

INTRODUCTION

Before World War I, the United States did not distinguish between refugees and immigrants, processing newcomers through centers like Ellis Island in New York and Angel Island in San Francisco.¹ This generous, open-door immigration policy characterized the first 100 years of the United States of America's existence, as the nation was founded and built by individuals seeking refuge and a better life for their families. Indeed, even before the United States was a country, it offered sanctuary to individuals persecuted for religious and other reasons. One community in the early years of our nation that exemplifies this generous policy was a French refugee settlement called Asylum (or Azilum), settled in 1793 in northeastern Pennsylvania by refugees from the French Revolution.²

Even in the 19th century, in the beginning of federal immigration regulation, the United States offered protection to those fleeing persecution.³ Of course, as one commentator has noted, this tradition of welcoming the persecuted was easier to honor when global population was low, travel was expensive and hazardous, and there were no immigration quotas.⁴ However, American symbols have continued to serve as a beacon of hope for the oppressed. As inscribed on the Statue of Liberty, the icon of freedom in the United States:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore,
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door!⁵

This spirit of offering protection to individuals fleeing persecution is the core concept and the origin of U.S. asylum law, which has evolved significantly since the dedication of the Statue of Liberty in 1886.

The evolution of U.S. asylum law began with a period of restriction fueled by prejudice against people of color and non-Protestant Christians, as well as fear of communism and poverty. In 1917, 1921, and 1924, the United States enacted a series of laws that restricted immigration through the use of quotas and ceilings on the

¹ *Well-Founded Fear* (Shari Robertson and Michael Camerini 2000).

² See Elsie Murray, *AZILUM: FRENCH REFUGEE COLONY* (Tioga Point Museum, 1st ed. 1940).

³ See David A. Martin, *ASYLUM CASE LAW SOURCEBOOK: MASTER INDEX AND CASE ABSTRACTS FOR U.S. COURT DECISIONS*, at xvii (Thomson West, 2d ed. 1998).

⁴ See David A. Martin, *ASYLUM CASE LAW SOURCEBOOK*, *id.*

⁵ Emma Lazarus, *THE NEW COLOSSUS* (1883), available at www.libertystatepark.com/emma.htm (last visited Oct. 12, 2014).

number of immigrants allowed from certain parts of the world.⁶ During World War II, restriction continued to dominate U.S. immigration policy, including toward refugees, as the United States made little effort to resettle those targeted and threatened by Nazi Germany.⁷

For example, in 1939, while war waged in Europe, the United States refused entry to the *St. Louis*, a ship carrying Jewish refugees. After Cuba reneged on its commitment to let the ship dock in Havana while the United States processed the passengers' paperwork, the *St. Louis* had no choice but to travel on toward U.S. shores. In the United States, the relevant immigrant quotas established in 1924 already had been filled that year, and there was a waiting list of several years. Allowing the passengers of the *St. Louis* to enter with visas would have permitted them to skip the waiting line, and although many were sympathetic to the plight of refugees and critical of Hitler's policies, public opinion in the United States continued to favor immigration restrictions.⁸ The Great Depression had fueled sentiments of xenophobia, nativism, and isolationism, with 83 percent of Americans opposed to relaxing restrictions on immigration.⁹ Instead of President Franklin Delano Roosevelt issuing an executive order to admit the refugees from the *St. Louis*, the vessel was turned back to Europe, where 254 of its passengers were murdered in concentration camps.¹⁰

The plight of refugees during World War II, like those passengers of the *St. Louis*, had a profound impact on United Nations and U.S. asylum policies. In 1948, the United Nations declared that "everyone has the right to seek and to enjoy in other countries asylum from persecution,"¹¹ while the United States passed the Displaced Persons Act of 1948. The Act allowed for a limited period of time certain eligible people who were displaced by the war to enter as permanent residents, and adopted a legal provision to allow people at risk of persecution to remain in the United States.¹² These efforts to alleviate the plight of refugees and find lasting solutions for their safe

⁶ *Well-Founded Fear* (Shari Robertson and Michael Camerini 2000).

⁷ *Id.*

⁸ *Voyage of the St. Louis*, U.S. HOLOCAUST MEM'L MUSEUM, www.ushmm.org/wlc/en/article.php?ModuleId=10005267 (last updated June 20, 2014).

⁹ *Id.*

¹⁰ *War Time Fate of the Passengers of the St. Louis*, U.S. HOLOCAUST MEM'L MUSEUM, www.ushmm.org/wlc/en/article.php?ModuleId=10005431 (last updated June 20, 2014); *Refugees*, U.S. HOLOCAUST MEM'L MUSEUM, www.ushmm.org/wlc/en/article.php?ModuleId=1005139 (last updated June 20, 2014) (acknowledging the number of Holocaust victims from the *St. Louis*).

¹¹ Universal Declaration of Human Rights, art. 14(1), G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. 1/777 (1948).

¹² The Displaced Persons Act of 1948, Pub. L. No. 80-774, §3(a), 62 Stat. 1009, 1010, amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219 (listing the number of visas); *Id.* §7, 62 Stat. 1009, 1012 (giving priority of issuance of a visa to displaced persons fearing persecution). This number was later amended to 400,000. See Office of Refugee Resettlement, *History*, DEP'T OF HEALTH AND HUMAN SERVS., www.acf.hhs.gov/programs/orr/about/history (last visited Sept. 30, 2014).

and voluntary repatriation, local integration, or resettlement continued throughout the aftermath of World War II and culminated in 1951 at the proceedings of the U.N. Convention Relating to the Status of Refugees (Refugee Convention).¹³ The Refugee Convention defined “refugee” as someone who is “unable or ... unwilling” to avail him or herself of the protection of his or her country because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership [in] a particular social group or political opinion.”¹⁴ It limited protection to refugees fearing persecution as a result of events occurring in Europe before January 1, 1951.¹⁵ With this definition, the Refugee Convention set forth the legal foundation for refugee law and policy.

The Immigration and Nationality Act of 1952 (INA),¹⁶ which is the foundation of U.S. immigration law today, allowed the admission of those fleeing persecution, even those who arrived in the United States outside of the formal refugee resettlement program. The INA also included a seventh preference category, INA §203(a)(7), which allowed refugees who were fleeing persecution from communist or communist-dominated countries or from the Middle East to be admitted to the United States.¹⁷

Although the United States continued with its national origins quota system throughout the 1950s, the 1953 U.S. Refugee Relief Act, and others, overrode national origin quotas for refugees fleeing communist countries and admitted about 340,000 Cubans and 90,000 Soviet Jews.¹⁸ This open policy toward those defecting from communist nations continued until the end of the Cold War. National origin quotas for immigrants and refugees were replaced with ceilings for the Eastern and Western hemispheres in 1965, with priority given to individuals with special skills or family already in the United States.¹⁹

In response to an outpouring of additional refugees following several historical conflicts, such as the decolonization of Africa in the 1960s and the Cold War, as well as the increasing shift from international war to civil war and internal strife, the United Nations removed the Refugee Convention’s temporal and geographic limitations on the protections of refugees in its 1967 U.N. Protocol Relating to the

¹³ See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

¹⁴ Convention Relating to the Status of Refugees, at art. 1A.

¹⁵ *Id.*

¹⁶ Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S. Code (USC) §1101 *et seq.*).

¹⁷ 8 USC §1153(a)(7) (repealed 1980).

¹⁸ See David M. Donahue and Nancy Flowers, *THE UPROOTED: REFUGEES AND THE UNITED STATES* (Hunter House 1995).

¹⁹ See Immigration and Nationality Act of 1965 (Hart-Cellar Act), Pub. L. No. 89-236, 79 Stat. 911, 916-17. The Act was amended in 1978 to provide a single worldwide ceiling for immigrants. See also Pub. L. No. 95-417, 92 Stat. 917 (1978).

Status of Refugees (Protocol), which incorporated Articles 2 through 34 of the Refugee Convention.²⁰ Although it had not signed the Refugee Convention of 1951, the United States acceded to the Protocol in 1968 and became obliged to abide by its provisions, including the definition of “refugee” and the principle of *non-refoulement*.²¹ It was not until 1980, however, that Congress passed the Refugee Act²² in an effort to bring U.S. law into conformity with its international obligations under the Protocol.²³

The United States has continued to develop its laws and procedures relating to refugees and asylum-seekers. In 1990, the United States created a special corps of asylum officers trained to review asylum applications.²⁴ In 1996, the United States clarified that refugee status may be based on either past persecution or a well-founded fear of persecution and that individuals fleeing coercive population control methods could seek asylum on account of political opinion. At the same time, however, the United States expanded and added more stringent bars to asylum eligibility and permitted the expedited removal of asylum-seekers who failed to establish a “credible fear” of persecution.²⁵

In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act,²⁶ which prohibits the United States from returning an individual to a country where he or she would be subjected to torture.²⁷

In 2001, however, the United States again **expanded** the bars to asylum protection and allowed for the detention of “suspected terrorists” even if they have been granted asylum, in its Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act.²⁸ The United States’ REAL ID Act of 2005 made significant changes regarding credibility determinations and corroboration in asylum claims, increasing the evidentiary burden

²⁰ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

²¹ See Part I.B. of chapter 1 for a detailed discussion of the refugee definition and the principle of *nonrefoulement*.

²² Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

²³ See Part II.A.1. of chapter 1 for a detailed discussion of the Refugee Act of 1980.

²⁴ See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5030–38; see also 55 Fed. Reg. 30, 674 (creating a specially trained corps of Asylum Officers).

²⁵ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, 689 (defining refugee); see *id.* §203(b)(1)(B)(i)–(ii), 110 Stat. 3009–581 (discussing expedited removal for asylum-seekers who fail to establish a credible fear).

²⁶ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, §2242(b), 112 Stat. 2681, 2681–822 (codified at 8 USC §1231).

²⁷ See chapter 4 for a detailed discussion of protection under the Convention Against Torture.

²⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered titles of U.S.C.).

on asylum-seekers.²⁹ In 2008, the Trafficking Victims Protection Reauthorization Act (TVPRA) specifically addressed the situation of unaccompanied children in removal proceedings, allowing them to apply for asylum initially in a non-adversarial proceeding before U.S. Citizenship and Immigration Services (USCIS). The TVPRA also required that unaccompanied children from “contiguous countries” be screened for potential trafficking and other protection needs prior to returning them to their country of nationality or last habitual residence.³⁰

Asylum law in the United States continues to evolve as Congress, often at a stalemate, considers both comprehensive and piecemeal legislation; government agencies issue asylum-related regulations, policy memoranda, and manuals; the Executive Office for Immigration Review and federal courts interpret current asylum laws and policies; and asylum applicants and their representatives strive for fairer and more generous applications of the current law in their individual cases.

²⁹ REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302–23].

³⁰ Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044.

