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INTRODUCTION

SUSAN JOHANNE ADAMS*

We Americans tell our nation's extraordinary story with no small amount of pride—the Patriots' pluck, the rhetorical grace and boldness of the Declaration of Independence, and the foresight and wisdom of the Framers. When Jefferson was composing the Declaration of Independence, the colonies looked West, at once terrified by its vastness and danger, and eager to populate it. In fact, the Declaration itself included among its litany of King George's "repeated injuries and usurpations" that he "has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither."

For many decades post-Independence, we proceeded enthusiastically with the "population of these States," powered by the explicit charge to Congress to "establish an uniform Rule of Naturalization," which secured an important right of the new sovereign nation. But American immigration was to become messy as early as 1798 with the infamous Alien and Sedition Laws. When, however, in the late Nineteenth Century, Congress decided to single out for harsh treatment the Chinese laborers whom we had so eagerly sought to mine gold and build railroads, the reach of Congress' immigration power came under judicial scrutiny. In addressing the Chinese Exclusion Acts, the United States Supreme Court cobbled together enumerated and extra-constitutional powers, enunciating Congress' plenary power over a broad range of immigration issues and reserving to the courts a very limited role. The Eighteenth, Nineteenth, and Twentieth Century natives did not always relish the succession of foreign immigrant groups with their different languages, food, and religions—as well as perceived disease, simplemindedness, and criminal propensities—but the land could, and did, absorb them.

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2. In the Alien Act of 1798, which remained in effect for only two years, the President was empowered to expel any alien whom he deemed to be a danger. See Act of June 25, 1798, ch. 58, 1 Stat. 570, 571.

3. See Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889).
In 2008, this American tradition of xenophobia thrives. The target groups are always in flux (currently Latinos and, perhaps, Muslims); the complaints take on alarming specificity (terrorist threat, usurpation of jobs meant for Americans, perceived drain on state resources); and all too often, our message to foreigners who would come to our country is that we are full to the brim, and to foreigners who are here—that they are not welcome. When Professor Samuel Huntington sent up the alarm about the bifurcation of United States culture, he warned that “[t]here is no Americano dream. There is only the American dream created by an Anglo-Protestant society.” And it is clear that many Americans share his concerns.

The articles in this volume expand on several of the modern complexities of American immigration law and policy:

- The escalating struggle between the federal and state governments to exert control over immigration, most especially in reducing the “pull” factor of unauthorized employment;
- The political stalemate that has prevented Congress from undertaking comprehensive immigration reform and resulted in administrative tweaking and re-tweaking, including high-profile ICE raids designed to ferret out document fraud, undocumented workers, and non-compliant employers;
- Unsettled questions and inconsistencies in our developing asylum law that often fail to take account of special circumstances such as persecution on account of gender and sexual orientation and changed conditions in war-ravaged countries;
- America’s unwillingness to grant favored immigration benefits to same-sex spouses of American citizens or legal permanent residents, even when the same-sex marriage has been legally solemnized; and
- The continuing hope of the large Cuban-American immigrant community that a changed regime in Cuba may restore their confiscated property.

Oscar Romero has provided a primer for the development of American immigration law, arguing that a contract model is a more useful way to conceptualize our relationship with foreigners than a focus on human rights. In fact, during the first 100 years of American independence, the deal that was struck with the immigrant had to do simply with opportunity in exchange for hard work. So eager were we for workers and so preoccupied with getting on with the job of making a country, we saw little need to act in any systematic way to define the relationship. But we soon made up for lost time in clarifying our side of the bargain.

The federal immigration system has been a work in progress, and as Professor Romero points out, the states enjoyed only limited controls on immigration through the so-called "alienage law." The federal courts stepped in regularly to circumscribe a state's attempt to limit aliens' access to state benefits in ways that would directly discourage the aliens from remaining in the state.5

The Romero piece also establishes the doctrinal backdrop to a very significant new wave of state legislation aimed at regulating the influx of undocumented migrants. This trend has been driven by the perception that the federal government has failed both to exercise its immigration power to stop unauthorized migration, and to reimburse the states for the economic burden they shoulder as a consequence of this failure. Perceiving that the undocumented have taken jobs more properly given to legal residents and have drained welfare, education, penal, and medical resources, this new wave has met with more success than previous attempts. Current state initiatives, aimed largely at exercising state power over business licensing, have sprung up at an astonishing rate.6 As of mid-November 2007, the National Conference of State Legislators reports that "1563 immigration-related state bills had been introduced. Of this total, 244 were enacted in 46 states, which was double the rate in 2006."7 And other states have been emboldened by the growing success of challenges to these "immigration" bills.

The federal district court struck down the Hazleton, Pennsylvania, city ordinance that proposed sanctions on local landlords and businesses for renting to or employing undocumented migrants.8 However, shortly thereafter, a federal district court in Missouri refused to find that the community's regulation of employment of unlawful workers was preempted by federal law or violated either due process or equal protection.9 Unlike the Pennsylvania court, the Missouri judge determined that the Immigration Reform and Con-

5. For example, in Plyler v. Doe, an attempt by Texas to deny public education benefits to the children of undocumented aliens was struck down, as was California's Proposition 187, which, in 1994, proposed harsh cutbacks on public benefits to the undocumented. 457 U.S. 202 (1982).

6. Scholars have weighed in on the states' growing role; notable among those who welcome this new role is Professor Peter H. Schuck, who rejects the conventional wisdom that states are more anti-immigrant than Congress, and he would encourage states to adopt provisions that "reflect a legitimate state interest and do not interfere with the goals of federal immigration policy, properly and conventionally understood." Peter H. Schuck, Taking Immigration Federalism Seriously, 2007 U. CHI. LEGAL F. 57, 58 (2007).


Central to these cases was *DeCanas v. Bica*, which acknowledged the exclusive power of the federal government in immigration matters, but advised that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power." 12

Arizona’s Legal Arizona Workers Act, which took effect on January 1, 2008, has apparently had the desired effect: in an already slowing economy dependent on a Latino workforce, the state has seen school enrollment drop and the threat of local law enforcement officials exercising federal immigration power has reportedly driven many out of state. 13 This provision, which also requires that state employers use E-Verify, survived a preemption challenge. 14 In addition, Oklahoma has passed perhaps the most restrictive of state bills and faces a legal challenge by the United States Chamber of Commerce. 15

This piecemeal attempt to regulate immigration by shifting populations of undocumented migrants from state to state underscores the failure of the federal government to take charge of immigration policy. In addition, the increasing popularity of federal delegation of federal immigration authority

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10. *Id.* at *12; see also 8 U.S.C. § 1324a(h)(2) (2000).
12. *Id.* at 355.
13. Randal C. Archibold, *Arizona Seeing Signs of Flight by Immigrants*, N.Y. TIMES, Feb. 12, 2008, at A1. On the other hand, Arizona’s success may cause unintended consequences for the state economy: a proposal has been introduced in that state to institute its own “guestworker” program patterned on a federal model. Such a blatant attempt to usurp federal prerogatives will likely meet with Department of Homeland Security (DHS) disapproval. In addition, there is some indication that even documented Latinos are finding life in Arizona to be inhospitable, further exacerbating the labor issue. Mary Jo Pitzl, *Guestworker Proposal Gains Friends*, ARIZ. REPUBLIC, Apr. 6, 2008, available at http://www.azcentral.com/news/articles/2008/04/06/20080406temporary0406.html. Nor is the labor shortage limited to Arizona: the combination of employer sanctions, the exodus of labor, and the failure of the H2A agricultural visa program has meant that many produce farmers are reluctant to commit to a new growing season with no assurance that the crop can be harvested in a timely fashion. *See* Paul Vitello, *Immigration Issues End a Grower’s Season*, N.Y. TIMES, Apr. 2, 2008, at A21 (detailing the plight of a Pennsylvania tomato farmer who has been put out of business).
to state and local law enforcement agencies under 8 U.S.C. § 1357(g) completes the squeeze play; this provision both encourages Latino profiling and, at least in the immigrant communities, discourages appeals to law enforcement in times of distress. Laurence Krutchik’s article traces twenty years of immigration law and policy reform. The clear watershed in this saga was September 11, which prompted a complete re-structuring of the immigration functions as well as hastily enacted statutory provisions ensuring that immigration policy and anti-terrorism provisions will be forever intertwined. The currently mired attempts at comprehensive immigration reform reveal a Congress that is hopelessly paralyzed, largely because members are unwilling to displease approximately half of their constituencies, which are deeply divided on undocumented migration and especially the possibility of another “amnesty.” Ironically, President Bush’s hopes for a “path to citizenship” for some of the undocumented migrants and a guestworker program that would keep agricultural interests happy found support largely outside his own party. But even after a brief hopeful period following the 2004 election, immigration policy for the foreseeable future seems to be limited to tinkering with the status quo, for example, the 700-mile Great Wall along the Mexican border, interior enforcement largely in the form of ICE raids and document verification strategies, and the enlistment of state and local law enforcement in immigration functions.

Congressional attempts at comprehensive reform foundered in both 2006 and 2007, but Krutchik traces the executive and agency directives that have nonetheless attempted to put in place some of the proposed changes. While reform is “evolving,” it does so at a glacial pace, arguably nibbling at

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16. This provision was first introduced as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), effective September 30, 1996, but has gained an enthusiastic following only in the last few years. In addition, under the same provision, states are encouraged to report criminal aliens who are incarcerated in state or local correctional facilities to report to DHS and see to it that removable aliens are not released into society when they have served their sentences.

17. See, e.g., Julia Preston, Fearing Deportation but Clinging to Life and Homes in U.S., N.Y. TIMES, Jan. 18, 2008, at A14. Ms. Preston describes panic in Waukegan, Illinois, following the institution of this federal/community cooperative scheme. She reports that Latinos avoid reporting crimes to police and live in a state of siege. Concerns about racial profiling and ineffective law enforcement have led a number of communities around the country to reject adoption of this program.

18. Among other provisions, IRCA provided a scheme for granting legal permanent resident status for some undocumented aliens who had been residing in the United States since January 1, 1982.
the edges rather than taking the bold steps that may be necessary to address the complex issues.\textsuperscript{19}

Among the enforcement schemes that have found favor since 2005 are the highly publicized, unannounced Immigration and Customs Enforcement (ICE) sweeps of places of employment. The Immigration Reform and Control Act of 1986 initially mandated sanctions against employers who knowingly "hire, recruit, or refer for a fee"\textsuperscript{20} workers who are not properly authorized; at that time, the employer was obliged to give only a cursory examination to employee documents offered to fulfill the I-9 Employment Eligibility Verification Form. For many years, this provision was enforced infrequently and only with the imposition of fines.\textsuperscript{21}

Lashus, Loughran, and Candler provide a profile of these ICE raids, which commanded considerable public attention after the Swift raid in December 2006 resulted in over 1000 arrests. Prior to this, Walmart had made the headlines when it reached an $11 million civil settlement that came about after ICE determined that the company had been hiring undocumented cleaning staff via independent contractors.\textsuperscript{22}

The authors quite properly focus on the employers' central dilemma: they cannot quickly and accurately verify prospective employees' documents, and they may not request additional documentation; nor can they risk falling foul of the discrimination provision if they attempt to circumvent potential problems by declining to hire applicants on the basis of their national origin.\textsuperscript{23} The authors point out that, to make matters worse, the only scheme that may offer some protection, E-Verify (formerly known as Basic Pilot), is notoriously inaccurate and may be implemented only after the hire. E-Verify, which informs the enrolled employer whether a new employee's social security number matches the employee's name, is fraught with problems. The result of a mismatch, post-hire, will be disruption of the work place

\textsuperscript{19} Congress has pushed measures that purport to address security concerns, such as the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). See DHS Secretary Chertoff Discusses Final Rule Regarding State Driver's Licenses and ID Cards, 85 INTERPRETER RELEASES 185, 199 (2008). A number of states have balked at what they view to be the excessive expense of the measure.


\textsuperscript{23} 8 U.S.C. § 1324b(a)(1).
while the employer attempts to verify the worker’s status; in addition there is real risk of an erroneous report. Meanwhile, the raids continue across the country and Lashus warns that even if they employ E-Verify, employers will continue to be subject to such surprise visits.

The E-verify program, which is still largely voluntary, is beginning to play an important role in state legislation. For example, effective January 1, 2008, the Legal Arizona Workers Act requires that all employers check eligibility through the system. On the other hand, the DHS has brought suit to prevent implementation of Illinois’ H.B. 1744, which bars Illinois employers from registering for the verification program until the DHS can ensure greater accuracy.

Gender and sexual preference issues are increasingly taking international center-stage in immigration and asylum matters. Payal Salsburg’s article focuses on the DHS’ failure to issue detailed guidelines to determine what constitutes the “substantial change in circumstances” grounds for denying asylum to Afghan and Iraqi women. To some extent, this failure may reflect political wishful thinking about the effectiveness of United States military initiatives in those countries and an inability to recognize that the condition of women will not inevitably improve following political change and anti-discrimination rhetoric.

In some cultures, mistreatment of women is removed from public scrutiny and considered, in any case, to be of no consequence. Just as deeply-engrained practices such as honor killings and female genital mutilation often take place below international radar, the very notion that women who have fallen foul of oppressive Iraqi or Afghani governments could return to the embrace and protection of “new” and “reformed” governments is unrealistic. The overthrow of Saddam Hussein and the reduced profile of the Tali-

24. Under this system, an employer has ninety days to correct the error or discharge the employee before being subject to sanctions. A New York Times editorial recently decried the DHS’s insistence on pushing the program, arguing that such a “Social Security crackdown would lead to countless unjust firings and discrimination against lawful immigrants by companies that cannot be bothered to help clear up their bureaucratic entanglements,” and that such a program would be “a boon for the unscrupulous businesses that hire off the books and have no use for W-2s” Editorial, A Foolish Immigration Purge, N.Y. TIMES, Mar. 27, 2008, at A26.

25. In a related issue, ICE raids on private homes have been on the increase, and at least in one New Jersey community, gave rise to a suit recently filed in the United States District Court for the District of New Jersey. This suit, brought by ten plaintiffs (including two United States citizens and two lawful residents), alleged Fourth and Fifth Amendment violations as a consequence of warrantless pre-dawn raids between August 2006 and January 2008. A copy of the complaint can be found at http://law.shu.edu/csj/ice/complaint.pdf.
ban, while significant advances, are unlikely to reverse many generations of gender persecution.

Fortunately, in recent years the plight of women has received considerably more attention. The United Nations Convention on the Elimination of All Forms of Discrimination Against Women and the Guidelines on Gender Related Persecution under refugee law of May 7, 2002, and the 1995 guidelines for asylum officers on questions of gender express welcome aspirations. While the directives seek to inform and sensitize the asylum process, they lack the kind of specificity that is essential to asylum officers and immigration judges. Absent such detailed and regularly updated DHS directives, the immigration judge must be briefed extensively through available sources, including but not limited to expert testimony, press reports, Amnesty International reports, Human Rights Watch, and the Country Reports. Staying abreast of country changes is hard work, and uninformed assumptions can spell disaster for the asylum-seeker.

Leonard Birdsong's thesis, like Salsburg's, deals in part with inconsistencies in the court precedents and the paucity of precedent decisions in the area of asylum law. His specific focus in this piece is on the lack of consis-

26. In In re R-A-, 22 I. & N. Dec. 906 (B.I.A. 1999), a Guatemalan woman sought asylum, arguing that she had endured persecution at the hands of her husband on account of her imputed political opinion or membership in a particular social group of women who object to male domination. The immigration judge granted asylum and the BIA reversed; although the BIA agreed with the immigration judge that the woman had been persecuted and that any appeal to the Guatemalan government would have been futile, the persecution was not on account of a protected characteristic. Attorney General Janet Reno vacated the BIA's decision and remanded to reconsider the case in light of proposed asylum regulations that were being introduced. In fact, the case remains in limbo as the regulations were never finalized.

27. The Department of State Country Reports on Human Rights Practices 2006, which is dated March 6, 2007, leaves little doubt that Afghani women are at risk. The report cites rape and sexual abuse in detention, and women were detained at the request of families for behavior that the families found unacceptable such as defying family wishes or attempting to escape domestic violence. Finally, while women are taking on a more visible role in the Karzai government, "[w]omen active in public life faced disproportionate levels of threats and violence from the Taliban." U.S. Dep't. of State, Country Reports on Human Rights Practices - 2006: Afghanistan (Mar. 6, 2007), http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm. Some federal judges, however, including Judge Easterbrook of the Court of Appeals for the Seventh Circuit, are deeply skeptical of excessive reliance on Country Reports. See Gomes v. Gonzales, 473 F.3d 746, 756 (7th Cir. 2007) (collecting cases to this effect). He calls for a system of "country specialists" to be employed, analogizing to vocational experts employed in the Social Security disability system. Banks v. Gonzales, 453 F.3d 449, 454 (7th Cir. 2006).

28. But see Stephen H. Legomsky, Learning to Live with Unequal Justice: Asylum and the Limits to Consistency, 60 STAN. L. REV. 413, 473 (2007) (arguing that complete consistency in asylum adjudication might be neither desirable nor attainable because "[i]n asylum cases, the unavoidable abstractness, complexity, and dynamism of the relevant legal language make it inevitable that the human adjudicators will bring their diverse emotions and personal
tent guidance on subjects of gender violence and sexual identity or preference, and the insensitivity of immigration judges in these matters. The good news is that the trend is to expand rights based on these characteristics, but Birdsong suggests that the failure of the DHS to issue clear and uniform policies, as well as the lack of precedent and published opinions, have led to a patchwork of decisions. Of course, many denials are not appealed, so immigration court is the forum of last resort for many applicants, and the immigration judges are given little to rely on in making difficult calls. In some cases, when the Attorney General and the Board of Immigration Appeals (BIA) were called upon to reach a reliable decision, they have not done so. For example, in the notorious In Re R-A case, the immigration judge’s grant of asylum to a victim of domestic violence in Guatemala, finding that she was a member of “a particular social group,” was reversed by the BIA; the Attorney General then vacated the BIA decision, in light of proposed regulations regarding domestic violence cases that have never found their way into the Code of Federal Regulations.

To underscore the lack of clear direction on key issues like “persecution,” “particular social group,” and “punitive intent,” asylum statistics reveal something that immigration watchers have long realized—it matters where you are when you make your application. The largest percentage of persons granted asylum in 2006 was in Florida (41%), while only 10% in New York were successful, and even fewer in Maryland, Virginia, and Georgia. Birdsong’s appeal to the ALI and the ABA to assemble and regularize our immigration laws and policies regarding asylum is a good one.

In recent years, the performance of immigration judges and the “streamlined” BIA has met with open disapproval from Circuit Court of Appeals

values to bear on their decisions.”). In his article, Professor Legomsky reacts to the study of 60,000 asylum decisions in Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 Stan. L. Rev. 295 (2007), which identified striking variations among adjudicators at several levels of the process.

29. At least one scholar, David Martin, has welcomed selective use of the courts’ power to remand to the BIA with instructions to clarify doctrines and reasoning. This procedure “helps to make sure that novel doctrinal questions receive complete BIA consideration and also helps signal which issues the courts regard as sufficiently novel or fundamental to require that kind of close agency look.” David Martin, Major Developments in Asylum Law Over the Past Year: A Year of Dialogue Between Courts and Agencies, 84 Interpreter Releases 2069 (2007) (offering examples of this kind of beneficial dialogue).


31. Id

32. See Thomas Alexander Aleinikoff et al., Immigration and Citizenship: Process and Policy 282 (6th ed. 2008) (outlining the re-structuring of the BIA following the huge increases in their caseloads). “Streamlining” in 1999 and again in 2002 reduced the three-person panels to one, reduced the total members of the Board, permitted AWO (affirm-
judges who acknowledge that these bodies have heavy dockets but also stress that much more care must be exercised given the interests that are at stake.\textsuperscript{33} Dissatisfaction with the administrative process has given rise to a sharp increase in appeals to the circuit courts, swelling the immigration docket in the Ninth Circuit from 8\% in 2002 to 48\% in 2005.\textsuperscript{34} Some judges in the Seventh Circuit have been especially vocal about what they see as shoddy and sometimes biased performances.\textsuperscript{35}

Immigration law and policy has always been values-driven and hence slow to undergo change. Nowhere is this better demonstrated than in issues surrounding homosexuality. Jim Wilets has assembled a very interesting comparative study of a number of industrialized democracies that illustrate different approaches to the question of immigration rights for same-sex partners. Currently, the United States' position is explicit: federal law does not recognize same-sex partnerships or marriages as conferring the same advantages (including immigration benefits and preferences) as heterosexual marriage.\textsuperscript{36} This means, of course, that when an American citizen enters into a same-sex marriage in, say, Canada, the American cannot bring in his or her spouse as an immediate relative or under a first preference.

What emerges from this collection is the fact that the United States, which only eighteen years ago eliminated homosexuality as grounds for inadmissibility,\textsuperscript{37} is behind the curve among countries with whom we most
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often compare ourselves. And the six countries that do not themselves recognize full marital rights—Australia, Brazil, France, Germany, Israel, and Switzerland—nonetheless will recognize the validity of the foreign union for purposes of immigration. This "de-coupling" of the granting of an immigration benefit to foreign same-sex marriages from the federal recognition of same-sex unions under federal law has much appeal. Equally inspiring is the position of the EU, which welcomes the immigration of foreign partners of EU citizens even though all EU countries do not confer full marital rights.

One of many fascinating aspects of this study is Wilets' attempt to mine the cultural underpinnings of the various countries in order to better understand their motivations. Counterintuitively, European and Scandinavian countries with strong Protestant and Catholic affiliations were among the first to recognize same-sex unions, but Wilets argues that the critical distinction is the pervasive fundamentalist religious influence in the United States. Wilets also observes that most of the states where slavery, and later Jim Crowe laws, were institutionalized are also the states that are most fundamentalist in their religious thinking and hence unsympathetic to same-sex issues.

Several American states have instituted legal civil unions and even same-sex marriages, and the question continues to be a live one in many state legislatures and courts. Significantly, in early February 2008, a New York appeals court\(^\text{38}\) ruled that same-sex marriages validly performed in other jurisdictions are entitled to full recognition in New York. The court held that because the marriage was entered into validly in Canada and because New York has no "positive law" prohibiting such a marriage and the marriage does not involve incest or polygamy, it is entitled to recognition.\(^\text{39}\) Unlike many states, New York declined to follow the lead of Congress in enacting legislation denying full faith and credit to same-sex marriages from other states. It remains to be seen whether this decision will survive appeal or subsequent enactments of the New York Legislature.

In an article exploring an issue with important implications for a large immigrant group, Cuban-Americans, Daniel Espino analyzes the possible disposition of property belonging to thousands of Cubans who fled after Fidel Castro came to power. Finding these takings to violate international law, human rights, and Cuba's 1940 Constitution, he makes recommendations for

\(^{38}\) Martinez v. County of Monroe, 850 N.Y.S.2d 740 (Sup. Ct. 2008). Three weeks later, the court in Beth R. v. Donna M., 853 N.Y.S.2d 501 (Sup. Ct. 2008), relied on Martinez to determine that a same-sex marriage entered into in Canada was not void under New York law and that the trial court would determine custodial rights and support obligations following divorce for children born during that union.

\(^{39}\) Martinez, 850 N.Y.S.2d at 742.
righting these wrongs in a post-Communist Cuba. As it happens, even though Fidel Castro stepped aside in early 2008, the National Assembly elected his brother, Raul, to succeed him. At the moment Cuba appears to be establishing a succession rather than a transitional government, although several months into his presidency, Raul Castro appears to have undertaken some significant changes well short of democratization. 40

Central to Espino’s thesis is that a new, non-Communist regime is inevitable, and that Cuba will be forced to negotiate regarding the confiscated properties in order to encourage investment and gain international credibility. The machinations of such a procedure are complex, beginning with the need for a treaty that will permit the settling of property claims, given the Cuban exiles’ current lack of standing to do so. Drawing from the models provided by a number of different countries, the author recommends a Step-Down Restitution Policy that would consider the feasibility of restitution, but alternatively provide compensation, or some combination.

In theory, restitution is the preferred solution, but the assumption that the original owners will be eager to return with their “entrepreneurial talent and capital” should be tempered by the fact that, after a half century, many of the original owners will have passed away and their progeny may not share their zeal. 41 Alternatively, compensation in lieu of restitution could be crippling to a Cuba trying to develop its ruined economy. But the conversation needs to continue and the various approaches laid on the table. Raul Castro is seventy-six years old and reportedly does not share the charisma of his older brother. There are some promising indications that conditions are changing in Cuba, but whether Cuba will return to the Western economic fold is far from clear.

John Jay’s curious statement in the Federalist No. 2 that this country is comprised of “one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs” does not begin to describe the United States in the Twenty-First Cen-

40. James C. McKinley, Jr., Taking the Helm as Cuba’s President, Castro’s Younger Brother Holds the Course, N.Y. TIMES, Feb. 25, 2008, at A10 (while Raul Castro has suggested that Cuba will need to make some changes to be effective in a new era, the government that was elected was comprised largely of old guard). However, on April 11, 2008, Raul Castro announced that the state wage system would be changed to permit workers to earn as much as they can, depending on their productivity. Cuba: Wage Limits Removed, N.Y. TIMES, Apr. 11, 2008, at A10.

41. Restitution of some property may have been complicated only two months into Raul Castro’s presidency when he issued his first formal published decree permitting Cubans who are now renting houses and apartments from the government to take title. Cuba to Allow Thousands to Own Homes, N.Y. TIMES, Apr. 12, 2008, at A7.
It is easy to criticize American immigration law and policy for lagging behind the times on certain sensitive issues and dragging its legislative feet. Perhaps, rather, we should be amazed that it does as well as it does, given the pace of globalization and the unprecedented movement of millions of people. This volume aptly illustrates some of these modern complexities.
UNITED STATES IMMIGRATION POLICY: CONTRACT OR HUMAN RIGHTS LAW?

VICTOR C. ROMERO*

All nations distinguish between their citizens and others. In the United States, the primary set of laws for determining these distinctions is found in our immigration policy. The term “immigration law” refers to a rather narrow set of rules covering essentially two aspects of a non-citizen’s stay in the United States: first, those rules that govern when that non-citizen may enter, and, second, those that dictate when she must leave. The whole of United States immigration law and policy relates to either of these two topics.

Although it may be tempting to think of immigration law as primarily involving human rights because it regulates the movement of migrants, it is perhaps more accurate to view it as a form of contract law between the United States and the foreigner. The United States grants the non-citizen the privilege to enter the country for some specific purpose and amount of time, and, in exchange, the non-citizen promises to abide by the terms the country sets forth. Should the non-citizen breach her promise, she must leave the United States.

The United States government consists of three branches—the legislature, the executive, and the judiciary—each of which plays a role in determining what the immigration laws mean, or, in keeping with the contract analogy, what responsibilities the state and the non-citizen have under the immigration contract. As the lawmaking body within our federal government, Congress has the responsibility for drafting the terms of the immigration contract between the United States and the non-citizens who seek entry. Like other federal laws, the terms of the contract are then executed and enforced by the President through administrative agencies, such as the Department of Homeland Security, which promulgate specific regulations to enforce the broad terms of Congress’s immigration policy. The United States Supreme Court, along with the lower federal courts, is charged with making sure that the terms of the contract are fairly enforced. In sum, Congress establishes the broad terms of the immigration contract, the President creates rules enforcing those terms, and the United States Supreme Court ensures that those terms are fair.

In reviewing our constitutional immigration history, it is clear that the United States Supreme Court has primarily taken a back seat in the development of the law, allowing Congress and the President to shape immigration policy in ways that reinforce the idea that immigration law is essentially a
contract and not a human rights policy, and that non-citizens are subject to restraints on their presence in the United States in ways that citizens are not. 1

At first blush, privileging United States citizens over foreigners makes intuitive sense. Any sovereign nation should be able to set terms by which visitors enter and remain on grounds which are inapplicable to those who are already full members of the polity. On the other hand, the history of congressional immigration policy is fraught with racial and ideological discrimination largely unchecked by the courts. 2 The underlying idea here is that Congress is in the best position to set the terms of a non-citizen's sojourn in America; an unelected federal judiciary should not second-guess the will of the people as embodied in democratically-enacted immigration policy. While perhaps sound in principle, the historical legacy of court deference to the legislature has had profound effects in our current time, as the United States seeks to determine what immigration policy would best suit a nation embroiled in a foreign war and whose citizens live in the shadow of September 11, 2001. 3

Much of the xenophobia that has gripped our post-9/11 world has its roots in the colonial period before the nation's founding. 4 Whether escaping religious persecution or seeking better economic circumstances, many European arrivals to the New World brought their cultural baggage along with them, as the displaced Native Americans and imported African slaves soon found out. But the conquerors' prejudices also included nativist bigotry, as the Europeans often settled in ethnic enclaves, each group sticking to its own. 5 It should come as no surprise, for instance, that Germantown, Pennsylvania began as a village of Germans transplanted from the Old World in 1683. 6 The tendency to prefer things familiar, and to demonize the foreign,

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3. Wishnie, supra note 1, at 284.
4. Daniels, supra note 2, at 6–9.
5. Id. at 7–8.
found its way into local anti-immigration policies that excluded certain religious groups and social classes, such as the Quakers and Catholics.\textsuperscript{7}

After independence in 1776, Congressional forays into immigration policy were confined largely to naturalization measures, but otherwise foreigners enjoyed an "open door" to the United States for about one hundred years.\textsuperscript{8} This early laissez-faire attitude toward immigration was born less of national largesse than of a lack of clarity as to who should have control over immigration, the thirteen states or the federal government.\textsuperscript{9} Then, as now, while the national government ultimately decided when and how a foreigner became a United States citizen, it was the states that felt the immediate impact of the non-citizen's migration. Because the fledgling nation was growing rapidly, the United States government was less concerned with limiting immigration than were the individual states, which viewed immigration control as but another manifestation of their reserved power.\textsuperscript{10} Thus, in contrast to states' wariness, the first federal legislation passed during this early period was An Act to Encourage Immigration in 1864.\textsuperscript{11}

This tension between the federal and state governments over the power to limit foreign migration was understandable given the new Constitution's lack of clarity. For instance, while Article I, Section 8 specifically granted power to Congress "to establish an [sic] uniform Rule of Naturalization" and "to regulate Commerce with foreign [n]ations," nowhere in Article I or elsewhere did the federal government have specific power to pass general immigration laws regulating the flow of foreigners from abroad.\textsuperscript{12} Because the founders understood that the federal government was one of limited power, the states continued to be most interested in regulating immigration, not only because they thought that this was reserved to them under the Constitution,
but also because they were most likely to feel the impact of a large immigrant influx. And so, it is perhaps unsurprising that Founding Father Benjamin Franklin, himself an immigrant, was concerned about the influx of German Catholics into his native Pennsylvania, just as many Californians and Arizonans today are concerned about the large migration of Latin Americans into the desert southwest.

Between 1820 and 1880, large numbers of German and Irish Catholics arrived in the United States to escape the European economic depression of the time, and, in turn, some predominantly Protestant states passed laws in an attempt to stem the tide of Catholic migration. This nascent anti-immigrant movement proved unsuccessful at the federal level due to the aggregate political strength of the Irish and German migrants nationally.

Over time, this brewing conflict between federal and state power over immigration came to a head. The United States Supreme Court stepped in to resolve this dispute, ruling against the states and paving the way for Congress to begin to craft a uniform immigration policy for the nation. Following the United States Supreme Court rulings in The Passenger Cases and Henderson v. Mayor of New York, finding state immigration laws unconstitutional, Congress enacted the first general federal restrictions on immigration law in 1882, which included a fifty-cent head tax and exclusionary laws based on criminal and economic grounds. While this first set of restrictions did not single out any particular ethnic group for exclusion, the nativist sentiments that led to state laws against Catholic immigration found expression in a more particular piece of federal legislation that year.

Later in 1882, Congress enacted immigration restrictions reminiscent of the states’ recent anti-Catholic pronouncements, when it passed the Chinese Exclusion Act. First brought in to work on the westward expansion of the railroads, Chinese laborers fell into disfavor once they reached a critical

13. DANIELS, supra note 2, at 9-11.
15. 48 U.S. (7 How.) 283 (1844).
16. 92 U.S. 259 (1875).
mass and the work was completed. Unlike the religious and ideological divide that separated the Anglo-Saxon Protestants from the Irish and German Catholics, the growing distrust of the Chinese appeared more racial and cultural in origin. Because no large ethnic voting block protected the Chinese as it did the Catholics, Congress handily passed the Chinese Exclusion Act to prevent a further influx.

One such worker adversely affected by the law was Chae Chan Ping. A twelve-year resident of the United States, he had permission from the government to visit China, for which he received a certificate of return for presentation upon his reentry. At the border, however, federal officials revoked Chae Chan Ping’s certificate and excluded him from reentering the United States under the Chinese Exclusion Act. Before the United States Supreme Court in Chae Chan Ping v. United States, Chae’s lawyers argued that Congress could not unilaterally revoke his permit to briefly travel abroad. The Supreme Court flatly rejected that argument, holding that as a sovereign nation, the United States has the unilateral prerogative to make immigration policy as it sees fit, and noting that non-citizens enjoy no right to be in the country. The Court then ruled that Congress had the power to exclude Chae because he was a member of a group, the Chinese, whom Congress had deemed to be undesirable. Its rhetoric regarding the unassimilable nature of the Chinese and the implication that they presented a threat to the United States even during peacetime, evinces the xenophobia first evident in pre-colonial restrictions on migration:

If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and

21. See id.
22. WEISSBRODT & DANIELSON, supra note 6, at 5–7.
23. Chae Chan Ping v. United States, 130 U.S. 581, 582 (1889). Hiroshi Motomura sees Chae Chan Ping as supporting the idea that our immigration policy operates like contract law. See HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 15 (2006) (“Chae Chan Ping’s case is a prime example of the view of immigration that I am calling immigration as contract.”).
24. Chae Chan Ping, 130 U.S. at 582.
25. Id. at 581.
26. See id. at 584.
27. See id. at 606–07.
28. Id. at 607–09.
security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. 29

Four years later in Fong Yue Ting v. United States, 30 the Court extended its holding in Chae Chan Ping by concluding that, incident to its plenary power over immigration law, Congress also had the power to deport or expel. 31 Perhaps even more disturbing than the rule the Court announced is that Fong's deportation came about as a result of his failure to come up with a "credible white witness" to testify to the length of his residence in the United States. 32 While Chinese nationals were ready to testify to Fong's continuous residence in the United States as the statute required, Fong was unable to secure such testimony from a white witness, perhaps owing to barriers created by culture and language, if not by racism. 33 The Court found the "white witness" requirement to be neither irrational, nor a denial of due process, deferring to Congress's judgment on the desirability of Chinese migration and the terms under which Chinese nationals must leave the United States. 34 This privileging of the white witness in Fong Yue Ting mirrors the xenophobia of the Chinese people's inability to assimilate in Chae Chan Ping. 35

While good reasons support the Court's deferral to Congress in both Chae Chan Ping and Fong Yue Ting, these are easily overshadowed by the racism afoot in both opinions. On the one hand, the structure and functions of the Constitution suggest that Congress, and not the Court, should be in charge of formulating immigration law and policy because it is the lawmaking body of the federal government. This exclusive power of Congress over immigration law came to be known as the "plenary power doctrine"—to wit, that as the legislative organ of the federal government, Congress has the sole right to determine what laws govern the entry and exclusion of those persons who are not citizens of the United States. 36

On the other hand, the very structure of the Constitution requires that the Court stand vigilant in making sure that Congress does not abuse its plenary power and that its immigration policies are fundamentally fair to non-citizens. Put another way, the Court has the responsibility for reviewing

29. Chae Chan Ping, 130 U.S. at 606.
30. 149 U.S. 698 (1893).
31. Id. at 728.
32. Id. at 729.
33. Id. at 703-04.
34. Id. at 729-30.
35. Fong Yue Ting, 149 U.S. at 729-30; Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).
36. Fong Yue Ting, 149 U.S. at 731.
legislative action when it appears that the terms of Congress’s contract with
the non-citizen violate a central constitutional truth. In a case decided just a
few years before Chae Chan Ping and Fong Yue Ting, the Court held in Yick
Wo v. Hopkins that San Francisco could not discriminate against Chinese
nationals by denying them permits to operate laundries solely on the basis of
their race. Invoking the Constitution’s Equal Protection Clause, the Court
concluded that a local government could not make race a factor in determin-
ing how to enforce the terms of a municipal ordinance. To do so would treat
Chinese non-citizens and others unequally under a law that was de-
dsigned not to limit immigration to the United States, but to regulate the safety
of laundries in San Francisco.

In contrast to Yick Wo, the Court in both Chae Chan Ping and Fong Yue
Ting failed to place a check on Congress’s power over immigration law by
allowing it to make race and national origin factors in determining whether
these foreign workers could remain in the United States. In Chae Chan
Ping, it was the plaintiff’s foreignness alone that made it permissible for
Congress to renege on its promise to readmit him into the country, while in
Fong Yue Ting, it was the Chinese man’s failure to find a white witness that
led to his deportation.

The secret to reconciling these seemingly disparate cases—Yick Wo fa-
voring the non-citizen versus Chae Chan Ping and Fong Yue Ting favoring
the government—lies in understanding the separate roles the federal and
state governments play with regard to immigration policy. As we saw ear-
erlier, the Court in the late nineteenth century struck down state immigration
laws, and once Congress started enacting its own restrictive migration poli-
cies, the Court affirmatively approved these. This guidance by the Court
made clear that while both the state and federal legislatures may want to re-

37. 118 U.S. 356 (1886). In a forthcoming essay, Jack Chin claims that Yick Wo was
actually not too remarkable as an equal protection case, but was rather a property-rights case
consistent with existing precedent. Gabriel J. Chin, Abstract, Unexplainable on Grounds of
narrowly stands for the proposition that treaty obligations to the Chinese trumped the state’s
ability to regulate against them. Id.
38. Yick Wo, 118 U.S. at 374.
39. Id.
40. Id. at 362–63.
41. See Chae Chan Ping v. United States, 130 U.S. 581 (1889). See also Fong Yue Ting,
149 U.S. at 698.
42. Chae Chan Ping, 130 U.S. at 609.
43. Fong Yue Ting, 149 U.S. at 729.
44. See id. at 731; Chae Chan Ping, 130 U.S. at 610–11; Yick Wo, 118 U.S. at 374; see
also supra notes 11–28 and accompanying text.
strict immigration, the Constitution has given that power to Congress, not the states. Even though San Francisco’s laundry ordinance in Yick Wo did not purport to restrict immigration, observers saw it as an attempt to discriminate against Chinese nationals, something which the city, as a state municipality, could not do. Such laws that indirectly seek to influence immigration by directly targeting non-citizens have come to be known as “alienage law,” whether passed by the state, local, or federal government. Chae Chan Ping and Fong Yue Ting make clear that Congress can directly set the terms of a non-citizen’s immigration contract on virtually any grounds, even on racial grounds the Court would not condone at the municipal level in Yick Wo.

After the creation of the plenary power doctrine through Chae Chan Ping and its progeny, Congress took full advantage of this new-found strength by passing many laws restricting immigration. These restrictions ranged from the exclusion of the “pauper” and the polygamist, to the expulsion of the Asian and the “anarchist.” Notable among these was the National Origins Quota system established in 1924, which pegged permissible immigration to two percent of the number of persons from that country as reflected in the census. While facially neutral, the quota operated as a bar to Asian migration, following on the heels of the Chinese Exclusion Act of 1882 and the 1917 establishment of an “Asiatic barred zone.”

The 1950s saw another period of nativistic sentiment, this time highlighting ideology rather than race as a legitimate ground for discriminating against non-citizens. Following World War II and the advent of the Cold War, Congress and the President turned to a stricter enforcement of ideological bases for excluding and deporting non-citizens, supported in their efforts by the United States Supreme Court. Just as it did in Chae Chan Ping and Fong Yue Ting, the Court would not stand in the way of the federal legisla-

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45. See Fong Yue Ting, 149 U.S. at 731; Chae Chan Ping, 130 U.S. at 610–11. See also Yick Wo, 118 U.S. at 374.
46. Yick Wo, 118 U.S. at 363.
47. See Romero, supra note 18, at 8.
48. See Yick Wo, 118 U.S. at 367–68.
51. IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 3 (7th ed. 2000).
ture’s and executive’s decisions to privilege democracy over communism, despite the negative impact upon longtime residents of the United States.\textsuperscript{54}

In \textit{Shaughnessy v. United States} ex rel. \textit{Mezei},\textsuperscript{55} for instance, the Court upheld the four year detention of Ignatz Mezei on Ellis Island following his return from visiting his dying mother in Romania.\textsuperscript{56} Because immigration officials were concerned that Mezei, a twenty-five-year non-citizen resident of the United States, had spent nineteen months “behind the Iron Curtain,” the Court deferred to Congress’s and the executive’s judgment that his detention without charge was a national security concern.\textsuperscript{57} It did so without specific proof of why Mezei was a threat to the nation; the Court simply accepted the political branches’ representations that he was one.\textsuperscript{58} Like in the Chinese Exclusion Act cases, the Court believed its proper role was to defer to the reasoned judgment of the other two federal branches, even without specific proof that the individual non-citizens—all longtime guests of the nation—had violated the terms of their stay in the United States.\textsuperscript{59}

In addition to the more stringent emphasis on ideological concerns, Congress and the Executive continued their promulgation and enforcement of racially discriminatory immigration policies, though this time, a bit more subtly. In 1952, Congress passed the McCarren-Walter Act, a comprehensive immigration bill that forms the framework of modern United States immigration law today, but included within it a more restrictive version of the National Origins Quota system and established a new special racial quota for Asians.\textsuperscript{60} The Attorney General also repatriated 1.3 million Mexicans—and, it turns out, Mexican-Americans—during the infamous “Operation Wetback,” designed to combat undocumented migration.\textsuperscript{61}

It may be argued that the plenary power doctrine should be divorced from its racist origins because it possesses independent value—the doctrine

\begin{footnotesize}
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\item[54.] See \textit{id.} at 216.
\item[55.] \textit{Id.} at 206.
\item[56.] \textit{Id.} at 208, 216.
\item[57.] \textit{Id.} at 214, 216.
\item[58.] See \textit{Shaughnessy}, 345 U.S. at 214–15.
\item[59.] See \textit{id.} at 214, 216.
\item[61.] KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 29 (2003). Some commentators have argued that the historical discrimination on race and ideological grounds merely mirrored the domestic discrimination citizens suffered as well. See, e.g., \textit{id.} at 13; Gabriel J. Chin, \textit{Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law}, 14 GEO. IMMIGR. L.J. 257, 257 (2000). Per this view, minority citizens—whether on account of race, gender, or sexual orientation—received few protections by the United States government; it should be no surprise then that non-citizens in the same groups also suffered accordingly. See Chin, \textit{supra}, at 257–58.
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properly places immigration law within the political realm, outside the pur-
view of unelected federal judges. As the political climate changes, the laws
change through amended legislation, not by judicial fiat. Indeed, several
Congressional initiatives have corrected the sins of the past, including the
1965 abolition of the National Origins Quota system—which has led to a
large influx of Asian immigration—and the passing of the Refugee Act of
1980, the beneficiaries of which have been largely from Communist re-
gimes.

But the near total deference afforded the political branches through the
plenary power doctrine may come at a high price to human rights. This
question of how to balance the role of the federal courts as a check against
the executive and the legislature is of particular concern to many non-citizens
post 9/11. Moreover, as de facto “first responders,” what role do states and
local governments play in a regime in which the Constitution confers immi-
gration power exclusively upon the federal government?

While the Court has consistently affirmed the original plenary power
doctrine born of the Chinese Exclusion Act cases, it has also developed two
other themes in an attempt to carve out a role for itself and the states in the
immigration policy debate. First, the Court recognizes it has the authority to
tell Congress when it has gone too far in imposing conditions upon the non-
citizen that violate her basic rights as an individual. It has done so subtly,
either by requiring Congress and the executive to provide for constitutional
due process safeguards, or by reading statutes and regulations broadly so as
to protect non-citizens from arbitrary treatment. Second, the Court has
held that states have only a limited role in regulating the activity of non-
citizens under so-called “alienage law.” While states are free to place lim-
its on the activities of non-citizens that go to the heart of state governance,
they may not enact legislation that discriminates against non-citizens in their
eligibility for public benefits as an alternative to directly preventing them
from settling into their state.

_Landon v. Plasencia_ is one prominent example of the Court requiring
the then Immigration and Naturalization Service (INS) to provide a non-

62. _See_ Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79
Stat. 911.
64. _See_ Michael J. Churgin, _Mass Exoduses: The Response of the United States_, 30 INT’L
MIGRATION REV. (SPECIAL ISSUE) 310, 317 (1996).
67. _See_ Mathews, 426 U.S. at 84.
68. _See id._ at 84 n.25.
citizen with a hearing in accord with the Constitution's due process clause. 70 Salvadoran national Maria Plasencia, a lawful permanent resident for five years, had left the United States for a brief, two-day visit to Mexico. 71 Upon her re-entry, federal authorities charged her with smuggling undocumented persons into the United States knowingly and "for gain." 72 An immigration judge summarily excluded Plasencia from entry after an expedited hearing at which she would ordinarily have been entitled to free legal counsel under then existing rules. 73 Because of her limited English, however, she had unknowingly waived her right to such assistance. 74 The "for gain" portion of the charge also bespeaks injustice and careless prosecuting. 75 While the evidence suggested that she provided a ride to undocumented individuals whom she met in Tijuana, it is unclear whether Plasencia knew that they were undocumented and even less clear whether she had received any money for transporting them. 76 Nonetheless, the immigration judge found her excludable, which would have required her separation from both her United States citizen husband and children. 77 The United States Supreme Court vacated the immigration judge's order, suggesting that Plasencia may not have been given due process in light of her substantial connections to the United States: "Plasencia's interest here is, without question, a weighty one. She stands to lose the right 'to stay and live and work in this land of freedom.' Further, she may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." 78

In reviewing "alienage law"—the law affecting non-citizens in the United States aside and apart from the entry and exit rules of immigration law—courts subject federal legislation to a "rational basis" test that has only occasionally resulted in invalidating discriminatory legislation. 79 Under such review, the Court will generally defer to the government's reasons for enacting legislation if these appear reasonable. 80 However, if the Court believes

70. Id. at 32.
71. Id. at 23.
72. Id.
73. Id. at 24–25, 36.
74. Landon, 459 U.S. at 36. These facts are described more fully in Kevin Johnson's description of the case. IMMIGRATION STORIES 223–25 (David A. Martin & Peter H. Schuck eds., 2005).
76. See id. at 40 n.5.
77. See id. at 23, 34 (majority opinion).
78. Id. at 34 (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)) (citation omitted).
80. A good example of a deferential application of rational basis review appears in Mathews v. Diaz. Id. at 83. Lawful permanent residents (LPR)—so-called "green card" holders—had challenged federal Medicare rules that only allowed for supplemental insurance

https://nsuworks.nova.edu/nlr/vol32/iss2/1
that the federal government has unfairly singled out non-citizens for unfavorable treatment, it will strike down legislation even under the deferential rational basis standard. 81

Aside from directly invoking procedural due process protections, as in Landon, or employing a more stringent rational basis review, the Court has also interpreted immigration statutes broadly to protect non-citizens from government overreaching. In Zadvydas v. Davis, 82 the Court ruled that authorities could not hold a lawful permanent resident indefinitely, pending the government’s efforts to deport him. 83 Following a finding that Zadvydas was deportable for having committed certain crimes, the government had sought to remove him, but could find no country willing to accept him; it therefore argued that it could detain Zadvydas indefinitely until it could effect his deportation, citing the 1953 Mezei case discussed earlier. 84 The government reasoned that if it could hold Mezei, a returning lawful permanent resident indefinitely at Ellis Island on national security grounds, then it could also hold Zadvydas, because his criminal conduct vitiated his right to remain in the United States. 85 The Court rejected this argument, finding that Congress intended to place a limit of reasonableness on a deportee’s length of detention pending deportation. 86 Concerned that a statute authorizing the indefinite detention of non-citizens would raise serious due process problems, the Court imposed a presumption of unconstitutionality to any period of confinement exceeding six months. 87

benefits to those who had been in the country for at least five years. Id. at 70 n.1. Applying a deferential rational basis review, the Court held that it was reasonable for Congress to condition receipt of these federal benefits on the length of an LPR’s stay, noting that those who had been in the United States longer may have stronger ties to the nation. Id. at 83.

81. See Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976). Hampton stands as an example of when the rational basis review may be used to strike down laws that irrationally discriminate against non-citizens. See id. Lawful permanent residents challenged United States Civil Service Commission regulations excluding all non-citizens from occupying federal civil service jobs, limiting such occupations to United States “citizens and natives of American Samoa.” Id. at 90. Applying what appeared to be a more stringent version of the rational basis test than in Mathews, the Court ruled that the government’s desire for administrative convenience did not outweigh lawful non-citizens’ rights to be considered on the same footing as United States citizens for such jobs. See id. at 115–16.

82. 533 U.S. 678 (2001).
83. Id. at 689, 699–700.
84. Id. at 684, 692. This consolidated case also involved a second criminal non-citizen, Ma, whom no other country would accept. Id. at 685.
85. Id. at 692.
86. Zadvydas, 533 U.S. at 699.
87. Id. at 701.
In 2005, the Court extended the holding of Zadvydas regarding deportable non-citizens to excludable non-citizens as well, thereby effectively limiting Mezei’s reach. Clark v. Martinez had its origins in the Mariel boatlift twenty-five years earlier. Embarking from the port of Mariel, approximately 125,000 Cubans arrived in the United States as refugees in 1980; most of these “Marielitos” had relatives in the United States whom they rejoined, eventually becoming lawful permanent residents. However, the Immigration and Naturalization Service (INS) had identified about 2000 individuals as being risks to public safety either because they had committed serious crimes or had suffered from severe mental illnesses that rendered them dangerous to others. Under immigration law, it was as if these persons had never arrived; like Chae Chan Ping and Mezei before them, the Cubans would not be permitted to legally and formally enter the United States because of the danger they posed to the public—in technical parlance, they were “inadmissible.” Cuba would not accept them back, but because of the threat they posed to safety, the INS was also unwilling to release them from detention, opting instead to temporarily “parole” them pending their removal. Unfortunately, many of those released committed crimes, prompting the government to re-detain them.

At issue in Clark v. Martinez was whether Mezei allowed the government to indefinitely detain these otherwise excludable Cubans, or whether the logic of Zadvydas placed reasonable limits on the government’s detention power. The Court chose to extend Zadvydas to cover the inadmissible Cubans, holding that it was Congress’s presumptive intent that all non-citizens, regardless of status—whether deportable or inadmissible—should not be detained for more than six months pending their removal. Undergirding this opinion was the Fifth Amendment’s Due Process Clause, which the Court in both Clark and Zadvydas saw as the basis for reading Congress’s intent in favor of the non-citizens, thereby limiting the government’s power over them.

89. Id. at 371.
90. Id. at 374.
91. See Palma v. Verdeyen, 676 F.2d 100, 101 (4th Cir. 1982).
92. See id. at 101, 102–03 n.2.
93. Clark, 543 U.S. at 375 n.2.
94. See Palma, 676 F.2d at 101–02.
95. See id. at 101.
96. Clark, 543 U.S. at 378–79.
97. Id. at 386.
In contrast to the general deference accorded Congress in formulating policies affecting non-citizens, both within and outside the immigration rules, the Court has more stringently reviewed state laws, holding that states have only a limited role in regulating the activity of non-citizens under alienage law. In *Graham v. Richardson*, the Court applied a more searching "strict scrutiny" test to root out invidious state discrimination against non-citizens. In *Graham*, the Court invalidated state welfare laws, which contained citizenship and durational residency requirements that unfairly discriminated against non-citizens. The reason for the difference in the Court's treatment of the two sets of law stems from its view of the proper role of the federal and state governments vis-à-vis non-citizens. Because Congress enjoys plenary power over immigration policy, it makes sense that Congress should also enjoy some leeway in other federal laws it passes that affect non-citizens during their visit. States, on the other hand, have no power to grant United States citizenship under our Constitution, nor do they have a say in who gets to enter and who has to leave. Immigration law is a federal matter, and so if a state decides that it wants to indirectly influence a non-citizen's residential choices by passing restrictive state laws, the Court will examine those with a keen eye to ensure that some higher, more important governmental objective is present than simply the desire to conserve resources for United States citizens and lawful permanent residents first.

Given that governments often use national origin as a proxy for racial discrimination—think of both the Japanese internment and the post-9/11 profiling of Muslims and Arabs—the Court holds states more accountable than the federal government for laws adversely affecting their non-citizen populations. The stricter scrutiny applied to state action has led to the invalidation of a host of laws, from citizenship limitations on the ability to

100. *Id.* at 376.
101. *Id.* The main difference between *Graham*—a state benefits law case—and *Mathews*—a federal benefits case—appears to be the degree to which the Court was willing to substitute its judgment for the Legislature's. See generally *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976). While in *Graham*, the Court was willing to second-guess the legislature, in *Mathews*, it wasn't. *Id.* Hence, it is unsurprising that in *Sugarman v. Dougall*, the Court struck down an anti-non-citizen state civil service rule similar to the federal one in *Hampton*. 413 U.S. 634, 646–47 (1973).
103. *Id.* at 382.
104. *See id.* at 378–79.
practice law\textsuperscript{106} to the ineligibility for financial aid for college based on alienage.\textsuperscript{107}

The Court has even protected undocumented immigrant children from state discrimination, applying a slightly less severe standard than strict scrutiny.\textsuperscript{108} In \textit{Plyler v. Doe},\textsuperscript{109} the Court struck down a Texas law that denied free public education to elementary and secondary school children of undocumented immigrants.\textsuperscript{110} Writing for a 5-to-4 majority, Justice Brennan applied what appeared to be an intermediate level of scrutiny, reasoning that because these innocent children were brought by their parents to this country, denying them the right to an education would impose a grave disability and create a permanent underclass of uneducated children.\textsuperscript{111}

If we have learned one thing from this brief tour of the nature and history of United States immigration law and policy, it is that Congress is the main governmental entity responsible for changes in America's contract with non-citizens. While that law may at times appear to be protective of human rights and dignity (in its refugee and amnesty laws, for instance), and at other times draconian and uncaring (in its denial of judicial review or its expedited deportation procedures), one should appreciate it for what it is—a list of rules governing the conditions under which non-citizens may enter and must leave the United States. It is more like a contract than a human rights document, and, in our country, Congress has the near exclusive power to define the terms of that contract.

To see this, we need only review one recent United States Supreme Court pronouncement on the rights of non-citizens under federal immigration law and policy—a decision that reflects the judiciary's continued deference to congressional plenary power. In \textit{Fernandez-Vargas v. Gonzales},\textsuperscript{112} Mexi-

\begin{itemize}
\item \textsuperscript{106} Id. at 724.
\item \textsuperscript{107} Nyquist v. Mauclet, 432 U.S. 1, 2, 12 (1977).
\item \textsuperscript{109} Id. at 202.
\item \textsuperscript{110} Id. at 230.
\item \textsuperscript{111} Id. at 220, 230. Despite the Court's preference for strict review, in one class of cases the Court has deferred to state alienage laws, sometimes called the "public function" exception. See, e.g., Michael Scaperlanda, \textit{Partial Membership: Aliens and the Constitutional Community}, 81 IOWA L. REV. 707, 736–37 (1996) (describing the "public function" exception). In \textit{Bernal v. Fainter}, the Court refused to apply strict scrutiny to state alienage classifications "that exclude [non-citizens] from positions intimately related to the process of democratic self-government." 467 U.S. 216, 220 (1984). Hence, in \textit{Foley v. Connellie}, the Court upheld a New York state law limiting police officer jobs to United States citizens only, reasoning that police are vested with a great deal of discretionary power to maintain law and order—power that, in the state's view, should not be given to non-citizens over citizens. 435 U.S. 291, 298–300 (1978).
\item \textsuperscript{112} 126 S. Ct. 2422 (2006).
\end{itemize}
can national, Humberto Fernandez-Vargas, first entered the United States in the 1970s and was deported for immigration violations several times, but each time he returned illegally to the United States. His final illegal reentry occurred in 1982, and, for approximately twenty years thereafter, he remained undetected. His life, however, had taken a turn for the better when he started his own trucking business in Utah, bore a United States citizen son and, in 2001, married the son’s mother, his longtime girlfriend, who is also a United States citizen. When his wife petitioned for his adjustment to LPR status in 2001, the federal government reinstated his 1981 deportation order, denied his application for status adjustment, and deported him to Mexico in 2004.

The issue before the United States Supreme Court was whether the government acted lawfully in resurrecting his now twenty-year-old deportation order pursuant to a federal law that had not been enacted until many years after he had returned to the United States and became a productive member of the community. In an 8-to-1 decision, the Court interpreted the 1996 law, the Illegal Immigration Reform and Immigrant Responsibility Act, in the government’s favor, upholding their reinstatement of the deportation order and his subsequent removal to Mexico. One might argue that Fernandez-Vargas should not have benefited from his ability to evade the authorities for twenty years; yet, one can easily imagine a judge weighing the equities in this case of a reformed man whose deportation would have devastating consequences for his U.S. citizen child and spouse.

Fernandez-Vargas stands as but the latest in a string of United States Supreme Court cases that underscore the plenary power of Congress over immigration matters, and lends support to the idea that immigration law is more like contract law than human rights law. Fernandez-Vargas violated the terms of his contract with the United States and was held responsible for his breach; a human rights version of immigration law might have insisted on an impartial arbiter’s review of the government’s interest in maintaining order, balanced against the non-citizen’s reformation.

We have also learned that states have less of a role to play in enforcing or enacting immigration law than does the federal government, although we

113. Id. at 2427.
114. Id.
115. Id.
116. Id.
117. Fernandez-Vargas, 126 S. Ct at 2425.
118. Id.
119. See id. at 2422–34.
120. Id. at 2233–34.
are likely to see more state and local governments seek to find ways to address immigration issues. The reality is that state and local authorities have exhibited growing frustration with the federal government’s response to immigration issues, especially with respect to the undocumented.

At an estimated twelve million and counting, some believe the undocumented have a significant impact in a handful of states and localities, and among the poor and lower classes; in terms of competition for jobs, many have become disillusioned by the perennial underfunding of immigration initiatives and the perceived lax federal approach to immigration enforcement. Yet, others acknowledge that the undocumented form the backbone of a significant number of industries, from farming to construction to textiles, so that the mass deportation of all undocumented persons, even if feasible, would severely damage these businesses and the national economy.

It will be interesting to see whether state and local governments will gain a greater ability to enforce immigration laws in the future. As states’ roles in immigration enforcement increase and the federal government’s role correspondingly wanes, scholars and pundits alike will pay close attention to the United States Supreme Court’s response to this paradigm shift. Whether the Court will hold on to its traditional skepticism of state actions against non-citizens or begin to defer to such initiatives as emanating from valid Congressional mandates, only time will tell.


I. INTRODUCTION

In May 2007, Senator Patrick Leahy (D-VT) and Congressman Jerrold Nadler (D-NY) reintroduced the Uniting American Families Act (UAFA); a bill seeking to recognize the rights of foreign same-sex partners of United
States citizens to immigrate to the United States on a similar or equal basis as foreign heterosexual spouses of United States citizens.\(^1\) This bill has been reintroduced in Congress in every session since 2000.\(^2\) The issue of same-sex partner immigration even became an issue in the 2000 presidential debates between Vice-President Al Gore and Governor George Bush wherein Vice President Gore noted the federal government’s refusal to provide similar immigration rights to bi-national same-sex couples as provided by other industrialized democracies, some of which, like the United States, also do not recognize the right of same-sex partners to legally marry.\(^3\) It is interesting to note that Gore raised this issue at the same time that he indicated he was against federal recognition of same-sex marriage.\(^4\)

The conceptual de-coupling of the issues of same-sex unions and same-sex partner immigration raises the possibility of providing the same relief to same-sex partners of United States citizens presently available to heterosexual spouses of American citizens, without resolving the larger issue of otherwise recognizing same-sex unions.

This article will explore the markedly different approaches of the United States from other industrialized democracies with respect to same-sex partner immigration, and provide some explanations for this divergent approach. The principal benefit of comparative legal analysis lies in identifying legal approaches in other societies that may have similar applicability in our own legal system. Comparative analysis thus requires an identification of the variables that account for the different approaches to a particular issue, and a determination of whether those variables preclude or support the adoption of those alternative approaches by our own legal system.

The comparative analysis provided in this article suggests that a de-coupling of the issues of same-sex unions and same-sex partner immigration is not a particularly dramatic step, and in fact, is a policy that has been adopted by the great majority of industrialized democracies—including those that have not yet granted full marriage rights. The country case studies ex-

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amine in this article suggest that most industrialized democracies have viewed the recognition of same-sex couple immigration rights as a logical requisite of application of non-discrimination and equal protection principles, even if some of those countries are unwilling to extend those principles to full legal recognition of same-sex unions.

Since the United States also recognizes those legal principles in theory, and the great majority of the American body politic supports basic non-discrimination rights for lesbian, gay, bisexual, and transgender/transsexual people in general, it would appear that there are the basic legal and political prerequisites for this modest change in the current federal refusal to recognize any same-sex couple rights under the Defense of Marriage Act.

The great majority of the world’s industrialized democracies recognize the right of same-sex couple immigration. In addition to all of the countries that grant marriage, or the equivalent thereof, to same-sex couples, such as Belgium, Canada, Spain, South Africa, the Netherlands, Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and the United Kingdom, other countries grant the more limited right of immigration to same-sex couples, in addition to other rights associated with marriage. Those countries include Australia, Brazil, France, Germany, Israel, Portugal, and Switzerland.

In furtherance of this analysis, it is helpful to discuss the means by which other countries that do not recognize full marital rights nevertheless provide immigration to same-sex partners, and the political and societal context in which those legal policies were adopted. It is also useful to consider how countries that currently recognize same-sex marital rights approached the issue of same-sex partner immigration prior to their recognition of same-sex unions. Finally, it is very useful to explore how a federal union, such as the European Union, with the same rights of freedom of movement for its citizens as the United States, addresses the issue of same-sex partner immigration. Like the United States, the European Union has member states that recognize same-sex marriage or civil unions, while other states do not.

II. SAME-SEX COUPLE IMMIGRATION IN COUNTRIES THAT DO NOT CURRENTLY RECOGNIZE FULL MARRIAGE RIGHTS

This article provides country case studies and examples of countries that provide same-sex couple immigration rights, but do not otherwise legally...
recognize full marriage rights. The case studies include Australia, Brazil, France, Germany, Israel, and Switzerland.

A discussion of these countries provides insight into how countries that have not recognized full marriage rights nevertheless have extended the principal of equal protection and non-discrimination to same-sex couples, at least in this area of the law.

A. The Case of Australia

Australia provides a particularly analogous case study of a country that shares many socio-political and legal attributes of the United States, including a federal structure. Thus, identifying the variables that the United States shares with Australia, as well as identifying the differences, assists in determining whether the Australian approach to this issue has relevance for the United States.

Until recently, Australia, like the United States, has had a conservative government for over eleven years, which has been resolutely and vocally opposed to same-sex unions. It nevertheless has recognized same-sex partner immigration rights. It also has a relatively "macho" social culture, with a historical and ongoing national identification with a frontier culture. It has a strong suburban and largely middle class socio-economic structure, which closely mirrors the United States, and a body politic that is somewhat skeptical towards immigration in general. It also has an active Christian fundamentalist movement that is nevertheless less powerful a force in Australian politics than anti-gay religious movements in the United States.

Australia shares this last factor—the less potent political impact of anti-gay religious sentiment—with almost all other industrialized democracies. This difference may at least partially account for this differing legal approach to same-sex partner immigration, even among otherwise conservative politi-

10. See id.
12. See id. at 7.

On April 15, 1991, the Australian federal government introduced a new visa and permit category for interdependent relationships which covers common law and same-sex couples and may be used by same-sex couples to achieve residency.\footnote{15}{Margaret Young, Library of Parliament, Immigration of Same Sex Couples (Jan. 8, 1992) (Can.), http://www.qrd.org/qrd/world/americas/canada/immigration_of_same.sex.couples. See generally Migration Regulations (Amendment), 1991, No. 60 (Austl.), available at http://www.austlii.edu.au/au/legis/cth/num_reg_es/mr1991n60334.html.} It is interesting to note how long ago this immigration category was introduced—only five years after the United States Supreme Court decision in \textit{Bowers v. Hardwick}.\footnote{16}{478 U.S. 186 (1986).}

The regulation provides for a six-month residency before an application for conditional residency can be made.\footnote{17}{See Young, supra note 16.} In order to qualify for this status, the applicant must, inter alia: 1) prove a genuine and continuing relationship of interdependency that involves residing together and "a continuing commitment to mutual emotional and financial support;" 2) demonstrate that the relationship "has existed for at least 6 months" before the application; and 3) satisfy normal health and public interest requirements.\footnote{18}{Id. See also 1 DEP’T OF IMMIGRATION & CITIZENSHIP, PARTNER MIGRATION 37 (2008) (Austl.), available at http://www.immi.gov.au/allforms/booklets/1127.pdf.}

A successful applicant will be granted a temporary interdependency visa, which permits the applicant to work.\footnote{19}{Id. See Young, supra note 16.} Permanent residency will be granted after two years, provided that the relationship has continued during that period.\footnote{20}{See Young, supra note 16.} Significantly, if the Australian partner dies during the two-year waiting period, the foreign partner is granted permanent residency.\footnote{21}{Id.}

B. \textit{The Case of Brazil}

Brazil is an important case study for at least six reasons and represents a study in contrasts, which adds to its value as a comparative case study. First, despite its relatively progressive recent legislation with respect to same-sex
unions, it has had a more severe history of significant anti-gay violence than the United States.22 Second, unlike the United States and Australia, it does not have a large, middle class, well-educated body politic that often proves a moderating force on populist anti-gay political rhetoric and legislation.23 Third, it is the largest country in Latin America; a region that has proven to be among the most violently anti-gay in the world.24 Fourth, as one of the larger developing countries in the world, and the largest developing country in the Western Hemisphere, its steps towards recognition of same-sex unions25 and same-sex couple immigration have important ramifications for the developing world in general, and Latin America in particular. Fifth, like many countries in Latin America, it has a growing fundamentalist Christian movement, although the majority of the population continues to be Roman Catholics.26 Sixth, and perhaps most significantly, unlike those countries that share a British colonial heritage, Brazil inherited Portugal’s markedly more tolerant heritage of tolerance of homosexuality and generally less ascetic view of sexuality in general.27

The best way to reconcile the history of anti-gay violence in Brazil with the progressive recent legislation on same-sex unions and same-sex couple immigration is to acknowledge that the level of violence in Brazil is very elevated throughout the society. Thus, gays and lesbians, although disproportionately targeted by that violence, are targeted not so much because of virulently anti-gay societal attitudes, but because they are easy targets because of the relative impunity with which people can commit crimes against gays and lesbians without fear of prosecution or reprisal.

In December, 2003, the National Immigration Council issued a decree that:

[A]llows temporary or permanent visas to be given to same-sex partners of Brazilian citizens who have any of the following: A

“certificate of concubinage” issued by a governmental office in Brazil or abroad; [p]roof of “stable partnership issued by a Family Court Judge or corresponding authority in Brazil or abroad;” [p]roof of mutual dependency issued by a government body in Brazil or abroad; [c]ertification “or similar document, issued by a civil registry authority or the equivalent abroad, of cohabitation for more than five consecutive years;” [or] [p]roof of “a common dependent child.”

Human Rights Watch and Immigration Equality note “that couples with children . . . who have legally formalized their partnership [within or outside Brazil], . . . can enjoy immigration rights similar to married couples. Same-sex couples unable to meet these criteria, like unmarried opposite-sex couples, can apply for a so-called ‘concubine visa,’ granted on a discretionary basis.”

C. The Case of France

France shares with the United States a large, well-educated middle class and a strong political democracy. It has also been dominated by politically conservative parties for over a decade. France, however, differs from the United States in some very significant ways.

France has generally had a very weak fundamentalist Christian movement, and the French people, in general, do not subscribe to the more conservative or moralistic tenets of the Roman Catholic Church. Because of this, the French tend to be significantly less ascetic or moralistic in matters of sexuality in general. It is interesting to note that Quebec, the French speaking province of Canada, is similarly noted for its more open attitudes towards sexuality and less hostile attitudes towards homosexuality than those prov-

29. Id.
31. Id. at 213.
inces of Canada with a more American-style, fundamentalist protestant religious population.\textsuperscript{34} It is interesting to note, however, that France has not gone as far as the United Kingdom in granting marriage rights to same-sex couples,\textsuperscript{35} which is surprising given the British reputation for asceticism in matters of sexuality. Part of the explanation may lie in the simple fact that the Labour Party has been in power in the United Kingdom during the last decade,\textsuperscript{36} as opposed to the conservatives in France.\textsuperscript{37} France, however, has promulgated civil partnerships for same-sex couples that do provide some of the same rights of marriage.\textsuperscript{38}

The Pacte Civil de Solidarité law (PACS) is a civil partnership act for same-sex couples passed in 1999.\textsuperscript{39} The act defines the PACS as "a contract concluded between two physical persons who have reached the age of majority, of different or the same gender, for the purposes of organizing their life in common."\textsuperscript{40} The French civil partnership grants the couple the following rights: 1) joint taxation status as married couple for purposes of social security benefits; 2) legal recognition of the partnership; and 3) naturalization of a same-sex foreign partner.\textsuperscript{41}

According to the U.K. Lesbian and Gay Immigration Group, a foreign partner in a PACS with a French citizen can obtain a temporary residence permit—\textit{permis de séjour}—after a one-year waiting period.\textsuperscript{42} "It is subject to annual renewal through the local [m]ayor's office . . . .\textsuperscript{43} After five years, a \textit{permis de séjour} holder is eligible to apply for permanent residency, which in France means a ten-year permit.\textsuperscript{44}

\begin{footnotes}
\item[34] Press Release, The Canadian Values Study: A Joint Project of Innovative Research Group, the Dominion Institute & the National Post, Social Conservatives Own Reluctance to Politicize Moral Issues Key Hurdle for this Political Minority (Sept. 25, 2005), http://www.innovativeresearch.ca/Canadian%20Values%20Study_Factum%20260905.pdf [hereinafter Press Release, The Canadian Values Study].
\item[35] \textsc{Equality for Lesbians and Gay Men}, supra note 34, at 47.
\item[36] \textit{Id.} at 91.
\item[37] \textsc{See} Chase, supra note 31, at 215.
\item[38] Frédéric Martel, Embassy of France in the United States, The PACS—A Civil Solidarity Pact (July 2001), http://www.ambafrance-us.org/atoz/pacs.asp.
\item[39] \textit{Id.}
\item[40] \textit{Id.} However, there are obstacles in the path to obtaining these rights. \textsc{See id.} In order to be taxed jointly, there is "a three-year waiting period before" they may take advantage of this benefit. \textit{Id.} Additionally, there are conditions that must be met by the partners "in order to obtain a residenc[y] permit." Martel, supra note 39.
\item[41] \textit{Id.}
\item[43] \textit{Id.}
\item[44] \textit{Id.}
\end{footnotes}
According to the Institut National d'Études Démographiques de France, a foreign partner of a French resident national is entitled to a residence permit and "[f]oreign spouses immediately and automatically receive a temporary residence permit."\textsuperscript{45} The formation of a registered partnership is one of the elements that indicate the existence of personal ties [sufficient to satisfy the requirements] of Art. 12b, par. 7, of Decree no 45-2658 of 2 November 1945 establishing the conditions of entry and residence of foreigners in France.\textsuperscript{46} "Foreign cohabitants must prove a certain period of cohabitation (exceptionally less than 5 years)."\textsuperscript{47} Registered foreign partners of a French citizen must prove at least one year of conjugal life on French territory, irrespective of the nationality of the partner and the date of signature of the registered partnership (telegram of 4 April 2002 and Council of State, 29/7/02, no 231158). The issuing of a temporary residence permit to registered partners or cohabitants is left to the discretion of the public authorities.\textsuperscript{48}

D. \textit{The Case of Germany}

Germany, like the United States, Australia and France, has a large, well-educated middle class. However, in almost all other socio-economic and political respects it resembles France and Australia more than the United States.\textsuperscript{49} Like France, and unlike the United States, Germany has a very weak fundamentalist Christian movement, and the German people, in general, do not subscribe to the more conservative or moralistic tenets of the Roman Catholic Church or Protestant denominations.\textsuperscript{50} Because of this, Germans tend to be significantly less ascetic or moralistic in matters of sexuality in general.\textsuperscript{51} Indeed, Germany was one of the first countries in the world in which a gay rights movement developed.\textsuperscript{52}

\textsuperscript{45} Kees Waaldijk et al., Institut National d'Études Démographiques, More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners 100 (2004), available at http://www.ined.fr/fichier/t_publication/1034/publi_pdf1_document_de_travail_125.pdf.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} See generally Equality for Lesbians and Gay Men, supra note 34, at 48, 51.
\textsuperscript{50} See Bréchon, supra note 33, at 31–32.
\textsuperscript{51} See id. at 42; Equality for Lesbians and Gay Men, supra note 34, at 51.
\textsuperscript{52} See Equality for Lesbians and Gay Men, supra note 34, at 51–54.
In a 1996 decision, the Higher Administrative Court in Münster, "which has sole jurisdiction in Germany [over visa appeals], ruled that the European Convention on Human Rights" required that the same-sex foreign partner of a German national "be granted a residence permit."^{53} The government was thus obliged to give "a visa to a Romanian citizen so that he could cohabit with his German . . . partner."^{54} "However, the decision was disregarded in many Länder (provinces), which have broad authority in Germany’s federal system."^{55} Nevertheless, because of federal legislation passed in 2001, same-sex couples now enjoy the same immigration rights as married couples.^{56}

On August 1, 2001, the German Parliament passed the Lifetime Partnership Act (Lebenspartnerschaftsgesetz).^{57} "It allow[s] same-sex couples throughout Germany to enter a new legal status [of] Eingetragene Lebenspartnerschaft, ‘registered life partnership,’ [which] carr[ies] most, [but not all], of the rights enjoyed by married heterosexual couples."^{58}

The legislation provides "equal immigration rights to same-sex couples."^{59} Now, according to Human Rights Watch and Immigration Equality, the foreign partner of a German national or resident can apply for a "long-stay visa" at a German consulate in their country, showing their partner’s sponsorship and the intention of registering their partnership after arriving in Germany. Foreign partners already in Germany, as temporary residents or visitors, can change their status to permanent resident once the partnership is registered.^{60}

According to the United Kingdom Lesbian and Gay Immigration Group, "[i]f the sponsor is a German citizen [or permanent resident], their partner has a legal right to a residence permit."^{61} "If the sponsor is a citizen of another [European Union] country, living and working in Germany with [a temporary] ‘[European Union] Residence permit,’ . . . granting of a resi-

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53. Id. at 53.
54. Id.
55. LONG ET AL., supra note 3, app. B at 159.
58. LONG ET AL., supra note 3, app. B at 159.
59. Id.
60. Id.
61. Europe - Residency Requirements, supra note 43.
dence permit to the partner [remains] discretionary."62 All the sponsoring partners have to demonstrate is that he or she is financially able to support both partners and that he or she is not receiving social assistance.63

E. The Case of Israel

Israel provides a somewhat unique and important case study for precisely the opposite reasons of most of the other industrialized democracies discussed herein. Unlike the other industrialized democracies, Israel does have various politically powerful conservative religious groupings that exert a significant influence over a wide variety of national policies.64 It also has been under the leadership of a conservative coalition for approximately thirty years, in which the religious parties have exerted a political influence far greater than their already considerable share of the Israeli electorate.65 However, part of the explanation for Israel’s encouraging approach to same-sex partner rights could be explained by the government’s active encouragement of increasing the Jewish demographics in Israel;66 although it should be noted that the Israeli rules apply to Jewish and non-Jewish Israeli citizens alike. Nevertheless, to the extent that the more gay-friendly immigration rules keep a gay Jewish citizen living in Israel, the desire to maintain Jewish individuals in Israel appears to override religious hostility towards homosexuality.67

The analogy to South Africa is somewhat instructive. During the apartheid era, the government was run by a very socially and politically conservative white elite.68 Nevertheless, the government’s attitude towards homosexuality was relatively tolerant, reflecting the government’s concern with

62. Id.
63. Id.
keeping white gay citizens from emigrating to other countries. As noted below, the current South African government, which is politically the opposite of the former apartheid regime, is among the most legally progressive countries in the world, recognizing full equality of its gay citizens with respect to marriage and immigration, albeit for very different reasons than the relatively tolerant policy of the otherwise intolerant and conservative predecessor apartheid regime.

"In 2000, the Israeli Ministry of the Interior granted resident status to two same-sex partners of Israeli citizens. Israel recognized the status of yedu’a ba-tzibur (common law spouse), and these couples obtained citizenship based on their ‘married’ status." This status is, however, only relevant for non-Jewish partners of an Israeli citizen, since all Jews enjoy the “right of return” entitling them to Israeli citizenship.

Same-sex couples must convince ministry officials that their relationship is genuine or “sincere” and that they maintain a home together. The foreign national is then granted a one-year work permit. After one year and a reexamination, the foreign national can receive temporary resident status. This status is renewed yearly. After seven years, the foreign national can become a permanent resident. “This differs from the procedure for a foreign national in a heterosexual marriage to an Israel citizen or resident, who can receive a temporary resident visa after six months and is eligible . . . for full citizenship four years later.”

F. The Case of Switzerland

Switzerland shares many of the socio-economic characteristics of France and Germany. This is unsurprising since it is a confederation of four national groups, the German, French and Italian national groups being dominant.

Like Germany, France, the United Kingdom and most of the other countries of Western Europe, Switzerland extends many of the rights of mar-

69. Contra id.
72. Id.
73. See Fishbein, supra note 68.
riage to its same-sex partners and some cantons (provinces) within Switzerland have extended even greater rights than the federal government.

The Swiss Federal Parliament passed a bill in 2004 creating registered partnerships for same-sex couples.\(^{75}\) The bill became law in 2007, extending the same immigration rights "to registered partners as to heterosexual spouses and mandated that marriages and civil partnerships between people of the same sex validly entered into in other countries would be recognized in Switzerland."\(^{76}\) Swiss law provides that the foreign same-sex partner of a Swiss citizen may apply for a three-month visa, during which the partner may visit Switzerland and enter into a registered partnership. The foreign partner will then be eligible for a residence permit, which permits the partner to work and exempts the foreign partner from all labor restrictions otherwise applicable to foreign nationals.\(^{77}\)

III. COUNTRIES THAT DO RECOGNIZE FULL MARITAL RIGHTS FOR SAME-SEX PARTNERS

It should not be surprising that all countries that recognize full marital rights for same-sex partners extend the same immigration rights to same-sex spouses as those accorded to heterosexual spouses. It is nevertheless instructive to look at the steps those countries took to recognize the right of same-sex partner immigration prior to their adoption of full marital rights, as that is precisely the context in which such immigration rights would be accorded to same-sex spouses in the United States.

A. The Case of Belgium

Belgium is divided between a Flemish majority, which speaks a dialect of Dutch, and a large Walloon minority, which speaks French.\(^{78}\) As such, Belgium shares many of the socio-economic characteristics of both France and the Netherlands. It thus should not be surprising that Belgium was the

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77. LONG ET AL., supra note 3, app. B at 170.

second country in the world, after the Netherlands, to recognize full marriage equality for gay couples.

The first step towards immigration equality was a Belgian circulaire adopted on September 30, 1997, by the Ministry of the Interior that authorized both Belgian nationals and aliens established in Belgium, or authorized to reside in Belgium for periods of more than three months, to be joined in Belgium by the person with whom they have a “stable relationship”—also known as “relation durable.” This benefited all de facto couples, whether heterosexual or homosexual. Indeed, the very purpose of the circulaire was to put an end to the discrimination against homosexuals with respect to family reunification, as they had no access to marriage.

With the advent of full marriage rights for gay couples in both terminology and substance, same-sex couples enjoy the same immigration rights as heterosexual married couples.

The implementation of the Ministry of Interior circulaire is one example of how countries have extended the principle of equal protection and non-discrimination, even before extending those principles to full marriage equality.

B. The Case of Canada

Canada, along with Australia, is the country that most resembles the United States from a socio-economic perspective. However, like most industrialized democracies, it has demonstrated a much more progressive policy towards extending the principles of non-discrimination and equal protection to its gay citizens, including in the area of same-sex couple immigration rights. It shouldn’t be surprising that the analysis of the reasons for its progressive position towards same-sex partner equality is largely the same analysis as that presented above with respect to Australia. In many respects, Australia resembles the United States even more than Canada. As discussed, Australia has a somewhat “macho” culture like the United States that differs

80. Id.
81. See Olivier De Schutter & Kees Waaldijk, Major Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners in Belgium, in WAALDIJK ET AL., supra note 46, at 49–50.
significantly from Canada. Explanations for Canada’s less “macho” culture, and correspondingly greater recognition of same-sex rights than either Australia or the United States, could arguably be found in Canada’s self-conscious differentiation from the United States, particularly with respect to certain foreign and domestic policies with which it would prefer not to be associated. Further distinguishing Canada from the United States is the existence of Quebec, which, as discussed above in the discussion of France, is particularly open-minded with respect to full equality for sexual minorities. Indeed, Quebec was the first province to recognize full same-sex marriage rights. It is interesting to note that those Canadian provinces that are the most similar to the American heartland, such as Alberta, Manitoba and Saskatchewan, were also the most resistant to implementation of full marriage rights for same-sex couples.

In 2001, even before the adoption of full marriage rights, Canada’s Immigration and Refugee Protection Act (C-31) provided the statutory basis for the recognition of the right of same-sex partners to immigrate. This Act, along with the corresponding Immigration and Refugee Protection Regulations, provided extremely broad immigration rights to lesbian and gay couples.

The 2005 Civil Marriage Act, which provides for full marriage rights for same-sex couples, in both terminology and substance, has completely eliminated any legal discrimination between heterosexual and same-sex couples, including in the area of immigration.

The implementation of the Canadian Immigration and Refugee Protection Act, prior to Canada’s recognition of full marriage equality, is another example of how a country that had not yet recognized full marriage equality nevertheless extended the principle of equal protection and non-discrimination to same-sex couples.

Despite the differences between Canada and the United States, Canada’s close geographic proximity to the United States, combined with its strong cultural and economic ties, and similar level of economic development to the United States, all suggest that Canada could provide a particu-

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86. Civil Marriage Act, 2005 S.C., ch. 33, §§ 2, 3.1 (Can.) (defining “marriage” in Canada as “the lawful union of two persons to the exclusion of all others”).
87. See Immigration and Refugee Protection Act, supra note 85, § 12.
larly useful example for the United States in eliminating discrimination in the area of same-sex couple immigration.

C. The Case of the United Kingdom

The United Kingdom provides a compelling case for the de-coupling of marriage rights and the rights of same-sex couple immigration. The United Kingdom not only shares a common legal and cultural heritage with the United States, but it also has a historical reputation as being somewhat more ascetic and conservative with respect to issues of sexuality than many of its continental European counterparts. This is reflected in the legal framework by which it recognized same-sex couples’ rights. It did so in the framework of a registered partnership act, roughly analogous to the legal civil unions in existence in Vermont, Connecticut, New Hampshire, and to a lesser extent, California. The United Kingdom, like California, Connecticut, New Hampshire, Belgium, and the Netherlands, accomplished this by legislative, rather than judicial action.

Foreign same-sex partners of British citizens were allowed to immigrate as of October 1994, even before the adoption of same-sex registered unions. On November 18, 2004, the Civil Partnership Act was enacted, legally recognizing same-sex couples in a committed relationship and providing those couples with the same immigration rights enjoyed by opposite-sex couples. After registering the civil partnership, the applicant partner is granted residence for up to two years. After that, if the partnership continues, he or she can apply for permanent residence.

88. See generally EQUALITY FOR LESBIANS AND GAY MEN, supra note 34, at 91–99.
93. See generally Civil Partnership Act, supra note 90.
95. See Immigration Rules, supra note 95, § 287.
Nevertheless, the discussion above begs the question of why the United Kingdom, which is the most similar of the European countries to the United States in cultural, socio-economic and legal terms, took such a markedly different path than the United States with respect to same-sex unions, and even earlier with respect to same-sex immigration rights. The answer is the same one that is applicable to the differences between the United States and almost all other industrialized democracies: fundamentalist religious forces in the United States that exercise a particularly strong influence on the political debate in the United States.96 The reasons for this phenomenon are discussed in much greater depth at the conclusion of this article. Seen this way, the United Kingdom’s approach is very consistent with the approach of the other countries that are most similar to the United States: Canada and Australia.97 Put differently, the United Kingdom’s similarity to Australia and Canada in not having a strong fundamentalist religious force dominating its political debate trumps the other similarities between the United Kingdom, Canada, and Australia on the one hand, and the United States on the other hand.98

D. The Case of Denmark

Denmark, along with Finland, the Scandinavian countries and the United Kingdom, has adopted registered partnerships that grant the substantive rights of marriage, without using the terminology of marriage.99 It should not be surprising that Denmark and the other Scandinavian countries have gone further than many other European countries in recognizing same-sex couple rights since Scandinavia as a whole is characterized by a low incidence of fundamentalist Christians and a correspondingly very high level of gender equality.100 As discussed further below, comparative and historical evidence indicates that the prevalence of gender equality is one of the highest correlates with recognition of same-sex partner rights.

A foreign national “who is married [or] registered with a Dane, . . . a citizen of [an]other Nordic countr[y], or a ‘convention refugee,’ can apply for a residence permit.”101

In the event that neither Danish resident is a Danish citizen,

96. See Wojcik, supra note 92, at 597.
97. See Drucker, supra note 12, at 9; Girshon, supra note 84, at 652.
99. See WAALDIJK ET AL., supra note 46, at 68.
100. See Bréchon, supra note 33, at 32, 42.
101. WAALDIJK ET AL., supra note 46, at 73.
the spouses have to be 24 years of age or more—and their relation to Denmark has to be stronger than the couple’s relation to the foreigner’s homeland. The Minister of Integration has decided that these two limiting rules do not necessarily apply to registered partners since they can not go to most of the countries and live as partners there.\textsuperscript{102}

E. The Case of Finland

Finland granted immigration benefits to same-sex couples in 2004 with the passage of the Aliens Act.\textsuperscript{103} The purpose of the Aliens Act was “to implement and promote good governance and legal protection in matters concerning aliens [and] to promote managed immigration and provision of international protection with respect for human rights and basic rights and in consideration of international agreements binding on Finland.”\textsuperscript{104}

The same-sex partner of a Finnish citizen or permanent resident is considered a family member under the Aliens Act and is eligible to apply for a residence permit.\textsuperscript{105} The following categories of individuals constitute family members within the meaning of the Aliens Act:

1) A person of the same-sex in a nationally registered partnership is also considered a family member.

2) Persons living continuously in a marriage-like relationship within the same household regardless of their sex are comparable to a married couple. The requirement is that they have lived together for at least two years. This is not required if the persons have a child in their joint custody or if there is some other weighty reason for it.\textsuperscript{106}

A foreign national “may apply for a residence permit abroad on the basis of family ties by filing an application with a Finnish mission, or a sponsor may initiate the procedure by filing an application with the District Police.”\textsuperscript{107}

\textsuperscript{102} Id.


\textsuperscript{104} Aliens Act, supra note 104, § 1.

\textsuperscript{105} Id. § 37.

\textsuperscript{106} Id.

\textsuperscript{107} Id. § 62(1).
A resident national may form a Registered Partnership with a non-resident foreigner. As noted above, the foreign partner of a resident national is entitled to apply for a residence permit.

F. The Case of Iceland

Iceland, like other Scandinavian countries, recognizes the equivalent of civil unions. Iceland granted same-sex couples the right to enter into Registered Partnerships in 1996. According to the Act on Registered Partnership, subject to laws regulating adoption, the "registration of partnership has the same legal effects as marriage. The [legal] provisions . . . relating to marriage and spouses . . . apply to registered partnership and individuals in registered partnership." This provision includes equal immigration rights for same-sex couples.

According to the Act on Foreigners, No. 96, section 13, "[t]he closest family members [eligible for permanent residence] . . . shall be the foreigner's spouse, a partner in cohabitation or registered partnership . . . ."

Iceland's Regulation on Foreigners requires registered and cohabiting partners to: 1) be at least eighteen years old; and 2) "be able to demonstrate that they have lived together in registered cohabitation or cohabitation otherwise confirmed for at least two years, and intend to continue their cohabitation."

G. The Case of the Netherlands

In April, 2001, The Netherlands was the world's first country to grant full marriage equality to same-sex couples, both in terminology and substance. As noted above, this is consistent with The Netherlands' histori-
cally welcoming approach to national minorities and gay individuals. Although The Netherlands is not technically a Scandinavian country, it shares many of the socio-economic, cultural and political characteristics of those countries. It could be argued that some of the reasons for Dutch progressive policies towards racial and sexual minorities are related to the reasons for Canadian tolerance of those same minorities: both countries share a common border with a much more powerful neighbor with histories of intolerant policies towards racial and/or ethnic minorities.

Although this article is not intended to be a treatise on World War II, some discussion of that history is helpful to understand why The Netherlands went even further than its Scandinavian neighbors in being the first country in the world to recognize same-sex marriage. The Netherlands, along with Canada, maintains a self-conscious distinction between itself and its more powerful neighbor, which is Germany in the case of The Netherlands. This self-conscious desire to distinguish itself from its neighbor was heightened by the German occupation of The Netherlands and the extermination of more than 100,000 Jewish Dutch citizens. Many Dutch, unlike many of their European counterparts, considered the extermination of Dutch Jews to be no less outrageous than if Germany exterminated over a hundred thousand non-Jewish Dutch citizens. This self-conscious differentiation with Germany is further heightened by Dutch consciousness of the extraordinary rates of Jewish extermination in The Netherlands as compared to other Western European countries, although it should be noted that the high rate of extermination was related more to Hitler’s desire to make an example of The Netherlands, rather than a particularly anti-Semitic attitude of the Dutch. Nevertheless, the Dutch are keenly aware that in Denmark virtually no Jew died at the hands of Hitler because of specific resistance activities undertaken by the Danish government and the Danish people in general. This distinction is all the more striking since, as noted above, The Netherlands shares many cultural socio-economic and political characteristics with Denmark.

Before recognition of full marriage equality in April 1, 2001, full immigration rights of same-sex partners were granted by policy guidelines (Vreemdelingencirculaire) that legally recognized, since 1975, informally cohabiting different-sex and same-sex partners of Dutch citizens. Those guidelines provided:

[Articles] 3.13 to 3.17 of the [Dutch] Aliens Decree 2000 (*Vreemdelingenbesluit* 2000, *Staatsblad* 497, in force since April [1], 2001) allow for the immigration of married, registered and unmarried/unregistered partners, provided that they live together and have a joint household. One of the conditions is that the ‘receiving’ partner has a sufficient income . . . .

H. *The Case of New Zealand*

New Zealand shares many of the same socio-economic characteristics of Australia, but has evidenced an even more progressive approach to the equal protection rights of its gay citizens than even the relatively progressive policies of Australia.\[121\] Part of the explanation for this approach could be explained by the relatively homogenous nature of New Zealand’s society and its much smaller population of just over 4,000,000.\[122\] It could be argued that more homogenous, smaller populations are much more likely to adopt policies benefiting even unrelated members of the population since the sense of commonality shared by New Zealanders is heightened by their relative insularity and lack of diversity. One could argue that this sense of commonality is not entirely dissimilar to the sense of common interests exhibited by Israel towards all of its Jewish citizens, whether gay or heterosexual. It can also be argued that New Zealand shares with Canada and The Netherlands, to a lesser degree, a desire to differentiate itself from its much larger Australian neighbor, with which it is ‘lumped together’ as Oceana.

Parliament created civil unions for both same-sex and opposite-sex couples in 2004, “giving the same rights as marriage [to same-sex couples].”\[123\] However, even before 2004, the New Zealand Immigration Department announced that the “lovers” of gay and lesbian citizens would be able to apply for residency.\[124\] Same-sex partners could apply for residence under the family relationship category.\[125\] The gay or lesbian couple must prove the relationship is genuine, stable, and of at least four years duration.\[126\]

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120. *Id.* at 146 n.C2.
125. Young, * supra* note 16.
126. *Id.*
"Immigration authorities must be satisfied that the relationship is 'genuine and stable,'" and an eligible sponsor must be a citizen or resident of New Zealand and must not have been "the perpetrator of an incident [of] domestic violence which . . . resulted in the grant of [permanent] residence . . . to a person under [the asylum] policy for victims of domestic violence." 

I. The Case of Norway

Norway, like the rest of Scandinavia, grants same-sex couples full marriage rights, in substance, if not in terminology. The analysis for Norway is therefore similar to that of the other Scandinavian countries. In 1993, Norway implemented the Registered Partnership Act No. 40. Section three of the Registered Partnership Act states that with the exception of adoption, "[r]egistration of a partnership has the same legal consequences as contraction of a marriage." 

The Registered Partnership Act limits two foreign nationals' ability to enter into a registered partnership with each other. For example, at least one of the parties must have been a resident of Norway for two years prior to registration.

J. The Case of Sweden

Sweden, like the rest of Scandinavia, provides same-sex couples full marriage rights—in substance, if not in terminology—in its Registration of Partnership Act of 1994. Moreover, the Swedish Parliament is now in the

127. LONG ET AL., supra note 3, app. B at 164.
131. See Registered Partnership Act, supra note 130, § 2(1); NORWEGIAN MINISTRY OF CHILDREN & EQUALITY, supra note 131, at 2.
132. See Registered Partnership Act, supra note 130, § 2(2); NORWEGIAN MINISTRY OF CHILDREN & EQUALITY, supra note 131, at 2.
133. See Registration of Partnership Act (SFS 1994:1117) (Swed.), available at http://www.homo.se/o.o.i.s/1630. See also LONG ET AL., supra note 3, app. B at 169.
process of changing their Registered Partnership Act to provide for full marriage rights for same-sex couples in substance and terminology.134

Sweden, however, permitted same-sex partner immigration long before it legally recognized same-sex unions. According to the Institut National d'Etudes Démographiques of France:

It has been a very long tradition (at least since the 1970s) not to tie the right to obtain a residence permit to civil status [in Sweden]. Instead the immigration authorities have evaluated every application on its own merits, trying to determine if an intimate relationship between a legal resident and her or his non-resident foreign partner (regardless of sexual orientation) is a genuine one or not. This practice is now codified in art. 4 of chapter 2 of the Aliens Act . . . .135

The Registered Partnership Act provides full spousal immigration rights to same-sex couples.136 In 2003, an act was passed regarding same-sex cohabitating couples who have not entered a registered partnership, affording them equal rights to other cohabitating couples.137

On March 10, 2003, "the Swedish Government announced that . . . its Embassies around the world [will] officiate at same sex unions, if the country concerned allows such unions."138

K. The Case of South Africa

South Africa is the only country on the African Continent to fully recognize same-sex marriages in substance and terminology.139 It has done this through a series of legislative enactments and judicial rulings, progressively expanding the rights of non-discrimination and equal protection to its gay and lesbian citizens.140 For example, South Africa was the first country in

138. Europe - Residency Requirements, supra note 43.
140. See id.
the world to contain explicit references in its constitution to non-discrimination based on "sexual orientation."141 Although the South African populace is not particularly supportive of gay rights, the national struggle against the apartheid regime has imbued its leaders with a strong commitment to non-discrimination and equal protection of the laws.142

Well before the grant of full marriage, the South African Constitutional Court ruled on December 2, 1999, that section 25(5) of the Aliens Control Act 96 of 1991, which did not permit immigration of same-sex partners, was unconstitutional.143 The Court found that section 25(5) reinforced harmful stereotypes of gays and lesbians relating to the rights of equality and dignity to this case.144 In a later case, the Court further stated that it was an invasion of gays' and lesbians' dignity to convey the message that gays and lesbians lack the inherent humanity to have their family lives in same-sex relationships respected or protected.145

The Immigration Act of 2002 provided that "the Department [of Home Affairs] shall issue a permanent residence permit to a foreigner who . . . is the spouse of a citizen or resident . . . ."146 It defined "spouse" as "a person who is party to a marriage, or a customary union, or to a permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support, and is proven by a prescribed affidavit substantiated by a notarial contract."147 Provisions in the Immigration Act of 2002 about obtaining permits for employment also extended equally to same-sex partners.148

Finally, in 2005, the Constitutional Court ruled that Parliament must implement same-sex marriage within one year, although that decision did not grant same-sex partners any more immigration rights than they previously had since they were already treated equally to heterosexual couples for immigration purposes under the law.149

141. Id.
142. See id.
143. Nat'l Coal. for Gay & Lesbian Equal. & Others v Minister of Home Affairs & Others 1999 (3) BCLR 280 (CC), 1999 SACLR LEXIS 13, at *38 (S. Afr.).
145. See Minister of Home Affairs & Another v Fourie & Others 2005 (3) BCLR 355 (CC), 2005 SACLR LEXIS 34, at *158 (S. Afr.).
147. Id. § 1(xxxxvi).
148. Id. § 27(a)(iv).
149. See Minister of Home Affairs & Another, 2005 SACLR LEXIS 34, at *121, *161.
IV. SAME-SEX IMMIGRATION IN A "FEDERAL" CONTEXT: THE CASE OF THE EUROPEAN UNION

The European Union ("EU") provides a particularly interesting case study in the treatment of same-sex partners since its "federal" structure is legally almost identical to that of the United States and presents the same issues regarding federal recognition of the rights of foreign spouses of U.S. citizens legally married under state law to live and work throughout the United States.

The legal doctrine of EU citizenship is of particular relevance to this comparative analysis. EU citizenship is analogous to the rights of privileges and immunity found in Article IV, Section 2 of the U.S. Constitution, and grants each citizen of any EU country the rights of European Citizenship, enabling that citizen to travel or work anywhere in the European Union. This "right to travel" and live and work anywhere in the EU operates almost identically to the U.S. legal doctrine of the "right to travel," granted to U.S. citizens through the Equal Protection Clause and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution.

EU law mirrors the U.S. federal legal system in four fundamental ways. First, EU law is supreme over individual countries' laws and even their constitutions. Second, the European Court of Justice conducts judicial review of national court decisions and legislation. Third, EU law has direct effect in individual European Union countries like federal legislation in the United States. Fourth, EU lawmaking bodies have implied powers to implement legislation suggested by, but not explicitly provided for, in the EU treaties, commonly referred to as the "European Constitution."

Because EU law recognizes the right of any citizen of an EU country to live and work anywhere in the European Union, any non-EU individual who legally marries a citizen in an EU country obtains the same rights of EU citizenship as any other EU citizen, including the right to live and work anywhere in the European Union.

151. Compare id., with U.S. Const. art. IV, § 2, and id. amend XIV.
154. Id.
The EU, however, has gone even further than simply recognizing the citizenship rights of non-EU individuals who have become EU citizens through marriage to a EU citizen. It has also adopted immigration laws for partners of EU citizens that permit foreign partners to live and work in countries that do not recognize same-sex marriage or civil unions. The European Union adopted a Directive—a kind of “federal” EU law—in 2004 that permits same-sex partners to immigrate to the state of his or her partner under specific guidelines. The Directive only applies when one partner is a citizen of a European Union member state, but it states that discrimination in granting immigration is strictly forbidden on the basis of sexual orientation. "By [April 30, 2006], all 25 Member States must ensure that domestic immigration laws have been revised in order to comply with the Directive."

V. CONCLUSION

The comparative analysis contained in this article permits a number of conclusions regarding the reasons for the widespread recognition of same-sex couple immigration rights in most industrialized democracies, and the non-recognition of such rights by the United States.

First, as an empirical matter, those countries that have recognized immigration rights for same-sex couples have also enjoyed a level of legal and political gender equality at least equal to, and in most cases, greater than that found in the United States. This is consistent with the comparative, anthropological, and historical research demonstrating a very high correlation between legal and political gender equality and legal equality for gays and lesbians.

Second, there does not appear to be a notable difference in approach between those countries sharing an Anglo-Saxon common law legal heritage and those countries sharing the more predominant civil law systems. There are examples of countries from both systems that recognize both full marriage equality in substance and terminology, and more limited marriage rights that include immigration rights.

Third, the role of religion appears to be a critical factor in the differing approaches of the United States and other industrialized democracies towards same-sex partner immigration. However, it is not the role of religion in isolation that is significant, but rather the interrelationship between religion and race. These joint, interrelated factors of religion and race will be discussed after some preliminary empirical observations about the role of religion itself in explaining the divergent approaches exhibited by the case studies herein.

The first empirical observation with respect to religion is that all of the countries discussed herein, with the exception of Israel, are predominantly Christian countries. The second empirical observation is that there is little correlation between a country’s legal approach to same-sex couple immigration and whether that country is Catholic or Protestant. The only countries to grant full marriage equality in substance and terminology in Europe are countries such as Spain, with a strong and longstanding Catholic tradition, Belgium, and the Netherlands, also with very sizable Catholic populations. Moreover, Quebec, a strongly Catholic Canadian province, was the first Canadian province to recognize civil unions for its gay and lesbian citizens; well before the granting of full marriage equality in predominantly Protestant Canada. On the other hand, the first countries in the world to grant civil unions to its gay and lesbian citizens were the predominantly Protestant countries of Scandinavia and Finland.

The critical difference in the approach of countries towards same-sex couple immigration, from a religious perspective, is the prominence of fundamentalist religious influence in the body politic. It is interesting to note, however, that Israel—with a very strong fundamentalist Jewish influence in its Parliament and government—is relatively progressive in its policies towards same-sex couple immigration for reasons that are more fully described in the Israel case study.

However, noting the influence of fundamentalist religious influence in the body politic only begs the deeper question of why the United States differs in that respect from other industrialized democracies. After accounting for all possible variables that could account for this difference, the answer appears to be the unique American history with race, and the involvement of some of its largest Christian denominations with that history. The only significant difference between the United States and its fellow industrialized democracies is the unique historical experience of the United States with over 200 years of slavery and almost 100 additional years of apartheid. No other variable distinguishes the United States so significantly from the other industrialized democracies. Australia and Canada also both had frontier histories and a history of forcefully subjugating an indigenous people. Every major Western European country has had a history of militarization and colonialism and some of the more progressive countries have had some of the
most brutal histories as colonizers. Almost all other socio-economic, political, cultural, and economic variables are largely similar among the United States and other industrialized democracies. Indeed, if one were to carve out those U.S. states that had institutionalized slavery and/or apartheid for almost 300 years, the United States would resemble the rest of the industrialized democracies with respect to its legal and political approach towards equal protection and non-discrimination rights for its gay and lesbian citizens. Some areas of this "non-slave state" United States would still be conservative, as are certain areas of all countries, but social attitudes and state legislation would be broadly similar to those of Europe, Canada, and Oceana.

The difference between the United States and other Western, industrialized countries, but what it shares with apartheid era South Africa, is the involvement of its largest Christian denominations with that history of slavery and apartheid. For example, the largest protestant denomination in the United States is the Southern Baptist Convention. The Convention was created through a split between southern and northern Baptists over the issue of slavery, and later over segregation. The northern Baptists ultimately formed the American Baptist Convention. The Southern Baptist Convention shares a history with the South African Dutch Reformed Church of using religion to justify the legal separation of the races. The areas of the United States where fundamentalist Christian theology is the strongest, with some significant exceptions, are those states that institutionalized slavery and apartheid.

Nevertheless, just because this correlation is most evident in those states that institutionalized slavery and apartheid does not mean that these attitudes did not affect other parts of the United States. For example, Mormonism, which is most predominant in Utah and other Western states that never had slavery, has historically evidenced strong opposition to non-discrimination based on race, gender, and sexual orientation. As late as 1978, persons of African descent were forbidden to participate as priests in the Mormon religion, even though priesthood is a status that is open to a far greater number of men in the Mormon faith than priesthood in other Christian denominations. It is no coincidence that both the Southern Baptist Convention and the Mormon religion also endorse strictly defined gender roles and eschew gender equality, which, as noted above, is very tightly correlated with opposition to legal rights for sexual minorities.

It could be argued that the religious experience of the United States with respect to race, gender equality, and sexual orientation may be unique to the

United States because the people that founded the United States had a pre-existing ascetic and fundamentalist theological outlook that was hostile to gender equality and homosexuality. The Puritans, for example, were notable for their narrow or “pure” theological views on a wide variety of issues, and for their harsh measures in dealing with those who disagreed with them. Their approach to theological dissent was evidenced by their forcible ejection of Roger Williams from Massachusetts Bay Colony, who subsequently founded the colony of Rhode Island as a haven for people of all faiths.\textsuperscript{161} However, even the ascetic Puritans ultimately evolved into Congregationalists, Presbyterians, and Baptists. Congregationalists and Presbyterians are currently considered mainstream Protestant faiths that tend to be relatively moderate on issues of gender equality, sexual orientation, and progressive on issues of race. Moreover, until the break between the southern and northern Baptists over slavery, the Baptist faith was not particularly associated with intolerance. Roger Williams, considered the founder of American Baptism, was himself a strong advocate of tolerance and amicable relations with Native-Americans,\textsuperscript{162} and northern Baptists are not currently considered notably immoderate on issues of gender equality and/or sexual orientation. It is thus difficult to argue that there was something inherent in the Baptist faith that created this linkage between the conservative views of the Southern Baptist Convention on race, gender, and sexual orientation. As is usually the case, theology followed the existing cultural and socio-political realities, rather than the other way around.

Moreover, the founders of the United States were predominantly Deists, the antecedents of modern day Unitarianism. Unitarianism is currently one of the most progressive religions in the world on matters of gender equality, race, and sexual orientation, again suggesting that there was nothing unique in the history of the United States, other than its history with slavery and apartheid, that can account for the emergence of large Christian sects that simultaneously supported discrimination based on race, gender, and sexual orientation.

It is beyond the scope of this article to explore the reasons for the correlations among support for gender, racial, and sexual orientation discrimination, but as an empirical matter, they appear to exist.

It is difficult to determine whether the unique history of the United States means that the progress made in otherwise similarly situated countries with respect to same-sex immigration has relevance for future developments

\textsuperscript{162} Id. at 535.
in the United States. It nevertheless, seems reasonable to conclude that the same inexorable forces that have led to legal equality for gays and lesbians in other countries will ultimately lead to similar legal equality in the United States. As noted in the case studies discussed above, the principal obstacle to such recognition of legal equality in the United States is the existence of powerful fundamentalist Christian groups with an unusual degree of political influence. However, those groups have themselves radically altered their own position on some of their most strongly held beliefs regarding discrimination. For example, the Southern Baptist Convention has apologized for its theological endorsement of slavery and apartheid, and the Mormon faith came to accept persons of African descent into the priesthood. More people were opposed to mixed race marriages in 1963 than are currently opposed to same-sex marriage. Moreover, same-sex marriage is a much greater step than simply recognizing the basic rights of a United States citizen to be united with their foreign same-sex partner.

Finally, the European Union provides an extremely useful example of how a federal legal system can accommodate the diverse views of its member states towards gays and lesbians, and yet still accommodate the rights of all of its citizens to immigration rights on an equal plane. Whereas in the United States, the federal government refuses to recognize state same-sex marriages for any federal purpose, the European Union permits any foreign partner of a European Union citizen to immigrate to the European Union and enjoy all the rights of European Union citizenship, even though same-sex couples do not otherwise enjoy the benefits of marriage in all EU states.

166. See *Bell*, supra note 157, at 2.
“GIVE ME YOUR GAYS, YOUR LESBIANS, AND YOUR VICTIMS OF GENDER VIOLENCE, YEARNING TO BREATHE FREE OF SEXUAL PERSECUTION...”: THE NEW GROUNDS FOR GRANTS OF ASYLUM

LEONARD BIRDSONG*

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I. INTRODUCTION

“[T]here have been great advances in [our immigration] laws [that protect] lesbian, gay, bisexual, and transgender (LGBT) immigrants,”¹ as well

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as laws "in regard to human rights violations inflicted on women." 2 When the United States of America came into being with the signing of the Declaration of Independence in 1776, there were no immigration laws. 3 There were no such laws for almost 100 years. 4 In 1875, the first immigration law was passed by Congress and Americans have since been debating who should be allowed to legally immigrate to the United States and who should be excluded. 5

One of our earliest immigration laws passed by "Congress excluded lesbian and gay[s]" from legal immigration channels. 6 The law, based on a belief that homosexuality was a medical condition, existed on the books until 1990. 7 "Also in 1990, the [Board of Immigration Appeals] (BIA) affirmed an immigration judge's [(IJ's)] decision to withhold [deportation] of a gay Cuban marielito in [the case of] In re Toboso-Alfonso." 8 This "was the first known instance in U.S. immigration law where a homosexual was cast as a member of a particular social group, namely that of Cuban gays, and permitted to successfully allege persecution on that basis so as to conform with the statutory definition" found in the law. 9 "Fidel Armando Tobosco [sic] said that because he was gay, he was sentenced to 60 days in a forced labor camp . . . ." 10

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4. Id. at 124–25.
5. Id. at 125. The "1875 statute barring convicts and prostitutes was quickly followed by the adoption of the first general immigration statute in 1882. The 1882 Act imposed a head tax of 50 cents and excluded idiots, lunatics, convicts, and persons likely to become a public charge." Id. This Act excluded the Chinese from immigrating to the U.S. Id.
7. Id. at 280. "The Immigration Act of 1917 was the first U.S. law to exclude lesbian and gay aliens from entry into the United States. Congress excluded lesbians and gay men because of the medical and psychiatric communities' belief that homosexuality was a disease." Id. at 279. "Congress ended the general exclusion of lesbian and gay aliens in 1990, [which has allowed] refugees to escape . . . sexual orientation-based persecution in their home countries." Id. at 280. "The statute simply eliminated 'sexual deviants' from its list of classes of excludable aliens." Id. at 280 n.5.
Later, at the time of the Mariel boatlift, he was threatened by the Cuban government “that if he did not leave [Cuba] immediately he would have to serve four years in . . . [prison] for being a homosexual.”11 “The Immigration and Naturalization Service (INS) argued that homosexuality should not be considered a particular social group . . . .”12 This argument was rejected by the BIA.13 Four years later, then “Attorney General Janet Reno issued an order declaring that Tobosco-Alfonso [sic] was to be considered precedent in all proceedings involving the ‘same issue or issues.’”14

“[I]n regard to human rights violations inflicted on women, courts have recognized new categories of ‘social groups,’ one of the grounds on which asylum may be granted or deportation withheld. The consequence of these decisions has been that more women may be granted [asylum] in the United States.”15 The seminal case in this area is In re Fauziya Kasinga.16 In Kasinga, the BIA reversed an immigration court’s denial of asylum for a young Togolese woman who fled her homeland to escape female genital mutilation (FGM).17 In its opinion the BIA held:

“the practice of female genital mutilation, which results in permanent disfigurement and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution.” The court also found that “young women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a ‘particular social group’ within . . . the Immigration and Nationality Act.”18

As a result of this decision, it has become possible, in very particular cases, that women fearing the brutality of genital mutilation in their home country may apply for and “be granted asylum in the United States based on

11. Id. at 342–43.
12. Id. at 343.
13. Id.
14. Id.
15. Farrone, supra note 2, at 661.
17. Id. at 368. See also Irena Lieberman, Women and Girls Facing Gender-Based Violence and Asylum Jurisprudence, Hum. RTS., Summer 2002, at 9–10.
[their very] reasonable fear of persecution." The BIA immediately designated the decision as precedent to be followed by all 179 immigration courts in the country.

The expansion of grants of political asylum, based on sexual orientation and gender based violence, is a welcomed trend in our law because we, as a society, have come to realize that basic human rights require justice even for those who are persecuted in their country of origin on account of the their sexual identity, their sexual conduct, or as a result of gender violence. Asylum seeks to uphold individual human dignity in the face of persecution in one's country of origin. This is a welcomed expansion of our basic and traditional immigration laws. Our basic immigration system is based on a complicated set of quantitative and qualitative laws passed by Congress over the years regulating and limiting legal immigration to our country. Our current immigration law was passed by Congress in the Immigration and Nationality Act (INA), as amended, first passed in 1952, and is codified in the United States Code. An integral part of our immigration law is the implementation of rules of human rights allowing those prosecuted in their homeland to seek protection in the United States. "Asylum and human rights doctrines are intertwined in that how a country defines persecution reflects its beliefs about what constitutes human rights violations."

Harassment and abuse of LGBT persons, as well as persecution of women who are victims of gender violence, have become "increasingly accepted as grounds for legal asylum in the United States." This is so despite the fact that the country is experiencing a period "of conservative judicial activism, fear [of] HIV/AIDS, ... and increased scrutiny" of all who wish to legally enter the United States. For persecuted LGBT persons and women

19. Id. at 259-60.
20. Id. at 260.
22. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952). See also DAVID WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 15 (5th ed. 2005). "The Immigration and Nationality Act of 1952 (INA) consolidated previous immigration laws into one coordinated statute. As amended, the 1952 Act provides the foundation for immigration law in effect today." WEISSBRODT & DANIELSON, supra, at 15. The 1952 Act was passed by Congress overriding President Truman's veto. Id.
24. Russ, supra note 21, at 46.
26. Id.
subjected to persecution because of their gender, such asylum protection represents recognition of their basic rights as human beings.  

This article is written to analyze the myriad of problems in obtaining justice in our asylum system with respect to the grants of asylum on the basis of sexual orientation and gender violence. It is also written to expose the need for better-trained and more sensitive immigration judges, the need for more consistency in defining and interpreting our asylum laws, and the need for the Department of Homeland Security to formulate policies that will guarantee uniformly just results for those escaping persecution. Part II will briefly explain the history of how asylum became a part of United States law and discuss immigration court proceedings, appeal, and review. This section will also provide up-to-date statistical information concerning grants of asylum. Part III of this article will discuss the difficulty of adjudicating asylum cases in a uniform way because of the lack of definitions of certain statutory language, such as the term "persecution." It will explore splits in the United States Circuit Courts, which interpret asylum law and discuss why there is little precedent inherent in the system of asylum.

Part IV will discuss two recent asylum decisions concerning sexual orientation and gender violence, which will demonstrate the difficulties and biases in our system of asylum. The two cases are out of the Ninth Circuit. The first, Ali v. Ashcroft, involved a Somali woman whose brother-in-law was shot and killed in her home while she was being raped by members of a militia group of a rival clan who opposed Ali's political beliefs. She and her family were forced to flee Somalia. The court upheld her claim of asylum finding that she was persecuted on account of "her political opinion and . . . her membership in a particular social group." The second case, Karouni v. Gonzales, involved an "outed" gay, Shi'te Muslim man from Lebanon, afflicted with AIDS, who was able to reverse the lower court's finding that his fear of future persecution was not well-founded. Analysis will demonstrate, because of the way asylum claims are adjudicated, the outcome of both these cases may have been different if they had been brought in circuits other than the Ninth Circuit Court of Appeals. In some circuits, Ms.

27. See GUY S. GOODWIN-GILL & JANE M. ADAM, THE REFUGEE IN INTERNATIONAL LAW 564 (3d ed. 2007). The 1948 Universal Declaration of Human Rights at Article 14 recognizes that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Id.
28. 394 F.3d 780 (9th Cir. 2005).
29. Id. at 782–83.
30. Id. at 783.
31. Id. at 787.
32. 399 F.3d 1163 (9th Cir. 2005).
33. See id. at 1166–69, 1179.
Ali's rape may have been determined to be a case of rape and burglary not amounting to persecution under the statutory requirements of our asylum system. Whereas in other circuits, Mr. Karouni may have been found not "gay" enough to have received a grant of asylum. Part V of this article concludes that there is a need to harmonize the splits in circuit interpretation of asylum terms and concepts. Also, the BIA should publish more of its cases and designate them for precedential treatment each year in order to gain more uniform adjudication by immigration judges. The author suggests that the American Law Institute and the American Bar Association work together to codify asylum law regulations that can be uniformly interpreted by immigration judges, practitioners, and law teachers.

II. BACKGROUND ON ASYLUM

A. History

International protection efforts and measures for refugees were first initiated after World War II by the creation of the UN Convention of 1951. These protections were later expanded in the Protocol Relating to Refugees passed in 1967. Under the 1951 Convention, a "refugee" is:

[A]ny person who . . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.

The 1951 Convention provided protection for World War II refugees. Future refugees were included in the 1967 Protocol. The United States

36. 1951 Convention, supra note 34, art. 1A(2).
38. See 1967 Protocol, supra note 35, pmbl. See also Morgan, supra note 37, at 139.
acceded to the Protocol in 1968, but Congress did not enact its own Refugee Act until 1980. In that year Congress adopted the 1967 Protocol as part of the immigration law at section 1101(a)(42) of the INA. This provision provides "that an applicant for asylum: 1) must have 'a well founded fear of persecution;' 2) the fear must be based on past persecution or the risk of future persecution; [and] 3) the persecution must be 'on account of race, religion, nationality, membership in a particular social group, or political opinion.'"

B. Eligibility for Asylum

It should be understood that the concept of asylum provides a legal avenue for both documented and undocumented aliens to obtain relief from persecution in their home country. Under our law such persecution must be on account of one of the protected grounds mentioned in the statute: "race, religion, nationality, political opinion, [or] membership in a 'particular social group.'" As a result not all those fleeing some form of hardship in their home countries are eligible for asylum. Their claim must be on account of one of the statutory grounds.

"An asylum request is automatically considered an application for an alternat[e] claim [of relief known as] withholding of removal." Both forms

42. Morgan, supra note 37, at 140 (quoting 8 U.S.C. § 1101(a)(42)). An alien will be considered a refugee if she has suffered persecution in the past on account of one of the statutory grounds or if she can show an objectively reasonable fear of such persecution in the future. See INS v. Cardoza-Fonseca, 480 U.S. 421, 425 (1987). If the alien establishes past persecution, moreover, a rebuttable presumption arises in favor of granting asylum. Draganova v. INS, 82 F.3d 716, 722 (7th Cir. 1996). Yet that presumption may be overcome by evidence suggesting that conditions in the alien's home country have changed to such an extent that she no longer is in danger of persecution there. Id. See also 8 C.F.R. § 208.16(b)(3)(ii) (2007).
44. Id. (citing 8 U.S.C. § 1101(a)(42)). This provision of the law is found in § 1231 of the United States Code and was formerly known as withholding of deportation. 8 U.S.C. § 1231(b)(3)(A); April E. Schwendler, In the Matter of Pearson: Partisan Politics and Political Pressure Contravene Congressional Intent, 10 PACE INT'L L. REV. 607, 613 n.20 (1998). The amendments to the Immigration and Naturalization Act of 1952 in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act replaced former hearings known as deportation
of relief require the claimant to demonstrate a certain quantum of persecution that the individual suffered in his or her home country or would suffer if returned there, and both require a “nexus” between the persecution and one of the protected grounds. 45

“Asylum and withholding of removal appear nearly identical but have important differences . . .” 46 “[A]sylum is subject to” the discretion of the Attorney General of the United States. 47 “[W]ithholding of removal, [if] proven, is a mandatory form of relief.” 48 A person granted asylum may be eligible for permanent residency in the United States after one year as an asylee. 49 “[M]ost litigants prefer asylum.” 50

Withholding of removal guarantees only that the person will not be forcibly returned to his or her country of origin and does not preclude the possibility of being removed to a third country. 51 “The applicable standard of proof is also higher [in a] withholding of removal” than in an asylum grant. 52 In order to obtain withholding or removal, the claimant “must show a clear probability of persecution.” 53 The showing for asylum is only a “well-founded fear of persecution.” 54

Applications for asylum are termed either “affirmative” applications or “defensive” applications. Applicants who are not currently in removal proceedings may file an affirmative application by mailing a Form I-589 to a regional USCIS service center, under the auspices of the Department of Homeland Security. 55 A specialized corps of full time professional asylum officers receive the applications and interview the applicants. 56 “Asylum


46. Id. at 241.
47. Id.
48. Id. See also 8 U.S.C. § 1231(b)(3)(A).
51. WEISSBRODT & DANIELSON, supra note 22, at 328.
52. Id.
53. Id. at 335.
54. Id.
55. This is the abbreviation for the United States “Bureau of Citizenship and Immigration Services, Department of Homeland Security. Created in 2003, this bureau houses the principle services and adjudications functions inherited from the [INS], including asylum officers and the refugee corps.” DAVID A. MARTIN ET AL., FORCED MIGRATION LAW AND POLICY xi–xii (2007). It is sometimes referred to as CIS. Id.
56. Id. at 79.
57. Id.
officers grant [asylum in] meritorious cases, which initially ran between 15 and 30[%] . . . but in recent years have . . . exceeded 40%. They do not deny the other cases; instead, asylum officers refer them to immigration court" placing the cases in removal proceedings.  

C. **Immigration Court Proceedings, Appeal, and Review**

IJ’s provide the initial evaluation of all defensive applications for asylum and withholding, and they provide a second review of affirmative applications referred by asylum officers. This allows the case to be heard in “the more formal setting of the immigration court” where witnesses may be examined and cross examined by the alien’s counsel and the Department of Homeland Security’s (DHS) counsel. If removal proceedings are already underway, the applicant can apply for asylum or withholding only by presenting a defensive application that is heard exclusively by the IJ.  

At the hearing, the claimant must present evidence to avoid removal. The DHS will present evidence and argument in support of its decision to refuse asylum. Alan G. Bennett, an observer of IJ court procedures, reminds us with respect to such proceedings:

Neither state nor federal rules of evidence apply in immigration proceedings. However, evidence presented must be relevant and conform to requirements of constitutional due process.

If the [claimant] persuades the [IJ] that she meets the statute’s asylum requirements, the judge [may] grant asylum for an indefinite time . . . . In addition, the [claimant’s] immediate family members who are still abroad may join her in the United States . . . .

If, on the other hand, the [IJ denies] the asylum request, she may appeal her case to the Board of Immigration Appeals.

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58. *Id.*
59. **MARTIN ET AL., supra** note 55, at 80.
60. *Id.* at 80. ICE—Bureau of Immigration and Customs Enforcement, Department of Homeland Security. See *id.* at x. “Created in 2003, this bureau houses interior enforcement functions transferred from the former [INS], including investigations, detention and removal, [as well as] the trial attorneys who represent the government in immigration court.” *Id.*
61. *Id.* at 80. Typically the alien makes known at the master calendar hearing—the first appearance in immigration court—“her wish to seek asylum [or withholding] as a form of relief from removal, and the judge then grants a specified period of time for [the] completion of the [Form] I-589, to be filed with the immigration court.” **MARTIN ET AL., supra** note 55, at 80.
62. *See* Bennett, *supra* note 6, at 284.
63. *Id.*
Only one BIA exists and it reviews all appeals from immigration courts throughout the United States.\textsuperscript{64}

The BIA is "an administrative appeals tribunal that is part of the Executive Office for Immigration Review in the Department of Justice (EOIR). The [BIA] has never been recognized by statute; it is entirely a creature of the Attorney General's regulations, and the Attorney General appoints its members."\textsuperscript{65} "The BIA has several options [with respect to the appeals]: [i]t can reject the [claim] on appeal, [it may] remand a case to the [IJ] with instructions to follow [an] appropriate course of action, or [it may] grant asylum directly."\textsuperscript{66} Although "[t]he BIA hands down a large volume of appellate decisions each [year,] [o]nly a small fraction are designated as precedent decisions for inclusions in the official reports."\textsuperscript{67}

If the BIA rules against the claim, judicial review may be available to the claimant by bringing an appeal "to the Federal circuit court of appeals that has jurisdiction over the area from which the case originated."\textsuperscript{68} The circuits have a number of options with respect to adjudicating the case if an appeal is taken.\textsuperscript{69} In some cases, the case may be remanded back to the BIA with orders to rule in accord with the circuit's findings.\textsuperscript{70} The Court may adopt a different rule of the case.\textsuperscript{71} "[I]f a circuit court of appeals adopts a different rule than the BIA, the new rule will be applied within that court's circuit in future cases. As a result, circuit splits [have arisen] because of inconsistent rulings among the circuit courts regarding the same legal issue."\textsuperscript{72}

D. \textit{The Statistics on Grants of Asylum}

"The [USCIS] \ldots does not break down its general asylum statistics according to the basis of the claim, [thus,] there are no official statistics available to indicate the number of sexual orientation [and gender violence] claims filed or approved."\textsuperscript{73} However, USCIS makes available other infor-
mation such as "the characteristics of asylum seekers." The trend reveals that grants of asylum are on an upswing.


The total number of persons [who were] granted asylum in the United States increased from 25,160 in 2005 to 26,113 in 2006. The number of persons who were granted asylum affirmatively through USCIS decreased from 13,423 in 2005 to 12,873 in 2006. Conversely, the number of persons granted asylum defensively through an [i]mmigration [c]ourt increased 13 percent from 11,737 in 2005 to 13,240 in 2006. The leading countries of origin for persons granted asylum in 2006 were China (21 percent), Haiti (12 percent), Colombia (11 percent), and Venezuela (5.2 percent). These [four] countries accounted for the origin of nearly 50 percent of the asylees.

74. Id. at 142.

75. See KELLY JEFFEYRS, U.S. DEP’T OF HOMELAND SEC., REFUGEES AND ASYLEES: 2006 5 (2007), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/Refugee_AsyileeSec508Compliant.pdf. On November 15, 2007, this author had the opportunity to have a telephonic interview with Attorney Victoria Neilson, who is the Legal Director of Immigration Equality. "Immigration Equality is a national organization" based in New York City "that works to end discrimination" under U.S. immigration laws for lesbian, gay, bisexual, and transgender immigrants and those immigrants who may be HIV positive, and "to help obtain asylum for those who are] persecuted in their home country based on their sexual orientation." See generally Immigration Equality, ImEq Mission, http://www.immigrationequality.org/template.php?pageid=8 (last visited Apr. 16, 2008). Attorney Neilson maintains that her organization has seen an increase of asylum claims based on sexual orientation over the years since the organization was founded in 1994. Telephone Interview with Victoria Neilson, Legal Director, Immigration Equality, in New York City, N.Y. (Nov. 15, 2007) [hereinafter Neilson Interview]. She further advised that in the last year, Immigration Equality has handled approximately seventy-five GLBT asylum cases and has had a very high success rate in winning asylum. Id. She also advised that two-thirds of the cases won were affirmatively filed cases. Id. One-third of the cases won were by a defensive filing while the claimants were in removal proceedings. Id. She opined that their success rate in gaining asylum resulted because they do not accept every GLBT case that comes to them. Id. Instead, they accept only the cases they believe likely will merit a grant of asylum. Neilson Interview, supra. It was also her opinion that agencies such as Immigration Equality have attorneys who prepare their affirmatively filed cases very well with ample documentation. Id. Such agency attorneys are well prepared for trials in the defensively filed cases. Id. It is her observation that IJs love to see such level of preparation and trial skill. Id.

76. JEFFEYRS, supra note 75, at 5. The largest percentages of individuals granted asylum [in 2006] affirmatively were living in Florida (41 percent) and California (24 percent). Sixty-five percent of affirmative asylees were located in one of these two states. Other major . . . states included New York (10 percent),
Demographic data for 2006 only includes that of affirmative asylees. 77 "Of the 12,873 persons granted asylum affirmatively . . . 80 percent were between the ages of 18 and 54. Fifteen percent were under 18 years of age, and individuals aged 55 or over accounted for less than 5 percent . . . [48] percent were married and 48 percent were single."78

"In 2006, 53 percent of affirmative asylees were male."79 "According to 2003 statistics, male applicants filed sixty-two percent of . . . new asylum claims."80 This indicates that more women appear to have won asylum claims in the United States if they received 47% of the affirmative applications in 2006.81 Nevertheless, "[t]he lack of a [specific] data breakdown" for claims of asylum for gender based violence makes it impossible to estimate the number of women who apply for asylum on [this] basis; however, it is likely that male applicants outnumber [women] . . . by a considerable margin. The fact that . . . landmark cases in the area of sexual orientation asylum law [mostly] deal with male applicants appears to bolster this assertion.82

"[I]t is likely that a large proportion of sexual orientation” and gender violence grants of asylum were to people of color.83 The statistics indicate that in 2006, 21.3% of the asylum claims were granted to people from China, approximately 11.5% of such claims were awarded to Haitians, 3% went to Ethiopians, 2.8% to Indonesians, and 2.2% to people from Cameroon.84

III. PROBLEMS IN ADJUDICATIONS

A. Persecution

Problems and inconsistencies prevail in asylum adjudications for a number of reasons, including lack of definitions for certain statutory words. "Under both asylum and withholding of deportation, the [claimant] must

Maryland (4.1 percent), Washington (2.1 percent), Virginia (1.9 percent), and Georgia (1.5 percent).

Id. at 6.

77. Id. at 5.
78. Id.
79. Id.
80. Morgan, supra note 37, at 142.
81. See JEFFERYS, supra note 75, at 5.
82. Morgan, supra note 37, at 142-43.
83. Id. at 142.
84. JEFFERYS, supra note 75, at 4.
show . . . that she [has] been persecuted” in the past or will be persecuted in the future if forced to return to the country of origin. Unfortunately, the statutes do not offer a definition of “persecution.” The Ninth Circuit has utilized a very broad definition of persecution as: ‘the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.” The First Circuit has held that a brief detention on several occasions did not rise to the level of persecution. Rather, persecution ‘encompasses more than threats to life or freedom, but less than mere harassment or annoyance.’

“The Third Circuit . . . limits persecution to ‘threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom.” The Ninth Circuit reminds us “that persecution must be inflicted either by the government or by groups that the national government was unwilling or unable to control.” “[W]here the source of the [persecution] is personal hostility, it is . . . considered outside [of] the realm of ‘persecution,’ [for statutory purposes] and asylum is denied.”

This limitation on “persecution may be particularly disadvantageous to women” who are victims of gender violence in cultures where conditions for many women “are ‘generally harsh,’ and their basic rights are likely to be violated.” Such was the situation in the aforementioned case of Ali v. Ashcroft, the Somali woman who was raped by militia men from a rival clan who also shot and killed her brother in law. The IJ denied her request for asylum on the ground that such persecution was not a result of her political opinion, but was instead a routine rape and burglary in a lawless country that has no functioning civil government.

Analysis of persecution requires the IJ’s, the BIA, and the courts to decide the motive of the persecutor. The United States Supreme Court held in

85. Farrone, supra note 2, at 672. See also 8 C.F.R. § 1208.13 (2007).
87. Farrone, supra note 2, at 672 (quoting Desir v. Ilchert, 840 F.2d 723, 727 (9th Cir. 1988)).
88. Id. at 672–73 (quoting Fesseha v. Ashcroft, 333 F.3d 13, 18 (1st Cir. 2003)).
89. Id. at 673 (quoting Li Wu Lin v. INS, 238 F.3d 239, 244 (3d Cir. 2001)). In Fatin v. INS, Fatin was an American educated Iranian woman who feared persecution if she was deported to Iran because she did not want to have to cover herself in a chador in order to go out in public. 12 F.3d 1233, 1235–36 (3d Cir. 1993).
90. Farrone, supra note 2, at 673 (citing McMullen v. INS, 658 F.2d 1312, 1315 (9th Cir. 1981)).
91. Id. (citing Zayas-Marini v. INS, 785 F.2d 801, 805–06 (9th Cir. 1986)).
92. Id.
94. Id. at 785–86.
INS v. Elias-Zacarias\(^\text{95}\) that a claimant is not required to provide direct proof of the persecutor's motivations, but a claimant "must [produce] some evidence of [the persecutors' motive whether] direct or circumstantial."\(^\text{96}\) Yet, the question remains, does persecution require a "punitive intent"? Circuit courts have been split on this question of "punitive intent." It is a very important question when analyzing claims of asylum by sexual minorities. The Ninth Circuit has decided that a broader standard than mere intent to punish should be utilized in sexual minority cases.\(^\text{97}\)

1. Punitive Intent: The Ninth Circuit

"In 1992, thirty-five-year-old Alla Pitcherskaia, a Russian national, claimed asylum in [the] United States" on the ground that she was persecuted in Russia because she was a lesbian.\(^\text{98}\) In her trial, she recounted that she had been arrested several times for such things as "failing to procure required government permits for a gay-rights protest."\(^\text{99}\) She suffered further harassment "including forced psychiatric counseling to 'cure' her . . . homosexuality."\(^\text{100}\) Her claim for asylum was denied.\(^\text{101}\) On appeal to the BIA, her claim was again denied on the ground that "even if her testimony is essentially credible," she had failed to meet her burden in establishing eligibility for relief under . . . the Act. The BIA majority concluded that Pitcherskaia had not been persecuted because, although she had been subjected to involuntary psychiatric treatments, the militia and psychiatric institutions intended to "cure" her, not to punish her, and thus their actions did not constitute "persecution" within the meaning of the Act.\(^\text{102}\)

"The issue on appeal [to the Ninth Circuit] was whether the [INA] requires an applicant to prove that the persecutor 'harbored a subjective intent to harm or punish when persecuting the victim.'"\(^\text{103}\) The court found the BIA's interpretation of persecution "to be 'arbitrary, capricious, [and] mani-
festly contrary to the statute, 'which allowed] the court [to] overrule [the BIA's] definition and impose another.'

[T]he court noted that neither the Supreme Court nor the Ninth Circuit has ever required an asylum applicant to show that her persecutor had the intention of inflicting harm or punishment. The court found that the term 'punishment' implied that the perpetrator believed the victim did some wrong or committed a crime. As a result, the perpetrator . . . took action in retribution. Persecution, on the other hand, only required that the perpetrator caused the victim suffering or harm. Although many asylum cases involved situations where the persecutor had a subjective intent to punish, the court concluded that punitive intent was not required in order to establish persecution. In clarifying th[e] new legal standard, the court stated that the definition of persecution is objective.

The court reversed the BIA and remanded the case "to the BIA for reconsideration [in light of the] opinion." 106

2. Punitive Intent: The Fifth Circuit

Although the Ninth Circuit's definition of persecution appears reasonable, "disagreement[s] exist[ ] among the Circuits regarding [the] legal issue." 107 In Pitcherskaia, "the Ninth Circuit recognize[d] persecution as the infliction of suffering or harm in a way regarded . . . offensive to a reasonable person, [but] the Fifth Circuit finds persecution only when the perpetrator acts with . . . intent to punish the victim." 108 In defining its own standard, the Ninth Circuit, in Pitcherskaia, expressly rejected the punitive intent requirement that the Fifth Circuit applied in Faddoul v. INS. 109

Joseph Faddoul, a thirty-three year old man of Palestinian ancestry who was born in and raised in Saudi Arabia, "alleged that he was persecuted by the Saudi Arabian practice of jus sanguinis, granting citizenship rights only to residents of Saudi Arabian ancestry." 110 He alleged further "that as a non-citizen living in Saudi Arabia he would be unable to own property or busi-

104. Id. at 300–01. (quoting Pitcherskaia, 118 F.3d at 646).
105. Id. at 301 (citing Pitcherskaia, 118 F.3d at 646–48).
106. Pitcherskaia, 118 F.3d at 648.
107. Bennett, supra note 6, at 303.
108. Id. (citing Pitcherskaia, 118 F.3d at 648 n.9; Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994)).
109. Pitcherskaia, 118 F.3d at 648 n.9. See also Faddoul, 37 F.3d at 188.
110. Saxena, supra note 10, at 348 (citing Faddoul, 37 F.3d at 188).
nesses or attend” university and as a result this constituted persecution.111 The Fifth Circuit affirmed the BIA’s denial of... Faddoul’s asylum [claim] and held that persecution required both a showing of the infliction of harm and intent to punish on one of the five protected... grounds” set out in the statute.112 In Faddoul, the court noted that he “receive[d] the same rights and [was] subject to the same [discrimination] as a Saudi-born Egyptian.”113 The court found no evidence that Faddoul had ever been “arrested, detained, interrogated, or... harmed” because of his ancestry.114 This distinction in definitions of persecution may be especially important to sexual minorities. In many countries, LGBT persons “may be abused because of their sexuality, [yet] the specific intent to punish is not always present, as in Pitcherskaia.”115

3. Punitive Intent: The Seventh Circuit

The Seventh Circuit has adopted a position [that may lie between] the Fifth and Ninth Circuits. In Sivaainkaran v. INS,116 the court ruled that an asylum [claimant] could demonstrate persecution by a showing of either the persecutor’s motivation to punish or, more generally, the infliction of harm for one of the five protected... grounds [of the statute].... The specific use of the term “punishment” suggests that, for the second requirement, “infliction of harm,” punitive intent is not required.... The Seventh Circuit’s definition comes from a 1970 case in the Sixth Circuit, a jurisdiction that has yet to address the question of punitive intent and uses the Webster’s Dictionary definition of persecution.117

111. Id. (citing Faddoul, 37 F.3d at 187).
112. Id. (citing Faddoul, 37 F.3d at 188).
113. Faddoul, 37 F.3d at 189.
114. Id. at 188.
115. Saxena, supra note 10, at 348–49. See Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).
116. 972 F.2d 161 (7th Cir. 1992).
117. Saxena, supra note 10, at 349. “‘Persecution’ is not defined in the Act, but we have described it as ‘punishment’ or ‘the infliction of harm’ for political, religious, or other reasons that are offensive.” Sivaainkaran, 972 F.2d at 164 n.2.

No doubt ‘persecution’ is too strong a word to be satisfied by proof of the likelihood of minor disadvantage or trivial inconvenience. But there is nothing to indicate that Congress intended section 243(h) to encompass any less than the word ‘persecution’ ordinarily conveys—the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive. Berdo v. INS, 432 F.2d 824, 846 (6th Cir. 1970).
"Future consequences of decisions such as [the one to reverse Pitcherskaia’s BIA denial of asylum] must be taken into account."

Nations have human rights laws to protect their citizens as well as the citizens of other nations. If people were able to [circumvent] these laws by simply stating that they were “curing” someone to correct what they saw as a problem, [such] laws would be totally useless. . . . If nations [were] allowed to torture their own people to “cure” sexual orientation, it is impossible to know where the line will be drawn. . . . [T]he inclusion of a punishment requirement in the determination of whether [there should be a grant of] asylum based on persecution [should] not [be] feasible [in all circuits].

B. Lack of Precedent and Published Opinions

Very few IJ court decisions are published each year. As a result of the lack of published opinions, it is difficult to determine or analyze whether important precedents have been established in the system. The “decisions based on sexual orientation [and gender based violence against women] at the Board of Immigration Appeals, which does publish a significant number of decisions, indicates that [the] decisions in the United States display significant variation . . . .”

Both the claimant and the government can appeal an IJ’s trial decision to the BIA. “The Attorney General is authorized to assign as precedent or overrule any decision made at the BIA level.” The claimant can then appeal directly to the relevant federal circuit court, whose decision will be binding on the BIA in that circuit.

Stuart Grider, another commentator on Immigration Court and BIA proceedings advises:

The EOIR is authorized to publish its decisions selectively and thereby establish precedential value for individual BIA level rulings at its discretion. Few BIA decisions are released; one scholar has reported that only about fifty of the four thousand decisions made each year by the BIA are actually published. [A] vast majority of these published cases are decisions

119. Id.
120. Swink, supra note 40, at 263.
122. Id. (citing 8 C.F.R. § 3.1(h) (1992)).
123. Id.
where asylum is denied, which creates a system in which it is nearly impossible for the [claimant], or the immigration judge, to discern clear standards necessary to establish a successful asylum claim. In addition, the few evidentiary and other standards that have been established clearly by published precedent or recent revisions to the administrative code are [often] ignored by immigration judges in favor of outdated or overturned standards. [Since] the vast majority of [asylum] cases are not appealed, outdated procedures persist and dictate the outcome of most cases. [This leaves the local IJ] with broad discretion [but] very little guidance regarding the exercise of that discretion. 124

Hence, often justice will not prevail in many cases, particularly cases involving sexual minorities and victims of gender based violence.

124. Id. See, e.g., Swink, supra note 40, at 264–65. Swink discusses an unpublished IJ opinion in his possession that gave a “detailed analysis [of] the intersection of gender and sexual orientation in Peru.” Swink, supra note 40, at 265. The case was heard by an IJ in San Francisco, and involved an asylum claim by a lesbian woman from Peru. Id. at 264. In this case, the [claimant] had not come out as a lesbian while in Peru, but had done so after developing a relationship with another woman while visiting the United States. The Immigration Judge (IJ) described a “strong level of social opprobrium against homosexuals in Peru, as well as a certain level of violence.” The IJ noted that “while homosexuality is legal in Peru,” homosexuals are excluded from certain areas of employment and may be fired if their sexual orientation is revealed. This was the case for 117 foreign diplomats relieved of their positions by former President Alberto Fujimori, who also “referred to homosexuality as a type of ‘subversion’ that the state needed to abolish.” The [IJ] specifically noted the significance of such anti-gay rhetoric from Peru’s highest elected official with regard to respondent’s prospects for state protection: “President Fujimori’s negative words about homosexuals represented the Peruvian government’s antipathy for homosexuals and the lack of protection Respondent can expect if she suffers persecution.”

Id. Swink opines that:

[the] decision [in this case] is notable for its comprehensive assessment of the social situation of homosexuals, as a class, within Peru. After describing the hostile economic and political climate, the [IJ] went on to discuss the centrality of the Catholic Church in the Peruvian Constitution and the significance of religious antipathy towards gays as it relates to the individual asylum seeker. Specifically, the court noted that the asylum seeker in this case was “a devout Catholic” who regularly attended church while growing up and with her partner while in the United States. The court also discussed other forms of persecution to which homosexuals in Peru have been subject, most notably forced sterilization, violent raids on nightclubs, and uninvestigated attacks by a gang known as “The Faggillers.”

Id. at 264–65. Although it is unclear whether there was a grant of asylum or withholding of removal, Swink is complimentary of the IJ in this case, because he or she wrote such a “nuanced and detail-oriented analysis” of the facts and country conditions in the analysis of this case. Id. at 264.
C. Social Group

Among the problems in adjudicating asylum cases, "has been the shifting scope of the 'particular social group' standard: in order to be eligible for asylum, refugees must belong to a particular social group if they do not qualify under" the other protected categories "of race, religion, nationality . . . or political opinion." 125 We know that in 1994, the Attorney General designated the Toboso-Alfonso case as precedent for the proposition that homosexuals, who had been persecuted in their country of origin, could be recognized "as a particular social group . . . in all proceedings involving [issues of persecution involving] the 'same issue or issues.'"126

Until 2001, there had been "two seemingly conflicting standards for defining a 'particular social group.'"127 The first was the standard which was derived from the BIA in its 1985 case of In re Acosta.128 In Acosta, the BIA upheld the IJ's denial of asylum to a thirty-six year old man from El Salvador who was in deportation proceedings.129 Among his claims for asylum was the proposition that he was a member of "a particular social group" of young taxi drivers, in the capital city of San Salvador, in the taxi cooperative known as COTAXI, who feared persecution at the hands of guerrillas who wanted to disrupt the public transportation system of the country.130 The BIA held that:

"[P]articular social group" . . . mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship, . . . or in some circumstances it might be a shared past experience such as former military leadership or land ownership.131

127. Recent Case, supra note 125, at 2571.
130. Id. at 216–17, 232.
131. Id. at 233.
Acosta’s claim for asylum on this ground was denied because his membership in a taxi cooperative was not an immutable trait.\textsuperscript{132} The court indicated that he could leave the cooperative, change jobs, and move to another part of the country, and he would not be a possible target of guerilla persecution.\textsuperscript{133} In 1986, the Ninth Circuit Court of Appeals departed from the Acosta standard in Sanchez-Trujillo v. INS,\textsuperscript{134} another case involving a claimant from El Salvador who feared return to his homeland because he might be drafted by the government there to fight against the guerillas.\textsuperscript{135} In deportation proceedings, Sanchez-Trujillo sought asylum on the ground that he would be persecuted if deported to El Salvador on account of the fact that he was a member "of a ‘particular social group,’ [to wit: a group] of young, urban, working class males of military age who had never served in the military or otherwise [supported] the government."\textsuperscript{136} The court rejected his claim of asylum and held that:

\begin{quote}
[T]he phrase “particular social group” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.\textsuperscript{137}
\end{quote}

Hernandez-Montiel was a native of Mexico who filed for asylum on the ground that he was persecuted in Mexico on account of his homosexuality and his female sexual identity, a particular social group.\textsuperscript{138} He testified at trial "that, at the age of eight, he ‘realized . . . [he] was attracted . . . [to] the age of 12, [he] began dressing and behaving as a woman. He faced numerous reprimands from family and school officials because of his sexual orientation."\textsuperscript{139} He was also abused and sexually assaulted by Mexican police officers.\textsuperscript{140} He subsequently "fled to the United States."\textsuperscript{141} His asylum claim was denied by the IJ and his appeal was re-

\textsuperscript{132} Id. at 234.
\textsuperscript{133} Id. at 234, 236.
\textsuperscript{134} 801 F.2d 1571 (9th Cir. 1986).
\textsuperscript{135} See id. at 1573.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1576 (emphasis omitted).
\textsuperscript{138} Hernandez-Montiel v. INS, 225 F.3d 1084, 1087–89 (9th Cir. 2000), overruled by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005).
\textsuperscript{139} Id. at 1087–88.
\textsuperscript{140} Id. at 1088.
\textsuperscript{141} Id.
jected by the BIA. 142 "The BIA found that Hernandez-Montiel did not meet his burden of 'establishing that the abuse he suffered [in Mexico] was because of his membership in a particular social group,' which [they] classified as 'homosexual males who dress as females.'" 143 The court concluded:

that the "tenor of [his] claim [was] that he was mistreated because of the way he [was] dressed (as a male prostitute) and not because he [was] a homosexual." [T]he BIA found that [he] failed to show that "his decision to dress as a female was an immutable characteristic." 144

The Ninth Circuit Court of Appeals in Hernandez-Montiel v. INS, 145 reconciled the Acosta and the Sanchez-Trujillo definitions of a particular social group into "one expansive standard, holding that a particular social group 'is one united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.' " 146 "Hernandez-Montiel [represents] an important development because it defines 'particular social group' in a way that embraces individuals who are actually persecuted—even if they fail to qualify for asylum under the statute's other enumerated categories." 147 Such a standard "provides a mechanism that meets the needs of those who do not fit neatly into a particular racial or religious group, but who are [still] persecuted [on account] of something immutable or fundamental to their persons." 148

The Ninth Circuit held that it was not just his dress that was critical for the particular social group requirement. 149 Instead, the Court found that Hernandez-Montiel's female sexual identity was so basic to him that either he could not change it or "[he] should not be required to change [it]." 150 The implication of such a standard is readily apparent in asylum claims based on sexual orientation or gender violence.

142. Hernandez-Montiel, 225 F.3d at 1089.
143. Id.
144. Id. at 1089–90.
145. 225 F.3d 1084 (9th Cir. 2000).
146. Recent Case, supra note 125, at 2571 (quoting Hernandez-Montiel, 225 F.3d at 1093 (emphasis omitted)).
147. Id. at 2573.
148. Id.
149. Hernandez-Montiel, 225 F.3d at 1094.
150. Id.
Recent cases such as *Reyes-Reyes v. Ashcroft*\textsuperscript{151} and *Molathwa v. Ashcroft*\textsuperscript{152} demonstrate, however, that despite the "particular social group" claims, asylum may still be denied if there is not credible, and sometimes, strong evidence of past persecution because of homosexual activity or abuse for being a homosexual.\textsuperscript{153} Insufficient evidence of past harassment or mistreatment by the government or the public will usually warrant a denial of asylum.\textsuperscript{154}

\textsuperscript{151} 384 F.3d 782 (9th Cir. 2004).
\textsuperscript{152} 390 F.3d 551 (8th Cir. 2004).
\textsuperscript{153} *Reyes-Reyes*, 384 F.3d at 787–88; *Molathwa*, 390 F.3d at 554. "Luis Reyes-Reyes, a citizen of El Salvador, fled to the United States as a teenager. . . ." *Reyes-Reyes*, 384 F.3d at 785. He lived in this country for twenty-five years until placed in removal proceedings. *Id.* "Reyes is a homosexual male with a female . . . identity. He dresses and looks like a woman, wearing makeup and a woman's hairstyle. . . . [H]e has not undergone sex reassignment surgery, [but] has . . . characteristically female . . . mannerisms and gestures . . . ." *Id.* "When [he] was thirteen and living with his [parents] in San Salvador, he was kidnapped [sic] by a group of men, taken to a remote location in the mountains, and raped and beaten because of his homosexual orientation. Reyes's attackers threatened future brutality if he reported their [activity]." *Id.* He never did until his removal proceedings. *Id.* The IJ denied his claim for asylum on the ground that it was not timely filed, that is, within one year from the date of April 1, 1997. *Reyes-Reyes*, 384 F.3d at 785. The IJ also found that he "failed to state that anyone in the government or acting on behalf of the government tortured him." *Id.* The BIA affirmed the IJ denial. *Id.* at 786. The Ninth Circuit Court of Appeals found it lacked jurisdiction to overturn the denial of asylum because of the late filing, but remanded the case to the BIA to determine whether he was eligible for relief under the Convention Against Torture or withholding of removal. See *id.* at 789.

\textsuperscript{154} See *id.; Molathwa*, 390 F.3d at 554. "[Mareko] Molathwa, a native of Botswana, entered the United States . . . as a nonimmigrant visitor." *Id.* at 552. He overstayed his visa and was placed in removal proceedings. *Id.* He filed a claim for asylum testifying that "he had been married" in Botswana, but that his wife divorced him when he entered into a romantic relationship with another man, Berger Hartlebrakke. . . . [W]hile Molathwa and Berger were living together in Botswana, police officers entered [their] apartment without a warrant. The police . . . said they were doing "routine checks" for drugs, but never searched the apartment for drugs. Molathwa claim[ed] the incident was merely a pretext to harass him and Berger because of their sexual orientation.

*Id.* A number of his friends in Botswana experienced beatings, arrest and jailing for several days "for engaging in homosexual activity;" one of these men subsequently committed suicide due to the "disgrace from being exposed as a homosexual." *Id.* Although Molathwa, a teacher, suspected that people in Botswana "knew he was a homosexual, he never experienced . . . problems at work." *Molathwa*, 390 F.3d at 552. He feared being returned to Botswana because in Botswana "homosexuals are blamed for . . . AIDS, and for natural disasters;" he feared that "others would beat him to death to save Botswana from epidemics." *Id.* The IJ denied his claim of asylum. *Id.* at 553. The BIA affirmed. *Id.* The Eighth Circuit Court of Appeals denied his petition for review, even though the court assumed, for purposes of his appeal, that "homosexuals are a particular social group eligible for relief." *Id.* at 553–54. The court found that Molathwa had not proven that "it was more likely than not [that] he would be subject to persecution in Botswana" because the "warrantless entry into [his] apartment . . . was an isolated event and did not involve violence, threats, intimidation . . . or even a search."
Despite the Kasinga decision, discussed in the introduction of this article, which designated FGM a form of persecution and found that young Togolese women who had not undergone such process and opposed it could be "a particular social group," claims by women seeking asylum as a result of gender based violence have not always fared well. In 1995, a Guatemalan woman, R.A., sought asylum in the United States. She had fled her country to escape a husband who for years had abused her, beaten her, kicked her in her vagina, raped and sodomized her, and had threatened to kill her. The police would not help her. The IJ found her testimony credible and granted asylum on the grounds that she was a member of a "particular social group of 'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.'" The IJ "found that such a group was cognizable and cohesive, as members shared the common and immutable characteristics of gender and the experience of having been intimately involved with a male companion who practice[ed] male domination through violence." The BIA reversed this decision and the reversal was affirmed by the Attorney General. The BIA held that "'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination' [are] not a particular social group." Absent from this group's makeup is 'a voluntary associational relationship' that is of 'central concern' in the Ninth Circuit.

Earlier, in 1990, a Salvadoran woman had been denied asylum as not being in a cognizable particular social group. "[Carmen] Gomez was born Molathwa."

Molathwa, 390 F.3d at 554. Further he had never been charged with a crime or detained by police. Id.

156. Id. at 908.
157. Id. at 909.
158. Id. at 911.
159. Id.
161. Id. at 911.
162. Id. at 917 (citing Li v. INS, 92 F.3d 985, 987 (9th Cir. 1996)); The court also found: [T]hat the respondent has been the victim of tragic and severe spouse abuse. We further find that her husband’s motivation, to the extent it can be ascertained, has varied; some abuse occurred because of his warped perception of and reaction to her behavior, while some likely arose out of psychological disorder, pure meanness, or no apparent reason at all. . . . [w]e are not persuaded that the abuse occurred because of her membership in a particular social group or because of an actual or imputed political opinion. We therefore do not find respondent eligible for asylum. Id. at 927.
in El Salvador and” lived there until she was eighteen.164 “Between the ages of twelve [to] fourteen [she] was raped and beaten by guerilla forces on [each of] five . . . occasions.”165 After living in the United States for almost a decade, she pled guilty to a “sale of a controlled substance,” served time in jail, and was placed in deportation proceedings.166 She claimed asylum on the ground of fear of persecution because she was a member of a particular social group: “women who have been previously battered and raped by Salvadoran guerillas.”167 The IJ denied her claim of asylum.168 The BIA affirmed.169 The Second Circuit Court of Appeals dismissed her petition on the grounds that “Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics—other than gender and youth—such that would-be persecutors could identify them as members of the purported group.”170

There have been several recent cases, cited below, wherein women who have been subjected to gender based violence have been granted asylum on the grounds that they were members of a particular social group, or on other grounds found in their cases.171

164. Id. at 662.
165. Id.
166. Id.
167. Id. at 663–64.
168. Gomez, 947 F.2d at 663.
169. Id.
170. Id. at 664. The court further held:

Indeed, there is no indication that Gomez will be singled out for further brutalization on this basis. Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well founded fear of persecution. We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman.

171. See, e.g., Angoucheva v. INS, 106 F.3d 781 (7th Cir. 1997). In this case, a Bulgarian woman claimed asylum based on past persecution on an account that she was sexually assaulted by a state security officer, which caused her to flee Bulgaria. Id. at 783. The Seventh Circuit vacated and remanded her BIA denial of asylum on the ground that she may have been persecuted because of her Macedonian nationality. Id. See also Shoafera v. INS, 228 F.3d 1070 (9th Cir. 2000). In Shoafera, the claimant, an Ethiopian woman of Amharic ethnicity, petitioned for review of her denial of asylum by the BIA. 228 F.3d at 1072. The Ninth Circuit held that her rape by a government official of Tigrean ethnicity, who was her boss, was motivated at least in part by the applicant’s Amharic ethnicity, and that she was persecuted on account of her nationality and remanded the case to the BIA. Id. at 1072, 1076. See also Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003) (involving a claim of asylum by a twenty-eight year old woman from the Democratic Republic of the Congo, where she was raped and imprisoned by soldiers during that country’s civil war in 2000). The Third Circuit in Zubeda vacated and remanded the BIA’s order denying asylum and withholding of asylum providing
IV. RECENT CASES AND THEIR IMPLICATIONS

The foregoing demonstrates that the United States continues to be a country which will accept and give asylum to those who flee persecution in their homelands, even if that persecution is a result of sexual orientation or gender based violence against women. It is apparent that not all LGBT persons or abused women obtain asylum status, but from a human rights point of view, we remain a safe haven where people of all sexual orientations can seek justice if they believe they have been persecuted.

The lack of precedent and the discretionary power of IJ’s in asylum cases, and the other aforementioned problems with adjudication, make it difficult to readily predict how such cases may be decided before filing. This may be by design because many asylum seekers are not represented by counsel.

Nevertheless, practitioners who do file claims for affirmative asylum or who represent claimants already in removal proceedings, are best advised to work to insure their efforts of gaining asylum for those they do represent. In this regard, it is advisable that counsel work with the claimant to prepare an affidavit which recounts the claimant’s background and recounts in detail each instance of persecution encountered in the country of origin. Attached to the affidavit should be as much documentary evidence as possible—relevant to the claim of asylum and that will support the claimant’s position—such as newspaper articles, photographs, hospital reports, and any evidence one can discover on the country of origin’s conditions and how that country treats LGBT persons. This section will examine two recent cases concerning gender based violence and sexual orientation, respectively, and may be helpful to practitioners and scholars interested in asylum law.

A. Deqa Ahmad Haji Ali

As recounted earlier in this article, Deqa Ahmad Haji Ali was a Somali woman who was granted asylum in the United States in 2005. Her story is only a minimal analysis of Zubeda’s claims of degrading treatment or punishment under the Convention Against Torture. 333 F.3d at 478-80.

172. See LEGOMSKY, supra note 3, at 980.

173. Id. at 1026.

174. Id. at 981.

175. See id. at 1021.

176. See Ali v. Ashcroft, 394 F.3d 780, 782 (9th Cir. 2005).
filled with instances of cruelty, anguish, and redemption.\footnote{177} "After two merit\[\] hearings, the IJ issued an oral decision . . . denying" the asylum request.\footnote{178} The IJ found her ineligible for asylum on the ground that "she failed to establish past persecution on account of a protected basis" as required by the statute.\footnote{179} Instead, the IJ [ruled] that the sole motivation for the murder, detention, and robbery . . . 'was shown to clearly be simply to steal, and in the case of the rape to take gratification from the helpless condition of the respondent.'\footnote{180} "The BIA affirmed the IJ without [a written] opinion.\ [181]

It is not completely clear whether Ali had sought asylum at the hearing level on the ground of her nationality—as a member of the Muuse Diriiye clan, which is referred to pejoratively as the Midgan clan. Muuse Diriiye clan members are bound in servitude to noble Somali families and are considered low-caste and subhuman by other Somali clans . . . . Traditionally, the Muuse Diriiye had no rights to engage in political activities or undertake political work, but under the presidency of Mohammed Siad Barre they were allowed to assume political positions for the first time. [The] opening of civil service positions to a non-noble clan angered higher-status clans, including members of the United Somali Congress (USC) militia that ousted Siad Barre in a civil war in 1991.

\textit{Ali}, 394 F.3d at 782. Siad Barre fled Somalia and clan warfare has continued to rage there.

\begin{itemize}
\item [{177}] See id. at 782–83. Ms. Ali "was born in Berbera, a northern Somali city." \textit{Id.} at 782. 
\item [{178}] Id. There is no functioning central civil government in the country. \textit{See id.} 
\item [{179}] [She] is a member of the Muuse Diriiye clan, which is referred to pejoratively as the Midgan clan. Muuse Diriiye clan members are bound in servitude to noble Somali families and are considered low-caste and subhuman by other Somali clans . . . . Traditionally, the Muuse Diriiye had no rights to engage in political activities or undertake political work, but under the presidency of Mohammed Siad Barre they were allowed to assume political positions for the first time. [The] opening of civil service positions to a non-noble clan angered higher-status clans, including members of the United Somali Congress (USC) militia that ousted Siad Barre in a civil war in 1991. 
\item [{180}] \textit{Id.} 
\item [{181}] \textit{Ali}, 394 F.3d at 782. Siad Barre fled Somalia and clan warfare has continued to rage there. \textit{Id.} 
\item [{178}] \textit{Id.} at 782–83. 
\item [{179}] \textit{Id.} 
\item [{180}] \textit{Id.} 
\item [{181}] \textit{Id.} 
\end{itemize}
clan, on account of her being in a particular social group—as a Midgan woman raped by USC militia members, upon an imputed political opinion, or upon all of these grounds.182 In a noteworthy opinion, the Ninth Circuit disagreed with the IJ opinion that stated that she was not persecuted on account of one of the statutory grounds.183 The court reversed the BIA and ruled that she had, in fact, suffered "past persecution on account of two protected grounds: 1) her political opinion; and 2) her membership in a particular social group."184

The court ruled that "[a]lthough the USC militia was not the ruling government in Somalia, its actions . . . [were] appropriately . . . considered persecution" because "groups seeking to overthrow a government can be non-state agents of persecution for asylum purposes."185 "The USC [had been] involved in the overthrow of the Siad Barre administration."186 The court saw that her persecution had been "on account of the political opinion [they] believed she held and [as a member of] a particular social group, her clan."187 Here, the court seems to be mixing the protected classes in an unusual way. In other cases we have seen claimants attempting to delineate themselves as a particular social group such as: "young women [that] are members of the Tchamba-Kunsutu tribe of Northern Togo, who have not been subjected to [FGM] . . . and who oppose the practice,"188 or "Guatemalan women who have been [abused by] male companions [that] believe women are to live under male domination,"189 or "women who have been . . . battered and raped by Salvadoran guerrillas" in the past and who fear such future persecution.190 In the instant case, the court rolls it all into one concept expressing the notion that Ali's particular cognizable social group would be all members of the Muuse Diriiye who were helped by Siad Barre, and would have political opinions different from that of the USC and other clans that believe that the Muuse Diriiye should not rise in society.191 This is a novel approach to finding persecution on both political opinion and particular social group grounds.

182. See Ali, 394 F.3d at 784–85.
183. Id. at 785.
184. Id. at 787.
185. Id. at 785.
186. Id.
187. Ali, 394 F.3d at 785.
188. Juncker, supra note 18, at 259 (quoting In re Fauziya Kasinga, 21 I. & N. Dec. 357, 357 (B.I.A. 1996)).
191. See Ali, 394 F.3d at 783, 786.
The court relied heavily on the words said to Ali by her persecutors during her rape to determine that there was a political motivation to their actions. Their words included statements such as: she was a "Midgans [sic] traitor" and that she was "getting what [she] deserved because she and her family were . . . not supposed to advance in society" since they were Muuse Diriiye; and finally, "let Siad Barre save you now. . . . We came back to our country, you Midgan you have everything, but now we are in power and Siad Barre is gone."

The Ninth Circuit court also found that the IJ was incorrect when it held that the rape was for sexual gratification. The court held that "[s]erious physical harm consistently has been held to constitute persecution. Rape and other forms of severe sexual violence clearly can fall [into] this rule." This particular rule was from a 1995 memorandum to all INS and asylum officers adjudicating claims from women. Either the IJ had not read this important memorandum or ignored it.

Among the implications that we may draw from this case on asylum claims for women who are victims of gender based violence, is that IJ's may not have read the literature, regulations, and memoranda that would help them to justly and properly adjudicate cases that come before them. Thus, the attorney bringing such claims must be up to date on such literature, regulations, and memoranda concerning adjudicating claims by women and take them to the hearing and make them known to the IJ during the hearing or at sidebar. Another implication that comes from Ali is the obvious one: the claimant may have more than one statutory ground upon which persecution can be founded. In Ali, there were both political opinion and particular social group grounds. It should become a mantra to often be repeated by those who do political asylum work that the five grounds are: race, religion, nationality, political opinion, or a member of a particular social group. One should attempt to help the claimant determine as many grounds as possible for which the claimant may have been, or will be, persecuted.

192. Id. at 786.
193. Id. at 783 (alterations in original) (quotations omitted).
194. Id. at 787.
195. Id. (citing Memorandum from Phyllis Coven, Office of Int'l Affairs, U.S. Dep't of Justice, to ALL INS Asylum Officers and HQASM Coordinators, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995) [hereinafter Coven Memorandum]) (quotations omitted).
196. See Coven Memorandum, supra note 195.
197. See Ali, 394 F.3d at 784–85.
198. See id. at 785.
199. Id. (citing 8 U.S.C. § 1101(a)(42)(A) (2000)).
An example might be that of the Ethiopian citizen of Oromo nationality who was persecuted by the Ethiopian government for seeking better political rights for the Oromo people. She claimed persecution on account of the fact that she was persecuted: 1) because of her nationality, that is her Oromo nationality; 2) because of her religion in that she was a Muslim in a majority Christian country; and 3) on account of her political opinion, the fact she opposed the Ethiopian government because for years most Ethiopians viewed the Oromo as the “slave” caste of Ethiopia, much like the Muuse Diriiye are viewed in Somalia.

The final implication that may be drawn from *Ali* is that this same result might not have been obtained if the case had been brought in a circuit other than the Ninth Circuit. Although the facts of *Ali* are compelling, and it is natural to believe that such a case warranted a grant of asylum, this may not have been the case if this had been heard by the Fifth Circuit, where the persecution must be performed with a “punitive intent.” Were the six USC militia men who broke into Ali’s home, raped her, shot her brother in law, and stole their belongings acting to punish her? The words of the militia men could be so construed to understand that they were punishing her for trying to rise in society. However, the “punitive intent” requirement of the Fifth Circuit could well allow a DHS attorney in the Fifth Circuit to argue that this was nothing more than a rape and burglary done for sexual gratification and pecuniary gain, and not a punitive act of persecution because of political opinion or social group, since the words of the militia men were nothing more than harassment of a helpless victim.

B. Nasser Mustapha Karouni

The *Karouni* case is also a Ninth Circuit case from 2005, and involved an “outed” gay, Shi’ite Muslim man from Lebanon afflicted with HIV, who was able to show that his fear of future persecution was well founded. The
IJ denied his claim for asylum on the ground that Karouni had not established past persecution on account of his homosexuality and held with respect to future persecution "that Karouni's testimony was 'full of supposition and devoid of supporting facts.'" The IJ [also] found that Karouni failed to provide evidence to corroborate that Hizballah militants" had shot Karouni's cousin, "Khalil, in the anus and later [had murdered] him." Karouni appealed "to the BIA, which... summarily affirmed the IJ." The Ninth Circuit held that the IJ's findings concerning the facts of Karouni's case were not supported by substantial evidence. The court disputed the notion that Karouni should have corroborated the evidence of the shooting in the anus—and later the murder of Khalil—by reminding us that: 
"[t]he testimony of the applicant, if credible, may be sufficient to sustain the

removal proceedings. Id. at 1166. At his hearing he sought asylum because he feared "persecution if removed to Lebanon because he [was] a homosexual, suffering from AIDS, and Shi'ite.... Karouni [had grown] up in the southern Lebanese province of Tyre," a region that is "controlled by an Islamic paramilitary organization named 'Hizballah.'" Id. "Hizballah applies Islamic law in [the] areas [it] control[s]." Id. at 1166–67 (internal citations omitted). "Under Islamic law, homosexuality... according to Karouni, [is a crime] 'punishable by death.'" Id. at 1167.

Karouni stated in his asylum application that he has "always been gay." As a youth in the late-1970s, [he and his cousin Khaleil] spent time together secretly meeting other gay men. Sometime between the late-1970's and 1984, Khaleil's family learned that Khaleil was gay and ostracized him. In 1984, Khaleil was shot in the anus at his apartment, apparently by the Hizballah because he was gay. Khaleil survived the injuries but, in 1986, was shot to death at his apartment, again apparently by the Hizballah. Karouni also has been the subject of anti-gay animus. In Fall 1984, two men armed with machine guns, "dressed in military garb," and identifying themselves as members of the Amal Militia, interrogated and attempted to arrest Karouni at his apartment after they learned that Karouni had been involved in a homosexual relationship with a man named Mahmoud. [He was] told to confess to the crime of homosexuality [and was asked] to name other homosexuals. [He] "feigned ignorance." An armed neighbor and friend of Karouni's interrupted the encounter and prevented the militiamen from arresting Karouni. Mahmoud was not as fortunate as Karouni: he was arrested and beaten by Amal militia-men and Karouni never saw him again. Karouni believe[d] that Mahmoud told... authoritie[s] that Karouni is gay. After Karouni's encounter with the militiamen... he avoided his apartment for [two] months and started "playing a straight life" by dating women. In 1987, shortly after Khaleil's murder, Karouni finally fled Lebanon for the United States. [He was] compelled to return twice to see his dying father in 1992, and in 1996, to visit his mother who was ill. In his 1992 visit to Lebanon, he attended a handful of dinner parties with other homosexuals. After his return to the U.S. [he learned] that at least three of the friends with whom he [had] dined were arrested, detained, beaten, and/or killed because they were gay. One of these friends, Andre Baladi, was arrested by... police because he [was] gay. [He] was jailed, beaten, and interrogated for names of other homosexuals... Karouni learned that during the interrogation, Baladi "outed" Karouni as a gay man... Karouni fears... he would be identified and persecuted for having associated with these homosexual friends [if removed to Lebanon].

Karouni, 399 F.3d. at 1167–69.

206. Id. at 1169.
207. Id. at 1173.
208. Id. at 1169.
209. Id. at 1173–74.
burden of proof without corroboration.”210 The court found that through his own testimony Karouni had presented substantial evidence that Hizballah had a military presence in his region of the country, and “that homosexuality [was] punishable by death,” and that “state officials have arrested, beaten, and in some cases killed known or suspected homosexuals.”211 In particular, at his hearing “Karouni submitted [as evidence] a BIA opinion from a similar immigration case involving a Lebanese homosexual, in which Muslim militia-men repeatedly forced the barrel of a rifle into the homosexual asylum-seeker’s anus.”212

This last point underscores the need for those who represent asylum seekers to file with the application for asylum, or submit as evidence prior to the hearing to the immigration court, all relevant authority, such as BIA opinions, circuit decisions, regulations and other documentary evidence that will help strengthen the claimant’s case. An advocate should not presume that the IJ will be aware of all aspects of asylum law.

“The IJ faulted Karouni for failing to provide evidence to corroborate that he had been identified as a homosexual to the authorities by either his former homosexual partner, Mahmoud, or the friends with whom he attended dinner parties in . . . 1992.”213 The court disagreed, finding that Karouni did not speculate that he [had] been identified to the authorities . . . [r]ather, Karouni testified that his friend and Mahmoud’s cousin . . . told him that his name had been submitted to the authorities as a homosexual. The IJ [had ruled] that Karouni should have obtained affidavits from [the cousin] or other friends . . . 214

Again, the court reminds us that when an applicant presents credible testimony “[n]o further corroboration is required.”215

In another finding the IJ “found that Karouni’s return[ ] to Lebanon in 1992 to attend to his dying father and in 1996 to attend to his dying mother ‘cut against’ his claim of fear of future persecution [since such] actions ‘[d]id not appear to be the actions of [one] who fear[ed] persecution because he [was] gay.”216 The Ninth Circuit dispatched with this finding, stating that

210. Karouni, 399 F.3d at 1174 (quoting 8 C.F.R. § 1208.13(a)) (quotations omitted). See also Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998).
211. Karouni, 399 F.3d at 1174.
212. Id.
213. Id. at 1175.
214. Id.
215. Id. (quoting Salaam v. INS, 229 F.3d 1234, 1239 (9th Cir. 2000)).
216. Karouni, 399 F.3d at 1175.
Karouni's stays in Lebanon on both occasions were short and that the court found no fault with Karouni going "to see his parents one last time." 217 The IJ found that such trips "constitute[d] substantial evidence that [Karouni's] fear of persecution was not well-founded." 218 Concerning the IJ's conclusion that Karouni's fear was not well founded, the Ninth Circuit appropriately held this to be "'personal conjecture' about what choice someone in Karouni's unfortunate position would have" done. 219 "An [IJ's] personal conjecture 'cannot be substituted for objective and substantial evidence.'" 220 In sum, the court reversed the IJ and the BIA's finding, instead concluding that Karouni had "both a subjectively and objectively well-founded fear of future persecution" if removed to Lebanon. 221

The implications of Karouni, for those who seek justice in immigration court for LGBT persons, are not as varied as those set out after Ali. As a result of In re Toboso-Alfonso, there is no need to prove that homosexuals are "a particular social group" under the statute. 222 There are no circuit splits and the concept of "punitive intent" normally does not have to be proven. 223 If the case had been brought in the Fifth Circuit, Karouni's petition for review may have been denied because of the fact that he had never been arrested or jailed for being a homosexual and that he had only been accosted by the Amal militia men on one occasion, and for only a brief amount of time. 224 In other words, there may not have been much evidence of persecution on account of his homosexuality. Some observers might describe Karouni as not being "gay enough" for the government because he could cover his homosexuality and should not fear future persecution in Lebanon. 225

The greater implication that we may draw from Karouni is that there is often much insensitivity in immigration courts, and too often asylum claimants encounter IJ's who are hostile to many of the cases they hear. 226 Such hostility may be the result of managing an overly burdensome daily docket, or it may result from racism, sexism, homophobia, or a belief that the testimony and facts are contrived or fabricated. Those who represent claimants in asylum cases must understand that such hostility may not be overcome at

217. Id. at 1176.
218. Id.
219. Id.
220. Id. (quoting Paramasamy v. Ashcroft 295 F.3d 1047, 1052 (9th Cir 2002)).
221. Karouni, 399 F.3d at 1178–79.
222. Saxena, supra note 10, at 343.
223. See, e.g., Pitcherskaia v. INS, 118 F.3d 641, 646 (9th Cir. 1997).
224. Karouni, 399 F.3d at 1168. See also Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994).
225. See Morgan, supra note 37, at 146.
226. See, e.g., Garrovillas v. INS, 156 F.3d 1010, 1016 (9th Cir. 1998).
the IJ level, but the representative must walk into the hearing with as strong a
case as possible and armed with as much corroborative evidence as possible,
if available. The representative needs to be aware of relevant prior decisions,
current regulations, and rules.

The greatest implication that may be drawn from Karouni, is the rule
concerning credibility. If the testimony of the claimant is credible, corrobo-
ration is not required to prove a well-founded fear of persecution.\textsuperscript{227} Thus,
the claimant must know her case, must be truthful about her case, and testify
in such a way to make the record show that the claimant believes her own
case. There must be extensive preparation.

\textbf{V. CONCLUSION}

There have been great advances in our immigration laws that protect
LGBT persons and women who may have been victims of gender based vio-
lence. Earlier immigration law legally "excluded lesbian\[\] and gay men be-
cause . . . the medical and psychiatric communities\[\] belie\[ved\] . . . homo-
sexuality was a disease.\textsuperscript{228} We, as a country, are to be commended for now
extending grants of political asylum to those who may have experienced past
persecution, or who fear future persecution in their country of origin because
of their sexual orientation or victimization on account of gender violence.
Grants of political asylum on account of such persecution recognize the basic
human rights that all human beings deserve. Recent statistics reveal that
grants of asylum are increasing, including such grants for persecution on
account of sexual orientation or gender based violence.\textsuperscript{229}

Asylum is a legal remedy available to legal and illegal aliens who seek
protection from persecution in their country of origin "on account of race,
religion, nationality," political opinion, or being a member of "a particular
social group."\textsuperscript{230} Thus, not all immigrants are protected from persecution.
Yet, as is often the case, the devil is in the details. We have no definition of
"persecution" or "particular social group" in the statute.\textsuperscript{231} Many of the defi-
nitions come from BIA or circuit court opinions. The circuits are sometimes
split on their definitions of these words "persecution" and "particular social
group." The definitions are specific to those particular circuits. Some cir-
cuits, like the Fifth Circuit Court of Appeals, require that there be a "punitive

\begin{footnotes}
\footnote{227. Morgan, \textit{supra} note 37, at 141.}
\footnote{228. Bennett, \textit{supra} note 6, at 279.}
\footnote{229. \textit{See} Morgan, \textit{supra} note 37, at 141–43.}
\footnote{231. \textit{See id.}}
\end{footnotes}
"intent" motivating the persecutor before asylum be granted. What is needed is for the United States Supreme Court to set some kind of standard that would reconcile and harmonize these definitions and make them uniform for all immigration courts and the BIA. It is unlikely that this will happen. Immigration cases seldom reach the Supreme Court because so few immigration cases dealing with asylum are appealed at all. The Attorney General could well designate more cases as precedent for certain grants of asylum. A review of the Ali and Karouni cases reveal that IJ's need better knowledge, training, and sensitivity in order to justly adjudicate the asylum cases that they hear.

Generally, the immigration service, now under the auspices of DHS, has written regulations for interpreting the immigration laws, but this is a slow and bureaucratic process. Some IJ's appear to ignore some of the regulations which already exist. In order to refine and harmonize our immigration rules and regulations for asylum, it would be best for an outside and disinterested group to set about accomplishing this task. The American Law Institute (ALI) would be the perfect group to become involved with such a project. ALI was first formed in 1923, and included American judges, lawyers, and legal scholars who would address uncertainty in the law. Over the years the work of the ALI has resulted in studies by scholars and experts in certain fields of the law who have provided "restatement[s] of basic legal subjects that . . . tell judges and lawyers what the law [means]."

DHS should authorize the ALI to study the problems with respect to grants of political asylum and produce a restatement or codification upon which IJ's, practitioners, and law teachers could rely with respect to grants of asylum. The ALI has already worked with the American Bar Association (ABA) to produce course study materials for the American Immigration Lawyers Association. A codification project for political asylum would be a logical and valuable ALI-ABA project.

232. See Faddoul v. INS, 37 F.3d 185, 188 (5th Cir. 1994).
233. Saxena, supra note 10 at 343.
235. Id.
FEAR THE ICE MAN: LESSONS FROM THE SWIFT RAIDS TO WARM YOU UP—THE NEW GOVERNMENT PERSPECTIVE ON EMPLOYER SANCTIONS

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When Special Agents returned to the Swift & Company meat processing plant in Des Moines, Iowa on July 11, 2007, the local United Food and Commercial Workers Union announced that the Immigration and Customs Enforcement (ICE) failed to “engage[] in the same level of intimidation and
overkill” that they had in December 2006.\(^1\) The ICE men returned to execute arrest warrants for many of the company employees.\(^2\) Seemingly, the lack of helicopters hovering about in support of armed agents in bulletproof vests was intended to minimize public scrutiny of ICE’s follow-up visit to the plants. However, this time, the significance was not the number of arrests, but rather who was arrested. A Human Resources manager, a union steward, and an employee accused of procuring false documents were among those arrested on alien harboring, smuggling, and other charges.\(^3\) For those employers noting the developments of the potential criminal case against Swift, the focused follow-up visit may speak at a higher pitch than the preceding round-up of immigrant workers.

I. LEGAL BACKGROUND

In 1986, Congress enacted employer sanctions as part of the Immigration Reform and Control Act (IRCA) in an attempt to curtail the illegal migration of alien workers.\(^4\) Increased worksite enforcement represented the stick to the carrot—amnesty for hundreds of thousands of undocumented workers—that had also been enacted as a result of IRCA. However, as the

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3. See id.

most recent attempt at comprehensive immigration reform revealed, the IRCA formulation of employer sanctions fails because businesses have no way to verify work authorization with certainty.\(^5\) Because employers seek a legitimate workforce comprised, in part, of non-native workers, they risk their business upon the assumption that its alien workforce has a legitimate basis to work. To the extent that the government seeks to disrupt the incentive for illegal immigration, the government seeks to sanction any employer it believes is responsible for the illegal migration. Unfortunately for the employer, the government maintains information that is inaccessible to the employer. As a result, the employer, who has the most to risk, also suffers from a lack of reliable information necessary to minimize its exposure during a worksite enforcement investigation.

II. THE PRECEDING IMMIGRANT ROUND-UP

On December 12, 2006, ICE raided several Swift & Company plants.\(^6\) Nine specially outfitted “Greyhound” buses, three helicopters, and dozens of “G” cars transporting several hundred ICE special agents descended on six Swift processing facilities culminating from an investigation initiated in the Minneapolis/Saint Paul ICE’s Office of Investigations.\(^7\) The enforcement action identified the massive use of document fraud by the Swift workforce. In total, nearly 1300 individuals were arrested.\(^8\) In a press conference the following day, Department of Homeland Security (DHS) Secretary Michael Chertoff was quick to point out that his Department and the President were committed to substantially increasing worksite enforcement in the United States.\(^9\) Referring to the 2006 fiscal year,
Secretary Chertoff stated, “we’ve set a new record this past year for worksite enforcement.” The Secretary’s pronouncement was not merely puffery. ICE easily surpassed the 2006 record when, in 2007, ICE executed several worksite enforcement investigations throughout the U.S. that resulted in almost five thousand arrests. As a result of its focus on worksite investigations during fiscal year 2007, ICE obtained “criminal fines, restitutions, and civil judgments” in excess of $31 million.

III. EMPLOYER’S “NO-WIN DILEMMA”: VERIFY WITHOUT VERIFICATION

Part of the overall strategy of worksite enforcement is to focus on those who exploit “illegal” documents and identity theft. ICE is specifically committed to identifying fraudulent document vendors. Recently, ICE has directed additional funding to its twenty-seven Special Agents-In-Charge to commit resources to rooting out document fraud, including the increased utilization of the ICE forensic document laboratory.

The problem for any business, and for Swift specifically, arises from the employer’s inability to readily verify the legitimacy of the documents presented by the alien for employment. The same law which sanctions employers for employing illegal immigrants also prohibits them from discriminating on the basis of national origin or citizenship in hiring, firing, recruitment, or...
referring for a fee, and prohibits them from requiring more or different
documents than are legally acceptable for employment verification pur-
poses.\(^\text{16}\) If the documents presented by the employee are legally acceptable,
and on their face, reasonably appear to be genuine, an employer must assume
the employee is authorized to work.\(^\text{17}\) In other words, an employer cannot
request any more of a prospective employee than a genuine looking docu-
ment. However, should the employee obtain a reasonably genuine document
that ultimately turns out to be fraudulent, the employer may still be subject to
a workforce disruption.

IV. FRAUDULENT DOCUMENTS ARE THE NORM

The "no win dilemma" most commonly arises when a prospective em-
ployee presents a social security card—the most misused Form I-9 document
of those available in list "C."\(^\text{18}\) For example, in the peak year of its use, so-
cial security number (SSN) 078-05-1120 was being used by 5755 different
people; in all, over 40,000 people have reported the same social security
number.\(^\text{19}\) The problem of multiple SSN use has become such a concern for
the Social Security Administration that in July it proposed a change to its
"area number" designations—a number which has historically retained geo-
graphical significance.\(^\text{20}\) So many fraudulent cards containing the same
"area number" were being used that locales were running out of legitimate
numbers.

Fraudulent documentation is so pervasive that Ray Marshall, former
Secretary of Labor during the Carter administration, recently identified
IRCA's failure to implement a secure worker identity or work authorization
system as the most significant cause of the country's current immigration
crisis.\(^\text{21}\)

17. Id. § 1324b(a)(6).
18. See Identity Fraud: Prevalence and Links to Alien Activities: Hearing Before the
Subcomm. on Crime, Terrorism, and Homeland Security and the Subcomm. on Immigration,
Border Security, and Claims of the H. Comm. on the Judiciary, 106th Cong. 12 (2002) (state-
20. See Press Release, L.A. Soc. Sec. L. Atty, SSA Proposes Changes to SSN Assigna-
tions (July 12, 2007), http://pressexposure.com/SSA_Proposes_Changes_To
_SSN_Assignations-4154.html; U.S. Soc. Sec. Admin., Social Security Numbers: The SSN
21. Ray Marshall, Getting Immigration Reform Right 2 (Econ. Pol'y Inst., Briefing Paper
V. SWIFT AS AN UNWILLING EMPLOYER SANCTIONS "POSTER CHILD"

In retrospect, Swift was the perfect illustrative target for what has been called the "largest worksite enforcement" raid in U.S. history.\(^\text{22}\) Swift & Co. is a relatively large employer, well known by the public.\(^\text{23}\) Swift provides the majority of employment to very small communities—communities whose constituencies are perceived as too small to have any effect on national elections. The bigger the employer, the better the headline. Given the pervasiveness of false documentation in the general U.S. workforce, there was little risk of failure: the government could safely assume the workforce was comprised of large numbers of unauthorized labor given the nature of the work—very difficult and injury prone. It was a logical target.

As it turned out, identifying the target was the easy part; releasing the trap on cue proved too difficult. In the end, the raid came two weeks two late for the White House.

Immigration enforcement is currently a hot-button, national political issue, and it is purported that ICE’s Swift sting was planned to occur before the November 2006 mid-term election, as were the press conferences and press releases. The theory was that the raid would rally the conservative base to support moderate Republicans polling poorly in districts because the prospect of immigration reform—including the President’s guest worker plan and some form of amnesty—was keeping Republicans from voting.

When the raid failed to take place on schedule, followed by a mid-term landslide loss,\(^\text{24}\) the President nonetheless attempted to use the Swift raids to buoy support from the far Right for immigration reform.\(^\text{25}\)

The more onerous employer sanctions component of the proposed comprehensive immigration reform package seemingly provided the President an ideal opportunity to buttress bipartisan support to ensure passage. Specifically, in a time when a very unpopular President needed to satisfy his conservative base, while reaching out to the moderates and liberals whose votes he desperately needed to pass reform, employer sanctions provided the perfect avenue for him to achieve both goals. The conservatives saw greater

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\(^{23}\) For information about Swift & Company, visit http://www.jbsswift.com/about/index.php.


worksite enforcement action as the key deterrent to stymieing illegal immigration at its root cause—the economic incentive; moderates and liberals were encouraged because greater worksite enforcement action punishes employers for their illicit hiring practices.26

Unfortunately for the President, the push for immigration reform failed.27 Nonetheless, ICE continues to commit a great deal of its resources to worksite enforcement.28

VI. SWIFT’S FAILED ATTEMPTS TO APPEASE THE GOVERNMENT

Ironically, DHS’s rush to execute the raid in November was attacked by its target; Swift sued to enjoin the raid.29

Understanding that its entire industry was a target, Swift believed it could defer and perhaps avoid enforcement by contracting with the government to take part in an employee pre-screening program. Accordingly, Swift became a participant in “Basic Pilot,”30 a government program which allows participating employers to check names and social security numbers presented by prospective employees against a government database31—now called E-Verify.32 The system’s utility is limited to verifying that a prospective employee holding a social security card is in possession of a legitimate number which matches the name of the employee and number in the system.33 Swift sued in federal court in Amarillo, Texas to prevent the raid from occurring, noting that the Government had implied that its participation in “Basic Pilot”—now E-Verify—would forestall worksite enforcement.34

Ultimately, the suit was dismissed, and the raid occurred a fortnight late.35

33. See id.
34. See Tatum, supra note 29.
35. Id.
The day of the raid, although conceding it was "not a magic bullet for every kind of problem," Secretary Chertoff nonetheless suggested that E-Verify is a useful tool in preventing illegal immigration and illegal work.\(^{36}\) What he failed to mention was that the tools used by ICE to investigate Swift are not available to the public.\(^{37}\) The Secretary’s words reflected, at best, a misunderstanding of the issues and the lack of resources available to employers.

VII. E-VERIFY: THE TROJAN HORSE USED TO BREACH YOUR COMPANY’S PRIVACY WALLS

In retrospect, Swift was wrong about “Basic Pilot”: E-Verify not only failed to deflect scrutiny, but may have hastened the raids. E-Verify provided the government with an opportunity, not otherwise available, to examine the legality of Swift’s workforce at a leisurely and thoughtful pace.\(^{38}\) Because of E-Verify, the government was not required to request human resource data or Form I-9 records via civil subpoena or criminal warrant.\(^{39}\) E-Verify was ICE’s key that unlocked Swift’s hiring practices.\(^{40}\) By signing on to take part in E-Verify, Swift allowed the government to investigate it without securing in return the benefit of civil or criminal immunity.\(^{41}\)

As a result of the raids, Swift—the nation’s third largest processor of fresh pork and beef—saw its production at six facilities, including its largest, grind to a halt;\(^{42}\) it saw a majority of its day-shift employees deported.\(^{43}\) Going forward, it faced the prospect that its remaining employees, who were not arrested, might very well possess the same work authorization that the government maintained was based upon “illegal” documents, yet which nonetheless complied with the government’s own employer verification program.\(^{44}\) In other words, the law that authorized the government’s raid of Swift is the same law that prohibited Swift from requesting additional verification documentation of those employees they suspected of having presented

\(^{36}\) Chertoff, supra note 9.


\(^{38}\) See Jacoby, supra note 8.


\(^{40}\) See Jacoby, supra note 8.


\(^{42}\) Jacoby, supra note 8.


fraudulent documentation. To suggest that Swift faced a Catch-22 scenario might be an understatement. Published reports indicate that the raid cost Swift upwards of $30 million in direct expenses and lost production.

VIII. GOING AFTER THE FALSE DOCUMENT "SOURCE"

Commentators have criticized the government’s justification for the enforcement action in that only a small percentage of those arrested during the raids resulted in criminal convictions for identity theft. They point out that raiding worksites is not the most effective way of controlling illegal immigration and noted that the Swift raids wiped out entire neighborhoods of the six communities affected by the raids.

The criticism was not misplaced, it was merely premature. On July 10, 2007, ICE agents returned to Swift’s production facilities and arrested twenty more employees. Most notably, a human resources manager, a union official, and a document vendor, who worked at one of the plants, was charged with harboring illegal aliens, aiding and abetting identity theft, and misprision of a felony. ICE was quick to note in its press release that the arrests resulted from a continuing investigation with assistance from the Federal Trade Commission—the entity charged with investigating reports of identity theft—the Social Security Administration’s Office of the Inspector General, four U.S. Attorneys Offices, and two District Attorney’s Offices.

IX. CRIMINAL INVESTIGATIONS: FORGET WHAT YOU THINK YOU KNOW ABOUT “MERE” FINES

What is critical to note is the continuing nature of the investigation. As a result of the commingling of the immigration expertise of the legacy INS special agents, with the complex criminal investigation tools of the legacy

45. See Jacoby, supra note 8.
51. See id.
52. Id.
customs service, a post-2003 ICE worksite enforcement action has the tell-tale signs of a complex white-collar or narcotics criminal investigation. Gone are the days of tips from citizens complaining about lost job opportunities. Now, investigations begin as a result of information sharing between government branches that touch upon all aspects of business—employment authorization verification, social security taxation, consumer protection, and document fraud. ICE utilizes informants and undercover agents during worksite enforcement. Additionally, U.S. attorneys have become remarkably creative with criminal charges arising from these investigations, including money laundering, harboring, and Racketeer Influenced and Corrupt Organizations (RICO) charges. Special agents use the statements of illegal aliens against HR managers, union stewards, and middle-management, who in turn provide state’s evidence against CEOs, company executives, and others in upper management, in exchange for sentencing departures.

X. GOVERNMENT’S “IMPROVEMENTS” TO E-VERIFY AMOUNT TO A PLACEBO

The government is confounded as to why more businesses have not signed on to E-Verify. With a growing recognition that the E-Verify system was flawed, at the end of March 2007, DHS announced a change to the system. DHS upgraded the E-Verify system to allow employers the ability to access a database of lawful permanent resident and employment authorization document photos. The result provides pictures that can be used to confirm that the applicant is presenting authentic immigration papers. “Gerri

57. See WRIGHT, supra note 55, at 41.
58. See Jacoby, supra note 8.
60. See id.
61. See id.
Ratliff, chief of the verification division of U.S. Citizenship and Immigration Services" (USCIS), attempted to deflect criticism of the government program by stating that, "assigning blame to [E-Verify] for the problems at Swift is ‘disingenuous’ because the immigrants fooled the [state DMV offices] into issuing false driver’s licenses.”

Remarkably, Ratliff’s conclusion is wrong; it is based upon the premise that the majority of the undocumented aliens working at the Swift plants illegally acquired an American citizen’s social security number to obtain employment. What DHS has not said is that, for the most part, the illegal aliens at Swift presented legitimate social security cards. The Social Security Administration issued cards upon the aliens’ submission of a valid Puerto Rican birth certificate. Mexicans, Hondurans, El Salvadorans, and others had purchased the valid Puerto Rican birth certificates from a document vendor in Puerto Rico. Their false claim to U.S. citizenship fatally jeopardized any hope the aliens had to ever immigrate legally, although they previously had a valid social security number with which they could obtain employment and state IDs. Assuming Swift utilized E-Verify to verify the social security numbers provided by any alien involved in the scheme—who had obtained the valid social security cards using the fraudulent birth certificates—E-Verify would have failed to recognize that they were not authorized to work.

Stated differently, had Swift relied solely upon E-Verify to verify employment eligibility, most of their illegal workforce would have cleared E-Verify as authorized to work. Not only that, but the government’s proposed fix—authorizing employers to view immigration photographs—would still have failed to identify that the employee presenting the valid social security card utilized a false birth certificate. An employee who fraudulently obtained a valid social security number would not have a photograph in the

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64. See id.
65. Id.
66. See id.
67. See Jacoby, supra note 8.
immigration database. Even if the alien were in the database, any photograph maintained by the immigration service would not match the photograph issued by the state identification agency because his valid social security card was issued under false pretense.

Given these facts, the Secretary proposing E-Verify as a cure to Swift's employment eligibility verification problems is ridiculously inapplicable, if not intentionally disingenuous.

XI. LIONS AND TIGERS AND BEARS, OH MY!—NEW PLAYERS AND RULES TO THE GAME

In sum, any employer similarly situated faces a catastrophic work stoppage, not to mention the possibility of civil and criminal sanctions for knowingly hiring illegal labor, unless it takes measures beyond those currently provided and even proposed by the government in a manner which is not discriminatory.

Presently, the government offers no tool for employers to discern between a valid social security number issued upon fraudulent identity documentation and any other valid social security number. The problem is so severe, Secretary Chertoff called upon Congress to address the issue, but provided for no alternative for employers other than E-Verify. So, as he requests a legislative fix, employers are still subject to sanctions arising from the Secretary's enforcement of the current law.

XII. STATE LEGISLATURES, EMPLOYEE GROUPS, AND SHAREHOLDERS WANT TO PLAY ON THE SEEMINGLY VACANT FEDERAL FIELD

The playing field is changing. Although comprehensive immigration reform appears dead—at least until there is a new president in the White


70. See Fact Sheet: E-Verify, supra note 68.


73. See Chertoff, supra note 9.

House—state legislatures have taken it upon themselves to join the game and require businesses to utilize E-Verify. 75 Georgia 76 and Minnesota 77 recently added themselves to the list of states including Arizona 78 and Colorado, 79 which require businesses that enjoy public contracts to agree to the federal terms of E-Verify. Arkansas is soon to follow. 80 Accordingly, those businesses that transact with these four states will be allowing the federal government into its hiring process, just as Swift did.

States are not the only new players. Groups of workers have sued businesses in federal court for civil RICO violations. 81 The employees claim that they are damaged whenever businesses are allowed to inadequately compensate them because of the availability of undocumented workers. 82 Because the company can pay illegal aliens to perform the same job at a disproportionate rate, the suits generally allege that wages are depressed as a result of a criminal conspiracy by management. 83

Another new player: shareholders have filed derivative suits against the publicly traded corporations they own under Sarbanes-Oxley for management’s failure to comply with their fiduciary duties. 84 The shareholders allege that because of technical and substantive violations of Form I-9 compliance, the corporation maintains unrealized civil exposure that might result in criminal charges against the business. 85 The suits routinely allege that management’s failure to audit the entire corporation’s Form I-9s amounts to a breach of their obligations to the company. 86

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80. Michaels & Solis, supra note 74.


82. See Weems, supra note 81, at 441; Commercial Cleaning Servs., 271 F.3d at 379.

83. See Weems, supra note 81, at 441-42; Commercial Cleaning Servs., 271 F.3d at 381.


85. See id.; State and Local Employment Verification Laws, supra note 75.

86. See Halligan, supra note 84.
Those are just the new players; the rules are also changing. Recently, the DHS promulgated regulations re-interpreting how businesses are required to respond to the Social Security Administration’s “No-Match” letters.\textsuperscript{87} DHS will allow an employer “safe harbor” from a criminal charge of constructive knowledge that an employee was not authorized to work if, and only if, it terminates the employee who fails to resolve the mismatch with the Social Security Administration within ninety days, under certain circumstances.\textsuperscript{88} Stated differently, in most situations, constructive knowledge of hiring an unauthorized alien will be imputed to any employer who fails to fire an employee who is unable to resolve a discrepancy between his name and social security number.\textsuperscript{89} Civil liability for discrimination claims remains in force, thereby raising the odds of some form of liability for almost any action taken.

As a result of litigation in the Ninth Circuit Court of Appeals,\textsuperscript{90} the regulation has been enjoined.\textsuperscript{91} Ultimately, DHS ceded many of the arguments identified by the District Judge by requesting a stay of further litigation, pending the release of additional regulations set for publication in March 2008, after additional rulemaking.\textsuperscript{92}

**XIII. WHAT IS AN EMPLOYER TO DO?**

Cognizant that civil and criminal penalties flow from the renewed enforcement of federal, and now state employment-eligibility verification law requirements, employers and their counsel should be mindful of the following:

1. Employers must be intimately aware of and remain constantly vigilant of their Form I-9 employment-eligibility verification requirements.
2. Employers must require that prospective employees complete Form I-9 within three days of their hire.
3. Employers must examine the genuineness of the documents presented and record that the documentation presented proves the employee’s identity and employment eligibility.


\textsuperscript{88} Id. at 45,617.

\textsuperscript{89} Id. at 45,612.

\textsuperscript{90} See Incalza v. Fendi N. Am., Inc., 479 F.3d 1005, 1011 (9th Cir. 2007).


4. Vigilance requires proper re-verification of employment eligibility for all hires and must occur prior to the date that work authorization is due to expire.

5. Employers must have a system of document verification beyond compliance in E-Verify.

6. Employers must be prepared to deal immediately when presented with any situation which tends to suggest an employee may have, or has revealed to management, that they presented false documents during the Form I-9 review process.

7. Moreover, employers must be prepared to internally audit the entirety of its Form I-9 documentation to discover correctible or recurring errors in order to minimize civil and criminal exposure.

8. Finally, employers must be prepared for worksite enforcement actions at any time. Every employer is subject to a raid, just as Swift faced on December 12, 2006.

9. Accordingly, the employer should have contingency plans in place for dealing with the ramifications of losing significant portions of its operating labor without notice.

Given the nature of and availability of fraudulent documentation and the lack of government assistance with employment eligibility verification when presented with such sophisticated documents, it is easy to see how Swift could have been ill prepared for dealing with the consequences of the government raids—consequences it is still dealing with. However, awareness of the law and its liabilities are the first of a multi-tiered process in minimizing significant exposure.

APPENDIX

XIV. RECENT WORKSITE ENFORCEMENT RAIDS: THE RECORD-SETTING YEAR

BY KEVIN LASHUS

The government easily surpassed last year’s totals for arrests and forfeitures resulting from the rash of government worksite enforcement raids. By the close of the fiscal year on September 30, 2007, 863 individuals had been criminally arrested.93 Additionally, over 4100 persons had been administratively arrested during the following enforcement actions:

On January 23, 2007, eleven workers were arrested in Chicago, Illinois. CleanPol, a residential and business sanitation company employed all the women arrested.

On Valentine’s Day, fifty-one illegal workers were arrested at two UPS warehouses in Auburn, Washington outside of Seattle. "UPS Supply Chain Solutions, a UPS subsidiary that operates the [UPS] warehouses, and . . . Spherion, a temporary-employment agency that helped staff the facilities,” employed the workers.

On February 22, 2007, over three hundred janitors employed by Florida-based Rosenbaum-Cunningham International, Inc. were arrested in sixty-three different locations in seventeen states and the District of Columbia. Three of RCI’s executives were charged with conspiracy to defraud the United States and to harbor illegal aliens for profit. The illegal workers were employed at restaurants, including the House of Blues, “Hard Rock Café, ESPN Zone, Planet Hollywood,” and others. The investigation began in July 2005.

On February 27, 2007, seventeen undocumented workers were arrested at Cano Packaging, “which provides packaging services for the confections and food industry.” Cano Packaging is a company located on the outskirts


95. Id.


99. See CNN Newsroom, supra note 98.

100. Seper, supra note 98.


of downtown Chicago in Arlington Heights, Illinois.\textsuperscript{103} The government investigation began sometime in October 2006.\textsuperscript{104}

On March 1, 2007, sixty-seven illegal workers were arrested at a raid at Super Express Van Tours in southeast Houston, Texas.\textsuperscript{105}

On March 6, 2007, thirty-six workers were arrested at Janco, a fiberglass fabrication company.\textsuperscript{106} Janco is a company located in Mishawaka, Indiana.\textsuperscript{107} More than fifty special agents surrounded the factory before a large white bus transported the detained workers to Broadview, Illinois.\textsuperscript{108} The government investigation began in late 2006.\textsuperscript{109}

The same day, 361 workers were arrested at Michael Bianco Inc., a factory in New Bedford, Massachusetts.\textsuperscript{110} Included in the arrests were the owner of the company and three managers.\textsuperscript{111} The executives "were charged with conspiring to encourage or induce illegal [aliens] to [reside] in the United States, and conspir[acy] to hire illegal [aliens]."\textsuperscript{112} It is alleged that the company was aware that many of its employees used fraudulent alien registration cards and social security cards to obtain employment.\textsuperscript{113} The company specializes in the manufacture of safety vests and backpacks for the U.S. Military.\textsuperscript{114} The investigation began in late 2005.\textsuperscript{115}

On March 8, 2007, eleven workers were arrested at "Raphael’s Party Rentals, a long-established business that" services the Marine Corps Air Station at Miramar outside of San Diego, California.\textsuperscript{116}

On March 9, 2007, thirteen workers were arrested at Sun Dry Wall & Stucco Inc. in Sierra Vista, Arizona, outside of Tucson.\textsuperscript{117} The company

\begin{flushleft}
\textsuperscript{104} St. Clair, supra note 102.
\textsuperscript{107} \textit{Id}.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}.
\textsuperscript{112} \textit{Id}.
\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} \textit{See id}.
\end{flushleft}
president and the firm's human resources manager were also taken into custody.\(^{118}\)

On March 29, 2007, sixty-nine workers were arrested at Jones Industrial Network.\(^{119}\) "[ICE] agents executed a criminal search warrant, civil warrants, and conducted consent searches at nine business locations . . . ."\(^{120}\) ICE also seized a bank account belonging to the company worth more than $600,000.\(^{121}\) The Baltimore area business provided temporary workers for local companies, including the sportswear fashion maker Under Armour Inc.\(^{122}\) The investigation began in 2006.\(^{123}\)

The same day, seventy-seven workers on construction projects in four states were arrested following a five-month ICE worksite enforcement investigation.\(^{124}\) Many of the workers were employed by Greenville, Mississippi-based company, Tarrasco Steel.\(^{125}\) ICE has alleged that Jose Gonzalez, the Tarrasco Steel owner, falsified and altered information on the I-9 employee eligibility forms.\(^{126}\)

On April 4, 2007, sixty-two managers and employees were arrested by ICE at "Quality Service Integrity Inc. [QSI], a cleaning service operating within the Cargill Meat Solutions Plant" in Beardstown, Illinois.\(^{127}\) "A criminal complaint charges two QSI managers with aggravated identity theft and aiding and abetting aggravated identity theft in connection with [the] alleged


\(^{118}\) Id.


\(^{121}\) Id.

\(^{122}\) See Jones, supra note 119.

\(^{123}\) Press Release, Baltimore, supra note 120.


\(^{125}\) Id.

\(^{126}\) Id.

\(^{127}\) Press Release, U.S. Immigration & Customs Enforcement, ICE Arrests 62 Managers, Employees of QSI Industrial Cleaning Service in Worksit...
fearing of illegal aliens." The affidavit, filed under seal, alleged managers "knowingly hired illegal aliens to work at QSI."

On April 17, 2007, nineteen employees of "Worley & McCullough Inc., a potato farm and processing plant," were arrested in Monte Vista, Colorado. The eleven-month investigation resulted in criminal charges against three employees: the general manager, company foreman, and another employee. The Social Security Administration's Office of Inspector General assisted ICE with the investigation and the execution of the search warrants.

On February 1, 2007, in El Paso, Texas, two brothers were sentenced to about "five months in federal prison for harboring" and hiring illegal aliens to work in a quarry they owned.

Two days later, thirteen employees were arrested at Eagle Bag, an Oakland, California packaging facility. ICE conducted a Form I-9 compliance audit that revealed that more than two-thirds of the workforce "submitted counterfeit immigration documents bearing fraudulent alien registration numbers."

On May 11, 2007, Jose Calhelha and his daughter, Diana, proprietors of ten Dunkin' Donuts stores at locations in Branford, Westbrook, Derby, East Haven, and Old Saybrook, Connecticut, were sentenced to serve ten months of imprisonment, followed by two years of supervised release, and to pay $1 million in criminal fines stemming from their guilty pleas to one count each of illegally "encouraging . . . aliens to come into the United States and harboring" aliens. The investigation was initiated upon a Social Security Administration mailing of employment documents "utilizing social security

128. Id.
129. Id.
131. Id.
132. Id.
135. See id.
numbers that were invalid or that did not match the name of the employee.”

On May 10, 2007, twelve employees, some of which were employed by El Nopal, a dining facility contractor at Camp Joseph T. Robinson Army National Guard base in Little Rock, Arkansas, were arrested as part of an ongoing worksite enforcement investigation.

The same day and the day after, “twelve defendants pleaded guilty... to fraud and misusing [Form I-9] documents related to a criminal worksite enforcement investigation against Quality Service Integrity Inc. in Beardstown, Illinois.” Sentencing is “scheduled for July 5 and 6.” The charges range from harboring illegal aliens, which have been lodged against the company managers, to “aiding and abetting aggravated identity theft,” which have been lodged against hiring personnel for the company. “If convicted, the offense of harboring illegal aliens carries a maximum statutory penalty of [ten] years in prison;” “aiding and abetting aggravated identity theft” carries a mandatory statutory penalty of two years in prison. The charges resulted from a criminal worksite enforcement operation conducted by ICE April 4.

On May 22, 2007, more than 100 employees were arrested at a large poultry-processing plant in Butterfield, Missouri. Armed ICE Special Agents rounded up all George’s Processing Inc.’s employees during the morning shift and checked them one by one. ICE spokesperson, Tim Counts, noted that employees who maintained legitimate work authorization but who, as a result of the enforcement action, missed several hours of work

140. Id.
141. Id.
142. Id.
143. Id.
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while being questioned, would not be compensated by ICE for their lost pay. The plant is the largest employer in Barry County, Missouri.146

On June 12, 2007, federal agents executed a federal search warrant at Fresh Del Monte Produce in Portland, Oregon, arresting more than 160 workers.147 Allegedly, nine out of ten employees from the staffing company that provided workers for Fresh Del Monte used social security numbers that were either fictitious or belonged to other people.148 The investigation was aided when ICE agents directed an informant to apply for work at Fresh Del Monte.149 Two weeks later, a federal grand jury returned indictments against ten of the workers—charging them with possession of fraudulent documents and fraud.150 ICE’s six-month investigation identified “the fraudulent use of documents to illegally obtain employment at American Staffing Resources.”151

On June 11, 2007, two Wisconsin men were arrested and charged for smuggling illegal aliens to live and work at two Super 8 Motels.152 Additionally, they were charged with aiding and abetting an alien in eluding immigration authorities.153

On June 18, 2007, several Kansas City, Missouri roofing companies, the owners, and several employees were indicted by a federal grand jury for conspiring to hire illegal aliens.154 Additionally, “34 illegal aliens were arrested on administrative charges.”155 The roofing companies “employed the illegal


149. See id.

150. Press Release, Fresh Del Monte Produce, supra note 147.

151. Id.


153. Id.


155. Id.
aliens as ‘sub-contractors’ for [a general contractor], thereby attempting to insulate’ the general contractor from liability.156

On June 19, 2007, operators of Monterey Pizza in San Francisco, California were charged with harboring illegal alien workers.157 The employees of the restaurant were also charged with identity theft.158

The following day, twenty-eight employees of Missouri’s George’s Processing, Inc. were “indicted on criminal immigration violations.”159 Charges included Social Security fraud and aggravated identity theft.160

A day later, special agents arrested eighty-one illegal aliens during a raid at Iridium Industries Inc., a manufacturing company in the Poconos outside of Allentown, Pennsylvania.161 In a press release, Iridium was quick to suggest that the raid was focused on a temporary worker agency that supplied workers for the plant.162

On June 27, 2007, a federal grand jury returned indictments for possession of fraudulent immigration documents and Social Security fraud against ten former workers of the Fresh Del Monte Produce facility in Portland, Oregon.163 Possession of fraudulent documents “carries a maximum punishment of 10 years imprisonment and a $250,000 fine.”164

On July 9, 2007, four operators of the El Pollo Rico restaurant in Wheaton, MD were charged with “employing and harboring illegal aliens, money laundering and structuring deposits to avoid currency reporting requirements.”165 The defendants face a maximum sentence of forty years in prison for employing numerous illegal aliens, paying them in cash until the employees obtained temporary status, housing them in residences owned by the restaurateurs, and laundering cash to the employees via a restaurant ATM.166

156. Id.
158. Id.
160. Id.
162. Id.
163. Press Release, Fresh Del Monte Produce, supra note 147.
164. Id.
166. Id.
"Pursuant to the arrests . . . agents seized over $2 million in cash and jewelry . . . and several vehicles."\(^{167}\)

A day later, ICE agents arrested thirty-one illegal aliens working construction and maintenance at a children’s summer camp in the Catskills.\(^{168}\)

The aliens “were employed by two companies working as sub-contractors at the camp.”\(^{169}\)

On July 11, 2007, ICE agents arrested an additional twenty employees of Swift & Company.\(^{170}\)

The additional arrests included a company “human resources employee, a union official,” and a document vendor employed at the plant.\(^{171}\)

On July 12, 2007, the former supervisor for QSI at the Cargill Pork Processing Plant in Beardstown, Illinois, pleaded guilty “to harboring illegal aliens and aiding aggravated identity fraud.”\(^{172}\)

The QSI employee “admitted instructing prospective . . . employees without proper work authorization how to obtain new identities” and then employed them under their assumed identities.\(^{173}\)

Seventeen other defendants have already been convicted and sentenced.\(^{174}\)

On July 16, 2007, the seventh former IFCO manager pleaded guilty to criminal charges stemming from the April 19, 2006 worksite enforcement raid which netted nearly 1200 illegal aliens at forty IFCO pallet plants nationwide.\(^{175}\)

Criminal charges ranged from misdemeanor charges of unlawfully employing illegal aliens to conspiracy to possess identification documents with the intent to use them unlawfully.\(^{176}\)

For the felony offenses, the potential sentence carries a maximum five year imprisonment, a $250,000 fine, and three years of supervised release.\(^{177}\)

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\(^{167}\) Id.


\(^{169}\) Id.


\(^{171}\) Id.


\(^{173}\) Id.

\(^{174}\) Id.


\(^{176}\) Id.

\(^{177}\) Id.
On July 23, 2007, Joseph Edward Fulmer, a resident of Centerville Ohio, was sentenced to six months in prison, 100 hours of community service, was forced to forfeit his residence, valued at $770,000, plus $2693 in currency seized by ICE during its raid of “Stitching Post, a store that sells and repairs sewing machines and related items.”

On August 2, 2007, the president and two managers of the New Bedford, Massachusetts manufacturing company, MBI, Inc., were indicted on one count each of conspiracy to “harbor or conceal or shield illegal aliens” and to “encourage and induce aliens to come to, enter, and reside in the United States.” If convicted, the executives “face a maximum sentence of 10 years in prison, [a] $250,000 fine, a $100 special assessment, and at least two years of supervised release.”

The same day, the owner of Tarrasco Steel made an initial appearance in federal court following his arrest by ICE special agents “as part of an ongoing investigation into charges that he hired illegal alien workers” to work on “critical infrastructure construction sites throughout the Gulf Coast.” Twenty-six Tarrasco employees were arrested on March 29 during an ICE-led raid in Greenville, Mississippi. Bank accounts totaling “$457,368.00 [have] been seized from the accounts of Tarrasco Steel.”

On August 28, 2007, ICE special agents executed a criminal search warrant at Koch Foods in Fairfield, Ohio. As a result of the enforcement raid, approximately 160 employees were administratively arrested for immigration violations. The enforcement actions were a result of a two-year, ongoing “investigation based on evidence that Koch . . . may have . . . knowingly hired illegal aliens at its poultry processing and packaging facility.”

180. Id.
182. Id.
183. Id.
185. Id.
186. Id.
The enforcement action was coordinated by ICE with the assistance of the U.S. Attorney’s Office, the USDA, the Ohio Department of Public Safety, and local law enforcement. 187

On September 10, 2007, five former employees of George’s Processing Inc., a poultry processing facility in Butterfield, Missouri, pleaded guilty in federal court "to various immigration and identity-theft related violations." 188 Each “pleaded guilty to falsely claiming to be a U.S. citizen, aggravated identity theft and misuse of a Social Security number.” 189 The U.S. Attorney’s Office, ICE, “the Social Security Administration’s Office of Inspector General, the Missouri State Highway Patrol, the U.S. Marshal’s Service, . . . and the U.S. Department of Agriculture [prosecuted the cases]." 190

On September 27, 2007, ICE special agents simultaneously executed searches of eleven McDonald’s restaurants in Reno, Sparks, and Fernley, Nevada. 191 Fifty-six employees suspected to be undocumented workers were detained. 192 The arrests resulted from a five-month investigation sparked by an identity theft complaint. 193

On October 3, 2007, Dean Hedges, owner of Hedges Landscape Specialists Inc., Exterior Designs Inc., and Performance Irrigation LLC, pleaded guilty to knowingly employing illegal aliens at his landscaping company in Crestwood, Kentucky. 194 A former employee informed ICE agents that it was “common knowledge that . . . Hedges employed illegal aliens to work for Exterior Designs Inc. and Performance Irrigation, and that those illegal aliens were considered a subclass of employees.” 195 A former employee alerted agents that, during the time he worked for Hedges, the companies knowingly and openly employed illegal aliens to work for his company. 196 The “employee said that, at the direction of Hedges, he/she was ordered to

187. Id.
189. Id.
190. Id.
192. Id.
193. Id.
195. Id.
196. Id.
pay the illegal aliens on about 20 to 25 occasions in cash ‘under the table’ for work they performed as employees of Hedges Landscape Specialists.\textsuperscript{197} The “former employee stated that during his/her employment with . . . Hedges, he/she had several discussions with Hedges about completing Employment Eligibility” Forms I-9 on the company’s employee—“Hedges indicated he was not worried and ‘would just pay a fine’ if he were ever caught by authorities.”\textsuperscript{198} The same employee swore out an affidavit indicating that Hedges would complete Forms I-9 for documented workers, but not for illegal alien employees.\textsuperscript{199} ICE agents executed a federal search warrant September 24 at Hedges Landscape.\textsuperscript{200} “During the execution of the search warrant, ICE . . . arrested 12 illegal alien workers from Mexico” who were all placed into removal proceedings.\textsuperscript{201} “The maximum potential penalties [sic] for the corporation is a $250,000 fine, and the maximum potential penalties for Hedges are a $24,000 fine and six months imprisonment or up to five years probation.”\textsuperscript{202} Hedges already agreed to forfeit $147,000 seized from corporate bank accounts.\textsuperscript{203} “All employers in all industries and locations must comply with our nation’s laws. ICE, and our law enforcement partners, will continue to enforce immigration laws from all angles, including: criminal charges, asset seizures, administrative arrests and deportations,” Chicago ICE Special Agent-In-Charge Elissa Brown said.\textsuperscript{204}

On October 17, 2007, Richard Rosenbaum, the former president of RCI Inc., “pleaded guilty to conspiring to defraud the United States and harboring illegal aliens” arising from operating a nationwide cleaning service.\textsuperscript{205} He was ordered to “pay restitution to the United States an amount expected to exceed $16 million.”\textsuperscript{206} Personally, he “agreed to forfeit bank accounts, life insurance policies, and currency totaling more than $1.1 million.”\textsuperscript{207} Rosenbaum operated a cleaning and grounds maintenance service that contracted with theme restaurant chains, including the Grand Traverse Resort, “the

\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Press Release, Oldham County, supra note 194.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Press Release, Oldham County, supra note 194.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
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House of Blues, Planet Hollywood, Hard Rock Café, Dave and Busters, Yardhouse, ESPN Zone, and . . . China Grill.\(^{208}\)

One week later, special agents from both ICE and the FBI arrested a Canadian citizen residing in Brattleboro, Vermont "on charges of employing and harboring illegal aliens and" misrepresentation.\(^{209}\) Gurdeep Nagra, "[p]resident of the Nanak Hotel Group, which owns the Hampton and Quality Inns in Brattleboro," faces a ten-year sentence and a $250,000 fine, if convicted.\(^{210}\) As early as two years ago, "ICE was notified that the hotels were employing illegal aliens and that the hotels were allowing the aliens to live on [the] premises."\(^{211}\) Simultaneously with Nagra's arrest, federal law enforcement agents searched the two hotels and "took into custody 10 aliens who were illegally working and living in Vermont."\(^{212}\)

On Halloween, twenty-three warehouse employees were arrested at ANNA II, Inc., a staffing company located in Bensenville, Illinois.\(^{213}\) "ICE initiated the investigation into ANNA II in April 2006 after receiving credible information that illegal aliens were employed there."\(^{214}\)

On November 7, 2007, "[a] corporate officer and an office manager of a . . . temporary employment agency were arrested [in Chicago] on federal charges alleging they harbored illegal aliens . . . ."\(^{215}\) Twenty workers "were arrested on state charges for allegedly using fraudulent airport security badges."\(^{216}\) "[M]ore than 100 temporary workers employed by the agency were in possession of fraudulently obtained airport security badges, issued by the Chicago Department of Aviation."\(^{217}\) According to the pleadings, "a majority of the social security numbers associated with [the staffing company] employees were either numbers that did not exist or were numbers that belonged to other persons.” The Social Security Administration-Office of the Inspector General, the Department of Labor-Office of the Inspector Gen-

\(^{208}\) Id.
\(^{209}\) Id.
\(^{211}\) Id.
\(^{212}\) Id.
\(^{214}\) Id.
\(^{216}\) Id.
\(^{217}\) Id.
eral, and other state and federal law enforcement agencies, assisted ICE in the investigation. If convicted, the corporate officers "face a maximum penalty of 10 years in prison for harboring illegal aliens and five years in prison for misuse of a social security number." The same day, ICE Special Agents raided Pepe’s Cabinets, an Oakland carpentry business. "The probe was sparked by information provided to ICE’s toll-free tip line." Eight individuals were arrested during the operation.

Later in the afternoon, "[t]he former comptroller of RCI Inc. entered a guilty plea . . . to charges arising from operating a nationwide cleaning service that was staffed predominantly with illegal aliens." The plea agreement required her and the company’s vice president “to forfeit funds totaling $1.5 million.”

A week later, “[f]ifteen illegal alien restaurant workers were arrested in the Louisville area” at Jumbo Buffet and the China Star Buffet and Grill. "ICE [Special] [A]gents initiated the investigation in December 2006." A day later, "[t]he owner and six managers of a northern Kentucky construction contractor were sentenced to federal prison . . . for conspiring to harbor illegal aliens.” The owner and his son and daughter “pleaded guilty . . . to conspiring to harbor illegal aliens for commercial advantage.” The company provided "framing services for new home construction in . . . northern Kentucky.”

On November 19, a “worksite supervisor and a former employee [of QSI] at the Cargill Pork Processing Plant in Beardstown, Illinois, were sen-
tenced to prison . . . for their roles in hiring illegal aliens to work for the cleaning service.”

The supervisor was sentenced to thirty-eight months and the “employee was sentenced to 10 months in federal prison.”

Sixteen other QSI employees were also arrested, charged, and pleaded guilty to fraud and misusing employment documents” as a result of an April 4, 2007 worksite enforcement raid. “The 16 were sentenced to prison terms ranging from three to seven months.”

Finally, on December 27, 2007, “[a]n Orem, Utah construction contractor” was criminally indicted on “federal criminal charges as part of an alleged scheme to bring illegal aliens into the United States and require them to work for his business to pay off their smuggling debt.”

In all, ICE arrested 24 employees of MJH Construction on criminal and administrative violations.

“During the three quarters of [Fiscal Year] 2007, ICE obtained criminal fines, restitutions, and civil judgments in [worksite enforcement] investigations in excess of $30 million.” The number of undocumented workers arrested at raids on businesses has skyrocketed to 4077 in the same time frame.

“In criminal cases, ICE [commonly] pursues charges of harboring illegal aliens, money laundering, and/or knowingly hiring illegal aliens. Harboring . . . is a felony with a potential 10-year prison sentence. Money laundering is a felony with a potential 20-year prison sentence.” ICE often notes that the potential of criminal sanctions constitutes a “far greater deterrent to illegal employment schemes than administrative sanctions.”

“I think we’re talking about something the American people have never seen before, which is what do we do and what do we see when the government gets serious about using all the legal tools available to make the law work and to enforce the law,” Homeland


231. Id.

232. Id.


234. Id.


236. ICE 2007 REPORT, supra note 15.


238. Id.
Security Secretary Chertoff told ABC News in an exclusive interview [on October 4, 2007].

Cognizant that civil and criminal penalties flow from the renewed enforcement of federal employment-eligibility verification law requirements, employers and their counsel should be mindful of the following:

Employers must be intimately aware of and remain constantly vigilant of their Form I-9 employment-eligibility verification requirements. Employers must require that prospective employees complete Form I-9s within three days of their hire. The employer must examine the genuineness of the documents presented and record that the documentation presented proves the employee’s identity and employment eligibility. Vigilance requires re-verification of employment eligibility for all hires and must occur prior to the date that work authorization is due to expire.

Employers must have a system of document verification beyond compliance in E-Verify. Employers must be prepared to deal immediately when presented with any situation which tends to suggest an employee may have, or has revealed, to management, that they presented false documents during the Form I-9 review process. Moreover, employers must be prepared to internally audit their Form I-9 documentation to discover correctible or recurring errors in order to minimize civil and criminal exposure.

Finally, employers must be prepared for worksite enforcement actions at any time. Every employer is subject to a raid. The employer should have contingency plans in place for dealing with the ramifications of losing significant portions of its operating labor without notice.

Given the nature of the fraudulent documentation, and the lack of government assistance with employment eligibility verification when presented with such sophisticated documents, it is easy to see how these firms could have been ill prepared for dealing with the consequences of the government...


241. Id. at 5.
242. See id. at 3–4.
243. Id. at 10.
244. See id. at 20.
245. See HANDBOOK FOR EMPLOYERS, supra note 240, at 20.
246. See id. at 17–18.
247. See id. at 3.
248. See id.
raids. However, awareness of the law and its liabilities are the first of a multi-tiered process in minimizing significant exposure.
STEP-DOWN RESTITUTION: A PROPOSAL FOR AN EQUITABLE RESOLUTION TO CONFISCATED CUBAN PROPERTY

DANIEL A. ESPINO

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I. INTRODUCTION

With the deterioration of Fidel Castro’s health in recent years, the focus of Cuban-Americans has once again been honed on the status of their real property in Cuba—property confiscated in some manner by the Communist Castro Regime. “In the years . . . following the rise of Fidel Castro,” hundreds of thousands of Cuban Citizens were forced to flee the island nation with nothing but the clothing on their backs, escaping property seizures and political pressure exercised by the Castro government.¹ These takings, ulti-

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mately, affected United States and Cuban citizens alike and, due to the nature of the of the takings and the lack of compensation paid by the Castro government, these takings constituted clear violations of international law, human rights, and Cuba’s Constitution of 1940.2 As such, when a future, post-Castro Cuban government at long last throws off the shackles of communist oppression and moves toward democracy, Cuba will undoubtedly be forced by economic and political pressure to enter into negotiations with the United States to resolve outstanding confiscated property claims from United States citizens and Cuban-American Citizens.3 In that undertaking, a post-Castro Cuban government should create a restitution and compensation policy with specific guidelines and procedures to administer equitable remedies for “existing and potential property claims.”4 Given the condition of Cuba’s government, infrastructure, and economy at the present time, “a ‘gradualist’ approach to privatization is the only feasible solution as it allows the development of a market economy that incorporates the socio-cultural and socio-psychological [and economic] order of the country.”5 Accordingly, this article proposes a remediation policy, which presumptively proffers natural restitution as the preferred remedy for confiscated land claims and gradually “steps down” to other remedies such as substitution of similar land and compensation for the seized property.

While the Castro regime may have a definite end, “[h]ow or when the ‘Castro [regime]’ will end is purely a matter of speculation.”6 As such, this

Puente de Jóvenes Profesionales Cubanos (Bridge of Young Cuban Professionals). B.A., Honors College, University of Miami. Special thanks to Nicolás Gutiérrez, Jr., Esq., Eloy Cepero, member of the Board of Directors of the Cuban American National Foundation, and Ralph Galliano of the Institute for U.S.-Cuba Relations for their insight and support in tackling this endeavor to right the wrongs that have plagued Cuba for over fifty years and for working towards a free and democratic Cuba.

1. Eduardo Moisés Peñalver, Distributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution, 52 FLA. L. REV. 107, 108 (2000). “Unable to carry their belongings with them, most of the Cuban refugees left with, as the . . . saying goes, ‘one hand in front and one hand behind.’” Id.

2. See generally id.


article must operate within certain established parameters. First, it is presumed Cuba will depart from its communist ways and adopt democratic principles in the near future, so as to regain its economic footing in the world. Second, this article presumes "Cuba will provide [redress] . . . to those [individuals] whose property was [confiscated] by the [Castro government] . . . and who have not yet received compensation for [such] taking[s]" as it transitions to a free market. Third, there are three categories of claimants that will benefit from such redress: "(1) Cuban nationals and exiles—[a.k.a. Cuban-American Citizens]; (2) U.S. corporations and individuals; and (3) foreign companies currently possessing [some kind of] ownership interest[] in [the confiscated] propert[ies]." The policy proffered in this article will only apply to the first class of claimants, Cuban nationals, as they do not yet have an avenue through which to seek redress for their property claims. Fourth, while the term "restitution" has been used to encompass all forms of redress for expropriations and confiscations, for purposes of this article the term restitution should be considered "synonymous with the return of expropriated property to [a claimant]," either directly or indirectly. Lastly, although disparate views of the legality and effectiveness of confiscations by Castro's regime exist—a topic which will be briefly discussed in this article, this article will operate under the presumption that the confiscations of Cuban property under the Castro government were ineffective either because they were illegal takings under Cuban law or because the Castro government failed to provide compensation for an effective taking in accordance with Cuban law.10

Despite the presumptions under which this article operates, the likelihood of Cuba's transition to a free market democracy should be discussed, taking a moment to highlight the difference between a transition from a post-Castro government and a succession. A transition in Cuba will be evinced by "[a] government defined by the presence of regularly scheduled, free and fair elections [with] [g]overnment actions [that] promote and respect internationally accepted definitions of human rights and other democratic rights and

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8. Ortiz, supra note 6, at 336.
10. Id. at 227, 244.
A succession, however, will be indicated by a continuation of the current governmental regime in Cuba with simply a change in leaders within the same organization. The United States undoubtedly favors a transition and mandates; in the Cuban Liberty and Democratic Solidarity Act, that Cuba convert to a democracy in order to re-establish bilateral relations between the United States and the island nation. By all indications, Cuba is heading towards a succession as Fidel Castro has already seamlessly passed power to his brother, Raúl Castro, as of July 31, 2006. "[T]he succession has proceeded in an orderly and mostly predictable manner . . . [and] has been largely successful in maintaining continuity in the government." This sentiment was reaffirmed by Cuba’s vice-president, Carlos Lage, who stated, “continuity’ is the word,” when asked about the current political situation in Cuba in early 2007. And continuity should come easy when it is considered that Raúl Castro has played “a major role in the [daily] operations of [Cuba]” since Fidel Castro came to power and all the key players of the Fidel Castro government remain in place, namely Ricardo Alarcón, head of the National Assembly, Felipe Pérez Roque, acting foreign minister, and Carlos Lage, vice-president and top economic advisor.

Nevertheless, while the Castro government attempts incessantly to portray a united and strong government, dissent grows in the upper echelons of the Castro government as Fidel Castro withdraws from the political scene—dissention “created and fueled by Fidel himself . . . to prevent alliances [that could] threaten his rule.” In keeping with his desire to prevent uprising within his own government, Fidel Castro failed to create any institutions or policies which could be implemented at such time when he decided to transfer power. Instead, Fidel Castro “resort[ed] . . . to charging a group

12. Id.
13. Id.
14. Id. at 15.
15. Id. at 25.
16. CREIGHTON REPORT, supra note 11, at 25.
of his trusted followers with the responsibility of overseeing the continuation of his disastrous legacy," an action which has resulted in the erosion of trust amongst Castro’s “inner circle.” While it appears in the short term that a successful succession has occurred, a transition to democracy in Cuba is still probable in light of several factors including, but not limited to, a possible civil uprising at the end of a charismatic regime, a worsening economy, dissention amongst the ruling members of Cuba, and an opportunistic elite class. “While the masses may play a role in provoking or exacerbating a crisis of legitimacy on the island, they are not as likely to play as important a role as members of the elite in dismantling . . . the current regime—primarily because of the general weakness of civil society in Cuba.” This elite class transition will likely arise when the ruling class becomes frustrated with the political, social, or economic status quo and seeks to impose reforms on the post-Castro government. Because little is known about the preferences of the elite and ruling class in Cuba, there is no way to tell what exactly will trigger these groups to transition to a democracy, but such a transition will likely arise when the members of these groups see a free market democracy as a valid and advantageous alternative to their current situation. The future of Cuba is unclear, but what is clear, even to Cuban officials, is that “no single person can replace the 80-year-old Maximum Leader, who micromanaged projects, gave marathon speeches, and entertained [elite] visitors at dinners lasting until dawn” and, as such, some kind of change in the Cuba regime can be seen on the horizon. Whether Cuba moves quickly towards democracy or evolves into a hybrid state of communism and capitalism like China, a post-Castro Cuban government will unquestionably have to deal with confiscated property claims in an equitable and legal manner, so as to encourage investment and enterprise in Cuba, and legitimize itself on the world stage.

Part II of this article provides a brief history of confiscations in Cuba, a necessary backdrop to understanding the applicability and appropriateness of restitution and compensation for Cuban takings. Part III similarly provides a brief survey of relevant Cuban, United States, and international property law, which should also be considered in the formulation of a restitution policy.

21. Id.
22. See CREIGHTON REPORT, supra note 11, at 26–28.
23. Id. at 28.
24. See id. at 28–29.
25. Id.
Part IV of this article proposes the Step-Down Restitution Policy as an answer to claims for confiscated Cuban property. Part IV also defines the various facets of the policy and explores how such a policy would operate. Part IV concludes by justifying implementation of such a policy based on Cuban and international law and the experiences of the Baltic States and Europe, which have similarly implemented restitution and compensation policies in their endeavors to return to a democratic and free market society. Part V briefly presents the lessons Cuba could learn from Iran and Ethiopia, which established special courts to handle property claims and remedy the taking of seized property. Part VI concludes that the Step-Down Restitution Policy is an equitable resolution to violations of Cuban and international law by the Castro regime, allowing a post-Castro Cuban government the flexibility to manage and resolve what will be a multitude of claims against it by hundreds of thousands of Cuban Nationals and Cuban Americans and providing a future Cuba the opportunity to attract a return of capital to the country by Cuban-American Citizens, the United States, and foreign investors, alike. If Cuba wishes to cure its economic woes, and develop a free market, it will need to reach a settlement with the world, one which includes an equitable restitution scheme.27

II. A BRIEF HISTORY OF CONFISCATIONS IN CUBA

A. Pre-Castro Regime

Cuban property rights began with the first recognition of the right of an individual to own private property, found in Article 32 of the Constitution of 1901, Cuba’s first since its independence from Spain.28 Article 32 required a property owner who was dispossessed of his or her property by the Cuban government to be provided compensation for such a taking, or restitution of the property where compensation was not given.29 After a period of political instability, Cuba enacted “[t]he Constitution of 1940 [which] guaranteed all

27. Ortiz, supra note 6, at 322–23.
28. Id. at 324.
29. Travieso-Diaz, Alternate Remedies, supra note 3, at 666. Article 32 specifically provides “[n]o one shall be deprived of his property except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification. If the indemnification is not previously paid, the courts shall protect the owners and, if needed, restore to them the property.” CONSTITUCIÓN DE LA REPÚBLICA DE CUBA art. 32 (1901), reprinted in 2 AMERICAN CONSTITUTIONS: A COMPILATION OF THE POLITICAL CONSTITUTIONS OF THE INDEPENDENT NATIONS OF THE NEW WORLD 112, 119 (José Ignacio Rodriguez trans., 1905).
Cuban citizens extensive social and economic rights, including substantial property rights, ... [through] Articles 24 and 87." 30 Article 24 stated:

> confiscation of property is prohibited. No one can be deprived of his property [except] by competent judicial authority and for a justified cause of public utility or social [interest], and always after payment of the corresponding indemnity in cash, judicially fixed. Non-compliance with these requisites shall determine the right of the person whose property has been expropriated, to be protected by the courts, and, if the case falls for it, to have his property restored to him. The reality of the cause of public utility or social interest, and the need for the expropriation, shall be decided by the courts in case of impugnation. 31

In 1952, after a military coup d'état, Fulgencio Batista repealed the Constitution of 1940 and failed to reinstate the property protections found in said constitution. 32 When Fidel Castro rose to power, he used Batista’s actions as a basis for his first attack on property rights, and made amendments to Article 24 of the Constitution of 1940 via the Fundamental Law of 1959. 33 These amendments were procedurally illegal under the amendment procedure of the Constitution of 1940, 34 which is significant considering that in 1959 “Judge Manuel Urritia, the person Castro chose to be Cuba’s President, announced that the 1940 Constitution ... would continue to be the law of the land.” 35 Cuban exiles consider the Constitution of 1940, “‘the last legitimate expression of the constitutional will of the Cuban people’ and therefore still in effect today.” 36

B. Post-Castro Regime

Beginning “[i]n 1959, [Fidel] Castro led a communist revolution that systematically and progressively destroyed the fundamental human rights of the people on the island,” despite his initial reenactment of Article 24 pursu-
ant to the Fundamental Law of 1959. After Castro “confiscate[d] property and bank accounts [belonging to] General Batista . . . and his supporters,” he initiated a nationalization agenda with the goals of “land reform, economic[stance] against the United States for cutting . . . sugar import[s],” and transformation of Cuba into a socialist state. To effectuate these goals, Castro enacted the Agrarian Reform Act, which seized all agricultural estates over 165 acres. In July of 1960, Castro seized all United States corporate property and virtually all Cuban businesses pursuant to Laws No. 851 and 890, respectively. While both laws mandated compensation for such takings, no such compensation was ever provided by the Castro government. In October of 1960, the Castro government enacted the Urban Reform law, which eliminated the private sale and rental of homes, transferred property to homeless Cuban citizens, canceled mortgages, and made all rent and mortgage payments payable to the state. In effect, the Urban Reform Law made the Cuban government the primary landlord of all residential property, reducing homeowners to tenants on their own land. Although the Urban Reform Law granted “title” to some Cubans in the transfer of property, this title was much more limited than the “classical notions of title” as it “was not freely alienable,” transfers required state approval, and the Cuban government maintained “the right of first refusal” on all transfers of property. The onslaught on property rights continued in 1961 with the passage of Law 989, which made “it illegal for Cubans to leave Cuba and penalized those who fled after the revolution by authorizing state agencies to seize their property.” The early years of Castro’s regime were marked with massive departures of Cuban Citizens and the taking and redistribution of their real property.

In 1976, Castro hammered the last nail in the proverbial coffin of Cuban property rights when he enacted the Constitution of 1976, which confiscated

37. Ortiz, supra note 6, at 322.
39. See Ortiz, supra note 6, at 329.
40. Id. at 332.
41. Id.
43. Peñalver, supra note 1, at 126.
44. Grider, supra note 5, at 476.
46. Peñalver, supra note 1, at 127.
or expropriated almost all property on the island. Amendments to the Constitution of 1976 in 1992 expanded property rights for the first time since Castro’s takeover by allowing foreign countries to purchase partial interests in commercial property tied to certain industries, such as tourism. These amendments also had the effect of further complicating property rights in Cuba by allowing foreign countries to obtain interests in property belonging to United States citizens and United States corporations. Offensive acts such as these and Castro’s expropriations in general in the years following his rise to power, serve as the single greatest impediment in a future transition of post-Castro Cuban government to a free market society.

III. LAW AND POLICY WHICH MUST BE CONSIDERED

When the tumultuous history of Cuban property rights is considered in conjunction with the disarray of the Cuban economy and legal infrastructure, it is evident that redressing confiscated property claims will be a monumental task. Since 1959, Cuba has seized property in three manners:

(1) expropriation of Cuban and foreign-owned land . . . ; (2) confiscation of property from alleged “collaborators” of the Batista regime [and] “counterrevolutionaries” . . . ; and (3) seizure of real and personal property “voluntarily” “abandoned” by Cuban citizens who travelled [sic] abroad and failed to return within a specified time period.

Given the disparate nature of the takings and the future claimants, no one set of governing principles will dictate the resolution of claims. Thus, a restitution and compensation policy may very well require the use of Cuban, American, and international law in the resolution of expropriated land claims.

A. Cuban Property Law: Then and Now

Legal protection of property rights at the time of Castro’s initial takings was found in Article 24 of the Constitution of 1940, which to this day “still

47. Ortiz, supra note 6, at 332–33.
48. Id.
49. Id. at 333–34.
51. Id. at 651.
52. Garibaldi & Kirby, supra note 4, at 233.
commands respect and enjoys legitimacy among the heirs to the democratic Cuban tradition.”

“Under Article 24, a governmental taking” is illegal if a court failed to certify the public purpose the government asserts as grounds for the taking, or if the government fails to provide compensation in cash. Certain takings, such as those made pursuant to Law No. 989, would then be violative of this standard and unconstitutional as no public purpose was ever legitimized by the court and compensation was never paid to those Cuban citizens who fled the country during the early years of the Castro regime and refused to return. The illegality of seizures made pursuant to Law No. 989 is underscored when it is considered that confiscated property was not voluntarily abandoned, but instead left behind by Cuban citizens who fled the country for fear of political persecution. Where acts of the Cuban government can be proven unconstitutional under the Constitution of 1940, which as referenced above was re instituted by the Castro regime, Cuban domestic law will be sufficient to validate a restitution program. However, “whether the Fundamental Law of 1959 is valid or the original 1940 Constitution is still the law of the land, compensation was [nevertheless] required but [never] paid.”

B. Relevant United States Law

Confiscated property claims by United States citizens and corporations were initially based on the 19th century “international law principle[] [which] require[s] ‘prompt, adequate and effective’ compensation to aliens whose property is confiscated.” However, the applicability of this principle as an international standard and the requirements of compensation for expropriations were called into question by the United States Supreme Court in Banco Nacional de Cuba v. Sabbatino, where it provided evidence of Soviet countries who refused to provide just compensation, if at all, for their takings. Since the early 1960s, United States law has developed several

53. Id. at 251.
54. Alexander & Mills, supra note 45, at 146. See also 2 AMERICAN CONSTITUTIONS, supra note 29, at 117.
55. See Grider, supra note 5, at 483.
56. See id. at 483–84.
57. Id. at 482.
59. Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 222.
61. Peñalver, supra note 1, at 141 n.220. See also Banco Nacional de Cuba, 376 U.S. at 428–30.
legal justifications upon which a compensation program could be based, such as "the Foreign Assistance Act of 1961, the Cuban Claims Program under the International Claims Settlement Act of 1949, the Cuban Democracy Act of 1992, and the Cuban Liberty and Democratic Solidarity Act of 1996." The Cuban Liberty and Democratic Solidarity Act of 1996, also known as the Helms-Burton Act, was developed "to discourage foreign investment in Cuba and to hasten the demise of Fidel Castro's communist regime." Title III of the Helms-Burton Act provides:

any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959, shall be liable to any United States national who owns the claim to such property for money damages in an amount equal to the sum of . . . the fair market value of that property, calculated as being either the current value of the property, or the value of the property when confiscated plus interest, whichever is greater; and . . . court costs and reasonable attorneys' fees.

The Helms-Burton Act allows Americans and American corporations who have had property confiscated to sue any person who has derived some sort of economic benefit from the use or purchase of expropriated property. This "private cause of action" stands as an avenue of compensation for injured parties and also serves to deter "foreign investment in Cuba." Overall, the Helms-Burton Act represents the United States "unwavering stance against Cuba's illegal seizure of [United States] property, a clear violation of

Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.


66. Shamberger, _supra_ note 63, at 517.
international law, and punishes those individuals and corporations who are...reaping benefits from this stolen property." 67

C. Don't Forget International Law

International law is as vast as it is undefined, but grounds for a compensation scheme can be found throughout its principles. "Under the human rights model...[of] international law," the unjustified expropriation of property without proper compensation constitutes a violation of the property owner's individual rights, standing in staunch contrast to classical international law which placed the state sovereignty above the property owner and individual rights. 68 In keeping with this notion, in 1948, the United Nations passed a resolution, entitled the Universal Declaration of Human Rights, which "stated, in Article 17, that everyone has the right to own property and to not be arbitrarily deprived of that property." 69 "In 1974, the United Nations adopted Resolution 3281 of the Charter of Economic Rights and Duties," which required appropriate compensation to be paid by the state that is undertaking the expropriation of property. 70 The importance of compensation after the expropriation of properties was supported by the adoption of chapter 11 of the North American Free Trade Agreement (NAFTA), which provides for a tribunal to determine compensation where "a state actor has [either blatantly] expropriated foreign investment property" or adopted regulation that has the effect of expropriation of such property. 71 Although the definition of compensation in chapter 11 "does not mention the word 'adequate,' that term has long been understood to mean fair market value, which NAFTA unequivocally requires." 72

67. Id. at 500-01.
68. See Peñalver, supra note 1, at 134-35.
69. Id. at 154.
70. Ortiz, supra note 6, at 339.
Article 2.2(c) of [U.N.] Resolution 3281 provides each state has the right [to] nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to... controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and in accordance with the principle of free choice of means.

Id.

72. Id. at 113.
IV. STEP-DOWN RESTITUTION EXPLORED

Despite the availability of Cuban, United States, and international property law as a legal foundation for confiscated property claims, one group of claimants, Cuban exiles, finds itself in the doldrums of legal protection when it comes to redress for seized property.\textsuperscript{73} Cuban exiles do not have standing under United States or international law to invoke the protection of foreign countries against Cuba because the property takings occurred when the exiles were nationals of Cuba.\textsuperscript{74} “Moreover, the Castro regime enacted laws prohibiting Cuban exiles who fled Cuba after the revolution from asserting property claims in Cuban courts.”\textsuperscript{75} The lack of redress for Cuban exiles is astounding when it is considered that the aggregate amount of confiscated property claims by Cuban nationals is thought to exceed $7 billion, more than three times that of United States claimants.\textsuperscript{76} Given the inequities in current property law, and Cuba’s need to transition into a free market society, a future post-Castro Cuban government will have to enter into a treaty with the United States that provides a new legal framework through which to address confiscated property claims.\textsuperscript{77} This “new legal framework must” proclaim all takings by the Castro government as illegal and invalid and implement an equitable restitution policy for all victims of Castro’s regime, preferably through a future dedicated court.\textsuperscript{78} A post-Castro Cuban government should institute the Step-Down Restitution Policy.\textsuperscript{79} While the presumptive remedy in this policy is the return of confiscated property, a Cuban court or tribunal will have the flexibility on a case-by-case basis to award other remedies such as the substitution of property and monetary compensation.\textsuperscript{80} Such a policy will allow the Cuban government, with its limited financial resources and struggling economy, to begin to provide redress for its

\textsuperscript{73.} See Alexander & Mills, supra note 45, at 156–60.
\textsuperscript{74.} Id. at 156–57. See also CREIGHTON REPORT, supra note 11, at 109.
Many Cuban nationals whose property was taken by the Castro regime fled Cuba and settled in the United States, where they eventually acquired the status of permanent residents or citizens of the United States. While their claims arose in Cuba, they seek the protection of the U.S. government. Such protection could not be granted because expatriates were not U.S. citizens when their claims arose.
Alexander & Mills, supra note 45, at 158.
\textsuperscript{75.} Alexander & Mills, supra note 45, at 158.
\textsuperscript{76.} Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 221.
\textsuperscript{77.} Ortiz, supra note 6, at 334, 336.
\textsuperscript{78.} Id. at 336, 341.
\textsuperscript{79.} See id.
\textsuperscript{80.} See id. at 342.
confiscations in a timely fashion in an attempt to jump start its future as a free market society.\textsuperscript{81}

At the inception of Cuba's march towards a free market society, Cuba will encounter its greatest obstacle, "the absence of an existing" commercial and real estate market from which to accurately gauge the value of seized properties and industries.\textsuperscript{82} Nevertheless, an appropriate remediation policy in Cuba must ensure restitution or equitable compensation to former property owners and must not be too strict in execution as to harm the economy by deterring foreign investment or destabilizing blossoming economic markets.\textsuperscript{83} A restitution system must also attempt to meet the following, albeit at times inconsistent, objectives:

1) providing predictable and substantially fair treatment to all interested parties; 2) creating, in the shortest possible time, a regime of clear, secure and marketable rights to property; 3) promoting the expeditious privatization of state-held assets; 4) encouraging the early onset of substantial foreign investment; and 5) keeping the aggregate cost of the remedies within the financial means of the country.\textsuperscript{84}

To meet these goals, a policy implementing Step-Down Restitution will require the establishment of commissions, tribunals, or courts with the legal authority to settle claims on an individual basis by virtue of a well defined body of procedures, eligibility guidelines, and evidentiary standards.\textsuperscript{85} A post-Castro Cuban government through these tribunals or courts "will have to balance the rights and interests of the former owners against" the rights of third party foreign investors and the rights of any lessees or occupants on the property at the time of settlement of the claim.\textsuperscript{86} This is especially true due to the presumptive remedy of restitution of the confiscated property offered by the Step-Down Restitution Policy.\textsuperscript{87} Moreover, the post-Castro Cuban government will have to determine and establish clear guidelines regarding if and/or how different types and sizes of property will be treated under the law as the former Czechoslovakian government did when it enacted legislation

\textsuperscript{81} Id. at 336.
\textsuperscript{82} Grider, supra note 5, at 457.
\textsuperscript{83} Alexander & Mills, supra note 45, at 168.
\textsuperscript{84} Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 244-45.
\textsuperscript{85} Ortiz, supra note 6, at 341.
\textsuperscript{86} Travieso-Diaz, Alternative Remedies, supra note 3, at 678.
\textsuperscript{87} See Ortiz, supra note 6, at 342; Travieso-Diaz, Alternate Remedies, supra note 3, at 676-77; Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 245.
distinguishing between small, large, and agricultural properties.\textsuperscript{88} Lastly, regardless of the effectiveness or ineffectiveness of confiscations by the Castro government, the post-Castro Cuban government must take up the duty to adequately and equitably provide redress to Cuban exiles, Cuban nationals, and all foreigners, alike.\textsuperscript{89}

A. \textit{Sum of Its Parts}

The first step in the Step-Down Restitution Policy is direct restitution.\textsuperscript{90} As noted above, the term restitution has been used interchangeably to refer to all forms of remediation for confiscated property claims.\textsuperscript{91} However, under this restitution policy, the term restitution is used to mean the return of the expropriated property “to the original owner or [the original owner’s] heirs.”\textsuperscript{92} Direct or natural restitution is often used to specifically connote the “return of the actual property expropriated during the communist era.”\textsuperscript{93} Where return of the actual confiscated property is impossible or impracticable, substitution restitution, as the second step in the policy, provides for the replacement of property equivalent to that which was illegally seized.\textsuperscript{94} However, courts should also have the option of returning confiscated property to the original owner even though such property is currently being used in a manner that would be incongruent with the former owner’s regular use, such as in the case where the property is being used for a governmental or utility purpose, where a change in the use of the property would be detrimental to the public welfare, or where the property is serving as the primary residence of an individual or individuals. Direct restitution in such a case would not serve as a tool which the claimant could use to remove individuals, businesses, or government buildings from the property, but instead would be the avenue through which the claimant could seek and recover current and past rent for the use of the property.\textsuperscript{95}

The third step in the Step-Down Restitution Policy is compensation, which refers to financial remediation in exchange for the expropriated property.\textsuperscript{96} One form of compensation, as used by Lithuania, Estonia, and Latvia

\begin{footnotes}
\footnotetext[88]{Travieso-Diaz, \textit{Cuban Claims Resolution}, supra note 7, at 246–47.}
\footnotetext[89]{\textit{Id.} at 247.}
\footnotetext[90]{See Travieso-Diaz, \textit{Cuban Claims Resolution}, supra note 7, at 245.}
\footnotetext[91]{\textit{See} Ortiz, supra note 6, at 342.}
\footnotetext[92]{Gilmore, \textit{supra} note 38, at 93.}
\footnotetext[93]{Foster, \textit{supra} note 50, at 633–34.}
\footnotetext[94]{\textit{Id.} at 635.}
\footnotetext[95]{\textit{See} Ortiz, \textit{supra} note 6, at 342–43. \textit{See also}, Travieso-Diaz, \textit{Alternate Remedies}, \textit{supra} note 3, at 677.}
\footnotetext[96]{Foster, \textit{supra} note 50, at 636.}
\end{footnotes}
(hereinafter the Baltic States), “consists generally of [a] lump-sum payment[] approximating the actual value of property at the time of nationalization.” 97 Under a voucher system of compensation, “former owners receive vouchers, certificates, bonds, or shares redeemable for property ‘similar in value’ to their confiscated assets, for shares in a compensation fund, or for stock or ‘investment checks’ in newly privatized enterprises, housing or land parcels.” 98 Some Eastern European countries have decided to offer vouchers as compensation, but have limited their versatility by not allowing such vouchers to be redeemable for money, but nevertheless available as collateral for loans, as payment for property sold by the government, and in exchange for annuity investments. 99 Hungarian law, for example, defines the vouchers as “interest bearing transferable securities that can be traded on the Budapest Stock Exchange, but can not be exchanged for cash.” 100 The last step of the Step-Down Restitution Policy constitutes a miscellaneous category comprised of alternative remedies considered equitable remediation for expropriation claims that can not be resolved in the previous steps. 101 A list of potential alternate remedies includes:

1. credits on taxes and duties to the extent of all or part of the claim amount;
2. the ability to exchange the claim for other investment opportunities, such as management contracts, beneficial interests in state-owned enterprises, and preferences in government contracting; and
3. other benefits [available through individual negotiations].

B. Step-Down in Detail

Restitution and compensation each have their own advantages and disadvantages. 103 While direct restitution is the preferred remedy in the Step-Down Restitution Policy, equitable resolution to varying property claims will require the use of all forms of redress in a pragmatic and flexible manner. 104

In general, restitution strategies have the advantages of 1) making a decisive break with a previous regime; 2) clearly establishing the

97. Id.
98. Id.
100. Alexander & Mills, supra note 45, at 176.
101. See Travieso-Diaz, Alternate Remedies, supra note 3, at 682.
102. Id.
103. See Ortiz, supra note 6, at 342–43.
104. Travieso-Diaz, Alternative Remedies, supra note 3, at 678.
priority and validity of property rights; 3) costing the state treasury less than paying compensation to previous owners would cost; 4) providing a clear title for owners of restituted property, which may ease issues of property governance and encourage new investment; and 5) stimulating markets in property and thereby leading to higher economic efficiency uses....

Conversely, compensation programs may help avoid many of these problems, but they are likely to be very costly, fail to make a decisive break from prior regimes and their policies and practices, open the question who will eventually gain control of these properties... and generally are paid at only a small percentage of any value that might be placed on the property. 105

Thus, a flexible policy which allows for the usage of both remedies—albeit favoring restitution—provides the post-Castro government with the opportunity to maximize the advantages of both remedies while limiting the disadvantages. 106 The remedies provided in the Step-Down Restitution Policy and the manner in which they are offered have been recognized and utilized by the Baltic States. 107 However, in the execution of such policies, the Baltic States have learned practical lessons that can serve as guidelines and regulatory gap fillers in a remediation policy used by a future, post-Castro Cuban government. 108 While the successes and failures of the Baltic States and European countries in their attempts toward a free market society will later justify the implementation of the Step-Down Restitution Policy, they will also serve to strengthen its application in a democratic Cuba. 109

Although direct restitution is the presumptive remedy in the Step-Down Restitution Policy, situations will arise where direct restitution will be appropriate only with the enforcement of certain conditions. 110 In Lithuania, a former owner may have confiscated property returned but may not reoccupy such property if the property currently houses tenants who lived on the property during the communist regime. 111 While title of property under such circumstances will return to the previous owner, the owner will be limited in his ability to reoccupy the land until the current tenants find an alternative place.

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105. CREIGHTON REPORT, supra note 11, at 88–89.
106. See id.
107. Ortiz, supra note 6, at 344–47.
108. Id. at 353.
109. See id.
110. See, e.g., id., at 345–50; Travieso-Diaz, Alternative Remedies, supra note 3, at 677–81; Alexander & Mills, supra note 45, at 172.
111. Ortiz, supra note 6, at 346.
to live.  However, Lithuania does allow restituted property owners to charge rent in these situations. Given the nationalization and redistribution of residential property and the socialist goal of expanding "home-ownership" to a greater number of Cuban citizens, Cuba will likely face the same problem as Lithuania and should adopt such a policy so as to avoid conflict between U.S. Citizens and returning Cuban exiles and Cuban Nationals. In Germany, "[w]hen property is returned, the former owner may have to pay for any improvements to the property that increased its value [but] . . . if the value of the property decreased as a result of the confiscation, the former owner is compensated for the decrease." Restitution programs operate on the underlying principle that a former property owner, foreign or domestic, has the right to the return of the confiscated property where the confiscation by the state was illegal or ineffective—a policy which should be at the heart of any Cuban remediation program.

"The possibility of returning the actual property seized by the government, however, [may] depend[,] on . . . economic and social considerations" and whether the original property may be clearly identified in the face of changes to that property. Similar to the proposed Step-Down Restitution Policy, "Baltic schemes attempt to" indemnify owners of confiscated property by providing substituted property where it has become impossible or impracticable to provide direct restitution. Direct restitution may be impossible because the property has "been devoted to a use not easily reversed or providing substantial public utility." However, as referenced above, courts in such a situation may have and should implement the option of returning the confiscated property to the original owner on the condition that the original owner will not expel current tenants or seek the removal of buildings on the returned property, but with the understanding that future, and perhaps past, rent may be collected.

Return of confiscated property "has been the preferred" and presumptive remedy in Germany, Czech Republic and Slovakia, the Baltic States, Bulgaria and Romania. However, countries like the Czech Republic and Slovakia have passed legislation which provides claimants and their succes-

112. Id.
113. Id.
114. Peñalver, supra note 1, at 126.
115. Ortiz, supra note 6, at 347.
117. Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 251.
118. Ortiz, supra note 6, at 345.
120. Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 252.
sors with compensation in situations where the expropriated "property has been destroyed, irrevocably altered, or improved through use" and a substitute cannot be found.\footnote{Ortiz, \textit{supra} note 6, at 349–50.} In these situations, "international arbitration tribunals have held that the state must pay compensation in an amount that would make the former owner[s] whole again.\footnote{Alexander & Mills, \textit{supra} note 45, at 172.}"\footnote{CREIGHTON REPORT, \textit{supra} note 11, at 37.} These are but a few samples of the determinations Cuba will have to make once it implements the Step-Down Restitution Policy as such decisions will allow Cuba to adequately manage claims with unique issues under a broader restitution policy. While lessons from the Baltic States and Eastern Europe serve as guiding principles in the execution of a remediation program, they also serve to justify the implementation of not only a remediation, but specifically the policy proposed in this article. Ultimately, Cuba and a special dedicated court should implement the proposed policy with the understanding the policy operates on the underlying principle that property illegally and unjustly seized should be returned to the true owner.

C. Justification from Around the World

In the Twentieth Century, the world witnessed a series of intrusions into private property rights on account of rising political and military conflicts, which resulted in the confiscation of property from millions of people.\footnote{See id.} Countries ravaged by attacks on private property rights have used differing systems of settling property disputes and their experiences prove invaluable to understanding the problems Cuba will face in its transition to a free-market democracy with re-instituted property rights.\footnote{See, e.g., Travieso-Diaz, \textit{Alternative Remedies}, \textit{supra} note 3, at 680–83; Travieso-Diaz, \textit{Cuban Claims Resolution}, \textit{supra} note 7, at 241–56; Foster, \textit{supra} note 50, at 625–49; Merrill, \textit{supra} note 71, at 114–16; Anna Gelpem, \textit{The Laws and Politics of Reprivatization in East-Central Europe: A Comparison}, 14 U. PA. J. INT’L. BUS. L. 315, 337–51 (1993).} As such, justification for the implementation of the Step-Down Restitution Policy can be seen from, not only the interpretation of Cuban law, but also the remedial actions and results of the international community.\footnote{Gilmore, \textit{supra} note 38, at 93.} Restitution should be identified as the preferred form of redress in Cuba "because it encourages property owners to repatriate with their entrepreneurial talent and capital . . . [and] minimizes costs for the government [by reducing the payment] of funds to previous owners."\footnote{See, e.g., Travieso-Diaz, \textit{Alternative Remedies}, \textit{supra} note 3, at 680–83; Travieso-Diaz, \textit{Cuban Claims Resolution}, \textit{supra} note 7, at 241–56; Foster, \textit{supra} note 50, at 625–49; Merrill, \textit{supra} note 71, at 114–16; Anna Gelpem, \textit{The Laws and Politics of Reprivatization in East-Central Europe: A Comparison}, 14 U. PA. J. INT’L. BUS. L. 315, 337–51 (1993).} Moreover, restitution has been said to accomplish three major goals:

\begin{itemize}
\item 121. Ortiz, \textit{supra} note 6, at 349–50.
\item 122. Alexander & Mills, \textit{supra} note 45, at 172.
\item 123. CREIGHTON REPORT, \textit{supra} note 11, at 37.
\item 124. See id.
\item 126. Gilmore, \textit{supra} note 38, at 93.
\end{itemize}
[f]irst, restitution promotes rapid, efficient transition to a market economy by transferring state and collective property to private owners and, at the same time, “restoring the value of property” in the minds of citizens; [s]econd, it is “morally the right thing to do” to remedy past “injustices”; [a]nd [t]hird, restitution reinforces governmental claims to continuity with pre-[Communist] regimes and thus, serves “as a vehicle for the construction of a post-Communist national identity.”

Restitution programs in place in Central and Eastern Europe and the Baltic States, as well as Cuban and international law in place at the time of the takings, provide clear justification for a restitution policy in a post-Castro Cuba. In addition, tribunals established in Iran and Ethiopia shed light on the issues that a future Cuban property court will face.

1. Lessons from the Baltic States and Europe

“[T]he former [c]ommunist countries [in] Central and Eastern Europe provide a context in which to assess the parameters of any future [restitution] program” and, through their experiences, many of the justifications for the adoption of such a flexible restitution policy. As stated above, the Baltic States have favored direct restitution of property, business, and residential buildings and have adhered to the principle “that their citizens are entitled to resume their lives as they were prior to the communist takeover.” The use of restitution as the main remedy was also utilized because most of the countries ravaged by attacks on property rights were extremely cash poor. However, the Baltic States like the Czech Republic have allowed “for compensation in cash and securities where restitution [has been] impossible.” Unlike other countries in the region, Hungary has favored a compensation policy that provided confiscated property owners with “interest-bearing certificates, which [could] be used to purchase state-owned property” and shares in business placed on sale by the state. While the incorporation of monetary and voucher compensation “recognizes the limits of Cuba’s ability to

127. Foster, supra note 50, at 626.
128. Id. at 625.
129. See CREIGHTON REPORT, supra note 11, at 38–58.
130. Alexander & Mills, supra note 45, at 145.
131. Foster, supra note 50, at 634.
132. Ortiz, supra note 6, at 344.
133. CREIGHTON REPORT, supra note 11, at 73.
134. Gelpem, supra note 125, at 337.
135. Ortiz, supra note 6, at 349.
pay compensation claims and avoids the dislocation costs and disputes associated with direct restitution.” 136 Over-reliance on this form of remediation could create disastrous results and create enormous difficulties for Cuba in the infancy of its development into a free market society.

Compensation when used in isolation as the sole remedy for confiscated property claims causes the privatizing governments to incur huge “debts, as seen in Hungary and Poland, which forces governments to choose between servicing the debt and funding needed social programs.” 137 This is evident as Hungary changed its voucher compensation program over the years by limiting the amount of capital private companies could draw from state-paid vouchers and the amount of revenue agricultural property owners could collect from the state. 138 Moreover, Hungary’s voucher program provides inadequate compensation for the takings as “the vouchers [have] trad[ed] at less than 50% of their face value.” 139 Most attempts at remediation by virtue of financial compensation have resulted in insignificant redress for illegal takings. 140 In the Czech Republic and Slovakia, claims redressed only by financial compensation were limited to approximately $1000 per claimant and were limited as to the amount of land for which one individual claimant could recover. 141 Financial compensation has even caused problems in those Baltic States where multiple remedies were provided. 142

Due to budgetary constraints, Baltic States have been effectively restricted in their capacity to offer extensive financial compensation. All three countries have limited hard currency reserves . . . Estonia has attempted to address this situation by creating a special “compensation fund,” consisting of fifty percent of all amounts received from privatization sales. 143

“Voucher privatization has also encountered problems . . . [a]ccording to recent reports . . . for many Estonians, such certificates have turned out to be little more than a ‘packet of waste paper.’ The Estonian government allegedly issued an estimated eight to nine times more securities than it had property to sell.” 144

139. Travieso-Diaz, *Cuban Claims Resolution*, *supra* note 7, at 256.
140. See Gelpem, *supra* note 125, at 355.
141. See id.
143. Id.
144. Id. at 644.
Restitution policies have provided beneficial results in countries such as the Czech Republic and Slovakia where it has been said to "'enhanc[e] the credibility of economic reform by increasing its irreversibility,' providing a way to resolve claims without impacting the country’s depleted treasury, and lending political legitimacy to the government and the democratization process.'"\(^{145}\) A transitional Cuban government will not likely "have access to adequate" capital and other financial resources to compensate all claimants for confiscated property and, as such, "restitution may be the preferred option," especially if Cuba is unable to get international financing.\(^{146}\) One commentator has argued that restitution has actually harmed the economies of the Baltic States because delays in the resolution of property claims resulted in delays of mass privatizations and unclear titles, thereby deterring foreign investment.\(^{147}\) However, most of the justifications for a restitution policy found in Cuban law and the Cuban experience, explained below, directly controvert those very allegations.\(^{148}\)

\(^{145}\) Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 253 (quoting Claus Offe et al., A Forum on Restitution, 2 E. EUROPEAN CONST. REV. 30, 31 (1993)).

\(^{146}\) CREIGHTON REPORT, supra note 11, at 78.

\(^{147}\) Foster, supra note 50, at 646–47. See also Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 253 n.128.

The Baltic experience reveals, however, that there could be . . . serious drawbacks to Cuban adoption of a restitution program. Identification, certification, review, and resolution of restitution applications could create a significant burden on inexperienced, inadequately staffed governmental and judicial organs. Cuba, like the Baltic [S]tates, has only limited personnel with the legal and real estate expertise to handle complex property issues.

Furthermore, the preceding study suggests that restitution could act as a major brake on overall Cuban national economic modernization. It could delay the establishment of stable, marketable legal title to assets, a critical requirement for both privatization and domestic and foreign investment. Moreover, it could further drain an already depleted Cuban national treasury. A Baltic-style restitution program would obligate the Cuban state either to turn over state and collective property gratuitously or to pay equivalent compensation. In the Cuban case this would be particularly onerous because of the sheer enormity of U.S. claims for "prompt, adequate and effective" compensation for expropriated property.

Finally, the examples of Estonia, Latvia, and Lithuania indicate that restitution could have a severe socioeconomic impact on current Cuban citizens. As in these three states, the Cuban government has heavily subsidized the living expenses of its population. It has prevented its citizens from significant acquisition of assets and, until recently, legally prohibited them from accumulating hard currency. Thus, if Cuba should elect to return property to former owners (many of whom are foreign corporations or émigrés) and to introduce free market mechanisms, its present population would be at a competitive disadvantage. Similar to the Baltic case, Cuba should expect particularly negative results in the housing sector, including widespread eviction of tenants.

Foster, supra note 50, at 649–50.

\(^{148}\) See Travieso-Diaz, Cuban Claims Resolution, supra note 7, at 241–54; Alexander & Mills, supra note 45, at 145–78.
2. Reflections on Cuban Law and Cuba’s Present State

The common justification for restitution of expropriated Cuban property is that all the takings were illegal because the acts were conducted by an illegitimate government and constituted transgressions against established property law protections. However, such arguments fail as the acts of revolutionary governments are usually given credit once said government is in complete control. While this may be so, the takings may be illegal based on the very laws and actions promulgated by Castro himself. As noted above, Judge Urritia declared that the 1940 Constitution would remain “the law of the land.” If this is true, the confiscation by Castro of any Cuban property, without a decree by a court certifying the public purpose for which the property was confiscated or the failure of the Castro government to pay financial compensation for such taking, would be tantamount to an invalidation of said taking. If the Fundamental Law of 1959 is considered the first valid promulgation of law by the Castro government—despite the failure to adhere to proper amendment procedures—such takings would nevertheless be legally ineffective as compensation for such takings were still required under Castro’s own law but never paid. Recalling that this article presumes Cuba will make a move towards democracy on its own accord, a post-Castro Cuban government will likely invalidate such takings because an affirmation of the legitimacy of such takings could be viewed as a discriminatory taking in violation of any foreseeable future property laws Cuba may promulgate in addition to current international law.

Restitution is further substantiated by Cuba’s Civil Code and its version of adverse possession, known as usucapio, which would disregard the claims made by occupants of confiscated property and allow for restitution of such property. The Spanish Civil Code, which served as the basis of Cuba’s

149. Travieso-Díaz, Cuban Claims Resolution, supra note 7, at 241–42.
150. Id. at 241.
This argument fails because the laws of a revolutionary regime that is fully in control and receives popular support are valid, regardless of the legitimacy of the regime. Also, as a practical matter, a blanket challenge to the Revolution’s legislation is troubling, in that it implies that all laws issued by the Batista regime after the 1952 coup d’état were invalid, as well as all laws issued by several other de facto regimes that have ruled Cuba . . . . In short, a successful challenge to the validity of all post-1959 laws on the grounds of lack of constitutional legitimacy by the enacting government could leave Cuba in a State of legal chaos and make it difficult for the country to govern itself.
152. Alexander & Mills, supra note 45, at 148.
153. Id. at 164.
154. Id. at 167.
Civil Code defined two forms of adverse possession, "ordinary" and "extraordinary." Under the former, "a possessor's legal right in land vested only if he or she had possession of the land for an uninterrupted period of twenty years and had no knowledge of other legal title to the land." No occupant of Cuban property would be able to satisfy these elements as the Castro regime took possession of all residential property pursuant to the Urban Land Reform and the Constitution of 1976. The 1988 Cuban Socialist Code further substantiated such a conclusion when it explicitly prohibited adverse possession against the state. Under these circumstances, an occupant of expropriated property would not be able to raise a valid claim on the property and attempt to prohibit restitution of such property. However, as referenced above, special conditions should be placed on property inhabited by Cuban citizens so as to avoid the potential for confrontations and evictions.

The public policy reasons for enacting a remediation policy with a restitution element far outweigh the legal conclusions from which such a policy can be launched.

[R]estitution would have powerful symbolic value. It would mark the advent of a new post-socialist era. It would formally repudiate Marxist principles and schemes for state and collective ownership and recognize, even exalt, private property rights. It would provide a moral as well as legal condemnation of the past. In so doing, restitution would help a post-socialist Cuban government establish legitimacy in the eyes of the world community. This would dovetail neatly with current Western rhetoric and policy, which make progress toward "democracy" and a "free market economy" prerequisites for foreign assistance and support. Restitution would also advance the reconstitution of a Cuban national identity. It would allow Cuba to emerge from the rubble of the world communist "empire" with a clearer sense of nationhood and national purpose. It could promote reconnection with former citizens and ultimately lead to reintegration of émigrés into a single community of Cuban nationals. Restitution could also help Cuba forge ties with the United States. Because of its proximity, wealth, and influence, the United States has the potential to play a major role in securing Cuba's economic future. Yet, until Cuba makes a meaningful effort to recognize and satisfy outstanding U.S. claims for

155. Id.
156. Id.
157. See Alexander & Mills, supra note 45, at 150.
158. Id. at 167.
159. See, e.g., Ortiz, supra note 6, at 346.
nationalized property, the United States is likely to continue to impede rather than advance Cuban economic development. At the very least, Cuban support for restitution could signal its willingness to acknowledge and discuss U.S. claims.  

Moreover, restitution should be the preferred remedy because “[a] transitional government in Havana . . . is not liable to have access to adequate financial resources to pay compensation” at a large scale. 161 Ironically, if Cuba were to prefer compensation, it would likely need to secure a favorable loan from the United States to make such payments and, when it is considered that most of the Cuban nationals that would receive such payments are residents of the United States and would not prefer compensation, the United States is not likely to grant the loan with the expectation of Cuba making those payments. 162 The community of Cuban Nationals and Cuban Americans armed with their newly restituted properties would likely be among the first to return to the island nation and seek business and investment opportunities and “jump-start” a newly established Cuban, free-market economy. 163 “However, if the property claims of the Cuban-American exile community are left unresolved, their political and economic power could be turned against stabilizing a new government in Cuba, much to the detriment not only of the island, but also to potentially fruitful Cuba-U.S. relations.” 164

Despite the doubt that arises regarding Cuba’s ability to compensate confiscated investors and property owners, “Cuba [nevertheless] possesses the necessary human infrastructure and natural resources to attract . . . investment . . . [armed with] many thousands of Cubans [who] are trained in foreign languages, the advanced sciences, and math[ ] . . . [the] great potential for tourism, and vast energy resources.” 165 “As for its [natural] resources, joint ventures in Cuba [in] nickel and cobalt industries brought in $1.3 billion in 2005, while estimates of offshore oil reserves are at 5 billion barrels and of natural gas reserves at 10 trillion cubic feet.” 166 In addition, in 1991, Cuba instituted a policy which sought the development of renewable energy re-

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160. Foster, supra note 50, at 649.
161. CREIGHTON REPORT, supra note 11, at 78.
162. See generally id.
163. Id. at 109–10.
164. Id. at 110.
165. Alexander & Mills, supra note 45, at 178.
sources.\textsuperscript{167} "For many years Cuba's sugar mills have burned waste cane solids (bagasse) as fuel to power their boilers, but the process is inefficient due to the age and condition of the turbines."\textsuperscript{168} However, with the emergence and prominence of sugar cane ethanol, as seen in places such as Brazil,\textsuperscript{169} Cuba can once again turn to sugar cane to help establish a new industry in Cuba and provide the economy with a much needed boost as it helps the world wean off of fossil fuels.\textsuperscript{170} The existence of these and other natural resources further substantiated the direct restitution of property.

Full restitution of all non-materially altered industrial, commercial and agricultural properties to their legitimate owners will not only carry out the justice required for social peace, but it will also place the means of production in the hands of those entrepreneurs which had elevated Cuba to the top of nearly every socio-economic index in Latin America prior to the communist revolution. By creating constitutional and other legal incentives to encourage the unleashing of the creative energies of the Cuban people (both on the island and in exile), Cuba can rapidly earn foreign exchange through exports, produce abundantly for its own domestic consumption, employ workers at real jobs paying in a currency that has value (unlike today's Cuban peso), and restore labor rights. The economic multiplier effect of this combined economic activity will rapidly return prosperity to the island.\textsuperscript{171}

Due to its location and natural resources, Cuba also attracts nearly two million tourists a year which "will appeal to hotel companies and cruise operators, as well as to corporate farmers in need of equatorial sunshine."\textsuperscript{172} Bottom line, Cuba is a blank canvas ready for the paint of investment from international companies. Without the reinstitution of property rights, Cuba's economy will never fully recuperate as is evident by the continued decline in

\begin{itemize}
\item \textsuperscript{168} Id.
\item \textsuperscript{169} See Joel K. Bourne, Jr., \textit{Green Dreams}, NAT'L GEOGRAPHIC, Oct. 2007, at 38. While ethanol produced by corn only yields 1.3 gallons of ethanol to every gallon of fossil fuels used in the process, the production of sugar cane ethanol is much higher with the production of eight gallons of ethanol to every one gallon of fossil fuels. \textit{Id.} To make the sugarcane ethanol production even more efficient, production plants burn the aforementioned bagasse to power their plants and, thus, do not even consume fossil fuels at any point in the process. \textit{See id.}
\item \textsuperscript{170} Piñón, supra note 167, at 17.
\item \textsuperscript{171} Travieso-Diaz, \textit{Cuban Claims Resolution}, supra note 7, at 254–55 n.131.
\item \textsuperscript{172} Davidson, supra note 166.
\end{itemize}
the number of foreign companies investing and operating in Cuba.  "Joint ventures between Cuba’s communist state and foreign investors fell to 236 at the end of 2006, down from 258 a year ago and 313 at the end of 2004." This trend will likely continue until Cuba makes the initial steps towards a free market society at which point it will have the capital and man power to implement a flexible remedial policy such as the Step-Down Restitution Policy, which will work in tandem with the blossoming economy.

3. And Now a Word on International Law

International law serves both to justify a restitution policy as well undercut the legitimacy of Castro’s takings. "[T]he Cuban government maintains that” its confiscations of property belonging to individuals who left the country for a specified time were appropriate as the property was abandoned under Cuban law. However, when it is considered that many Cuban citizens fled Cuba due to fear of political persecution, international law dictates such action did not constitute property abandonment.

Necessity serves to protect a party against the consequences of a wrongful act if the act was deliberately taken to safeguard an “essential interest” of the party against a “grave and imminent peril.” The essential interests of individuals include their right to avoid political persecution. Similarly, an essential interest of a business entity would be to avoid a state-imposed dissolution or expropriation of its assets.

Moreover, general principles of international law allow citizens “to flee their country in times” of revolutions when they are experiencing political persecution without fearing that their property will be dispossessed. Thus, the taking of exiles’ property under these principles should be construed as illegal and merit the restitution of the expropriated property.

While international law does not specifically call for the restitution of expropriated property, restitution can be deemed necessary to redress takings according to the human rights model of international law, which considers

174. Id.
176. Id. at 165–66.
177. Id. at 166.
178. Id.
the confiscation of property a violation of human rights.\textsuperscript{179} Justification for restitution can only be inferred from international law, but international law unequivocally calls for compensation for the expropriation of property belonging to foreigners.\textsuperscript{180} Although compensation is generally thought to constitute a fair market value payment for seized property, it is unclear exactly what compensation standard to apply under international law.\textsuperscript{181}

Where a state takes possession of an enterprise [or property], as through nationalization, two techniques for ascertaining fair market value are "net book value" and "going concern value." The former is a backward-looking approach that is based on the historical prices of assets (preferably adjusted for inflation), less liabilities and depreciation. The latter is a forward-looking approach that relies upon an estimate of what future earnings [or value] would have been absent the expropriation, discounted to present value.\textsuperscript{182}

Moreover, NAFTA's measure of compensation "is a restatement of . . . basic . . . American constitutional law of compensation."\textsuperscript{183} American law also requires dispossessed property owners to receive fair market value for their property; defining fair market value as "the amount that a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker."\textsuperscript{184} Regardless of the definition of compensation employed, the price of compensation must be construed from circumstantial evidence and is highly subjective, relying on the discretion of the administering body and only constrained by a future restitution policy.\textsuperscript{185} However, it is in this discretion where justification for restitution, or at least a policy that offers restitution as a possible remedy, can be found because a compensation policy employing such definitions would usually provide incomplete compensation,\textsuperscript{186} failing to consider the benefits conferred to the former owner derived with the seized property and any loss incurred by the former property owner because of the taking.\textsuperscript{187}

\textsuperscript{179.} See Peñalver, \textit{supra} note 1, at 135.
\textsuperscript{180.} See Ortiz, \textit{supra} note 6, at 339. \textit{See also} Merrill, \textit{supra} note 71, at 110.
\textsuperscript{181.} Merrill, \textit{supra} note 71, at 113.
\textsuperscript{182.} \textit{Id.} at 113–14.
\textsuperscript{183.} \textit{Id.} at 115.
\textsuperscript{184.} \textit{Id.} at 116.
\textsuperscript{185.} \textit{Id.} at 119–20.
\textsuperscript{186.} Merrill, \textit{supra} note 71, at 111.
\textsuperscript{187.} \textit{Id.} at 119.
The Step-Down Restitution Policy should be implemented by way of a special tribunal or court established by agreement between the United States and Cuba. Such an agreement must include a provision in which both countries commit "to act in good faith so as to promote the mutual prosperity of their nations and citizens." A post-Castro Cuban government must pledge to create a special court to resolve all confiscated property claims "by Cuban nationals who became nationals of the United States after the date of accrual of such claims." This court will have independent and limited jurisdiction within the Cuban judicial system. In implementing the Step-Down Restitution Policy, a future Cuban property claims court can turn to the lessons learned in Iran and Ethiopia, where similar courts were introduced to handle confiscated property claims.

A. Lessons from Iran

In 1982, Iran and the United States established a dedicated tribunal for the redress of property claims akin to the one needed in Cuba to implement the Step-Down Restitution Policy. The need for a claims tribunal in the case of Iran was prompted by the Islamic Revolution of 1979. Forces acting in support of the Ayatollah seized not only the U.S. Embassy in Tehran, but also many privately held American assets. Correspondingly, the necessity of claims tribunals in the case of Cuba was prompted by Castro's revolution in 1959, and the still-uncompensated property seizures that went along with it. The two situations thus present similarities in terms of the emotional and political aspects of the breakdown in relations.

Like the Iran-U.S. Claims Tribunal, a future Cuban property claims court implementing the Step-Down Restitution Policy will have to apply law and policy in a flexible manner, granting jurisdiction over a series of claims that arise in differing circumstances, taking law and policy from various sources including Cuban and international law, and granting different redress

188. CREIGHTON REPORT, supra note 11, at 150.
189. Id.
190. Id. at 6.
191. See id., at 38–58.
192. Id. at 46.
193. CREIGHTON REPORT, supra note 11, at 38.
depending on the circumstances.\textsuperscript{194} However, in issuing remedies, a future Cuban property claims court should do well to consider that Cuba, unlike Iran, has low-valued currency and limited or no funds with which to pay compensation claims—claims that may include payment of the value of property, interest, lost profits, and/or past unpaid rent.\textsuperscript{195} As such, the preferred remedy of direct restitution should be granted where possible. An important lesson Cuba can learn from Iran is that “much can be done with informal structures and the good will of [the] participants.”\textsuperscript{196} Because the Step-Down Restitution Policy does not provide for the expulsion of tenants and businesses on confiscated properties, informal mediations could facilitate the settlement of property claims where the true owner simply seeks re-institution of title and would be content with collecting rent from tenants on the property. Given the proximity of Cuba to the United States and the sizeable Cuban/Cuban American population residing in the United States, relations with Cuba and the establishment of a Cuban property claims court will not likely suffer the delays and set-backs faced in Iran given the limited cultural boundaries and understood motivations amongst the groups with interests in Cuba.\textsuperscript{197}

B. \textit{Lessons from Ethiopia}

The Eritrea-Ethiopia Claims Commission is another example of a property claims tribunal created by bilateral treaty.\textsuperscript{198} While the Ethiopian Commission was given broad jurisdiction—even so far as to include tort claims—in a post war scenario, a future Cuban property claims court implementing the Step-Down Restitution Policy may nevertheless find applicable case law stemming from the Ethiopian court because of their stance on confiscated property.\textsuperscript{199} The Ethiopian Commission stated:

\begin{quote}
A belligerent is bound to ensure insofar as possible that the property of protected persons is not despoiled or wasted. If private property of enemy nationals is to be frozen or otherwise impaired in wartime, it must be done by the State, and under conditions pro-
\end{quote}

\begin{itemize}
  \item \textsuperscript{194} \textit{See id.} at 40.
  \item \textsuperscript{195} \textit{id.} at 38.
  \item \textsuperscript{196} \textit{id.} at 39.
  \item \textsuperscript{197} \textit{See id.}
  \item \textsuperscript{198} CREIGHTON REPORT, \textit{supra} note 11, at 49.
  \item \textsuperscript{199} \textit{id.} at 50–51.
\end{itemize}
viding for the property’s protection and its eventual disposition by return to the owners or through post-war agreement.\footnote{Id.}

Such a proclamation is at the heart of the Step-Down Restitution Policy and should be at the heart of any remediation treaty, program, or policy implemented by Cuba.

VI. CONCLUSION

Cuba will eventually take its first step towards the long road to a free market society. In this endeavor, Cuba should implement the Step-Down Restitution Policy as a means of achieving a prompt and efficient resolution to hundreds of thousands of property claims. The presumptive remedy of restitution will allow many Cuban exiles to take up their property and begin to make improvements to it immediately with the resources they have amassed while living elsewhere, mainly the United States. While situations may arise where former property owners find occupants currently living on the expropriated property, the Cuban government should take measures to prevent conflict between the parties and the eviction of these individuals. Given the poor housing sector, Cuba will likely have to implement legislation calling for the construction of affordable housing for Cuban Nationals living on the island currently occupying confiscated property, who do not have their own confiscated property to which to return. Restitution is most appropriate for commercial properties which have undergone little or no change during the Castro regime. Given its proximity to the United States, Cuba will surely attract an enormous number of tourists from the United States and will most likely become a “stop” on the itineraries of many vacation cruise lines, like Puerto Rico and the Bahamas. With the potential for sudden interest in the country, Cuba will need to provide fast and efficient remedies to corporate claimants. With the award of direct restitution, corporate claimants may immediately use their property or alienate their property to corporations who have the resources and are ready to invest in industries such as tourism and mining. The greatest strength of restitution is the symbolism of the act. Restitution represents returning Cuba to its pre-Communist days of individual success and economic prosperity.

The greatest strength of the Step-Down Restitution Policy, however, is the flexibility afforded to the fledgling democratic Cuban Government in its ability to award appropriate remedies on a case-by-case basis. With the adoption of such a policy, a healthy body of case law will quickly be estab-
lished and allow for the dispensation of property claims based on differing scenarios. Although Cuba has limited land resources to offer in the form of substituted restitution, varying forms of compensation coupled with restitution or alternative remedies will allow Cuba to adequately, efficiently, and equitably handle confiscated property claims. The different types of claimants which will approach Cuba seeking restitution and the various forms of property expropriated during the Castro regime should force Cuba to avoid applying a one-size-fits-all resolution to confiscated property claims. Such a sweeping method aimed to settle all claims quickly will infuriate those on the short end of the remediation arrangement. The Step-Down Restitution Policy, with its varying remedies, allows for former owners to seek justice for Cuba's transgressions by allowing them to receive individualistic and equitable remediation.
DOWN BUT NOT OUT: A COMPARISON OF PREVIOUS ATTEMPTS AT IMMIGRATION REFORM AND THE RESULTING AGENCY IMPLEMENTED CHANGES

LAURENCE M. KRUTCHIK*

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I. INTRODUCTION

Recently, immigration reform has caught the attention of the United States. The media has been following the development of the recent immigration bill, Senate Bill 1348—formerly known as the Comprehensive Immigration Reform Act of 2007 (CIRA 2007)—presented by a bipartisan
group of senators. The 110th Congress of the United States believed that this Act and several amendments would have resulted in radical changes to immigration laws. Unfortunately, on June 28, 2007, CIRA 2007 was defeated, coming up "fourteen votes short of the necessary sixty" to proceed to consideration by the House of Representatives. This revolutionary bill would have closed the gaps in current immigration law through the creation of several programs, as well as rewriting certain parts of the United States Code. This is not the first time that Congress considered such a change in immigration law.

Last year, the 109th Congress considered Senate Bill 2611 (CIRA 2006), which was essentially identical to CIRA 2007. The CIRA 2006 was passed by the House and Senate, but was never signed into law. Senator Harry Reid was the sponsor of both bills, and continues to promote immigration reform in this country. With the failure of these bills in Congress, the White House has presented changes they can make, through
administrative principles, within the existing law. These changes do not require congressional approval, but still have a binding legal effect on the nation through amendments to existing rules and regulations.

This article will discuss the evolution of immigration reform in the past and the attempts for contemporary reform. It is important for legislation, successful or not, to be evaluated. Doing so allows for a better understanding of the process of trial and error Congress struggles through to reform laws in this country. Part II briefly discusses the immigration reforms implemented before the September 11, 2001 (9/11) terrorist attacks. Part III will briefly review the legislation that was passed after 9/11 and the effect the laws had on immigration in a now terrorist-threatened country. Part IV will review the Comprehensive Immigration Reform Act of 2007 and the proposed changes that it would make to the law mentioned in the previous sections, in addition to other relevant laws. Additionally, this note will discuss the Comprehensive Immigration Reform Act of 2007 in detail. There are five main aspects of the bill that will be broken down and discussed. They are: 1) securing America’s borders; 2) a temporary work program for immigrants; 3) holding employers accountable for the illegal hiring of illegal aliens; 4) the three-group categorization of aliens currently residing in the United States; and lastly, 5) the assimilation of immigrants into American society through the enactment of the DREAM Act. Part V will discuss the similarities and differences of the immigration initiatives put forth by President Bush. There are some aspects of the initiatives that mimic the comprehensive acts and others that do not.


11. See id.

Since these changes will drastically affect the status of immigration in this country, this article will also incorporate predictions as to the effects that the new law will have on the economy and the country as a whole.

II. PRE-SEPTEMBER 11, 2001 IMMIGRATION LEGISLATION

Current immigration law in the United States is detailed and complex. There have been a multitude of acts and amendments that govern immigration in the United States. Discussing every act and the changes they made would encompass volumes. For purposes of this article, the major changes in the law, a review of CIRA 2007, and the current initiatives will be examined. This article examines legislation enacted prior to and following the 9/11 terrorist attacks.

A. Immigration Reform and Control Act of 1986

The first of recent changes in immigration law occurred with the enactment of the Immigration Reform and Control Act of 1986 (IRCA). Although similar to almost all other immigration laws, this law did not immediately pass in Congress. In fact, the law was voted down in three prior congressional sessions. The IRCA made changes to the laws established by the Immigration and Nationality Act (INA). This and other similar acts are referred to as an ‘amnesty’ or a legalization program because it provides LPR [(lawful permanent resident)] status to aliens who are otherwise residing illegally in the United States. The major changes resulting from IRCA include: 1) sanctions imposed on employers who knowingly hired or em-

16. Id.
ployed aliens not authorized to work; 19 2) enactment of a provision that would legalize the status of aliens residing in the United States since before January 1, 1982; 3) increased resources for immigration law enforcement; 20 and 4) an amnesty program for certain undocumented aliens and special provisions relating to foreign agricultural workers. 21 Additionally, IRCA established a new H-2A visa nonimmigrant status. 22 Although this new visa was added, immigrant and nonimmigrant visas were not overhauled. 23 As will be seen later in this article, there are laws enacted which made changes to the overall immigration system. Such changes include, but are not limited to, the elimination of the Immigration and Naturalization Service (INS) and the transfer of authority over immigration to the Attorney General of the United States. 24 Additionally, CIRA 2007 proposed more changes to the laws enacted under this and many of the other laws described in this article. 25


20. WEISSBRODT, supra note 15, at 22. CIRA 2007 also addresses the issue of immigrants residing in the United States. See LEGISLATIVE NOTICE, supra note 7, at 17.


22. 2 GORDON ET AL., supra note 17, 2-30. This visa program allows foreign workers to do farm work in the United States strictly through contracts. GUIDE TO THE H-2A VISA PROGRAM, supra note 21, at 1. Foreign workers contract with employers and return to their home countries when the contract is over. Id.

23. WEISSBRODT, supra note 15, at 23.


B. Immigration Marriage Fraud Amendments of 1986

With the enactment of the IRCA, problems developed with aliens committing marriage fraud in order to obtain benefits they otherwise would not be entitled to receive. With the enactment of the IRCA, problems developed with aliens committing marriage fraud in order to obtain benefits they otherwise would not be entitled to receive. The Immigration Marriage Fraud Amendments of 1986 (IMFA) were enacted specifically to counteract such fraud. The INS commissioner stated that “marriage fraud posed a significant threat to the integrity of the immigration system because marriage was the easiest . . . means of obtaining permanent residence status.” While these amendments were being debated, Representative Romano L. Mazzoli (D-KY) stated that: “Because spouses of U.S. citizens and permanent resident aliens are . . . given special consideration under our immigration laws, many aliens who would not otherwise be allowed to live in the United States find it expedient to enter into a fraudulent marriage.” The IMFA still allowed immigrants to marry in order to obtain citizenship, but attached certain conditions. The conditions revolve around the conditional permanent resident status granted to an alien upon marriage. The immigrant-resident petitioner must maintain a valid two year marriage. However, the INS may terminate the conditional status if it is determined that the marriage is a sham. Criminal penalties were increased for marriages that were determined to be shams.

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29. Id. at 682.
31. 8 U.S.C. § 1186a(a)(1). See also Jones, supra note 26, at 682.
32. Jones, supra note 26, at 682. The INS has the power to waive these conditions and is known as a hardship waiver. Id. at 683.

The Attorney General, in the Attorney General’s discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that—(A) extreme hardship would result if such alien is removed, (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1), or (C) the qualifying marriage was entered into in good faith by the alien spouse and during the marriage the alien spouse or child was battered by or was the subject of extreme cruelty perpetrated by his or her spouse or citizen or permanent resident parent and the alien was not at fault in failing to meet the requirements of paragraph (1).

33. Jones, supra note 26, at 682.
34. Id. Sham marriage is defined as “[a] purported marriage in which all the formal requirements are met or seemingly met, but in which the parties go through the ceremony with
C. **Anti-Drug Abuse Act of 1988**

The next landmark legislation, the Anti-Drug Abuse Act of 1988, addressed immigration from a different angle. This legislation focused on the epidemic of narcotics drug trafficking. In addition to the drug related changes in the law, there were immigration issues that were also addressed. This Act specified the term aggravated felony to include murder, drug trafficking, and illicit trafficking of firearms. This Act relates to immigration because it precluded granting voluntary departure to an alien convicted of the newly defined “aggravated felony,” which “[a]dded a new deportation ground for an alien convicted of an aggravated felony . . . , [e]nlarged the criminal penalties for aliens” charged with an aggravated felony attempting to reenter the United States unlawfully, and “[c]hanged [the] deportation proceedings relating to an alien convicted of an aggravated felony.”

D. **Immigration Act of 1990**

In 1990, Congress passed the Immigration Act of 1990 which modified immigration law in the United States. This law has been said to be “ill conceived, deceptively designed, poorly timed, and subtly racist.” Critics of this act state that it emphasizes the worst parts of the system and contains some hints of unethical principles. Critics have formed this view from the fact that the supporters of the act used the myth of labor shortages to justify the enactment of the legislation. Some of the major highlights of this legislation include, but are not limited to: an increase in the number of immigrants admitted into the United States, changes in laws applying to aliens

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35. 2 GORDON ET AL., supra note 17, 2–32.
37. See generally id.
38. See id. §§ 7341-50, 102 Stat. at 4469–73.
39. 2 GORDON ET AL., supra note 17, 2-34.
40. Id. at 2-34 to 2-35.
43. Id.
44. Id.
45. See LEGISLATIVE NOTICE, supra note 7, at 15. The breakdown of visas allocated by CIRA 2007 are as follows: 480,000 for family sponsored immigrants, 450,000 for employment based immigrants, and 55,000 for “diversity” visas. Id.; Representative Sheila Jackson
seeking temporary entry, switching naturalization power from the federal courts to the Attorney General, and making revisions to the grounds for exclusion and deportation from the United States.

E. Illegal Immigration Reform and Immigrant Responsibility Act of 1996

One of the last major changes in immigration law, prior to the 9/11 attacks, was the enactment of the Illegal Immigration Reform and Responsibility Act of 1996 (IIRIRA). This Act was intended to “strengthen and tighten the immigration laws.” The purpose of this Act was “to improve border control by . . . [enforcing] criminal penalties for high speed flight from immigration checkpoints. [It] also contain[ed] various provisions . . . to facilitate legal entry, and interior enforcement of . . . laws.”

Another aspect of the IIRIRA that has seen considerable attention, as addressed by the current proposal, is the issue of document integrity. The IIRIRA increased criminal penalties and imposed the first “civil penalty[ies] for fraud or misuse of visas, permits, and other documents.” Furthermore, this Act “defined the term ‘falsely make’” as it applies to the previously mentioned documents.

Lee, Why Immigration Reform Requires a Comprehensive Approach that Includes both Legislation Programs and Provisions to Secure the Border, 43 HARV. J. ON LEGIS. 267, 282 (2006).

46. 2 GORDON ET AL., supra note 17, 2-44 to 2-45. The next major aspect of this act is the change to the status of non-immigrants. Changes were made to the following areas: visa waiver pilot program, crewmembers (individuals employed for longshore work), treaty traders, temporary workers, and intra-company transferees. Id.

47. Id. at 2-46. Since 1795, Congress has granted federal “courts the power to award naturalization” to aliens. Id. Effective on October 1, 1991, the Attorney General was granted the “sole authority to naturalize persons as citizens of the United States.” Id. (quoting 8 U.S.C. § 1421 (2000)) (internal quotations omitted). Courts still maintained jurisdiction to adjudicate claims filed by aliens. 2 GORDON ET AL., supra note 17, 2-46.

48. See id. at 2-47 to 2-49. The Act addressed the following categories of exclusion: health-related provisions, criminal-related provisions, security and related grounds which includes activities that would adversely affect United States foreign policy, communists, and significant changes relating to misrepresentation which was expanded by the Marriage Fraud Act. Id.


51. Id.

52. Id. § 7.

53. Id.
III. POST-SEPTEMBER 11, 2001 IMMIGRATION LEGISLATION

The 9/11 attacks on the United States were a major wakeup call that the then current restrictions on the entry of immigrants, document security, and background checks were not strict enough. The terrorists that attacked the United States fell through the cracks of the complicated system of, not only immigration laws, but other laws aimed at protecting the United States from such attacks. Specifically, the attacks demonstrated the dangers associated with, not only illegal immigrants, but legal immigrants as well. The report issued by the National Commission on Terrorist Attacks upon the United States (9/11 Commission) stated that “more than 9 million people are in the United States outside the legal immigration system.” However, not everyone feels that the legislation resulting from the terrorist attacks was the most appropriate. In an e-mail from immigration attorney and professor, Ira Kurzban, he stated that the 9/11 attacks opened the door to improper actions by the United States government. Mr. Kurzban believes that aliens are typically the first to feel the brunt of repression, and that the 9/11 attacks are no exception.

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[The term “falsely make” means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted. 8 U.S.C. § 1324c(f) (2000).


55. See id. n.4.


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59. See E-mail from Laurence M. Krutchik, J.D. Candidate 2009, Nova Se. Univ., Shepard Broad Law Ctr., to Ira J. Kurzban, Esq., Adjunct Professor of Law, Nova Se. Univ., Shepard Broad Law Ctr. (July 10, 2007, 18:44:00 EST) (on file with author).

60. Id.
A. Homeland Security Act of 2002

One of the most drastic changes in the United States government, which also affected immigration laws, occurred with the passage of The Homeland Security Act of 2002 (HSA).61 This Act established the Department of Homeland Security (DHS).62 The DHS is a cabinet-level department and is managed by the Secretary of Homeland Security.63 This department was established to strengthen the security measures used to protect against terrorism occurring in the United States.64 Subtitles D, E, and F of Title IV of the Act made substantial changes to immigration laws in the United States.65 Some of the most drastic changes are found in section 402, which stipulates functions relating to border patrol.66 The Act transfers the following agencies and their function to the DHS: United States Customs Service, INS, Animal and Plant Health Inspection Service, United States Coast Guard, and Transportation Security Administration.67

B. Intelligence Reform and Terrorism Prevention Act of 2004

The Homeland Security Act of 2002 was Congress’ initial response to the terrorist attacks on the country.68 However, the extent of the reaction and implementation of new laws would not stop there. The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) was signed into law, “by the President on December 17, 2004.”69 The Act is designed to attack document


64. Id.


67. REORGANIZATION PLAN, supra note 61, at 4.

68. David S. Rubenstein, Restoring the Quid Pro Quo of Voluntary Departure, 44 HARV. J. ON LEGIS. 1, 5 (2007).

fraud which aids terrorists in entering the United States.70 Before the enactment of this legislation, there were no national standards set for drivers’ licenses, social security cards, and birth certificates.71 Additionally, the 9/11 Commission addressed the issue of uniformity of documentation in its report by stating that, “[t]he federal government should set standards for the issuance of birth certificates and sources of identification, such as drivers’ licenses.”72 The law requires that every new license or identification card from every state contain certain features that could allow the cards “to be accepted for any official purpose by a federal agency.”73 As for the issuance of social security numbers and cards, restrictions were placed on the number of cards and the cards themselves to secure the numbers from fraudulent use.74 Lastly, this Act addresses the issuance of birth certificates for newborn children.75 The Act delegates authority to the Secretary of Health and Human Services to set minimum standards for the issuance of birth certificates.76

C. REAL ID Act of 2005

Although many features were added to the various forms of identification by IRTPA, the legislation for eliminating fraudulent forms of identification continued with the REAL ID Act of 2005 (REAL ID Act).77 There still remained some proposals from the IRTPA, which would be set into place by the REAL ID Act.78

[T]he major provisions of the REAL ID Act [did the following]:

70. See id. at 2.
71. Id. at 1.
72. 9/11 COMMISSION REPORT, supra note 57, at 390.
73. TATELMAN, supra note 69, at 2. The drivers’ licenses or identification cards must include the following information: “1) full legal name; 2) date of birth; 3) gender; 4) driver’s license or identification card number; 5) digital photograph; 6) address; and 7) signature.” Id. The cards must also contain a “physical . . . feature[] designed to prevent tampering.” Id.
74. Id. at 6. The Commissioner of Social Security may restrict the issuance of social security cards to three per year per individual and “10 for the life of the individual.” Id. However, the Commissioner has discretion, if he or she feels that there is little chance of fraud. TATELMAN, supra note 69, at 6.
75. Id. at 8–9.
76. Id. at 8. The Act requires that the issuing agency or state use safety papers and/or other measures “designed to prevent tampering, counterfeiting, or otherwise duplicating the birth certificate for fraudulent purposes.” Id.
1) modify[d] the eligibility criteria for asylum and withholding of removal; 2) limit[ed] judicial review of certain immigration decisions; 3) provid[ed] additional waiver authority over laws that might impede the expeditious construction of barriers and roads along land borders, including a 14-mile wide fence near San Diego; 4) expand[ed] the scope of terror-related activity making an alien inadmissible or deportable, as well as ineligible for certain forms of relief from removal; 5) require[d] states to meet certain minimum security standards in order for the drivers’ licenses and personal identification cards they issue to be accepted for federal purposes; 6) require[d] the Secretary of Homeland Security to enter into the appropriate aviation security screening database the appropriate background information of any person convicted of using a false driver’s license for the purpose of boarding an airplane; and 7) require[d] the Department of Homeland Security to study and plan ways to improve U.S. security and improve inter-agency communications and information sharing, as well as establish a ground surveillance pilot program. 79

Another key area addressed by this Act is the issue of asylum in the United States. 80 “An alien who is physically present or arrives in the United States, regardless of the alien’s immigration status, may apply for asylum.” 81 The Attorney General of the United States has the authority to grant asylum to an alien under section 208(b) of the Immigration and Nationality Act (INA). 82 The REAL ID Act slightly changed who may grant asylum. 83 Specifically, the “authority to grant asylum” is now given to both “the Secretary

79. See generally id.
80. See id. at 2. Asylum is defined as “[p]rotection of [usually] political refugees from arrest by a foreign jurisdiction; a nation or embassy that affords such protection.” BLACK’S LAW DICTIONARY 135 (8th ed. 2004).
81. GARCIA ET AL., supra note 78, at 3.
82. Id.; 8 U.S.C. § 1158(b)(1)(A) (2000). In order to be granted asylum, an alien must be classified as a refugee under the INA, which defines the term refugee to mean:

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

83. See GARCIA ET AL., supra note 78, at 5. “Subsection 101(a) of the REAL ID Act amends § 208(b)(1) of the INA . . . .” Id.
of Homeland Security and the Attorney General” of the United States. When an alien applies for amnesty under the new REAL ID Act, they have a higher burden of proof to “establish that at least one central reason for persecution [in their native country] was or will be race, religion, nationality, membership in a particular social group, or political opinion.”

IV. COMPREHENSIVE IMMIGRATION REFORM ACT OF 2007 (SENATE BILL 1348)

President Bush had been advocating the need for immigration reform since January 2004 with the announcement of “his principles of reform.” The 109th Congress considered Senate Bill 2611 (CIRA 2006), which proposed immigration reform, although it was never signed into law. The more recent reform is CIRA 2007. The purpose of this bill was to amend the INA to provide for more effective border and employment enforcement, to prevent illegal immigration, and to reform and rationalize avenues for legal immigration, as well as for other purposes. This proposal was essentially identical to CIRA 2006, which passed through the Senate on May 25, 2006. Recently, President Bush outlined the five main areas for reform: 1) the need to secure the borders of the United States; 2) “a temporary worker program” for immigrants granted admission into the United States; 3) holding employers accountable for hiring immigrants whom the employers know are in the United States illegally; 4) a means to handle immigrants who currently reside in the United States; and 5) assimilation of immigrants into American society.

85. GARCIA ET AL., supra note 78, at 5.
90. See id.
91. LEGISLATIVE NOTICE, supra note 7, at 1.
A. Securing America’s Border

1. Increase in Enforcement Personnel

“The U.S. Border Patrol, [a department] within the . . . [DHS’s] U.S. Customs and Border Protection (CBP), is responsible for patrolling 8,000 miles of the land and coastal borders of the United States . . . .” The purpose of the CBP is to prevent the entry of aliens and contraband into the United States. “As of October 2006, [there were] 12,349 [border patrol] agents stationed” at various points throughout the United States.

CIRA 2007 called for an increase in enforcement personnel in several areas. The Act proposed the addition of “200 new positions . . . to investigate alien smuggling” and 500 new port of entry inspectors between 2008 and 2012. Also, within this same time frame, CIRA 2007 proposed the addition of 11,200 CBP. This increase in Border Patrol agents does not come without a cost to the taxpayers. The United States Government Accountability Office (GAO) estimates that it costs about $14,700 to train a new agent. With the addition of 11,200 agents, the cost for training alone amounts to $164,640,000.

In addition to human beings patrolling America’s borders, the bill will authorize the use of unmanned technology. Such technologies include, but are not limited to, cameras, unmanned aerial vehicles, and sensors. The combination of the various technologies is referred to as “The President’s

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94. NUÑEZ-NETO & VIÑA, supra note 93, at 1. The other goals of the CBP are “to deter and interdict terrorists, weapons of mass destruction, and aliens attempting to enter the country unlawfully.” Id.

95. Stana Hearing, supra note 93, at 4.

96. LEGISLATIVE NOTICE, supra note 7, at 4.

97. Id.

98. Id.


100. Id.

101. See id. This amount was calculated by taking the cost to train ($14,700) multiplied by the number of new agents (11,200). See id.; LEGISLATIVE NOTICE, supra note 7, at 4.

102. LEGISLATIVE NOTICE, supra note 7, at 4.

103. Id.
Secure Border Initiative. Appropriations for the technologies are authorized by CIRA 2007. Also associated with the increased number of personnel, the President proposed the abolishment of the policy of "Catch and Release."

2. Border Fence Proposals

Currently, the United States has border fencing erected for a substantial amount of the borders. However, there needs to be a more secure system of fencing. The idea of building a fence to deter and keep illegal aliens out of the United States is not a new idea. There is a history to border fence construction that is essential to understanding the proposed upgrades and additions. The Border Patrol began erecting a fence in 1990 in the San Diego sector of the border. The power to order the construction of the fence rests in the Attorney General who has the broad power "to control and guard the [United States] border[s]." In 1996, Congress passed the [IIRIRA], which authorized the [INS] to construct a secondary layer of fencing to buttress the completed [San Diego] fence. Appropriations were made by the REAL ID Act to complete the fourteen mile San Diego fence. Congress [then] passed the Secure Fence Act of 2006, which allowed the Secretary of the DHS to order the building of additional fencing totaling 850 miles.

Since there is already a system of fencing in place from previous legislation, the purpose of the fencing provision in CIRA 2007 is to repair and

105. See LEGISLATIVE NOTICE, supra note 7, at 4.
106. Press Release, Comprehensive Immigration Reform, supra note 104.
107. See generally NUÑEZ-NETO & VÍÑA, supra note 93.
108. See id.
109. Id. at 1.
110. Id.
111. Id.
112. NUÑEZ-NETO & VÍÑA, supra note 93, at 2.
114. Id. at 6.
add to the current fencing in place. The proposed bill authorized monies necessary for the repair of damaged primary fencing "and to construct at least 200 miles of vehicle barriers and all-weather roads in areas" known to be breach points for illegal immigrants.

3. Technological Advances in Biometrics and Document Integrity

A substantial problem in the United States is document fraud. The problem became evident following the terrorist attacks of September 11, 2001. The proposed bill calls for a massive overhaul "of [C]hapter 75 of Title 18 of the U.S. Code." This section of the United States Code addresses issues relating to "passport[] and visa fraud." Along with rewriting parts of the United States Code, the technological advances include the implementation of the "Integrated Automated Fingerprint Identification System (IAFIS)" which would be integrated with the "United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program." This system:

applies to a certain group of foreign nationals—non-immigrants from countries whose residents are required to obtain nonimmi-

115. LEGISLATIVE NOTICE, supra note 7, at 4.
116. Id.
117. Id. at 5.
118. See 9/11 COMMISSION REPORT, supra note 57, at 390.
119. See LEGISLATIVE NOTICE, supra note 7, at 5. The rewriting of this section of the United States Code creates new crimes for:

[1] trafficking in passports and punishing those who unlawfully produce, issue, transfer, forge, or falsely make passports, as well as those who transact in passports they know to be forged or counterfeited, and those who prepare, submit, or mail applications for passports that they know include a false statement; [2] completing, signing, or submitting a passport application knowing that it contains a false statement or representation; [3] knowingly and without lawful authority producing or issuing a passport for or to any person not owing allegiance to the United States; [4] knowingly and without lawful authority transferring a passport to a person for use when such person is not the person for whom the passport was issued or designed; [5] knowingly using a passport to enter or attempt to enter the country, knowing that the passport is forged or counterfeited; [6] knowingly using a passport to defraud an agency of the United States or a State, knowing that the passport is forged or counterfeited; [7] knowingly executing a scheme to defraud any person in connection with any matter arising under the immigration laws or that the offender claims arises under the immigration laws; [8] knowingly using any immigration document issued or designed for use by another; [9] trafficking in immigration documents; [10] knowingly and without lawful authority, producing, obtaining, or possessing various papers, seals, symbols, or other materials used to make immigration documents; [11] entering into multiple marriages to evade immigration law; and [12] arranging, supporting, or facilitating such multiple marriages.

Id.
120. Id.
121. Id.
grant visas before entering the United States and residents of certain countries who are exempt from [United States] visa requirements when they apply for admission to the United States for up to 90 days for tourism or business purposes under the Visa Waiver Program. 122

There is some history to the implementation of the system. Originally, part of the Immigration and Naturalization Service Data Management Improvement Act (DMIA) of 2000 contained a requirement for the implementation of an integrated data system to monitor foreign nationals. 123 This Act replaced a provision that was part of the IIRIRA which "required an automated system to record and then match the departure of every foreign national from the United States to the individual’s arrival record." 124 The IAFIS "will support the paperless submission of fingerprint records." 125 US-VISIT is an "automated biometric entry-exit system [integrated by the DHS] that records the arrival and departure of certain aliens . . . ; conducts certain immigration violations, criminal, and terrorist checks on aliens; and compares biometric identifiers to those collected on previous encounters to verify identity." 126 The systems are located at the various air, sea, and land ports of entry (POEs) into the United States. 127 Under the US-VISIT system, prior to entry into the Unites States, "[v]isitors applying for a visa [must] have their information reviewed before [entering] the United States." 128 In order to


The Visa Waiver Program (VWP) enables nationals of certain countries to travel to the United States for tourism or business for stays of 90 days or less without obtaining a visa . . . . VWP eligible travelers may apply for a visa, if they prefer to do so. Not all countries participate in the VWP, and not all travelers from VWP countries are eligible to use the program. VWP travelers are screened prior to admission into the United States, and they are enrolled in the Department of Homeland Security’s US-VISIT program.


123. US-VISIT PROGRAM, supra note 122, at 10.

124. Id.


126. PRIVACY IMPACT ASSESSMENT, supra note 19, at 2.

127. US-VISIT PROGRAM, supra note 122, at 1. “[T]he entry portion of [the] US-VISIT [system has been installed] at 154 of the nation’s 170 land POEs.” Id. at 5.

enter the United States, passports must comport with digital requirements; if a passport is expired or does not comply with the standards, then the visitor is "required to obtain a visa" in order to enter into the United States.\textsuperscript{129} When exiting the United States, the US-VISIT system "compares arrival and departure [information] . . . to know when [individuals] enter[] and exit[] the country."\textsuperscript{130} At this point in time, there are exit procedures in effect in certain cities.\textsuperscript{131} The program is continuing to study exit alternatives to determine the most effective means for the use of the system.\textsuperscript{132} Furthermore, the Act requires Congress to specify a timeline of implementation of the US-VISIT system at the various entry and exit points into the United States.\textsuperscript{133}

4. Detention and Removal of Aliens

The detention and removal of illegal aliens is no easy task. The problem is that once a person enters the United States, that person is entitled to protections granted under the law.\textsuperscript{134} Specifically, the Due Process Clause applies to all persons present in the United States.\textsuperscript{135} The United States Supreme Court addressed the issue of illegal aliens who are held for an unreasonable time in the case of \textit{Zadvydas v. Davis}.\textsuperscript{136} This case is important to this aspect of the Act, as the bill expands upon the Supreme Court's ruling. The case came before the Supreme Court as two separate cases addressing the same situation.\textsuperscript{137} The first defendant, Kestutis Zadvydas, had an extensive criminal record and had a known "history of flight, from both criminal and deportation proceedings."\textsuperscript{138} His most recent conviction was for possession of cocaine with the intent to distribute which carried a sixteen year sentence.\textsuperscript{139} Zadvydas was released after two years, immediately placed in the custody of the INS, and was ordered deported from the United States thereafter.\textsuperscript{140} Unfortunately, attempts to deport him were unsuccessful and the de-
fendant was held beyond the removal period. As a result, "Zadvydas filed a petition for a writ of habeas corpus [pursuant] to 28 U.S.C. § 2241 challenging his continued detention."142

The second defendant, Kim Ho Ma, was an alien with a similar criminal history. Ma had been "involved in a gang-related shooting, convicted of manslaughter, and sentenced to 38 months imprisonment."144 Ma was released into the INS's custody and several attempts were made to deport him as well. He was held beyond the ninety day removal period, and also filed a writ of habeas corpus [pursuant] to 28 U.S.C. § 2241.146 The United States Supreme Court granted certiorari and noted what they call a "special statute" which grants the further detention of aliens if they pose "a risk to the community," or will not comply with the removal proceedings. In this case, it was evident that the defendants posed a risk to society, and one of them had a history of evading criminal and deportation proceedings. On the basis of this "special statute," the court found that there was no constitutional violation by the government in the extended detention of the defendants.149

This case is crucial to the proposed Act as it seeks to provide greater authority to the federal government to detain aliens beyond the specified time periods. Currently, according to 8 C.F.R. § 241.14, "an alien may be detained even when there is no significant likelihood of removal in the near future."151 The Act grants the Attorney General the power to determine who is "a risk to the community" and/or who would not comply with removal procedures. Additionally, the new bill would expedite the removal of

141. Zadvydas, 533 U.S. at 684.
142. Id. at 684–85.
143. Id. at 685.
144. Id. See also 8 U.S.C. § 1101(a)(43)(F) (2000) (this is the section concerning aggravated felonies, which was expanded by the Anti-Drug Abuse Act of 1988).
145. Zadvydas, 533 U.S. at 685–86.
146. Id.
147. Id. at 682. The special statute refers to 8 U.S.C. § 1231(a)(6) (2000). Id.
148. See id. at 684–86.
149. See Zadvydas, 533 U.S. at 699.
150. LEGISLATIVE NOTICE, supra note 7, at 8.
151. Rachel Canty, The New World of Immigration Custody Determinations After Zadvydas v. Davis, 18 GEO. IMMIGR. L.J. 467, 484 (2004). The circumstances in this section "are very narrowly drawn and include aliens who are determined to 1) have a highly contagious disease posing a danger to the public, 2) pose foreign policy concerns, 3) pose national security and terrorism concerns, or 4) be individuals who are specially dangerous due to a mental condition or personality disorder." Id. See also 8 C.F.R. § 241.14 (2006).
152. LEGISLATIVE NOTICE, supra note 7, at 8.
aliens apprehended within a certain amount of time and/or distance from the border.\textsuperscript{133}

B. \textit{Temporary Work Program}

1. Work Visas

The proposed legislation would have established a new temporary work visa (H-2C).\textsuperscript{154} The purpose of this visa is to allow aliens to work in the United States temporarily, where “American employer[s] find unemployed Americans capable of performing [the tasks they require].”\textsuperscript{155} There are a variety of requirements that the alien must meet in order to receive the new visa.\textsuperscript{156} Among other requirements, the alien must: 1) show a capability of performing labor for the intended occupation; 2) pass a medical examination; and 3) pass a background check.\textsuperscript{157} The bill sets out a maximum of 200,000 visas to be distributed.\textsuperscript{158} Additionally, the bill would have reinstated the practice of allowing the State Department to reissue work visas while an alien was still in the United States.\textsuperscript{159}

2. Green Cards

The new work visa program relates directly to the issuance of new green cards to immigrants.\textsuperscript{160} The issuance of green cards relates directly to immigrants who are currently residing in the United States. This aspect of the proposed Act will be discussed later in this paper. There are two categories of aliens admitted into the United States: 1) non-immigrants, who are persons seeking admission “for a limited period of time” and “for a limited purpose” and 2) immigrants, who are persons who wish “to become permanent residents of the [United States].”\textsuperscript{161} “In order to qualify for an immigrant visa, a person must ordinarily demonstrate that [he or she] has the in-

\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 16.
\item \textsuperscript{154} \textit{Id.} at 13.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textsc{Legislative Notice}, \textit{supra} note 7, at 13.
\item \textsuperscript{158} \textit{Id.}
\item \textsuperscript{159} \textit{Id.} at 14. This practice was eliminated following 9/11, due to security concerns. \textit{Id.}
\item \textsuperscript{160} \textsc{Weissbrodt}, \textit{supra} note 15, at 109. Green cards are also known as “immigrant visas.” \textit{Id.}
\item \textsuperscript{161} \textit{Id.} at 109.
\end{itemize}
tent to live indefinitely in the United States and qualifies for one of the family-sponsored, employment-related, or diversity visas.'"

CIRA 2007 would have modified the number of green cards issued in the aforementioned three categories. The modifications would have resulted in an "increase[] [in] the number of employment-based green cards from 140,000 to 450,000 per year (for the next 10 years) . . . and [an] increase[] [of] family-based greed card[s] . . . from 226,000 to 480,000 per year." Increasing quotas was intended to alleviate the backlog of applications for green cards.

C. Employer Accountability

Even with the passage of the IRCA "more than 20 years" ago, there are still almost 500,000 undocumented workers entering the United States every year. "Because illegal aliens are willing to work for lower wages than an American and [a] legal immigrant who is doing the same job, employers are willing to hire an illegal alien over an American citizen[] [or a] legal immigrant." The current system, established by IRCA, requires "[a]n employer [to] wait for a newly hired employee to [begin] work[ing] before . . . verify[ing] [their] work eligibility." Then, "[w]ithin the first three days [of employment], the employee [presents] the employer" with documentation of his or her "identity and eligibility to work." Unfortunately, such a system is subject to fraud because the "[e]mployers are not document [specialists, and i]f a document looks valid on its face," it will be taken as such.

162. Id. at 110.
163. LEGISLATIVE NOTICE, supra note 7, at 15.
164. Id. at 15.
165. Id. Out of the "12 million applications for green cards . . . [only] 1 million green cards are processed each year." Id.
168. Johnson Hearing, supra note 166, at 3.
169. Id.
170. Id.
1997, in an attempt to combat possible document fraud related to employment eligibility, the DHS implemented the Basic Pilot Program.\textsuperscript{171} This is a voluntary internet based system that allows employers to check an employee’s social security number against the government-run database.\textsuperscript{172} However, problems arose with the system, including lack of updates and “high error rate[s] in determining work authorization.”\textsuperscript{173}

To combat this problem, CIRA 2007 proposes several changes to verification by employers of potential employees.\textsuperscript{174} The new changes are collectively referred to as the Work Authorization Verification located in Title III of the proposed legislation.\textsuperscript{175} Title III was also placed into CIRA 2006 which was the previous year’s proposed immigration reform, but it was further developed in CIRA 2007.\textsuperscript{176} The major changes proposed are the following:

Employment of unauthorized aliens is unlawful; Employers who in good faith follow the provisions . . . have an affirmative defense; DHS can require an employer to certify [compliance with this section]; An employer must attest that he has reasonably verified (under the totality of the circumstances) the identity and eligibility for work of each new hire; DHS will develop an electronic employee verification system . . . [providing] . . . employer[s] [with] a “green light” or “red light” or “tentative non-confirmation” for every employee name and social security number . . . or alien number . . . submitted to the system; DHS will designate critical employers that must be using the system within 180 days of bill enactment (e.g., critical infrastructure employers), and all other employers must utilize the system [eighteen] months after funds are appropriated for the system; [and] an annual increase of 2,000 investigators (for five years) dedicated to worksite enforcement of the immigration laws, and specifically requires not less than 20 percent of the enforcement hours of Immigration and Customs Enforcement (DHS) be used for worksite enforcement.\textsuperscript{177}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{171} BRUNO, \textit{supra} note 19, at 4–6. In 1996, the IIRIRA would “direct[] the Attorney General to conduct three pilot programs: . . . the Basic Pilot program, the Machine-Readable Document Pilot program, and the Citizen Attestation Pilot.” \textit{Id.} at 4.
\item\textsuperscript{172} Johnson Hearing, \textit{supra} note 166, at 3.
\item\textsuperscript{173} \textit{Id.} at 4. “A future employment eligibility verification system will need to take into account the failures and successes of the Basic Pilot Program to ensure that it is workable.” \textit{Id.}
\item\textsuperscript{174} LEGISLATIVE NOTICE, \textit{supra} note 7, at 12–13.
\item\textsuperscript{175} \textit{Id.}
\item\textsuperscript{176} \textit{Id.} at 12.
\item\textsuperscript{177} \textit{Id.} at 12–13.
\end{enumerate}
\end{footnotesize}
These proposed provisions are the most noteworthy, as they attempt to rectify the problems with the current employment verification system.

This aspect of the bill has not been favored by employers. Specifically, businesses are not pleased with the idea that civil penalties would be increased. Additionally, criminal liability would be imposed by the new bill should it be determined that an employer's subcontractors are caught hiring illegal workers.

D. Immigrants Currently Residing in the United States

Another controversial area of the proposed legislation is the admission of immigrants currently residing in the United States. CIRA 2007 would have established three separate groups relating to the general unauthorized alien population. The details relating to these groups can be "found in section 601 of [CIRA 2007]."

1. Group One: Unauthorized Aliens Residing in the United States for Five Years and Who Have Worked for Three Years

The first group of aliens consists of individuals who have resided in the United States for five years and who have worked for at least three of the five years. The aliens who qualify as part of this group may apply for a green card if they:

were illegal on April 5, 2006; were physically present in the [United States] on or before April 5, 2001; did not depart the [United States] during that time, except for short trips; worked for 3 years during that time period (and paid or will pay state and federal taxes owed for that work); pass[ed] a security check; pay a $2,000 fee (80 percent of the funds would go to border security); work[ed] 6 years after bill enactment; and demonstrate that they meet the naturalization requirements for English language ability (but [this] can also be satisfied by "pursuing a course of study to achieve such an understanding of English").

179. Id.
180. Id.
181. LEGISLATIVE NOTICE, supra note 7, at 17–19.
182. Id. at 17.
183. Id. at 17–18.
184. Id. at 17.
In addition to these requirements, there are benefits that come with being part of Group One. The "[s]pouse and children of [an] . . . alien" in this group are permitted to "obtain a green card [and] . . . are not subject[ed] to the green card quota[s]" previously discussed. Also, the aliens that are classified in this group would be permitted to travel abroad, even while their green card is being finalized.

2. Group Two: Aliens Who Have Resided in the United States for Two to Five Years

The second group, known as "Group 2," consists of "aliens who have resided in the [United States] for [two to five] years." The requirements of this group are far more complicated than that of Group One. Aliens who were "present in the [United States] on January 7, 2004," would be presented with two options. First, they could leave the United States "and apply for an H-2C visa . . . with all of the normal requirements waived." Second, they could leave the United States and apply for a green card. Additionally, aliens must show that: "They were physically present in the [United States] on January 7, 2004; They were illegally present on that date; They had been employed from that date until present—except for 60-day breaks; and [t]hey have been continuously present—short trips abroad excepted—in the [United States] since then." Any alien who seeks to depart the United States would have the following options:

185. Id. at 17–18.
186. LEGISLATIVE NOTICE, supra note 7, at 18.
187. Id.
188. Id.
189. Id.
190. See id. at 17–19.
191. LEGISLATIVE NOTICE, supra note 7, at 17–19. CIRA 2006, which was assimilated into CIRA 2007, created the H-2C or "guest-worker visa." Id. at 1. This program would allow people to enter the United States temporarily to work on the condition that they meet certain requirements and that they apply for permanent residency. Id. In order to receive the guest-worker visa, the individual must have been offered employment prior to entering the United States and must have paid a $500 fee. Id. at 1, 13. The visa would be valid for three years with the possibility for a one time, three year extension. Id. at 13. The guest workers and their dependents could apply for permanent residence after four years—or earlier if done by their employer—and they could remain in the United States pending the review of their application(s) for residency—even if the guest visa has expired. LEGISLATIVE NOTICE, supra note 7, at 1.
192. Id. at 18.
193. Id.
194. Id.
States must register with the DHS. All of these conditions apply to the children and spouse of the principal alien.

3. Group Three: Aliens Who Have Resided in the United States for Less than Two Years

The final group, "Group 3," is not directly stated, but is implied by the silence of the bill. This third group consists of "aliens who have resided in the United States [for] less than two years."

E. Assimilation of Immigrants Through the Development, Relief, and Education for Alien Minors Act

Another controversial aspect of the bill is its incorporation of "the Development, Relief, and Education for Alien Minors Act" (DREAM Act). This proposed legislation shows how to fully incorporate these individuals into the United States, and ultimately, into American society. Immigrants must be able to obtain a proper education to achieve complete assimilation into American society. Proponents of the DREAM Act state that:

Each year about 65,000 [United States]-raised students who would qualify for the DREAM Act . . . graduate from high school. These include honor roll students, star athletes, talented artists, homecoming queens, and aspiring teachers, doctors, and [United States] soldiers. They are young people who have lived in the [United States] for most of their lives and desire only to call this country their home. Even though they were brought to the [United States] years ago as children, they face unique barriers to higher education, are unable to work legally in the [United States], and must live in constant fear of detection by immigration authorities.

195. Id.
196. LEGISLATIVE NOTICE, supra note 7, at 19.
197. Id.
198. Id.
200. See id.
201. See id.
Currently, unauthorized aliens are permitted to obtain an education through high school. The United States Supreme Court addressed the issue of allowing illegal alien children to obtain an elementary education in the class action case of Plyler v. Doe. This case allowed for immigrants to obtain an elementary education. The case came before the United States Supreme Court on constitutional grounds. The plaintiffs, consisting of a class of undocumented children of Mexican origin, alleged that the denial of an education violates the Equal Protection Clause. The court decided in favor of allowing immigrant children to obtain an education based on the fear of creating a permanent underclass of uneducated, illegal immigrants. The court noted that there is a lifelong effect of an elementary education and that children should not be punished for their parents immigrating to the United States.

However, obtaining a postsecondary education has proven difficult due to a provision of the IIRIRA which discourages states and localities from granting unauthorized aliens such an education. To counter this hurdle, CIRA 2007 incorporated the DREAM Act. It should be noted that this Act has never been passed into law, but there have been multiple attempts in the previous Congresses to enact such legislation. The first attempt to pass the Act was made in the 107th Congress by Senator Orrin Hatch (R-Utah). Another version of the bill was approved, but it “did not receive a floor vote before the end of the 108th Congress.” Another attempt to pass this legislation was made with the proposed CIRA 2007.

203. See id.
204. 457 U.S. 202, 205 (1982).
205. See id. at 226, 230.
206. Id. at 205.
207. Id. at 206, 213. See also U.S. CONST. amend. XIV.
209. Id.
211. See LEGISLATIVE NOTICE, supra note 7, at 20.
212. See id.
213. Id.
214. Id.
215. See id.
V. IMMIGRATION INITIATIVES: THE ADMINISTRATIVE CHANGE APPROACH

A. Introduction of Administrative Power to Amend Current Law

Although an overhaul of immigration law never came to fruition, President Bush is not letting this hinder his ability to bring about change. Almost immediately following the defeat of CIRA 2007, the White House announced changes which would be made by amending existing law. These reforms, however, do not require comprehensive congressional legislation. How is this possible? Doesn't Congress need to approve all changes to the law? Not necessarily. There exists within the government the power of the administrative agencies to enact regulations that are permitted within the scope of the statutes that give them power. This aspect of governmental power has been addressed by Congress and the United States Supreme Court. In 1946, Congress enacted the Administrative Procedure Act that allows administrative agencies, established by the executive branch, to propose and establish regulations. Currently, President Bush and the White House are utilizing this Act and the holding in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (NRDC), discussed below, to promulgate agency based reforms. It will be shown, however, that these changes to existing law are not as expansive as the changes that would have taken effect under CIRA 2007.

B. The Chevron Case

The United States Supreme Court elaborated on the concept of administrative power in Chevron. Surprisingly, this issue arose from the interpretation of an aspect of the Clean Air Act Amendments of 1977. The ques-


217. See Spalding, supra note 216, at 1.


222. See id. at 840.

223. Id. at 839-40. See also Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.
tions presented centered on the interpretation of the term "stationary source," as promulgated in the EPA's clean air regulation. The definition of this term was problematic because its statutory construction led to a loophole in the statute. More specifically, the rules applied to pollution emissions at energy production facilities which used "stationary sources" (cooling towers). The statute was argued to apply pollution restrictions to each of the individual emission units, otherwise known as cooling towers. However, due to the lack of a clear statutory construction, the EPA decided to allow for the cooling towers to be encased "within a single [hypothetical] 'bubble.'" In evaluating this problematic part of the Clean Air Act, the United States Supreme Court acknowledged that there was no explicit evidence of Congressional intent as applied to the meaning of the term "stationary source." Additionally, the Court noted that this issue was not addressed in the legislative history.

Chevron is relevant to the current immigration issue because it demonstrates the power, which an executive appointed agency maintains within our government, with respect to the agency's ability to interpret and implement laws. "The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Without this power, the immigration initiatives promulgated by President Bush would not be possible. With respect to the current initiatives, the DHS has been granted the power to promulgate and interpret current law to support its objectives.

The ability to interpret law is stated best by the Chevron Court, which proposed that two questions arise when reviewing an agency's interpretation of a statute. The first is whether Congress has addressed the question and whether their intent is clear. If this is the case, then Congressional intent

225. See id.
226. Id.
227. Id.
228. Id.
230. Id.
231. Id. at 843 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
232. See id.
233. Id. at 842; Thomas Arthur Utzinger, Federal Permitting Issues Related to Offshore Wind Energy, Using the Cape Wind Project in Massachusetts as an Illustration, 34 ENVTL. L. REP. 10,794, 10,802 (2004).
will trump the agency’s interpretation.\textsuperscript{235} If, however, Congressional intent is unclear, “the [second] question . . . is whether the agency’s [interpretation] is based on a permissible [and reasonable] construction.”\textsuperscript{236} Such construction of a statute will be upheld “unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”\textsuperscript{237} This two-prong analysis is applicable to DHS rulemaking.

C. Border Security

1. Strengthening Personnel and Infrastructure

One of the most problematic areas requiring attention is border security. The new initiatives have a deadline of December 31, 2008, and include the following measures: 1) “18,300 Border Patrol agents”—with an additional 1700 border patrol agents by 2009; 2) “370 miles of fencing;” 3) “300 miles of vehicle barriers;” 4) “105 camera and radar towers;” and 5) three additional Unmanned Aerial Vehicles (UAV) (a fourth UAV will be added by 2009).\textsuperscript{238}

These changes are not unlike those sought through CIRA 2007. The new initiative calls for 18,300 Border Patrol agents, whereas CIRA 2007 called for the addition of 11,200 agents.\textsuperscript{239} Even though CIRA 2007 did not pass, there is a noticeable increase in the proposed number of agents under the current initiative.\textsuperscript{240} The GAO indicated that there is a cost associated with the addition of new agents.\textsuperscript{241} With the enactment of the initiatives, the result will be an overall increase in cost.\textsuperscript{242} This is due to the difference in the number of agents.\textsuperscript{243}

\textsuperscript{235.} Chevron U.S.A. Inc., 467 U.S. at 842–43.
\textsuperscript{236.} Id. at 843.
\textsuperscript{237.} Id. at 844.
\textsuperscript{239.} Id.; LEGISLATIVE NOTICE, supra note 7, at 4.
\textsuperscript{240.} Press Release, Improving Border Security, supra note 10; LEGISLATIVE NOTICE; supra note 7, at 4.
\textsuperscript{241.} Stana Hearing, supra note 93, at 10.
\textsuperscript{243.} See Stana Hearing, supra note 93, at 9; Press Release, Improving Border Security, supra note 10. The amount to the taxpayer resulting from the increased amount under the initiatives is $104,370,000; this amount was calculated by taking $14,700—the amount to train each agent as stipulated by the GAO—and multiplying it by $7100, which is the difference in the number of agents proposed in CIRA 2007 and the amount to be enacted by the immigration initiatives. See Stana Hearing, supra note 93, at 9; LEGISLATIVE NOTICE, supra note 7, at 4; Press Release, Improving Border Security, supra note 10.
Next, CIRA 2007 called for repairing the fences already in place, and for the addition of "200 miles of vehicle barriers and all-weather roads" at points of common breach.244 The current initiatives come with a noticeable increase.245 By the end of 2008, there should be "370 miles of fencing" and "300 miles of vehicle barriers."246 The difference here is that instead of merely repairing the current fencing, an additional "370 miles of fencing" and "300 miles of vehicle barriers" will be erected,247 an increase of 100 miles from CIRA 2007.248 Lastly, the new initiatives call for technological security measures through the use of "105 camera and radar towers," and the addition of three UAVs.249

2. "Catch and Return" Policy

The policy initiatives will implement a strict "catch and return" policy.250 This policy was last seen in Senate Bill 1639 which was superseded by CIRA 2007.251 Originally, aliens who illegally crossed the border were only given "a [n]otice to [a]ppear ... before an immigration judge."252 However, they will now be detained and held until they can be extradited back to their native country.253 The administration is integrating this aspect of the bill and CIRA 2007 into their new initiatives.254 The Due Process dilemma seen in Zadvydas v. Davis will most likely arise in the implementation of this policy as well.255 In implementing this policy, the administration will...

244. LEGISLATIVE NOTICE, supra note 7, at 4.
246. Id.
247. Id.
248. See LEGISLATIVE NOTICE, supra note 7, at 4.
250. Id.

The Secretary of Homeland Security is detaining all removable aliens apprehended crossing the international land border between the United States and Mexico in violation of Federal or State law, except as specifically mandated by Federal or State law or humanitarian circumstances, and United States Immigration and Customs Enforcement has the resources to maintain this practice, including the resources necessary to detain up to 31,500 aliens per day on an annual basis.

Id.
253. S. 1639, § 1(a)(4).
255. See generally Zadvydas v. Davis, 533 U.S. 678, 693 (2000); LEGISLATIVE NOTICE, supra note 7, at 8.
"[i]ncrease [f]unding [f]or [d]etention [b]eds," as well as ask recalcitrant countries to assist the United States in extraditing illegal immigrants.\textsuperscript{256} Hopefully, with the cooperation of other countries in expediting the deportation of illegal immigrants, the Due Process problem can be averted.

3. Expansion of Exit Requirements

The next change was included in CIRA 2007. The DHS will implement the US-VISIT program "[b]y [t]he [e]nd [o]f 2008."\textsuperscript{257} Recall that US-VISIT is an automated biometric system to be placed at various POEs throughout the United States.\textsuperscript{258} Even after this system has been implemented, the DHS will continue to research and further develop the effectiveness of "biometric exit requirements at land border crossings."\textsuperscript{259} Note that this system is applicable to individuals that have overstayed their time allotted by their visas.\textsuperscript{260}

To accommodate guest workers who are granted visas, such as the seasonal visas, the United States will implement "[a] [n]ew [l]and-[b]order [e]xit [s]ystem."\textsuperscript{261} This system will most likely mimic the US-VISIT system, but will apply to temporary workers.\textsuperscript{262} This system will enforce "mandate[s] to leave . . . [the country once the workers'] work authorization expires."\textsuperscript{263}

D. Interior Enforcement

1. Training State and Local Officials to Address Illegal Immigration

The administration will expand on an eleven-year-old program established under section 287(g) of the IIRIRA.\textsuperscript{264} The IIRIRA added section 287(g) to the INA to allow for the "performance of immigration officer func-

\textsuperscript{257.} Id.
\textsuperscript{258.} PRIVACY IMPACT ASSESSMENT, supra note 19, at 2.
\textsuperscript{260.} Id.
\textsuperscript{261.} Id.
\textsuperscript{262.} See id.
\textsuperscript{263.} Id.
tions by state officers and employees." More specifically, this section "authorizes the Secretary of the [DHS] to enter into agreements with state and local law enforcement agencies [and to allow them] to perform immigration law enforcement functions." The administration will continue to expand upon this program through training and other enforcement tools, including "search and seizure authority granted under Title 19."

2. Regulatory Action to Close the "Voluntary Departure" Loophole

A major problem that the new initiatives will address is a loophole in the voluntary departure procedure. This loophole has been, and continues to be, exploited by illegal immigrants. Currently, under the INA, "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." This is the alternative to formal removal proceedings and the entry of a formal removal order against the illegal alien(s). "[A]n immigration judge may permit an alien to depart" voluntarily, so long as it is within 120 days.


266. Press Release, Delegation of Authority, supra note 264. The agreements are in the form of Memorandum of Agreements and as of September 14, 2007, these agreements have been entered into by the following 28 agencies: Alabama State Police, Arizona Department of Corrections, Arizona Department of Public Safety, Maricopa County (Arizona) Sheriff's Office, Los Angeles County (California) Sheriff's Department, Orange County (California) Sheriff's Office, Riverside County (California) Sheriff's Office, San Bernardino County (California) Sheriff's Office, Colorado Department of Public Safety, El Paso County (Colorado) Sheriff's Office, Collier County (Florida) Sheriff's Office, Florida Department of Law Enforcement, Georgia Department of Public Safety, Cobb County (Georgia) Sheriff's Office, Massachusetts Department of Corrections, Framingham (Massachusetts) Police Department, Barnstable County (Massachusetts) Sheriff's Office, Alamance County (North Carolina) Sheriff's Office, Cabarrus County (North Carolina) Sheriff's Office, Gaston County (North Carolina) Sheriff's Office, Mecklenburg County (North Carolina) Sheriff's Office, Hudson City (New Hampshire) Police Department, Tulsa County (Oklahoma) Sheriff's Office, Davidson County (Tennessee) Sheriff's Office, Herndon (Virginia) Police Department, Prince William-Manassas Adult Detention Center (Virginia), Rockingham County (Virginia) Sheriff's Office, and Shenandoah County (Virginia) Sheriff's Office. Id.


268. Id.

269. Id.


271. Id. at 67,674–75.

272. Id. at 67,675.
For aliens, voluntary departure is desirable because it allows them to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, to avoid stigma and various penalties associated with forced removal—and it facilitates the possibility of return to the United States.\footnote{273}

Although the current rule seems fair and expedites the removal of illegal aliens, it allows immigrants to gain extra time in the United States.\footnote{274} They do so “by filing a procedural motion to reopen the case.”\footnote{275} Not only does the current rule allow for more time in the United States with the voluntary departure, but “the alien is not regarded as having been deported and thus obtains the benefits of departure without deportation.”\footnote{276} The initiative has proposed amending parts 1240 and 1241 of Title 8 to the Code of Federal Regulations.\footnote{277} The amendment to the regulations will still allow for illegal aliens to file the procedural motion to reopen and a motion for judicial review; however, doing so “will have the effect of . . . terminating the grant of voluntary departure.”\footnote{278} This will close the loophole and prevent illegal aliens from overstaying their welcome in the United States.\footnote{279} Additionally, civil penalties, in the amount of $3000, will be set for failure “to comply with a voluntary departure agreement.”\footnote{280}

Currently, the United States Supreme Court is addressing this issue.\footnote{281} Recently, the Court granted certiorari to answer the question: “[w]hether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure.”\footnote{282} The Court heard oral arguments for this case on January 7, 2008.\footnote{283} A decision on this matter may have an effect on the substance of the changes to be made to these sections of the Code of Federal Regulations.

\footnote{273}{Id. (quoting Iouri v. Ashcroft, 487 F.3d 76, 82–83 (2d Cir. 2006)).}
\footnote{274}{Press Release, Improving Border Security, supra note 10.}
\footnote{275}{Id.}
\footnote{276}{Iouri, 487 F.3d at 85.}
\footnote{277}{See Voluntary Departure, 72 Fed. Reg. at 67,674.}
\footnote{278}{Id.}
\footnote{279}{See Press Release, Improving Border Security, supra note 10.}
\footnote{280}{Id.}
\footnote{281}{See Dada v. Mukasey, No. 06-1181, cert. granted sub nom. Dada v. Keisler, 128 S. Ct. 36, 36 (2007).}
\footnote{282}{Id. at 36–37.}
E. Worksite Enforcement

1. Documentation for Employment Eligibility

In early 2008, the Administration will release a regulation that reduces the number of documents employers are required to accept when verifying the identity of their employees.\(^{284}\) Currently, Form I-9 specifies an extensive list of documents that can be used to verify the employee’s status.\(^{285}\) Unfortunately, this list leaves room for an applicant to present a prospective employer with forged documents.\(^{286}\) This future regulation is an extension of the REAL ID Act of 2005.\(^{287}\) The new regulation will reduce the number of acceptable documents, thereby reducing document fraud; thus, resulting in the reduction of unlawful employment of illegal aliens.\(^{288}\)

2. Increase in Civil Fines to Employers

To act in conjunction with the prevention of document fraud, the Administration will increase civil penalties for employers who knowingly hire illegal immigrants.\(^{289}\) The White House has concluded that the problem, under the current law, is that the fines are lenient and have been considered by many employers to be “a cost of doing business.”\(^{290}\) The Administration plans to increase the penalties by twenty-five percent, which is the maximum allowed under the current law.\(^{291}\)

3. Rulemaking for the Use of the E-Verify System

The E-Verify system is a free, internet-based system that is meant to assist employers in verifying employment eligibility.\(^{292}\) The verification helps employers avoid current and future civil penalties for hiring illegal immi-

\(^{289}\) Id.
\(^{290}\) Id.
\(^{291}\) Id. See also 8 C.F.R. § 280.53 (2006).
grants. Verification is made possible by the joint effort of the DHS and the Social Security Administration. However, the use of this system is not required under the current law.

The administration will implement this system in various ways. First, they will “require all federal contractors and vendors to use” the system for all employees. Considering that the United States currently conducts business with over 200,000 companies, there will be a substantial reduction in employment for illegal immigrants through the use of fraud. Second, although “some states currently mandate the use of” the system, the Administration will facilitate nationwide implementation of the system by providing outreach and technical assistance. Third, the Administration will increase data sources that will allow for cross checking of records. This will allow authorities to more easily catch repeat offenders. Lastly, the Administration will solicit state Departments of Motor Vehicles to share photos and records to “help prevent illegal immigrants from using fraudulent driver’s licenses to obtain employment.”

F. Streamlining Existing Guest-Worker Programs

Under CIRA 2007, the H-2C temporary work visa was proposed. The new initiatives do not address this particular visa, but instead address issues related to seasonal workers.

1. The H-2A Agricultural Seasonal Worker Program

The H-2A visa was established by IRCA and “authorizes the lawful admission of temporary, nonimmigrant workers . . . to perform agricultural labor or services of a temporary or seasonal nature.” The Bush Administration has recognized that the agriculture industry “requires a legal flow of

294. E-Verify, supra note 292.
296. Id.
297. Id.
298. Id.
299. Id.
301. Id.
foreign workers.” Unfortunately, there has been a shortage of workers due to tightened security on the Southern border. Thus, President Bush has directed the Department of Labor (DOL) to institute regulatory changes that will allow more foreign workers into the United States legally “while protecting the rights of laborers.”

2. Streamlining the H-2B Program for Non-Agricultural Seasonal Workers

The H-2B program is similar to the H-2A visa, except that it applies to non-agricultural workers. This program "permits employers to hire foreign workers to come temporarily to the U.S. and perform temporary nonagricultural services or labor on a one-time, seasonal, peakload or intermittent basis." This visa has found popularity in seasonal industries because employers in hospitality and landscaping experience difficulties in finding temporary workers. The “DOL’s proposed rule will” make the process easier for employers by moving away from the “government-certified system to an employer [verification] system.” The proposed system is similar to another system already in place that has had the effect of a reduction of “backlog[,] in other areas.”

3. Extension of the Visa Term for Professional Workers from Canada and Mexico

The United States is always looking to bring foreign professionals into the country. Professionals from other countries are permitted to enter and work in the United States through the nonimmigrant NAFTA Professional visa (TN visa). This “visa allows [professionals from] Canada and Mexico . . . to work in the United States” if they meet the following conditions: 1)
they are a citizen of Canada or Mexico; 2) their "profession is on the NAFTA list;" 3) there is a "position in the U.S. that requires a NAFTA professional;" 4) the "Mexican or Canadian applicant is to work in a prearranged full-time or part-time job for a U.S. employer;" and 5) "[t]he professional Mexican or Canadian citizen" meets requirements of the profession set out by the U.S. Department of State.\footnote{Id.}

Unfortunately, the current law requires that "workers who enter the United States" under the TN visa renew it each year.\footnote{Press Release, Improving Border Security, supra note 10.} The DHS will put forth a new regulation that will increase the duration of these visas to three years which is the same as many of the "other popular professional visas."\footnote{Id.}

G. Assimilation

CIRA 2007 focused on education of alien minors through the DREAM Act.\footnote{See BRUNO, supra note 199, at 1.} However, the new initiatives appear to focus generally on the assimilation of immigrants into the country.\footnote{See Press Release, Improving Border Security, supra note 10.}

1. The Revised Naturalization Test from the Office of Citizenship

One of the major steps to assimilate immigrants into American society is "[a] revised naturalization [t]est."\footnote{Id.} The purpose of the redesign of the test is to "encourage civic learning and patriotism among prospective citizens."\footnote{Id.} "A revised test, with an emphasis on the fundamental concepts of American democracy and the rights and responsibilities of citizenship, will help to encourage citizenship applicants to learn and identify with the basic values that we all share as Americans."\footnote{Id.} Furthermore, the revised "test will ensure fairness, as there are variations throughout the country in the quality of testing."\footnote{Id.}

The revised test will be different in the following ways. First, the English reading and writing sections will be "similar to the existing test," except

\begin{itemize}
  \item 313. \textit{Id.}
  \item 315. \textit{Id.}
  \item 316. \textit{See} BRUNO, \textit{supra} note 199, at 1.
  \item 318. \textit{Id.}
  \item 320. \textit{Id.}
\end{itemize}
that the "USCIS will provide [all] applicants with study materials."\textsuperscript{322} Second, the civics portion of the test "will still consist of 100 questions and answers," but now the "USCIS will place these questions and answers, along with a study guide on the Internet and elsewhere in the public domain."\textsuperscript{323} The third and last part, which is the English speaking test, will not substantially change from the existing test.\textsuperscript{324} The new test is currently in the pilot testing phase, which began in February 2007.\textsuperscript{325} The new test will see nationwide implementation at some point in 2008.\textsuperscript{326}

2. Additional Training for People that Lead Immigrants Through the Naturalization Process

The United States currently allows for volunteers and adult educators to assist immigrant applicants through the naturalization process.\textsuperscript{327} To foster the assimilation of immigrants, the Office of Citizenship will provide additional training of these educators through a web based training program.\textsuperscript{328} The training program "covers U.S. government, civics education, and the naturalization process" and will also include training conferences to improve the instructors' abilities.\textsuperscript{329}

3. Internet Portal to Assist in Immigrants to Learn English

A major aspect of immigrant assimilation is their ability to learn and speak the English language. The White House has stated that "[k]nowledge of English is the most important component of assimilation."\textsuperscript{330} In order to promote education in English, the Department of Education will launch a free, internet based site to assist in their education.\textsuperscript{331} The Administration has further asserted that "[a]n investment in tools to help new Americans learn English will be repaid many times over in the contributions these immigrants make to our political discourse, economy, and society."\textsuperscript{332}

\textsuperscript{322} Naturalization Test Redesign, \textit{supra} note 319.
\textsuperscript{323} Id.
\textsuperscript{324} Id.
\textsuperscript{325} Id.
\textsuperscript{326} Id.
\textsuperscript{328} Id.
\textsuperscript{329} Id.
\textsuperscript{330} Id.
\textsuperscript{331} Id.
VI. CONCLUSION

This article has touched on some of the major immigration provisions in the United States as a background to show the evolution of reform. Each act has established new laws either through amending existing laws or creating totally new provisions. Either way, there continue to be loopholes in immigration law. The CIRA 2007 has some positive aspects and some negative aspects. Unfortunately, such a drastic change in the immigration laws may have been premature and, therefore, rushed. The members of the House and Senate must try to work harder at a bipartisan relationship to establish realistic, fair, and workable alternatives to the existing immigration laws in the United States. In an e-mail from immigration attorney and professor, Ira Kurzban, regarding his opinion on this legislation, he indicated several areas where the proposed legislation fell short. He believes that “[t]he legislation was ill advised for many reasons” and that the important issue of amnesty was not addressed due to the fear of a “vocal right-wing minority.” Another problem that was not addressed by this legislation was that it did not have provisions “to attract both high skilled and low skilled workers into the U.S.” Next, “[i]t was also a poor bill in terms of enforcement because it failed to meaningfully secure the borders of the U.S.” Mr. Kurzban proposes that Due Process issues with respect to fair treatment and judicial review were not properly addressed. With that in mind, this is not an issue that will die a natural death. As was seen previously with IRCA, it took several attempts at passage before it was finally passed into law. This issue will come up again in future Congressional sessions. It can only be hoped that there will be more thought and realistic mentality devoted to proposed changes to one of the largest, most complicated, and controversial areas of the law in the United States. In the meantime, President Bush is taking advantage of executive and agency power in order to bring about changes hoped for in CIRA 2007. Although these changes will have legal effect, Congress still needs to consider immigration reform to bring about the changes that did not arise from the initiatives. Finally, it will be interesting to see the approach the future president will take on immigration reform in the United States.

333. E-mail from Laurence M. Krutchik, J.D. Candidate 2009, Nova Se. Univ., Shepard Broad Law Ctr., to Ira J. Kurzban, Esq., Adjunct Professor of Law, Nova Se. Univ., Shepard Broad Law Ctr. (July 16, 2007, 17:16:00 EST) (on file with author).
334. Id.
335. Id.
336. Id.
The status of women in Afghanistan during the Taliban era, and in Iraq during the Saddam Hussein era, was deplorable. After the events of September 11, 2001, the United States and other western nations made attempts to bring democracy to both countries. Yet, neither the liberation of the Iraqis from Saddam’s rule nor the Afghans from Taliban rule has succeeded in changing the status of women in either country more than superficially. Despite this fact, judges in immigration courts sometimes rely on “substantial change in circumstances” as a reason to deny post-war asylum claims. The stark reality is that nothing has effectively changed in the status of women in either country since the War on Terror began in 2001. While women in Afghanistan and Iraq continue to suffer gender-related persecution, asylum officers and judges in the United States are none-the-wiser.

II. BASIC LAW OF ASYLUM IN THE UNITED STATES

Under the Immigration and Nationality Act, a refugee is defined as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is
unable or unwilling to return to, and is unable or unwilling to avail
. . . herself of the protection of, that country because of persecution
or a well-founded fear of persecution on account of race, religion,
nationality, membership in a particular social group, or political
opinion.1

A refugee seeking asylum in the United States “carries the burden of
proving [her] statutory ‘refugee’ status and thereby establishing asylum eli-
gibility.”2 Female applicants from Iraq and Afghanistan most often rely on
the protected categories of persecution on account of political opinion and
membership in a particular social group to advance their applications for
asylum.3 Though the Act does not define persecution, both federal and im-
migration courts have held that persecution connotes extreme behavior, in-
cluding “threats to life, confinement, torture, and economic restrictions so
severe that they constitute a threat to life or freedom.”4 “[It] does not en-
compass all [types of actions] that [the American] society regards as unfair,
unjust, or . . . unconstitutional.”5 If courts were to interpret persecution so
broadly, a large majority of women in politically unstable countries would
qualify for asylum in the United States.6 Therefore, ordinary
“[d]iscrimination on the basis of race or religion, [though] morally reprehen-
sible . . ., does not ordinarily amount to ‘persecution.’”7 Even officially
sanctioned legal and economic discrimination against individuals does not
amount to “persecution” sufficient to warrant grant of asylum.8 But in ex-
ceptional cases, discrimination can be “severe and pervasive [enough] to
constitute ‘persecution’ within the meaning of the Act.”9 However, this de-
determination is strictly made on a case-by-case basis.

“[T]o establish persecution ‘on account of’ [her] political opinion,” an
applicant must show that the persecutor is motivated by his perception of the

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3. Id. at 1230–31.
5. Id.
6. Id.
7. Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995).
9. Ghaly, 58 F.3d at 1431.
applicant's opinion, rather than by his own political beliefs. Further, the applicant must show: 1) that she holds a political opinion; 2) that her political opinion is known to her persecutors; and 3) that the persecution was or will be on account of her political opinion. A showing "that there exists a generalized or random possibility of persecution" on account of political opinion is not enough; the alien "must show that [s]he is at particular risk," that is, that "her predicament is appreciably different from the dangers faced by [her] fellow citizens." On the other hand, "persecution on account of membership in a particular social group" is that which is "directed toward[s] an individual who is a member of a group of persons . . . [who] share a common, immutable characteristic" like sex, color, kinship ties, a shared past experience or land ownership. "[W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." An alien claiming asylum on this ground must establish that: 1) she identifies with a group that constitutes a "particular social group;" 2) "she is a member of that group;" and 3) she was persecuted or "has a well-founded fear of persecution based on that membership." A nexus must exist between the shared trait of the social group and the persecution suffered, such that the persecutors are motivated, at least in part, by the immutable characteristic. An applicant need not prove future persecution to an absolute certainty. "Even a ten percent chance that [an] applicant will be persecuted in the future is enough to establish a well-founded fear" of future persecution. In that regard, proof of past persecution gives rise to a presumption of a well-founded fear of future persecution and shifts the evidentiary burden to the government to rebut that presumption. The presumption can be rebutted with a showing: 1) that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the [home] country" on account of the protected category; or 2) that

11. See Gonzales-Neyra v. INS, 122 F.3d 1293, 1296 (9th Cir. 1997), amended by 133 F.3d 726 (9th Cir. 1998).
12. Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998) (quoting Kotasz v. INS, 31 F.3d 847, 852 (9th Cir. 1994)).
14. Id.
15. Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993).
17. Sael v. Ashcroft, 386 F.3d 922, 925 (9th Cir. 2004).
18. Popova v. INS, 273 F.3d 1251, 1259 (9th Cir. 2001).
petitioner can “avoid future persecution by relocating to another part of the . . . country . . . and under all the circumstances, it would be reasonable to expect [her] to do so.”\textsuperscript{19} Thus, an applicant for asylum may not qualify as a refugee if the government establishes by a preponderance of the evidence that since the time the persecution occurred, conditions in the applicant's country of nationality or last habitual residence have changed to such an extent “that the applicant no longer has a well-founded fear of [being] persecut[ed]” if she were to return.\textsuperscript{20}

III. GENDER GUIDELINES FROM THE UNITED NATIONS

The United Nations (UN) recommends that women fearing persecution or severe discrimination on the basis of their gender be considered members of a social group when determining whether they are eligible for refuge.\textsuperscript{21} These women “also often fit under the political opinion and religion grounds.”\textsuperscript{22} Additional support for gender-related asylum is contained in the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which states:

“[D]iscrimination against women” shall mean any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.\textsuperscript{23}

Similarly, the UN Declaration on the Elimination of Violence Against Women states that “‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private

\textsuperscript{19} Procedures for Asylum and Withholding or Removal, 8 C.F.R. § 208.13(b)(1)(A)–(B) (2007).
\textsuperscript{20} Id. § 208.13(b)(1)(i)(A).
\textsuperscript{22} Id.
life.”\textsuperscript{24} Amnesty International suggests that “[e]ven though the Department of Homeland Security [DHS]\textsuperscript{25} and international human rights [organizations] recognize gender-related violence as human rights violations, many asylum adjudicators in the United States apply a restrictive interpretation of the international definition of a [woman] refugee entitled to protection.”\textsuperscript{26}

In 2002, the United Nations High Commissioner for Refugees (UNHCR), issued guidelines for governments, the judiciary, and attorneys who “carry[] out refugee status determination in the field.”\textsuperscript{27} In this document, the agency acknowledged that although the term “‘[g]ender-related persecution’ . . . [had] no legal meaning per se,” gender often dictates the type of persecution and the reason for this treatment.\textsuperscript{28} Gender-related claims usually covered acts of sexual violence or “domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.”\textsuperscript{29} Rape, “dowry-related violence, . . . genital mutilation, [and] domestic violence . . . are acts which inflict severe” physical and mental pain and must be regarded as forms of persecution.\textsuperscript{30} Therefore, there was an urgent need for procedural safeguards to ensure that adequate attention is given to women asylum seekers who base their claims on gender-related persecution.\textsuperscript{31}

In evaluating the grounds for persecution, the guidelines suggest that a gender-sensitive interpretation be given to each category.\textsuperscript{32} For example, persecution on account of race may be carried out by “destroy[ing] the ethnic identity [and] prosperity of a racial group by killing, maiming or incarcerating the men,” and persecuting women through sexual violence and reproductive control to stop them from “propagating the ethnic or racial identity.”\textsuperscript{33}


\textsuperscript{25} See Asylumlaw.org, United States, http://www.asylumlaw.org/legal_tools/index.cfm?useaction=&countryID=194 (last visited Feb. 17, 2008). DHS is the new agency which currently represents the government in asylum cases. \textit{Id}. INS and DHS are used interchangeably throughout this paper.

\textsuperscript{26} Amnesty Int’l USA, supra note 21.


\textsuperscript{28} \textit{Id}. \textsect 1.

\textsuperscript{29} \textit{Id}. \textsect 3.

\textsuperscript{30} \textit{Id}. \textsect 9.

\textsuperscript{31} See \textit{id}. \textsect 1.

\textsuperscript{32} UN Refugee Agency [UNHCR], supra note 27, \textsect 38.

\textsuperscript{33} \textit{Id}. \textsect 24.
In countries where the established religion assigns particular behavioral codes to women, a woman’s failure to abide by such codes is perceived as her “hold[ing] unacceptable religious opinions regardless of what she actually believes.” As to persecution on the basis of political opinion, the guidelines propose that “women are less likely than [men] to engage in [outwardly open] political activity, and are more often involved in ‘low level’ political [action]” like refusing to provide meals to government soldiers, “nursing sick rebel soldiers,” recruiting sympathizers, and preparing and disseminating leaflets. Therefore, in this context, it is vital to understand political opinion in the broadest sense to incorporate even indirect opinions on issues concerning the government or social policy.

IV. GENDER GUIDELINES FROM THE INS

In 1995, the Immigration and Naturalization Service (INS) published a set of guidelines to help Asylum Officers adjudicate cases of women whose “asylum claims [are] based wholly or in part on . . . gender.” In recognizing many international sources of gender-related instruments and documents, including the CEDAW, the memorandum proposes “creating a ‘customer-friendly’ . . . interview environment that [would] allow[] women claimants to” safely relate their stories of abuse and violence. The memorandum explains that in countries where the laws and customs are de facto discriminatory towards women, “[b]reaching social mores [by] . . . marrying outside of an arranged marriage, wearing lipstick or failing to comply with . . . religious norms [could] result in” particularized and directed “harm, abuse or harsh treatment.” In societies that require women to “live under the protection of male family members,” women become “even more vulnerable to abuse” when the male family member dies. Finally, “[w]omen who have been raped or . . . sexually abused” are subject to further violence “because they are viewed as having brought shame and dishonor on themselves, their families, and their communities.”

34. Id. ¶ 25.
35. Id. ¶¶ 33, 34.
36. See id. ¶ 33.
38. Id. at 4.
39. Id.
40. Id.
41. Id. at 5.
However, in clarifying the legal analysis of claims, the memorandum states that although “[t]he form of harm or punishment may be [governed by] the gender of the victim, . . . the analysis of the claim should not vary based on the gender.” So while “[r]ape and other forms of severe sexual violence [may] fall within” the definition of persecution, the mere “appearance of sexual violence in a claim should not lead” to the automatic conclusion that there has been persecution based on a protected category. The memorandum further outlined case law pertaining to the categories of persecution and their interpretation in several federal and immigration courts, but did not give any additional guidance on how to deal with asylum cases that are not squarely addressed by case law or by directives from DHS. This set of guidelines is in itself ineffective in dealing with post-war asylum claims from women in Afghanistan and Iraq because it does not address the particularities of either society or the specific gender-related claims that continue to arise as a result of the novel political and social situation in either country past 2001. To that effect, DHS has not issued guidelines to determine what constitutes a “substantial change in circumstances” in the post-war period.

V. COUNTRY CONDITIONS PRE- AND POST-WAR ON TERROR

A. Afghanistan and the Taliban

In late 1994, the Taliban militia took over Afghanistan; by 1996, it had complete control over the capital, Kabul. A radical Islamic movement, the Taliban, insisted on enforcing the “proper code of conduct for [all] Afghans, [which consisted of] harsh dress codes, [severe] restrictions on women,” and cruel punishment for those who violated the code of conduct. The Taliban prohibited women from working outside the home, strictly obligated women to wear chadors, and did not allow them to travel outside the home without being accompanied by a close male relative. “It’s like having a flower, or a

42. Memorandum, supra note 37, at 9.
43. Id.
44. Id. at 9–11.
46. Id. at 3.
48. AFGHANISTAN PROFILE OF ASYLUM, supra note 45, at 9.
rose. You water it and keep it at home for yourself, to look at it and smell it. It [a woman] is not supposed to be taken out of the house to be smelled. 49

Infractions of any part of the Taliban code were dealt with brutally. In one case, a young Afghan mother was forced to travel alone across town with her feverish child. 50 When a teenage Taliban guard saw her and failed in his attempts to stop her, “he raised his weapon and shot her repeatedly” purely because she “should not have been out alone.” 51 In another case, a woman who was found walking in the street “with an unrelated man . . . was publicly flogged with 100 lashes.” 52 She was lucky—had she been married, the Taliban would have stoned her to death. 53 In another part of town, a ten year old girl “was sentenced to amputation of her fingers” because she had varnished her nails. 54 There are numerous credible reports of women being “whipped with chains and even shot at” 55 for showing their ankle under the full-length garb, having “too pretty” a chador, or wearing white socks, which was viewed as disrespecting the white Taliban flag. 56

The few women who were allowed to work in hospitals were not permitted to work alongside male doctors or treat male patients. 57 Male doctors could only treat “female patient[s] if [they] were fully clothed,” defeating any attempt to get an accurate diagnosis and proper treatment. 58 Due to these harsh restrictions, “an estimated forty-five women [were dying] everyday from pregnancy related causes.” 59 Moreover, the female doctors and nurses were under-trained and unable to provide more than basic medical care. 60

The primary cause being that the Taliban closed all girls’ schools and banned


51. Id.

52. Id.

53. Id.


55. AFGHANISTAN PROFILE OF ASYLUM, supra note 45, at 7.

56. HAIDAR, supra note 54, at 2.

57. AFGHANISTAN PROFILE OF ASYLUM, supra note 45, at 6.

58. Taliban’s War Against Women, supra note 50.


60. See AFGHANISTAN PROFILE OF ASYLUM, supra note 45, at 6–7.
women from attending a university; female teachers were forbidden from teaching male students and were punished for secretly home-schooling female children. Over ninety percent of Afghan women remained illiterate and untrained in any skill.

Under Taliban rule, Afghan women were subjected to brutal rapes, abductions, forced marriages, honor killings, and other horrific acts of violence. In one village, as women attempted to escape during a Taliban invasion, guards tore the women’s chadors to see “if [they] were young and beautiful” so that the guards could take them away for themselves. In fear, some families sent their young girls “to Pakistan [and] Iran to protect them” from these brutal acts. Women who were left behind were effectively stripped of their dignity.

After the coalition forces invaded Afghanistan in October 2001, the Taliban gradually lost its grip over Kabul. The Department of State reported that Afghan women were beginning to return to their rightful place in society, with “[s]chools . . . preparing to reopen and women [being allowed to pray] in mosques.” Yet, years “after the Taliban’s fall, women . . . still face [the same] restrictions and violations of . . . rights, [this time at the hands of] warlords, police officers, and local officials with similar attitudes toward women. In some [provinces], the same officials who administered the anti-women policies of the Taliban remain[ed] in their positions.”

While women in cities continue to get greater access to education, health care, and employment, women in villages and rural areas are not aware of their rights under the new constitution and continue to suffer gender driven persecution at the hands of the militia factions.

Rape, domestic violence, forced marriages, and honor killings remain serious problems despite attempts to improve the status of women. Women who report rapes and seek justice through the court system “are perceived to
Abusers are rarely prosecuted, with the accused being exonerated or punished lightly. The victims, on the other hand, are convicted and imprisoned for having committed zina crimes. "Dozens of women are [also] imprisoned . . . for ‘running away’ from . . . forced marriages, or for transgressing social norms by eloping." In one case, a girl who was raped by her brother was forced to reveal the incident to her parents after she learned that she was pregnant. "In order to save the family’s reputation the parents set the girl on fire [and s]he died three days later." There has never been an investigation of this case.

"Sexual abuse and rape are taboo subjects within Afghan society, and as a result government officials are loathed to address the problem." As of October 2002, police in Herat, a province in Western Afghanistan, were conducting gynecological examinations on young girls to see if “they had recently had sexual intercourse.” The results of these “chastity examinations” were officially reported to the criminal branch. In other areas, elders forego the new constitution and instead choose to rely on Shari’a law that holds a woman inferior to her male counterpart. For example, in rape cases, the victim is required to produce multiple witnesses “while the man can simply claim that it was consensual sex . . . [and have] the woman convic[ed] of adultery.”

In 2004, the first set of women graduated from the national police academy and formed a police unit to respond to crimes against women. Six of those female officers “spent the first four months on the job cleaning the police station,” “were paid [ten dollars] less than their official salary, and . . .

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73. Afghan 2006, supra note 70.
75. B.I.A. AFGHANISTAN REPORT, supra note 72, § 23.04.
76. Afghan 2006, supra note 70.
77. Id.
78. Id.
79. WOMANKIND WORLDWIDE, supra note 74, at 16.
80. LIVE AS HUMANS, supra note 69, at 20.
81. Id. at 21–22.
83. Afghan 2006, supra note 70.
84. Id.
were forced to wear burqas over their uniforms.”85 In another province, female political candidates were forced to get permission from their male elders to conduct activities outside their home.86 Attacks are routinely carried out on female government officials, journalists, teachers, and activists with the “specific goal of intimidating them and undermining their efforts to strengthen women’s status in society.”87 Women’s rights activists still report “death threats, visits to their homes by gunmen, and dismissals from their jobs.”88 The United Nations Office for the Coordination of Human Affairs reports that, in Basra last year, nearly eighty women were killed for violating Islamic law and almost fifty were murdered as part of honor killings.89 “The killers enforcing their own version of Islamic justice are rarely caught, while women live in fear.”90

From these accounts, it is plainly evident that although there has been some progress in protecting women from violence and discrimination, they continue to be plagued with harsh restrictions on their everyday life. They are systematically excluded from positions of authority and are subjected to abusive exercise of power by the government’s agents and private actors.91 Afghan women continue to be among the worst-off in the world, especially in health, deprivation of rights, protection against violence, education and literacy, and public participation.92 Every choice is made in light of the danger they face: “where they can go, how they can get there, whom they can go with, and how they can dress.”93 Although the Taliban is no longer in power, the cultural legacy of the Taliban remains.

85. Id.
86. Id.
87. B.I.A. AFGHANISTAN REPORT, supra note 72, § 23.11.
88. HUMAN RIGHTS WATCH, BETWEEN HOPE & FEAR: INTIMIDATION & ATTACKS AGAINST WOMEN IN PUBLIC LIFE IN AFGHANISTAN 2 (2004), available at http://www.hrw.org/backgrounder/asia/afghanistan1004/afghanistan1004.pdf. "They called me on my mobile phone, saying, 'You are doing things you should not [do]. We will kill you. We will kill you as an example to other women.'” Id. at 1.
90. Id.
91. Id.
93. LIVE AS HUMANS, supra note 69, at 4.
B. Iraq and Saddam Hussein

In Iraq, life for women under Saddam Hussein's reign was no better. During his time in power, the Ba'ath Party practiced arbitrary arrests, torture, lack of due process, and the expanded use of the death penalty. The government used Islamic and tribal traditions to consolidate power with a disproportionate impact on women. As in Afghanistan, women in Iraq had "increasing restrictions on their freedom of mobility and protections under the law." The government issued numerous decrees and introduced legislation against women in the labor code and the criminal justice system. For example, under one decree, "men who kill[ed] or assault[ed] their female relatives [to defend] their family's honor [were exempt] from prosecution and punishment." Saddam's security forces "beheaded . . . women suspected of prostitution and . . . men suspected of facilitating . . . such activities."

In the area of employment in 1998, Saddam's government dismissed all females working as secretaries in governmental agencies. The legislature then enacted a law requiring all state ministries to put restrictions on women working outside the home. Women under the age of forty-five were prohibited from leaving the country unless accompanied by a male relative. "[F]ormerly co-educational high schools were required by law to provide single-sex education only, further reflecting the reversion to religious and tribal traditions."

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95. Id.
96. Id.
97. Id. at 4.
101. Id.
103. WOMEN'S STATUS IN IRAQ, supra note 92.
"Domestic violence against women occur[ed] but little is known about its extent." 104 Such abuse was often dealt with within the family without any public discussion of the subject. 105 But human rights organizations continued to receive reports of women who were raped by men in the security forces. 106 The government never "acknowledged these reports, conducted any investigation, [or took] action against" the perpetrators. 107 Although the laws prohibit rape, security forces routinely raped family members of persons in the opposition as a punishment for dissent. 108 The government used sexual violence for political purposes including videotaping "the rape of female relatives" of dissenters and using these "for blackmail . . . and to ensure future cooperation." 109

After the United States-led invasion and occupation of Iraq in 2003, the coalition forces and civilian administration has failed to provide public security as women are increasingly vulnerable "to sexual violence and abduction." 110 "The fall of Saddam’s regime . . . left a power vacuum that [has been] rapidly . . . filled by right-wing political Islamist groups . . . ." 111 Between May and June that year, at least "twenty-five cases of sexual violence and abduction" were reported to one organization. 112 "[M]ore than 400 . . . women were abducted and raped within the first four months of [the] U.S. occupation." 113 In one of those cases, a forty-nine year old woman, who was suspected to have connections with Saddam’s government, was abducted at gun point from her home at night and taken to an unknown location where she was repeatedly gang-raped, burned with cigarettes, and bitten before the gunmen dropped her off at an unfamiliar location the next morning. 114 For months she lay awake at night, in fear that the perpetrators would return. 115

105. Id.
106. Iraq 2000, supra note 97.
107. Id.
109. Id.
112. CLIMATE OF FEAR, supra note 108, at 3.
115. Id. at 5.
Victims of rape continue to be denied medical treatment and are deprived of "access to medications to treat sexually transmitted diseases."\(^{116}\) Those who seek treatment are turned away because they also often want forensic examinations to document their assertion that they have not been raped in order to protect themselves from possible retaliation by their family.\(^{117}\) For example, a "nine-year-old rape victim was turned away" from Iraqi hospitals even though she was still bleeding for three days after being raped.\(^ {118}\) The child was finally treated at a U.S. military unit stationed nearby.\(^ {119}\)

Women who choose to report rapes to the police are turned away by officers, who do not recognize, "or purposefully downplay[], the seriousness . . . of sexual violence and abductions."\(^ {120}\) In some police stations, officers assert that women provoke rape simply by leaving their homes.\(^ {121}\) For cases that reach the court system, "[t]he Penal Code . . . allows perpetrators of rape, sodomy, [and] sexual violence . . . to receive reduced sentences if they marry their victims."\(^ {122}\) This effort to unite the kidnapper and the kidnapped is aimed at avoiding revenge cases.\(^ {123}\) "[A]uthorities are reluctant to acknowledge a problem" while the police force continues to be incompetent, corrupt, and overwhelmed.\(^ {124}\)

A 2007 report states that although the new Iraqi "[C]onstitution forbids discrimination on the basis of gender, in practice, conservative societal standards impeded women's abilities to exercise their rights."\(^ {125}\) Women are subject to "increasing pressure to wear veils," with explicit threats for non compliance.\(^ {126}\) Since 2003, "the number of women attacked for choosing not to wear head scarves and veils has more than tripled."\(^ {127}\) Several "have been burned by acid attacks" to punish them for not wearing the proper cloth-

\(^{116}\) Id. at 8.
\(^{117}\) Id.
\(^{118}\) Id.
\(^{119}\) Climates of Fear, supra note 108, at 9.
\(^{120}\) Id. at 11.
\(^{121}\) Id.
\(^{122}\) Id. at 14.
\(^{123}\) Id. at 15.
\(^{126}\) Id.
Women are also targeted for participating in everyday activities like “driving a car, talking on a cell phone, and wearing trousers.” Women continue to live in fear of death “for being a member of the wrong sect, . . . for helping their fellow women, . . . for doing jobs that the militants have decreed that they cannot do, . . . [and for being] the softest targets for . . . criminal gangs.” They “live in terror of speaking their opinions . . . or defying the strict . . . prohibitions on dress and [behavior].”

VI. PARTICULAR CASES OF GENDER-RELATED ASYLUM CLAIMS

A majority of asylum cases in the United States are disposed of at the hands of magistrates and immigration judges and are therefore not publicly documented. This fact makes it particularly cumbersome to collect detailed data tracking asylum claims from women in particular countries. Yet, there are a handful of unpublished cases where judges have used the overthrow of the Taliban and Saddam Hussein as evidence of a substantial change in circumstances to deny both male and female applicants asylum in the United States.

For example, in July 2002, the Fifth Circuit summarily rejected an Afghan man’s asylum application because of the simple fact that the Taliban regime was no longer in existence and thus his claim of fear of persecution based on his former association with a military group was destroyed. Yet, scores of reports, including those assembled by the U.S. Government, make it clear that insurgency has been rampant in the country since the invasion; if anything, the persecution has only heightened since the Taliban’s fall from power, making such asylum claims all the more genuine and urgent. Similarly, another Afghan man, who was suspected of being against the Taliban,
was kidnapped and severely beaten for two and a half months after being accused of killing Taliban soldiers "and storing weapons in [his] store." 136

When a Taliban judge ordered that the man be executed, the man escaped through Pakistan and was smuggled to the United States where he applied for asylum. 137 Despite presenting several reports from the Department of State and Amnesty International, various news articles, and "personal affidavits from relatives attesting to his identity" the immigration judge nonetheless denied his asylum request, reasoning that the Taliban was no longer in power and, therefore, the man had no reason to fear future persecution. 138 On appeal, the court took note of the evidence presented by the INS that the "interim government led by Hamid Karzai" was working towards reconstruction. 139 The court held that because "generally poor conditions and random private acts of violence do[es] not constitute persecution," the court affirmed the petitioner's denial of asylum. 140 Finally, in a third case, an Afghan man, who was "persecut[ed] by the Taliban based on the Taliban's conscription of his brother" and imprisonment of his father, had his claim for asylum rejected simply because "[a]t the time of the hearing the Taliban were no longer in power." 141 Unfortunately, these unpublished opinions fail to outline or clearly explain what specifically has changed in the particular circumstances of the asylees with respect to the new government in Afghanistan that inexplicably gives them respite from future persecution on the same account.

Cases currently pending before immigration judges across the country include one from a Westernized Afghan woman who fears future "persecut[ion] for being perceived as Western" and defiant of established roles, and one from "a woman who was in a long term abusive marriage with an Afghan warlord" who divorced her after twenty years, forcing her to flee from the country in fear of retaliation for "being a divorced woman." 142 Another pending "[c]ase [is] of a Phoston [sic] woman who was placed in an arranged marriage against her will and . . . forced to wear a burqa. She applied for asylum based on . . . repressive social norms." 143 A third case involved an Afghan teen who moved to the United States for one year after winning a

137. Id.
138. Id. at 877–78.
139. Id. at 880.
140. Id. at 881.
142. Email from Lisa Frydman, Staff Attorney, Center for Gender and Refugee Studies to author (Oct. 23, 2007, 13:56 EST) (on file with author) [hereinafter Frydman Email].
143. Id.
special scholarship, and who later applied for asylum based on her fear of "honor killing[s] and being shunned from [the] community" for "living in an American family and participating in activities . . . [like] eating meals with boys," which would be totally unacceptable in Afghanistan. 144

In 2006, similar asylum cases were rejected from Iraqi women because Saddam Hussein had been removed from power and, therefore, the women could not have a well-founded fear of persecution. 145 For instance, an Iraqi Assyrian Christian female, who suffered broken ribs during one interrogation and was repeatedly subjected to harassing questioning about the whereabouts of her sons, was denied asylum because "[t]he immigration judge took administrative notice of the fact that the Hussein regime . . . ceased," to exist and therefore, her fear did not justify asylum. 146 Similarly, the Sixth Circuit reviewed a claim from an Iraqi Chaldean Christian woman who, after suffering rape and torture over a period of a few months, claimed she feared fundamentalist insurgents. 147 The court rejected her application because her past tormentors had long been overthrown and "the new Iraqi regime [had intentions of recognizing] the country’s multi-religious society." 148 In a final case, the Sixth Circuit rejected a claim from a Chaldean Christian Iraqi woman because there was no evidence that the new government acquiesced with the group that she feared would torture her in the future. 149 In March 2007, the Sixth Circuit boldly claimed "that the fall of the Hussein government rebuts any well-founded fear based on persecution that occurred under that regime." 150 The court, therefore, effectively closed all avenues for asylum claims from women based on such types of persecution. 151

Other cases before immigration judges include one from "an Iraqi woman . . . who married against her family’s wishes and was threatened with honor killing;" her application "was [rejected] because the [judge] did not believe women [who lived] in the capital [city and were] allowed . . . to study at [the u]niversity would be subject to honor killing[s]." 152 A case now pending before an immigration judge was filed by "an Iraqi woman whose Muslim parents sent her to . . . a Christian school" where she started to "con-

144. Id.
145. See, e.g., Margos v. Gonzales, 443 F.3d 593, 598 (7th Cir. 2006); Toma v. Gonzales, 179 F. App’x 320, 324 (6th Cir. 2006).
146. Margos, 443 F.3d at 595–96, 598.
147. Toma, 179 F. App’x at 321–22.
148. Id. at 324.
151. Id.
152. Frydman Email, supra note 140.
sider[,] herself Christian and . . . translated for American soldiers.” 153 “As a result, her family and individuals in her community put a reward out for her [execution].” 154 A final case comes from “an Iraqi woman who fled Iraq . . . because her family was persecuted for speaking out against Saddam’s regime;” after she arrived in the United States, “she had children out of wedlock and [now] fear[s] an honor killing in Iraq.” 155

VII. RECOMMENDATIONS FOR MAGISTRATES AND IMMIGRATION JUDGES

With this scenario in mind, immigration judges must recognize that a general change in the home country’s political condition does not render the applicant ineligible for asylum when there still exists a specific danger to the applicant. 156 Despite claims that women’s lives have improved since the overthrow of Saddam Hussein and the Taliban, women in both countries continue to face new challenges that have halted their effort towards gender equality. 157

From the very first steps of the asylum process, it is imperative that immigration officers and staff use gender-sensitive techniques to obtain information from women who may be understandably reluctant to disclose accounts of rape and sexual violence. Officers and interpreters should be female so that the interview experience is not aggravated by the presence of unknown male officials in positions of authority. Staff must be appropriately trained in applicable cultural norms to ensure a safe environment for the asylees to relate their experiences away from the presence of family members, especially their male relatives. If a woman is unable to testify in court due to shame, fear of ridicule, or reprisal, judges should allow testimony to be presented through affidavits, videotapes, or in the privacy of a judge’s chambers. In addition, any information gathered during the interview process must be kept strictly confidential outside of its use in the courtroom and in chambers.

In analyzing claims for asylum, immigration judges must be mindful that women from excessively repressive cultures are less likely to publicly engage in anti-religious or political organizations. Nevertheless, their opinions may be expressed by providing services, shelter and/or food to activists, or distributing leaflets promoting a change in the traditional social and politi-

153. Id.
154. Id.
155. Id.
156. Gailius v. INS, 147 F.3d 34, 45–47 (1st Cir. 1998).
SUBSTANTIAL CHANGE IN CIRCUMSTANCES

Judges must also recognize that asserting one’s right to be sexually active or inactive, to exercise reproductive rights, or to refuse cultural norms are all expressions of political opinion. For example, if a woman refuses to conform to social mores, she may be perceived as being a feminist and, therefore, a political opinion may be imputed on her based on her refusal.

Given the near impossibility of obtaining documentary evidence of rape and sexual violence in the home country, judges must take into account testimony of other similarly situated women that is documented in written reports or oral statements. Summarily deciding cases based on the assumption that a country’s social, economic, religious, and political conditions change when one figurehead is replaced by another, defeats the purpose and spirit of granting asylum to the genuinely persecuted. Judges must, therefore, weigh the evidence presented by the applicant in the form of testimony, affidavits, and reports on a country’s conditions; specifically the status of women, as prepared by non-governmental or international organizations, or judges must carry out independent research before making their decision to reject a claim for asylum on the basis of “substantial change in circumstances.”

VIII. CONCLUSION

In light of the prolonged War on Terror, restoring fairness to the asylum process has become crucial. The group of asylum seeking women from Afghanistan and Iraq need special consideration because, despite attempts by coalition forces to restore democracy and ensure everyday security for citizens, the decline in the socio-political status of women has only been exacerbated since the invasion.\footnote{See id.} A fair asylum system is, therefore, essential to ensure that the United States lives up to its obligations to protect female victims of rape and sexual violence who flee to this country as a safe haven and seek refuge on its land.
SYMPOSIUM NOTES AND COMMENTS

Step-Down Restitution: A Proposal for an Equitable Resolution to Confiscated Cuban Property

Daniel A. Espino

Down But Not Out: A Comparison of Previous Attempts at Immigration Reform and the Resulting Agency Implemented Changes

Laurence M. Krutchik

Substantial Change in Circumstances: An Unjustified Reason to Deny Post-War Asylum Claims from Afghan and Iraqi Women

Payal Saksburg