

TOWARD COLLECTIVE RESPONSIBILITY IN ASYLUM LAW: REVIVING THE ERODING RIGHT TO POLITICAL ASYLUM IN THE UNITED STATES AND THE FEDERAL REPUBLIC OF GERMANY

“The life of the Law has not been logic: it has been experience.”
Oliver Wendell Holmes, *The Common Law* 1 (1881).

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INTRODUCTION

An overwhelming number of asylum-seekers strains the most liberal asylum laws.¹ In the United States, approximately 100,000 people sought asylum in 1992.² The Immigration and Naturalization Service (INS) reports that asylum-seekers filed 73,757 applications between October 1993 and March 1994, bringing the total number of pending cases during this period to 378,935.³ In the Federal Republic of Germa-

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1. See 117 CONG. REC. S9,993 (daily ed. July 30, 1993) (statement of Sen. Kennedy) (arguing that the most important aspect of new asylum legislation is to establish mechanisms to prevent abuse of the asylum system).

2. See *Motel Kafka*, N.Y. NEWSDAY, Oct. 24, 1993, at 25 (reporting the number of asylum-seekers in the United States during 1992).

3. See INS Statistical Report, Asylum Division (April 22, 1994) (reporting the number of asylum applications filed and pending between October 1993 and March 1994). During this same period, the INS granted 3,441 applications, denied 14,801 applications, and closed 4,992 applications. *Id.*

ny,⁴ approximately 440,000 asylum-seekers filed claims in 1992.⁵ During the first four months of 1993, 161,324 new asylum applicants registered—a thirty percent increase from the same period in 1992.⁶

Today, more than ever before, a worldwide refugee epidemic compels the attention and action of the international community.⁷ Although many theorists dream of freeing asylum law from the political influences and procedural chaos that historically have plagued it,⁸ the fruition of this dream remains distant at best.⁹ Reality, meanwhile, compels states to adopt more practical and realistic approaches to the refugee problem.¹⁰

4. The author hereinafter refers to the Federal Republic of Germany as Germany.

5. See *infra* note 115 and accompanying text (discussing the dramatic increase in German asylum claims).

6. See *infra* note 117 and accompanying text (discussing the percentage increase in asylum claims during 1993).

7. See, e.g., Sadako Ogata, United Nations High Commissioner for Refugees, Statement to the Third Committee of the General Assembly of the United Nations (Nov. 10, 1992) (stating that at a minimum, eighteen million refugees exist around the world); LAWYERS COMMITTEE FOR HUMAN RIGHTS, UNCERTAIN HAVEN: REFUGEE PROTECTION ON THE FORTIETH ANNIVERSARY OF THE 1951 UNITED STATES REFUGEE CONVENTION 3 (1991) (noting, in addition to refugees, the existence of approximately thirty-five million internally displaced persons).

8. See generally Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act*, 19 SAN DIEGO L. REV. 9 (1981) [hereinafter *Forty Year Crisis*] (arguing for depoliticizing the asylum process and for the special training of those who process asylum claims); Ira Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91 (1981) (calling for the elimination of the State Department and more lenient time restrictions in the asylum process); Arthur C. Helton, *Political Asylum Under the Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243 (1984) [hereinafter *Unfulfilled Promise*] (criticizing the procedural mechanisms for processing asylum claims); T. Alexander Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons For the United States*, 17 U. MICH. J.L. REF. 183 (1984) [hereinafter *Political Asylum*] (suggesting that the United States should examine Germany's and the Republic of France's asylum laws when revamping its own politicized system of processing asylum claims).

9. See, e.g., T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); David Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983) (discussing the due process rights of refugees under the United States Constitution).

10. See Sam Blay & Andreas Zimmerman, *Recent Changes in German Refugee*

As the United States and Germany narrow the scope of asylum rights,¹¹ the international community must either share more of the burden, or witness the deterioration of the right to asylum.

This Comment examines the proposed changes in United States asylum law and the changes recently agreed to in Germany.¹² Part I traces the evolution of asylum law in the United States. Part II addresses recent proposals before the United States Congress to amend existing asylum law. Part III examines Germany's approach to processing asylum claims in order to chronicle the development of its asylum law. To understand Germany's reasons for amending its asylum law, Part IV documents its staggering number of asylum-seekers. Part V recounts the political struggle to change the German asylum law and describes the influence of right wing radicalism on this debate. Part VI discusses the recent amendment to the German Constitution (*Grundgesetz*) governing asylum, and the related agreements entered into with other European countries. Part VII recommends a system of collective responsibility that would globalize the burden sharing of this worldwide epidemic. In conclusion, this Comment urges the United States, Germany, and the United Nations High Commissioner for Refugees (UNHCR) to take the initiative in halting the erosion of the right to asylum.

I. POLITICAL ASYLUM LAW IN THE UNITED STATES

A. HISTORY

Prior to 1968, United States asylum law was a generous program of *ad hoc* responses to migratory situations.¹³ During this period, refugees could obtain asylum in the United States by three methods: (i) withholding of deportation;¹⁴ (ii) conditional entry status;¹⁵ and (iii) the parole

Law: A Critical Assessment, 88 AM. J. INT'L L. 361, 365 (1994) ("[T]he practice of sending refugees back to countries of first refuge has become a rather common feature of refugee law in many states.").

11. See *infra* notes 48-92, 145-75 and accompanying text (documenting the ways in which the United States and Germany are altering their asylum laws to limit the number of asylum-seekers their systems process).

12. See *infra* notes 48-92 and 145-75 (describing changes in United States and German asylum laws).

13. See The Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009 (1948); The Displaced Persons Act Amendments of 1950, Pub. L. No. 81-555, 64 Stat. 219 (1950) (addressing migration in World War II aftermath); H.R. Rep. No. 581, 81st Cong., 1st Sess. 15 (1949) (allowing political dissidents to enter from communist countries).

14. See Immigration and Nationality Act of 1952, § 243(h), 614.226 Stat. 163.

power of the Attorney General.¹⁶ Withholding of deportation, as the name suggests, allowed the Attorney General¹⁷ to withhold the deportation of refugees to any country where it was "clearly probable" that they would experience physical persecution.¹⁸ Conditional entry status, which concerned the admission of refugees from overseas, allowed the INS to admit aliens who could demonstrate that they had fled either a Middle Eastern country or a communist country.¹⁹ Finally, the Attorney General exercised parole power for emergency or public interest reasons.²⁰

In 1968, the United States became a party to the United Nations Protocol Relating to the Status of Refugees.²¹ One of the 1967

214 (1952) (codified as amended at 8 U.S.C. § 1253(h) (1982)) [hereinafter 1952 Act] (authorizing the Attorney General to withhold the deportation of any alien who might experience persecution). This withholding provision had, however, geographic and ideological limitations. *Id.*

15. See Immigration and Nationality Act, 1965 Amendments, Pub. L. No. 89-236, § 11, 79 Stat. 911, 918 (1965) (codified as amended at 8 U.S.C. § 1253(h) (1982)) [hereinafter 1965 Amendments] (replacing the requirement that an alien demonstrate that he or she would be subject to "physical persecution" with a standard of persecution based on "race, religion or political opinion"). Conditional entry status was subject to numerical limitations. *Id.*

16. See 1952 Act, *supra* note 14, at § 212(d)(5), 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1182(d)(5)(A) (1982)) (granting the Attorney General the authority to parole aliens into the country for emergency or public interest reasons). Although the statute did not impose geographic, ideological, or numerical limitations on this parole power, Attorneys General used it almost exclusively to admit persons fleeing from communist states. See *Unfulfilled Promise*, *supra* note 8, at 246-48 (documenting the evolution of asylum law in the United States).

17. The Attorney General heads the Department of Justice. A unit of this Department, the Immigration and Naturalization Service (INS), has primary responsibility for enforcing immigration laws. Within the INS, the Executive Office of Immigration Review (EOIR) and the Board of Immigration Appeals (BIA) handle administrative appeals. See *infra* note 30 (describing the administrative apparatus that enforces United States immigration law).

18. See 1952 Act, *supra* note 14, at § 243(h), 66 Stat. 163, 214 (codified as amended at 8 U.S.C. § 1253(h)) (delineating the requirements for withholding of deportation).

19. See 1965 Amendments, *supra* note 15, at § 3, 79 Stat. 911, 913 (repealed at 94 Stat. 102, 107 (1980)) (setting out the requirements for conditional entry status).

20. See 1952 Act, *supra* note 14, at § 212(d)(5), 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1182(d)(5)(A) (1982)) (specifying the parole power of the Attorney General).

21. See The Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter 1967

Protocol's central provisions was its definition of a "refugee" as a person who feared persecution "for reasons of race, religion, nationality, membership in a particular social group, or political opinion."²² Although the drafters of the 1967 Protocol intended this ideologically neutral definition of a refugee to expand both the use of the Attorney General's parole power and the withholding of deportation,²³ the United States subsequent implementation of this definition, as statistics demonstrate, was far from effective in this regard.²⁴ For example, from 1968-1980 the Attorney General exercised its parole power to retain 608,365 persons from communist nations and only 7,150 persons from non-communist nations.²⁵ In addition, although the Attorney General's

Protocol] (establishing global standards for treatment of refugees). By acceding to the 1967 Protocol, the United States also became a party to the 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. 137 [hereinafter 1951 Convention], that imposes upon states the duty of *non-refoulement*, or non-return, of political refugees. *See id.* at art. 33 (describing *non-refoulement* as a duty of contracting parties not to deport a refugee to territories where his or her race, religion, nationality, membership of a particular social group, or political opinion will jeopardize his or her life); *see also* Karen Parker and Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 435-36 (1989) [hereinafter *Human Rights*] (discussing *non-refoulement* as a *jus cogens* norm that imposes an obligation on all states not to deport refugees back to countries at war); UNHCR, Annual Report to the U.N. General Assembly, U.N. GAOR, 40th Sess., Supp. No. 12, at 6, U.N. Doc. A/40/12 (1985) (stating that the *non-refoulement* norm prohibits a refugee's deportation to a country at war regardless of whether the refugee satisfies the elements of the 1951 Convention definition); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1 (1994) (noting that during the early 1980s, the Department of Justice took the position that Article 33 of the 1951 Convention applied extraterritorially).

22. *See* 1967 Protocol, *supra* note 21, at art. I, § 2; 1951 Convention, *supra* note 21, at art. I, § A(2) (defining a refugee).

23. *See Unfulfilled Promise*, *supra* note 8, at 251 (stating that the drafters created the new refugee standard to assist in determining claims for asylum and claims of withholding). As the 1980 Refugee Act eliminated conditional entry, discussion of this provision ends subsequent to 1980. *See infra* notes 29-34 and accompanying text (describing the 1980 Refugee Act).

24. *See Unfulfilled Promise*, *supra* note 8, at 246-50 (discussing the United States' failure to implement effectively the provisions of the 1967 Protocol during the years 1968-1980).

25. *See World Refugee Crisis: The International Community's Response. Report to the Committee on the Judiciary*, 96th Cong., 1st Sess. 213 (1979) (describing the retention of persons from communist countries under the Attorney General's parole power).

broad discretion in decisions on the withholding of deportation could have accommodated the new definition of "refugee," the Board of Immigration Appeals (BIA) continued to use the more stringent clear probability standard.²⁶ Moreover, the courts reviewing withholding of deportation cases failed to reach a clear consensus on the appropriate refugee eligibility standard.²⁷ These inconsistencies fueled the debates that led to the Refugee Act of 1980.²⁸

B. RECENT INCONSISTENCIES

The Refugee Act of 1980²⁹ marked a turning point in asylum law, creating a uniform system³⁰ under which the United States could con-

26. See *Unfulfilled Promise*, *supra* note 8, at 247 (discussing the Attorney General's and the Board of Immigration Appeal's retention of the clear probability standard); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987) (stating that the clear probability standard is higher than that the United States requires for a grant of asylum, because it requires objective evidence that demonstrates that it is more likely than not that an alien will experience persecution if deported to his or her native country).

27. See *Unfulfilled Promise*, *supra* note 8, at 247 (stating that after the implementation of the 1967 Protocol, some reviewing courts applied the clear probability standard, others applied the well-grounded fear standard, and still others applied an assortment of hybrid standards).

28. See *infra* notes 29-34 and accompanying text (discussing the Refugee Act of 1980).

29. Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as amended in scattered sections of 8 U.S.C., and at 22 U.S.C. § 2601) (1990)) (establishing a nonideological, uniform basis for determining a refugee's eligibility to remain in the United States).

30. See Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 439-43 (1992) [hereinafter *Legal Norms*] (discussing the two groups of asylum application procedures for aliens present in the United States). First, prior to the initiation of exclusion or deportation hearings, applicants file claims with the INS. *Id.* Aliens who enter without INS inspection or those in the country on expired nonimmigrant visas who affirmatively request asylum fall into this category. Under this procedure, asylum officers conduct an "unrecorded, non-adversarial interview." *Id.* at 441 (citing 8 C.F.R. § 208.9 (1992)). Second, after the government initiates exclusion or deportation hearings, applicants file with the Executive Office of Immigration Review (EOIR). *Id.* (citing 8 C.F.R. § 3.0 (1992)). This procedure requires a "formal administrative hearing" that an immigration judge conducts. *Id.* (citing 8 C.F.R. § 3.10 (1992)). This judge may examine the alien and any witnesses. *Id.* at 442, citing 8 U.S.C. § 1252(b) (Supp. 1992). The hearing allows the immigration judge to receive a "broad" range of evidence relevant to any issue in the case. *Id.* (citing 8 C.F.R. § 242.14(c) (1992)). The immigration judge renders his or her opinion "based on recorded evidence." *Id.* (citing

sider claims of asylum³¹ and claims for withholding of deportation.³² The United States intended this Act to enforce domestically its commitment to international, humanitarian traditions.³³ The Act included a definition of refugee consistent with the 1967 Protocol as one of its primary provisions.³⁴

Yet many of the procedural hardships that occurred after implementation of the 1967 Protocol also characterize the period following the Refugee Act of 1980.³⁵ First, there remain inconsistencies between the

8 U.S.C. § 1252(b) (Supp. 1992)). An applicant "has the right to" counsel during an EOIR proceeding. *Id.* (citing 8 U.S.C. § 1252(b)(1)-(4) (Supp. 1992)). The applicant and the government may "appeal a decision to the BIA," which is an "administrative appellate unit within the EOIR." *Id.* at 443 (citing 8 C.F.R. § 3.1 (1992)). Applicants "can further appeal to a federal district court or a circuit court of appeals." *Id.* (citing 8 U.S.C. § 1105(a) (Supp. 1992)).

The government promulgated changes to the 1980 interpretation of the refugee definition in 1990. *Id.* at 440 n.17 (citing 8 U.S.C. § 1101(a)(42)(A) (Supp. 1992)). Although it is preferable for asylum officers to receive an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA), they may issue a final decision without an advisory opinion "if at least 60 days have elapsed since the request." *Id.* (citing 8 C.F.R. § 298.11(b) (1992)). The United States further authorizes asylum officers to consider evidence "credible sources other than the State Department" provide. *Id.* (citing 8 C.F.R. § 208.12(a) (1992)). An applicant need not establish that he or she would experience persecution if he or she can establish a "pattern" of persecution of "persons similarly situated." *Id.* at 441 (citing 8 C.F.R. § 208.13(b)(2)(i)(A) (1992)).

31. Immigration and Nationality Act § 208(a), 8 U.S.C. § 1158(a) (1982) [hereinafter INA].

32. INA § 243, 8 U.S.C. § 1253(h) (1982).

33. See *Forty Year Crisis*, *supra* note 8, at 64-89 (stating that the purpose of the 1980 Refugee Act was to implement international standards, and thus eliminate the use of selection criteria based on geographic considerations, foreign policy, and country of origin); U.S. GOV'T ACCOUNTING OFFICE, ASYLUM: APPROVAL RATES FOR SELECTED APPLICANTS (1987) (examining the selection criteria the United States uses in asylum processing); U.S. GOV'T ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 8 (1987) (discussing uniformity within the asylum structure); see also *Unfulfilled Promise*, *supra* note 8, at 250 (discussing the policy behind the 1980 Refugee Act).

34. See 8 U.S.C. § 1101(a)(42)(A) (Supp 1992) (promulgating the "well-founded fear" definition of refugee consistent with the 1967 Protocol). A noticeable difference between the treaty and United States statutory provisions, however, is that the statute explicitly includes those who suffered past persecution, independent of determining the possibility of future persecution. *Id.* See also 8 C.F.R. § 208 13(b)(1)(ii) (1994) (demonstrating that a showing of past persecution is sufficient to sustain an asylum claim unless no compelling humanitarian factors are present or future persecution is unlikely).

35. See generally Robert Koulish, *Systematic Deterrence Against Prospective Asy-*

refugee standards that immigration authorities and courts actually apply and the international principles the United States charges them with upholding.³⁶ Second, the United States continues for ideological reasons to grant asylum to a disproportionately greater number of applicants from countries unfriendly to the United States.³⁷ Third, bureaucratic ineffi-

lum Seekers: A Study of the South Texas Immigration District, 19 N.Y.U. REV. L. & SOC. CHANGE 529 (1992) (stating that the EOIR and INS system in South Texas is geared toward deterring applicants and not toward fair adjudication of asylum determinations). The asylum interviews impose difficult-to-satisfy "corroboration" requirements, fail to consider the applicant's "subjective fear," and provide "poor foreign language interpretation." *Id.* at 549. Lack of counsel for the applicant often impacts asylum decisions. *Id.* at 547. See also THE RECORDER, Jan. 30, 1991, at 1 (conducting a survey of the San Francisco immigration court's practices). Although observers consider the San Francisco immigration court one of the most benevolent toward illegal immigrants, with an asylum grant rate as high as thirty-nine percent in 1989, contradictions, arbitrariness, and loopholes characterize the system. *Id.* at 7.

36. See *Legal Norms*, *supra* note 30, at 447 (stating that a "significant disparity" remains between the asylum law Congress enacts and the asylum law officials practice). The current process fails to satisfy the Congressional intent to "supply fair and uniform methods" of asylum adjudication. *Id.* "Bureaucratic inefficiencies" often delay reaching final decisions on cases. *Id.* During an eighteen-month period, the EOIR court granted seven asylum applications using "no coherent legal doctrine" or "consistent application" of the law. *Id.* at 452. Many of the applications the immigration court granted it approved "on the basis of theories rejected in other cases." *Id.* As government attorneys were not likely to appeal asylum decisions and "the EOIR does not make immigration judges' decisions publicly available . . . cases and theories which supported a grant of asylum" the process effectively buried. *Id.* See also Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1316-48 (1972) (emphasizing the paradoxical development of two systems of asylum law, one that is written and entirely unfavorable to applicants, and another that is unwritten and entirely favorable to applicants).

37. See *Legal Norms*, *supra* note 30, at 447 (insisting that current asylum procedures perpetuate ideological preferences). For example, although proof existed concerning political violence in Haiti, El Salvador, and Guatemala during an eighteen-month period, an immigration court did not award asylum to any Haitians or Guatemalans and awarded asylum to only one Salvadoran. *Id.* at 455. Contrary to Congressional intent, cultural factors, social class, and "the adjudicator's perception of the applicant's ideological beliefs" substantially influence those cases the government approves for asylum. *Id.* at 454. Applicants who succeed in obtaining asylum tend to be well-educated, are able to produce corroborative evidence, and have the benefit of experienced counsel. *Id.* Exaggerated burdens of proof contribute to these inconsistent standards. *Id.* at 448. Adjudicators often apply a "clear likelihood" standard instead of the "reasonable possibility" test international standards and the Supreme Court's decision in *Cardoza-Fonseca* require. *Id.* See *supra* note 26 (discussing the *Cardoza-Fonseca* decision). Although the "reasonable possibility" standard emphasizes the relevance of asy-

ciencies delay the processing of claims within the asylum system.³⁵ The United States interdiction program, which intercepts applicants at sea in an attempt to deter their entry, highlights these political considerations.³⁹ The recent acceleration of United States interdiction efforts illuminates the longstanding variance between international norms and their domestic application.⁴⁰

By failing to adhere to the universal duty of *non-refoulement*,⁴¹ the

lum-seekers' personal testimony and their subjective beliefs, immigration judges frequently require substantiated proof of corroborative evidence. *Legal Norms*, *supra* note 30, at 448-49.

The State Department plays a major role in incorporating social, cultural, and ideological factors into the asylum adjudication process. *Id.* A startling correlation exists between the State Department's issuance of positive or negative advisory opinions and the outcome of asylum cases. *Id.* Although the State Department rarely recommends granting an applicant asylum, such applicants almost always gain approval. *Id.* See also Richard N. Preston, *Asylum Adjudications: Do State Department Advisory Opinions Violate U.S. International Obligations?*, 45 MD. L. REV. 91, 116-22 (1986) (questioning the role of the State Department in asylum adjudication).

38. See *Legal Norms*, *supra* note 30, at 456 (stating that the INS conducts protracted cross-examinations and refuses to concede claims early in the process thereby delaying resolution of meritorious claims). Among the many factors that stall the adjudication process, the EOIR's difficulty in furnishing transcripts for appeals has the greatest derogatory impact. *Id.* at 457. Immigration judges often display bias, and may impose restrictive evidentiary rules even though immigration courts have no rules of evidence. *Id.* at 449-50. Inadequate foreign language interpretation is also a problem for applicants. *Id.*

39. See *Unfulfilled Promise*, *supra* note 8, at 254-62 (describing the encroachment of domestic policy on asylum law). The United States has implemented a deterrence program of intercepting asylum-seekers on the high seas, imprisoning them upon arrival, and often denying them a fair opportunity to present their claims. See Howard W. French, *U.S. Is Holding 200 Haitians on 2 Ships*, N.Y. TIMES, Nov. 8, 1991, at A3 (noting that during the decade following the beginning of the Haitian interdiction program, the United States intercepted 23,000 Haitians and brought only twenty-eight to shore to apply for asylum); *Islands of Inequality*, WASH. POST, Nov. 4, 1992, at A18 (stating that the United States Coast Guard intercepted over 38,000 Haitian boat people in an eight-month period after President Jean-Bertrand Aristide's September 1991 ouster).

40. See, e.g., Arthur C. Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. HUM. RTS. 325 (1993) [hereinafter *Haitian Boat People*] (assessing the United States interdiction policy toward Haitian refugees); Koh, *supra* note 21 (describing legal challenges to the interdiction policy).

41. See Koh, *supra* note 21 (arguing that the interdiction policy violates United States obligations under Article 33 of the 1951 Convention). *But see* Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993) (holding that neither United States immigra-

interdiction program fosters this disparate application in three ways. First, interdiction revives the long-discredited view that a person's human rights depend upon geography by placing a geographic limit on a *non-refoulement* mandate that the international community unanimously accepts.⁴² Second, the United States policy toward Haitian refugees is inconsistent with its position in prior consequential human rights controversies. In the Nuremberg trials,⁴³ for example, the United States took the position that international law could sanction crimes against humanity—including murder, deportation, and other political or racial persecution—regardless of the law of the country where the crimes occurred.⁴⁴ Finally, the United States interdiction policy of apprehending refugees at sea tacitly acknowledges the increased rights of refugees once they reach shore.⁴⁵ Increasing public hostility to all forms of immigration further politicizes United States immigration law and policy and encourages non-compliance with international obligations. Much of this hostility stems from the belief that immigrants contribute disproportionately to crime and to welfare and education costs.⁴⁶

tion law nor international treaties prohibit the forced return of Haitians the United States apprehends in international waters).

42. See Koh, *supra* note 21 (asserting that Congress did not intend to limit the application of the *non-refoulement* obligation to United States territory); cf. Scott v. Sandford, 60 U.S. (19 How.) 393, (1856) (Campbell, J., concurring) (holding that the fugitive slave clause of the Constitution provides for the return of escaping slaves within the limits of the Union).

43. Charter of International Military Tribunal, August 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279.

44. See *Human Rights*, *supra* note 21, at 435-46 (suggesting that the Nuremberg trials fostered the notion that certain fundamental norms transcend the consent of states); see also *Baker Rejects Asian Criticism of U.S. Over Boat People*, Reuters Library Report, July 26, 1990, available in LEXIS, Nexis Library, OMNI File (noting that in criticizing the Asian nations' "push-backs" of Vietnamese boat people into the sea, then Secretary of State James Baker stated that the United States deplored involuntary repatriation); *Refugee Reports*, vol. 9, no. 3 (Mar. 18, 1988) (reporting a letter from the United States Ambassador to Thailand to that nation's foreign minister calling for an end to "push-backs" of Laotian refugees); 135 CONG. REC. 6,354 (1989) (noting that in 1989, the Senate passed Concurrent Resolution 26 urging first asylum countries of the Association of Southeast Asian Nations (ASEAN) to reinstate the practice of providing refugee assistance to all asylum-seekers and pointing out that these nations should not consider the forced repatriation of refugees to Vietnam).

45. See, e.g., *Haitian Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1112 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1245 (1992) (Hatchett, J., dissenting) (stating that the United States interdiction of Haitians at sea does not alleviate its moral obligation to furnish a safe haven for those refugees).

46. See Roberto Suro, *Study Boosts States' Bid for Greater Federal Burden in*

II. CHANGES IN UNITED STATES POLITICAL ASYLUM LAW

In the 103d Congress, members introduced numerous bills seeking to amend immigration law in general⁴⁷ and asylum law in particular.⁴⁸

Immigration Costs, WASH. POST, Sept. 15, 1994, at A3 (reporting an Urban Institute study that calculated the annual cost of educating undocumented children at \$3.1 billion and the cost of incarcerating undocumented criminals at \$471 million, compared to tax revenue of \$1.9 billion); Marc Sandalow, *Politicians Paying Attention to Up-roar Over Immigration*, S.F. CHRON., Mar. 31, 1994, at A1 (stating that proposals to restrict immigration respond to grass-roots anger over economic competition, welfare, and crimes such as the World Trade Center bombing); John J. Miller, *Immigrant-Bashing's Latest Falsehood*, WALL ST. J., Mar. 8, 1994, at A16 (arguing that the public falsely holds all immigrants responsible for the well-publicized crimes of a few).

47. See Lizette Alvarez, *Border Disorder is the Talk of Congress, Many Touting Get-Tough Laws*, MIAMI HERALD, Mar. 1, 1994, at 1A (reporting that the 103d Congress has introduced more than 150 immigration-related bills).

48. See, e.g., H.R. 3363, 103d Cong., 1st Sess. (1993) (amending the Immigration and Nationality Act of 1952 to reform the asylum law broadly by summarily excluding aliens arriving without valid documentation, increasing appropriations for the INS, and improving immigration enforcement and anti-smuggling activities); H.R. 2602, 103d Cong., 1st Sess. (1993) (containing the same proposed reforms as H.R. 3363, as the Subcommittee on International Law, Immigration, and Refugees of the House Judiciary Committee approved); S. 1333, 103d Cong., 1st Sess. (1993) (introducing President Clinton's Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993, along with its companion bill, S. 2836, to prevent illegal entry into the United States, to expedite procedures for the deportation and removal of excludable aliens and felons, and to deter illegal entry and smuggling through increased sanctions and criminal penalties); S. 1884, 103d Cong., 1st Sess. (1994) (proposing asylum reform, the disbursement and imposition of land border crossing fees, increased enforcement and penalties for alien smuggling, and summary exclusion for asylum); S. 1358, 103d Cong., 1st Sess. (1993) (proposing identical amendments to H.R. 3363); S. 1923, 103d Cong., 1st Sess. (1993) (containing comparable provisions to S. 1884); S. 1091, 103d Cong., 1st Sess. (1993) (proposing to control international organized crime); H.R. 3860, 103d Cong., 1st Sess. (1993) (proposing provisions similar to H.R. 3363); S. 1348, 103d Cong., 1st Sess. (1993) (proposing to amend the Immigration and Nationality Act of 1952 to reform the asylum law, to authorize appropriations for the INS, and to increase penalties for alien smuggling); S. 1351, 103d Cong., 1st Sess. (1993) (proposing to protect American workers from unfair labor competition, to curb criminal activity by aliens, to defend against acts of international terrorism, and to relieve the pressure on public services by strengthening border security and stabilizing immigration into the United States); H.R. 3223, 103d Cong., 1st Sess. (1993) (authorizing increased expenditures for immigration enforcement).

Health care and crime notwithstanding, the Clinton Administration has addressed immigration and asylum issues. On March 30, 1994, the Clinton Administration pub-

This legislation includes new provisions which, if the United States implements, would have a significant impact on its asylum law.⁴⁹ The majority of these bills start from the premise that the rights of refugees are greater once they reach United States territory, using this premise to justify a policy of exclusion.⁵⁰ To comprehend the magnitude of the proposed changes, it is necessary to examine in detail this asylum legislation.⁵¹

lished a proposed rule aimed at solving INS workload and staffing issues. 59 Fed. Reg. 14,779 (1993). Under this rule, INS asylum officers would interview applicants and grant asylum approval at their discretion, referring other cases to the EOIR immigration judges. *Id.* at 14,786. This proposal also separates the asylum process from procedures for issuing work authorizations. *Id.* at 14,784. The INS would not issue work authorizations until 150 days after the alien files an asylum application. *Id.* at 14,785. Only if the INS or EOIR did not hear a case within 180 days would the applicant automatically receive a work authorization. *Id.* The proposed rule would require applicants to pay an unprecedented \$60 fee for initial work authorization and a \$130 application fee. *Id.* at 14,784. *See also* Sandalow, *supra* note 46 (noting that one purpose of the proposed regulations was to defuse legislative proposals to eliminate asylum applicants' rights to a hearing).

49. *See Haitian Boat People*, *supra* note 40, at 345 (stating that the balance legislators are trying to maintain with present asylum legislation is delicate). A "minimalist" approach will allow entry to fewer refugees each year. *Id.* An "activist" approach could invite too many asylum-seekers and create an immigration emergency. *Id.* The extent to which this administration achieves a balance will have a lasting effect on future United States refugee protection. *Id.*

50. *See* H.R. 3363, *supra* note 48, at § 201 (stating that the right to apply for provisional asylum attaches when an alien is physically present in the United States or at a land border or port of entry). This provision seeks to amend § 208(a) of the Immigration and Nationalization Act of 1952, 8 U.S.C. § 1158(a). *Id.* Most of the bills pending before Congress preserve the right of aliens to apply for asylum if present in the United States or at a land border or a port of entry. *See, e.g.*, S. 1348, *supra* note 48, at § 210; S. 1358, *supra* note 48, at § 210; S. 1351, *supra* note 48, at § 301 (stating that an alien in the United States or at a land border or a port of entry has the right to apply for asylum); *see also infra* notes 45-52 and accompanying text (discussing the increased rights of asylum-seekers once present in the United States).

51. *See infra* notes 62-92 and accompanying text (examining the current asylum legislation before Congress). The two principal pieces of legislation are President Clinton's Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993, introduced as S. 1333 by Senator Edward M. Kennedy on July 30, 1993, and the Immigration Enforcement and Asylum Reform Act of 1993, which Representative Romano Mazzoli introduced as H.R. 2602 on July 1, 1993 and which is now pending as H.R. 3363. *Id.* S. 1333 is narrowly tailored to domestic issues concerning asylum and illegal alien smuggling. *Id.* H.R. 3363, in contrast, takes a wide scale approach to immigration and asylum, proposing both domestic and international reform. *See also* Interview with Robert Lange, staff member on the Senate Judiciary Subcommittee on

Refugees may gain admission to the United States in two ways.⁵² The United States may admit them from abroad,⁵³ in which case the admissions ceilings of the Refugee Act of 1980 apply,⁵⁴ or they may apply for and receive asylum once they reach the United States.⁵⁵ The due process rights that attach to an asylum-seeker once he or she arrives in the United States confer three distinct advantages over the rights of refugees who fail to reach the United States.⁵⁶ First, once an asylum-seeker reaches the United States, he or she is exempt from admissions ceilings.⁵⁷ Second, asylum applicants may seek protection regardless of immigration status.⁵⁸ Third, asylum-seekers may raise protection claims as a defense to removal in immigration court proceedings or affirmatively to the INS.⁵⁹ Asylum applicants may remain in the United States for several years pending the outcome of their cases.⁶⁰ Many applicants whose asylum claims the United States denies find other ways of obtaining legal residency or remain in the United States illegally.⁶¹

A. PRE-INSPECTIONS AT FOREIGN AIRPORTS

To minimize the likelihood that refugees will gain permanent residence in the United States, Congress has implemented political asylum legislation and proposes to expand efforts to prevent refugees from reaching United States territory.⁶² For example, H.R. 3363, the Immi-

Immigration and Refugee Affairs, in Washington, D.C. (October 1993) (stating that both the Kennedy and Mazzoli bills are expected to receive approval and that some hybrid of these bills will most likely constitute the new United States asylum law).

52. See *Haitian Boat People*, *supra* note 40, at 333-34 (discussing the manners in which refugees may gain admission to the United States).

53. 8 U.S.C. § 1157 (1988).

54. Pub. L. No. 96-212, 94 Stat. 102 (1980).

55. 8 U.S.C. § 1158 (1988).

56. See *Haitian Boat People*, *supra* note 40, at 335 (discussing the rights that attach during the asylum application process).

57. See *id.* (discussing the inapplicability of admission ceilings to asylum-seekers who reach the United States).

58. 8 U.S.C. § 1158(a) (1988).

59. 8 C.F.R. § 208.2 (1992).

60. 119 CONG. REC. S10,432 (daily ed. Aug. 4, 1993) (statement of Sen. Johnston) (complaining that the average asylum claim takes two years to process).

61. *Id.* (stating that the United States does not detain most aliens, and therefore; aliens drop out of sight while awaiting adjudication of their claims).

62. See 117 CONG. REC. S9,993 (daily ed. July 30, 1993) (statement of Sen. Kennedy) (announcing that President Clinton intends to seek an additional \$171.5

gration Enforcement and Asylum Reform Act of 1993, proposes pre-inspection of refugees at foreign airports.⁶³ It also requires the INS to train airline employees to detect fraudulent documents.⁶⁴ Such provisions aim to limit the number of aliens who make political asylum claims at United States airports without official, or with fraudulent, documentation.⁶⁵

B. EXPEDITING THE PROCESS

Current legislative proposals would also expedite asylum application processing.⁶⁶ These provisions call for the immediate dismissal of asylum claims by aliens who manage to arrive in the United States with fraudulent documentation, or with no documentation at all.⁶⁷ Although aliens may credibly fear persecution even if they cannot document it,⁶⁸

million in fiscal year 1994 to curb illegal immigration). The FY 1994 Justice Department Appropriations Act includes these monies. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121 (1993). Although S. 1333 and S. 2836 do not specifically address pre-inspections at foreign airports, President Clinton intends to allocate resources to carry out these inspections. *Id.* These two bills do, however, contain anti-smuggling and summary exclusion proposals. *Id.*

63. See H.R. 3363, *supra* note 48, at § 301 (stating that the Attorney General shall establish and maintain pre-inspection stations in at least three foreign airports the United States identifies as last points of departure for substantial numbers of passengers traveling to the United States).

64. See H.R. 3363, *supra* note 48, at § 304 (stating that the Attorney General shall provide for expenditures relating to the training of, and technical assistance to, commercial airline personnel).

65. See 119 CONG. REC. S10,432, *supra* note 60 (declaring that this legislation is important because it will prevent many aliens from reaching the United States).

66. See H.R. 3363, *supra* note 48, at § 302 (calling for the expeditious processing of asylum claims at airports); S. 1333, *supra* note 48, at § 2 (proposing acceleration of asylum processing).

67. See H.R. 3363, *supra* note 48, at § 101 (stating that immigration officials should immediately dismiss claims that refugees inadequately document); S. 1333, *supra* note 48, at §§ 2(a), 2(b) (proposing the immediate dismissal of a claim where the applicant either fails to present documentation or presents fraudulent documentation to an immigration official); see also 119 CONG. REC. S10,433 (daily ed. Aug. 4, 1993) (statement of Sen. Johnston) (stating that tightening documentation requirements would prevent refugees with frivolous claims from manipulating the system).

68. See S. 1333, *supra* note 48, at § 2(b) (defining a credible fear of persecution as a "substantial likelihood" that the alien's statements are true, and that the alien could establish eligibility as a refugee within the meaning of § 102(a)(42)(A) of the INA, 8 U.S.C. § 1101(a)(42), or who the United States could return to a country

an INS officer, subject only to immediate supervisory review,⁶⁹ may deem this fear incredible and return the alien immediately.⁷⁰ In this circumstance, the proposed legislation stipulates that a petition for habeas corpus is the only form of judicial review.⁷¹

The new proposals, furthermore, place an affirmative burden on an applicant with valid documentation to articulate at least an intention to file an asylum claim within thirty days of arrival.⁷² Currently, the United States fails to detect many refugees for months or years. These refugees only apply for asylum once the United States apprehends them. The thirty-day deadline would prevent asylum-seekers from using fear of persecution as a defense in a deportation hearing, unless they can show that they are refugees *sur place* because changed circumstances in the country of origin have created a fear of persecution that did not exist when they departed.⁷³ Proposed legislation also would ban those aliens who fail to appear at hearings from receiving any benefits under the Act.⁷⁴ Finally, asylum applicants would have to submit to fingerprinting and photographing, as well as pay any fees the Attorney General deems

where there is a substantial likelihood he or she could establish eligibility as a refugee).

69. See H.R. 3363, *supra* note 48, at § 201 (giving sole decision-making authority to specially trained asylum officers in an effort to streamline the processing of claims). At present, an INS asylum officer, a Justice Department immigration judge, or in some circumstances both agents, consider claims. *Id.*

70. See *id.* at § 201 (stating that the INS official has the discretion to return the alien immediately).

71. 8 U.S.C. § 1105a(a), INA § 106(a); see *infra* notes 80-84 and accompanying text (discussing present asylum legislation limitations on judicial review); see also Stephen H. Legomsky, *A Research Agenda for Immigration Law: A Report to the Administrative Conference of the United States*, 25 SAN DIEGO L. REV. 227, 242-43 (1988) (discussing the ability of aliens the United States holds in custody pursuant to deportation hearings to obtain judicial review by habeas corpus).

72. See H.R. 3363, *supra* note 48, at § 201 (requiring that asylum-seekers state an intention to file for asylum within thirty days of arrival).

73. See OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, ¶ 94, U.N. Doc. HCR/IP/4/Eng. Rev. 1 (1988) (defining "refugee *sur place*" as an individual "who was not a refugee when he [or she] left his [or her] country, but who becomes a refugee at a later date").

74. See, e.g., H.R. 3363, *supra* note 48, at § 202; S. 1358, *supra* note 48, at § 202; S. 1348, *supra* note 48, at § 202; S. 1351, *supra* note 48, at § 303 (stating that applicants who fail to appear for scheduled asylum hearings become ineligible for benefits under the Act).

reasonable.⁷⁵ The above proposals indicate Congressional intent to replace "asylum" with "provisional asylum."⁷⁶

C. RESERVING THE RIGHT TO SEND REFUGEES TO WILLING COUNTRIES

Current asylum proposals would permit the United States to send refugees, at any time, to other countries willing to accept them.⁷⁷ These provisions apply with equal force to refugees the United States has already granted provisional asylum, thus permitting the Attorney General to terminate a refugee's provisional asylum status when another country agrees to accept the alien.⁷⁸ Recent diplomatic efforts to encourage third countries to accept Haitian and Cuban refugees suggest that international interdependence will foster increased use of legal provisions for refugee-sharing.⁷⁹

D. LIMITING JUDICIAL REVIEW

Under current legislative proposals, asylum-seekers the United States deems excludable could obtain judicial review only through the narrow avenue of habeas corpus.⁸⁰ These provisions would disallow substantive

75. See H.R. 3363, *supra* note 48, at § 201 (delineating fingerprinting and fee requirements for asylum applicants); see also S. 1333, *supra* note 48, at § 5 (proposing an additional increase of immigration user fees for commercial aircraft and vessel passengers).

76. See H.R. 3363, *supra* note 48, at § 202 (striking "asylum" and inserting "provisional asylum").

77. See *id.* at § 201 (stating that the right to provisional asylum does not apply if the Attorney General identifies a country willing to accept the alien, provided it is not the original country from which the alien seeks refuge, and the alien is unable to establish a likelihood that such a country would threaten his or her life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion); see also S. 1333, *supra* note 48, at § 2(b) (allowing the United States to send aliens who could establish eligibility to another country where the same opportunity and protection exist).

78. See H.R. 3363, *supra* note 48, at § 201 (permitting the Attorney General to revoke a refugee's provisional asylum if another country is willing to receive the refugee).

79. See *Haitian Boat People*, *supra* note 40, at 346 (suggesting that the United States should undertake a diplomatic effort to establish relations with countries which could provide temporary relief for refugees arriving in the United States).

80. See H.R. 3363, *supra* note 48, at § 202; S. 1333, *supra* note 48, at § 4(a); S. 1358, *supra* note 48, at § 202; S. 1348, *supra* note 48, at § 203; S. 1351, *supra*

review of decisions to exclude refugees.⁸¹ Courts of Appeals could examine only whether the petitioner is an alien and whether the United States correctly followed the statutory procedures in reaching its decision to exclude.⁸² Regardless of the nature of the claim, no court would have jurisdiction to consider the validity of any adjudication or determination of exclusion, to certify a class in an action, or to provide declaratory or injunctive relief.⁸³ Nor could refugees collaterally attack exclusion decisions during actions brought against them to assess penalties for improper entry or re-entry.⁸⁴

E. REVITALIZED BORDER PATROLS

Pending legislation calls for an increase in the number of border patrol officers and the number of asylum officers.⁸⁵ The Asylum Reform and Alien Smuggling Control Act of 1993⁸⁶ proposes an increase of 1,000 border patrol officers for fiscal year 1994, and for the same fiscal year,⁸⁷ an increase to not less than twice the average number of

note 48, at § 304 (limiting the scope of judicial review for those deemed excludable from the United States solely to habeas corpus).

81. See H.R. 3363, *supra* note 48, at § 202; S. 1333, *supra* note 48, at § 4(a); S. 1358, *supra* note 48, at § 202; S. 1348, *supra* note 48, at § 203; S. 1351, *supra* note 48, at § 304 (stating that no court would have the power to review exclusion decisions).

82. See H.R. 3363, *supra* note 48, at § 202; S. 1358, *supra* note 48, at § 304; S. 1348, *supra* note 48, at § 203; S. 1351, *supra* note 48, at § 304 (stipulating the limitations on habeas corpus review in asylum cases); see also S. 1333, *supra* note 48, at § 4 (promulgating the same limitations as the corresponding legislation and in addition requiring the petitioner to prove by a preponderance of the evidence that he or she is an alien lawfully admitted for permanent residence).

83. See H.R. 3363, *supra* note 48, at § 202; S. 1358, *supra* note 48, at § 202; S. 1348, *supra* note 48, at § 203; S. 1351, *supra* note 48, at § 304 (delineating additional limitations on the jurisdiction of courts when reviewing asylum decisions).

84. See H.R. 3363, *supra* note 48, at § 202; S. 1358, *supra* note 48, at § 202; S. 1348, *supra* note 48, at § 203; S. 1351, *supra* note 48, at § 304 (restricting the use of collateral attacks in these circumstances).

85. See S. 1348, *supra* note 48, at §§ 301-02 (calling for an increase in the number of border patrol and asylum officers); see also 117 CONG. REC. S9,994 (daily ed. July 30, 1993) (statement of Sen. Kennedy) (stating that President Clinton intends to allocate \$45.1 million to increase border patrol personnel and technology).

86. S. 1348, *supra* note 48.

87. See also S. 1351, *supra* note 48, at § 701 (suggesting an increase in the number of full-time INS border patrol officers to 5,900 in fiscal year 1994, 6,900 in fiscal year 1995, 7,900 in fiscal year 1996, 8,900 in fiscal year 1997, and 9,900 in

asylum officers in fiscal year 1993.⁸⁸ As the United States has long employed a disproportionately small number of border patrol and asylum officers relative to the number of refugees it is confronted with annually, Congress is expected to approve such increases.

F. INCREASED APPROPRIATIONS FOR THE INS

All pending immigration legislation acknowledges the need for increased resources to confront the problem of increased immigration. Some bills merely appropriate funds necessary to implement their provisions;⁸⁹ other legislation proposes specific increases.⁹⁰ For instance, the Immigration Enforcement and Asylum Reform Act of 1993 proposes an INS allocation of \$1.082 billion for fiscal year 1994, with \$413 million earmarked for expanded border patrol operations and \$27.43 million for anti-smuggling activities.⁹¹ For fiscal 1995, the Act allocates \$1.154 billion, with \$454 million allocated to border patrols and \$31 million to anti-smuggling activities.⁹²

III. THE EROSION OF POLITICAL ASYLUM IN THE FEDERAL REPUBLIC OF GERMANY

German asylum law has changed gradually over the past thirty years.⁹³ A dramatic rise in the number of asylum claims in the late

fiscal year 1998).

88. See H.R. 3223, *supra* note 48, at § 5; S. 1351, *supra* note 48, at § 302 (calling for an increase in the number of asylum officers).

89. See S. 1348, *supra* note 48, at § 303 (authorizing an increase in appropriations necessary to implement the provisions of the Act).

90. See H.R. 3363, *supra* note 48, at § 401; S. 1358, *supra* note 48, at § 401 (delineating specific resource allocations in connection with INS employee increase).

91. See H.R. 3363, *supra* note 48, at § 401 (proposing specific increases in INS allocations over the next few years).

92. See *id.* at § 401 (calling for enough funds to provide for a 100 percent increase in the average number of asylum officers over the fiscal 1993 period by October 1, 1996). The bill also appropriates:

- (1) funds for the purchase of police-type use passenger motor vehicles;
- (2) funds for the acquisition, lease, maintenance, and operation of aircraft;
- (3) funds for the purchase of uniforms;
- (4) funds not to exceed \$50,000 to meet unforeseen emergencies of a confidential character; and
- (5) funds not to exceed \$500,000 of those sums appropriated for research and \$17,188,000 of those funds appropriated for construction.

Id.

93. See, e.g., HANS KREUBERG, GRUNDRECHT AUF ASYL 21-25 (1984) (discussing

1970s⁹⁴ prompted the German government (*Bundestag*) to centralize its asylum process, beginning in 1980.⁹⁵ The *Bundestag* hoped that altering its policy would deter applicants with frivolous claims from entering the country, expedite adjudication, and limit both applicants' employment authorization and their access to social welfare benefits.⁹⁶

This centralization process culminated in the 1982 Asylum Procedures Law.⁹⁷ This statute allocated asylum-seekers among the German states (*Länder*), following a percentage formula that tracked the population and resources of each state (*Land*), in order to maximize the efficient and equitable use of resources.⁹⁸ Although the 1982 Asylum Procedures Law generally met with cautious optimism, skeptics claimed—as do critics of asylum laws in the United States—that politics frequently

the initial controversy over the language in German asylum provisions); HELMUT QUARITTSCH, EINWANDERUNGSLAND BUNDESREPUBLIK DEUTSCHLAND? AKTUELLE REFORMFRAGEN DES AUSLANDERRECHTS 28-40 (1981) (discussing the political importance of asylum rights); Maryellen Fullerton, *Persecution Due To Membership In A Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 381, 389 n.30 (1990) [hereinafter *Social Group*] (stating that as a result of Germany's signing of the 1951 Convention, it adheres to a definition of "refugee" as a person persecuted on account of race, religion, nationality, or membership in a particular social group).

94. See *Political Asylum*, *supra* note 8, at 197 (stating that asylum-seekers filed 9,627 claims in 1975 compared with 107,818 in 1980).

95. See Daniel Kanstroom, *Wer Sind Wir Wieder? Laws of Asylum, Immigration, and Citizenship in the Struggle for the Soul of the New Germany*, 18 YALE J. INT'L L. 155, 195 (1993) [hereinafter *Laws of Asylum*] (discussing the evolution of German asylum law).

96. See *id.* at 195 (delineating the goals of the *Bundestag* in altering its asylum policy).

97. Gesetz über das Asylverfahren, July 16, 1982, BGBI.I 946 [hereinafter 1982 Asylum Law]; see also *Political Asylum*, *supra* note 8, at 197-203 (discussing the specific procedures of German asylum law). See generally Gerald L. Neuman, *Immigration and Judicial Review in the Federal Republic of Germany*, 23 N.Y.U. J. INT'L L. & POL. 35 (delineating the procedures of German asylum law); Maryellen Fullerton, *Restricting the Flow of Asylum Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands*, 29 VA. J. INT'L L. 33, 69 (1988) (examining asylum procedures in Germany).

98. 1982 Asylum Law, *supra* note 97, at § 22. The law does not allow asylum-seekers to choose their place of residence. *Id.* Although allocation of refugees has not cured the crisis in Germany, it remains a viable method for sharing the political and economic costs of the asylum problem. *Id.* The global system of collective responsibility that the author recommends derives its foundation from this part of the 1982 Asylum Procedures Law. See *infra* notes 197-203 and accompanying text (proposing a formula for collective responsibility).

influenced the decisions of officials responsible for initial processing of asylum claims.⁹⁹

Although the *Bundestag* designed the 1982 Asylum Procedures Law to expedite the asylum process, its implementation failed to stem the tide of asylum-seekers.¹⁰⁰ This failure prompted the *Bundestag* to modify its laws, once again, in 1987.¹⁰¹ The 1987 Asylum Law authorized border police to deny entry to an asylum-seeker they deemed to have received protection in another country¹⁰² and extended the ban on employment from two to five years.¹⁰³ Nevertheless, this new asylum law could not withstand the subsequent influx of refugees that, in large part, the end of the Cold War generated.

IV. THE END OF POLITICAL ASYLUM IN GERMANY

A. THE RATIONALE FOR REFORM

Citing the high cost of maintaining its asylum system,¹⁰⁴ the over-

99. See *Laws of Asylum*, *supra* note 95, at 195 (noting that asylum applications filter through local authorities to the Federal Office for the Recognition of Foreign Refugees [Bundesamt für die Anerkennung ausländischer Flüchtlinge] (BAF). The German Constitution guarantees the right to have an administrative court review a denial of an asylum application in the state in which the asylum-seeker resides. *Id.* See also *Social Group*, *supra* note 93, at 392-94 (examining judicial review for asylum-seekers in Germany). Although judicial review would appear to provide some protection against the political bias of immigration officials, some observers believe that politics also influence the courts. See, e.g., *Political Asylum*, *supra* note 8, at 205 (stating that disparities in the number of asylum applicants recognized from Eastern Europe, Western Europe, and Asia reflects politicizing of the asylum process). The judges in these courts, however, tout their decisions as apolitical, in large part because they maintain a degree of independence from administrative authorities. See *id.* at 207 (stating that the process of determining the facts of a case makes asylum procedures susceptible to politicizing because investigating the conditions in an applicant's country of origin may require judges to consider the German Foreign Ministry's comments, newspaper articles, and other politically-motivated reports). The judges claim that politics do not influence their decisions; pointing out, for example, that they sometimes refuse to reach decisions in order to prolong the applicant's stay in Germany and increase his or her chances of receiving a residence card. *Id.* at 208.

100. See *Laws of Asylum*, *supra* note 95, at 196 n.331 (noting that the BAF took nine to eleven months on average to decide on applications and that the appeals process took another two to three years).

101. Gesetz zur Änderung asylverfahrensrechtlicher, arbeitserlaubnisrechtlicher und ausländerrechtlicher Vorschriften, Jan. 6, 1987, BGB1.189.

102. *Id.* at § 1(2).

103. *Id.* at § 2(1).

104. See Yuri Shapakov, *Germany: War Against Refugees*, MOSCOW NEWS, June

whelming number of frivolous claims,¹⁰⁵ and increasing public disfavor with asylum policy,¹⁰⁶ the *Bundestag* in 1993 approved an amendment to article 16 of the Constitution¹⁰⁷ along with an implementing statute.¹⁰⁸

1. The Escalating Numbers

The 6.2 million foreigners living in Germany today¹⁰⁹ include 1.5 million refugees, more than 600,000 asylum-seekers whose claims Germany has not ruled on definitively¹¹⁰ and another 100,000 individuals

2, 1993 (stating that Germany spends six billion DM [\$3.57 billion] on persons who have applied for political asylum).

105. See *German Bundestag Votes To Restrict The Right To Asylum; Bonn In A State Of Siege*, WEEK IN GERMANY, May 28, 1993, at 1 (statements of Wolfgang Schaeuble, Chairperson, CDU/CSU parliamentary group, Herman Otto Solms, Chairperson, FDU, and Hans Ulrich Klose, Chairperson, SPD) (stating that the amendment aimed to stop a massive abuse of asylum rights).

106. *Id.* (stating that the preservation of internal peace necessitated altering the right to political asylum).

107. *Gesetz zur Änderung des Grundgesetzes vom 28 Juni 1993* [Law of June 28, 1993 to Amend Article 16 of the Basic Law], 1993 BGBI.I 1002. The German Constitution is officially known as the Basic Law [Grundgesetz]. Originally conceived as a transitional document pending reunification, it has acquired the status of a genuine constitution. See Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837 (1990) (describing the legal status of the Basic Law).

108. *Gesetz zur Änderung asylverfahrensrechtlicher-ausländer-und staatsangehörigkeitsrechtlicher Vorschriften*, 1993 BGBI.I 1062 [hereinafter *Asylum Procedure Act of 1993*].

109. Margaret Talbot, *Germany bars the door: no asylum for outsiders*, 258 NATION 832 (1994). Under German law, blood relation defines citizenship. "Foreigners," therefore, includes those individuals born and raised in Germany and those who speak German. See *Laws of Asylum*, *supra* note 95, at 172 (detailing the relationship between asylum laws and citizenship laws in Germany). This exclusionary concept of citizenship contrasts sharply with the genuine commitment to fundamental human rights and equality contained in the German Constitution, which states that "[p]ersons persecuted on political grounds shall enjoy the right of asylum." GRUNDGESETZ [Constitution] [GG] art. 16a (1993). See generally Daniel Kanstroom, *The Shining City and the Fortress: Reflections on the "Eurosolution" to the German Immigration Dilemma*, 16 B.C. INT'L & COMP. L. REV. 201, at nn.169-242 and accompanying text [hereinafter *Shining City*] (discussing the interaction of immigration, nationalism, and citizenship in the European Community).

110. See *Political Asylum*, *supra* note 8, at 207 (discussing the role of German courts in asylum adjudication). Asylum-seekers file applications with local authorities who forward the applications to the BAF. *Id.* A court of the state in which the applicant lives reviews denials of asylum claims. *Id.*

Germany has granted refugee status.¹¹¹ In addition, 640,000 *de facto* refugees live in Germany.¹¹² Germany absorbs seventy percent of the total number of refugees absorbed into the European Community (EC).¹¹³ This disproportionate burden is a major impetus for the adoption of new asylum laws.¹¹⁴

These data reflect the dramatic rise in the number of asylum-seekers over the past few years. In 1992, Germany received more than 438,000

The German asylum process differs from that of the United States in two important respects. First, German administrative judges belong to the judicial branch and are more comparable to United States federal judges than to the immigration judges of the Department of Justice, whose decisions are subject to review by the BIA and the Attorney General. *Id.* German administrative review is formally independent of the political branches, whereas reviewing authorities in the United States are more susceptible to political pressures. *Id.*

Second, Germany does not place the formal burden of proof on the asylum applicant. *Id.* The court must make an "independent, *de novo*, investigation of the case" in reaching its conclusions. *Id.* In contrast, the United States requires the asylum applicant to demonstrate the veracity of his or her claim, and courts cannot inquire independently into the facts of a case. *Id.* See also Neuman, *supra* note 97, at 36 (comparing the process of immigration and judicial review in the United States and in Germany).

111. See Steve Crenshaw, *Immigration: Germany: Hand of Welcome Keeps Visitors at Arm's Length*, INDEPENDENT, June 6, 1993, at 17 (stating that 130,000 family members accompanied these recognized refugees). The decision to tighten the asylum law is particularly ironic in light of the huge armies of guest workers (*Gastarbeiter*) whom Germany encouraged to immigrate after World War II to help reconstruct its economy, but who were never eligible for German citizenship. *Id.* Now these same people are bearing the brunt of the new asylum law. *Id.* See also John Fox, *Calls For Easier Citizenship Grow: Killing of Turks Brings Outcry Against Violence To Foreigners*, FIN. POST, June 19, 1993, § 5, at S14 (describing right wing violence against guest workers); Note, *German Asylum Law Reform and the European Community: Crisis in Europe*, 7 GEO. IMMIGR. L.J. 795 (1993) (describing proposals to facilitate naturalization of Turkish guest workers).

112. See German Information Center, *Laws on Asylum Procedure Urgency and Focuses of Reform*, at 1 (July 1993) (on file with the German Embassy, Washington, D.C.) [hereinafter German Information Center] (defining *de facto* refugees as rejected asylum-seekers whom Germany has not deported for humanitarian or political reasons). Under the new asylum law, the government has begun deporting large numbers of *de facto* refugees. See also Talbot, *supra* note 109 (describing the German government's proposal to deport 100,000 Croatian refugees).

113. See *id.* (stating that Germany accounts for more than seventy percent of the refugees the EC nations absorb).

114. See *id.* (stating that Germany's disproportionately greater absorption rate has created financial and social hardships that make continued application of the German asylum law untenable).

applications for asylum,¹¹⁵ up from 256,000 in 1991 and approximately 193,000 in 1990.¹¹⁶ In the first four months of 1993, approximately 161,000 asylum-seekers arrived in Germany, the largest number of whom were Romanians.¹¹⁷ This influx marked an increase from the same period in 1992, which saw 124,000 asylum-seekers.¹¹⁸

2. Frivolous Claims

The *Bundestag* maintains that refugees abuse its asylum system.¹¹⁹ For example, in the second week in April 1993, multiple or false applications comprised 25.7% of the applications refugees submitted for social welfare assistance payments.¹²⁰ Germany recognized only 1.7% of those who sought asylum in April 1993 as having a well-founded fear of political persecution.¹²¹ The German government claims that this high percentage of denials establishes that many asylum claims are frivolous and merits legislative reform.¹²²

115. See *Bundestag (Again) Debates Proposed New Laws on Foreigners and Asylum Seekers; Majority Support Likely*, WEEK IN GERMANY, Mar. 5, 1993, at 1 (reporting the number of asylum applications in 1992).

116. See *id.* (describing the increase in asylum applications from 1991 to 1992).

117. See *Germany's Agreement With Romania*, VANCOUVER SUN, June 5, 1993, at 1 (stating that the influx of Romanian refugees prompted Germany to enter into an agreement with Romania under which Germany would accelerate the deportation of Romanian asylum-seekers); see also Jonathan Kaufman, *Germany Hastens Exit of Gypsies*, BOSTON GLOBE, Nov. 1, 1992, at 1, 32 (discussing deportation of Romanians from Germany).

118. See VANCOUVER SUN, *supra* note 117, at 1 (stating that Germany experienced an increase in asylum-seekers from the first four months of 1992 to the first four months of 1993).

119. See German Information Center, *supra* note 112, at 1 (stating that asylum abuse motivates the revision of German asylum laws).

120. See *id.* (documenting abuse of the social welfare assistance program in Germany).

121. See *id.* (noting that only 1.7% of the April 1993 asylum claims succeeded). But see Talbot, *supra* note 109 (pointing out that under its new asylum policy, Germany is deporting refugees who in the past would have qualified for asylum, such as conscientious objectors and victims of civil conflicts). German courts have held that because only states can effect political persecution, refugees from areas outside the effective control of any state, such as Somalia and Bosnia, cannot qualify for asylum regardless of their fear of persecution. *Id.* See also *Political Asylum*, *supra* note 8, at 233-40 (stating that deficiencies in processing of asylum claims contributes to the low number of candidates who receive asylum).

122. See German Information Center, *supra* note 112, at 1 (discussing the rationale

3. Increased Crime

The *Bundestag* asserts that a disproportionately greater number of asylum candidates participate in crime relative to the total German population.¹²³ The percentage share of crime it attributes to asylum applicants increased from 1.3% in 1984 to 10.9% in 1992.¹²⁴ The percentage shares are particularly large, the *Bundestag* maintains, for robbery, trafficking and smuggling of heroin, shoplifting, and aggravated larceny.¹²⁵ In addition, Germany attributes 38.5% of its 1992 rape cases to non-Germans, 11.4% of whom were asylum-seekers.¹²⁶ Such data aroused German citizens' discontent with their government's lenient asylum policies.

4. Financial Costs

The *Bundestag* states that the government spends over seven billion deutsche marks (DM) (\$4.54 billion)¹²⁷ per year on social welfare assistance for the more than 600,000 asylum-seekers with pending cases.¹²⁸ It spends DM 1 billion (\$648 million) a year on such medical benefits as prenatal and maternity care.¹²⁹ The annual cost per asylum candidate in 1991 was DM 7,000 (\$4,540).¹³⁰ The government at

for German asylum reform).

123. *See id.* (discussing asylum-seekers' disproportionately high participation in crime).

124. *See id.* (delineating the increase in the percentage of crimes Germany attributes to asylum applicants from 1984 to 1992).

125. *See* Comments by Secretary Eduard Lintner, *Bundestag* Publication 12/4735, question 28 (indicating the areas of crime in which most asylum-seekers participate, in response to a parliamentary query).

126. *See Bundestag* Record, April 28, 1993, Annex 3 (documenting non-German and asylum-seeker participation in German rapes).

127. The author calculates all subsequent deutsche mark conversions into United States dollars using a United States dollar factor of \$.6486, the conversion factor at the close of the United States currency markets on September 14, 1994.

128. *See* German Information Center, *supra* note 112, at 2 (documenting the costs Germany incurs to maintain its asylum system). This figure assumes an average expenditure of approximately DM 1,000 (\$648) per recipient per month, including housing and incidental costs. *Id.*

129. *See id.* (documenting the cost of providing maternity and prenatal care for asylum-seekers).

130. *See id.* (citing the results of a German *Bundestag* Research Service survey documenting the costs Germany incurs per asylum-seeker).

tributes these costs to administrative infrastructure and rent subsidies for candidates.¹³¹ In 1992 alone, the *Bundestag's* total cost in connection with asylum-seekers exceeded the DM 8.27 billion (\$5.36 billion) the Foreign Ministry allocated for economic cooperation and development.¹³²

V. THE POLITICAL BATTLE

Although the foregoing statistics might appear to compel government action, proposals for reform of asylum law triggered an intense political debate within the *Bundestag*.¹³³ In the end, the resurgence in right wing radicalism,¹³⁴ coupled with a series of xenophobic attacks from

131. See *id.* (attributing outlays per asylum-seeker to expenditures for infrastructure and rent subsidies).

132. See *id.* (comparing total asylum expenditures to economic development spending).

133. See, e.g., Rolf Soderlind, *German Asylum Deal Criticized*, Reuters Library Report, Dec. 8, 1992, available in LEXIS, Nexis Library, OMNI File (noting that German newspapers and politicians accused the *Bundestag* of disingenuously attempting to turn neighboring countries into buffer states that would impede the flow of refugees to Germany); Kohl, *Opposition Fail to Agree on Asylum; Racist Attacks Continue*, AGENCE FRANCE PRESSE, Nov. 29, 1992, available in LEXIS, Nexis Library, OMNI File (stating that the Christian Social Union, the Christian Democratic Union of Chancellor Helmut Kohl and the opposition Social Democrats could not reach an agreement on a proposal to amend an article of the Constitution guaranteeing political asylum); *The SDP Special Convention*, WEEK IN GERMANY, Nov. 20, 1992, available in LEXIS, Nexis Library, OMNI File (discussing the Social Democratic Party's inability to reach a consensus on the proposal to eliminate the right to asylum in Germany).

134. See GERMAN INFORMATION CENTER, FOCUS ON . . . RIGHTWING RADICALISM IN GERMANY, Mar. 1993, at 1 (documenting the resurgence of right wing radicalism in Germany). Many attribute the upsurge in right wing radicalism to financial problems associated with the reconstruction of Eastern Germany and the dramatic increase in the number of asylum-seekers entering Germany. *Id.* The Office for the Protection of the Constitution [*Verfassungsschutz*], Germany's domestic security agency, reported a total of 2,285 right wing extremist acts of violence in 1992, most of which were against foreigners, an increase of 54% over 1991. *Id.* Seventeen of these extremist acts were murders. *Id.* at 2. Violence occurs throughout the *Länder*. *Id.* North Rhine-Westphalia suffered the highest number of attacks in 1992, 513 and 256, respectively. *Id.* Hamburg and Bremen experienced the fewest number of attacks, thirty-six and two respectively. *Id.* Mecklenburg-Vorpommern and Brandenburg were the states with the highest incidence per 100,000 residents, with 9.52 and 8.52 per 100,000 residents respectively. *Id.*

1991 to 1993,¹³⁵ provided the impetus for changing the asylum laws.¹³⁶ These attacks set in motion a political debate between Chancellor Helmut Kohl's Christian Democratic Union (CDU) and the opposition Social Democratic Party (SDP).¹³⁷ Chancellor Kohl argued that Germany should amend its constitutional right to asylum both to protect foreigners who might enter the country, and to appease an increasingly intolerant public.¹³⁸ The SDP maintained that a constitutional amendment would undermine Germany's post-World War II commitment to human rights, arguing instead for a statutory solution to the refugee crisis.¹³⁹

On May 26, 1993, after a thirteen-hour debate and months of political turmoil, the *Bundestag* approved a constitutional amendment.¹⁴⁰ The

The right wing movement is gaining strength. *Id.* at 3. Approximately 65,000 persons in Germany possess extreme right wing convictions, 41,000 of whom affiliate with major parties of the extreme right. *Id.* The German People's Union (*Deutsche Volkunion* or DVU) is the largest of these parties, with approximately 25,000 members. *Id.* The National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands* or NPD) is the oldest party, with approximately 5,000 members. *Id.*

135. *See id.* (discussing acts of right wing violence during the 1991-1993 period). The German government makes a distinction between right wing attacks and xenophobic attacks, noting that although members of right wing groups commit many crimes against foreigners, they target other minority groups as well. *Id.* Nor can one assume that every xenophobic attack relates to right wing activity. *Id.*

136. *See* AGENCE FRANCE PRESSE, *supra* note 133, at 1 (stating that racist attacks on foreigners provided a catalyst for the *Bundestag* to act expeditiously in revising its asylum law). For example, right wing radicals set a foreigners' hotel ablaze and stabbed a nineteen year-old Turkish immigrant in a wave of neo-Nazi, racist and anti-Semitic bloodshed over the government's failure to reach an agreement on the constitutional amendment to restrict Germany's asylum laws. *Id.* Israel issued a stern appeal for Germany to put an end to the violence. *Id.*

137. *See Governing Coalition Passes Resolution Calling for Change of Asylum Law: SDP Boycotts the Vote*, WEEK IN GERMANY, Oct. 16, 1992, at 1 (highlighting the tension between the coalition party and the SDP over the change in the asylum law).

138. *See id.* (stating that Chancellor Helmut Kohl proposed a constitutional amendment affecting the right to asylum). Although the coalition parties had a genuine concern for foreigners' safety, this concern was secondary to the impact of amending the asylum law on Chancellor Kohl's re-election prospects. *Id.* *See Prospects for Profits: Germany through 1995*, BUSINESS INT'L, Apr. 5, 1993, available in LEXIS, Nexis Library, OMNI File (predicting that social and economic tensions resulting from the German refugee situation would prompt Chancellor Kohl to either resign before or lose the next election).

139. *See Laws of Asylum*, *supra* note 95, at 199 (stating that the SDP insisted on a statutory approach to asylum reform).

140. *See German Bundestag Votes to Restrict the Right to Asylum; Bonn In a*

vote was 521 in favor to 132 against,¹⁴¹ indicating a mandate to change the law. Deputies from the opposition SDP joined forces with deputies from the CDU coalition parties, the Christian Social Union (CSU), and the Free Democratic Party (FDP) to assure passage of the bill.¹⁴² Because the bill's passage required a two-thirds majority of the 662 deputies, and the coalition parties command a total of only 398 seats (319 for the CDU/CSU and 79 for the FDP), the votes of the Social Democratic deputies were decisive.¹⁴³ Political analysts have suggested that the SDP supported the bill in large part out of a desire to neutralize the far-right Republican Party.¹⁴⁴ Nonetheless, the vote marked a victory for the Coalition parties and a setback for asylum-seekers.

VI. CRITICAL PROVISIONS OF NEW LAW 16(a) AND THEIR RAMIFICATIONS

A. EXCLUSION OF APPLICANTS WHO ENTER FROM A "SAFE THIRD COUNTRY"

The Asylum Procedure Act of 1993¹⁴⁵ requires the deportation of asylum candidates who enter Germany from a safe third country.¹⁴⁵ For example, Germany will now return a candidate who travels through¹⁴⁷ Poland to get to Germany.¹⁴⁸ The premise of this law is

State of Siege, WEEK IN GERMANY, May 28, 1993, at 1 (reporting the *Bundestag*'s vote to amend the right to asylum).

141. *See id.* (stating the number of votes for and against the amendment).

142. *See id.* (describing the agreement the *Bundestag* parties reached for the asylum amendment to pass). The 132 deputies who voted against the amendment included the seventeen members of the Party of Democratic Socialism (the former East German Workers' [Communist] Party, the Eastern German Alliance '90, who have eight seats, and some Social Democratic and Liberal deputies). *Id.*

143. *See id.* (explaining the importance of the SDP vote on the asylum amendment).

144. *Id.* (analyzing the SDP's strategy in supporting the amendment).

145. *See* Asylum Procedure Act of 1993, *supra* note 108, at art. 1 (setting out the new procedures for asylum law in Germany).

146. *Id.* at art. 1(2)(1). *See* German Information Center, *supra* note 112, at 4 (stating that Germany may deport, without legal recourse, a refugee who passes through a safe third country). Germany considers as "safe third countries" fellow members of the EC or countries that subscribe to the UN Convention Relating to the Status of Refugees. *Id.*

147. *See* Blay & Zimmerman, *supra* note 10, at 369 (noting that in contrast to

that since the candidate has already found protection in the "safe third country," he or she can no longer fear persecution, and thus should not have the additional right of choosing in which safe country to reside.¹⁴⁹ Although some argue that such a provision unfairly assumes that all "safe" countries provide equal safety to refugees,¹⁵⁰ the intent of this provision is to distinguish the non-economic factors that drive refugees to seek haven in a safe country from the economic factors that draw asylum-seekers residing in countries that are safe, but poor, to a wealthy nation such as Germany.¹⁵¹ By elevating all EC and all neigh-

the 1982 Asylum Law, which held that Germany could not return a refugee to a third country unless he or she had remained in that country for three months (and presumably had the opportunity to apply for asylum there), under the 1993 amendment "mere travel through a secure third state . . . constitute[s] 'entry from' that state."). *But see id.* at 376-77 (reporting that the German constitutional court stayed the deportation of an Iraqi applicant who arrived in Germany via Turkey and Greece, where under Greek law the applicant was not permitted to apply for asylum).

148. *See Soderlind, supra* note 133 (reporting a proposal by Interior Minister Rudolf Seiters that refugees who arrive in Germany via Poland should have no claim to asylum); Steve Crenshaw, *Protests Erupt Over Vote to Limit Refugees; German MPs Forced to Run Gauntlet of Demonstrators to Enter Parliament for Debate on Constitutional Amendment*, INDEPENDENT, May 27, 1993, at 12 (noting that Germany has entered into an agreement with Poland to return asylum-seekers who enter Germany from Polish territory, and is negotiating a similar agreement with the Czech Republic); *see also Germany's Agreement With Poland*, WEEK IN GERMANY, May 14, 1993, at 1 (discussing the agreement between Germany and Poland).

149. *See Blay & Zimmerman, supra* note 10, at 366 (contending that the 1951 Convention's objective is to secure freedom from persecution, not to give asylum-seekers a choice of states of refuge).

150. *See* Guy S. Goodwin-Gill, *Safe Country? Says Who?*, 4 INT'L J. REFUGEE L. 248, 248-49 (1992) (stating that in deciding which countries are "safe," officials may fail to take account of the instability of judicial and political protection in an apparently "safe country"). Administrators prefer the "safe country" approach because it is likely to reduce the number of applicants quickly, allowing diversion of resources to the more difficult cases. *Id.* at 248. Human rights and refugee advocates, however, maintain that the "safe country" approach replaces the particularized inquiry that respect for individual human rights demands with an unwarranted presumption that presence in a "safe country" protects refugees' rights. *Id.* *See also* Blay & Zimmerman, *supra* note 10, at 371 (questioning whether Poland and the Czech Republic have the capacity effectively to serve as states of first refuge).

151. *See* Goodwin-Gill, *supra* note 150, at 249-50 (stating that the socioeconomic complexity of many "countries of origin" makes it virtually impossible to separate economic interests from political interests). Yet countries facing asylum crises view separation of political and economic interests as critical to the protection of persons with legitimate claims to asylum. *Id.* *See generally* Elizabeth Kay Harris, *Economic*

boring nations to the status of "safe third country," the new asylum law affects claims of the ninety percent of asylum-seekers who arrive in Germany by land.¹⁵²

B. EXPEDITED PROCEDURES

Another component of the Asylum Procedure Act of 1993 expedites the process of obtaining asylum.¹⁵³ It allows immigration officials summarily to reject the application of a refugee who has passed through a "safe country," unless the refugee provides sufficient proof of political persecution in that safe country.¹⁵⁴ To remain in Germany, a refugee who has passed through a "safe country" must overcome the presumption that he or she no longer fears persecution by demonstrating that the country from which he or she arrived presents a danger of political persecution.¹⁵⁵ The government expects every applicant to reveal the third country from which he or she enters Germany.¹⁵⁶

Additionally, this component places an increased burden on asylum-seekers who have not passed through a "safe third country."¹⁵⁷ Even

Refugees: Unprotected in the United States by Virtue of an Inaccurate Label, 9 AM. U. J. INT'L L. & POL'Y 269 (1993) (discussing the difficulty of distinguishing "economic" from "political" refugees).

152. See *The New Asylum Agreement*, WEEK IN GERMANY, Dec. 11, 1992, at 1 (stating that the new asylum law in Germany will affect asylum-seekers who arrive by land). This change in the asylum law means that applicants who arrive by land have practically no chance of securing a hearing. *Id.*

153. Asylum Procedure Act of 1993, *supra* note 108, at art. 1; see also *Gesetz zur Neuregelung der Leistungen an Asylbewerber vom 30 Juni 1993* [Law of June 30, 1993 to Amend Social Benefits Procedure for Asylum], 1993 BGBl.I 1074, §§ 1, 10 [hereinafter Social Benefits Procedure of 1993] (implementing procedures to expedite the processing of asylum applications). The Social Benefits Procedure of 1993 is a derivative Act of the Asylum Procedure Act of 1993, and many provisions of these two Acts are related. *Id.*

154. See Asylum Procedure Act of 1993, *supra* note 108, at art. 1 (stating that Germany will summarily dismiss claims of asylum-seekers who lack proper documentation).

155. See *id.* at art. 1 (requiring an applicant to establish the existence of political persecution in the country from which he or she arrived); see also German Information Center, *supra* note 112, at 4 (stating that asylum-seekers carry the burden of establishing the danger of political persecution).

156. See Asylum Procedure Act of 1993, *supra* note 108, at art. 1; Social Benefits Procedure of 1993, *supra* note 153, at § 1 (stating that Germany expects applicants to cooperate in the administration of social benefits).

157. See *id.* (calling for the BAF to encourage the full cooperation of asylum ap-

where an applicant arrives from a country Germany deems unsafe, the government may reject the refugee's claim.¹⁵⁸ For instance, if the candidate cannot provide acceptable information to the judge or agent hearing the case, the government's interest in expediting claims could result in rejection of a legitimate application.¹⁵⁹

C. STEMMING ABUSE

The Asylum Procedure Act of 1993 also aims to prevent candidates from submitting multiple applications for social welfare assistance payments.¹⁶⁰ In years past, Germany granted more than the stipulated share of welfare payments to individuals who successfully abused the system.¹⁶¹ The government intends to decrease the number of falsified applications by implementing a new Automated Fingerprint Identification System (AFIS).¹⁶² Such procedural safeguarding meets with near-universal approval among German citizens.¹⁶³

plicants in the asylum process).

158. *See id.* (determining that Germany may reject legitimate claims under certain circumstances).

159. *See id.* (permitting the rejection of legitimate claims).

160. *See, e.g.,* Social Benefits Procedure of 1993, *supra* note 153, at § 3 (implementing measures to prevent social welfare assistance abuse). The German Department of the Interior [*Bundesministerium des Innern*] now provides food and clothing directly to refugees instead of giving them stipends to purchase such items. *Id.* Refugees must go in person to receive their welfare payments; they may not send a proxy. *Id.* Refugees must exhaust completely any assets they possessed upon entering Germany before they qualify for welfare assistance. *Id.* at § 7. Refugees may not receive welfare benefits from both the federal government and a state government. *Id.* at § 9.

161. *See* German Information Center, *supra* note 112, at 5 (stating that asylum-seekers often illegally receive multiple welfare assistance payments because there are insufficient safeguards to prevent such occurrences). The "double identity" rate for the first and second weeks of April 1993 was 19.4% and 25.7% respectively. *Id.*

162. *See* Social Benefits Procedure of 1993, *supra* note 153, at § 1 (effecting measures to reduce falsification of welfare assistance applications); *see also* German Information Center, *supra* note 112, at 5 (stating that the government seeks to implement a fingerprinting mechanism to curtail social welfare abuse).

163. *See* German Information Center, *supra* note 112, at 3 (stating that most procedural modifications Germany aims at reducing abuse meet with approval among Germans).

D. EC COMPATIBILITY

The Asylum Procedure Act of 1993 modifies German law to the extent necessary for Germany to participate, without reservation, in European agreements on jurisdiction for asylum proceedings.¹⁶⁴ An individual whom Germany acknowledges as having a legitimate claim to asylum and having satisfied the new criteria does not have an absolute right to asylum in Germany.¹⁶⁵ Instead, Germany reserves the right to distribute asylum-seekers to other EC nations, as well as to those nations wishing to associate with the EC.¹⁶⁶

Germany not only reserves this right; it has also begun to establish reciprocal agreements with neighboring European countries. On May 7, 1993, Germany and Poland entered into a cooperative agreement requiring the Polish government to accept 10,000 refugees from Germany in 1993.¹⁶⁷ This agreement aims to prevent Germany's new asylum law from creating a disproportionate impact on the Poles by limiting the number of refugees Poland must accept and assisting the Polish government to accommodate the returnees.¹⁶⁸ But because the agreement does not include refugees turned back at the German border, the new asylum law will greatly increase the number of refugees Poland must absorb.¹⁶⁹

164. See Asylum Procedure Act of 1993, *supra* note 108, at art. 1 (permitting German participation in cooperative jurisdictional agreements); see also German Information Center, *supra* note 112, at 5 (stating that the new Asylum Procedure Act allows Germany to participate in European agreements on jurisdiction for asylum proceedings).

165. See Asylum Procedure Act of 1993, *supra* note 108, at art. 1 (allowing Germany to transfer asylum-seekers to other countries).

166. See *id.* (endorsing sharing of the asylum burden among EC nations).

167. See WEEK IN GERMANY, *supra* note 148, at 1 (stating that under the agreement Germany may return up to 10,000 asylum-seekers who have entered Germany through Poland, if Germany rejects them within six months); see also Judy Dempsey, *Poland Agrees to Take Back Refugees*, FIN. TIMES, Feb. 10, 1993, at 2 (discussing the refugee agreement between Germany and Poland). Germany's threat to impose visa requirements on Polish citizens was a probable factor in obtaining Poland's signature on the agreement.

168. See WEEK IN GERMANY, *supra* note 148, at 1 (noting that under the agreement Germany was to give Poland DM 120 million [about \$74 million] in aid during the next year to expand its infrastructure and to accommodate asylum-seekers).

169. See Talbot, *supra* note 109 (noting that Poland has in turn signed readmission agreements with Bulgaria, Romania, Slovakia, and Ukraine, which may allow Poland to return refugees it accepts from Germany to their countries of origin). Under

The Schengen Agreement and Convention,¹⁷⁰ which standardize border patrols within Europe¹⁷¹ to regulate drugs, arms, third party nationals, and refugees,¹⁷² and the Dublin Convention¹⁷³ regulating asylum procedures, exemplify Germany's interest in establishing reciprocal agreements. The asylum provisions of the Schengen Agreement are controversial because they prohibit asylum-seekers from applying for asylum in any country but the state of first application.¹⁷⁴ Modification of Basic Law 16 marks a concerted German effort to ensure its full participation in the Schengen Agreement.¹⁷⁵

E. THE IMPACT OF BASIC LAW 16(A)

Although predicting the impact of the new asylum law is difficult,¹⁷⁶ the number of asylum-seekers registering in Germany has declined since

Article 33 of the 1951 Convention, Germany has an ongoing responsibility for the treatment of these refugees. *See* Blay & Zimmerman, *supra* note 10, at 372 ("If Germany returns asylum seekers to a state on the basis of a determination that application of the Refugee Convention is guaranteed in that state, Germany indirectly becomes responsible for the asylum seekers' treatment in that state in a manner consistent with the Convention.").

170. Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders, June 14, 1985, and Convention Applying Their Agreement, June 19, 1990, 30 I.L.M. 68 [hereinafter Schengen Agreement].

171. *Id.* at arts. 2, 3, 6.

172. *Id.* at arts. 4, 5, 28-91.

173. The European Community Convention Determining the State Responsible for Examining Applications for Asylum in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 (Dublin Convention). Observers generally regard the Dublin Convention as a complement to the Schengen system. *Shining City*, *supra* note 109, at n.132.

174. *See Laws of Asylum*, *supra* note 95, at 198 (stating that the asylum provisions in the Schengen Agreement, which call for states to evaluate applications in accordance with the Geneva Convention on the Status of Refugees and the New York Protocol, will create "a more restrictive asylum model for relatively liberal asylum states").

175. *See* Schengen Agreement, *supra* note 170, pmbl. (stipulating that Germany, the Benelux states, France, Portugal, Italy, and Spain have signed the Agreement).

176. German Information Center, *Decline in Number of Asylum-seekers: Precise Evaluation of Impact of New Asylum Law Not Yet Possible*, at 1 (Sept. 9, 1993) (on file with the German Embassy, Washington, D.C.) (noting that the Federal Ministry of the Interior considered an evaluation of the new asylum law based solely on the statistics of the last few months unreliable). How organizations that smuggle people illegally across borders will respond to the new asylum law remains an important, undetermined factor. *Id.*

the law's enactment, according to the Interior Ministry.¹⁷⁷ In July 1993, 20,658 asylum-seekers registered in Germany, a 33.7% drop from the 31,123 who registered in June 1993.¹⁷⁸ In August 1993, Germany registered only 14,521 asylum claims, a decrease of approximately 30% from the previous month.¹⁷⁹ Between January and August 1993, 259,193 asylum-seekers registered, a 5.4% decrease from 274,000 in the same period in 1992.¹⁸⁰ In May 1993, the number of asylum applications the Federal Agency for the Recognition of Foreign Refugees adjudicated exceeded the number of incoming applications for the first time.¹⁸¹ For Basic Law 16(a) to meet its stated objective of reducing the number of entitled asylum-seekers, the federal and state governments must continue to join forces in implementing the new regulations.¹⁸²

VII. RECOMMENDATION FOR "COLLECTIVE RESPONSIBILITY"

The global refugee crisis creates an agonizing paradox for the United States and Germany, industrialized nations that historically have absorbed a disproportionate number of refugees for reasons of both humanitarian principle and economic self-interest.¹⁸³ On the one hand,

177. *See id.* (documenting the decline in registered asylum-seekers).

178. *See id.* (noting a decline in asylum-seekers in July 1993). The number of asylum-seekers in March and April of 1993 exceeded 43,000. *Id.*

179. *See id.* (noting a decrease in the number of asylum applications for August 1993).

180. *See id.* (noting a decrease in asylum applicants over the first eight months of 1993).

181. *See id.* (noting the number of asylum cases upon which Germany ruled exceeded the number of incoming applications for the first time). The number of rulings increased 23.5 percent in June 1993 to 53,620. *Id.* Germany ruled on approximately 50,000 applications in July and 48,519 in August. *Id.*

182. *See id.* (citing the need for state and federal cooperation with the new asylum law). From January 1993 to August 1993 68,733 asylum applicants came from Romania, 51,574 from Yugoslavia, 21,273 from Bulgaria, and 14,100 from Turkey. *Id.* Of those who sought asylum during this period, Germany granted asylum to 11.7 percent of the applications from Turkey, 0.1% of those from Bulgaria, 4.1% of those from Yugoslavia, and 0.1% of those from Romania. *Id.* The total number of applications to which Germany granted asylum was 5,130, or 2.1% of the total applications asylum-seekers filed. *Id.* In July 1993, Germany granted 1,623 persons asylum, or 3.3% of the total number of adjudications. *Id.* In August 1993, Germany granted asylum to 1,903 persons, or 3.9% of the total number of applications it adjudicated. *Id.*

183. *See supra* notes 13-46 and 93-103 (describing the past refugee policies of the

post-Cold War domestic political realignments make it extremely difficult for ruling parties in either country to mobilize support for continued adherence to international refugee conventions.¹⁸⁴ On the other hand, unilateral closing of borders by Germany and the United States does nothing to encourage multilateral strategies for accommodating the refugee crisis. Politicians in both countries have argued that it is necessary to limit the right to asylum in order to preserve it.¹⁸⁵ This section argues that, although some restrictions are unavoidable in the short-term, long-term resolution of the crisis cannot depend on the subordination of fundamental human rights to national self-interest. Instead, the United States and Germany must seek global solutions that preserve the right to asylum while allocating the costs of the refugee crisis in a more equitable manner.

A. POINTS OF DEPARTURE—THE MODELS IN THE UNITED STATES AND THE FEDERAL REPUBLIC OF GERMANY

The germ of a system of “collective responsibility,”¹⁸⁶ or global burden sharing of the asylum epidemic, is present in the asylum laws of both Europe and the United States.¹⁸⁷ Three areas of German asylum law could contribute to the establishment of a workable global asylum processing structure while allocating the asylum burden across a broader spectrum of countries. First, Germany’s system of allocating asylum-seekers among its states provides a proportional formula for sharing the asylum burden—a formula any successful global system will need.¹⁸⁸ Second, Germany’s negotiation of reciprocal agreements with Poland,

United States and Germany).

184. See *supra* notes 46, 134-39 (describing public pressure to restrict immigration).

185. See *supra* notes 29-46 and 104-32 and accompanying text (recounting political rationales for limiting asylum).

186. The author uses the term “collective responsibility” to denote a recommendation for globalizing the present asylum framework of Germany and in the United States. Under this globalized framework, more countries would share the burden of a worldwide refugee epidemic.

187. See *supra* notes 77-79, 166-69 and accompanying text (discussing the United States’ reservation of the right to send refugees to other countries and Germany’s cooperative agreements with Poland, Hungary, and other European countries). See generally Schengen Agreement, *supra* note 170 (implementing a cooperative effort among EC nations to standardize border patrols and address the refugee issue).

188. See *supra* note 98 accompanying text (discussing Germany’s method of allocating asylum-seekers among its states).

Romania, the Czech and Slovak Republics, and other EC nations exemplifies on a regional level the cooperative effort necessary for a global system.¹⁸⁹ Finally, Germany has adjusted its asylum law to permit its participation in the Schengen Agreement, thus broadening the range of countries upon which it may rely in alleviating its disproportionate burden.¹⁹⁰

Aspects of United States asylum law also could contribute to a global system of collective responsibility. Although in a less advanced stage, the structure of United States asylum law also appears, at least tacitly, to endorse global sharing of the asylum burden. For example, under its present asylum law, the United States "reserves the right" to disperse asylum-seekers to willing countries both before and after hearing their cases.¹⁹¹ In addition, the United States has initiated cooperative agreements with countries in its region both to restrict the flow of refugees¹⁹² and to share the burden of refugees apprehended in international waters.¹⁹³

A system of collective responsibility¹⁹⁴ based on existing programs

189. See *supra* notes 164-75 and accompanying text (delincating reciprocal agreements between Germany, former Eastern Block countries, and European Community states).

190. See *supra* notes 170-75 and accompanying text (discussing the Schengen Agreement principles).

191. See *supra* notes 77-79 and accompanying text (discussing United States reservation of the right to send asylum-seekers to other countries).

192. See, e.g., Agreement on Interdiction of Haitian Immigration to the U.S., Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559, 3559 [hereinafter 1981 Haitian Immigration Agreement] (setting forth the terms of a cooperative agreement between the United States and Haiti whereby the Haitian government agreed to assist the United States in stopping the migration of refugees from Haiti to the United States); Roberto Suro, *U.S., Cuba Agree on Stemming Raft Tide*, WASH. POST., Sept. 10, 1994, at A1 (reporting an accord between the United States and Cuba under which the United States agreed to accept 20,000 Cuban refugees and Cuba promised to use all possible means to prevent its citizens from seeking refuge in the United States).

193. See Ann Devroy, *U.S. to Bar Haitians Picked Up at Sea, Other Countries to Provide Temporary Havens*, WASH. POST., July 6, 1994, at A1 (reporting that Panama, Dominica, and Antigua had agreed to accept Haitian refugees the United States interdicted); Maria Puente, *Few Countries Have Offered Safer Areas for Refugees*, USA TODAY, Aug. 30, 1994, at 2A (observing that the United States had been unable to obtain firm agreements from most Caribbean countries it approached to accept Cuban and Haitian refugees).

194. See, e.g., Eve B. Burton, *Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries*, 19 COLUM. HUM. RTS. L. REV. 307, 309 (proposing an instrument whereby the international community buys an

in the United States and Germany would allow the international community to reallocate the costs of the global asylum burden.¹⁹⁵ Although "collective responsibility" would mandate international reform, it would not require an entirely new system. As the United States and German frameworks demonstrate, many of the components indispensable to a successful program exist in national asylum laws. An international system of collective responsibility would apply on a global scale the regional strategies already in place throughout the world.¹⁹⁶

B. A FORMULA FOR COLLECTIVE RESPONSIBILITY

One possible formula for addressing the asylum problem would allocate asylum-seekers throughout participating countries of the international community,¹⁹⁷ under UNHCR supervision,¹⁹⁸ according to a percentage formula that tracks the population and resources of each country.¹⁹⁹ This approach borrows elements from the 1982 Asylum Proce-

easement or a right of access to land refugees occupy in a host country). In consideration for the payment, the host country would allow an international human rights monitoring team unobstructed access to refugee populations within the country. *Id.*

195. *See supra* notes 164-75, 192 and accompanying text (discussing the regional agreements in place in the United States and Germany).

196. *See, e.g.*, 1981 Haitian Immigration Agreement, *supra* note 192, at 3559 (outlining a cooperative arrangement between the United States and Haiti); Schengen Agreement, *supra* note 170 (promulgating a cooperative arrangement within the EC to curtail illegal immigration activities in Europe). Collective responsibility would encourage the United States and Germany, for example, not only to conclude sound regional agreements to address the refugee dilemma, but to expand the base of these agreements beyond their own regions to include as many countries as possible. The United States and Germany also could agree to cooperate on the refugee dilemma bilaterally.

197. *See Political Asylum, supra* note 8, at 229 n.157 (describing a global asylum processing strategy proposed by Dale F. Swartz, President of the National Immigration, Refugee and Citizenship Forum, whereby "countries of first asylum would transfer asylum-seekers to an international holding center" where international representatives would adjudicate their claims). This strategy would resettle refugees in a country which is not necessarily their country of first asylum. *Id.*

198. *See Unfulfilled Promise, supra* note 8, at 243-50 (stating that UNHCR involvement in asylum processing coupled with a limited role for the State Department would help depoliticize the asylum process); *Forty Year Crisis, supra* note 8, at 19 (recommending that the UNHCR issue advisory opinions and help clarify asylum standards and procedures); *see also* Clare Nullis, *U.N. Agency to help Screen Haitians*, PHILA. INQUIRER, May 23, 1994, at A4 (reporting that the United Nations and the United States reached an agreement whereby the UNHCR would "counsel Haitians, train U.S. officials involved in refugee determination, monitor the overall process and assist in seeking third country cooperation").

199. *See supra* note 98 and accompanying text (discussing the formula for allocat-

dures Law in Germany,²⁰⁰ the Schengen Agreement,²⁰¹ the "reservation clauses" of United States legislation,²⁰² and the 1981 immigration agreement between the United States and Haiti.²⁰³ Although much debate will ensue concerning the factors this international consortium should use in determining the resources and population of each country, the analysis should consider such factors as the Gross National Product (GNP), Gross Domestic Product (GDP), budget deficits, and unemployment rates of the participating countries in reaching a decision as to where to locate an asylum-seeker.

The goal of this analysis is to determine the ability of countries to absorb refugees (their "absorption rate") in order more efficiently to allocate the resources of a larger contingent of countries. For example, if the UNHCR determines that the United States can absorb ten percent of the projected number of refugees for a given year, then the United States' obligation cannot exceed that amount. If twenty-five percent of the world's refugees in that year apply for asylum at United States ports of entry, then the United States, in consultation with the UNHCR, may transfer the surplus to other countries that have failed to exhaust their stipulated quota for the year. Because the "collective responsibility" model presumes that true political asylum candidates concern themselves first and foremost with safety, not the economic viability of a particular country, it grants asylum-seekers minimal discretion in selecting their ultimate destination. At the same time, the model recognizes the futility of requiring a country to accept asylum-seekers for whom it is unable to provide economically.

C. EXPEDITIOUS PROCESSING AND DETERRENCE OF FILINGS

A collective responsibility approach would accomplish two reforms national legislation consistently pursues: expeditious processing of pend-

ing asylum-seekers among the various German states). The proportionate burden sharing of collective responsibility mirrors Germany's domestic concept. *Id.*

200. See *supra* notes 145-75 and accompanying text (examining the German Asylum Procedure Act of 1993).

201. See *supra* notes 170-75 and accompanying text (discussing the Schengen Agreement's conceptual foundation).

202. See *supra* notes 77-79 and accompanying text (discussing the United States' reservation of the right to seek assistance from other countries in administering its asylum dilemma).

203. See 1981 Haitian Immigration Agreement, *supra* note 192, at 3559 (outlining the cooperative immigration agreement between the United States and Haiti).

ing claims,²⁰⁴ and reduction of new claims.²⁰⁵ The collective responsibility model would centralize the global asylum machinery²⁰⁶ and direct more resources to the problem, thereby expediting the processing of asylum claims.²⁰⁷ International regulation would reduce the number of new claims in two ways. First, limiting applicants' discretion would deter frivolous claims.²⁰⁸ Second, collective responsibility moots fears that the law will discourage legitimate candidates from applying for asylum.²⁰⁹ Because collective responsibility allocates claims on a percentage basis, it always provides a haven for legitimate candidates. The international community must accommodate all claims under this model. Although candidates for asylum will lose some freedom of choice, preservation of a guaranteed safe haven outweighs any loss in individual discretion.

204. See *supra* notes 66-76 and accompanying text (discussing proposals to expedite processing of asylum claims in the United States).

205. See Asylum Procedure Act of 1993, *supra* note 108, at art. 1 (implementing Basic Law 16 of the Grundgesetz, as amended, to limit refugees' right to asylum); see also *Political Asylum*, *supra* note 8, at 226 (stating that Germany and the United States have enacted legislation which seeks to deter the filing of new asylum claims). To deter the filing of new claims, Germany required visas, restricted work authorization, instituted communal housing arrangements, and cut benefits. *Id.* The United States program for interdiction of Haitians and restrictions on opportunities for asylum applicants to work pending adjudication of their claims seek to deter the filing of additional claims. *Id.* at 246-47.

206. See *Haitian Boat People*, *supra* note 40, at 336-37 (suggesting that the United States work in close collaboration with the UNHCR in processing claims).

207. See *supra* notes 89-92 and accompanying text (discussing U.S. proposals to direct increased resources to asylum processing).

208. See *Political Asylum*, *supra* note 8, at 233 (stating that short-term detention, expeditious adjudication of cases, and improved border patrols will deter frivolous claims). Expeditious processing will diminish the expectations of aliens looking to buy time with the filing of a frivolous claim and may deter those with frivolous claims from leaving their homeland in the first place. *Id.* But see *id.* at 230 (arguing that attempts to distinguish "economic" from "political" refugees often have the effect of denying legitimate claims).

209. See *id.* at 230 (stating that the troublesome aspect of programs that seek to deter the filing of claims is that they may deter the filing of *bona fide* claims). The challenge is to create a system which creates disincentives large enough to deter frivolous claims, but not to deter legitimate claims. *Id.*

D. THE FAMILY MEMBER DILEMMA

Under collective responsibility, the location of family members would become a factor only after the candidate had established a legitimate claim for asylum.²¹⁰ Processing officials would first determine the merits of the claim. Once the candidate had won asylum, the residence of family members would become a factor in determining the candidate's country of asylum.²¹¹ If the asylum-seeker had an immediate family relationship to any individual in the country in which the claim was filed, the asylum-seeker would gain entry to that country.²¹² Furthermore, any persons under eighteen years of age or persons who could demonstrate an unequivocal dependence on the family member would gain entry after establishing a legitimate claim to political persecution.²¹³

210. See generally T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983) (discussing the lack of constitutional protection for immigrants trying to enter a country to reunite with family members). The United States applies stricter scrutiny in exclusion decisions (preventing aliens' entry into the United States) than in deportation decisions (removing aliens residing in the United States). *Id.* Historically, an individual to whom a country grants asylum gains admission to that country. *Id.* See *infra* notes 210-15 and accompanying text (explaining that a collective responsibility program, which attempts to create safe havens for all legitimate candidates, would only guarantee admission to immediate family members, minors, and persons dependent for other documented reasons).

211. See Hartmut Esser & Herman Korte, *Federal Republic of Germany*, in EUROPEAN IMMIGRATION POLICY: A COMPARATIVE STUDY 165, 173-74 (Tomas Hammar ed., 1985) (stating that since the *Bundestag* stopped recruiting foreign workers in 1973, family reunification has become a source of increased immigration); see also John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 276 (stating that reuniting members of the immediate family should be a constitutional right); Neuman, *supra* note 97, at 57-63 (discussing entry for the purpose of reuniting families in Germany).

212. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (holding that any procedure Congress authorizes constitutes due process for aliens the United States denies entry). In *Knauff*, the United States denied entry to the German wife of an American soldier. *Id.* See also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (affirming the twenty-one-month detention and denial of re-entry of a permanent resident alien).

213. See Guendelsberger, *supra* note 211, at 258 (discussing the admission of minors for family reunification purposes); see also Kay Hailbronner, *Citizenship and Nationhood in Germany*, 70-71 in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN

Collective responsibility would not guarantee legitimate candidates entry to countries where they lack immediate family members. Rather, candidates would have the burden of making out a case for admission to a particular country based on specific circumstances²¹⁴ before an international review board.²¹⁵ Depending on the merit of the argument and absorption rate of the country at the time the asylum-seeker files the claim, the board would have discretion to grant admission. This process would not deter a refugee whose motive is to escape persecution by gaining entry to any safe haven.

E. METHODS FOR SUBSIDIZING—THE “POOLED FUND”

A “pooled fund,” to which the participating parties contribute a percentage equal to their absorption rate for a given year, funds this collective responsibility structure.²¹⁶ If the total cost of processing and trans-

EUROPE AND NORTH AMERICA (W. Brubaker ed., 1989) (discussing chain migration as it relates to children and spouses of first generation and second generation resident aliens). To limit family reunification, the federal administration of Germany denies first-time resident permits to spouses of second generation resident aliens unless the spouse has been married for at least one year, has reached the age of eighteen, and has lived continuously in Germany for eight months. *Id.*

214. See Neuman, *supra* note 97, at 59 (discussing the various restrictions on the admission of family members in Germany, the most common of which is a one-year waiting period for second generation resident aliens and eight years of residence); see also *Social Group*, *supra* note 93, at 396-437 (emphasizing the importance of considering ethnicity when making asylum determinations). Collective responsibility would consider the persecution of various ethnic groups before providing an asylum-seeker with a safe haven.

215. See generally *Political Asylum*, *supra* note 8 (discussing the importance of adequate processing agencies and review boards). Beyond the INS and EOIR, which, in conjunction with the UNHCR, would remain in place as the bodies that initially hear asylum claims, this collective responsibility program would establish at least two review boards. The first board would review individual asylum decisions on appeal and determine family reunification claims. Members from the host country as well as the UNHCR would comprise this board. The collective responsibility model would entrust dispute resolution between participating countries to a second board. Representatives from all participating countries would serve on this board, along with UNHCR members. Aside from these two review boards, collective responsibility participants would form a committee to determine the “absorption rate” of participating countries and to determine in which safe haven legitimate asylum candidates would ultimately receive refuge. At least one member from all participating countries as well as members from the UNHCR, like the dispute resolution board, would comprise this board.

216. Under this proposal each country would have to expend resources in proportion to its “absorption rate” for the year.

porting asylum-seekers in a given year is \$5 billion and the United States absorption rate is ten percent, then the United States would contribute \$500 million to the pooled fund. Although this system would require significant financial outlays, countries could expect a streamlined approach to asylum processing to reduce overall costs.²¹⁷

An internationally centralized program would reduce costs by expediting claims.²¹⁸ Delays in processing applications and adjudicating appeals contribute significantly to the expense of present asylum systems.²¹⁹ A global approach to immigration with clearly defined criteria for granting asylum could effect savings by decreasing the amount of adjudication. Furthermore, contributors to the pooled fund would recoup a portion of such expenditures because of a decreased need for border patrols.²²⁰ Finally, collective responsibility may seem particularly appealing to politicians who must remain accountable to their constituencies. By placing the responsibility for determining each country's asylum burden on an international body, politicians would be able to accept a fair number of immigrants while reducing political backlash.²²¹ The United States and Germany would almost certainly agree to assume the lead role in such a program because it would lessen their burdens significantly. The participation of these major powers should motivate countries that now carry only a proportional share of the refugee burden, and thus would not feel an adverse impact from collective responsibility.²²²

Those countries who currently pay less than their share would also have some incentive to participate. Although their short-term costs might increase, such countries might prefer the predictability and fairness of a

217. See generally *Legal Norms*, *supra* note 30 (recommending a streamlined approach to asylum processing); *Unfulfilled Promise*, *supra* note 8 (emphasizing the need for an orderly approach to asylum adjudication).

218. See *supra* notes 66-76, 153-59 and accompanying text (discussing means of expediting processing of asylum claims).

219. See, e.g., *supra* notes 127-32 and accompanying text (delineating the costs associated with delays in asylum adjudication in Germany).

220. See *supra* notes 85-88 and accompanying text (discussing the proposed increases in resource allocation for border patrols in the United States).

221. See J.F.O. McAllister Washington, *Lives on Hold*, *TIME*, Feb. 1, 1993, at 50 (stating that the Clinton Administration desires to implement an asylum program that achieves the proper balance between affording asylum to legitimate candidates and protecting the interests of United States citizens).

222. See generally *Political Asylum*, *supra* note 8 (emphasizing the importance of the United States and Germany in the development of a global asylum policy).

global allocation mechanism to the risks of an unregulated asylum system.²²³ Participation in a system of collective responsibility offers opportunities to accumulate the goodwill of the major powers; while refusal to participate encourages ostracism. Countries could channel the global savings resulting from a more efficient asylum system into a fund to provide adjustment assistance to participants that increase their refugee costs by entering into the system of collective responsibility.²²⁴ Finally, the allocation mechanism could distribute well-educated refugees, who under an unregulated system would probably choose industrialized countries, to countries with particular needs for their skills. By promoting both equity and efficiency, the "pooled fund" would fulfill collective responsibility's primary goal of preserving the right to asylum for legitimate claimants.²²⁵

F. REALISTIC LIMITATIONS ON ENFORCEMENT

Domestic compliance is the most important element to the success of such a program, and admittedly, the most difficult to satisfy.²²⁶ Although it appears the motives exist for the United States and Germany to participate in collective responsibility,²²⁷ the model's success depends on these countries' collaboration. Collective responsibility poses no fundamental threat to sovereignty. Although the UNHCR's powers would increase, collective responsibility would compel no state to cooperate, and each state would participate substantially in all decisions in which it had a stake. Each state would have input in the collective determination of its absorption rate and the identification of asylees for which it would function as a safe haven. Participating states would share

223. See generally *Social Group*, *supra* note 93 (articulating the need for an equitable distribution of asylum costs).

224. See *Political Asylum*, *supra* note 8, at 226-41 (suggesting that increases in spending on the asylum dilemma could lead to long-term efficiency and savings).

225. See generally *Unfulfilled Promise*, *supra* note 8 (emphasizing the importance of preserving asylum rights for legitimate applicants).

226. See *supra* notes 29-46 and accompanying text (discussing U.S. recognition of the *jus cogens* norm of *non-refoulement* and its seemingly contradictory domestic policy, which includes designing programs to deter asylum applications and interdiction of certain refugee groups at sea without inquiry as to whether or not they have a well-founded fear of persecution).

227. See *supra* notes 186-225 and accompanying text (elaborating on the incentive for the United States and Germany to participate in collective responsibility).

decision-making responsibility with specially trained UNHCR employees and representatives from other participating countries.²²⁸

Collective responsibility would allow participating countries to maintain their present immigration agencies. The United States, for example, could continue to use the INS and the EOIR as its representatives in asylum processing, assuming Congress approves increased funding for personnel and training. UNHCR representatives would act as liaisons between the INS and EOIR and the other signatories to the agreement. Ideally, UNHCR involvement would centralize and coordinate asylum administration. Furthermore, UNHCR presence would diminish the State Department's role in the asylum system, thus depoliticizing the process.²²⁹ Although some may criticize the United Nation's oversight ability due to its often excessively bureaucratic management style, others believe that, despite these drawbacks, the United Nations has far more experience and expertise in the global management and implementation of refugee policies than each of its member nations respectively.

Finally, dispute resolution for disagreements concerning determinations on refugee receipts and contributions to the pooled fund would provide a forum for a country dissatisfied with the process. Countries could appeal these disagreements to an international committee, similar to the International Court of Justice (ICJ),²³⁰ comprising representatives of each participating country and the UNHCR.²³¹ Although politics would inevitably affect this body's decisions,²³² representation from all participating countries and the UNHCR would provide a fair opportunity to develop consensus.²³³

228. See *supra* note 215 and accompanying text (discussing the composition of the various processing and review boards under collective responsibility).

229. See *Legal Norms, supra* note 30, at 454-56 (suggesting the need to decrease the State Department's role in asylum adjudication); see also *Political Asylum, supra* note 8, at 235-36 (recommending the abolition of State Department involvement in asylum processing).

230. See 1967 Protocol, *supra* note 21, at art. IV (stipulating that the ICJ has jurisdiction to resolve disputes between member parties).

231. See *supra* note 215 and accompanying text (delineating dispute resolution board composition).

232. See *Political Asylum, supra* note 8, at 240 (noting that the idea that countries can create institutions to apply universally shared public interest concepts has existed for years). Unfortunately, real world operations deny most of this fantasy. *Id.* The interests independent bodies regulate often overwhelm the regulatory entities. *Id.*

233. See Burton, *supra* note 194, at 319-32 (proposing a leasing arrangement for refugees between an international community and a host country). Based on such proposals, it is conceivable that collective responsibility could develop into a system

CONCLUSION

The end of the Cold War has accelerated migration across the boundaries of once-polarized nations.²³⁴ As the evaporating right to political asylum in the United States and Germany indicates, this new found mobility on behalf of much of the world's populace, combined with economic strife across the globe, has generated great concern.²³⁵ The asylum laws of the United States and Germany, which originate in post World War II democratic and humanitarian sentiments, can no longer effectively protect the internationally recognized rights of political refugees.²³⁶ Countries are revising their asylum laws and limiting the rights of asylum-seekers in the process.²³⁷

For asylum to survive as a viable remedy for legitimate political refugees, a substantial part of the international community must increase its share of the refugee burden. At the same time, participating countries in a global asylum program must implement restrictions, such as limiting the extent to which a refugee can choose his or her safe haven. Such restrictions would reduce the number of frivolous applications and contribute to preserving the system for legitimate claims.

The success of this globalized movement, undoubtedly, will depend upon increased resources and better trained officials. As the United States and Germany have carried a large share of the burden, their in-

which accommodates one country paying another country to receive refugees and applying the number of refugees sold against that country's "absorption rate." It is conceivable that if international efforts addressing the refugee dilemma are successful, the international community could provide this foundation for a much wider range of activity in this area.

234. See *supra* note 7 and accompanying text (describing the increase in global mobility).

235. See Ricou Heaton, *The European Community After 1992: The Freedom of Movement of People and Its Limitations*, 25 VAND. J. TRANSNAT'L L. 643, 646-54 (1992) (stating that EC members remain concerned about the potential derogatory effect on EC asylum programs migration from former communist countries).

236. See, e.g., 117 CONG. REC. S9,993 (daily ed. July 30, 1993) (statement of Sen. Kennedy) (stating that President Clinton's proposed asylum legislation seeks to repair a system which is unfair to legitimate asylum-seekers); *Id.* at S9,998 (statement of Sen. Simon) (stating that the present asylum system does not control alien smuggling, which affects the treatment of legitimate applicants); *Id.* (statement of Sen. DeConcini) (stating that asylum-seekers overburden the present asylum system and render it ineffective).

237. See *supra* notes 48-92, 145-75 and accompanying text (delineating changes to asylum laws in the United States and Germany).

sight is both invaluable and necessary. Together with a willing international community, these two nations can succeed in preserving the right to asylum for legitimate claimants, or remain inactive and witness its erosion. The necessary tools exist within existing national asylum programs. Nations must now use them to forge a global approach to asylum reform.