

University of Miami International and Comparative Law Review

Volume 18
Issue 1 *Volume 18 Issue 1 (Fall 2010)*

Article 3

10-1-2010

Spaces of Freedom for Citizens and Asylees in the EU and U.S.

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Francis J. Conte, *Spaces of Freedom for Citizens and Asylees in the EU and U.S.*, 18 U. Miami Int'l & Comp. L. Rev. 1 (2014)

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SPACES OF FREEDOM FOR CITIZENS AND ASYLEES IN THE EU AND U.S.¹

The author, Francis J. Conte, professor of law and former dean at the University of Dayton School of Law, died in late March of 2011 after a brief illness. This article was completed shortly before his death and is his last in a long list of publications written over his 34 years as a professor and dean. This article is published posthumously in his memory.

I.	INTRODUCTION	5
II.	BORDERS AND CITIZENS	10
III.	HOSPITALITY	23
IV.	ASYLUM IN THE EUROPEAN UNION	27
V.	SALIENT U. S. ASYLUM PRINCIPLES	33
VI.	SOME SUGGESTIONS	37
VII.	CONCLUSION	45

I. INTRODUCTION

In one part of the European Union (“EU”), desperate refugees about to reach shore may be chased back into the sea.² Yet in another

¹ I would like to thank Dean Lisa Kloppenberg of the University of Dayton School of Law for her encouragement and the generous grant in support of my work.

² Greek officials have been observed in the sea, chasing and otherwise forcing people from Somalia and Middle East hot spots, notably Iraq, seeking refuge from landing on Greek shores. See *Greece: Iraqi Asylum Seekers Denied Protection*, Human Rights Watch (Nov. 26, 2008), <http://www.hrw.org/en/news/2008/11/25/greece-iraqi-asylum-seekers-denied-protection> [hereinafter *Greece: Iraqi Asylum Seekers*]; Greek Coast Guard officials have been reported to be pushing . . . “migrants out of Greek territorial waters, sometimes puncturing inflatable boats or otherwise disabling their vessels.” *Id.* (quoting *Stuck in a Revolving Door: Iraqis and Other Asylum Seekers and Migrants at the Greece-Turkey Entrance to the European Union*, Human Rights Watch, 43-45 (Nov. 2008), http://www.hrw.org/sites/default/files/reports/greeceturkey1108_webwcover.pdf (detailing various personal accounts of Greek authorities puncturing rubber boats or otherwise disabling vessels); see also *Observations on Greece as a country of asylum*, Office of the United Nations High Commissioner for Refugees, 4 (Dec. 2009), <http://www.unhcr.org/refworld/pdfid/4b4b3fc82.pdf> (noting that incidents involving Greek

part of the EU, substantial percentages of undocumented non-citizens meet international legal standards and are granted asylum.³

In China, thousands of desperate North Koreans live in and travel across the vast country, often in disguise, fearing recognition and return to a brutal environment; yet Chinese leaders, including academics, deny the existence of asylum seekers in their land.⁴

In the U.S., while the asylum process is relatively well-known, and the standards and criteria for granting asylum are reasonably well agreed upon, people in similar⁵ circumstances are often treated differently merely because of the location of the immigration office or court.⁶ The decision to grant asylum is a matter

officials puncturing rubber boats and removing engines and oars have been reported). An acceptance rate of .05% out of 20,000 applications for asylum tends to reinforce the notion of resistance to asylum seekers by Greek authorities. See Bill Frelick, *Greece's Refugee Problem*, Human Rights Watch (Jul. 31, 2009), <http://www.hrw.org/en/news/2009/07/31/greeces-refugee-problem>.

³ Sweden, for example, hosted 18,000 Iraqi asylum seekers in 2007. Its general asylum recognition rate is approximately 50%, roughly the same rate as Italy. Sweden seems to base their asylum policies on generally accepted international standards, and tends to be more generous than most countries. Hemme Battjes, *Taking Forward Asylum Policy in the EU: The Legal Implications of the 2008 Commission Policy plan on Asylum*, Address at the Third Forum on EU Immigration and Asylum Policy (Nov. 13, 2008).

⁴ When the author gave a lecture to PhD students and faculty at Renmin University's Faculty of Law in Beijing, China, in June 2007, a faculty member and former international judge stated that the need for a consistent and transparent process for adjudicating asylum claims in China was not pressing because there were hardly any refugees or asylees in China. A Korean PhD student interrupted him to declare that it was well-known that there were over 40,000 desperate people who had in recent times escaped to China from North Korea. Many of these North Koreans, due to the fear that Chinese authorities would pick them up and send them back to North Korea without any consideration of the persecution they would suffer upon return, disguised themselves and lived in wretched conditions. Some engaged in prostitution and illicit activities to get by; others tried to cross China to seek refuge elsewhere.

⁵ Historically, refugees from countries unfriendly to the U.S., as in communist states, were more likely to be welcome while those fleeing tyranny in non-communist states, such as Haiti or Columbia, were less likely to be granted asylum status.

⁶ See generally JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ, & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* 17-60 (2009).

of some discretion,⁷ and some newcomers, for example women fleeing abusive cultural practices, are seldom welcomed at all.⁸ The oppression of women and girls, for what may be deemed “mere” cultural or religious reasons, rarely seems to qualify for asylum. Likewise, Iraqis who are in jeopardy of persecution because of their overt support for the U. S. military and U.S military action in Iraq, or U.S. policies, ironically and sadly, were unlikely to be welcomed to U.S. shores.⁹

On the other hand, in some EU states in economic crises, such as Greece, the economic well-being, and the social stability of national citizens may be perceived to be in jeopardy, perhaps aggravated by substantial migration of non-citizens to a nation-state. The safety, national security and the society of a respective nation-state seems to some to be threatened,¹⁰ and for this reason the state’s limited and depleting resources cannot be spared for uninvited non-citizens. It

⁷ See Immigration and Nationality Act, 8 U.S.C. § 1158 (2000); see also DAVID A. MARTIN ET AL., *FORCED MIGRATION LAW AND POLICY* 161-171 (2007).

⁸ In *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. *en banc* 2008) the Board of Immigration Appeals granted the claimant asylum due to the applicant’s female genital mutilation, which provided such exceedingly narrow standards as to make them virtually applicable only to her case. Likewise, in *Fatin v. INS* 12 F.3d 1233 (1993) the Court of Appeals for the Third Circuit refused to grant asylum to a woman who resisted oppressive and discriminatory fundamentalist Islamic cultural practices in Iran.

⁹ In 2005, the U.S. allowed only 202 Iraqi refugees into the United States. However, under increasing pressure, U.S. authorities agreed to allow 7,000 refugees in 2007. Bill Frelick, *Iraqis Denied Right of Asylum*, (May 2007) (unpublished dissertation, Human Rights Watch) (available at www.fmreview.org/textOnlyContent/FMR/Iraq/Frelick.doc).

¹⁰ Greece, for example, has recently been undergoing an economic crisis, which along with its geographic vulnerability, its proximity to the thousands of refugees fleeing Middle Eastern states, may account for some of its resistance to more generous sharing of its resources. See *Timeline: Greece’s Economic Crisis*, REUTERS, Feb. 3, 2010, <http://www.reuters.com/article/idUSTRE6124EL20100203>. But as part of the E.U., Greece has a very decent standard of living, and its \$32,000 per capita annual income and recent 10.6% unemployment rate for November 2009, suggest that Greek citizens have not been that much harder hit than many in the recession of 2008-09. See also <http://news.bbc.co/2hi/8510386.stm>.

must be reserved for their citizens and others lawfully residing in these states in order to weather the severe economic turbulence.¹¹

Genuine fears of threats to national and cultural identity, and the potential dilution of national and cultural values in some EU states¹² and the U.S.,¹³ and concerns about physical security¹⁴ are leading to national policies and proposals that compel conformity and assimilation by Islamic and Latin American migrants and immigrants to national, cultural, and social values or official use of

¹¹ *Id.* See also *Greece: Unsafe and Unwelcoming Shores*, HUMAN RIGHTS WATCH, Oct. 12, 2009, <http://www.hrw.org/en/node/86025>.

¹² In the Netherlands, Lilianne Ploumen, the Dutch Labor Party's chairperson, representing a party and a people noted for tolerance of difference and different ideas, recently issued a position paper calling for an end to the failed Dutch model of "tolerance" and for requiring Arabs and Turks living in the Netherlands to conform to Dutch society's social standards, to let go of "the grip of the homeland" and to take responsibility for the Netherlands, "to cherish and protect Dutch essence". See John Vinocur, *From the Left, a Call to End the Current Dutch Notion of Tolerance*, N.Y. TIMES, Nov. 29, 2008, available at <http://www.nytimes.com/2008/12/29/world/europe/29iht-politicus.3.18978881.html>. Much of this concern has been inspired in the context of the aftermath of the September 11, 2001 attacks in the U.S., the assassinations in the Netherlands by resident Islamist radical extremists of Pim Fortuyn, leader of a revolt against Muslim immigrants and filmmaker Theo Van Gogh for making what was perceived by some Islamists as a blasphemous film depicting the life of Ayaan Hirsi Ali, a Somali woman who was a member of the Dutch Parliament and an outspoken critic of radical Islam, who herself left the Netherlands under constant threats to her life by such Islamists in the Netherlands. These events, coupled with the habit of the Arab and Turkish communities (about 6% of Netherlands' 16 million people) of isolating themselves on islands of their traditional life (men refusing to shake hands with women; Islamic women in burqas, etc.) has caused such communities to be perceived often as hotbeds of criminality and trouble-making.

¹³ See generally Leah Sullivan, *Press One for English: To Form A More Perfect Union*, 50 S. TEX. L. REV. 589 (2009) (describing the arguments for and against making English the Official language of the United States, and discussing various legislation); Josh Hill, Devin Ross, Brad Serafine & Richard E. Levy, *Watch Your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies*, 57 U. KAN. L. REV. 669 (2009) (discussing the various legislative approaches of multiple states and the issues raised with regard to making English the official language of the United States).

¹⁴ Vinocur, *supra* note 12.

the nation's predominant language.¹⁵ Violence, crimes, and drug smuggling go hand in hand with illegal border crossing in the U.S., and this fact is often noted by leading public figures. The southern border of the U.S. is seen as porous, contributing greatly to the growth of a population of about 12 million undocumented migrants and immigrants, consisting mostly of Latin Americans. Many U.S. citizens express their fear for the survival of their national and cultural identity;¹⁶ some for their physical security¹⁷.

National *citizens* in all historically migrant and immigrant receptive states, such as the U.S, which accepts the most immigrants and asylees worldwide each year,¹⁸ Canada,¹⁹ and the EU, who are now also adversely affected by economic turbulence, uncertainty and insecurity, demand economic, social, cultural and physical protection from outsiders from their respective states. They see their own needs as their foremost priority, including the need to be protected from

¹⁵ See generally Sullivan, *supra* note 13; Hill et. al., *supra* note 13; Vinocur, *supra*, note 12; see also Horne v. Flores, 129 S. Ct 2579, 2587 (2009). Also, recently the Dutch Labor Party, the largest party of the left in the Netherlands, issued a white paper and proposal to combat the “‘loss and estrangement’ felt by Dutch society facing parallel communities that disregard its language, laws and customs.” See Vinocur, *supra*, note 12. Radical Islamist assassinations of and threats to major Dutch figures, street crime, and Islamist cultural insulation from Dutch society have led to the paper. Lilianne Ploumen, the party’s chair, stated that ‘immigrants must “take responsibility for this country” and cherish and protect its Dutch essence’. *Id.*

¹⁶ See generally PATRICK J. BUCHANAN, *THE DEATH OF THE WEST* (St. Martin's Press 2002).

¹⁷ The overflow of Mexican drug wars threatening the physical security of Americans on both sides of the border have been well documented. See, e.g., Paul J. Weber, *In Texas, Fear Follows Mexicanos Who Flee Drug War*, EL PASO TIMES, Mar. 29, 2010; Ana Campoy, *In El Paso, Mexican Violence is Never Far*, WALL STREET JOURNAL, Mar. 17, 2010.

¹⁸ MARTIN ET AL., *supra* note 7, at 90-95.

¹⁹ The ordinarily generous Canadians, often criticized for the liberality of their application of asylum standards, have in these recent tough economic times taken some harsh stances due to large numbers of asylum claimants from Mexico, e.g., Press Release, Citizenship and Immigration Canada (July 13, 2009), <http://www.cic.gc.ca/english/departement/media/releases/2009/2009-07-13.asp>, and Romas from the Czech Republic, e.g., Peter O'Neil, *Canada Flooded with Czech Roma Refugee Claims*, <http://www.canada.com/news/Canada+flooded+with+Czech+Roma+refugee+claims/1499804/story.html>.

largely ‘foreign’²⁰ threats. While most citizens should surely recognize that the likely *temporary* economic problems are brought on largely by domestic institutions and factors, voices, spurred on by momentary passions, often political, are raised against the involvement or meddling of non-domestic entities. These foreigners and outsiders are frequently the source of blame. The undoubted focus of the citizenry of traditionally migrant-receiving states is to *husband resources* for national citizens, and to prevent their distribution beyond their borders and to those unlawfully residing within their borders.²¹

In these respects national citizens are in effect calling upon their states and governments to exercise the responsibilities of *the sovereign*, to protect the health, security, economic well-being, and the cultural and national identity of citizens, in order to preserve a secure nation, protected within its borders. They are holding their states to their *sovereign* responsibility to secure the nation’s borders by ensuring the economic well-being, health, security, and the national and cultural identity, of their national citizens. These responsibilities are indeed, at bottom, essential attributes of sovereignty—the protection of *national citizens*. These attributes are part of the *people’s*

²⁰ The adjective ‘foreign’ is used here, rather than merely ‘external,’ to denote the palpable sense that such threats come from sources different and sometimes alien to perceived internal values.

²¹ Protectionist “Buy America” provisions in President Obama’s Stimulus Package reflect this fortress mentality, sometimes justified by those one would assume know better. See Scott Horsely, *Buy-American Stimulus Provision Sparks Debate*, NPR (Feb. 3, 2009), <http://www.npr.org/templates/story/story.php?storyId=100212839>. For example, Nobel Prize winning economist Paul Krugman has stated that because the world economy is so large that for effective U.S. economic stimulus it must focused upon *our* economy. See Dave Johnson, *Stimulus Package’s Buy America Clause in the News*, THE HUFFINGTON POST (August 10, 2009, 5:22 PM) http://www.huffingtonpost.com/dave-oohnson/stimulus-package-buy-ame_b_255971.html. In Norway, for example, one might find in food stores signs like “Norwegian Cucumbers are Best” or containers of *Norwegian* milk carrying the Norwegian flag. Oivind Fuglerud, *Inside Out: The Reorganization of National Identity in Norway*, in *SOVEREIGN BODIES: CITIZENS, MIGRANTS AND STATES IN THE POST-COLONIAL WORLD* 291, 292 (Thomas B. Hansen & Finn Stepputat eds., 2005).

essential connection to its community and its space, without which the nation-state system, in its current form, and the billions of people relying on it, could drift into a global anarchy in their respective states.²²

Although the perceptions of citizens often translates into their reality, tough times, such as the recent recession, though "tough", are in reality temporary economic downturns. Such temporary economic experiences may be reasons for policy-makers to exercise some prudence in carrying out economic and social policies. But where such temporary economic experiences generate unwarranted hysteria towards outsiders as a major cause of financial distress, economic and social (including immigration-related) protectionism, raising social and economic walls at borders, is likely to be a shortsighted and counter-productive policy response.

Rational citizens in most states, in tough times or good, would still agree²³ that persons outside their country of nationality or habitual residence who are unwilling or unable to return because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"²⁴ are persons in need of refuge from their home countries. Most would agree that as part of the international community, we

²² This perspective reflects a somewhat idealized view of sovereignty in relation to the national citizen, rather than the more nuanced view that arguably better reflects twenty-first century realities. Today, states and their citizens often share or surrender some of their sovereign attributes with others through international systems, such as the EU or treaty regimes. However, in relation to the bargain between the sovereign and the national citizen, it is the ideal view that the national citizen will hold the state to.

²³ "All agree" in the sense that virtually all states have agreed to and ratified the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention] and the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol], which Congress implemented by enacting the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified at 8 U.S.C. §§ 1101(a)(42), 1157-59, 1253(h), 1521-24 (2006)) (amending the Immigration and Nationality Act, ch. §§ 101(a), 207, 243(h), 66 Stat. 163, 166, 181, 214 (1952)). About 144 states, including the U. S., all EU Member States, and China, have agreed to the 1967 Protocol, which makes the Refugee definition universal.

²⁴ See Refugee Convention, *supra* note 23, art. 1.

have a responsibility²⁵ to offer such persons asylum, and hospitality, ensuring their right to reside and work and to be accorded many of the rights and protections of national citizens. These rights and responsibilities include basic social benefits, freedom and security, in our sovereign states, even though they are not, of course, national citizens.

With the level of agreement on asylum among states, it would not be too daring to characterize asylum as a “human right,” perhaps even something that cannot be denied in a civilized society, *jus cogens*, a compelling norm of international law. This notion seems to conflict, if not clash, with the practices of many states but especially with the foremost responsibilities of a *sovereign* state to its citizens, those essential attributes of sovereignty²⁶ that are also embedded obligations to citizens—security of the nation and its citizens, protection of its cultural and national identity, and ensuring the economic and social well being of all national citizens—under which the sovereign may if necessary prohibit all entry.

Whether asylum is a human right or merely a compelling moral obligation, the protection of those who may be subject to persecution in their homelands is critical to the humanity of our world moving forward. It also is an obligation that must be met in the context of the indefeasible obligations of sovereign states to their citizens. If these dual obligations are to be successfully met, it is also critical that they be seen as mutually reinforcing and that they be fulfilled by current and emerging economic powers, particularly the European Union and its Member States, the United States, and the emerging economic giants such as China. This means that states need

²⁵ When states, such as Greece and others, seem to resist effectuating these responsibilities, one wonders whether all have committed to this responsibility in fact agree that it is a right, or even a privilege. *See Greece: Iraqi Asylum Seekers*, *supra* note 2.

²⁶ *See The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812), where Chief Justice John Marshall stated that “(t)he jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute ...” , as an essential attribute of sovereignty.; *see also Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (proclaiming the plenary power of the federal government to exclude foreigners); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (extending the plenary power over foreigners to the power to deport foreigners).

to create principled and reliable, perhaps even parallel frameworks, that can be consistently if not uniformly applied to ensure the full protection of asylees and refugees²⁷ without eroding the essential attributes of sovereignty. It is essential for well-developed states to create a duality of primary rights that, in their implementation, never reach the point of ultimate conflict and that ensure national and international security and well-being sufficient to guarantee spaces of freedom for all national citizens while still welcoming all refugees.

In this article, I will first discuss some underlying fundamental concepts, such as borders, national citizenship, and sovereignty. I will also discuss the values and principles animating and defining these concepts, including national identity and how it functions or should function in states that seek to create spaces of freedom; then I will discuss some key asylum principles and practices. In the end, I suggest some principles and practices that ought to both (1) animate the application of asylum principles and practices and (2) reinforce the essential attributes of sovereignty and national citizenship²⁸ in the European Union, the United States, and, in time, beyond.

²⁷ This article focuses on *asylees*, those seeking refuge from within the borders or at the door of the state from whom asylum is sought, whose predicament presents the more immediate challenge to the interests of a state's citizens. The core of a principled framework for defining asylees and *refugees* would largely be the same, as is the definition of a refugee in the Refugee Convention and the 1967 Protocol. However, refugees by definition remain outside the borders of states to which they seek entry and do not present the same immediate rights conflict. Refugee Convention, *supra* note 23, art. 1.

²⁸ I often use the phrase "national citizenship" rather than merely "citizenship" here to distinguish the "citizenship" related to sovereignty (connected to the nation-state) from "European Citizenship", a treaty-based conferral of a number of citizen-like rights upon national citizens of all Member States, including free movement of persons to reside, work and do business within all of the states of the European Union so long as they have sufficient resources, including medical coverage,. See Case C-413/99, *Baumbast & R. v. Sec'y of State for the Home Dept.*, 2002 E.C.R. I-7136, para. 65 (casting European citizenship as of a fundamental nature), http://curia.europa.eu/jcms/jcms/j_6/ (enter case number "C-413/99"; then follow "Search" hyperlink; then follow the second hyperlink titled "C-413/99"). Though not discussed here, the premise of this article, cast in terms of the fundamental nature of

II. BORDERS AND CITIZENS

My starting point on the significance of borders and boundaries to people within them and outside them, is Hannah Arendt²⁹ and how she perceived borders and boundaries as “spaces of freedom,”³⁰ and protected communities as “islands in a . . . sea or oases in a desert.”³¹ Arendt declares:

Freedom, where it existed as a tangible reality, has always been spatially limited. This is especially clear for the greatest and most elementary of all negative liberties, the freedom of movement; the border of national territory or the walls of the city-state comprehended and protected a space in which men could move freely What is true for freedom of movement is, to a large extent valid for freedom in general. Freedom in a positive sense is possible only among equals, and equality itself is by no means a universally valid principle, but again, applicable only with limitations and even within spatial limits³²

Though her notion that “equality itself is by no means a universally valid principle” applicable only within spatial limits, would today have its vigorous challengers,³³ Arendt’s view of the essential

national citizenship, strongly implies that European citizenship is not of the same nature.

²⁹ See, e.g., HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 286 (Harcourt Brace 1951); see also HANNAH ARENDT, *ON REVOLUTION* 275 (Penguin Books 1990).

³⁰ See Francis J. Conte, *Sink or Swim Together: Citizenship, Sovereignty, and Free Movement in the European Union and the United States*, 61 U. MIAMI L. REV. 331, 377 (2007).

³¹ Hans Lindahl, *Finding a Place for Freedom, Security and Justice: the European Union’s Claim to Territorial Unity*, EUR. L. REV. 461, 463 (2004) (quoting HANNAH ARENDT, *ON REVOLUTION* 275 (Penguin Books 1990)).

³² *Id.* at 462 (quoting HANNAH ARENDT, *ON REVOLUTION* 275 (Penguin Books 1990)).

³³ See DAVID WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* 5 (Oxford Univ. Press 2005).

freedom and security protectiveness of borders remains enormously significant.³⁴

"All communities face boundaries in one form or another..."³⁵ whether it is the sea surrounding an island community, mountains that separate cultures of desert and coast, or simply the territorial borders of a nation-state. If people have no boundaries, they face fear. Even the Pilgrims who arrived in Massachusetts rather than their expected destination, Virginia, felt this in drawing up their "Mayflower Compact."³⁶ "[T]hey obviously *feared* the so-called state of nature, the untrod wilderness, *unlimited by any boundary*, as well as the unlimited initiative of men bound by no law."³⁷ But, within boundaries, communities may and will flourish in, as Hannah Arendt would put it, 'spaces of freedom'.³⁸

where the author asserts that international human rights law *requires* the equal treatment of citizens and non-citizens (emphasis added). There are instances, Weissbrodt admits, where non-citizens' expectations of equal treatment are fewer, such as the improper entry into a country. *Id.* at 5 n.34. Though not all would concede his general point, even if equality rights of non-citizens were required by *binding* international human rights law, their effective enforcement by either international or nation-state systems would be sporadic at best, and very limited. Equal treatment of non-citizens may be best exemplified under U.S. constitutional law where discrimination by states against permanent resident non-citizens in employment presumptively violates the Equal Protection Clause, unless the job constitutes a "public function". See *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982).

³⁴ See THOMAS BLOM HANSEN & FINN STEPPUTAT, *SOVEREIGN BODIES: CITIZENS, MIGRANTS AND STATES IN THE POST COLONIAL WORLD* 3 (2005) (focusing on empire building, the changing nature of our global society, and on the brutality and menace of the exercise of sovereign power). For a more nuanced, and perhaps more realistic, view of the roles of sovereignty, citizenship, and borders, see JOHN AGNEW, *GLOBALIZATION & SOVEREIGNTY* 60-68 (2009).

³⁵ Conte, *supra* note 30, at 376.

³⁶ HANNAH ARENDT, *ON REVOLUTION* 166 (Viking Press 1965) (emphasis added).

³⁷ *Id.*

³⁸ See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1951). There is of course great irony here; Hannah Arendt lived through the most despicable example of the treatment of peoples within what should have been 'spaces of freedom.' The inhumane treatment and murder of the Jews by Germans and national collaborators in Germany, Austria, Hungary, Poland, France and elsewhere is just the kind of menacing brutality that would lead us to look away from sovereign power for protection of people. Sovereign power can clearly be profoundly abused. Hannah Arendt knew this well and studied and rigorously analyzed the causes of the

In the modern nation-state, of course, these communities are populated by citizens, *national* citizens, who are, or should be, bound to each other, in equality, as members of the national community. This membership in the political community of the nation-state,³⁹ the sovereign people of the nation,⁴⁰ embraces the *political* and *public* dimensions of membership—political participation and engagement, such as voting, electoral candidacy and service, public service and policy-making, law-making, interpretation and enforcement; but it is more than this.

Communities, as 'spaces of freedom,' embody security dimensions, including physical security, bringing military and other security activities within the realm of citizenship involvement, perhaps exclusively. They also require and embrace social security or social well-being, including health and safety, economic security, cultural security and environmental security, as well as personal freedoms, rights and equality.

In these bounded spaces of freedom there must also be protection of *national identity*, which is the quality of the collective character of people of the nation, its history, law, language and traditions, and its underlying values of self-identification. This is what makes the French, *French*, the Chinese, *Chinese*, and the American, *American*. This means that the sovereign must protect its national citizens as a whole, including the foundations of their values of self-identification, from reasonably perceived threats to them, so that they may flourish within their spaces of freedom. The continuing significance of this role and relationship between sovereign and citizen, is not always recognized, perhaps understandably, by

abuse. See generally *Id.* In aftermath of that debasement of elemental human values, fortunately its witnesses and survivors led the world to the Refugee Convention and the development of a growing regime of human rights, which will hopefully curb this kind of "nationalist" bloodthirstiness. Although of course, considering the genocides of Cambodia, Rwanda, Bosnia and Darfur, among others, we have not learned well enough.

³⁹ See MARTIN ET AL., *supra* note 7; Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 454 (2000); see also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 32 (1983); Conte, *supra* note 30, at 385.

⁴⁰ MARTIN ET AL., *supra* note 7.

scholars⁴¹ or even by supra-national institutions, such as the European Court of Justice.⁴² But it exists, vibrantly and prominently, today.

Sovereignty animated security protections, essential to national citizens, often advance the development of (1) social institutions, including rights to residence and employment, education, health and safety, family, home, personal well-being and autonomy, security for the elderly, children and the vulnerable; (2) economic institutions, including individual and corporate business, banking and finance, and the professions and trades, food and agriculture, work and earnings systems; (3) cultural elements, such as language, arts, history, religion, diversity, lifestyle and deeply rooted traditions; (4) environmental characteristics, such as physical space, water, air, energy, land use, forests, parks and nature; as well as (5) self-governing political and legal institutions and all of the rights, benefits and privileges that they confer and are responsible for. In addition to the essentialness of protecting these security dimensions of citizenship in the sovereign state, it must also be ensured that the national identity of citizens⁴³ is not threatened. Rational policies protecting the vitality and long-term health of national identity should be expected, and able to be relied upon.

National citizens have almost always been happy to share much of the protection within the spaces of freedom offered by sovereign boundaries, with invited and otherwise welcome non-citizens, even to some significant extent with unwelcome non-citizens. Concerns about sharing the benefits of the sovereign arise when such sharing would encumber or threaten sovereignty's protections.

⁴¹ See, e.g., Fuglerud, *supra* note 21.

⁴² See Case C-413/99, *Baumbast v. Secretary of State for the Home Dep't.*, 2002 E.C.R. I-7091, para. 93 (holding that a national requirement that non-nationals carry insurance for medical emergencies in the Member State of residence could not destroy the right of residence of EU citizens, and embracing the fundamental character of freedoms under *European* citizenship, purporting to leave little, or much less room for Member States to fully protect the well-being of their own *national* citizens), http://curia.europa.eu/jcms/jcms/j_6/ (enter case number "C-413/99"; then follow the "Search" hyperlink; then follow the second hyperlink titled "C-413/99").

⁴³ See *infra* text accompanying notes 46-62.

Reliable assurances of the sovereign's protection of critical levels⁴⁴ of well-being in each space or enclave of freedom are essential to the *on-going vitality* of the national community, today's sovereign nation-state of citizens.

Spaces of freedom also need to include a felicitous environment for the enjoyment of basic fundamental rights and freedoms, perhaps beginning with the freedom of unfettered movement and the right to reside anywhere in the nation-state. Spaces of freedom should also include the freedoms of expression, assembly, press, religion, privacy and individual autonomy, access to justice and due process, the right to vote, the right to travel, including the right to leave the state, and equality before the law. Such citizenship-based rights protect the humanity of everyone, certainly those within the nation-state, but also very much those outside it. In Hannah Arendt's vision it was in *non-citizenship* that those oppressed, dispossessed, imprisoned or enslaved and ultimately murdered in World War II, became "rightless" because they were not part of, not within, the community of citizens.⁴⁵ Moreover, in the states where non-citizen Jews or Romas lived, they shared few, and eventually, none of the benefits of their spaces of freedom, defining citizenship rigidly and racially and seeing an obligation, not for hospitality, but for untempered hostility.

As pointed out above, the day-to-day reality of *who* most people see themselves as, their national identity, is of fundamental

⁴⁴ What the minimum or critical level of protection is, may be the subject for another discussion. For now, it is enough to say that the level of protection required should be that level that is *sufficient* to enable the maintenance of adequate national resources for each element of the "space for freedom," reasonable growth and adequate health of social, economic and other institutions advancing the vitality of other elements of the nation's well-being, and a healthy environment for the unstrained protection of rights, freedom and equality. What may be 'much more than necessary' or disproportionate protection, and how non-citizens can be protected against it, is an important and interesting question. In the European Union context of course, this question would often be addressed by the European Court of Justice, in determining the rights of "European Citizens" who have moved to and are residing a Member State of which they are not national citizens. See generally *Baumbast*, 2002 E.C.R. I-7091.

⁴⁵ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 293-95 (1951).

importance, individually and collectively. This self-identification might have a psychological dimension.⁴⁶ It concerns a combination of an individual's self-identification of herself and a people's collective experience of itself, what has been called "the affective ties of identification and solidarity" with other people around us, sometimes even with people in other parts of the world who share this collective experience.⁴⁷ When I visit Ireland from which some of my descendants left over 150 years ago, I am effusively greeted with "welcome home." In some cases this reflects family connection. However it is just as often a greeting from strangers; the family connection is to the 'national family.' This is reinforced by long-held views, still generations later, that those who left 150 years ago were *coerced* economic exiles, *temporarily* exiled by famine and the policies of Ireland's colonial oppressor, intending someday to return. The Norwegian government, which has recently expressed concern over encroachment upon Norway's national identity by many groups, currently welcomes back Norwegian Russians, the descendants of Norwegian fishermen and their families who had migrated in the 18th century with their families to fish along the Kola Peninsula on Russian soil and remained there through the 1917 Revolution and Soviet life,⁴⁸ despite being "... treated as traitors under the communist regime."⁴⁹ "[F]rom one of the poorest places ... in Europe ..." they are welcomed back to the "fatherland" to live in one of the richest countries, Norway, "[due to] their genes [!]"⁵⁰ National identity remains, well beyond sojourns abroad, overriding, perhaps more than it should be, but national identity alas. Even today we are children and descendants of Norwegian and Irish, deemed still to share the same national identity.

This notion is recognized in Ireland by the ease with which the children of grandparents born in Ireland may acquire Irish citizenship without themselves or their parents ever having lived in

⁴⁶ Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 479 (2000).

⁴⁷ *Id.*

⁴⁸ Fugelrud, *supra* note 21, at 305, 306.

⁴⁹ *Id.* at 306.

⁵⁰ *Id.*

Ireland. Other national groups share this fervid national identity solidarity, for example, the French in Quebec, Poles in Chicago, Chinese everywhere.

In any case, this self-identification and collective experience of the people of the nation lies at the heart of national citizenship, and engenders solidarity, passionate loyalty and family connectedness. It may have been *this national identity* for example, as much or more than economic or social well-being, that led the French and the Dutch in 2005 to reject ratification of the proposed Constitutional Treaty of the European Union.⁵¹ It was somewhat ironic that the French people, through their national leaders, have been leading voices in support of, and great beneficiaries of the European Community and the European Union from its inception. The French language is the primary language of work in the EU's institutions, the one language really required of all officials and staff. In addition, the European Parliament's headquarters is in Strasbourg in deference to France's cornerstone role in the development of the EU. French agriculture has historically greatly benefitted economically from special treatment and subsidies in the EU, and the French people have greatly benefitted from the security virtually guaranteed by the EU's creation of interdependence with German industry and power. Somewhat ironic indeed, it was Valéry Giscard d'Estaing, former president of France, who chaired, drove and controlled the Convention for the Future of Europe, which produced the proposed Constitutional Treaty. It was

⁵¹ In 2005, French and Dutch citizens voted against the European Union's proposed Constitutional Treaty. Fear was expressed, in France for example, of the likely disproportionate influx of "Polish Plumbers", a fairly obvious surrogate for concerns about dilution of French identity in France. Coupled with recent immigration and migration from North Africa and concerns about EU expansion to Eastern Europe and potentially Turkey, this further exacerbated the national identity dilution concerns of many French people. In the Netherlands, concerns about expansion and integration of different cultures, particularly Muslim cultures, triggered by the murders of filmmaker Theo Van Gogh and anti-immigration populist Pim Fortuyn by radical Islamists, likely led to feelings of vulnerability for the Dutch cultural and national identity. The proposed Constitutional Treaty, though not itself particularly significant in relation to expansion of, and migration to Member States of the EU, was a surrogate for perceived external threats to national control over one's own national and cultural identity.

ironic as well for the Dutch, long seen as the most tolerant of societies, liberal and generous of peoples and ideas, welcoming in the broadest sense.

When push came to shove the Dutch voted *against* the Constitutional Treaty, and *for* national identity. Contributing factors included⁵² Muslim migration and immigration to the Netherlands, about 1 million mostly of Moroccan and Turkish origin, coupled with concerns about radical Islamic political behavior, including the assassination of Theo Van Gogh.⁵³ More recently, rigid adherence to non-Dutch traditions and values, and street crime by young Muslims, has led to a call by the most liberal of Dutch political parties in a White Paper⁵⁴ for Muslims, who live in or want to live in the Netherlands, to become *Dutch*, to acquire the Dutch language, to know, understand and embrace Dutch culture, history and traditions, and to know, understand and live by Dutch political, social and cultural values.

In the Dutch Labor Party's view, the Dutch should offer space to traditions and religions of new people living in the Netherlands, but there cannot be parallel societies. Immigrants should find emancipation in becoming Dutch, "take responsibility for this country and 'cherish and protect its Dutch essence'."⁵⁵ While other traditions may be welcome, the enormous importance of national identity cannot be submerged by other cultural, even religious,

⁵² See *supra*, notes 12, 15, and 51. The assassinations of Van Gogh and Fortun by radical Islamists bred in the Netherlands, the threats to a member of Parliament, Ayaan Hirsi Ali, the Somali woman critic of radical Islam, and the way of life of many Muslims, deliberately lived in cultural and religious ghettos, apart from, and disdaining Dutch values, and the rise of support for radical Islamic terrorism within the Muslim community, together are perceived to represent a threat to Dutch national and cultural identity. See generally Vinocur, *supra*, note 12.

⁵³ See Theodore Dalrymple, *Why Theo van Gogh Was Murdered*, CITY JOURNAL, Nov. 11, 2004, <http://city-journal.org/printable.php?id=1719> and *Van Gogh Killer Jailed for Life*, BBC NEWS, Jul. 26, 2005, <http://news.bbc.co.uk/2/hi/europe/4716909.stm>.

⁵⁴ See Vinocur, *supra*, note 12 (reporting on the call from Lilianne Ploumen, leader of the Dutch Labor Party, for an end to "the failed model of Dutch 'tolerance.'").

⁵⁵ *Id.* (quoting Ploumen as she advances the very positive, freedom enhancing aspects of integration and becoming Dutch).

traditions and identification, at least when it comes to national citizenship, perhaps even "residence."

The protection of national culture by the sovereign nation-state is an essential dimension of national citizenship. The health of a nation, and its strength, is derived from the vitality of the national culture. Conflict becomes less disruptive, cohesion embraces tranquility and contributes to a general feeling of security in the community. At some point immigrants may challenge this cohesion, particularly those who resist integration or who significantly reduce the availability of adequate resources for the national community; then they become unabsorbable by the *fabric* of social and cultural well-being.⁵⁶

Before World War II, Poland was a diverse multi-cultural nation. Polish speaking persons of Polish origin, almost always Roman Catholic, made up about 69% of the nation's people in the years of the Second Polish Republic, between 1921 and 1939. Jews, Romas, Byelorussians, Ukrainians, Lithuanians and Germans, many of whom spoke predominantly their own language and adhered closely to their own religions and cultural traditions, made up the remaining 31% of the population. Poland and surrounding states were reconfigured in the aftermath of World War II by Josef Stalin other Allied leaders. Over a third of the former Poland, parts of Ukraine, Byelorussia and Lithuania would become parts of the Soviet Union. Parts of the former Germany, regions known as Silesia, Pomerania and east Prussia became part of Poland, to which over a million Poles from the eastern portions of its former state were resettled, the Germans being forcibly relocated back to the new, smaller Germany. More tragically, over 3 million Polish Jews had been gruesomely murdered and over 3 million other Poles, Roma and others were also murdered by the Germans during World War II. The consequences of World War II and the aftermath of Communist Party rule for over 40 years led to a new and very different Poland. Its land mass was reduced by 20% and its population about 35 million in 1929. By 1945, the population had reduced to 23 million, over a third of the former population. The Poland that emerged from World War

⁵⁶ See WEISSBRODT, *supra* note 33.

II and the Poland of today is a nation of over 98% Polish speaking, ethnically Polish, largely Roman Catholic Poles in Poland, a Poland with virtually no Jews or Romas, Lithuanians or Ukrainians.⁵⁷

Today, when asked, some thoughtful Poles strongly believe that the ethnically "Polish" nation as a functional state is better off than it had been prior to the war.⁵⁸ This is not by any means to suggest that, in their view, the horrific and murderous brutality of the Germans in Poland in World War II, especially towards the Jews, justified any of these consequences. Certainly in the period before World War II, disharmony of values in the newly independent and democratic Polish political system, included significant anti-semitism.⁵⁹ A major movement, *Endecja*, and a major political party, the National Democracy Party led by one of the two major Polish leaders, Roman Dmowski, openly advocated for anti-Semitic policies.⁶⁰ Poles were unable to find sufficient agreement among political parties. Parties were rife with ethnically connected interests and coalitions of working political majorities constantly disintegrated, leading to quasi-dictatorial rule of the aging Polish revolutionary hero, Marshall Josef Pilsudski and his followers. After Pilsudski's death in 1935 and then World War II,⁶¹ Poland and the

⁵⁷ Fulbright Conf. on Polish Culture and Demographics, Univ. of Wroclaw, Wroclaw, Pol., Sept. 20-30, 2008.

⁵⁸ This was evident from conversations with Polish academics and other Poles, usually Poles who were international and liberal in outlook, during the author's year of teaching in Warsaw, Poland under a Fulbright award in 2008-2009.

⁵⁹ See EVA HOFFMAN, *SCHTETL: THE HISTORY OF A SMALL TOWN AND AN EXTINGUISHED WORLD, 168-170* (1999) [hereinafter HOFFMAN, *SCHTETL*].

⁶⁰ *Id.* at 164-169.

⁶¹ The 1939 invasion of Poland, independent from 1918 to 1939, the explosive trigger for World War II, was under the pretext of a German claim to German territory made part of Poland by the allied winners of World War I. Germans under Hitler and the Soviets under Stalin laid claim to significant parts of Poland. Ukrainian, Byelorussian and Lithuanian *national* territorial claims undergirded the Soviet claims. Dating back at least to 1762, much of historical Poland was part of Russia, and by 1795 Poland no longer existed as Poland, having been partitioned among the Russian, Prussian and Austro-Hungarian empires. Polish values were under siege for much of this time, as they would again under post-war Communist Party rule

vulnerable Poles would become again victims of oppression and loss of independence, perhaps a nation of too many nationalities, or one in search of a national identity.

Some might view the "Polish" view of national identity that emerged after World War II as a limiting, narrow vision of national identity and citizenship. In "limiting the circle of persons" upon whom to ascribe the benefits of citizenship, the glass half empty shall remain half empty. Of course, these demographic circumstances were not chosen by the Polish people or any of its governments, but were forced upon them. It is what Poland has been left with. And indeed, this limiting or constricted view of Polishness likely contributed to an exodus of Jews from Poland in the 1950's. Jews who had remained or returned to Poland after the war, but who after some time, doubting the ability of the minority culture to thrive, felt the need to look elsewhere, "such as Israel or North America."⁶²

Critics would perhaps see citizenship in Poland merely as a "tie that binds people to [a] government," one for insiders versus outsiders,⁶³ and not worth much in the larger moral sense. Thus, for some it is an excuse for enforcing ethnic purity, for justifying racism, and a status that can be used to oppress others, a Nazi-like dogma after all. No doubt this kind of 'blood-purity' "citizenship" can be used, as it has been, in conjunction with gruesome notions of ethnic or racial purity and justifying genocide. One must *very* carefully scrutinize any signs of this in any society, particularly one seeking to be excessively protective of its citizens, and uninclusive in its definition of citizenship, perhaps on racial, religious or ethnic grounds.

Some see that the concepts of *sovereignty* and *citizenship* together arbitrarily "compartmentalize the planet," enabling

in the grip of Soviet hegemony. See Adam Zamoyski, *THE POLISH WAY: A THOUSAND YEAR HISTORY OF THE POLES AND THEIR CULTURE*, 344-55 (Hippocrene Books 1994).

⁶² See generally EVA HOFFMAN, *LOST IN TRANSLATION* (1998) (describing the experiences of the author and her family in post-war Poland and their move to North America).

⁶³ ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 53 (1975).

marginalization and discrimination against others⁶⁴ who are unable to share in the elite citizenships. Others see citizenship as a malleable concept, the effect of a political contest, *simply* delineating political membership and the nature of the political community.⁶⁵ This is especially congenial to exponents of a European political state. National citizenship being malleable, indeed seen as divisible, and limited in scope, can be seen as evolving into a supranational citizenship with national citizenship on the way to being replaced by European citizenship⁶⁶ Still others take it a step further, seeing citizenship as de-linked from the nation-state, that supranational citizenship, as in the EU for European citizens.⁶⁷ For some, several factors have undermined the essentialness of the link of citizenship to the sovereign nation-state. These factors include: the globalization of economics and the multiplicity of political relationships, the broadly binding international human rights regime, parallel rights development for resident aliens in some states, and the growing use of multiple citizenships. The argument is that the sovereign nation-state is an outmoded concept, and that the exclusivity of national citizenship should not long endure.⁶⁸ But the premises for this observation are substantially overstated.⁶⁹

None of these developments are at all inconsistent with a robust form of national citizenship deeply rooted in the sovereign nation-state. In fact, much of these developments were created by nation-states and groups of nation-states deliberately, not to undermine the concept of national citizenship but to enrich it. For it is the healthiest and most secure of national communities that shares its space, rights and freedom, that in recognizing international human rights regimes, sees them as non-threatening but life-giving, and that

⁶⁴ See LAWRENCE T. FARLEY, *PLEBISCITES AND SOVEREIGNTY: THE CRISIS OF POLITICAL ILLEGITIMACY* 6-20 (1986); see also Conte, *supra* note 30.

⁶⁵ WILLEM MAAS, *CREATING EUROPEAN CITIZENS* 115-20 (2007).

⁶⁶ *Id.*

⁶⁷ Bosniak, *supra* note 39, at 455 (citing URSULA VOGEL & MICHAEL MORAN, *THE FRONTIERS OF CITIZENSHIP* at x-xii (1991)).

⁶⁸ *Id.*

⁶⁹ *Id.*

is free to join with others to attain economic and social goals for its own national citizens as well as others.

This is also not to say that “political membership” and “political self-definition” are not significant dimensions of national citizenship in the sovereign nation state. As Justice Byron White stated for the U.S. Supreme Court regarding its view of national citizenship in relation to the exclusion of non-citizens from basic governmental processes in the state, it is “a necessary consequence of the community’s process of political self-definition. Self-government, whether direct or through representatives begins by defining the scope of the community of the governed and thus of the government as well. Aliens are by definition outside of this community.”⁷⁰

However, this definition is only part of the concept of citizenship. National citizenship, with the sovereign nation-state created to protect it, embraces much more, as reflected above. Citizenship in a healthy state is also about hospitality, freedom, and rights. Courts and commentators need to consider this when construing the “rights” of non-citizens, especially rights concerning migration, residence and immigration. For although a sovereign state may not be defined politically by aliens, it cannot thrive without welcoming hospitality. Sovereign spaces that seek to be the gardens of an inhospitable citizenry will wither and die.

Once feeling secure and healthy, national citizens and their governments are far more apt, due to the broad boundary-based security and protections afforded them by the healthy sovereign nation-state, to extend the security, rights, privileges, and benefits of citizens to non-citizens, including uninvited asylees. Indeed, it is in the robustness and richness of the citizens’ well-being, their comfort in their national identity, in their freedom, rights, and political control of their nation-states, that those seeking asylum will ultimately be best protected. It is the most free and secure who can and will offer the best hospitality to the least free and secure.

⁷⁰ *Cabell v. Chavez-Salido*, 454 U.S. 432, 437-440 (1982) (holding that a state could require that Deputy Probation Officers be American citizens because the position involves public policy execution, which substantially affects members of the political community).

III. HOSPITALITY

“Wariness towards ‘strangers’ predates any formal system for granting or denying citizenship.”⁷¹ The ancient Greeks limited citizenship to a few; others were deemed to be “barbarians.”⁷² But, despite this crabbed view of citizenship, and fearsome view of foreigners, “hospitality towards foreigners was generally practiced by ancient peoples.”⁷³ Even in primitive society:

[T]o deny shelter to a stranger and abandon him to himself would have been more than a simple lack of courtesy; it would have been an act of positive cruelty. For, there being no support from any public institutions, life in a foreign country without the benefit of private hospitality would have been well nigh impossible.⁷⁴

The “ancients” sympathized with foreigners, even in cultural environments where citizens deemed them to be non-persons.⁷⁵

Later, in medieval times and in the Middle Ages, notions of the equality of all persons and the inherent dignity of the individual were affirmed in Christian Church doctrine espoused by St. Augustine.⁷⁶ Still, the hospitality respecting equality and the inherent dignity of the individual at that time may have meant no more than

⁷¹ WEISSBRODT, *supra* note 33, at 18 (citing RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 5 (Gillian M. White ed., 1984)).

⁷² *Id.* at 18-19 (citing 1 COLEMAN PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME* 145 (William S. Hein & Co., Inc. 2001) (1911); James A. R. Nafziger, *The General Admission of Aliens under International Law*, 77 AM. J. INT’L L. 804, 809 (1983)).

⁷³ *Id.* at 19 (citing Giorgio Del Vecchio, *The Evolution of Hospitality: A Note on the History of the Treatment of Foreigners*, 4 SYDNEY L. REV. 205, 205 (1962-64)).

⁷⁴ Giorgio Del Vecchio, *The Evolution of Hospitality: A Note on the History of the Treatment of Foreigners*, 4 SYDNEY L. REV. 205, 207 (1962-64).

⁷⁵ WEISSBRODT, *supra* note 33, at 20.

⁷⁶ *Id.* at 21-22.

access to safety, shelter, and food, *bargained and paid for*; and for merchants, the right to trade, and pass through the country.⁷⁷

When Christopher Columbus was “discovering” the Americas,⁷⁸ he encountered numerous groups of native people, including Mayans near the Yucatan peninsula, Guaymi in the area of coastal Panama, and others on the islands and continental coasts. These people often offered Columbus and the Spaniards food and gifts, including gold, shelter, safe passage in their lands and waters, and the opportunity to trade; in another word, “hospitality.”⁷⁹ However, when they learned of the Spaniards’ efforts to take possession of their lands, build a permanent settlement or colony, intrude upon their way of life and well-being, and threaten their security, the natives turned to warfare and in the beginning sometimes drove the Spaniards away.⁸⁰

Concerns about the motives and threats of new arrivals, foreigners, non-citizens, and their different cultural traditions, religions, values, appearances, and national identity, continue to play a substantial role in forming the views of citizens towards non-citizens, and ultimately the development of national public policy towards migrants and immigrants. However, increasing knowledge, education, international agreements, and global awareness can mediate to help create an expectation, and eventually a desire, to offer more humane, hospitable, and rights-driven national policies. When encountering persons and families from different cultures and ethnic identities, society cannot turn away from the visible and less visible private, often painful, challenges they are encountering in a new land. Immigrants, even those lawfully living and supported in the new land, often face enormous difficulties adjusting to the

⁷⁷ See *id.* at 22-23.

⁷⁸ Other Europeans, Irish, Vikings and perhaps others had discovered what would become the American continent before Columbus, but he stayed, or wanted to, establishing settlements and beginning the process of colonization. See MARTIN DUGARD, *THE LAST VOYAGE OF COLUMBUS* 267 (2005).

⁷⁹ *Id.* at 60-61, 150-54, 184-87. Although arguably this initial hospitality may have been offered in part out of fear, done to placate the Spaniards, it was also clearly offered in recognition of the Spaniards’ vulnerability.

⁸⁰ *Id.* at 61, 186-204.

culture, language, and social constructs of the host society. Families and individuals often still cling to bedrock elements of life in the homelands that they have physically abandoned. It sometimes seems that they have given up paradise for sterile exile.⁸¹ They are often *mourning* the loss of their home country and their family foundation.⁸²

Hospitality towards non-citizens today takes, and must take, many forms beyond access to food, shelter, and safety. Today lawful resident non-citizens in the United States are often treated “equal under the law,” often including having equal access to employment opportunities,⁸³ equal educational opportunities, equal access to health and social benefits (such as housing and food), protection by

⁸¹ Though the remaining Polish Jews of the Poland of the 1950s saw little chance for success in a land where their numbers were one-tenth what they had been, when they left, many felt lost in a new world in which their language, culture, and ways had little value. See HOFFMAN, SHTETL, *supra* note 59.

⁸² See generally ROSANNE BIOCCHI & SHANTHI RADCLIFFE, A SHARED EXPERIENCE: BRIDGING CULTURES: RESOURCES FOR CROSS-CULTURAL TRAINING (1983).

⁸³ See *Sugarman v. Douglass*, 413 U.S. 634 (1975); *In Re Griffiths*, 413 U.S. 717 (1973) (confirming that state laws discriminating against non-citizens in employment as well as in the distribution of social benefits will be subject to strict scrutiny and holding that states could not prevent otherwise qualified non-citizens from obtaining civil service jobs or practicing law). Similar rules apply in the EU, at least with respect to “European” non-nationals; a state cannot deny employment in the private sector, and in much of the public sector, to non-national citizens from other Member States. See *Case 149/79, Comm’n v. Belgium*, 1980 E.C.R. 3881. On the other hand where the job entails activities that go to the heart of the public political system, such as making public policy or enforcing the law, in the U.S., the Court’s scrutiny will not be so strict. See *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding state laws limiting employment of state police officers and public school teachers to citizens, or in the latter case to those intending to become citizens, under the “public function exception”). In the EU, there is also an exception to the rule against non-citizen discrimination where “public service” employment occupies a “special relationship of allegiance to the state.” *Belgium*, E.C.R. at 3882. However, the exception appears to be a bit narrower than that of the U.S.; for example, non-citizens cannot be prohibited from teaching in public secondary schools. See *Case C-4/91, Bleis v. Ministere de l’Education Nationale*, 1991 E.C.R. I-5627.

law enforcement, and access to the justice system and fair judicial procedures.⁸⁴

Hospitality towards non-citizens *unlawfully* residing in a state has not been as expansive. They usually receive fewer benefits of hospitality; they might not receive access to free or discounted higher public education,⁸⁵ social benefits, or employment. However, In the United States and some other nation-states unlawfully residing non-citizens are still constitutionally protected as persons, less so than lawful non-citizen residents, but they do often receive the safeguards of due process of the law, equal protection of the law, and other fundamental rights, if not the right to remain in the country.⁸⁶

As will be discussed further below, hospitality to non-citizens should also include reasonable, clear, just, and consistently applied standards by states in making "asylum" determinations, and full, fair, consistent, and *competently administered* procedures. In time, hospitality should also include the development of policies that will enable persons deserving refuge due to humanitarian reasons other than asylum, to remain and reside in the host nation-state under the same conditions as qualified asylees. Collateral to this recognition it would make sense that such hospitality based policies also include affirmative efforts to ensure safe and healthy temporary shelter and food, to reunify and keep families together, and to assist in locating and coordinating efforts to relocate and resettle people not qualifying as asylees. Such hospitality should also ensure, to the extent compatible with the security of the community of citizens, the enforcement of the full panoply of individual rights available to citizens in the state, subject to appropriate limitations determined to

⁸⁴ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (confirming that the courts and the constitutional protections of the 14th Amendment were available to non-citizens); see also *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971) (excluding non-citizens from welfare benefits violated the Equal Protection Clause of the 14th Amendment).

⁸⁵ But see *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that the State of Texas could not deny a public school education to the children of *undocumented* aliens).

⁸⁶ *Id.*

be inconsistent with non-citizen status. Should guests not be as free and comfortable as their hosts? Is that not what hospitality means?

IV. ASYLUM IN THE EUROPEAN UNION

In the European Union (EU), legislators and commentators speak of “a common European asylum system,”⁸⁷ and an EU-wide commitment to the standards for asylum eligibility elaborated and agreed to in the UN Convention Relating to the Status of Refugees, and its 1967 Protocol.⁸⁸

The EU has enacted measures that establish “minimum standards on procedures in Member States (of the EU) for granting and withdrawing refugee status.”⁸⁹ These constitute an extensive set of procedural standards, procedural due process-like safeguards on applications for asylum, including minimum standards on “criteria and mechanisms for determining which Member State is responsible for examining the asylum application lodged in one of the Member States by a third-country national”⁹⁰ This is intended as a road map for Member States to determine which Member State is responsible⁹¹ for examining and acting upon a claimant’s application

⁸⁷ Battjes, *supra* note 3.

⁸⁸ See Refugee Convention, *supra* note 23; 1967 Protocol, *supra* note 23; *see also* Council Directive 2004/83, on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12 (EC).

⁸⁹ Council Directive 2005/85, art. 1, 2005 O.J. (L 326) 13, 16 (EC).

⁹⁰ Council Regulation No. 343/2003, art. 1, 2003 O.J. (L 50) 1, 2 (EC) (replacing the Dublin Convention whose implementation stimulated the process of harmonizing asylum policies).

⁹¹ Often persons seeking asylum will first enter the EU in one Member State, either as a temporary visitor or undetected, and then once in the EU move on to one or more other Member States, perhaps to reunite with family or friends, or to find work or support in another Member State. Passing from one to another Member State in much of the EU goes unnoticed and unmonitored to facilitate freedom of movement within the EU. So, once passing through an external EU border from outside the EU, the asylee claimant, or potential asylee claimant can rather readily move among Member States. The claimant may then seek to claim asylum in a Member State other than the first one he or she has entered.

for asylum, once a claim for asylum is being made.⁹² EU law also requires all Member States to apply at least minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection.⁹³ These standards make reference to the common European asylum system and policies, and require that Member States evaluate claims in accordance with a number of relevant content-based elements (factors) to be taken into account in determining whether the applicant has a “well-founded fear of persecution on account of race, religion, nationality membership in a particular social group or political opinion.”⁹⁴ Even with all these efforts to achieve fairness, hospitality, clarity, and consistency throughout the EU, enormous differences in the application of these procedural criteria and substantive standards remain.

In some recent years only one-twentieth of one percent of those seeking asylum in Greece were awarded asylum.⁹⁵ At the same time, presumably subject to the same criteria and standards, Sweden recognized asylum in forty to fifty percent or more of cases brought.⁹⁶ In addition, “Greece denies protection to vulnerable people *and* abuses them in detention.”⁹⁷ Critically, also, there is no mention in the controlling EU Qualification Directive of the core meaning of

⁹² Council Regulation No. 343/2003, art. 3, 2003 O.J. (L 50) 1, 3 (EC). These criteria, which usually point to the responsibility of the first EU Member State entered, under Article 3 also permit the Member State to which the claimant applies to examine the application for asylum even if that Member State is not otherwise “responsible” for examining the application.

⁹³ Council Directive 2004/83, art. 1, 2004 O.J. (L 304) 12, 14 (EC).

⁹⁴ *Id.* at arts. 2, 4, 5, 9, & 10. A number of these interpretive elements appear to be drawn from U.S. asylum cases. For example, Article 10(d) of the Directive states that “a group shall be considered to form a particular social group where in particular members of that social group share an innate characteristic, or a common background that cannot be changed or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, . . .” although according to the Directive, this definition does not apply to “sexual orientation” when such a status does *not include* “acts” considered to be criminal in the relevant law of the Member State.

⁹⁵ *Greece: Iraqi Asylum Seekers*, *supra* note 2.

⁹⁶ *Battjes*, *supra* note 3.

⁹⁷ *Greece: Iraqi Asylum Seekers*, *supra* note 2.

“well-founded fear of persecution,” particularly with respect to the level of risk of persecution that needs to be demonstrated by the claimant, or of the meaning of the term “persecution.” There are no references to burdens of proof, no mention of the need or lack thereof for collaborative documentary evidence, nor of the value that should be attributed to certain other forms of evidence by the decision-maker, such as personal testimony and reports of governmental and non-governmental organizations.⁹⁸

There is no indication of just what kinds of circumstances constitute a qualifying *well-founded fear* of persecution, and what level of risk, or what probability or possibility that “persecution” would occur. The European Court of Justice makes reference to the “probability” that the claimant herself would actually suffer persecution.⁹⁹ There is little attention given to the important idea that fear, even a well-founded fear, is a *subjective* construct. European courts seem to be taken with the need to prove some level of *individual threat* of persecution, being caught up in connecting the claimant personally to likely persecution, rather than the notion that those who belong to a qualifying group of persons who are being persecuted may well have a well-founded fear of persecution.¹⁰⁰ This is, of course, just one element of the asylum or refugee standards that adjudicators apply, though it is a linchpin to the award of asylum. The terms “well founded fear,” level of risk, and burden of proof are linchpin elements, and need proper and just definitions that are consistently applied. Definitions of other elements, such as “persecution” and

⁹⁸ See Refugee Convention, *supra* note 23; 1967 Protocol, *supra* note 23; *see also* Council Directive 2004/83, on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 12 (EC).

⁹⁹ *See, e.g.*, In Joined Cases C-175/08, C-176/08, C-178/08, C-179/08 *Abdulla, et al. v. Bundesrepublik Deutschland*, para. 85 (March 2, 2010), http://curia.europa.eu/jcms/jcms/j_6/ (enter case number “C-175/08”; then follow the “Search” hyperlink; then follow the second hyperlink titled “C-175/08”).

¹⁰⁰ *See* Case of R.C. v. Sweden, App. No. 41827/07 Eur. Ct. H.R. (2010) (Fura, J., dissenting), *available at* http://www.echr.coe.int/echr/Homepage_EN (follow the “Case-Law” hyperlink; then follow the “HUDOC” icon; then enter “41827/07” in the “Application Number” search box; then follow the “Search” hyperlink).

"membership in a particular social group," may also need attention. In Greece, the United Nations High Commissioner for Refugees (UNHCR) reports that asylum decisions do not include sufficient reference to the facts or include any detailed legal reasoning, just standardized references to "economic motivation for leaving the country of origin," even when claimants are "from countries in conflict . . . generat[ing] significant numbers of refugees."¹⁰¹

Without developing just and clear standards on the most salient aspect of the asylum determination, the "well-founded fear of persecution" element, and its consistent application throughout the EU, in *each* Member State, harmony in the application of EU asylum standards, much less uniformity, will not be found, and widely divergent treatment of asylees and others seeking refuge will continue to rule in the EU.¹⁰² Asylum recognition rates in EU Member States as indicated above will continue to vary wildly.¹⁰³ The applicants' country of first contact with the EU will also continue to be a significant and often adverse determinant in the award of asylum. Again, the Greek example; over the same period, in Greece, the first EU country of contact for many asylees and where untrained police officials have been making most initial asylum determinations, only two percent of Iraqis fleeing war and political and religious vengeance in Iraq were eventually granted asylum, whereas forty percent of Iraqis were granted asylum in Belgium.¹⁰⁴

¹⁰¹ See The UN Refugee Agency, Asylum in the European Union: A Study of the Implementation of the Qualification Directive 31-34 (Nov. 2007), <http://www.unhcr.org/47302b6c2.html>.

¹⁰² In the author's experience as an advocate and observer, when immigration judges have an excess of discretion in evaluating whether a "well-founded fear of persecution" exists and whether the nature of the evidence is sufficient to support such a well-founded fear, preconceived social and political attitudes as to what is fitting all too often drive the judges determinations. Clearly articulated burdens and evidentiary standards tend to lessen the judges control and exercise of personal predilection, and where serious applicants do not succeed at the first level, offer greater opportunities for success on appeal. And my experience comes in an immigrant-receptive country context, unlike most of the European settings.

¹⁰³ Battjes, *supra* note 3.

¹⁰⁴ *Id.*

Harmony or uniformity in the application of asylum procedures and legal standards will not alone of course guarantee consistency in the recognition of similarly situated asylum claimants. In the U.S. where procedures are fairly uniform and substantive standards and criteria virtually the same throughout the country, asylum recognition rates among immigration officials and judges often vary widely in accordance depending upon the locality of the decision-maker, the national origin of the claimant, and even the gender of the judge.¹⁰⁵ Still, without the assurance that procedures and standards are being uniformly applied throughout the EU, consistency cannot be even a distant hope. A step toward bringing substance and direction to bare labels must be made.

In Recommendations to the Swedish Presidency of the EU for the latter half of 2009, the United Nations High Commissioner on Refugees (UNHCR) noted that applications for asylum by persons of the same nationality with similar case histories were resulting in totally different outcomes in different EU Member States, thus “undermining the very premise of a Common European Asylum System.”¹⁰⁶ The problem is clearly recognized. A big step to a solution must come next.

It may be difficult for EU policy-makers to foresee all of the particular interpretive challenges that will emerge from new legislated criteria, and even more difficult to obtain an EU-wide Member State and legislative agreement on fair, just, clear and *complete* interpretive standards, the quest for uniform, clear and much more precise standards must be made. This quest must be made if the EU is to successfully address migrant movement into the EU and develop a rights and hospitality based EU-wide asylum policy. The resulting predictability and reliability would leave *national* citizens of

¹⁰⁵ See RAMJI-NOGALES ET AL., *supra* note 6, at 17-53. While the disparities in the U.S. are not as large as those in the EU, they are significant. An asylum claimant is more than four times more likely to be granted asylum in San Francisco, New York and Orlando, than in Atlanta; a claimant is twice as likely to be granted asylum in Chicago or Boston than in Detroit. *Id.* at 37.

¹⁰⁶ See The UN Refugee Agency, Moving Ahead: Ten Years after Tampere UNCHR’s Recommendations to Sweden for its European Union Presidency (July-Dec. 2009), <http://www.unhcr.org/4a3b5ef56.pdf>.

Member States secure in their well-being and national identity, and which would be fair, just and hospitable to persons seeking refuge in the EU. In time, the European Court of Justice could supply some interpretive guidance. However, given the nature of the Court's process, including the reticence of the courts of a number of Member States to refer cases to the ECJ, its deference to implementation by Member State courts of last resort, the timeliness of its process (about 2 years per case, except in accelerated cases, which have been rare), and the piecemeal and perhaps haphazard approach to addressing a policy that needs a coherent, purposive solution with all parts working together, it would be inefficient and perhaps ineffective to ultimately leave it to the ECJ. It would be better to come to terms with completeness, clarity and consistency through European legislation.

Though there is much to focus upon in the U.S. and EU, and there are currently procedural directives (legislation) directing the setting of minimum standards for all asylum applicants,¹⁰⁷ and minimum standards for the reasonable and humane treatment of asylee applicants and their families before, during and after refugee status determinations,¹⁰⁸ and laws concerning the harmony and cooperation among Member States on border arrangements,¹⁰⁹ and on the criteria for determining which Member State is responsible for examining asylum applications,¹¹⁰ there are other *linchpin elements* that need to be considered. A key to establishing refuge in another land is having competent and responsible decision-makers apply the actual legal standard under which one becomes qualified to be a refugee. As the concerns noted by the UNHCR above indicate,¹¹¹ divergent applications of the same general principles leading to divergent outcomes ill serve an effective, just, and hospitable system. In order to attain coherent, just and consistently applied asylum

¹⁰⁷ See, e.g., Council Directive 2005/85, 2005 O.J. (L 326) 13, 16 (EC)..

¹⁰⁸ See, e.g., Council Directive 2003/9, Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 O.J. (L 31) 18 (EC).

¹⁰⁹ Council Regulation 2007/2004, Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) 1 (EC).

¹¹⁰ Council Regulation No. 343/2003, 2003 O.J. (L 50) 1, 2 (EC)3.

¹¹¹ See *supra* note 106 and accompanying text.

principles and practice, that in turn would lead to a robust rights-based and hospitable outcome for asylees in foreign lands, these policies and practices must also be mindful of, indeed reinforce, the essential attributes of national sovereignty and the values underlying national citizenship. To that end, much more needs to be done.

V. SALIENT U.S. ASYLUM PRINCIPLES

Several key U.S. asylum principles set the standards for proving an asylum claim, the most significant of which may be, the level of risk of persecution, or burden of proof, that a claimant must demonstrate and meet in order to be considered an asylee or refugee.¹¹² In *INS v. Stevic* the U.S. Supreme Court interpreted Section 243(h), now Section 241(b)(3), of the Immigration and Nationality Act (INA) which requires the Attorney General to withhold the deportation of a claimant whose “life or freedom would be threatened . . . because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”¹¹³ The Court required claimants to demonstrate “a clear probability of persecution,” that it is more likely than not that the claimant would be subject to persecution, a high hurdle to overcome for most claimants.¹¹⁴

Over the next several years the government imposed the same burden of proof upon claimants seeking asylum under Section 208 of the INA, the “well-founded fear of persecution” standard.¹¹⁵ Then in *INS v. Cardoza-Fonseca*, Justice Stevens, who had authored the *Stevic* opinion, declared that unlike the language of Section

¹¹² See *INS v. Stevic*, 467 U.S. 407, 430 (1984) (holding that an alien must establish a “clear probability of persecution” to avoid deportation under Section 243(h) of Immigration and Nationality Act of 1952, 8 U.S.C. § 1231(b)(3)(A) (2006); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that asylum applications under Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158 (2006), need only show a “well-founded fear of persecution”). In *Cardoza-Fonseca*, the Court noted that Congress intended Section 208(a) to conform with the standards set forth in the 1967 Protocol. 480 U.S. at 434, 436-37.

¹¹³ 8 U.S.C. § 1253(h)(1) (1996).

¹¹⁴ *Stevic*, 467 U.S. at 429.

¹¹⁵ See *Matter of Acosta*, 19 I&N Dec. 211, 219 (B.I.A. 1985).

243(h)¹¹⁶—“whose life or freedom would be threatened”—the language of Section 208—“a well-founded fear of persecution”—meant that the asylum determination must turn, to some extent, on the subjective mental state of the alien and not necessarily on any substantial likelihood that the claimant herself would be persecuted.¹¹⁷ Justice Stevens went on to point out that the “difference between the words ‘well-founded fear’ and ‘clear probability’ may be as striking as that between a subjective and an objective frame of reference”¹¹⁸ Such a “well-founded fear,” he noted, can occur with less than a fifty percent chance.¹¹⁹ In fact, he noted approvingly the following statement:

Let us . . . presume that it is known that in the applicant’s country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have ‘well-founded fear of being persecuted’ upon his eventual return.¹²⁰

While the Court did not there “set forth a detailed description of how the ‘well-founded fear’ test should be applied,”¹²¹ it was clear that the test would focus on the individual’s *fear*, and that the “ordinary and obvious meaning of the phrase is not to be lightly discounted.”¹²²

¹¹⁶ INS v. Cardoza-Fonseca, 480 U.S. 421, 429-30 (1987) (where Justice Stevens pointed out that the mandatory nature of the obligation on the Attorney General, under Sec. 243(h), now Sec. 241(b)(3), to withhold deportation and the language used in the statute that the alien show that his or her life or freedom *would be* threatened, supported a higher, objective burden, such as “clear probability of persecution”).

¹¹⁷ *Id.* at 430-31.

¹¹⁸ *Id.* at 431 (quoting Guevara-Flores v. INS, 786 F.2d 1242, 1250 (5th Cir. 1986)).

¹¹⁹ *Id.*

¹²⁰ *Id.* (quoting 1 A. GROHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 180 (1966)).

¹²¹ *Id.* at 448.

¹²² *Id.* at 431 (citing Russello v. United States, 464 U.S. 16, 21 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198-99 (1976)).

Close on the heels of *Cardoza-Fonseca*, the Board of Immigration Appeals (BIA) asserted that an asylum claimant under Section 208 must demonstrate “that a reasonable person in [the claimant’s] circumstances would fear persecution.”¹²³ And, in 1996, INA regulations were amended to require decision-makers to grant asylum if “[t]here is a reasonable possibility of suffering such persecution if he or she were to return to [the home] country.”¹²⁴ Both of these efforts to put flesh on the bones of the Court’s *Cardoza-Fonseca* principle, however, fall short. Both approaches seem still to eschew consideration of the subjective dimension of “fear,” while seemingly focusing on the “well-founded” adjective, as if it said “well-founded likelihood.” While judges and adjudicators may be more comfortable applying seemingly objective standards—such as the likelihood of persecution, the reasonableness of the fear and the reasonable possibility of it occurring—in determining whether the claimant has a “well-founded fear,” objective standards should not be exclusive and much more emphasis on the subjective nature of the claimant’s fear, credibility in expressing it, and credibility of the persecution to the claimant’s category of people in his or her homeland seems warranted. While the current standard, a “reasonable possibility of persecution” is a lower hurdle of the level of risk to demonstrate than “clear probability of persecution, it remains still objective in nature, and does not require decision-makers to consider subjective factors. However, the “reasonable possibility” standard directs courts and adjudicators to consider the individual claimant’s personal physical connection to actual persecution, the likelihood that she herself will be singled out for persecution upon return, and the judge or adjudicator’s view of the reasonableness of the claimants’ claimed fear of *likely persecution*, rather than the claimant’s actual *fear of persecution*. In applying such a standard both the reason and

¹²³ Matter of Mogharrabi, 19 I&N Dec. 439, 445 (B.I.A. 1987) (adopting the Fifth Circuit’s definition of “well-founded fear” set forth in *Guevara-Flores*, 786 F.2d at 1250). While the BIA paid lip service to the Supreme Court’s mandate for subjectivity in the determination of a “well-founded fear,” in actuality the standard adopted in *Mogharrabi* is an objective inquiry. *Valle-Zometa v. INS*, No. 88-7174, 1990 WL 208725, at *3 (9th Cir. Dec. 5, 1990).

¹²⁴ 8 C.F.R. § 208.13(b)(2)(i)(B) (2010).

discretion of a judge are all too easily subtly affected by personal preferences and other non-germane factors. A credible *fear* based in the reality of the circumstances on the ground, persecution against persons in the claimants category in the home country, would be *well-founded*, whether or not *this* individual claimant can prove a likelihood that he or she has been singled out for persecution or whether or not there is a one in ten chance that he or she would be. If the circumstances on the ground make it clear that arbitrary or regular persecution of persons in the claimant's particular category occur, and the fear expressed by the claimant is connected to that reality, even if in the adjudicator's view there is a less than five or ten percent chance that this claimant would actually suffer the persecution, other elements being met, asylum should be granted. This seems to be the plain meaning of the phrase "well founded fear of persecution." Certainly the framers of the Convention were capable of including language suggesting that some objective level of likelihood of persecution of the particular claimant was required. They did not.

A standard that reduces or takes the "measuring of probability" *discretion* away from the adjudicator will also lead to more consistent, predictable and fair asylum adjudications. Decision-makers should be encouraged to recognize the many factors producing the subjective reality of the claimant in relation to the objective reality of the facts on the ground.

In the U.S., even with rather firm agreement on the currently accepted meaning of the "well-founded fear of persecution standard," demonstrating a reasonable possibility of persecution—applying the standard to a very wide variety of facts and circumstances, and to claimants of different political opinions, different nationalities, different races, religions and "particular social groups,"—has led to very inconsistent results, and thus serious issues of fairness and justice.¹²⁵

¹²⁵ Between January 2000 and July 2004, asylum grant rate for Chinese claimants in Atlanta's Immigration Court was 7%, whereas 400 miles south in Orlando, Florida, the rate for Chinese asylum grants was 76%. Nationwide it was 47%. On the other hand, the average rate for Haitians was only twenty percent. RAMJI-NOGALES ET AL., *supra* note 6, at 33-37.

VI. SOME SUGGESTIONS

There are of course other important elements used in determining whether a claimant should be awarded asylum. Clear and just definitions of what constitutes “persecution” and “membership in a particular social group,” or “political opinion” in asylum determinations are vital to many claimants and the states in which they seek to stay, and deserve considerable attention. For the moment, it is enough to say that there are two major areas of reform that need to be addressed by EU and U.S. policy-makers. First, both the EU and U.S. need to further refine the applicable legal standards for establishing asylee status. These standards must be just and hopefully reduce the amount of discretion exercised by asylum adjudicators. More clearly defining a claimant’s burden of proving a “well-founded fear of persecution,” in a way that removes emphasis from the probabilities of risk of persecution is critical. U.S. courts and regulators, and their EU counterparts, must better define that burden in a way that focuses upon the subjective character of *fear* and that reduces the breadth of judicial discretion that comes with measuring the probability of persecution in a so-called wholly objective frame of reference.

Justice Stevens was headed in the right direction when he emphasized:

[T]he reference to “fear” in the § 208(a) standard *obviously* makes the eligibility determination turn to some extent on *the subjective mental state* of the alien. “The linguistic difference between the words ‘well-founded fear’ and ‘clear probability’ may be as striking as that between a subjective and objective frame of reference” That the fear must be well-founded does *not* alter the obvious focus on the individual’s subjective beliefs, nor does it transform the standard into a “more likely than not” one.¹²⁶

¹²⁶ INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987) (emphasis added) (citations omitted); *see also* Matter of Acosta, 19 I&N Dec. 211, 221 (B.I.A. 1985) (“‘Fear’ is a subjective condition, an emotion characterized by the anticipation or

While proving a “reasonable possibility of persecution” is a lower threshold and perhaps more just than the “clear probability of persecution” standard for withholding of deportation, it still engages the judge and prosecutor in the exercise of measuring the “likelihood” of persecution. For the judge or adjudicator who is reluctant to grant asylum it offers a more free “exercise of discretion,” usually to the detriment of the fearful claimant. It pulls the inquiry *away* from the claimant’s subjective *fear* and increases the affect of the judge’s biases on the outcome, even where there is a real effort to be objective. The exercise of broader discretion in terms of *evaluating* the likelihood of the risk of persecution, is very likely to be affected by other non-germane factors, such as the location of the adjudicator, the location of the state, the particular nationality of the claimant, or even the gender or age of the adjudicator.¹²⁷ For instance, the proximity of Greece to troubled regions near the eastern end of the Mediterranean Sea likely affects the exercise of judgment on asylum claims in Greece.

This subjective fear component ought to depend largely on a claimant’s own expression of fear of persecution, *and* the objective reality of (1) his or her membership in one of the five categories for protection under the refugee definition and (2) the circumstances of persecution or threats of persecution of the claimant’s group on the ground in his or her home country. This analysis would lead to more certain and predictable asylum eligibility determinations by reducing the breadth of discretion of the decision-makers, and effect of other non-germane factors.

Some may object that eliminating an evaluation of the likelihood of the individual claimants’ own persecution lowers the threshold too much, and that doing so would only add to the number of asylum claimants and asylees, in turn increasing the fear of national citizens and heightening their reluctance to receive them. However, if immigrants are effectively integrated,¹²⁸ citizens will

awareness of danger.” (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 831 (16th ed. 1971)).

¹²⁷ See RAMJI-NOGALES ET AL., *supra* note 6, at 47.

¹²⁸ This of course means paying heightened attention to the language, cultural, and political education and engagement of immigrants.

note that the well-being of their national identity, culture, social, political, and economic life is strengthened rather than harmed, and their visceral concerns over security will readily transform itself into a hospitality that embraces asylees. “Secure” citizens will not fear a legal threshold that accepts asylees where it is clear that circumstances in a claimant’s homeland have produced persecution of others in the claimant’s category. Under these circumstances, even if the individual claimant need *not* prove some likelihood or reasonable possibility that he or she *will* be singled out for persecution in the event of return, the lack of the extra element of *proof* would not trouble the “secure” citizen. So long as the individual claimant expresses a credible *subjective* fear that is based on the reality of circumstances on the ground in her home country, and she is a member of the category that is subject to persecution or threat of it, she should be granted asylum under the “well-founded fear of persecution” standard.

In addition, with clear definitions of the categories of refugees—race, religion, nationality, membership in a particular social group, or political opinion¹²⁹—there will be much more predictability as to who is a refugee. While it may, as noted, result in higher numbers of recognized refugees, this will be a just result. Furthermore, if the claimants are clearly members of the persecuted class in their respective homelands, it will also be more acceptable in the secure sovereign state.

The standard offered here is not only much closer to what the “well-founded fear” standard embraces, a *subjective fear* felt by one of a group of particular people who are persecuted or who are threatened with persecution, but it also aligns better with the embrace of hospitality by national citizens. Citizens secure in their own well-being are likely more secure with predictable bases for the admission of others into their spaces of freedom.

The second important area of reform has to do with *who* makes asylum determinations and *where* they are made. So long as humans are making judgments concerning sharing their privileges with others who look and act differently, we will not have a perfect

¹²⁹ Refugee Convention, *supra* note 23, at art. 1.

system to adjudicate asylum claims. And there is of course no necessary moral content to consistency and predictability. A consistent and predictable system that always leads to “No” or “Yes” is not necessarily a good or just system. However, where the content of standards, such as meeting the definition of a refugee, are just, and amenable to more consistent and predictable adjudication, then the fair application of those standards by *competent professionals*, not pervasively influenced by local attitudes, is more likely to be good and just, and accepted by national citizens and asylees alike. The assurance that competent professionals adjudicate asylum claims is as critical as the consistency and justness of the standard applied.

Professional competence in all asylum adjudication is necessary to substantially reduce the introduction of adjudicator, national or geographic preferences and other factors non-germane to the adjudication process. Hopefully, broadly administered education, training and selection, loyalty to the profession and the shared values of peer professionals would help override more locally developed attitudes and other non-germane preferences in their work.

Still, the preservation of integrity of national sovereign, especially in the EU, is also critical.¹³⁰ For example, rather than eliminate some of the non-germane factors influencing asylum determinations in Greece by using non-Greek judges, or judges situated outside of Greece, it needs to be recognized that the national citizens of Greece, or other Member States, clearly enjoy the full right and responsibility to decide who may or may not enter and reside in their state and that, with limited exceptions not relevant here, authority over one’s national territory resides in the sovereign state

¹³⁰ As we have seen, concerns about EU expansion and perceived Islamist threats to cultural and national identity, encroachments upon national sovereignty, were likely significant factors in the “no” votes of France and the Netherlands in 2002 on the proposed EU Constitutional Treaty, and concerns about traditional Irish neutrality in foreign policy, a key aspect of national sovereignty, was a significant element in Ireland’s initial vote against ratification on the Lisbon Treaty. More recently, the decision to administer “economic governance” by the EU’s Council of Ministers over Member State banks’ required participation in a bailout loan program for Greece, raised serious national sovereignty encroachment concerns among Member States. See Stephen Castel & Matthew Saltmarshe, *Europeans Reach Deal On Rescue For Greece*, N.Y. TIMES, Mar. 26, 2010, at B1, B4.

alone.¹³¹ Thus, adjudication over asylum claimants in Greece must be done by competent Greek professionals and judges in Greece, and those in France, by French professionals in France. But Greece, France, and Sweden, among others, can also well agree to more refined standards for adjudicating asylum claims and to a system for training, hiring, and monitoring competent national professionals under EU-wide standards and with the help of EU institutions.

These Member States can also agree that while harmony, consistency and predictability are very desirable qualities to have in the common EU asylum process, an equitable sharing of the burdens of responsibility is also essential. No state in a European Union dedicated to Free Movement of Persons¹³² and equality of opportunity for all European citizens should be expected to carry the lion's share and heaviest burden of taking on legitimate asylees. Those in the north of Europe, furthest from the homelands of claimants and refugees, must fully share in the responsibility for taking care of asylees with those states that are more vulnerable at the frontiers of the EU system, such as Greece. Ensuring that Greece's citizens, or those of any vulnerable state, feel secure in their own national, geographic, cultural, and economic well-being is particularly vital. Only when Greek citizens really feel the robustness of their sovereign state's protection of them, will they feel healthy enough to fully exercise the hospitality that national citizens in a healthy state should embrace.

With full participation of citizens, including academics, judges and officials of all Member States in the EU, a system should be developed and established that sets standards for and assists in the hiring, training and professional development of all asylum decision-makers and adjudicators, and sets standards for professional competence and on-going evaluation of such professionals and judges. While the details are better left to others, the system ought to include as overall administrator, an independent executive agency under the Presidency of the European Commission, and should

¹³¹ See *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 606-07 (1889).

¹³² Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47, 65-73.

include national and EU-wide asylum process review panels that would be responsible for ensuring the consistency and predictability of asylum determinations in and among Member States. Such panels would have authority to visit and report on national adjudicative systems to ensure compliance with standards, and to make recommendations to Member State and EU-wide regulators. Such a system should in time result in reasonably comparable levels of competency and professionalism among decision-makers and adjudicators, and substantial consistency and predictability in the asylum adjudication process. Professional competence in applying the same standards, refined to be more predictable and just, will add measurably to the evenhandedness and ultimately the hospitality shown to asylum claimants and asylees.

A similar system should be able to be put in place more easily in the U.S., although, in view of the current situation, it should truly be administered on a national level. In the U.S. it may be that while standards, hiring and some training may currently be “national,” it is also quite political, and in the end much of that is “local.” It is also essential for the U.S. to adopt the same kind of new attention to asylum standards as described above for the EU: competency; training; professional development of decision-makers, adjudicators, and judges; and both national and regionally-based monitoring and compliance review.¹³³

And, of course, in the U.S. there is far less danger of any encroachment on national sovereignty that needs to be watched for. However, given the current divided responsibility for asylum and other immigration matters largely between the Department of Homeland Security and the Justice Department (entities with significant other responsibilities), it may be better for asylees, other non-citizens, and ultimately for U.S. citizens that the suggested system be part of a new independent, executive agency that can start from a clean slate, at least with respect to incorporating the suggested asylum adjudication system.

¹³³ See generally RAMJI-NOGALES ET AL., *supra* note 6, at 100-16 (providing recommendations and commentary relating to immigration courts).

The second significant process reform that is essential would be to create in both the EU and U.S. systems that enable an equitable geographic burden-sharing of asylee adjudications and awards of asylum. This would perhaps reduce the perception of threat in states and regions where refugees seek to enter in largest numbers and, as a consequence, increase the likelihood of serious consideration of asylum claims and hospitable treatment of asylees in these areas. This process reform would require a carefully designed, data driven system, whereby when a claimant makes a claim for asylum in a Member State A of the EU or Region A of the U.S., the claimant-receiving initial decision-maker or adjudicator in Member State or Region A will be able to determine if her state or region should make the determination, or whether because her state or region has had an excess of claimants, the claimant's application should be rotated to a an asylum claimant "deficient state." The initial decision-maker or adjudicator in Member State A will first determine whether the claimant represents an excess of greater than five percent of a predetermined percentage of asylum claimants allocated to that Member State or region, so long as the percentage of claimants *awarded* asylum in the last three years is within ten percent of predetermined percentage of asylum awards being granted over the same period throughout the EU. The predetermined percentages of claimants and awards should be a function of the proportion that the population of the Member State or region bears to the population of the entire EU or U.S. "Excess claimants" would then be allocated to the closest state that is deficient in numbers of claimants and award-ees under its predetermined percentages. Data and computations of numbers of claimants, awardees, percentages for each and predetermined percentages should be maintained in centrally administered data bases where calculations would be made by EU or U.S. professionals representing all Member States and regions.

The purpose here would be to allocate claimants largely on the basis of EU Member State or U.S. region population, so long as awards of asylum in any three year period is reasonably close (within ten percent) to the numbers awarded in similarly sized Member States or regions. In this way no Member State or region that may be more vulnerable due to geography or other factors, such as Greece or

Spain in the EU, would carry too large a burden. Knowing that their asylum burden is shared by its distant sister Member States or regions, the citizens of those states should feel substantially less threatened. They will have greater confidence in their government's ability to protect their economic, social, cultural, and national well-being, and should be much more likely to embrace their new arrivals with natural hospitality.

This system would also ensure that traditionally less receptive Member States and regions will carry their fair and just share of the perceived burden of effectively evaluating asylum claims and offering hospitable treatment to those who come to their shores because they do have a fear of persecution based upon Geneva Convention standards, because of (1) a new level of EU and U.S. developed competence, training, hiring, professionalism, and professional collegueship and (2) monitoring the numbers and percentages of actual awards of asylum,.

These two significant reforms would also mesh well with the "Dublin Process."¹³⁴ In the Dublin process, once the appropriate official determines on the basis of family reunification, residence permit, length of residence, place of entry or other basis where a claimant should have her application for asylum considered, that official would then be able to consult the data bank calculation in order to determine to which Member State if any other than the present one, the claimant should be sent to for adjudication. Although the author has not analyzed here all the Dublin criteria in relation to this determination, the author would think that to the extent that the primary Dublin criteria, such as family reunification and residence,¹³⁵ come into play in the determination, they would ordinarily be deemed to trump the predetermined percentage allocation described herein, other than when Dublin leads to the return of the claimant to the Member State of entry, in which cases the predetermined percentage calculations would be determinative.

¹³⁴ See Council Regulation No. 343/2003, 2003 O.J. (L 50) 1, 1 (EC).

¹³⁵ *Id.* at 1, 2, 4, 5.

VII. CONCLUSION

The two goals of these process reforms, along with the refinement of the “well-founded fear” standard are: (1) to ensure that the standard and the application process is more just, more equitably shared, and better reflects the purpose of the refugee right, and (2) to ensure that these critical dimensions of protecting refugees reinforce and respect national sovereignty and citizenship. These goals seek to add more certainty, consistency, and predictability to the application of the standard and to the award process, and to ease the concerns and strengthen the confidence of national citizens. The broader goal is to open the twenty-first century to a security and confidence-based hospitality in hosting and sharing with refugees our spaces of freedom.

Other improvements are also needed concerning non-citizens coming to our lands and the treatment of immigrants, migrants, and other non-citizens, particularly with respect to the establishment of priorities. These improvements too should respect national sovereignty and national citizenship, buttressing the confidence of citizens in the security of their citizenship’s essential attributes, and at the same time be consistent, predictable, and just in the application of such priorities and treatment as part of the welcoming hospitality of citizens as hosts.

The recommendations made here may well be imperfect. They are offered in the hope that they lead to consideration of asylum protection approaches that do justice and share burdens among healthy states, that respect national sovereignty and citizenship, and that lead in the end to genuine hospitality, sharing our spaces of freedom with sisters and brothers from around the world who find themselves among us.

