UNITED STATES ASYLUM POLICY:
SAFE HAVEN OR STRUCTURED EXCLUSION?

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ABSTRACT

This thesis investigated whether past and current United States immigration policies toward asylum seekers reflect the American value of the United States acting as a safe haven. Founding policy was based on international treaties that helped mold the evolution of domestic asylum policy. The sub-questions examined in this work are how the importance of the state of origin asylees flee affects their probability of being granted asylum, how ideological preference plays a role, whether policies are prejudicial or impartial, and if American attitudes are globally congruent toward all political refugees in need of asylum.

A thorough study of founding asylum policy forms the basis for research and comparison of modern asylum policies. It was found that when policies and procedures were formally standardized, admission numbers increased but approval rates did not follow. A quantitative analysis of data on asylum applications and rejections, state of origin, year of application, method of application submission, and rate of application approval or rejection was performed. This analysis helped answer the primary question and the sub-questions of this thesis.
I expected to find that the United States applied blanket exclusionary practices toward asylum seekers. Generally speaking, this was established as false. As a result of my investigation and analysis, I contend that the United States has become more guarded in its generosity of absorbing asylum seekers in the name of national security, however it has not abandoned the founding value of being a safe haven to the world’s persecuted. Measures have been written into asylum policy to ensure those who need asylum are given it, while simultaneously, ensuring those who have no bona fide claim for asylum are prohibited from it. And although asylum criteria and the application process are less than welcoming, the United States maintains its status as a safe haven for asylees.

The ultimate goal of policies designed to address human rights violation is to eliminate the need for asylum in the first place. By abolishing the conflict and violence that cause individuals to flee their home state, the need for asylum policy would also be abolished. However, until that occurs, this thesis provides research, data, conclusions and recommendations for improving the valuable system of asylum in the United States.
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CHAPTER 1

AMERICAN VALUE OF SAFE HAVEN AND ASYLUM SEEKERS

Asylum seekers comprise the smallest and most vulnerable category of the immigrant population in the United States. The largest category of “immigrant” has a limited sub-category of “refugee.” The sub-category of “refugee” has an even more narrow and exclusive category, that of “asylum seeker.” The asylum seeker is the population of immigrant that is at the heart of this thesis.

Many people flee their state of origin and arrive on American soil seeking safety, shelter and social services for a variety of reasons. The common motivation for choosing the United States is its core values of freedom, independence, protectiveness and compassion. Seeking refuge in the United States is attributed to the idealistic view that America provides fair treatment, has an open door, and an open mind to the acceptance of diverse peoples. These perceived cultural values ethically and ideologically bond the U.S. together, creating the reputation as a safe haven for the internationally persecuted. It is these ideas, these values that initiate policy creation or policy change. These ideas and how they reflect American values are featured prominently in this work.

**Question and Sub-Questions**

The primary question that guides this thesis is the following: Has the spirit of United States political asylum policies been one that supports the values of America as a safe haven, or has the spirit of these policies been one of structured exclusion? The
American value of providing safe haven for the persecuted may or may not have been the foundation for either past or present United States political asylum policies and is the focus of this investigation. This thesis will examine and evaluate U.S. asylum policies in order to answer a number of related cogent questions: Do American attitudes toward different groups of nationalities vary depending on their states of origin, and therefore, the rate of granting them asylum? Are American attitudes and policies globally congruent, or are there differences according to geo-political factors, such as communist states, for example? Are there ideological or other biases in the purposes and practices of U.S. asylum policy?

Safe haven for asylum seekers is a commonly recognized core American value; however, this value originated from the influx of immigrants around the turn of the twentieth century. Inscribed on the Statue of Liberty, a prodigious monument representing freedom and liberty, is the promise of the United States to non-citizens that shelter and acceptance can be found in America. A quote by Emma Lazarus that is dated 1886 reads: “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tost to me. I lift my lamp beside the golden door!”

These bold words can be found at the port of entry most commonly used to access the United States and remains to this day. The promise of safe haven for those foreign nationals was in the consciousness of the American citizenry at the time of the Statue of Liberty’s inscription; however, our task is to determine whether this value is fixed in U.S.
history or if it remains relevant in today’s modern policies and principles. Have U.S. policies shifted away from Lady Liberty’s credo, "Give me your tired, your poor, Your huddled masses yearning to breathe free...” and the American value of being a safe haven, and instead evolved toward structured exclusion?

My research shows that asylum policy in the United States is nowhere near perfect, but it functions. And, though U.S. asylum policy is quite generous, there is room for improvement. What has driven the evolution of asylum policy toward an ethically responsible direction is the American value of compassion. The perception of the United States as a safe haven, regardless of the state of origin from which asylum seekers may have fled, is prevalent in current policy. American attitudes continue to support that notion regardless of the administrative deficiencies, budgetary needs or burdens of frivolous claims. “Moreover, fears that non-genuine asylum seekers are abusing the generous refugee and welfare systems have not done much to erode public sympathy for refugees.”

Roadmap to Thesis

The focus of this thesis is the asylum policies themselves, their details and the spirit that animates them. It is arranged into four substantive chapters. This first chapter will discuss the common American attitudes of political asylum policy as well as describe the various categories of immigrants, refugees and asylum seekers. In addition, this section will define exactly what qualifications individuals are required to possess in order
to be considered eligible to apply for asylum status, which in turn will label immigrant groups and explain why some cannot be considered eligible for asylum status.

The second chapter will investigate some of the early key pieces of international law and domestic legislation that paved the way to create current U.S. asylum policy, from 1951 to 1980. The United Nations High Commissioner for Refugees’ (UNHCR) Convention Relating to the Status of Refugees in 1951, also known as “the Convention,” remains the cornerstone of international immigrant protection. This thesis will attempt to determine if this international treaty had any effect on the U.S. in the way it does business with refugees and asylees. The 1967 United Nations Refugee Protocol will also be outlined, as it issued the global protection against refoulement, the returning of an asylum seeker (or a refugee) to his state of origin. The chapter will end with an assessment of how the 1980 Refugee Act changed the way United States asylum policy functioned in both spirit and enforcement. The 1980 Refugee Act was the first major piece of U.S. asylum policy legislation that accomplished for the United States what the 1951 UNHCR Convention did for global refugee humanitarian concerns.

Chapter 3 will cover the recent domestic asylum policy developments. This chapter will begin with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIA) of 1996. The state sponsored changes found in the 1996 Reform policy provide a basis for the argument that some U.S. asylum policies were built to be restrictive and in direct opposition to the spirit of a safe haven. Lastly, post-September 11, 2001 policy changes will be outlined. The vast changes that occurred in spirit, written word,
departments exercising these authorities, and the structure of the laws have created such a
different atmosphere from the pre 9/11 policies that one is forced to wonder: Could the
United States still be considered a safe haven by persecuted refugees abroad?

The fourth chapter will provide a quantitative analysis of asylum applications and
decisions passed down from the immigration departments of authority. This analysis will
cover rates of sending states, that is, “states of origin,” focusing specifically on the
relationship the state of origin has with the United States at the time asylum decisions
were made (in the case of Haiti), as well as asylum rates from communist and non-
communist states. This analysis will break down the approval and denial rates according
to the method by which asylum was applied, having originated out of United States
Citizenship and Immigration Services Bureau (USCIS) or the Executive Office for
Immigration Review (EOIR). Any obvious trends in the data will be presented. The
quantitative analysis in chapter 4 will help answer the primary and subsequent questions
posed in this thesis. Issues of safe haven, ideological preference, and prejudicial or
impartial policies will be addressed.

The fifth and final chapter of this thesis will discuss some of the changing
American attitudes that have certainly been affected by the current state of America and
its culture of fear. In addition, it will forecast an ever-growing need for asylum policy
improvement. Last of all, conclusions and recommendations will be addressed. Included
will be recommendations for reducing or removing some of the barriers to America being
considered a country that provides asylum for the internationally persecuted, such as
mandatory detention, language barriers, promote intra-departmental cooperation, additional training for asylum agents and more.

American Values and Attitudes

A “value” is a characteristic or trait that a society agrees is important to share. It is a description of cultural norms, of core beliefs that are strongly held and rarely changed. Values are ways cultures define themselves. Some American core values are individualism and independence, compassion and protectiveness, freedom and competition. The values that relate to the U.S. as a safe haven are both ideologically and ethically based.

On the other hand, an “attitude” is a disposition. It is how one thinks or feels about an issue, the interpretation of something to be positive or negative. Attitudes drive behavior and can be influenced by actual or anticipated fear or pleasure. Attitudes are permeable and can change with ease, for they are not firmly rooted in cultures like values are.

Values are important to American society because, according to John Kenneth White who wrote, The Values Divide, “…values provide the connective tissue linking public policy to voter attitudes about contemporary politics.” The value of asylum, of safe haven, is one of the most humanitarian driven notions and, if ignored or polluted, devastation and loss of life would certainly follow. The moral compass of a nation state rests on its inherent values and those values help to build its laws. John White further explains why asylum seekers opt for the United States as their country of choice when
fleeing their home states. He argues that the American Dream is the guiding factor. “That dream contains three elements: (1) a celebration of freedom, (2) the enthronement of the individual, and (3) a firm belief in equality of opportunity.”

The American value of providing asylum has been a long standing tradition of the United States. That value helped build this immigrant-nation, into the diverse society the U.S. citizenry enjoys today. James Silk, the author of Despite a Generous Spirit, writes that providing asylum “…is the human act of offering safety to others….Asylum laws were meant to institutionalize, to codify, to make secure this human act. To interpret them [asylum laws] otherwise is to forget the humanitarian impulse that lies behind the words.” On the other hand, some argue that though the American value to provide safety from persecution is important, it is equally important, if not more so, to have guidelines and safety measures behind immigration, refugee and asylum policies to safeguard national security.

In Mark Gibney’s book, Open Borders? Closed Societies? The Ethical and Political Issues, the principle of non-deprivation is discussed as a moral duty the U.S. has toward refugees and asylum seekers. The principle of non-deprivation is defined as the following: “The duty to avoid depriving persons, including foreigners, of life and liberty, unless some compelling state interest justifies doing so, stems from our equal moral worth as human beings. The moral equality of persons is an indispensable premise of communal life in the United States.” This principle, “…whose ancient moral foundation is deeply rooted in the American ethic,” is directly relevant to the values that support the
safe haven notion. “It is particularly relevant in the now frequent instances in which
refugees arrive directly at our borders and shores seeking asylum.”

Positive and Negative Approaches

The competing or qualifying American attitudes have been, and continue to be: allow the internationally persecuted to enter and stay in the United States, thus providing safety, shelter and social services, but on a limited and conditional basis so as not to threaten the safety in this country. These competing attitudes have certainly influenced asylum policy throughout its evolution. For example, this positive approach would support more open asylum policies, less burdensome legal steps required by applicants, the elimination of any quota system and additional barriers to providing rights for asylum applicants prior to any formal approval decision, as well as an expedited review of each asylum claim.

I consider this to be the “positive approach” due to the generous spirit of this attitude, which is to give charitably, with few restrictions imposed on the asylum seeker. The objective of the positive approach would be to emphasize the long-held value that the U.S. acts as a safe haven, while simultaneously meeting the basic needs of asylum seekers. In short, the positive approach interprets the concept of safe haven as the foundation for asylum policy.

The values behind this positive approach are inspired by and focused on humanitarianism and benevolence. They invoke the spirit of the 1951 and 1967 United Nations agreements. The advocates of this positive approach to asylum policy fear that if
U.S. lawmakers use only the negative approach, asylum policies would be restrictive and exclusionary. Furthermore, fears of human rights violations and political, economic and physical injustices would go unaddressed by the United States. The perceived abuses of the asylum system are a major barrier to convincing advocates of the negative approach that reformed asylum policies are gravely needed. These abuses come in the form of frivolous applications which backlog the entire system, create a further financial and administrative burden on U.S. taxpayers, reduce the compassion factor among national attitudes, and therefore contribute to a feeling that many are taking advantage of American hospitality.

The American attitude that supports protecting the safety of the United States above the safety of asylum seekers will also advocate for specific characteristics that influence the shape of asylum policy. For example, this negative approach would support a thorough investigation of asylum claims including a strong burden of proof, as well as maintaining the current mandatory detention for all refugees who entered the U.S. without legal documentation and then apply for asylum status, and keeping or even lowering the annual quota system.

I consider this the “negative approach” due to the self-protective spirit of this attitude, which does not openly welcome all who seek refuge, but provides steps for being granted asylum status, thus limiting full rights until an asylum claim has been approved. The objective of the negative approach would be to use somewhat
exclusionary tactics as the foundation for U.S. asylum policy, rather than the vision that the U.S. provides blanket safe haven, while simultaneously protecting domestic interests.

From the perspective of an asylum seeker, this negative approach creates barriers to being granted asylum. On the other hand, by establishing a process for which asylum applications are reviewed, it stabilizes the process and creates a level playing field for all applicants. Without an established procedure, U.S. asylum policy would still be operating under an ideological bias, “…a pattern favoring those fleeing countries whose governments are unfriendly to the United States,” which is inherently unequal and discriminatory. The goal is to synthesize certain functioning attributes of both the positive and negative approaches that will result in a process demanding uniform reasonable screening.

The values behind this negative approach originate out of the right of sovereignty of the state and the need for national security. The advocates of this negative approach to asylum policy fear that if U.S. lawmakers use only the positive approach, asylum policies would lead to the ultimate demise of this country due to limitless and uncontrolled absorption of immigrants, refugees and asylum seekers. Such fears are based on forecasted adverse economic conditions, national security concerns, terrorist infiltration, assimilation problems and overburdened social welfare programs, to name a few. Some authors, like Irving H. Jacob who wrote, *The New Trojan Horse*, claim that the negative approach to asylum policy dominates legislation. Jacob says, “The plain fact of the matter is, the doors of the United States are no longer open to the hungry and tired….The
theoretical open door policy has long since come to an end as simply a practical impossibility.”

His perspective is due to the long historical bias within the system making it seem corrupt and inept, and the breeding of fear among U.S. citizens.

Dirk Chase Eldredge’s book, *Crowded Land of Liberty*, addresses the concern over an unbalanced system, where policy is affected entirely by either the positive or the negative approach. Eldredge questions the length to which nation states can go, or should go, to maintain the value of the United States as a safe haven. “We can deplore and work toward the cessation of human rights violations around the world. But how far should we take our humanitarian impulses when any one of our planet’s potential trouble spots could produce unpredictable numbers of refugees heading for America?”

The goal should be to fuse the positive approach with the negative approach, meeting the immediate needs of asylum seekers while at the same time protecting the rights of the United States and its current citizens. What is needed is a balance of humanitarianism with the sovereign rights of national security interests, equilibrium of American self-interest and global moral duty, taking into equal consideration the economic interests as well as the security interests. In the long run, safety and protection cannot be guaranteed to newly arriving individuals if the receiving country allows both the persecuted and the persecutors the same opportunity to live the American Dream.

The proportion of asylum seekers compared to the classic immigrant and even to the general refugee population, is quite small. Though the cases of legitimate political asylum applications are few in the grand scheme of things, debate continues as to
whether or not granting asylum should be done for humanitarian purposes or should be limited to ensure the protection of the sovereign state.

We [the U.S.] seem bound to grant asylum for two reasons: because its denial would require us to use force against helpless and desperate people, and because the numbers are likely to be involved, except in unusual cases, are small and the people easily absorbed….But if we offered a refuge to everyone in the world who could possibly say that he needed it, we might be overwhelmed.10

This quote simply states that asylum is not usually granted in terms of the unique situation faced by political refugees who fear persecution but that it is more often in terms of weighing the potential consequences of refusing asylum. This is in direct contrast to the assumed notion of the U.S. being a humanitarian safe haven, centered on the ethical rights of the international community; meaning the spirit of asylum is not entirely altruistic.

**Immigrant vs. Refugee vs. Asylum Seeker**

Before going further, a definition of asylum seeker is needed according to both federal requirements and the category this unique population is assigned to on the ladder of “immigration.” The immigration process is not the focal point of this thesis; however, all asylum seekers are immigrants but few immigrants are asylum seekers.

There has been increasing evidence in recent years of confusion in the public mind between the very special situation of refugees and that of the many millions of other aliens who are endeavoring to gain entry into countries other than their own. This confusion has been to the detriment of refugees and has tended to impede a sympathetic approach to refugees at the official level.11
It is important to outline the distinction between a refugee, or more specifically, an asylum seeker, and an immigrant in order to understand the categories that are not legally eligible to apply for asylum status under international and U.S. asylum policies. An *immigrant* is considered an individual who has freely left his or her state of origin and has the ability to return to that state without experiencing legislative or political punishment or persecution. The common reasons this particular category of foreign person seeks to emigrate to the U.S. would be for stronger economic opportunities, professional development, or simply a better life for one’s family. For example, an individual who crosses the border into the United States for the sole purpose to find work that is limited, non-existent or could earn him more money than in his native country cannot be considered an asylum seeker under international law or U.S. policy.

The definition of an immigrant versus a refugee is extremely important, for both categories are unique and need specific attention. Refugees can be defined as, “…citizens whose home country has failed to provide for their basic needs.” An individual that flees his home state due to economic hardships, political persecution, gender discrimination, social group membership, sexual orientation, and a host of other reasons, is considered to be a refugee. To be considered for refugee status, the individual had to be outside of U.S. territory. There are categories of refugees that must be considered and addressed: economic, environmental, and political. “To distinguish, in meeting the need for protection, refuge, food, and resettlement, between someone fleeing from political persecution and someone who flees from a land made uninhabitable by
prolonged drought is difficult to justify, although the latter person would not be classified as a refugee under the U.N. definition.”

At the core, an asylum seeker is a refugee who has fled to the United States and has formally announced fear of persecution should he or she return to the state of origin; in effect, requesting U.S. absorption as well as protection from one’s native country. The criterion that will allow someone to apply for asylum in the United States is a well-founded fear of persecution if returned home, based on the individual’s nationality, race, religion, political affiliation, or social group membership. These differences in immigration categories are directly correlated to American attitudes and how differential policies are shaped.

The Status of Asylum Seeker

Asylum is both a verb and a noun. The goal of providing asylum is to alleviate suffering and to safeguard the threatened. According to Peter and Renita Singer in their article, “The Ethics of Refugee Policy,” not all refugees who are seeking asylum are to be held equally in the eyes of the U.N. They claim that “(So) there are two categories of refugees: those defined on a case-by-case basis and who come under the U.N. definition, and the other, large groups of people who flee from their country of origin. Only the former are conceded the right of asylum.” To be considered for asylum status, the individual must also be physically located in the country for which they are requesting asylum.
The origins of domestic asylum policy began with the 1980 Refugee Act. Prior to this, all persons fleeing hostile states of origin were automatically considered to be “refugees” in the United States. This Act drilled down a narrow definition that led to the protected category of asylum seeker. Refugees are not synonymous with asylees, but asylees are indeed synonymous with refugees because all asylum seekers have fled their state of origin, and are therefore considered a refugee.

They are similar to other migrants in that they, too, often seek better economic opportunities and desire reunification with family members....However, despite these shared economic and familial reasoning for migrating, refugees and asylum seekers differ from other immigrants in that they either experienced harm or feared they would experience harm if they did not leave.15

A refugee has the option to apply for asylum status, but not all do so. And those who do apply are guaranteed neither a quick process nor an affirmative outcome.

The individual who plans to seek refuge in the United States has two options: one can either apply for refugee status in his home state through governmental channels in order to ensure his entry into the United States is legal, or one can travel to the U.S. and begin the application for asylum status once on U.S. soil. A refugee cannot claim or apply for asylum status without first being physically located in the United States. Therefore, a refugee can only be considered an “asylum seeker” after he or she has entered the United States.

An asylum seeker enters the United States as a refugee, most often without any formal documentation, and informs the agent at the port of entry that he or she is afraid to return to the state of origin. The most pervasive characteristic that will isolate the asylum
seeker from the greater pool of refugees is to claim, then later prove, their fear of “persecution” due to nationality, race, religion, political affiliation and social group membership. Unfortunately, there are abuses of the system. Economic refugees, immigrants, and other non-natives that do not meet the criteria for an asylum claim still apply for asylum status, taking advantage of the timely process for adjudicating a claim. By the mid 1990s, “…there has been a significant increase in the number of asylum claims by individuals who are fleeing neither from political persecution nor from violence….Unable to gain entry [to the U.S.] under existing migration laws, many would-be migrants looking for economic opportunities attempt to enter as asylees….” Economic hardship however does not fall under the protected categories of persecution set forth by international policy. These frivolous claims create a clog in the system where bona fide asylum seekers are the most negatively affected. The multitude of these disingenuous claims help, influence the negative approach to policy making, whereby lawmakers feel forced to build policy around deterrence rather than safe haven.

**Conclusion**

The asylum seeker is a citizen of a state whose government has failed to protect against deprivation and persecution, and due to this failure, the asylum seeker feels a need to find refuge elsewhere. The centuries old commitment to “Give me your tired, your poor, your huddled masses yearning to breathe free…” is a testimony to the value of the U.S. providing safe haven to those in need. However, as time moves forward, these words seem to be diluted in U.S. asylum policy. Only through history can it be learned
what was effective policy of the past and apply those values and lessons today in order to exercise humanitarianism toward asylum seekers.
CHAPTER 2
THE ORIGIN OF ASYLUM POLICY IN THE UNITED STATES

Chapter 1 discussed the value of the United States acting as a safe haven for asylum seekers, some of the American attitudes behind that value and the ethical considerations toward refugees and asylum seekers. Chapter 2 will investigate the “durable solutions” that are standard for refugees and asylum seekers, as well as what states are legally prepared and willing to do for refugees seeking asylum. This chapter draws primarily from three international documents, the 1948 United Nations Declaration on Human Rights, the 1951 United Nations Convention Relating to the Status of Refugees, and the 1967 Protocol; and one major domestic law, the 1980 Refugee Act. In addition, specific U.S. policies will be inspected. Together, these legal sources provide the foundation of U.S. policy as it handles refugees and asylum seekers under the context that the United States acts as a safe haven.

In this chapter, the term “refugee” will be used as if it were synonymous with the term “asylum seeker.” The term “refugee” will be used almost exclusively because at the time the following cornerstone policies were introduced, “asylum” was strictly considered the act of safe haven, not also a classification of immigrant. Therefore, to stay true to these founding international policies, the term “refugee” will be used but it will represent both the modern definition of a refugee as well as the modern definition of an asylum seeker. As established in Chapter 1, all asylum seekers are inherently refugees.
Durable Solutions

When discussing refugees and asylum seekers, the two most important questions are: “Where shall they go?” and “What shall be done for them?” The first part of this chapter uses durable solutions to address the question “Where shall they go?” The second and more in-depth section of this chapter will address the second question, “What shall be done for them?”

Applying the concepts of “durable solutions” categorizes the various considerations to the issue of where refugees shall go after flight. Durable solutions provide three manageable outcomes for refugees who have fled their country of origin for geographic absorption. In the order of preference, durable solutions mean: voluntary repatriation to their home country, settlement in their country of first asylum, and resettlement in a third state. The particular outcome or solution for the refugee will be influenced by a host of variables such as geopolitical, economic, and environmental issues at the time of flight, policies of the host country, and of course, the intent of the individual refugee, to name a few.

The first such durable solution for refugees is voluntary repatriation. This is when the refugee freely returns to his or her home country, most often after the conditions that made him or her flee have been eliminated. These fleeing individuals could be considered political, economic, or environmental refugees. For example, Haitians who fled Haiti after the military coup that overthrew President Jean-Bertrand Aristide fled to the United States but once President Aristide was reinstated and the coup was brought
down, many of those were voluntarily repatriated back to Haiti. They did so because the threat that made them leave in the first place changed, and their freedom and safety were no longer in danger. Though not always an option because of the length of time needed for a threat to neutralize, “Voluntary repatriation is the preferred long-term solution for the majority of refugees. However, because of an ongoing threat of persecution or other reasons, some civilians cannot repatriate….”1 Voluntary repatriation is the recommended outcome for the refugee, the home country and the absorption state due to cultural and language reasons, national identity concerns and absorption costs that states who are not producing political refugees are forced to incur.

The second durable solution for refugees is settlement in the country of their first asylum. The country of first asylum is considered the first country the refugee arrives in that is outside his home country’s official border. This is considered traditional refugee immigration, whereby the temporary shelter found in a neighboring country becomes a permanent home. Most frequently, this occurs in developing countries, which are more likely to absorb refugees and asylees than are industrialized or developed ones. And they do so regardless of how overpopulated their developing country may already be. However, the plight of those seeking refuge and safe haven is not reserved just for the poor who reside in developing states, as evidenced by the historical exodus out of Europe by wealthy, educated Jews during the Second World War, or for example, the refugees and asylum seekers that have fled the recent Balkan wars onto U.S. soil.
Many refugees seeking protection and safety against persecution do so in neighboring countries, or in countries of their first asylum, even if the state to which they flee has similar economic or political conditions. “Because the majority of all refugees worldwide seek refuge in neighboring countries, or countries on the same continent, the overwhelming share of the international responsibility to provide asylum to refugees is being fulfilled by countries that are among the poorest of the world, such as Malawi and Pakistan.” Another example of settlement in a country of first asylum is the United States hosting Cubans who have fled Cuba.

Resettlement is the final and least desirable of the durable solutions for refugees. Resettlement occurs when the refugee who has fled neither returns home nor settles in the country of his first asylum, but has either by choice or by force, attempts to resettle in another country to seek refuge. Resettlement is meant to be the last resort for individuals who have nowhere else to go. The resettlement country is oftentimes, but not always, the second location the refugee has fled to after the country of their first asylum. And for the purposes of this thesis, that resettlement country is the United States. “Resettlement often requires transcontinental movement, as the three major receiving countries – the United States, Canada and Australia – are distant from most of the countries of first asylum.” In the case of Cubans, Haitians, South Americans, and others who did not travel through a second country after leaving their home country in order to get into the United States, this country has two roles: a non-native’s country of first asylum, or the country in which s/he plans to resettle.
Resettlement is the least supported for a variety of mostly cultural reasons, but it is the end result under U.S. policy toward asylum seekers. Resettlement is seen as a band-aid solution to war, political conflict and unstable international relations because it does not address the problem of why flight occurred in the first place. If it is international policy for countries to absorb refugees and provide the opportunity for asylum perhaps there should also be a policy that makes the resettlement countries stakeholders in the peace process for civil unrest that created the refugees in the first place. There is a need for a quid pro quo for the absorbing states to be compensated somehow for the responsibility and burden of providing for asylees. Unfortunately, “The main response of the industrialized countries has been to institute deterrent policies and close their doors as tightly as they can. Admittedly, resettlement can never solve the problems that make refugees leave their homes, nor can it solve the world refugee problem.”

The American value of providing safe haven for asylum seekers may or may not be built into its refugee and asylee policies. Mark Kritz, author of *U.S. Immigration and Refugee Policy* states, “U.S. refugee policy has always been predicated on the United States as a country of resettlement and not a temporary haven from which people could be repatriated after stability returned.” Kritz goes on to explain, “The problems of resettlement, especially the lack of regular and dependable funding, the problems of housing, the secondary migration within the United States to counter a policy of dispersion….and the sheer numbers and problems of language training and job placement, all led to pressures on Congress to restructure resettlements” in the U.S.
Simply put, U.S. policy defaults to assuming it will take on the role and burden as the absorption country rather than a “stop-over” country for refugees fleeing their native lands.

The second question posed in this chapter, “what shall be done for refugees?” can be answered by examining international and domestic policies.

Debate on the treatment of asylum seekers and refugees tends to revolve around the financial costs of processing claims, social security benefits for asylum seekers, and social tensions arising from the presence of large numbers of refugees in receiving communities….But any discussion of the refugee question should also be placed firmly in the context of the causes of flight, and the sorts of persecution or violence from which many asylum seekers seek refuge.7

There is a moral component to the debate, however, and that is the potential disparity of rights between asylees and citizens of a country for the sake of easily attainable rights. Were the policies created for asylum and refugee protection written with moral fortitude in mind? This investigation will begin with the international policies that have shaped domestic ones.

1948 United Nations Declaration of Human Rights

The definition of providing for asylum is quite different than the definition of an asylum seeker. Providing for asylum is absorbing a refugee into the United States and by providing this shelter, protects the asylee against further prosecution and harm. This protective act is an internationally binding obligation set forth by the United Nations in 1948, which all nation states must follow. Article 14 of the United Nations Declaration of Human Rights of 1948 guarantees the right to seek asylum. It states that “…everyone
has the right to seek and to enjoy in other countries asylum from persecution.”8 At that
time, asylum was meant for anyone. Today, asylum is meant for refugees – for citizens
of another country whose own leadership has failed them. This evolution created a
narrow framework for the guaranteed asylum provision to be applied. Additionally, it is
the global human right of all persons to exercise freedom of movement in their home
country, to remain in their country of nationality, to leave their nation state, and to return
to it.

Though requesting asylum is an international human right that all persons possess,
it is up to states to determine the terms of acceptance or denial of asylees, enact quota
systems, give preference depending on state of origin, or the like. Each state has the right
to decide its own individual policies. It must be made clear that under the U.N., states are
obligated to offer the option of asylum but they are under no obligation to guarantee
approval of asylum status for any or all applicants. Each sovereign nation state has the
right to create such categories as immigrant, refugee or citizen with its own procedures,
expectations and exclusions as it deems fit. “No individual, dissident or refugee, from any
situation has the absolute right to receive political asylum in any country unless that
country has adopted the policy to grant such asylum. Each individual has a right to
request asylum, this is protected by the UN agreements, but the granting of asylum is
under each states’ control.”9 There exists no blanket asylum policy; it is dependent on
individual states.
1951 United Nations Convention

Modern international refugee and asylum policy was born out of the July 28, 1951 United Nations Convention Relating to the Status of Refugees that was ratified on April 22, 1954. The Convention was in response to the aftermath of the Nazi regime’s systematic plan to annihilate the Jewish race and other crimes against humanity. These international policies were not incorporated into U.S. law until the 1980 Refugee Act. By subscribing to the 1951 Convention, the United States agreed to follow all the terms of the Convention, from defining a refugee as the Convention does, to providing security and services to refugees as the Convention details.

Specific provisions of the Convention are particularly important and demand elaboration. Chapter IV, Part D, states that “The Conference, considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position, recommends that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement.” The 1951 Convention absorbed all previous international instruments relating to refugees and outlined the basic minimum standards for treatment of refugees that were to be applied without discrimination based upon race, religion or state of origin.

The most important feature of the 1951 Convention is the specific definition of a refugee, and to a further extent, an asylee. Chapter I, Article 1, Part A defines what is required to be considered a refugee, and therefore obtain international protection. It also
absorbed the previous definition dating as far back as 1926, thus grandfathering in a plethora of immigrants into the updated definition of a refugee. It broadened the definition to include those refugees who are the focus of this thesis, someone who,

“[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, is unwilling to return to it”\textsuperscript{11} due to events that occurred on or before January 1, 1951.

The Convention is not solely a positive document that grants rights to individuals without any encumbrance on their potential exclusion under a receiving state’s laws and policies. For the most part, however, the Convention provides generous rights to individuals who meet the definition of a refugee. The Convention also specifically excludes individuals who present with a certain history or status. According to the 1951 Convention, the following individuals or groups of people are prohibited from being considered refugees:

- anyone who is considered to have committed a war crime
- anyone who is considered to have committed a crime against humanity
- anyone who is considered to have “…committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.”\textsuperscript{12}
- individuals who fled due to circumstances that have ceased to exist in his home country
- refugees who are considered nationals in their country of refuge
• refugees who have voluntarily repatriated to their country of origin
• refugees who enjoy asylum in any country
• refugees that are already protected under and receiving assistance by other United Nations High Commission for Refugee (UNHCR) programs.

Chapter I, Article 9, *Provisional Measures* designates individual states to function in a self-protective nature toward the admission of refugees so that national security interests are safeguarded. Article 9 states:

Nothing in this Convention shall prevent the Contracting State, in time of war or other grave and exceptional circumstances, from taking provisional measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.13

This provision retains state sovereignty and allows states to erect barriers to restrict granting asylum status.

The 1951 Convention benevolently answers the question, “What shall be done for refugees?” Essentially, all the property ownership rights, educational rights, eligibility to work, public relief, free access to courts of law, and the same legal assistance that is bestowed upon a country’s national citizenry should also be extended to refugees that are lawfully residing in the host country. In particular, the eligibility to work is a point of contention between many international and domestic policymakers. Chapter III, Article 17 qualifies that so long as the refugee has completed three years of residency in his country of refuge, he shall not be restricted or prohibited from gainful employment.
The issue of employment rights is extremely volatile in the United States. At the time of the Convention, the refugee was automatically permitted the right to work in the United States. Public opinion came crashing down on this policy, blaming the asylum seekers for a poor economy and growing unemployment rates. In fact, asylum seekers make up a small portion of the immigration pool and the asylum seeker tends to be educated and seeking a professional position in the field which they were formerly employed in their home country before they fled. As a result, the argument that asylum seekers are a drain on the economy and abuse social services does not have much validity. Unfortunately, perceptions about refugees and asylees are loosely based on the economic migrant category of immigration.

The portion of immigrants that takes advantage of these generous rights has created a burden on the U.S. economy and social welfare programs. This portion submits frivolous asylum claims and abuses the system in so many ways that American attitudes sometimes confuse the (either legal or illegal) “immigrant” with the “refugee” or the “immigrant” with the “asylum seeker” as a result of the feeling of being taken advantage of and the frustration over their own negative economic standing.

The narrow population this thesis is investigating is but one category of illegal immigrant, the non-native who enters the U.S. without proper documentation, claims to be a refugee, and then applies for asylum. At the most primitive level, asylum seekers are sometimes illegal immigrants first and running for their lives second. Article 31 of the Convention covers what states should and should not do about refugees who have
illegally entered a country of intended refuge without valid immigration documentation. This chapter states: “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” The emphasis here is on the prohibition of penalizing illegally arriving refugees, who may or may not eventually become an asylum seeker.

Most often, the genuinely persecuted individuals will have been unable to apply for or receive official travel documents that this country requires in order for the refugee to arrive legally. They often leave with little preparation and their method of flight is typically done covertly. The near impossibility of obtaining legitimate travel documents prior to flight is a barrier against enjoying asylum. To the extent that it can make suggestions, the Convention recommends not only the prohibition of punishment for illegally entering refugees, but moreover, a relaxed legal expectation toward this immigration group.

The requirement of host states to refrain from punishing the illegally arriving refugee can only be honored by the ambiguously phrased feature of Article 31, that presenting both themselves and their good cause for their illegal entry that must be done “without delay.” It can be debated forever what the length of time that “without delay” means. Also, does the provision against penalizing the illegal refugee cover both the
presentation of the individual and the presentation of “good cause,” or can only the individual be presented in a timely manner without also showing one’s “good cause” for entering a country illegally and still be protected from punishment? These precise ingredients to refugee admission policy, and by extension asylum policy, fall under the sovereign umbrella of nation states and their domestic policies.

The United States, at the time of the 1951 Convention and thereafter, had no adequate definition of “without delay” that was to be applied to refugees who illegally entered the United States. There was also a burden of proof, or proof of “good cause” that was required to avoid punishment for illegally entering a country for refuge. This lack of a timeline, the ambiguity of “without delay,” and the minimal show of good cause, per the adopted international policy, conforms to the idea that the United States operates as a generous safe haven.

Chapter V, Article 32 of the 1951 Convention covers the issue of expelling refugees from the country to which they have fled. It states that countries cannot arbitrarily expel lawful refugees without due process of law unless the refugee is deemed a threat to national security or public order. Article 33 is a continuation of the expulsion ban in Article 32 that prohibits forcibly returning someone to a country where that individual’s freedom or life may be threatened on the criteria listed in Chapter I. The international community calls this embargo against the return of a refugee to his home country “refoulement,” so disallowing the forced return to a hostile environment is called “non-refoulement.” The non-refoulement clause states: “No Contracting State shall expel
or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” ¹⁶ Non-refoulement “…means that a refugee cannot legally be pushed back to the country from which he or she has fled.”¹⁷ Though the principle of non-refoulement protects against being forcibly returned home, it does not guarantee the right to remain in the country in which he seeks asylum. The difference between Article 31 and Article 32 is that Article 31 prohibits expulsion of legal refugees while Article 32 prohibits returning refugees to where they claim to have been persecuted.

The individual’s fear of persecution if forced home does not need to be immediately proven in order for the non-native to be protected by the law of non-refoulement. It needs only to be expressed. The United Nations High Commission on Refugees pursues the right of refugees to seek safe asylum and be granted the same rights and benefits that nationalized citizens enjoy. Formally, the United States abides by the international principle of non-refoulement. There are gray areas in which it can be argued that the U.S. has come close to violating or has violated this clause, such as interdicting ships at sea and enacting country-to-country agreements, such as with the United States and Haiti. In the end, however, the 1951 Convention’s international protections against refoulement, against expulsion, and against penalty for entering a host country illegally, as well as all the positive attributes of international protection are
granted to individuals who have qualified as bona fide refugees as a result of events that occurred on or before January 1, 1951.

The terms set forth under the 1951 Convention are broad, global prescriptions that subscribing states ought to implement within their domestic policy. However, in the end, it is the sovereign state that has the ultimate say in whether it will implement any, all, or none of the features of this international regulation. “The benefits of both systems – refugee admission or asylum status – are granted at the discretion of the government; they are not mandatory.”18 When the United States appears to have been pivoted against its longstanding values of providing a safe haven with open borders public opinion shakes its punitive finger at it claiming exclusionary rules and human rights violations. For those who argue that the U.S. should welcome any and all, the domestic policies that are meant to protect a country’s permanence would appear restrictive and exclusionary. However, on the other hand, to those who argue that the U.S. goes above and beyond the realistic expectations of international policy suggestions, these domestic policies not only abide by international standards but also generously benefit refugees and asylum seekers. “The United States is not obligated to grant asylum to people because they are refugees, only not to return them to a country where they face possible persecution.”19

1952 United States Immigration and Nationality Act

The 1951 Immigration and Nationality Act was one of the first major pieces of U.S. legislation simply because it affirmed a connection between foreign nationals and foreign policy. The 1951 INA gave the U.S. Attorney General parole authority to admit
refugees over the established quota and to “...temporarily admit aliens in response to foreign crisis.”20 The INA also removed the quota for immigrants entering the United States from other Western Hemisphere countries.

The overt spirit of the 1952 Act was claimed to be family reunification, however its unstated intent was an effort to reduce if not eliminate immigration (refugees or otherwise) into the United States by people who did not physically, ideologically and religiously reflect the status quo.21 It generally reduced restrictions on Asians but introduced preferred categories of immigrants, such as those who are highly educated and those who had immediate relatives in the United States that already held legal permanent residency status.

1967 United Nations Protocol

The 1967 Protocol was another primary international agreement that paved the way toward unified refugee and asylee protection. On December 16, 1966 the Protocol Relating to the Status of Refugees was introduced to the U.N. General Assembly and was ratified on October 4, 1967. The United States signed the 1967 Protocol into law on November 1, 1968. It absorbed Articles 2-34 of the 1951 Convention and covered the same parameters as the 1951 Convention with only a few mentionable changes. One of these changes was that the 1967 Protocol could be subscribed to independently of the Convention.

Another major change to international refugee policy was that the 1967 Protocol eliminated the deadline by which events must have occurred that would qualify a person
to be considered. This change exudes the spirit of providing safe haven to an even
greater population due to the removal of that January 1951 date. The 1948 Declaration
established the universal right to seek asylum, and the 1951 Convention and the 1967
Protocol required states to follow the non-refoulement clause.

1980 United States Refugee Act

The 1951 Convention and the subsequent 1967 Protocol were not entirely adopted
by the United States until much later, with the passage of the Refugee Act in 1980. This
Act supplemented and updated the 1951 INA. Though the Refugee Act was passed in
1980, it was not fully implemented until 1991, and even then it operated mostly under old
guidelines. The learning curve was most likely the cause of the ripple effect from
negative asylum policy backlash as well as the misunderstood impression of asylum
seekers.

There were four major precedents that came out of the 1980 Refugee Act. They
were: (1) the U.S. definition of a refugee, (2) the removal of an ideological preference
that made refugee status easier to obtain, (3) the establishment of a formal provision for
asylum seekers in U.S. immigration policy, and (4) an adjustment to the quota system.

The first major change to U.S. policy was the inclusion of the entire definition of
a refugee as it is known in the 1967 Protocol. Prior to 1980, the United States did not
subscribe to the well-founded fear clause that helped define a refugee but instead used the
fear of one’s life or freedom would be threatened to distinguish a refugee. “The U.S.
Supreme Court in March 1987 decided that asylum applicants did not have to prove the
likelihood of persecution but only that they had a ‘well-founded’ fear in the words of the 1951 Refugee Convention and the U.S. Refugee Act of 1980.”22 The Act also identified a refugee as someone that is “…outside any country of such person’s nationality or, 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 avail himself or herself of the protection of that country of race, religion, nationality, membership in a particular social group, or political opinion.”23

This defined a refugee exactly the same way the international policies do and it made refugees a distinct group from all other aliens in the United States. “An alien is any person not a citizen or national of the United States and we may define an illegal alien as any alien in the United States in violation of the Immigration and Naturalization Act.”24 The 1980 Refugee Act even went so far as differentiating a refugee from an asylum seeker.

The second important change that came out of the 1980 Refugee Act was the elimination of refugee admissions based on the grounds of U.S. geographic and ideological preferences. Prior to this Act, refugees were considered to be anyone fleeing a communist controlled or a Middle Eastern state, also known as the “Seventh Preference.” Due to the political tension between the U.S. and mostly the USSR and Cuba, the ideological Seventh Preference allowed a watered down version of a refugee for only those individuals. Before 1980, refugee policy was part of the overall U.S. strategy intended to “…damage and ultimately defeat Communist countries.”25
By eliminating the “communist” and the “Middle Eastern” clause in refugee policy, the U.S. effectively opened its borders to an unprecedented scope. The spirit of this section of the 1980 Refugee Act was to open the immigration-refugee-asylum doors to the masses, very much the American value of providing a safe haven. At the end of the Cold War, refugee and asylum approvals were greatly increased for individuals from both communist and non-communist origination states. Under the option to apply for the Seventh Preference, “…the share of refugees from these sources who were granted permanent resident status from 1981 – 1990 was 94.6 percent.” As stated earlier, the 1980 Refugee Act was not fully implemented until 1991. In table 1, asylum approval rates during the 1990s, well after the elimination of the ideological preference benefiting refugees from communist or Middle Eastern countries, are presented.

Table 1. U.S. Asylum Approval Rates in the 1990s

<table>
<thead>
<tr>
<th>State</th>
<th>Asylum Approval Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Syria</td>
<td>73%</td>
</tr>
<tr>
<td>Peoples Republic of China</td>
<td>52%</td>
</tr>
<tr>
<td>Former Yugoslavia</td>
<td>50%</td>
</tr>
<tr>
<td>Cuba</td>
<td>49%</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>44%</td>
</tr>
<tr>
<td>Russia</td>
<td>44%</td>
</tr>
<tr>
<td>Ukraine</td>
<td>40%</td>
</tr>
<tr>
<td>Haiti</td>
<td>21%</td>
</tr>
</tbody>
</table>

The changes to refugee/asylum policy would take time to transfer into practice. For example, “In 1993 the overwhelming majority of U.S. resettlement places for refugees from abroad still went to people from the former Soviet bloc and Indochina, relatively few of whom would meet the international standard for a claim on international
protection.”28 The spirit of the much needed change to eliminate the Seventh Preference, rings true to the American value of providing safe haven. “The previous law permitted 17,400 people to be conditionally admitted to the United States each year if they fled from a Communist or Communist-dominated country or from a country in the Middle East. This wording and restriction was eliminated in the new law. All refugees or asylees are ostensibly treated equally based on the circumstances from which they have fled.”29

The third change that was perhaps the most important feature of the 1980 Refugee Act was the mandated development of an asylum status application procedure for those who qualify.

Among other reforms, the Refugee Act of 1980 mandated establishment of an asylum procedure to protect individuals with a well-founded fear of persecution in their homeland who are physically present in the United States. This provision recognized that the United States at times acts as a country of first asylum. As such, it has an obligation under international law to those individuals who need it.30

The office of the U.S. Coordinator of Refugee Affairs was created so that the Attorney General could construct a uniform process for adjudicating claims for asylum status. Rather than arbitrarily deciding the status of asylum on a unilaterally communist or Middle East front, the 1980 Act sought to codify and standardize a procedure that would protect the smallest and most vulnerable of immigration populations. The task of investigating and adjudicating asylum claims remained the responsibility of the Immigration and Naturalization Services.
Originally housed in the Department of Justice, the INS was considered to be a department dealing with domestic issues. It was purportedly built external to the Department of State for that exact reason: that its function and objectives were not directly related to, or resulting from, foreign policy. This could not be a more faulty assumption, for there is certainly a direct connection between the international stage and refugee migration patterns. After the governmental redesign by President George W. Bush after the September 11, 2001 attacks, the INS was reorganized and folded into the newly created Department of Homeland Security.

The final major change to domestic policy was the adjustment of quotas for admitted refugees and asylum seekers. The Refugee Act required the setting of annual quotas for legal permanent residents (LPR) to be admitted into the United States in advance of that year. This quota system for LPR recipients is a number that the President, in cooperation with the Congress decided each year. The Executive Office retained presidential discretion to increase this prearranged number on the basis of human rights concerns or national interests. In order to qualify for LPR, the alien must have been awarded asylum status, continue to reside in the United States for one year after asylum status was awarded, and cannot qualify for LPR under any other status as an immigrant. Under the 1980 Refugee Act, the LPR timeline changed from being granted immediately to being granted after one full year of residency in the United States.

The quota of asylum seeking refugees stagnated while the traditional refugee quota fluctuated. “In practice, until the 1990s no more than 5,000 asylum applications
were approved each year, usually less than a third of all applications.” Table 2 below shows the comparison between the quotas for receiving refugees seeking asylum and the quota for receiving traditional refugees in the years 1980, 1983, and 1995:

<table>
<thead>
<tr>
<th>Year</th>
<th>Asylum Quota</th>
<th>Refugee Quota</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>5,000</td>
<td>234,000</td>
</tr>
<tr>
<td>1983</td>
<td>5,000</td>
<td>90,000</td>
</tr>
<tr>
<td>1995</td>
<td>+5,000</td>
<td>100,000</td>
</tr>
</tbody>
</table>

The Act also required the refugee and asylum quotas to be divided among geographic regions so as not to discriminate according to ideological biases, that is among communist, ally or benign states and peoples. A trend to consider when examining the maximum number of refugees allowed into the U.S. per region is political affinity. Does the United States have a special obligation to accept refugees and asylum seekers from countries where the U.S. was complicit in creating the conditions which necessitated flight in the first place, such as in Vietnam in the 1960s and 1970s or in Iraq and Afghanistan today? “But in the absence of any sense of political affinity to which refugees can appeal, [Michael] Walzer says, they may well have no right to be successful.”

**Procedure for Asylum Seekers**

An asylum seeker is a non-native who meets the definition of a refugee, who is afraid to return to his home country due to persecution, and most importantly, that individual is geographically located within the United States. The non-native must express this fear of return to a federal agent at any port of entry to the United States to
begin asylum adjudication procedures. The federal agency that has been tasked with this role is the INS.

The asylum seeker who meets the INS officer at the port of entry must verbally express his fear of persecution should he be repatriated to his home country. The INS agent at the port of entry begins processing their asylum claim and filling out forms I-213, the “Record of Deportable Alien” and I-274, the “Request for Voluntary Departure.” The primary immigration officer asks preliminary questions and it is up to that officer to determine if a second interview would be appropriate to begin the formal asylum application process. Testimonials have surfaced that informally and unofficially, the interviewing officer(s) attempt to frighten the non-native into changing his mind, suggesting that returning home is in his best interest, or threatening that if asylum was denied the non-native would be deported and his home country’s government would be informed. For example, “INS processing agents or officers further discouraged Salvadorans from applying for asylum by telling them that the information on the application would be sent to El Salvador, and stating that asylum applicants would never be able to return to El Salvador.”

Primary and secondary interviews are performed to determine if the non-native meets the criteria to apply for asylum status. After the secondary interview has been conducted, the immigration officers would release the non-native and begin the proceedings for the newly developed asylum status procedures (per the 1980 Refugee Act), or determine the non-native not credible, or send the case on to an immigration
judge for additional investigation. “Some of the recommendations an agent can make after processing an alien are: (1) issuance of an order to show cause why the alien should not be deported, with or without an (2) issuance of a warrant of arrest to detain the alien; (3) voluntary departure of an alien by a certain date; (4) no action,” pending a decision based on the evidence, “or, (5) further investigation to determine amenability of the alien to INS proceedings.”

If the application has been declared credible and the burden of proof of both persecution and fear was convincing based on the facts and details of one’s story, such as dates, names, incidents, witnesses, etc., the INS asylum agent would make a recommendation for approval. At that point the refugee is considered an asylee and paperwork can begin being processed for the rights of asylees, such as being placed on a list to be granted the right to work. In addition, after one full year of residency in the United States the asylee can apply for citizenship, thus bringing with that asylum status all the rights and privileges of being an American citizen.

In the cases where an individual has been declared not a refugee, therefore not eligible for asylum status, the act of non-refoulement that was put forth in the 1951 Convention would not be violated if/when the United States returns these non-natives. Should the individual be declared a refugee and then forcibly returned to his home country, it would be a violation of the non-refoulement function of the U.N. Convention.

If the asylum officer cannot reach a decision to grant the alien asylum status, the officer would refer the case to an immigration judge for an immigration hearing. An
immigration hearing, once called a deportation hearing, provides the non-native the opportunity to tell his story again and make his case for being granted asylum. The judge can either declare the applicant not-credible and will immediately determine when and how the alien will be deported; or the judge can declare the applicant credible and approve asylum status at that time. The immigration judge also has the authority to overturn the asylum officer’s decision or vote in favor to support it.

Immigration judges are human and therefore can make mistakes in judgment in both courtroom and ethical consideration. Discrepancies in asylum approval and denial rates support the notion that U.S. asylum policy can act as a barrier from being granted safe haven. Over a five year period it was found that “Some judges granted two-thirds or more of the asylum applications before them, while others granted fewer than 5 percent. In one district where two immigration judges handled every asylum case for four states, the approval rate for both judges was less than 4 percent.”36

The final safeguard for asylum applicants is the Board of Immigration Appeals (BIA). The BIA reviews immigration judges’ decisions and has the authority to overrule their decisions. This is considered the fourth review of an asylum application and one that clearly expresses the generosity of spirit in American values, ensuring all that can be done for an applicant will indeed be done. Each method of asylum review acts as a security mechanism so that individuals do not fall through the cracks of xenophobic, ambivalent or uninformed asylum officers. At the same time, however, each method acts as a hurdle for asylum seekers, for convincing one step of the reviewing body is not
sufficient: all bodies must be convinced of both a well-founded fear of persecution and satisfying the burden of proof. Each asylum method can have disparity of outcome depending on the interviewer’s or a judge’s subjective application and interpretation of law and regulations. All these opportunities for approval create an open network of a multitude of chances for the applicant to convince someone in authority of his claim.

**Conclusion**

Domestic refugee and asylum policy was born out of the 1948, 1951, and 1967 international policies and was solidified for the first time in the 1980 Refugee Act. Key ethical issues such as non-refoulement, establishing a well-founded fear, and the protection of national interests and sovereignty evolved into doing what is morally right for the vulnerable refugee seeking asylum in the United States. The policy pieces thus far contribute to the notion that the U.S. acts as a safe haven. Chapter 3 will investigate major policy pieces such as the 1996 Illegal Immigration Reform and Immigrant Responsibility Act and post-9/11 changes, as well as issues of Safe Third Country Agreements and the practice of interdicting vessels at sea containing refugees. These evolving characteristics of U.S. asylum policy calls into question the spirit of the policy and the direction in which this nation is headed.
CHAPTER 3
THE EVOLUTION OF ASYLUM POLICY

Chapter 2 discussed the durable solutions for refugee and asylee absorption, as well as the international and domestic origin of refugee and asylum policy. Only in 1980 was the separate sub-category of an asylum seeker formally recognized in the United States. This sub-category of immigrant is the smallest of the broader “immigrant” population. As the definition of an asylum seeker became individualized and separate from a “refugee,” so too did the need for policies to implement that legal status.

The original legislation was very supportive of taking care of the internationally persecuted. These policies went beyond a generous hand to provide options to individuals who fled their home country due to the fear of, or actual persecution due to one’s nationality, race, religion, political affiliation or social group membership. “In crude summary, the international law of refugees says, ‘let these people go’; ‘don’t send them back where they came from’; but it does not say ‘take these people in.’”¹ The origins of refugee and the subsequent asylee policies were very much aligned with the American value of providing a safe haven in the United States. The questionable continuation of such a notion, however, will be discussed in this chapter.

Chapter 3 will examine the evolution of U.S. asylum policies and determine whether or not they still support the notion of the United States acting as a safe haven. The specific policies this chapter will investigate are the country-to-country agreements,
the U.S. interdicting ships at sea whose occupants are potential asylees, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, and post-9/11 policies that address asylum seekers.

**Refusal of Entry**

Beginning in the 1980s, the United States Navy and Coast Guard engaged in interdicting ships at sea before they had the opportunity to dock at U.S. ports to unload their human cargo. Those aboard hoped to become traditional immigrants, economic, political or environmental refugees, or even asylum seekers. The intended objective was to prevent non-refugees from setting foot into the United States due to the INS having pre-determined these “boat people” to be economic migrants or economic refugees - therefore ineligible to be considered political refugees or asylees.

The wisdom of this interdiction policy was that by preventing the arrival of these ships, fraudulent refugee or asylee claims would be eliminated. However, by removing the opportunity to submit bogus asylum applications, the U.S. government also eliminated the opportunity to apply for traditional immigrant status as well. Generally, the countries from which the boat immigrants tended to originate were Caribbean states such as Haiti and Cuba, and South American states such as El Salvador and Nicaragua. These individuals arriving on America’s doorstep were being profiled. That is, their state of origin was deemed to be sufficient enough information to refuse entry into the United States regardless of their individual circumstances.
Country-to-Country Agreement: United States and Haiti

Under the guise of a country-to-country agreement, national origin discrimination legally began in the middle of 1981, when the United States and Haitian governments agreed to allow U.S. naval ships to interdict vessels originating from Haiti. If the immigrants on board did not vocalize either their desire to be considered a refugee or their fear of persecution should they be returned to Haiti, the U.S. concluded they were all intended immigrants. Therefore, the U.S. would advise the vessel that it is prohibited from entering U.S. waters and must return to where it originated. In cooperation, the Haitian government agreed to accept those individuals back into Haiti once they have been returned.

Because of this country-to-country agreement with a corrupt leader, Jean-Bertrand Aristide, many opponents of this policy cried foul. They contended that this prohibition of entry to the United States, and the forced return of the affected individuals was in violation of the non-refoulement agreement. Generally speaking, Haitian immigrants claimed to have fled for reasons of poverty that resulted from a corrupt and abusive government, which turned into economic persecution. When does the result of dictatorial and abusive government leadership turn into a direct and personal threat to one’s life and freedom, thus creating a well-founded fear of persecution? There is a very gray area between economic persecution and legitimate asylum protected persecution.
The Case for Haiti

Haiti is the perfect example of the morphing of indirect persecution easily turning into direct persecution; changing from the group to the individual. For example, “Haiti’s poverty is due largely to abuses of political power and intentional government policies.” Political persecution bleeds into the economic sphere. A pivotal downfall of defining one group against another is that the “…attitude is based on the assumption that the distinction between refugees and economic migrants is a sharp one.” The separation of an asylee from a refugee can sometimes be unclear and perhaps cannot be easily defined.

In 1992 under President George H. W. Bush, a system was designed for the United States Coast Guard and Navy to stop and investigate ships coming out of the Caribbean toward the United States and re-route them to a base set up in Guantanamo Bay, Cuba for case-by-case investigations into refugee and asylum claims. Although this sounds like an intimidating process, it allowed non-natives the opportunity to vocalize their fear of persecution should they be returned home and in the privacy of an interrogation room with an INS agent.

By May 1992, Guantanamo was inundated with processing Haitian refugee seekers to such a bottleneck point that President George H. W. Bush closed the processing center and adopted a new policy of simply repatriating all those who were not found to have sufficient information to immediately establish the required well-founded fear. This automatic repatriation policy was challenged and later deemed by the U.S.
Supreme Court to be within the rights of United States and international refugee law. In 1994, however, after continued pressure from American interest groups, the federal base at Guantanamo was re-opened to offer temporary safe haven for Haitian refugees that were deemed to have no basis for asylum upon their original interdiction by the U.S. military.

How the United States avoided violating the principle of non-refoulement was to never allow those individuals to set foot inside official borders to begin with. If they had, the United States would have been prohibited from returning these individuals without fully investigating their fear of return and deeming them either an asylee or not. However, since these ships were stopped at sea before having docked and before the individuals could physically step onto U.S. soil, the United States was not in violation of the international agreement.

Between September 1991 and January 1993, over 30,000 Haitians were repatriated. These individuals were not protected under the non-refoulement clause because they had not stepped foot in the U.S. before being turned around. In addition, for non-refoulement to be extended to an individual, that individual must be first considered a refugee who can prove his life or freedom is or would be threatened based on narrow international categories: nationality, race, religion, political orientation, and social group membership. The principle of non-refoulement was adopted by the U.S. and continued to be a feature of domestic asylum policy throughout the 1980 Refugee Act.

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On the surface, refusal of entry and the country-to-country agreement appear to be structured exclusion based on the nationality of the boat immigrants. However upon further investigation, this country-to-country agreement provides for those few asylum seekers huddled among the masses of economic migrants to be identified and allowed application for asylum status. First, the two countries had a formal agreement so this policy, though imperfect, maintains the U.S. as a safe haven granting country. The forced repatriation of individuals aboard vessels interdicted at sea, before the opportunity for the individuals aboard to step foot on U.S. soil, is one of the reasons that Haitian asylum admission numbers are so low; in comparison, those fleeing South American persecution most often arrive by land through Mexico, therefore cannot be interdicted. Although lacking generous compassion, stopping boats filled with Haitian citizens from entering U.S. territories and returning those who did not qualify as an asylee or refugee was within U.S. rights.

And secondly, the United States government felt that the majority of Haitian immigrants did not fit the bill of refugee, thus not fitting the bill for asylee. “The Immigration and Naturalization Services feels that most Haitians are economic migrants and not political refugees. Only a few hundred have been granted asylum as a result of individual case reviews.” As a result, those Haitians forced to return did not have their international human rights violated, nor did the United States violate the non-refoulement statute. “Between 1981 and 1991 some 24,600 Haitians were intercepted by the Coast
Guard. Only twenty-eight were permitted to enter the United States to apply for asylum; the rest were returned to Haiti. By using the Guantanamo base for temporary shelter, both the INS and the fleeing individuals were given more time to determine who was truly a refugee fleeing persecution and who was not. Therefore, this was a more generous policy toward Haitians than simply the country-to-country agreement that was previously enacted.

What, then, is the difference between refoulement, the forced return of a non-native, and interdicting ships at sea and turning them around? The difference, according to United States and international policies, is that non-refoulement protects the political refugee and asylum seeker; it protects the most vulnerable of immigrant categories from being returned into a life of persecution and possible death. To others, however, there is not much difference between refoulement and stopping ships before entry to U.S. ports and forcing them to return to their native lands. This country has a history of selectively choosing categories of refugees it will refuse. According to Kathleen Newland’s essay in Threatened Peoples: Threatened Borders: World Migration and U.S. Policy, “The United States was reluctant to admit as refugees the Greeks fleeing from the Colonels’ coup in 1967, Chileans escaping from Pinochet’s Chile after 1973, and Salvadorans, Guatemalans, and Haitians seeking asylum from right-wing dictators.”

The military coup that overthrew Haitian President Jean-Bertrand Aristide in 1991 created a new wave of migration out of Haiti who focused on arriving in the United
States. This population made a large impact on the INS and the asylum application system for, Michael McBride states in his report, *The Evolution of U.S. Immigration and Refugee Policy: Public Opinion, Domestic Politics and UNHCR*, these truly were “…refugees who were suffering from human rights abuses.”⁸ The statistics from this time period support those human rights abuse claims, for between 1991 and 1992, “The US Coast Guard interdicted over 40,000 Haitians…, sending 34,000 of them to Guantanamo Bay…. [and] Approximately 10,000 of these were granted asylum and allowed to enter the USA.”⁹ To give credit to the validity of those thousands of political asylum claims, when Aristride returned to power in October 1994, “…most of them repatriated voluntarily to Haiti…”¹⁰

The issue at hand is whether or not the United States continues to provide safe haven for asylum seekers. It has been shown that the majority of individuals arriving by the boat load have been declared economic immigrants by the INS rather than bona fide political refugees or asylum seekers. In a 2004 interview with President George W. Bush, he represented the attitude of the United States and the spirit of recent asylum policy by declaring that Haitian boats will continue to be interdicted at sea prior to entry onto U.S. soil. In the context of Haitian rebels who were challenging Haitian President Aristide’s power, President Bush proclaimed “…I have made it abundantly clear to the Coast Guard that we will turn back any refugee that attempts to reach our shore. And that message needs to be very clear, as well, to the Haitian people. We will have a robust
presence with an effective strategy. And so we encourage, strongly encourage the Haitian people to stay home as we work to reach a peaceful solution to this problem.”

This assertion is far from the original declaration of the U.S. acting as a safe haven.

By 2004 there were approximately 2.5 million refugees or asylee immigrants in the United States out of a total of 25.4 million authorized migrants. And sadly, in 2005, the same year that the United Nations called Haiti’s human rights situation “catastrophic,” the United States denied asylum applications submitted by Haitian natives at a whopping 83% of the time. Ironically, though the rejection rate was high, Haiti ranked third in the highest asylum approvals by the U.S. in 2005, with 12,657 being approved.

By 2007, the statistics coming out of Haiti pertaining to prison rates, unemployment and poverty levels call into question the premises of the U.S. labeling whole Haitian boat loads of people economic migrants rather than possible political refugees or asylees.

Haiti is the poorest country in the Western Hemisphere, with over two-thirds of its 7.8 million people living in desperate poverty. Some 70 percent of Haitians are unemployed. Two-thirds live on less than one dollar a day. The judicial system is virtually nonexistent, and the International Red Cross says that over 95 percent of those in Haiti’s jails do not have a sentence or have not been tried in court. The economy is controlled by foreign powers through the International Monetary Fund (IMF), World Bank, and the U.S. government allowing it to be flagrantly abused by those in power and leaving the masses to fight over the scraps…Throughout, there has been an entirely separate asylum policy for Haitians than there has been for other foreign nationals coming to the United States.
The status of Haitian economic refugees has evolved, due to decades of neglect and corruption, into political and social refugee statuses – now making those individuals eligible to apply for asylum in the United States. There is a thin line that divides an economic refugee from an asylum seeker. If the economic refugee has been systematically oppressed, that economic barrier could lead to other oppressions. However, the statistics provided here not only denote economic disenfranchisement, but also the lack of a judicial system; in short, it is not known what groups may be targeted or why. Therefore, it cannot be definitively determined that all if arriving Haitians seeking asylum have bona fide or fraudulent claims. On the contrary, it is more likely that most in fact are victims of poverty on such a large scale that it can be interpreted as persecution of all Haitians.

U.S. Asylum Policy Shifts toward Exclusivity

In the early days, “Those [asylum] laws were designated, not to keep people out, but to see to it that those who need protection get in, or are allowed to stay in.”15 The United States made concentrated efforts to open its borders to the world’s persecuted while balancing issues of national security, economic burdens and the challenges of integrating different cultures (although it did so with quotas and ideological preference). Overall, the value of protecting the afflicted and providing asylum to those in need was the guiding spirit of past U.S. asylum policies.
After the 1980 Refugee Act, however, policies changed. And so did attitudes about rights, benefits and even allowances for entry, as in the case of country-to-country agreements. Significant changes were legislated in 1996. These reforms had obvious characteristics of a country that has built obstructions into its policies for granting asylum. Whether it was due to fears of national security deterioration, rising unemployment, social welfare assistance, crime rates, xenophobia, or the ever changing face of a “typical American,” United States asylum policy evolved into one of profiling, isolation and exclusion.

1996 Illegal Immigrant Reform and Immigration Responsibility Act

The 1996 Illegal Immigrant Reform and Immigration Responsibility Act (IIRIRA) probably produced more of a change in U.S. asylum policy than the 1980 Refugee Act had. And it did so by implementing the following procedures: mandatory detention, deadline for asylum status application submission after arriving in the US, safe third country agreements, and expedited removals. On the surface, the 1996 reforms made applying for asylum status appear much more difficult, if not outright exclusionary. The spirit of the 1996 IIRIRA was to unify the asylum process, to create equity for all applicants, minimize the application backlog and expand the protected criteria against persecution.
1996 Asylum Process

Under the 1996 IIRIRA, individuals without proper documentation who arrive in the United States and apply for asylum status were to be interviewed by an INS asylum officer and at that time required to prove a well-founded fear of persecution based on their religion, race, ethnicity, political affiliation or social group membership. If the INS agent at the port of entry is not convinced by the individual of this fear, or if the individual does not actually tell the INS agent of his or her fear or of his wishes of asylum, then the non-native is put on the expedited removal track and deported as soon as possible to is state of origin. A point of contention for the asylum process is that at the port of entry, the alien is usually intimidated by the INS agent and afraid his story will be considered a lie, only to be automatically be deported. The typical aggressor in their home country had been police officers or military personnel who significantly resemble the INS uniformed agent, therefore making it psychologically more difficult for an individual to announce a fear of, or an actual experienced persecution.

The most challenging part of the entire asylum application process can be the first step – to convince the INS border agent of a well-founded fear or of a desire to apply for asylum.

Christine Stancill, a lawyer in one of Los Angeles’ most prominent immigration law firms, concurs that asylum officials and immigration judges are well-trained and sensitive to the needs and concerns of asylum seekers and that a majority of applications will be granted. The problem lies with the inspectors who are the first INS officials a prospective asylum seeker comes in contact with at ports of entry.16
The standard of proof is relatively low – convince an INS officer with one’s story, include details of past persecution and describe the fear of future persecution. Paperwork and photos assist in proving one’s case, but are not required to prove this fear. One must be found authentic, credible and consistent. These character attributes substantiate the safe haven value as a continuance within the spirit of evolving asylum policy.

Within seven days of the INS interview, the case sets to be heard by an immigration judge whose decision is be both immediate and final; there is no appeal option against an immigration judge’s decision. The same exclusions found in the founding international policies stayed true throughout the 1996 reforms. That is, “Anyone representing a terrorist organization would be deported or denied entry. In addition, those ordered to leave would be held in mandatory detention until departure.”

The final step in the process to go from a refugee to an asylee under the IIRIRA, is that refugees were given one year from the date of their entry into the United States in which to formally apply for asylum status. After those 12 months have passed, the individual would no longer be eligible to apply for asylum unless s/he can prove extraordinary circumstances that prevented compliance to this imposed timeline.

Mandatory detention

Between the time of arrival in the United States and an asylum interview with an INS officer, the asylum applicant can be detained in either an INS center or in a contract-
operated criminal detention center. To some, the UNHCR’s 1967 Protocol on Refugees is in direct conflict with the mandatory detention component to the 1996 IIRIRA policy. McBride quotes Article 31 of the Protocol, in that, “Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who…enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

Some argue that individuals entering the United States without proper documentation, thus illegally, are being detained until they can show the good cause for their illegal presence. This argument supports international policy, domestic policy, national security concerns and both the positive and negative approaches to U.S. asylum policy. The competing argument is that mandatory detention is a deterrent against an influx of refugees or asylum seekers. In Mark Dow’s book, American Gulag, he writes, “‘Attorney General William French Smith said, ‘Detention of aliens seeking asylum was necessary to discourage people like the Haitians from setting sail in the first place.’ The use of detention as a deterrent to potential refugees violates obligations assumed by the executive under international law…’” In the end, the practice of mandatory detention certainly creates an atmosphere of deterring asylees from choosing the United States to seek a safe haven from persecution.

The newly arrived undocumented refugee, or the refugee who presents false identification, is transferred from their port of entry to a detention center until their well-
founded fear of return has been investigated. The suggested timeframe for this investigation is a maximum of seven days.\textsuperscript{20} If the individual’s fear has been discounted or unsubstantiated, that person will remain in detention until either the decision is contested in front of an immigration judge or the person is deported. If the individual’s fear is substantiated, then parole can be recommended by the Asylum Pre-Screening Officer. The non-native can either choose to accept this parole or remain in detention until the asylum procedure is complete. The complete asylum application process can take up to several months or years.

Proponents of the mandatory detention process claim it is beneficial because it keeps track of non-natives since they would first be considered immigrants having entered the country illegally, and second, asylum seekers. It has also been found that a number of asylum applicants who were denied asylum status have never reported to their deportation date. “The policy [of mandatory detention] was justified as necessary based largely on statistics that most people with a deportation order, issued when asylum claims were denied, had never left the United States. Lawmakers deemed it necessary therefore, to keep all arriving asylum seekers under close scrutiny.”\textsuperscript{21} Mandatory detention as an element of asylum policy is uncommon in many advanced nation states. The only developed countries with this feature are the United States and Australia.\textsuperscript{22}

The detention of asylum seekers is dangerously similar to criminal imprisonment. The facilities are cramped, many asylum applicants are mixed with criminals due to a
shortage of space (more common for women than men\textsuperscript{23}), translation assistance is oftentimes not provided and the potential for abuse or neglect is high. “Prolonged detention severely erodes the physical, mental, and emotional energy of a detained individual. At best, this inhibits the ability of a detainee to articulate her story during her asylum adjudication.”\textsuperscript{24} “It has been well documented that jailing those fleeing life-threatening situations only compounds their trauma.”\textsuperscript{25} The end result of this detention is that it dissuades that tender group of asylum seekers from considering the United States as a safe haven option, meaning that the evolution of U.S. asylum policy has features of exclusivity to keep some people out. “From 1973 to 1980 the average daily number of people in INS detention centers almost doubled, from 2,370 to 4,062.”\textsuperscript{26} Mandatory detention creates an atmosphere denouncing the opportunity to be protected by the United States.

Though it has created controversy, mandatory detention of undocumented asylum seekers can provide a unified way to evaluate asylum claims. Residency in detention is provided inside the United States, the country of choice by the non-native asylum seeker. Shelter is provided, along with food, clothing, and minimal legal representation. As federal immigration policies became more necessary, the need for mandatory detention space increased. Though it is not ideal, mandatory detention is a way to consolidate and keep track of asylum applicants who arrived illegally, thus having nowhere else to go, no means of support, no method of staying connected to the government of their new
country, and may in fact pose a threat to the United States until that person’s case is investigated.

**Application timeline and other lasting changes.** The 1996 IIRIRA enforced a timeline for which to apply for asylum status. Anyone who wished to apply for asylum status must do so within one year from entering the United States. This blanketed all immigrants. The shift in status is not mandatory for asylees (it is for refugees), but may benefit them in the long run. Though President Clinton initially opposed a timeline, his administration ultimately lengthened it by 30 days.²⁷

The spirit of the IIRIRA timeline change was “…to remove aliens who arrived in the United States without proper travel documents or who were suspected of carrying documents procured by fraud.”²⁸ Another change the IIRIRA implemented was that an individual who was approved for asylum status can, after one year, apply for legal permanent resident status.

Lastly, the IIRIRA barred asylum eligibility for those who have submitted multiple asylum requests. This would greatly reduce fraudulent claims, thus maximizing efforts on legitimate ones. It also called for 300 new INS officers and 1,000 new border guards each year until 2002. “INS Commissioner Doris Meissner noted that the major reasons for the passage of IIRIRA were “…(1) xenophobia, (2) a culmination of three decades of increases in legal and illegal immigration, (3) voter-support for government controlled immigration, [and] (4) the balancing of illegal and legal immigration’
In the end, these new policy features were far removed from the original spirit of providing asylum and a safe haven in the United States.

**Post - 9/11 Changes**

Prior to September 11, 2001, the conversation surrounding national interests had typically been the “…protection of scarce natural resources, security of sea and air for international commerce, protection of US corporations and citizens doing business in foreign lands.” Yet after the attacks on September 11, 2001, the protection of citizens and structures at home from foreign aggression took precedence even over humanitarian concerns. Post-9/11 asylum policy changes had a dual purpose: (1) to prevent another attack and (2) to make it appear that the law enforcement branches and federal departments were making up for their failure to protect this country against the attacks in the first place.

**U.S. Patriot Act: Better Safe than Sorry, They Said**

The U.S. Patriot Act of 2001 was the first legal change after 9/11. It has strict interpretations of the definition of an asylee that contradict the international policies adopted worldwide. This Act prohibits an individual from being considered for asylum status if one assisted in the persecuting of another human being in any way and mandates a strict interpretation of the idea of “material support.” That is, any material an individual provided that can be found having supported, or assumed to have supported a
terrorist or a terrorist organization will exclude that individual from being eligible to apply for asylum status. For example, in the case of an individual supporting an aggressor under extreme duress or even at gunpoint, bonds the person who is being held at gunpoint to the person holding the gun; the U.S. Patriot Act does not see a difference between the two. Under the Patriot Act, the actions that prohibit asylum from being granted range from being forced to kill by rebels, to a nurse in Colombia who was abducted and forced to medically treat a wounded guerilla fighter.  

The material support interpretation has prevented an untold number of individuals from all areas of the world from being eligible to apply for even refugee status, let alone asylum status. In addition, this Act empowered the U.S. Attorney General to legally detain, for an indefinite period, any foreign-born person that he suspects of being a terrorist without a hearing or even providing proof of the terrorist claim.

The spirit of the U.S. Patriot Act is so far removed from the original spirit of asylum policy in the United States that the original motivations are nearly unrecognizable. The former spirit was one of save haven, of humanitarianism, and the opportunity for a second chance at life for the persecuted. The original spirit of asylum policy was that of sanctuary and global goodwill. The evolution of asylum policy in the United States, of which this Act is an excellent example, has become exclusionary, motivated by fear, and crippled by the threat of terrorism.
False Identification Charges, 2002

In 2002, “[U]nder a new measure, which the government deems necessary to protect the borders, those who present fake or doctored documents [upon entry to the US] are being prosecuted.”32 Opponents of this federal policy feel that by criminalizing entry to this country with false documents and then deporting that individual can be a death sentence for someone who would later try to re-enter the United States but with un-doctored or legal paperwork. “The policy of prosecuting asylum seekers for using false documents to enter the U.S. appears to be unique to Miami. From 2002 to 2003 there was a 48 percent increase in the number of defendants being prosecuted by the southern district of Florida.”33

Article 13 of the 1951 Refugee Convention cannot protect asylum seekers in this case. It does not apply here because these false-document holders have broken U.S. law by providing false documents to officials. If the asylum seeker does not have valid travel documents, s/he would be detained until their fear of persecution was found to be credible. At that time, the asylum application proceedings could begin.

Asylum shopping

The post-9/11 security measures implemented in the U.S. were similarly addressed in other democratic and industrialized nations. In 2002, the United States and Canada entered into a Safe Third Country Agreement. “The agreement was designed to close the Canadian border to asylum seekers coming from the United States, barred
anyone from applying for asylum if they had spent any time in the other country’s soil. The agreement…helped streamline the system by discouraging migrants from ‘asylum shopping’ for the most advantageous situation…’34 In total, 928 asylum cases were rejected and 782 were accepted in Montreal in the year 2004. This was a far cry from the pre-9/11 figures of asylum seekers, for “…in 2001, some fourteen thousand people used the United States to get into Canada to apply for asylum.35 The intent of this invoked the durable solution of settlement in the country of first asylum.

**The INS gets a facelift.** In March 2003, the newly developed Department of Homeland Security (DHS) became the epicenter of immigration and asylum policies and procedures. Previously, asylum responsibility fell to the Immigration and Naturalization Services, a division of law enforcement housed in the Department of Justice. After its absorption into the DHS, the INS was stripped of some of its powers and were redistributed among DHS sub-departments.

Prior to 2003, there were two ways to apply for asylum status after admission to the United States. One was by an investigation handled by the INS. The other was through the immigration court process handled by the Executive Office for Immigration Review (EOIR). Each division, INS and EOIR, was a separate office, held to different standards, and required to operate under a different set of rules. After the 2003 restructuring, “…the INS was divided into three agencies – the United States Citizenship and Immigration Services (CIS), the United States Immigration and Custom Enforcement
ICE), and the Bureau of Customs and Border Protection (CBP) – and moved from the Department of Justice to the Department of Homeland Security.” Henceforth, the INS became accountable to the United States Immigration Services (USIS) which reports directly to the Department of Homeland Security.

The DHS has been charged with controlling the entrance into and exit out of the United States for both U.S. and non-U.S. citizens. “This new mission includes enforcing the immigration laws as well as narcotics enforcement, illegal commerce, and combating terrorism.” Also, “The Department of Homeland Security fulfills certain critical functions in the refugee admissions system, primarily focused on interviewing applicants and approving their refugee claims before they can travel to the United States as part of the refugee admissions program.” Streamlining the procedures for asylum seekers and refugees is the right direction to move toward, however the DHS is tasked with such a heavy burden and is spread so thin that asylees are bearing the brunt of neglect and backlog.

**REAL ID Act, 2005.** The effects of the REAL ID Act were the improvement and enforcement of procedures for immigrant documentation, as recommended by the 9/11 Commission. Among other things, this Act would force “…the asylum seeker to prove that one of the five grounds for persecution – race, religion, social group, political opinion, or nationality – is the central reason for the fear of return, not one among other reasons. It also allows for judges to demand corroborating evidence almost impossible to
prove because someone who is fleeing danger rarely stops to think of bringing evidence of their persecution.\textsuperscript{39}

Under the REAL ID Act, judges can deny asylum for reasons pertaining to the demeanor of the applicant. This policy also proposes to “…deny asylum to individuals who do not disclose a claim of rape on arrival at the airport but that do so later, when they come before an immigration judge.”\textsuperscript{40} This post-9/11 Act is the extreme opposite in spirit, function and direction of the founding policies for asylees. The United States has created more than a barrier for asylum seekers; it has created a process in which it appears to be punishing them.

Human Rights First, an international human rights non-profit organization, “…believes the \textit{Real ID Act} seriously erodes the basic rights of asylum applicants and flies in the face of America’s historic commitment to refugees. It denies fair treatment and violates international obligations to refugees. Moreover, its provisions are culturally insensitive and broadly expand the power of immigration judges to make life or death decisions.”\textsuperscript{41}

\textbf{Conclusion}

One of the fundamental facts of U.S. asylum policy is it is controlled by human beings. On one side is the INS officer: an official member of both law enforcement and the federal government dressed in uniform attempting to do right by his country, by his fellow human beings, and to himself. This officer, typically male, is the face and representation of asylum policy and safe haven. On the other side is the non-native, who may or may not be fluent in English, fleeing for his life against the persecutory landscape of his home country, and into the arms of the uniformed INS officer trying to balance duty to country, department, and self. Therefore, the human factor is the focal point of both policy development and execution. The fears of policymakers and the fears of asylum seekers are both human fears; however the fear of potential harm should not outweigh the fear of experienced harm.
CHAPTER 4
QUANTITATIVE ANALYSIS OF ASYLUM DECISIONS AND QUESTIONS ANSWERED

The previous chapters provided a summary of the extensive changes in United States asylum policy. Each of these policy changes was meant to equally satisfy dual goals: provide a place of asylum for the world’s political refugees, while at the same time maintain state autonomy with an emphasis on proactive national security measures. The origin of asylum policy created an atmosphere of safe haven for those international citizens who had been persecuted at home and whose own governments were either unable or unwilling to protect them. The spirit of asylum policy originally focused on humanitarian needs. However, that spirit of generous safe haven by providing asylum to those in need has shifted to one characterized by bureaucratic obstacles through boundaries, procedures, and restrictive definitions of asylees. The shift to a unified, sometimes exclusionary system was needed as the threats to sovereignty changed, due in part to the globalized world of the post-World War II era.

Chapter 4 provides a quantitative analysis of approval and denial rates for refugee and asylum seekers according to the method of application as well as the state of origin. These data provide evidence that help answer the questions set forth in the beginning of this thesis, the primary one being: are current immigration policies toward asylum seekers representative of the American value of providing safe haven? This chapter will also answer whether or not U.S. asylum policy is prejudiced or impartial, exclusionary or
open, deterrent or permissive. Lastly, this chapter will identify trends revealed by the data.

**Introduction**

Asylum opportunities for political refugees became codified by the United States to ensure the long-term offering of asylum for many years to come. However, as a direct result of this shift, the balance between humanitarianism and national security became skewed, and policies benefited safeguarding our national security more than human beings. Officially, one does not take precedence over the other, but in practice the security of this nation’s borders will always prevail over what is beneficial for the world’s refugees. “The plain fact of the matter is, the doors of the United States are no longer open to the hungry and tired….The theoretical open door policy has long since come to an end as simply a practical impossibility.”¹

It is not surprising that practices such as mandatory detention and deadlines for which to apply for asylum status are now characteristics of modern U.S. asylum policy. In fact, those limitations seem to be supported by a large public opinion. “According to a 2000 Gallup poll, 43 percent of Americans said they would support a law that would stop almost all legal immigration to the United States….”² Such a high percentage of public opinion is mainly due to fear and blame. Immigrants, refugees and asylees tend to be blamed “…for declining welfare resources, unemployment, poor standards in schools, criminality, or declining solidarity.”³ In truth, this claim is baseless because asylees
consist of such a small percentage of the immigrant population, and just a tiny fraction of the total United States population.

**Caps on Refugees/Asylees**

It is not uncommon for states to set numerical limits on how many refugees and asylum applications will be received and even approved. To ensure asylum policies are satisfying the international need, as well as the domestic threshold of sponsorship, the United States sets an annual refugee/asylee capacity. Due to the constant unknowns of international relations and conditions, discretion can be used by the Attorney General to increase the cap.

Though the 1980 Refugee Act formally abolished caps on how many refugees/asylum seekers the United States would receive, it was not fully implemented until 1991. And even then, many of the INS agents and administrators supported and operated under the old guidelines. The Act did impose a cap on how many refugees could apply for asylum. Under the 1980 Refugee Act, only 5,000 refugees were slated to be approved for asylum status regardless of how many applied, regardless of the validity to their claim or evidence of persecution based on the categories protected by the United Nations. Annual caps for refugees and asylees for various years since 1982 were as follows:

- 1982: Executive authorized 140,000 refugees to be admitted, but only accepted 99,200.\(^4\) This is a 71% approval rate for the year 1982.
• 1983: Executive authorized 98,000 refugees to be admitted, but only accepted 73,651. This is a 75% approval rate for the year 1983.

• 1989: Aliens filing for asylum surpassed 100,000.

• 1996: Asylum application protection under the newly approved coercive population control (CPC) category for well-founded fear of persecution was capped at 1,000 per year. This cap was later repealed by the REAL ID Act of 2005.

The bottom line for nation states was to offer asylum without being overwhelmed by that population of immigrant. The negative effects a state may be forced to incur, should it assume responsibility for more refugees and asylum seekers than it can provide services for, can lead to overtaxed welfare programs and domestic political backlash. Dangerous individuals, criminals, or terrorists gaining entry into the United States, and bogus asylum claims that abuse the right to stay in the U.S. and reap the benefits established for safe haven seekers, are additional risks this country faces.

**Analysis of Approval-Denial Rates: Rhyme or Reason?**

The reasons why asylum status is granted or denied may informally depend on the relationship the United States enjoys with the country of origin the asylee has fled. “Nations that oppose each other either by political organization or by force of arms frequently extend asylum to political dissidents who defect and seek refuge.”

Between 1975 and 1980, the United States admitted over one million refugees, of whom “…99.7 percent [were from] countries under communist rule.” Prior to the 1980 Refugee Act, which was not fully implemented until 1991, it was policy to give
preference to those individuals fleeing counties to which the United States felt ideological opposition, and these individuals were admitted under the Seventh Preference code of asylum policy. This featured a bias toward those from former U.S. government enemies while dismissing the horrors and plight of individuals who fit the definition of refugee but were excluded from being able to enjoy asylum in the United States due to the state from which they originated was neither communist or Middle Eastern states. Though the 1980 Refugee Act officially eliminated this preference, not much changed. From 1981 to 1990, there was a 94.6% refugee admittance rate for individuals who originated from communist or Middle Eastern states. In addition, “The rate of approval for asylum cases decided by INS district directors between June 1983 and September 1986 was highest for applicants from countries generally characterized as unfriendly to the United States.”

From 1984 to 1990, over 60% of the refugees admitted originated from the Caribbean and Central American states. It should be noted, however, that Haiti is only one of a handful of states whose fleeing asylees face discrimination. U.S. asylum policy has neglected large portions of asylum seekers originating from Central and South America. These asylum seekers tend to be automatically categorized as economic migrants or economic refugees rather than political refugees who have the right to asylum.
This widespread disregard for individuals coming out of Haiti contests the notion that the United States still values safe haven and indicates an element of xenophobia in current policy. “Ideology continues to play a role in granting asylum, so that for applicants from certain countries, especially those of the eastern bloc, there is a presumption that most applicants meet the standard. But applicants from other places, particularly Central America and Haiti, must meet a much higher standard.”

Table 3 displays the Central American asylum application breakdown between 1984 and 1990.

Table 3. Central American Asylum Statistics 1984-1990

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>El Salvador</td>
<td>45,000</td>
<td>2.5%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>9,500</td>
<td>1.8%</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>48,000</td>
<td>25%</td>
</tr>
</tbody>
</table>

Asylum Results in the 1990s

The following data illustrate some of the key developments in U.S. asylum policy in the 1990s:

- According to the American Immigration Law Center, a private immigration law firm based in Fort Lauderdale, Florida, it was calculated that “…in fiscal year (FY) 1992, asylum seekers filed approximately 103,000 applications. By FY 1993, the rate of receipt had jumped to 150,000.”

- In 1994, the year prior to the radical reforms of the IIRIRA, approximately 140,000 asylum applications were filed. In 1996 however, 116,000 asylum applications were filed, a reduction of nearly 20%.

- “Between 1996 – 2005, the U.S. government accepted 60,800 refugees a year on average, and granted asylum to an average of just over 28,000 people a year.”
Asylum policy in the 1990s fluctuated between the implementation of the 1980 Refugee Act and the 1996 IIRIRA reforms. The initial goal was to broaden the opportunity to receive safe haven by codifying the refugee approval process and designating a separate asylum category. By the time the 1996 reforms materialized, seeking asylum became a bureaucratic nightmare. Asylum applicants poured into mandatory detention, hoping to prove their claim of past and fear of future persecution so that they may be granted the authority to find safety and a new life in the United States.

**Did the American Value of Asylum Drastically Change As a Result of September 11, 2001?**

- In a sample collection of asylum applications in 2002, the GAO “…found a 90 percent rate of fraud in a preliminary review of five thousand petitions for asylum. A more detailed follow-up review of 1,500 of those petitions could locate only one that was bona fide.”\(^{18}\)

- “Of the 52,607 asylum cases decided in 2002, only 18,998 were accepted – a denial rate of 64 percent.”\(^{19}\)

- “In 2003, there were an estimated 11.9 million people around the world in need of protection because they were fleeing persecution of one sort or another.” Of these, “…the U.S. granted asylum to 244,700 people….”\(^{20}\) Not included in that asylum granting statistic was the “…46,000 political asylum cases that were filed or reopened in the U.S…less than 25% were approved.”\(^{21}\)

- “In FY 2003, there were 42,000 claims for asylum filed with UCIS…asylum officers approved 11,434 cases in FY 2003, and the percentage of cases approved was 29% of cases decided.”\(^{22}\)

- FY 2003 – FY 2007: Asylum applications submitted to immigration court fell by 18%.\(^{23}\) This reduction in applications can be a result of the difficulty reaching
asylum status is in this country, or because genuine claims made up such a small percentage of actual applications that by the time an application reached immigration court, fraudulent claims had been rejected.

The above data reflect that non-natives are still seeking the United States as a safe haven regardless of the exclusionary elements found in the 1996 IIRIRA and the post 9/11 security policies. The numbers also testify to the fact that the United States has not lost sight of the inscription found on Lady Liberty for over 11,000 asylum claims were approved just by asylum officers alone in FY 2003.

All immigration hearings that pertain to asylum applicants, such as asylum-only, credible fear review, reasonable fear review, appeals from DHS decisions, etc., are collectively grouped into what the Department of Justice calls “receipts.” Recent statistics on immigration hearings for asylum purposes are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Asylum Receipts</th>
<th>Asylum Completions</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 2005</td>
<td>53,160</td>
<td>60,658</td>
</tr>
<tr>
<td>FY 2006</td>
<td>55,654</td>
<td>58,056</td>
</tr>
<tr>
<td>FY 2007</td>
<td>54,957</td>
<td>55,573</td>
</tr>
</tbody>
</table>

Immigration Courts received asylum-only cases that are numbered as follows:

<table>
<thead>
<tr>
<th></th>
<th>FY 2005</th>
<th>FY 2006</th>
<th>FY 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asylum Cases Received</td>
<td>1,553</td>
<td>959</td>
<td>810</td>
</tr>
<tr>
<td>Asylum Cases Completed</td>
<td>2,063</td>
<td>1,456</td>
<td>994</td>
</tr>
</tbody>
</table>
The discrepancy between “Received” and “Completed” for both receipts and asylum-only cases represents a disproportionate ratio between how many cases the DHS can successfully handle each year. The differential between cases received and completed became narrower by FY 2007 than it was in FY 2005. This data signifies that the review process has been reducing the number of backlogged asylum application cases, but it still falls short of efficiently executing compassionate asylum policy. This shortfall is due to the current mandatory detention and the length of time many bona fide asylum seekers must wait for their cases to be heard.

Fiscal years 2006 and 2007 saw little change in the ranking of top five states from which the asylum applicants originated. In order, they are:

<table>
<thead>
<tr>
<th>State</th>
<th>Applications Received</th>
<th>Applications Granted</th>
<th>Asylum Approval Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>China</td>
<td>9,317</td>
<td>4,061</td>
<td>44%</td>
</tr>
<tr>
<td>El Salvador</td>
<td>7,170</td>
<td>95</td>
<td>1%</td>
</tr>
<tr>
<td>Haiti</td>
<td>6,073</td>
<td>570</td>
<td>9%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>5,060</td>
<td>160</td>
<td>3%</td>
</tr>
<tr>
<td>Mexico</td>
<td>2,641</td>
<td>48</td>
<td>2%</td>
</tr>
</tbody>
</table>

As indicated in table 7, the states producing the most asylees are exactly the same in FY 2007 as they were in FY 2006, only the order slightly changed.
Table 7. FY 2007 Top States Producing Asylees27

<table>
<thead>
<tr>
<th>State</th>
<th>Applications Received</th>
<th>Applications Granted</th>
<th>Asylum Approval Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>El Salvador</td>
<td>10,522</td>
<td>138</td>
<td>1%</td>
</tr>
<tr>
<td>Guatemala</td>
<td>8,078</td>
<td>134</td>
<td>2%</td>
</tr>
<tr>
<td>China</td>
<td>7,934</td>
<td>4,540</td>
<td>57%</td>
</tr>
<tr>
<td>Haiti</td>
<td>4,263</td>
<td>587</td>
<td>1%</td>
</tr>
<tr>
<td>Mexico</td>
<td>2,917</td>
<td>48</td>
<td>2%</td>
</tr>
</tbody>
</table>

Table 8 below shows that between FY 2006 and FY 2007, asylum approval percentage rates increased and the number of denied asylum applications decreased. Though the backlog of adjudicating claims still poses a great deal of concern, the grants and denials rates prove that a systematic asylum process can in fact work to the benefit of both the refugee seeking asylum, and the individual state providing that safe haven.

Table 8. FY 2005 – FY 2007 Approval Rate28

<table>
<thead>
<tr>
<th></th>
<th>FY 2005</th>
<th>FY 2006</th>
<th>FY 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approvals</td>
<td>11,757</td>
<td>13,352</td>
<td>12,807</td>
</tr>
<tr>
<td>Denials</td>
<td>19,167</td>
<td>16,566</td>
<td>14,850</td>
</tr>
<tr>
<td>Approval Rate</td>
<td>38%</td>
<td>45%</td>
<td>46%</td>
</tr>
</tbody>
</table>

Theaters of Conflict: U.S. Participation & Asylum

In the context of the United States involvement in Operation Enduring Freedom (Afghanistan) and Operation Iraqi Freedom, asylum application approval/denial statistics are of great interest. Does the United States consider its military presence in these two conflict areas to be a reasonable factor in granting large-scale asylum to those who have assisted in these war efforts? Does the U.S. extend a lenient asylum policy for applicants
from Iraq, Afghanistan, and Pakistan, or does the U.S. maintain a unified and overall fair asylum policy for even those individual states? In a summary, table 9 indicates a concentrated effort of citizens fleeing these three states.

<table>
<thead>
<tr>
<th>State</th>
<th>FY 2005</th>
<th>FY 2006</th>
<th>FY 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Afghanistan:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Apps.</td>
<td>65</td>
<td>53</td>
<td>57</td>
</tr>
<tr>
<td>Approvals</td>
<td>33</td>
<td>25</td>
<td>22</td>
</tr>
<tr>
<td>Denials</td>
<td>30</td>
<td>10</td>
<td>13</td>
</tr>
<tr>
<td>Iraq:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Apps.</td>
<td>314</td>
<td>344</td>
<td>427</td>
</tr>
<tr>
<td>Approvals</td>
<td>94</td>
<td>191</td>
<td>276</td>
</tr>
<tr>
<td>Denials</td>
<td>121</td>
<td>126</td>
<td>61</td>
</tr>
<tr>
<td>Pakistan:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Apps.</td>
<td>739</td>
<td>574</td>
<td>453</td>
</tr>
<tr>
<td>Approvals</td>
<td>140</td>
<td>178</td>
<td>140</td>
</tr>
<tr>
<td>Denials</td>
<td>328</td>
<td>250</td>
<td>167</td>
</tr>
</tbody>
</table>

In FY 2007 the U.S. granted asylum to nearly 39% of applying Afghanistan refugees, nearly 65% for Iraqi refugees, and nearly 31% for asylum applications for Pakistani nationals. The applications for asylum from Afghani natives fluctuated between 2005 – 2007 and the rate for Pakistan natives significantly decreased. The rate of applications originating out of Iraq has grown incrementally from 2005 to 2007. It is my opinion that this increase is a result of the state’s civil unrest and the danger of repercussion directed toward natives who assisted in the U.S. war effort, or a combination of the two.
Method of Asylum Application

Applying for asylum by presenting one’s case at the border and/or filing an application with the Asylum Office is called an “affirmative” application. Applying for asylum by going through an immigration hearing where the judge presides over one’s case is called a “defensive” application. Defensive applications are also considered to be appeals from INS-UCIS decisions, removal orders, and other judicial proceedings.

The following data address approval rates associated with how an asylee seeks asylum approval in the United States:

- 1992: Immigration judges approved 19 percent of all asylum applications.30
- “A recent study found that immigration judges granted asylum four to six times as often to applicants with attorneys.”31
- The Asylum Corps was created by the 1980 Refugee Act but was not established until 1990. It is a sub-division in the Office of Refugee, Asylee and Parole and the Corps is made up of specially trained, professional asylum officers fluent in domestic and international refugee law. In 1992, the Asylum Corps approved only 38 percent of their asylum cases.32
- FY 2003: “Generally, over two-thirds of all asylum cases that EOIR (Executive Office for Immigration Review) received were cases referred to the immigration judges by the asylum officers. The percentage of EOIR asylum cases approved was 37%....”33
- FY 1999 – FY 2005: asylum denial rate for applicants without a lawyer was 93%; denial rate with a lawyer was 64%.34
- FY 1999 – FY 2005: identified ‘a significant judge-by-judge disparity,’ with 10 percent of judges denying asylum in 86% or more of their decisions, and another 10% denying in 34% or fewer.35

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• The majority of asylum applications are submitted affirmatively rather than defensively.

• Between FY 2003-FY 2007, the U.S. saw a reduction by 16% of affirmative asylum applications and a decrease by 24% of defensive asylum cases. This decrease in defensive asylum approvals can be attributed to the all too common failure to appear for their hearing.

Asylum cases that were adjudicated in immigration court saw approval rates increase for both affirmative and defensive categories. Table 10 below illustrates these approval increases.

<table>
<thead>
<tr>
<th>Case Types Approved</th>
<th>FY 2005</th>
<th>FY 2006</th>
<th>FY 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirmative Cases</td>
<td>44%</td>
<td>51%</td>
<td>51%</td>
</tr>
<tr>
<td>Defensive Cases</td>
<td>28%</td>
<td>34%</td>
<td>39%</td>
</tr>
</tbody>
</table>

This data shows a steady course of approval rates among affirmative and defensive cases. It also shows a greater approval rate for affirmative cases over defensive cases in each year studied, save for the affirmative approval rate for 2006 and 2007 which held firm at 51%.

**Trends Identified**

The INS, UCIS, and further, the DHS are imperfect bureaucracies. The asylum process for bona fide seekers is lengthy, demanding and sometimes fruitless for the applicant who may have a valid claim for protection against persecution. The federal agencies are imperfect in another way, in that they have allowed persecutors into the U.S. who have made fraudulent asylum claims. In Michelle Malkin’s book, *Invasion*, she
states, “(But) according to various human rights groups and newspaper investigations, there may be anywhere between one hundred and seven thousand foreign nationals living in the United States who have committed human rights atrocities around the globe….Many have taken advantage of compassionate asylum and refugee policies intended for the victims of their abuse.”38

“Individuals from countries with the worst human rights violations are being bypassed in US refugee admissions. One possible explanation of course, is that refugees…have found a safe haven elsewhere [somewhere between their home state and the US]... Additional possible explanations could be that the United States does not attribute as much concern for these survivors of human rights abuses as the United Nations hoped it would, or that all applicants are not given a fair chance at asylum admission due to some of them having been labeled economic migrants.

Another obvious trend remains the failure of federal agencies to competently, ethically and efficiently conduct port of entry interviews, secondary interviews and investigations. By the summer of 1994, there were over 400,000 asylum applications that were backlogged awaiting INS attention, not to mention the projected increase of 10,000 new cases per month.40 The backlog frustration is true for both the legacy of the INS and now, UCIS. UCIS has done a much better job at minimizing the asylum backlog than the INS was able to. But due to the time-consuming nature of these investigations, while
simultaneously processing new asylum claims, the system continues to operate inefficiently and overwhelmed.

The approval rate of asylum cases with attorney representation speaks volumes about the spirit of asylum policy in the U.S. There seems to be a bias against non-natives who have experienced persecution in their home country but possess no liquid resources, nor fluency in English or knowledge of the judicial and asylum systems. For the individual who has recently fled his home state out of fear of persecution, asylum in the United States may as well be a dangerous gamble. Having a greater chance of approval with legal representation is obvious; however it creates an unfair advantage for the wealthy and connected, while simultaneously creating further barriers for the impoverished refugee fleeing oppression and possible death.

Another trend is the approval/denial rates for applicants in relation to the method they used to apply for asylum, either by submitting an asylum application to the INS-UCIS or by an immigration hearing. The trend here has been a reduction in asylum denial rates for immigration court decisions and an overall steady increase in approval rates. This trend speaks volumes to the intended codification of asylum policy. The spirit this structure invokes is one concerned with the homogenous or the consistent generosity for all individuals instead of an advantageous asylum policy for only those originating out of certain states. The policy reforms, though certainly needing improvements, have standardized the system to be more fair and equal for all. And in
doing so, the notion of the United States maintaining its ‘safe haven’ concept for the world’s political refugees has resurfaced.

**Reporting the Findings**

To answer the primary question of this thesis, current immigration policies toward asylum seekers continue to be representative of the American value of providing safe haven. It is evident that more importance has been placed on advocating for refugees with legitimate claim to asylum approval by removing the Seventh Preference according to the 1980 Refugee Act. This Act was by far the most generous U.S. policy piece for asylum seekers. Since then, changes in policies tend to reference burdens of proof, deadlines for when a refugee may apply for asylum after arriving in the United States, and mandatory detention while a claim is being investigated. However, these changes to the guidelines for asylum applicants do not change the inherent spirit of providing for asylum. The American value of providing safe haven for those in need has not drastically changed but it has now a negative context due to the steps asylees must advance through before being granted full asylum status.

The founding principle of asylum in the United States was to provide a safe haven for those fleeing persecution, and unfortunately, recent years have shown the number of those seeking this safe haven has exploded. The catastrophic events of September 11, 2001 and the subsequent attempts at further attacks on U.S. soil and its citizenry have forced additional reviews of immigration policies and a special focus on asylum policy.
The resulting limitations and structures to the asylum application system are required to maintain safety inside a nation’s borders so that not only its citizens can be safe, but also so that asylum can be provided to non-natives.

In general, asylum policies are developed by politicians and they are enforced by public servants. Historically, enforcement has been a great concern for human rights advocates and well-intentioned politicians because the execution of policy sometimes falls short of the actual written policy. For example, an asylum seeker should not be held in mandatory detention longer than a “reasonable amount of time” needed to investigate a claim, but people are being held for years. Another example is in 1999 it was found that INS agents had ignored the mandatory terrorist background checks for asylum seekers 90% of the time. These examples beg the question of whether the parallel importance of humanitarianism and national security can ever, in fact, be in balance.

The system must be re-designed to meet the ever-increasing needs of the international refugee and asylum community. However, this growth cannot be done if it threatens to place the United States at risk; for if it does, the U.S. would be a safe haven for both the persecuted and the persecutors. Should all rules and regulations be removed, the United States would be unable to provide safety to even its own citizen, let alone the asylum population of the world. The spirit behind mandatory detention is not in its entirety negative, for there must be some responsibility to ensure the safety of the citizenry before opening its borders to all individuals who seek the haven of the United
States. Mandatory detention is a feature built to exclude the fraudulent asylum seekers, criminals and persecutors included, however it sometimes does so at the expense of bona fide asylum applicants.

Additional Questions Answered

The beginning of this chapter presented a series of sub-questions regarding the evolution of asylum policy in the United States. The analysis of refugee and asylum data helped determine these answers. The first sub-question posed was whether or not U.S. asylum policy was prejudicial or impartial. De jure asylum policy is more impartial than it is prejudicial. However, evidence points to de facto practices of prejudicial approvals toward asylum seekers from certain types of countries. The longstanding asylum qualification in the United States had been the Seventh Preference, but even after the 1980 Refugee Act abolished this clause, it remained an active procedure. Due to this preference that was still being followed long after its abolishment, the state of origin that had preferential treatment continued into an atmosphere of prejudice. Investigatory policies were followed more often and the applicants who originated from other than communist or Middle Eastern states received greater scrutiny.

Ideological preference has historically benefitted asylum applicants from communist states and Middle Eastern states. There have also been prejudicial practices against asylum applicants whose state of origin plays a limited geo-political role on the world stage. This is most evident when analyzing the approval/denial rates of asylum
applicants that fled from Caribbean and South and Central American states. Tremendous
denial rates come from labeling these aliens as “economic immigrants” who do not fit the
criteria for asylum qualification.

The second question asked if U.S. asylum policy has become more exclusionary
or open. Asylum policy has exhibited a shift toward exclusionary attributes rather than a
shift toward open borders. However, the exclusionary features of asylum policy are to its
overall benefit in that the shift provides greater opportunity for more refugees to qualify
for asylum status. This is most true due to the 1980 Refugee Act eliminating the Seventh
Preference and removing the annual cap on refugee absorption. Although U.S. policy has
shifted toward exclusionary attributes, these attributes standardized the system so that
more legitimate asylees may enjoy safe haven. The exclusionary features found in the
evolving asylum policies are not intended to keep asylees out of the U.S. On the
contrary, they seek to allow asylees a uniform and fair opportunity to stay in the U.S.

And finally, the third question put forward was to determine if current asylum
policy acts as a deterrent or is permissive to asylum applicants. The attributes in asylum
policy are permissive in spirit so that the important division meant for asylum status
remains specialized and protective. The evolution of policy codified the asylum
procedures and as a result, demanded equality for the alien from Afghanistan or the
former USSR, India or China, Haiti or Colombia. The definition of a refugee eligible for
asylum is narrow enough to protect those who have a well-founded fear of persecution
due to nationality, race, religion, political following, or group membership if he or she is returned home. The asylum applicant must convince the immigration judge or the UCIS agent of this fear as the burden of proof is the asylees’ burden. The findings from the subsequent investigation into applicant’s request provide the ultimate deciding factor. Should enough evidence be found to support a claim of persecution, and the U.S. was the state of first asylum for the alien, and that person has not committed particular crimes in the U.S., he or she stands a strong chance of being approved.

Conclusion

The asylum process demands a great deal of patience from the applicant for the initial investigation and any subsequent appeals will be lengthy. The burden of proof, interviews, investigations and mandatory detention for applicants arriving without valid travel documents all act as deterrents against fraudulent applications. These measures are meant to prevent individuals who are intent on benefiting from policy loopholes from taking advantage of the generosity of safe haven.

Chapter 5 will present final conclusions about the evolution of U.S. asylum policy as it relates to the American value of providing a safe haven to a very small and vulnerable immigrant category. The next and final chapter will also provide recommendations for asylum policy that would better balance humanitarianism and national security. A goal of this balance would be meeting the needs of the international community as well as the current U.S. citizenry. The notion of safe haven has been in the
American fabric of international policy since the 1948 United Nations Declaration of Human Rights and continues to afford, in one form or another, the protection needed by eligible political refugees.
The origins of asylum policy in the United States used the American value of providing safe haven as a building block. And the initial asylum policy was the result of the refusal to accept refugees, mostly from Europe, into the United States during World War II. These initial policies adopted into U.S. law originated from various departments within the United Nations. The 1948 U.N. Declaration of Human Rights folded into the 1951 Convention Relating to the Status of Refugees, which was absorbed into the 1967 Protocol that helped set the stage for U.S. domestic policy protecting the value of safe haven and opening its borders to the internationally persecuted.

The shift in attitudes came during policy evolution, in the mid-1990s. This shift toward codifying the asylum-granting system was negatively viewed as structured exclusion, mostly as a result of the xenophobic bias against aliens seeking safety and economic opportunity in this country. The codification of the system did demand protocol be followed by conducting interviews, background checks and eliminating the ideological bias. However, procedures and structure are not synonymous with structured exclusion.

The original policies are romantically viewed as opening borders to any and all who sought resettlement in the United States; and it was because there were very little domestic policy pieces in place to set up the larger, unified policy for success. One of these domestic policies was the process to ensure the safety of American citizens from
fraudulent and/or violent criminals taking advantage of the system under the guise of having been persecuted. The evolution of asylum policy does not create structured exclusion or unnecessary obstacles. For example, the 1980 Refugee Act eliminated the longstanding annual quotas for accepting asylees each year, and it removed the clause allowing preferential treatment to a few groups while many other groups were systematically neglected. The American value of providing safe haven is integrated in current asylum policies. This final thesis chapter will offer conclusions, final recommendations and contributions made by this thesis, and suggestions for future research.

Chapter 4 provided a quantitative analysis of approval rates, methods of asylum application submission, and capacity limits that support the notion that the United States maintains its credibility when claiming to offer safe haven to the world’s asylum population. This analysis also helped answer successive questions such as whether or not attitudes are globally congruent and whether geopolitical forces influence asylum admission/denial rates. The American value of providing safe haven for refugees is challenged by negative attitudes that are sometimes associated with immigration policy, of which asylum is a part. The American people as a whole know opening our borders to those who have a legitimate asylum claim is the right thing to do. Challenges surface when it comes time to transition from the words “providing asylum” into action.
Decisive Conclusions Drawn

Historically, U.S. refugee/asylee policy has been reactive. It is no surprise that a large portion of political refugees will continue to consider seeking asylum in the United States, regardless of the bureaucratic hurdles. And they do so to achieve a version of the American Dream. That dream contains three elements: “…a celebration of freedom, the enthronement of the individual, and a firm belief in equality of opportunity.”¹ Actual policies should be shaped or influenced by the intent or the spirit designed for that policy. American attitudes have not always exuded compassion and tolerance. These attitudes tend to be more negative toward general immigration though not specifically toward asylees. On the whole, the American value of promoting and protecting humanitarianism and freedom from harm fully support the opportunity for asylum in this country. The mechanics of reaching this status are the focus of the true asylum policy debate.

Rafeena Rashid, author of *Fortress North America*, protests that asylum policy in the United States is incomplete due to the fact that an asylum seeker can be denied asylum status. The chance of asylum denial, for Rashid and others, measures whether or not asylum policy is effective or complete. The right to seek asylum is guaranteed by the 1948 United Nations Declaration on Human Rights, but the granting of asylum is not guaranteed by the international agency, nor could it ever be. The approval/denial decisions, caps and procedures which asylum applicants experience will remain controlled and determined by autonomous sovereign states.
Basically stated, aliens (political refugees and asylees included) have the right to leave their home country and the protection of non-refoulement, but they lack the automatic right to stay in the United States or any other country. An open border policy is not the solution. Opening borders would relax broader immigration policies, thus exposing the United States to an overwhelming population explosion that would threaten to weaken the effectiveness of maintaining a unique population of asylees that are an internationally protected group. A conclusion of this thesis is that the evolution of asylum policy should not provide blanket asylum for any and all who apply. All immigration policies, asylum included, have become more guarded and circumspect. This country has grown to be more cautious and emits skeptical generosity in its attempt to pre-empt a national security catastrophe.

**Final Recommendations & Contributions**

The following recommendations and contributions embrace the value of safe haven, preserve national security measures and allow for policy adaptability. It should be noted that the problem with any proposition is its feasibility. It places responsibility on many actors and the focus should be the end goal and on effective implementation of solutions. “American refugee [and asylum] policy and the principles that guide it must be sufficiently flexible to accommodate an evolving international system.”\(^2\) Any change in asylum policy must be accompanied by a convincing international need, brought to the
U.S. citizenry by a strong leader and meant to implement positive changes for the right reasons. The right reasons are the saving of lives.

One proposed recommendation to improve U.S. asylum policy is to increase the scope of existing categories for which one can be persecuted. “Under pressure from feminist, antiabortion and gay rights groups, government agencies and immigration judges have ruled since 1994 that applicants may qualify for asylum based on declarations of homosexuality, assertions of women’s rights, fear of female circumcision, and even spousal abuse in their home countries.”3 These are not new “categories” of persecution that would qualify one for asylum under the international U.N. definition, but they would be sub-categories of “group membership” such as gender, sexual orientation, etc. and “political association” such as women’s rights advocacy. These sub-categories should be explicit in defining what qualifies for asylum applications. This would be done on a national level with the aspiration to influence the global community for accompanied participation.

A second recommendation is to abandon the presumption that most Haitian aliens pursuing shelter in the United States are economic migrants rather than possible political refugees seeking asylum. This wholesale overgeneralization, having been established long ago, bears little evidence on the current and continuous deluge of Haitian refugees claiming persecution by their home country and seeking asylum here. The evidence is clear, as Chapter 3 presented, that the current state of Haiti is that of political corruption,
large-scale poverty and unemployment, and widespread human rights abuses. The challenge asylum officers face in the field should not be the chronic attitudes of a prior INS era. Each and every asylum applicant should be evaluated on his own merits, according to consistent criteria.

Third, mandatory detention should be in UCIS-specific shelters only. No longer should asylum applicants awaiting their immigration hearing or their burden of proof investigation be co-mingled with the criminal population in prisons and jails. According to Article 31 of the United Nations Convention Relating to the Status of Refugees, the asylees without valid documentation who entered the United States did so under extraordinary circumstances. This benefit of the doubt should be the status quo pending an investigation rather than treating a refugee who has escaped with only his life as a criminal to be punished in the American prison system. Asylum seekers entering this country without valid documentation should not warrant criminal detention unless a background check identifies the individual is a repeat applicant with a fraudulent claim and who discloses no additional evidence to corroborate his story.

A fourth recommendation would be an adjustment to the structure of the division that is responsible for processing asylum applications. UCIS should continue to report directly to the Department of Homeland Security, but a counterpart unit in the Department of State should be created. This liaison unit in State would be assigned to specific global regions to provide field expertise when an application from any particular
region is submitted. It would report to the asylum agents investigating a claim on the status of a country, its home government and current economic conditions. In addition, the Asylum Corps could have an increased role in asylum case review.

Fifth, a DHS Foreign Languages Division should be developed to be used for all non-English speaking asylum applicants. This language division would reduce asylee confusion in relation to the required steps involved and information requested, minimize the lack of support that is felt by the applicant, and expedite the asylum process with clear communication. In addition, UCIS agents should cross-train in a foreign language. At least a working knowledge of one foreign language should be encouraged.

Sixth, asylum agents stationed at ports of entry specifically, but all immigration agents generally, should be required to train in cultural diversity and crisis counseling or crisis management courses. By developing compassionate skills, a smoother interviewing atmosphere and investigation process will be created. It is also recommended that a demeanor of respect and genuine good-will be used for all asylum applicants.

More generally, American attitudes should focus on the fact that only a small proportion of refugees are asylum seekers in this country. There should be zero ideological preference or prejudice when developing, reforming or enforcing asylum policy. An important and challenging recommendation is to change how individuals think. Change how they think about immigration as a whole and about asylees as a sub-
set. Change how they think about national security and the extent to which this nation should not return to the days of isolationism. “The attitude is that as a nation we are under no moral or legal obligation to accept any refugees at all, and if we do accept some, it is an indication of our generous and humanitarian character.”\textsuperscript{4} That national attitude must change. The right to live without the threat of persecution should be a universal moral goal.

The most challenging recommendation is to eliminate the need for safe haven in the first place by preventing conflicts and human rights abuses that produce refugees and asylees. “Fundamental solutions to the refugee problem require either permanent resettlement or reparation. At a deeper level, they depend on prevention: the avoidance of the kind of violent civil conflicts and government repression and persecution of its citizens that generate the refugee flow.”\textsuperscript{5}

Since September 11, 2001, Western leaders have shown a strange ambivalence. They continue to provide humanitarian relief, albeit in dwindling amounts. They also continue to support and to accept refugees, although also in dwindling amounts. But they have not tried to prevent, to contain or to solve the many crisis that beset South Asia, Chechnya, the Middle East or major parts of Africa – although President Bush and the ‘Quartet’ of the United States, the United Nations, the European Union, and Russia are making another long overdue effort to arrange a peace settlement between the Israelis and the Palestinians.\textsuperscript{6}

Prevention of the threat of, and actual persecution, should be one of the primary functions of national security, and as a result, the need for asylum policy would be expunged.
Future Research

This thesis followed the evolution of U.S. asylum policy in the context of American values and attitudes, to investigate the claim that the United States retains its spirit of acting as a safe haven for the world’s political asylees. This narrow topic, within the larger scope of immigration, can be the starting point for further research into the ongoing need for asylum policy improvements meant to standardize and humanize the system. A unique and challenging concept for future research is to investigate how much economic hardship does it take to qualify as a “persecuted” individual? That is, is there a length of time for suffering economic hardship that would re-categorize an “economic migrant” as tantamount to a “political refugee” who would then meet the qualification to apply for asylum?

An example of this question is the white farmer in South Africa who had a share of farm land taken by the state. That farmer was still able to work the land he was allowed to keep to stay economically self-sufficient. But when the state transfers the rest of that white farmer’s land to a black farmer, on the sole basis of race, that white farmer’s livelihood has become taken from him. Is it then that he has become eligible to seek asylum? This very specific division would further develop the definition of an asylee.

Flexibility and generosity of spirit must stay at the forefront of asylum policy in the United States. A goal of asylum policy change is to provide simultaneously safe asylum for those who need it while ensuring our national security. “We want people who
cherish freedom, not those who worked in other countries to smother it. We want people who respect the law, not those who once engaged in bloody lawlessness. We want people who embrace the American Dream, not those who caused nightmares abroad.”7 These fundamental characteristics held by bona fide asylees are the intended target of America’s generous policies and that should be the only American prejudice toward aliens.

The rash of civil wars and political instability in the post-Cold War era, fueled by underdevelopment and the proliferation and misuse of small arms and light weapons, have contributed to human rights abuses worldwide. These conditions, coupled with the ease of travel and globalized information systems, have resulted in a surge of asylum seekers entering the United States. Conflicts will most likely persist and people will continue to flee for safety. Therefore, the ever-growing need for a cohesive, strategic and humane American asylum policy will not soon dissipate.
NOTES

CHAPTER 1


3 Ibid., 53.


6 Ibid., 136.


10 Gibney, *Open Borders?*, 119.


12 Gibney, 133.

13 Ibid., 114.

14 Ibid.


CHAPTER 2


6Ibid. 351.

7Christina Boswell, The Ethics of Refugee Policy, (VT; Ashgate Publishing Limited, 2005), 155.

8Gibney, Open Borders?, 113.


11Ibid., 16.

12Ibid., 18.

13Ibid., 20.

14Ibid., 31.

15Ibid.

16Ibid., 32.


19Ibid., 20.


CHAPTER 3


9Ibid.

10Ibid., 8.


13Ibid., 34.


15Silk, Despite a Generous Spirit, 11.


17Ibid., 13.

18Ibid., 20.


22Ibid.


24Ibid., 40.
28Ibid., 254.
33Ibid., 118.
35Ibid., 133.
39Fernandes, 142.
40Ibid., 143.

CHAPTER 4


5. Ibid.


21 Ibid, 140.
24 Ibid., 11.
26 Ibid., 20-36.
27 Ibid.
28 Ibid., K2.
29 Ibid.
30 Hing, *Defining America Through Immigration Policy*, 252.
32 Hing, *Defining America Through Immigration Policy*, 252.
35 Ibid., 33-34.
37 Ibid., K3.
39 Gibney, *Open Borders?*, 164.
41 Malkin, *Invasion*, 224.
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4Gibney, Open Borders?, 116.


7Malkin, Invasion, 140.
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