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Refuge in America: What Burden of Proof?, 17 J. Marshall L. Rev. 81 (1984)

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COMMENTS

REFUGE IN AMERICA: WHAT BURDEN OF PROOF?

INTRODUCTION

The Refugee Act of 1980[1] proclaims as its purpose the continuation of this country's long heritage of welcoming the displaced and persecuted.[2] Underlying that admirable proclamation, however, is the recognition that the United States cannot continue to accept unlimited numbers of refugees indis-

1. Pub. L. No. 96-212, 94 Stat. 102 (1976 & Supp. IV 1980) (codified in various sections of 8 U.S.C.). The underlying legislative reports are H.R. REP. No. 608, 96th Cong., 1st Sess. (1979) (accompanying S. 643); H.R.REP. No. 781 (Conference Rep. 1980), *reprinted in* 1980 U.S. CODE & AD. NEWS 160; S.R. No. 590 (Conference Rep. 1980).

2. The preamble of the Act states that its intention includes the "[h]istoric 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. note at § 1521 (1976 & Supp. IV 1980). The legislative history of the Act is replete with demonstrations of humanitarian concern. For example, one witness for the State Department testified, "[w]e should remember that the United States is a land of immigrants, and since the founding of the Republic we have had a special national heritage of concern for the uprooted and persecuted . . . ." *Hearings on H.R. 3056 before the Subcomm. on Immigration, Citizenship and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 16 (1977). Another example is the testimony of the Commissioner of the Immigration and Naturalization Service to the effect that the most important factor to consider is "our national tradition of humanitarian concern. It seems to me that it is on that basis and from that point of our national drive and tradition that we have admitted most of the refugees over the past 20 years." *Id.* at 91. Finally, the words of Congressman Rodino, a strong supporter of the Act, reflect the attitude of many of the legislators involved in its passage. According to him, the Act is

> one of the most important pieces of humanitarian legislation ever enacted by a United State Congress . . . . [It] confirm[ed] what this Government and the American people are all about. . . . By the deep dedication and untiring efforts, the United States once again . . . [has] demonstrated its concern for the homeless, the defenseless, and the persecuted peoples who do fall victim to tyrannical and oppressive governmental regimes.

126 CONG. REC. 1519 (1980). *See generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

criminately.[3] For a nation of immigrants, the selection of those who will be granted the right to enter the country and to remain is a persistent problem.

According to current estimates, at least fourteen million refugees exist in the world.[4] Even if the United States accepted every one of them,[5] world events could always create more. Accordingly, the Refugee Act of 1980 represents an attempt to provide a permanent method for selecting and admitting refugees to this country.[6]

Prior to the 1980 Act, aliens had the burden of proving that they were entitled to refugee status;[7] that burden has not been

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3. *See* Anker & Posner, *supra* note 2, at 11. Some have said that the proposition of a national concern for refugees is specious. According to one commentator, "[a]n ambivalent policy toward refugees emerges from any recounting of this recent history . . . ." Evans, *The Political Refugee in U.S. Immigration Law and Practice*, 3 INT'L LAW 204, 249 (1969). It has also been observed that

> [t]he history of immigration laws in the United States is a tale of accommodation between the humanitarian goal of accepting into this country those immigrants who seek to build a new life here and a variety of reasons for restricting immigration. In retrospect, one cannot be proud of all the measures taken by Congress in the past . . . .

Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442, 452-53 (S.D. Fla. 1980).

If no other argument can be made, the admission of refugees is certainly costly; total refugee costs for 1981 were estimated to be $1,687,300,000. *Estimated Costs of Refugee Assistance in Fiscal Year 1981*, 5 REFUGEES & HUMAN RIGHTS, NEWSLETTER 22, 24 (1981). *See generally* Elgass, *Federal Funding of United States Refugee Resettlement Before and After the Refugee Act of 1980*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 179 (1982).

For the purposes of this introduction only, the term "refugee" will be used in a generic sense. *See infra* notes 12-19 and accompanying text.

4. Gross, *Open Up America!*, 10:2 HUMAN RIGHTS 26 (1982).

5. It is estimated that refugee admission from 1948 through 1979 exceeded 1.7 million. Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 620 (1981).

6. According to the preamble: "[t]he objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted." Refugee Act of 1980 § 101(b), 8 U.S.C. § 1521 note (1976 & Supp. IV 1980).

7. *See generally* 1 C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 2.24Ae (1981). The Constitution gives Congress the exclusive authority to formulate immigration policy. U.S. CONST. art. I, § 8, cl. 3. Consider the discussion *infra* 29-31 regarding the possible conflict between the legislative and the executive branches with regard to immigration. Congress may decide which aliens shall be allowed to enter and what procedure will be used to determine their admissibility. Nonresident aliens have no absolute right to enter the United States as nonimmigrants or otherwise. The admission of aliens to the United States is a privilege granted by the sovereign government and may be granted only upon the terms as that government shall provide. *See* Kleindienst v. Mandel, 409 U.S. 753 (1972); Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Knauff v. Shaughnessy, 338 U.S. 537 (1950); Louis v. Nelson, 544 F.

changed.[8] The 1980 Act, however, has failed to make clear what degree of proof is required in order to establish eligibility.[9] Con-

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Sup. 973 (S.D. Fla. 1982); 8 U.S.C. § 1361 (1976). There is probably no area of law in which Congress has greater freedom from judicial review. *E.g.*, Fiallo v. Bell, 430 U.S. 787 (1977); Ludecke v. Watkins, 335 U.S. 160 (1948); Nishimura Ekiu v. U.S., 142 U.S. 651 (1892). For example, Congress can legitimately make distinctions among and against aliens that would be unacceptable if applied to citizens. *E.g.* Mathews v. Diaz, 426 U.S. 67 (1976); Galvan v. Press, 347 U.S. 522 (1954). Nevertheless, some limits do exist. In the enforcement of its immigration policies, the government must respect the procedural safeguards of due process. *E.g.* Mathews v. Diaz, 426 U.S. 67 (1976); Galvan v. Press, 347 U.S. 522 (1954); Wong Yan Sung v. McGrath, 339 U.S. 33 (1950).

Congress has charged the Attorney General with the responsibility for the administration and enforcement of immigration policies. 8 U.S.C. § 1103 (1976). The Attorney General acts through the Immigration and Naturalization Service (INS). 8 U.S.C. §§ 1103, 1551 (1976). *See also* 8 C.F.R. § 2.1 (1983). INS is managed by a Commissioner. 8 U.S.C. §§ 1103, 1552 (1976). *See generally* 1 GORDON & ROSENFIELD, *supra*, at § 2.24A(f). The Commissioner has delegated his authority to the district directors of the various INS offices. 8 C.F.R. § 103.1 (1983). The authority of INS is limited by both the general restrictions of the Constitution and statutes passed by Congress. Courts are permitted to review INS actions for both misinterpretation of the law and misapplication. NLRB v. Brown, 380 U.S. 278, 291-92 (1965) (general concept of review to assure administrative agency's decision complies with statutory mandate or with policy); Tejeda v. INS, 346 F.2d 389, 392 (9th Cir. 1965) (court review insures against decisions based on inadequate findings, findings contrary to law, or findings reached without regard to proper procedure); Rongetti v. Meelly, 27 F.2d 281, 284 (7th Cir. 1953) (stating classic approach for leaving stand administrative determinations "unless, upon the record, the proceedings were manifestly unfair, or substantial evidence to support the administrative finding is lacking, or error of law has been committed, or the evidence reflects a manifest abuse of discretion"). *See* 2 GORDON & ROSENFIELD, *supra*, at §§ 8.12(a), 8.17(b). In addition, INS must adhere to its own regulations. United States v. Wixon, 418 U.S. 683 (1974); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954). Where granted the authority to act by discretion, INS must not exercise its discretion arbitrarily or capriciously. Henry v. INS, 552 F.2d 130 (5th Cir. 1977). *See generally* 2 GORDON & ROSENFIELD, *supra* at § 8.15(c). *See*, Fleurinor v. INS, 585 F.2d 129 (5th Cir. 1978); Martineau v. INS, 556 F.2d 306 (5th Cir. 1977); Henry v. INS, 552 F.2d 130 (5th Cir. 1977); Daniel v. INS, 528 F.2d 1278 (5th Cir. 1976); Paul v. INS, 521 F.2d 194 (5th Cir. 1975); Shubash v. INS, 450 F.2d 345 (9th Cir. 1971).

8. 8 C.F.R. § 208.5 (1983); 8 C.F.R. § 242.17(c) (1983).

9. Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), *cert. granted sub nom.*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983) (no "bright line" drawn in the legislative history). *See generally* Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 107 (1981).

The definition of "burden of proof" contains two elements: the requirement to prove a fact exists; and the obligation to establish the existence of that fact to a requisite degree of belief in the mind of the trier of fact. BLACK'S LAW DICTIONARY 178 (rev. 5th ed. 1979). In litigation, some allowance must be made for possible error in the fact-finding process. Speiser v. Randall, 357 U.S. 513, 525 (1958). One method is to adjust the burden of proof to the likelihood of error and to the interests at stake. The Supreme Court has recognized this approach on a number of occasions. For example, Justice Harlan once wrote that the function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a partic-

sequently, since the passage of the Act, the determination of the degree of proof required by an alien seeking refuge in the United States has presented a significant dilemma.[10]

This comment begins with a brief survey of refugee law in the United States which identifies and defines the distinct categories of aliens seeking refugee status. The comment then proceeds to discuss three fundamental issues. First, was the same degree of proof applied to *all* aliens prior to enactment of the Refugee Act of 1980? Second, did Congress intend the Act to require the same degree of proof of all aliens, and if so, what standard should be used? Finally, have different standards continued to be used since the passage of the Act? The comment concludes with a proposal for resolving the apparent con-

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ular type of adjudication." *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). In a more recent case, Chief Justice Burger similarly observed that "[t]he standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision. . . . [and that] we must be mindful that the function of legal process is to minimize the risk of erroneous decisions." Addington v. Texas, 441 U.S. 418, 423-25 (1979).

Because the consequences of a wrong decision in refugee matters may sometimes be as serious as an erroneous decision in a capital punishment case, it is important that the burden of proof placed upon the applicant be equitably distributed and administered. *See generally* Kurzban, *supra*, at 108-113 (burden of proof is not equitably distributed between government and alien in these cases). INS is required to request the views of the Department of State before making a decision on these requests, unless the request is clearly meritorious or clearly frivolous. 8 C.F.R. § 208.7 (1983). The State Department reports are frequently relied upon by INS in making the final decision and this policy has been endorsed by the courts. *E.g.*, Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976); Hosseinmardi v. INS, 405 F.2d 25 (9th Cir. 1968), *rehearing denied*, 405 F.2d 28 (9th Cir. 1969); Asghari v. INS, 396 F.2d 391 (9th Cir. 1968); Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955). It has been contended, however, that the State Department reports are not always reliable because

> [s]uch letters from the State Department do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations with nations through the world.

Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968). The above problem makes it all the more imperative that the burden of proof placed on the alien be equitable.

10. The opposing views are aptly illustrated by the decisions of two key cases. *See* Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982); Stevic v. Sava, 678 F.2d 401 (2d Cir. 1982), *cert. granted sub nom.*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983). For a discussion of the *Stevic* case, see *infra* notes 138-43 and accompanying text. For a discussion of *Rejaie*, see *infra* notes 152-60 and accompanying text. It has been contended that by promulgating regulations which offer only minimal guidelines, INS in effect decides the outcome of these requests in any way it wants. Comment, *Due Process Rights for Excludable Aliens under United States Immigration Law and the United Nations Protocol Relating to the Status of Refugees—Haitian Aliens, A Case in Point*, 10 N.Y.U. L.J. INT'L L. & POL. 203 (1977). *See also infra* note 108 and accompanying text.

flict surrounding the appropriate burden of proof to be applied in refugee cases.

CLASSIFICATION OF ALIENS SEEKING REFUGE

A common definition of a refugee is "one who flees for refuge or safety, especially to a foreign country."[11] The standard definition of asylum in international law is a "temporary refuge granted political offenders."[12] Consequently, the normal connotation of asylum would include every harborage of a refugee.[13] The Act, however, reserves the term "asylum" for aliens requesting sanctuary either at a port of entry or while physically present in the United States.[14] The specific label of "refugee" is only applied to aliens already granted that status prior to entry.[15] A third category, "withholding of deportation," tends to overlap with the asylum provision. "Withholding of deportation" refers to an alien who requests that his deportation be withheld on the grounds that it would result in a threat to his life or freedom.[16] The relief available under the "withholding" category is distinct from that offered by an actual grant of asylum,[17] but they are closely related because the same burden of proof has been applied to both forms of relief.[18] This comment will maintain the distinction among the various groups by limiting the use of its terms as defined above.

Refugees

Originally, the immigration laws of the United States made no specific provision for the admission of refugees.[19] The refugees who did obtain entry usually came as immigrants under other provisions within the immigration laws.[20] Beginning in the late nineteenth century, Congress enacted various laws which resulted in restricted admission of aliens in general, and

11. THE AMERICAN COLLEGE DICTIONARY 1018 (1962).
12. *Id.* at 77.
13. *See* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Af.
14. 8 U.S.C. § 1158(a) (1976 & Supp. IV 1980).
15. 8 U.S.C. § 1101(a)(42)(A) (1976 & Supp. IV 1980).
16. 8 U.S.C. § 1253(h)(1) (1976 & Supp. IV 1980).
17. *See infra* note 67 and accompanying text.
18. *See infra* note 82 and accompanying text.
19. Soewapadji v. Wixon, 157 F.2d 289 (9th Cir. 1946), *cert. denied*, 329 U.S. 792. *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa; Evans, *supra* note 3, at 204; Note, *A Comparative Overview of the Vietnamese and Cuban Refugee Crises: Did the Refugee Act of 1980 Change Anything?*, 6 SUFFOLK TRANS. L.J. 25 (1982) [hereinafter cited as Note, *Crises*].
20. 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa. *See also* Evans, *supra* note 3, at 205.

refugees in particular.[21] A change in the nation's attitude toward refugees resulted from its participation in World War II.[22] In the post-war period, the United States was actively involved in the rehabilitation and resettlement of refugees.[23] The post-war involvement, however, was primarily on an *ad hoc* basis, consisting of a series of responses to temporary crises.[24]

The first permanent statutory basis for the admission of refugees was established by the 1965 amendments to the Immigration and Nationality Act.[25] Refugees admitted pursuant to this legislation were commonly referred to as "conditional entrant refugees" or "seventh preference immigrants."[26] For a variety of

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21. For an overview of legislation in this area, see TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES, app. II (1982). The impact of these restrictions was most obvious in the period before World War II when thousands of refugees fleeing Nazi oppressions were not permitted to enter the United States. 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa.

22. 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa.

23. For a comprehensive review of U.S. participation in the resettlement of refugees, see H.R. REP. No. 1066, 87th Cong., 1st Sess. (1970). *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa; Evans, *supra* note 3, at 211. Note, *Crises*, *supra* note 19, at 25-31.

24. It has been said that "[i]n good measure, our country's humanitarian tradition of extending a welcome to the world's homeless has been accomplished in spite of, not because of, our laws relating to refugees." *Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees and Int'l Law of the House Comm. of the Judiciary*, 96th Cong., 1st Sess. (1979) Statement of Congresswoman Elizabeth Holtzman [hereinafter cited as *Hearings on H.R. 2816*]. *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa; Anker & Posner, *supra* note 2, at 10-12; Note, *The Right of Asylum under United States Immigration Law*, 33 U. FLA. L. REV. 539, 541 (1981) [hereinafter cited as Note, *Right of Asylum*]. Congress passed the Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, which provided for the admission of 400,000 refugees. This act expired in 1951. *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa; Anker & Posner, *supra* note 2, at 13; Note, *Right of Asylum*, *supra*, at 541. This was followed by the Refugee Relief Act of 1953, Pub. L. No. 83-243, 67 Stat. 400, which permitted the entry of nearly 300,00 more refugees. This act expired in 1956. *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa; Anker & Posner, *supra* note 2, at 14; Note, *Right of Asylum*, *supra* at 541. The Fair Share Law, Pub. L. No. 86-648, 74 Stat. 504 (1960), was passed by Congress to authorize the Attorney General to admit "a fair share" of those refugees remaining in the camps in Europe. *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa; Anker & Posner, *supra* note 2, at 15. In addition, Congress passed the Refugee-Escapee Act, which authorized the admission of victims of racial, religious, or political persecution fleeing from communist or communist-dominated countries or a country in the general area of the Middle East. Act of Sept. 11, 1957, Pub. L. No. 85-316, 71 Stat. 639. *See generally*, Anker & Posner, *supra* note 2, at 17.

25. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 (repealed 1980).

26. To qualify as a conditional entrant refugee, the alien had to establish the following: (1) departure from a communist dominated country or from a country within the general area of the Middle East; (2) the departure constituted "flight"; (3) such flight was caused by persecution or fear of persecution on account of race, religion, or political opinion; and (4) an inability or unwillingness to return. *Id.* *See generally*, Anker & Posner, *supra*

reasons, these provisions were inadequate from inception.[27] In addition to geographic and ideological limitations on admission qualifications, the provisions were not sufficiently flexible. Emergency situations involving large numbers of refugees created problems because of the numerical restrictions. Refugees in the western hemisphere simply were not covered.[28] These problems were frequently resolved through the President's use of the parole power contained within the provisions of the Immigration and Nationality Act.[29] The use of the parole power[30] to

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note 2, at 17-18; Note, *Right of Asylum*, *supra* note 4, at 543. While conditional entrants were not admitted as immigrants, they were eligible for permanent residence after two years physical presence in the United States. Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 91 (repealed 1980). *See generally* Anker & Posner, *supra* note 2, at 18.

27. Anker & Posner, *supra* note 2, at 19.

28. 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Aa; Anker & Posner, *supra* note 2, at 18.

29. The parole power, in pertinent part, states

> [t]he Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

8 U.S.C. § 1182(d)(5)(A) (1976 & Supp. V 1981).

This statute was amended in 1980 to include a limitation on the use of parole. The statute now further provides that

> [t]he Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee. . . .

Id. § 1182(d)(5)(B). This provision was intended to resolve the conflict between the executive and the legislative branches over basic immigration policy. *See infra* notes 30-31 and accompanying text. Paroled aliens were not considered immigrants. Although they were permitted to remain in the United States and work, special legislation was required to grant them resident status. *E.g.*, Hungarian Refugees Act of July 25, 1958, Pub. L. 85-559, 72 Stat. 419; Cuban Refugees Act of November 2, 1966, Pub. L. 89-732, 79 Stat. 919; Indochina Refugees Act of October 28, 1977; Pub. L. 95-145, 91 Stat. 1223 (Title I). It was asserted that Congress, by passing these acts, acquiesced in the President's use of the parole power. *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.54; Anker & Posner, *supra* note 2, at 18-19; Note, *Refugees Under United States Immigration Law*, 24 CLEVELAND STATE L. REV. 528 (1975); Comment, *Refugee-Parolee: The Dilemma of the Indochinese Refugee*, 13 SAN DIEGO L. REV. 175 (1975).

30. Parole programs have been used for a variety of mass refugee groups, including Hungarians, Czechoslovakians, Poles, Ugandan-Asians, Chileans, Chinese refugees from Hong Kong, Cubans, and the Indo-chinese. Anker & Posner, *supra* note 2, at 15-22.

admit large numbers of refugees outside the statutory scheme resulted in frequent conflicts between the President and Congress.[31]

The Refugee Act of 1980 was intended, in part, to end this conflict by its comprehensive treatment of the refugee problem.[32] The Act established a permanent method for the admission and absorption of refugees.[33] Major changes have been made by the Act. The annual allotment of numbers under the Act dramatically increased the number of admissions which were permitted under the now abolished 1965 amendments.[34] Geographic and ideological requirements were eliminated.[35] Moreover, the use of the parole power[36] to admit groups of refugees was also restricted. The most significant reform produced by the Act, however, was the creation, for the first time, of a statutory definition of "refugee." This definition explicitly and intentionally adopted the international definition used in the 1951 Convention Relating to the Status of Refugees.[37] Basically, the term refugee now refers to

> 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

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31. Congress originally intended the use of the parole power to be limited to emergent, individual and isolated situations. Parole developed, however, into an *ad hoc* program of refugee admission at the discretion of the President, acting through the Attorney General. Without guidelines for consultation or predefined eligibility criteria, admission of refugee groups through the parole power became a matter of political or foreign policy, rather than individual determination. Anker & Posner, *supra* note 2, at 18-19. *See also* Note, *Crises*, *supra* note 19, at 34.

32. Anker & Posner, *supra* note 2, at 12 (the Act as resolution of executive and legislative conflict over right to determine immigration policy).

33. 8 U.S.C. § 1521 note (1976 & Supp. IV 1980). Although such refugees are still not admitted as immigrants, they are allowed to acquire permanent residence status after one year of physical presence in the United States. 8 U.S.C. § 1159(a)(1) (1976 & Supp. V 1981). *See also* 8 C.F.R. § 209.1 (1983).

34. Under prior law, only 17,400 conditional entrant refugees were permitted to enter annually. 8 U.S.C. § 1153(a)(7) (repealed 1980). Now the law provides for admission of up to 50,000 refugees each year. 8 U.S.C. § 1157(a)(1) (1976 & Supp. V 1981).

35. The definition of "refugee" is no longer limited by any geographic or ideological requirements. *See supra* notes 26-28 and accompanying text.

36. *See supra* note 29 and accompanying text.

37. The Conference Reports emphasized that the purpose was to create a nondiscriminatory definition of refugee which conformed to the United Nations definition. H.R. REP. NO. 781, 96th Cong., 2nd Sess. 19 (1980); S. REP. NO. 590, 96th Cong., 2d Sess. 19 (1980). For a discussion of the United Nations definition of refugee and the 1951 Convention Relating to the status of Refugees, see *infra* note 95 and accompanying text.

political opinion.[38]

Asylum

The Refugee Act also resulted in changes for "asylum" applicants.[39] Prior to the Act, a nonimmigrant alien physically present in the United States who satisfied the eligibility requirements of conditional entrant refugees[40] could apply for classification as a "refugee" after a period of two years.[41] An alien could also apply for "asylum" under an informal procedure which had developed in the absence of direct statutory authority.[42] This procedure implemented rights already existing in immigration regulations and under the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).[43] The application for "asylum" could be made only to a district director of the Immigration and Naturalization Service.[44] The district director's decision, which was discetionary, was final.[45]

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38. 8 U.S.C. § 1101(a)(42)(A) (1976 & Supp. V 1981) (emphasis added). The statute also states that

> in such special circumstances as the President after appropriate consultation . . . 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*.

Id. § 1101(a)(42)(B) (emphasis added). The statute further identifies groups which are excluded from consideration as refugees. A refugee could not be "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." *Id.*

39. 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.3i.

40. *See supra* note 26.

41. 8 U.S.C. § 1153(a)(7) (repealed 1980).

42. This procedure has been codified at 8 U.S.C. § 1158(a) (1976 & Supp. V 1981). The procedure was originally initiated because of the Kudirka affair. A Soviet sailor jumped from his ship onto a U.S. ship while both were in U.S. territorial waters. Without any provision for presenting his asylum request, the sailor was returned to the Soviet vessel. *See* Evans, *supra* note 3.

43. Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583 (D.N.J. 1975). The courts rejected arguments that asylum applicants were entitled to full constitutional protections. *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Af. Essentially the Protocol is an extension of a United Nations agreement on the treatment of refugees after World War II. For a full discussion of the 1967 Protocol, *see infra* note 95.

44. Matter of Chumpitazi, 16 I. & N. Dec. 629, 631-32 (1978). The current version of this regulation is at 8 C.F.R. § 208.1 (1983).

45. The current version is at 8 C.F.R. § 208.8(a) and (c) (1983). While there was no appeal from the district director's decision, applicants denied asylum were permitted to request the withholding of a deportation order if they alleged potential persecution in the country to which they were ordered deported. *See infra* notes 69-70 and accompanying text.

The Act, for the first time, grants statutory approval to this informal procedure.[46] The most significant feature of the new provision is that it makes the qualifications for obtaining asylum co-extensive with the qualifications for obtaining refugee status because both are based on the same definition of refugee.[47] In pertinent part, the Act states that

> [t]he 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 section 1101(a)(42)(A) of this title.*[48]

Withholding of Deportation

A provision frequently confused with "asylum" is one which permits an order of deportation to be withheld.[49] The object of a deportation hearing is the removal of an alien deemed to be undesirable.[50] Deportation is an administrative proceeding[51] and is not considered punishment for a crime.[52] A deportation order may, nevertheless, be "a drastic measure and at times the equivalent of banishment or exile,"[53] depriving a man of "all that makes life worth living."[54]

The power to withhold deportation first appeared in the immigration laws as a prohibition on the deportation of an alien to any country in which the alien would be subjected to physical persecution.[55] The provision was continued intact in the Internal Security Act of 1950.[56] Although physical persecution was not defined, subsequent practice usually limited it to incarcera-

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46. 8 U.S.C. § 1158(a) (1976 & Supp. V 1981). *See generally* 1 GORDON & ROSENFIELD, *supra* note 7 at § 2.24Af.

47. *See supra* note 38 and accompanying text.

48. 8 U.S.C. § 1158(a) (1976 & Supp. V 1981) (emphasis added).

49. 8 C.F.R. § 208.9 (1983). *See infra* note 67 and accompanying text.

50. There are nineteen general provisions by which an alien may become deportable. *See* 8 U.S.C. § 1251(a) (1976 & Supp. IV 1980).

51. The deportation procedure is described in 8 U.S.C. § 1252 (1976). The process begins when an alien is issued an order to show cause why he should not be deported. Once an order to show cause has been issued, an alien is not eligible to submit his request for asylum to the district director. 8 C.F.R. § 208.3 (1983). *See infra* note 67 and accompanying text. The subject of deportation is given extensive treatment in 1A GORDON & ROSENFIELD, *supra* note 7, at § 4.

52. Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

53. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948), *citing*, Delgadillo v. Carmichael, 332 U.S. 388 (1947).

54. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

55. Act of Feb. 5, 1917, Pub. L. 64-301, 39 Stat. 874 § 20(a).

56. Pub. L. 81-831, 64 Stat. 987 § 20(a) (repealed 1952).

tion, corporal punishment, torture, or death based upon one's race, religion, or political opinion.[57] In 1965, the phrase "persecution on account of race, religion, or political opinion" was substituted for the requirement of physical persecution.[58] The recognition that the "techniques of persecution are not limited to bodily violence alone"[59] implied an ameliorative intent behind the amendment, but the extent of the liberalization was never clear.[60] Another modification of the provision[61] underscored the discretionary nature of the power to withhold deportation.[62] This exercise of discretionary authority had been found to be a constitutional delegation of legislative power.[63]

The Refugee Act has eliminated the discretionary nature of the decision to withhold deportation. The relevant section now states that "[t]he Attorney General *shall not deport or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[64] Accordingly, the exercise of the power to withhold deportation is now mandatory when the Attorney General determines that the alien falls within one of the designated categories.[65] The withholding provision, like the definition of "refugee," tracks the language of the Protocol.[66] A request for asylum made during a

57. Blazina v. Bouchard, 286 F.2d 507, 511 (3d Cir.), *cert. denied*, 366 U.S. 950 (1961). *See generally* Frank, *Effect of the 1967 United Nations Protocol on the Status of Refugees in the United States*, 11 INT'L LAW. 291, 293 (1977).

58. 8 U.S.C. § 1253(h) (1976) (current version at 8 U.S.C. § 1253(h) (1976 & Supp. V 1981)).

59. H.R. REP. NO. 745, 89th Cong., 1st Sess. 22 (1965).

60. 1A GORDON & ROSENFIELD, *supra* note 7, at § 5.16b. *See also* Frank, *supra* note 57, at 293.

61. 8 U.S.C. § 1253 (1952) (current version at 8 U.S.C. § 1253 (1976 & Supp. V 1981)).

62. Khalil v. INS, 457 F.2d 1276 (9th Cir. 1972) (power to withhold deportation discretionary). *Accord* Fu v. INS, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lena v. INS, 379 F.2d 536 (7th Cir. 1967); Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961), *cert. denied*, 366 U.S. 950 (1961); Chi Sheng Liu v. Holton, 297 F.2d 740 (9th Cir. 1961); Obrenovic v. Pilliod, 282 F.2d 874 (7th Cir. 1960); Wang v. Pilliod, 285 F.2d 517 (7th Cir. 1960); Cakmar v. Hoy, 265 F.2d 59 (9th Cir. 1959); United States *ex rel.* Cantisani v. Holton, 248 F.2d 737 (7th Cir. 1957), *cert. denied*, 356 U.S. 932 (1958); Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955). *Cf.* Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) (possible limitation on discretion due to U.S. signing of Protocol). *Accord* Daniel v. INS, 528 F.2d 1278 (5th Cir. 1976); Shkukani v. INS, 435 F.2d 25 (9th Cir. 1969).

63. Obrenovic v. Pilliod, 282 F.2d 874 (7th Cir. 1960).

64. 8 U.S.C. § 1253(h)(1) (1976 & Supp. V 1981) (emphasis added).

65. The Protocol may already have made this provision mandatory. *See infra* note 97 and accompanying text.

66. Congress made it clear that the intent was to conform to international law. "The Conference substitute adopted the House provision with

deportation proceeding will automatically include a request for withholding deportation.[67]

BURDEN OF PROOF BEFORE THE REFUGEE ACT

The importance of the withholding provision discussed above stems from the fact that it is the principal source of case law regarding the burden of proof aliens are required to meet when seeking refuge in the United States. There is no appeal when overseas refugees are denied entry to the United States.[68] Furthermore, there is no appeal for the denial of an asylum request.[69] The regulations do permit an alien whose asylum request has been denied by the district director to reopen his request during a deportation hearing.[70] The decision reached in that deportation hearing is reviewable by the Board of Immigration Appeals.[71] After these administrative remedies have been

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the understanding that it is based directly upon the language of the Protocol and it is intended that the language be construed consistent with the Protocol." S. REP. NO. 590, 96th Cong., 1st Sess. 20 (1979). For a discussion of the Protocol, see *infra* note 95.

67. 8 C.F.R. § 208.9 (1983). This results in a confusing dichotomy in that the distinction between the forms of relief may be blurred. 1A GORDON & ROSENFIELD, *supra* note 7, at § 5.8f. Although the terms are often used interchangeably, a request for withholding deportation is not equivalent to a request for asylum. *See, e.g.*, Matter of Lam, INS Interim Dec. #2857 (Mar. 24, 1981); Matter of Castellon, 17 I. & N. Dec. 616 (1981). The usual distinction is made based upon the types of relief offered. A grant of asylum, for example, may eventually lead to an adjustment of status as a permanent resident. 8 U.S.C. § 1159(b) (1976 & Supp. V 1981). *See also* 8 C.F.R. § 209.2 (1983). Withholding an order of deportation, however, is only specific with reference to one country and does not mean that the alien may not be deported if another country is willing and able to receive him. 8 U.S.C. § 1253(h) (1976 & Supp. V 1981). *See, e.g.*, Matter of Lam, INS Interim Dec. 2857 (Mar. 24, 1981). *See also* HEARINGS ON H.R. 2816, *supra* note 24 at 168-86. Recent decisions indicate that INS may now appreciate the fine distinction which exists between these two forms of relief. *See infra* notes 164-65 and accompanying text.

68. Nonresident aliens have no right of entry. The discretionary denial of an alien's request to enter is not subject to review. *See supra* note 7 and accompanying text. *See also* 2 GORDON & ROSENFIELD, *supra* note 7, at § 8.21; Anker & Posner, *supra* note 2, at 83.

69. 8 C.F.R. § 208.8(c) (1983). *See also* 2 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Af; Anker & Posner, *supra* note 2, at 76.

70. 8 C.F.R. § 208.9 (1983). *See also* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Af.

71. 8 C.F.R. § 242.2(b) (1983). *See also* 1A GORDON & ROSENFIELD, *supra* note 7, at § 5.12(c) and 5.13(a). The Board of Immigration Appeals is under the control of the Attorney General. The Board is not a statutory body and exists only by virtue of the Attorney General's regulations. It exercises his authority and discretion in deportation cases. 8 C.F.R., Part 3; § 19, Dept. of Justice Order 175-59, 25 FR 2460 (March 28, 1960). *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 1.10.

exhausted,[72] judicial review is finally possible.[73]

The fact that the Attorney General's decision could be based on discretion under prior law[74] restricted the scope of judicial review.[75] The courts could only review a case to determine whether the Attorney General had abused his discretion or exercised it in an arbitrary or capricious fashion.[76] Under current law, however, the Attorney General is required to withhold deportation if he determines the alien comes within one of the designated categories.[77] This change in the law necessarily changes the role of the reviewing court.[78] Because the decision is now mandatory if the alien can be classified within one of the designated categories, the courts may properly review the case to determine whether the decision regarding the alien's classifi-

72. Various policies are promoted by permitting the administrative process to run its course: (1) a more complete record may be developed; (2) the agency is allowed to exercise its discretion; (3) the agency has the opportunity to correct its own errors; and (4) the agency's authority is not diminished by easy circumvention of its procedures. McKart v. United States, 395 U.S. 185 (1969); Ecology Center of Louisiana, Inc. v. Coleman, 515 F.2d 860 (5th Cir. 1975); Haitian Refugee Center v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980).

73. 8 U.S.C. § 1105(a) (1976). The general rule is that all administrative remedies must be exhausted before resort may be had to judicial review. McKart v. United States, 395 U.S. 185 (1969); Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375 (1938); Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). The denial of a request to withhold deportation is considered a final order and courts of appeal have exclusive jurisdiction in reviewing these cases. 8 U.S.C. § 1105(a) (1976). The Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06 (1976), is inapplicable to deportation proceedings. It was the intention of Congress to prevent stalling tactics by successive appeals through the federal courts. *E.g.*, Foti v. INS, 375 U.S. 217 (1963). The current law eliminates suits in district courts as the initial step in the judicial review process. 8 U.S.C. § 1105(a) (1976).

74. *See supra* notes 7, 45, 48, 62, 68, 69 and accompanying text. Critics questioned whether the Attorney General's discretion had been changed to mandatory action after the Protocol had been signed. *See infra* note 97-98 and accompanying text.

75. All forms of obtaining refuge in the United States were discretionary under prior law. *See supra* notes 7, 45, 48, 62, 68, 69 and accompanying text.

76. Luk v. Rosenberg, 409 F.2d 555 (9th Cir.), *cert. denied*, 396 U.S. 801 (1969); Wang v. Pilliod, 285 F.2d 517 (7th Cir. 1960). *See also* 1A GORDON & ROSENFIELD, *supra* note 7, at § 8.17; Note, *Section 243(h) of the Immigration and Nationality Act of 1952 as Amended by the Refugee Act of 1980: A Prognosis and a Proposal*, 13 CORNELL INT'L L. REV. 291 (1980) [hereinafter cited as Note, *Section 243(h)*]. *See generally supra* note 7.

77. Only the decision to withhold deportation has become a mandatory one. *See supra* note 64 and accompanying text. The discretionary nature of the decision regarding entry is unchanged. *See supra* notes 7-8 and accompanying text. The discretionary nature of the decision regarding an asylum application is also unchanged. The current provision for asylum states that the "alien *may* be granted asylum in the discretion of the Attorney General." 8 U.S.C. § 1158(a) (1976 & Supp. IV 1980) (emphasis added).

78. McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981). *See generally* 2 GORDON & ROSENFIELD, *supra* note 7, at § 8.17.

cation is supported by a substantial amount of evidence in the record.[79] This more active role of the courts has added to the controversy over the required burden of proof because, rather than simply determining whether an abuse of discretion exists, the reviewing court is permitted to examine more closely the actual standard used in making the decision.[80]

Because the prior laws permitted the Attorney General's decision to be based on discretion in all cases and because judicial review was limited, it is virtually impossible to determine whether a single standard was being applied to all three groups of aliens: refugees, asylum applicants, and applicants for withholding of deportation. The consensus, however, is that discrepancies did exist.[81] There has been no independent case law for the asylum category, but the burden of proof required appears to have been the same standard required for applicants who requested withholding of deportation.[82] Any distinction, therefore, would lie between the standard applied to applicants for withholding of deportation and the standard applied to refugees.

Both standards were allegedly based on the concept of persecution, but the term "persecution" was never defined in the immigration laws.[83] In the absence of criteria by which to judge claims for withholding of deportation based on persecution, the Immigration and Naturalization Service (INS) developed its own criteria.[84] Since there was never an absolute right to have deportation withheld,[85] INS apparently reasoned that it was free to limit the relief to those it believed most clearly deserving of

79. McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981). Reviewing courts must determine that nondiscretionary exercises of authority are performed according to the proper standard of the law. *Id.* at 1314. The case is reviewed to determine whether the decision is supported by a substantial amount of evidence in the record as a whole. 2 GORDON & ROSENFIELD, *supra* note 7, at § 8.17. *See also supra* note 7.

80. *See supra* note 10 and accompanying text.

81. *See infra* notes 105-09 and accompanying text.

82. Where a finding is made that an alien's life or freedom would be threatened in a given country such that deportation to that country should be withheld, then it should also be found that the alien has established persecution in that country for asylum purposes. *E.g.*, Matter of Salim, INS Interim Dec. 2922 (Sept. 29, 1982); Matter of Lam, INS Interim Dec. 2857 (Mar. 24, 1981). *See also* Kurzban, *supra* note 9, at 107-10.

83. *See, e.g.*, Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968) (without showing clear probability of persecution, no necessity to consider absence of standards). *Cf.* Kovac v. INS, 407 F.2d 102 (9th Cir. 1969) (in absence of standards, word is given ordinary, everyday meaning). *See generally* 1A GORDON & ROSENFIELD, *supra* note 7, at § 5.16; Note, *Section 243(h)*, *supra* note 76, at 299-300.

84. Note, *Right of Asylum*, *supra* note 24, at 540. *See also*, *infra* note 89 and accompanying text.

85. *See supra* notes 7, 8, 62 and accompanying text.

protection.[86] INS viewed the statute as merely setting the outermost limits, while the agency retained the power to set more restrictive standards if it so desired.[87] Accordingly, INS developed a "clear probability standard" for withholding applicants. A withholding applicant was required to prove, through objective and tangible evidence, that there was a clear probability that he would be singled out as an individual or as a "target" for persecution if he were deported.[88] Courts, reviewing cases only for an abuse of discretion, supported this position.[89]

Refugees, on the other hand, appeared to be subject to a much less stringent test. The use of *ad hoc* and parole programs permitted a very liberal approach.[90] Frequently, foreign policy considerations, rather than individual determinations, were used to decide eligibility.[91] Without adequate and independent case law, it is relatively difficult to determine the exact standard used by INS to decide the claims made by refugees abroad. The Board of Immigration Appeals, however, did indicate that there was a difference between the burden placed on refugees and that required of withholding applicants.[92] Refugees were held to

86. Note, *The Right of Asylum under United States Law*, 80 COLUM. L. REV. 1125 (1980).

87. *Id.* at 1132.

88. The applicant must show a clear probability that he would be persecuted as an individual if returned. This is more than demonstrating the simple fact of flight or the existence of human rights violations in the country from which asylum or withholding of deportation is sought. Proof of generalized conditions in the country is not enough. The applicant's failure to produce persuasive evidence that he would be singled out as a target for persecution can be fatal to his claim. *See, e.g.*, Matter of Joseph, 13 I. & N. Dec. 70 (1968) (clear probability of persecution means that the alien must show that he would be singled out as an individual by the government for persecution); Matter of Tan, 12 I. & N. Dec. 564 (1967) (the respondent must submit evidence that he would be subject to persecution); Matter of Sihasale, 11 I. & N. Dec. 531, 532 (1966) (applicant has "obligation to set forth the conditions relating to her personally which support her anticipation of persecution").

89. The policy of restricting the favorable exercise of discretion to cases in which the applicant can demonstrate the clear probability of persecution of the particular individual has been sanctioned by the courts. Matter of Tan, 12 I. & N. Dec. 564, 568 (1967). *See, e.g.*, Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968) (only where there is a clear probability of persecution of particular alien should discretion be favorably exercised); Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967) (requiring a "clear probability of persecution of the particular individual petitioner"). *See also* 1A GORDON & ROSENFIELD, *supra* note 7, at § 5.16.

90. *See supra* notes 29-31 and accompanying text. *See also* Anker & Posner, *supra* note 2, at 20, n.49; Note, *Crises*, *supra* note 19, at 39.

91. *See supra* notes 29-31 and accompanying text. *See also* Kurzban, *supra* note 9, at 103; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1132.

92. INS never defined the standard applied to refugees, but generally distinguished it from the clear probability standard by implying that it was less exacting. *See, e.g.*, Matter of Ugricic, 14 I. & N. Dec. 384 (1972) ("good

a "good reason to fear" standard.[93] The refugee was only required to show objective evidence that the conditions in his country provided a rational basis for his fear of persecution; he did not have to prove that he had been, or would be, sought out individually for persecution.[94] The "good reason to fear" standard was considered to be the functional equivalent of the international "well founded fear" standard used by the United Nations Protocol.[95]

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reason to fear" persecution requirement is a lower standard than the "clear probability" standard); Matter of Janus and Janek, 12 I. & N. Dec. 866 (1968) (applicant for conditional entrant status not in same legal posture as an applicant for withholding); Matter of Adamska, 12 I. & N. Dec. 201 (1967) ("good reason to fear" is lower requirement than "clear probability"); Matter of Tan, 12 I. & N. Dec. 564, 569-70 (1967) (no support that deportee is required to meet only the standard applied to conditional entrant refugee).

93. The "good reason to fear" standard was alternatively known as "rational basis for fear." *See supra* note 92 and the cases cited therein.

94. Critics have charged that the standard applied to refugees is more lenient than that applied to asylum or withholding applicants. Overseas, little attention is devoted to the question of likely persecution as an individual. Proof of generalized conditions in the country from which asylum is sought is usually sufficient. Martin, *The Refugee Act of 1980: Its Past and Future*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 92 (1982); Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1138.

95. Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982), *cert. granted sub nom.*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983). In 1968, the United States signed the United Nations Protocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force with respect to the U.S. Nov. 1, 1968) [hereinafter cited as United Nations Protocol]. The Protocol, with some minor changes, essentially extended the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137. The United States was not a signatory to the Convention. Weis, *The Development of Refugee Law*, in TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 27 (1982).

The definition of refugee, as derived from the Protocol, refers to any person who

> *owing to a well-founded fear of being persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

United Nations Protocol, *supra* art. I (modifying the Convention) (emphasis added). The similarity between this definition and the definition in the Act should be noted. *See supra* note 38 and accompanying text.

The United Nations has published a guide to assist in determining the meaning of well-founded fear as contained in the Protocol definition of refugee. OFFICE OF THE UNITED NATIONS HIGH COMMISSION FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1979) [hereinafter cited as HANDBOOK ON PROCEDURES]. The handbook does not attempt to deal with the question of asylum, but is intended to act as a practical guide in making determinations of refugee status under the Convention or the Protocol. *Id.* at 1, 7. The handbook places the burden of proving refuges status on the applicant. *Id.* at 9.

After the United States finally became a signatory to the Protocol, there was a question whether the clear probability standard for withholding applicants was obsolete. Critics reasoned that the treaty, as part of the supreme law of the land,[96] gave applicants direct access to benefits under the Protocol, made withholding mandatory on the Attorney General, and changed the burden of proof for withholding applicants to the less restrictive "well founded fear standard" used by the Protocol.[97] INS rejected these arguments by claiming that the burden

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For a comparison to U.S. law on this burden, *see supra* notes 7-8 and accompanying text.

An entire section of the handbook is devoted to an interpretation of the terms used by the Convention and the Protocol. HANDBOOK ON PROCEDURES, *supra*, at 11. "Well-founded fear" is designated as the key phrase in the definition of refugee. *Id.* The definition contains both subjective and objective elements. *Id.* at 12. The objective elements of the definition must be judged, at least in part, by the conditions in the applicant's country. *Id.* The handbook clearly states, however, that these considerations "need not necessarily be based on the applicant's own personal experience." *Id.* at 13. While an applicant must show he has a good reason why he individually fears persecution, he does not actually have to have been persecuted individually. Fear may also relate "*to those who wish to avoid a situation entailing the risk of persecution*." *Id.* (emphasis added). The applicant is deemed to have established his claim if he demonstrates a rational basis for his fear. *Id.* Compare this with the standards applied to refugees under U.S. law, *supra* notes 93-94 and accompanying text.

96. U.S. CONST. art. VI, cl. 2.

97. Two sections of the United Nations Protocol are deemed to have superseded, and thus changed, the nature of the discretionary power granted to the Attorney General under the withholding provisions. Article 32 of the Protocol provides:

> (1) The Contracting States *shall not* expel *a refugee* lawfully in their territory save on grounds of national security or public order.
>
> (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> (3) The *Contracting States shall allow such a refugee* a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

United Nations Protocol, *supra* note 95, ch. 5, art. 32 (emphasis added). Article 33 of the Protocol provides:

> (1) *No Contracting State shall expel or return ("refouler") a refugee* in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Id. art. 33 (emphasis added). *See also* 1 GORDON & ROSENFIELD, *supra* note 7,at § 2.3i; Frank, *supra* note 58, at 296; Note, *The Right of Asylum Under*

of proof under the clear probability standard was the same as that under the "well founded fear" or the "good reason" standards.[98] Reviewing courts generally supported INS;[99] the courts, however, reached these decisions by applying the abuse of discretion test, despite claims that the courts' standard of review had also been changed by the Protocol.[100]

Setting aside possible deficiencies in the standard of review, several reasons remain why these judicial interpretations were overly broad and should not have been applied by subsequent cases without being distinguished. First, INS stated that the standards were the same and, later, reviewing courts simply agreed with little or no analysis.[101] Next, the expressions of congressional intent regarding the signing of the Protocol, on which the decisions relied, were at best ambiguous and subject to con-

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United States Law, *supra* note 86, at 1129, 1132; Note, *Recent Developments*, 14 VAND. J. OF TRANSNAT'L L. 561 (1981).

98. In rejecting various requests for withholding, INS contended that the Protocol made no substantial changes in the withholding provision. Its contention was based on the application of general rules of interpretation which determine whether a treaty has repealed or modified a previously enacted statute. INS concluded that, where there is an absence of clear legislative intent, repeals by implication are never favored. Since the treaty was not regarded as absolutely incompatible with the prior legislation, INS reasoned that it should try to give effect to both. Without extensive discussion, INS concluded that the standards under the Protocol and those under the prior case law for withholding were co-extensive. Matter of Dunar, 14 I. & N. Dec. 310 (1973) (seminal decision for clear probability standard). *See also* Matter of Chumpitazi, 16 I. & N. Dec. 629 (1978). *See generally* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.3i; Frank, *supra* note 58; Note, *Recent Developments*, *supra* note 97, at 580.

99. Ming v. Marks, 367 F. Supp. 673, 677 (S.D.N.Y. 1973), *aff'd on opinion below*, 505 F.2d 1170, 1172 (2d Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 911 (1975) (history of Protocol adoption clearly indicates all parties involved in process believed Protocol would not alter or enlarge effect of existing laws). *Accord*, Moghanian v. INS, 577 F.2d 141 (9th Cir. 1978); Martineau v. INS, 556 F.2d 306 (5th Cir. 1977); Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976); Rosa v. INS, 440 F.2d 100 (1st Cir. 1971). The Supreme Court declined to rule on this issue stating "[i]t is premature to consider whether, and under what circumstances an order of deportation might contravene the Protocol and Convention Relating to the Status of Refugees, to which the United States acceded on November 1, 1968." INS v. Stanisic, 395 U.S. 62, 79-80 n.22 (1969).

100. Because the Protocol made the withholding decision mandatory, rather than one based on discretion, the proper review should have been based on the substantial evidence test. *See supra* notes 7, 79 and accompanying text.

101. *See, e.g.*, Martineau v. INS, 556 F.2d 306 (5th Cir. 1977) (evidence presented held not to show a "clear probability" without any further discussion); Kashani v. INS, 547 F.2d 376 (7th Cir. 1977) (well founded fear standard and clear probability standard will, in practice, converge); Cisternas-Estay v. INS, 531 F.2d 155 (3d Cir. 1976) (held not to have shown a "clear probability" of persecution without any further discussion); Rosa v. INS, 440 F.2d 100 (1st Cir. 1971) (used clear probability standard with no further discussion).

flicting interpretations.[102] Also, despite INS claims to the contrary, the withholding of deportation had been denied as an exercise of discretion in a case of clear eligibility for refugee status.[103] Finally, the major cases cited by all later decisions involved claims that would be impermissible even under the Protocol.[104]

Subsequent events indicate that criticism of INS policies was correct.[105] A clear disparity existed between the standard applied to asylum and withholding applicants and the standard applied to refugees.[106] Applicants for asylum or withholding continued to be held to a higher, nearly impossible,[107] standard, while refugees were only required to prove a "good reason to

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102. The language used in the hearings on the Protocol was ambiguous. It was not clear whether Congress intended to affect existing law by signing the Protocol. For example, the Secretary of the State testified that the "United States accession to the Protocol would not impinge adversely upon the laws of this country." S. EXEC. K. 90th Cong., 2d Sess. at VII (1967). Also, a representative of the State Department assured the Senate that the "Protocol . . . accession does not in any sense commit the contracting state to enlarge its immigration measures for refugees." S. EXEC. REP. NO. 14, 90th Cong., 2d Sess. at 6 (1967). Finally, in a letter making one brief, but explicit, reference to the withholding provision, the Secretary of State informed the President that "[t]his article is comparable to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. Section 1254 [sic], and it can be implemented within the administrative discretion provided by existing regulations." S. EXEC. K., 90th Cong., 2d Sess. at VIII (1967).

This language is susceptible to various interpretations. What constitutes adverse impingement? What was meant by expanding or enlarging immigration commitment? Implementation within the administrative discretion provided by existing regulations could mean that Congress intended the Attorney General simply to use his discretion within the existing framework in order to adhere to the guidelines of the Protocol. Because the remarks do not expressly state that the law would remain unchanged, they are equally consistent with the proposition that the Protocol did change the protection available. Compare this with the express language used in the hearings on the Refugee Act, *supra* notes 37, 66 and accompanying text, *infra* notes 113-114 and accompanying text. *See also infra* note 158 and accompanying text.

103. *See, e.g.*, Matter of Liao, 11 I. & N. Dec. 113 (1965) (Attorney General may deny an application for withholding without making any formal finding regarding eligibility).

104. Some applicants attempted to assert a claim that a totally subjective standard was permissible under the Protocol. *See, e.g.*, Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); Matter of Dunar, 14 I. & N. Dec. 310 (1973). The Protocol, however, requires objective evidence in addition to subjective elements. *See supra* note 95. The point apparently overlooked by the courts was the distinction in the nature of the objective evidence required. Requiring evidence to prove that persecution is individualized is more restrictive than merely requiring evidence which demonstrates a rational basis for the fear of persecution. *See supra* notes 93-95 and accompanying text.

105. Martin, *supra* note 94, at 111-13.

106. *Id.*; Scanlan, *supra* note 5, at 633; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1137; Note, *Right of Asylum*, *supra* note 24, at 544.

107. Kurzban, *supra* note 9, at 104-13.

fear." One explanation is that INS was attempting to limit the flow of immigration through interpretive measures.[108] Even before the Refugee Act was passed, some courts had begun to defect from the INS position.[109] The questions remain, however, whether the Act was intended to resolve this disparity between the groups and, if so, whether the clear probability or the good reason to fear standard was intended by Congress.

THE BURDEN OF PROOF ACCORDING TO THE REFUGEE ACT

Passage of the Act undermined the INS claim that Congress had intended no changes in the law when it signed the Protocol.[110] The ambiguous langauge used by Congress in considering the Protocol was replaced by clear and express language in the hearings on the Act.[111] The consensus is that Congress no longer trusted INS to amend its own procedures administratively; instead changes were mandated by Congress through statute.[112] Congress intended one standard to be used for all groups and that standard was the Protocol's well-founded fear standard. As discussed below, the legislative history of the Act, the language of the provisions, and the announced public policy all support this position.

While considering the proposed legislation, Congress repeatedly expressed its intention that the language used in the Act was to be based on the Protocol.[113] Congress reiterated its intent by stating that all language should be construed in a man-

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108. Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1137.

109. *E.g.*, Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977) (announcing a substantial evidence test and remanding the case for a new hearing).

110. Note, *Right of Asylum*, *supra* note 24, at 559. The reforms made by the Act support the view that the Protocol was intended to have some effect on the law. Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1131. *See also supra* notes 98, 102 and accompanying text.

111. Anker & Posner, *supra* note 2, at 46; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1130; Note, *Right of Asylum*, *supra* note 24, at 545, 559. *Compare* Congress's language *supra* in note 102 *with* language *supra* notes 1, 2, 6, 32, 66.

112. Stevic v. Sava, 678 F.2d 401, 406 (2d Cir. 1982), *cert. granted sub nom*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983) (Congress has implemented Protocol rights through Refugee Act). *See also* Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) (citing *Stevic* for proposition that no rights beyond those under domestic law). *See generally*, 1 GORDON & ROSENFIELD, *supra* note 7, at §§ 2.3i, 2.24Af; Martin, *supra* note 94, at 109; Anker & Posner, *supra* note 2, at 41. *Compare supra* note 102 (ability to make changes administratively) *with supra* note 64 (withholding provision mandatory).

113. *See supra* note 66 and accompanying text. *See also* 1 GORDON & ROSENFIELD, *supra* note 7, at § 2.24Ab; *Legislative History*, *supra* note 2, at 11, 46, 63; Scanlan, *supra* note 5, at 621-25; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1131-32; Note, *Right of Asylum*, *supra* note 24, at 540, 559.

ner consistent with the Protocol.[114] The standard used by the Protocol is based on a well-founded fear,[115] which is the functional equivalent of the good reason standard INS traditionally applied to refugees.[116] Continued use of the higher clear probability standard, therefore, would be inconsistent with the language of the Protocol.[117] By selecting the Protocol standard, Congress, at the very least, expressed its intent to adopt a burden of proof lower than the clear probability standard.[118]

Moreover, Congress intended that the standard it adopted should be applied uniformly to all groups—refugees as well as applicants for asylum or for withholding of deportation.[119] According to the language of the statutes,[120] the definition of refugee applies to both refugees and applicants for asylum.[121] Although the withholding statute does not expressly refer to the definition of refugee,[122] the definition is implied through the use of similar criteria.[123] Substitution of the phrase "life or freedom would be threatened" for the word "persecution" is not intended to change the prior law requiring persecution;[124] the difference in terminology does not create a significant distinction between

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114. S. REP. NO. 256, 96th Cong., 2d Sess. 4, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 515, 535 (new refugee definition will bring the United States into conformity with the Protocol; withholding provision is based directly on the Protocol and is intended that the provision be interpreted in a manner consistent with the Protocol).

115. *See supra* note 95 and accompanying text.

116. *See supra* notes 93-95 and accompanying text.

117. A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INT'L LAW 145 (1965) (well founded fear standard of Protocol requires a liberal interpretation); Comment, *Immigration Law and the Refugee—A Recommendation to Harmonize the Statutes with the Treaties*, 6 CALIF. W. INT'L L.J. 129, 152 (1975) (well founded fear standard requires a lesser burden of proof than clear probability).

118. Stevic v. Seva, 678 F.2d 401 (2d Cir. 1982), *cert. granted sub nom*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983). *See also* Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1131-32; Note, *Right of Asylum*, *supra* note 24, at 559.

119. It is the consensus of commentators that the Act intended to create equivalent eligibility standards. Anker & Posner, *supra* note 2, at 10, 48, 60; Scanlan, *supra* note 5, at 625; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1137; Note, *Crises*, *supra* note 19, at 46; Note, *Recent Developments*, *supra* note 97, at 563.

120. *See supra* notes 38, 48 and accompanying text.

121. *Id. See also* Anker & Posner, *supra* note 2, at 60; Scanlan, *supra* note 5, at 625; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1137; Note, *Crises*, *supra* note 19, at 46; Note, *Recent Developments*, *supra* note 97, at 563.

122. *See supra* note 64 and accompanying text.

123. *E.g.*, Matter of Lam, INS Interim Dec. 2857 at 4-5 (Mar. 24, 1981) (alien qualifying under asylum or refugee provisions must prove same five elements as applicant for withholding).

124. *Id.* at 5 n.3 ("no significant distinction" between withholding or asylum because of use of "life or freedom" rather than "persecution").

the groups.[125] This interpretation is reinforced by reference to the Protocol articles, which are the source of the language used in the withholding statute.[126] These articles apply to "refugees," as defined by the Protocol,[127] which is, again, the same definition used in the Refugee Act.[128] As a matter of course, all provisions in the Refugee Act ultimately rely upon the same definition of refugee and that definition is based upon the Protocol's well-founded fear standard.

This interpretation of the standard and its applicability to all groups of aliens conforms to the announced public policy of the Act.[129] The lawmakers repeatedly went on record to affirm the humanitarian basis for the Act.[130] Accordingly, it would be implausible that Congress, intending to create a uniform standard where two had previously existed, would choose the higher standard.[131] It is more credible that the uniform standard chosen by Congress was the "well-founded fear" or "good reason" standard.[132] There is no indication that Congress intended to undo the reforms made in refugee legislation over the years; on the contrary, Congress expressed its intent to make its policy even more humanitarian than it had previously been.[133]

THE BURDEN OF PROOF SINCE THE REFUGEE ACT

In spite of the expressed intent of the Act, covert discrimination continues.[134] INS has continued to apply the clear probability standard to asylum and withholding cases decided

125. Matter of McMullen, 17 I. & N. Dec. 542 (1980) (use of word persecution instead of "life or freedom" is not a significant distinction).

126. The provisions of Articles 32 and 33 both use the term "refugee" which is defined in Article 1 of the Protocol. *See supra* note 98 and accompanying text. *See also* Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1136-37; Note, *Right of Asylum*, *supra* note 24, at 559-60.

127. *See supra* note 95 and accompanying text.

128. *See supra* note 38 and accompanying text.

129. *See supra* note 2 and accompanying text. *See also* Anker & Posner, *supra* note 2, at 11, 38, 64; Scanlan, *supra* note 5, at 626; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1138; Note, *Right of Asylum*, *supra* note 24, at 540, 559.

130. *See supra* note 2 and accompanying text.

131. Stevic v. Sava, 678 F.2d 401 (1982), *cert. granted sub nom.*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983).

132. *Id.*

133. *See supra* note 2 and accompanying text. *See also* Anker & Posner, *supra* note 2, at 64; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1132.

134. Martin, *supra* note 94, at 112-13; Anker & Posner, *supra* note 2, at 69, 72, 78; Note, *The Right of Asylum Under United States Law*, *supra* note 8, at 1132.

since the passage of the Act.[135] The decisions in these cases are based on the previous INS theory that the clear probability standard is the equivalent of the well-founded fear standard.[136]

Changes in judicial review,[137] however, have permitted the courts greater freedom in examining the standard which INS is applying to these cases. *Stevic v. Immigration and Naturalization Service*[138] is the leading case in this area. In that case, the United States Court of Appeals for the Second Circuit directly confronted the issue of whether INS had properly applied the correct burden of proof under the Act.[139] The *Stevic* court considered the legislative intent behind the Act, the Act's language, and the public policy expressed by Congress.[140] It then determined that Congress had intended the well-founded fear standard to be uniformly applied to applicants for asylum or

135. *E.g.*, Matter of Martinez-Romero, INS Interim Dec. 2872 (June 30, 1981) (conclusory assertions and generalized evidence do not establish applicant would be subject to persecution); Matter of Lam, INS Interim Dec. 2857 (March 24, 1981) (alien failed to show he had been persecuted); Matter of Castellon, 17 I. & N. Dec. 616 (1981) (unsupported claims); Matter of McMullen, 17 I. & N. Dec 542 (1980) (evidence should relate to respondent specifically); Matter of Rodriguez-Palma, 17 I. & N. Dec. 465 (1980) (no evidence to support claims).

136. *See supra* note 98 and accompanying text.

137. *See supra* note 79 and accompanying text.

138. 658 F.2d 401 (2d Cir. 1982), *cert. granted sub nom.*, I.N.S. v. Stevic, 103 S. Ct. 1849 (1983). Stevic was a citizen of Yugoslavia who originally entered the United States on June 8, 1976, for the purpose of visiting his sister. *Id.* at 402. When his permission to remain expired, Stevic neither left nor obtained an extension; deportation proceedings were subsequently commenced. Stevic agreed to depart voluntarily, but failed to do so. Instead, he married a United States citizen; she filed a relative petition for him which was the first step toward obtaining his permanent resident status. Stevic's spouse was accidently killed and the approval of her petition was automatically revoked under 8 C.F.R. § 205.1(a)(2) (1983). Deportation proceedings were resumed and Stevic then expressed his fear of persecution if he was returned to Yugoslavia. Stevic was denied asylum and withholding of deportation; his appeals were dismissed by the Board of Immigration appeals. Because of Stevic's repeated refusals to surrender for deportation, INS took him into custody. He was transported in INS custody to New York City to be placed on board a connecting flight for Yugoslavia. Stevic attempted to escape and was then temporarily detained. He thereupon commenced proceedings for a writ of habeas corpus in the United States District Court for the Southern District of New York and for a motion to reopen his deportation hearing before the Board of Immigration Appeals. The Second Circuit consolidated the appeals from the district court's denial of habeas corpus and from the Board's denial of the motion to reopen deportation.

139. 658 F.2d at 404. Stevic claimed that the Board of Immigration Appeals applied the wrong standard to his second motion to reopen deportation proceedings. He argued that the passage of the Act prior to his second motion changed the standard to be applied.

140. *Id.* at 404-09. The *Stevic* court traced in detail the origins of the Act. *Id.* at 404-07. The decision contains large sections reviewing pre-1968 asylum law, the Protocol, asylum law between 1968 and 1980, and the Act itself. *Id.* at 404-09.

withholding of deportation as well as to refugees.[141] The *Stevic* court concluded that INS, in using the clear probability standard for asylum or withholding applicants, was not performing according to the proper standard required by law.[142] The court remanded the case for a hearing under a standard less restrictive than the clear probability standard.[143]

The reasoning of the *Stevic* court has been adopted by at least three other courts. In *Reyes v. Immigration and Naturalization Service*,[144] the United States Court of Appeals for the Sixth Circuit held that there was substantial evidence in the record as a whole to support the alien's application for withholding of deportation.[145] In *Ellis v. Ferro*,[146] the United States District Court for the Western District of New York relied upon the *Stevic* decision in reaching its determination that an evidentiary

141. *Id.* at 407-08. The *Stevic* court found that the Act "dictates that a uniform test of 'refugee' be applied to all aliens, whether seeking admission" as refugees or as applicants for asylum or withholding. *Id.* at 408.

142. *Id.* at 409. The *Stevic* court found that the clear probability test was "no longer the applicable guide for administrative practice" under the Act. *Id.* at 408. It reasoned that the Act "completed the process, begun with accession to he Protocol, of modifying the legal test applicable to [withholding] applications." *Id.*

143. *Id.* The court conceded that the "matter is hardly free from doubt" and that there is no "bright line drawn in the legislative history." *Id.* at 404, 408. The court maintained, however, that it found "meaningful guideposts" for its decision that, at minimum, Stevic was entitled to a plenary hearing under the standards established by the Protocol. *Id.* at 408.

144. 693 F.2d 597 (6th Cir. 1982). Reyes was a twenty-two year old Filipino woman who originally entered the United States on August 15, 1975, as an exchange visitor under the Youth for Understanding Program. *Id.* at 598. She failed to leave upon the termination of her program and deportation proceedings were initiated. She requested asylum and withholding during the deportation hearing. *Id.* In support of her claim that she would be persecuted for her political beliefs, Reyes submitted newspaper and magazine articles regarding the lack of human and civil rights in the Philippines and affidavits from individuals. *Id.* at 599. The Immigration Judge and the Board of Immigration Appeals, on review, denied both of her requests. *Id.* at 598.

145. *Id.* The *Reyes* court found that the clear probability test was 'inconsistent with the tenor and spirit, if not the language, of the new provisions." It further stated that "[s]ince the Board applied the more stringent clear probability test, the holding cannot stand." *Id.* The court concluded that "in considering the record as a whole, we not only find that there is not substantial support in the record for the conclusions of the Board, but that overwhelming evidence supports petitioner's claim." *Id.* at 600. The *Reyes* court asserted that it was difficult "to see what more than what was offered here [should be required] short of actual persecution after the fact." *Id.*

146. 549 F. Supp. 428 (W.D.N.Y. 1982). Ellis was a citizen of Ireland who was refused legal admission into the United States. *Id.* at 429. He was taken into custody and prepared for a formal hearing which would exclude him from entering the United States. During this proceeding, Ellis requested asylum. *Id.* Before any action was taken by INS on that request, Ellis filed a writ of habeas corpus with the district court. *Id.* at 430. The request for asylum was eventually denied. *Id.* at 431.

hearing should be held and that the parties should submit memoranda regarding the relevant standards.[147] Finally, in *Almirol v. Immigration and Naturalization Service*,[148] the United States District Court for the Northern District of California applied the *Stevic* analysis to an application for a waiver of the foreign residence requirement[149] which was based on a fear of persecution. The *Almirol* court held that the applicant had the option of proving persecution in fact, or a fear of persecution based on objective evidence.[150] The *Almirol* court further stated, however, that objective evidence was not required to prove that the applicant was a "target" of a particular government.[151]

To date, only one court has adopted the INS position. In

147. *Id.* at 434. The court found Ellis was entitled to a plenary hearing on his asylum claim under the Protocol standard. *Id.* at 433. The Ellis court made specific reference to the *Stevic* case in reaching its decision. *Id.*

148. 550 F. Supp. 253 (N.D. Cal. 1982). Almirol was a citizen of the Philippines who originaly entered the United States as an exchange visitor. *Id.* at 254. He requested a waiver of the requirement that he return to his country for two years before seeking permanent residence in the United States based on his claim of a fear of persecution if he returned to the Philippines. His request was denied by the district director and his appeal dismissed. He then brought an action in the district court to seek judicial review of the final INS decision. *Id.*

149. 8 U.S.C. § 1182(e) (1976 & Supp. V 1981). A nonimmigrant alien admitted as a foreign exchange visitor may be subject to a requirement that he return to the country of his nationality or of his last residence for two years before he is permitted to obtain permanent residence in the United States. *Id.* The requirement may arise as a result of government funds being used to sponsor his program or as a result of his government stating that his skills are in short supply in that country. A waiver may be granted on the basis of hardship, fear of persecution, or a no-objection letter from the alien's government.

150. Almirol v. INS, 550 F. Supp. 253 (N.D. Cal. 1982). The *Almirol* court reasoned that the decision of INS should not be reversed unless there was an abuse of discretion or there was an improper understanding of the law. *Id.* at 254. The issue the court confronted was whether INS had applied the proper legal standard to Almirol's request. *Id.* at 255. The court found that the history of the waiver for the foreign residence requirement indicated that the provision is consistent with the authority to withhold deportation. *Id.* Consequently, the court was compelled to review the decisions of other courts which had considered similar provisions in the context of the applicable standard of proof for persecution. *Id.*

151. *Id.* at 256. The court drew a distinction between the clear probability standard and the well-founded fear standard. The court rejected the contention that the applicant was "required to show that he was the 'target' of the Philippine government's persecution." *Id.* The court distinguished the cases cited by the attorneys for INS, stating that "[i]n each of those cases, the courts found a lack of *any* factual support or objective evidence for the plaintiff's allegations." *Id.* (emphasis in original). The court remanded the case for reconsideration under the well-founded fear standard. *Id. Cf.*, Order, Regional Commissioner, INS Northern Regional Office (March 1, 1983) (dismissing appeal to denial of § 212(e) waiver because evidence did not refer to applicant personally, despite recognition that applicant "and his family will be subject to various adversities.")

Rejaie v. Immigration and Naturalization Service,[152] the United States Court of Appeals for the Third Circuit expressly rejected the *Stevic* opinion[153] and stated that the standards of well-founded fear and of clear probability are co-extensive.[154] To date, no cases have followed the *Rajaie* decision.

An analysis of the *Rejaie* decision reveals several deficiencies in the court's reasoning. For example, the *Rejaie* court accepted the INS claim that the standards are equal without any critical examination of the meaning previously given each term.[155] In addition, the *Rejaie* court ignored INS decisions which made a distinction between the standards.[156] The court repeatedly described the legislative intent in changing the law as a mere clarification,[157] but the court never explained why changes would be made simply for clarification, particularly if

152. 691 F.2d 139 (3d Cir. 1982). The *Rejaie* court has relied on its own decision for at least one other case. *See*, Marroquin-Manriquez v. INS, 699 F.2d 129, 133 (3d Cir. 1983) (relying on *Rejaie* to reject claim that clear probability standard is incorrect). Two other courts have had the burden of proof issue before them. Both courts failed, however, to define any specific standard. In both cases, the courts evaded the issue by holding that the applicant's claims would have failed even under the *Stevic* standard. *See*, Minwalla v. INS, 706 F.2d 831, 835 n. 2 (8th Cir. 1983); Choafee v. INS, 706 F.2d 1079, 1084 (9th Cir. 1983).

153. 691 F.2d 139, 146. Rejaie was a citizen of Iran who originally entered the United States as a student. *Id.* at 141. Rejaie failed to attend the school for which he had been authorized and he failed to extend the time in which he was permitted to remain in the United States. He was subsequently prepared for a deportation hearing at which he was granted permission to depart the United States voluntarily. Rather than depart, he submitted a request for asylum which was denied; the Board of Immigration Appeals later denied two motions to reopen. *Id.* at 145. Rejaie contended that the wrong burden of proof had been applied to his request. *Id.* at 142. His argument was based on *Stevic*. *Id.* at 144-45. The *Rejaie* court cited three principal bases of error in *Stevic*. According to the *Rejaie* court, *Stevic* attributed a stringency to the phrase "clear probability" that was not consistent with prior opinions within *Stevic's* own circuit. *Id.* at 146. Also, the *Rejaie* court stated that *Stevic* failed to appreciate the "caselaw consensus . . . that the two standards were equivalent." *Id.* Finally, the *Rejaie* court stated *Stevic* misinterpreted the legislative history behind the Act. *Id.*

154. *Id.* at 146. The *Rejaie* court relied on cases decided before the Refugee Act of 1980 which had held that the standards were equivalent. *Id.* at 143, 146. *See supra* notes 98-104 and accompanying text.

155. The *Rejaie* court examined only two such cases. Rejaie v. INS, 691 F.2d 139 (3d Cir. 1982). The court did not review other cases to determine whether the standards had been applied in different ways. The *Stevic* court did. Stevic v. Sava, 678 F.2d 401, 405-07 (2d Cir. 1982), *cert. granted sub nom*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983).

156. For example, the *Stevic* decision relied in part on the holding in the *Tan* case. Stevic v. Sava, 658 F.2d 401, 405 (2d Cir. 1982), *cert. granted sub nom.*, I.N.S. v. Stevic, 103 S. Ct. 1249 (1983). *Tan* is discussed *supra* at note 92. The *Rejaie* court did not even consider *Tan*.

157. Rejaie v. INS, 691 F.2d 139, 146 (3d Cir. 1982) (calling the Act "cosmetic surgery").

there was nothing which needed to be clarified.[158] Finally, the *Rejaie* court relied upon an alleged case law consensus[159] which was not readily apparent.[160]

ALTERNATIVES

INS has endorsed *Rejaie* and rejected *Stevic*.[161] Despite this public stand, the Board of Immigration Appeals has now adopted the well-founded fear "label" for the decisions it has made since the *Stevic* case.[162] A careful examination of those

158. In a similar manner, INS had tried to dismiss the effects of the signing of the Protocol. INS interpreted Senate ratification of the Protocol as a symbolic gesture to human rights and as an impetus for encouraging other nations to reform their own immigration laws. Matter of Dunar, 14 I. & N. Dec. 310 (1973) (citing the President's message to the Senate, S. EXEC. K., 90th Cong., 2d Sess. III (1967)).

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

160. Many of the cases relied upon by INS can be distinguished and do not comprise a consensus. Almirol v. INS, 550 F. Supp. 253 (N.D. Cal. 1982) (cases relied on by INS failed to present *any* factual support or objective evidence).

161. On December 31, 1982, the general counsel for INS distributed a memorandum to all INS regional counsels. The purpose of the memorandum was to set forth the INS position in regard to the standard of proof applicable to requests for asylum, particularly when *Stevic* is cited. The general counsel advised the INS attorneys to adhere to the holding in the *Exilus* case. (The *Exilus* decision is discussed *infra* note 162). In addition, the INS attorneys were encouraged to cite the *Rejaie* decision. Memorandum from Maurice C. Inman, Jr. to all regional counsels (Dec. 21, 1982) (regarding standard of proof in asylum cases).

162. *See, e.g.*, Matter of Exilus, INS Interim Dec. 2914 (Aug. 3, 1982):

> The law is well settled that an applicant for asylum or for withholding of exclusion and deportation bears the burden of proving that he has a *well founded fear* of persecution if he returns to his native land. *Fleurinor v. INS*, 585 F.2d 129 (5th Cir. 1978); *Martineau v. INS*, 556 F.2d 306 (5th Cir. 1977); *Henry v. INS*, 552 F.2d 130 (5th Cir. 1977); *Daniel v. INS*, 528 F.2d 1278 (5th Cir. 1976). This language refers to more than the alien's subjective state of mind. He must establish that he is likely to be persecuted on account of his race, religion, nationality, membership in a particular social group, or political opinion. *See Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977); *see also McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981).

Id. at 3 (Emphasis added). The authorities cited by the INS in *Excilus* are interesting. Conspicuous by its absence is the *Dunar* case which has been considered the seminal decision in this area. *See* Matter of Dunar, 14 I. & N. Dec. 310 (1973). *See also supra* notes 98, 104. The *Kashani* case has also been extensively cited by INS for the clear probability standard, but in this decision its application was limited. *See* Kashani v. INS, 547 F.2d 376 (7th Cir. 1977). *See also supra* notes 99, 101, 104. In addition, INS was the losing party in the *McMullen* case. McMullen v. INS, 658 F.2d 1312 (9th Cir. 1981) (substantial evidence did not support INS determination that alien had failed to show a sufficient likelihood of persecution for his political beliefs). Finally, INS cited only decisions from the Court of Appeals for the Fifth Circuit for the use of "well founded fear" standard. Matter of Exilus, INS Interim Dec. 2914 (Aug. 3, 1982). The Fifth Circuit has apparently always been more liberal in its application of the standard of proof. *E.g.*, Coriolan

decisions indicates, however, that INS has actually continued to apply the clear probability standard.[163] In effect, the INS has used the well-founded fear "label" as a disguise. Moreoever, INS has apparently discovered a means of avoiding the issue altogether. Many recent decisions issued by the Board of Immigration Appeals have granted withholding of deportation, but have denied asylum as a matter of discretion.[164] Because withholding of deportation is specific only with reference to the country in which persecution can be shown, the INS decision to grant withholding provided only temporary relief to the applicant. In these cases, the applicant was still deportable to another country.[165]

The *Rejaie* court claimed it had rejected a view that would "make a fortress out of a dictionary."[166] In fact, the *Rejaie* court fell victim to just that tactic. INS continues to use two different standards, but simply affixes the same label to both[167]—a change without a difference. There may, however, be practical considerations which explain why INS has adopted two different standards.

The United States is experiencing many of the problems associated with being a country of initial mass asylum. Through-

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v. INS, 559 F.2d 993 (5th Cir. 1977). *See also*, Matter of Salim, INS Interim Dec. 2922 (Sept. 29, 1982); Matter of Exame, INS Interim Dec. 2920 (Sept. 3, 1982).

163. Although the label "well founded fear" has appeared in connection with the required burden of proof, the decisions still refer to a lack of evidence relating to the alien individually or as a "target" which is the essence of the clear probability standard. *E.g.*, Matter of Exilus, INS Interim Dec. 2914 (Aug. 3, 1982) (nothing related to applicant individually or specifically). *See also* Matter of Exame, INS Interim Dec. 2920 (Sept. 3, 1982) (ultimate test is whether objective evidence of record is significantly probative of the likelihood of persecution to this particular alien). *See supra* note 89 and accompanying text.

164. *E.g.*, Walai v. INS, 552 F. Supp. 998 (S.D.N.Y. 1982) (fraudulently obtained entry documents); Matter of Salim, INS Interim Dec. 2922 (Sept. 29, 1982) (fraudulently obtained entry documents); Matter of Lam, INS Interim Dec. 2857 (Mar. 24, 1981) (firmly resettled in third country).

165. *E.g.*, Walai v. INS, No. 82 Civ. 779 (S.D.N.Y. Dec. 30, 1982) (Afghan returned to Pakistan); Matter of Salim, INS Interim Dec. 2922 (Sept. 29, 1982) (Afghan returned to Pakistan); Matter of Lam, INS Interim Dec. 2857 (Mar. 24, 1981) (mainland Chinese returned to Hong Kong). *See also supra* note 61 and accompanying text.

166. Rejaie v. INS, 691 F.2d 139, 146 (3d Cir. 1982) (citing Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945)). The court elaborated on its view by stating that a word or a phrase "is not a crystal, transparent and unchanged[;] it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Rejaie v. INS, 691 F.2d 139, 146 (3d Cir. 1982) (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).

167. Martin, *supra* note 94, at 112-13; Anker & Posner, *supra* note 2, at 69, 72, 78; Scanlan, *supra* note 5, at 633; Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1132, 1137.

out its history, the United States generally could pick and choose whom it wanted from among camps located in other countries.[168] Now, in unprecedented numbers, aliens are claiming asylum after they arrive in the United States.[169] While limits may exist on how many refugees may enter the United States, there is no limit on how many aliens may apply for asylum or withholding of deportation after they have entered in some other status.[170] Granting benefits based upon the same standard, whether the applicant is physically present in the United States or not, could logically only induce more aliens to enter the United States for the purpose of pursuing their claims.[171] Rather than having to wait for a decision in a refugee camp, the alien would simply come to the United States to wait. In addition, this policy would encourage other kinds of fraud. Frequently, for example, frivolous requests for asylum or withholding are used by aliens to delay or stall their departure from the United States.[172]

Recognizing that these problems exist and that a single liberal standard may only contribute to them is more useful than pretending that there is really a uniform standard which is applied equally. Some alternatives have been suggested by commentators in the field. One suggestion is that the standard for all groups be uniformly raised, thus requiring applicants for refugee status to meet the same criteria as applicants for asylum and withholding.[173] In addition to the practical problems this may create,[174] that suggestion does not appear to comply with

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168. Scanlan, *supra* note 5, at 621, 627; Note, *Crises*, *supra* note 19.

169. It is estimated that between 45,000 and 50,000 potential asylum seekers will arrive in the United States each year. Scanlan, *supra* note 5, at 627.

170. The only limitation exists on how many aliens granted asylum may receive the benefit of permanent residence in any given fiscal year. "Not more than five thousand of the refugee admissions authorized under section 207(a) in any fiscal year may be made available by the Attorney General . . . to adjust to the status of an alien lawfully admitted for permanent residence the status of any alien granted asylum . . ." 8 U.S.C. § 1159(b) (1976 & Supp. IV 1980).

171. According to the dissent in the *Coriolan* case,

> It is no wonder that it has been publicly asserted by those in position to know that there are millions of aliens illegally in this country, taking jobs from those who complain bitterly of the lack of job opportunity, a deficiency to be remedied by lifting more funds from law abiding taxpayers, thereby in effect subsidizing the illegal alien racket. There is one thing for sure—the majority opinion is not going to help in stemming the tide.

Coriolan v. INS, 559 F.2d 993, 1006 (5th Cir. 1977) (Coleman, J., dissenting).

172. Frank, *supra* note 51, at 305; Note, Section 243(h), *supra* note 76, at 307.

173. Martin, *supra* note 94, at 112-13.

174. More stringent scrutiny overseas would require additional staff and resources without any corresponding increase in the benefits derived. The

the congressional intent of the Act.[175] Another suggestion is that the applicants for asylum or withholding satisfy the same criteria as applicants for refugee status.[176] Although this suggestion conforms to the congressional intent of the Act,[177] it does not resolve the practical problems mentioned above.[178] Suggestions that the withholding provision be eliminated altogether are without merit because they fail to recognize the distinction between asylum and withholding.[179]

A sounder approach might be to recognize that the dual standard not only exists, but is necessary and appropriate.[180] This suggestion would require new legislation.[181] As the law now stands, even aliens who enter the United States in flagrant disregard of the law cannot be deported if they apply for asylum or withholding.[182] Such aliens not only avoid the prescreening required of all other aliens entering the country,[183] they also obtain additional benefits as a direct result of their violations. For example, aliens overseas have no right to appeal if they are denied entry,[184] but aliens within the United States—no matter how they entered—are entitled to the Constitutional guarantees

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fact that the applicant for refugee status is in another country is usually assurance enough that he cannot enter the United States unless selected for resettlement. Martin, *supra* note 94, at 113.

175. *See supra* notes 129-33 and accompanying text.

176. Martin, *supra* note 94, at 112-13.

177. *See supra* notes 129-33 and accompanying text.

178. *See supra* notes 168-72 and accompanying text. According to one commentator,

> [a]sylum constitutes a wild card in the immigration deck. No other provision of the [Immigration and Nationality Act] opens such a broad potential prospect of U.S. residency . . . if it becomes too easy to establish entitlement to asylum, if the United States does not stringently require the applicant to show solid reasons why he or she is likely to be singled out for persecution on return, then great numbers of illegal aliens would probably be happy to surface and claim the benefits of asylum. The United States is also accessible to thousands more in the Caribbean, Central America, and conceivably, in South America, who would leave countries with poor enough human rights records to make any claim to asylum at least initially plausible.

Martin, *supra* note 94, at 112-13.

179. *See supra* note 67 and accompanying text. *See also* Kurzban, *supra* note 19, at 110; Scanlan, *supra* note 5, at 637.

180. Martin, *supra* note 94, at 113.

181. *Id.*

182. With few exceptions, most exclusion grounds which would ordinarily bar an alien from receivin permanent residence, are waived for refugees and aliens who have been granted asylum. 8 U.S.C. § 1159(c) (1976 & Supp. IV 1980). *See also* 8 C.F.R. § 209.2 (1983).

183. Martin, *supra* note 94, at 112. Even an alien who obtains his entry surreptitiously may be granted asylum and, eventually, permanent residence. INS, Operations Instructions, 209.2(e) (1982).

184. *See supra* note 68 and accompanying text.

of due process and judicial review.[185] Applicants with legitimate claims should be encouraged to enter the United States in the proper status as refugees. Requiring more in the way of proof from aliens who present their claims after entry may have this effect.

CONCLUSION

Prior to the passage of the Refugee Act, refugees and applicants for asylum or withholding of deportation were required to satisfy different standards in proving their eligibility for the benefit sought. The Refugee Act of 1980 was intended to equalize the standard for the burden of proof. The standard to be applied was the less restrictive, well-founded fear standard used by the United Nations Protocol. In spite of this mandate, INS has continued to apply, both expressly and covertly, the higher clear probability standard to applicants for asylum or withholding of deportation. Practical problems generated by applying the less restrictive refugee standard to applicants for asylum or withholding indicate that the standards should be distinct. The choice, however, does not belong to INS; the choice is for Congress to make. Until Congress changes the statutory language that requires the uniform application of the well-founded fear standard, INS should administer the law as it was intended.[186]

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185. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1967); Galvan v. Press, 347 U.S. 522 (1954); Wong Yan Sung v. McGrath, 339 U.S. 33 (1950).

186. Note, *The Right of Asylum Under United States Law*, *supra* note 86, at 1138.