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THE REFUGEE ACT OF 1980: A HUMANITARIAN STANDARD

Mark Gibney*

I. INTRODUCTION

The Refugee Act of 1980¹ was passed with a certain degree of promise that American refugee policy would change. To begin, under the Act the United States definition of "refugee" now conforms to international standards.² Refugee admissions are now re-

* B.A. Boston College (1974); J.D. Villanova Law School (1977); Ph.D. Univ. of Michigan (1985). Author is currently an Assistant Professor of Political Science, Purdue Univ.

1. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

2. Immigration and Nationality Act [hereinafter INA] § 101(a-42), 8 U.S.C. § 1101(a-42)(1982):

The term "refugee" means (A) 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. . . . The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

Under the 1965 amendments to the INA, Sec 3, 79 Stat. 911, 913 (1965) (repealed at 94 Stat. 102, 107 (1980)) aliens could be granted conditional entry to the United States if they could demonstrate that "(i) because of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion, and

moved from the preference system in the Immigration Act,³ which under the old seventh preference limited the number of refugees admitted to 17,400⁴ per year.⁵ The Refugee Act established a baseline of 50,000 admissions per year, with provisions for increased numbers beyond that.⁶

More importantly, the language of the Refugee Act strongly indicates that American refugee admissions are no longer to serve as a foreign policy tool, as they had in the past.⁷ The clearest ex-

(iii) are not nationals of the countries or areas in which their application for conditional entry is made. . . .

In 1968 the United States became a party to the United Nations Protocol Relating to the Status of Refugees *open for signature*, Jan. 31, 1967, 19 U.S.T. 6223 T.I.A.S. No. 6577, 606 U.N.T.S. 267. The Protocol incorporated the terms of the 1951 Geneva Convention Relating to the Status of Refugees, 189 U.N.T.S. 137 (July 28, 1951), a treaty to which the United States was not a signatory. The change in American law with passage of the 1980 Refugee Act essentially conformed U.S. law to the U.N. definition, *compare* INA § 102(a)(42)(B) with Geneva Convention, *supra*, at 153 ch. I (A)(2), but went beyond the convention by recognizing as a refugee an alien fearing persecution in the country in which he resides.

3. For a good discussion of U.S. refugee, asylum, and non-refoulement practice, and the close interrelationship of each, *see* Note, *The Right to Asylum Under United States Law*, 80 COLUM. L. REV. 1125 (1980). *See also*, Teitelbaum, *Political Asylum in Theory and Practice*, PUB. INTEREST, 74 (Summer 1984). In the present Article little distinction will be drawn between these varying avenues of achieving "refugee" status.

4. INA § 203 (a)(7) (repealed by the Refugee Act of 1980). When originally enacted, the seventh preference allowed for the admission of 10,200 refugees annually. By 1978, after Congress had amended the Immigration Act to provide for a single worldwide preference system, this number was increased to 17,400 annually. *See* CONGRESSIONAL RESEARCH SERVICE, 96th Cong., 2d Sess., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES 11 (Comm. Print, Senate Comm. on the Judiciary, 1980).

5. It should be noted that despite the presence of the seventh preference, the more widely used vehicle to admit "refugees" was the frequent use of the Attorney General's parole power. Arthur Helton computes that before 1968 the Attorney General paroled 233,636 refugees into the United States. For the period 1968 to 1980, the Attorney General used his parole power to admit 615,515 refugees into this country. Ideology dominated here as well. Although the Refugee Act was a concerted effort to remove use of the Attorney General's power, even after passage of the Refugee Act this power was relied upon to admit large numbers of Cubans. Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J. L. REF. 243, 246-48, (1984).

6. INA § 207 (a)(1) and (2), 8 U.S.C. § 1157 (a)(1) and (2). In fiscal year 1984 over 71,000 refugees entered into the United States. In fiscal year 1983 there were 61,681 refugee admissions. During fiscal year 1982 there were over 97,000 refugees admitted to the U.S., compared with 159,000 in fiscal year 1981 and 207,116 in fiscal year 1980 (excluding Cuban and Haitian "entrants"). OFFICE OF THE U.S. COORDINATOR FOR REFUGEE AFFAIRS, PROPOSED UNITED STATES REFUGEE ADMISSIONS AND ALLOCATIONS FOR FISCAL YEAR 1987, (1986) appendix C.

7. *See* Teitelbaum, *Immigration, Refugees, and Foreign Policy*, 38 INT'L ORG. 429 (1984). *See also*, Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447

ample of this change is the removal of the ideological and geographical restrictions that had previously limited refugee admissions to those from communist countries or countries in the Middle East.⁸ The House Report stated quite unequivocally that "the Committee intends to emphasize that the plight of the refugees themselves, as opposed to national origins or political considerations, should be paramount in determining which refugees are to be admitted to the United States."⁹

Despite these strong indications that "business as usual" should change, in fact, the Refugee Act has brought about very little change.¹⁰ There remains a bias¹¹ towards admitting individuals from communist countries as refugees/asylees, while ignoring the claims of those who are not from such countries. Along with this, there are few indications that foreign policy concerns have been removed from U.S. refugee policy.¹²

In this article I will examine the 1980 Refugee Act as a "moral" document, premised on moral rights and moral duties rather than legal rights and legal duties. This argument has its source in the Act itself, particularly in the Act's continual references to humanitarian concerns. Part I will examine the moral basis of the Refugee Act. Part II will look at the implications of these humanitarian standards, with a particular focus on the Sanctuary movement in the United States. This section will spend a fair amount of time dealing with issues in political philosophy, particularly the notion of individual duties. Part III attempts to frame a different role for the judiciary in the area of refugee admissions. I

(1983).

8. See *supra* note 2.

9. H.R. Rep. No. 608, 96th Cong., 1st Sess. 13 (1979).

10. For a discussion of how little State Department practices changed see Posner and Kaplan, *Who Should We Let In?* HUMAN RIGHTS (Summer 1981), at 16, 19. Accord, Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 878-881 (1982).

11. For example, in fiscal year 1983, 78 percent of the Russian, 64 percent of the Ethiopian, 53 percent of the Afghan, and 44 percent of the Romanian cases decided received political asylum. This contrasts rather starkly with the fact that less than 11 percent of the Philippine, 12 percent of the Pakistani, 2 percent of the Haitian, 2 percent of the Guatemalan, and 3 percent of the Salvadoran applications were granted asylum. See Helton, *supra* note 5, at 253.

12. For a discussion of the enormous influence wielded in the asylum adjudication process by the desk officers in the State Department see Aleinikoff, *Political Asylum in the Federal Republic of Germany and Republic of France: Lessons for the United States*, 17 U. MICH. J. L. REF. 183, 193-96 (1984).

argue that courts, generally, should serve as a public forum where the moral values in the Refugee Act itself, and in U.S. refugee admissions generally, can be addressed. The recent trial of Sanctuary leaders in Tucson presented a missed opportunity to play such a vital role.

II. THE STANDARDS OF THE REFUGEE ACT

One of the Refugee Act's most striking features is that it is replete with language and standards that can best be described as "moral."¹³ For example, the Purpose of the Act reads in part: "The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."¹⁴ Part (b) of this same section states that "the objectives of this Act are to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States."¹⁵

While the Refugee Act is no different from most other legislation in heralding non-legislative standards in the Preamble or the Purpose, what is so noteworthy about the Act is that these same kinds of "standards" exist in the substantive sections as well. For example, the Act provides for the admission of more than 50,000 refugees per year if this larger number can be "justified by humanitarian concerns or is otherwise in the national interest."¹⁶ If a ceiling on admissions for a given year has been set, the Act allows for increased admissions if justified by "grave humanitarian concerns or is otherwise in the national interest."¹⁷ In describing the consul-

13. It is ironic how moral concerns can permeate this area at a time when it is not apparent that government officials generally see refugee admissions (and the Refugee Act itself) as based on moral duties. For example, Perry Rivkind, the INS district director for Florida, has recently enunciated a policy that no Nicaraguans will be deported to Nicaragua because of the possibility of persecution by the Sandinista government. Rivkind explained his unilateral action (the New York Times describes Justice Department and Immigration officials as acquiescing) in these terms: "I would personally—not just as a Government official, but personally—have trouble sending people from a Communist country back to that country. Morally and ethically it would be wrong to send people back to Nicaragua when we are at great odds with that Government." Pear, *Key Federal Aide Refuses to Deport Any Nicaraguans*, N.Y. Times, Apr. 17, 1986, at 1, col. 1.

14. INA § 101(a), 8 U.S.C. § 1521 note (1982).

15. INA § 101(b), 8 U.S.C. § 1521 note (1982).

16. INA § 207(a-1), U.S.C. § 1157(a-1) (1982).

17. INA § 207(b), 8 U.S.C. § 1157(b) (1982).

tation between Congress and the Executive Branch, the Act states such consultation is to "discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest."¹⁸

To summarize, and at the same time to avoid added undue confusion, an individual who wishes to gain admission to the United States as a refugee must 1) meet the statutory definition of refugee, 2) justify such admission under humanitarian concerns, or grave humanitarian concerns, or the national interest, and 3) demonstrate s/he is of special humanitarian concern to the United States.

Given the nature of these "standards," perhaps it should not be surprising the 1980 Refugee Act has brought about very little change in U.S. refugee policy.¹⁹ Professor David Martin has argued that the humanitarian standards in the Act should not be taken too literally.²⁰ He correctly points out that all refugee programs, by their very nature, are humanitarian in character.²¹ His position is that given the spectre of millions of refugees in the world, the United States must limit its refugee admissions to those who are, in a sense, more important to this country. This commentator also notes that the House Report itself—which asserted that the plight of the refugees was to be paramount²²—listed several factors that could be considered in the allocation process: family, cultural or historical ties with the United States, or past U.S. involvement in, or treaty relations with, the country of origin.²³ Finally, Martin points out the Act does not mandate choices divorced from foreign

18. INA § 207(e), 8 U.S.C. § 1157(e) (1982). It should be noted that such language appears in other sections of the Refugee act as well.

19. *Supra* note 11.

20. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L L. STUD. 91, 105:

There have been efforts to read great significance into the addition by Congress of the adjective "humanitarian." But the word change offers little assistance in deriving standards for judging whether any given allocation decision is proper under the Act. Any refugee resettlement program is animated, at least in part, by a humanitarian spirit. But Congress plainly intended to authorize selectivity, and selectively is in many respects antithetical to a truly humanitarian response.

21. *Id.*

22. *Supra* note 9.

23. Martin, *supra* note 20, at 106.

policy concerns.²⁴ Martin concludes that the phrase "special humanitarian concern" is "best understood as a term of art indicating that a different political choice will be made each year by the political branches of the government based on shifting assessments of political and humanitarian factors"²⁵

My point in this section is simple: the 1980 Refugee Act is unique because it relies quite extensively on humanitarian standards and moral concerns. While Martin suggests these provisions deserve no particular notice, the next section provides an alternative interpretation.

III. THE SIGNIFICANCE OF THE STANDARDS

On one level, Martin's analysis of the Refugee Act is by no means a tortured reading of it, and certainly those administering the Act have not been insensitive to political considerations. In addition, the Act's humanitarian standards described in the last section are seemingly tempered by the inclusion of the phrase "or in the national interest." This is not to say the "national interest" is necessarily without a moral component. However, the dominant view that governments serve merely as "trustees"²⁶ has largely ignored moral considerations in international affairs.²⁷ Finally, one might well presume that most administrators are not well versed in the kinds of moral and humanitarian standards that dominate the Refugee Act.

The end result, then, is a refugee policy premised largely on political concerns, rather than on the humanitarian concerns that the Act mandates. Despite such difficulties, I will argue here that the Refugee Act was in fact intended to change the nature of U.S.

24. *Id.*

25. *Id.*

26. The "trustee" position is essentially this: Governments are trustees for their citizens; trustees have a duty to pursue the interests of those for whom they are trustees; and finally, governments should not be persuaded by moral considerations in pursuing this fiduciary relationship. Professor Brian Barry has challenged this notion that a trusteeship is necessarily without a moral component. B. BARRY, *RICH COUNTRIES AND POOR COUNTRIES* (forthcoming, noted with permission of the author).

27. There is, however, a growing movement towards recognizing moral concerns in this realm. See C. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); T. NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* (1983); Singer, *Famine, Affluence, and Morality*, 1 *PHIL. & PUB. AFFAIRS*, 229 (1972).

refugee policy. Simply stated, it intended to make humanitarian concerns,²⁸ rather than political, paramount.²⁹ Another controversial position to be discussed is that individuals in one country have certain duties to those in other societies when the latter's basic rights are not met. This argument is premised on the evolution of human rights doctrines that not only seek to protect the basic rights of all individuals,³⁰ but also seek to specify who has the duty to meet such rights. Finally, I apply the implications of the humanitarian standards in the Act, along with the notion of individual duties, to U.S. refugee admissions.

The first point to consider when speaking about "humanitarian" policies is that it is quite natural to speak of individuals' actions as "humanitarian," rather than, or in addition to, government's actions.³¹ Beyond this, there have been a number of recent political phenomena—U.S.A. for Africa, for example—that have been based on humanitarian motives, and, more importantly for the present analysis, which have been created and carried out by

28. It is interesting to note that the sponsors of H.R. 4447, which would extend Extended Voluntary Departure (EVD) status to Salvadorans in this country, have stressed the humanitarian nature of such a policy. Typical is this argument by Representative Gejderson:

Extended Voluntary Departure—a temporary stay of deportation—is the very least that we can do. To allow the beleaguered who have seen family and friends hacked to death a brief respite from those horrors, and hopefully to make it possible for them to survive, is to demonstrate a minimum of compassion for those who did not ask for a war that has destroyed their country and taken 43,000 lives in four years.

Temporary Suspension of Deportation of Certain Aliens, 1984: Hearings of H.R. 4447, Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 98th Cong. 2d Sess. 49 (1984). For an excellent analysis of INS policy towards Salvadorans see Note, *Salvadoran Illegal Aliens: A Struggle to Obtain Refugee in the United States*, 47 U. PITT. L. REV. 295, 309-14 (1985).

29. Professor Jack Garvey has recently argued the humanitarianism underlying refugee admissions is ultimately self defeating since a focus on human rights, within the refugee context, does much to exacerbate the human rights violations rather than aid them. The focus of the present Article is different from Garvey's work. The present concern is with how humanitarian concerns have been completely dominated by political concerns in the decision of who is a refugee, and which refugees are of "special humanitarian concern" to the United States. Garvey, *Toward a Reformulation of International Refugee Law*, 26 HARV. INT'L L. J. 483 (1985).

30. Andrew Shacknove has recently defined refugee status in terms of the violation of one's basic needs. Shacknove, *Who is a Refugee?*, 95 ETHICS 274 (1985).

31. The first definition of "humanitarian" in Webster's dictionary is "a person actively concerned in promoting human welfare and esp. social reform: philanthropist." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966).

individual citizens. Moreover, the very noticeable rise in numbers and importance of non-governmental organizations (NGOs)³² indicates it is no anomaly to speak of individual based actions on the international level. The point to be underscored is that empirically there has been a burgeoning movement of individual based actions in the international realm, even going so far as to proclaim that "we are the world."³³

In tandem with these empirical changes is a change in normative theory. An evolving area of political philosophy has recognized that individuals—rather than nations or corporations—have duties to those in serious need.³⁴ Henry Shue is the staunchest proponent of the notion of individual duties. In his book *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Shue neatly argues for the promotion and protection of what he terms the basic rights that all individuals possess, no matter where they live. Under Shue's definition,

Basic rights are a restraint upon economic forces that would otherwise be too strong to be resisted. They are social guarantees against actual and threatened deprivations of at least some basic needs. Basic rights are an attempt to give the powerless a veto over some of the forces that would otherwise harm them the most.³⁵

Shue defends the proposition for at least three basic rights: the right to security, the right to liberty, and the right to subsistence.

In addition to this notion of basic rights, Shue also posits a typology of duties. He talks about three types of duties: a duty not to deprive others of their basic rights, a duty to protect the basic rights of others, and a duty to aid those who do not have their basic rights met.³⁶ Beyond this, Shue suggests these are duties in-

32. See H. JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM 50-53 (2d ed., 1984).

33. The reference here, of course, is to the contemporary pop hit of this name recorded by Quincy Jones, Michael Jackson, et al as a fund-raiser for African famine victims.

34. But see J. FISHKIN, THE LIMITS OF OBLIGATION, (1982); James, *The Duty to Relieve Suffering*, 93 ETHICS, 4 (1982).

35. H. SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 18 (1980).

36. Actually Shue's typology of duties is slightly more complicated. His full-blown typology looks like this.

- I. To avoid depriving
- II. To protect from deprivation
 1. By enforcing duty (I) and

dividuals qua individuals have, rather than duties states possess.³⁷ This is not to say the governments of affluent countries³⁸ do not have a role to play in meeting the basic rights of individuals in other countries. However, Shue suggests the role of the government is essentially one of serving as agent in carrying out the duties the citizens of that society have.

To bring the discussion full circle, because the Refugee Act is largely premised on the notion of meeting humanitarian duties, and since humanitarian duties are arguably duties individuals rather than governments have, then perhaps it could be argued individuals ought to be able to meet their duties to others through their own private refugee admission policy. It is quite necessary to give this position further consideration. What weighs heavily against the notion of such a private policy is the unique nature of humanitarian assistance through admission to another society. Consider this example: There is massive starvation in a communist country and a number of private citizens in the United States attempt to provide monetary assistance to those starving. For the sake of argument, we can also presume that the U.S. government attempts to prevent this aid from being sent, asserting such aid will prevent an imminent coup that would overthrow the communist regime. Should the U.S. government prevent the sending of this aid?³⁹ The answer suggested here is no. The individuals seek-

2. By designing institutions that avoid the creation of strong incentives to violate duty (I).

III. To aid the deprived

1. Who are one's special responsibility
2. Who are the victims of social failures in the performance of duties (I), (II-1), (II-2) and
3. Who are victims of natural disasters.

Id. at 60.

37. *Id.*, at 150:

Apart from duties to avoid depriving, which are owed to every person, relatively few duties are borne by the national government of any given nation in its own right toward persons living in other nations, as opposed to being performed by the government acting as agent for some of, or all, its own constituents.

Accord, Gibney, *The Obligations of Individuals*, CONTEMP. REV. (forthcoming).

38. Shue often lays the duty to aid at the feet of those he terms "the affluent," those "who spend absolutely large amounts in the satisfaction of mere preferences" rather than on meeting basic rights. For a critique of the looseness of this duty see M. GIBNEY, *STRANGERS OR FRIENDS: PRINCIPLES FOR A NEW ALIEN ADMISSION POLICY* 38-43 (1986).

39. For a discussion of the similarities and difference between refugee admissions and foreign aid see King, *Immigration From Developing Countries: Some Philosophical Issues*,

ing to provide this aid are simply attempting to meet the basic rights of others. Among other things, this example should highlight the possible conflict between humanitarian aid and the notion of the national interest, at least in its present guise. In the situation presented, it is suggested that most moral theories would agree that despite any claims about promoting the "national interest" the government should not block the sending of such aid.⁴⁰

Contrast this situation with an individual based refugee admission policy. Admitting any strangers to a polity will cause some disruption to the receiving society, a disruption that might seriously harm the communal processes of that society, as well as pose possible risks to the society's physical and economic health.⁴¹ Professor Michael Walzer lays down a general guide:

Are citizens bound to take in strangers? Let us assume that the citizens have no formal obligations; they are bound by nothing more stringent than the principle of mutual aid. The principle must be applied, however, not to individuals directly but to the citizens as a group, for immigration is a matter of political decision. Individuals participate in the decision making, if the state is democratic; but they decide not for themselves but for the community generally.⁴²

The point here, then, is that because of the negative consequences that might ensue from admitting strangers to our midst, humanitarian assistance in the form of a citizen based refugee admission program should generally not be followed.

Does this preclude further discussion of a refugee admission policy based on actions by private citizens? The answer is a qualified no. The general rule is spelled out above. However, when one's government is helping to turn individuals in other lands into refugees,⁴³ and when one's government is at the same time ignoring the

93 ETHICS 525 (1983).

40. At the present time private U.S. citizens are providing two general types of "aid" to Central America. One is the provision of Sanctuary, *infra* notes 46-48 and accompanying text. The other type of "aid" is money and military equipment that is being sent to the Contras. For a discussion and distinction between these two activities see Gibney, *Citizen Involvement in Central America*, 246 CONTEMP. REV. 225 (1985).

41. Bruce Ackerman has suggested that the admission of aliens will eventually threaten what he terms the "liberal dialogue" in a society. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 89-95 (1980).

42. M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 45 (1983).

43. This is not meant to say it has been conclusively proven most Salvadorans are

refugee claims of these harmed individuals,⁴⁴ then, and perhaps *only* then, are private refugee actions warranted.⁴⁵

With this as background, it is suggested here that the rapidly growing Sanctuary movement meets both of these rigid criteria. At the present time, approximately 300 churches,⁴⁶ 20 cities,⁴⁷ and even the state of New Mexico⁴⁸ have declared themselves to be safe havens for individuals fleeing from El Salvador and Guatemala. The position of the United States government is that these 600,000 or so illegal aliens from these countries are in the United States simply for economic betterment.⁴⁹ The Sanctuary movement contends that, given the human rights violations in these countries, the large bulk of these individuals face severe persecution in their homeland.⁵⁰ Beyond that, the Sanctuary movement is based on the moral premise that individuals in the U.S. have a special responsi-

truly political refugees. Obviously the Executive branch does not take this position. However, there is substantial evidence to indicate that this position is egregiously erred. For example, William Stanley's time series study established that the level of migration out of El Salvador is largely correlated with the degree of killing and persecution in that country. Stanley, *Economic Migrants or Refugees From Violence? A Time Series Analysis of Salvadoran Migration to the United States* (unpublished manuscript, copy with author). In addition, the United Nations High Commissioner for Refugees (UNHCR) has issued a critical study of the U.S. policy toward Salvadoran asylum seekers, 128 CONG. REC. S827 (daily ed. Feb. 11, 1982).

44. "Ignored" is probably too strong. Congress has enacted legislation stating that the "sense of Congress" is, because of the life-threatening situation in El Salvador, that the Secretary of State should recommend Extended Voluntary Departure status be granted to Salvadorans in the United States until they could return safely to El Salvador. Dep't of State Authorization Act of 1984 and 1985, Pub. L. No. 98-164, Title X, § 1012, 97 Stat. 1062 (1983). This "sense of Congress" is not legally binding on the Executive branch, and thus far it has been ignored by this coordinate branch.

45. See, WALZER, *supra* note 42, at 49 ("Toward some refugees, we may well have obligations of the same sort that we have toward fellow nationals. This is obviously the case with regard to any group of people whom we have helped turn into refugees."). Accord, GIBNEY, *supra* note 38.

46. N.Y. Times, May 2, 1986, at A19, col 2.

47. *Id.*

48. *Id.*

49. See PROPOSED REFUGEE ADMISSIONS AND ALLOCATIONS FOR FISCAL YEAR 1987, *supra* note 6, at 14. See also, *Temporary Suspension of Deportation for Nationals of Certain Countries: Hearing on H.R. 822 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess., 33-44 (1986) (prepared statement of Maurice Inman Jr., General Counsel of the Immigration and Naturalization Service).

50. See generally, R. GOLDEN & M. McCONNELL, *SANCTUARY: THE NEW UNDERGROUND RAILROAD* (1986).

bility to Salvadorans and Guatemalans—they are of “special humanitarian concern” to this country—because of the military involvement of the United States in those countries.⁵¹

To summarize, I suggest that refugee admissions might have more grounding in individuals' actions than is commonly thought. That is, under the terms of the Refugee Act, refugee admissions could well be viewed as a humanitarian response to those in serious need, carried out by individual citizens. Beyond this, it is also possible to link an individual based refugee admission policy to the notion that individuals have duties to individuals in other countries. It should be clear neither of these positions is consonant with the present method of determining who is a refugee, and how many should be admitted to this country. The present process is exclusively within the domain of the political branches. In the next section I will argue for a different kind of participation by the judicial branch, one that will give at least some airing to the moral issues raised by the Refugee Act itself and by current U.S. policy.

IV. THE STANDARDS AND JUDICIAL PARTICIPATION

This analysis must start with the recognition that in no area of American public law or public policy has the judicial branch played a more passive role than in the area of alien admissions.⁵² It should also be recognized at the outset that with only a few exceptions,⁵³ refugee admissions presents no variation from this pattern of judicial deference. I will not argue the judiciary should become a full partner in the determination of who is a refugee and how many

51. See Gibney, *Seeking Sanctuary: A Special Duty for the U.S.?*, COMMONWEAL, May 18, 1984 at 295.

52. There has been a long history of such deference, epitomized in this language from *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), “At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.” (Citations omitted). See generally, Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Note, *Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983).

53. The most sterling example of this can be found in *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S. D. Fla. 1980), *aff'd as modified sub nom.*, *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). In this case district court Judge King subjected State Department practices to a very searching analysis. In addition, the inclusion of pages and pages of testimony by persecuted Haitians added to the moral forum that is the hallmark of this decision. See also, *Orantes-Hernandez v. Smith* 541 F. Supp. 351 (C.D. Cal. 1982).

are to be admitted to the United States each year.⁵⁴ However, the Refugee Act offers a new avenue for judicial participation, particularly in serving as a public forum for debate on refugee issues.

The first hurdle to overcome is the notion of judicial passivity itself. Although the courts have overwhelmingly acceded to the political branches in the past—in some cases with good cause—at the present time such reasons are no longer compelling or valid. I have made this argument at greater length elsewhere,⁵⁵ but it can be summarized as follows: In “normal flow” admissions which had previously been very heavily politicized, the abandonment of the national origins quota system used from the 1920s to 1965 went to great lengths to depoliticize this avenue of admitting aliens. In terms of refugee admissions, the depoliticization is apparent from the language in the Act itself and from its legislative history.⁵⁶ What needs serious re-examination, then, is the judiciary’s great reluctance to address immigration or refugee issues because to do so would be to interfere with “political” issues. What the judiciary’s deferential stance fails to consider is that this area has been depoliticized by the political branches themselves.

A second point to consider is the poor track record of the political branches in the area of refugee admissions generally. The ideological bias in American law prior to the passage of the 1980 Refugee Act has been maintained in practice since passage of the Act.⁵⁷ Although the legislative history speaks of a concern for the plight of the individual,⁵⁸ and the Act is replete with language about admitting individuals who are of “special humanitarian con-

54. Although this Article focuses on the role the courts should play in terms of fulfilling the moral nature of the Refugee Act, this is not to say that the judiciary cannot also serve a useful purpose in a more strictly policy-oriented way. For example, in *Haitian Refugee Center v. Civiletti*, 503 F. Supp. 442 (S.D. Fla. 1980), the court was quite effective in recognizing the political considerations that prompted the U.S. government to deny refugee status to Haitians and which also prompted the illegal “Haitian Program” for asylum adjudications.

55. Gibney, *The Role of the Judiciary in Alien Admissions*, 8 B.C. INT’L & COMP. L. REV. 341 (1985).

56. *Supra* note 9.

57. See Helton *supra* note 5 and accompanying text. In fact, what had previously been a de facto policy of pursuing foreign policy goals through a heavily biased ideological refugee/asylee system, might now become standard government policy. Pear, *Plan to Give More Poles Asylum is Under Study by Administration*, N.Y. Times, Mar. 30, 1986, at 1, col. 4.

58. *Supra* note 9.

cern" to the United States,⁵⁹ the translation of this language into practice has been to perpetuate an ideologically biased refugee/asylum admission system that is far more generous to those "fleeing"⁶⁰ from communist regimes, and which is quite harsh in its treatment⁶¹ of those seeking asylum who are from countries friendly with the United States. Humanitarian concerns play little role in the allocation of U.S. refugee admissions or asylum determination.⁶² In addition, bureaucratic procedures, rather than the plight or the protection of the individual, determine which of the refugees determined eligible will be admitted to the United States.⁶³

59. *Supra* notes 13-18 and accompanying text.

60. Ironically enough, it is questionable whether many of those who have been admitted to this country as refugees are in fact actually "fleeing" persecution. *See generally*, G. LOESCHER & J. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* (1986).

61. "Harsh" treatment is not only accorded in the repeated denials of asylum claims, but in a literal sense. *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982).

62. A recent critique of who the U.S. admits as refugees describes the process this way: Nationality is often the basis for determinations about which refugees are of "special humanitarian concern to the United States." Each year refugees from certain countries are given this designation during the Consultations between the Administration and Congress as refugee admissions. These designations effectively set the boundaries of the U.S. resettlement program. Officers in the field have been instructed not to take applications from refugees leaving countries not so designated, unless special permission is given by the Bureau for Refugee Programs.

Foreign policy considerations, evidence of former connections to the United States and the desire to promote family reunification are primary factors in designating refugees from certain nationalities to be of special concern. We recommend that the term "of special humanitarian concern to the United States" be interpreted to emphasize the admission of refugees who are most in need of the protection that admission to the United States can afford. While the other considerations certainly are relevant, they should not be overriding factors, as they now are, in defining which refugees are of special concern to this country.

Refugee Policy Group, *Of Special Humanitarian Concern: U.S. Refugee Admissions Since Passage of the Refugee Act* 7 (1985) (emphasis in original).

63. *Id.* at 44-52. The State Department has instituted a priority system for admitting refugees as follows:

1. Compelling concern/interest: exceptional cases a) of refugees in immediate danger of loss of life and for whom there appears to be no alternative to resettlement in the United States, or b) of refugees of compelling concern to the United States, such as former or present political prisoners and dissidents.
2. Former U.S. government employees: refugees employed by the U.S. government for at least one year prior to the claim for refugee status. This category also includes persons who were not official U.S. government employees, but who for at least one year were so integrated into U.S. Government offices as to have been in effect and appearance U.S. government employees.

Professor Martin has argued the Act was not to ignore foreign policy concerns.⁶⁴ Instead, humanitarian concerns have been ignored. The promise of the Refugee Act for a refugee policy based on moral principles and humanitarian concerns has not been fulfilled. The political branches have continued to "play politics"⁶⁵ through refugee admissions. To fill this moral void a sizeable number of people are recognizing a duty to aid those harmed by the foreign policy actions of the United States government. The result has been the Sanctuary movement.⁶⁶

3. Family Reunification: refugees who are spouses, sons, daughters, parents, grandparents, unmarried siblings or unmarried minor grandchildren of persons in the United States. (The status of the anchor relative in the United States must be one of the following: U.S. citizen, lawful permanent resident alien, refugee, asylee.)

4. Other ties to the United States: a) refugees employed by U.S. foundations, U.S. voluntary agencies or U.S. business firms for at least one year prior to the claim for refugee status; and, b) refugees trained or educated in the United States or abroad under U.S. auspices.

5. Additional family reunification: refugees who are married siblings, unmarried grandchildren who have reached their majority, or married grandchildren of persons in the United States; also more distantly related individuals who are part of the family group and dependent on the family for support. (The status of the anchor relative in the United States must be one of the following: U.S. citizen, lawful permanent resident alien, refugee, or asylee.)

6. Otherwise of national interest: other refugees in specified regional groups whose admission is in the national interest.

Several things should be noted about this priority system. The first is that it does not operate as a preference system. That is, the U.S. does not consider all applicants in the second priority before considering those in priority groups 3-6. Second, not all of these priority categories are processed in different parts of the world. For example, refugees from the Near East are processed in the first four priorities, although until fiscal year 1985 they were processed in all six categories. Latin America processing is limited to the first two priority categories. Southeast Asians who fled prior to April 1982, Eastern Europeans, and Africans currently are processed in all six priority groups. Finally, although the first priority would appear to come closest to considering the plight of the refugee, it has rarely been employed.

Critics have charged the priority cart has been leading the refugee determination horse. That is, the first determination is whether an individual meets one of the priorities and, only then, whether this individual is in fact a refugee.

64. *Supra* notes 22-25 and accompanying text.

65. The recently passed Simpson/Mazzoli bill gives a good example of this. The original House version of this legislation had a provision in it for the suspension of deportation for Salvadorans and Nicaraguans. H.R. 3810, 99th Cong., 2nd Sess., 132 CONG. REC. H9759 (1986). The House-Senate conference committee deleted this provision. S.1200/H.R. 3810 (Summary of Conference Compromise) 99th Cong., 2nd Sess., 132 CONG. REC. H10586 (1986).

66. For an excellent discussion of the possible first amendment protection of those participating in the Sanctuary movement see, Comment, *The Expanded Jurisprudence of the Religion Clauses: Will the Sanctuary Movement Benefit?*, 21 GONZ. L. REV. 177 (1985/86).

Greater judicial involvement might bring refugee policy closer to the intent of the Refugee Act itself, but thus far the courts would have to receive mixed reviews for their work in this area.⁶⁷ Perhaps the pertinent question is what role could, or should, the judiciary play? Here there is much more room for optimism. Professor Michael Perry has argued that a policy's "moral evolution" is not particularly consonant with the goals and incentives under which legislators operate.⁶⁸ As a result, Perry argues that the ongoing, vigorous re-evaluation of moral conventions so necessary to a society such as ours is far better performed by the judicial branch.⁶⁹

Perry's position seems particularly appropriate in the context of refugee admissions. This does not mean that judges are or ought to be political philosophers well versed in the theory of John Rawls or Robert Nozick⁷⁰ or Henry Shue. What I suggest instead is that without judicial participation moral or ethical concerns may not receive a hearing. Perhaps in regard to most legislation, this flaw is not necessarily serious to our society. In the context of refugee ad-

67. An excellent example of shoddy judicial practice in this area is *Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982), where the entirety of the court's opinion is set out below.

The orders of the Immigration and Naturalization Service before us for review are affirmed.

If we were to agree with the petitioner's contention that no person should be returned to El Salvador because of the reported anarchy present there now, it would permit the whole population, if they could enter this country some way, to stay here indefinitely. There must be some special circumstances present before relief can be granted.

But see *Espectacion Bolanos-Hernandez v. INS*, 749 F.2d 1316 (9th Cir. 1984); *Zavala-Bonilla v. INS*, 730 F.2d 562 (9th Cir. 1984).

68. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 100-01 (1982). Ronald Dworkin takes a similar position: "Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of political principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself." Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 517 (1981).

69. Perry, *supra* note 68, at 100-01.

70. See J. ELY, *DEMOCRACY AND DISTRUST* 56-60 (1980). Ely has rejected the position of writers like Perry and Dworkin, on the grounds that judges are not imbued with any special talents in political philosophy, nor should they be. The present article is not suggesting that judges are or should be political philosophers as such. What is being argued, instead, is that inherent in refugee admissions, and more importantly in the Refugee Act itself, are moral standards and concerns that are receiving scant attention. The branch of government that might well fill this void is the judiciary.

missions, however, shunning moral or humanitarian concerns will not only ignore the provisions of the Refugee Act itself, but beyond that, will retard this country's moral advancement.

The notion that the courts should serve as a forum for the moral or humanitarian concerns in refugee admissions does not mean such concerns should be the exclusive preserve of that branch of government. Instead, the involvement of the courts with this aspect of the Refugee Act, which goes to the very heart of the Act itself, might well prompt the political branches to pay more attention than the "lip service" attention to humanitarian concerns heretofore given.

Given the positions outlined above, the recent trial and conviction of Sanctuary leaders merits consideration. For some time the policy of the INS was to ignore the Sanctuary movement, the rationale being that to prosecute those involved would provide them the public forum the movement sought.⁷¹ For reasons unknown, the Justice Department pursued the activities of certain individuals in the Sanctuary movement. By using undercover operations, the government was able to infiltrate a church's Sanctuary activities and those involved were charged with smuggling aliens.

At trial, District Court Judge Earl H. Carroll refused to admit any of the defendants' evidence concerning the moral and religious convictions they believed they were following. What ensued at trial, then, was a "typical" illegal alien smugglers trial. Eight of the eleven defendants were convicted, given suspended sentences and enjoined from further activity in the Sanctuary movement.⁷²

There were several shortcomings in the conduct of the Sanctuary trial. To begin, although Judge Carroll recognized that the defendants were in fact following humanitarian concerns and an unfair application of the law,⁷³ he still refused to recognize the humanitarian basis in the law itself.⁷⁴ Related to this, a second difficulty with Judge Carroll's handling of this trial was the exclusion

71. Interview with Doris Meissner, formerly the Acting Director of the Immigration and Naturalization Service, University of Michigan Law School, Nov. 1983.

72. Applebome, *Sanctuary Trial Leaves a Political Aftertaste*, N.Y. Times, July 6, 1986 at E 5.

73. *Id.* Judge Carroll commented the defendants acted "in the main, because of humanitarian concerns and because they perceive an unfair application of the law."

74. *Supra* notes 13-18.

of any evidence of the religious and moral imperatives to which the defendants adhered. It was no doubt obvious to Judge Carroll that the Sanctuary defendants were in no way similar to others brought before the court for smuggling illegal aliens. By allowing testimony regarding their motives, Judge Carroll could have done much to widen public debate on the United States refugee policy with regard to Central Americans. At the same time, the moral standards of the Act—who is of special humanitarian concern to the U.S.? how is this decided? by whom?—could have received a fair hearing.⁷⁵ However, these avenues were not pursued, and we are a poorer nation for it.

CONCLUSION

This article suggests that a truer reading of the 1980 Refugee Act is to view it as a moral document. That is, the Act specifies humanitarian considerations and moral goals are to dominate over mere political concerns. This has not occurred and U.S. refugee policy is in serious need of re-evaluation. It has been argued here that stronger judicial involvement would greatly aid a return to the moral standards in the Refugee Act. The recent trial of Sanctuary leaders has been examined as a missed opportunity to examine the moral underpinnings in U.S. refugee policy in the Refugee Act itself.

75. Juries have often been described as the "conscience of the community." What Judge Carroll effectively did was to negate this role of the jury by not allowing it to hear these pleas of conscience. For a discussion of the role of juries in civil disobedience cases, see generally, Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).