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

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

James M. Didden, Jr.*

INTRODUCTION

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

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1. See 117 CONG. REc. S9,993 (daily ed. July 30, 1993) (statement of Sen. Kennedy) (arguing that the most important aspect of new asylum legislation is to establish mechanisms to prevent abuse of the asylum system).
3. See INS Statistical Report, Asylum Division (April 22, 1994) (reporting the number of asylum applications filed and pending between October 1993 and March 1994). During this same period, the INS granted 3,441 applications, denied 14,801 applications, and closed 4,992 applications. Id.
ny, approximately 440,000 asylum seekers filed claims in 1992. During the first four months of 1993, 161,324 new asylum applicants registered—a thirty percent increase from the same period in 1992.

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

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

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

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


10. See Sam Blay & Andreas Zimmerman, Recent Changes in German Refugee
As the United States and Germany narrow the scope of asylum rights, the international community must either share more of the burden, or witness the deterioration of the right to asylum.

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

I. POLITICAL ASYLUM LAW IN THE UNITED STATES

A. HISTORY

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


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

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


14. See Immigration and Nationality Act of 1952, § 243(h), 614.226 Stat. 163,
power of the Attorney General. Withholding of deportation, as the name suggests, allowed the Attorney General to withhold the deportation of refugees to any country where it was “clearly probable” that they would experience physical persecution. Conditional entry status, which concerned the admission of refugees from overseas, allowed the INS to admit aliens who could demonstrate that they had fled either a Middle Eastern country or a communist country. Finally, the Attorney General exercised parole power for emergency or public interest reasons.

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

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22. See 1967 Protocol, supra note 21, at art. 1, § 2; 1951 Convention, supra note 21, at art. 1, § A(2) (defining a refugee).

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

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

broad discretion in decisions on the withholding of deportation could have accommodated the new definition of "refugee," the Board of Immigration Appeals (BIA) continued to use the more stringent clear probability standard. Moreover, the courts reviewing withholding of deportation cases failed to reach a clear consensus on the appropriate refugee eligibility standard. These inconsistencies fueled the debates that led to the Refugee Act of 1980.

B. RECENT INCONSISTENCIES

The Refugee Act of 1980 marked a turning point in asylum law, creating a uniform system under which the United States could con-

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

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

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


30. See Deborah E. Anker, Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 439-43 (1992) [hereinafter Legal Norms] (discussing the two groups of asylum application procedures for aliens present in the United States). First, prior to the initiation of exclusion or deportation hearings, applicants file claims with the INS. Id. Aliens who enter without INS inspection or those in the country on expired nonimmigrant visas who affirmatively request asylum fall into this category. Under this procedure, asylum officers conduct an "unrecorded, non-adversarial interview." Id. at 441 (citing 8 C.F.R. § 208.9 (1992)). Second, after the government initiates exclusion or deportation hearings, applicants file with the Executive Office of Immigration Review (EOIR). Id. (citing 8 C.F.R. § 3.0 (1992)). This procedure requires a "formal administrative hearing" that an immigration judge conducts. Id. (citing 8 C.F.R. § 3.10 (1992)). This judge may examine the alien and any witnesses. Id. at 442, citing 8 U.S.C. § 1252(b) (Supp. 1992). The hearing allows the immigration judge to receive a "broad" range of evidence relevant to any issue in the case. Id. (citing 8 C.F.R. § 242.14(c) (1992)). The immigration judge renders his or her opinion “based on recorded evidence.” Id. (citing
sider claims of asylum\textsuperscript{31} and claims for withholding of deportation.\textsuperscript{32} The United States intended this Act to enforce domestically its commitment to international, humanitarian traditions.\textsuperscript{33} The Act included a definition of refugee consistent with the 1967 Protocol as one of its primary provisions.\textsuperscript{34}

Yet many of the procedural hardships that occurred after implementation of the 1967 Protocol also characterize the period following the Refugee Act of 1980.\textsuperscript{35} First, there remain inconsistencies between the

\begin{itemize}
  \item 8 U.S.C. § 1252(b) (Supp. 1992)). An applicant "has the right to" counsel during an EOIR proceeding. \textit{Id.} (citing 8 U.S.C. § 1252(b)(1)-(4) (Supp. 1992)). The applicant and the government may "appeal a decision to the BIA," which is an "administrative appellate unit within the EOIR." \textit{Id.} at 443 (citing 8 C.F.R. § 3.1 (1992)). Applicants "can further appeal to a federal district court or a circuit court of appeals." \textit{Id.} (citing 8 U.S.C. § 1105(a) (Supp. 1992)).
  
  The government promulgated changes to the 1980 interpretation of the refugee definition in 1990. \textit{Id.} at 440 n.17 (citing 8 U.S.C. § 1101(a)(42)(A) (Supp. 1992)). Although it is preferable for asylum officers to receive an advisory opinion from the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA), they may issue a final decision without an advisory opinion "if at least 60 days have elapsed since the request." \textit{Id.} (citing 8 C.F.R. § 298.11(b) (1992)). The United States further authorizes asylum officers to consider evidence "credible sources other than the State Department" provide. \textit{Id.} (citing 8 C.F.R. § 208.12(a) (1992)). An applicant need not establish that he or she would experience persecution if he or she can establish a "pattern" of persecution of "persons similarly situated." \textit{Id.} at 441 (citing 8 C.F.R. § 208.13(b)(2)(i)(A) (1992)).
  
  
  
  33. \textit{See Forty Year Crisis, supra} note 8, at 64-89 (stating that the purpose of the 1980 Refugee Act was to implement international standards, and thus eliminate the use of selection criteria based on geographic considerations, foreign policy, and country of origin); U.S. GOVT ACCOUNTING OFFICE, ASYLUM: APPROVAL RATES FOR SELECTED APPLICANTS (1987) (examining the selection criteria the United States uses in asylum processing); U.S. GOVT ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 8 (1987) (discussing uniformity within the asylum structure); \textit{see also Unfulfilled Promise, supra} note 8, at 250 (discussing the policy behind the 1980 Refugee Act).
  
  34. \textit{See} 8 U.S.C. § 1101(a)(42)(A) (Supp 1992) (promulgating the "well-founded fear" definition of refugee consistent with the 1967 Protocol). A noticeable difference between the treaty and United States statutory provisions, however, is that the statute explicitly includes those who suffered past persecution, independent of determining the possibility of future persecution. \textit{Id. see also} 8 C.F.R. § 208 13(b)(1)(ii) (1994) (demonstrating that a showing of past persecution is sufficient to sustain an asylum claim unless no compelling humanitarian factors are present or future persecution is unlikely).
  
  35. \textit{See generally} Robert Koulish, Systematic Deterrence Against Prospective Asy-
refugee standards that immigration authorities and courts actually apply and the international principles the United States charges them with upholding. Second, the United States continues for ideological reasons to grant asylum to a disproportionately greater number of applicants from countries unfriendly to the United States. Third, bureaucratic inefficiencies remain.

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

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

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

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

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


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


46. See Roberto Suro, Study Boosts States’ Bid for Greater Federal Burden in
II. CHANGES IN UNITED STATES POLITICAL ASYLUM LAW

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

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

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


Health care and crime notwithstanding, the Clinton Administration has addressed immigration and asylum issues. On March 30, 1994, the Clinton Administration pub-
This legislation includes new provisions which, if the United States implements, would have a significant impact on its asylum law. The majority of these bills start from the premise that the rights of refugees are greater once they reach United States territory, using this premise to justify a policy of exclusion. To comprehend the magnitude of the proposed changes, it is necessary to examine in detail this asylum legislation.

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

50. See H.R. 3363, supra note 48, at § 201 (stating that the right to apply for provisional asylum attaches when an alien is physically present in the United States or at a land border or port of entry). This provision seeks to amend § 208(a) of the Immigration and Nationalization Act of 1952, 8 U.S.C. § 1158(a). ld. Most of the bills pending before Congress preserve the right of aliens to apply for asylum if present in the United States or at a land border or a port of entry. See, e.g., S. 1348, supra note 48, at § 210; S. 1358, supra note 48, at § 210; S. 1351, supra note 48, at § 301 (stating that an alien in the United States or at a land border or a port of entry has the right to apply for asylum); see also infra notes 62-92 and accompanying text (discussing the increased rights of asylum-seekers once present in the United States).

51. See infra notes 62-92 and accompanying text (examining the current asylum legislation before Congress). The two principal pieces of legislation are President Clinton's Expedited Exclusion and Alien Smuggling Enhanced Penalties Act of 1993, introduced as S. 1333 by Senator Edward M. Kennedy on July 30, 1993, and the Immigration Enforcement and Asylum Reform Act of 1993, which Representative Romano Mazzoli introduced as H.R. 2602 on July 1, 1993 and which is now pending as H.R. 3363. ld. S. 1333 is narrowly tailored to domestic issues concerning asylum and illegal alien smuggling. ld. H.R. 3363, in contrast, takes a wide scale approach to immigration and asylum, proposing both domestic and international reform. See also Interview with Robert Lange, staff member on the Senate Judiciary Subcommittee on
Refugees may gain admission to the United States in two ways. Subsequent to the United States may admit them from abroad, in which case the admissions ceilings of the Refugee Act of 1980 apply, or they may apply for and receive asylum once they reach the United States. The due process rights that attach to an asylum-seeker once he or she arrives in the United States confer three distinct advantages over the rights of refugees who fail to reach the United States. First, once an asylum-seeker reaches the United States, he or she is exempt from admissions ceilings. Second, asylum applicants may seek protection regardless of immigration status. Third, asylum-seekers may raise protection claims as a defense to removal in immigration court proceedings or affirmatively to the INS. Asylum applicants may remain in the United States for several years pending the outcome of their cases. Many applicants whose asylum claims the United States denies find other ways of obtaining legal residency or remain in the United States illegally.

A. PRE-INSPECTIONS AT FOREIGN AIRPORTS

To minimize the likelihood that refugees will gain permanent residence in the United States, Congress has implemented political asylum legislation and proposes to expand efforts to prevent refugees from reaching United States territory. For example, H.R. 3363, the Immigrant and Refugee Affairs, in Washington, D.C. (October 1993) (stating that both the Kennedy and Mazzoli bills are expected to receive approval and that some hybrid of these bills will most likely constitute the new United States asylum law).

52. See Haitian Boat People, supra note 40, at 333-34 (discussing the manners in which refugees may gain admission to the United States).
56. See Haitian Boat People, supra note 40, at 335 (discussing the rights that attach during the asylum application process).
57. See id. (discussing the inapplicability of admission ceilings to asylum-seekers who reach the United States).
59. 8 C.F.R. § 208.2 (1992).
61. Id. (stating that the United States does not detain most aliens, and therefore; aliens drop out of sight while awaiting adjudication of their claims).
62. See 117 CONG. REc. S9,993 (daily ed. July 30, 1993) (statement of Sen. Kennedy) (announcing that President Clinton intends to seek an additional $171.5
Migration Enforcement and Asylum Reform Act of 1993, proposes pre-inspection of refugees at foreign airports.\textsuperscript{63} It also requires the INS to train airline employees to detect fraudulent documents.\textsuperscript{64} Such provisions aim to limit the number of aliens who make political asylum claims at United States airports without official, or with fraudulent, documentation.\textsuperscript{65}

### B. Expediting the Process

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

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

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

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

\textsuperscript{65} See \textit{Id.} These two bills do, however, contain anti-smuggling and summary exclusion proposals. \textit{Id.}

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

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

\textsuperscript{68} See S. 1333, \textit{supra} note 48, at § 2(b) (defining a credible fear of persecution as a "substantial likelihood" that the alien's statements are true, and that the alien could establish eligibility as a refugee within the meaning of § 102(a)(42)(A) of the INA, 8 U.S.C. § 1101(a)(42), or who the United States could return to a country
an INS officer, subject only to immediate supervisory review,69 may
dean this fear incredible and return the alien immediately.70 In this cir-
cumstance, the proposed legislation stipulates that a petition for habeas
corpus is the only form of judicial review.71

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

where there is a substantial likelihood he or she could establish eligibility as a refu-
gee).

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

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

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

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

73. See Office of the U.N. High Comm'r for Refugees, *Handbook on
HCR/IP/4/Eng. Rev. 1 (1988) (defining "refugee sur place" as an individual "who was
not a refugee when he [or she] left his [or her] country, but who becomes a refugee
at a later date").

202; S. 1348, *supra* note 48, at § 202; S. 1351, *supra* note 48, at § 303 (stating that
applicants who fail to appear for scheduled asylum hearings become ineligible for
benefits under the Act).
reasonable. The above proposals indicate Congressional intent to replace "asylum" with "provisional asylum."

C. RESERVING THE RIGHT TO SEND REFUGEES TO WILLING COUNTRIES

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

D. LIMITING JUDICIAL REVIEW

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

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

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

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

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

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

80. See H.R. 3363, supra note 48, at § 202; S. 1333, supra note 48, at § 4(a); S. 1358, supra note 48, at § 202; S. 1348, supra note 48, at § 203; S. 1351, supra
review of decisions to exclude refugees. Courts of Appeals could examine only whether the petitioner is an alien and whether the United States correctly followed the statutory procedures in reaching its decision to exclude. Regardless of the nature of the claim, no court would have jurisdiction to consider the validity of any adjudication or determination of exclusion, to certify a class in an action, or to provide declaratory or injunctive relief. Nor could refugees collaterally attack exclusion decisions during actions brought against them to assess penalties for improper entry or re-entry.

E. REVITALIZED BORDER PATROLS

Pending legislation calls for an increase in the number of border patrol officers and the number of asylum officers. The Asylum Reform and Alien Smuggling Control Act of 1993 proposes an increase of 1,000 border patrol officers for fiscal year 1994, and for the same fiscal year, an increase to not less than twice the average number of

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

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

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

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

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

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

86. S. 1348, supra note 48.

87. See also S. 1351, supra note 48, at § 701 (suggesting an increase in the number of full-time INS border patrol officers to 5,900 in fiscal year 1994, 6,900 in fiscal year 1995, 7,900 in fiscal year 1996, 8,900 in fiscal year 1997, and 9,900 in
asylum officers in fiscal year 1993. As the United States has long employed a disproportionately small number of border patrol and asylum officers relative to the number of refugees it is confronted with annually, Congress is expected to approve such increases.

F. INCREASED APPROPRIATIONS FOR THE INS

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

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

German asylum law has changed gradually over the past thirty years. A dramatic rise in the number of asylum claims in the late fiscal year 1998).

88. See H.R. 3223, supra note 48, at § 5; S. 1351, supra note 48, at § 302 (calling for an increase in the number of asylum officers).
89. See S. 1348, supra note 48, at § 303 (authorizing an increase in appropriations necessary to implement the provisions of the Act).
90. See H.R. 3363, supra note 48, at § 401; S. 1358, supra note 48, at § 401 (delineating specific resource allocations in connection with INS employee increase).
91. See H.R. 3363, supra note 48, at § 401 (proposing specific increases in INS allocations over the next few years).
92. See id. at § 401 (calling for enough funds to provide for a 100 percent increase in the average number of asylum officers over the fiscal 1993 period by October 1, 1996). The bill also appropriates:
   (1) funds for the purchase of police-type use passenger motor vehicles; (2) funds for the acquisition, lease, maintenance, and operation of aircraft; (3) funds for the purchase of uniforms; (4) funds not to exceed $50,000 to meet unforeseen emergencies of a confidential character; and (5) funds not to exceed $500,000 of those sums appropriated for research and $17,188,000 of those funds appropriated for construction.
Id.
93. See, e.g., HANS KREUBERG, GRUNDRECHT AUF ASYL 21-25 (1984) (discussing
1970s⁹⁴ prompted the German government (Bundestag) to centralize its asylum process, beginning in 1980.⁹⁵ The Bundestag hoped that altering its policy would deter applicants with frivolous claims from entering the country, expedite adjudication, and limit both applicants' employment authorization and their access to social welfare benefits.⁹⁵

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

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

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


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


98. 1982 Asylum Law, supra note 97. at § 22. The law does not allow asylum-seekers to choose their place of residence. Id. Although allocation of refugees has not cured the crisis in Germany, it remains a viable method for sharing the political and economic costs of the asylum problem. Id. The global system of collective responsibility that the author recommends derives its foundation from this part of the 1982 Asylum Procedures Law. See infra notes 197-203 and accompanying text (proposing a formula for collective responsibility).
influenced the decisions of officials responsible for initial processing of asylum claims. 99

Although the Bundestag designed the 1982 Asylum Procedures Law to expedite the asylum process, its implementation failed to stem the tide of asylum-seekers. 100 This failure prompted the Bundestag to modify its laws, once again, in 1987. 101 The 1987 Asylum Law authorized border police to deny entry to an asylum-seeker they deemed to have received protection in another country 102 and extended the ban on employment from two to five years. 103 Nevertheless, this new asylum law could not withstand the subsequent influx of refugees that, in large part, the end of the Cold War generated.

IV. THE END OF POLITICAL ASYLUM IN GERMANY

A. THE RATIONALE FOR REFORM

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

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

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


102. Id. at § 1(2).

103. Id. at § 2(1).

104. See Yuri Shkapkov, Germany: War Against Refugees, MOSCOW NEWS, June
whelming number of frivolous claims, and increasing public disfavor with asylum policy, the Bundestag in 1993 approved an amendment to article 16 of the Constitution along with an implementing statute.

1. The Escalating Numbers

The 6.2 million foreigners living in Germany today include 1.5 million refugees, more than 600,000 asylum-seekers whose claims Germany has not ruled on definitively and another 100,000 individuals...
Germany has granted refugee status. In addition, 640,000 *de facto* refugees live in Germany. Germany absorbs seventy percent of the total number of refugees absorbed into the European Community (EC). This disproportionate burden is a major impetus for the adoption of new asylum laws.

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

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

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

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

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

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

114. See id. (stating that Germany’s disproportionately greater absorption rate has created financial and social hardships that make continued application of the German asylum law untenable).
applications for asylum, up from 256,000 in 1991 and approximately 193,000 in 1990. In the first four months of 1993, approximately 161,000 asylum-seekers arrived in Germany, the largest number of whom were Romanians. This influx marked an increase from the same period in 1992, which saw 124,000 asylum-seekers.

2. Frivolous Claims

The Bundestag maintains that refugees abuse its asylum system. For example, in the second week in April 1993, multiple or false applications comprised 25.7% of the applications refugees submitted for social welfare assistance payments. Germany recognized only 1.7% of those who sought asylum in April 1993 as having a well-founded fear of political persecution.

The German government claims that this high percentage of denials establishes that many asylum claims are frivolous and merits legislative reform.


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

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

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

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

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

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

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

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

4. Financial Costs

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

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

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

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

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

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

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

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

130. See id. (citing the results of a German Bundestag Research Service survey documenting the costs Germany incurs per asylum-seeker).
tributes these costs to administrative infrastructure and rent subsidies for candidates. In 1992 alone, the Bundestag's total cost in connection with asylum-seekers exceeded the DM 8.27 billion ($5.36 billion) the Foreign Ministry allocated for economic cooperation and development.\(^{32}\)

V. THE POLITICAL BATTLE

Although the foregoing statistics might appear to compel government action, proposals for reform of asylum law triggered an intense political debate within the Bundestag. In the end, the resurgence in right wing radicalism,\(^{34}\) coupled with a series of xenophobic attacks from

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

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

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

134. See GERMAN INFORMATION CENTER, FOCUS ON . . . RIGHTWING RADICALISM IN GERMANY, Mar. 1993, at 1 (documenting the resurgence of right wing radicalism in Germany). Many attribute the upsurge in right wing radicalism to financial problems associated with the reconstruction of Eastern Germany and the dramatic increase in the number of asylum-seekers entering Germany. Id. The Office for the Protection of the Constitution [Verfassungsschutz], Germany's domestic security agency, reported a total of 2,285 right wing extremist acts of violence in 1992, most of which were against foreigners, an increase of 54% over 1991. Id. Seventeen of these extremist acts were murders. Id. at 2. Violence occurs throughout the Länder. Id. North Rhine-Westphalia suffered the highest number of attacks in 1992, 513 and 256, respectively. Id. Hamburg and Breman experienced the fewest number of attacks, thirty-six and two respectively. Id. Mecklenburg-Vorpommern and Brandenburg were the states with the highest incidence per 100,000 residents, with 9.52 and 8.52 per 100,000 residents respectively. Id.
1991 to 1993, provided the impetus for changing the asylum laws. These attacks set in motion a political debate between Chancellor Helmut Kohl’s Christian Democratic Union (CDU) and the opposition Social Democratic Party (SDP). Chancellor Kohl argued that Germany should amend its constitutional right to asylum both to protect foreigners who might enter the country, and to appease an increasingly intolerant public. The SDP maintained that a constitutional amendment would undermine Germany’s post-World War II commitment to human rights, arguing instead for a statutory solution to the refugee crisis.

On May 26, 1993, after a thirteen-hour debate and months of political turmoil, the Bundestag approved a constitutional amendment. The right wing movement is gaining strength. Id. at 3. Approximately 65,000 persons in Germany possess extreme right wing convictions, 41,000 of whom affiliate with major parties of the extreme right. Id. The German People’s Union (Deutsche Volksunion or DVU) is the largest of these parties, with approximately 25,000 members. Id. The National Democratic Party of Germany (Nationaldemokratische Partei Deutschlands or NPD) is the oldest party, with approximately 5,000 members. Id.

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

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

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

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

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

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

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

A. EXCLUSION OF APPLICANTS WHO ENTER FROM A “SAFE THIRD COUNTRY”

The Asylum Procedure Act of 1993 requires the deportation of asylum candidates who enter Germany from a safe third country. For example, Germany will now return a candidate who travels through Poland to get to Germany. The premise of this law is

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

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

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

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

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

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

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

147. See Blay & Zimmerman, supra note 10, at 369 (noting that in contrast to
that since the candidate has already found protection in the "safe third country," he or she can no longer fear persecution, and thus should not have the additional right of choosing in which safe country to reside.\textsuperscript{149} Although some argue that such a provision unfairly assumes that all "safe" countries provide equal safety to refugees,\textsuperscript{150} the intent of this provision is to distinguish the non-economic factors that drive refugees to seek haven in a safe country from the economic factors that draw asylum-seekers residing in countries that are safe, but poor, to a wealthy nation such as Germany.\textsuperscript{151} By elevating all EC and all neigh-

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

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

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

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

151. \textit{See} Goodwin-Gill, supra note 150, at 249-50 (stating that the socioeconomic complexity of many "countries of origin" makes it virtually impossible to separate economic interests from political interests). Yet countries facing asylum crises view separation of political and economic interests as critical to the protection of persons with legitimate claims to asylum. \textit{Id. See generally} Elizabeth Kay Harris, \textit{Economic
boring nations to the status of "safe third country," the new asylum law affects claims of the ninety percent of asylum-seekers who arrive in Germany by land. 152

B. EXPEDITED PROCEDURES

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

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


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


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

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

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

157. See id. (calling for the BAF to encourage the full cooperation of asylum ap-
where an applicant arrives from a country Germany deems unsafe, the
government may reject the refugee's claim. For instance, if the can-
didate cannot provide acceptable information to the judge or agent hear-
ing the case, the government's interest in expediting claims could result
in rejection of a legitimate application.

C. STEMMING ABUSE

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

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

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

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

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

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

163. See German Information Center, supra note 112, at 3 (stating that most pro-
cedural modifications Germany aims at reducing abuse meet with approval among Germans).
D. EC COMPATIBILITY

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

Germany not only reserves this right; it has also begun to establish reciprocal agreements with neighboring European countries. On May 7, 1993, Germany and Poland entered into a cooperative agreement requiring the Polish government to accept 10,000 refugees from Germany in 1993.\(^\text{167}\) This agreement aims to prevent Germany’s new asylum law from creating a disproportionate impact on the Poles by limiting the number of refugees Poland must accept and assisting the Polish government to accommodate the returnees.\(^\text{168}\) But because the agreement does not include refugees turned back at the German border, the new asylum law will greatly increase the number of refugees Poland must absorb.\(^\text{169}\)

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

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

\(^{166}\) See id. (endorsing sharing of the asylum burden among EC nations).

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

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

\(^{169}\) See Talbot, supra note 109 (noting that Poland has in turn signed readmission agreements with Bulgaria, Romania, Slovakia, and Ukraine, which may allow Poland to return refugees it accepts from Germany to their countries of origin). Under
The Schengen Agreement and Convention, which standardize border patrols within Europe to regulate drugs, arms, third party nationals, and refugees, and the Dublin Convention regulating asylum procedures, exemplify Germany’s interest in establishing reciprocal agreements. The asylum provisions of the Schengen Agreement are controversial because they prohibit asylum-seekers from applying for asylum in any country but the state of first application. Modification of Basic Law 16 marks a concerted German effort to ensure its full participation in the Schengen Agreement.

E. THE IMPACT OF BASIC LAW 16(A)

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

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

171. Id. at arts. 2, 3, 6.
172. Id. at arts. 4, 5, 28-91.
173. The European Community Convention Determining the State Responsible for Examining Applications for Asylum in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 (Dublin Convention). Observers generally regard the Dublin Convention as a complement to the Schengen system. Shining City, supra note 109, at n.132.
174. See Laws of Asylum, supra note 95, at 198 (stating that the asylum provisions in the Schengen Agreement, which call for states to evaluate applications in accordance with the Geneva Convention on the Status of Refugees and the New York Protocol, will create “a more restrictive asylum model for relatively liberal asylum states”).
175. See Schengen Agreement, supra note 170, pmbl. (stipulating that Germany, the Benelux states, France, Portugal, Italy, and Spain have signed the Agreement).
176. German Information Center, Decline in Number of Asylum-seekers: Precise Evaluation of Impact of New Asylum Law Not Yet Possible, at 1 (Sept. 9, 1993) (on file with the German Embassy, Washington, D.C.) (noting that the Federal Ministry of the Interior considered an evaluation of the new asylum law based solely on the statistics of the last few months unreliable). How organizations that smuggle people illegally across borders will respond to the new asylum law remains an important, undetermined factor. Id.
the law's enactment, according to the Interior Ministry. In July 1993, 20,658 asylum-seekers registered in Germany, a 33.7% drop from the 31,123 who registered in June 1993. In August 1993, Germany registered only 14,521 asylum claims, a decrease of approximately 30% from the previous month. Between January and August 1993, 259,193 asylum-seekers registered, a 5.4% decrease from 274,000 in the same period in 1992. In May 1993, the number of asylum applications the Federal Agency for the Recognition of Foreign Refugees adjudicated exceeded the number of incoming applications for the first time. For Basic Law 16(a) to meet its stated objective of reducing the number of entitled asylum-seekers, the federal and state governments must continue to join forces in implementing the new regulations.

VII. RECOMMENDATION FOR "COLLECTIVE RESPONSIBILITY"

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

177. See id. (documenting the decline in registered asylum-seekers).
178. See id. (noting a decline in asylum-seekers in July 1993). The number of asylum-seekers in March and April of 1993 exceeded 43,000. Id.
179. See id. (noting a decrease in the number of asylum applications for August 1993).
180. See id. (noting a decrease in asylum applicants over the first eight months of 1993).
181. See id. (noting the number of asylum cases upon which Germany ruled exceeded the number of incoming applications for the first time). The number of rulings increased 23.5 percent in June 1993 to 53,620. Id. Germany ruled on approximately 50,000 applications in July and 48,519 in August. Id.
182. See id. (citing the need for state and federal cooperation with the new asylum law). From January 1993 to August 1993 68,733 asylum applicants came from Romania, 51,574 from Yugoslavia, 21,273 from Bulgaria, and 14,100 from Turkey. Id. Of those who sought asylum during this period, Germany granted asylum to 11.7 percent of the applications from Turkey, 0.1% of those from Bulgaria, 4.1% of those from Yugoslavia, and 0.1% of those from Romania. Id. The total number of applications to which Germany granted asylum was 5,130, or 2.1% of the total applications asylum-seekers filed. Id. In July 1993, Germany granted 1,623 persons asylum, or 3.3% of the total number of adjudications. Id. In August 1993, Germany granted asylum to 1,903 persons, or 3.9% of the total number of applications it adjudicated. Id.
183. See supra notes 13-46 and 93-103 (describing the past refugee policies of the
post-Cold War domestic political realignments make it extremely difficult for ruling parties in either country to mobilize support for continued adherence to international refugee conventions. On the other hand, unilateral closing of borders by Germany and the United States does nothing to encourage multilateral strategies for accommodating the refugee crisis. Politicians in both countries have argued that it is necessary to limit the right to asylum in order to preserve it. This section argues that, although some restrictions are unavoidable in the short-term, long-term resolution of the crisis cannot depend on the subordination of fundamental human rights to national self-interest. Instead, the United States and Germany must seek global solutions that preserve the right to asylum while allocating the costs of the refugee crisis in a more equitable manner.

A. Points of Departure—The Models in the United States and the Federal Republic of Germany

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

184. See supra notes 46, 134-39 (describing public pressure to restrict immigration).
185. See supra notes 29-46 and 104-32 and accompanying text (recounting political rationales for limiting asylum).
186. The author uses the term "collective responsibility" to denote a recommendation for globalizing the present asylum framework of Germany and in the United States. Under this globalized framework, more countries would share the burden of a worldwide refugee epidemic.
187. See supra notes 77-79, 166-69 and accompanying text (discussing the United States' reservation of the right to send refugees to other countries and Germany's cooperative agreements with Poland, Hungary, and other European countries). See generally Schengen Agreement, supra note 170 (implementing a cooperative effort among EC nations to standardize border patrols and address the refugee issue).
188. See supra note 98 accompanying text (discussing Germany's method of allocating asylum-seekers among its states).
Romania, the Czech and Slovak Republics, and other EC nations exemplifies on a regional level the cooperative effort necessary for a global system. Finally, Germany has adjusted its asylum law to permit its participation in the Schengen Agreement, thus broadening the range of countries upon which it may rely in alleviating its disproportionate burden.

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

A system of collective responsibility based on existing programs

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

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

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

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

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

194. See, e.g., Eve B. Burton, Leasing Rights: A New International Instrument for Protecting Refugees and Compensating Host Countries, 19 COLUM. HUM. RTS. L. REV. 307, 309 (proposing an instrument whereby the international community buys an
in the United States and Germany would allow the international community to reallocate the costs of the global asylum burden.\textsuperscript{95} Although "collective responsibility" would mandate international reform, it would not require an entirely new system. As the United States and German frameworks demonstrate, many of the components indispensable to a successful program exist in national asylum laws. An international system of collective responsibility would apply on a global scale the regional strategies already in place throughout the world.\textsuperscript{96}

**B. A FORMULA FOR COLLECTIVE RESPONSIBILITY**

One possible formula for addressing the asylum problem would allocate asylum-seekers throughout participating countries of the international community,\textsuperscript{97} under UNHCR supervision,\textsuperscript{98} according to a percentage formula that tracks the population and resources of each country.\textsuperscript{99} This approach borrows elements from the 1982 Asylum Proce-
dures Law in Germany,200 the Schengen Agreement,201 the "reservation clauses" of United States legislation,202 and the 1981 immigration agreement between the United States and Haiti.203 Although much debate will ensue concerning the factors this international consortium should use in determining the resources and population of each country, the analysis should consider such factors as the Gross National Product (GNP), Gross Domestic Product (GDP), budget deficits, and unemployment rates of the participating countries in reaching a decision as to where to locate an asylum-seeker.

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

C. EXPEDITIOUS PROCESSING AND DETERRENCE OF FILINGS

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

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

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

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

203. See 1981 Haitian Immigration Agreement, supra note 192, at 3559 (outlining the cooperative immigration agreement between the United States and Haiti).
ing claims, and reduction of new claims. The collective responsibility model would centralize the global asylum machinery and direct more resources to the problem, thereby expediting the processing of asylum claims. International regulation would reduce the number of new claims in two ways. First, limiting applicants' discretion would deter frivolous claims. Second, collective responsibility moots fears that the law will discourage legitimate candidates from applying for asylum. Because collective responsibility allocates claims on a percentage basis, it always provides a haven for legitimate candidates. The international community must accommodate all claims under this model. Although candidates for asylum will lose some freedom of choice, preservation of a guaranteed safe haven outweighs any loss in individual discretion.

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

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

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

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

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

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

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

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

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

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

213. See Guendelsberger, supra note 211, at 258 (discussing the admission of minors for family reunification purposes); see also Kay Halbrunner, Citizenship and Nationhood in Germany, 70-71 in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN
Collective responsibility would not guarantee legitimate candidates entry to countries where they lack immediate family members. Rather, candidates would have the burden of making out a case for admission to a particular country based on specific circumstances before an international review board. Depending on the merit of the argument and absorption rate of the country at the time the asylum-seeker files the claim, the board would have discretion to grant admission. This process would not deter a refugee whose motive is to escape persecution by gaining entry to any safe haven.

E. METHODS FOR SUBSIDIZING—THE "POOLED FUND"

A "pooled fund," to which the participating parties contribute a percentage equal to their absorption rate for a given year, funds this collective responsibility structure. If the total cost of processing and trans-
Supporting asylum-seekers in a given year is $5 billion and the United States absorption rate is ten percent, then the United States would contribute $500 million to the pooled fund. Although this system would require significant financial outlays, countries could expect a streamlined approach to asylum processing to reduce overall costs.217

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

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

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

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

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

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

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

222. See generally Political Asylum, supra note 8 (emphasizing the importance of the United States and Germany in the development of a global asylum policy).
global allocation mechanism to the risks of an unregulated asylum system.\textsuperscript{223} Participation in a system of collective responsibility offers opportunities to accumulate the goodwill of the major powers; while refusal to participate encourages ostracism. Countries could channel the global savings resulting from a more efficient asylum system into a fund to provide adjustment assistance to participants that increase their refugee costs by entering into the system of collective responsibility.\textsuperscript{224} Finally, the allocation mechanism could distribute well-educated refugees, who under an unregulated system would probably choose industrialized countries, to countries with particular needs for their skills. By promoting both equity and efficiency, the "pooled fund" would fulfill collective responsibility's primary goal of preserving the right to asylum for legitimate claimants.\textsuperscript{225}

F. REALISTIC LIMITATIONS ON ENFORCEMENT

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

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

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

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

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

\textsuperscript{227} See supra notes 186-225 and accompanying text (elaborating on the incentive for the United States and Germany to participate in collective responsibility).
decision-making responsibility with specially trained UNHCR employees and representatives from other participating countries.  

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

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

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

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

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

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

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

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

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

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

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

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

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


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

237. See supra notes 48-92, 145-75 and accompanying text (delineating changes to asylum laws in the United States and Germany).
sight is both invaluable and necessary. Together with a willing international community, these two nations can succeed in preserving the right to asylum for legitimate claimants, or remain inactive and witness its erosion. The necessary tools exist within existing national asylum programs. Nations must now use them to forge a global approach to asylum reform.