THE REFUGEE ACT AND THE RULE OF LAW: A LEGISLATIVE PROPOSAL

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[T]oday's refugee movements pose ethical and moral choices that are tragic... *[A] tragic choice is one which brings into conflict the ultimate values by which society defines itself.*[2]

This paper was originally prepared for presentation to a meeting of the Asylum Project of the National Lawyers Guild in Washington, D.C. in 1990. While not reflecting all current trends in asylum law,[3] it has been generally updated for this publication and remains up-to-date in terms of future directions for the law.

Thesis: The Refugee Act of 1980[4] has not achieved its purposes, and it has damaged the rule of law. It should be corrected by legislation that would grant the government express discretion to grant asylum for purely humanitarian reasons.

Introduction: One summer day in 1997 more than the heat was making me sweat. My client Alyosha (not his real name) and I were waiting in Immigration Court for an asylum hearing on the merits. All our expert witnesses and stacks of exhibits could not eliminate the fact that just a few months previously peace and democracy had broken out in Alyosha's homeland, and the immigration judge had commented on this fact at the calendar hearing.

Alyosha had a humanly compelling case. He had literally fled for his life from a Communist dictatorship in 1989, having been brutally terrorized, threatened and beaten by the police for political activism. When he first sought asylum in the United States in the early 1990s, his case should have been almost automatically approved. But he had the misfortune to be represented by a volunteer lawyer with no experience in immigration law who spent less than an hour on the case and hopelessly botched it. By the time I succeeded as replacement counsel in getting the case reopened on the ground of ineffective assistance of counsel, there was no longer an objective risk of persecution.

And yet this was a case where the subjective fear of persecution was off the scale. Alyosha desperately feared being deported, and he had been hospitalized several times for suicide attempts directly related to this fear. Thus, I was sweating mightily in the courtroom, because I did not think there was a realistic chance of success, and yet I was convinced that deportation would be a death sentence for this particular human being.

The judge summoned me to chambers. "What are we doing here, counsel?" he started. "You know as well as I do that I can't grant asylum on these facts!" That was my first time in a judge's chambers as an advocate, and those words are burned in memory.

Facing that intimidating problem, I made a wild leap, arguing that the judge was correct. There was no longer an objective risk of persecution, I agreed, and in fact the judge did not have legal authority to grant asylum! (That was a perilous argument, because clients are bound by the concessions of counsel.) However, I argued persistently, the judge was obligated to

grant asylum, and was going to grant asylum, because he did not have moral authority to impose a death sentence, and on the facts that is what a denial would amount to. I was backed up by a forceful psychiatric opinion, and some precedents regarding past persecution.

We went around like this for 10 or 15 minutes, and finally the judge rolled his eyes, sat back, sighed, and said, "Well, I guess some things are just meant to be." To the amazement of the INS Trial Counsel, he then announced that he had decided to grant asylum, we orchestrated a five-minute hearing for the record, and that was that. Alyosha is now employed, married, and living happily ever after.

The point of the story is that it is outrageous that an immigration judge does not have express legal authority to grant asylum for purely humanitarian reasons like that. Alyosha got lucky. But the vast majority of asylum seekers in his position do not get lucky like that, because they draw the wrong judge, or appear on the wrong day, or do not have the help of a lawyer. The administration of justice should not be like a casino.

The asylum bar and the government have been fighting the wrong battle. Contrary to conventional wisdom in the asylum bar, the enemy is not biased government decisionmakers misapplying the Refugee Act. Contrary to conventional wisdom in the government, the enemy is not biased advocates trying to stretch the Refugee Act to cover economic migrants. The real enemy—of both sides—is the Refugee Act itself.

In few areas of immigration practice is the tension between private lawyers and government officials more intense than it long has been in asylum cases. This tension between the asylum bar and the government harms human beings in two ways: (1) it deprives worthy applicants of asylum and (2) it causes asylum applicants, asylum advocates, government lawyers and decisionmakers, and the general public to lose respect for the law.[5] This loss of respect for the law is harmful to the rule of law, the foundation of American society.

The tension is resolvable. The asylum bar and the government share important goals: protecting people in danger, upholding the law, resolving cases quickly and amicably. These common goals can be realized, if lawyers, the government, and ultimately Congress, can be persuaded that the source of the trouble is not the people on either side of the debate. The problem is the Refugee Act.

The Refugee Act:

- is immoral, because it does not actually protect human beings; it protects an abstract ideal of political freedom.
- is not based on superior international norms; it is based on a legal solution to problems of a specific period in European history and is largely irrelevant to the current world refugee situation.
- has polarized the debate over asylum law, causing harm to human beings and undermining the rule of law.
- is a failure, because it perpetuates the biases it was designed to abolish.

- is a copout, because it lets Congress take credit for noble intentions, passing the hard decisions to the government without giving the government adequate discretion.

- is contrary to American political values, because it does not protect many people who most citizens believe deserve protection.

I. THE PROBLEM

A. Psychological Note

This paper starts with the proposition that the Refugee Act is fundamentally immoral. That is an extreme and unfamiliar position, because the Refugee Act is usually regarded with reverence. Some preliminary remarks about psychological attitudes may clarify this perspective. (The focus is on the asylum bar, although the government also reveres the Refugee Act, from a different perspective with similar results.) It is important to consider this question for two reasons. First, reverence for the Refugee Act is an obstacle to reform, for the simple reason that people will not fix something unless they think it is broken. Second, reform of the Refugee Act requires cooperation among the asylum bar, the government, Congress and the public. Cooperation is only possible if people stop blaming other people for injustice in the U.S. asylum system. That would be easier to achieve if people consider whether injustice can be traced instead to the Refugee Act itself.

The idea that the Refugee Act is immoral is hard to swallow. Why is this so? I think most asylum advocates (myself included) come first to the law with an uncomplicated desire to help endangered human beings. The 1980s presented us with thousands of cases like this: Here is a person from El Salvador named Sophia. She was raped and forced to watch her family being tortured and killed because her uncle was involved in land reform. Her life has been threatened. If she returns, she will live in terror and might be killed. The moral claim on us is so strong, and our faith in our legal institutions is so strong, that we believe this person simply must be protected by the law. But the federal courts held she was not.[6] Facing cases like this, courts often claim their hearts are moved by the hardships faced by asylum applicants, but that their hands are tied by the law.

How can this be? As discussed below, although the Refugee Act came draped with noble purposes,[7] its administration has consistently been tainted by all the biases it was designed to abolish. It is easy to see how asylum advocates, seeing all this and constantly losing heart-wrenching cases, would come to feel that biased decisionmakers are misapplying a good law.

This natural conclusion, however, makes an unwarranted leap. The system is certainly injust and the government is not without sin.[8] However, these facts do not support the premise that the law itself is good.

Why is the Refugee Act generally regarded as a good law? Because it is thought to be the best compromise we have? Because it sometimes achieves just results? Because it is almost the only tool available to asylum advocates, and people love their tools?

If Sophia needs protection, and the Refugee Act seems the only tool to protect her, then it must be a good thing. The psychology behind the belief, of course, may not be very relevant. But I think most asylum advocates do believe the Refugee Act is a basically noble attempt by Congress to help people in need.

International law aspects. Perhaps the feeling the Refugee Act is basically good reflects an underlying belief that the Refugee Act represents an idealized body of international humanitarian law that is superior to the biased U.S. practices it supposedly replaced. Such a belief would be unwarranted, for at least two reasons. First, as developed below, the Refugee Act is not based on transcendent international principles. It is based on a hardheaded legal solution to a specific problem in European history that is largely irrelevant to the current world refugee crisis. Second, to some degree this belief may reflect a prejudice that European or other foreign asylum practices are generally more just than U.S. asylum practice. That is inaccurate. Although the asylum policies of some countries are in some respects more generous than their U.S. counterparts, those of other countries are harsher. Further, although exceeded by some countries on a per capita basis, the U.S. has consistently been more generous in its asylum and refugee policies than any other country, in terms of admissions and financial assistance.

From a jurisprudential perspective, the feeling that the Refugee Act is basically good may derive in part from a subtle confusion between international law and natural law. More precisely perhaps, it may derive from a confusion between international treaty law and customary international law (in particular, *jus cogens* norms, or fundamental human rights).[9] It is natural law (i.e., *jus cogens* norms) that rings in the heart of the advocate who knows that Sophia deserves protection. People assume naturally that *jus cogens* norms are protected by law, and that laws that provide such protection are good. It is thought that such protection must exist on the level of international law. Sophia's best hope for a legal remedy is the Refugee Act, an implementation of international law. Consequently, it seems to me, the Refugee Act acquires the aura of goodness associated with *jus cogens* norms. In fact, of course, the Refugee Act is based on international treaty law, not customary international law.[10] Treaty law, which necessarily reflects elaborate compromises with state interests, deserves less respect than humanitarian custom.

B. The Refugee Act Is Immoral

A fresh, critical look should begin with the fact that the Refugee Act actually does not protect human beings. It protects an abstract ideal of political freedom.[11] That is immoral, because it is immoral to treat human persons as less important than abstract principles.[12]

The term "political." The Refugee Act is also immoral because it obscures the political nature of the decision whether to grant asylum.[13] It is useful to distinguish between two different meanings of the term "political." This distinction is important, because conventional wisdom says that "politics" is a bad thing and thus that the refugee and

asylum system should be purged of "politics." I would argue, however, that the key to reforming the Refugee Act is to make it *more* "political." I believe the Refugee Act over-restricts the government's discretion while trying to make a tidy legal question out of the inherently political decision whether to grant protection. Political *bias* should be removed, but political *decisionmaking* cannot be avoided.

When I say that the decision whether to grant asylum is inescapably political, I am not referring to the discretionary aspect of an asylum determination. Asylum is an intrinsically discretionary remedy. That is, like many applications for relief under the INA, application for asylum is a two-step process. An asylum applicant must pass two legal hurdles. First, the applicant must establish statutory eligibility by showing that he or she meets the refugee definition (that is, fears persecution on account of one of the five protected interests). Second, the applicant must show that he or she warrants asylum in the exercise of the decisionmaker's discretion. The decisionmaker can be an INS asylum officer, an immigration judge, the BIA, or a federal court. The BIA has liberalized its approach to the exercise of discretion in asylum cases. Under *Matter of Pula*, an asylum applicant bears the burden to present evidence showing that the favorable exercise of discretion is warranted in his or her case, but supposedly in the "absence of any adverse factors, however, asylum should be granted in the exercise of discretion."[14] This exercise of discretion is not, and should not, be "political," in the usual way that "political" is used in this context—in other words, it should not be biased by hidden political preferences.

However, the decision whether to grant asylum is ultimately political, in the sense that it reflects a human choice, rather than being predetermined by a legal rule. That general statement requires further clarification, because of possible confusion about distinctions between case-by-case adjudication and group classifications. Whether or not refugee status is determined in an individual adjudication or in connection with a group classification, a political decision is ultimately being made. The point in distinguishing this political choice from the discretion exercised by an individual decisionmaker is that the right to make the choice is owned by the state (in our system, ultimately, by the people generally), rather than by an individual decisionmaker. The people delegate the decision to the decisionmaker, fixing criteria for decision. Thus, the decision ultimately must be made according to a political choice by the people. It would be improper for an individual decisionmaker to exercise that choice on the basis of personal political concerns without express authority.

Anne, Betty & Carol. It seems paradoxical to call the Refugee Act immoral, because obviously it does guarantee protection for people who can meet the international refugee definition.[15] The immorality can be illustrated with a concrete example.

Imagine three asylum applicants from the same foreign country. Anne and her family are about to be tortured and killed by the secret police because they dislike her political opinions (or religion, nationality, social group, or race). Betty and her family are about to suffer starvation and death because

the government stole all the food from their province to finance the country's Olympic basketball team. Carol and her family are about to die because of a five-year drought. Under the Refugee Act, only Anne and her family are eligible for asylum. A good lawyer might be able to make a case for Betty. Carol has no chance. What is being protected? It is not human life that is being protected, but an abstract ideal of freedom. In my view this is an immoral way for a government to discriminate between equally desperate human beings.

If you have to choose between human beings, and you decide to choose in a way that favors one characteristic, why is that immoral? Is not that more moral than a random choice? Perhaps. This is a hard question. Take another example. Suppose three men, Arthur, Bill and Charles, have all proposed to one woman. Arthur is rich, Bill and Charles are not. Is it moral to choose Arthur solely because he is rich? Perhaps. But notice that in this case the operative question changes from "is this the person I love?" to "is he rich?" The characteristic of wealth is treated as more important than the person. In asylum law, the facts always raise this issue: "Does this person have a moral claim to protection?" But the legal issue is: "But where's the persecution?" Or in other words: "Will we be advancing our abstract interest in freedom if we protect this person?" It is profoundly immoral, when something as precious as human life is at stake, for Congress to force government decisionmakers to rest their asylum decisions exclusively on the narrow issue of persecution.

One objection to this argument is that legislation routinely decides who gets benefits or burdens and who does not. That is the nature of legislative decisions, the translation of political choices into legal rights and duties. Asylum law is different, however, because it involves a superordinate claim of entitlement, i.e., preexisting rights. Even if the international refugee definition did not exist, at least as a moral matter, and arguably as a matter of customary international law, a large class of persons has a claim to a right of protection, which claim does not derive from municipal (i.e., domestic) legislation.[16] Thus, the legislative decision to grant protection to some and to deny it to others is not a process of creating rights in those protected; rather it is a process of defeating rights in those denied. This may be compared to legislation (or judicial decisions) that seek to defeat preexisting rights, as in a balancing between competing constitutional rights. The process of making such decisions must be exceedingly careful to avoid arbitrary discrimination.

"Asylum" or "political asylum." For a long time I was a stickler about saying "asylum" instead of "political asylum," because it seemed important to make two things clear: (1) asylum is available not only because of political persecution but also because of persecution based on social group membership, race, nationality, and religion; and (2) asylum is supposed to be not a political grace, but a legal right. But now I think "political asylum" is a more accurate term, for two reasons: (1) it primarily protects politics, not human beings; and (2) the decision whether to grant asylum is an inescapably political decision, not a matter of legal right.

Tragic choices. This paper begins with the observation that refugee policy involves tragic choices. The U.S. will not protect all desperate people, but will protect some. So there must be a way to discriminate between desperate people. The decision whom to protect and whom to ignore is nakedly political. Lawyers are trained to disdain policy choices and concentrate on legal rights. That makes sense in the individual case, but is not helpful when it comes to big problems. Asylum law obscures the underlying political nature of every asylum decision. It is generally thought to be a great advance that the Refugee Act installed a system of case-by-case adjudication that purports to be free of politics. That is a cruel illusion. Congress tried in the Refugee Act to convert the political choice into a legal decision, by deciding the political question once and for all in adopting the international refugee definition.

The international refugee definition is basically immoral, if it is taken (as in U.S. law) as the sole selection criterion for protection. Exactly why is it that we should protect Anne but not Carol? Well, the political reality is that we are only willing to protect one person, and we have three applicants. So we decide to protect Anne and let Betty and Carol die, because that way we kill two birds with one stone. (And I mean really kill.) We help a human being, and we also advance our political interests (in particular, the political interest in opposing persecution, which curtails the flavor of political freedom we value most in the West). This tragic choice must be made, and perhaps this is the only politically realistic way to make it. But let's not pretend we're talking about law and not politics.

The United States is obligated by treaty to protect persons who meet the international refugee definition. This should be regarded, however, as a minimum requirement, not a noble act.

C. The Refugee Act Is Not Based On Superior International Norms

The Refugee Act is not based on superior international norms. It is based on a legal solution to problems of a specific period in European history, the problem of displaced European populations in the wake of World War II. It is largely irrelevant to the current world refugee situation.[17]

D. The Refugee Act Has Undermined The Rule Of Law

The Refugee Act has polarized the debate over asylum law, causing harm to human beings and undermining the rule of law. As noted above, the tension between the asylum bar and the government harms human beings in two ways: (1) it deprives worthy applicants of asylum and (2) it causes asylum applicants, asylum advocates, government lawyers and decisionmakers, and the general public to lose respect for the law. This loss of respect for the law is harmful to the rule of law, the foundation of society.

The rule of law. Like the word "political," the term "the rule of law" is freighted with propaganda and buzzing with opposite meanings. But it really is a fundamental idea. On the one hand, the "rule of law," when used by a writer like Chief Justice Rehnquist, means "law and order," i.e., preservation of government control over persons.[18] But when Justice Black

says "rule of law," he—like many scholars, such as Ken Davis—means "due process," i.e., preservation of freedom from arbitrary government control over persons.[19] Thus, the talismanic phrase expresses both the law of love and the law of power.[20] In the middle of these two polar meanings is the core meaning of the rule of law: respect for the law is the foundation of a just and stable society.[21]

Two examples, from many, of the ways in which U.S. asylum law has undermined the law involve the disparate treatment of favored and disfavored groups, and the legal nonsense perpetuated by the forcing of the need for humanitarian protection into the straitjacket of the Refugee Act.

Disparities in the law. It is notorious that wealthy white European artists and baseball players from Communist countries breeze into the U.S. by "defecting"—a term that does not exist in U.S. immigration statutes[22]—while black Haitians and brown Central Americans, who face genuine dangers to their lives, are scorned as "economic migrants" and treated like criminals, harassed on the high seas by the Haitian Interdiction Program and imprisoned in what must be called concentration camps. Even more onerous are many harsh features of the Illegal Immigration and Immigrant Responsibility Act of 1996.

Legal nonsense in asylum law. Oceans of litigative blood have been shed to prove that the first prong of the well-founded fear standard in the refugee definition means what it means in common speech—according to the Supreme Court, a person has a *well-founded* fear of persecution if a reasonable person in the same circumstances would fear persecution.[23] Considering the implacable administrative hostility and inertia that required the Supreme Court to laboriously state the obvious, the *Cardoza-Fonseca* decision was accurately, but tragically, hailed as a great victory by asylum advocates. Having scaled mountains to reach that pedestrian result, the asylum jurisprudence of the BIA and federal courts has since focused on the meaning of persecution.[24]

E. The Refugee Act Is A Failure

The Refugee Act is a failure (one might even say, a pious fraud), because it perpetuates the biases it was designed to abolish.

For example, from 1965 to 1980, express preference was given within the refugee quota system to aliens from Communist countries, and during those years 95 percent of successful asylum claims came from those countries.[25] The Refugee Act was expressly intended by Congress to remove all such biases from U.S. asylum law.[26] The Refugee Act amended the INA to establish in U.S. law for the first time a statutory asylum program.[27] The Refugee Act was intended by Congress to conform U.S. treatment of asylees and refugees to treaty obligations the U.S. had assumed by acceding in 1968 to the United Nations Protocol Relating to the Status of Refugees.[28] According to the INS, the Refugee Act's incorporation into the Immigration and Nationality Act of the international refugee definition "freed U.S. law from earlier geographic and ideological bias thereby extending the provisions of our law to any person with a well-founded fear of persecution."[29]

From 1980 to 1987, however, the percentage of successful applicants for refugee or asylee status who came from Communist countries remained about the same as before—90.5 percent.[30] In 1988, for example, the INS granted 2,786 of 5,241 asylum applications from Nicaragua (53 percent), but only 110 of 3,932 from El Salvador (2.8 percent).[31]

In more recent years, there have continued to be wide disparities in results in application of the INA's refugee definition.[32]

F. The Refugee Act Is A Copout, Contrary to U.S. Political Values, and Ripe for Revision

The Refugee Act is a copout, because it lets Congress take credit for noble intentions, passing the hard decisions to the government without giving the government adequate discretion. The Refugee Act is contrary to U.S. political values, because it does not protect many people who most citizens believe deserve protection.

II. A PROPOSED SOLUTION

> *The bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations And Religions; whom we shall wellcome to a participation of all our rights and privileges, if by decency and propriety of conduct they appear to merit the enjoyment.*
>
> —George Washington[33]

As the quotation shows, the United States has always offered protection to "the oppressed and persecuted." Notice that President Washington did not just say "persecuted"—he also promised shelter to the "oppressed." The Irish immigrants he was greeting may have been ultimately fleeing tyranny, but the immediate cause of their flight was hunger. In Washington's time, protection was not reserved for the persecuted: it was open to all decent human beings. The criterion was the protection of life. The Refugee Act should be amended to restore this original vision.

The key is to make the Refugee Act more political, not less political.

A. Proposed Legislation

The injustice of U.S. asylum law can be minimized, but it cannot be corrected, by litigation under the Refugee Act. A durable solution could be achieved by supplementing the Refugee Act with legislation expanding the government's discretion to grant protection. This can be done in a way that *will not necessarily increase the number of asylee and refugee admissions*, which is a separate political issue. But it would cure the damage that the Refugee Act has inflicted upon the rule of law.

Legislation should extend the legal *possibility* of protection (not a right to protection) to persons who do not meet the persecution standard. In particular:

A statutory possibility of permanent asylum should be extended to two new categories:

(1) persons with a well-founded fear of serious physical harm, for any reason, whose own government cannot or will not

protect them currently, and is not likely to do so in the future; and

(2) persons of special humanitarian or political concern (including defectors).

Admissions under these categories may be referred to collectively as admissions in "non-persecution refugee status." Non-persecution refugee status would be discretionary and subject to the same (or most of the same) restrictions now imposed on eligibility for asylee or refugee status.

B. Proposed Implementation

For such a proposal to have any chance of success, limits would have to be placed on the numbers to be admitted. The purpose of this proposal is not to increase the number of refugee admissions. That is an independent political issue. The purposes are: (1) to make the Refugee Act more just; (2) to acknowledge U.S. customary international law obligations (e.g., the right of non-return, and developing notions of the principle of *non-refoulement*); and (3) to restore the rule of law.

Here is how to implement this: Have the President and Congress, as part of their consultation process on overseas refugee admissions, determine a separate ceiling for non-persecution refugees (i.e., one number for both classes described above). Let's say the number is 10,000. This is the naked political choice. Assign the task of determining non-persecution refugee status to asylum officers, immigration judges and the BIA, under a scheme like the new asylum system where a claim for protection can be raised before an asylum officer, or before an immigration judge in removal proceedings, or before the BIA on review of the immigration judge's decision. Give the Attorney General statutory authority, as a matter of discretion, to designate particular groups as eligible for one of the categories of non-persecution status. Prohibit judicial review of any aspect of the non-persecution relief system. Consider granting to federal judges the right in habeas corpus proceedings to grant non-persecution refugee status.

Then allocate the numbers among the decisionmakers. For example, assume 100 asylum officers, 100 immigration judges, and the BIA. Give 50 numbers to each asylum officer and each immigration judge. Provide that the BIA gets 50 numbers each year above the ceiling fixed by the President and Congress. Permit the asylum officers and immigration judges to use the first half of their numbers whenever an appropriate case comes within their jurisdiction. Require them, once they have exhausted that half, to stay proceedings until the end of the fiscal year on all subsequent applicants raising a prima facie case of entitlement to non-persecution refugee status. Give those applicants parole status with work authorization during that time.

Require the asylum officers and immigration judges, at the end of the year, to allocate the remaining half of their numbers among the applicants whose cases were stayed. Have the asylum officers and immigration judges who do not allocate all 50 numbers within the year return their numbers to the Chief Immigration Judge. Require the asylum officers and immigration judges who do allocate all 50 numbers

to transmit to the Chief Immigration Judge the A-files of all persons not allocated numbers whose cases were stayed pending allocation.

Require the Chief Immigration Judge, shortly after the end of the year after he or she has received all the unused numbers, to allocate those numbers among the A-files from the cases stayed pending allocation. Permit the BIA to allocate its bonus 50 numbers a year at any time to worthy cases coming within its jurisdiction, without requiring it to allocate any of these numbers. Require the Attorney General to promulgate regulations providing guidelines on how the Chief Immigration Judge should exercise this discretion. Deport everybody who does not make the final cut (subject to the right of non-return and other relief opportunities that might be available). The Attorney General and the BIA, of course, under this system would also retain their current range of discretionary authority to provide additional protection to persons not making the cut.

While contrary to certain traditional U.S. ideals (e.g., the motto "equal justice under law" carved on the Supreme Court building), this idea is consonant with a number of recent immigration schemes, such as the NP–5, OP–1 and DV immigrant visa lotteries. The idea could be implemented at a small cost in money and administrative resources.

The idea has two especially desirable features. First, as a political matter, a mechanism like this should make the adoption of non-persecution status easier to promote politically because it would guarantee an acceptable level of admissions. Second, as a philosophical matter, this mechanism would serve the rule of law, because it would make explicit the political nature of the decision whether to grant protection. Requiring the Chief Immigration Judge at the end of the year to make the final decisions on who are the persons most deserving of protection would make the whole process fairer, notwithstanding the fact that it would necessarily produce some results that would appear arbitrary. The fact is, no matter how the system is constructed, the bottom line is arbitrary, and the system should face this honestly.

It is generally believed that case-by-case adjudications are fairer than group admissions. This is a cruel illusion in a system where the naked political reality is that most deserving persons will not be protected. The system outlined here would strike a balance between case-by-case adjudications and group admissions. It should also have the desirable effect of impelling the government, in a systematic fashion, to humanize the aggregate exercise of discretion.

It would also mean that a person like my client Alyosha, as described above, could come into Immigration Court and make the straightforward argument that, while he no longer could meet the rigid requirements of the Refugee Act, nonetheless he had a situation of special humanitarian concern and a special need for protection. An asylum officer, an immigration judge and the BIA should be able to respond compassionately to such a direct appeal without fearing the risk of compromising his or her fidelity to the law. Moreover, at the end of the year, when an adjudicator finally was compelled to sit down and allocate 25 safe havens among 100 sympathetic human beings, it would go a long way toward forcing the adjudicator away

from the illusion that his or her decision is mandated by law. It would be necessary to face the reality of the tragic decisions involved. This would force attention away from the rules and toward the persons affected. Some hearts would be softened. Some lives would be saved. The Republic would survive.

III. CONCLUSION

Refugee advocates rightly argue that the Refugee Act's administration must be reformed. But administrative reform is not a complete response to the never-ending crisis in U.S. asylum policy, because the Refuge Act itself is a failure. The Refugee Act is inherently contradictory, such that no matter how generously it ever might be interpreted by courts, it necessarily perpetuates the biases it was designed to abolish. The foundations of the Refugee Act should be reexamined and changed.

A solution is achievable. The tragedy of refugee law must be faced squarely—neither litigation in individual cases nor any kind of legislative reform can ever protect more than a small fraction of the world's refugees, but all of them have a moral claim on our protection. Therefore, the legislation proposed here must be founded on the truth that refugee protection is essentially a political problem, not a legal problem. These proposals could be implemented at a small monetary cost. They might not increase the number of human beings protected in fact, but they would increase the number protectable by law. They would conform U.S. asylum law to the realities of U.S. political goals and social values, without sacrificing human rights guaranteed by international law. They would restore the rule of law and restore intellectual honesty to asylum law. Those are profound goals that should be embraced with equal fervor by all sides to the debate, liberal and conservative, Congress and judiciary, public bar and private bar.

As noted above, the asylum bar and the government share important goals: protecting people in danger, upholding the law, and resolving cases quickly and amicably. These common goals can be realized, if lawyers, the government, and ultimately Congress, can be persuaded that the source of the trouble is not the people on either side of the debate. The problem is the Refugee Act. Let's fix it.

FOOTNOTES:

1. Bruce A. Hake (http://ilw.com/hake) is a lawyer in private practice in Silver Spring, Maryland.

2. Teitelbaum, "Tragic Choices in Refugee Policy," in *American Refugee Policy: Ethical & Religious Reflections* 32 (J. Kitagawa ed. 1984). Teitelbaum argues that the world's millions of refugees force the United States to make four tragic choices: (1) the international refugee definition (embodied in Immigration and Nationality Act (INA) § 101(a)(42), 8 USC § 1101(a)(42)) protects only those who flee "persecution," and thus excludes millions of equally desperate people; we must choose a definition; (2) whatever the definition, millions who meet it will be excluded as a matter of political reality; we must choose; (3) resources are limited; we must choose; do we favor the young? the educated? persons fleeing foreign enemies?; (4) as we choose whom to

protect, we must bear the moral hazard that the promise of admission itself stimulates refugee flows; our humanity perversely forces us to be inhumane. The definition of "tragic choice" is taken from G. Calabresi & P. Bobbitt, *Tragic Choices* (1978)). *See also* Conner, "Updating the Golden Rule for the Global Village," in *id.* at 47, 48 (putting the issue this way (adapted): If a man came seeking shelter on a cold night, most people would let him in without question. A whole family seeking shelter would raise some questions. What happens when a whole village knocks?).

3. For instance, the tortured efforts to find alternate forms of relief under the Torture Convention, *see, e.g.*, Morton Sklar, "Implications of the New Implementing Statute and Regulations on Convention Against Torture Protections," 76 *Interpreter Releases* 265 (February 22, 1999), or the new form of relief called "temporary protected status" created by the Immigration Act of 1990, Pub. L. No. 101-649, and now codified as INA § 244, 8 USC § 1254a).

4. Pub. L. No. 96–212, 94 Stat. 103 (adding INA §§ 101(a)(42), 207–209, 8 U.S.C. §§ 1101(a)(42), 1157–59) (Refugee Act, as subsequently amended). This paper focuses on the Refugee Act's asylum provisions, INA §§ 101(a)(42) and 208, and not on overseas admissions procedures, INA § 207.

5. One cause of loss of respect for the law is decisions like *M.A. v. INS*, 899 F.2d 304 (4th Cir. 1990) (en banc), digested in 67 *Interpreter Releases* 440 (Apr. 16, 1990), which outrageously ignore the law for political reasons. It may seem odd to relate this kind of injustice to a "tension between the asylum bar and the government." However, if the Refugee Act, under the pressure of historical circumstances with which it was not designed to cope (i.e., constant mass influxes of refugees), had not created an extreme polarization between asylum advocates and the government, we would not see so many cases like *M.A.*

6. *See Campos-Guardado v. INS*, 809 F.2d 285 (5th Cir. 1985), *cert. denied*, 484 U.S. 826 (1987), reported in 64 *Interpreter Releases* 1142 (Oct. 9, 1987). *See also* Lewis, "Well-Founded Fear: The story of one Salvadoran," *New York Times*, Mar. 13, 1986 (describing this case).

7. Refugee Act § 101(a) ("The 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....").

8. For instance, the government often simply ignores the law as it is. *See, e.g.*, 66 *Interpreter Releases* 716–17 (July 3, 1989) (congressional testimony of Delia Combs, then-INS Ass't Comm'r for Refugees, Asylum and Parole, indicating total ignorance of the basic fact that past persecution is a ground of asylum); *see also Matter of Chen*, 20 I&N Dec. 20 (BIA 1989), digested in 66 *Interpreter Releases* 851 (July 31, 1989), in which the BIA devoted one of its rare precedent decisions to the holding that INA § 208 means what it says on its face when it says that asylum eligibility may be established by showing past persecution; *see also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), digested in 64 *Interpreter Releases* 387

(Mar. 26, 1987), in which the Supreme Court, after years of litigation across the country, held that INA § 101(a)(42)(a) means what it says when it says "well-founded fear," not "clear probability" as interpreted by the BIA. *See generally* Elliot, "Relief From Deportation: Part I," 88-8 *Immigration Briefings* 14–17 (Aug. 1988) (summarizing asylum and withholding law).

9. A *jus cogens* right is a peremptory international norm, such as the right to life, the right not to be tortured, the prohibition against genocide, and the right of *non-refoulement* (non-return to a place of danger) as embodied in the U.S. form of relief called withholding of deportation (now termed withholding of removal). Such peremptory norms are sometimes called rights *erga omnes*. *See generally* Guy Goodwin-Gill, *The Refugee in International Law* 68, 168 (Oxford Univ. Press 2d ed. 1996). For a fascinating account of how Constitutional law in the United States has the same aura of sacred, natural law, see Edward S. Corey, *The 'Higher Law' Background of American Constitutional Law* (Cornell Univ. Press 1955, reprinting a classic article from the 1928 Harvard Law Review).

10. Treaties sometimes reflect a formal expression of custom. For example, the principle of *non-refoulement* exists, and continues to develop, simultaneously as a rule of customary international law (as expressed in state practice and *opinio juris*) and as a rule of treaty law, particularly as embodied in Article 33 of the 1951 Refugee Convention and implemented in former INA § 243(h) (now INA § 241(b)(3)). *See generally* Goodwin-Gill, *supra* n.9, ch. 4. In U.S. asylum law, *non-refoulement* has crystallized in a statutory form that maximizes state sovereignty. Consequently, the "right of non-return" affirmed by the decision in *Matter of Santos*, A29-564-781 (IJ Arlington, Va. Aug. 24, 1990) (Nejelski, IJ), summarized in 67 *Interpreter Releases* 945, 982 (Aug. 31, 1990) (denying applications for asylum and withholding of deportation that were submitted by Salvadoran nationals, but ruling that customary international law required that such aliens be granted safe haven in the United States until the threat to their lives and safety in El Salvador ended) is expressed in terms of independent principles of customary international law, and distinguished from the right of *non-refoulement*, even though conceptually the right of non-return may be regarded as a customary (as opposed to a treaty) form of *non-refoulement*.

11. *Cf.* Goodwin-Gill, *supra* n.9, at 68 ff. (discussing "protected interests," i.e., race, religion, nationality, political opinion, and social group membership, which are the "characteristics of individuals and groups which are considered worthy of special protection" under the international refugee definition).

12. *Cf.* A. Schweitzer, "Civilization and Ethics," Preface to *The Philosophy of Civilization* 79 (C.T. Campion trans. 1949) ("Ethics...are nothing but reverence for life. That is what gives me the fundamental principle of morality, namely, that good consists in maintaining, promoting, and enhancing life...."); John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as*

Makers of the Masks, xi-xii (1976) ("[T]he persons who are involved in legal history, philosophy, and education, are or should be concerned with law not as a set of technical skills which may be put to any use but as a human activity affecting both those acting and those enduring their action. . . . [I]t is necessary to insist that the person precedes analysis . . . . The central problem . . . of the legal enterprise is the relation of love to power. We can often apply force to those we do not see, but we cannot, I think, love them.") (Noonan is now a judge on the U.S. Court of Appeals for the Ninth Circuit).

13. The process of consultations between the President and Congress that determines overseas refugee numbers, under INA §§ 101(a)(42)(B) and 207, 8 USC §§ 1101(a)(42)(B) and 1157, obviously does not obscure the political nature of the decision to grant protection to the same degree as does the asylum process. Both processes, however, by restricting eligibility at the outset to persons who meet the persecution standard, sidestep the tragic political choice that must be made in connection with each decision to grant or deny protection.

14. 19 I&N Dec. 467, 474 (BIA 1987), digested in 64 *Interpreter Releases* 991 (Aug. 24, 1987), amended opinion reported in 65 *Interpreter Releases* 137 (Feb. 8, 1988).

15. Regarding the international refugee definition, see Goodwin-Gill, *supra* n.9, ch. 1. In U.S. law, the definition is as follows: "The term 'refugee' means (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 circumstances as the President after appropriate consultation (as defined in section 207(e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 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." INA § 101(a)(42), 8 USC § 1101(a)(42) [an additional sentence regarding coercive population control measures, added by Section 601(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009, is omitted here].

16. *See* Goodwin-Gill, *supra* n.9, chs. 2 & 9; *cf. id.* at 202 ("[T]he individual still has no right to be granted asylum. The right appertains to states.... The right itself is in the form of a discretionary power. The state has discretion whether to exercise its right,

as to whom it will favour, as to the form and context of the asylum to be granted.").

17. *See* Goodwin-Gill, *supra* n.9, ch.5.

18. *INS v. Delgado*, 104 S. Ct. 1758 at n.5 (1984) (Rehnquist, J., dissenting).

19. *In re Winship*, 397 U.S. 358, 384 (1970) (Black, J., dissenting); cf. Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Univ. of Illinois Press 1971) (see ch. 2, "The Rule of Law and the Non-delegation Doctrine"); Kenneth C. Davis, 2 *Admin. L. Treatise*, ch. 8, "Control of Discretion" (2d ed. 1979).

20. *Cf.* the quote from Judge Noonan, *supra* n. 12.

21. *See, e.g.*, John Rawls, *A Theory of Justice* § 38 (1971).

22. Defectors theoretically must comply with the asylum procedures of the Refugee Act. *See* INS Operations Instructions 212.8 (rescinded June 27, 1997).

23. *Cardoza-Fonseca, supra* n.8.

24. *See, e.g.*, Anker & Blum, "New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in *INS v. Cardoza-Fonseca*," 1 *Int'l J. Refugee L.* 67 (1989), reprinted in 1990 Immigration and Nationality L. Rev. 181.

25. Note, "Political Legitimacy in the Law of Political Asylum," 99 *Harv. L. Rev.* 450, 458 (1985).

26. *Id.*, citing Stepick, "Haitian Boat People: A Study in the Conflicting Forces Shaping Immigration Policy," *Law & Contemp. Probs.*, Spring 1982, at 163, 173.

27. Refugees previously had been admitted not as "refugees" or "asylees," but under the now-defunct rubric of "conditional entrants," or under the "seventh preference," which restricted eligibility to persons fleeing Communist countries or the Middle East.

28. *See Cardoza-Fonseca, supra* n. 12); *INS v. Stevic*, 467 U.S. 407 (1984).

29. INS, *Worldwide Guidelines for Overseas Refugee Processing* 6 (1983).

30. *See* 1987 *INS Statistical Y.B.* 63, Table 38.

31. 66 *Interpreter Releases* 3 (Jan. 2, 1989), citing *New York Times*, Dec. 21, 1988, at A18, col. 1.

32. *See, e.g.*, Karen Musalo, "Matter of R- A-: An Analysis of the Decision and Its Implications," 76 *Interpreter Releases* 1177 (Aug. 9, 1999) (discussing landmark BIA decision, Int. Dec. 3403, in which the Board, in a sharply divided 10-5 decision, refused to grant asylum to a Guatemalan woman who had been severely brutalized by her husband for 10 years, but did not plainly meet the confines of the refugee definition; this is the kind of danger that would be resolved under the proposal urged in this article); Charles Wheeler and Mary McClenehan, "C.L.I.N.I.C. Report #5 on Credible Fear/Expedited Removal,"

3 *Bender's Imm. Bull.* 411 (May 1, 1998); U.S. Comm'n on Immigration Reform, *U.S. Immigration Policy: Restoring Credibility* 162-174 (1994).

33. Letter to "the members of the Volunteer Association and other Inhabitants of the Kingdom of Ireland who have lately arrived in the City of New York" (Dec. 2, 1783), reprinted in 27 *The Writings of George Washington* 254 (J.C. Fitzpatrick ed. 1938) and in *Respectfully Quoted: A Dictionary of Quotations requested from the Congressional Research Service* 169 (S. Platt ed. 1989).

NEWS

CLINTON AUTHORIZES DEFERRED ENFORCED DEPARTURE FOR LIBERIANS

President Clinton announced his approval of deferred enforced departure for Liberians until September 29, 2000 and the Immigration and Naturalization Service followed up by announcing it will defer for one year the deportation or removal of qualified Liberians living in the United States.

Liberians in the United States were granted Temporary Protected Status (TPS) in early 1991 in the middle of Liberia's civil war. The continuing human rights abuses and civil strife after the war ended prompted the U.S. government to extend TPS throughout the 90's. In July, Attorney General Janet Reno announced the termination of TPS for the approximately 10,000 Liberians in the United States effective September 28, 1999. The President decided that for foreign policy reasons, protection from removal should be extended to the Liberians for an additional year.

The procedures for obtaining employment authorization and a "Questions and Answers" section regarding the deferred enforced departure program are available via INS's newly revamped website, <www.usdoj.gov>.

USIA MERGES WITH STATE DEPARTMENT

With little fanfare, the United States Information Agency was abolished on September 30, 1999. Most of its functions were merged into the Department of State on October 1 in accordance with the Foreign Affairs Reform and Restructuring Act of 1998.

According to the Washington Post Online, President Clinton bid farewell to the Agency and its staffers at a party for over 200 USIA veterans and guests in September at the National Press Club. The Post quoted John Reinhardt, USIA Director from 1997 to 1981 as saying, "There is no one in this room who doesn't approach the merger with trepidation. We fear that public diplomacy will be swallowed and destroyed in the State Department, which practices formal diplomacy."

Information regarding the transfer of specific functions can be found at the USIA and State Departments websites, <www.usia.gov> and <www.state.gov>.
