an early and honorable retirement in accordance with U.N. Resolutions 917 and 940 when a general amnesty will be voted into law by the Haitian Parliament, or October 15, 1994, whichever is earlier. The parties to this agreement pledge to work with the Haitian Parliament to expedite this action. Their successors will be named according to the Haitian Constitution and existing military law.

THE MILITARY activities of the U.S. military mission will be coordinated with the Haitian military high command.

THE ECONOMIC embargo and the economic sanctions will be lifted without delay in accordance with relevant U.N. resolutions and the need of the Haitian people will be met as quickly as possible.

THE FORTHCOMING legislative elections will be held in a free and democratic manner.

remains deeply ambivalent. Over the past several years, many American policymakers and legal practitioners have expressed their sympathy towards the thousands of men, women and children who have fled a military government that has shown little respect for their lives, or the lives of their fellow citizens.³ These policymakers have attempted to implement humanitarian policies and to apply legal principles that would aid people whose hopes for a better life were embodied in the election of the later-exiled Jean-Bertrand Aristide, a former Roman Catholic priest.⁴

IT IS UNDERSTOOD that the above agreement is conditioned on the approval of the civilian Governments of the United States and Haiti.

Text of Haiti Agreement, N.Y. TIMES, Sept. 19, 1994, at A9. The White House acknowledged that if an accord had not been reached, the invasion of Haiti was scheduled to have begun the evening of September 18, 1994. In fact, invasion force headquarters had received word at noon on September 18th to begin implementation of invasion plans. Richard P. Peña, *At Fort Bragg, A Sudden Rush to Get Ready*, N.Y. TIMES, Sept. 19, 1994, at A9. At 6 P.M., over 60 American warplanes, carrying several thousand troops, set off for the six-hour flight to Haiti. It was reported that Cedras's knowledge that American troops were en route to Haiti assisted in the resolution of the crisis. See Douglas Jehl, *Haiti's Military Leaders Agree to Resign*, N.Y. TIMES, Sept. 19, 1994, at A1. The planes were rerouted back to the United States after the accord was transmitted to Washington. See Peña, *supra*, at A9.

³ See, e.g., Alfonso Chardy, *Haitian Refugee Advocates Leave for Guantanamo Bay Today*, MIAMI HERALD, Nov. 30, 1991, at 16A.

⁴ See Howard W. French, *Man in the News: Jean-Bertrand Aristide, A Priest to the Very Poor at the Pinnacle in Haiti*, N.Y. TIMES, Dec. 19, 1990, at A12. Expelled from the Salesian order of the Roman Catholic Church in 1988 for his decidedly leftist political ideology and preachings, Aristide remains a symbol of salvation to many of Haiti's poor; "His messianic pledge of redemptive justice for the victims of violence and persecution, and his own simplicity, . . . was received like a soothing balm by many Haitians." *Id.*; see also Elaine Sciolino, *Aristide Adopts New Role: From Robespierre to Gandhi*, N.Y. TIMES, Sept. 18, 1994, at A1. Since 1985, Father Aristide had been a leader of the Ti Legliz (little church), a liberation school of theology that promotes priests assisting the poor through political activism. See Michael Serrill, *Haiti Victory for a Radical Priest*, TIME INT'L, Dec. 31, 1990, at 18. This activism led to brushes with death, thereby increasing his popularity with the poor. *Id.* Even after Aristide's landslide victory, the path to a peaceful democracy remained studded with danger; he was forced to wear a bullet-proof vest and move constantly, unable to rely on the military for security.

Yet Aristide also has been a controversial figure to many Haitians and Americans. It is widely reported that he supported the practice of "necklacing", the placing of a burning tire around an opponent. See Sciolino, *supra*, at A14. The U.S. Central Intelligence Agency disseminated reports questioning his mental stability. *Id.* However, his three years in exile seem to have assisted in his evolution as a statesman. His public statements have stressed unity rather than vengeance, and he now "talks of cement plants, salt producing complexes and shrimp fishing pro-

The supporters of Haitian asylum-seekers pointed to the many Haitians who, discouraged by atrocities and bleak futures, prayerfully embarked on a perilous voyage in overcrowded, unseaworthy vessels.⁵ Their hope, no matter how remote, was that they would find a safe haven, an end to their misery. They knew some had perished while attempting the same voyage, and others had arrived safely only to be incarcerated and subsequently returned to Haiti, yet still they came.

Detractors complained that the enticements to come to the United States are many, but the country's resources are limited and cannot absorb millions of people who seek not a safe haven but a better life.⁶ They argued that asylum is a growth

jects." *Id.*

Aristide came to power by spearheading a liberation movement, known as the Lavalas movement. Lavalas was dedicated to "washing" away all of Haiti's class inequities. It had tremendous appeal to a populace that comprised the poorest nation in the Western hemisphere. See generally Bella Stumbo, *From Horror to Hope: For the First Time in Decades, Haiti Has a Popularly Elected President*, L.A. TIMES, Apr. 21, 1991, at 8 (defining "lavalas" in Lavalas Movement as "flash flood" in Creole and referring to the grassroots movement that elected Aristide to the presidency in 1991).

The Lavalas Movement rose to prominence after promising to rid Haiti of the Ton Ton Macoutes, who had terrorized Haiti during the Duvalier regime. *Id.*; see also Barbara L. Bernier, *Economic Development in Ravaged Haiti: Is Democracy Really the Answer*, 11 DICK. J. INT'L L. 49, 69 (1992). The Ton Ton Macoutes were Duvalier's private security force. They played an important part in the repressive machinery and are reported to have frequently used torture and random killings to maintain compliance. *Id.* As an uneducated and loyal military force, they carried out Duvalier's reign of terror. Only the top officers of the Ton Ton Macoutes were salaried. The other members of the "organization" obtained money by extortion. *Id.* Literally translated, "Tonton Macoute" means "Uncle Knapsack," who is a character from a Haitian fable counterpoised to Uncle Christmas, "Tonton Noel." Whereas good children receive presents from Tonton Noel at Christmas, bad children are carried off in the knapsack of Tonton Macoute, never to be seen again. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 497 (S.D. Fla. 1980), *aff'd sub nom. Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

In the first democratic election in Haiti since it achieved its independence from France in 1804, Father Aristide was able to garner 67% of the vote and emerge victorious. See Thomas D. Jones, *Organization of American States and United Nation's Resolutions in Support of the Democratic Government of Haiti*, 7 INT'L ENFORCEMENT L. REP. 436, 437 (1991). Aristide was exiled in a military coup led by Lt.-Gen Raoul Cedras of the Haitian armed forces on September 30, 1991. He was allowed to go into exile in Venezuela and lived in Washington, D.C. Following the signing of the agreement between the junta leaders and the American delegates, Aristide returned to Haiti on October 15, 1994.

⁵ See Chardy, *supra* note 3, at 16A. A single 50-foot boat may carry as many as 278 passengers toward freedom in Florida. *Id.*

⁶ See Michael S. Teitelbaum, *Asylum in Theory and Practice*, 76 PUB. INTER-

industry, and that Haitians were not refugees, but savvy immigrants who sought a short-cut to permanent residency⁷ and knew that adjudication in the asylum process could extend their stay here for years. Even in the case of genuine refugees, the detractors contended, if the United States continues to resettle them, the number of applicants will increase, resulting in a never-ending stream of refugees.⁸

Since the flight of the Haitians began, these opposing views have competed for predominance in U.S. policy towards Haiti. The result was the appearance of administrative ambivalence. This ambivalence was reflected in periods of humanitarian concern, alternating with long periods of disdain or even maleficence. According to U.S. State Department reports, basic human rights were routinely abused in Haiti.⁹ The popular press was filled with stories of government-approved killings.¹⁰ Evidence exists that, after the military coup that removed President Aristide in August 1991, between 2000 and 7000¹¹ political murders occurred in Haiti, whose population

EST 74 (1984).

⁷ *Id.* at 77-78. The "asylum strategy" has become well known in countries of out-migration. Increasing numbers of persons ineligible for refugee or immigrant admission are choosing to enter the country illegally (or on temporary visitors' visas) in order to claim asylum. *Id.*

⁸ See Doris Meissner, *Reflections on the U.S. Refugee Act of 1980, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980's*, at 57, 59 (David A. Martin ed., 1988) ("Over time a refugee flow loses much of its refugee character and becomes a migration stream.").

⁹ See, e.g., *U.S. Confirms Army Massacred Civilians*, MIAMI HERALD, Apr. 29, 1994, at 11A. On the 29th of April, the U.S. State Department confirmed that during the prior week, the Haitian army massacred civilians in a northern town. The Department said it would deliver a "vehement" protest to the country's military rulers. *Id.*

¹⁰ See, e.g., LAWYERS COMM. FOR HUMAN RIGHTS, *HAITI: A HUMAN RIGHTS NIGHTMARE 1* (1992); *Haiti: Assassination of Prominent Haitian Priest Increases Call for International Action Against Military Regime*, in NOTSUR, Sept. 2, 1994 ("Most observers in Haiti believe the killing was ordered by the military in defiance of U.S. pressure on them to step down."), available in LEXIS, News Library, NOTSUR File. Countless Haitians have been illegally arrested, tortured and executed. LAWYERS COMM. FOR HUMAN RIGHTS, *supra*, at 1. After Aristide's departure, the power of the presidency was assumed by Joseph Nérette. Nérette is described as an "[i]llegitimate, illegal and unconstitutional *de facto* provisional president" who was not recognized by any foreign governments and who ruled Haiti from October 8, 1991, to June 19, 1992. MICHEL S. LAGUERRE, *THE MILITARY AND SOCIETY IN HAITI* 32 (1993).

¹¹ See *A New Holocaust is Underway Off Our Shores*, MIAMI HERALD, Apr. 19, 1994, at 1B. A report by Human Rights Watch/Americas issued in April 1994

totals only seven million. Human rights monitors reported widespread persecution of Aristide supporters by the regime's military and security forces.¹² During the first eight months after the coup, more Haitians fled Haiti than in the previous decade.¹³ Despite this evidence, the U.S. government has maintained that a majority of Haitians seeking to enter the United States were economic migrants rather than political refugees.¹⁴

For Haitians coming to the United States in search of jobs, food and educational opportunity, the door is firmly closed unless they can qualify for immigrant¹⁵ or non-immigrant¹⁶

details at least 412 political killings since July 1993. Most of the victims were supporters of previously ousted President Aristide. Human Rights/Americas Watch estimated that there have been 2000 political murders in Haiti since Aristide was overthrown in August 1991. *Id.* Steven Forester, an attorney for Miami's Haitian Refugee Center, estimated that the number of political murders was closer to 7000 and further stated that "Haiti is one huge killing field. . . . It's a concentration camp surrounded by U.S. Coast Guard vessels making sure no 'Jews' escape. I'm Jewish, and I don't say that lightly." *Id.*

¹² See generally AMERICAS WATCH ET AL., RETURN TO THE DARKEST DAYS: HUMAN RIGHTS IN HAITI SINCE THE COUP (1991); AMNESTY INT'L, HAITI: THE HUMAN RIGHTS TRAGEDY (1992); LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 10.

¹³ See SENATE COMM. ON THE JUDICIARY, 102D CONG., 2D SESS., REPORT ON HAITIAN DEMOCRACY AND REFUGEES: PROBLEMS AND PROSPECTS 12 (Comm. Print 1992). Haiti has a long history of repressive, short-lived military governments and the worst poverty in the Western Hemisphere. It has a per capita income of a mere \$350 U.S. per annum. See VIRGINIA R. DOMINGUEZ & JORGE I. DOMINGUEZ, THE CARIBBEAN: ITS IMPLICATIONS FOR THE UNITED STATES 23 (1981); William Steif, *Revenge of the Ton Ton Macoutes: Haitian Terrorism*, PROGRESSIVE, May, 1993, at 29.

¹⁴ See *infra* note 20.

¹⁵ The Immigration and Nationality Act ("I.N.A.") defines one "lawfully admitted for permanent residence" as having the privilege of residing in the United States on a permanent basis as an immigrant. Immigration and Nationality Act § 101(a)(20), 8 U.S.C. § 1101(a)(20) (1988) [hereinafter I.N.A.]. The intent to make the United States a permanent home is required, *id.*, and the holder of lawful permanent residence is colloquially referred to as a "green-card holder." There are five means of obtaining a lawful permanent residence:

- (1) family-sponsored immigration;
- (2) employment-based immigration;
- (3) diversity immigration;
- (4) refugees and asylees; or
- (5) persons not subject to limitations.

See I.N.A. §§ 201-209, 8 U.S.C. §§ 1151-1159 (1988 & Supp. V 1993).

¹⁶ Non-immigrant status is granted to visitors, students and business people who wish to enter the United States on a temporary basis. Most non-immigrants are not permitted to work lawfully in the United States, although some may be granted employment authorization. To enter the United States as a non-immigrant,

status. Many middle- and upper-class Haitians, who have family members in the United States, or are professionals, migrate to the United States annually, without fanfare, and lead productive lives in the professional and business ranks.¹⁷ The impetus for their immigration is multifaceted. Some come to escape the turmoil in their homeland, others for employment or family reunification reasons.

In addition to the stream of documented immigrants, the United States also accepts those who can demonstrate genuine refugee status, that is, that they are fleeing persecution based on race, religion, nationality, membership in a particular social group, or political opinion.¹⁸ The Immigration and Na-

an applicant must demonstrate that he has a foreign residence which he has no intention of abandoning and is entering the United States solely for the purpose delineated in the visa. I.N.A. § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1988).

¹⁷ See generally Joel Dreyfuss, *The Invisible Immigrants*, N.Y. TIMES, May 23, 1986, § 6 (Magazine), at 20 (discussing the successful assimilation of Haitian immigrants into American society).

¹⁸ "Refugee" is defined by the Immigration and Naturalization Act as:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e)) may specify The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

I.N.A. § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1988). This language is based on Article I of the United Nations Convention Relating to the Status of Refugees ("U.N. Convention") as modified by Article 1 of the 1967 Protocol. See Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter U.N. Protocol].

Refugees are selected by region and the selection is governed by a system of priorities that is politically motivated. See DEBORAH E. ANKER, *THE LAW OF ASYLUM IN THE UNITED STATES: A GUIDE TO ADMINISTRATIVE PRACTICE AND CASE LAW* 1-2 n.3 (2d ed. 1991) (noting that "[f]rom October 1981 through September 1989, . . . 99.4[%] of refugees admitted to the United States originated from the communist world. . . . By adding two Middle Eastern regimes opposed by U.S. foreign policy in the 1980's—Iran and Iraq—the percentage of refugees originating from 'enemy' regimes from communist-dominated lands or the Middle East rises above 99.9[%] . . ."). There is no refugee allocation for Haitians, Central Americans and other people fleeing persecution in South America or the Caribbean. *Id.* at 22-23.

In addition to meeting the definition given above, and being of special hu-

turalization Service ("I.N.S.") of the United States, however, has, with broad strokes, painted the majority of Haitians who came during President Aristide's exile as illegal immigrants escaping poverty rather than as potential refugees fleeing a cruel and illegitimate military junta.¹⁹ In denying asylum applications, asylum officers²⁰ relied on investigative reports

manitarian concern to the United States, a refugee must be screened by the Immigration and Naturalization Service ("I.N.S.") at an overseas processing center. I.N.A. § 207(c)(1), 8 U.S.C. § 1157(c)(1). If the refugee is determined to be admissible to the United States as an immigrant, she must undergo reinspection in order to obtain permanent resident status. I.N.A. § 209(a), 8 U.S.C. § 1159(a); see also ANKER, *supra*, at 1 n.2 (outlining the process of becoming a permanent resident alien).

¹⁹ Interestingly, this view is shared by many middle- and upper-class Haitians in the United States and Haiti, who are vehemently opposed to the Aristide regime. They consider the press reports of repressive acts by the military government as contrived and passionately oppose Aristide's return to Haiti. Aristide is viewed as a threat to the economic well-being of this segment of the Haitian population because of his socialist leanings. See Rick Bragg, *Haiti's Light-Skinned Elite: The Tiny Minority Behind Aristide's Ouster*, N.Y. TIMES, Aug. 28, 1994, at A14.

The elite saw Father Aristide as a threat to their way of life, one that had endured two centuries of killing, extortion and thievery under a never-ending line of dictators, including three decades under Francois and Jean-Claude Duvalier, who preyed on the rich and poor alike.

Father Aristide promised, without making it clear what he meant, that the poor people would share the wealth. . . . The elite do not have to rationalize the killings of so many Aristide supporters, because they do not believe that they are really happening. . . . Carl Denis, a senior advisor to Emile Jonassaint, who was installed by the military as the interim President, in discussing the Aristide supporters, stated that they "get the bodies from the morgue, shoot at them, put some ketchup on them, and then, get some news person to go pay \$50 to take a picture of it."

Id.

²⁰ 8 C.F.R. § 208.1(a), (b) (1994). This section established a system whereby asylum officers would hear and decide asylum applications filed after October 1, 1990. The officers receive special training in international relations and international law and are under the jurisdiction of the Office of Refugees, Asylum, and Parole, rather than the district directors of the I.N.S. See generally SARAH IGNATIUS, NATIONAL ASYLUM STUDY PROJECT, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE 20 (1993) (upon signing the new regulations, U.S. Attorney General Thornburgh stated that the regulations would "ensure that those who seek the protection of this country encounter a fair and sensitive legal process, faithful to the intent of Congress, and one that generates uniform and consistent results."). The rules, according to then-Attorney General Thornburgh, reflect two "basic guiding principles: a fundamental belief that the granting of asylum is inherently a humanitarian act distinct from the normal operation and administration of the immigration process; and a recognition of the essential need for an orderly and fair system for the adjudication of

issued by U.S. embassy officers suggesting that arrests, beatings, killings and other human rights abuses were falsely reported.²¹ The ordinary Haitian citizen faced an insurmount-

asylum claims.'" *Id.* at 20-21.

The current procedure encourages use of the affirmative asylum process by providing that an asylum applicant file with the I.N.S., then obtain an interview with an asylum officer at one of the seven asylum offices in Newark, N.J.; Arlington, Va.; Miami, Fla.; Chicago, Ill.; Houston, Tex.; San Francisco and Los Angeles, Cal.; or at one of the circuit riding locations. ANKER, *supra* note 18, at 47. Following the interview, "[t]he asylum officer writes a preliminary assessment to grant or a notice of intent to deny asylum[,] . . . and sends it to the Department of State for an advisory opinion, and to the central office of INS for review." IGNATIUS, *supra*, at 3. A notice of intent to deny is also sent to the applicant, who may file materials in rebuttal. If the decision is to deny asylum, the asylum officer prepares the final decision and the appropriate documents for filing in the immigration court for expulsion of the applicant. *Id.*

The applicant, after being denied asylum by the I.N.S., has a second opportunity to gain asylum. She may raise any asylum claim before an immigration judge. This opportunity provides for an extended hearing, compared to the asylum officers' goal of 45 minutes per interview. *Id.* In contrast to the asylum officer, the role of the counselor is more extensive in the immigration court. *Id.* Other advantages of the court include the presence of a trained interpreter, who is not present in the asylum hearing before an officer, and a written record, which is also unavailable at the asylum officer hearing. *Id.*; see also ANKER, *supra* note 18, at 24-63 (describing when and where an individual may apply for asylum).

²¹ See, e.g., IGNATIUS, *supra* note 20, at 154. In denying the asylum applications of Haitians, asylum officers frequently would use the following language:

While . . . there were and continue to be human rights abuses in Haiti, investigations by U.S. Embassy officers there indicate that many of the reports made by asylum applicants of arrests, killings and intimidation are exaggerated or false. Reports from Haiti suggest that many of the people who departed by boat seized upon the current situation as their best opportunity to reach the U.S.

Id.

A confidential cable obtained by the *Miami Herald*, dated April 12, 1994, asserted that "the Haitian left, including President Aristide and his supporters in Washington and here, consistently manipulate or even fabricate human rights abuses as a propaganda tool." Susan Benesch, *A Change in Haiti Policy: Embassy Had Disputed Human Rights Reports*, MIAMI HERALD, May 8, 1994, at 1A. The confidential cable, authored by Ellen Cosgrove, the embassy political officer in charge of reporting on human rights, asserted that "The army and right-wing elements are unquestionably committing numerous, serious human rights abuses, including murders of suspected Aristide partisans. . . . The majority of Haitian boat people remain, however, . . . economic migrants." *Id.* The cable also stated that "for a range of cultural reasons . . . rape has never been considered or reported as a serious crime here." *Id.* The cable also implied that the new rash of reported rapes were offered in an attempt to draw comparisons between Haiti and the abuses occurring in Bosnia. The cable was perceived by human rights activists as an effort to rationalize the United States' interdiction and immigration policy. *Id.*

able burden when faced with the task of convincing an asylum officer of both the persecution suffered and that flight within Haiti or to the Dominican Republic was not a viable option.²²

The Haitian refugee was the ultimate outsider. He or she embarked upon a perilous journey in an unseaworthy vessel and, upon arriving within U.S. territorial waters, found race, class, language and culture insurmountable barriers that prevented rescuers from extending a welcome. During the Interdiction Program,²³ a majority of Haitian refugees were returned to governmental persecutors in their homeland without an opportunity to prove the merits of their individual cases. Between October 1991 and June 1992, I.N.S. asylum officers interviewed 36,596 Haitians at Guantanamo Bay.²⁴ The U.S. government detained 10,319 to pursue their asylum claims and forcibly returned 26,777 men, women and children to Haiti.²⁵ Even if a refugee was fortunate enough to obtain an interview, the chances of success were abysmal.

The approval rate for Haitian asylum applicants remains among the lowest of all applicants,²⁶ despite the many Haitians who have died at sea and those who risked their lives in search of freedom from persecution. The recent influx of Cubans,²⁷ economic immigrants for whom permanent residency is proposed,²⁸ makes it appear, once again, that within the racial hierarchy of asylum, black bodies are placed lower than white or brown bodies. It also confirms that, as long as the

²² In the early 1980s, information on human rights abuses came to the I.N.S. via the State Department's Bureau of Human Rights and Humanitarian Affairs ("B.H.R.H.A."). ANKER, *supra* note 18, at 38. The B.H.R.H.A. issued annual reports and advisory opinions that were criticized as being disproportionately weighted by the I.N.S. in determining the legitimacy of stories told by asylum applicants concerning human rights abuses. *Id.* at 38. One B.H.R.H.A. opinion letter to the Miami asylum office stated that "We do not believe the fact that an ordinary citizen is known to support or to have supported President Aristide by itself puts that person at particular risk of mistreatment or abuse." IGNATIUS, *supra* note 20, at 157. The letter further stated that "[d]espite Haiti's violent reputation, it is possible for many people to find safe residence in another part of the country." *Id.*

²³ See *infra* notes 118-51 and accompanying text (discussing the Haitian migrant interdiction program).

²⁴ See 69 Interpreter Releases 1065 (1992).

²⁵ *Id.*

²⁶ See *infra* note 80.

²⁷ See *infra* notes 152-58 and accompanying text (discussing the Cuban refugee crisis).

²⁸ See *infra* note 153.

United States remains a powerful and relatively prosperous nation surrounded by less fortunate neighbors, the likelihood of other refugee crises is great.

The United States must learn from its past mistakes and avoid the tragic refugee body count at its doorstep in the future. These bodies are human beings; their stories have been told and still need telling. These stories are of people such as Michelle, who was forced into hiding after the military came to her home, killed her security guard and arrested a servant:

I am 31 years of age and I am a married woman. I am a secretary. I worked for [the office] from February 1991 to September 1991. This office is very well known and was very active. We helped Haitian people, specifically the ones coming from abroad and those living outside the country in coordinating their support to the newly elected government.

On September 30, 1991, after the coup d'etat of General Cedras, . . . [the office] had to close its doors because its staff had been sought by military soldiers.

On October 1, 1991, it was about 11 A.M., when five military soldiers in green uniforms entered into our property where I resided with my family and two servants. After shooting and killing my security guard who did not want to open the gate . . . they ransacked my entire house. They interrogated Ti Jean, a youth who used to give some assistance at home, and Felice, a servant. Then they arrested Ti Jean.

Fortunately, when this event occurred, my family and I were out of the house, visiting a cousin of my mother. There, someone called to inform us of what was happening at home. He advised us to stay away from the property, because they had put it under surveillance.

Filled with fear, I had to go into hiding with my son, three years old then, and my entire household. In the first days, my mother's cousin invited us to stay at her house. . . . We hid there until the last of October 1991.²⁹

A priest later assisted Michelle and her son in their escape from Haiti. The military persecuted many of her colleagues and friends; they were arrested, beaten and jailed without due process.

The persecution of individuals like Michelle confirms the inadequacy of the in-country refugee program.³⁰ Under the

²⁹ Affidavit of Asylum Applicant (names and other identifying material have been altered to protect the asylum applicant) (on file with author).

³⁰ See Carol Wolchok, *The Haitian Struggle for Democracy*, 20 HUM. RTS. 18,

Haitian military regime, repression was a way of life and requesting that refugees apply in-country exposed them to further unnecessary risks.³¹

This Article considers the realities faced by Haitian refugees and uses this example to argue that the United States must stop summarily closing its doors to Haitians and similarly situated refugees. Part I examines the substantive legal framework of U.S. refugee and asylum law with a discussion of relevant case law. Next, Part II discusses interdiction, which was used to stem the flow of Haitians seeking political asylum in the United States, and considers the implications of the use of blockades on future asylum applicants. Part III explores the disparate treatment of Haitians under the facially neutral refugee policy and discusses possible reasons for such disparity. This section also examines the intersection among race, class, language and culture in Haitian asylum seekers and how these factors affect the treatment of Haitian refugees. By analogizing to models developed in Title VII litigation and section 274B of the Immigration and Nationality Act ("I.N.A."), this section proposes the creation of changes in the asylum adjudicatory process, distinct and separate from U.S. foreign policy, to encompass the goals envisioned by the drafters of the Refugee Act of 1980 ("1980 Act").³² This Article concludes with a proposal for a more humane approach that involves a more liberal application of Temporary Protected Status laws, and the withholding of expulsion and deportation.

21 (1993) ("Although in-country processing may be an appealing concept, [an] on-site investigation revealed many flaws [in the system].").

³¹ *Id.* A recent investigation of the in-country refugee processing program revealed that Haitians at the greatest risk were the least able to use the complicated and bureaucratic program. *Id.* The program involves significant paperwork, multiple visits to an office in Port-au-Prince, and the "revelations of one's most intimate confidences to strangers." *Id.* Not surprisingly, more than 4000 individuals have abandoned the process. *Id.*

³² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (1980) (codified as amended at 8 U.S.C. §§ 1101-1157 (1988 & Supp. V 1993)).

I. THE SUBSTANTIVE LEGAL FRAMEWORK OF REFUGEE AND ASYLUM LAW

A. *Relief Accorded Refugees Under Domestic Law*

Prior to enactment of the Refugee Act of 1980, a haphazard immigration policy existed, composed of stop-gap measures that effectively gave the Attorney General significant discretionary power to grant temporary asylum or parole to aliens.³³ The 1980 Act was the first comprehensive immigration statute that dealt exclusively with refugees and individuals seeking political asylum.³⁴ Passage of the Act fulfilled the United

³³ One of the early attempts to address refugee matters on an ad hoc basis was the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 (1948) (codified as amended at 50 U.S.C. §§ 1951-1965 (1948)). It was amended in 1950 through 1952, and supplemented by the Refugee Relief Act of 1953, ch. 336, 67 Stat. 400 (1953) (codified as amended at 50 U.S.C. § 1971 (1953) (repealed 1956)). See generally Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 244 (1984).

In addition to the parole power of the Attorney General, see 8 U.S.C. § 1182(d)(5) (1988 & Supp. V 1993); Helton, *supra*, at 245-46, the Immigration and Nationality Act of 1952 authorized the Attorney General to "withhold deportation of any alien . . . to any country in which in his opinion the alien would be subject to physical persecution." Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (1952) (current version at 8 U.S.C. § 1253(h) (1988)).

"Conditional entry," enacted in 1965, provided a means of admitting refugees from overseas. The I.N.S. could grant this status to aliens who fled a communist or Middle Eastern country because of race-, religion- or political opinion-based persecution. 1965 Amendments, Pub. L. No. 89-236, § 3, 79 Stat. 911, 913, *repealed* by § 203(c), 94 Stat. 107 (1980). See Helton, *supra*, at 245.

Before the enactment of the Refugee Act of 1980, United States law allowed only 17,400 refugees from communist and Middle Eastern countries to be admitted annually. I.N.A. § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976) (*repealed* by the Refugee Act of 1980, Pub. L. No. 96-212, § 203(c), 94 Stat. 107). This is referred to as the "seventh preference" of the I.N.A. The provision granted the Attorney General discretionary parole authority to admit large numbers of people in response to serious refugee crises. Meissner, *supra* note 8, at 57. This proved to be a flexible tool, responsive to humanitarian needs; but the disadvantages of vesting so much power in the Attorney General included concerns that the executive power had infringed upon the statutory power of Congress to admit persons to the United States. *Id.* at 57-58.

³⁴ Meissner, *supra* note 8, at 58. Doris Meissner, the I.N.S. Commissioner, described the Refugee Act as accomplishing four major goals. First, it placed in the statute a procedure involving annual consultations between the Executive branch and Congress to fix refugee admissions ceilings. Second, it incorporated the United Nations' definition of refugee into U.S. law, bringing the United States into conformance with other signatories to the U.N. Protocol. Third, the Act held a

States' commitment as a signatory of the Protocol to the United Nations Convention on Refugees.³⁵

The United States has, in theory, a generous refugee policy that welcomes persecuted individuals and provides them with a safe and permanent haven.³⁶ An individual fleeing persecution can become a legal immigrant in two ways: through refugee status,³⁷ which is sought overseas in the refugee's country or in a refugee camp, or through political asylum,³⁸ which is sought either inside the United States or at its border.³⁹ Both refugees and political asylees must demonstrate a

promise of greater efficiency by coordinating the efforts of governmental agencies and the voluntary community serving the needs of refugees. Finally, the Act clarified the legal status of refugees and provided an identifiable path for permanent resettlement and eventual citizenship in the United States. *Id.* at 63-64.

³⁵ See Katherine L. Vaughns, *Taming the Asylum Adjudication Process: An Agenda for the Twenty-First Century*, 30 SAN DIEGO L. REV. 1, 19-23 (1993).

³⁶ See DOMINGUEZ & DOMINGUEZ, *supra* note 13, at 389-90.

³⁷ See *supra* note 18.

³⁸ The establishment of the asylum procedure is defined as follows:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

I.N.A. § 208(a), 8 U.S.C. § 1158(a) (1988).

³⁹ See ANKER, *supra* note 18, at 14-26. The applicant seeking asylum has two avenues. First, she can apply affirmatively by submitting an application for asylum before being apprehended and put in either deportation or exclusion proceedings. *Id.* at 15. An affirmative application is administered by the I.N.S. and adjudicated by an asylum officer. *Id.* at 16. Under the new asylum regulations, the affirmative process has been reformed and is encouraged. *Id.* at 18. Secondly, after apprehension or denial of an affirmative claim, she can raise asylum as a defense to the exclusion or deportation proceedings. *Id.* at 22. Exclusion and deportation hearings are under the jurisdiction of the Executive Office of Immigration Review. *Id.* These claims are adjudicated by immigration judges.

Some benefits of an affirmative application are:

- 1) The I.N.S. may view an alien who has presented herself voluntarily more favorably, making low bond or no bond more likely;
- 2) Asylum applications which are determined to be "nonfrivolous" require the granting of work authorization pending a final determination (including all levels of appeal) of eligibility for asylum;
- 3) An alien who applies after apprehension may appear to have purposefully violated U.S. immigration laws. Under current regulations, this should have no negative implications, but in fact weigh against an applicant; and
- 4) The asylum applicant's argument that she is a genuine refugee, not an economic migrant is supported by an affirmative application.

"well-founded fear of persecution" in their homeland because of race, religion, nationality, political opinion, or membership in a particular social group.⁴⁰

The Refugee Act merely requires that, subjectively, the refugee demonstrate a well-founded fear of persecution.⁴¹ Yet, despite the clear standard, courts have held that a person must have both a subjective fear and the fear must be objectively reasonable.⁴² Once a refugee's story suggests that the fear is well-founded, that person's wealth or resources is imma-

Id. at 18-19.

Aliens may seek asylum during an exclusion or deportation hearing or may appear before the district director for consideration of their claims. *See* I.N.S. v. Elias-Zacarias, 112 S. Ct. 812 (1992) (stating that a request for asylum and withholding of deportation can be brought in a deportation proceeding). If asylum is granted, the alien becomes eligible for the same federal assistance received by refugees. I.N.A. § 208(a)-(c), 8 U.S.C. § 1158(a)-(c) (1988). The percentage of asylum claims granted in the United States is, not surprisingly, quite low. In 1991, of the 56,310 claims for asylum, only 2908 were granted. Moreover, in 1992, when the number of Haitian refugees exploded, there were only 3919 asylum cases granted of 103,964 applications. IMMIGRATION & NATURALIZATION SERVICE, U.S. DEPT OF JUSTICE, 1992 STATISTICAL YEARBOOK 76 (1993). In 1993, there were 144,166 asylum applications and only 21.8% were approved. IMMIGRATION & NATURALIZATION SERVICE, U.S. DEPT OF JUSTICE, INS FACT BOOK 16 (1994) [hereinafter FACT BOOK].

The alien's stay in the United States is authorized until either an adjustment of status to permanent resident is granted, or the reason for the "well-founded fear of persecution" no longer exists. *See* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL 121 (1985).

⁴⁰ I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), 1158(a); *see also* Krishna Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOK. L. REV. 929 (1994) (discussing the failure of the 1951 United Nations Convention Relating to the Status of Refugees to extend specific protection from gender-based persecution).

⁴¹ Asylum officers were found to have made many errors in deciding whether to grant asylum. *See* IGNATIUS, *supra* note 20, at 7 (finding that in 50% of the decisions studied, asylum officers were ignorant of the law or made errors in legal analysis). The primary error was that in applying the well-founded-fear-of-persecution standard, they demanded a greater certainty of harm than the statute requires. *Id.* Various officers required that asylum applicants show a "singling out" for persecution, or a probability of persecution. *Id.*; *see also* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432-34 (1987) (finding that the quality of decision-making of the asylum officers varied, suggesting that the asylum applicant is at the mercy of the vagaries of fate).

⁴² *See* Estrada-Posadas v. I.N.S., 924 F.2d 916, 918 (9th Cir. 1991); Beltran-Zavala v. I.N.S., 912 F.2d 1027 (9th Cir. 1990); Alvarez-Flores v. I.N.S., 909 F.2d 1, 5 (1st Cir. 1990); Cardoza-Fonseca v. I.N.S., 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987); Bolanos-Hernandez v. I.N.S., 767 F.2d 1277, 1283 (9th Cir. 1985).

terial and refuge should be provided, as promised by the Act. The application will be denied if refugee status is based upon economic deprivation, natural disaster or military hostilities in the homeland, rather than political persecution.⁴³

Many asylum officers find the distinction between economic and political refugees fraught with interpretive difficulties. Asserting that the refugees are fleeing Haiti for economic rather than political reasons ignores the fact that retaliation against opposition members often will be economic in nature.⁴⁴ In countries experiencing political turmoil, the ruling government typically controls scarce resources such as jobs and food. Regardless of the opposition level, whether grass roots or through an organized party, one of the most effective tools for suppressing dissent is denial of the opportunity to earn a livelihood.⁴⁵ Courts have recognized that this denial can amount to persecution.⁴⁶ The Ninth Circuit, in *Desir v. Ilchert*,⁴⁷

⁴³ Cf. *Martinez-Romero v. I.N.S.*, 692 F.2d 595, 596 (9th Cir. 1982) (holding that special circumstances must be present before relief can be granted).

⁴⁴ See S.L. Bauchman, *Post-Cold War, Who Is a Refugee?*, SAN JOSE MERCURY NEWS, Apr. 14, 1992, at 5B. Bauchman asserts that in Haiti, poverty is political repression. Since Haiti's rich ruling elite controls the vast majority of resources, they hold the grindingly poor population helpless to combat state violence. *Id.* The combination of economic oppression coupled with political repression keeps the "poor poor, the rich rich, and dissent down." *Id.*; see also Harry Levins, *Haiti's Army: Echoes of Feudalism*, ST. LOUIS POST-DISPATCH, Sept. 19, 1994, at 5B.

The role of Haiti's army is to protect "people who are living off other people. It's a nationwide extortion racket." *Id.* Often, younger members of the wealthy class are given officer positions in the army, along with the adjunctive business opportunity of extorting poor and politically repressed Haitians. *Id.*; cf. *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 509 (S.D. Fla. 1980) ("Indeed it could be said that Duvalier has made his country weak so that he could be strong. To broadly classify all of the class of plaintiffs as 'economic refugees' as has been repeatedly done, is therefore somewhat callous. Their economic situation is a political condition.").

⁴⁵ Bauchman, *supra* note 44, at 5B. Therefore, asylum claims based solely on improving one's economic lot will always fail, but where there is deliberate imposition of substantial economic disadvantage because of one of the five statutory bases, the application is appropriate. See Catholic Legal Immigr. Network, Inc., Outline of Asylum Law for Presentation to Association of the Bar of the City of New York 6 (Mar. 2, 1992) (on file with author); see also *Kovac v. I.N.S.*, 407 F.2d 102 (9th Cir. 1969) (sustaining asylum claim where government forced skilled chef to work as unskilled cook).

⁴⁶ See *Dunat v. Hurney*, 297 F.2d 744 (3d Cir. 1961). In adjudicating the denial of a Roman Catholic Yugoslav seaman's asylum claim the court stated:

To belittle economic sanctions regardless of their impact was, we think, to bypass the realities of everyday life . . . The denial of an opportunity to earn a livelihood . . . is the equivalent of a sentence to death by

found to be credible the applicant's testimony that the Ton Ton Macoutes, a paramilitary force, had beaten and prevented the applicant from obtaining gainful employment because he would not pay them extortion money,⁴⁸ and therefore granted the applicant asylum.

In Haiti, the government traditionally maintains power through paramilitary forces acting in an extortionate manner.⁴⁹ Therefore, an alien who leaves his or her country for what amounts to both political and economic reasons should

means of slow starvation and none the less final because it is gradual. The result of both is the same, and it is one that Congress, motivated by the humanitarian instincts that have always characterized our conduct and that of our civilization, certainly hoped to avoid when subsection 243(h) [of the I.N.A.] was enacted.

Id. at 746. The seaman asserted that the communist-dominated government would deny him an opportunity to earn a livelihood because of his adherence to the Roman Catholic faith. In denying his asylum application, the lower court had entered summary judgment in favor of the Attorney General. The Attorney General had determined that the standard of "physical persecution" was not met by the alien's evidence. *Id.*; cf. *Zalega v. I.N.S.*, 916 F.2d 1257 (7th Cir. 1990) (holding that applicant's dismissal from government job after refusal to sign a loyalty oath, and the prevention of his obtaining additional land for his fox farm, "may be characterized as economic persecution" but, where applicant was not denied the opportunity to make a living, these were not substantial enough to establish asylum eligibility).

⁴⁷ 840 F.2d 723 (9th Cir. 1988). In *Desir*, the court found that in addition to physical abuse, the impairment of Desir's ability to earn a livelihood was political persecution by the Ton Ton Macoutes. *Id.* at 729.

⁴⁸ *Id.* at 727. The immigration law judge, at the trial level, and the Board of Immigration Appeals reasoned that the Ton Ton Macoutes harassed Desir not because of his race, religion, nationality, membership in a particular social group, or political opinion, but because they sought to extort money from him for personal reasons. *Id.* at 725. The Ninth Circuit found that Desir "was tangibly harmed, both physically and in his ability to earn a livelihood." *Id.* at 727. Indeed, "to resist extortion is to become an enemy of the government." *Id.* (quoting *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 498 (S.D. Fla. 1980)).

⁴⁹ See JAKE C. MILLER, *THE PLIGHT OF HAITIAN REFUGEES* 7-8 (1984). After "Papa Doc" Duvalier assumed the presidency in 1937, he sought to neutralize the army that had supported his rise to power. *Id.* at 7. In its place, he instituted the feared Ton Ton Macoutes—a paramilitary unit that had greater freedom than the army or private citizens. *Id.* at 8. Duvalier alone had power to enroll a Macoute and, in return, the selected few showed great loyalty to the dictator. *Id.*; see also *Desir*, 840 F.2d at 727. The Haitian government operated as a "kleptocracy," or a government by thievery. Since the Macoutes were often unpaid, "they depended on their fellow Haitians for their livelihood, a circumstance encouraging wide-scale corruption, extortion and violence." *Id.* Since the Macoutes were created for political purposes, extortion became the main underpinnings supporting the Haitian government. *Id.*

not be barred from refugee status.⁵⁰

If an alien's life or freedom is endangered, the United States may grant an alternative relief: the withholding of exclusion or deportation of the alien under section 243(h) of the I.N.A.⁵¹ Unlike refugees, an alien granted withholding of deportation under this statute has no right to apply for permanent residency.⁵² The United States, however, may force an alien to depart to a third country.⁵³ Obtaining withholding is not discretionary; by law, qualified applicants are entitled to such relief.⁵⁴ An asylum request automatically is considered a request for withholding of deportation⁵⁵ and, therefore, puts the alien under a heavier evidentiary burden during his or her I.N.S. hearing.⁵⁶ This result is incongruous because asylum of-

⁵⁰ See, e.g., *Garcia-Ramos v. I.N.S.*, 775 F.2d 1370, 1374-75 (9th Cir. 1985) ("We do not find it inconsistent with a claimed fear of persecution that a refugee, after he flees his homeland, goes to the country where he believes his opportunities will be best. Nor need fear of persecution be an alien's only motivation for fleeing."); see also *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 507-10 (S.D. Fla. 1980) (discussing the economic motivation for refugee flight).

⁵¹ I.N.A. § 243(h), 8 U.S.C. § 1253(h) (1988); *I.N.S. v. Stevic*, 467 U.S. 407, 410-11 (1984) (holding that an alien must be granted withholding of deportation or return to any country where her "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion," unless one of four statutory bars applies); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 444 (1987).

⁵² *ANKER*, *supra* note 18, at 4, 64.

⁵³ See *Amanullah v. Cobb*, 862 F.2d 362, 367 (1st Cir. 1988) (allowing excludable aliens who feared deportation to Afghanistan to reinstate their political asylum appeal unless the U.S. government could obtain written assurance that they would be accepted by India); *In re Salim*, 18 I. & N. Dec. 311, 315 (BIA 1982) (holding that a grant of withholding only prohibits the alien's deportation to a specific country).

⁵⁴ This absolute prohibition against deportation of bona fide applicants contrasts with the discretionary authority of the U.S. Attorney General under the previous Refugee Act and under the asylum/refugee provision. See IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 202 (4th ed. 1994).

⁵⁵ 8 C.F.R. § 208.3(b) (1994); see also *In re Lam*, 18 I. & N. Dec. 15 (B.I.A. 1981).

⁵⁶ *I.N.S. v. Stevic*, 467 U.S. 407, 429-30 (1984). The standard to be applied provides:

An alien is entitled to withholding of deportation to a specific country only if it more likely than not that the alien will be persecuted in that country because of race, religion, nationality, membership in a particular social group, or political opinion. . . . This standard of proof is more exacting than the "well-founded fear" standard that applies to an asylum claim. . . . Thus the mere fact that an alien is eligible for a grant of asylum does not necessarily mean that he or she is also entitled to withholding of deportation.

fers far greater benefits than withholding of deportation.

The granting of political asylum concededly has great potential for abuse. Since applying for admittance to the United States from one's homeland is a slow, uncertain and occasionally dangerous process, the asylum option may encourage a rush toward U.S. shores. Many of those seeking to circumvent the immigration laws have discovered that reaching the United States may confer resettlement rights, even if the alien violates immigration laws in arriving here.⁵⁷ It becomes the asy-

U.S. DEP'T OF JUSTICE, BASIC LAW MANUAL: ASYLUM 75 (Supp. 1993) [hereinafter BASIC LAW MANUAL].

Although the standard of proof for withholding of deportation is higher, both withholding and asylum present similar evidentiary questions. In both cases, the following requirements apply:

(1) the alien's uncorroborated testimony may be sufficient, if it is credible in light of known conditions in the country in question;

(2) proof of past persecution may be sufficient to show that future persecution is more likely than not, unless there is evidence establishing that country conditions have changed significantly;

(3) an alien need not prove that he or she will be "singled out," if the alien shows that there is a pattern or practice of persecution against a group of persons situated similarly to the applicant and that he or she belongs to or identifies with that group; and

(4) the Asylum Officer must give due consideration to evidence that the country in question persecutes (rather than prosecutes) persons who violate departure control laws or seek asylum abroad.

See 8 C.F.R. § 208.16(b) (1994). If the alien has participated in the persecution of another, or is a security risk, she will be barred from consideration for withholding or deportation. See BASIC LAW MANUAL, *supra*, at 76-77.

⁵⁷ See I.N.A. § 208(a), 8 U.S.C. § 1158(a). The new procedures contained in draft operations instructions provide that asylum applicants attempting entry with valid documents may be released from detention pending exclusion proceedings. 55 Fed. Reg. 306.74, No. 135 (1991) (proposed July 27, 1990). These individuals "may be paroled . . . to pursue [the] application for asylum with the asylum officer." Draft O.I. 208.8(a) (1991). An excludable asylum applicant who attempts entry with false or nonexistent documentation was previously subject to mandatory detention. See 8 C.F.R. § 235.3(b) (1990); see also Arthur Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353, 369 (1986); Paul W. Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305 (1987).

Under the new procedures, even the asylum applicant with false or no documentation may be paroled to pursue an asylum claim before an asylum officer provided that several conditions are met. ANKER, *supra* note 18, at 27-28. These include requirements that:

[T]he applicant be represented by counsel or other representative; post a bond; have a place to live (and official address); have an employment offer or other means of sustenance; not be barred from asylum on a mandatory ground; and most importantly, present a written application that the asylum officer determines provides a *reasonable basis* for finding

lum officer's task to determine, in an interview, whether the applicant's claim is genuine.⁵⁸ In addition, applying for asylum can circumvent the sometimes long and tedious procedures required to obtain lawful permanent residency⁵⁹ through family-sponsored,⁶⁰ employment-based,⁶¹ or diversity immigration procedures.⁶²

Hence, a foreign national who arrives on the shores of the United States and falsely claims political asylum faces a no-lose situation. Claims of political asylum can provide relief from both exclusion⁶³ and deportation.⁶⁴ Statutory and treaty

the alien eligible [for asylum].

Id. at 28. The claims of those who do not meet the criteria for release on parole will be adjudicated in exclusion proceedings before an immigration judge and the older, more stringent criteria for release contained in 8 C.F.R. § 212.5(a) (1994) will apply. ANKER, *supra* note 18, at 28-29.

⁵⁸ The new regulations and procedures manual provides for a non-adversarial interview that will "elicit all relevant and useful information bearing on the applicant's eligibility." 8 C.F.R. § 208.9(b) (1990); *see also* ASYLUM BRANCH, IMMIGRATION & NATURALIZATION SERV., ASYLUM: PROCEDURES MANUAL AND OPERATIONS INSTRUCTIONS (1991). The asylum officer is encouraged to assist the applicant in the development of her claim, rather than to act as her opponent. ANKER, *supra* note 18, at 45.

⁵⁹ *See* I.N.A. § 203(a)-(c), 8 U.S.C. § 1153(a)-(c) (Supp. V 1993).

⁶⁰ Family-sponsored immigration is very important because family reunification is one of the principal objectives of the statute. Consequently, immediate relatives (children, spouses and parents) of U.S. citizens are admitted to the United States without numerical limitations. I.N.A. § 203(a)(1)-(4), 8 U.S.C. § 1153(a)(1)-(4) (providing four family-sponsored preference categories: the first preference is for unmarried sons and daughters of citizens; the second preference is for spouses and unmarried children (under the age of 21) and unmarried sons and daughters of permanent residents; the third preference is for married sons and daughters of U.S. citizens; and the fourth preference is for brothers and sisters of citizens). With the exception of the immediate-relative category, obtaining permanent residency through family-sponsored immigration is a lengthy process.

⁶¹ I.N.A. § 203(b)(1)-(5), 8 U.S.C. § 1153(b)(1)-(5) (Supp. V 1993) (providing five employment-based preference categories encompassing the following groups: (a) priority workers; (b) members of the professions holding advanced degrees and persons with exceptional ability in the sciences, arts, or business; (c) "skilled workers," and unskilled workers; (d) special immigrants; and (e) "employment creation" immigrants who invest in new commercial enterprises).

⁶² *See* I.N.A. § 201(a)(3) & (e), 8 U.S.C. § 1151(a)(3), (c) (1991). Diversity immigration refers to an annual allotment of 55,000 immigrant visas, beginning in 1995. The transitional diversity program, in effect from 1992-1994 provides a "visa lottery" for natives of those countries that were "adversely affected" by amendments to the I.N.A. in 1965. I.N.A. § 203(c), 8 U.S.C. § 1153(c) (Supp. V 1993).

⁶³ Exclusion and deportation are distinct remedies available to the U.S. government. The destination hinges on whether an alien has made an "entry" into the United States. An alien who has not made an entry is considered "excludable."

requirements forbid application of nearly all exclusion criteria or eligibility qualifications to refugees.⁶⁵ Moreover, though adjudication is a long administrative process, in the interim the claimant often obtains permission to work⁶⁶ and may be eligible for public assistance.⁶⁷ The claimant who convinces an

The term "entry" means "any coming of an alien into the United States from a foreign port or place or from an outlying possession, whether voluntarily or otherwise." I.N.A. § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1988). The grounds for exclusion are delineated in I.N.A. § 212(a), 8 U.S.C. § 1182(a). The procedural safeguards available to an excludable alien are fewer than those available to a deportable alien.

⁶⁴ An alien must have made an "entry" into the United States in order to be deportable. *See supra* note 63. An alien who was excludable at time of entry is deportable under I.N.A. § 241(a)(1)(A), 8 U.S.C. § 1251(a)(1)(A). In addition, there are other independent means by which an alien may be found deportable. In 1950, Congress adopted the first political asylum provision by exempting aliens from deportation "to any country in which the Attorney General shall find that such alien would be subjected to physical persecution." Internal Security Act of 1950, ch. 1024 § 23, 64 Stat. 987, 1010 (repealed 1993). Internal Security Act of 1950 ch. 1024 § 23, 64 Stat. 189, 50 U.S.C. § 782, *repealed*, Pub. L. 103-199 Title 8, § 803(1), 107 Stat. 2329, Dec. 17, 1993.

Among the alternative forms of relief available to asylum applicants are deferred action, humanitarian parole and extended voluntary departure, suspension of deportation and other deportation relief, as well as temporary protected status under the Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1254(a) (1991), and the settlement of American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991). *See generally* ANKER, *supra* note 18, at 68-92 (discussing rights of applicants).

⁶⁵ *See* KURZBAN, *supra* note 54, at 222-23.

⁶⁶ 8 C.F.R. § 208.7(a) (1994); *see also* IGNATIUS, *supra* note 20, at 6-7. Applicants who file "non-frivolous" cases are entitled to work authorization during the processing of their case. IGNATIUS, *supra* note 20, at 6. Critics express the concern that some applicants are filing for asylum solely to obtain work authorization. *Id.* The National Asylum Study Project proposes that requiring asylum interviews within 90 days of filing and before granting work authorization would eliminate this incentive. *Id.* It further states that "[i]mmediate asylum interviews would address this concern more squarely than other proposals, such as eliminating work authorization entirely, which would harm genuine asylum-seekers and burden both public and private resources and social services." *Id.* at 7.

On December 5, 1994, the I.N.S. published a final rule for adjudicating asylum applications, effective January 4, 1995. The rule streamlines the process by allowing asylum officers to grant meritorious claims and refer cases of deportable or excludable applicants to immigration judges. Employment authorization is no longer routinely granted to all applicants. Applicants may not apply for work authorization until their asylum application has been pending for 150 days. If a judge denies the case within 180 days, no employment authorization will be granted. 1994 WL 672718 (to appear at 58 Fed. Reg. 62,284-01 (1995)). *See generally* Jeanne A. Butterfield, *New Asylum Rule Released Effective January 1995*, A.L.I.A. MONTHLY MAILING, Jan. 1995, at 29 (discussing new asylum regulations).

⁶⁷ *See* Vaughns, *supra* note 35, at 20-23.

asylum officer or immigration judge that his or her life and freedom would be threatened upon return to his or her home country has established a direct route to permanent residency.

Politicians have hotly debated this preferential treatment.⁶⁸ Critics have pointed to a high "no-show" rate at scheduled interviews among asylum applicants as evidence that their claims were not genuine.⁶⁹ However, other reliable evidence has provided statistics that suggest these allegations are exaggerated.⁷⁰

Each year, the President, in consultation with Congress, determines the number of overseas refugees to be admitted into the United States⁷¹ and allocates these admission spaces among various refugee groups.⁷² The admissions system is designed to respond to political realities,⁷³ so that the President may consider "foreign policy" in determining which refugees are of "humanitarian concern" and therefore admissible.⁷⁴ This structure was a major improvement over the dis-

⁶⁸ See Gigi Anders, *Black Beans, Rice & A Side of Hot Debate*, WASH. POST, Sept. 8, 1994, at C1; Joan Beck, *Immigration Must Be Controlled*, CALGARY HERALD, Nov. 1, 1994, at A4.

⁶⁹ IGNATIUS, *supra* note 20, at 4-5.

⁷⁰ The National Asylum Study Project, conducted by the Harvard University School of Law, is the only independent non-governmental organization to assess the asylum officer corps. The study was funded by the Ford Foundation and involved the work of researchers and law students. "They analyzed over 1300 asylum cases and interviewed officials at the I.N.S. and the Department of Justice, asylum officers, directors of regional asylum offices, over 380 practitioners, legal workers and immigration consultants." IGNATIUS, *supra* note 20, at 2. The "no show" rate was 16% for the first eleven months of fiscal year 1993 (through August). The Project found that despite computer problems which often provided no notice to the applicant or her attorney, 84% of the applicants appeared for their interviews. *Id.* at 4.

⁷¹ I.N.A. § 207(a)(2), 8 U.S.C. § 1157(a)(2) (1988). This section provides for an annual allocation of refugees, which "shall be such number as the President determines . . . after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest." *Id.*

⁷² Refugee Act, Pub. L. No. 96-212, § 201(b), 94 Stat. 103 (1980); I.N.A. § 207(a)(3), 8 U.S.C. § 1157(a)(3).

⁷³ Thus, although the statute initially provided for an annual allocation of refugees not to exceed 50,000, after fiscal year 1982, the allocation is set by presidential determination after consultation with Congress, with the final number based on humanitarian concerns and the national welfare. *See* I.N.A. § 207(a), 8 U.S.C. § 1157(a), (b).

⁷⁴ I.N.A. § 207(a), (e), 8 U.S.C. § 1157(a), (e); *see also* I.N.A. § 207(b), which states that the annual allocation of refugees may be increased:

If the President determines, after appropriate consultation, that (1) an

cretionary power wielded by the Attorney General under the older system.⁷⁵ Congress removed the fixed numerical limitations contained in the previous immigration act⁷⁶ and gave itself a continuing role in the shaping of refugee policy as consultant to the President in determining the yearly allocation.⁷⁷

The "humanitarian concerns" criterion broadly stated in the 1980 Act mentions no communist or non-communist preference. Even under this neutrally phrased clause, however, the United States continued to grant "a blanket presumption of persecution to those fleeing communist states, while maintaining a far stricter standard for those fleeing rightist authoritarian regimes."⁷⁸ If "humanitarian concerns" are paramount,

unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a) of this section, the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States

I.N.A. § 207(b), 8 U.S.C. § 1157(b).

Legislative history shows that the provision for political asylum in the Refugee Act was an afterthought, inserted to provide statutory authority for a procedure that had been permitted by the regulations for years. *See, e.g.*, 8 C.F.R. § 108 (1978).

⁷⁵ *See* Vaughns, *supra* note 35, at 4. As the centerpiece of the new act, Congress intended to "eradicate years of ideological and geographical discrimination" in the asylum process. *Id.* at 11.

⁷⁶ T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION PROCESS AND POLICY* 710 (2d ed. 1991).

⁷⁷ I.N.A. § 207, 8 U.S.C. § 1157.

⁷⁸ *Cf.* I.N.A. § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976) (*repealed by* Refugee Act of 1980, Pub. L. No. 96-212, § 203(c), 94 Stat. 107 (1980)) (providing for the annual admission of only 17,400 refugees from communist and Middle Eastern countries, termed "the seventh preference" of the I.N.A.). The Attorney General was given broad discretionary parole authority pursuant to I.N.A. § 212(d)(5), 8 U.S.C. § 1157(d) (1976), which was used to compensate for the inadequacy of "the seventh preference" by admitting larger numbers of people in serious refugee crises. *See* Meissner, *supra* note 8, at 57; *see also supra* note 34. Its use by successive Attorneys General was greatly diminished in response to concerns that it was a usurpation of congressional authority by the Executive branch. *Id.* at 58. The Refugee Act of 1980 amended this provision to limit its scope. *See* 8 U.S.C. § 1182(d)(5) (1982); ANKER, *supra* note 18, at 11; *see also* Ellen B. Gwynn, Note, *Race and National Origin Discrimination and the Haitian Detainees*, 14 FLA. ST. U. L. REV. 333, 340 (1986).

as the Refugee Act so dictates,⁷⁹ Haitians would be granted refugee status in greater numbers.⁸⁰ The provisions for assisting these individuals exist in current law, if applied with the emphasis and sense of fair play intended by Congress.

Immigration and asylum are distinct pathways to resettlement, and should remain so. Immigration policies control the normal ebb and flow of visitors and new or returning residents to the United States, while asylum provides special assistance to individuals suffering as a result of exceptional circumstances. As discussed above, the story of Michelle demonstrates that many Haitians fit the statutory definition of "refugee" as per-

⁷⁹ I.N.A. § 207(b), 8 U.S.C. § 1157(b) (1988).

⁸⁰ See Davalene Cooper, Note, *Promised Land or Land of Broken Promises? Political Asylum in the United States*, 76 Ky. L.J. 923 (1987-88). The approval rate of those seeking asylum in the United States is much lower for Haitians than most other countries, especially communist countries:

Country	Approval Rate	
	1982-86	1987
Haiti	1.8%	0.0%
All Countries	23.3%	54.0%
Romania	51.0%	59.7%
Afghanistan	37.7%	26.2%
Nicaragua	14.0%	83.9%

Id. at 941-42.

More recent statistics are not encouraging. The National Asylum Study Project found that with the exception of Syria, which held the highest asylum approval rate of 73%, communist and former communist countries still have the highest approval rates. For example, China approval rates were 52%; Yugoslavia, 50%; Cuba, 49%; Ethiopia, 44%; Russia, 44%; and Ukraine 40%. IGNATIUS, *supra* note 20, at 3.

While statistics alone do not measure the fairness of the adjudications, a troubling trend is that the highest grant rates are for applicants from communist and former communist countries, whom INS is approving at two to three times the rate of others suffering widespread documented persecution, such as Haitians, who have an approval rate of 21%.

Id.

The figures for Haitians include those screened at Guantanamo Bay as well as other Haitians seeking asylum. The study demonstrated that in screening the applicants, the interviewers concluded that 30% of Haitians exhibited a credible fear of persecution and were allowed to continue the process of applying for asylum; the remaining 70% were repatriated to Haiti. The study further stated that "the Haitian applicant pool is comprised in large part of people who have already met a threshold showing. The I.N.S. states that the approval rate for Guantanamo Bay Haitian applicants is approximately 50%." *Id.* at 4.

In 1993, China's asylum approval rate was 49.1% compared to 23.6% for Haiti. Refugee approval rates for Haiti were a mere 16.8%, compared to 96.0% for the Soviet Union, 78.4% for Cuba, and an overall approval rate of 74.7%. FACT BOOK, *supra* note 38, at 16.

sons to whom the Attorney General may grant asylum.⁸¹

To be considered a refugee,⁸² an alien must have a "fear"

⁸¹ I.N.A. § 208(a), 8 U.S.C. § 1158 (1982) provides a procedure for an alien "physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum." *Id.* The Refugee Act correctly did not establish the number of individuals to be granted political asylum. Upon passage, the statute provided an annual allocation of 5000 asylees to be adjusted to permanent residence. *See* RICHARD A. BOSWELL & GILBERT P. CARRASCO, *IMMIGRATION AND NATIONALITY LAW* 149 (2d ed. 1992). Because the President sets refugee quotas in consultation with Congress and the asylum applications have no quotas, a refugee may meet the statutory definition but not be allowed to enter the country. *Id.* Asylees are able to enter the country and obtain asylee status without limitation until they seek adjustment to permanent resident status. At that time a quota of 10,000 is applied. *Id.*

While some assert that this allocation is generous and is sufficient to meet the demands on the system, it has proven to be woefully inadequate. *See generally* Meissner, *supra* note 8, at 60-61. At the time of the signing of the Refugee Act on March 17, 1980, asylum applicants numbered less than 2000 annually, representing at that time a peak in applications. *Id.* On April 20, 1980, the 1980 Mariel boat lift began and culminated several months later, adding an unanticipated 125,000 Cubans seeking asylum. *Id.* The backlog soon increased when the Iranian hostage crisis caused Iranian students residing in the United States to be held in limbo by the I.N.S. *Id.* Actual grants of asylum, policymakers feared, might be viewed by the Ayatollah Khomeini as a hostile act and incite Khomeini to retaliate against the hostages. *Id.* Additionally, the civil war and fall of the Somoza government in Nicaragua provided a third source of individual claims and a strain on the ill-prepared system. *Id.*

⁸² *See* Refugee Act § 101(a)(42), 8 U.S.C. § 1101(a)(42).

A refugee is defined generally as a person outside of his/her country of nationality and not within the U.S. or at the borders of the U.S., who is unable or unwilling to return to his home country because of persecution or a "well founded fear of persecution on account of race, religion, nationality, membership in a particular group or political opinion."

KURZBAN, *supra* note 54, at 187. Under U.S. law, the refugee definition also includes persons with a well-founded fear of persecution who are still within the country of persecution, if the President certifies the existence of such refugees after consultation with Congress. *Id.* The definition incorporates the refugee standard of the United Nations Convention and Protocol Relating to the Status of Refugees, *opened for signature*, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, 152.

The Refugee Act of 1980 directs the Attorney General to establish procedures for aliens physically present in the United States or at land borders or ports of entry to apply for asylum in the United States, if the alien falls within the definition of refugee established by the Act. Refugee Act § 208(a), 8 U.S.C. § 1158(a). The definition of refugees therefore also applies to asylum seekers. Typical examples of persons seeking asylum are the Haitian and Mariel-Cuban applicants who arrive by boat and El Salvadoran and Nicaraguan applicants who seek asylum after entering the United States.

The immigration laws of the United States permit persons fleeing persecution to seek entry into the United States under several different categories:

- a. normal flow refugees under I.N.A. § 207(a);

of "persecution";⁸³ the fear must be "well-founded";⁸⁴ the persecution must be on "account of race, religion, nationality, membership in a particular social group or political opinion";⁸⁵

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- b. refugees of special humanitarian concern under I.N.A. § 207(b);
 - c. asylum seekers under I.N.A. § 208;
 - d. persons seeking withholding of deportation or exclusion for fear of persecution under I.N.A. § 243(h);
 - e. parolees under I.N.A. § 212(d)(5);
 - f. persons granted extended voluntary departure; and
 - g. persons granted temporary protected status.

KURZBAN, *supra* note 54, at 187. "The Refugee Act of 1980 . . . expanded the legal definition of 'refugee' to include those fleeing 'persecution on account of membership in a particular social group.'" See T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923 (1992).

⁸³ Fear brings a subjective element into the refugee analysis. UNITED NATIONS, HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 111 (1988). Therefore the first step in the analysis is an evaluation of the applicant's statements. *Id.* This replaces the prior process of first judging the situation in the applicant's country. *Id.* This evaluation of the applicant's statements is closely linked to an assessment of his or her personality and psychological state and attempts to discern why this person's life is intolerable. *Id.* at 12.

"Persecution" is defined as "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985). While the term encompasses confinement and torture, courts also have held that severe economic deprivation, which threatens an individual's life or freedom, is equivalent to persecution. See *Dunat v. Hurney*, 297 F.2d 744 (3d Cir. 1961); *In re Salama*, 11 I. & N. Dec. 536 (B.I.A. 1966); *In re Eusaph*, 10 I. & N. Dec. 453 (B.I.A. 1964); see also KURZBAN, *supra* note 54, at 191 (stating that persecution may include relegation to substandard dwellings, exclusion from institutions of higher learning, enforced social and civil inactivity, passport denial, constant surveillance, and pressure to become an informer).

⁸⁴ "Well-founded fear" was interpreted by the Board of Immigration Appeals in *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), where the court held that the term required a genuine apprehension or awareness of danger in another country. *Id.* at 221. This interpretation was later amended in light of *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). See also *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

⁸⁵ In construing the "on account of" phraseology, the U.S. Supreme Court has held that applicants seeking asylum based on "persecution on account of . . . political opinion" must show that the government's actions specifically result and stem from the individual's particular political views. See *I.N.S. v. Elias-Zacarias*, 112 S. Ct. 812, 815 (1992). Under this standard, harsh conditions which are shared by many, or general civil strife, anarchy or criminal punishment are not considered persecution by the B.I.A.. *In re Sanchez*, 19 I. & N. Dec. 286 (B.I.A. 1985); see also *Canas-Segovia v. I.N.S.*, 970 F.2d 599, 601 (9th Cir. 1992) (holding that the "on account of" language applies to religious and political persecution alike); *Sivaankaran v. I.N.S.*, 972 F.2d 161, 163 (7th Cir. 1992) (noting that if an applicant is seeking to show a genuine fear of political persecution it must be one

and the alien must be unable or unwilling to return to his or her country of nationality (or to the country in which he or she last habitually resided) because of the persecution or fear of persecution.⁸⁶ Past persecution satisfies the requirement for asylum and, although relevant to the exercise of discretion to grant asylum,⁸⁷ the refugee does not have to establish a "well-founded fear of persecution" in the future.⁸⁸

To be eligible for asylum, each Haitian refugee is expected to have documentary evidence to prove, on an individual basis, his or her well-founded fear of persecution.⁸⁹ A refugee leaving by cover of night with minimal possessions should not be expected to have extensive files documenting persecution. Sometimes, evidence of torture on the refugee's body is the most eloquent witness to the persecution suffered.⁹⁰

Legislative history suggests that Congress, whose express purpose in enacting the Refugee Act of 1980 was to respond to the needs of persons subject to persecution in their homelands, intended to strike a balance between practical and moral considerations.⁹¹ The need to restrict the number of aliens admit-

which a reasonable person in the applicant's shoes would form). *But see* *Osorio v. I.N.S.*, 18 F.3d 1017, 1030-31 (2d Cir. 1994) (finding Guatemalan refugee eligible for asylum based on his well-founded fear of persecution for political beliefs).

⁸⁶ 8 C.F.R. § 216(b) (as enabled by I.N.A. § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988 & Supp. II 1990)); *see also* 8 U.S.C. § 1101(a)(42)(A) (definition of a refugee).

⁸⁷ *See* Jennifer M. Corey, Note, Immigration & Naturalization Service v. Doherty: *The Politics of Extradition, Deportation and Asylum*, 16 MD. J. INT'L L. & TRADE 83 (1992). To prove oneself to be a refugee from any country, there must be a showing or proof of a "well-founded fear of persecution" if returned to that country. *Id.* at 99 n.123. Also, "the recent situation involving Haitian refugees demonstrates that foreign policy consideration are alive and well in United States asylum adjudications." *Id.* at 125-26.

⁸⁸ *See In re Chen*, Int. Dec. No. 3104 (B.I.A. 1989) (evidence of past persecution obliges I.N.S. to present evidence that such circumstances no longer exist).

⁸⁹ Where an applicant should supply a document probative of the question of persecution and fails to do so, the asylum adjudicator may draw an adverse inference. *See In re Dass*, Int. Dec. No. 3122 (B.I.A. 1989).

⁹⁰ *See* ANKER, *supra* note 18, at 60; Melinda Hennenberger, *The Body as Evidence: Refugees' Wounds Bear Witness to Torture, Supporting Claims for Political Asylum*, N.Y. TIMES, June 23, 1994, at B1; Deborah Sontag, *The File of a Refugee: One Haitian's Account*, N.Y. TIMES, Aug. 8, 1992, at A1. Presented with tales of torture in Haiti, U.S. immigration authorities ask "Where is the body? Where is the scar? Where is the proof of persecution?" *Id.*

⁹¹ Section 101(a) of the 1980 Act states: "Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . ." Refugee Act of 1980 § 101(a), 8 U.S.C. § 1101(a) (1988). *See also* S. REP. NO. 256, 96th Cong., 2d Sess. 1 (1979), *reprinted*

ted into the United States reflected practical considerations, balanced against the moral imperative of protecting legitimate refugees. The ultimate treatment of refugee applicants demonstrates these competing values. Section 208(a) of the I.N.A. provides for a discretionary grant of refugee status, although it is governed by international standards.⁹² While the initial grant is discretionary, section 243(h) does prohibit the return of aliens to their persecutors.⁹³ The protection offered by section 243(h) only prohibits the deportation to the country where persecution awaits;⁹⁴ it does not preclude the aliens' deportation from the United States.

B. *Relief Accorded Refugees Under International Law*

The U.S. Constitution recognizes treaties as the law of the land.⁹⁵ The United States, along with approximately 100 other nations, is a party to several treaties that set forth specific and rather extensive legal protection for refugees. In 1968, the United States signed the 1967 United Nations Protocol Relating to the Status of Refugees⁹⁶ (the "U.N. Protocol"), adopting Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees (the "U.N. Convention").⁹⁷ Under

in 1980 U.S.C.C.A.N. 141, 141.

⁹² I.N.A. § 208(a), 8 U.S.C. § 1158(a); I.N.A. § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1988 & Supp. V 1993).

⁹³ I.N.A. § 208(a), 8 U.S.C. § 1158(a). When refugees enter the United States, they are almost guaranteed permanent residency. In contrast, when an asylum or withholding of deportation applicant seeks to remain in the United States, it is without legal status and with the risk that she will be returned to her country if her application is denied. For a discussion of the differences between asylum and withholding of deportation, see *supra* text accompanying notes 51-56; ANKER, *supra* note 18, at 3-4.

In *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987), the Supreme Court held that § 208(a) required the application of a more liberal standard than the standard for the withholding of deportation under § 243(h).

⁹⁴ See Christina C. de Matteis, *Forced Return of Haitian Migrants Under Executive Order 12,007: A Violation of Domestic and International Law*, 18 N.C. J. INT'L L. & COM. REG. 431, 443 (1993).

⁹⁵ Article VI provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, . . . shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

⁹⁶ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter U.N. Protocol]. The United States signed with reservations on November 1, 1968.

⁹⁷ United Nations Convention Relating to the Status of Refugees, July 28,

both the U.N. Convention and Protocol, a refugee is defined as any person who, "owing to a well-founded fear of being persecuted for race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."⁹⁸ United States law incorporates this language into its Refugee Act of 1980.⁹⁹ As a signatory to the U.N. Protocol, the United States has assumed a duty under Article 33 to *protect* refugees by not returning them to their persecutors.¹⁰⁰ Under the U.N. Protocol, however, there is no duty to *grant asylum* to these refugees.

United States courts have discussed extensively the relevance and effect of both the U.N. Convention and the U.N. Protocol. For example, in *Haitian Refugee Center, Inc. v. Baker*, the Eleventh Circuit construed Article 33 of the Protocol as not self-executing and, therefore, not applicable to U.S. law.¹⁰¹ Similarly, in *Haitian Refugee Center, Inc. v. Gracey*,¹⁰² a district court found that the U.N. Protocol was not self-executing because its terms provided that the signatories inform the United Nations of the laws and regulations subsequently adopted to ensure the application of the Protocol.¹⁰³ Since Congress did not act immediately after the United States signed the U.N. Protocol, the court found that the treaty had

1951, 189 U.N.T.S. 137 [hereinafter U.N. Convention]. The United States never signed the U.N. Convention.

⁹⁸ U.N. Protocol, 189 U.N.T.S. at 152.

⁹⁹ See 8 U.S.C. § 1101(a)(42) (1988).

¹⁰⁰ Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2342 (1991). Article 33 of the U.N. Convention contains an absolute prohibition against the return of a person whose life or freedom would be threatened in the country from which she fled. U.N. Convention, 189 U.N.T.S. at 176.

¹⁰¹ 949 F.2d 1109, 1110 (11th Cir. 1991) (per curiam), *cert. denied*, 112 S. Ct. 1245 (1992). The dissent argued that the Protocol is a self-executing document, binding upon the United States, and that the protection it affords extends to Haitians who are interdicted on the high seas. *Id.* at 1114-15 (dissenting opinion).

¹⁰² 600 F. Supp. 1396 (D.D.C. 1985), *rev'd*, 809 F.2d 794 (D.C. Cir. 1987). The challenge to the Haitian interdiction program was subsequently rejected by the Court of Appeals for the District of Columbia on the ground that the plaintiff, the Haitian Refugee Center, did not have the standing to invoke the aid of the federal courts. *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987).

¹⁰³ *Gracey*, 600 F. Supp. at 1406.

no place in domestic law.¹⁰⁴

In contrast, the Board of Immigration Appeals, in *In re Dunar*,¹⁰⁵ stated that "such a treaty, being self-executing, has the force and effect of an act of Congress."¹⁰⁶ Similarly, the Southern District of Florida, in *Sannon v. United States*,¹⁰⁷ regarded the U.N. Protocol as a controlling rule of law that did not require legislative implementation.¹⁰⁸ It may be argued that the Supreme Court settled this controversy in *I.N.S. v. Cardoza-Fonseca*,¹⁰⁹ where it concluded that the U.N. Protocol includes a self-executing clause.¹¹⁰

In any case, with the implementation of the Refugee Act of 1980, the United States became bound by the Protocol. *Cardoza-Fonseca* held that once implementing legislation was passed, it was the statute and not the treaty that applied.¹¹¹ Thus, since the Refugee Act of 1980 was enacted later in time, it supersedes the U.N. Protocol in United States law and, some argue, should be the primary focus of parties seeking authority for the protection of refugees.¹¹² Others assert, however, that

¹⁰⁴ *Id.*

¹⁰⁵ 14 I. & N. Dec. 310 (B.I.A. 1973).

¹⁰⁶ *Id.* at 313; see also *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1361 (2d Cir. 1992) (stating that the Supreme Court has recognized "that one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the 1967 United Nations Protocol." (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987))).

¹⁰⁷ 427 F. Supp. 1270, 1275 (S.D. Fla. 1977) (holding that the U.N. Protocol established a right to a hearing for aliens threatened with exclusion), *vacated and remanded on other grounds*, 566 F.2d 104 (5th Cir. 1978).

¹⁰⁸ *Id.* at 1274; see also *Coriolan v. I.N.S.*, 559 F.2d 993, 996 (5th Cir. 1977) (the Attorney General's authority to withhold deportation of aliens must be measured "in light of the Protocol"); *Kashani v. I.N.S.*, 547 F.2d 376, 379 (7th Cir. 1977) (finding that the U.N. Protocol was binding on the United States and stating that the "well-founded fear of persecution" standard should be adopted in deportation proceedings); *Fernandez-Roque v. Smith*, 91 F.R.D. 117, 120 (N.D. Ga. 1981) (claims under Article 33 of U.N. Protocol state valid causes of action for which relief may be granted). *But see Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982) (the Protocol provides no rights for detained Haitians beyond the rights provided under domestic law).

¹⁰⁹ 480 U.S. 421, 432 (1987).

¹¹⁰ FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 592 (1990). See generally Carlos M. Vasquez, *The "Self-Executing" Character of the Refugee Protocol Non-Refoulement Obligation*, 7 GEO. IMM. L.J. 39, 43 (1993) ("[T]he terms 'self-executing' and 'non-self-executing' do not describe a fixed legal attribute of treaties and analytically are virtually useless and potentially very confusing.").

¹¹¹ *Cardoza-Fonseca*, 480 U.S. at 441.

¹¹² See Abigail D. King, Note, *Interdiction: The United States' Continuing Viola-*

reliance on the Protocol is equally appropriate.

The issue of whether the Protocol was self-executing appeared to have been settled. It was revisited, however, when the U.S. government argued that the Protocol did not prevent the return of refugees to their persecutors. The principle of *non-refoulement* set forth in the Protocol is applicable to Haitian refugees; that is, they should not be returned to a country where persecution awaits.¹¹³ Despite stating that they would face persecution if returned to Haiti, and the apparent relevance of the Protocol to those who fled during the military regime, courts have denied relief based on the treaty.¹¹⁴ By refusing to recognize the U.N. Protocol's effect, and stating that it did not apply on the high seas,¹¹⁵ the Supreme Court wrongfully removed the core protection offered to refugees—the promise not to return them to their persecutors, regardless of where they are found.¹¹⁶ Both the U.N. Protocol and the Refugee Act provide such protection. Finally, in addition to law created by international accord, U.S. courts also are bound,

tion of International Law, 68 B.U. L. REV. 773, 786 (1988) (noting that "[b]y the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . [I]f the two are inconsistent, the one last in date will control the other." (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1887)); see also Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986).

¹¹³ See *Sannon*, 427 F. Supp. at 1274 ("No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality or membership in a particular social group or political opinion.") (quoting U.N. Protocol, 19 U.S.T. at 6223). See generally Helton, *supra* note 100, at 2335.

¹¹⁴ *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498 (11th Cir. 1991), *cert denied*, 112 S. Ct. 1245 (1992); *Bertrand v. Sava*, 684 F.2d 204 (2d Cir. 1982). But see *Coriolan v. I.N.S.*, 559 F.2d 993 (5th Cir. 1977); *Kashani*, 547 F.2d at 379; *Fernandez-Roque*, 91 F.R.D. at 120; *Sannon*, 427 F. Supp. at 1274-75.

Some Haitians were able to provide documentary evidence supporting their claim. See Sontag, *supra* note 90, at A1; cf. Janet Reitman, *For Haitians Sent Back Home, The Risk of Reprisal Is Unclear*, WASH. POST, July 1, 1994, at A2 (U.S. Embassy spokesman Stanley Shrager stated, "We have no evidence that there has been any retaliation [on repatriated Haitians].").

¹¹⁵ *Sale v. Haitian Ctrs. Council*, 113 S. Ct. 2549, 2562 (1993).

¹¹⁶ See e.g., Cheryl Little, *United States Haitian Policy: A History of Discrimination*, 10 N.Y.L. SCH. J. HUM. RTS. 269, 311 (1993) (stating that the forcible return of Haitians "threatens to undermine carefully crafted international arrangements for the protection of those who flee [persecution]").

subject to any statutory and judicial restrictions, to apply customary international law that provides protection to refugees fleeing persecution.¹¹⁷

II. INTERDICTION AS A DETERRENT

A. *The Haitian Migrant Interdiction Program*

It is anomalous that the Haitian Migrant Interdiction Program ("Interdiction Program"), which sought to dissuade the persecuted from seeking safe haven in the United States, coexisted with the refugee policy which seeks to protect those who face legitimate dangers. At its most extreme implementation, Haitians were returned without verifying the veracity of their claims of persecution. The United States government described the interdiction policy as an effective deterrent to Haitians fleeing by sea.¹¹⁸ During the height of the Interdiction Pro-

¹¹⁷ A treaty binds only the parties to it, but a customary norm binds all governments, including governments that have not recognized the norm, as long as they have not expressly and persistently objected to its development. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. d (1986). The Supreme Court recognized the principle that federal common law is informed by international law. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that customary law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (noting that "in the absence of a congressional enactment, U.S. courts are bound by the law of nations, which is part of the law of the land").

Evidence exists that the *non-refoulement* principle is well accepted within customary international law. See Scott M. Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357 (1983); see also Patricia Hyndman, *Asylum and Non Refoulement—Are these Obligations Owed to Refugees Under International Law?*, 57 PHILIPPINE L.J. 43 (1982).

¹¹⁸ See Brunson McKinley, Address on U.S. Policy on Haitian Refugees, 3 U.S. DEP'T ST. DISPATCH, June 15, 1992, at 472. In explaining President Bush's Executive Order of May 24, 1992, permitting the U.S. Coast Guard to return Haitians picked up at sea directly to Haiti, the Deputy Assistant Secretary for Refugee Programs stated:

One essential element of our policy is to safeguard human life. When the numbers of boat people began to exceed the capacity of our Coast Guard cutters to pick them up, we were forced to implement a practice of selectivity—asking the cutter captains to decide which boats were sufficiently seaworthy to let sail on. Sooner or later, a Haitian boat would go down and lives would be lost. Similarly, at some point the overcrowding at

gram, Coast Guard cutters, with I.N.S. officials aboard, patrolled the Windward Passage, the body of water separating Haiti from Cuba. The Coast Guard employed aerial surveillance to ensure that suspicious vessels were identified and boarded by I.N.S. officials.¹¹⁹ The Coast Guard effectively prevented Haitian asylum-seekers from arriving on United States soil and obtaining the advantages which attach upon having "entered" the United States.¹²⁰ This was not the first use of such tactics by the U.S. government against Haitian refugees.

1. History of the Haitian Migrant Interdiction Program

The Haitian Migrant Interdiction Program originated in 1981 from an exchange of diplomatic letters between Presidents Ronald Reagan and Jean-Claude Duvalier. The letters authorized United States officials to board Haitian flag vessels on the high seas "outside the territorial waters of the United States," and to question the crew and passengers regarding the immigration status of those on board.¹²¹ Initially, the I.N.S. screened the asylum applicants individually to determine if a "credible fear of persecution" could be detected.¹²² The agree-

Guantanamo would pose serious risks to human health. These risks were clearly intolerable and unsustainable, and, on May 24, the President determined that the point of maximum capacity had been reached.

Id. Other policy elements included the unsanitary conditions at Guantanamo Bay caused from overcrowding, and the "pull of the magnet" of the United States for "economic refugees" desperate enough to make the journey. *Id.* McKinley later noted that the interdiction policy was working—he cited the fact that new boat departures from Haiti had essentially dropped to zero by May 24, 1992. *Id.*

¹¹⁹ Julia Preston, *Haitian Refugee Stream Grows; Coast Guard Forced to Double its Efforts to Intercept Boats*, WASH. POST, Apr. 30, 1989, at A30.

¹²⁰ The term "entry" means "any coming of an alien into the United States from a foreign port or from an outlying possession, whether voluntarily or otherwise." I.N.A. § 101(a)(13), 8 U.S.C. § 1101(a)(13).

Distinctions between exclusion and deportation rest upon the concept of "entry." An excludable alien has not made an entry into the United States, while a deportable alien has done so. Due process rights in a deportation hearing are more extensive. *See supra* note 63 and *infra* note 147.

Interdiction also has been used to prevent the recent wave of Cuban boat people from reaching U.S. shores. *See* Don Melvin, *Voters Endorse Blockade*, SUN SENTINEL, Sept. 1, 1994, at 1A.

¹²¹ U.S.-Haiti Agreement to Stop Clandestine Migration of Residents of Haiti to the United States, Sept. 23, 1981, U.S.-Haiti, T.I.A.S. No. 10,241 at 3559-60, 20 I.L.M. 1198 (1981) [hereinafter U.S.-Haiti Agreement]; *see also* Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981), *reprinted in* 8 U.S.C. § 1182 (1988).

¹²² *See* Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1329-30 (2d Cir.

ment provided that the United States would not "return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."¹²³ The Haitian government assured the United States that the returning Haitians would not be prosecuted for their illegal departure.¹²⁴ Neither of these promises were kept.

On September 29, 1981, citing "a serious national problem detrimental to the interests of the United States," President Ronald Reagan attempted to address the "continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" by ordering the Coast Guard to intercept vessels carrying undocumented aliens and to return them to their point of origin.¹²⁵ For the first time in U.S. history, immigration was controlled by using Coast Guard blockades to prevent people from reaching the its shores. Both national and international observers vigorously condemned the use of such extraordinary measures.¹²⁶

1992) (describing the initial I.N.S. policy of prescreening Haitians interdicted under the U.S.-Haiti Agreement to determine if those with a "credible fear of persecution" would be eligible for a transfer to the United States to pursue an asylum claim).

¹²³ U.S.-Haiti Agreement, *supra* note 121, at 3560, 20 I.L.M. at 1200.

¹²⁴ U.S.-Haiti Agreement, *supra* note 121, at 3560, 20 I.L.M. at 1200. The Haitian government promised that only traffickers in illegal aliens would be prosecuted. *Id.* Instead, it punished returning Haitians whose only crime was attempting to flee.

¹²⁵ Proclamation No. 4865, 3 C.F.R. §§ 50-51 (1981-1983), *reprinted in* 8 U.S.C. § 1182 (1988).

¹²⁶ See Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993) (criticizing interdiction program that prevents refugees from reaching the United States).

The office of the United Nations High Commissioner for Refugees, which was created to provide legal assistance to refugees and to seek permanent solutions to the refugee problems, has condemned the Interdiction Program and described the policy as setting a dangerous precedent that other governments might follow in order to deter asylum seekers. See ANKER, *supra* note 18, at 6; REFUGEE POL'Y GROUP & CTR. FOR POL'Y ANALYSIS & RES. ON REFUGEE ISSUES, REPRESSION IN HAITI: A CHALLENGE FOR MULTILATERALISM (1993) [hereinafter CHALLENGE FOR MULTILATERALISM].

Amnesty International also has criticized the Interdiction Program, describing it as "an egregious violation of international law that not only places Haitians at risk of human rights violations upon return, but also directly undermines the international regime for the protection of refugees." Amicus Curiae Brief for Appellant at 3, Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992) (No. 92-6144).

In 1992, President George Bush expanded this restrictive program through the Kennebunkport Order, resulting in thousands of Haitians being either returned to Haiti or detained at Guantanamo Bay.¹²⁷ The Kennebunkport Order allowed the Coast Guard to question passengers and crews of vessels suspected of smuggling undocumented aliens, to have their "documents examined and the vessels and [their] passengers returned to the country from which they came, or to another country, when a violation of immigration or other laws, or appropriate laws of a foreign country is suspected."¹²⁸

The Kennebunkport Order granted the Attorney General unreviewable discretion to decide whether a refugee would be returned involuntarily.¹²⁹ The order stated further that it was not to "be construed to require any procedures to determine whether a person is a refugee."¹³⁰ The failure to provide procedures to identify refugees is one of the most objectionable aspects of the Kennebunkport Order. Instantly, by a single executive order, the 1980 Refugee Act's entire promise of safe haven was nullified. The government could now return Haitians to Haiti without an asylum interview or the opportunity to demonstrate a well-founded fear of persecution.

In September 1991, the overthrow of Haitian President Aristide and the attendant civil rights abuses in Haiti brought a temporary halt to repatriations under the Interdiction Program.¹³¹ Within the island nation, individuals deemed sup-

¹²⁷ See Exec. Order 12,807, 57 Fed. Reg. 23,133 (1992); see also 69 Interpreter Releases 672 (1992). The I.N.S. pre-screened Haitians for asylum claims on board U.S. Coast Guard cutters. The Haitians were then taken to the U.S. naval base at Guantanamo Bay, Cuba. After the Kennebunkport Order, these pre-screenings were suspended. The Kennebunkport Order reads, in pertinent part:

The Secretary . . . shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens. . . . Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard . . . [t]o return the vessel and its passengers to the country from which it came

57 Fed. Reg. 23,133-34. On May 24, the White House spokeswoman stated that the order will permit the "Coast Guard to halt all boats carrying . . . refugees . . . and to escort them back to Haiti." Michael Wines, *Switching Policy, U.S. Will Return Refugees to Haiti*, N.Y. TIMES, May 25, 1992, at A1.

¹²⁸ Exec. Order 12,087, 57 Fed. Reg. 23,133 (1992).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1330 (2d Cir.

porters of Aristide suffered arrests, beatings and assassinations.¹³² Migration to the United States increased as the power of the military government in Haiti grew and the persecution worsened.¹³³ However, the U.S. government resumed the Interdiction Program,¹³⁴ and the exclusion of Haitian refugees soon became more severe despite the election of a new, presumably more sympathetic President, Bill Clinton.

The Interdiction Program not only continued during the Clinton Administration, but was defended by it before the Supreme Court in *Sale v. Haitian Centers Council, Inc.*¹³⁵ Although, as a presidential candidate, Bill Clinton had been unwavering in his criticism of President Bush and the inhumane treatment accorded Haitians, and in fact had vowed to suspend the Interdiction Program, within days of his inauguration he reversed his position, leaving the program in place and instead promising to work toward the return of President Aristide.¹³⁶

1992), *vacated*, 133 S. Ct. 3028 (1993) [hereinafter *H.C.C. I*]; see also Harold H. Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994); Harold H. Koh, *Reflection on Refoulement and Haitian Centers Counsel*, 35 HARV. INT'L L.J. 1 (1994). See generally GIL LOESCHER & JOHN A. SCANLON, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR* (1986) (discussing foreign policy considerations that have driven U.S. refugee policy since World War II).

¹³² 138 CONG. REC. S13,095 (daily ed. Sept. 9, 1992) (report issued December 31, 1991 by Americas Watch, the National Coalition for Haitian Refugees, and Physicians for Human Rights).

¹³³ Cf. *U.S. Taking New Steps to Respond to Crisis in Haiti*, 5 U.S. DEPT. STATE DISPATCH 325, 325 (1994) (President Clinton announced a change in the U.S. migration policy toward Haiti, while acknowledging that "the repression and bloodshed in Haiti have reached alarming proportions").

¹³⁴ The Interdiction Program was reinstated just weeks later, on November 18, 1991. *H.C.C. I*, 969 F.2d at 1330.

¹³⁵ 113 S. Ct. 2549 (1993).

¹³⁶ Anthony Lewis, *The Two Clintons*, N. Y. TIMES, Feb. 22, 1993, at A17; see also Elaine Sciolino, *Clinton Says U.S. Will Continue Ban on Haitian Exodus*, N.Y. TIMES, Jan. 15, 1993, at A17 (reporting then-Governor Clinton as saying "If I were President, I would—in the absence of clear and compelling evidence that they weren't political refugees—give them temporary asylum until we restored the elected government of Haiti."). In criticizing the Bush Administration, then-Governor Clinton stated, "I am appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum. This process must not stand." Lewis, *supra*, at A17. After his election, President Clinton stated, "we should have a process in which these Haitians have a chance to make their case." *Clinton Plans to Change Policy on Stopping Haitian Refugees*, ORLANDO SENTINEL TRIB., Nov. 13,

The asylum applicants returned to Haiti by the United States were often detained and beaten by the Haitian military government.¹³⁷ As a result of their mere departure from Haiti, they were branded as supporters of President Aristide, and a threat to the army and police-backed de facto government. The U.S. interdiction policy left many Haitians in a decidedly precarious situation—"desperate to flee the island, unwelcome in the United States, [and] persecuted upon their return."¹³⁸

The Clinton Administration, mimicking the Reagan and Bush Administrations, asserted that this policy of interdiction was instituted as a humanitarian effort to save Haitians from the perils of traveling to the United States in unseaworthy vessels.¹³⁹ Though frequent reports of deaths on the high seas provided some support for this position,¹⁴⁰ these very reports should have provided evidence to policy makers of the sincerity of the asylum seekers' claims and the cruelty of returning them to their persecutors.

In May 1994, after considerable pressure from within his own party and from human rights activists, President Clinton

1992, at A8. He saw the Bush Administration's policy of sending Haitians back without an opportunity to argue for political persecution as "an error" that he sought to "modify." *"I Intend to Look Beyond Partisanship . . . to Help Guide Our Nation"*, WASH. POST, Nov. 13, 1992, at A10. Following the announcement, many administration officials predicted a flood of Haitian refugees would head for U.S. borders after inauguration day. *Id.*; see also Jun Ishii, *Clinton Helping Bush Legacy*, HOUSTON CHRON., Jan. 29, 1993, at C15 (stating the new President's reversal of position on several issues—including the Haitian refugee crisis—may be an omen of further broken promises).

¹³⁷ See Diego Ribadeneira, *Two Forced Back to Haiti Live in Persecution, Fear*, BOSTON GLOBE, June 23, 1993, at 1 (recounting stories of two repatriates who suffered torture and detention after being branded supporters of Jean Bertrand Aristide); see also AMNESTY INT'L U.S.A., *FORCIBLE RETURN OF HAITIAN ASYLUM-SEEKERS BY THE UNITED STATES* (1994) (noting widespread documentation of torture, disappearances and extrajudicial executions).

¹³⁸ Ribadeneira, *supra* note 137, at 1.

¹³⁹ William Gray, *Address on Establishing the Basis for a Successful Conclusion to the Crisis in Haiti* (June 29, 1994), in 5 DEPT ST. DISPATCH 26 (1994); Gary Pierre-Pierre, *Drownings of Haitians Rise as Island Exodus Continues*, N.Y. TIMES, July 6, 1994, at A8.

¹⁴⁰ See Ron Howell, *Terror at Sea: Haitian Survivors Recall Wreck That May Have Killed 400*, NEWSDAY, Feb. 1, 1993, at 3. The sinking of a 70-foot wooden freighter caused the drowning of approximately 400 people who were attempting to flee to the United States. In July, 1994, over 100 were feared drowned. Gary Pierre-Pierre, *Drownings of Haitians Rise as Island Exodus Continues*, N.Y. TIMES, July 6, 1994, at A8.

ordered the cessation of the Interdiction Program.¹⁴¹ While stating that the change in policy might open "the floodgates to indiscriminate refugee migration into the United States," the President ordered that Haitian asylum seekers would be granted hearings aboard U.S. Navy ships or within third countries.¹⁴² The Administration acknowledged that, "while in-country processing has been crucial in affording Haitians within Haiti an opportunity to leave safely, and not have to flee by boat, [President Clinton] has been increasingly concerned by reports of human rights violations in Haiti, including several hundred killings in recent months."¹⁴³ While some questioned the President's resolve to implement the new policy, human rights advocates applauded his order.

Haitians' determination to flee their homeland despite the risk to their lives indicates something far greater than mere economic motivation. Such determination demonstrates a fear of persecution in Haiti. And such determination by so many suggests that, in the eyes of refugees, life in Haiti was too dangerous to be tolerated. Yet the United States maintained that these refugees fled only economic hardship.¹⁴⁴ The Unit-

¹⁴¹ The most compelling act of protest against President Clinton's continued support of the Interdiction Program was undertaken by Randall Robinson, Executive Director of TransAfrica. Karen DeWitt, *Man Fasting in Haiti Protest Is Hospitalized*, N.Y. TIMES, May 5, 1994, at A5. On April 12, 1994, Robinson began a hunger strike, which lasted 23 days, to express his disappointment with Clinton's failure to reverse the policy. *Id.* In explaining his decision to engage in the strike, Robinson stated that "I'm just asking that the President simply grant hearings before forcibly repatriating people." *Id.* To do less makes the United States and "our President complicit in the murder and killing of [Haitians]." Susan Page, *Lobbyist's Fast Over Haiti Stirs Black Caucus*, ST. LOUIS-DISPATCH, May 6, 1994, at 5B. During his hunger strike, Robinson's health as well as his statements were closely monitored by White House and State Department officials. His fast was seen as a rallying point in the crusade to change U.S. policy towards Haiti and many have perceived him as being instrumental in effecting that change. *Id.*

¹⁴² Christopher Marquis, *A Change in Haiti Policy Hearings at Sea OK'd*, MIAMI HERALD, May 8, 1994, at 1A.

¹⁴³ *Id.*

¹⁴⁴ *U.S. Drops Off First of Repatriated Haitians*, CHI. TRIB., Feb. 3, 1992, at 4. It has been argued that the majority of Haitians who come to the United States are not fleeing oppression, because if they were, they would simply cross the border into the Dominican Republic. *See id.* (quoting Defense Secretary Dick Cheney as saying that "there's an open border between Haiti and the Dominican Republic, and yet] . . . [t]here are not masses of people fleeing into the Dominican Republic. What they're trying to do is get into the United States"). Yet the long history of animosity between the two countries suggests that this is not a viable option.

ed States should acknowledge that those who are willing to risk their lives to leave Haiti in small, overcrowded, unseaworthy vessels deserve a presumption of persecution.

2. Effectiveness of the Interdiction Program

Critics claim, with justification, that the true purpose of implementing the Interdiction Program was to deny Haitians the procedural rights they would have accrued under the Immigration and Naturalization Act if they were deemed to have "entered" the United States.¹⁴⁵ Persons who have "entered" the United States are considered deportable, not excludable.¹⁴⁶ If fleeing Haitians fail to reach United States soil, then neither the rights to an exclusion hearing nor the more extensive rights of a deportation hearing accrue.¹⁴⁷ Hav-

See MILLER, *supra* note 49, at 38-40 (chronicling the long history of animosity between the adjoining countries). Some of the ill-will on the part of Dominicans is attributed to the Haitian occupation of the Dominican Republic from 1822 to 1844. *Id.* at 38. In the 1930s, the Dominican dictator Trujillo, reportedly resentful of his own Haitian ancestry, scapegoated the Haitians whom he described as "despised Negro aliens whose voodoo, cattle rustling and presence on Dominican soil was the ruin of the good life for Dominicans." *Id.* at 39 (quoting BERNARD DIEDERICH & AL BURT, PAPA DOC: THE TRUTH ABOUT HAITI TODAY 42 (1969)). In September 1937, Trujillo sought to rid the Dominican Republic of Haitians by organizing a massacre known as "Operation Parsley." *Id.* Knowing that Haitians, as Creole speakers, experienced difficulty pronouncing the Spanish word for parsley, Trujillo sent troops disguised as peasants throughout the countryside asking suspected Haitians to identify sprigs of parsley. Those who responded "pelegil" instead of the Spanish "perejil" were killed. Thousands were murdered in this manner. *Id.* More recently, there have been numerous reports of deplorable treatment of Haitian sugar workers in the Dominican Republic. *Id.* at 41.

¹⁴⁵ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2553 (1993) (stating that the Interdiction Program has prevented Haitians from invoking statutory protections afforded aliens residing illegally).

¹⁴⁶ If aliens are apprehended when attempting to enter the United States, they are placed under "exclusion" proceedings, whereas those who are apprehended while within the United States are placed under "deportation" proceedings. Exclusion orders may be appealed to the district court only by writ of habeas corpus. I.N.A. § 106(b). The rights available in exclusion hearings are more limited. First time entrants are unprotected by the Constitution's guarantee of due process. I.N.A. § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1988); see also *Olvera v. I.N.S.*, 504 F.2d 1372, 1374 (5th Cir. 1974) (stating that an alien's right to counsel of choice in deportation proceedings is "clearly not without limit"). There is a right to counsel in an exclusion proceeding under I.N.A. § 292, but it is not an unqualified right. See *Ledesma-Valdes v. Sava*, 604 F. Supp. 675, 682 (S.D.N.Y. 1985) ("An unadmitted alien has no constitutional right to parole").

¹⁴⁷ In a deportation hearing, the burden of proof is on the government to prove

ing been intercepted outside the United States, Haitians can be returned to Haiti with impunity and with no recourse.

The Interdiction Program was effective in denying Haitian asylum seekers an opportunity to be heard. Between 1981 and 1991, the program authorized the interdiction of approximately 24,600 Haitians by the Coast Guard.¹⁴⁸ During that ten-year period, the I.N.S. officers conducted interviews on board Coast Guard ships and determined that only twenty-eight of the 24,600 refugees had credible asylum claims.¹⁴⁹ Those twenty-eight refugees were brought to the United States and the remainder were returned to Haiti.¹⁵⁰

an alien's deportability by "clear, unequivocal and convincing evidence." *Woodby v. I.N.S.*, 385 U.S. 276, 277 (1966). Asylum seekers have access to the federal courts after denial of an administrative appeal. 8 C.F.R. § 208.18. When the alien's administrative remedies are exhausted, i.e., once the alien has been found deportable or excludable and has been denied a remedy that prevents return to the alien's original country, then federal jurisdiction over asylum determinations begins. See I.N.A. § 106(c), 8 U.S.C. § 1159(c) (1988). The district courts and the circuit courts of appeal share original federal court jurisdiction over asylum-related matters. A final order of deportation (a B.I.A. decision to deport the alien) is directly reviewable by the circuit court sitting in the circuit in which the alien resides, or where the deportation hearing was held. 8 U.S.C. § 1105(a)(2). The alien, not the government may seek review of the B.I.A. decision. I.N.A. § 106(a)(2), 8 U.S.C. § 1105a(a)(2). Orders of exclusion cannot be reviewed directly by the circuit court; such orders are reviewed by district courts. See I.N.A. § 106(b), 8 U.S.C. § 1105(b).

In contrast, an alien who applies for refugee status at a consular office overseas has no right of review in a U.S. federal court. I.N.A. § 211, 8 U.S.C. § 1182 (1988 & Supp. IV 1992); see also *Ben-Issa v. Reagan*, 645 F. Supp. 1556, 1558-59 (W.D. Mich. 1986) ("the relevant case law establishes that even narrow judicial review of a consular officer's decision to deny a visa is inappropriate"). Although the I.N.S. must prove an alien's deportability, aliens who have not entered the United States are not "persons" automatically protected by the Constitution. *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Hence, Congress has placed the burden of proving admissibility in exclusion hearings on the alien. I.N.A. § 291, 8 U.S.C. § 1361.

¹⁴⁸ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2553 (1993); Helton, *supra* note 126, at 330.

¹⁴⁹ U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GAO/T-NSIAD-92-25, REFUGEES: U.S. PROCESSING OF HAITIAN ASYLUM SEEKERS 1 (1992); see also IGNATIUS, *supra* note 20, at 143.

¹⁵⁰ See *U.S. Human Rights Policy Toward Haiti: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 102d Cong., 2d Sess. 7 (Apr. 9, 1992) (statement of Harold J. Johnson, Director, Foreign Economic assistance Issues) [hereinafter *Subcomm. Hearings on Policy Toward Haiti*]. Coast Guard records show that between September 30, 1991, when a military coup ousted President Aristide, and April 7, 1992, 18,095 Haitians were interdicted, 10,149 were returned to Port-au-Prince and 4301 were brought to the United States. *Id.* at 1. It is calculated that 2589 were held at Guantanamo

One study criticized the administrative procedures following the screening and processing procedures at Guantanamo Bay for having "numerous errors in the I.N.S. computer data base, which is used in the processing of individuals for return to Haiti or on to the United States. . . . [B]ecause of these weaknesses, at least 54 Haitians were apparently mistakenly repatriated."¹⁵¹ Even after a Haitian asylum seeker has, against all odds, safely reached the United States and embarked upon the asylum process, her efforts may be stymied by administrative ineptitude.

Despite its effectiveness, this method of keeping asylum applicants from reaching the shores of the United States should not be used in the future. The image of fleeing refugees being taken into custody and incarcerated in Guantanamo Bay tarnishes the United States' reputation as a champion of human rights. In addition, interdiction denies asylum applicants the right to apply for asylum in the United States, offering incarceration instead of freedom. Despite criticism from human rights advocates, interdiction also was employed as Cubans fled toward the United States.

B. *The Cuban Interdiction Program*

The U.S. response to the recent flight of Cubans, estimated at 30,000 between August and September 1994, demonstrated that the interdiction policy is alive and well.¹⁵² Incoming

Bay awaiting transport to the United States to pursue their asylum claims, 646 were awaiting I.N.S. screening and 410 were sent to other countries. *Id.*

¹⁵¹ See *id.* at 2. The report identifies several reasons for the problems: clerical errors by the I.N.S. in entering the screening decisions in its computer data base, reports of which were consequently used to identify individuals for repatriation; family reunification decision were not timely made, and other candidates for reunification were repatriated before investigation of their claims.

¹⁵² Tim Golden, *U.S.-Cuba Accord Sets Off a Surge of New Refugees*, N.Y. TIMES, Sept. 11, 1994, at A1. In the wake of an agreement between Cuba and the United States to curb the departure of asylum seekers on rafts, even more Cubans left in small, unseaworthy vessels heading toward the United States. *Id.* As many as 3000 Cubans were picked up in a single day during the height of the exodus. Ian Brodie & Tom Rhodes, *Washington Fails to Secure Foreign Havens for Cubans*, LONDON TIMES, Aug. 30, 1994. Representative Newt Gingrich (R-Ga.) has been one of the most vocal critics of the administration's new policy. To show support for the Cuban-American community, he visited the Cubans held at Guantanamo Bay. See Carl Hiaasen, *Haitian Refugees: Out of Sight, Out of Mind*, RECORD, Aug. 25, 1994, at B7. But some critics view this latest refugee crisis as another exam-

Cubans were stopped and sent to the U.S. Naval base in Guantanamo Bay, Cuba, and to detention centers in the United States.¹⁵³ This reflected a change in policy toward Cuba that drew sharp criticism from Cubans throughout the United States, but was done as a response to the concerns of Governor Lawton Chiles of Florida and others who feared another Mariel boatlift.¹⁵⁴

ple of the disparity between the treatment of the Haitians and the Cubans:

The same politicians now bellowing in outrage about the interdiction of Cuban rafters made not a peep of protest when Clinton took the same step to halt the influx of boat people from Haiti. . . .

Just like the Cubans, the Haitians fled an economic nightmare caused by repression, corruption, and a harsh U.S. trade embargo.

Like the Cubans, the Haitians were so desperate that they set out for Florida in flimsy, overcrowded crafts. And, like the Cubans, many perished on the journey.

There are differences. The Haitians have no special immigration law giving them status in the United States. Their exile community is smaller, and much weaker in political clout, than that of Cuban-Americans.

And finally, of course, Haitians are black. You will never see, in your lifetime, a coalition of conservative Democrats and Republicans on the floor of Congress demanding automatic asylum for Haitians fleeing the Cedras regime. Never.

Id.

¹⁵³ See 71 Interpreter Releases 1148 (1994); 71 Interpreter Releases 1091 (1994). see also Linda Diebel, *Crisis in Cuba: Clinton Can't Let Castro Win the War of Nerves*, CALGARY HERALD, Aug. 23, 1994, at A5. (describing the interdiction and return of Cubans to Guantanamo Bay or safe havens in other countries as overturning 30 years of automatic entry for Cuban refugees). Clinton's resolve is attributed to his experiences as Governor of Arkansas, when 18,000 Cuban refugees from the Mariel boatlift were sent to the U.S. military base at Fort Chafee, Arkansas. *Id.* Ensuing riots terrified residents, and many consider these events a contributing factor to Clinton losing the governorship of Arkansas for two years. *Id.* See generally Leo Rennert, *Clinton Bucks Tide of World Opinion on Cuba*, SACRAMENTO BEE, Aug. 26, 1994, at A1.

¹⁵⁴ See 71 Interpreter Releases 1213, 1215 (1994); Lisa Frederick, *Cubans Protest Refugee Policy*, ST. PETERSBURG TIMES, Aug. 29, 1994, at 3B. Protesters in Tampa, Florida, objecting to President Clinton's new policy of detaining Cuban refugees at Guantanamo Bay, called for an invasion of Cuba. The day before, an estimated 10,000 Cuban-Americans marched in Little Havana "carrying the body of a dead rafter and dozens of mock coffins symbolizing others who didn't survive the journey." *Id.* These events symbolize the strength and political clout of the Cuban American community. See 71 Interpreter Releases, *supra*, at 1213-14; see also Don Melvin, *Voters Endorse Blockade; Cuba Policy Wins Support in State Poll*, SUN SENTINEL, Sept. 1, 1994, at 1A. A survey of Florida voters overwhelmingly support Clinton's policy: 61% of those surveyed support the policy, 24% oppose it. *Id.* "While the poll showed strong statewide support for detaining rafters indefinitely, a slim plurality of Hispanic voters—the majority of whom are of Cuban origin—oppose the policy." *Id.*

Prior policy, under the Cuban Refugee Adjustment Act of 1966, provided that after parole, or even after entering the United States on a valid temporary visa and remaining in the United States for one year, Cubans could apply for adjustment of status to permanent resident.¹⁵⁵ The change in policy placed the new Cuban arrivals on equal footing with all refugee applicants by requiring them to show a "well-founded fear of persecution."¹⁵⁶ In September 1994, the Clinton Administration signed an agreement guaranteeing admission or parole into the United States for a minimum of 20,000 Cubans annually,¹⁵⁷ while Cuba agreed to stem the flow of Cubans seeking

¹⁵⁵ Prior to the Refugee Act of 1980, the Attorney General had the authority to parole refugees into the United States without permanent status or formal admission. Congress passed legislation conferring permanent residency. The Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966), and the Cuban-Haitian Adjustment Act, Pub. L. No. 99-603, 100 Stat. 3359 (1986), were examples of this piecemeal effort by Congress. See KURZBAN, *supra* note 54, at 264. The Cuban Refugee Adjustment Act of 1966 differed from most legislation providing for adjustment of status in that there is no cut-off date for applicants and any national of Cuba or the immediate relative of a Cuban national was eligible. *Id.*

¹⁵⁶ See *supra* notes 15, 38-43 and accompanying text. Because of foreign policy considerations, a presumption of persecution existed and Cubans were not required to show individual persecution or membership in a routinely persecuted group. The 1990 regulations provide a new substantive standard for establishing refugee status under § 208:

(i) In evaluating whether the applicant has sustained his burden of proving that he has a well-founded fear of persecution, the Asylum Officer or Immigration Judge shall not require the applicant to provide evidence that he would be singled out individually for persecution if:

(A) He establishes that there is a pattern or practice in his country of nationality or last habitual residence of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) He established his own inclusion in and identification with such group of persons such that his fear of persecution upon return is reasonable.

(ii) The Asylum Officer or Immigration Judge shall give due consideration to evidence that the government of the applicant's country of nationality or last habitual residence persecutes its nationals or residents if they leave the country without authorization or seek asylum in another country.

8 C.F.R. § 208.13(b)(2) (1994). Section 243(h), Withholding of Deportation, has similar provisions, except that the withholding applicant must show that "it is more likely than not that he would be persecut[ed] on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.*; see also ALENIKOFF & MARTIN, *supra* note 76, at 764.

¹⁵⁷ See 71 Interpreter Releases 1213 (1994). This figure does not include imme-

to come to the Florida coast on makeshift rafts.¹⁵⁸

The quick resolution of the Cuban "refugee crisis" contrasted sharply with the administration's slow response to the similar Haitian "refugee crisis." It also demonstrated that the use of interdiction will continue as a means of deterring prospective Haitian asylum seekers.

C. Legal Challenges to the Interdiction Program

1. The Second Circuit's View

The two most significant challenges to the interdiction policy, *Haitian Centers Council, Inc. v. McNary* ("H.C.C. I")¹⁵⁹ and *Haitian Centers Council, Inc. v. McNary* ("H.C.C. II"),¹⁶⁰ are known, respectively, as the "right-to-counsel" and the "non-return" cases.¹⁶¹ In *H.C.C. I*, various organizations and Haitian refugees challenged the Bush Administration's new policy of bringing "screened-in" Haitians to Guantanamo Bay Naval base instead of into the United States.¹⁶² At Guantanamo,

diates relatives of U.S. citizens of Cuban descent who are not included in a quota under I.N.A. § 201(b), 8 U.S.C. § 1151(b). *Id.* The agreement also provided that the United States would take an "additional extraordinary measure" to arrange within one year "the issuance of documentation to permit the migration to the United States of those qualified Cuban nationals in Cuba" currently waiting for a visa. *Id.* Janet Reno, Attorney General estimated that figure to be between 4000 and 6000. *Id.* at 1214. The guarantee of a minimum of 20,000 visas is very unusual; "We know of no other agreement between the U.S. and another country that guarantees that a minimum number of nationals of that country will be admitted to the U.S." *Id.*

¹⁵⁸ *Id.* The "voluntary return" of Cubans who arrive in the United States or in safe havens on or after August 19, 1994, was also arranged. *Id.*

¹⁵⁹ 969 F.2d 1326 (2d Cir. 1992), *vacated*, 113 S. Ct. 3028 (1993).

¹⁶⁰ 969 F.2d 1350 (2d Cir. 1992) [hereinafter *H.C.C. II*].

¹⁶¹ See Harold H. Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L. L. 483, 483 (1993). Professor Koh is on the faculty of Yale Law School where he teaches at the Lowenstein International Human Rights Clinic. Professor Koh, along with the ACLU Immigrants' Rights Project, the National Refugee Rights Project of the San Francisco Lawyers' Committee for Urban Affairs, the New York law firm of Simpson Thatcher & Bartlett, and others, brought the case. *Id.* at 484-5 n.2.

¹⁶² *H.C.C. I*, 969 F.2d at 1330. The new policy was purportedly in response to the unprecedented numbers of Haitians fleeing Haiti following the 1991 coup that had ousted President Aristide. *Id.* At the height of the Interdiction Program, Guantanamo Bay accommodated far more refugees than the administration had anticipated. I.N.S. asylum officers assumed extra duties in an attempt to cope with this emergency and screened over 36,000 Haitian asylum seekers in

the screened-in Haitians underwent a second interview, without the benefit of legal counsel, to determine whether they were bona fide refugees.

The plaintiffs argued that since the Haitians were detained in an American enclave and subject exclusively to United States jurisdiction, they were entitled to due process in the form of representation by counsel.¹⁶³ The complaint also alleged that the government's conduct under the Interdiction Program was violative of U.S. laws and the Constitution.¹⁶⁴ The district court first granted a temporary restraining order and then a preliminary injunction, holding that the plaintiffs had shown that irreparable harm would result if the government was not enjoined from repatriating screened-in Haitians.

The Second Circuit agreed with the District Court and held that the fifth amendment claims brought by "screened in" Haitians were not collaterally estopped. The Second Circuit found that Haitian aliens, once screened-in, enter a status akin to asylees and should have the advice of counsel despite the contention that they had not "entered" the United States.¹⁶⁵ By the time the Supreme Court heard the case, counsel had

Guantanamo Bay from November 1991 through June 1992. Approximately 30% were screened in and the remainder were repatriated to Haiti. See IGNATIUS, *supra* note 20, at 9.

¹⁶³ *H.C.C. I*, 969 F.2d at 1332; see also Koh, *supra* note 161, at 484. "Disproportionate harm results to unrepresented asylum applicants" because they are reluctant "to present their cases fully or speak about personal experiences." See IGNATIUS, *supra* note 20, at 10. When a fundamental legal error occurs, the unrepresented applicant generally has no ability to correct the error. Disproportionate harm also occurs because the unrepresented applicants are not able to present an overview of country conditions or understand that the interviewer is ignorant or misinformed about conditions in their home country. *Id.* "A systemic problem of the current system is the lack of funds to provide counsel at government expense since unrepresented applicants are at a disadvantage compared to represented applicants." *Id.*

The plaintiffs argued that the presence of counsel would in fact be useful at the second interview and would not interfere with I.N.S. officers' duties. *H.C.C. I*, 969 F.2d at 1333. In response, the government sought Rule 11 sanctions for filing a "frivolous" lawsuit and demanding the posting of a \$10,000,000 bond before the case continued. Koh, *supra* note 161, at 484.

¹⁶⁴ *H.C.C. I*, 969 F.2d at 1332. The plaintiffs' attorney noted that the "refugees endured inadequate medical care and squalid living conditions for months on end." See Koh, *supra* note 161, at 484. It has been suggested that the squalor of the camp at Guantanamo may have been calculated to deter more Haitians from embarking on the journey to the United States. *H.C.C. I*, 969 F.2d at 1332.

¹⁶⁵ *H.C.C. I*, 969 F.2d at 1339-40, 1345-46.

been provided and, therefore, the Second Circuit decision was vacated as moot.¹⁶⁶

The Second Circuit provided further protection to Haitian refugees through its ruling in *H.C.C. II*. The "non-return" case, *H.C.C. II* addressed the legality of President Bush's Kennebunkport Order directing the Coast Guard to intercept Haitians at sea and return them to Haiti without the benefit of a screening process.¹⁶⁷ The Second Circuit held that the interception of Haitian vessels and the forced repatriation of the occupants was a "return" within the meaning of the I.N.A. and was forbidden under the I.N.A. and the Articles of the U.N. Convention.¹⁶⁸ While recognizing a sovereign nation's right to turn away any alien, as well as the President's power to regulate entry into the United States, the court stated that the President had no power to authorize the return of Haitian refugees intercepted in international waters.¹⁶⁹

Both *H.C.C. I* and *H.C.C. II* represent attempts by the Second Circuit to maintain the separation of powers envisioned by the Constitution and to apply its law in a humanitarian fashion. In each decision, the court recognized the inherent right of a sovereign nation to determine its foreign policy and to regulate immigration. The decision also prevented the government from overreaching and infringing upon the rights of would-be asylees. The position that the Supreme Court took in response to these arguments should not have been a surprise. In February 1992, the Court denied certiorari in *Haitian Refugee Center v. Baker*,¹⁷⁰ a case that also challenged the interdiction policy.

¹⁶⁶ See *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993).

¹⁶⁷ *H.C.C. II*, 969 F.2d at 1352.

¹⁶⁸ *Id.* at 1360-61.

¹⁶⁹ *Id.* at 1366-67. The government considered this result absurd, that the Coast Guard could prevent Haitian vessels from reaching Miami but could not return them to Haiti. *Id.* at 1366-67. The court stated that the President's directive prevented Haitians from reaching any country, including Mexico, Jamaica or the Bahamas. *Id.*

¹⁷⁰ 953 F.2d 1498 (11th Cir.), *cert. denied*, 112 S. Ct. 1245, 112 S. Ct. 1073 (1992).

2. The Supreme Court's View

In *Sale v. Haitian Centers Council, Inc.*,¹⁷¹ the Supreme Court declared that the U.S. policy of intercepting boats carrying Haitians seeking political asylum and returning them to Haiti without a hearing did not contravene domestic or international law.¹⁷² The Court held that neither section 243(h)(1) of the Immigration and Nationality Act of 1952 nor Article 33 of the U.N. Protocol applied to the Coast Guard's interdiction of Haitians on the high seas.

The Court rejected the Council's argument that the right of protection attached as soon as refugees cleared the territorial borders of their home countries and should protect aliens fearing political persecution irrespective of whether the refugees were seized beyond U.S. shores.¹⁷³ The Court based its reasoning on statutory interpretation,¹⁷⁴ and stated that the Council's reading of the word "return" would make the word "deport" redundant.¹⁷⁵ Section 243(h)(1) reads, in pertinent part: "The Attorney General shall not deport or return any alien . . . if the Attorney General determines that such alien's life or freedom would be threatened"¹⁷⁶ The Court concluded that by using both "deport" and "return," Congress expressed its intention to extend the protection of section 243(h) to deportation and exclusion hearings.¹⁷⁷ Justice Stevens,

¹⁷¹ 113 S. Ct. 2549 (1993).

¹⁷² *Id.* at 2567.

¹⁷³ The domestic law, the government claimed, applied only to those aliens who were at the borders of the United States, or in the United States. The government further argued that judicial relief was precluded because of the presumption against extraterritorial application of congressional enactments. The government further argued that since the President's interdiction orders required the use of military resources, they were entitled to the deference given to foreign policy matters and military operations.

The Council argued for a broad reading of the statute's language. They urged that the words "any alien" and "return" conveyed the plain meaning and were not limited to aliens within the United States. In addition, the 1980 amendment to § 243(h), which deleted the words "within the United States," gave the statute an extraterritorial effect. *Id.* at 2558-59.

¹⁷⁴ See *Sale*, 113 S. Ct. at 2560 ("The presumption that Acts of Congress do not ordinarily apply outside our borders would support an interpretation of § 243(h) as applying only within United States' territory.").

¹⁷⁵ *Id.*

¹⁷⁶ I.N.A. § 243(h)(1); 8 U.S.C. § 1253(h)(1).

¹⁷⁷ *Sale*, 113 S. Ct. at 2560.

writing for the majority, concluded that the word "return" in the statute and treaty had a narrower meaning that did not prohibit this kind of return.¹⁷⁸ The Court conveniently ignored the fact that the Kennebunkport Order authorized the Coast Guard to return Haitian vessels and passengers to Haiti, while the statute and treaty prohibited the return of those who fear persecution to their persecutors.

The Court found further support for its interpretation in the negotiating history of the U.N. Convention.¹⁷⁹ A majority of the Court was influenced by the remarks of Baron van Boetzelaer of the Netherlands.¹⁸⁰ The Baron suggested that among the delegates a consensus was attained that interpreted "expulsion" as referring to a refugee already admitted to the host country. *Refoulement*, therefore, did not apply to a refugee who had entered the territory but was not a resident.¹⁸¹

Justice Blackmun's dissent also used the plain meaning method of statutory interpretation to construe section 243(h). He concluded that the language was "unambiguous."¹⁸² Justice Blackmun expressed the view that the act of placing the Dutch delegate's remarks on the record was a mere courtesy and did not amount to an adoption or agreement on the part of the whole convention.¹⁸³ He stated that the legal restrictions Congress placed on the Attorney General applied equally to the Haitian situation because the Coast Guard had acted in accordance with the Attorney General to enforce this law.¹⁸⁴ Justice Blackmun placed considerable emphasis on the deletion of the phrase "within the United States" from the 1980 Act.¹⁸⁵ He concluded that this deletion indicated that refugees may not be returned to their persecutors, regardless of the refugee's

¹⁷⁸ *Id.* at 2551.

¹⁷⁹ *Id.* at 2565 (declaring that "a treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent").

¹⁸⁰ *Id.* at 2566.

¹⁸¹ *Id.* at 2566-67. Baron van Boetzelaer agreed with the Swiss delegate's interpretation that Article 28 would not impose any obligations on the signatory countries in cases involving mass migrations such as the Haitian asylum seekers. *Id.*

¹⁸² *Sale*, 113 S. Ct. at 2568 (Blackmun, J., dissenting) ("Vulnerable refugees shall not be returned. The language is clear, and the command is straightforward; that should be the end of our inquiry.").

¹⁸³ *Id.* at 2572.

¹⁸⁴ *Id.* at 2573.

¹⁸⁵ *Id.* at 2574.

location when the application for asylum is made.¹⁸⁶ Rejecting the majority's contention that Congress meant section 243(h) to apply only to aliens who were physically present in the United States or at its borders, Justice Blackmun asserted that "[w]hen Congress wanted a provision to apply only to aliens 'physically present in the United States, or at a land border or port of entry,' it said so."¹⁸⁷ As stated cogently by Justice Blackmun's dissent, the Court's opinion has a "looking glass" quality to it:¹⁸⁸ "[T]he word 'return' does not mean return, . . . the opposite of 'within the United States' is not outside the United States, and . . . the official charged with controlling immigration has no role in enforcing an order to control immigration."¹⁸⁹

The Supreme Court's decision hinged on whether Congress intended to apply section 243(h)(1) outside U.S. boundaries.¹⁹⁰ By construing the statute, the history of the Refugee Act, and Article 33 of the Refugee Convention as not permitting extraterritorial application, the Court upheld the administration's policy. The Court erroneously relied on the presumption against extraterritorial application of domestic laws. Such a presumption should not apply to a statute based on an international treaty and designed to protect aliens seeking admission from outside the United States.¹⁹¹ The Court's reasoning is arbitrary and unprincipled. In effect, the Court

¹⁸⁶ *Id.* at 2574 (Blackmun, J., dissenting).

¹⁸⁷ *Sale*, 113 S. Ct. at 2575. The phrase "physically present within the United States" is used throughout the Immigration and Nationality Act. *See, e.g.*, 8 U.S.C. §§ 1159(a)(1)(B) (1988) (referring to adjustment of refugee status); 8 U.S.C. § 1101(a)(27)(I) (defining "special immigrant" for visa purposes); 8 U.S.C. § 1254 (a)(1) (concerning adjustment of status for permanent residence).

¹⁸⁸ Like Alice, after her journey through the looking glass, we are faced with a unique use of words:

There's glory for you! "I don't know what you mean by 'glory,'" Alice said. "I meant, 'there's a nice knock-down argument for you!'" "But 'Glory' doesn't mean 'a nice knock-down argument,'" Alice objected. "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I chose it to mean—neither more nor less."

LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 186 (Signet Classic 1960) (1872).

¹⁸⁹ 113 S. Ct. at 2568 (Blackmun, J., dissenting) (citations omitted).

¹⁹⁰ *Id.* at 2551.

¹⁹¹ *See, e.g., id.* at 2577 (offering a more applicable canon of construction: the "well-settled rule that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'" (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804)).

concluded that the 1980 Refugee Act prohibits the United States from returning an alien who is physically present on U.S. shores, but allows it to do so if that same alien is a few miles away on the high seas.

The Refugee Act of 1980 directs the establishment of asylum procedures for an alien who falls within the Act's definition of refugee and who is physically present in the United States or at land borders or ports of entry.¹⁹² Furthermore, it permits the establishment of refugee status overseas, which indicates the congressional intention to give refugees extensive protection, regardless of their method of entry into the United States.¹⁹³ Additionally, the 1981 agreement between Haiti and the United States, which initiated the Interdiction Program, specified that the United States would not return any passengers who qualified for refugee status.¹⁹⁴ The government seems to assert that since it failed to interview the Haitians and, therefore, did not know their qualifications for refugee status, it did not knowingly return any Haitians who qualified for refugee status. The position taken by the government in *Salé* indicates that this promise, based upon an obligation under international and domestic law, can be broken.

Some may question the recognition of international law obligations, yet it is undisputed that Congress may control immigration. This is so although the Constitution does not explicitly grant the federal government the power to regulate immigration. The Chinese exclusion case, *Chae Chan Ping v. United States*,¹⁹⁵ established the source of the federal power to regulate immigration and to characterize that power as a hallmark of sovereignty.¹⁹⁶ As representatives of a sovereign

¹⁹² See *In re Gharadaghi*, 19 I. & N. Dec. 3001 (1985). The court ruled that an immigration judge had erred in refusing to hear an asylum claim because the applicant was in Canada. *Id.* at 312.

¹⁹³ See generally S. REP. NO. 256, 96th Cong., 2d Sess. (1979), reprinted in 1980 U.S.C.A.N. 141 (providing in the Refugee Act for a more "comprehensive United States refugee resettlement and assistance policy").

¹⁹⁴ U.S.-Haiti Agreement, *supra* note 121, at 3560, 20 I.L.M. at 1200.

¹⁹⁵ 130 U.S. 581 (1889).

¹⁹⁶ *Id.* at 603-08. Chae Chan Ping was a Chinese laborer who had entered the United States in 1875 and resided in San Francisco. In 1887 he left the United States to visit China. During his absence from the United States in 1888, Congress passed a statute that prohibited the return of all Chinese laborers who had left the United States, even if they had obtained a certificate before their departure. Although Chae Chan Ping possessed such a certificate, he was denied read-

nation, Congress can choose to encourage immigration from certain regions and discourage others from coming to the United States.¹⁹⁷ Congress may even discriminate against aliens on grounds that would violate the Constitution if applied to American citizens.¹⁹⁸ But there is no indication that Congress intended to discriminate when it enacted the Refugee Act.

The Refugee Act was a response to a moral problem; it was a humanitarian piece of legislation designed to assist people in need, without consideration of their country of origin.¹⁹⁹ It is distinct from the immigration process.²⁰⁰ Implementation of policies under the Refugee Act therefore should be impartial and fair.²⁰¹ In showing such deference to the Ex-

mission pursuant to the 1888 Act. Justice Field's analysis included the following:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.

....

... If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

....

The power of exclusion of foreigners [is] . . . incident [to the] . . . sovereignty . . . [of] the government of the United States . . .

Id. at 603-09; see also *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

Id. at 659 (citations omitted).

¹⁹⁷ See Immigration Act of 1990, § 132(c), 8 U.S.C. § 1153 (Supp. II 1990). An immigration lottery seeks to reduce the admission of aliens from high-admission regions (defined as regions where the states have more than one-sixth of all visas issued; all other regions are defined as low-admission). For fiscal years 1992-94, the government allocated 40,000 visas per year. Forty percent of the visas were reserved for Ireland. Donatella Lorch, *Organizing for Visas: Irish, Lottery and Luck*, N.Y. TIMES, Oct. 12, 1991, at A31.

¹⁹⁸ *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976).

¹⁹⁹ S. REP. NO. 256, 96th Cong., 2d Sess. 1 (1979), reprinted in 1980 U.S.C.A.N. 141, 141. The Act "reflects one of the oldest themes in America's history—welcoming homeless refugees to our shores." *Id.*

²⁰⁰ See IGNATIUS, *supra* note 20, at 20.

²⁰¹ See IGNATIUS, *supra* note 20, at 20.

ecutive Branch, the Court in *Sale* perpetuates the discriminatory treatment of Haitians.

III. DISPARATE TREATMENT OF HAITIAN ASYLUM SEEKERS

A. Courts' Views on Discrimination

The history of discriminatory treatment of Haitian asylum seekers is a long and disappointing one. In *Haitian Refugee Center v. Civiletti*,²⁰² the District Court for the Southern District of Florida exposed this long pattern of discrimination. In *Civiletti*, an action was commenced against government officials by Haitians seeking political asylum and alleging unlawful discrimination by the I.N.S.²⁰³ Specifically, the plaintiffs challenged the new "Haitian Program," wherein the government, during the Spring and Summer of 1978, attempted to dispose of a backlog of Haitian asylum applications.²⁰⁴ In holding for the plaintiffs, the court acknowledged systematic discrimination against Haitians:

[T]here was a program at work within the INS to expel Haitians. Their asylum claims were prejudged, their rights to a hearing given second priority to the need for accelerated processing. . . . Virtually every one of the [due process] violations occurred exclusively to Haitians. . . . The District Director did not grant a single request for asylum between September, 1978 and May, 1979. . . . Those denials were not a case-by-case adjudication, but an intentional, class-wide, summary denial.²⁰⁵

The court noted that such discrimination against Haitians was part of a seventeen-year pattern of systematically denying Haitian asylum claims.²⁰⁶ The court called the "Haitian Pro-

²⁰² 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom.* *Haitian Refugee Ctr. v. Smith*, 676 F.2d 1023 (5th Cir. 1982).

²⁰³ *Id.* at 510-30.

²⁰⁴ *Id.* at 510.

²⁰⁵ *Id.* at 519.

²⁰⁶ *Cuban-Haitian Adjustment, 1980: Hearings on HR 4853 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) (statement of Ira Kurzban, General Counsel, Haitian Refugee Center); see also HOUSE COMMITTEE ON THE JUDICIARY, 97TH CONG., 2D SESS., CARIBBEAN MIGRATION (1980) (revealing accelerated processing and systematic denial of Haitian asylum claims).

This speedup policy resulted in the most gross violations of due process imaginable. Haitians had their employment authorizations cancel-

gram" the "largest-scale, most dramatic example of that pattern."²⁰⁷ Despite the *Civiletti* decision, the disparate treatment of Haitian asylum seekers continued.

Louis v. Meissner,²⁰⁸ a class-action lawsuit to enjoin the deportation of ninety Haitians, illustrates the discriminatory treatment they received.²⁰⁹ During the first week of June, 1981, the I.N.S. held mass exclusion hearings to determine the admissibility of refugees.²¹⁰ The hearings were seriously flawed: they occurred behind locked doors, provided inadequate translators, and failed to inform Haitians of their rights.²¹¹ The Haitian Refugee Center ("H.R.C.") filed an action seeking an injunction against the enforcement of the policy that had mandated the detention and deportation proceedings.²¹² On

led; asylum hearings in Miami for refugees from all countries escalated from the earlier level of about 10 per day to 150 per day for Haitian asylum applicants only.

. . . In most cases, moments after the conclusion of this roughshod procedure, presigned form letters of asylum denials were presented to Haitians which stated that they had failed to present sufficient evidence to support a claim of asylum. It also was recommended that Haitians not be advised of their right to appeal their claims to UNHCR, in order to speed up processing. . . . [T]he Deputy INS District Director in Miami, Richard Gullage, admitted that INS had never had mass asylum proceedings for any other group except Haitians.

Id. at 143-44. This report also details the discriminatory treatment accorded Haitian refugees, as compared to Cuban refugees. For example, "Cubans' I-94 forms [were] marked as 'Asylum Applicants' while Haitians' I-94 forms were marked 'Exclusion Proceedings.'" *Id.* at 145. This resulted in the Haitians having to show cause why they should not be deported from the United States while Cubans obtained the benefit of the district director's discretion in granting individual asylum claims. *Id.*; see also Little, *supra* note 116, at 273; Alex Stepick, *Haitian Boat People: A Study in the Conflicting Forces Shaping U.S. Immigration Policy*, 45 IMMIGR. POL'Y 163, 182 (1982).

²⁰⁷ *Civiletti*, 503 F. Supp. at 519.

²⁰⁸ 530 F. Supp. 924 (S.D. Fla. 1981).

²⁰⁹ *Id.*; see also Ira J. Kurzban, "Long and Perilous Journey": The Nelson Decision, 11 HUM. RTS. Q. 41 (1983).

²¹⁰ Jean v. Nelson, 711 F.2d 1455, 1462 (11th Cir. 1983), dismissed in part & rev'd in part, 727 F.2d 957, 978-79 (1984) (en banc), *aff'd*, 472 U.S. 486 (1985).

²¹¹ *Id.* at 1463.

²¹² Prior to its use in this instance, the policy of detaining aliens who seek admission to the United States had been used from 1892-1954. The Attorney General of the United States announced the demise of the policy in 1954. See Arthur C. Helton, *The Detention of Asylum Seekers in the United States and Canada*, in ASYLUM LAW AND PRACTICE IN EUROPE AND NORTH AMERICA: A COMPARATIVE ANALYSIS BY LEADING EXPERTS 165 (Jacqueline Bhabha & Geoffrey Coll eds., 1992).

Between April 20 and June 20, 1980, over 125,000 Mariel Cubans arrived. *Id.*

September 30, 1981, the district court entered an order enjoining the deportation of and exclusion hearings for the unrepresented Haitians. The court stated:

Having made a long and perilous journey on the seas to Southern Florida, these refugees, seeking the promised land, have instead been subjected to a human shell game in which the arbitrary [I.N.S.] has sought to scatter them to locations that . . . are [mostly] in desolate, remote, hostile, culturally diverse areas, containing a paucity of available legal support and few, if any, Creole interpreters.²¹³

In March of the following year, a six-week trial commenced to resolve first whether the I.N.S. could detain Haitians under this new policy without first publishing the policy in the *Federal Register*, thus giving the community opportunity to review and comment, and second, whether the I.N.S. executed this policy in a discriminatory manner aimed exclusively at Haitians.²¹⁴ In addition, the petitioners argued that the refugees should have been informed of their right to apply for asylum and that the First Amendment guaranteed their access to information offered by advocacy groups such as H.R.C.²¹⁵ The district court not only held that the violation by the I.N.S. of the Administrative Procedure Act²¹⁶ rendered the detention policy null and void, but that the Fifth Amendment applied to

at 166. Many of them admitted to I.N.S. agents that they had been convicted of crimes or suffered from mental illness, which made them excludable. Many of them were detained as an emergency response to a government overwhelmed by the sheer number of refugees. *Id.* at 167. A smaller number of Haitians followed. *Id.*

In May 1981, the alien-detention policy was re-introduced and all Haitians arriving by boat in southern Florida were detained at Camp Krome, near Miami. *Id.* at 167. When Krome became overcrowded, the detainees were transferred to federal prisons and I.N.S. detention facilities, often in remote areas of the United States. *Id.* "Haitians were incarcerated whether or not they were likely to abscond or likely to pose a threat to national security or public safety if released. The new policy of detention was intended to deter Haitians from seeking refuge in the United States." *Id.* After challenges to the new policy, regulations were promulgated under 8 C.F.R. §§ 212.5, 235.3 (1991). *Id.*; see also Bernier, *supra* note 4, at 69-75.

²¹³ *Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981).

²¹⁴ *Jean*, 711 F.2d at 1463; Kurzban, *supra* note 209, at 41.

²¹⁵ *Jean*, 711 F.2d at 1463.

²¹⁶ The court considered two statutes in finding that the Administrative Procedure Act had been violated: Pub. L. No. 89-554, 80 Stat. 381 (codified as amended at 5 U.S.C. § 551 (1988)) and Pub. L. No. 89-554, 80 Stat. 383 (codified as amended at 5 U.S.C. § 553 (1988)).

excludable aliens.²¹⁷ The court also held, however, that the plaintiffs had not proven discrimination by the I.N.S.²¹⁸ The court declined to rule on the first amendment and notice issues.²¹⁹ The government appealed and the plaintiffs cross appealed the discrimination, first amendment and access issues.²²⁰

In the 136-page decision that followed, an Eleventh Circuit panel held that excludable aliens enjoyed the protection of the First and Fifth Amendments and, most significantly, that the I.N.S. had intentionally discriminated against Haitians on the basis of race or national origin.²²¹ The panel described the substantial documentary and testimonial evidence of the mistreatment suffered by Haitian refugees as demonstrating a stark and "historic pattern of discrimination."²²² This was the first decision in U.S. history to find explicitly that the federal government had engaged in unlawful discrimination on the basis of race or national origin in a non-employment context.²²³

At a subsequent rehearing en banc, the earlier decision was dismissed in part and reversed in part. The court held that although the executive branch possesses the authority under the I.N.A. to discriminate on the basis of national origin, contrary policies had been adopted and low-level immigration officials were bound by these policies.²²⁴ The case was remanded to the district court to determine whether there was a "facially legitimate and bona fide reason" for the government's

²¹⁷ *Louis v. Nelson*, 544 F. Supp. 973, 984 (S.D. Fla. 1982). The court acknowledged that the actions challenged were not congressional:

Plaintiffs allege the defendants are applying a neutral statute in a discriminatory fashion. This distinction, between legislation and enforcement, is critical. Congress can legitimately make distinctions among and against aliens that would be unacceptable if applied to citizens, but "[i]n the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . A statute, otherwise neutral in its face, must not be applied so as invidiously to discriminate on the basis of race."

Id. at 998-99 (citations omitted).

²¹⁸ *Id.* at 1000.

²¹⁹ *Id.* at 1003.

²²⁰ *Jean*, 711 F.2d at 1464; *Kurzban*, *supra* note 209, at 42.

²²¹ *Jean*, 711 F.2d at 1509-10; *see also id.* at 1494.

²²² *Id.* at 1487, 1490.

²²³ *Kurzban*, *supra* note 209, at 42.

²²⁴ *Jean v. Nelson*, 727 F.2d 957, 978-79 (11th Cir. 1984) (en banc).

denial of parole.²²⁵ Absent such a reason, the government's actions would constitute an abuse of discretion.

The Supreme Court affirmed the Eleventh Circuit and held that no constitutional question should have been reached because current statutes and regulations, as well as executive branch policy statements, required the I.N.S. to employ non-discriminatory consideration in determining alien parole issues.²²⁶ It has been argued that by espousing the non-discriminatory import of current statutes and regulations, the Court refused to countenance discrimination against asylum applicants.²²⁷ Whether the Court intended such a broad interpretation is questionable. A narrower view of the decision would conclude that, since non-discriminatory parole decisions could be achieved by adherence to current neutral statutes and regulations, the Court did not have to address the constitutional issues presented.

The *Civiletti* and *Jean* cases demonstrate not only the discrimination that Haitians encounter when they avail themselves of U.S. asylum policies,²²⁸ but also the federal courts' attempts to afford these Haitians appropriate relief. To date, there has been no echo of this outrage in the Supreme Court, and agents in the field, if so inclined, are free to treat Haitian asylum applicants in a discriminatory manner.

B. *Equal Treatment Under the Law*

The definition of refugee is ideologically and geographically neutral.²²⁹ The merits of an individual claim, rather than geographic or political considerations, are paramount under the Refugee Act of 1980. Some critics of the Act have argued that it has failed to establish uniformity and eliminated the ideological bias that existed in prior immigration laws.²³⁰ Prior to the passage of the 1980 Act, the vast majority of refugees

²²⁵ *Id.* at 977 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

²²⁶ *Jean v. Nelson*, 472 U.S. 846, 857 (1985).

²²⁷ Mary J. Lapointe, *Discrimination in Asylum Law: The Implications of Jean v. Nelson*, 62 IND. L.J. 127, 140 (1986).

²²⁸ See generally Little, *supra* note 116, at 270 (discussing discriminatory treatment of Haitians).

²²⁹ Helton, *supra* note 33, at 250-51.

²³⁰ Helton, *supra* note 33, at 252-53.

admitted were fleeing communism in Eastern Europe, the Soviet Union, and Indochina.²³¹ Surprisingly, even today, the bias in favor of communist and former communist countries continues.²³²

While individuals fleeing communist countries benefit from a presumptive eligibility for refugee status,²³³ the U.S. government grants relatively few political asylum applications for Haitians.²³⁴ In contrast to individuals fleeing communist countries, Haitians are viewed as fleeing economic hardship, not political oppression.

Letters from the State Department, which attest to conditions within a given country and are disseminated to asylum officers, are influential in the asylum process. Ironically, refugees from countries that maintain good diplomatic relations with the United States face a more severe burden of proof in asylum proceedings.²³⁵ Before implementation of the 1980

²³¹ See Helton, *supra* note 33, at 253-54; see also *The Year of the Refugee*, ECONOMIST, Dec. 23, 1989, at 17 ("Until May 1988 . . . virtually any Soviet refugee could come to America. . . . The administration no longer believes that all Soviet Jews and evangelicals are persecuted. It would like to examine applicants case by case, and bring in 30,000 a year over five years. But the demand is far greater.").

²³² IGNATIUS, *supra* note 20, at 3 (confirming that this bias in favor of communist countries and former communist countries continues); Arthur C. Helton, *Ecumenical, Municipal and Legal Challenges to United States Refugee Policy*, 21 HARV. C.R.-C.L. L.REV. 493, 496 (1986). A 1993 study by Harvard Law School indicates that under the new procedures, bias in favor of communist and former communist countries has lessened, but not to the extent anticipated, given that the applicants can no longer claim persecution based on political opinion. See IGNATIUS, *supra* note 20, at 3.

²³³ See S. REP. NO. 256, 96th Cong., 2d Sess. 4 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 144 (noting that the current legislative framework "was originally designed to deal with people fleeing communist regimes in Eastern Europe or repressive governments in the Middle East. . . . This framework still assumes that most refugees admitted to the United States come from these two geographic areas, or from Communist-dominated countries.").

²³⁴ See Cooper, *supra* note 80, at 941-43; see also IGNATIUS, *supra* note 20, at 3-4; U.S. COMMITTEE FOR REFUGEES, *DESPITE A GENEROUS SPIRIT: DENYING ASYLUM IN THE UNITED STATES* (1986).

²³⁵ HULL, *supra* note 39, at 122. The National Asylum Study Project indicates that under the new regulations, the U.S. State Department still has the opportunity to respond with an opinion letter concerning each asylum claim. This is done infrequently, and creates confusion with contradictory information. This information may contradict "other credible non-governmental sources and at times even other Department of State materials and information from I.N.S. These opinion letters also delay case adjudication while asylum officers wait the 60 days required in the regulations for a response." IGNATIUS, *supra* note 20, at 9, 9. The Study Project

Refugee Act, when I.N.S. examiners conducted asylum interviews, ninety-five percent of the cases followed State Department recommendations.²³⁶ To counteract the conscious or unconscious effects of political bias emanating from the State Department, the 1980 Act authorized the creation of a Resource Information Center to collect information from independent sources about a country's condition.²³⁷ Though severely criticized, the emphasis on political concerns has continued and has overshadowed the humanitarian ideal embodied in the statute.²³⁸

recommends elimination of these letters from the adjudication process because, in addition to confusing the officers, they "inject improper foreign policy influences into decision-making, and slow the ultimate time for decision". *Id.* at 12. This contradictory information occurred in the case of the Haitian asylum seekers stationed at Guantanamo Bay. *Id.* at 146-48.

²³⁶ IGNATIUS, *supra* note 20, at 8.

²³⁷ IGNATIUS, *supra* note 20, at 8; *see also* 8 C.F.R. § 208.1(c) (1993) (providing for "a documentation center to compile and disseminate . . . information on human rights conditions"). A memorandum from the I.N.S.'s Acting Director of International Affairs to its Refugee Division on law and country conditions in Haiti contradicted the Department of State on several key issues and surprisingly, relied on credible non-governmental sources of information. IGNATIUS, *supra* note 20, at 147. It purported to promote consistency and fairness in decision making and a reduction in the influence of foreign policy in asylum adjudication. *Id.*

²³⁸ Congress's desire that "humanitarian concern" be of paramount interest in the Act is reflected in its rejection of the Administration's proposed standard that asylum claims be "of special concern to the United States". Tani Tyson, Note, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interest*, 65 WASH. L. REV. 921 (1990). It also is reflected in the implementation of a two-step process: the claimant must meet the threshold definition of refugee and come from one of the "regions and countries of 'special humanitarian concern' to the United States as designated by the annual consultation process." *Id.* at 926 (citing 8 U.S.C. § 1101(a)(42) (1988)).

One of the primary concerns of the National Asylum Study Project was that the asylum adjudication process was a mere reflection of the United States foreign policy. "I.N.S. examiners making asylum decisions under the previous process merely followed the recommendation of the Department of State in over 95% of the cases, regardless of the actual danger the applicant faced." IGNATIUS, *supra* note 20, at 17; *see also* U.S. GEN. ACCOUNTING OFFICE, ASYLUM: APPROVAL RATES FOR SELECTED APPLICANTS (1987) (Pub. No. GAO/GGD-87-82FS); U.S. GEN'L ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN (1987) (Pub. No. GAO/GGD-87-33BR) (discussing how final asylum decisions show an uncanny correlation to Department of State advisory opinions—96% of cases worldwide correspond to the advisory opinions; 99% for Salvadorans, 99% for Nicaraguans, 96% for Poles, and 87% for Iranians); AMNESTY INT'L U.S.A., REASONABLE FEAR: HUMAN RIGHTS AND U.S. REFUGEE POLICY (1990) (documenting evidence of I.N.S. and Department of State bias against Salvadoran, Guatemalan and Haitian

The continuing emphasis on political concerns is only one factor in the disparate treatment of Haitian refugees. The treatment accorded Cubans differs from that of Haitians for many reasons, not the least of which is that, although many Cubans are of African descent, they are viewed as "Hispanic" rather than African. This favorable treatment can also be traced to the U.S. government's desire to embarrass Fidel Castro. Once again foreign policy considerations intrude upon refugee policy, when they should be distinct and separate. The recent application of interdiction policies to the Cubans should not be viewed as evidence of race neutrality. Rather, it demonstrates that in a unique and specific situation, the geographical and political facets of refugee law assumed prominence. Moreover, as discussed earlier, unlike the Haitian situation, the Cuban crisis was more quickly resolved and resulted in more favorable terms for Cuban asylum seekers.²³⁹ Similarly, the federal government's favorable treatment of the Chinese passengers of the Golden Venture contrasts sharply with its intentional prevention of Haitians from applying for asylum from within the United States.²⁴⁰

Commentators have noted that foreign policy and ideology continue to influence U.S. refugee policy despite the neutral principles embodied in the Refugee Act of 1980.²⁴¹ Of the cases decided five years after the passage of the Refugee Act, 73% of the Libyan, 59% of the Romanian, 57% of the Czechoslovakian, and 46% of the Russian applicants received political asylum. In contrast, asylum was granted in less than 15% of the Pakistani, 1% of the Haitian, 1% of the Guatemalan and 3% of the Salvadoran cases.²⁴² Even when the applicants' allegations were similar, the rates of asylum varied substantial-

asylum seekers); KARIN KÖNIG, U.S. HELSINKI WATCH COMM., DETAINED, DENIED, DEPORTED: ASYLUM SEEKERS IN THE UNITED STATES (1989) (reporting that I.N.S. decisions agreed with State Department Advisory opinions in more than 95% of asylum cases); Jeffrey L. Romig, Comment, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 315 (1985) (positing that friendly U.S.-El Salvador relations impacts negatively on persecuted Salvadorans seeking refuge in the United States).

²³⁹ See *supra* notes 152-58 and accompanying text.

²⁴⁰ Kathleen Blanchard & Jan C. Ting, Letter to the Editor, N.Y. TIMES, July 15, 1994, at A26.

²⁴¹ Refugee Act of 1980 § 311(a)(2), 8 U.S.C. § 1522(a) (1982).

²⁴² Helton, *supra* note 232, at 496-97.

ly.²⁴³ These ideological and foreign policy considerations affect all refugees.²⁴⁴

The uneven application of U.S. asylum policies has been challenged by supporters of refugees from non-communist countries. For instance, in *American Baptist Churches v. Thornburgh*,²⁴⁵ hundreds of thousands of Salvadorans and Guatemalans in the United States formed a nationwide class and sued the I.N.S. to challenge the prior adjudication system. They alleged that foreign policy considerations led to unfavorable treatment for Salvadorans and Guatemalans compared to applicants fleeing communist countries. The government defended the litigation while developing new asylum regulations, and settled the lawsuit shortly after promulgating the new regulations.²⁴⁶ Despite such systemic changes, Haitians con-

²⁴³ Salvadorans who claimed to have been arrested and imprisoned, to have had their lives threatened, or to have endured torture, received asylum in 3% of the cases while Poles with similar stories were approved 55% of the time and Iranians were approved in 64% of the cases. "From 1980 to 1986, 76% of the asylum grants went to applicants from three countries that the United States opposed: Iran, Poland and Nicaragua, whereas applicants from El Salvador won less than 3% during this period." IGNATIUS, *supra* note 20, at 18.

²⁴⁴ Helton, *supra* note 232, at 497.

A typical illustration of the discriminatory processing of political asylum applications is provided by El Salvador, a country with which the United States shares significant foreign policy interests. As a matter of policy, the executive branch has great incentive to minimize human right violations and characterize the situation in El Salvador as improving, an image that could be jeopardized by granting asylum to large numbers of Salvadorans. . . . [T]he State Department sometimes recommends favorable action even where the applicant cannot meet the individual well-founded fear of persecution test. This happened in December 1981, one week after martial law was declared in Poland. Seven Polish crewmen jumped ship and applied for asylum in Alaska. Even before seeing the asylum applications, a State Department official said: 'We're going to approve them.' . . . In one instance, a crewman cited his attendance at a single Solidarity rally (he was one of the more than 100,000 participants) as the reason he feared returning to Poland. The crewman had never been a member of Solidarity and had never engaged in any political activity. His claim was approved within 48 hours.

Id.

²⁴⁵ 760 F. Supp. 796 (N.D. Cal. 1991).

²⁴⁶ See Carolyn P. Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT'L. J. REF. L. 347, 352 (1991). In May 1985, the jailing of Guatemalan and Salvadorans in I.N.S. detention centers, in conjunction with the denial of the asylum applications, led to the development of the sanctuary movement. *Id.* at 347-48. Church-assistance organizations led by congregations in Tucson and Berkeley declared

tinue to experience disproportionately low rates of asylum approvals, particularly in contrast to refugees and asylum seekers from other nations.²⁴⁷

C. Four Strikes Against Haitians—Racial, Class, Language and Cultural Biases

During periods of political turmoil and its accompanying economic difficulties, Haitians have sought greener pastures in the United States. As early as 1920, Haitians migrated to the United States and settled in Harlem, New York.²⁴⁸ The mi-

their churches to be "sanctuaries" of refuge for Guatemalans and Salvadorans. *Id.* at 350. "An underground railroad, modelled on the network that had helped escaping U.S. slaves before the Civil War, was created to aid refugees travelling from the U.S.-Mexican border towns to sanctuaries throughout the United States. By the mid-1980's over 300 churches and synagogues declared 'public sanctuary' " *Id.*

In response, the U.S. Justice Department conducted a series of criminal prosecutions of sanctuary activists. Two church shelter workers connected with a Catholic Archdiocese-sponsored refugee sanctuary in Brownsville, Texas, were convicted on charges of transporting refugees in 1984 and 1985. This conviction was followed by the conviction of 16 people on conspiracy and other criminal charges. *See American Baptist Churches v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989). During the discovery phase of the litigation, the I.N.S. announced the promulgation of new asylum regulations, effective October 1, 1990. The government, in settling the litigation, "implicitly acknowledged serious flaws in its previous asylum adjudication process and explicitly agreed to new asylum interviews for the hundreds of thousands of Salvadoran and Guatemalan *American Baptist Churches* class members. The settlement agreement also explicitly stated that foreign policy consideration should not be relevant in determining a well-founded fear of persecution." *IGNATIUS, supra* note 20, at 19.

²⁴⁷ *IGNATIUS, supra* note 20, at 4.

Certain nationalities historically suffering discriminatory treatment under the previous process received asylum in a greater percentage than before. Previously, under the INS examiners the approval rate for Salvadorans, Guatemalans and Haitians, for example, was less than 3% despite documentation of widespread human rights abuses and political violence. Under the new processing FY 1992 the approval rate for Salvadorans was 28%, Guatemalans 21%, and Haitians 31%. Currently, the approval rate for these three nationalities has dropped to: Salvadorans 5%, Guatemalans 7%, and Haitians 21% for the first eleven months of FY 1993 (through August).

Id.; see also *supra* note 80.

²⁴⁸ Debra Sontag, *Haitian Migrants Settle In, Looking Back*, N.Y. TIMES, June 3, 1994, at A1. The newly settled Haitian community in New York City went on to play a significant role in shaping the political and cultural forces behind the Harlem Renaissance. Elaine Ray, *In Another Country*, BOSTON GLOBE, July 26, 1992, Magazine, at 14.

gration from Haiti began on a larger scale when Francois "Papa Doc" Duvalier took power in 1957 and five years later declared himself President for life.²⁴⁹ The first Haitians to leave were dissident politicians, followed by middle-class professionals and finally by tradespeople.²⁵⁰ Upon their arrival in the United States, they experienced what Michel LaGuerre, a Haitian American anthropologist, calls their "'triple minority status' as blacks, foreigners and non-English speakers."²⁵¹

Throughout its history, the United States has struggled with problems associated with race.²⁵² No aspect of American society has been immunized from the pernicious effects of racial discrimination or racial tension. Immigration policy has been marred by decisions motivated by racial factors.²⁵³ For instance, the Chinese exclusion case in 1888²⁵⁴ and the treatment of Japanese during World War II²⁵⁵ are two early and

²⁴⁹ See Bernier, *supra* note 4, at 69. Papa Doc's son, Jean-Claude Duvalier, known as "Baby Doc," was only 19-years old when he declared himself "President for Life" after his father's death on April 21, 1971. *Id.* His extravagant lifestyle led to his exile on April 7, 1986. He and his wife were given asylum in France. *Id.* During the Duvalier regime in Haiti, Papa and Baby Doc's steadfast declaration of their hatred for communism, combined with the country's proximity to Cuba, encouraged the United States to maintain good relations with Haiti. See Mary F. Nevans, Comment, *The Repatriation of the Haitian Boat People*, 5 TEMP. INT'L COMP. L.J. 273, 277 (1992).

²⁵⁰ See ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT 11 (1987). Haiti is estimated to have lost more than 60% of its professionals to the United States between the years 1977 and 1980. *Id.* at 162 ("The most intensive brain drain in the world has probably occurred in Haiti, which has lost as much as 75 percent of its skilled manpower since 1950—the result, almost entirely, of the disastrous policies of its government.").

²⁵¹ Sontag, *supra* note 248, at A1, B4; see also Bruce Frankel, *New York Haitians Proud: "We Try Hard,"* USA TODAY, July 15, 1993, at 8A (reporting that Haitian Americans face double discrimination: first as Blacks, then as Haitians).

²⁵² See ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 17 (1992); Derrick Bell, *Remembrances of Racism Past: Getting Beyond the Civil Rights Decline*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY, 73, 73 (Herbert Hill et al. eds., 1993) (stating that the struggle for civil rights has continued for over 300 years).

²⁵³ Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1162-74.

²⁵⁴ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

²⁵⁵ *Korematsu v. United States*, 323 U. S. 214 (1944). In *Korematsu*, the Civilian Exclusion Order No. 34, which directed the exclusion, after May 9, 1942, from a West Coast military area of all persons of Japanese ancestry, was held constitutional when an American of Japanese descent, whose home was in the area, violated the order. *Id.* at 219. At that same time, other orders provided for the de-

graphic examples of the racism that has marked America's immigration policy. The passage of California's Proposition 187 is a recent example.²⁵⁶

Although Africa has the largest number of refugees, only two percent of the more than one million refugees admitted to the United States since 1980 have come from Africa.²⁵⁷ America's history, combined with these statistics, demand an examination of America's refugee policy and the factors that influence it. Even before today, Haiti has felt the sting of American racial intolerance disguised as foreign policy. In 1804, the uprising of black slaves on the French-owned island of Haiti, so near the American South, threatened America's internal stability and disrupted its belief in black inferiority.²⁵⁸ Not surprisingly, the United States refused to officially recognize the Republic of Haiti until 1862, thirty-seven years after France and twenty-nine years after Great Britain had recognized the new nation.²⁵⁹ Yet the United States was

tention of Japanese Americans in "assembly centers." *Id.* at 222.

²⁵⁶ In 1982, the Supreme Court held that, under the Equal Protection Clause of the Fourteenth Amendment, Texas could not deny undocumented school-age children a free public education provided to children of citizens and legal residents. *Plyler v. Doe*, 457 U.S. 202 (1982). Proposition 187, passed by the California electorate in November 1994, seeks, among other goals, to exclude children of "illegal aliens" from public elementary and secondary schools and public postsecondary educational institutions.

²⁵⁷ See Helton, *supra* note 126, at 344; see also Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REF. L. 185 (1991). In the past thirty years,

Africa has witnessed the economic and social misery symptomatic of massive displacements of people. The number of refugees ascended from approximately 400,000 in 1964 to over 700,000 by 1967. This 'human tragedy' has been characterized as the product of racism and white domination, of colonialism and neo-colonialism, and of birth pangs associated with the process of decolonialization and the evolution of time and viable Nation-States.

Id. at 191.

²⁵⁸ J. MICHAEL DASH, HAITI AND THE UNITED STATES: NATIONAL STEREOTYPES AND THE LITERARY IMAGINATION 6-7 (1988). "American sensitivity to . . . slave revolt [is] 'unquestionably, the principle cause of the ill-will of the American people toward Haiti.'" *Id.* at 8 (quoting JACQUES N. LEGER, HAITI: HER HISTORY AND DETRACTOR 303 (1907)). "The hostility to Haiti can be seen as part of 'the tragic limitation of the white racial imagination of the nineteenth century, namely its characteristic inability to visualize an egalitarian biracial society.'" DASH, *supra*, at 9 (quoting GEORGE FREDERICKSON, *preface to THE BLACK IMAGE IN THE WHITE MIND* (1971)).

²⁵⁹ DASH, *supra* note 258, at 8.

quick to acknowledge as legitimate the governments of other ex-colonies, such as Mexico, Chile and Argentina, despite their obvious instability.²⁶⁰

The seemingly predetermined rejection of Haitian asylum claims and the negative treatment of Haitians throughout the asylum process have led critics to question whether the disparate treatment of Haitians can, in good faith, be separated from the issue of race.²⁶¹ The National Council of Churches, in a task force study of the Haitian refugee problem, stated that the "racial overtones of the treatment of Haitians suggested, through implications, that we are saying that our doors are open only to those who are white, skilled and fleeing from socialist governments."²⁶² Additionally, the noted civil rights leader, Benjamin Hooks, former executive director of the NAACP, commented on the situation in a letter to President Reagan:

The action is clearly discriminatory, because it amplifies a pattern which, for the past five years has singled out Haitian refugees for special and harsh treatment unlike any other refugees and in spite of the fact that we have welcomed and supported more than a half million refugees from elsewhere in the past two years.²⁶³

The African American press also has lent its voice to the denunciation of U.S. refugee policies. One editorial noted that "while it may be true that America cannot absorb every refugee who seeks political asylum in the country, it is also true that our failure to do so was never so vehemently pronounced

²⁶⁰ DASH, *supra* note 258, at 8. The recognition of these Latin American countries began in 1822. *Id.*

²⁶¹ The I.N.S. has argued that Haitians have been treated poorly not because of their race, but as a result of "the unique circumstances surrounding the Haitians' arrival here in the United States. . . . David Crossland, Acting Commissioner of the I.N.S., noted that unlike most other refugees, Haitians 'have entered the United States in an undocumented status' and this has been complicated by the fact that 'there has never been a determination by the Department of State that the conditions existing in their homeland were of such a nature as to merit extended voluntary departure' status." MILLER, *supra* note 49, at 97.

²⁶² MILLER, *supra* note 49, at 93 (quoting HOUSE COMM. ON INT'L RELATIONS, 94TH CONG., 1ST SESS., HUMAN RIGHTS IN HAITI 79 (1975)).

²⁶³ MILLER, *supra* note 49, at 93. Vernon Jordan, director of the National Urban League also stated that "it is hard to escape the conclusion that race is a factor here. Black Haitians are unwanted in the United States. . . . [I]f we've got room for non-black political refugees, we've got to make room for black political refugees." *Id.* at 95-96.

until black refugees began arriving on our shores.”²⁶⁴ The active and vocal involvement of both the congressional Black Caucus and the respected Washington-based lobbying organization, TransAfrica, similarly demonstrates that race is a significant factor in the development and implementation of American refugee policy.²⁶⁵ Not only is “no issue . . . more associated with the Black Caucus than the Clinton administration’s policy on Haiti,”²⁶⁶ but also, the head of the administration’s new Haiti policy was a former chairman of the congressional Black Caucus.²⁶⁷ Congressman Kweisi Mfume, chairman of the Black Caucus, has publicly stated that “[i]f Haitians were not black, we would not sit back and watch this murder occur.”²⁶⁸ The passions raised by this intermingling of foreign policy and race relations are felt so deeply that Randall Robinson, TransAfrica president and human rights activist, undertook a twenty-seven day hunger strike to protest what he characterized as a racist interdiction policy.²⁶⁹ Moreover, so much of the African American community’s limited political capital was expended on this issue, underscoring the serious-

²⁶⁴ MILLER, *supra* note 49, at 96.

²⁶⁵ See John Latigua, *Despite Favorable Shift, Haiti Activists Still Wary*, MIAMI HERALD, May 19, 1994, at 5A.

²⁶⁶ See Peter J. Boyer, *The Rise of Kweisi Mfume*, NEW YORKER, Aug. 1, 1994, at 27. Mr. Boyer states that the Black Caucus was instrumental in moving the Clinton Administration closer toward a decision to intervene militarily to restore President Aristide. *Id.* Such is the depth of the caucus’s commitment to the issue of the Haitian cause that “[a]llegiance to Aristide and an insistence that he be returned to office are, in fact, two of the only issues on which the caucus has been unanimous.” *Id.* The Caucus’ influence on Haitian policy can be traced to a letter, dated March 18, 1993, to President Clinton, which began with the words “[t]he United States’ Haiti policy must be scrapped.” *Id.* at 34. Not coincidentally, several weeks later, Lawrence Pezzullo, the Administration’s special envoy to Haiti, was removed from his office and replaced by former Congressman William Gray. *Id.*

²⁶⁷ *Id.* at 34. It is reported that Gray would not take on the role of liaison to Haiti without having first received the support of the Black Caucus.

²⁶⁸ *Id.* at 27. Congressman Mfume’s words were echoed by Congressman Major Owens (D-N.Y.), also a member of the Black Caucus, in a letter to President Clinton where he “likened the President’s situation to that of Abraham Lincoln before the Emancipation Proclamation, thereby equating the reinstallation of Aristide to the freeing of the American slaves.” *Id.*; see also Latigua, *supra* note 265, at 5A (“[T]he policy has been racist. I don’t think the President would have done anything about this without the Congressional Black Caucus pushing him into a corner.” (quoting state representative Josephus Eggleton)).

²⁶⁹ See *supra* note 141.

ness of the allegations of unequal treatment based in racial bigotry.

Concrete proof of racial discrimination is as difficult to obtain in the immigration arena as it is in any other area of American society. Yet few observers would deny that the Haitian asylum seekers' journey through the asylum process has involved unique difficulties. In light of America's history of race relations with its own African American citizens, the "race issue" and its interrelationship with refugee policy should not be ignored.

Issues of class differences compound racial inequities in the United States and shape its refugee and asylum policies. American immigration history has shown that in times of economic distress, a recurrent nativism and hostility rears its ugly head.²⁷⁰ This nativism is compounded in the Haitian refugee crisis because an overwhelming number of the refugees are illiterate and unskilled.²⁷¹

²⁷⁰ See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 2-4 (1984) (arguing that the new immigration ideology is marked by insulation and exclusionary tendencies); see also SHARRY FRANK, *THE RESURGENCE OF NATIVISM IN THE 1990'S* (1992). One of the low points of this bigotry occurred when, in 1939, German Jews fleeing Nazi Germany made it safely to the United States only to be returned to their death. On June 5, 1939 a boat transporting 908 German Jews seeking asylum in the United States was forced to sit in Miami Harbor. The U.S. Coast Guard surrounded the vessel and the passengers' requests for political asylum were denied. They were returned to Nazi Germany and ultimately faced death in Nazi concentration camps. Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 122 (1989) (statement of Msgr. Brian O. Walsh, Executive Director, Catholic Community Services).

The Haitian experience has been described as a new Holocaust. See *supra* note 11. See generally Ronald Tanaki, *A Tale of Two Decades: Race and Class in the 1880s and the 1980s*, in *RACE IN AMERICA: THE STRUGGLE FOR EQUALITY* 402, 411 (Herbert Hill et al. eds., 1993).

Professor Tanaki states that the anti-Chinese racism personified in the Chinese Exclusion Act of 1882 was a response not only to racial intolerance but to economic difficulties of the time. *Id.* at 402-03. The congressional debates revealed the belief that "the presence of an 'industrial army of Asiatic laborers' was exacerbating the class conflict between white labor and white capital. . . . [R]emoval of the Chinese was designed not only to defuse an issue agitating white workers but also to alleviate class tensions within white society." *Id.* In more recent history, Professor Tanaki relates the story of the brutal and deadly beating, in Detroit, of Vincent Chin by two white auto workers in 1982. *Id.* at 411. Before shattering Vincent Chin's skull, the assailants were reported to have shouted "it's because of you m_____ that we're out of work." *Id.*

²⁷¹ See Editorial, *End Refugee Double Standard*, CHI. SUN TIMES, Nov. 17, 1993,

The poverty in Haiti is undisputed. Haiti has repeatedly been described as the poorest nation in the Western Hemisphere.²⁷² Political repression and poverty are inextricably linked in Haiti. The rich minority's control of the economic resources is central to the repression of the people.²⁷³ Therefore, those who leave as refugees are more likely to be poor.

The United States views the poverty of Haitian refugees as a potential drain on its scarce resources, both social and economic. It is not coincidental that some of the strongest support for a military invasion of Haiti has come from Florida's elected

at 47; Sontag, *supra* note 248, at A1.

²⁷² See MILLER, *supra* note 48, at 2. Haiti is described as a "fourth world" nation because it lags behind even "third world" under-developed nations. This reality of poverty is amplified by stratification along class and color lines. The elite, composed of approximately 10% of the population, dominate. *Id.* In addition to traditional control of the political structure, they are characterized by their superior education, use of the French language, rather than Creole, identification with French customs and membership in the Roman Catholic church. They have traditionally held positions other than those that involve manual labor. *Id.* at 2-3.

In sharp contrast, the life of the Haitian peasant is one characterized by an attempt to eke out an agricultural existence. *Id.* There is a lack of natural resources, which contributes to the inability to employ its inhabitants or attract substantial foreign investors. *Id.* at 10-11. This has resulted in an agriculturally based economy. *Id.* at 11. Agriculture has been unable to provide sufficient work to make a significant dent in the unemployment problems. *Id.* at 13. This economic reality in Haiti led to the ascendancy of Jean-Bertrand Aristide, who appealed to the majority with his Lavalas movement and socialist leanings. He was viewed as very threatening to the status quo. Aristide was the first democratically elected President in 200 years. See generally, Bernier, *supra* note 4 (discussing the historical framework and political and economic factors leading to the election of Jean-Bertrand Aristide).

²⁷³ S.L. Bauchman, *Post-Cold War, Who is a Refugee*, SAN JOSE MERCURY NEWS, Apr. 14, 1992, at B5. According to the author, state violence, as cruel and oppressive as anything practiced by communist governments,

has kept the poor, poor, the rich, rich, and dissent down. Anyone who flees leaves not only a nation of paupers, but also the repression of a political system that depends for survival on keeping people poor. Proof is in the boat people numbers. During the nine months after the reformist Aristide was elected with high support from poor voters, the flow of Haitian boat people headed for Florida dried up to a trickle. Haiti is an extreme case, but it's not unique in using state power to repress the kind of political dissent that could change the economic system. A new definition of refugee is needed.

Id.; see also Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 461 (1985) ("If in a given country the poor are kept poor by those in power in order to maintain the current political structure—if all or substantially all economic opportunity is foreclosed—a victim of such poverty suffers 'substantial economic disadvantage' on account of his membership in the lower class.").

officials. Many of these same individuals pressured the Clinton Administration to continue the Interdiction Program because they feared the impact of an influx of poor, unskilled refugees on the state's economy.²⁷⁴ So great was the fear that, in 1993, Florida Governor Lawton Chiles, the Dade County School Board, and the Dade Public Health Trust brought suit against the federal government, seeking remuneration for over one billion dollars in immigration-related expenditures.²⁷⁵

In addition to race and class biases against Haitian asylum-seekers, discrimination on the basis of language also is prevalent. Scholars maintain that speech is inextricably linked to class and social position, and Americans' preconceptions are often a factor in discrimination.²⁷⁶ A thick Haitian accent may be jarring to an American interviewer. Accent discrimination often occurs without conscious intent;²⁷⁷ consequently, this aspect of discrimination against Haitians often goes unrecognized. Although in seventy percent of the asylum interviews studied in the National Asylum Study Project the asylum offi-

²⁷⁴ It was reported that Senators Connie Mack and Bob Graham, and Governor Lawton Chiles delivered to President Clinton a letter signed by all 23 members of the House of Representatives from Florida stating their concern that Florida would bear the brunt of an immigration emergency created by an influx of Haitians. See Paul Anderson & Christopher Marquis, *Graham and Mack Deliver Plea on Haiti: Say State Can't Bear Cost of an Influx*, MIAMI HERALD, May 14, 1994, at A1.

²⁷⁵ See Lizette Alvarez & Mark Silva, *Reno Briefs Chiles on Haitians*, MIAMI HERALD, May 5, 1994, at 2B (quoting Governor Chiles as saying "from the moment the federal government made a decision to admit [Haitians], Florida has considered each of them to be a federal responsibility . . . [a]nd each of them should be issued the equivalent of a federal credit card to guarantee payment for any services they require or receive").

²⁷⁶ Mari J. Matsuda, *Voices of America: Accent, Anti-Discrimination Law, and A Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1330 (1991) (discussing the sense of futility experienced by individuals bringing Title VII cases on the basis of accent discrimination). Although courts have recognized that accent discrimination can function as the equivalent of the prohibited national origin discrimination, the cases described by Ms. Matsuda were not successful in the courts. See, e.g., *Carino v. University of Okla. Bd. of Regents*, 750 F.2d 815, 819 (10th Cir. 1984); *Walters v. Lee*, No. CIV.A.85-5383, 1988 WL 105887, at *7 (E.D. Pa.) (reasoning that "[t]o avoid discrimination in the United States, it has always been necessary to make considerable allowance of a person's foreign accent and difficulty in being understood"). Accent is also closely related to race, national origin and class.

²⁷⁷ Matsuda, *supra* note 276, at 1351-52; see also Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (suggesting that our evaluation of others is colored by unconscious cultural messages of racial inferiority).

cers appeared "sensitive, compassionate, professional, friendly, business-like, or polite," twenty-three percent of the interviewers exhibited a hostile interviewing style.²⁷⁸ This is likely to further hinder communication with heavily accented Haitian applicants who are not fluent in English.

The extent to which subconscious and negative reaction to the Haitian accent may have affected their decisions is unclear. Some officers could well have believed that Haitians would experience more problems assimilating because of their heavy accents and therefore denied their applications more frequently. These are not permissible reasons for denial of political asylum under the facially neutral Refugee Act.²⁷⁹

In addition to the Haitian accent, the language of the

²⁷⁸ See IGNATIUS, *supra* note 20, at 7. The Harvard Study revealed that the I.N.S. initially scheduled asylum interviews in Guantanamo Bay on an expedited basis

at a time that a senior INS official had prejudged the merits of these cases, stating that 90% of them would be denied. . . .

Certain asylum officers used the notes of the brief screening interviews of Haitians at Guantanamo Bay in their asylum interviews in the United States without disclosing them to the applicants. The asylum officers attached undue weight to these sketchy interview notes to undermine the credibility of the applicants.

Id. at 9.

The asylum officers, however, are viewed as much more professional and sympathetic than the I.N.S. examiners who previously interviewed asylum applicants. IGNATIUS, *supra* note 20, at 7. They are considered better interviewers than their predecessors. *Id.* The training program and hiring of asylum officers with experience outside of the I.N.S. are considered contributing factors to an improvement in eliciting the applicant's claim. *Id.* Job skills such as bilingual language ability, experience in foreign countries and legal and other advanced degrees are credited by the National Asylum Study Project for improving the quality of interviews. *Id.*

Still, 23% of asylum officers are described as conducting interviews in a "hostile, aggressive, accusatory, adversarial, or rude manner in violation of the regulations and I.N.S. training materials for the asylum officer corps." *Id.* This is viewed as especially problematic for female asylum applicants who allege gender-based persecution or sexual abuse. *Id.* Some female asylum applicants have claimed that rape is used as a means of persecution in Haiti. Michael D. Barnes, *To End the Crisis, Restore Aristide*, WASH. POST., July 23, 1994, at A19.

The National Asylum Study Project recommends improving the calibre of the asylum officers by revising the hiring criteria to require a law or other advanced degree, assessing the writing and analytical ability, conducting in-person interviews of prospective employees and weighing relevant experience outside I.N.S. equally with I.N.S. experience. *Id.* at 12. Other recommendations include assigning female officers to interview women alleging forms of gender-based persecution, such as rape and discrimination and training asylum officers about appropriate questioning. *Id.*

²⁷⁹ Refugee Act of 1980 § 311(a)(2), 8 U.S.C. § 1521 (1982).

Haitian populace, Creole, may be a source of discrimination or act as an impediment to meaningful communication. Even President Aristide was made to feel the brunt of language discrimination when the American intelligence community based its reports that he was mentally unstable partly on his use of the "rich imagery" of Creole, a mix of French, African and European languages.²⁸⁰

Similar to discrimination on the basis of language, biases based upon cultural differences create additional barriers for Haitian asylum-seekers. To the average American, Haitian culture is unfathomable. Knowledge of Haitian culture, according to one scholar, comes mostly from published works "based on myths, most of which are, at best, uninformed and plagiaristic and, at worst, mean-spirited and narrow-minded."²⁸¹ Many journalists, travelers and scholars have historically maligned the country, describing it as "backwards, dangerous and savage," and populated by "pawns of superstition" who have "no understanding of the social forces of their own society."²⁸²

The United States' antipathy towards Haitians can be traced to the Haitian Revolution of 1804.²⁸³ The United States responded to the revolution by mythicizing Haiti through sensational journalism, which projected fantasies and insecurities on the recently independent state.²⁸⁴ By depicting Haiti in extremes and in terms of otherness,²⁸⁵ the United

²⁸⁰ See Sciolino, *supra* note 4, at A1 (stating that Aristide's speech, translated from Creole to English, in which he stated that "we have been struggling nonviolently in this way ever since back before the devil was even a corporal . . . ever since back when the ginger root was still fighting the eggplant" contributed to reports of his mental instability).

²⁸¹ Margo Hammond, *Haiti: The Victim of Bad Press*, ST. PETERSBURG TIMES, Aug. 30, 1992, at 1D. See generally ROBERT LAWLESS, HAITI'S BAD PRESS (1992) (discussing the erroneous image Americans have of the Haitian people).

²⁸² Hammond, *supra* note 281, at 1D.

²⁸³ Toussaint L'Ouverture led black Haitians in a thirteen-year war against French dominance. ALFRED N. HUNT, HAITI'S INFLUENCE ON ANTEBELLUM AMERICA 2 (1988).

²⁸⁴ *Id.* at 2-8.

²⁸⁵ This "otherness" is described as stereotyping both cultures in terms of light and dark, clean and unclean, good and evil, mind and body, culture and nature, order and chaos. *Id.* at 3. European views of Asian and African cultures have been characterized by the same terms of otherness. See generally CHRISTOPHER L. MILLER, BLANK DARKNESS: AFRICANIST DISCOURSE IN FRENCH (1985) (writing about the use of stereotypes to keep Africa at a safe distance); EDWARD W. SAID, ORIENTALISM (1979) (same for "the Orient").

States was able to reinforce its own identity. The 1915 U.S. occupation of Haiti presented an opportunity to relive the paternalistic myth of the Southern plantation: the United States could justify its blatant imperialist motives in Haiti by claiming the excuse of "a civilizing mission."²⁸⁶

Sensationalist literature of the time conveyed to the world the idea "that American intervention in Haiti was the only way of curbing [Haiti's] barbarous instincts."²⁸⁷ American commentators presented the exoticism of Haiti by labeling it culturally primitive, backward and savage.²⁸⁸

It is not surprising, therefore, that today the notion of Haiti may bring to mind images of voodoo, savagery and black magic.²⁸⁹ The misinformation and maleficence reached its peak in the early 1980s, when the origination of the AIDS-causing virus was erroneously linked to Haitians.²⁹⁰

Today, Hollywood stereotyping continues to contribute to a frightening and distorted image of the average Haitian. For example, the 1987 film, *The Serpent and the Rainbow*,²⁹¹ depicted a nation of "secret rituals, involving cannibalism, orgies and wild-eyed priests controlling a docile population by threatening to turn them into zombies."²⁹² In the Haiti depicted in this film, "evil clearly has the upper hand."²⁹³ Critics have

²⁸⁶ DASH, *supra* note 258, at 22-23.

²⁸⁷ DASH, *supra* note 258, at 22-23. A school of sensational journalism emerged at this time. *Id.* at 24 (citing WILLIAM D. BOYCE, UNITED STATES DEPENDENCIES 123 (1914)).

²⁸⁸ DASH, *supra* note 258, at 23.

²⁸⁹ Hammond, *supra* note 281, at 1D.

²⁹⁰ See Hammond, *supra* note 281, at 1D; Christine Russell, *Immune Disease Linked to Blood in Transfusion*, WASH. POST, Dec. 10, 1982, at A1; Claudia Wallis, *The Deadly Spread of AIDS: Homosexuals, Haitians and Hemophiliacs Fall Victim*, TIME, Sept. 6, 1982, at 55; see also Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 719 n.259 (1993). Haitians face discrimination because they are believed to be more likely to be HIV-positive. *Id.* In reality, less than one percent of the thousands of Haitians recently seeking asylum were found to carry the virus. *Id.*

²⁹¹ THE SERPENT AND THE RAINBOW (Universal 1987).

²⁹² Hammond, *supra* note 281, at 1D. Wes Craven is a horror picture director most known for his direction of *A Nightmare on Elm Street*. *The Serpent and the Rainbow* was rated R for sex, violence and nudity. Hammond, *supra* note 281, at 1D.

²⁹³ Kevin Thomas, *Good, Evil Clash in "Serpent and Rainbow,"* L.A. TIMES, Feb. 5, 1988, at F4 (movie review).

denounced the research used in making the film, which was billed as part documentary, part supernatural ghost story, and part classic Hollywood adventure tale, comparing its portrayal of the darker side of voodoo as equivalent "to writing a book on the satanic cults of Southern California and presenting it as a study of Christianity."²⁹⁴

In Haiti, voodoo is, in fact, an ancient and legitimate religion derived from African ancestor worship and characterized by propitiatory rites and communication with deities by trance.²⁹⁵ This is not understood or appreciated by ethnocentric Americans who habitually ridicule voodoo and its practitioners.²⁹⁶ Ultimately, sensationalism and stereotyping of Haitian culture makes the Haitian refugee a less desirable candidate in the eyes of an asylum officer.

IV. POTENTIAL SOLUTIONS TO THE HAITIAN "CRISIS"

The United States must begin using consistent criteria to put the principles of the Refugee Act to work, and to provide for equal treatment of all refugees, regardless of race, class, language or culture. Before the negotiated return of President Aristide, the U.S. government had already taken a step in the right direction by suspending the policy of returning Haitians without determining their asylum status, and by announcing that Jamaica would allow American ships to process Haitian refugees in its harbors.²⁹⁷

²⁹⁴ Hammond, *supra* note 281, at 1D.

²⁹⁵ See Ann-Marie O'Connor, *Voodoo Remains Powerful in Haiti*, ATLANTA J. & CONST., May 11, 1992, at A2 (reporting that, while voodoo is most often characterized as a religion, it is also comparable to a culture, "a way of life, like Hinduism in India").

²⁹⁶ Hammond, *supra* note 281, at 1D. American media has called Ronald Reagan a "voodooist" and some White House studies "voodoo science so mad-dog it bays at the moon." *Id.* Former President George Bush coined the phrase "voodoo economics" as a form of ridicule in the 1988 presidential election campaign. See Richard Clark, *Chameleon?*, CHI. TRIB., Dec. 18, 1988, at 2C; Timothy J. McNulty & George Curry, *Dukakis, Bush Maneuver into Debate Position*, CHI. TRIB., Sept. 20, 1988, at 1C.

²⁹⁷ See Howard W. French, *Doubting Sanctions, Aristide Urges U.S. Action on Haiti*, N.Y. TIMES, June 3, 1994, at A3; Jenny Staletoovich, *To Haitians, Coast Guard a Fleeting Hope*, PALM BEACH POST, Aug. 13, 1994, at 1A; see also Charles Aldinger, *U.S. Begins Screening Haitians in Jamaica*, REUTERS WORLD SERV., June 16, 1994, available in LEXIS, News Library, WIRES Files; Ron Howell, *Clinton's Haiti Policy Gets Boost*, NEWSDAY, June 2, 1994, at A21, available in LEXIS, News

The Clinton Administration contends that there is no discriminatory intent in the treatment of Haitian asylum seekers.²⁹⁸ Every change in immigration policy, however, appears to have had a disparate impact upon Haitian asylum seekers. Evidence of this negative treatment, as discussed above, has been shown in *Haitian Refugee Center v. Civiletti*²⁹⁹ and *Jean v. Nelson*,³⁰⁰ in policies to detain rather than parole asylum seekers,³⁰¹ and in the interdiction policy. Principles of fairness dictate that each refugee be treated equally under whatever procedure Congress authorizes.³⁰²

A. Equal Treatment Under the Title VII Model

Principles of fairness and equal treatment embodied in Title VII of the Civil Rights Act of 1964 provide a model for improving U.S. treatment of Haitian refugees and asylum-seekers. Title VII is a comprehensive statute designed to remedy discrimination in the employment arena.³⁰³ The Supreme Court identified the major purpose of Title VII as the

Library, WIRES file.

²⁹⁸ Nancie L. Katz, *Haitian-American Children Stranded by U.S. Bureaucracy*, ST. PETERSBURG TIMES, Sept. 17, 1994, at 10A (reporting that "state department officials in Washington adamantly deny they have been deliberately treating Haitians unfairly").

²⁹⁹ 503 F. Supp. 442 (S.D. Fla. 1980), *aff'd as modified sub nom.* Haitian Refugee Ctr. v. Smith, 676 F.2d 1023 (5th Cir. 1982); *see also* text accompanying notes 202-207.

³⁰⁰ 711 F.2d 1455 (11th Cir. 1983); *see also* text accompanying notes 210-11.

³⁰¹ Exec. Order No. 12,324, 3 C.F.R. § 2 (1981-1983 Comp.).

³⁰² Courts have repeatedly stated that an applicant denied admission into the United States has no due process rights. As summarized by Justice Minton: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). This much-criticized case established that the due process rights of aliens in exclusion proceedings are nearly non-existent.

³⁰³ *See* S. REP. NO. 872, 88th Cong., 2d Sess. 1 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355. The Senate Committee on the Judiciary stated that the purpose of the Civil Rights Act of 1969 was "to achieve a peaceful and voluntary settlement of the persistent problem of racial . . . discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations." *Id.* The House Committee on the Judiciary stated that "[t]he purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment." H.R. REP. NO. 914, 88th Cong., 2d Sess. 9 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

achievement of "equality of employment opportunities and [the removal of] barriers that have operated in the past to favor an identifiable group of white employees over other employees."³⁰⁴

In applying Title VII, courts have distinguished "impact" and "intent" issues.³⁰⁵ Employer conduct giving rise to a disparate impact generally affects many individuals and does not require a showing of intent.³⁰⁶ The plaintiff in an impact case has the initial burden of establishing that a rule or classification has the effect of denying employment opportunities to a protected class based on its national origin, race, religion, age or other factors.³⁰⁷ Impact cases usually involve large numbers of potential plaintiffs and statistical evidence indicating systemic employment discrimination.³⁰⁸ In contrast to behavior that has an unintended impact, some employer conduct shows an intent to treat certain employees less favorably than others because of their group status.³⁰⁹ Intent (or disparate treatment) cases usually involve a single plaintiff who can

³⁰⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); see also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment.") (quoting Senator Humphrey, 110 CONG. REC. 13088 (1964)); *Bowe v. Colgate Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973) (holding that the primary purpose of relief from discrimination is to insure minorities are not continually locked out of previously restricted jobs).

³⁰⁵ See BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1147-96 (1976). "After discriminatory impact is established, the employer carries the burden of establishing that the qualification is justified by objective proof of 'business necessity.'" *Id.* at 1160-61. Plaintiffs bear the initial burden of establishing a prima facie case of illegal disparate treatment in an intent case. *Texas Dep't of Community Aff. v. Burdine*, 450 U.S. 248, 252-53 (1981). Plaintiffs meet that burden by showing that: (1) they belong to a racial minority; (2) they applied and were qualified for a job for which the employer was seeking applicants; (3) they were rejected despite their qualifications; and (4) after their rejection, the position remained open and the employer continued to seek applicants from persons of complainants' qualifications. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

³⁰⁶ See *International Bhd. of Teamsters*, 431 U.S. at 335 n.15.

³⁰⁷ *McDonnell Douglas*, 411 U.S. at 802; see also *Subia v. Colorado & S. Ry.*, 565 F.2d 659 (10th Cir. 1977) (finding that plaintiff proved prima facie case).

³⁰⁸ See, e.g., *Griggs*, 401 U.S. at 424 (comparing percentage of minority to non-minority persons within potential applicant pool who possess qualifications); see also *Roberts v. Gadsden Memorial Hosp.*, 835 F.2d 793 (11th Cir.), *amended on reh'g*, 850 F.2d 1549 (11th Cir. 1988); *Day v. Patapsco & Back Rivers R.R.*, 504 F. Supp. 1301 (D. Md. 1981).

³⁰⁹ See *Burdine*, 450 U.S. at 253-54.

show that the employer intended to discriminate and that the employer's stated reason for an employment-related decision was merely pretextual.³¹⁰

By analogy, the case of the Haitians who were denied even the opportunity to apply for political asylum resembles a disparate treatment case. Many Haitians, on an individual basis, can establish a prima facie case of discrimination in the political asylum process. Because so many people have suffered injury through interdiction, however, and because of the statistics showing the extremely small number of Haitians granted asylum,³¹¹ a Haitian refugee claim closely resembles an impact case of deep-rooted, systemic discrimination.

The success of Title VII has influenced immigration law. Indeed, it resulted in the passage of section 274B of the I.N.A.³¹² With the promulgation of the Immigration Reform and Control Act of 1986 ("I.R.C.A."), Congress sought to control the borders of the United States and stem the tide of undocumented aliens.³¹³ The new law imposed sanctions on employ-

³¹⁰ A presumption of discrimination is created once the plaintiff establishes a prima facie case. *See supra* note 305. As the Supreme Court stated, "[e]stablishment of a prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case." *See Burdine*, 450 U.S. at 254.

Once this presumption is created, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the plaintiff's rejection. *Id.*; *see also* McDonnell Douglas, 411 U.S. at 802. Presenting this reason raises a genuine issue of fact regarding whether the employer discriminated against the plaintiff. *Burdine*, 450 U.S. at 254 (citing *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 (1978)).

If the defendant succeeds in rebutting the presumption of discrimination, the plaintiff must then show by a preponderance of evidence that the proffered reason of the defendant is simply a pretext for intentional discrimination. *Id.* at 256. The plaintiff can meet this burden by showing through either statistical or inferential evidence that the defendant's reason for its discriminatory behavior is a subterfuge for intentional discrimination. *Id.*

³¹¹ *See supra* note 80.

³¹² Both the text of § 274B and congressional intent indicate that the standards developed under Title VII are to be employed in enforcing § 274B. *See* Lucas Guttentag, *Immigration-Related Employment Discrimination: IRCA's Prohibitions, Procedures and Remedies*, 37 FED. B. NEWS & J. 29 (1990).

³¹³ The House Report stated that, "[w]hile there is no doubt that many who enter illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly, and regulated fashion. As a sovereign nation, we must secure our borders." H.R. REP. NO. 682(I),

ers hiring undocumented workers and legalized those workers who were already in the United States by granting amnesty, thereby conscripting each employer to join the war against illegal aliens.³¹⁴ The law also required employers to assist the government in its enforcement by verifying each employee's identity and employment eligibility.³¹⁵ Civil rights groups expressed justifiable concern that employers, on the pretext of avoiding sanctions, would indulge in discriminatory employment practices against individuals of ethnically or racially identifiable groups such as those of African descent with foreign accents, Hispanics, Asians and others.³¹⁶ The anti-discrimination provision of section 274B, entitled Unfair Immigration-Related Employment Practices, prohibits employers from discriminating by refusing to hire any person who appears "foreign,"³¹⁷ but does not duplicate the protections offered under

99th Cong., 2d Sess. 46 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5650.

In an attempt to achieve the goal of securing the border of the United States, the Immigration Reform and Control Act ("I.R.C.A.") made the following employer conduct illegal: (1) knowingly hiring aliens not authorized to work; (2) knowingly continuing to employ an alien who had become unauthorized; and (3) hiring an employee without adhering to the record-keeping requirements of the I.N.A. § 274A, 8 U.S.C. § 1324a (Supp. III 1991).

³¹⁴ The sanction provisions of the I.R.C.A. make it unlawful for an employer to "hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." I.N.A. § 274A(a)(1), 8 U.S.C. § 1324a(1).

The criminal penalties for a pattern or practice of hiring unauthorized aliens include a fine of not more than \$3000 for each unauthorized alien, and/or imprisonment for not more than six months. I.N.A. § 274A(f)(1), 8 U.S.C. § 1324a(f)(1). The employer could also be liable for civil fines for failure to adhere to the inspection and attestation requirements. The fines range from \$100 to \$1000 per violation. I.N.A. § 274A(e)(5), 8 U.S.C. § 1324a(e)(5).

³¹⁵ I.N.A. § 274A(b), 8 U.S.C. § 1324a(b). The employer is required to complete an I.N.S. form attesting that acceptable documents were reviewed and that, to the best of the employer's knowledge, the employee is authorized to work in the United States. The employee is also required to attest that he or she is authorized to work in the United States. 8 U.S.C. § 1324a(b)(1)(A), (1).

³¹⁶ See 132 CONG. REC. H9708-02 (daily ed. Oct. 9, 1986) (statement of Rep. Roybal) ("[W]e are fearful that sanctions will definitely result in discrimination against the Hispanics and the Asians in this Nation"); *Immigration Control and Legalization Amendments Act of 1985: Hearings on HR 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 123 (1985) (statement of Richard Fajardo, Acting Associate Counsel, Mexican American Legal Defense and Education Fund).

³¹⁷ I.N.A. § 274B, 8 U.S.C. § 1324b. Upon signing the I.R.C.A., President Reagan issued a statement that § 274B covered only the intentional "disparate treatment" under Title VII and not "disparate impact." *Immigration Reform and Con-*

Title VII. Title VII covers employers with fifteen or more employees, while section 274B applies to employers with between four and fourteen employees and exempts employers with three or fewer employees.³¹⁸

The worst fears of the bill's sponsors and proponents have been realized. A 1990 General Accounting Office report cited widespread discrimination against "foreign sounding" job applicants as a result of the I.R.C.A.³¹⁹ The report indicated that forty-six percent of employers treated "foreign-sounding" applicants differently, and employers admitted that they discriminated against "foreign-sounding" and "foreign-looking" applicants.³²⁰

This evidence of widespread discrimination against people with foreign accents and people of African descent generally is duplicated in the discrimination Haitians experience in the asylum application process. The low approval rate of Haitian asylum applicants, compared to other similarly situated asylum seekers, also supports the premise that Haitians are being discriminated against in the application process. The Refugee Act sought to reduce discriminatory treatment in this process.³²¹ By adopting Title VII, a model that has been successful in enforcing ideals of equal treatment in the employment arena, the moral concept of fairness in the asylum application process can be transformed into a legally enforceable norm.

Once aliens become refugees under section 207 of the I.N.A., or asylees under section 208 of the I.N.A., they are pro-

trol Act of 1986, 22 WKLY. COMPILATION PRES. DOC. 1534 (1986). Representative Barney Frank (D:Mass.) responded immediately by denouncing President Reagan's interpretation as not supported by the language and structure of § 274B or case law. See Howard Krutz, *Ed Meese's Blind Spot*, WASH. POST, July 19, 1987, at C1; see also *League of United Latin Am. Citizens v. Pasadena Indep. Sch. Dist.*, 662 F. Supp. 443 (S.D. Tex. 1987) ("Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the [House Judiciary] Committee is of the view that [§274B] must do so." (quoting H.R. CONF. REP. No. 99-682(I), 99th Cong., 2d Sess.70, reprinted in 1986 U.S.C.C.A.N. 5649, 5674)). See generally Guttentag, *supra* note 312, at 29; Carlos A. Gonzalez, Note, *Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986*, 41 VAND. L. REV. 1323, 1327 (1988).

³¹⁸ See Guttentag, *supra* note 312, at 29.

³¹⁹ Pub. L. No. 99-603, Title I, § 101(a)(1), 100 Stat. 3360 (1989) (codified as amended at 8 U.S.C. § 1324(a) (1988)).

³²⁰ U.S. GEN. ACCOUNTING OFFICE, PUB. NO. GGD-90-62, EMPLOYER SANCTIONS (1990).

³²¹ See *supra* text accompanying notes 33-35.

tected against discrimination under section 274B.³²² Those in the process of applying for such status, however, enjoy no protection from disparate treatment. The evaluation process to determine whether a refugee is genuinely fleeing persecution will inevitably invite discretion and subjective judgment. Ingrained prejudices and assumptions about race, class, language and culture are likely to affect the evaluation process. Guidelines should be instituted which will improve the likelihood of a fair and unbiased determination of refugee status.³²³

Congress could decide to prohibit discrimination on the basis of race against individuals seeking to enter the United States as asylees. The legislation would provide that individuals who are of African, Hispanic or Asian heritage or are members of an ethnically or racially identifiable minority are protected from discrimination. An individual would then need to show that he or she (1) is within a protected class: an asylum seeker of African, Hispanic or Asian heritage, or a member of an ethnically or racially identifiable minority;³²⁴ (2) applied and met the qualification of asylee, i.e., possessed a well-founded fear of persecution on the basis of one or more of the five categories identified in the I.N.A.;³²⁵ and (3) that his or her application was rejected. At this point, the asylum seeker would have created a *prima facie* case of discrimination.

The burden would then shift to the government to show a legitimate, nondiscriminatory reason for rejecting the asylum seeker. The government may be able to show that the documents proffered by the asylum seeker are not genuine, or that

³²² The Act protects U.S. citizens and certain classes of aliens: legal permanent resident aliens, aliens legalized under the I.R.C.A., refugees and asylees who execute in duplicate a form indicating an intention to become a U.S. citizen and/or initiate the naturalization process within six months after satisfying the residency requirement for citizenship. I.N.A. § 274B(a)3(B)(ii)(I), 8 U.S.C. § 1325b(3) (1988). See generally Guttentag, *supra* note 312, at 31.

³²³ See S. REP. NO. 96-256, 96th Cong., 2d Sess. 16 (1979), reprinted in 1980 U.S.C.C.A.N. 141, 156.

³²⁴ The test that follows is based on the tripartite analysis outlined by the Supreme Court in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). In that case, the plaintiff was suing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1976). The test is easily adaptable, however, to the present context. See *supra* note 310.

³²⁵ I.N.A. § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988). A well-founded fear of persecution must be based on race, religion, nationality, membership in a particular social group, or political opinion. See *supra* note 18 and accompanying text.

the rejection was based on a failure to demonstrate persecution. If the presumption of discrimination can be rebutted, then the asylum seeker would have the burden of showing that the reason proffered by the government is merely pretextual, an attempted shield for its discriminatory behavior.

Federal courts would hear the cases on appeal from either asylum officers or immigration judges, but no monetary awards would be granted if the asylum applicant succeeded in demonstrating discrimination by the government. Instead, the asylee would be granted accelerated permanent residency without having to wait for one of the 10,000 adjustment-of-status slots for asylees.³²⁶ This would encourage the most meritorious claims, deter any asylum officers and immigration judges who act in a discriminatory way, and improve the odds of a fair and impartial hearing for all asylum applicants.³²⁷ For the unsuccessful applicant, the I.N.S. would begin deportation proceedings because the applicant would have no further appeal.

B. Systemic Revisions

The need for systemic revisions that will streamline the process while providing fair adjudications has been identified. A solution, however, has proven elusive.³²⁸ The drafters of the Refugee Act envisioned a system that would process 5000 asylum requests each year.³²⁹ The current system receives 100,000 asylum applications each year and is ill-equipped to handle them.³³⁰ The United States encourages Haitian refu-

³²⁶ Usually asylees become eligible for adjustment of status proceedings after being physically present in the United States for one year from the date of approval of their asylum status. I.N.A. § 209(b), 8 U.S.C. §1159(b).

³²⁷ An alternative under the impact theory would involve a class action by Haitians, similar to the *American Baptist Churches* litigation which would show by statistical analysis the disparate impact of the government's policies towards the Haitians. See *supra* note 246 and accompanying text.

³²⁸ See *supra* note 66 (discussing recent changes in asylum adjudication).

³²⁹ I.N.A. § 209(b), 8 U.S.C. § 1159(b). In 1990, the number of adjustments of status slots for asylees was raised to 10,000 per year. Pub. L. No. 101-649, § 104(a)(1), 104 Stat. 4985, 5082 (1990) (codified as amended at 8 U.S.C. § 1159 (Supp. III 1991)).

³³⁰ 70 Interpreter Releases 581, 583 (1993) (comments of Rep. Bill McCollum (R.-Fla.) in discussing proposed bill HR 1679, the Asylum Reform Act of 1993, sponsored by Rep. Roman L. Mazzoli (D.-Ky.), House Immigration Subcommittee Chairman). The bill is intended to "streamline and simplify the asylum process

gees to apply through the "in-country" Overseas Refugee Program. President Bush initiated the program in an attempt to stem the tide of refugees.³³¹ President Clinton also urged Haitians to use the in-country processing system and announced that only applications received from this source would be processed.³³² Defenders of the interdiction policy also have argued, quite unrealistically, that Haitians could apply for asylum or refugee status through the in-country processing system, rather than through coming to the United States

The in-country program is described by Americans who have visited Haiti as ill-conceived, poorly administered, and gravely flawed.³³³ In some cases, even the act of applying in-

while keeping it fair for legitimate asylum seekers." Rep. Mazzoli urged congressional action in reforming the asylum system, rather than the continued perception that all asylum seekers are opportunists, circumventing the laws, leading to "nativist talk and xenophobia." *Id.* at 584. Rep. Jerrold Nadler (D.-N.Y.), in discussing several bills designed to improve the asylum system—(H.R. 1153) the Immigration Pre-Inspection Act of 1993, sponsored by Rep. Charles E. Schumer (D.-N.Y.); H.R. 1355, the Exclusion and Asylum Reform Amendments of 1993, sponsored by Rep. Bill McCollum, and H.R. 1679, the Asylum Reform Act of 1993, sponsored by Rep. Romano L. Mazzoli (D.-Ky.)—stated that "[o]ne of the proudest traditions of the United States is to serve as a haven for the oppressed" and that Congress should be guided by that principle in ensuring that asylum-seekers "continue to receive due process and fair treatment." *Id.* at 583.

The difficulty in processing the many asylum applications has overwhelmed the asylum officer corps. IGNATIUS, *supra* note 20, at 4. The National Asylum Study Project credited the I.N.S. with creating a new administrative structure, opening seven new asylum offices in April 1991 with a total of 150 asylum officers trained by March 1992. However, the lack of adequate staffing is viewed as a serious problem. *Id.* at 5. Rep. Mazzoli noted a backlog of 250,000 pending asylum cases. 70 Interpreter Releases 581, 583 (1993).

³³¹ See Mike McCurry, State Dep't Briefing, June 22, 1993. In response to criticism regarding the return of Haitians to their persecutors, Mr. McCurry responded that such Haitians have the option of applying for U.S. asylum while in Haiti. *Id.* "[W]e've processed, I think, as many as 16,000 applications, or we have received 16,000 applications and are now processing them, and I think that it's known that avenue is available to those who are returned." *Id.*

³³² See William Gray, Special White House Briefing, July 5, 1994.

³³³ See generally Carol Wolchok, *The Haitian Struggle for Democracy*, HUMAN RIGHTS, Spring 1993, at 18, 21 (describing the program as requiring "extensive paperwork, multiple visits to a prominent office building in downtown Port-au-Prince, and revelation of one's most intimate confidences to strangers." In addition, "[t]he program does not adequately protect the anonymity and confidentiality of applicants, employs local Haitians in sensitive duties, and utilizes inexperienced caseworkers and I.N.S. adjudicators who are unfamiliar with Haiti's political history and human rights conditions." *Id.* at 21. "The process, moreover, can take eight to ten months. As a result, more than 4,000 people have abandoned the process." *Id.*

country can lead to persecution.³³⁴ Americans who have visited Haiti report that arbitrary arrests, disappearances and other acts of persecution have contributed to an environment of fear.³³⁵ Low rates of applicant approvals suggest that the program cannot be called a resounding success, at least not from the refugees' perspective.³³⁶

In contrast, an alternative program called Temporary Protected Status ("T.P.S.") offers innovative relief from deportation for illegal aliens.³³⁷ The program is designed to provide temporary refuge to aliens who are unable to meet the standard for either asylum or withholding of deportation. It provides work authorization for these individuals until the emergency in their home country is alleviated.³³⁸

Under the Immigration Act the Attorney General was given discretion to grant nationals of specified countries temporary refuge in the United States for up to eighteen months.³³⁹ The Attorney General initially designated nationals of Kuwait, Lebanon and Liberia for T.P.S.,³⁴⁰ followed by Somalia,³⁴¹

³³⁴ Amnesty International reports on one asylee, for example, who suffered torture and ill treatment after simply applying for asylum and waiting for an interview. When he was found in possession of a letter citing an interview date, he was arrested, badly beaten and suffered the *kalot marassa*, a method of torture where simultaneous blows are given to both ears. His crime was the drawing of attention to himself by seeking asylum. He was detained for two weeks and, among other methods of torture, he was blindfolded and forced to drink urine. AMNESTY INT'L U.S.A., *supra* note 137, at 4. The persecution of individuals in this manner confirms the inadequacy of the in-country refugee program. In a country like Haiti, where repression is a way of life, requiring asylum-seekers to apply in-country is exposing them to further unnecessary risks.

³³⁵ Ms. Wolchok reports that between 10% and 20% of those repatriated are arrested on the pier by waiting Haitian soldiers. *See* Wolchok, *supra* note 333, at 21.

³³⁶ As of January 1993, statistics indicated that 2300 applicants were rejected, many of whom were genuine refugees. One hundred and sixty-five were found to be refugees and only 61 were brought to the United States. *Id.* at 21.

³³⁷ Immigration Act of 1990, Pub. L. No. 101-649, § 303, 104 Stat. 4978, 5030 (1990) (codified at 8 U.S.C. § 1254a (Supp. II 1990)).

³³⁸ *See generally* 2 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 33.08, at 33-87 (1994).

³³⁹ *See supra* note 33 and accompanying text; *see also* Immigration Act of 1990 § 302(b)(2), 8 U.S.C. § 1254a(b)(2) (Supp. II 1990). The sponsors of this legislation orally agreed not to seek proposals for permanent residence for Temporary Protected Status ("T.P.S.") beneficiaries. *See* Immigration Act § 302(a), 8 U.S.C. § 1254a(h) (Supp. II 1990) (limiting the Senate's ability to consider similar measures); 67 Interpreter Releases 1209, 1212 (1990). *See generally* 2 GORDON & MAILMAN, *supra* note 338, § 33.08, at 33-86.

³⁴⁰ Immigration Act of 1990 § 303 (amending scattered sections of 8 U.S.C.); 68

and an initial mandatory grant was issued to Salvadorans. This legislation was a hard-won victory after ten years of criticism of the executive branch's failure to implement the Refugee Act in a neutral, humanitarian manner, without consideration of political factors.³⁴² Obtaining immediate temporary resident status for all undocumented Salvadorans in the United States was a major accomplishment, relieving the pressure on the administrators and courts who were attempting to process the thousands of asylum claims by Salvadoran nationals.³⁴³

Because T.P.S. is intended to provide refuge only until the hostilities in the beneficiaries' homeland subside, there should be no fear of long-term liabilities for the United States. Beneficiaries would not be subject to deportation during the grant period, although appearance bonds from deportation or exclusion proceedings would not be canceled.³⁴⁴ The beneficiary would receive work authorization, but would not be eligible for state welfare benefits or public assistance.³⁴⁵ A balance between humanitarian ideals and economic realities could be achieved through T.P.S. policies.

Haitians who fled the wrath of the military and para-military forces in Haiti, but who could not show that they were singled out for persecution, would have benefited greatly from this designation. The congressional intent in the passage of T.P.S. was to provide relief in identical circumstances. Failure to designate Haiti for T.P.S. status is further evidence of the lack of regard for Haitian lives. If a crisis such as the one in Haiti should recur in another country, with equally reliable evidence of extensive human rights violations, citizens of that country should be granted T.P.S. until a legitimate, non-oppressive government is restored.³⁴⁶

Interpreter Releases 214 (1991).

³⁴¹ Attorney General Order, No. 1525-96, 56 Fed. Reg. 45804 (Sept. 18, 1991).

³⁴² ALEINIKOFF & MARTIN, *supra* note 76, at 840-53.

³⁴³ Immigration Act of 1990 § 303 (amending scattered sections of 8 U.S.C.). See generally GORDON & MAILMAN, *supra* note 338, § 33.08, at 33-86.

³⁴⁴ I.N.A. § 244A(a)(1), 8 U.S.C. § 1254a(a)(1); I.N.S. Cable to All Field Offices, Mar. 22, 1991, reproduced in 68 Interpreter Releases 470 (1991). See also GORDON & MAILMAN, *supra* note 338, § 33.08[5][a], at 33-91.

³⁴⁵ I.N.A. § 244A(f)(1), (2), 8 U.S.C. § 1254a(f)(1), (2); see also GORDON & MAILMAN, *supra* note 338, § 33.08[5][b], at 33-92.

³⁴⁶ T.P.S. applicants must meet the following requirements to qualify for bene-

In addition to employing the Temporary Protected Status option, the U.S. government could utilize withholding of deportation more extensively as an alternative to the wide-scale denial of asylum claims. The regulations concerning withholding of deportation provide that any application for asylum is automatically considered an application for withholding of deportation or return.³⁴⁷ In the event of a similar crisis in the future, a larger number of withholding of deportation applications should be granted to demonstrate good faith towards Haitian asylum applicants. Such an action would meet the expressed concern of critics who believe that a large number of Haitian applicants face genuine persecution, and would appease those who fear that economic migrants view the asylum process as an expedited means of obtaining permanent U.S. residency. Because withholding of deportation would not confer permanent residency, but instead would serve as a temporary solution until a democratically elected government was restored in Haiti, there would be less incentive for immigrants to pose as refugees. People who are genuinely in fear of losing their lives would welcome a respite from fear to regroup until the political climate improves in their homeland.

Since asylum confers a greater and more permanent benefit to an alien, the standard of proof for granting asylum should be higher than that of withholding of deportation.³⁴⁸ Rather than the "more likely than not" standard presently applied to withholding of deportation claims, the standard should be whether the applicant demonstrates a "credible fear of return," a lower standard employed by the I.N.S. in some contexts.³⁴⁹ Current regulations state that an asylum officer

fits. He or she (1) must be a national of a country designated by the Attorney General for such benefits; (2) must have been continuously physically present in the United States since the effective date of a T.P.S. designation by the Attorney General; (3) must have resided continuously in the United States since a date designated by the Attorney General, 8 C.F.R. § 240.1(2) (stating that the required continuity of residence or of physical presence is not breached by brief, casual and innocent absences from the United States); (4) must register for T.P.S. during a registration period of not less than 180 days; and (5) must be admissible to the United States except for grounds of inadmissibility that are inapplicable or grounds that may be waived. GORDON & MAILMAN, *supra* note 338, § 33.08[5][a], at 33-91.

³⁴⁷ 8 C.F.R. § 208.3(b) (1990).

³⁴⁸ See *supra* note 56 and accompanying text.

³⁴⁹ The "credible fear of return" standard is lower than the "well-founded fear of

who denies asylum—a discretionary determination—but grants withholding must reconsider the denial of asylum as a matter of course.³⁵⁰ The asylum officer is required to consider alternatives, other than asylum, which will permit family reunification in the United States.³⁵¹ Under the proposed plan, where withholding of deportation would be more widely used to provide temporary refuge to political asylees, the denial of asylum would have less serious ramifications for the alien. An opportunity would be provided for re-consideration of the claim, but if refuge is provided in the United States or a third country, the life and freedom of the asylee would be saved, without requiring the United States to absorb all the costs.

CONCLUSION

During periods of stability, even poor people would prefer to remain in their homeland if there remains some hope for a better future.³⁵² The United States must recognize that although many Haitian asylum seekers are poor, their flight may be prompted by a genuine fear of persecution, and not solely by economic motivations.³⁵³ During the brief period when President Aristide was at the helm of Haiti's government and there was hope for the poor in Haiti, the number of people fleeing in

persecution" standard applied in asylum cases. IGNATIUS, *supra* note 20, at 144. This standard was used by the I.N.S. to screen interdicted asylum applicants. Those who met the standard were sent to the United States to pursue their claims. See IGNATIUS, *supra* note 20, at 144 n.13.

³⁵⁰ See 6 C.F.R. § 208.16(c)(4) (1994); BASIC LAW MANUAL, *supra* note 56, at 75.

³⁵¹ BASIC LAW MANUAL, *supra* note 56, at 75.

³⁵² On October 14, 1994, the day before Aristide's return to Haiti, the *New York Times* reported that many Haitians were returning for the event, and some of them intended to remain permanently in Haiti. Ashley Dunn, *Haitians Return With Hopeful Hearts*, N.Y. TIMES, Oct. 14, 1994, at B1. Mr. Casseus, a Brooklyn taxi driver, planned a one-month vacation to witness Aristide's return, visit relatives and investigate a permanent return to Haiti:

Even though he has spent 14 years in the United States, raising two children in Brooklyn, he said being black, Haitian and poor in this country has always made him feel like an outsider.

"Living in the United States is both good and bad," he said. "In Haiti, you can feel more like a human being."

Id. at B3.

³⁵³ CHALLENGE FOR MULTICULTURALISM, *supra* note 126, at 1 (recognizing mixed motivations in the Haitian exodus and writing, "Nor have the Haitian boat people been motivated solely, or even largely, by poverty. In a crisis like Haiti's, repression and poverty go hand in hand.")

boats was reduced to a trickle.³⁵⁴ This is strong evidence that persecution, not economic motivation, was the driving force behind the exodus from Haiti. The restoration of the Aristide government once again has stemmed the tide of refugees.

The solution to the refugee crisis, according to Thorvald Stoltenberg, the former High Commissioner for Refugees, is in strengthening not only the observance of civil and political rights, but the equally important economic, social and cultural rights in the refugee's country of origin.³⁵⁵ As the ancient African proverb instructs us: "Give a man a fish and you have fed him for one day, teach him how to fish and you have fed him for a lifetime." A vital element in the solution to the refugee crisis lies in establishing the economic means and political stability to encourage Haitians to remain at home.³⁵⁶

One of the sad ironies of the Haitian situation is that America denied refuge to Haitians, a people who assisted Americans as they struggled to become an independent nation in 1776.³⁵⁷ There has been a long history of discriminatory treatment of Haitians arriving in the United States.³⁵⁸ In 1980, the Honorable Elizabeth Holtzman, Chair of the House Subcommittee on Immigration, Refugees and International Law, declared that "[r]ace, geography and ideology should play no part in our country's asylum and refugee policies."³⁵⁹ In 1995, this advice has still not been heeded. An end to discriminatory asylum and refugee policies is long overdue.

³⁵⁴ Herbert Buchsbaum, *Operation: Restore Democracy*, SCHOLASTIC UPDATE, Nov. 4, 1994, at 6.

³⁵⁵ Thorvald Stoltenberg, U.N. High Comm'r for Refugees, Refugees and Human Rights, Address Before the 46th Sess. of the U.N. Comm'n on Human Rights (Feb. 22, 1990), in 2 INT'L J. REFUGEE L. 274, 276 (1990).

³⁵⁶ *Id.* at 276 (strengthening observance of "economic, social, and cultural rights is fundamental" to addressing refugee crisis).

³⁵⁷ George P. Clark, *The Role of the Haitian Volunteers at Savannah in 1779*, 41 PHYLON 356 (1980).

³⁵⁸ Ira Kurzban, Testimony During Hearings of HR 4853 Cuban-Haitian Adjustment.

³⁵⁹ See *Cuban Haitian Adjustment 1980: Hearings on H.R. 4853 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980); Helton, *supra* note 100, at 2343.