CARDOZO
Benjamin N. Cardozo School of Law

Cardozo Law Review

Vol. 4
Iss. 3

Article 2

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THE DILEMMA OF THE REFUGEE: HIS STANDARD FOR RELIEF

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Introduction

The nature of the United States historical position in the world as a safe haven for refugees has recently undergone rapid change. Tragically, however, the development of this country's laws and regulations relating to this most human of all concerns has only rarely kept pace with the changes. Consequently, the United States truly finds itself in a watershed period, with the existence of numerous theses—each valid and yet each militating for a different emphasis in the refugee law—threatening to test seriously the moral fiber of that nation which flatters itself as being, in Lincoln's phrase, "the last, best hope of earth."[1]

No longer merely the ultimate destination of persons being conveniently detained and processed in way stations such as Vienna,[2] the United States has now emerged as a first-haven for the multitudes of Cubans, Haitians, and others fleeing conditions in their respective homelands.[3] Daily, the news media remind Americans of the flood of persons who come to the shores of this country attempting to escape from the political, social or economic conditions of their homelands.[4]

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The author expresses profound gratitude to Joseph Lampert, a student at Columbia Law School, for his diligent research and valuable assistance which contributed to the development of this Article.

[1] A. Lincoln, Second Annual Message to Congress (Dec. 1, 1862).

[2] The Immigration and Naturalization Service (INS) maintains overseas offices which consider application for refugee entry to the United States. In addition to Vienna, INS offices are located in Bermuda, the Bahamas; several cities in each Mexico, Canada, and Italy; Frankfurt, Athens, Manila, Seoul, Tokyo, and Hong Kong. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.24Ae (rev. ed. 1981). The filing of applications and examination of applicants are governed by federal regulations. See 8 C.F.R. § 207.2 (1982). The regulations do not provide for refugee applications by aliens in the United States. The Refugee Act of 1980 provided the first formal procedure for the granting of asylum to refugees present in this country. See infra note 98 and accompanying text.

[3] See Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 523-25 (S.D. Fla. 1980) (discussion of processing of asylum claims for mass numbers of Haitian refugees); Recent Developments, Aliens Rights—The Refugee Act of 1980 as Response to the 1967 Protocol Relating to the Status of Refugees: The First Test, 14 Vand. J. Transnat'l L. 561 (1981) (discussion of Cuban refugees under the Refugee Act of 1980). See generally sources cited infra note 4 (newspaper coverage of Cuban and Haitian refugee crises).

[4] See, e.g., N.Y. Times, Sept. 24, 1980, at A20, col. 1; id., Aug. 26, 1980, at A14, col. 6; id., June 21, 1980, at A1, col. 6; id., May 27, 1980, at A1, col. 5; id., May 8, 1980, at A12, col.

These people, who are physically in the United States, pose administrative and moral questions which were simply not raised in the past, when the great majority of refugees were processed in a foreign land.

Inevitably, these changed circumstances will necessitate altered rules and perhaps, on a more intangible plane, an altered view of the proper meaning to be ascribed to the term "refugee." The standard utilized to determine whether to admit, exclude, or deport one seeking asylum becomes all the more important when those seeking refuge are not being held in a distant land, but rather are already on American soil. In addition to the different intellectual considerations these two distinct situations involve, the emotional argument for permitting a refugee already here to stay is perhaps more compelling than is the argument to be made for admitting a refugee not yet here. Indeed, this is one area of the law where there should not be a summary dismissal of emotional arguments.

These changes make it imperative, therefore, that a fundamental reevaluation of United States policy be made. This, in turn, must require a careful analysis of past statutes and praxis, as well as an examination of the relevant refugee standards used in the past.

This Article will consider the most fundamental of issues in the field of refugee law—that concerning the proper definition of "refugee." Section I briefly examines the historical developments in the refugee law necessary to an understanding of current issues. Section II introduces a relevant United Nations Protocol and discusses its possible implications for the issue at hand. The Refugee Act of 1980 is analyzed in Section III, especially insofar as the Act has an impact upon the definition of "refugee." Section IV of the Article examines several recent federal court of appeals decisions which are in conflict regarding the standard of relief for the refugee. Finally, the Article presents a summary of how new refugee standards may affect emerging issues of asylum.

I. Historical Analysis

The refugee policy of the United States has long consisted of a series of responses to current world or regional conditions, rather than any comprehensive initiative which would embody specific American

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3; id., May 7, 1980, at A13, col. 1; id., May 6, 1980, at A1, col. 1; id., Apr. 14, at A16, col. 6; id., Mar. 27, 1980, at A22, col. 1. See generally Recent Developments, supra note 3 (discussion of Refugee Act of 1980 and Cuban refugees).

principles and tenets. It is, perhaps, this reliance not upon action but upon continual reaction which led to many of the inequities inherent in the refugee law; on the other hand, it is equally possible that the same reliance accounted for much of the law's flexibility.

As the twin pillars of this nation's immigration law for the first half of the twentieth century, the Immigration Acts of 1917[5] and 1924[6] nevertheless contained no affirmative provision for the acceptance of refugees or the granting of asylum.[7] Somewhat surprisingly, considering the worldwide reputation of the United States as a haven, asylum policies were effected on a strictly improvisational basis.[8] That is, rather than comprising rules which would cope with problems as they arose, refugee law evolved as a series of reactions to various crises.

The catastrophic events surrounding World War II and its traumatic results ensured that some revisions in American policy would be forthcoming.[9] It was inescapable that the rigors of the war would profoundly affect American thinking with regard to refugees and asylum. Nonetheless, the United States remained unconvinced of the need for a new, comprehensive refugee initiative. Rather, temporary measures were enacted in the form of the Displaced Persons Act of

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[5] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (codified as amended in scattered sections of 8 U.S.C. (1976 & Supp. V 1981)).

[6] Immigration Act of 1924, ch. 190, 43 Stat. 153 (codified as amended in scattered sections of 8 U.S.C. (1976 & Supp. V 1981)).

[7] See, e.g., Soewapadji v. Wixon, 157 F.2d 289, 290 (9th Cir.), cert. denied, 329 U.S. 792 (1946); United States *ex rel.* Von Kleczkowski v. Watkins, 71 F. Supp. 429, 437 (S.D.N.Y. 1947); Glikas v. Tomlinson, 49 F. Supp. 104, 107-08 (N.D. Ohio 1943); *Ex parte* Kurth, 28 F. Supp. 258, 263 (S.D. Cal.), appeal dismissed sub nom. Kurth v. Carr, 106 F.2d 1003 (9th Cir. 1939). See also Evans, The Political Refugee in United States Immigration Law and Practice, 3 Int'l Law. 204, 208 (1969) (discussing special circumstances mitigating the stringency of immigration laws). The first statutory use of the term "asylum" appears in the Refugee Act of 1980 (1980 Act). 8 U.S.C. § 1158 (Supp. V 1981). The term is used in reference to a person whom the Attorney General determines to be a "refugee," see infra notes 90-91 and accompanying text, and who is "physically present in the United States or at a land border or port of entry." Id. § 1158(a).

[8] See Anker & Posner, The Forty Year Crisis: A Legislative History of the Refugee Act of 1980, 19 San Diego L. Rev. 9, 10 (1981); Note, The Right of Asylum Under United States Immigration Law, 33 U. Fla. L. Rev. 539, 540 (1981).

[9] See Staff of Senate Comm. on the Judiciary, 96th Cong., 1st Sess., Report on the Formation of the Select Commission on Immigration and Refugee Policy: United States Immigration Law and Policy: 1952-1979 at 5 (Comm. Print 1979) [hereinafter cited as U.S. Immigration Law and Policy]; see also H.R. Rep. No. 1066, 87th Cong., 1st Sess. (1961) (the Migration and Refugee Assistance Act of 1961 to aid migrants and refugee-escapees); Evans, supra note 7, at 204 (United States recognition of its responsibility for political refugees).

1948,[10] as modified in 1950,[11] and again in 1951.[12] While clearly a step forward for the United States in its attempts to translate real humanitarian concerns into effective and pragmatic programs for the accommodation of refugees, the 1948 Act with its amendments was, in the final analysis, again merely a reaction to a crisis. Subsequent events would soon prove that it would not, and could not realistically have been expected, to provide any solutions to the long-range refugee dilemma.[13]

The lack of a foresighted American approach to the full panoply of refugee issues was not substantially remedied by the passage of what is still the basic immigration statute, the Immigration and Nationality Act of 1952 (INA).[14] While passage of the INA does indicate a recognition that a thorough overhaul of the immigration law of this country was in order, the act tellingly skirted the entire refugee issue.[15]

In the absence of any provision in the INA dealing categorically with refugees or asylum, the United States was forced to utilize a variety of special measures not originally intended, nor specifically designed, for refugee relief. Among such measures was the 1952 provision allowing an alien present in the United States to request the withholding of deportation to any country where, if deported, he

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[10] Pub. L. No. 80-774, 62 Stat. 1009 (1948) (repealed). This Act was intended to provide sanctuary for persons displaced by the war. It was quite restrictive, however, granting refuge only to certain persons displaced from countries conquered by Germany, and to others who qualified under United Nations standards because they had fled Nazi, Fascist, or Soviet persecution. See Anker & Posner, supra note 8, at 13.

[11] Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219.

[12] Act of June 28, 1951, Pub. L. No. 82-60, 65 Stat. 96.

[13] The United States never signed the 1951 United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150. Prior to 1950, there was no provision by which an alien could avoid deportation due to anticipated persecution in the country to which he was destined. Accordingly, the courts did not recognize any right to asylum in the United States. In 1950 Congress enacted an amendment which enjoined the Attorney General from deporting an alien to a country where he would be physically persecuted. Act of Feb. 5, 1917, Pub. L. No. 64-301, § 20(a), 39 Stat. 874, 890, amended by Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010. The statute, as further amended in 1952, clarified the discretionary nature of the Attorney General's power to withhold deportation. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (current version at 8 U.S.C. § 1253(h) (Supp. V 1981)). In 1965 the requirement that the persecution be "physical" was eliminated, Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (current version at 8 U.S.C. § 1253(h) (Supp. V 1981)). The statute specified that the persecution must be on the basis of "race, religion, or political opinion." Id. The debates in the House disclosed that the purpose of the latter specification was to aid refugees. 111 Cong. Rec. 21,755, 21,768-69 (1965). See infra note 16 and accompanying text.

[14] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (current version at 8 U.S.C. §§ 1101-1157 (1976 & Supp. V 1981)).

[15] See Anker & Posner, supra note 8, at 14.

would be subjected to physical persecution.[16] This statutory clause, section 243(h) of the INA, was expanded by subsequent administrative praxis, undoubtedly well beyond the imaginations of its enacting legislators, to provide some alleviation of the plight of refugees.[17]

A second of the numerous measures used to aid refugees was the broad parole power of the Attorney General. First statutorily recognized in section 212(d)(5) of the INA,[18] it was intended to be an extraordinary instrument available for use only in temporary emergencies.[19] Due to its inherent vagueness, however, which made it a tempting way to cure defects in the INA,[20] the Attorney General's parole power was soon welcomed as a device whereby individual refugees could be admitted to the United States.[21]

Dilation and evolution of the parole power to include its utilization for the admission of mass numbers of refugees was, foreseeably, the next step. This development first occurred in 1956, when the Soviet Union suppressed a popular rebellion in Hungary, producing thousands of refugees. The United States responded to the event by again expanding the role of the Attorney General's emergency parole power.[22] In later years, the role would be further enhanced by a 1960

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[16] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (current version at 8 U.S.C. § 1253(h) (1976 & Supp. V 1981)). In 1965, this section was amended to permit withholding of deportation based on "persecution on account of race, religion, or political opinion." Immigration and Nationality Act of 1952, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918; see supra note 13.

[17] See infra text accompanying notes 20-23.

[18] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (current version at 8 U.S.C. § 1182(d)(5) (Supp. V 1981)). In 1952, the statute read:

> The Attorney General may 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.

Id.

[19] See Study of Population and Immigration Problems, Special Series No. 13, House Comm. on the Judiciary, Sub-Comm. No. 1 (G.P.O. 1963).

[20] See id.

[21] See H. Rep. No. 745, 89th Cong., 1st Sess. 15 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 16, reprinted in 1965 U.S. Code Cong. & Ad. News 3328, 3334-35.

[22] Because existing immigration laws were inadequate to handle the flood of Hungarian refugees, President Eisenhower first offered asylum to a small number under available statutes, then authorized the admission of the remaining refugees by requesting the Attorney General to exercise his parole power under section 212(d)(5) of the Immigration and Nationality Act of 1952 (INA). See U.S. Immigration Law and Policy, supra note 9, at 18; Anker & Posner, supra note 8, at 15-16; supra note 18.

statute authorizing the use of parole as part of a partnership between the United States and the United Nations High Commissioner for Refugees,[23] as well as by the developments of 1961 and 1962 with regard to Chinese refugees.[24]

Despite the enactments in 1953 and 1962 of legislation dealing with the refugee problem,[25] the general situation did not significantly improve. Use of the clause of the INA providing for the withholding of deportation and use of the Attorney General's parole power retained their durability and popularity as the chief refugee relief measures.[26]

The next major statute to have a substantial impact upon the field was the 1965 amendments to the Immigration and Nationality Act of 1952.[27] Perceived abuses of the parole power had greatly troubled Congress, which recognized the rather enthusiastic expansion of the parole power which had taken place since 1952.[28] The legislators determined, therefore, to supplement the power—attempting to make continued frequent resort to it unnecessary—by creating a special preference category for refugees.[29] Through this legislation, a specific

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[23] Act of July 14, 1960 (Fair Share Law), Pub. L. No. 86-648, 74 Stat. 504. This statute grants the Attorney General authority to admit a "fair share" of the refugees remaining in European refugee camps under the mandate of the United Nations High Commissioner for Refugees. See Anker & Posner, supra note 8, at 16 & n.27.

[24] See U.S. Immigration Law and Policy, supra note 9, at 46. In May 1962, President Kennedy authorized the Attorney General to parole more than 15,000 Chinese refugees from Hong Kong. They were fleeing both political conditions and famine. Id.

[25] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400. The Refugee Relief Act was intended, at least in part, to encourage anti-Communists to leave Communist controlled countries. See Anker & Posner, supra note 8, at 14.

Migration and Refugee Assistance Act of 1962, Pub. L. No. 87-510, 76 Stat. 121. This Act was a response to the Communist domination of Cuba. Unlike the Refugee Relief Act of 1953, however, it did not specifically refer to refugees from Communist controlled areas. In this sense, the 1962 Act represented a broadening of the American view towards refugees. See U.S. Immigration Law and Policy, supra note 9, at 48; Anker & Posner, supra note 8, at 16–17.

[26] See H.R. Rep. No. 745, 89th Cong., 1st Sess. 15 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 16, reprinted in 1965 U.S. Code Cong. & Ad. News 3328, 3334–35.

[27] Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911. The Act was later revised by the Refugee Act of 1980, §§ 207–209, 94 Stat. 102, 103–06 (codified at 8 U.S.C. §§ 1157–1159 (Supp. V 1981)). The primary change of the 1965 amendments was the repeal of the national origins quota system, established in the 1920's. See U.S. Immigration Law and Policy, supra note 9, at 51. Under the national origins quota system, American immigration policy was based on admission of specific numbers of immigrants of certain nationalities, predicated on place of birth. Each group contained a number of "preference categories." The 1965 amendments lessened the importance of place of birth and emphasized the reunification of families and the need for particular types of skilled workers. Id.; see infra note 30.

[28] See H.R. Rep. No. 745, 89th Cong., 1st Sess. 15 (1965); S. Rep. No. 748, 89th Cong., 1st Sess. 16, reprinted in 1965 U.S. Code Cong. & Ad. News at 3334–35. See also Anker & Posner, supra note 8, at 19–20 (congressional reaction to continued use of parole power).

[29] Immigration and Nationality Act of 1952, § 203(a)(7) (codified at 8 U.S.C. § 1153(a)(7) (Supp. V 1981)), repealed by Pub. L. No. 96-212, § 203(c)(3), 94 Stat. 102, 107 (1980).

number of visas was allocated to aliens who qualified as "conditional entrants" each year.[30] Notwithstanding this new seventh preference category, and the express intent of Congress that use of the parole power thenceforth be limited to true crises,[31] the Attorney General's power continued to be used quite often.[32]

Following the passage of the 1965 amendments, then, there existed a number of devices which were being employed to assist those seeking refuge. The least formalized of these included the intermittently-enacted statutes providing for temporary refugee relief,[33] and the questionable, albeit prevalent, utilization of the parole power of the Attorney General.[34] More canonized, though, were the two fundamental statutory provisions relating to refugees and asylum.

The first of these two provisions, by its terms applicable to aliens physically present in the United States who were faced with deportation proceedings, was founded upon the 1965 amendments to section 243(h) of the INA.[35] This section stated that:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons.[36]

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[30] Id.; see infra text accompanying note 38 for text of statute. Previous admission of refugees had been accomplished by special legislation, see supra text accompanying note 25, rather than by the quota system, see supra note 27.

The 1965 amendment created a seventh preference category for persons fleeing their own countries due to persecution or fear of persecution. See 8 U.S.C. § 1153(a)(7) (1976) (repealed 1980); infra text accompanying notes 37-39.

[31] S. Rep. No. 748, 89th Cong., 1st Sess. 17, reprinted in 1965 U.S. Code Cong. & Ad. News at 3335.

[32] For example, in 1973 alone, the Attorney General paroled into the United States nearly 10,000 Cubans, 200 Soviet Jews, and 1200 Ugandan Asians. See Immigration and Naturalization Serv., 1973-74 Annual Report 5. See generally Anker & Posner, supra note 8, at 18-19, 26 (discussion of continued use of parole power).

[33] See supra note 25 and accompanying text.

[34] See supra note 32 and accompanying text.

[35] 8 U.S.C. § 1253(h) (1976), amended by 8 U.S.C. § 1253(h) (Supp. V 1981). The 1965 amendment changed the former requirement that the persecution be "physical" in order for the Attorney General to withhold deportation. See supra notes 13 & 16.

[36] 8 U.S.C. § 1253(h) (1976) (amended 1980). The authorization for the Attorney General to withhold deportation, granted by section 243(h) of the INA, is to be distinguished from the Attorney General's parole power of section 212(d)(5) of the INA. See supra note 18 and accompanying text. The parole power is a method for admitting an alien into the United States, while withholding of deportation bars removal to a specified country, despite some ground for deportation.

The second of the two provisions was section 203(a)(7) of the INA, the seventh preference category created by the 1965 amendments.[37] Pertaining to aliens outside the United States who were requesting that they be granted asylum, it stated that:

> (7) Conditional entries shall next be made available by the Attorney General, . . . to aliens who satisfy an Immigration and Naturalization Service officer . . . (A) that (i) because of persecution or fear of persecution on account of race, religion, or political opinion they have fled . . . .[38]

It is patent from the language of the two sections that both were intended to aid refugees, or others facing possible persecution. This is fully supported by the legislative history of section 243(h), where it was expressed by congressmen that no one should be deported to a land where he could be subjected to persecution on account of race, religion or political opinion.[39]

Furthermore, the legislative history makes it clear that, in addition to the equivalent purposes of the two sections, Congress intended that the burdens of proof to establish entitlement to relief under the two provisions be identical.[40] That is, the same standard of proof was to be employed in a situation where a person outside the United States was applying for classification as a seventh preference refugee and where a person present in the United States was seeking to avoid the prospect of deportation to a country where he claimed he would be subjected to persecution.

In spite of the support in the legislative history for this identity in the burdens of proof, the standards whereby the two sections were actually implemented differed considerably, so that relief under section 243(h) was more difficult to obtain. An alien who sought to come within the section 203(a)(7) preference category affording refugee status needed only to prove a "good reason to fear persecution,"[41] a

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[37] See supra notes 27 & 30 and accompanying text.

[38] 8 U.S.C. § 1153(a)(7) (1976) (repealed 1980). This seventh preference category also contained a proviso that immigrant visas be made available in a number not to exceed one-half the total number of conditional entrants to aliens who were continuously present in the United States for a period of at least two years prior to their application for permanent residence status. Id. The seventh preference category was, however, applicable only to aliens fleeing Communist or Communist dominated countries, aliens fleeing countries within the "Middle East" (a defined area) and persons uprooted by "catastrophic natural calamity." Id.

[39] See 111 Cong. Rec. 21,755, 21,803-04 (1965).

[40] Id. at 21,804.

[41] See, e.g., *In re* Ugricic, 14 I. & N. Dec. 384, 385-86 (1972); see also Stevic v. Sava, 678 F.2d 401, 405 (2d Cir.) (discussion of burden of proof under INA sections 203(a)(7) and 243(h)), petition for cert. filed, 51 U.S.L.W. 3484 (U.S. Dec. 12, 1982) (No. 82-973).

yardstick which, while rarely fully explored, was generally recognized by the courts as the relevant shibboleth.[42]

On the other hand, in order to be eligible for the relief offered by section 243(h), and thus to avoid deportation, the alien was forced to rely upon the broad discretion of the Attorney General.[43] This discretion to withhold deportation was properly exercised, it was often said, "[o]nly where there is a clear probability of persecution to the particular alien."[44] Mere "good reason," as required under section 203(a)(7), would not suffice, nor would a clear probability of persecution if it could not be shown to relate "to the particular alien." On rare occasion, some courts varied the precise wording of the section 243(h) standard, demanding only a "probability" of persecution to the particular alien, but the basic concept was left intact.[45] In effect, a section 243(h) applicant would be faced with the burden[46] of meeting a two-pronged test: (a) that there was a "clear probability" (or, rarely, a "probability") of persecution upon deportation, and (b) that the persecution expected must be particularized or directed specifically at the individual alien.

Thus, sections 243(h) and 203(a)(7) of the INA, which had identical purposes and which, by all indications, should have required identical standards of proof, were applied in radically different manners. Not only did section 243(h) require a greater quantum of proof ("clear probability" as opposed to "good reason"), it also necessitated

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[42] See supra note 41.

[43] See, e.g., Khalil v. Immigration & Naturalization Serv. 457 F.2d 1276 (9th Cir. 1972); Cheng Kai Fu v. Immigration & Naturalization Serv., 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); Lena v. Immigration & Naturalization Serv., 379 F.2d 536, 537 (7th Cir. 1967); Blazina v. Bouchard, 286 F.2d 507, 510-11 (3d Cir. 1961); Chi Sheng Liu v. Holton, 297 F.2d 740, 741 (9th Cir. 1961); Chao-Ling Wang v. Pilliod, 285 F.2d 517, 519 (7th Cir. 1960); Obrenovic v. Pilliod, 282 F.2d 874, 876 (7th Cir. 1960); Cakmar v. Hoy, 265 F.2d 59, 62 (9th Cir. 1959); United States *ex rel.* Cantisani v. Holton, 248 F.2d 737, 738-39 (7th Cir. 1957), cert. denied, 356 U.S. 932 (1958); Namkung v. Boyd, 226 F.2d 385, 338 (9th Cir. 1955). See also Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993 (5th Cir. 1977); Shkukani v. Immigration & Naturalization Serv., 435 F.2d 1378, 1380 (8th Cir.), cert. denied, 403 U.S. 920 (1971); Hosseinmardi v. Immigration & Naturalization Serv., 405 F.2d 25, 27 (9th Cir. 1969).

[44] Cheng Kai Fu v. Immigration & Naturalization Serv., 386 F.2d at 753; see also Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129, 134 (5th Cir. 1978) (alien must produce evidence of particularized persecution); Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 380 (7th Cir. 1977) (alien failed to prove he would in fact be persecuted); *Lena*, 379 F.2d at 538 (discrimination against church generally).

[45] See, e.g., Kovac v. Immigration & Naturalization Serv., 407 F.2d 102, 105 (9th Cir. 1969).

[46] See 8 C.F.R. § 242.17(c) (1982). For a more thorough discussion of the alien's burden of proof under section 243(h) of the INA, see 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.J. 291, 298-301 (1980).

a higher quality of anticipated persecution ("particularized" as opposed to "generalized").

Imposing this formidable burden on those attempting to come within section 243(h) denied many aliens relief despite the strong appeal of their cases. Indeed, some of the most emotionally objectionable decisions were those which revolved around the necessity of "particularized persecution." For example, an exile from the Chinese mainland who, upon return to Hong Kong, would face the persecution confronting all such exiles, was not entitled to section 243(h) relief, since such "difficulties do not amount to the kind of particularized persecution that justifies a stay of deportation."[47] Similarly, a member of a cruelly persecuted church group could be deported to Turkey, as "such discrimination as exists is against the Church itself rather than individuals."[48] The standard was perhaps most concisely stated in a 1968 opinion of the Board of Immigration Appeals which declared that, in order to come within the protection of section 243(h), "an alien must show that he would be singled out as an individual by the governmental authorities and suffer persecution therefrom."[49] By contrast, an alien who alleged that he was fleeing his home country because of the fear of religious or political persecution could qualify for relief without showing particularized acts of persecution directed specifically at him under the section 203(a)(7) preference for "conditional entrant" classification.[50]

Thus the two basic statutory provisions in effect in 1965 relating to refugees and asylum were being implemented in extremely different ways. One, the new seventh preference status, was applied in a liberal manner, requiring only a showing of a good reason to fear persecution. The other, pertaining to the withholding of deportation, was saddled with a restrictive twofold test serving to exclude many of the aliens it was intended to assist.

II. Adoption of the United Nations Protocol

The refugee policy of the United States was next affected in 1968 by the adoption of the United Nations Protocol Relating to the Status of Refugees (Protocol).[51] One of the most significant portions of the Protocol was its definition of a "refugee" as an alien who flees his

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[47] *Cheng Kai Fu*, 386 F.2d at 753.

[48] *Lena*, 379 F.2d at 537.

[49] *In re* Joseph, 13 I.& N. Dec. 70, 72 (1968).

[50] See supra text accompanying notes 40-41.

[51] Opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268 [hereinafter cited as Protocol]. The Protocol incorporates and supplements the substantive

homeland due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[52] The Protocol further prohibited the return of any refugee to any country where his life or freedom would be in danger.[53]

By acceding to the Protocol and the elements of the Convention contained therein, through the approval of the Senate and the President, the United States imbued the Protocol with the force of a treaty[54] and thus the backing of article VI, clause 2 of the United States Constitution.[55] Adoption of the Protocol was of course effected with full knowledge of the existence of sections 203(a)(7) and 243(h) of the Immigration and Nationality Act of 1952, and with complete awareness of the manner in which the two sections were being implemented. Since it is evident that the "well-founded" fear of persecution test in the Protocol's definition of refugee conflicts with both the "good reason" to fear persecution standard recognized for section 203(a)(7),[56] and the "clear probability" of "particularized persecution" guidelines developed for section 243(h),[57] assumption of the Protocol's provisions was apparently expected, and indeed intended, to have a definite bearing on the interpretation of these statutory sections.

The conflict between the Protocol and section 203(a)(7) is not very troublesome, in that there is little substantive distinction between the "well-founded" standard of the Protocol and the "good reason" standard of section 203(a)(7) of the INA.[58] Regarding the conflict

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provisions of Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 U.N.T.S. 150 [hereinafter cited as Convention], a document to which the United States never acceded. See generally Note, The Right of Asylum Under United States Law, 80 Colum. L. Rev. 1125, 1126 (1980) (elaboration on Protocol as extension of 1951 Convention).

[52] Convention art. 1, as adopted by Protocol, supra note 51, art. 1, 19 U.S.T. at 6261, T.I.A.S. No. 6577 at 3, 606 U.N.T.S. at 268. For complete text of the Protocol's definition of refugee, see infra note 102.

[53] Convention art. 33, as adopted by Protocol, supra note 51, art. 33, 19 U.S.T. at 6276, T.I.A.S. No. 6577 at 54, 189 U.N.T.S. at 176.

[54] See *In re* Dunar, 14 I. & N. Dec. 310, 313 (1973) (because the Protocol was self-executing, it has the effect of an act of Congress); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 8–9 (1968).

[55] This clause states that the Constitution and laws of the United States, "and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. See infra notes 77–78 and accompanying text.

[56] 8 U.S.C. § 1153(a)(7) (1976) (repealed 1980). See supra text accompanying notes 40–41.

[57] 8 U.S.C. § 1253(h) (1976) (amended 1980). See Lena v. Immigration & Naturalization Serv., 379 F.2d at 538; supra text accompanying notes 44–45.

[58] The similarity between the "well-founded" test of the Protocol and the "good reason" test of section 203(a)(7) of the INA is even more apparent considering the background of the 1951

between the refugee standard of the Protocol and that of section 243(h), however, there does exist a clear substantive distinction.[59] For an alien to establish a "well-founded" fear of persecution, as required by the Protocol, he would only have to satisfy some form of a reasonableness test. According to the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (Handbook),[60] a fundamental premise of the United Nations Protocol is that the article I "well-founded" test comprises subjective, as well as objective, components.[61] That is to say, in addition to relatively objective factors such as conditions in the refugee's or asylee's home country,[62] and the plight of others presently in or fleeing from that country,[63] the subjective elements of the individual refugee's or asylee's state of mind and personality are also to be considered.[64] Needless to say, when the countless factors of a human personality are considered, the possibility of discovering in an asylee or refugee a "well-founded" fear of persecution is quite high. In this regard, it would appear far simpler to meet the "well-founded" standard of the Protocol than the stringent "clear probability" of "particularized" persecution standard applied to section 243(h).

The United Nations has long promoted the notion that the more liberal standard is the correct one. Indeed, even before adoption of the Protocol, the world body had issued an official advisement that the objective and subjective components of refugee status should be viewed in tandem.[65] It was the position of the United Nations that the "essential elements in the evaluation of the subjective feeling are the

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U.N. Convention, which was the forerunner to the Protocol. See Ad Hoc Committee on Statelessness and Related Problems, 10 U.N. ESCOR (5th mtg.) at 39, U.N. Doc. E/1618 [E/AC. 32/5] (1950); supra note 51.

[59] But see Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 379 (7th Cir. 1977) ("[T]he 'well-founded fear' standard contained in the Protocol and the 'clear probability' standard which court has engrafted onto section 243(h) will in practice converge.").

[60] Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1979) [hereinafter cited as Handbook].

[61] Id. para. 38. By comparison, the alien's subjective beliefs regarding the probability of persecution in an application for withholding of deportation under section 243(h) have often been given less weight than is suggested by the Handbook. Cf. Pereira-Diaz v. Immigration & Naturalization Serv., 551 F.2d 1149, 1154 (9th Cir. 1977); Moghanian v. United States Dep't of Justice (Board of Immigration Appeals), 577 F.2d 141, 142 (9th Cir. 1978) (both cases finding inadequate proof of probable persecution based on alien's subjective beliefs).

[62] Handbook, supra note 60, paras. 42–43.

[63] Id.

[64] Id. See Note, supra note 46, at 300.

[65] Legal Division, Office of the United Nations High Commissioner for Refugee Status, Eligibility—A Guide for the Staff of the Office of the United Nations Commissioner for Refugees 69 (1962).

questions of the degree of that fear and its credibility,"[66] as based upon either "personal experience or some other concrete facts."[67]

Nevertheless, despite the distinctions between the Protocol's test and that developed under section 243(h),[68] and despite the fact that acceding to the Protocol should have been considered to have directly affected United States law,[69] various statements made by government officials at the time of adoption of the Protocol indicate a belief that the United Nations document would not have an impact upon United States law or policy. For example, the Acting Deputy Director of the Office of Refugee and Migration Affairs claimed that "the United States already meets the standards of the Protocol,"[70] while the Secretary of State felt that the Protocol "would not impinge adversely upon the laws of this country."[71] Finally, the Secretary of State also declared that article 33 of the Protocol (dealing with the prohibition of returning an alien to a persecuting country) "is comparable to Section 243(h) . . . and it can be implemented within the administrative discretion provided by existing regulations."[72]

It was mainly due to this line of statements that a number of courts came to the conclusion that adoption of the Protocol was a purely symbolic gesture with no significant impact upon either section 203(a)(7) or section 243(h). These courts, therefore, slighted the mandate of the United Nations Protocol and continued to apply the traditional two-pronged test of section 243(h).[73] The method varied, with some courts simply ignoring the Protocol altogether, while others deigned to recognize the Protocol's existence, but little else. One Board of Immigration Appeals decision, for example, acknowledged that the Protocol must be regarded as a treaty having the force and effect of an act of Congress.[74] Nevertheless, the Board concluded that

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[66] Id.

[67] Id.

[68] See supra text accompanying notes 59-65.

[69] See supra text accompanying notes 54-58.

[70] S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 7 (1968).

[71] Id.

[72] Id. at 8.

[73] See Fleurinor v. Immigration & Naturalization Serv., 585 F.2d 129, 135 (5th Cir. 1978); Kashani v. Immigration & Naturalization Serv., 547 F.2d 376 (7th Cir. 1977); Henry v. Immigration & Naturalization Serv., 552 F.2d 130, 131 (5th Cir. 1977); Cisternas-Estay v. Immigration & Naturalization Serv., 531 F.2d 155, 159 (3d Cir.), cert. denied, 429 U.S. 853 (1976); Paul v. Immigration & Naturalization Serv., 521 F.2d 194, 196-97 (5th Cir. 1975); Hamad v. Immigration & Naturalization Serv., 420 F.2d 645 (D.C. Cir. 1969); *In re* Williams, 16 I. & N. Dec. 697, 700 (1979); *In re* Dunar, 14 I. & N. Dec. 310 (1973); *In re* Tan, 12 I. & N. Dec. 564 (1967).

[74] *In re* Dunar, 14 I. & N. Dec. at 313.

accession to the Protocol did not require any reappraisal of United States law.[75] It ruled, accordingly, that a thirty-two year old Hungarian alien who left during the uprising of 1956 could be deported over his claims of anticipated persecution.[76]

It must be stressed that the reluctance of the courts and the Board to accord the Protocol due weight when seeking to interpret the United States immigration laws was unwarranted. The United Nations Protocol, as a treaty,[77] can and must supersede a prior inconsistent statute.[78] This much was conceded even by those tribunals which chose not to defer to the Protocol as a valid interpretive tool.[79] A denial of the Protocol's binding effect, therefore, would seem to be inappropriate.

Moreover, the assertion that the Protocol, despite its admittedly binding effect, did not necessitate any change in the manner in which section 243(h) was being applied, does not take adequate account of the full terms of the United Nations document. Aside from the obvious incompatibility between the customary two-pronged test of section 243(h) and the "well-founded" standard of the Protocol,[80] the High Commissioner's accompanying handbook clarifies and sharpens this difference.[81]

Furthermore, while many courts did, in the period following the United States accession to the Protocol, refuse to consider any possible effect the United Nations Protocol may have had upon American refugee and asylum law,[82] a number of other courts expressly made reference to the Protocol's potential impact.[83] These opinions, while certainly not conclusive proof of the Protocol's significance, do provide an important buttress to the proposition that United States law should have been deeply affected by the 1968 adoption of the Protocol.

The Fifth Circuit, for example, proclaimed that, while "[w]e do not suggest that the Protocol profoundly alters American refugee law

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[75] Id. at 314, 319-20.

[76] Id. at 324-25.

[77] See S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 8-9 (1968); supra notes 54-55 and accompanying text.

[78] Cf., e.g., Cook v. United States, 288 U.S. 102, 119-20 (1933); Whitney v. Robertson, 124 U.S. 190, 194 (1888)(cited in *In re* Dunar, 14 I. & N. Dec. at 313-14).

[79] See *In re* Dunar, 14 I. & N. Dec. at 310.

[80] See supra text accompanying notes 59-64.

[81] See supra notes 60-61 and accompanying text.

[82] See supra note 73 and accompanying text.

[83] See, e.g., Coriolan v. Immigration & Naturalization Serv., 559 F.2d 993, 997 (5th Cir. 1977); Muskardin v. Immigration & Naturalization Serv., 415 F.2d 865, 867 (2d Cir. 1969).

[w]e do believe our adherence to the Protocol reflects or even augments the seriousness of this country's commitment to humanitarian concerns . . . ."[84] Likewise, faced with a petitioner who sought to rely upon the Protocol as evidence of "a 'liberalization' of the Congressional attitude toward those who claim to fear return to a country where they might be persecuted,"[85] the Second Circuit was forced to confront squarely the issue of the relevance of the Protocol and the Convention to United States refugee and asylum law. The court implied that it might, if operating under another set of facts, have been willing to accord the documents even greater weight.[86] For the purposes of the instant case, however, it would suffice to conclude that the Protocol "may well have been a proper consideration in guiding the discretion" of immigration officials.[87]

The full import of the United Nations Protocol was thus not appreciated by the majority of United States tribunals, and barely hinted at by the few that seemed cognizant of the impact which adoption of the Protocol should have had on United States law. Despite this lack of recognition, however, a major change in United States law adopted a decade after accession to the Protocol would, ironically, make clear the various ramifications which should actually have accompanied accession.

III. The Refugee Act of 1980

The Refugee Act of 1980 (1980 Act)[88] brought about significant changes in United States law and policy. A far-ranging overhaul of United States refugee and asylum provisions, the 1980 Act represents the culmination of a long series of proposals and counterproposals put forward during the 1970's.[89] Most importantly, for the purposes of this study, the 1980 Act statutorily established American refugee policy and the right to asylum enjoyed by all who are subject to persecution.

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[84] *Coriolan*, 559 F.2d at 997.

[85] *Muskardin*, 415 F.2d at 867.

[86] Id. In *Muskardin*, the alien was a citizen and native of Yugoslavia who had entered the United States as a crewman, admitted for the period that his ship remained in port. Immigration and Naturalization Act of 1952, § 252, 8 U.S.C. § 1282 (1976). He deserted ship, and was found deportable. 415 F.2d at 866. The Second Circuit stated that its scope of review was limited to the issue of whether the Special Inquiry Officer had abused his discretion in denying Muskardin's application for a stay of deportation. Id. at 866–67.

[87] Id. at 867.

[88] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (Supp. IV 1980)).

[89] See Anker & Posner, supra note 8, at 20–42.

The 1980 Act took the form of a series of substantial amendments to the Immigration and Nationality Act of 1952.[90]

Whereas earlier United States statutes had resisted any attempt to define the word "refugee,"[91] the 1980 Act took as its cue the United Nations Protocol, and explicitly defined the term as follows:

> (42) The term "refugee" means (A) any person . . . [fleeing] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[92]

Another major change effected by the Act concerns the severe curtailment of the broad parole power of the Attorney General embodied in section 212(d)(5) of the INA. Since refugee and asylum law was to be definitively codified in the new Act, there would be no need for a catchall, pliable power. Consequently, the 1980 Act amended section 212(d)(5) of the INA so that the parole power was limited, at least in theory, to those situations where its use was necessary for legitimately "emergent reasons or for reasons deemed strictly in the public interest."[93] Additionally, the power would be available for use in admitting an individual refugee only where there exist "compelling reasons in the public interest."[94] Moreover, the parole power was not to be used for the admission of groups of aliens, as had been the practice in the past,[95] but only to permit the entry of individuals within the statutorily prescribed limitations.[96]

The withholding of deportation under section 243(h) of the INA was also changed by the Refugee Act of 1980. The discretionary nature of the Attorney General's power pursuant to this section was eliminated in favor of a mandatory edict. As amended, section 243(h) provides:

> The Attorney General *shall not* deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom could be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.[97]

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[90] See 8 U.S.C. §§ 1157-1159 (Supp. V 1981).

[91] See Recent Developments, supra note 3, at 564-65.

[92] Refugee Act of 1980, § 201(a), 94 Stat. 102 (codified at 8 U.S.C. § 1101(a)(42) (Supp. IV 1980)).

[93] Id. § 1182(d)(5)(A).

[94] Id. § 1182(d)(5)(B).

[95] See supra notes 22-24 and accompanying text.

[96] 8 U.S.C. § 1182(d)(5) (Supp. V 1981).

[97] Id. § 1253(h)(1) (emphasis added). This section is also limited in application as follows: Paragraph (1) shall not apply to any alien if the Attorney General determines that—

Finally, the 1980 Act codifies this nation's historical commitment to humanitarian interests, announcing that a comprehensive asylum procedure be established for refugees "physically present in the United States or at a land border or port of entry."[98] Under regulations issued pursuant to the 1980 Act, section 243(h) is also applicable to a person seeking asylum following the initiation of deportation proceedings.[99]

These statutory alterations and innovations are noteworthy for a variety of reasons. Foremost among these is their significance as substantial modifications of this nation's central immigration statute. Moreover, the 1980 changes are equally important symbolically in that they represent the transformation of this country's long-standing policy of solicitude towards refugees into concrete statutory stipulations.

An incidental, but critical, facet of the Refugee Act of 1980 is the force which it lends to another piece of American law. The changes effected by the 1980 Act have an impact upon the degree to which the United Nations Protocol Relating to the Status of Refugees should be perceived as influencing United States law. While the Protocol should have been used to interpret United States legislation even prior to the 1980 Act,[100] its use as an interpretive device subsequent to the 1980 Act seems imperative.

A strong argument may be made that the 1980 Act demands that great weight be accorded the Protocol, based on the fact that many of the most vital portions of the 1980 Act were lifted from the Protocol with virtually no alteration in language. For example, the definition of "refugee" provided by the 1980 Act[101] coincides so closely with that

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(A) the alien 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;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Id. § 1253(h)(2).

[98] Id. § 1158(a). The establishment of an asylum procedure for those already in or about to enter this country is significant as a recognition of the United States changing status as a first haven for refugees. See infra text accompanying notes 155-61.

[99] 8 C.F.R. § 208.3(b) (1982). This regulation states that a request for asylum after the initiation of exclusion or deportation proceedings "shall also be considered as requests for withholding exclusion or deportation pursuant to section 243(h) of the [1980] Act." Id.

[100] See supra text accompanying notes 51-57.

[101] See supra text accompanying note 92.

earlier offered by the Protocol[102] that there can be no questioning the origins of the 1980 Act provision. Additionally, the revision of section 243(h), making the Attorney General's power to withhold deportation a mandatory edict rather than a discretionary right, traces its roots to the Protocol.[103]

That the powerful similarities in language between the Protocol and the 1980 Act are not mere coincidences was emphasized by the enacting legislators.[104] Specifically, the final conference committee report of Congress explicitly recognized that many of the terms of the 1980 Act are "based directly upon the language of the Protocol and it is intended that the provision be construed consistent [sic] with the Protocol."[105]

This strong endorsement by the conference committee of the use of the United Nations document as an interpretive tool when attempting to understand the provisions and standards of United States immigration statutes, supplies a critical link in comprehending how the 1980 statute lends greater force and credence to the 1968 treaty.

The correspondence in language, and recognition of the correspondence by the key conference committee, are not the only indicators of the relationship between the two laws. It is evident that legislators also intended passage of the 1980 Act to bring United States law into compliance with the provisions of the United Nations Protocol. This intent was expressed in various ways during the legislative development of the 1980 Act.

Several clauses of the Refugee Act of 1980 were seen by legislators as assuring that the statute conforms United States statutory law to our obligations under article 33 of the Protocol.[106] Furthermore, the United States Coordinator for Refugee Affairs told the Senate Committee on the Judiciary during its hearings that whereas, "[U]ntil

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[102] The Protocol defined a "refugee" as a person who, "owing to 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. . . ." Convention art. 1, as adopted by Protocol, supra note 51, art. 1, 19 U.S.T. at 6261, T.I.A.S. No. 6577, 606 U.N.T.S. at 268. Cf. supra text accompanying note 94 (the language in 8 U.S.C. § 1101(a)(42) (Supp. V 1981) closely parallels the language in the Protocol).

[103] See Note, supra note 51, at 1128. See also supra note 97 (text of 8 U.S.C. § 1253(h) (Supp. V 1981) defining the Attorney General's power as a mandatory edict).

[104] See infra note 105–06 and accompanying text. See also infra notes 107–11 and accompanying text (testimony before congressional committees).

[105] Joint Explanatory Statement of the Comm. of Conference, H.R. Con. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980) [hereinafter cited as Explanatory Statement].

[106] H.R. Rep. No. 608, 96th Cong., 1st Sess. 9, 17 (1979); S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979).

now, . . . our refugee programs [have been] essentially a patchwork of different programs that evolved in response to specific crises,"[107] the 1980 Act could serve to provide the country with uniform, efficient procedures, as it "essentially adopts the definition [of refugee] of the United Nations Protocol Relating to the Status of Refugees, to which we are a party."[108]

With regard to the alteration in section 243(h) of the INA to make the withholding of deportation compulsory, a representative of Amnesty International testified before a House subcommittee that the old clause was "not in conformity with the requirements of the Convention and Protocol"[109] and thus was in need of revision. This same representative informed Congress that his organization had concluded that the new statute was acceptable, since it established procedures consonant with United States obligations under international law, and was, in fact, patterned directly upon the Protocol.[110] The same sentiment was expressed by the final conference report of Congress, which declared that both the Senate and House versions of the Refugee Act of 1980 strived to conform United States refugee and asylum law to the standards proclaimed by the United Nations.[111]

In view of the language of the Refugee Act, the explicit intent of the legislators, and the stature of the Protocol itself, it now appears indisputable that after 1980 the Protocol must be consulted when interpreting United States law. Thus it next becomes necessary to examine the ways in which the 1980 Act, as supplemented by the Protocol, affected the standards for determining whether to admit an alien to this country as a refugee, or whether to withhold deportation of an alien already here.

Under the 1980 Act, the former distinction between the section 203(a)(7) standard of fear of persecution and the section 243(h) standard of fear of particularized persecution has been wholly eliminated.

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[107] The Refugee Act of 1979: Hearings on S. 643 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 9 (1979) (statement of the Hon. Dick Clark, U.S. Coordinator for Refugee Affairs).

[108] Id. at 11.

[109] Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 169 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, representing Amnesty International).

[110] Id.

[111] Explanatory Statement, supra note 105, at 17–19. Nonetheless, several courts have recently found, based on pre-1980 precedent, that the new section 243(h) still does not require any reevaluation of the standard used for withholding of deportation. See infra text accompanying notes 146–54; see, e.g., Rejaie v. Immigration & Naturalization Serv., 691 F.2d 139, 143 (3d Cir. 1982).

The section 203(a)(7) preference category for refugees was repealed, and a new section 207 was added, providing for admission of a set number of refugees every year.[112] Under the terms of the 1980 Act, the definition of refugee contained in the Act[113] is to provide the exclusive relevant standard for admission.[114]

As has been noted, that standard is based directly on the language used in the Protocol of twelve years earlier.[115] Utilizing the Protocol and its accompanying documents, then, to interpret the standard for relief mandated by the 1980 Act—a practice sanctioned expressly by Congress[116]—it is evident that the Act has adopted a test unlike that applied under the old section 243(h). The "well-founded" standard of both the Protocol and the 1980 Act is far less stringent than is the earlier test.[117]

Most significantly, the need to show by a clear probability a particularized fear of persecution to the individual alien, an integral feature of the standard under the former section 243(h), should now be discarded.[118] Whether applying for entry to this country as a refugee, within the meaning of section 207 of the 1980 Act,[119] or attempting to avoid deportation due to fear of persecution upon return to one's native land under section 208 of 1980 Act and the amended section 243(h) of the INA,[120] the alien should only be required to show a valid fear of generalized persecution, and not necessarily a fear of persecution which would be leveled at the alien as an individual.

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[112] See 8 U.S.C. § 1157 (Supp. V 1981). This section fixed the number of refugees for fiscal 1980, 1981, and 1982 at 50,000, unless the President determined that admission of a greater number was "justified by humanitarian concerns or is otherwise in the national interest." Id. § 1157(a)(1). For each fiscal year after 1982, the President is to determine the number of refugees to be admitted, also as "justified by humanitarian concerns or otherwise in the national interest." Id. § 1157(a)(2). The existence of an "unforeseen emergency refugee situation," also would permit the President to admit an unspecified number of refugees, when "justified by grave humanitarian concerns." Id. § 1157(b)(1)-(3).

[113] See supra text accompanying note 92.

[114] In this regard, the granting of asylum under section 208 is based upon a finding of "refugee" status, as per the definition of that term. See 8 U.S.C. § 1158(a) (Supp. V 1981).

[115] See supra notes 101-02 and accompanying text.

[116] See supra text accompanying notes 91-92. A number of courts have also used the Protocol as an interpretive tool. See supra text accompanying notes 84-87.

[117] See supra text accompanying notes 56-64.

[118] See supra text accompanying notes 65-69; infra text accompanying notes 137-44. But see infra text accompanying notes 146-54.

[119] Section 207 was added in place of the section 203(a)(7) preference category for refugees. See supra text accompanying note 114.

[120] See supra text accompanying notes 35-39.

It should be stressed that this concept is not an innovation of the 1980 Act. It is, rather, the inevitable product of accession to the United Nations Protocol. Indeed, it is only due to the unwarranted reluctance of most courts to defer to the Protocol in the years between 1968 and 1980[121] that the more liberal standard appears new at all.

Even after passage of the 1980 Act, however, recognition of the Protocol as an important part of United States refugee and asylum law has been grudgingly forthcoming. Much as in the years following accession to the Protocol, several tribunals have only reluctantly welcomed use of the Protocol as an interpretive device. Since elimination of the need for a fear of particularized persecution is at least partially dependant on acceptance of the Protocol and Handbook as supplementing the 1980 Act, the fate of the particularized persecution requirement has closely paralleled the fate of the Protocol. A court placing emphasis on the Protocol will be more likely to discard the old section 243(h) particularized test, while a court viewing the United Nations document in a less favorable light may well retain the old standard.

IV. Recent Case Law

Signs of a growing warmth toward the Protocol may gradually be appearing. In *In re McMullen*,[122] for example, the Board of Immigration Appeals initially held that enactment of the Refugee Act of 1980 did not alter section 243(h) with regard to the restrictive standard of particularized persecution. The Board claimed that evidence of general persecution in the petitioner's homeland was not helpful to his plea, as it "is not probative on the issue of the likelihood of this alien being subject to persecution if deported."[123] Significantly, this decision was reversed by the Ninth Circuit on the ground that either standard, generalized or particularized, had been satisfied by the evidence presented.[124] The Ninth Circuit did not, however, expressly state which standard was the correct one.

Several other courts of appeal are in conflict regarding whether the particularized standard is still required in order to qualify for

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[121] See supra text accompanying notes 73–88.

[122] 17 I. & N. Dec. 542 (1980), rev'd on other grounds, 658 F.2d 1312 (9th Cir. 1981).

[123] Id. at 546.

[124] *In re* McMullen, 658 F.2d at 1316–18. See also *In re* Rogriguez-Palma, 17 I. & N. Dec. 465 (1980) (Board of Immigration Appeals made extensive use of the Protocol and Handbook in interpreting the 1980 Act).

section 243(h) relief. The strongest arguments for disapproving the particularized standard are expressed in *Stevic v. Sava*,[125] a May 1982 decision of the Court of Appeals for the Second Circuit. Predrag Stevic, a citizen of Yugoslavia, had entered the United States in June of 1976 with a visa permitting him to remain for approximately seven weeks.[126] He overstayed this period of time by six months and deportation proceedings were instituted against him. Stevic then agreed to depart voluntarily by February 1977. He again overstayed, and was notified to surrender for deportation on August 24, 1977.

Refusing to surrender, Stevic moved to reopen the deportation proceedings in order to apply to have the deportation withheld under section 243(h)—as it read and was being applied in 1977.[127] Stevic claimed that he would face individual persecution upon return to Yugoslavia, presenting as evidence the experiences of other members of his family, his own ties to anti-Communist organizations, and the Yugoslav Government's traditional hostility to such groups and their members. An immigration judge denied the motion to reopen, and the denial was upheld on appeal by the Board of Immigration Appeals.[128]

In its January 18, 1980 opinion dismissing Stevic's appeal, the Board declared that for section 243(h) relief to be warranted, the customary test must be applied, namely, "a clear probability of persecution to be directed at the individual respondent . . . [who] will be singled out for persecution."[129] Ignoring the order to surrender for deportation on February 24, 1981, Stevic was apprehended on July 17, 1981, and later in the same year filed another motion to have his deportation proceedings before the Board reopened. On September 3, 1981, the Board of Immigration Appeals again denied the motion, explaining that no new evidence had been offered, and that the standard applied in its January 18, 1980 denial of the motion remained the correct one.[130] The Board reasoned that there was no

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[125] 678 F.2d 401 (2d Cir.), petition for cert. filed, 51 U.S.L.W. 3484 (U.S. Dec. 12, 1982) (No. 82-973).

[126] Id. at 401-02. The factual discussion of the *Stevic* case is taken from the circuit court opinion, id. at 402-04.

[127] The text of section 243(h) at that time read:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

8 U.S.C. § 1253(h) (1976) (amended 1980). Compare the text of present section 243(h), supra text accompanying note 97.

[128] 678 F.2d at 403.

[129] Id. (quoting the Board's decision).

[130] Id. 403-04.

justification for approval of a reopening—Stevic had still not shown that he would be singled out for persecution.[131] Stevic then petitioned the Second Circuit for review of the 1981 Board of Immigration Appeals denial of his motion to reopen.[132]

The Second Circuit reversed the Board's denial, basing its decision in large part on the effects of the United Nations Protocol and the Refugee Act of 1980.[133] The court concluded that the "[Act] completed the process, begun with . . . the Protocol of modifying the legal test applicable to section 243(h) relief from deportation."[134] Despite earlier findings by the Board and other courts that accession to the Protocol did not affect United States law,[135] the court indicated that even before enactment of the Refugee Act of 1980 it would have been preferable to look to the Protocol for assistance.[136] In the words of the court, "[s]ince Article 33 of the Convention imposes an absolute obligation upon the United States, standards developed in an era of discretionary authority require some adjustment."[137]

The court felt that with the passage of the 1980 Act, however, any lingering doubts concerning the applicability of the Protocol were convincingly erased.[138] The Protocol was now a legitimate interpretive device, to be accorded great weight. Relating the provisions of the Protocol and Handbook to the statute made replacement of the prior section 243(h) test both logical and desirable. Although the court focused primarily on the first part of the former section 243(h) test, dealing with "clear probability," it emphasized that it was disapproving the test as a whole.[139]

Making full and frequent use of the Protocol and the accompanying Handbook, as it believed was mandated by the legislative directive,[140] the court held that "asylum may be granted, and, under section 243(h), deportation must be withheld, upon a showing *far short* of a 'clear probability' that an individual will be singled out for persecution."[141]

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[131] Id.
[132] Id. at 404.
[133] See id. at 405–09.
[134] Id. at 408.
[135] Id. at 407. See supra text accompanying notes 73–76.
[136] 678 F.2d at 409.
[137] Id. at 406.
[138] See id. at 407–08.
[139] See id. at 408.
[140] See id. at 409.
[141] Id. at 409 (emphasis added).

Only months after the *Stevic* decision had apparently confirmed the demise of the "clear probability" of "particularized persecution" standard, the Third Circuit, in *Rejaie v. Immigration and Naturalization Service*,[142] paid homage to its continuing viability.

Rejaie, a citizen of Iran, was admitted to the United States on September 9, 1978 on a student visa, with authorization to remain until June 30, 1979.[143] Rejaie failed to depart, and was found deportable upon hearing by an immigration judge. The Board of Immigration Appeals denied his motion to reopen.[144] Rejaie filed a petition for review in the Third Circuit, and simultaneously filed with the Immigration and Naturalization Service a Request for Asylum, asserting that he feared political persecution in Iran.[145]

Pursuant to INS regulations, Rejaie's asylum request was considered as a motion to reopen for the purpose of withholding deportation under section 243(h).[146] Basing his argument on *Stevic*, Rejaie claimed that the Board had incorrectly applied the old "clear probability of particularized persecution" standard.[147] The Third Circuit disagreed with *Stevic*, and concluded that the Refugee Act of 1980 had produced no significant change in the burden of proof in asylum cases.[148]

Compounding the confusion, several weeks after *Rejaie*, the Sixth Circuit, in *Reyes v. Immigration and Naturalization Service*[149]

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[142] 691 F.2d 139 (3d Cir. 1982).

[143] Id. at 141. The following discussion of facts is taken from the Third Circuit opinion. Id. at 139.

[144] Id. at 141.

[145] Id. Rejaie's petition for review was filed on August 27, 1981, the date he was ordered to report for deportation by the Board. Id. The filing of the petition entitled him to an automatic stay of deportation under 8 U.S.C. § 1105(a)(3) (1976). On October 16, 1981, the Board denied his motion to reopen "on the ground that [Rejaie] ha[d] failed to reasonably explain why he did not assert his asylum claim prior to the completion of the deportation hearing." 691 F.2d at 141 (quoting record). In support of a second motion to reopen, filed on December 10, 1981, he explained that he had earlier been unaware of the political developments in Iran. The Board found that he had failed to substantiate his claims of fear of political persecution in both motions to reopen. See id. at 141 n.3.

[146] Id. at 141; see 8 C.F.R. § 108.3(b) (1981).

[147] See 691 F.2d at 142, 145-46.

[148] Id. at 146. The *Rejaie* court based its rejection of *Stevic* on three points. First, the court felt that the *Stevic* court had "attributed a stringency to the phrase 'clear probability' that was not consistent with its own [earlier interpretations of that standard]." Id. Second, the *Stevic* court had "failed to appreciate the caselaw consensus" that the "clear probability" standard and the "well-founded fear" standard were equivalent. Id. Third, the *Stevic* court had "misapprehended" the legislative history of the 1968 accession to the Protocol and of the 1980 Act. Id.

The *Rejaie* court adhered to the view that accession to the Protocol and the 1980 modification of section 243(h) of the INA were "made solely for the sake of clarity," and did not change the standard for relief under section 243(h). Id.

[149] 693 F.2d 597 (6th Cir. 1982).

appears to have sided with the *Stevic* court in rejecting the "clear probability" standard.[150] In finding that standard to be too strict, however, the *Reyes* court nonetheless felt that section 243(h) still required some showing of persecution directed at the specific alien.[151]

This confusion regarding the proper standard for relief is contrary to the tenor of both the United Nations Protocol and the Refugee Act of 1980. The undeniable purpose of the 1980 Act was to lend clarity and uniformity to what had been an inconsistent refugee policy, by conforming United States law to the language of the Protocol.[152] Despite some pre-1980 statements that the "clear probability" test of section 243(h) and the "well-founded" test of the Protocol would in practice require an equivalent burden of proof,[153] continued use of the former standard fails to recognize the 1980 Congress' humanitarian concerns.[154]

Conclusion

The change in the United States position from a hopeful destination of refugees detained at way stations to a first haven for those fleeing persecution was dramatic and sudden.[155] The arrival of large numbers of Haitians and Cubans—the first wave of refugees ever to land directly upon American soil—shook the very foundations of our existing refugee procedures. Their arrival overwhelmed the system and sent the already overburdened Immigration and Naturalization Service adjudication process of asylum claims into a tailspin. It was unfortunate that the system was exposed to such unprecedented strains so soon after the United States had adopted the first complete asylum law incorporating changes mandated by our treaty obligations under the Protocol.

It is quite possible that the system broke down because it was too cumbersome. When the Haitians and Cubans arrived, existing procedures permitted them to apply for asylum before the local Immigra-

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[150] See Id. at 599. The *Reyes* court made no mention of the *Rejaie* decision of four weeks earlier.

[151] Id. (citing McMullen v. Immigration & Naturalization Serv., 658 F.2d 1312 (9th Cir. 1981)).

[152] See supra text accompanying notes 101-05.

[153] E.g., Kashani v. Immigration & Naturalization Serv., 547 F.2d 376, 379 (7th Cir. 1977).

[154] See, e.g., S. Rep. No. 256, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. Code Cong. & Ad. News at 141; see also Anker & Posner, supra note 8, at 37-39 (discussion of humanitarian factors in earlier legislative versions of 1980 Act).

[155] See supra text accompanying notes 3-4.

tion Service District Director.[156] If the application was denied, it could be renewed under section 243(h) before an immigration judge in exclusion or deportation proceedings.[157] In either case, the immigration officer dealing with the application was required to seek the advisory opinion of the Department of State.[158] A habeas corpus proceeding would bring the matter into federal district court for a de novo review of the case, and an adverse decision could be appealed to a federal court of appeals.[159]

The system clearly was not designed to handle large numbers of cases. Considering that by February 1983 there were already over 140,000 pending asylum applications awaiting the recommendation of the State Department's Bureau of Human Rights and Humanitarian Affairs, and only a small number of officers available to study each case and make the necessary recommendations,[160] the Government looks to Congress for a legislative panacea. A number of proposals have been introduced in Congress, whose task it will be to find procedures capable of handling the large volume of emergency entrants in a manner consistent with our world stature, as well as with the standards of fairness which we accepted in acceding to the United Nations Protocol.

In seeking legislative and other means to accord asylees the rights protected under the Protocol, it is evident that the recent judicial uncertainty regarding the proper standard for relief must first be remedied. Indeed, since recent legislative efforts favor simplification of all asylum procedures,[161] it would appear that the adoption of a

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[156] 8 C.F.R. § 208.3(a)(2) (1982). These procedures were established pursuant to section 208(a) of the 1980 Act, which 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 . . . to apply for asylum. . . ." 8 U.S.C. § 1158(a) (Supp. V 1981). The District Director is authorized to approve or deny the application "in the exercise of discretion." 8 C.F.R. § 208.8(a) (1982). The application may be denied by the District Director for a number of reasons, including the applicant's failure to meet the definition of "refugee" set out in section 101(a)(42) of the INA. Id. § 208.8(f); see supra text accompanying note 91. There is no appeal from the decision of the District Director. 8 C.F.R. § 208.8(c) (1982).

[157] 8 C.F.R. § 208.9 (1982). When an application for asylum is denied, the applicant must be "expeditiously" placed under exclusion proceedings, unless the applicant withdraws the application for admission. Id. § 208.8(f)(3).

[158] Id. § 208.7. The advisory opinion is issued by the Bureau of Human Rights and Humanitarian Affairs of the State Department. Id.; see infra text accompanying note 159.

[159] See 8 U.S.C. § 1105(a)(b) (Supp. V 1981); see also Auerbach, Immigration Laws of the United States 499-501 (discussion of existing procedure for judicial review of orders of exclusion).

[160] 129 Cong. Rec. 51,343 (daily ed. Feb. 17, 1983) (statement of Sen. Simpson).

[161] For example, the Simpson-Mazzoli Bill, S. 2222, 97th Cong., 2d Sess. (1982) and H.R. 5872, 97th Cong., 2d Sess. (1982), introduced on March 17, 1982, was a bipartisan measure which came quite close to endorsement. The bill would completely eliminate judicial review of

single standard for adjudicating both asylum applications and applications for the withholding of deportation under section 243(h) is especially desirable. A definitive rejection of the "clear probability" standard would be an important first step toward establishment of a fair and effective system for processing asylum claims.

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asylum cases, providing for summary exclusion proceedings before specially trained administrative law judges. It specifically provided that section 243(h) be amended by adding the following paragraph:

> *(b)Section 243(h) is hereby amended by adding at the end the following new paragraph:
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> (3) An application for relief under this subsection shall be considered to be an application for asylum under section 208 and shall be considered in accordance with the procedures set forth in that section.

Id. This bill was reintroduced on February 17, 1983 in substantially similar form. S. 529, 98th Cong., 1st Sess., 129 Cong. Rec. 51,342, 51,345-46 (daily ed. Feb. 28, 1983).

Thus, in the most broadly supported legislative proposal recently made, Congress chose to equate the application for asylum status with section 243(h) relief.