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Optimal Asylum

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ABSTRACT

The U.S. asylum system is noble but flawed. Scholars have long recognized that asylum is a "scarce" political resource, but U.S. law persists in distributing access to asylum based on an asylum seeker's ability to circumvent migration controls rather than the strength of the asylum seeker's claim for protection. To apply for asylum, an asylum seeker must either arrange to be smuggled into the United States or lie to the consulate while abroad to obtain a nonimmigrant visa. Nonimmigrant visa requirements effectively filter the pool of asylum applicants according to wealth, educational attainment, and intent not to remain in the United States indefinitely—criteria completely unrelated to or at odds with the purposes of refugee law. The system as currently designed, therefore, selects asylum seekers based entirely on their ability to satisfy irrelevant criteria and without regard to their relative need for protection from persecution. Such a system fails to maximize the humanitarian benefits of scarce U.S. asylum resources.

To better protect individuals facing serious persecution, this Article contends, Congress should consider reforming the immigration laws to provide for an "asylum visa" to be made available to certain foreign nationals. U.S. consulates abroad, under proper and limited circumstances, might issue this visa to foreign nationals who demonstrate a credible fear of persecution on a ground enumerated in the United Nations Convention Relating to the Status of Refugees (Refugee Convention). Applicants would then lawfully enter the United States and apply for asylum. Successful applicants would remain, and unsuccessful applicants would face removal. Drawing on the extant literature on "protected entry procedures" (PEPs) that once existed in Europe, this Article considers the costs and benefits of the practice of issuing asylum visas. This Article concludes that, despite serious and uncertain costs and the impracticability of issuing asylum visas in some countries, this practice would likely create substantial benefits. In particular, it would likely decrease asylum seekers' reliance on human smugglers, clear a path to protection for bona fide asylum seekers, and increase the accuracy of information possessed by both asylum seekers and the U.S. government. Thus, the asylum

visa would assist asylum seekers in making better-informed decisions ex ante and help to achieve a better allocation of asylum resources ex post. For these reasons, the creation of an asylum visa and the potential details of such a proposal merit further study.

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I. INTRODUCTION

Chen Guangcheng, a Chinese human rights activist, escaped from house arrest in the Shandong Province and entered the U.S. embassy in Beijing on April 26, 2012, seeking refuge from the Chinese authorities.[1] Chen's escape and subsequent sheltering by the U.S. embassy triggered a diplomatic crisis, calling attention to China's abuse of rights activists at a time when the two countries were on the verge of economic talks.[2] The embassy sheltered Chen for six days.[3] Chen apparently rejected the idea of political asylum in the United States and expressed a desire to remain in China, provided the Chinese authorities would ensure his safety and that of his family.[4] Chen eventually left the embassy unaccompanied by embassy officials.[5] Within hours, he concluded that he could not live safely in China.[6] The U.S. government subsequently negotiated a deal with the Chinese government that would allow Chen to travel to the United States on a student visa and enroll at New York University Law School as a visiting fellow.[7]

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1. *Chen Guancheng Timeline*, WASH. POST (May 2, 2012), http://www.washingtonpost.com/wp-srv/special/world/chen-guangcheng-timeline/.

2. *Id.* (providing an overview of Mr. Chen's escape to the United States).

3. Martin Patience, *China Dissident Chen Guancheng Heads to US*, BBC NEWS (May 19, 2012), http://www.bbc.co.uk/news/world-asia-18127886.

4. Jan Perlez & Andrew Jacobs, *A Car Chase, Secret Talks, and Second Thoughts*, N.Y. TIMES (May 2, 2012), http://www.nytimes.com/2012/05/03/world/asia/a-car-chase-secret-talks-and-second-thoughts.html?pagewanted=2.

5. Thomas Kaplan, Andrew Jacobs & Steven Lee Myers, *Blind Dissident From China Arrives in US, Ending Ordeal*, N.Y. TIMES (May 19, 2012), http://www.nytimes.com/2012/05/20/world/asia/china-dissident-chen-guangcheng-united-states.html.

6. *See id.* (explaining how Mr. Chen came to change his mind several hours after initially choosing to remain in China).

7. *See* Kaplan, Jacobs & Myers, *supra* note 5 (explaining that the terms of the "complex understanding" would permit Mr. Chen "to attend law school on a fellowship rather than seek asylum"); Steven Lee Myers & Mike Landler, *Behind Twists of Diplomacy in the Case of a Chinese Dissident*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/09/world/asia/behind-twists-of-diplomacy-in-case-of-chen-guangcheng.html?ref=world (discussing the negotiations that "resulted in a

In this way, the United States resolved the matter temporarily by granting Chen a student visa and transporting him to the airport.[8] Chen boarded a plane to the United States without incident and without being confronted by the Chinese authorities.[9] By avoiding talk of political asylum, which China considered an "affront,"[10] this arrangement allowed China to save face and the United States to extend protection, however temporary, to Chen.[11]

Chen's story highlights the core humanitarian concerns of refugee law as well as the sensitive political and diplomatic considerations that shape the asylum system. To a lesser extent, it demonstrates the subterfuge that the U.S. system depends upon—the admission of refugees on temporary, nonimmigrant visas because the law neither acknowledges the refugee's intent to seek asylum nor facilitates that process openly. Although Chen's quest for safety ended successfully, many lower profile asylum seekers lack access to protection.

This Article assesses the current methods by which U.S. law regulates access to the asylum procedure, focusing on the role of nonimmigrant visas—issued only for purposes other than asylum. These visas generally require applicants to demonstrate sufficient wealth and—in some cases—education. [12] These requirements effectively filter for characteristics that are wholly irrelevant to the goals of refugee law.[13] More fundamentally, the system as currently designed deprives both sides of important information. The migrant has no information about his or her chances of prevailing in a claim for asylum prior to incurring significant cost and risk to make the journey to U.S. territory.[14] Similarly, the U.S. government lacks

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second arrangement to allow Mr. Chen to study at New York University but not to seek asylum").

8. Myers & Landler, *supra* note 7.

9. *Id.*; Kaplan, Jacobs & Myers, *supra* note 5, at 2 (suggesting that, after concluding negotiations, Chinese authorities did not try to prevent Mr. Chen from leaving China).

10. Kaplan, Jacobs & Myers, *supra* note 5, at 2.

11. *See id.* at 3 (discussing China's "eager[ness] to blunt the domestic impact of Mr. Chen's departure").

12. *See* 8 U.S.C. §§ 1101(a)(15)(B), (F) (2012) (defining "classes of nonimmigrant aliens" as exceptions to the term *immigrant* and outlining the requirements for a tourist and student visa).

13. *See, e.g.*, James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 116 (1997) ("The goal of refugee law, like that of public international law in general, is not enforceability in a strict sense. It is instead a mechanism by which governments agree to compromise their sovereign right to independent action in order to manage complexity, contain conflict, promote decency, or avoid catastrophe.").

14. *See ECRE Interview with Susanne Bolz, Head of the Protection Unit at the Swiss Refugee Council (SFH/OSAR)*, EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) (Sept. 2, 2011), *available at* www.ecre.org/component/downloads/downloads/

knowledge of the applicant's true intentions; that is, whether he or she is a tourist, a student, a scholar, a refugee, or perhaps none of these.[15]

This Article argues for addressing this problem by instituting an "asylum visa."[16] Such a visa would be issued at the embassy within the applicant's home country or in a third country for individuals who demonstrate, for example, a "credible fear of persecution"[17] and wish to enter the United States for the purpose of applying for asylum. The practice of issuing asylum visas would allow the United States to openly facilitate the journey of applicants with strong claims, discourage applicants with no chance of success, and reduce asylum seekers' reliance on human smuggling to access U.S. territory.[18] Although no Western country currently issues asylum visas on a regular basis,[19] these visas have a rich history rooted in the experiences of World War II refugees.[20] Thus, they are hardly novel or unprecedented.

283.html (discussing the value of prescreening to asylum seekers in informing them of their chances of success).

15. *Cf.* OUTI LEPOLA, COUNTERBALANCING EXTERNALIZED BORDER CONTROL FOR INTERNATIONAL PROTECTION NEEDS: HUMANITARIAN VISA AS A MODEL FOR SAFE ACCESS TO ASYLUM PROCEDURES 21 (Collaborative Project, Seventh Framework Programme 2011), *available at* www.detecter.bham.ac.uk/pdfs/D14_3_Humanitarian_Visas.doc (discussing humanitarian visas as tools to enhance national security by providing more accurate information to asylum states about the identity of the visa holder).

16. This term appears in Gregor Noll, *New Issues in Refugee Research: From 'Protective Passports' to Protected Entry Procedures? The Legacy of Raoul Wallenberg in the Contemporary Asylum Debate* 11 (United Nations High Commissioner for Refugees, Working Paper No. 99), *available at* http://www.unhcr.org/3fd731964.html [hereinafter Noll, *Protective Passports*] (quoting a statement by Mr. Ruud Lubbers, UNHCR, that uses the term *asylum visa*); *id.* at 7 (arguing that issuance of such a visa has historically been part of what was known as a "protected entry procedure," which existed in several European states until a few years ago and in Switzerland until 2012); *ECRE Interview with Susanne Bolz*, *supra* note 14, at 1 (explaining the concept of special visas for those seeking asylum in Switzerland from abroad); Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?* 17 INT'L. J. REFUGEE L. 542, 542–44 (2005) (discussing PEPs in Northern EU states); Urs Geiser, *Parliament Moves to Tighten Asylum Laws*, SWISS INFO (June 14, 2012), http://www.swissinfo.ch/eng/swiss_news/Parliament_moves_to_tighten_asylum_laws.html?cid=32897538 (reporting that the Swiss government abolished "the possibility of applying for asylum at Swiss embassies" on June 13, 2012).

17. *See* DAVID A. MARTIN ET AL., FORCED MIGRATION: LAW AND POLICY 815 (2d ed. 2013) (raising the question of whether a visa system should be invalid for failure to "mandate issuance of a visa to a person who makes a threshold showing (perhaps a 'credible fear of persecution') to the consular officer").

18. *See* SHELDON X. ZHANG, SMUGGLING AND TRAFFICKING IN HUMAN BEINGS 2, 160–61 (2007) (noting that demand for smuggling rises when "legitimate channels [of entry] are either blocked or inadequate").

19. For a brief survey of PEPs that existed at various times in EU countries, see LEPOLA, *supra* note 15, at 13–17. Lepola includes asylum applications at embassies (or in-country asylum) as part of the range of PEPs that have been made available to individuals fleeing from harm in their home countries.

20. *See* Noll, *Protective Passports*, *supra* note 16, at 3 (characterizing the history of protection as "so much richer" than is commonly acknowledged); *id.* at 3–5

This Article proceeds in three parts. Part II describes the U.S. refugee protection regime and its political and humanitarian purposes. The U.S. refugee protection regime includes the resettlement of overseas refugees in addition to statutory asylum and the withholding of removal (withholding) for refugees present on U.S. soil. It further suggests that while resettlement, grounded in the executive's authority, may necessarily prioritize political considerations when distributing protection and access, humanitarian considerations should prevail in the asylum system.[21] Ultimately, Part II identifies the central problem in the current system of access to asylum in the United States—that it fails to fully realize its humanitarian aims because it distributes access to asylum in a manner that ignores both the need for protection and the strength of an asylum seeker's claim. Part III considers the history of the current refugee law framework and explains why the international legal regime does not require asylum states to issue visas to asylum seekers facing acute harm. It also briefly considers the history of protected entry procedures (PEPs). Part IV describes the asylum visa in general terms and considers the costs and benefits of this potential reform, noting its limitations and impracticability in some instances, but concluding that the idea of an asylum visa warrants further study.

II. THE PROBLEM WITH ASYLUM IN THE UNITED STATES

A. *The Purposes of Asylum and Refugee Law*

Since the founding of the League of Nations, nations have recognized the "responsibility of the international community" to protect refugees.[22] Under the United Nations Convention Relating to the Status of Refugees (Refugee Convention), a refugee is

> any person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social

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(discussing Sweden's and Switzerland's uses of protective passports during World War II).

21. *See* Deborah E. Anker, *Discretionary Asylum*, 28 VA. J. INT'L L. 1, 32–36, 39–40 (1987) (characterizing different purposes of overseas refugee resettlement and statutory asylum and indicating that "Congress may have institutionalized the historically different roles of resettlement and asylum: one serves the larger requirements of U.S. policy; the other responds to the immediate needs of individuals").

22. *See* U.N. HIGH COMM'R FOR REFUGEES, AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF REFUGEES, at 2, RLD1 (1992), *reprinted in* KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 19 (4th ed. 2011) (explaining that "an awareness of the responsibility of the international community to provide [refugees] protection, and help them to solve their problems, dates only from the time of the League of Nations").

> 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 . . . .[23]

The elements of this definition require that the individual be outside his or her country of nationality, have a "well-founded fear" of persecution "for reasons" of a ground enumerated in the treaty, and be unwilling or unable to return to that country on account of this fear.[24]

Refugee law has political as well as humanitarian purposes. Politically, refugee law represents an effort by states to provide a coordinated response to the displacement of "involuntary migrants" by balancing refugees' need for protection with the interests of the states that absorb them.[25] Accordingly, the international refugee law framework recognizes few rights or obligations regarding access to protection other than a limited right against expulsion or return, or nonrefoulement, once a refugee has effectuated an entry into an asylum state.[26] Refugee law creates no right to be granted asylum[27] or admission to the asylum state,[28] nor does it guarantee an asylum seeker's ability to flee his or her home country or to travel to safety through lawful means.[29] These legal limitations reflect the political reality that asylum states lack the resources and will to absorb all the world's refugees. [30] These limitations further demonstrate that refugee law is far from a field of unfettered humanitarianism.[31]

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23. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

24, *See id.* (defining the term *refugee*).

25. *See* Hathaway & Neve, *supra* note 13, at 116 (explaining that "[i]nternational refugee law was established precisely because it was seen to afford states a politically and socially acceptable way to maximize border control in the face of inevitable involuntary migration").

26. *See* Refugee Convention, *supra* note 23, at art. 33 (explaining that "[n]o 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").

27. *See* JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 300–01 (2005) (highlighting the differences between the "duty of *non-refoulement*" and the "right to asylum from persecution").

28. *See id.* ("State parties may therefore deny entry to refugees so long as there is no real chance that their refusal will result in the return of the refugee to face the risk of being persecuted."); *see also* Anker, *supra* note 21, at 3 ("States generally have not recognized a duty to admit an alien and grant asylum status.").

29. *Cf.* Refugee Convention, *supra* note 23, at Recommendations (A) (facilitation of refugee travels).

30. *See* Hathaway & Neve, *supra* note 13, at 116–18 (noting that "[w]e can no longer . . . expect all governments, whatever their circumstances, simply to receive and provide quality protection to all refugees who arrive at their territory").

31. Anker, *supra* note 21, at 42 (counseling not to "read too much into some of [the Refugee Act's] exhortatory rhetoric").

Despite the political constraints on refugee protection, a compelling humanitarian purpose continues to animate refugee law.[32] For centuries, societies have honored the "tradition" of shielding strangers who would face harm if forced to return to their place of origin.[33] According to some scholars, refugee law provides "surrogate protection" to a refugee when the state fails to fulfill its role of protecting citizens from violations of core human rights.[34] Courts around the world have increasingly cast refugee law as a tool for human rights protection,[35] and scholars have lauded the expansion of substantive bases for asylum in the United States to cover persecution by nonstate actors, especially in cases of violence against women.[36]

The U.S. refugee protection regime reflects this mix of political realism and humanitarian stirrings.[37] The regime currently consists of refugee resettlement for refugees located abroad and statutory asylum and withholding for refugees located within U.S. territory or at the border.[38] Resettlement and asylum both serve the purpose of protecting refugees, but they protect very different people for different reasons.[39] Overseas refugee resettlement historically has provided extensive group-based protection on foreign policy grounds, and statutory asylum and withholding provide individualized

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32. *Cf. id.* at 41–42 (noting the humanitarian purposes of U.S. asylum law); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1266 (1990) (discussing the "proud tradition" of offering "asylum to the persecuted" and noting the popularity of bona fide refugees in the "public imagination").

33. *See* MUSALO, MOORE & BOSWELL, *supra* note 22, at 19 (explaining that "[r]efugees have been around as long as history").

34. *See* Matthew E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, 47 HARV. INT'L L.J. 413, 453–54 (2006) (describing James Hathaway's "surrogate protection" view); *cf.* Andrew J. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 283 (1985) (arguing for expanding the definition of refugee to cover internally displaced persons whose states fail to provide them with basic protection).

35. *See, e.g.*, Hathaway & Neve, *supra* note 13, at 117 (characterizing the "essence of refugee protection as a human rights remedy").

36. *See* Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 135–39 (2002) (explaining that "[g]ender asylum law has also been a catalytic force in itself, a major vehicle for the articulation and acceptance of the human rights paradigm").

37. *See supra* note 21 and accompanying text.

38. Although asylum and withholding have distinct statutory bases, this Article treats them together here to emphasize the contrast between these forms of relief, which are available only after a noncitizen has effectuated an entry or reached the border, and the overseas resettlement program, which determines refugee status while the refugee is located abroad. *See* Immigration and Nationality Act, Pub. L. No. 82-414 (1952) (codified as amended in scattered sections of 8 U.S.C.) (setting forth the laws governing resettlement, asylum, and the withholding of deportation for refugees); 8 U.S.C. § 1157 (2012) (overseas refugee program); *id.* § 1158 (a)(1) (asylum); *id.* § 1231(b)(3) (withholding).

39. *See supra* note 21 and accompanying text.

protection on more explicitly humanitarian grounds.[40] For example, the greatest beneficiaries of the U.S. resettlement program have traditionally been refugees from countries where the United States has engaged in war, such as Vietnam and Iraq, or nationals of enemy nations.[41] The greatest beneficiaries of asylum, however, have been from China and Ethiopia.[42]

The U.S. refugee protection regime seeks to protect refugees, but it cannot protect everyone in the world who satisfies the definition of a refugee.[43] Accordingly, the question arises: whose claims should have priority? Whose claims should the United States attract, and whose should it deter? Scholars have debated this question with respect to overseas refugee resettlement for decades, and many support the view that the United States should channel its limited refugee protection resources toward those individuals who, otherwise satisfying the definition of refugee, need it most—those who face the greatest harm from persecution as defined by its imminence and severity.[44] Others defend a system that prioritizes the claims of

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40. Anker, *supra* note 21, at 31–36.

41. Susan Raufer, *In-Country Processing of Refugees*, 9 GEO. IMMIGR. L.J. 233, 254–55 (1995). More recently, the greatest numbers of refugees admitted through the overseas refugee program were from Iraq and Burma. DEP'T OF STATE, BUREAU OF POPULATION, REFUGEES, & MIGRATION, FY 2011 REFUGEE ADMISSION STATISTICS (Jan. 31, 2012), *available at* http://www.state.gov/j/prm/releases/statistics/184843.htm.

42. *See* Office of Planning, Analysis, & Tech., *Immigration Courts FY 2011 Asylum Statistics by Nationality*, *in* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUST., FY 2011 STATISTICAL YEARBOOK 2–3 (Feb. 2012), *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf (demonstrating the number of applications for asylum granted in FY 2011).

43. *See* David A. Martin, *The Refugee Concept: On Definitions, Politics, and Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES 30, 34–37 (Howard Adelman ed., 1991) (explaining the tension between "genuinely wish[ing] to provide [a] haven for the persecuted" and the "value [of] the reassurance that comes from reasonable control over the entry of aliens").

44. *See, e.g.*, Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 699 (1995) ("[O]ne can distinguish within the class of refugees both by the likelihood of persecution and by the harm they will face if the threatened persecution materializes."); Raufer, *supra* note 41, at 252–53 (noting that a goal of refugee protection is to protect people facing imminent danger); Court Robinson & Bill Frelick, *Lives in the Balance: The Political and Humanitarian Impulses in US Refugee Policy*, INT'L J. REFUGEE L. 293, 297 (1990) ("[O]ur principal recommendation is that a single criterion be used to govern our refugee and asylum programme—*priority must be given to those with the greatest need for protection.*") (alteration in original); *id.* at 301 (advocating for a resettlement program that uses an "index of vulnerability" that considers the "nature of persecution suffered or feared" and prioritizes claims based on "life-threatening or especially acute" harm, among other factors); Daniel J. Steinbock, *The Qualities of Mercy*, 36 U. MICH. J.L. REFORM 951, 973 (2003) ("[T]he most important factors [measuring the relative need for protection] are the degree and probability of harm."). This view resonates with the intuition that scarce resources should be allocated to maximize the objective function and assumes that the objective function of refugee protection is to protect refugees from severe and imminent harm.

refugees who share ideological, ethnic, or religious commitments with large portions of the population.[45]

Few scholars, however, have considered this question of priority in the context of asylum.[46] Asylum is typically cast as a passive, residual[47] form of relief, one that has no numerical limit, and therefore, one for which the question of priority simply does not arise.[48] In theory, the secretary of the U.S. Department of Homeland Security or the U.S. attorney general could, in his or her discretion, grant every single meritorious asylum claim that is filed in the United States.[49] However, this characterization glosses over the ways by which the United States selects its asylum seekers in the first place through its principal tool of migration control: the visa system.[50] Far from avoiding the question of prioritization, the current system implicitly prioritizes asylum claims at the source by limiting access to travel and entry.[51] U.S. law prioritizes claims from those who make it on to U.S. shores without any inquiry into the likelihood and severity of the persecution they face before they arrive.[52]

This Article posits that asylum should generally be granted to those individuals who, otherwise satisfying the definition of refugee, need protection the most. Considering the mismatch between the goal

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45. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 48–51 (1983) (explaining that "we can also be bound to help men and women persecuted or oppressed by someone else—if they are persecuted or oppressed because they are like us"); *see also* MUSALO, MOORE & BOSWELL, *supra* note 22, at 83 (noting that some scholars have advocated an approach based on "choos[ing] among the victims on the basis of ethnic, religious or ideological affinity").

46. *But see* Robinson & Frelick, *supra* note 44, at 305 (advocating for prioritizing asylum claims based on objective human rights criteria); *see also* Price, *supra* note 34, at 465 (arguing for prioritizing claims based on the "persecution criterion" rather than simply humanitarian need).

47. *See* Martin, *supra* note 32, at 1259–60 (describing Congress's approach to asylum as "largely a legislative afterthought").

48. This assertion is an inference drawn from the dearth of discussion of "priority" regarding asylum and the abundance of such discussion with respect to resettlement. *See supra* note 44.

49. *See* 8 U.S.C. § 1158(b)(1) (2012) (describing the "[c]onditions for granting asylum").

50. *See* GUY GOODWIN-GILL & JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 374 (3d ed. 2007) (describing "visa regimes" as a "permissible tool of immigration control").

51. *See, e.g.*, Hathaway & Neve, *supra* note 13, at 120 ("[M]ost Northern states impose a visa requirement on the nationals of refugee-producing states, and penalize airlines and other transportation companies for bringing unauthorized refugees into their territories. By refusing to grant visas for the purpose of making a claim for asylum, Northern countries have been able to insulate themselves from many potential claimants of refugee status."); GOODWIN-GILL & MCADAM, *supra* note 50, at 37–76 (discussing the exploitation and deterrent effects of visa regimes).

52. *Cf.* Anker, *supra* note 21, at 35–36, 39 n.189 ("Whether those who arrive at our borders, by virtue of that fact, have demonstrated greater desperation, greater resourcefulness, or some combination of both, is a difficult issue and one that Congress did not seem to address.").

of refugee protection and the purposes of migration control, Congress should consider reforming the law's method of distributing access to the asylum procedure. It is not enough merely (to aspire) to rank by relative need the claims of those applicants who are already present[53] for the neediest asylum seekers are also most likely the ones with the least access to U.S. shores.[54] To truly realize the protective potential of asylum, the system should consider the applicant's need for protection at the point of providing access to the territory. Only through such a change can the United States ensure that the law allocates its scarce[55] asylum resources optimally.

One objection to this premise is that the United States *should* embrace the preference for those who happen to be "in our midst."[56] On this view, asylum should be available exclusively to "the lucky or the aggressive, who have somehow managed to make their way across our borders . . . ."[57] According to this view, asylum is as much a benefit for the United States as it is for the asylum seeker; by offering asylum, the United States avoids the harsh act of deporting a refugee from its territory.[58]

However, such a view focuses excessively on the needs of the asylum state at the expense of the asylum seeker. Moreover, it glosses over the legal and policy framework that screens those "lucky or aggressive"[59] migrants for particular traits that happen to be irrelevant to asylum.

B. *Overview of the Paths to Protection*

The 1980 Refugee Act[60] (the Act) is the centerpiece of U.S. refugee law.[61] Through the Act, Congress codified international

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53. *Cf.* Robinson & Frelick, *supra* note 44, at 304–05 (noting that "a rating scale based on measurable human rights criteria might, in fact, be helpful in guiding adjudicators to appreciate in a more objective fashion the situations asylum applicants are fleeing").

54. *Cf. ECRC Interview with Susanne Bolz*, *supra* note 14, at 2–3 (discussing the role of PEPs in facilitating protection for asylum seekers facing a "crisis" or an "acute" harm).

55. Martin, *supra* note 43, at 36.

56. Anker, *supra* note 21, at 42–43. Price calls this a "proximity bias." Price, *supra* note 34, at 446–48.

57. WALZER, *supra* note 45, at 50–51.

58. *Id.* at 51; *see also* Price, *supra* note 34, at 448 ("To deny admission to refugees at our border, and force them to return to countries to face serious harm, violates the injunction to 'do no harm,' and thus implicates us in having caused their plight.").

59. WALZER, *supra* note 45, at 51.

60. Refugee Act, Pub. L. No. 96-212, 94 Stat. 102 (1980).

61. *See* Deborah E. Anker & Michael Posner, *The Forty Years Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981) (characterizing the Act as "the most comprehensive United States law ever enacted concerning refugee admissions and resettlement").

commitments to protect refugees and divided authority over refugee policy between the president and Congress, ending a 40-year period of scattered, [62] ideologically driven asylum policy.[63] In the early and middle parts of the twentieth century, the executive branch had used its parole authority to grant asylum to refugees in response to mass migrations.[64] Critics and members of Congress decried the system as ad hoc and overly political.[65] After years of attempts at reform, the final compromise reflected agreement on four principal areas.[66] First, it incorporated the definition of refugee contained in the Refugee Convention and the Protocol Relating to the Status of Refugees (1967 Protocol), and it extended protection to certain additional persons when authorized by the president.[67] Second, it codified the Refugee Convention's obligation not to return (*refouler*) refugees to territories where their life or freedom would be threatened, creating a mandatory[68] form of relief known today as withholding.[69] Third, it provided for the president, in consultation with Congress, to determine the numerical cap for refugee admissions through the overseas refugee program.[70] Fourth, it created a uniform procedure for discretionary asylum to noncitizens who are "physically present in the United States or at a land border or port of entry," and it provided

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62. *See id.* at 12 (characterizing the purpose of the Act as moving away from "*ad hoc* refugee admission procedures").

63. *See id.* at 13 (noting that the executive branch "viewed refugee admission as an instrument of foreign policy").

64. *See id.* at 15 (discussing the use of parole authority for mass admission of Hungarian refugees).

65. *See, e.g., id.* at 30–31 (quoting Senator Edward Kennedy's criticism of the executive's practice of waiting until a refugee crisis develops and then using an emergency parole program to admit refugees on a mass scale); *id.* at 46 (quoting Ambassador William Clark's testimony that the most current emergency "should not blind us to the hardships" faced by refugees from other regions of the world); *id.* at 63 (quoting Congresswoman Shirley Chisholm's observation that only a miniscule number of refugees admitted to the United States since World War II have been from Africa or Latin America).

66. *See id.* at 64 ("[T]he Refugee Act is the product of years of debate and compromise.").

67. *Id.* at 60; 8 U.S.C. § 1101(a)(42) (2012) (extending refugee status to persons who remain within their country of origin, where authorized by the president).

68. *See* Anker & Posner, *supra* note 61, at 56 ("[T]he House and Senate Committees eliminated the discretionary element in the withholding provision making its provisions mandatory."); Martin, *supra* note 32, at 1260 ("Congress changed INA 234(h) to a mandatory form, leaving no doubt about the obligatory character of the *nonrefoulement* provisions in domestic law.").

69. *See* 8 U.S.C § 1231(b)(3) (2012) (establishing a general principle of "restriction on removal to a country where [an] alien's life or freedom would be threatened"). The U.S. Supreme Court has determined that withholding is owed only to a subset of refugees who can prove a higher likelihood of harm, namely that it is "more likely than not" that their life or freedom would be threatened if removed to a particular country. INS v. Stevic, 467 U.S. 407, 429–30 (1984).

70. Anker & Posner, *supra* note 61, at 61.

for "the adjustment of status for asylees." [71] Thus, the Act incorporated the Refugee Convention and 1967 Protocol, clarified the nonrefoulement obligation, and codified two paths to refugee protection: 1) overseas resettlement for refugees located abroad outside their home countries and 2) statutory asylum and withholding for refugees within U.S. territory or at the border or a port of entry.

Both refugee resettlement and statutory asylum play important roles in refugee protection. Traditionally, the United States has admitted more refugees for resettlement than it has granted statutory asylum claims.[72] In fiscal year (FY) 2011, 56,424 refugees were admitted through the resettlement program. [73] During that same period, the United States received 41,000 applications for statutory asylum. [74] Of these, 27,300 were filed "affirmatively" and 13,600 were filed "defensively." Over 11,500 applications were granted.[75]

The next two subparts sketch out the mechanics of resettlement and asylum to illuminate the explicit and implicit policy choices that prevent many worthy claims of asylum from ever being heard.

1. Resettlement

Tens of thousands of refugees who have fled their countries of origin may qualify for resettlement annually through the United States Refugee Admissions Program (USRAP). [76] USRAP is a collaboration of several government agencies and voluntary organizations.[77] The Department of State's (the State Department) Bureau of Population, Refugees, and Migration (PRM), the

71. *Id.* at 62.

72. *Compare* MUSALO, MOORE & BOSWELL, *supra* note 22, at 79 (refugee admissions statistics for 2001–2010), *with* EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2010 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY10AsyStats-Current.pdf (2010 asylum grant statistics), *and* EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2009 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY09AsyStats-Current.pdf (2009 asylum grant statistics), *and* EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2008 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY08AsyStats-Current.pdf (2008 asylum grant statistics).

73. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, FY 11 REFUGEE ADMISSIONS STATISTICS (2012), *available at* http://www.state.gov/j/prm/releases/statistics/184843.htm.

74. EXEC. OFFICE FOR IMMIGRATION REV., U.S. DEP'T OF JUST., FY 2011 ASYLUM STATISTICS (2013), *available at* http://www.justice.gov/eoir/efoia/FY11AsyStats-Current.pdf (documenting that the United States received 40,729 asylum applications in FY 2011 not abandoned or withdrawn).

75. *Id.*

76. *See U.S. Refugee Admissions Program*, U.S. DEP'T OF STATE, http://www.state.gov/j/prm/ra/admissions/index.htm (last visited Oct. 20, 2013) (listing the government agencies and nongovernmental organizations contributing to USRAP).

77. *Id.*

Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), and the Department of Health and Human Services' Office of Refugee Resettlement are each involved.[78]

Under the Act, the president, in consultation with Congress, determines the maximum number of refugees that the United States can resettle during the coming FY.[79] In FY 2011, the cap for all regions combined was 80,000, but the United States actually admitted 56,424 refugees during this period.[80] Admission numbers have traditionally fallen short of the cap, suggesting that the United States does not resettle as many refugees as it could.[81] Yet, the United States resettles more refugees than "all other resettlement countries combined."[82]

USRAP considers applications primarily from refugees who have fled their home country and who have registered with the Office of the United Nations High Commissioner for Refugees (UNHCR).[83] The UNHCR determines whether the individual qualifies as a refugee and determines the "best possible durable solution" for the individual, whether it be "safe return to the home country," "local integration" in the country to which the individual fled, or "third-country resettlement."[84] In some cases, the UNHCR may refer a refugee applicant to USRAP.[85] One of nine Resettlement Support Centers (RSC) worldwide then processes the case.[86] A USCIS officer interviews the applicant face-to-face and reviews "the information that the RSC has collected."[87] Successful applicants may be admitted to the United States as refugees.[88]

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78. *Id.*

79. 8 U.S.C. § 1157(a)(2) (2012).

80. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEP'T OF STATE, FY 11 REFUGEE ADMISSIONS STATISTICS (2012), *available at* http://www.state.gov/j/prm/releases/statistics/184843.htm. The combined cap for FY 2010 was also 80,000, and the United States admitted 73,311 refugees during this period. BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEP'T OF STATE, FY 10 REFUGEE ADMISSIONS STATISTICS (2010), *available at* http://www.state.gov/j/prm/releases/statistics/181160.htm.

81. *See, e.g.*, BUREAU OF POPULATION, REFUGEES, AND MIGRATION, DEP'T OF STATE, FY 10 REFUGEE ADMISSIONS STATISTICS (2010), *available at* http://www.state.gov/j/prm/releases/statistics/181160.htm (showing a refugee admissions ceiling of 80,000 with 73,311 actually admitted).

82. *See U.S. Refugee Admissions*, U.S. DEP'T OF STATE, http://www.state.gov/j/prm/ra/ (last visited Oct. 20, 2013) (noting that, of the "15.4 million refugees in the world," "less than one percent . . . are eventually resettled in third countries" and that the United States admits "over half of these refugees").

83. *See id.* ("The first step for most refugees is to register with the [UNHCR] in the country to which s/he has fled.").

84. *Id.*

85. *See U.S. Refugee Admissions Program*, *supra* note 77 ("When UNHCR . . . refers a refugee applicant to the United States for resettlement, the case is first received and processed by a Resettlement Support Center (RSC).").

86. *Id.*

87. *Id.*

88. 8 U.S.C. § 1157(c)(1) (2012).

Scholars and policymakers have criticized the resettlement program for prioritizing foreign policy objectives over humanitarian need.[89] However, some have also noted that a program over which the president has such extensive discretion will inevitably privilege foreign policy considerations over humanitarian ones.[90] As it was designed to achieve U.S. policy objectives,[91] and not to vindicate human rights abuses, the very character of resettlement is irreducibly political.[92] Thus, it is unsurprising that USRAP was not designed to give priority to refugees who face the most severe or imminent harm.[93] Instead, the numbers allocated to each region have historically reflected the United States' Cold War priorities—namely, undermining Communist regimes by admitting their fleeing nationals.[94] Access to USRAP is also limited by the applicant's location and ties to the United States,[95] thus placing it beyond the reach of most refugees.[96] In sum, despite the creation of a priority for refugees who pose a "special humanitarian concern," overseas resettlement by design does not offer protection to those refugees who need it most.[97]

2. Asylum

Given the United States' long history of refugee resettlement and the comparatively recent phenomenon of asylum seekers traveling to U.S. territory, the purpose of statutory asylum is not immediately apparent.[98] Indeed, scholars have characterized asylum as a

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89. *See supra* note 44 and accompanying text.

90. *See* Legomsky, *supra* note 44, at 701 (noting the "inherent unreality of expecting" the president to weigh humanitarian considerations over foreign affairs).

91. *See* Anker, *supra* note 21, at 39–40 (explaining that resettlement has historically served "the larger requirements of U.S. policy").

92. *Id.* at 46.

93. *See id.* at 36 ("[A]dmission decisions are not . . . prioritized individually based on the relative desperation of the applicant's plight, the strength of his persecution claim, or his need for protection."). *But see* Raufer, *supra* note 41, at 252 (discussing one goal of the refugee program as the "protection of persons in imminent danger").

94. *See* Tahl Tyson, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 921–38 (1990), *reprinted in* MUSALO, MOORE & BOSWELL, *supra* note 22, at 81 (highlighting the political considerations at play in the formulation of U.S. refugee policy).

95. Anker, *supra* note 21, at 36.

96. *See id.* ("[F]or most persons in need of protection there is no practical opportunity for admission [through USRAP], even in those cases where the applicants are members of a designated nationality group.").

97. For criticism of overseas resettlement as insufficiently directed at helping those refugees in greatest need, see *supra* note 44.

98. *See* Martin, *supra* note 32, at 1258 ("[Until recently], [r]esponding to refugees meant resettling displaced persons from refugee camps overseas, rather than dealing with populations already on national territory."); *see also* Martin, *supra* note

"legislative afterthought."[99] Deborah Anker and Michael Posner's analysis of the legislative history of the Act indicates that Congress sought to protect asylum applicants' interest in due process and to prevent the abuse of existing asylum procedures.[100] More fundamentally, Congress sought to institutionalize a mechanism for "select[ing] refugees based primarily on humanitarian criteria."[101] Although the legislative history does not indicate that Congress sought to prioritize humanitarian considerations over all others, commentators have suggested few other compelling purposes, especially given the overtly political purposes of resettlement.[102]

The current framework for permitting access to the asylum procedure does not serve these humanitarian ends adequately. It offers no method of attracting strong claims or deterring weak ones.[103] This is largely due to the system's reliance on irregular migration.[104] Under the Refugee Convention, illegal entry does not bar an application for asylum,[105] so an asylum seeker may apply for asylum without penalty after having entered either without inspection or pursuant to a valid visa.[106] However, because satisfying the definition of a refugee is not a basis for receiving a U.S. visa,[107] "as a practical matter, most asylum seekers cannot use the normal migration procedures to reach U.S. . . . soil and apply for asylum."[108]

43, at 35 ("We did not have to confront this built-in tension [between refugee status and immigration control] so baldly in earlier times, largely because physical distances and the cost of travel provided natural limitations on the numbers who might seek extra-regional asylum . . . .").

99. Martin, *supra* note 32, at 1260 ("Even though asylum applications were increasing throughout the period of legislative deliberation [over the Refugee Act] . . . , asylum was again largely a legislative afterthought.").

100. Anker & Posner, *supra* note 61, at 41.

101. Anker, *supra* note 21, at 39.

102. *See supra* notes 37–42. *But see* Price, *supra* note 34, at 424 (discussing the purpose of asylum as a way to shame nations).

103. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V) (2012) (listing classes applicable for nonimmigrant visas, none of which relate to humanitarian need).

104. *See* HATHAWAY, *supra* note 27, at 292 ("Because a visa will not be issued for the purpose of seeking refugee protection, only those who lie about their intentions or secure forged documentation are able successfully to satisfy the inquiries of the transportation company employees who effectively administer [the asylum state's] law abroad.").

105. *See* Refugee Convention, *supra* note 23, at art. 31, ¶ 1 ("The 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.").

106. *See* 8 U.S.C. § 1158(a)(1) (2012) ("Any alien who is physically present in the Unites States or who arrives in the United States . . . *irrespective of such alien's status*, may apply for asylum . . . .") (emphasis added).

107. *See* MARTIN ET AL., *supra* note 17, at 774 ("Satisfying the refugee definition is not a basis for receiving a U.S. visa, although it can provide a basis . . . for papers that will ultimately lead to admission under the overseas refugee program.").

108. *Id.* at 594.

Moreover, even those asylum seekers who initially entered after obtaining a valid visa either violate the terms of the visa after arrival (by seeking to remain in the United States indefinitely) or have committed fraud in obtaining papers.[109] As a result, they are typically "out-of-status" by the time they apply for asylum.[110] Thus, the asylum system expects and relies upon illegal or deceptive entry,[111] and there is almost no way for a person in the United States to be both an asylum seeker and a lawfully present foreign national.[112] Although unlawful entry does not and should not prejudice an asylum seeker's claim in light of the many barriers to a lawful entry,[113] it is surprising that the law does not make any attempt to lift this burden for applicants who face acute harm.[114]

As described below, the current system provides two principal paths of access to the asylum procedure, neither of which selects asylum seekers based on relevant traits. The first is entrance through smuggling.[115] The second is entrance on a valid nonimmigrant visa.[116]

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109. *See* Anker, *supra* note 21, at 29 ("The only group of out-of-status asylum seekers, other than those who enter undocumented or with false documents, are aliens who enter in a lawful status, but subsequently overstay the period of time authorized or otherwise violate the original conditions of their entry.").

110. *Id.* at 29 (quoting T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY (1985)).

111. *See id.* at 28 ("[B]eing an asylum seeker and entering 'irregularly' are inextricably linked.") (citations omitted).

112. *See id.* at 29–30 (noting that the Board of Immigration Appeals' preoccupation with fraudulent documents or illegal entry leaves asylum available only to people "subject to political changes" who become refugees after entry in the asylum state or refugees *sur place*).

113. *See id.* at 5 ("[R]efugees are by definition persons who lack entry or travel documentation and whose desperate search for a country of refuge often leaves them with little alternative but to use false documentation in order gain airline passage, exit from other countries, or entry into the United States.").

114. *Cf.* James C. Hathaway, *The Emerging Politics of Non-entrée*, REFUGEES 40, 40 (1992) (discussing the ways in which Northern countries have imposed burdens on asylum seekers attempting to enter asylum states).

115. *See, e.g.*, Cleo J. Kung, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of "Refugee"*, 90 J. CRIM. L. & CRIMINOLOGY 1271, 1295 (2000) (discussing Chinese asylum seekers' use of human smugglers to access U.S. territory).

116. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V) (2012) (listing grounds for nonimmigrant visas); *see also* Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B. U. INT'L L.J. 61, 65–68 (2009) (discussing asylum seekers' use of and difficulty in obtaining nonimmigrant visas to access U.S. territory).

a. Illegal Entry Through Human Smugglers

Human smuggling is an important and dangerous form of illegal entry for asylum seekers and other migrants.[117] Smugglers "essentially peddl[e] services for financial gain in exchange for the illegal entry into a country of someone who either does not qualify for or is not willing [or able] to go through legal channels."[118] Smugglers bring roughly 500,000 undocumented migrants into the United States annually.[119] Another 500,000 undocumented migrants enter without smugglers.[120] Chinese "snakeheads" move thirty thousand to forty thousand Chinese nationals into the United States illegally each year,[121] some of whom subsequently apply for asylum.[122] People who retain the services of a smuggler often pay thousands of U.S. dollars in fees.[123] Others cram into vehicles, nearly a dozen to a car, or stow away in commercial fishing vessels or freight boats.[124] Migrants who use smugglers not only take serious physical risks and incur significant costs to enter the United States, but they often face retribution by "street gangs" if they fail to pay the fees due to the smugglers.[125] As a result, migrants who use smugglers risk torture and death if they are unable to pay.[126]

b. Entry on Nonimmigrant Visas Issued for Nonasylum Purposes

Aside from entry without inspection, asylum seekers may enter using a nonimmigrant visa.[127] Although previously rare, passports and visas became crucial after World War I for anyone who wished to cross a national boundary.[128] The United States first authorized

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117. *See* Kung, *supra* note 115, at 1275, 1305 ("[T]he 1996 Amendment facilitated a dramatic rise in the number of Chinese migrants smuggled into the U.S. . . . . Debt-collectors [then] use brutal tactics [on behalf of smugglers] to insure . . . full payment [from those brought into the country].").

118. ZHANG, *supra* note 18, at 23.

119. *Id.* at 18.

120. *Id.*

121. *Id.* at 18–19.

122. *See* Kung, *supra* note 115, at 1286 ("Chinese migrants apprehended by the INS can . . . escape immediate deportation by seeking asylum.").

123. *See* ZHANG, *supra* note 18, at 59 (describing an anecdote of Eastern European migrants who paid a smuggler $5,000 to $9,000 to cross the Mexico–U.S. border from Tijuana).

124. *Id.* at 60, 70.

125. *Id.* at 71.

126. *See id.* ("[S]tories of migrants being assaulted, tortured, and even killed have appeared frequently in the news media.").

127. Settlage, *supra* note 116, at 66.

128. *See* BUREAU OF CONSULAR AFFAIRS, THE VISA FUNCTION 1, *available at* http://www.travel.state.gov/pdf/FY2000%20visa%20function.pdf ("In 1917, a general requirement that all aliens seeking to enter the United States obtain visas was instituted and has been continued since that time . . . .").

consular officials to issue visas to "certain" noncitizens in 1884.[129] In 1917, it imposed a "general requirement" that all noncitizens seeking to enter the United States obtain a visa.[130]

Current U.S. law requires most foreign nationals to obtain visas prior to entering the United States.[131] Although visas do not guarantee admission,[132] they allow a foreign national to request admission at the border.[133] Common carriers bound for the destination country also require foreign nationals to produce sufficient travel documents, including a valid visa, and carriers face sanctions for permitting any person to board without such documents.[134] Accordingly, it is generally not possible for a foreign national to board a vessel bound for the United States without documentation of the foreign national's right to seek admission.[135] For asylum seekers who cannot or do not wish to hire a human smuggler to enter without inspection, the only remaining options are lying to the consulate about their intentions or obtaining fraudulent papers.[136] This subterfuge at the heart of the U.S. asylum system may reveal U.S. ambivalence about the humanitarian purposes of asylum.[137]

i. Visa Adjudications

Foreign nationals apply for visas in U.S. consulates abroad, typically in their home country.[138] Consular officials, who possess "special training in the visa process" and expertise regarding "local culture," adjudicate visa applications filed at the consulate where they are posted.[139] Consular officials review the paperwork and

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129. *Id.*

130. *Id.*

131. James A. R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 8–9 (1991). *But see Visa Waiver Program (VWP)*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/without/without_1990.html#overview (last visited Oct. 20, 2013) (listing countries the citizens of which need not obtain a visa prior to traveling to the United States).

132. *See* 8 U.S.C. § 1185(d) (2012) (providing for the nonadmission of certain aliens).

133. *See* Nafziger, *supra* note 131, at 14 ("A visa is . . . more of a clearance to request admission by the INS at the border or other port of entry.").

134. *See* MARTIN ET AL., *supra* note 17, at 774 ("Carriers are not supposed to permit a noncitizen who lacks a passport or visa to board a vessel or plane bound for the United States (unless the visa requirement is inapplicable), and they are subject to significant fines if they fail in this duty.").

135. *Id.*

136. HATHAWAY, *supra* note 27, at 292; *see also supra* note 105.

137. *See* Martin, *supra* note 43, at 36 (discussing limitations on asylum that result from states' fears of political backlash).

138. *See* Nafziger, *supra* note 131, at 9 (illustrating typical visa application procedures).

139. *Id.* at 53–54.

conduct face-to-face interviews with applicants.[140] They attempt to discern the applicant's intentions, especially regarding the applicant's intention to leave the United States before the visa expires.[141]

Consular officials may not deny a visa application absent knowledge or "reason to believe" that the applicant is ineligible.[142] Accordingly, they must base a denial on known facts about the applicant.[143] However, once the official denies a visa, the applicant has limited recourse.[144] The Visa Office in the Bureau of Consular Affairs of the State Department may review denials, but the applicant is not entitled to notice of this review, and further administrative or judicial review is unavailable under current law.[145]

ii. Types of Nonimmigrant Visas

Although visa regimes serve the legitimate purpose of migration control,[146] they also deter asylum seekers[147] and filter them for particular characteristics.[148] Under U.S. law, the most common nonimmigrant visas impose stringent requirements and, most importantly, require proof of intent *not* to immigrate to the United States.[149] The law presumes every foreign national to be an immigrant "until he establishes to the satisfaction of the consular

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140. *See Temporary Visitors to the U.S.*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/temp_1305.html (last visited Oct. 20, 2013) (describing the process of applying for and processing a visa, including the interview at the embassy).

141. *See* Nafziger, *supra* note 131, at 13 (analyzing relevant factors for the adjudication of applications for nonimmigrant visas).

142. *Id.* at 12.

143. *Id.*

144. *Id.*

145. *See id.* at 93–94 (illustrating the review process for visa denials); *see also* Donald S. Dobkin, *Challenging the Doctrine of Consular Non-Reviewability*, 24 GEO. IMMIGR. L.J. 113, 122 (2010) (noting that the "doctrine of consular non-reviewability still persists [in the United States]").

146. GOODWIN-GILL & MCADAM, *supra* note 50, at 374.

147. *See* Hathaway & Neve, *supra* note 13, at 120 (discussing the deterrent effect of visas and noting that "[b]y refusing to grant visas for the purpose of making a claim to asylum, Northern countries have been able to insulate themselves from many potential claimants of refugee status"); *see also* Satvinder Juss, *Sovereignty, Culture, and Community: Refugee Policy and Human Rights in Europe*, UCLA J. INT'L L. & FOREIGN AFF. 463, 483–84 (Fall/Winter 1998–1999) (discussing the deterrent effect of the EU visa regime).

148. *Cf.* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 825 (2007) (discussing the ex ante screening of noncitizens under U.S. law based on "pre-entry credentials, credentials that are determined in advance and identified at the border").

149. *See, e.g.*, 8 U.S.C. § 1101 (a)(15)(F)(i) (2012) ("[A]n alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student . . . ."); *see also* MARTIN ET AL., *supra* note 17, at 774 (" . . . U.S. law bars the issuance of a nonimmigrant visa in the most widely used categories, such as a student or tourist, if there are indications that the person intends, for any reason to abandon his or her foreign residence.").

officer, at the time of application for a visa . . . that he is entitled to nonimmigrant status under [Immigration and Nationality Act] section 101(a)(15)."[150]

The specific requirements of each of these visas bear no relationship to the merits of an asylum applicant's claim; indeed, the requirement of proof of nonimmigrant intent and rejection of "dual intent"[151] means that an applicant who indicates a desire to apply for asylum will most likely have his or her application denied.[152] Nonimmigrant visas also typically require the applicant to submit evidence of wealth, education, or extraordinary scientific, artistic, or athletic skill.[153] Below, this Article focuses on student and tourist visas, which are two of the most common nonimmigrant visas issued.[154]

a) Students

To be eligible for the "F visa," the applicant must show that he or she is a bona fide student, has no intent to remain in the United States after his or her course of study has ended, and has the funds sufficient to pay for his or her educational program.[155] The State Department further cautions that applicants "should be prepared to provide" transcripts from previous institutions attended, standardized test scores, and "financial evidence that shows that you or your [sponsor] has sufficient funds to cover your tuition and living expenses during the period of your intended stay."[156] The consulate may require tax returns or bank statements as additional evidence of ability to pay.[157] Under current law, a student is ineligible for this

150. 8 U.S.C. § 1184 (b) (2012).

151. Dual intent refers to a nonimmigrant's intent to remain in the United States "permanently in accordance with the law, should the opportunity to do so present itself." T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 400 (6th ed. 2008) (internal citation omitted).

152. *See* MARTIN ET AL., *supra* note 17, at 774 ("[A] consular officer's judgment that the visa applicant may be interested in asylum in the United States could even lead to the refusal of a temporary-visit visa for which the applicant seems otherwise qualified.").

153. *See, e.g.*, 8 U.S.C. §§ 1101 (a)(15)(J), (O), (P) (2012) (defining "scholars," "artist[ists] [and] athlete[es] . . . [of] sustained national or international acclaim," and "performers").

154. *See* DEP'T OF STATE, NONIMMIGRANT VISAS ISSUED, FISCAL YEAR 2011, Table XVII (Part I), *available at* http://www.travel.state.gov/pdf/FY11AnnualReport-Table%20XVII.pdf (last visited Oct. 20, 2013) (indicating that the grand total of F visas issued in FY 2011 was 476,072 and the grand total of B visas issued during this period was 4,349,087).

155. *Student Visas*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1268.html#6 (last visited Oct. 20, 2013) (explaining the requirements and steps to obtain an F visa).

156. *Id.*

157. *Id.*

visa if, at the time of applying for it, he or she intends to remain in the United States after graduation.[158]

b) Tourists

To be eligible for the "B visa," commonly known as the "tourist" visa, the criteria are less numerous but equally focused on wealth.[159] The applicant must show that he or she has sufficient funds to cover his or her expenses for the trip, that he or she has sufficient ties outside the United States to ensure that he or she will leave when her visa expires, and that the purpose of the trip is for "business, pleasure, or for medical treatment."[160]

The consular official's determination as to whether the applicant is likely to become a public charge requires the official to make "speculative predictions."[161] For some visa adjudications, consular officials may look to the applicant's savings on deposit, as well as his or her "total estate and income potential."[162]

Not surprisingly, applicants from poorer countries have great difficulties obtaining tourist visas.[163] For example, in FY 2011, the adjusted refusal rate for tourist visas from Somalia was nearly 67 percent; from Ghana, 59 percent; from Mauritania, 61 percent; and from Laos, nearly 75 percent.[164] Issuance of these visas has also plummeted after the terrorist attacks of September 11, 2001.[165] Nonimmigrant visas are harder than ever to obtain for many foreign nationals.[166]

By their requirements, the student and tourist visas privilege wealthy, more educated applicants and discourage poor, less educated

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158. *See* 8 U.S.C. § 1101(a)(15)(F) (2012) (requiring a nonimmigrant seeking to enter as a student to be "an alien having a residence in a foreign country which he has no intention of abandoning"); *see also* Daniel Walfish, Note, *Student Visas and the Illogic of the Intent Requirement*, 17 GEO. IMMIGR. L.J. 473, 479 (2003) (discussing the denial of an F visa due to the student's failure to prove nonimmigrant intent).

159. *See generally Visitor Visas – Business and Pleasure*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/temp/types/types_1262.html#4 (last visited Oct. 20, 2013). Some inquiry into the applicant's wealth is necessary to ensure that the applicant is not inadmissible due to a likelihood of becoming a public charge under 8 U.S.C. § 1182(a)(4) (2012).

160. *Id.*

161. *See* Nafziger, *supra* note 131, at 18 (explaining the controversy and safeguards surrounding "speculative predictions" made by consular officials).

162. *Id.*

163. *Adjusted Refusal Rate – B-Visas Only, by Nationality, Fiscal Year 2011*, U.S. DEP'T OF STATE, http://www.travel.state.gov/pdf/FY11.pdf (last visited Oct. 20, 2013) (providing the adjusted refusal rate for B visas by nationality for FY 2011).

164. *Id.*

165. *Cf.* Edward Alden et al., *Faster, Safer, and Smarter: A Modern Visa System for the United States*, COUNCIL ON FOREIGN RELATIONS (Jan. 2012), http://www.cfr.org/immigration/faster-safer-smarter-modern-visa-system-united-states/p27055 (noting a backlog in visa adjudications after September 11, 2001).

166. *See* Settlage, *supra* note 116, at 66–68 (discussing the difficulty of obtaining nonimmigrant visas post-9/11).

applicants, effectively driving less elite applicants into the hands of smugglers[167] if such applicants are able to flee at all.

3. Assessment of the Current System

Ultimately, the purposes of visa controls have no connection to the purposes of refugee law,[168] and yet the U.S. asylum system depends on these controls to regulate access to asylum.[169] Visa controls serve to control the type of migrants who enter so that they are temporary, self-sufficient visitors, some of whom possess exceptional skills or educational potential.[170] Refugee law seeks to extend protection to those at risk of persecution on account of a protected characteristic.[171]

U.S. asylum law, in particular, began formally as a residual humanitarian benefit for those within or at U.S. borders,[172] but it has become an important system of protection.[173] Nonetheless, nonhumanitarian interests continue to dominate asylum because of the method by which the law regulates access.[174] The visa system precludes applicants from traveling to the United States openly for the purpose of applying for asylum, instead driving them to hire human smugglers, to obtain fraudulent documents, or to lie at their consulate interviews.[175] This system of access conveys to asylum seekers that the purpose of the system is not providing humanitarian protection but testing applicants' abilities to navigate a bureaucratic maze.[176] Without widespread legal aid services for individuals applying for asylum, the system remains a mystery, and applicants

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167. *See ECRE Interview with Susanne Bolz*, *supra* note 14 (asserting that asylum visas reduce asylum seekers' reliance on smugglers).

168. *See* MARTIN ET AL., *supra* note 17, at 774 ("The basic U.S. visa system grew up for reasons having nothing to do with asylum . . . .").

169. *Cf.* Hathaway & Neve, *supra* note 13, at 120 (discussing asylum states' use of visa requirements to limit access to asylum).

170. *See* Cox & Posner, *supra* note 148, at 825 (describing the ex ante screening of noncitizens under U.S. immigration law).

171. *See* Refugee Convention, *supra* note 23 (defining *refugee* under the Convention).

172. *See* Martin, *supra* note 32, at 1260 (tracing the development of asylum legislation in the United States); *see also* Robinson & Frelick, *supra* note 44, at 293 (noting that the U.S. asylum provision was created "[a]lmost as an afterthought").

173. *See* Robinson & Frelick, *supra* note 44, at 294–95 (noting that initial estimates predicted around five thousand asylum requests annually but that actual applications soon exceeded thirty thousand).

174. *See* 8 U.S.C. §§ 1101(a)(15)(A)–(V) (2012) (nonimmigrant visa categories, none of which relate to asylum).

175. *See* HATHAWAY, *supra* note 27, at 292 (describing how visa requirements are used by multiple countries to prevent applications for refugee status by migrants).

176. *See generally* DAVID NGARURI KENNEY & PHILIP G. SCHRAG, ASYLUM DENIED: A REFUGEE'S STRUGGLE FOR SAFETY IN AMERICA (2008) (describing the odyssey of a refugee who was denied asylum).

may believe that adjudicators will recognize only the most egregious claims, leading to unnecessary embellishment.[177]

As previously noted, the current visa system also filters the type of asylum seekers who can access the territory and seek protection.[178] Those who use nonimmigrant visas to gain admission must meet certain requirements regarding health, wealth, ties abroad, and—in some cases—education.[179] One might argue that these are valid bases on which to select U.S. refugees,[180] but this cannot be so. The current bases of selection have *no relationship* to the purposes of refugee law. It is not clear why the law should contain separate criteria for admission if these criteria do not represent a different basis of selection.[181] Instead, to make the best use of the "scarce resource"[182] of asylum, U.S. laws should make asylum available to those in the greatest danger of persecution[183] and deter applications from those who need it less. Asylum seekers facing such acute harm often require the greatest assistance in fleeing and becoming refugees.[184]

III. HISTORY OF THE REFUGEE PROTECTION FRAMEWORK

U.S. refugee law is grounded in international refugee law.[185] Neither international nor domestic refugee law recognizes an individual's right to be granted asylum in a foreign country,[186] nor do they guarantee individuals access to the asylum state's territory in order to seek asylum.[187] Instead, international and domestic refugee law recognizes that most asylum seekers will enter the asylum state's

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177. *See* Suketu Mehta, *The Asylum Seeker*, THE NEW YORKER, Aug. 1, 2011, at 32–37 (describing the context in which asylum seekers increasingly embellish their applications while illustrating the particular embellishments made by one asylum seeker on her own application).

178. *Cf.* Cox & Posner, *supra* note 148, at 825 (discussing ex ante screenings of noncitizens under U.S. law based on "pre-entry credentials, credentials that are determined in advance and identified at the border").

179. 8 U.S.C. §§ 1101 (a)(15)(B), (F), (J) (2012).

180. *Cf.* MUSALO, MOORE & BOSWELL *supra* note 22, at 83 (querying whether states should "choose among the victims [of persecution] on the basis of ethnic, religious or ideological affinity") (quoting Michael Walzer).

181. *Cf.* Tyson, *supra* note 94, at 927 ("Congress's humanitarian intent is implicit in the choice of the 'humanitarian concern' language to describe the standard for determining admissions allocations.").

182. Martin, *supra* note 43, at 36.

183. *See* Anker, *supra* note 21, at 42 (warning of "exaggerat[ing] the significance" of references to "humanitarian" purposes in the Act but suggesting that statutory asylum, like nonrefoulement, reflects "some recognition of the special moral claims of those in our midst seeking U.S. protection").

184. *ECRE Interview with Susanne Bolz, supra* note 14, at 3.

185. MUSALO, MOORE & BOSWELL, *supra* note 22, at 3.

186. *See generally* ATLE GRAHL-MADSEN, 2 THE STATUS OF REFUGEES IN INTERNATIONAL LAW (A. W. Sijthoff 1972).

187. *Id.* at 101.

territory without formal admission. With the Refugee Convention,[188] States Party superimposed international refugee law on existing migration control systems, revealing their competing interests in providing humanitarian protection and controlling migration into their territory.[189]

A. *A State's Right to Grant Asylum*

International refugee law does not recognize an individual's right to be granted asylum in a foreign country.[190] The Universal Declaration of Human Rights (UDHR) recognizes only the "right to seek and to enjoy, in other countries, asylum from persecution."[191] At a minimum, this principle secures the individual's right of asylum "*vis-à-vis* the pursuing [s]tate"—the right to flee the pursuing state and to seek and enjoy asylum elsewhere.[192] But this right imposes no obligation on states to grant asylum—or even access to the territory—to a refugee.[193] Atle Grahl-Madsen has explained that the United Nations Commission on Human Rights (UNCHR), in drafting the UDHR, initially considered recognizing the "right to seek and be granted, in other countries, asylum."[194] The British delegation, however, resisted this phrasing, believing that it would effectively entitle any asylum seeker to admission into any other country of his or her choosing.[195] Such a right would tread on states' immigration laws.[196] As an alternative, the British delegation proposed replacing the phrase "be granted" with "to enjoy."[197] Members of the UNCHR understood plainly that an individual's right to enjoy asylum meant little without a corresponding right to be granted asylum.[198]

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188. Refugee Convention, *supra* note 23.

189. *See* Hathaway & Neve, *supra* note 13, at 116 ("International refugee law was established precisely because it was seen to afford states a politically and socially acceptable way to maximize border control in the face of inevitable involuntary migration."); *see also* Anker, *supra* note 21, at 41 ("[A]sylum will retain a certain ambiguity, caught as it is in the irresolution of obligation and discretion inherent in international refugee law.").

190. GRAHL-MADSEN, *supra* note 186, at 80.

191. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 14 (Dec. 10, 1948).

192. GRAHL-MADSEN, *supra* note 186, at 79, 101.

193. *Id.* at 101.

194. *Id.* at 100.

195. *Id.* at 100–01 (discussing the objection of Mrs. F. Corbet of the United Kingdom, specifically her concern that the draft of present Article 14 of the UDHR "was closely linked to immigration laws, inasmuch as it gave any person . . . persecuted for political or other reasons the right to demand admission into the country of their choice").

196. *Id.* at 100.

197. *Id.*

198. *See id.* at 101 (discussing the remarks to this effect of Soviet delegate Mr. Alexei Pavlov); *see also* GOODWIN-GILL & MCADAM, *supra* note 50, at 384 ("To have any

However, the British delegation cared not about the *individual's* right to enjoy asylum; it was concerned with the rights of asylum states to "enjoy" granting asylum.[199] The proposed revision would protect "'the right of every State to offer refuge and to resist all demands for extradition.'"[200] By characterizing asylum as a sovereign right of an asylum state rather than a human right of the individual, the British delegation advanced the view of asylum as a discretionary institution compatible with states' complete territorial sovereignty.[201]

The territorial sovereignty of the pursuing state generally prevents an asylum state from providing refuge to an asylum seeker who has not yet fled. In *The Asylum Case*, the International Court of Justice determined that an asylum state's act of protecting an asylum seeker from the pursuing state's authorities *within* the pursuing state constituted "derogation from the territorial sovereignty" of the pursuing state.[202] Accordingly, a state generally cannot grant asylum in an embassy or consulate located in the pursuing state without that state's consent.[203] This does not preclude individuals from seeking the physical safety of an embassy.[204] Rather, in Grahl-Madsen's words, such protection constitutes merely a "tolerated stay," not asylum.[205] An asylum seeker thus resides for a time in a jurisdiction from which he or she wishes to "separate" himself or herself.[206] For this reason, "internal asylum" may both produce undesirable diplomatic consequences for the pursuing and asylum states and present practical challenges, such as transporting the asylum seeker out of the pursuing state without obstruction.[207] Accordingly, the asylum seeker's flight plays a central role in international refugee law: absent flight from the pursuing state, the asylum state may have only a limited ability to execute a grant of asylum.[208]

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meaning, the right to seek asylum implies not only a right to access asylum procedures, but also to be able to leave one's country in search of protection.").

199. *See* GRAHL-MADSEN, *supra* note 186, at 101 (quoting HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW (1947) (quoting the British delegation)).

200. *Id.* (quoting the British delegation). Grahl-Madsen notes that the UDHR cannot be invoked to resist legitimate demands for extradition, i.e., those in accordance with a treaty. *Id.* at 101–02 n.55. More fundamentally, Grahl-Madsen emphasizes that extradition and asylum are best conceived of as two distinct institutions rather than as two sides of a single issue, or one as the rule and the other as the exception.

201. GOODWIN-GILL & MCADAM, *supra* note 50, at 355.

202. GRAHL-MADSEN, *supra* note 186, at 45–46 (discussing *The Asylum Case*).

203. *Id.* at 46.

204. *Id.*

205. *Id.*

206. Raufer, *supra* note 41, at 257–58.

207. *See id.* ("It is unreasonable to expect that an in-country program which processes refugees who are in current fear will not be affected by, or affect, the diplomatic relationship between the countries.").

208. *See* GRAHL-MADSEN, *supra* note 186, at 45–46 (discussing diplomatic asylum).

WikiLeaks founder Julian Assange's ongoing efforts to flee the United Kingdom and enjoy asylum in Ecuador demonstrate this difficulty.[209] Sweden seeks to exercise jurisdiction over Assange to try him for alleged sexual offenses arising out of a trip he took there in 2010.[210] Assange fled to the United Kingdom, which then determined that it was obligated to extradite him to Sweden.[211] He then sought refuge in the Ecuadorian embassy and applied for asylum, hiding for two months while awaiting a decision.[212] Ecuador ultimately granted him "diplomatic asylum" on the ground that he might ultimately be extradited to the United States and subjected to the death penalty.[213] Nonetheless, the United Kingdom maintained that it was bound to extradite Assange and that it would arrest him if he attempted to flee the Ecuadorian embassy to travel to Ecuador.[214] Accordingly, although Assange has obtained a grant of asylum in a third country, he has no straightforward way to travel there without the risk of apprehension and extradition. Asylum has no force where the individual remains within the territory of the pursuing state and the latter prevents the individual's flight to the safe haven.[215] As a result, even an asylum state's right to enjoy granting asylum is circumscribed by the interests of the pursuing state.

B. *An Individual's Right to Seek Asylum*

Against this backdrop of territorial sovereignty, however, are the individual's right to seek asylum and international human rights

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209. *See* William Neuman & Maggy Ayala, *Ecuador Grants Asylum to Assange, Defying Britain*, N.Y. TIMES (Aug. 16, 2012), http://www.nytimes.com/2012/08/17/world/americas/ecuador-to-let-assange-stay-in-its-embassy.html?pagewanted=all ("Tensions between Britain and Ecuador had been building over Britain's efforts to secure a handover of Mr. Assange."); *see also Ecuador Restates Support for Assange on Asylum Anniversary*, THE GUARDIAN (Aug. 16, 2013), http://www.theguardian.com/media/2013/aug/16/ecuador-julian-assange-asylum-anniversary ("'Ecuador accepts that resolving Julian's status and specifically his right to leave the embassy without threat of arrest and onward extradition to the US involves the jurisdictions of three sovereign nations – the UK, Sweden and Ecuador.'").

210. *Julian Assange Loses Extradition Case*, THE GUARDIAN (May 30, 2012), http://www.guardian.co.uk/media/blog/2012/may/30/julian-assange-extradition-verdict-live-coverage.

211. *See, e.g.*, Nicolas Watt, *UK Tells Ecuador Assange Can't Be Extradited If He Faces Death Penalty*, THE GUARDIAN (Sept. 3, 2012), http://www.guardian.co.uk/media/2012/sep/03/ecuador-julian-assange-extradited-death-penalty?newsfeed=true (observing that Britain was obligated to extradite Assange to Sweden as long as his human rights would not be violated there).

212. Neuman & Ayala, *supra* note 209.

213. *Id.*

214. *Id.*

215. *See* GRAHL-MADSEN, *supra* note 186, at 45–46 (discussing diplomatic asylum).

related to free movement.[216] Some have argued that Article 14 of the UDHR implicitly guarantees individuals a right to access an asylum procedure by guaranteeing the right to *seek* asylum.[217] Moreover, the right to seek asylum established in the UDHR continues to evolve in relation to other international instruments, reflecting developments in human rights law.[218] These instruments reinforce the right of individuals to flee a country of persecution[219] and encourage asylum states to admit refugees for this purpose.[220]

The right to emigrate is chief among these rights.[221] Article 13.2 of the UDHR establishes that "[e]veryone has the right to leave any country, including his own, and to return to his country."[222] Article 12 of the International Covenant on Civil and Political Rights (ICCPR) codifies this guarantee: "Everyone shall be free to leave any country, including his own."[223] States may, however, restrict this right to "protect national security, public order, public health or morals or the rights and freedoms of others."[224] Moreover, the right to emigrate imposes obligations on the country of origin not to thwart departure or withhold travel documents, but it does not obligate asylum states to admit asylum seekers.[225]

The Declaration on Territorial Asylum further endorses the "moral" right of a refugee to gain admission to a country of refuge,[226] but it is neither a binding treaty obligation nor customary international law.[227] Accordingly, absent greater engagement with

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216. *See* Universal Declaration of Human Rights, *supra* note 191, at art. 14 (expressing the right to seek asylum); *see also* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR Supp. At 52, U.N. Doc. A/6316, at art. 12 (Dec. 16, 1966) (guaranteeing the freedom to "leave any country").

217. THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL 14 n.6 (2011) ("A closer reading of the drafting history further suggests that while the declaration falls short of an individual right to be *granted* asylum, a procedural right to *seek*, or in other words a right to an asylum process, was intended to remain.") (alteration in original).

218. GOODWIN-GILL & MCADAM, *supra* note 50, at 383 (observing that asylum protections overlap with the right to freedom of movement, protected by the ECHR).

219. *Id.*

220. GRAHL-MADSEN, *supra* note 186, at 102.

221. *Id.* at 105.

222. Universal Declaration of Human Rights, *supra* note 191, at art. 13.2.

223. International Covenant on Civil and Political Rights, *supra* note 216, at art. 12.

224. GOODWIN-GILL & MCADAM, *supra* note 50, at 381 (quoting the ICCPR).

225. *See id.* at 382 ("The right to leave is not a right which other states need to 'complete' through a duty to admit; rather, it is simply a right which each State must guarantee to those within its own territories, as a matter of constitutional principle.").

226. GRAHL-MADSEN, *supra* note 186, at 108.

227. *Id.*

human rights law, traditional concepts of territorial sovereignty continue to constrict the right to seek asylum.[228]

C. *Refugee Convention*

The central treaty on the rights of refugees, the Refugee Convention, obligates states not to refouler refugees to countries where they face persecution. [229] This subpart describes the nonrefoulement obligation and observes that international refugee law is not designed to attract asylum claims from abroad based on the degree of harm suffered by the claimant. Instead, international refugee law is designed to address the status of people who have already fled into another country.[230] Accordingly, refugee law does not obligate asylum states to issue visas to facilitate the travel of asylum seekers who wish to flee their countries of origin.[231] Its failure to do so, however, means that the community of refugees existing in any asylum state represents not those refugees who necessarily face the most imminent or severe harm but those who succeeded in crossing national boundaries and navigating migration controls.[232]

This subpart begins by examining the principle of nonrefoulement generally; next, it explores its purpose in a regime that expects most asylum seekers to enter asylum states illegally; it then describes how nonrefoulement applies to visa rules; and, finally, it discusses the role of nonrefoulement in U.S. law.

1. Nonrefoulement Generally

Refugee law has evolved since the adoption of the UDHR into a "hybrid"[233] of discretionary asylum and obligatory nonreturn to a persecuting country.[234] The Refugee Convention is widely regarded as

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228. *Cf.* Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625, 630 (2009) (arguing for interpreting the Refugee Convention in the context of international human rights law).

229. Refugee Convention, *supra* note 23, at art. 33.

230. *See id.* at art. 1 (defining *refugee* as a person who is "outside his country of nationality" among other requirements).

231. Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 572 (noting that there is "no implied obligation [on an asylum state] to issue an entry visa flowing from" the ICCPR).

232. *See* Martin, *supra* note 32, at 1268 ("After all, the only clear requisites for [filing an application for asylum] are physical presence on the soil of a Western democracy and persistence in asserting the claim.").

233. *See* Anker, *supra* note 21, at 40–41 ("The best view of asylum is a hybrid, an intermediary status, partaking of the relatively generous definitional standard of the overseas refugee program and some of the protection purposes of section 243(h).").

234. *See id.* at 41 ("Beyond this, asylum will retain a certain ambiguity, caught as it is in the irresolution of obligation and discretion inherent in international refugee law.").

the "centerpiece"[235] of international refugee law and an important humanitarian achievement.[236] The Refugee Convention defines who is a "refugee" and establishes states' obligations toward refugees.[237] However, as scholars have noted, the treaty is far less generous than it is typically understood to be.[238] Although it extends numerous rights to refugees upon admission and recognition, such as the right to industrial property,[239] it does not create a right to asylum and does not require states to provide asylum seekers with access to the asylum procedure unless they are inside the territory of the asylum state or at the frontier.[240] In fact, some scholars characterize the Refugee Convention as an agreement premised on the right of states to control migration in the usual ways.[241]

The central feature of the Refugee Convention is its definition of *refugee*:

> [A]ny person who . . . (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in 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 . . . .[242]

This definition has been widely praised as "nondiscriminatory,"[243] and it serves as the foundation for modern refugee law.[244]

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235. *See* Refugee Convention, *supra* note 23, at 2.

236. *See* Sadako Ogata, *Foreword* to THE REFUGEE CONVENTION, 1951 (Paul Weis ed., 1995), *available at* http://www.unhcr.org/4ca34be29.pdf (noting that "[o]ne of the outstanding achievements of the 20th century in the humanitarian field has been the establishment of the principle that the refugee problem is a matter of concern to the international community and must be addressed in the context of international cooperation and burden-sharing").

237. *See id.* ("At the universal level, the most comprehensive legally binding international instrument defining standards for the treatment of refugees is the United Nations Convention relating to the Status of Refugees of 28th July 1951.").

238. *See* Martin, *supra* note 32, at 1255 ("The 1951 Convention, a cautious and more limited treaty than is often appreciated, provides relatively few actual guarantees to refugees illegally present in the country of haven (as most asylum seekers now are).").

239. Refugee Convention, *supra* note 23, at art. 14; *see also id.* at arts. 16–17, 22 (providing refugees with access to courts, the right to wage-earning employment, and public education, respectively).

240. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 45 (discussing nonrefoulement).

241. *See* James C. Hathaway, *Preface* to RECONCEIVING INTERNATIONAL REFUGEE LAW, at xviii–xix (James C. Hathaway ed., 1997) ("The absence of a duty to grant permanent residence to refugees was critical to the successful negotiation of the Convention. While willing to protect refugees against return to persecution, states demanded the right ultimately to decide which, if any, refugees would be allowed to resettle in their territories.").

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

243. *See* Anker & Posner, *supra* note 61, at 60 ("Both House and Senate sponsors emphasized [in the conference report for the Refugee Act of 1980] that the

Although not a party to the Refugee Convention, the United States ratified the 1967 Protocol, and thereby committed not to return refugees to any country where their life or freedom would be threatened on account of a protected ground.[245] The Senate viewed the 1967 Protocol as a codification of existing humanitarian commitments.[246] The 1967 Protocol revised the definition of *refugee* by eliminating the requirement that a refugee be displaced due to events occurring before 1951.[247] It also removed the restriction that these events have occurred in Europe.[248] The 1967 Protocol otherwise incorporated by reference the key provisions of the Refugee Convention.[249] As a result, the United States has essentially acceded to the entire Refugee Convention.[250]

At its core, the Refugee Convention offers a limited guarantee against refoulement to foreign nationals who, having somehow accessed the territory of the "country of haven,"[251] or, on some interpretations, appeared at the frontier,[252] would face threats to their life or freedom if returned to their country of origin.[253] Article 33.1 of the Refugee Convention 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."[254] The emphatic[255]

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purpose was to create a nondiscriminatory definition of refugee and to make the United States law conform to the UN Convention.").

244. *See* Refugee Convention, *supra* note 23, at 2 (referring to the Refugee Convention as the "centerpiece" of international refugee law).

245. Martin, *supra* note 32, at 1259 (noting that ratification of the 1967 Protocol "was tantamount to acceding to the earlier instrument").

246. *See id.* ("An unexamined assumption that U.S. practices conformed fully to the 1951 Convention's requirements permeated the proceedings, and executive spokespersons assured the Senate that the 1967 Protocol could be implemented without changes in the statutes.").

247. Refugee Convention, *supra* note 23, at 2 ("[The Convention] has been subject to only one amendment in the form of a 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention.").

248. *Id.*

249. Martin, *supra* note 32, at 1259.

250. *Id.*

251. *See id.* at 1255 ("Article 33 [of the Refugee Convention] affords a limited and country-specific protection" from refoulment).

252. GOODWIN-GILL & MCADAM, *supra* note 50, at 208 (observing that a broader interpretation of nonrefoulement has been established through state practice, as states regularly allow large numbers of asylum seekers to cross their frontiers).

253. Refugee Convention, *supra* note 23, at art. 33.

254. *Id.* at art. 33.1. Article 33.2 limits this guarantee: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." *Id.* at art. 33.2.

255. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 53–54, 60 ("[P]rohibiting *non-refoulement* 'in any manner whatsoever' would suggest that it applies regardless of

expression "in any manner whatsoever" belies the restrictive interpretation of refoulement adopted by some states and the general disagreement over its scope.[256]

2. Nonrefoulement and "Impunity"[257] for Illegal Entry

The Refugee Convention creates no obligations to admit refugees, nor does it require states to facilitate refugees' flight from harm.[258] It addresses the plight of refugees who have already fled their home countries and who have effectuated an entry into an asylum state.[259] Because asylum states generally do not admit refugees formally for the purpose of applying for asylum, refugees must ordinarily enter the asylum state irregularly.[260] Under this framework, access to asylum is distributed to those who succeed in evading normal immigration controls.[261] Although flight and successful entry may reflect a refugee's desperation and his or her need to escape harm, it may also simply reflect the refugee's *ability* to effectuate an entry[262]—his or her skill in navigating official paperwork, procuring false documents, or arranging for smuggling.[263] Thus, the legal framework for refugee protection is not designed to extract credible claimants from their home countries, to sort claims by strength, or to create a priority for claims based on the severity or imminence of harm.

Not surprisingly, the Refugee Convention expressly contemplates that refugees will enter asylum states illegally and prohibits states from penalizing refugees for such entry.[264] Other than a few brief, nonbinding recommendations that nations provide travel documents to refugees,[265] the treaty does not candidly address the "controversial

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whether actions occur inside the territory of an acting state, at the border, or even beyond the national territory."); *see also* GOODWIN-GILL & MCADAM, *supra* note 50, at 385 ("[R]emoving refugees 'in any manner whatsoever' to territories where they may be persecuted, whether removal occurs within or outside State territory, will breach article 33(1).").

256. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 17, 68 (noting states' restrictive interpretations of nonrefoulement and summarizing the debate).

257. GRAHL-MADSEN, *supra* note 186, at 209.

258. GOODWIN-GILL & MCADAM, *supra* note 50, at 264.

259. *See* Martin, *supra* note 32, at 1255 (highlighting the fact that most asylum seekers have already fled their home countries).

260. MARTIN ET AL., *supra* note 17, at 775.

261. GAMMELTOFT-HANSEN, *supra* note 217, at 61 (questioning the logic of maintaining an "interpretation whereby the refugee who manages to elude the border guard and enter illegally will receive more protection than the refugee who honestly presents his or her asylum claim to the authorities at or before the border").

262. Martin, *supra* note 32, at 1268.

263. *See* HATHAWAY, *supra* note 27, at 292 (noting that, absent an asylum visa, "only those who lie about their intentions or secure forged documentation are able successfully to satisfy the inquiries" of those who screen refugees abroad).

264. Refugee Convention, *supra* note 23, at art. 31.

265. *Id.* at Recommendations (A) (facilitation of refugee travels).

question of admission."[266] Instead, Article 31 establishes "impunity" [267] for illegal entry:

> 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.[268]

In failing to impose any substantive or procedural admission requirements, the Refugee Convention reflects the States Party's unwillingness to alter existing migration control systems in light of humanitarian needs.[269]

Modern trends have demonstrated states' resolve to minimize burdens associated with accepting and assimilating refugees. [270] James Hathaway and R. Alexander Neve contend that refugee protection has evolved from a temporary "human rights remedy"[271] to an end run around existing migration procedures leading to permanent residence.[272] Seeking to avoid the burden of permanently hosting large numbers of involuntary migrants from the Global South, states have enacted policies of "non-entrée."[273] These policies include a range of deterrent measures, including summary exclusion procedures, burden-shifting arrangements, interdiction, carrier sanctions, and restrictive visa regulations.[274]

3. Nonrefoulement Applied to Visa Regimes

Visas limit access to asylum because they limit asylum seekers' access to the asylum state's territory. When countries require entrants to obtain a visa in order to board a common carrier, but they do not offer a visa for the purpose of applying for asylum, they deny asylum seekers "all legal means" of accessing the asylum

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266. GOODWIN-GILL & MCADAM, *supra* note 50, at 264.

267. GRAHL-MADSEN, *supra* note 186, at 209.

268. Refugee Convention, *supra* note 23, at art. 31.

269. *See* Hathaway & Neve, *supra* note 13, at 117 ("[G]overnments increasingly believe that a concerted commitment to refugee protection is tantamount to an abdication of their migration control responsibilities. They see refugee protection as little more than an uncontrolled back door route to permanent immigration, in conflict with official efforts to tailor admissions on the basis of economic or other criteria.").

270. Hathaway, *supra* note 114, at 41.

271. *See* Hathaway & Neve, *supra* note 13, at 210 (offering a view of refugee law as a human rights remedy rather than a back door to permanent immigration).

272. *Id.*

273. Hathaway, *supra* note 114, at 40.

274. *Id.*; Hathaway & Neve, *supra* note 13, at 122 (discussing summary exclusion procedures and interdiction); *see also* GOODWIN-GILL & MCADAM, *supra* note 50, at 370 (describing "deflection techniques" used by states).

procedure.[275] Visa regimes may eliminate access to asylum or force asylum seekers to pursue fraudulent visas or entry through smuggling or other "illegal migration channels."[276]

Ultimately, international institutions accept visa regimes as legitimate tools of migration control,[277] and no court has interpreted the decision to grant or deny a visa to access a territory as refoulement.[278] In the *Roma Rights* case, for example, British courts considered the legality of the British pre-entry screening procedure at the Prague Airport, which targeted asylum seekers of Roma ethnicity who sought to flee mistreatment in the Czech Republic.[279] The Court of Appeal determined that the pre-entry procedure violated international legal principles of nondiscrimination on the basis of race but that the procedure was lawful under the Refugee Convention; the House of Lords agreed.[280] The prescreening program was consistent with nonrefoulement and not a breach of the duty of good faith because a state's obligation not to refouler is "triggered [only] once an asylum seeker is outside his or her country of origin or habitual residence."[281] Accordingly, denying visas to asylum seekers does not constitute refoulement under the Refugee Convention even if objectionable on other grounds.[282]

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275. GOODWIN-GILL & MCADAM, *supra* note 50, at 375 ("If external movement is premised on the acquisition of a visa, and visas for asylum are not forthcoming, then all legal means of seeking asylum are denied.").

276. *Id.* at 374–75.

277. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 134 ("In general, however, granting or denying a visa, even if conducted directly by consular or embassy agents, has seldom been considered sufficient to constitute *refoulement*. Merely refusing a visa does not necessarily provide a sufficient causal link to any future violation of the *non-refoulement* principle, and visa controls in general thus seem to have been accepted as legitimate measures even by UNHCR."). *But see* HATHAWAY, *supra* note 27, at 312–13 (discussing the UNHCR's view that visa controls may breach duties under the ICCPR's guarantees of "freedom of international movement").

278. *See* GAMMELTOFT-HANSEN, *supra* note 217, at 133–35 (discussing the refoulement principle in this context); *see also* Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 556 ("With regard to embassy applications, one cannot subsume the rejection of an entry visa under the terms of expulsion, return, *refoulement* or transfer to the frontier of territories or to another State or to a country where the specified threats await an applicant. Accordingly, there is no obligation to provide for a [visa for the migrant to enter the haven state's territory for the purpose of applying for asylum] inherent in these norms.") (internal quotation marks omitted).

279. GOODWIN-GILL & MCADAM, *supra* note 50, at 371 (discussing the *Roma Rights* case).

280. *See* HATHAWAY, *supra* note 27, at 308–12 (discussing the *Roma Rights* decision).

281. GOODWIN-GILL & MCADAM, *supra* note 50, at 385.

282. Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 573.

4. Emergence of PEPs

Given that international refugee law does not obligate states to issue visas to refugees to facilitate their journey and admission to the asylum state, it may be surprising that countries chose to adopt PEPs at various points in time during the twentieth century.[283] To understand the rationale for PEPs from the asylum state's perspective, it is useful to trace the history of the use of passports and visas for humanitarian ends.

Protective passports and other types of protective papers first appeared during the infancy of international refugee law.[284] During World War II, for example, Swedish diplomats initially restricted entry of Jewish refugees.[285] However, faced with knowledge that mere "persecution" had morphed into mass atrocities,[286] these diplomats issued protective papers to a number of Jews in Norway,[287] Denmark,[288] and Hungary,[289] who otherwise faced deportation to Holocaust "death camps."[290] Many recipients of protective papers had only tenuous connections to Sweden, and some had none.[291] German and Hungarian authorities honored these papers, albeit inconsistently,[292] possibly because they had been issued pursuant to "diplomatic and bureaucratic norms"[293] and provided "physical evidence of the concern of a foreign power."[294] In Hungary after German occupation, for example, "[e]veryone understood that the mere possession of an official looking paper might have some positive

283. *See, e.g.*, INTERGOVERNMENTAL CONSULTATIONS ON MIGRATION, ASYLUM AND REFUGEES, ASYLUM PROCEDURES: REPORT ON POLICIES AND PRACTICES IN IGC PARTICIPATING STATES 2009, at 239 [hereinafter IGC] (describing the Netherlands' defunct asylum visa and long-standing resettlement program).

284. *See* J. Craig Barker, *The Function of Diplomatic Missions in Times of Armed Conflict or Foreign Armed Intervention*, 81 NORDIC J. INT'L L. 388, 393 (2012) (describing the Swedish protective passport or schutzpass during World War II and noting "little evidence . . . that such passes had ever been used before").

285. *See* PAUL A. LEVINE, FROM INDIFFERENCE TO ACTIVISM: SWEDISH DIPLOMACY AND THE HOLOCAUST 1938–1944, at 103 (1996) (noting that, unlike Great Britain which "opened its doors more than before," "Sweden turned the other way and tightened its restrictions when the need for refuge grew most acute").

286. *Id.* at 130.

287. *See id.* at 146 (describing Swedish diplomatic efforts to provide "papers indicating Swedish interest in" Norwegians at risk).

288. *See id.* at 233, 242 (describing Swedish diplomat Gösta Engzell's cable to Danish Minister von Dardel that indicated "mere possession of a Swedish document might induce better treatment [of vulnerable Jews]" and discussed authorization of "provisional passports" to Danish Jews).

289. *See id.* at 267 (discussing the value of Swedish documents in protecting Jews in Hungary).

290. *Id.* at 52.

291. *Id.* at 139.

292. *See id.* at 268 (explaining how the "various types of document[s] issued by the Swedes" came to have "relative value[s]").

293. *Id.* at 46.

294. *Id.* at 267.

effect."[295] Thus, diplomats continued to issue protective papers when deemed appropriate, despite their inconsistent effect.[296]

Protective documents ranged from the protective passport to an entry visa to Sweden to two types of protective letters.[297] Swedish diplomats determined that protective passports had the highest relative "protective value."[298] These passports, known as *schutzpass*, were made to look official; through "trial and error"[299] diplomats determined whether letterhead, stamp, certificate, and signature affected the impact of these documents.[300] Swedish diplomats were inundated with requests for help, and they could not assist everyone who asked.[301] Ultimately, however, they used a combination of passports, visas, and other papers to protect thousands of Jews from certain death.[302]

Switzerland also issued protective papers during World War II, and for that reason it may be less surprising that Switzerland provides the most recent example of a country offering a PEP.[303] The Swiss asylum law contained a provision for PEPs as early as 1979.[304] When the program existed, Swiss embassies announced the availability of the PEP visa on their websites.[305] The application for a PEP visa required applicants to explain, orally or in writing, the basis of the claim for refugee status.[306] The embassy would then forward the information to the Federal Office of Migration (FOM), which screened the application.[307] If the application presented sufficient

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295. *Id.*

296. *Id.*

297. *See id.* at 268 (examining a memorandum describing the various Swedish papers).

298. *Id.*

299. *Id.*

300. *See id.* ("[A] document with a signature was worth more than one without it [...] possession of any document with a Swedish letterhead or stamp was better than having nothing at all.").

301. *Id.* at 269.

302. *See id.* at 277 ("Many thousands [of Jews] survived at least partly due to the heroic efforts of Wallenberg, Anger, Swiss diplomat Charles Lutz and others.").

303. *See Few Humanitarian Visas Granted by Swiss*, SWISSINFO.CH (Apr. 25, 2013, 9:11 PM), http://www.swissinfo.ch/eng/swiss_news/Few_humanitarian_visas_granted_by_Swiss.html?cid=35632382 (noting the prior Swiss practice of issuing asylum visas).

304. CHRISTOPHER HEIN & MARIA DE DONATO, EUROPEAN REFUGEE FUND, EXPLORING AVENUES FOR PROTECTED ENTRY IN EUROPE 12–13 (Laura Facchi ed., Mar. 2012), *available at* http://www.fluechtlingshilfe.ch/asylrecht/eu-international/schengen-dublin-und-die-schweiz/exploring-avenues-for-protected-entry-in-europe/?searchterm=entering.

305. *Visa for People Living in India/*Bhutan, FED. DEP'T OF FOREIGN AFFAIRS, http://www.eda.admin.ch/eda/en/home/reps/asia/vind/ref_visinf/visind.html (on file with the author).

306. *Asylum Applicants from Abroad, At a Border Crossing, or At the Airport*, FED. OFFICE OF MIGRATION, http://www.bfm.admin.ch/bfm/en/home/themen/asyl/asylverfahren/asylgesuch/asylgesuch_aus_ausland.html (on file with the author).

307. *Id.*

merit, FOM would recommend issuing a PEP visa, and the applicant would be permitted to travel to Switzerland for the purpose of applying for asylum properly. [308] The procedure also required applicants to demonstrate some ties to Switzerland to explain why Switzerland would be the most appropriate destination for resettlement. [309] Thus, PEP was not equivalent to in-country processing of asylum claims or the adjudication of asylum claims at an embassy. A visa through PEP simply authorized the travel and entry of an asylum seeker with a credible claim.[310]

The Swiss PEP played an important role in helping asylum seekers facing acute harm to circumvent the barriers erected by non-entrée.[311] According to an official from the Swiss Refugee Council, a nongovernmental organization advocating for refugees, the purpose of PEP was to be able to respond to "very special situations of acute danger or to help persons out of protracted situations of insecure or unsafe conditions."[312] This official has also asserted that the PEP visa benefitted women disproportionately, [313] as women comprised a greater share of asylum applicants through PEP, at the airport and at the border, than applicants lodging applications from inside Swiss territory after overstaying a nonimmigrant visa or entering without inspection.[314] The Swiss government, however, maintained that most PEP applications were unsuccessful and branded the program an administrative and financial drain. [315] Accordingly, it began dismantling PEP in 2011 and fully abolished it in 2012.[316] News reports suggest the government intended to limit asylum claims from Eritrean conscientious objectors at Swiss embassies.[317] PEP has been replaced with a "humanitarian visa," available to individuals whose "life or physical integrity is seriously and concretely under threat in their homeland."[318] However, only half a dozen such visas have been granted to date.[319]

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308. *Id.*
309. *Id.*
310. *Id.*
311. See Hathaway, *supra* note 114, at 40.
312. *ECRE Interview with Susanne Bolz*, *supra* note 14, at 3.
313. *See id.* at 2 ("Statistics show that the rate of women among the persons allowed entry is higher than among spontaneous arrivals.").
314. *See* E-mail from Susanne Bolz to Author (June 14, 2012, 04:34 CET) (on file with author) (detailing the figures on "special" asylum applications from the Swiss border and airport procedure from 2010–2011); HEIN & DE DONATO, *supra* note 304, at 59.
315. *ECRE Interview with Susanne Bolz*, *supra* note 14.
316. *See* Geiser, *supra* note 16 (explaining the process by which the Swiss government dismantled the PEP program).
317. *Swiss Protests Against Tightening of Asylum Laws*, AL ARABIYA NEWS (June 23, 2012, 9:42 PM), http://english.alarabiya.net/articles/2012/06/23/222323.html.
318. *Few Humanitarian Visas Granted by Swiss*, *supra* note 303.
319. *Id.*

It is also worth noting that Switzerland participates in refugee resettlement on an ad hoc basis only,[320] and thus, PEP may have served as its way of contributing to overseas refugee protection. Participating in refugee resettlement and offering PEPs, however, were not mutually exclusive.[321] During the heyday of PEPs in Western Europe, a few countries, such as the Netherlands, did both.[322]

In 2002, six European states offered such protected entry visas or received asylum applications at their embassies, but three of those countries abolished those practices shortly thereafter "due to the adoption of increasingly restrictionist political agendas."[323] Today, such visas are not offered regularly, but they may be available in exceptional circumstances.[324] As of June 2012, when Switzerland abolished its PEP,[325] no Western country offers this visa as a matter of course.[326] The disappearance of PEPs from modern migration control is a huge loss for the humanitarian objectives of refugee law.

IV. THE ASYLUM VISA

A. *Overview*

An asylum visa is a visa granted to a foreign national at the asylum state's embassy in that person's home country, or a third country, that permits that person to enter the asylum state lawfully for the purpose of filing an application for asylum.[327] An asylum visa is designed in part to facilitate access to the asylum procedure for an individual who seeks to flee his or her country of origin but has not yet done so.[328] A person who has not yet fled his or her country of

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320. *See* IGC, *supra* note 283, at 344 (explaining that "Switzerland does not have in place an annual resettlement program" but does engage in ad hoc resettlement activities).

321. *Id.* at 239.

322. *Id.*

323. Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 542.

324. *See* IGC, *supra* note 283, at 148 (discussing the "informal possibility" of obtaining a visa in order to enter France to "make a formal application for asylum").

325. Geiser, *supra* note 16.

326. Press Conference, International Press Center, Reaching Europe in Safety: The Possibility to Seek Asylum Through an Embassy Saved My Life (Mar. 28, 2012), *available at* http://www.presscenter.org/en/event/press-conference-reaching-europe-in-safety-the-possibility-to-seek-asylum-through-an-embassy-s.

327. This is also referred to as a "humanitarian visa" by some policymakers. *See* LEPOLA, *supra* note 15, at 5. However, this terminology is not universal; in Switzerland, for example, the government has implemented a so-called humanitarian visa as a *replacement* for PEP. For this reason, this Article uses the term *asylum visa* over *humanitarian visa*.

328. *See* Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 543 ("The notion of Protected Entry Procedures 'is understood to allow a non-national to approach the

origin is generally ineligible for resettlement.[329] Thus, his or her remaining options for flight from his or her country of origin are to obtain a visa for some other purpose, such as tourism or education, or to embark on a journey to enter without inspection, most likely through smuggling. The subparts below consider the costs and benefits of an asylum visa.

B. *Benefits*

An asylum visa would likely provide the following benefits: (1) increased access to asylum for nonelite asylum seekers, (2) the ability to attract asylum seekers with the strongest claims, (3) increased transparency to applicants and the U.S. government, and (4) cost savings related to decreased detention of asylum seekers without travel documents or those with marginal[330] claims.

First, an asylum visa stands to benefit asylum seekers who currently are unable to obtain nonimmigrant visas to board common carriers bound for the United States because of their inability to prove their intent *not* to immigrate or to satisfy other visa requirements. These are people who are unable to convince consular officials of their story (including unskilled liars) or who simply do not know what to say or how to qualify for a nonimmigrant visa (including those who are ignorant of the law).[331] As the failure to prove nonimmigrant intent is a significant reason why such visas are

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potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.'") (quoting EUROPEAN COMM'N, COMMC'N TO THE COUNCIL AND THE EUROPEAN PARLIAMENT TOWARDS MORE ACCESSIBLE, EQUITABLE AND MANAGED ASYLUM SYSTEMS, COM (2003) 315 FINAL (JUNE 3, 2003)).

329. *See The United States Refugee Admissions Program (USRAP) Consultation & Worldwide Processing Priorities*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Apr. 8, 2013), *available at* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=385d3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextoid=796b0eb389683210VgnVCM100000082ca60aRCRD (noting that "[r]efugees must generally be outside their country of origin, but [they] can process some individuals in their home countries if authorized by the President").

330. *Cf.* Martin, *supra* note 32, at 1287 ("When the process cannot reliably sort the qualified from the unqualified, asylum applicants drawn to the system will include not only those with a reasonable chance of qualifying but also others whose claims are marginal or nonexistent.").

331. By definition, people who do not receive visas are those who were deemed unqualified by consular officials. All asylum seekers are generally ineligible for nonimmigrant visas because of their inability to prove that they intend to return home; if they receive a visa, it is because they led the consulate to believe that they did not intend to abandon their home country. If they did not receive a visa, it is because they did not succeed in this effort or failed to qualify for some other reason. They might not have succeeded because they did not know that they needed to establish nonimmigrant intent (unaware of requirements) or were simply ineffective in doing so.

denied,[332] it appears that asylum seekers who are truly desperate to flee their country of origin may have particular difficulty obtaining travel documents under the current system.[333] By providing an alternative lawful status with which to board a common carrier, an asylum visa would provide access to these applicants as well as to those who are unable to secure a loan, unable to obtain a scholarship, or are otherwise less elite and unqualified for existing nonimmigrant visas.[334] Moreover, an asylum visa would also facilitate claims from applicants who are less willing or able to lie[335] or hire a smuggler.[336]

Second, apart from enhancing access for less elite applicants and applicants less willing or able to lie, an asylum visa would also enhance access for those with strong claims of asylum based on imminent risk of severe persecution. Applicants facing the gravest, most imminent risk often require the most assistance in fleeing because they have the least time to plan an escape;[337] creating a status for traveling that is responsive to their situation will facilitate applications from individuals facing serious harm. This may particularly enhance access for women and girls, many of whom may lack the financial independence or access to loans to hire a smuggler or obtain guidance in applying for nonimmigrant visas.[338] Admittedly, an asylum visa is unlikely to help a political dissident who is easily recognized by his or her country of origin and for whom the very act of applying for any kind of visa would pose a grave risk.[339] However, an asylum visa may help an asylum seeker who has been victimized by his or her family, tribe, or other nongovernmental entity where the government is unwilling or unable to stop the harm. Such a person may be completely unknown to his or her home government. An asylum visa may also help those facing political

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332. Nafziger, *supra* note 131, at 14; *Visa Denials*, U.S. DEP'T OF STATE, http://travel.state.gov/visa/frvi/denials/denials_1361.html (last visited Oct. 20, 2013) (explaining what the denial of a visa means under 8 U.S.C. § 1184(b)).

333. *See* Settlage, *supra* note 116, at 66 (discussing the difficulty of obtaining nonimmigrant visas from poorer countries and the lack of visas for the purpose of seeking protection).

334. Whether the new visa captures claims from poorer asylum seekers also depends on whether applicants for the asylum visa are required to prove that they are unlikely to become public charges or whether this ground of inadmissibility would be waived for them. *See* 8 U.S.C. § 1182(a)(4) (2012) (detailing the public charge ground of inadmissibility).

335. *See supra* note 104.

336. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 2 ("The embassy procedure contributes also to undermine the activities of unscrupulous human smugglers that are abusing the desperate situation of refugees.").

337. *See id.* at 3 ("It is important to have a legal possibility to access protection from outside the country to be able to react to very special situations of acute danger or to help persons out of protracted situations of insecure and unsafe conditions.").

338. *Id.* at 1.

339. *See* Raufer, *supra* note 41, at 256 ("The people least likely to be able to avail themselves to ICP are . . . those who would be recognized by the government as adversaries.").

persecution who have fled to a third country but have no hope for resettlement there.

Third, institutionalizing an asylum visa would enhance transparency for both applicants and the U.S. government, which, in turn, could enhance humanitarian outcomes and security.[340] The applicant would receive an indication of his or her chances of prevailing on a claim for asylum, and the Swiss experience suggests that asylum seekers value this information.[341] The preliminary screening performed in the adjudication of the asylum visa may deter asylum seekers with marginal[342] claims from making the journey by alerting them to the likelihood of failure.[343] And it would facilitate the journey of applicants with strong claims.[344] Through adjudication of asylum visas, the United States would also be in a position to collect more accurate information about the intentions and characteristics of potential asylum seekers. Higher quality information about potential entrants could enhance security.[345] Policymakers have suggested that, in this way, an asylum visa might function as a tool of "externalized border control" that helps both asylum seekers and the asylum states.[346]

Fourth, institutionalizing an asylum visa could save money by reducing detention costs associated with detaining asylum seekers at the border who possess no travel papers.[347] Under § 235 of the

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340. *See* LEPOLA, *supra* note 15, at 11 (noting that one of the purposes underlying the Visa Information System (VIS) is to prevent threats to internal security).

341. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 2 (describing the benefit to asylum applicants of learning their chances of success prior to traveling to Switzerland).

342. Martin, *supra* note 32, at 1287.

343. David A. Martin has suggested that:

> Designing policy to discourage the unqualified from even applying for a benefit is a perfectly legitimate policy objective, particularly when existing statistics demonstrate that a high percentage of applications lack merit. To the extent that current measures are meant to encourage self-selection, so that only those with strong cases bother to leave their home countries, they address an unimpeachable administrative aim. In design, at least, these restrictive practices are meant to send a 'general deterrence' message to persons still in the home country.

Id. at 1290. Here, the denial of an asylum visa would also potentially deter an applicant from making a journey to the United States and filing an application.

344. *See id.* ("To the extent that current measures are meant to encourage self-selection, so that only those with strong cases bother to leave their home countries, they address an unimpeachable administrative aim.").

345. LEPOLA, *supra* note 15, at 10 (highlighting the security strength of a functioning VIS).

346. *Id.* This author does not endorse the use of externalized border control but simply notes that an asylum visa can be cast as a "win-win" tool of externalized border control. *See id.*

347. *See* HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 47 (2009), *available at* http://www.humanrightsfirst.org/

Immigration and Nationality Act, the government must place in expedited removal all foreign nationals, including asylum seekers, who attempt to enter at the border or a port of entry with fraudulent documents or no documents.[348] To the extent that an asylum visa provides appropriate travel papers to an asylum seeker who would otherwise rely on smuggling or fraudulent documents, the government would need to spend less on detaining such applicants because there would be fewer of them.

Finally, any measure that reduces the use of detention will benefit asylum seekers because detention imposes tremendous costs on them.[349] Detained asylum seekers face greater barriers to proving their claims largely because of their inability to participate in the development of their case.[350] An asylum visa would offer many asylum seekers an alternative to the use of fraudulent documents and thus diminish one source of prolonged detention for many of them.

C. *Costs of Asylum Visa*

Instituting an asylum visa may involve the following costs: (1) the loss of the ability to screen applicants based on certain attractive characteristics, (2) the inability to assess the strength of claims made prior to flight from the asylum seeker's home country, (3) damage to diplomatic relations, (4) danger to applicants, (5) domestic political disapproval, and (6) costs of increased workload at the consulates.[351]

First, allowing applicants to enter for the sole purpose of applying for asylum eliminates barriers that filter for attractive characteristics: diligence and savvy to procure a visa or hire a smuggler, wealth or ability to secure a loan, an appetite for risk, and knowledge of what the consular official needs to hear to grant the visa.[352] Given that the United States cannot (and has no duty) to

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wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf (finding that the U.S. government spent $300 million to detain asylum seekers between March 2003 and February 2009); *see also id.* at 49 (discussing the cost savings of using alternatives to detention).

348. *See* Karen Musalo et al., *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J. ETHICS & PUB. POL'Y 1, 3 (2001) (discussing the process of expedited removal due to fraud).

349. HUMAN RIGHTS FIRST, *supra* note 347, at 42–45 (discussing the impact of detention on asylum seekers to include increased incidence of depression, post-traumatic stress disorder, anxiety, a reduced ability to win asylum, and pressure to abandon asylum claims altogether).

350. *Id.*

351. These considerations are adapted from Susan Raufer's article, which focuses on self-selection, risk, diplomacy, and the value of flight. *See* Raufer, *supra* note 41, at 257–60.

352. An asylum visa might also encourage those with claims of past persecution to come forward over those who fear future harm, and this could undermine the purpose of capturing claims of asylum seekers facing "acute" harm. Raufer's analysis of the "self-selection" phenomenon in the context of in-country refugee processing is

absorb all of the world's refugees,[353] some might defend the current system for its ability to select for other traits, such as potential for economic success.[354] Introducing an asylum visa would interfere with this selection mechanism. However, as discussed extensively in Part II, the U.S. visa system already heavily, almost exclusively, privileges those with economically advantageous traits. U.S. asylum law need not and should not do the same. Instead, it should privilege those with strong asylum claims based on fear of severe and imminent persecution.[355]

Second, the absence of flight eliminates an important signal of the seriousness of the claim.[356] Once an applicant has arrived in the United States, one can begin to conceive of that person as a refugee as defined in the Refugee Convention because that person has successfully fled from his or her country of origin.[357] If consular officials are tasked with considering asylum visa applicants as potential refugees, but without the benefit of those applicants having fled (already), it could lead consular officials to demand more information or evidence regarding the strength of the asylum claim than what would be demanded once the applicant has already fled.[358] However, the adjudication of an asylum visa can serve simply as a prescreen of the asylum claim and not a full adjudication of the claim.[359] Proper training of consular officials could help address this issue, but it remains a serious concern.

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instructive. Raufer argues that in-country processing programs attract applicants with claims of past persecution, because claims based on past persecution are, by definition, based on events that occurred with certainty rather than events that are only likely to occur. Thus, applicants for asylum based on past persecution have greater confidence about their likely success in qualifying for protection. In contrast, applicants with claims based only on future persecution may not risk coming forward if success is uncertain. Raufer concludes that ICP programs, with their numerical caps, thus divert precious refugee protection resources to victims of past persecution rather than asylum seekers facing imminent future threats. *Id.* at 255. This concern may apply with equal force to an asylum visa program.

353. MUSALO, MOORE & BOSWELL, *supra* note 22, at 80.

354. *See* Price, *supra* note 34, at 450–51 (arguing that the duty to provide refugee protection is stronger when domestic political support is "greater-than-usual," as in the case of refugees who will "impose less of an economic hardship because their skill profile better complements the national economy").

355. *See* Raufer, *supra* note 41, at 255 (arguing that the primary goal of the U.S. refugee program should be to provide a "safe alternative" to those facing imminent persecution); *see supra* Part II.

356. *See* Raufer, *supra* note 41, at 260–61 (noting that flight "may be a determining factor in an asylum application").

357. *See* Refugee Convention, *supra* note 23, at art. 1(A)(2) (defining a refugee as, among other things, "a person who is outside the country of his nationality").

358. *Id.*; *see also* Raufer, *supra* note 41, at 261 ("[T]he absence of flight in an ICP application results in a greater burden for the in-country applicant.").

359. *See* HEIN & DE DONATO, *supra* note 304, at 55 (noting that travel authorization in the form of a protection visa is given if the government seeks to "clarify the merits and facts of the case").

Third, an asylum visa could prove diplomatically costly or even completely infeasible in some countries. Countries that produce asylum seekers are likely to take offense to a U.S. practice of issuing visas so that their citizens can advance claims of persecution in the United States.[360] The very existence of the practice in the home country's territory and jurisdiction would appear to undermine the traditional regard for territorial jurisdiction evident in refugee law.[361] As embassies operate and issue visas "at the behest of the government from which the [asylum seekers] wish to separate themselves," it may not be possible to offer asylum visas in all countries.[362] The prior existence of asylum visa procedures for a number of European countries suggests, however, that such a program can be implemented, at least in part, without diplomatic crisis.[363]

Fourth, an asylum visa may endanger asylum seekers who obtain (or even apply for) such a visa by exposing them as government adversaries.[364] For an asylum seeker who succeeds in obtaining an asylum visa, the visa amounts to an announcement to the country of origin, by a stamp in the applicant's passport, that the applicant desires asylum in the United States and intends to accuse

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360. *Cf.* Price, *supra* note 34, at 443 (discussing asylum as a tool to shame or sanction other nations).

361. *See* Raufer, *supra* note 41, at 257–58 (discussing the diplomatic costs of adjudicating in-country asylum claims); *cf.* GRAHL-MADSEN, *supra* note 186, at 45 ("A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State." (quoting *The Asylum Case*)).

362. Raufer, *supra* note 41, at 257. With regard to in-country processing, Raufer states,

> In such a program the United States is placed in the untenable position of negotiating an ongoing program of release with a government it is accusing of violating its citizens' rights. When a person comes to the U.S. embassy fleeing current or potential persecution, a grant of refugee status by the U.S. necessarily conveys to the home country that the U.S. believes the home country is currently in violation of its duties to that person, either by actively persecuting, or by failing to protect the individual.

Id. at 257–58. An asylum visa, however, presents a distinct situation where the United States would not be adjudicating the claim of refugee status but simply performing a preliminary screen to expedite and facilitate the individual's flight from the home country. *See also* Noll, *Seeking Asylum at Embassies*, *supra* note 16, at 552–53.

363. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 1 (noting the existence of a Swiss PEP since 1979).

364. *See* Raufer, *supra* note 41, at 256 (discussing the risks asylum seekers would face by the physical act of coming to the embassy to file a claim for asylum through an in-country processing program); *see also* Anker & Posner, *supra* note 61, at 47 (discussing congressional testimony from a representative of the ACLU stating that "it would be impossible for a person in a country where he is suffering persecution, to be pre-cleared, screened or processed by the Immigration and Naturalization Service") (quoting David Carliner, American Civil Liberties Union).

the country of origin of persecution or unwillingness, or inability, to stop persecution.[365] Such concerns could be dealt with through establishing the asylum visa as a "shadow" visa. It would not need to openly announce the applicant's intention to apply for asylum but could be designed to look exactly the same as other common nonimmigrant visas. Further, it might carry a unique bar code or other identifying information detectable only by USCIS. These measures might sufficiently shield asylum seekers' intentions from the country of origin. However, the country of origin's knowledge of this practice itself may complicate its execution, as countries that tolerate or purport to tolerate the issuance of such visas may still thwart suspected asylum seekers' efforts to flee by, for example, detaining and questioning suspected asylum seekers at the airport. Ultimately, the practice of issuing asylum visas would be impracticable in some countries.

Fifth, the American public is wary of perceived abuse of the asylum system, and the media have fueled the perception that the system is filled with and, to a lesser extent, creates incentives to commit fraud.[366] The domestic political cost of creating an asylum visa is the popular fear of opening the "floodgates"[367] to asylum seekers worldwide. Creating a new basis for entering the country while preserving the old would seem to increase access without any limit.[368] However, one strategy for combating public disapproval is to emphasize the way in which an asylum visa provides a more straightforward path to the U.S. asylum procedure, decreasing the forced deception at the heart of the current system. Despite the unequivocal purpose of increasing access, the asylum visa may, in this way, also serve as an antifraud device.

Ultimately, as noted above, an asylum visa is not a practical option for many asylum seekers. Applicants for asylum, therefore, must still be allowed to resort to other means of accessing the asylum procedure.[369] If embassies offer asylum visas abroad, however, what

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365. *See generally* Glenna MacGregor, *Human Rights First Concerns about US-VISIT's Implications for Asylum Seekers' Confidentiality and Safety*, http://epic.org/privacy/us-visit/hrf_memo.pdf (last visited Oct. 20, 2013) (discussing the privacy interests of asylum seekers).

366. *See* Mehta, *supra* note 177, at 32–37.

367. *See* Anker & Posner, *supra* note 61, at 57 (discussing then-Congressman Dante Fascell's modification of the House committee's amended refugee definition allowing those still within the country of persecution to "qualify as refugees").

368. *Cf.* Hathaway & Neve, *supra* note 13, at 117–18 (noting that governments cannot be expected to provide "quality protection to all refugees who arrive at their territory. The critical right of at-risk people to seek asylum will survive only if the mechanisms of international refugee protection can be reconceived to minimize conflict with the legitimate migration control objectives of states . . . .").

369. Refugee Convention, *supra* note 23, at art. 31(1) (stating that the 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

will the public, not to mention the courts, make of claims filed by asylum seekers who entered after obtaining other visas or who were smuggled in? Will those claims be tainted by an assumption that the applicant is not credible? If Congress creates a ground for admission that supports an asylum visa, it will need to address such matters as well.

Sixth, introducing an asylum visa would undoubtedly impose new administrative and financial costs on the government. The "pull" effect of such a visa could be staggering.[370] Embassies would likely be flooded with applicants, many of whom would not be asylum seekers but rather purely economic migrants seeking to qualify for a new ground for admission. There would undoubtedly be an increase in the workload for consular officials. Consular officials would be stretched by the burden of adjudicating these additional visa applications.[371] This would likely require hiring more consular officials and securing a larger State Department budget. A modest fee for an asylum visa application could ameliorate the financial burden and deter frivolous applications, but no system can be designed to preclude fraud entirely. Careful design, however, might help mitigate these basic structural concerns. A rational asylum visa provision must contend with these possibilities.

Lastly, the potentially significant costs associated with deporting unsuccessful applicants must also be considered.

D. *Objections*

This subpart addresses additional objections apart from the "costs" discussed above. First, one might wonder why the United States should not simply institute in-country processing of asylum applications or expand the overseas refugee program instead of instituting a new visa. As explained above, in-country processing suffers from a number of problems that Susan Raufer has identified.[372] In particular, it grants a status that actually has no effect until the asylee, in this case, leaves his or her home country.[373] As in the situation faced by Julian Assange, a grant of asylum while one is still within the country one seeks to flee is particularly

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authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence").

370. I am grateful to Jennifer Rellis for raising this point; *see also ECRE Interview with Susanne Bolz*, *supra* note 14, at 3 (discussing the Swiss government's fear of the "pull-effect" of the PEP).

371. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 3 (discussing the overwhelming workloads of Swiss consular officials).

372. Raufer, *supra* note 41, at 253–59.

373. *See* GRAHL-MADSEN, *supra* note 187, at 77 (noting that a right to grant in-country asylum is "not recognized" outside Latin America, although states may still provide temporary refuge to persons in danger).

ineffective.[374] Would a grant of *less* protection, a mere visa, help *more*? The lessons of World War II suggest yes—modest interventions often have greater effect than a large scale, public rescue.[375] For lesser known figures who are not on the government's radar, but who still have a well-founded fear of persecution, such a visa is a "quiet" way of facilitating the asylum seeker's escape without shaming the country of origin through an outright grant of asylum.[376] For famous figures, such as Chen Guangchen, nothing short of diplomatic talks is likely to work; an asylum visa may do little to help such a person, but the current system is no better.[377]

Expanding USRAP is also no substitute for facilitating travel for asylum seekers in imminent danger of severe persecution. As discussed in Part II, USRAP is generally unavailable and privileges political considerations.[378] Merely expanding that program without recognizing the unique role of asylum misses the opportunity to make the most of the U.S. asylum system. One might respond that having consular officials adjudicate asylum visas reproduces this very problem by involving the State Department in an adjudication related to asylum. However, there are advantages to this approach, which are discussed below.

One might also assert that the asylum visa stops arbitrarily at the point of providing papers to authorize travel and admission. Why not cover airfare and other expenses? The neediest asylum seekers, after all, could very well be destitute and unable to access the asylum visa for that reason. This Article proposes to draw the line at providing a visa because, as controversial as such a measure might be, providing additional support would invite greater controversy.[379] The many decades of PEPs in Europe demonstrate that an asylum visa, however, is not inherently untenable, financially or

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374. *See* Raufer, *supra* note 41, at 238 (discussing the anomaly under international law of a country extending permission to enter while an individual remains in his or her home country, which is seen as a foreign country inserting "one's own law between the individual and the laws of the sovereign country"); *see also Ecuador Restates Support for Assange on Asylum Anniversary*, THE GUARDIAN (Aug. 16, 2013), http://www.theguardian.com/media/2013/aug/16/ecuador-julian-assange-asylum-anniversary (noting that Assange's ability to leave the Ecuadorian embassy without the threat of extradition implicates the jurisdiction of the United Kingdom, Sweden, and Ecuador).

375. LEVINE, *supra* note 285, at 278.

376. *Cf.* Price, *supra* note 34, at 443 (discussing the "political conception" of asylum as a "sanction against other states").

377. Chen Guancheng, *Timeline*, WASH. POST (May 2, 2012), http://www.washingtonpost.com/wp-srv/special/world/chen-guangcheng-timeline/.

378. *See supra* Part II.

379. *Cf.* Martin, *supra* note 43, at 35 (discussing the public's backlash against the asylum adjudication system when it is demonstrated to be "dismayingly ineffective").

administratively.[380] The political choices that Western European countries have made to dismantle those programs do not undermine their potential value elsewhere.[381]

Finally, it is important to consider the wisdom and practicability of any U.S. measure in the context of other countries' protection policies.[382] Most asylum states have scaled back humanitarian protections in recent years and have increasingly adopted deterrence policies to prevent asylum seekers from entering the asylum state's territory.[383] Under what circumstances would it make sense for the United States to offer more opportunities for protection, especially given the tremendous existing U.S. resettlement program? Framed this way, the reason for doing so is unclear, other than outsized generosity. However, an asylum visa offers the potential of screening asylum claims at the origin (or near to the origin) for the strength of the claim, which, as this Article has argued, could potentially lead to a better allocation of existing U.S. asylum resources to the neediest claimants rather than simply "more" asylum. Nonetheless, many scholars and practitioners have rightly acknowledged the need among states for a collaborative solution to protecting refugees.[384]

E. *Toward an Ideal Asylum Visa Regime*

An ideal asylum visa regime would maximize humanitarian benefits and minimize fraud. A complete discussion of the details of an ideal asylum visa regime is beyond the scope of this Article, but a few observations will be offered in this subpart.

1. Role of Asylum Visa in Context of Other Visas and Entry Without Inspection

To maximize humanitarian benefits, an asylum visa provision should allow applicants to apply for the visa without preclusive effect;

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380. *See ECRE Interview with Susanne Bolz*, *supra* note 14, at 1 (noting that the asylum visa had been available in Switzerland since 1979).

381. *See* Noll, *Seeking Asylum in Embassies*, *supra* note 16, at 542 (discussing "restrictionist political agendas" in Northern Europe that led to the dismantling of PEPs there).

382. I am grateful to Michael Kagan for raising this point.

383. *See* Hathaway & Neve, *supra* note 13, at 115–16 (noting that "many countries are withdrawing from the legal duty to provide refugees with the protection they require").

384. *Id.* at 169–70 (discussing a collaborative approach to temporary refugee protection); *ECRE Interview with Susanne Bolz*, *supra* note 14, at 3 ("We believe that the situation [the pressure to dismantle the PEP] might have been different if Switzerland had not been one of the very few countries with such a procedure in place at that time. If refugees had had the opportunity to address other countries as well, there could have been a more concerted proceeding, to the benefit of the refugees. This exemplifies just how important it is to look for European solutions. It all boils down to the issue of shared responsibility.").

this means they could reapply after some period of time or after a relevant change in circumstances if unsuccessful on the first application. Due to U.S. obligations under Article 31 of the Refugee Convention, and because an asylum visa would not be practicable for many asylum seekers,[385] those who obtain other nonimmigrant visas or who enter without inspection should retain the same right to apply for asylum after entering the United States without any penalty for having not first obtained an asylum visa.[386]

2. Adjudicators of the Visa Must be Trained in Refugee Law

As in the Swiss PEP, consular officials could send asylum visa applications to asylum officers to adjudicate.[387] Under the Swiss program, asylum officers determined the merit of the application and recommended whether the embassy should issue a visa.[388] That approach has numerous advantages—principally, that it uses the asylum officer corps' existing expertise in refugee law.[389] The disadvantage, however, is the potential for delay and extra administrative burdens in a context where applicants might face imminent harm. Ultimately, the more effective approach might be to train consular officials in refugee law and then to utilize their expertise in visa adjudication and local conditions in the countries where they work.[390] USCIS and the State Department should join forces to train consular officials in refugee law so that they are competent to adjudicate asylum visas.

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385. *See supra* note 305.

386. *See* Refugee Convention, *supra* note 23, at art. 31(1) ("The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.").

387. *Asylum Applicants from Abroad*, *supra* note 306.

388. *Id.*

389. *See* Nafziger, *supra* note 131, at 53 (highlighting the expertise of consular officers).

390. *Id.*

3. Adjudications Must be Expeditious to Benefit Asylum Seekers Facing Imminent Harm and Perform Only a Basic Review of the Claim for Protection

An asylum visa will only help those facing acute harm if consular officials can adjudicate visa applications quickly.[391] This will require sufficient staffing at the consulates and adequate training of consular officials in refugee law. Applicants for an asylum visa would undergo screening for admissibility according to general visa guidelines, such that asylum seekers with certain criminal histories will not be admitted.[392] Beyond the basic background checks performed by the State Department, further inquiry into potential bars to eligibility for asylum would be improper at this stage. Consideration of such issues would increase the complexity of the analysis and delay decisions. Moreover, applicants could overcome bars through advocacy once they have prepared their applications after arrival.[393]

4. Efficacy

An asylum visa, as described thus far, essentially creates a new ground for admission that potentially leads to permanent residence. Such a basis for admission must be used carefully to retain public support and efficacy abroad.[394] It may not be feasible for Congress to create an asylum visa in the mold of others as a "normal" basis for admission. Instead, an asylum visa may work best when used in exceptional cases of humanitarian crisis. As Paul Levine notes at the close of his study, Swedish diplomat Gösta Engzell captured the possibility and limitations of protective passports in a cable to a fellow diplomat:

> Finally I want to touch upon the provisional passports and want to emphasize that we must be restrictive with them. Everyone wants one and it would be a debacle if we conceded too much. It is partially chance who gets them. We don't really know what good they do. . . . Much is a question of judgement which is difficult to decide from here. . . . But if you see in individual cases that such papers can save someone, we of course have nothing against your decision.[395]

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391. *See* LEPOLA, *supra* note 15, at 22 ("[A] request for a humanitarian visa should enable the applicant to leave the country as soon as possible.").

392. *Visa Denials*, *supra* note 332 (explaining that an applicant's past or current criminal actions can make the applicant ineligible for a visa).

393. A formal visa appeals process for asylum visas would also promote accuracy and fairness in the adjudication of these applications. I am grateful to Kate Aschenbrenner for raising this point. *Cf.* Dobkin, *supra* note 145, at 120–21 (describing the dangers of insulating consular decisions from judicial review in light of the effects of racism and other "malicious factors").

394. *Cf.* Mehta, *supra* note 177.

395. LEVINE, *supra* note 285, at 278 (quoting Engzell's cable to a fellow diplomat).

Analogously, asylum visas granted too frequently or without careful consideration may antagonize "refugee-producing"[396] countries or prompt such countries to thwart visa holders attempting to flee.[397] The paradox of humanitarian rescue, alluded to by Engzell above, is that it is most effective when rare.[398] But this does not mean that the law should not authorize the possibility of rescue.

V. CONCLUSION

By design, the current method of regulating access to the asylum procedure in the United States screens asylum seekers based on criteria unrelated to their underlying claim for asylum. The two current paths to the asylum procedure are smuggling and entry on a nonimmigrant visa. The former requires asylum seekers to risk great danger, and the latter requires asylum seekers to prove great wealth or skill—characteristics unrelated to their need for protection from persecution. Thus, the law fails to facilitate the admission of applicants necessarily in greatest need of protection from persecution, and it fails to deter those whose claims are weaker and who may ultimately make the long journey for nothing. The United States can do better to honor its humanitarian aspirations while acknowledging the practical and political constraints on the system. The first step may be to explore more fully the idea of an asylum visa.

396. Hathaway & Neve, *supra* note 13, at 119 (noting that Northern states impose a visa requirement on nationals of "refugee-producing" countries).

397. *See* LEVINE, *supra* note 285, at 278 (discussing the risks of overusing protective papers).

398. *Id.*

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