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## Marginal Refuge: The Ramifications Of Terrorism For An Unsustainable United States Asylum Policy

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# Marginal Refuge: The Ramifications of Terrorism for an Unsustainable United States Asylum Policy

MICHAEL D. YANOVSKY SUKENIK\*

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## I. INTRODUCTION

As the famous plaque adorning the Statue of Liberty suggests, the United States has long welcomed the disenfranchised masses emigrating from other nations, seeking to find their fortunes in the New World. Since its founding, the United States has greeted millions of immigrants, both legal and illegal, documented and undocumented, and provided them with protection, opportunity, and refuge from economic and societal troubles in their countries of origin. While a humanitarian desire to assist destitute peoples may have partially motivated this liberal immigration tradition, such policy very likely reflected an additional consideration: a pragmatic acknowledgment that a population influx was necessary to populate a sparsely inhabited frontier and to provide labor for a rapidly expanding industrialized society.<sup>1</sup> At the same time, although practical thinking undoubtedly influenced the development of an open-door policy initially, humanitarian interests eventually began to play a clearly discernible, if smaller, role in furthering migration to the United States through asylum, a narrow entry path for select individuals

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1. Kathleen A. Connolly, *In Search of the American Dream: An Examination of Undocumented Students, In-State Tuition, and the Dream Act*, 55 CATH. U. L. REV. 193, 197 n.26 (2005).

who are subject to persecution in their homelands.<sup>2</sup>

Refugees who are granted asylum receive permanent resident status with all the rights and privileges pertaining thereto, including freedom from the fear of deportation, the right to work, and a path to eventual citizenship.<sup>3</sup> For many otherwise ineligible migrants, asylum affords a new lease on life. Eligibility criteria are relatively straightforward and include a "one-year deadline on applying for asylum, delay in work authorization eligibility, prompt adjudication of asylum applications, expedited removal, and detention of asylum seekers."<sup>4</sup> Precisely because asylum is so attractive to many refugees, however, the United States' generosity has frequently been rewarded with widespread abuse by unscrupulous and non-meritorious applicants.<sup>5</sup> Efforts to reform, streamline, and tighten the asylum adjudication process emerged as a result.<sup>6</sup> Although these changes reduced "the number of non-meritorious filings . . . and the size of the [applicant] backlog,"<sup>7</sup> such reforms relied in large part on foundation data and thinking dating back to the Cold War period. In the face of these efforts, the dawn of the terrorism age threatens to significantly change both the asylum playing field and the game itself.

The development and proliferation of international terrorism suggests that an increasing number of aliens will be driven to seek refuge in the United States and will be able to satisfy the statutory requirement for asylum: that a refugee "suffered past persecution or . . . has a well-founded fear of future persecution."<sup>8</sup> At the same time, advances in technology and the easing of restrictions on international travel have made it easier and cheaper to cross borders without detection to gain the foothold on United States soil necessary to make an asylum application a reality.<sup>9</sup> This timely confluence of needs and means forecasts a poten-

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2. Immigration & Nationality Act (INA), 8 U.S.C. §§ 1101–1537 (2006).

3. See 8 U.S.C. § 1158 (2006).

4. Marisa Silenzi Cianciarulo, *Counterproductive and Counterintuitive Counterterrorism: The Post-September 11 Treatment of Refugees and Asylum-Seekers*, 84 DENV. U. L. REV. 1121, 1133 (2007) (discussing Congress's passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).

5. Lamar Smith & Edward R. Grant, *Immigration Reform: Seeking the Right Reasons*, 28 ST. MARY'S L.J. 883, 894–95 (1997) (noting that after the liberalization of U.S. asylum and refugee policy in 1980, aliens "quickly learned how to abuse the system" by showing up at "airports with fraudulent or even no travel documents," and being "provided authorization to work in the United States" pending delayed hearings).

6. John Fredriksson, *Bridging the Gap Between Rights and Responsibilities: Policy Changes Affecting Refugees and Immigrants in the United States Since 1996*, 14 GEO. IMMIGR. L.J. 757, 772–73 (2000) (noting a "seventy-five percent decline in the number of asylum applications" between 1993 and 1999).

7. *Id.* at 772.

8. 8 C.F.R. § 208.13(b) (2007).

9. Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights Under the Hague Convention on the Civil Aspects of International Child Abduction*, 21 FORDHAM INT'L

tially overwhelming number of eligible refugees swelling the ranks of asylum applicants. In turn, immigration administrators will be compelled to pick and choose amongst similarly qualified aliens without clearly delineated grounds for distinguishing these refugees from terrorists. Forcing government officials to adjudicate an expanding quantity of asylum applications on potentially arbitrary and capricious grounds runs the risk of paralyzing, or at least derailing, an already severely strained immigration system. A substantial increase in asylum admissions would also result in considerable integration costs, which the government and the voting public would likely find unreasonable to bear in the absence of significant advancement of national interests.

This Essay argues that the continuation of global terrorism is likely to exacerbate the practical weaknesses in the asylum system, while at the same time imperiling the normative arguments in favor of granting asylum to refugees fleeing terrorism-inspired persecution.<sup>10</sup> By applying existing asylum law and its legislative underpinnings to the factual realities of the terrorism age, this Essay will demonstrate the inherent tensions between the general humanitarian policy interests supporting asylum policy and the geo-political and practical national interests implicated by refugee admission. More narrowly, this Essay proposes that humanitarian policy concerns alone do not justify the extension of asylum law to encompass the terrorism refugee population.

Part II of this Essay discusses the historical origins and evolution of the use of terrorism in modern times and its effect on failing nation-states. Part III illustrates how the statutory framework underlying asylum law and policy renders the United States vulnerable to an onslaught of refugees fleeing terrorism and an unanticipated expansion of asylum law. Part IV then analyzes both the evolution and rationale at the core of asylum law, highlighting and explaining how congressional tinkering with asylum regulations attempted to expand the scope of asylum eligibility despite perverse consequences for immigration policy. Part V explains the normative costs of asylum policy, arguing that despite the absence of national interest or direct moral imperative, the broad scope of current asylum law incentivizes illegal entry and leads to arbitrary adjudication. Part V also suggests several statutory and policy proposals for improving and streamlining the administration of asylum. Finally, this Essay concludes that although the sentiment and policy underpin-

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L.J. 308, 315 n.37 (1997) (citing articles discussing greater mobility and relaxation of travel restrictions).

10. Although central to the modern era, this Essay does not address the propriety or effectiveness of counterterrorism actions undertaken by the United States, focusing solely upon the ramifications of terrorism for asylum policy. Also, for the sake of brevity, this Essay does not examine the impact of terrorism upon asylum policy in European or other Western nations.

ning asylum law is both appropriate and commendable, the dawn of widespread political and religious terrorism has rendered the current asylum system precariously in danger of collapse.

## II. RISE OF THE TERRORISM AGE

The use of terrorism and its associated forms of violence and intimidation as a means of political advancement has a long and transnational history. Indeed, the word *terroriste* first entered modern lexicon in describing the Jacobins and the Reign of Terror during the French Revolution at the end of the Eighteenth Century.<sup>11</sup> Equally long has been the struggle to prevent future terrorist attacks and to punish perpetrators for physical, psychological, and financial wounds inflicted.<sup>12</sup> In line with this history, the United States has long suffered from and responded to both domestic and international terrorism.<sup>13</sup> But despite extensive prior experience, only the terrorist attacks of September 11, 2001 stimulated the widespread domestic realization that America was not immune to terrorism.<sup>14</sup> In the context of United States policy, September 11th further demonstrated the weaknesses of the current system, whereby the well-financed al-Qaeda perpetrators exploited the existing legal framework and went undetected in legally crossing the United States border and mixing with the local populations.<sup>15</sup>

Interestingly, and perhaps not surprisingly, in the aftermath of the terrorist attacks, “[a]lthough Americans regularly dealt with heightened terror alerts and news of terrorism in foreign countries, with each passing day when no 9/11-type events occurred locally, the feeling that the country was shielded from attacks [began] to creep back into the national psyche . . . .”<sup>16</sup> The absence of large-scale domestic terrorism

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11. Robert J. Rhee, *Terrorism Risk in a Post-9/11 Economy: The Convergence of Capital Markets, Insurance, and Government Action*, 37 ARIZ. ST. L.J. 435, 437 n.2 (2005).

12. Symposium, *America Fights Back: The Legal Issues*, 11 CARDOZO J. INT’L & COMP. L. 831, 843–44, 847 (2004) (discussing a long history of combating terrorism through both criminal law and warfare).

13. See, e.g., Steven G. Brandl, *Back to the Future: The Implications of September 11, 2001 on Law Enforcement Practice and Policy*, 1 OHIO ST. J. CRIM. L. 133, 141 (2003) (“In the recent history of terrorism, the villains have changed—America’s attention has moved from the Ayatollah Khomeini, to Carlos the Jackal, to Abu Nidal, to Moammar Kaddafi, to Osama bin Laden.”); Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE. W. RES. J. INT’L L. 449, 500 (2006) (discussing the United States’ short-term and long-term military commitments, economic pressures, and arms sales in terrorism crises involving Lebanon and the Middle East, Central America, and Africa).

14. See Brandl, *supra* note 13, at 142.

15. Raquel Adana & Sylvia R. Lazos Vargas, “Aliens” in Our Midst Post-9/11: Legislating Outsideness Within the Borders, 38 U.C. DAVIS L. REV. 1683, 1696 (2005) (“[T]he 9/11 report ma[de] clear the hijackers entered the United States with valid visitors’ visas in the comfort of airline seats.”).

16. Eugene Kim, Comment, *The New York City Police Department’s Random Bag Search*

did nothing to alter this perception.<sup>17</sup> But the reality on the global stage was far different. “In the intervening eight years [since 2001], the world has seen an exponential increase in terrorist activity . . . .”<sup>18</sup> As a result of this escalation, large population centers are now consistently, if unpredictably, exposed to this suddenly common form of violence and intimidation.

Nowhere is this more evident than in the unstable global hot spots of Iraq, Afghanistan, and Sudan.<sup>19</sup> Perhaps not immediately obvious, but central to this Essay, the proclivity for terrorist violence in these failing nation-states has broad implications for domestic asylum policy in the United States. In the past, asylum law applied mainly to those specifically and directly targeted or at risk for persecution.<sup>20</sup> The situations in Iraq, Afghanistan, and Sudan, however, show that, tragically, entire populaces are now directly vulnerable to asylum-eligible persecution based on some combination of ethnic, religious, or political discrimination. In addition, those affected by terrorism generally lack both the means of escaping these precarious situations within their homeland as well as the ability to seek government solace from the rampant persecution.

Since the United States’ invasion of Iraq in 2003, common Iraqis have been exposed to a daily torrent of car bombings, random killings,

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*Policy: Withstanding Fourth Amendment Scrutiny Is Only the First Step in Combating Terrorism*, 37 SETON HALL L. REV. 561, 565 (2007).

17. See generally Michelle Ward Ghatti, *The Terrorist Is a Star!: Regulating Media Coverage of Publicity-Seeking Crimes*, 60 FED. COMM. L.J. 481, 482 n.7 (2008) (noting that “terrorist crime in the United States has decreased since 1982, although international terrorism has increased.”).

18. Kelly A. Gable, *Cyber-Apocalypse Now: Securing the Internet Against Cyberterrorism and Using Universal Jurisdiction as a Deterrent*, 43 VAND. J. TRANSNAT’L L. 57, 116–17 (2010); see also Susan B. Glasser, *U.S. Figures Show Sharp Global Rise in Terrorism—State Dept. Will Not Put Data in Report*, WASH. POST, Apr. 27, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/26/AR2005042601623.html>.

19. See, e.g., Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT’L L. 427, 461 (2009) (“The U.S. National Counterterrorism Center (‘NCTC’) 2008 Report on Terrorism found that 55% of the 11,800 terrorist attacks committed in 2008 took place in Iraq, Afghanistan, and Pakistan.”); John Norris, *Getting It Right: What the United States Can Do To Prevent Genocide and Crimes Against Humanity in the Twenty-First Century*, 27 YALE L. & POL’Y REV. 417, 429–30 (2009) (“[T]he plight of Darfuris who continued to be driven from their homes and killed in large numbers.”).

20. See, e.g., Nicole S. Thompson, *Due Process Problems Caused by Large Disparities in Grants of Asylum: Will New Department of Justice Recommendations Solve the Problem?*, 22 EMORY INT’L L. REV. 385, 398 (2008) (“The asylum seeker must demonstrate individual circumstances showing he was or would be a target for persecution.”); Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 TEMP. L. REV. 1117, 1121 (2000) (“[T]he applicant must meet the burden of providing either direct or circumstantial evidence from which it is reasonable to conclude that the individual had been persecuted in the past or fears persecution in the future . . . .”).

targeted assassinations, and other deprivations of both rights and life.<sup>21</sup> Many of these terrorist acts have been and continue to be motivated by religious, ethnic, and political differences along Shi'ite, Sunni, and Kurdish sectarian lines.<sup>22</sup> Apart from the dead, the unabated terrorist violence has resulted in over four million refugees attempting to flee to neighboring and distant countries alike.<sup>23</sup> The striking severity of the situation results from the absolute unpredictability of terrorist attacks and the capricious, but targeted, killing of all Iraqis. Although there has been recent progress, the government is still unable—and often unwilling—to provide adequate assurances of future safety.<sup>24</sup>

Almost identically, Afghans are constantly reminded of their perilous situation. Acts of terrorism target common civilians based upon their religious and political affiliation, and specifically, opposition to the Taliban's rule and rejection of the Taliban's strict interpretation of Islam.<sup>25</sup> Among the innumerable terrorist offenses perpetrated against Afghani civilians are "forced deportation; massacres; torture; extrajudicial executions . . . religious and ethnic persecution of the [minority Shiite Muslims]; [and] politicide . . ."<sup>26</sup> Consequently, approximately

21. See Jeremy Sarkin & Heather Sensibaugh, *How Historical Events and Relationships Shape Current Attempts at Reconciliation in Iraq*, 26 WIS. INT'L. L.J. 1033, 1033–35 (2009).

22. See generally *id.* at 1071 ("America's Iraq policy has created innocent victims and has lumped together insurgents based on sectarian identities, when political motivations are more important than religion."); Timothy G. Burroughs, *Turning Away from Islam in Iraq: A Conjecture as to How the New Iraq Will Treat Muslim Apostates*, 37 HOFSTRA L. REV. 517, 521 (2008) ("[T]he branding of others as infidels . . . has been an ideological underpinning of the terrorism and sectarian killings in Iraq.").

23. See, e.g., Eleanor E. Downes, *Fulfilling the Promise?: When Humanitarian Obligations and Foreign Policy Goals Conflict in the United States*, 27 B.C. THIRD WORLD L.J. 477, 490 (2007) (reviewing MARIA CRISTINA GARCIA, *SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA* (2006)) (noting that a substantial number of Iraqi refugees fled to Syria, Jordan, "Australia, Denmark, Germany, Iran, the Netherlands, Norway, Sweden, the United Kingdom, and the United States."); Cara Buckley, *Red Crescent Says 25,000 Iraqi Refugees Have Returned*, N.Y. TIMES, Dec. 4, 2007, <http://www.nytimes.com/2007/12/04/world/middleeast/04iraq.html>; David M. Brown, *U.N. Focuses Efforts on Iraq Refugee Crisis*, PITT. TRIB. REV., Oct. 19, 2007, [http://www.pittsburghlive.com/x/pittsburghtrib/news/Westmoreland/s\\_533492.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/Westmoreland/s_533492.html).

24. Major Michael D. Banks, *Addressing States (Ir-)responsibility: The Use of Military Force as Self-Defense in International Counter-Terrorism Operations*, 200 MIL. L. REV. 54, 105 (2009) ("Iraq . . . provide[s] [an] example[ ] of [a] State[ ] that [is] unwilling or unable to act effectively against the terrorist organizations present within [its] borders.").

25. See, e.g., Taimoor Shah & Carlotta Gall, *At Least 80 Are Killed in Afghan Suicide Bombing*, N.Y. TIMES, Feb. 18, 2008, <http://www.nytimes.com/2008/02/18/world/asia/18afghan.html> (noting that militant suicide attacks have risen in Afghanistan with militants executing over 140 suicide attacks in 2007); Carlotta Gall & Eric Schmitt, *Taliban Step Up Afghan Bombings and Suicide Attacks*, N.Y. TIMES, Oct. 21, 2005, <http://www.nytimes.com/2005/10/21/international/middleeast/21afghan.html> (noting an increase in terrorist activity, including beheadings, throat cuttings, and assassinations of religious and tribal leaders).

26. Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 356–57 (2004).

two million refugees are currently hosted in Pakistan, almost one million in Iran, and over ten thousand in India.<sup>27</sup> Since a majority of the country is effectively outside the national government's control—and many terrorists operate directly from neighboring Pakistan, a sovereign state—most Afghanis have a justifiable fear of future injury, but are unable to seek refuge from a weak and impotent government.<sup>28</sup>

Similarly, in the Sudan, “[t]he government of Sudan has supported and orchestrated years of mass murder, rape, and the displacement of hundreds of thousands of Darfurians,”<sup>29</sup> a group ethnically distinct from the largely Arab northern Sudanese.<sup>30</sup> As a result, almost three million people have been displaced with several hundred thousand killed.<sup>31</sup> In contrast with conventional civil wars of the Cold War era, the victims of this ethnic cleansing are persecuted by government-sponsored militias and mercenary terrorists based on ethnic and cultural distinctions, as well as due to traditional political opportunism.<sup>32</sup> Attempts by the afflicted to flee to neighboring countries have created a significant diaspora of vulnerable refugees unable to seek protection from their government, their indirect persecutor.<sup>33</sup>

Although distinguishable on the facts and causes, all three conflicts evince a common principle: targeted persecution of entire populations in furtherance of particular religious, sectarian, or political objectives. Importantly, although many of the refugees have presently relocated to

27. U.S. DEP'T OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2009: REPORT TO THE CONGRESS 44 (2009) [hereinafter PROPOSED REFUGEE ADMISSIONS 2009].

28. James Kitfield, *The Neglected Front*, NAT'L J., Feb. 9, 2008, at 36, 38.

29. Mary T. Reynolds, Note, *Legitimizing the ICC: Supporting the Court's Prosecution of Those Responsible in Darfur*, 30 B.C. THIRD WORLD L.J. 179, 206 (2010).

30. Jamie A. Mathew, *The Darfur Debate: Whether the ICC Should Determine that the Atrocities in Darfur Constitute Genocide*, 18 FLA. J. INT'L L. 517, 539 (2006) (“[T]he United States and the United Nations . . . pronounc[ed] that the tribes victimized in Darfur are a distinct ethnic group from their attackers and the conflict is based on ethnicity.”).

31. Colum Lynch, *International Criminal Court To Issue Arrest Warrant for Sudan's Bashir*, WASH. POST, Feb. 12, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/11/AR2009021103951.html>.

32. See, e.g., Noah Bialostozky, *Overcoming Collective Action Failure in the Security Council: Would Direct Regional Representation Better Protect Universal Human Rights?*, 15 BUFF. HUM. RTS. L. REV. 1, 3 n.10 (2009) (“[G]overnment forces and the Janjaweed have waged a systematic campaign of ethnic cleansing against the civilian population of Darfur, Sudan.”); Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 208 (2008) (noting that the Sudanese government committed genocide and ethnic cleansing in part “to clear areas surrounding its oil concessions in Southern Sudan.”).

33. See *Iraq: Rhetoric and Reality: The Iraqi Refugee Crisis*, 8 (June 15, 2008), <http://www.amnesty.org/en/library/asset/MDE14/011/2008/en/2e602733-42da-11dd-9452-091b75948109/mdc140112008eng.pdf>; 2007 *Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons*, 7 (June 17, 2008), <http://www.unhcr.org/statistics/STATISTICS/4852366f2.pdf>.



neighboring countries, their presence in these nations is undeniably tenuous and temporary. Generally, such refugees lack legal status and most basic rights in the host countries.<sup>34</sup> More recently, many host nations—responding to domestic pressure—have begun to restrict entry and to make life utterly untenable for the fleeing diasporas, pressuring the refugees to either return to their home country or to resettle elsewhere.<sup>35</sup> Witnessing no abatement in terrorist violence in any of the failing nations, these refugees will inevitably require an alternative locale for resettlement at some point in the near future.

Current asylum law provides that these refugees would find such an opportunity for settlement in the United States. Indeed, the number of refugee arrivals in the United States has increased from a low of 26,776 in the immediate aftermath of the September 11th attacks in 2002, to 60,108 refugee arrivals in 2008.<sup>36</sup> Similarly, the number of individuals granted asylum has almost tripled since the end of the Cold War period in 1990.<sup>37</sup> Accordingly, the continuing escalation of terrorist persecution will likely increase the number of refugees seeking refuge in the United States.

### III. ASYLUM LAW COVERAGE

To determine whether the emergence and proliferation of modern terrorism renders the United States vulnerable to an onslaught of refugees from the aforementioned nations, it is imperative first to understand the scope of eligibility requirements for asylum. At its core, modern asylum policy is supposed to reflect the United States' traditional role as a haven of freedom from persecution. By providing refuge and opportunity, this policy is intended to signify the nation's position as a global defender of human rights and freedoms, particularly in comparison to other less-generous hegemonies. Accordingly, in 1980, Congress amended the original Immigration and Nationality Act ("INA") to include a sec-

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34. Roberta Cohen, *Iraq's Displaced: Where To Turn?*, 24 AM. U. INT'L L. REV. 301, 310 (2008).

35. *Id.* at 307–08; Lauren Fouda, *Compulsory Voluntary Repatriation: Why Temporary Protection for Sudanese Asylum-Seekers in Cairo Amounts to Refoulement*, 14 GEO. J. ON POVERTY L. & POL'Y 511, 527 (2007) (discussing UNHCR's and Egypt's limited allocation of funds for refugee services); Meri Melissi Hartley-Blecic, *The Invisible Women: The Taliban's Oppression of Women in Afghanistan*, 7 ILSA J. INT'L & COMP. L. 553, 580 (2001) (discussing abuses of Afghani refugees in Pakistan, including denial of aid, bribery, rape, theft, and assault).

36. U.S. DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STAT., 2008 YEARBOOK OF IMMIGRATION STATISTICS 40 (2009) [hereinafter 2008 IMMIGRATION STATISTICS].

37. *Id.* at 43. The report notes that 8472 individuals received asylum in 1990, compared to 22,930 individuals who received asylum in 2008. *Id.* Importantly, these statistics exclude information pertaining to the total number of asylum applicants, merely tracking the number actually granted asylum.

tion defining refugees, thereby enabling the immigration administrators to better determine whether a particular applicant qualified for asylum.<sup>38</sup> Including the revision, the current INA states:

The term "refugee" means . . . any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .<sup>39</sup>

Interpreting this statutory language, the Board of Immigration Appeals succinctly summarized the four primary elements that an applicant claiming asylum as a refugee must satisfy: (1) the applicant must have a fear of persecution; (2) this fear must be well-founded; (3) the persecution must be motivated by race, religion, nationality, membership in a specific social group, or political opinion; and (4) the asylum applicant must be unable to return to the country of his nationality or last residence due to the established or well-founded fear of persecution.<sup>40</sup> Additionally, the asylum applicant carries the burden of proof to establish that he or she fulfills the above elements; these may be demonstrated through either credible testimony of the applicant or through corroborating evidence.<sup>41</sup>

An individual may qualify as a refugee and receive asylum regardless of whether the applicant is outside the territorial boundaries of the United States or within. A person seeking protection in the United States, while physically outside the country, may be admitted through the Overseas Refugee Program by satisfying the above requirements of section 1101(a)(42).<sup>42</sup> Alternatively, an individual already physically present in the United States may receive asylum by affirmatively demonstrating their status as a refugee, also within the meaning of the same statutory section.<sup>43</sup>

Section 1101(a)(42)'s requirement of persecution is particularly relevant for understanding the state of United States asylum law in the terrorism age. As an initial matter, an asylum applicant must advance "specific facts demonstrating that he has actually been the victim o[f]

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38. Refugee Act of 1980, Pub. L. No. 96-212, §§ 201(a)(42), 94 Stat. 102-03 (1980) (codified as amended at 8 U.S.C. § 1101(a)(42) (1980)).

39. 8 U.S.C. § 1101(a)(42) (2006).

40. See, e.g., *In re Sanchez*, 19 I. & N. Dec. 276, 283 (BIA 1985).

41. 8 C.F.R. § 208.13(a) (2007).

42. See 8 U.S.C. § 1157(c)(1)-(4) (2006).

43. See 8 U.S.C. §§ 1158(a)(1), (b)(1)(A) (2006).

persecution or has good reason to believe that he will be singled out for persecution.”<sup>44</sup> Among others, some actions that “rise above mere harassment” to constitute persecution include “detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture.”<sup>45</sup> There is some disagreement among the courts regarding the specific types of behavior that constitute persecution in each individual situation.<sup>46</sup> Nevertheless, it is well established that an asylum applicant must only present a “subjectively genuine and objectively reasonable fear” of cognizable persecution to receive asylum.<sup>47</sup> The Supreme Court has further clarified that “so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution; it is enough that persecution is a *reasonable possibility*.”<sup>48</sup> Additionally, an “alien who establishes past persecution” is logically “presumed to have a well-founded fear of persecution.”<sup>49</sup>

Importantly, the federal regulations governing asylum explicitly provide that “the asylum officer or immigration judge *shall not require* the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution,”<sup>50</sup> a circumstance particularly applicable to asylum applicants fleeing wide-spread terrorism.<sup>51</sup> So long as the applicant establishes a “pattern or practice in [the asylum applicant’s] country . . . of persecution of a group of persons similarly situated to the applicant,” and can establish “his or her own inclusion in, and identification with, such group of persons,” the asylum seeker can easily establish past persecution and a reasonable fear of per-

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44. *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000) (internal citations omitted).

45. *See, e.g., Begzatowski v. INS*, 278 F.3d 665, 669 (7th Cir. 2002) (internal citations omitted).

46. *Compare Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000) (defining persecution as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate”) (internal citations omitted) with *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that “persecution is an extreme concept that does not include every sort of treatment our society regards as offensive”) (internal citation omitted).

47. *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000) (internal citation omitted); *see also Pieteron v. Ashcroft*, 364 F.3d 38, 43 (1st Cir. 2004).

48. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (rejecting a “more likely than not” standard and finding that “a 10% chance of being shot, tortured, or otherwise persecuted” may suffice to establish well-founded fear) (emphasis added) (internal citation omitted).

49. *See, e.g., Avetova-Elisseva*, 213 F.3d at 1195 (internal citation omitted); *Gomes v. Gonzales*, 473 F.3d 746, 753 (7th Cir. 2007) (internal citation omitted).

50. 8 C.F.R. § 208.13(b)(2)(iii) (2007) (emphasis added).

51. Certainly, where a refugee fleeing one of the terrorism affected nations can demonstrate an individualized fear of persecution, such candidate would qualify for asylum in the same way as any other applicant with a well-founded individualized fear of persecution. This Essay focuses primarily upon applicants who cannot demonstrate individualized danger apart from the terrorism targeting their religious, ethnic, racial, national, or political group.

secution upon return.<sup>52</sup>

Pursuant to the statutory text, refugees fleeing terrorism in Iraq, Afghanistan, and Sudan would qualify for refugee treatment. As discussed, in the three mentioned countries, among others, terrorism and violence are daily occurrences affecting entire communities without any advanced warning. Such terrorist activity can take on various iterations of potential cruelty and viciousness, but undeniably targets civilians based precisely on the sectarian, religious, national or political distinctions protected by the INA.<sup>53</sup> As a result, wide swaths of refugees fleeing these terrorism-prone states could persuasively argue that for persons similarly situated, persecution—in the form of possible death, injury, and torture—is at least a “reasonable possibility” in their home country,<sup>54</sup> if not an apparent probability in many contexts. Under these circumstances, the refugees could demonstrate the requisite “subjectively genuine and objectively reasonable” fear of being persecuted necessary for claiming and receiving asylum in the United States.<sup>55</sup> Moreover, as terrorism continues unabated in each nation, the refugees could demonstrate an inability to repatriate without exposing themselves to a reasonable possibility of persecution. As such, the multitude of prospective refugees applying for asylum on the basis of a legitimate fear of terrorism in their home country would likely satisfy the legal definition for a “well-founded fear” of persecution.<sup>56</sup>

Significantly for this terrorism analysis, “[t]here is no rule requiring that persecution actually be directed by the state or by an organized political party.”<sup>57</sup> Nonetheless, absent direct government involvement in

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52. 8 C.F.R. § 208.13(b)(2)(iii)(A)–(B); *see also* *Pierson*, 364 F.3d at 44; *Ndom v. Ashcroft*, 384 F.3d 743, 754 (9th Cir. 2004) (finding particularized prosecution unnecessary to demonstrate persecution even in the context of prevalent violence, as long as the applicant demonstrates a “[personal] nexus to a protected ground[s.]”); *M.A. A26851062 v. INS*, 858 F.2d 210, 214 (4th Cir. 1988) (finding it unnecessary for an asylum applicant to prove fear of being singled out for persecution if evidence exists that “members of his group, which includes those with the same political beliefs of the petitioner, are routinely subject to persecution”) (internal citation omitted).

53. In many instances, innocent bystanders are targeted based upon their presence in a particular ethnic section of the country or their participation in activities dominated by specific ethnic groups.

54. *See* *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

55. *See* *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000) (internal citation omitted).

56. *See, e.g.,* *Elias v. Gonzales*, 490 F.3d 444, 453–55 (6th Cir. 2007) (Merritt, J. concurring) (noting that persecution of a religious and ethnic minority by insurgents and Muslim extremist organizations may constitute grounds for granting asylum in light of the “climate of extreme violence” existing in Iraq).

57. *Bace v. Ashcroft*, 352 F.3d 1133, 1138 (7th Cir. 2003) (finding persecution where ousted politician was subjected to injuries, threats, and torture by politically-motivated attackers for refusing to certify an election).

the alleged persecution, an alien applicant must still satisfy an important requirement of the asylum statute: that the alien applicant be unable to avail himself of the protection of the government.<sup>58</sup> Persecution occurs when a government, either directly or by abetting private discrimination, “provid[es] protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct.”<sup>59</sup> In fact, to be considered persecution, an applicant must come forward with evidence establishing a clear connection between the alleged actions and the government by showing that the authorities were either unwilling or unable to protect the victim against the private actors.<sup>60</sup> Therefore, while persecution does not need to be perpetrated by the government unequivocally, an applicant claiming persecution by private individuals is not “persecuted” under the asylum statute unless the government either condones the attacks or is “complete[ly] helpless[ ]” to protect the victim.<sup>61</sup>

Since many terrorist acts are perpetrated by non-governmental actors in a chaotic political environment, individuals can reasonably claim persecution by private individuals in spite of the government’s lack of direct control or participation in the terrorist activity. In fact, the situations in the three aforementioned countries represent paradigmatic instances of government inability or unwillingness to protect potential victims from terrorist and insurgent persecution. As evidenced over the last several years, both Iraq and Afghanistan lack the means and the energy to protect many of their residents from terrorist activity. Similarly, the Sudanese government has more than turned a blind eye to the plight of the refugees in the Darfur region, directly providing financial and military assistance to the militias perpetrating the majority of the ethnic cleansing.<sup>62</sup> In each context, the governments are “complete[ly] helpless[ ]”<sup>63</sup> or unwilling to prevent terrorist attacks that target civilian

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58. 2 AUSTIN T. FRAGOMEN, JR. ET AL., *IMMIGRATION LAW & BUSINESS* § 7:9 (2008); *see also* 8 C.F.R. § 208.13(b)(3)(i)–(ii) (2007).

59. *See, e.g.*, *Hor v. Gonzales*, 400 F.3d 482, 485 (7th Cir. 2005) (finding that a ruling party member could not avail himself of future protection in his home country regardless of his political affiliation).

60. *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1st Cir. 2005) (failing to find the necessary connection to government inaction or inability); *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (finding that government’s unwillingness or inability to control private actors is a “factual question that must be resolved based on the record in each case”); *Khachatryan v. Ashcroft*, 86 F. App’x 207, 211 (7th Cir. 2004) (holding that an asylum applicant failed to show that the government “either orchestrated or sanctioned” the actions by failing to offer assistance).

61. *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000) (declining to find persecution where the beating of a political activist, rather than being orchestrated or sanctioned by the authorities, was actually perpetrated by three miners protesting the government’s democratic reforms) (internal citation omitted).

62. *See* Lydia Polgreen, *Scorched-Earth Strategy Returns to Darfur*, N.Y. TIMES, Mar. 2, 2008, <http://www.nytimes.com/2008/03/02/world/africa/02darfur.html>.

63. *See Roman*, 233 F.3d at 1034.

populations. Because such potential asylum applicants could satisfy the statutory requirement that they be unable to avail themselves of the protection of the government,<sup>64</sup> refugees from these regions could demonstrate that they cannot return to their home country due to a tangible fear of terrorist violence and persecution, as required by federal administrators.<sup>65</sup>

Finally, the last statutory element for qualifying for asylum is the requirement of belonging to or identifying with a targeted race, religion, nationality, or particular social group, or holding a certain political opinion.<sup>66</sup> As previously discussed, asylum applicants fleeing the situations in Iraq, Afghanistan, and Sudan are motivated to flee terrorist persecution precisely by the enumerated racial, religious, ethnic, and political affiliations. Therefore, if considering the statutory language alone, these refugees are to be accorded the protection of the United States' asylum law, so long as they can demonstrate the requisite fear of persecution discussed above.

A potential obstacle to claiming asylum based upon the type of terrorism described above results from judicial reticence at attributing asylum eligibility to "random danger faced by the population as a whole . . . ."<sup>67</sup> Historically, asylum applicants needed to demonstrate an individualized fear of persecution to receive asylum in the United States.<sup>68</sup> And some courts interpreted the asylum regulations discussed above to require "specific information showing a real threat of individual persecution,"<sup>69</sup> rather than accepting as sufficient evidence of persecution to a similarly situated general population. Indeed, administrators and courts could potentially exercise their discretion generally to preclude the application of asylum law to refugees fleeing terrorism.

Such an approach, however, ignores both the statutory text of the federal regulations, as well as the reality that terrorism presents a unique quandary due to its wide scope and effect. A refugee fleeing the aforementioned terrorism-riddled states would encounter little difficulty demonstrating a "'pattern or practice . . . of persecution of a group of persons similarly situated to the applicant,"'<sup>70</sup> specifically motivated by sectarian, religious, or politically oriented impulses. The most recent

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64. See *Hor*, 400 F.3d at 485.

65. See *In re Sanchez*, 19 I. & N. Dec. 276 (BIA 1985).

66. 8 C.F.R. § 208.13(b)(2)(iii)(A)–(B) (2007); 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 33.04[4] (Matthew Bender rev. ed., 2010).

67. *Odisho v. Gonzales*, 206 F. App'x 465, 470 (6th Cir. 2006); see also *M.A. A26851062 v. INS*, 899 F.2d 304, 315 (4th Cir. 1990) (noting that courts generally reject asylum applications based on fears of general violence).

68. *Odisho*, 206 F. App'x at 470.

69. *Id.* (internal citation omitted).

70. *Sugiarto v. Holder*, 586 F.3d 90, 94 (1st Cir. 2009) (citing 8 C.F.R. § 1208.13(b)(2)(iii)).

jurisprudence emphasizes that “[t]he idea behind the ‘pattern or practice’ exception to the individualized proof requirement is that, where the persecution of a group on the basis of a protected ground is sufficiently widespread, a ‘reasonable possibility’ of persecution is evident and evidence of individualized targeting becomes unnecessary.”<sup>71</sup> A refugee from terrorism is not attempting to escape random violence or the general civil strife that previously occupied asylum administrators and courts during the Cold War. Instead, modern terrorism presents the requisite “pattern or practice”<sup>72</sup> of unavoidable persecution premised on discriminatory and protected grounds. Indeed, “[t]he more evidence of group targeting an . . . applicant proffers, the less evidence of individually specific evidence [s]he needs to [satisfy her ultimate burden of proof].”<sup>73</sup> Accordingly, in the terrorism context, the severity of targeting of disfavored groups undermines the counter argument that a refugee from one of the highlighted countries must advance “individually specific evidence” of certain persecution.<sup>74</sup>

The consequences of “threat[s] to an individual’s life or freedom [are] not lessened by the fact that the individual resides in a country where the lives and freedom of a large number of persons are threatened.”<sup>75</sup> Such an actuality may actually heighten the credibility of a fear of persecution.<sup>76</sup> At bottom, the terrorism context implicates the asylum laws presenting a legitimate fear of persecution targeting ethnically, religiously, or politically distinct individuals.

#### IV. PURPOSES UNDERLYING ASYLUM LAW

Considering the potentially broad applicability of asylum regulations to the multitude of prospective asylum applicants wrought by the terrorism age, whether asylum law should, on a normative level, shield refugees fleeing terrorism becomes the salient question. Section III established that the asylum laws, if read for their plain meaning, seemingly apply to most refugees from terrorism-prone nations. Thus, before answering the normative question, it is prudent first to determine

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71. *Id.* at 97 (citing *Chen v. INS*, 195 F.3d 198, 203 (4th Cir. 1999)); *see also*, *Vakeesan v. Holder*, 343 F. App’x 117, 126 (6th Cir. 2009) (noting that “[a]n alien ‘may prevail on his asylum claim even without credible evidence’ of potential individualized persecution” (quoting *Krishnapillai v. Holder*, 563 F.3d 606, 620 (7th Cir. 2009))).

72. *Sugiarto*, 586 F.3d at 97.

73. *Tampubolon v. Holder*, 598 F.3d 521, 527 (quoting *Wakkary v. Holder*, 558 F.3d 1049, 1064 (9th Cir. 2009)), *opinion amended and superseded on denial of reh’g* by 610 F.3d 1056 (9th Cir. 2010).

74. *Id.*

75. *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1984).

76. *Id.*

whether Congress, in crafting the regulations, actually intended or would have intended to protect such refugees from domestic persecution.

While the final text of a statute should usually reflect the legislative purpose,<sup>77</sup> where congressional intent is ambiguous and difficult to immediately discern from the plain text, administrative agencies and courts often rely upon “the legislative history underlying its passage” to determine legislative intentions.<sup>78</sup> By turning to such extrinsic evidence, it may be possible to gauge how Congress—the framer of the United States’ asylum policy—would resolve the instant question if it were to consider the matter at the present time.<sup>79</sup>

In the instant situation, the legislative history offers very little guidance to recommend an alternative resolution of the salient question versus that suggested by the plain text, namely, that refugees from terrorism-prone countries such as Iraq, Afghanistan, and Sudan are eligible for asylum in the United States. In the run-up to the enactment of the 1980 Refugee Act, Congress struggled with a fragmented refugee admissions policy and considered various bills intended to protect persecuted refugees.<sup>80</sup> The legislative history of these bills provides guidance for understanding the motivations that ultimately led to the enactment of the 1980 Act. In one instance of such precursor asylum legislation, Congressman Peter Rodino, a strong advocate for the ultimate 1980 legislation, highlighted Congress’s concern for “uphold[ing] America’s tradition as an asylum for the oppressed,” and for offering “quick, effective, and affirmative action to permit the orderly entry into the United States of a fair share of refugees seeking freedom.”<sup>81</sup> Similarly, the designers and administrators of alternative, but comparable, asylum legislation emphasized the “national ethos of humanitarian concern for the

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77. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (“In construing statutes, ‘we must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.’” (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962))).

78. Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1974 (2007). Cross also observes that the use of legislative history reflects “a relatively minimalist approach to decisionmaking.” *Id.* at 1972; see also Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) (discussing the benefits of legislative history in helping “a court understand the context and purpose of a statute”).

79. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990) (noting that the hierarchy of legislative sources correlates with the comparative reliability of each source).

80. See Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (analyzing legal responses to refugee and asylum issues in the post-World War II context).

81. Kathryn M. Bockley, Comment, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT’L L. & COM. REG. 253, 280 (1995) (statement Rep. Peter W. Rodino).



uprooted and persecuted.”<sup>82</sup> A subsequent draft of asylum legislation emphasized the responsibility to protect aliens “uprooted by catastrophic natural calamity, civil disturbance or military operations and who [are] unable to return to [their] usual place of abode.”<sup>83</sup> Numerous other legislative comments to the various differing bills underscore the humanitarian concerns underlying all asylum legislation, confirming the earlier observation that the protection of terrorism refugees is an important national value.

In finally reaching a compromise by enacting the comprehensive 1980 Refugee Act, Congress specifically indicated its intent to abide by “the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands.”<sup>84</sup> The Act codified “an historic tenet of American political policy,”<sup>85</sup> “consistent with this country’s tradition of welcoming the oppressed of other nations,”<sup>86</sup> and confirmed the nation’s “‘deep dedication . . . [and] concern for the homeless, the defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes.’”<sup>87</sup> The broad statutory text adopted in the final legislation and discussed in Section III reflects these policy interests.

Considering the aforementioned goals, millions of refugees from terrorist-prone areas could plausibly argue that they constitute the oppressed and persecuted individuals for whom Congress expressed such innate concern. As targets of terrorists motivated by ethnic, racial, and political stimuli, these refugees could credibly assert that they are defenseless and unable to return to their countries of origin due to a well-founded fear of persecution. Moreover, refugees from Iraq and Afghanistan in particular could persuasively advance an additional argument: that they are entitled to particular solicitude considering the United States’ involvement in contributing to the authority vacuum that factored in the oppressive terrorist campaigns.

One could counter, on the other hand, that Congress’s concern for protecting defenseless refugees related specifically to the Cold War era concerns of the time of passage. Lacking clairvoyance, the legislators’ then-current political dialogue—as expressed through the legislative his-

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82. Robert G. Rooney, *The Power to Preempt an Application for Asylum: Improper Policy for American Asylum Law*, 5 GEO. IMMIGR. L.J. 641, 652 n.78 (1991) (statement of James Carlin).

83. Refugee and Displaced Persons Act of 1978, S. 2751, 95th Cong., 124 CONG. REC. 3746 (1978).

84. Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980).

85. *Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the H. Comm. on Foreign Affairs*, 96th Cong. 186 (1979) (statement of David Carliner, General Counsel, American Civil Liberties Union).

86. H.R. REP. NO. 96-608, at 17 (1979).

87. Anker & Posner, *supra* note 80, at 63 (citing 126 CONG. REC. 1519, 1522 (1980)).

tory—did not and could not have anticipated the effects of modern terrorism on refugee populations. Accordingly, the humanitarian concerns expressed should not be extrapolated to apply to the instant environment.

Although plausible, this view partially ignores the statutory evolution and the language ultimately enacted by Congress in the 1980 Refugee Act, whatever the policy considerations may have been. In fact, the transformation of the federal regulations provides further guidance in deciphering Congress's disputed intent to cover asylum situations borne out of modern terrorism. Prior to the enactment of the 1980 Act, "America's declared refugee policy was expressly anti-Communist," intended to undermine the legitimacy of communist regimes while bolstering the humanitarian credentials of the United States.<sup>88</sup> While the United Nations Convention Relating to the Status of Refugees focused primarily upon persecution in determining refugee status, the precursor to the 1980 Refugee Act—the United States Refugee Relief Act of 1953—departed from this "nonpartisan approach," and instead "specified that refugees must come from communist or communist-dominated countries."<sup>89</sup> The 1980 bill eliminated such favoritism for communist-related refugees. The legislation noted that the Cold War definition was "clearly unresponsive to the current diversity of refugee populations and [did] not adequately reflect the United States' traditional humanitarian concern for refugees throughout the world."<sup>90</sup>

This update to the language considerably broadened the scope of asylum law to a wider array of refugees, providing numerous persecuted individuals with a previously unavailable opportunity to apply for asylum in the United States regardless of their nation of origin. Notably, the elimination of the communism requirement buttresses the argument that the millions fleeing terrorist persecution in Iraq, Afghanistan, and Sudan constitute some of the many diverse populations outside the realm of the communist-dominated world considered by Congress. As such, from a legislative intent standpoint, Congress may have intended to consider these refugees eligible for asylum.

Moreover, along with eliminating preferences for migrants from communist countries, the 1980 Act further tracked the United Nations definition of a refugee in adopting the now common requirement for "persecution or a 'well-founded fear' of persecution."<sup>91</sup> The prior incar-

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88. Kenneth D. Brill, Note, *The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*, 32 CLEV. ST. L. REV. 117, 119 (1983).

89. *Id.* at 122; see also Refugee Relief Act of 1953, Pub. L. No. 203-336, § 2(a)-(c), 67 Stat. 400 (1953).

90. H.R. REP. NO. 96-608, at 9.

91. Downes, *supra* note 23, at 484 (internal citation omitted).

nations of immigration law required an asylum applicant to demonstrate a "clear probability" that he would be targeted for persecution if not granted asylum.<sup>92</sup> The Supreme Court, basing its decision upon an extensive review of the legislative history and administrative and judicial statements on the matter, determined that Congress intended the updated standard to be more generous to asylum applicants than the previous "clear probability" standard.<sup>93</sup> As such, the Court lowered the burden of proof for asylum petitioners. Consequently, a well-founded fear of persecution may now be found upon the mere showing of a "reasonable possibility" of persecution.<sup>94</sup>

This element of congressional intent is particularly significant for applicants seeking asylum from terrorist persecution. Although many refugees who fled the conflicts in Iraq, Afghanistan, and Sudan could arguably persuade a court of a clear probability that the general protected group to which they belong would be targeted by terrorists based on their race, religion, or political membership, the government would counter that an individual could not prove the clear probability of being harmed by a terrorist attack. In contrast, considering the sheer number of terrorist attacks and the millions who fled their homes out of a well-founded fear, a potential asylum applicant would, at a minimum, be able to demonstrate a reasonable possibility of being targeted in a terrorist attack in their home country. While the true meaning of a reasonable well-founded fear can only be determined through case-by-case adjudication,<sup>95</sup> the amendment suggests that Congress's abandonment of the "clear probability" standard was purposely intended to increase the likelihood of receiving asylum in circumstances where individual persecution is difficult to establish, such as the instant terrorist persecution scenario.

Considering the several aforementioned factors, the legislative history appears to suggest that Congress's intent would have been to cover victims of terrorist persecution through asylum law. In fact, the history intimates that Congress passed the 1980 Refugee Act to expand the scope and availability of asylum to a broader subset of peoples in line with the United States' tradition of welcoming the persecuted and oppressed. Alternatively, the statutory evolution and the history may merely suggest an inability by the legislators to grasp or "address every important policy question that might arise under their statutes."<sup>96</sup> Indeed, it is perfectly reasonable to assume that in crafting the 1980

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92. *INS v. Stevic*, 467 U.S. 407, 413 (1984).

93. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 421 (1987).

94. *Id.* at 440 (citing *Stevic*, 467 U.S. at 424-25).

95. *Id.* at 448.

96. Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and*

Refugee Act, Congress may not have fathomed the ramifications of its textual choices for future situations where entire populaces are targeted by terrorists based upon religious, racial, or political distinctions.<sup>97</sup> Despite the persuasive weight bestowed upon legislative history, it is neither a necessarily accurate predictor of current legislative behavior, nor can it properly balance the policy factors affecting present-day implementation of asylum law. While the statutory language and legislative narration seemingly afford solicitude to refugees fleeing terrorism, asylum law should not operate in a policy vacuum where the benefits are clearly outweighed by the detriments.

## V. IMPLICATIONS FOR REFUGEE POLICY

Even if existing law might apply to the multitude of refugees fleeing terrorist-inspired conflicts under both the textual reading of the statute and pursuant to congressional intent, the question remains whether it is sound policy to apply the asylum laws to refugees from Iraq, Afghanistan, and Sudan. From both a practical and normative perspective, the answer is no.

### A. *Numerical Restrictions Encourage Arbitrary Judgments and Illegal Entry*

Presently, millions of potential asylum applicants are in exile, having fled their homes due to racial, religious, or politically-motivated terrorist persecution.<sup>98</sup> From a practical standpoint, current asylum law is not responsive to this terrorism-created reality, which raises two predicaments for the United States. The first concern is that having satisfied the legal requirements for eligibility under the relevant statute, 8 U.S.C. § 1157, the processing and admission of many of these refugees would entail reliance upon arbitrary distinctions. The second concern is the anxiety that the mass of refugees discussed above may now seek asylum in the United States pursuant to 8 U.S.C. § 1158.

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*Institutional Defense of Judicial Power over Statutory Interpretation*, 96 Nw. U. L. REV. 1239, 1241 (2002).

97. See *id.* at 1253–54, 1296 (discussing James Madison’s observation in the Federalist that “[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal[,] . . . until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

98. See, e.g., Hannibal Travis, *After Regime Change: United States Law and Policy Regarding Iraqi Refugees, 2003-2008*, 55 WAYNE L. REV. 1007, 1008–09 (2009) (noting that “2.5 million refugees had fled Iraq” by 2008 due to an increase “of persecution on religious, sectarian, and ethnic grounds.”); William Kirtley, *The Tampa Incident: The Legality of Ruddock v. Vadarlis Under International Law and the Implications of Australia’s New Asylum Policy*, 41 COLUM. J. TRANSNAT’L L. 251, 258 (2002) (noting that 3.6 million Afghans fled persecution “‘from one of the world’s most repressive regimes’”) (internal citations omitted).

On both points, the fear that terrorist persecution will result in “substantially greater refugee admissions than the country could absorb” is not unreasonable.<sup>99</sup> But, Congress partially allayed this anxiety in passing the 1980 refugee legislation. There, Congress noted that “merely because an individual or group of refugees comes within the definition [for asylum] will not guarantee resettlement in the United States.”<sup>100</sup> Pursuant to the 1980 Refugee Act, total annual refugee admissions are limited by two formulas. As an initial matter, the President, after consultation with Congress, may allocate a specific number of refugee admissions as “justified by humanitarian concerns or . . . other[ ] . . . national interest[s]” at the start of each fiscal year.<sup>101</sup> In recent years, the refugee admissions allotment has called for 80,000 refugee admissions, divided among applicants from Africa, East Asia, Central Asia, Europe, Latin America, the Caribbean, the Middle East, and an unallocated reserve.<sup>102</sup>

Alternatively, the statute authorizes the President, after further cabinet-level consultation with Congress, to admit additional refugees if he determines that an emergency refugee situation exists and the additional admissions are “justified by grave humanitarian concerns or . . . national interest.”<sup>103</sup> These additional refugees may then be admitted during “the succeeding twelve months as refugees of special humanitarian concern.”<sup>104</sup> Both methods of admission clearly limit the ability of refugees to gain authorized access to the United States, reducing the likelihood that innumerable refugees from countries severely affected by terrorism would flood the United States by using the legal process.

The notable loophole in this procedure, however, is that the numerical restrictions only apply to aliens seeking refugee status while outside the United States. Indeed, the numerical restrictions discussed above are “for persons designated as refugees outside of the United States and subsequently issued refugee visas for admission to the United States,” through the previously mentioned Overseas Refugee Program.<sup>105</sup> In contrast, refugees who gain access to the United States through alternative routes may apply for asylum without counting against the allocation restrictions, regardless of the legality of the means used to enter the United States.<sup>106</sup> As such, assuming the millions of refugees fleeing terrorist persecution in Iraq, Afghanistan, and Sudan could each demon-

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99. H.R. REP. NO. 96-608, at 10 (1979).

100. *Id.*

101. 8 U.S.C. § 1157(a) (2006).

102. PROPOSED REFUGEE ADMISSIONS 2009, *supra* note 27, at 19.

103. 8 U.S.C. § 1157(b) (2006).

104. GORDON ET AL., *supra* note 66, at § 33.04(8)(a).

105. *Id.*; see also 8 U.S.C. § 1157.

106. GORDON ET AL., *supra* note 66, at § 33.04(8)(a); 8 U.S.C. §§ 1157–58 (2006).

strate sufficient fear of persecution,<sup>107</sup> such refugees would be eligible for asylum in the United States in numbers directly proportional to the number capable of reaching United States territory.

Regardless of the means by which individuals fleeing terrorism seek asylum in the United States, the existing laws fail to provide a flexible framework for adjusting admissions to account for increased demand. As previously mentioned, in addition to the refugees seeking asylum from within the United States, the overseas refugee admissions allotment calls for 80,000 refugee admissions annually; these admissions are divided amongst every continent.<sup>108</sup> Even if a small fraction of the millions of eligible refugees sought asylum, the government would encounter tremendous difficulty in distinguishing among a multitude of eligible individuals, each expressing a similar justified, but general, fear of terrorist persecution in their homeland. Considering the strict numerical limitations for refugee admission, government administrators would be forced to pick and choose a limited number of applicants deemed most deserving of asylum in the United States.

Yet despite this pressure, it is unclear how government authorities would distinguish among these refugees. Pursuant to federal regulations, immigration judges and asylum officers exercise wide discretion in granting or denying asylum—the decision is based upon a personal interview with the applicant and corroborating documents and evidence.<sup>109</sup> This exercise of discretion through the adjudication of asylum cases has often “fallen below the minimum standards of legal justice,” in the words of Judge Posner.<sup>110</sup> Indeed, for cases referred by asylum officers to immigration judges, the asylum officer corps holds an error rate of over 50%, signifying a profound failure to adequately understand and adjudicate valid requests for protection.<sup>111</sup> As a result, several Circuit Courts of Appeals have expressed dismay at the “pattern of arbitrary, unlawful, and biased rulings” in asylum adjudication.<sup>112</sup> The potential influx of numerous similarly situated refugees would likely exacerbate the already seeming prevalence of arbitrary decision-making by asylum administrators. Since, as demonstrated above, a significant

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107. See discussion *supra* Part III.

108. PROPOSED REFUGEE ADMISSIONS 2009, *supra* note 27, at 19.

109. 8 C.F.R. § 208.14 (2007).

110. David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. 1359, 1390 (2007).

111. Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. INT'L. L.J. 61, 104–05 (2009) (noting that many asylum officers lack “an educational background that is appropriate for their decision-making authority,” namely, a law degree).

112. Zaring & Baylis, *supra* note 110, at 1390 (citing *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005) and *Sukwanputra v. Gonzales*, 434 F.3d 627 (3d Cir. 2006)).

number of these refugees could demonstrate the legally-mandated well-founded fear of persecution based on sectarian, religious, or political terrorism, the allocation limits indicate that numerous applicants would likely be rejected based upon a particular administrator's subjective—and often arbitrary—decision.

This result is unsurprising considering that the drafters of the 1980 legislation and its progeny could not have anticipated that millions of refugees would at the same time become eligible for asylum due to terrorism. Nevertheless, in light of the realities of the terrorism age, this situation presents a potential obstacle to achieving the United States' traditional mission of offering an asylum for those truly oppressed.

Besides the administrative burden of adjudicating asylum applications from terrorism refugees, the perverse incentive for refugees to physically enter the United States for purposes of seeking asylum is a further potential weakness of current policy. Technological advances and the easing of international travel restrictions are making access to the United States and its European allies less expensive, less burdensome, and very achievable.<sup>113</sup> In addition, the prevalence of illegal immigrants in the United States from impoverished countries throughout the world confirms that current immigration and border controls are largely incapable of preventing, or are unwilling to prevent, motivated individuals from attaining admission.<sup>114</sup> Arguably, few individuals are more motivated to enter the United States than those fleeing terrorism targeted at their religious, ethnic, or political group.<sup>115</sup> Moreover, as evidenced by al-Qaeda's prior success in legally placing its operatives within the United States, many refugees could potentially gain admission on temporary legal visas and subsequently request asylum. While most aliens who overstay their visas and illegal immigrants apprehended in the United States are eventually deported, refugees fleeing terrorist persecution would have a legitimate legal claim for remaining in the

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113. See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 357 (2001) (discussing the "technological advancements that make it easier and less expensive for people to travel great distances"); Ryszard Piotrowicz, *The UNHCR's Guidelines on Human Trafficking*, 20 INT'L J. REFUGEE L. 242, 242 (2008) (observing how the collapse of the Eastern Bloc resulted in greatly relaxed travel restrictions and "led to significant movements of people generally from east to west . . ."); Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 BUFF. HUM. RTS. L. REV. 5, 11 (2006) ("The lifting on travel restrictions and the opening up of borders have made it easier to enter the E.U. and move freely within it.").

114. Joel P. Trachtman, *Toward International Order in Migration and Trade?*, 101 AM. SOC'Y INT'L L. PROC. 301, 302 (2007) (noting "the ease of evading enforcement of legal restrictions" in international migration).

115. See generally *id.* (arguing that pressure to emigrate and general demand for migration is increasing due to human rights violations and domestic insecurity in poor nations).

United States and even for eventually receiving permanent residency status.<sup>116</sup>

Although the United States has experienced a dramatic increase in refugee and asylum admission,<sup>117</sup> it has not yet been overwhelmed with refugees. In fact, while millions of refugees from Iraq, Afghanistan, and Sudan technically qualify for asylum under applicable federal provisions, this reality has not translated into increases in overseas refugee admission from these countries between 2001 and 2005, the height of the refugee crises. Before September 11, 2001, the United States admitted 2473 Iraqis,<sup>118</sup> 2954 Afghans,<sup>119</sup> and 5959 Sudanese refugees<sup>120</sup>. While terrorism and persecution in Iraq, Afghanistan, and Sudan considerably increased thereafter, the United States gradually reduced refugee admissions from these terrorism-prone countries by 2005, admitting only 198 refugees from Iraq, 902 from Afghanistan, and 2205 from the Sudan.<sup>121</sup> The decreases were likely motivated in part by national self-interest. By limiting the number of refugees admitted from Iraq and Afghanistan, the United States avoided the impression that its involvement created a refugee crisis, requiring the resettlement of many foreign nationals in the United States.<sup>122</sup> Such a strategy also advanced the argument that conditions in the afflicted countries were improving due to the American government's efforts, despite evidence to the contrary.<sup>123</sup> Additionally, the United States may have limited admissions from the terrorism-prone nations due to fears of potential terrorists sneaking into the country by pretending to be refugees.<sup>124</sup> In any event, it is evident that the Cold War-era rules created a significant disconnect between legal eligibility for obtaining asylum and the actual attainment of refugee protection.

The numerical impact may soon change, however, particularly in the context of refugees gaining physical entry to the United States prior to applying for asylum. As discussed, until recently, countries bordering the terrorism conflict zones willingly, albeit unhappily, hosted millions

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116. See 8 U.S.C. § 1159(b) (2006).

117. See *supra* Part II.

118. Meital Waibsnider, Note, *How National Self-Interest and Foreign Policy Continue To Influence the U.S. Refugee Admissions Program*, 75 FORDHAM L. REV. 391, 412 n.187 (2006).

119. *Id.*

120. 2008 IMMIGRATION STATISTICS, *supra* note 36, at 40.

121. *Id.*

122. See Daniel L. Swanwick, Note, *Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror*, 21 GEO. IMMIGR. L.J. 129 (2006) (discussing the effect of foreign policy considerations upon the administration of asylum laws); Waibsnider, *supra* note 118, at 423 (arguing that decreased admissions from Iraq and Afghanistan correlate to the United States' interests).

123. See Waibsnider, *supra* note 118, at 422–23.

124. See *id.* at 422.



of refugees.<sup>125</sup> As the eagerness of these nations to continue their humanitarian mission wanes, the demand for resettlement and asylum elsewhere will logically increase multifold. Because many refugees will be unable or unwilling to return to their home countries, refugee social networks can play “a central role” in migration decisions.<sup>126</sup> In fact, social networks “are the most important source of information about destination countries” for asylum seekers, who “are unlikely to trust information disseminated by formal institutions.”<sup>127</sup> As information pertaining to the liberal asylum policy offered by the United States for those physically present within its borders percolates through the new refugee communities, the United States is likely to see a gradual increase in the quantity of asylum applications from terrorism refugees pursuant to section 1158’s numerically-unlimited asylum procedure rather than section 1157’s restricted Overseas Refugee Program.

In this climate, domestic law enforcement surrenders control over the influx of refugees, which becomes contingent upon external forces, namely, the severity of persecution in foreign countries, the willingness of third-party host countries to continue to house the refugees, the proximity of affected asylum seekers to the United States, and the willingness of neighboring nations to regulate their own borders, among others. While a plausible argument could be advanced that the probability of the nation being immediately overrun with illegally-admitted refugees is relatively small, such relinquishment of immigration control suggests that the asylum laws are nonetheless improperly suited to manage the humanitarian refugee crises arising in the terrorism age.

### B. *Doubtful National Interests and Moral Imperatives*

Concurrent with the practical difficulties of administering asylum policy in the terrorism age, the normative question of whether the asylum laws should protect terrorism refugees becomes salient. Because the granting of asylum to such refugees appears to serve different national interests than traditional asylum, the answer to this question counsels against an expansion of asylum’s function. In the post-World War II era, when refugee and asylum policy first gained recognition as an important government priority, asylum became primarily tied to advancing United

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125. Travis, *supra* note 98, at 1028–29; see also PROPOSED REFUGEE ADMISSIONS 2009, *supra* note 27.

126. Khalid Koser & Charles Pinkerton, *The Social Networks of Asylum Seekers and the Dissemination of Information About Countries of Asylum*, MIGRATION RESEARCH UNIT, U. C. LONDON, U.K. HOME OFF., 1,10, <http://www.homeoffice.gov.uk/rds/pdfs2/socialnetwork.pdf> (last visited Aug. 21, 2010) (defining social networks as family and friends, community organizations and associations, and intermediaries).

127. *Id.* at 15–16.

States foreign policy interests.<sup>128</sup> In line with the Cold War priorities of the time, the United States focused on admitting refugees from communist-dominated nations as part of a campaign of “psychological warfare” against the Soviet Union and its leadership.<sup>129</sup> By encouraging emigration from Eastern Bloc and allied nations, asylum policy endeavored to undermine the legitimacy and esteem of the communist construct.<sup>130</sup> Moreover, in striving to cultivate a positive global image, the granting of asylum to refugees fleeing communist states served to brand such states as oppressive persecutors, thereby furthering the appeal of democracy and capitalism as superior systems of government.<sup>131</sup> In this effort, the United States and other Western nations deliberately incorporated language in the United Nations asylum regulations, including the terms “well-founded fear” and “persecution,” to obtain a political advantage against the USSR.<sup>132</sup> Thus, each time it granted asylum based on the aforementioned grounds, the United States insinuated condemnation of a refugee’s state of origin.<sup>133</sup>

The advancement of these foreign policy considerations served as the basis for granting asylum to hundreds of thousands of refugees until the 1980 Refugee Act, which, as discussed in Section IV above, attempted to expand asylum eligibility to greater numbers of refugees and to minimize the emphasis on foreign policy as the motivating basis for granting asylum. Yet despite the language updates reflecting greater attention to altruistic humanitarian concerns, foreign policy considerations continued to play an intrinsic role in asylum decisions. Refugees from communist dominated regimes continued to receive asylum in disproportionately higher percentages than refugees from countries with which the United States enjoyed non-hostile relations.<sup>134</sup>

In the instant situation, there is minimal evidence to suggest that the grant of asylum to refugees from terrorism in Iraq, Afghanistan, or Sudan would promote the foreign policy objectives that motivated refugee policy for the duration of the Twentieth Century. With the collapse of communism, there is no longer a clearly identifiable enemy whose interests and legitimacy could be undermined simply by accepting refu-

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128. See Zaring & Baylis, *supra* note 110, at 1385 (discussing the historical development of asylum policy and its relevance to the current geopolitical climate).

129. Bockley, *supra* note 81, at 262.

130. *Id.*

131. See Swanwick, *supra* note 122, at 130.

132. See, e.g., 8 U.S.C. § 1101(a)(42) (2006) (using such language).

133. Matthew E. Price, *Politics or Humanitarianism? Recovering the Political Roots of Asylum*, 19 GEO. IMMIGR. L.J. 277, 309–10 (2004).

134. Arthur C. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REFORM 243, 253 (1984) (discussing the continued role of geopolitical considerations after the 1980 reforms).

gees. Because terrorism is usually perpetrated by either non-governmental organizations or by governments disinterested in international prestige, the granting of asylum to refugees fleeing such persecution would not serve to undermine or vilify any powerful nation-state or ideology. Additionally, considering the violent and often revolting tactics utilized by terrorist groups, United States asylum policy would be unlikely to further delegitimize organizations already viewed with disdain in the majority of the world. Similarly, asylum policy would minimally affect supporters of terrorism, who likely would view the refugee policy as a sign of weakness, an inability by the United States and its allies to protect Iraqi, Afghan, and Sudanese refugees in their partially occupied homelands.

An argument could be made that asylum policy "still presents an opportunity to cultivate an image of the United States as a 'beacon for freedom,'"<sup>135</sup> particularly in certain regions of the world where the United States has lost much of its luster as the foremost supporter of human rights, such as the Middle East. Although plausible, any public relations benefits accruing from the potential admission of thousands of refugees from Iraq, Afghanistan, and Sudan are tenuous, especially when compared with the significant cost of integrating thousands of impoverished refugees. As such, the national interest justifications historically relied upon as the bases for asylum law appear inapplicable in the terrorism context and do not justify the inclusion of millions of refugees fleeing terrorist persecution.

Arguably, asylum coverage of terrorism refugees could also be premised upon a moral obligation to provide shelter to oppressed allies, particularly in Iraq and Afghanistan where the United States unwittingly contributed to the rise of terrorist persecution. This argument finds some historical support in the use of asylum after the 1956 Hungarian Revolt against Soviet apparatchiks, whereby 40,000 Hungarians were granted refuge in the United States after the CIA funded and supported the ill-fated uprising.<sup>136</sup> Although this use of asylum accorded with the anti-communist ethos of the period, the strikingly large number of admitted refugees reflected a deeper sense of responsibility for contributing to the crisis. Similarly, in the case of Vietnamese, Laotian, and Cambodian refugees, the United States granted asylum to significant numbers out of "a sense of obligation to a people the United States had supported and then abandoned,"<sup>137</sup> rather than solely due to foreign policy considerations.

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135. Zaring & Baylis, *supra* note 110, at 1385.

136. Waibsnider, *supra* note 118, at 403.

137. Bockley, *supra* note 81, at 276.

Although this justification provides some support for utilizing existing asylum laws to protect Iraqi and Afghani refugees, there are clear distinctions between the multitudes of refugees targeted by terrorists as a result of their religious and sectarian loyalties and the refugees who directly aligned with United States insurgency efforts during the political wars of the Cold War. A more comparable example would involve Iraqis and Afghans who specifically fought with the United States against terrorist factions and now fear for their well-being due to this specific alliance. In this context, the United States would likely have a greater moral obligation to apply its asylum laws to protect the individual refugees. Such a principled obligation would not, however, extend to generally targeted refugees, making the application of asylum law to the thousands of terrorism-related refugees unwarranted on this basis.

Without a foreign policy imperative or a direct moral obligation to protect the refugees, the remaining justification for applying asylum law to the current terrorism conflicts must be premised on humanitarian concerns. As previously discussed, the asylum laws were updated in 1980 to better display America's commitment to human rights and the protection of the oppressed.<sup>138</sup> Yet in spite of these concerns, Congress expressed anxiety that a large number of refugees could potentially overwhelm the country's ability to absorb and integrate the influx.<sup>139</sup> Congress further emphasized the need to strictly limit and control the total number of refugees annually admitted.<sup>140</sup> Consequently, the nation's asylum policy is based upon an annual balancing of the humanitarian concern for refugees against the domestic costs of immigration and assimilation.<sup>141</sup>

In the instant terrorism context, it is unlikely that the high financial, cultural, and security burden of integrating thousands of foreign refugees from disparate backgrounds would skew the cost-benefit analysis in favor of applying the asylum laws to the multitudes of new refugees. Since most Iraqi, Afghani, and Sudanese refugees are destitute and escaped their nations under generally abhorrent circumstances, the government would need to allocate immense resources to provide for their health, energy, food, education, and general societal integration,<sup>142</sup> a

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138. See *supra* Part IV.

139. See H.R. REP. NO. 96-608, at 10 (1979).

140. See 8 U.S.C. § 1157(a) (2006).

141. See GORDON ET AL., *supra* note 66, at § 33.04[4].

142. See Benjamin Cook, Note, *Method in its Madness: The Endowment Effect in an Analysis of Refugee Burden-Sharing and a Proposed Refugee Market*, 19 GEO. IMMIGR. L.J. 333, 338 (2004) ("The political, environmental, or other strains that may come from admitting protection seekers can impose significant costs on a country, but . . . to what extent is simply too difficult to quantify."); Donald D. Slesnick II & Jennifer K. Poltrock, *Public Sector Bargaining in the Mid-90s (the 1980s Were Challenging, but This Is Ridiculous)—a Union Perspective*, 25 J.L. & EDUC.

burden that all of the current refugee-hosting countries have found unbearable.<sup>143</sup> Even ignoring the cultural differences and security implications, the United States is unlikely to finance such an expensive endeavor just for the sake of protecting human rights, without significant foreign policy benefits and without a sense of moral obligation. In fact, considering that greater admissions of terrorism refugees would incentivize other refugees to seek entry to the United States, one response to the potential asylum onslaught would actually favor lowering the number of annually admitted refugees as a disincentive.

Fundamentally, if the motivation behind United States policy is to protect the oppressed from continued persecution, nothing precludes the advancement of humanitarian interests through means other than asylum. By way of example, increased financial assistance and the allocation of resources to those countries currently hosting the refugees could largely serve the humanitarian mission at the center of asylum policy. While Iraqi, Afghani, and Sudanese refugees may be unable to avail themselves of the protection of their home countries, these refugees have generally not suffered from extensive persecution in the neighboring states of Syria, Jordan, Iran, India, and Chad, where many refugees and refugee camps are located. Rather than encouraging and providing for the immigration of these refugees to the United States, the active support of these countries' efforts would align with the United States' traditional humanitarian ethos, while avoiding the significant costs of maintaining the asylum applicants domestically. Additionally, support of third-party host nations would minimize the urgency for refugees to seek resettlement elsewhere, potentially limiting the strain upon an already overextended asylum system.

In light of the considerable costs and the attenuated benefits, the furtherance of humanitarian values does not alone sufficiently justify the application of the asylum laws to applicants fleeing terrorist persecution in Iraq, Afghanistan, and Sudan. To remedy any inconsistency between national interests and current asylum law, Congress has several legislative tools at its disposal. As an initial matter, it is politically impossible to solidify the country's border control capabilities to prevent unauthorized entry by refugees from terrorism-stricken countries. Consequently, tightening the statutory regulations to diminish eligibility for refugees claiming a generalized fear of persecution solely due to nationwide ter-

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661, 662 n.3 (1996) (noting "the added cost of integrating large numbers of non-English-speaking immigrants and refugees into the student bodies of inner city and suburban schools").

143. See John Zarocostas, *Syria Calls Refugee Burden Overwhelming*, WASH. TIMES, Oct. 2, 2007, <http://www.washingtontimes.com/news/2007/oct/2/syria-calls-refugee-burden-overwhelming/print/>; Bashir Urges International Community To Support Countries Hosting Iraqis, JORDAN TIMES, Nov. 21, 2008, <http://www.jordantimes.com/?news=12283>.

rorism would minimize abuses of the system. Unlike the current regulations, which do not require evidence of individual persecution where the asylum applicant establishes a pattern or practice “of persecution of a group of persons similarly situated to the applicant,”<sup>144</sup> updated language could be narrowly tailored to require a reasonable possibility that a particular applicant would be individually targeted by terrorists, rather than merely belonging to a protected group targeted by terrorists. Such an amendment would also collaterally benefit those refugees actually possessing an individualized and genuine fear of persecution. By significantly curtailing the overall number of refugees capable of meeting the higher threshold for demonstrating a well-founded fear of persecution, the new text would decrease competition for the limited numerical allotment and would disincentivize entry to the United States by ineligible refugees. As a result, those refugees entering illegally or under false pretenses would be processed in the same manner as all other illegal immigrants and deported if found ineligible for asylum relief.

Furthermore, Congress or the executive agencies charged with administering the INA must allocate greater resources and improve training for asylum officers and immigration judges, who too often demonstrate an uncanny ability to incorrectly adjudicate asylum applications. In the absence of Congressional action to limit the scope of the asylum provisions, the government will depend upon these asylum officers to exercise an enormous amount of discretion to effectively and efficiently determine the eligibility of numerous similarly situated refugees. The current level of administration leaves much to be desired.

Alternatively, even if Congress’s humanitarian concerns predominate above other factors and the legislature is prepared to welcome an influx of refugees from terrorism-afflicted countries, only one legislative change is needed. Congress should address the basic unfairness of permitting an unlimited number of illegal entrants to receive asylum, while severely restricting the asylum opportunities for similarly-situated refugees who follow legal protocol and apply for refugee status while in exile. Under the current system, refugees who enter illegally are rewarded with an opportunity to apply for asylum, incentivizing other refugees to utilize the same illegal approach. Although the dimensions of United States’ immigration policy as it relates to illegal entry are outside the scope of this Essay, the same divisive factors are at play here, and should be addressed.

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144. 8 C.F.R. § 208.13(b)(2)(iii)(A) (2007).

## VI. CONCLUSION

The purpose of asylum law is to continue the tradition of providing the oppressed with opportunities to settle in the United States. Yet the current system is arguably ill-equipped to accomplish this task. Although the general policy, as expressed both in the statute and legislative history, favors humanitarian assistance for the displaced, the laws are at once exclusionary and encouraging of entry for asylum-eligible refugees fleeing terrorism. At the same time, practical considerations of cost and assimilation suggest that increases in refugee admissions should not be encouraged. Finally, as a normative matter, the utility from expanding asylum policy to encompass additional numbers of refugees is greatly outweighed by the national interests at stake. It is unclear whether asylum alternatives exist for aligning the humanitarian mission with pragmatic considerations of controlled entry. Most any system, including a lottery or ranking system, would continue to suffer from similar difficulties in balancing the competing interests.

Because asylum applicants are refugees who are unable to return to their home countries due to fear of persecution, the denial of entry is significantly more harmful than for regular immigration applicants. At the same time, the processing and admission of all eligible refugees would create unmanageable domestic repercussions. Conceding that most refugees from terrorism-prone regions do not currently seek admission to the United States, current law and policy would likely fail to respond if even a fragment of the millions of refugees displaced by terrorism increased their efforts to seek asylum in the United States.