Unsafe Havens

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State parties to the 1967 Protocol Relating to the Status of Refugees have an obligation not to return refugees to the countries they have fled. Under the Protocol, a "refugee" is any person who is unable or unwilling to return to his country of nationality or former habitual residence "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Other individuals

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1 Protocol Relating to the Status of Refugees, Jan 31, 1967, 19 UST 6223, 6225, TIAS No 6577 ("1967 Protocol"), incorporating by reference Article 33 of the Convention Relating to the Status of Refugees, Jul 28, 1951, 189 UNTS 150, 176 ("1951 Convention"), reprinted as an appendix to the 1967 Protocol, 19 UST at 6276. ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

2 1967 Protocol, Art I, 19 UST at 6225 (cited in note 1), incorporating by reference (and without the time qualification) the definition of "refugee" in Article I, ¶ A(3) of the 1951 Convention:

[T]he term "refugee" shall apply to any person who, . . . owing to 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
seeking admittance to a country have no such right not to be returned. United States immigration law makes the same distinction, adopting the Protocol's definition of refugee.³

Since the mid-seventies, the flow of emigrants⁴ from Cambodia, Cuba, El Salvador, Ethiopia, Haiti, Somalia, Vietnam, and other countries has tested the force and meaning of this obligation. In these cases, large numbers of individuals have fled countries that are both economically poor and politically repressive. In each case, some recipient countries have repatriated large numbers of these emigrants, arguing that they were economic and not political refugees. In addition, both the Hong Kong and the United States governments have argued that a less stern approach encourages economic refugees to undertake journeys across dangerous seas in unsafe boats.⁵

residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
1951 Convention, 189 UNTS at 152, reprinted as an appendix to the 1967 Protocol, 19 UST at 6261.

³ See 8 USC § 1101(a)(42) (1988) (definition of “refugee”); 8 USC § 1158(a) (1988) (only refugees may be granted “asylum”). See also INS v Stevic, 476 US 407, 428 n 22 (1983) (“Our [statutory] definition of a ‘refugee’... virtually mirrored the Protocol definition.”). Aliens seeking political asylum may qualify for two different immigration statuses: If they are outside the United States they may request “refugee” status. 8 USC § 1101(a)(42). If they are within the United States or seeking entry in the United States they may request “asylum” status. 8 USC § 1158(a). In addition, if they are within or seeking entry to the United States and cannot meet the criteria for asylum, they may seek a “withholding of deportation” status. 8 USC § 1255(h) (1988). Finally, the Attorney General, under appropriate circumstances, may grant “temporary protective” status to a particular nationality. 8 USC § 1254a(a) (Supp 1990). The criteria for eligibility and award of these statuses differ, as do the procedural and substantive burdens and the benefits of the status. The structure of U.S. law is discussed more fully in Section II.A.

⁴ Terminology in the context of immigration policy is treacherous. In ordinary language the term “refugee” is often used as a generic reference for someone who has fled his country. As the earlier footnotes indicate, however, “refugee” also has a technical, legal meaning. In what follows we try to adhere to the following conventions: “Refugee,” unmodified by an adjective, is used in its legal sense. “Economic refugee” refers to someone who has fled his country for economic reasons (and hence does not qualify as a refugee in the legal sense). “Political refugee” is synonymous with “refugee” in the legal sense.

We also use “alien” as a generic term. Moreover, “emigrants” is used generically to describe economic and political refugees from the perspective of the country they have fled; “immigrants” describes the same individuals from the perspective of the country to which they have fled. Usually, “immigrants” is not used in any technical, legal sense.

The legal debates over these repatriations and the appropriate state policies toward the flow of emigrants have focused on the process for assessing claims of persecution, on the nature of “voluntary” repatriation programs implemented by recipient countries, and on the extent of oppression in the countries from which the emigrants fled. These debates, however, have neglected the interdependent effects that the quality of screening of immigrants and the repatriation policy have on the flow of emigrants.

In this Article, we argue that an understanding of these effects is crucial to an evaluation of state policies. Part I sets out the theoretical argument. In particular, we demonstrate that a restrictive immigration policy that inadequately distinguishes political from economic refugees may disproportionately discourage those with a well-founded fear of persecution from flight. A failure to recognize this effect may lead to a misevaluation of state policy.

Part II analyzes recent U.S. policy toward Haitians. We present evidence concerning the extent of political persecution in Haiti and the quality of screening procedures used by the United States. This evidence bears on the evaluation of U.S. policy not only directly but also indirectly through the effect described in Part I. Readers averse to formal argument may prefer to read Part II first.

I. A SIMPLE MODEL OF EMIGRATION DECISIONS

A. An Outline of the Argument

Consider some country A whose citizens suffer both economic hardship and political oppression. Some citizens of A (call them “aliens”) decide to leave in the hope of settling in country T, which offers better economic conditions and more personal security. We wish to understand how restrictive immigration policies of T affect the decisions of aliens to leave A.

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7 Throughout this Article, we consider either a hypothetical country T or an actual country (the United States) with a restrictive immigration policy. We do so to clarify the issues raised above. The argument that follows does not imply an endorsement of these restrictive immigration policies or of the repressive policies of the country fled.
An immigration policy for T has two parts. First, it articulates criteria that classify aliens into acceptable and unacceptable immigrants. Second, it establishes screening procedures to sort individual aliens into these two classes.

Suppose that country T adopts a “closed door” policy that basically excludes immigration.8 T, however, is a party to the 1967 Protocol and therefore admits aliens with a well-founded fear of persecution.9 Thus, domestic law and policy in T identify two classes of aliens seeking to enter: “economic refugees” (whose claims to asylum are denied) and “political refugees” (who meet the 1967 Protocol’s definition and whose claims are granted).

Consider now T’s screening process. Suppose a population of aliens awaits screening. Some will be permitted to stay in country T and others will be forcibly repatriated.10 The screening procedure may fail in two distinct ways. First, T may refuse entry to a person with a legitimate claim to asylum; call this failure a “wrongful denial of asylum.” Second, T may permit a person without a legitimate claim to stay; call this procedural failure an “erroneous

8 Our argument does not require that country T ban all immigration of non-political aliens; we make this assumption for expositional convenience. In Section II.A., we suggest that U.S. policy as applied to Haitian nationals approximates the closed-door policy assumed in this Section. See text accompanying note 84.

9 The law of the United States governing establishment of a claim of a “well-founded fear of persecution” is extremely complex. Various procedural and evidentiary questions were resolved in INS v Cardoza-Fonseca, 480 US 421 (1987), and INS v Stevic, 467 US 407 (1984), but the substantive law itself remains complex for several reasons. First, as discussed at greater length in Section II, an alien may seek either withholding of deportation or asylum status (if he is within the United States) or refugee status (if he is outside it). See text accompanying notes 63-66.


Third, to prevail on an asylum claim, the applicant must establish not only that she has a well-founded fear of persecution but also that (a) she is a target of persecution and (b) that she is a target “on account of” her membership in one of the statutorily listed groups. Ira J. Kurzban, Kurzban’s Immigration Law Sourcebook 149 (AILF, 2d ed 1991) (collecting cases); Sanchez-Trujillo v INS, 801 F2d 1571, 1574-76 (9th Cir 1986).

“[P]ersecution includes more than just restrictions on life and liberty," Cardoza-Fonseca v INS, 767 F2d 1448, 1452 (9th Cir 1985), aff’d, 480 US 421 (1987); it encompasses other forms of punishment or reprisal, including at times an impairment of the ability to earn a living, Desir v Ichert, 840 F2d 723, 727 (9th Cir 1988), due to beliefs or characteristics that the government finds intolerable, Hernandez-Ortiz v INS 777 F2d 509, 516-17 (9th Cir 1985).

10 In some instances, as with respect to Cubans who left Mariel in 1980, forcible repatriation might be impossible because the “home” country will not accept its own nationals. Under these circumstances, country T might attempt either to deport the aliens to some other country that will accept them or to intern them.
grant of asylum.” One goal of T’s policy, then, is to minimize the likelihood of both these types of error or, when both errors cannot be minimized simultaneously, to strike an appropriate balance between them.

Many procedures in a wide variety of contexts present opportunities for similar types of error. In statistics, “wrongful denials” are usually characterized as “false negatives,” while “erroneous admissions” are characterized as “false positives.” Ideally, one would like to minimize both errors, but an inherent tension between them generally forces one to reduce one error at the cost of increasing the other. For instance, in a different context, a fire alarm can malfunction by not ringing when there is a fire (a false negative) or ringing when there is no fire (a false positive). If the alarm is very sensitive to temperature changes or the presence of particulates in the air, it will detect almost all fires (i.e., have few false negatives); but it will also often ring when there is no threat of fire (i.e., have many false positives). As the alarm’s sensitivity to temperature or particulates declines, the number of false positives declines, but the number of false negatives unfortunately rises.

This conflict appears in the emigration context as well. If the entire group of aliens is allowed into the country, then the first error is eliminated altogether—no legitimate refugees are deported—but the second error is at its highest—all the aliens without legitimate claims are accepted into the country. On the other hand, if the entire group is rejected, the first error is maximized—all the refugees with legitimate claims are rejected—but the second error is minimized—no aliens without legitimate claims are accepted. As we shall see, however, the present context raises an additional subtlety that is absent from the statistician’s usual case.

The above discussion has assumed a given population of aliens seeking admission. However, the screening process may also influence the number and kind of aliens who seek admission. Conscien-

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11 Statisticians call false negatives “type I errors,” while naming false positives “type II errors.”

12 Some changes, however, reduce both types of error. A sophisticated fire alarm with a computer chip may register fewer false alarms and miss fewer real fires than a more rudimentary device.

Another example further illustrates the two types of error: Various commentators have noted that the burden of proof and other procedural devices in criminal cases affect the probability of wrongful conviction. Criminal procedure attempts to minimize the number of wrongful convictions at the cost of increasing the number of erroneous acquittals. Procedural requirements in civil cases strike this balance differently.
The screening process adopted by country A may also make both types of error. It may wrongly identify some "innocent" repatriated aliens (true economic refugees) as state enemies subject to persecution, and it may fail to identify some repatriated aliens who had attempted to flee government persecution.

At times, other features of T's and A's policies may be relevant. For example, the duration of the screening process may be important to an alien. Consider an individual who fears persecution in A but believes that the regime she fears will be deposed in six months. If the screening will last at least six months, she may be reasonably indifferent to the quality of the screening. In this case, a reinterpretation of the probability of repatriation in our model as the probability of repatriation within six months might be adequate for analytic purposes. We ignore these complications in the text.
care taken during the screening process and T’s overall propensity
to repatriate refugees.\textsuperscript{16}

The two numbers that characterize A’s policy toward repatriated
visitors are (1) the probability that a political refugee will be
persecuted upon his return and (2) the probability that an eco-
nomic refugee will be persecuted. With regard to the first number,
the probability that a political refugee will be persecuted once re-
patriated most likely exceeds the probability that this person
would have been persecuted had he never left A, but had instead
taken other preventive steps. After all, from A’s point of view, it
makes sense to exploit the fact that T has handed over a person A
had previously sought. Still, persecution is not certain since A may
fail to identify the political refugee upon his return.\textsuperscript{18}

At the same time, officials of A might mistakenly conclude
that a person who fled for economic reasons had a political motive
for leaving. Thus, a person who originally had little reason to fear
persecution might suddenly find himself a target upon his repatria-
tion. Though possible, we will assume for the most part that A is
competent in identifying its “enemies,” so that a non-political ref-
ugee faces little chance of persecution when repatriated.\textsuperscript{17}

A person deciding whether or not to leave country A and seek
refuge in T balances the benefits and costs of such a decision. The
benefits may include such things as freedom from political perse-
cution and an improved economic position, while the costs may in-
clude such things as the risk of death that the voyage itself may

\textsuperscript{16} As we shall see in Section II.B.4, at least in the case of Haitian refugees coming to
the United States, evidence shows that both these likelihoods are quite high and similar in
magnitude.

\textsuperscript{18} Even if country A does make a correct identification, it may, for various reasons,
choose not to persecute this person immediately upon his arrival. For example, country T or
human rights organizations may be monitoring the returns, and this monitoring is likely to
be most intensive at the points of return. Such a delay may cause A to lose track of the
person, so that again, persecution is not a certainty.

An additional consideration also suggests that the probability of persecution may be
higher for a repatriated refugee. A person might legitimately flee country A out of a fear
that his past activities will lead to future persecution, although the government of A is as
yet unaware of these activities. The government may discover these activities after the indi-
vidual’s departure or (because the government of A is likely to examine repatriated refugees
more closely than those people who never leave) this person’s activities may be discovered
upon his return.

\textsuperscript{17} Country A might also choose to punish people simply for the attempt to leave. Al-
though such a policy may characterize some countries (such as the former eastern bloc coun-
tries), it does not characterize all countries. In Section II.B.4, we evaluate evidence concern-
ing Haiti on this question.
entail, the trauma experienced when leaving one's family, friends, language, and culture, and the monetary cost of the voyage.  

Consider what happens as country T reduces the percentage of aliens it accepts. At the extreme, if country T adopts a firm policy of never letting anyone into the country, this will virtually eliminate the flow of refugees. After all, there is no point in undertaking a voyage only to be returned. Any reduction in the percentage of people accepted operates in the same direction: it tends to decrease the total number of people seeking refuge. But while this reduction discourages all people from seeking refuge, it does so differentially—as we shall show, it disproportionately discourages political refugees.

A person in country A who has engaged in activities that his government considers unacceptable, and quite possibly punishable by death, has basically two choices. First, he can stay in his country and take measures to avoid his pursuers. Second, he can leave and seek refuge elsewhere. This second option carries various costs, including the possibility that he may not reach the country of refuge. Moreover, even if this person does reach his destination, he might not be permitted to stay. If repatriated, he will once again face the threat of persecution. Furthermore, as discussed above, this threat will be greater than if he had never left. The increase

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18 For some emigrants, the risk of the voyage may be very high; Haitians and Vietnamese have often fled their respective countries by venturing onto the high seas in small, unseaworthy craft. See Howard W. French, 90 Haitians Drown as Boat Capsizes, NY Times A9 (Jul 22, 1992); Barbara Crossette, 135 Feared Lost as Haitian Boat Sinks Off Cuba, NY Times A1 (Nov 22, 1991); Jane Fritsch, Judge Acquits Captain of Charge in Vietnam Refugee's Drowning, LA Times A25 (Oct 30, 1985). Similarly, individuals often pay a significant portion of their income to make the voyage. Howard W. French, Haitians Still Determined to Get Out, NY Times A4 (May 25, 1992) (fare of $500 for voyage in October; $100 to $150 in May); Steven Erlanger, Would-Be Refugee Describes His Vietnamese Round Trip, NY Times A1 (Feb 17, 1990) (fare of $250-$350).

This list is certainly not all-inclusive of costs and benefits. Nor is it suggested that each person has the same potential costs and benefits.

19 The flow may not fall to zero because (1) some aliens may enter country T without detection and hence not be repatriated; (2) for various reasons, some aliens may believe that they will not be repatriated; or (3) if repatriation occurs after long delays, individuals may flee on the expectation that the danger will have passed before repatriation occurs. See note 14.

As we will discuss at greater length, in the case of Haitians seeking entry to the United States, an alien whose initial entry to the United States is undetected may raise her asylum claim in a forum that affords greater procedural protections than the forum provided to aliens interdicted on the high seas. See Section II.B.

20 See text accompanying notes 13-16.
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in the threat of persecution upon repatriation is an additional cost to emigration.

Now consider a person who chooses to leave A but is not facing possible persecution. This person too faces the costs of emigration. Also, once in T, he may be repatriated. In contrast to a political refugee, however, a repatriated economic refugee is in more or less the same situation as before he left. Upon his return to A, he does not face the extra cost of an increased risk of persecution that a political refugee faces.

If the officials of country T screened aliens perfectly, then people with a well-founded fear of persecution would never be repatriated. Screening, however, is far from perfect. Suppose that, faced with an increasing number of aliens seeking admission, T decides to grant fewer and fewer of them asylum. To implement this more restrictive policy, T may well adopt an increasingly poor screening procedure. This policy has an obvious effect on the total flow of emigrants and a perverse effect on the composition of the flow. Certainly, many potential emigrants will be discouraged from emigrating to T as they learn of this stricter policy. Perversely, however, as more and more aliens are repatriated, those people with a fear of persecution are the most discouraged from emigrating. These people, after all, have the most to lose from being repatriated, because they face the additional cost of an increased probability of persecution upon repatriation. Thus, T's restrictive policy primarily discourages the "wrong" people from seeking asylum. In the next Section we make this argument more precise and explore its implications.

B. Country T's Policy and the Flow of Aliens from A

Consider two citizens (and residents) of country A, call them E (for "economic refugee") and P (for "political refugee"). Suppose they are identical in all respects, except that P faces the possibility of persecution at home, while E does not.

Assume that both E and P decide whether to emigrate by comparing the costs and benefits of remaining at home to the costs and benefits of leaving. Consider first E's and P's evaluations of

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31 The repatriated alien may actually find himself in a worse position than before he left for a variety of reasons, including, for instance, the loss of employment. This possible effect is the same for both a political and economic refugee, however, and so we ignore it for simplicity.

32 Our qualitative conclusions do not depend on this homogeneity of citizens of country A.
remaining in country A. Each faces the same economic hardship and we may assume that each "values" this hardship in the same way. P, however, faces an additional danger; if the government of A persecutes him, his "quality of his life" in A deteriorates dramatically. This persecution does not occur with certainty, but only with some probability. Thus, the value to P of remaining in country A is less than the value to E. We measure this difference by the degree to which P's quality of life when persecuted declines, discounted by the probability that such persecution will occur.23

Now consider the costs and benefits to E and P of emigration to country T. Since we are interested in people who might leave their home country, we assume that both E and P value living in T more highly than living in A.24 Of course, E or P may fail in his efforts to emigrate. Each might fail for two reasons. First, each might not survive the voyage to T; this risk is identical for E and P.25 Second, once E or P reaches T, he may be excluded from entering and then be repatriated. P, who has a legitimate claim to asylum, should not face a higher risk of repatriation than E. The extent to which P’s risk of repatriation is lower than E’s risk will depend on the quality of screening done by T.26

The differential risks of repatriation, however, do not completely capture the different costs that repatriation imposes on E.

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23 We may represent these ideas symbolically as follows. Let U(A) be the value, or utility, to both E and P of staying in country A, unpersecuted. P, however, faces a probability of persecution p, if he stays in A. E faces no such danger. If P is persecuted, his utility falls to some number X, which will be less than U(A) because persecution has lower utility than non-persecution. P's expected utility from remaining in A is then equal to the sum:

$$pU(A) + (1-p)X$$

while E's expected utility is simply U(A). The difference is then equal to:

$$p(U(A) - X).$$

24 Formally we may write the utility that E and P receive from living in country T as U(T). The assumption that E and P are potentially interested in leaving their home country, implies that U(A) < U(T).

One might think that P, who faced persecution at home, should receive a greater utility than E from living in country T. This would double count, however. P receives a greater potential benefit (the difference between his utility abroad and his expected utility at home) from his emigration, and this additional benefit is already reflected in his lower expected utility from staying at home.

25 There are various costs associated with undertaking such a trip, the risk of the voyage being only one of them. We denote these costs by a fixed sum C for both people. This is a fairly general formulation which permits a relatively simple formalism. More cumbersome formulations would not alter the model in a significant way.

26 Formally, we write that E, who has no political claim to asylum, faces a probability qE of being returned home and a probability (1-qE) of being permitted to stay in country T. P, who has a legitimate political claim to asylum, faces a probability qP of deportation, and a probability (1-qP) of being granted asylum. Assuming that immigration policy is not completely perverse, P's risk of repatriation will not exceed E's risk—or qE ≥ qP.
and P. They face not only different risks of being returned to A but also different treatment upon return. If returned to his home country, E will be in a similar situation to the one he was in before he left; we will assume that E's valuation of life in A after repatriation is the same as his valuation prior to departure. In contrast, upon P's return he once again faces the risk of persecution. As discussed above, this risk of persecution will be greater than if he had never left.\textsuperscript{27} Thus, though E's valuation of life in A upon return is identical to his valuation prior to departure, P's valuation of life in A after repatriation is lower than his valuation prior to departure.\textsuperscript{28}

Having elaborated the costs and benefits of emigration for E and P, we can now analyze their decisions whether or not to emigrate. E's decision is relatively simple; he compares the value of remaining in A to the value of life in T, discounted by the probability that he will be permitted to remain in T and by the dangers of the voyage.\textsuperscript{29} If the discounted value of life in T exceeds the value of life in A, then E will decide to emigrate.

The decision for P is more complex. Like E, P compares the value of remaining in country A to the value of attempted emigration. Of course, the benefits of attempted emigration are different for P, since he faces possible persecution in A. But the costs are different as well: repatriation exposes him to an increased risk of persecution. P must consider these additional factors when deciding whether or not to emigrate.\textsuperscript{30}

An increased risk of repatriation discourages both E and P from emigrating, but it does so differentially. To highlight this difference, assume for the moment that immigration officials in country T do not distinguish at all between political and economic refu-

\textsuperscript{27} See text accompanying notes 13-16.
\textsuperscript{28} The paragraph embodies several assumptions regarding A's policy toward those repatriated. Formally, we assume first that, if repatriated, both P and E still value an unpersecuted life in A at U(A). Second, we assume that, if repatriated, P's risk of persecution increases so that \( p_r > p_p \). Third, we assume that, if repatriated, E still faces no risk of persecution. We discuss weakening this last assumption in note 47 and accompanying text.
\textsuperscript{29} Thus, E will attempt emigration to T if and only if:
\[
U(A) < (1-q_E)U(T) + q_EU(A) - C
\]
\textsuperscript{30} Thus, P will emigrate if and only if:
\[
(1-P_r)U(A) + p_pX < (1-q_p)U(T) + q_p[(1-P_r)U(A) + p_pX] - C.
\]
The left-hand side of this inequality represents the expected value to P of remaining in A. The right-hand side represents P's expected value of emigrating, with the first term representing the value of living in T discounted by the likelihood that T will permit P to stay, the second term representing the new, lesser valuation of life in A discounted by the probability that T will repatriate P, and the third term representing the costs associated with the voyage.
Assume further that country A takes full advantage of the return of those people it would like to persecute. Thus, a repatriated political refugee faces certain persecution.\(^2\)

These simplifications permit us to reformulate the cost-benefit comparison that underlies E’s and P’s decisions to emigrate.\(^3\) Consider E first. We may easily determine E’s benefit from emigration. If E succeeds in staying in T, his benefit is measured by the increase in the quality of his life in T over the quality of his life in A. Call this increase the “standard of living difference.”\(^4\) In contemplating emigration, of course, E must discount this difference by the probability that T will permit him to stay. E will choose to emigrate only if the discounted standard of living difference exceeds the “costs” of emigration.\(^5\)

For P the calculation differs slightly. Although the discounted standard of living difference, the probability of repatriation, and the cost of the voyage to country T are the same for E and P, there is also a potential “persecution cost” for P. This persecution cost is the decrease in P’s standard of living from its “ordinary” level in A to its level when he is persecuted.\(^6\)

Note that, on our simple assumption, P is persecuted with certainty in the event of repatriation. Thus, if P emigrates, he bears the persecution cost in the event of repatriation or, put differently, he bears this cost with a probability equal to the probability that T will repatriate him. On the other hand, if P does not emigrate, he bears the persecution cost with some other probability. The benefits of emigration then include a term that takes into account the change in the probability that P will be persecuted. More precisely, the benefits to P from emigration contain the added benefit of the persecution cost discounted by the change in the probability that P will incur this cost. Call this term “the persecution differen-

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\(^31\) This means that \(q_E = q_P = q\). Actually, this assumption comes close to describing reality in some situations. We return to this in Section II. See notes 152-192 and accompanying text.

\(^32\) That is, \(p_T = 1\).

\(^33\) E emigrates if and only if:

\[
U(A) < (1-q)U(T) + q U(A) - C.
\]

P emigrates if and only if:

\[
(1-p_T)U(A) + p_TX < (1-q) U(T) + qX - C.
\]

\(^34\) The standard of living difference is \(U(T) - U(A)\).

\(^35\) Thus, E will emigrate if and only if:

\[
[U(T) - U(A)] (1-q) > C.
\]

\(^36\) Formally, \(U(A) - X\).
The persecution differential represents the "added" incentive for P to seek asylum. P, like E, chooses to emigrate if the benefits exceed the costs. The difference between E's cost-benefit calculation and P's calculation equals the persecution differential. As the prospect of repatriation increases, the discounted standard of living difference falls equally for P and E. At the same time, however, the probability that P will be persecuted increases—that is, the persecution differential falls. Consequently, the benefits of emigration decrease more rapidly for P than for E. Thus, paradoxically, as T increases the rate at which it repatriates aliens, it discourages political emigrants more than economic emigrants.38

Moreover, if the prospect of repatriation exceeds the prospect of persecution from simply staying at home (and taking whatever preventive measures one can), political refugees have a lower absolute level of benefits from emigration than economic refugees.39

A simple example may clarify our exposition. Suppose that E and P value "normal" life in A at 100 while each values life in T at 300. The standard of living difference is thus 200. P, if persecuted, values "life" in A at 0. The persecution cost then equals 100. Suppose the prospect of repatriation (which we have assumed is identical for E and P) is .8. The discounted standard of living difference is 40.40 Suppose that the dangers of the voyage impose a cost valued at 25 by both E and P. Since the discounted standard of living difference of 40 exceeds the cost of 25, E will emigrate.

Finally, suppose that P's probability of being persecuted if he remains at home is .6. The change in the probability of persecution is then (.6 -.8) = -.2, and P's additional "benefit" from emigration is -20.41 P's overall benefit from emigration, which is the discounted standard of living difference plus the persecution differential, is then 20. Because the benefit of emigration is less than the

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37 The persecution differential is:

\[(p_s - q)(U(A) - X)\]

We may conclude that P will emigrate if and only if the sum of the discounted standard of living difference and the persecution differential exceeds the costs of the voyage:

\[U(T) - U(A)(1-q) + (p_s - q) [U(A) - X] > C.\]

38 This fact holds because \[U(A) - X\] is positive, so that as the probability that asylum is not granted increases, P is discouraged from seeking asylum "more" than E. Of course, any given person either finds it beneficial to emigrate or does not. One way to interpret a statement such as "P is discouraged from emigrating" is that P would now choose to emigrate for a smaller range of C's.

39 When q increases beyond \(p_s\) (i.e., when \(q > p_s\)), P is less likely to seek asylum than is E. The reason is clear: if not granted asylum, P faces an increased cost of persecution at home.

40 That is, \(200 \times (1-.8) = 40\).

41 That is, \(100 \times (-.2) = -20\).
cost of 25, P will not emigrate. Although E and P are identical in every respect except that P faces the possibility of persecution at home, it is E, not P, who leaves to seek asylum.

Now let us relax our simplifying assumptions. The analysis remains essentially unchanged if the home government persecutes political returnees with a probability less than one. In this case, the change in the probability of persecution depends not only on the prospect of repatriation but also on the probability that repatriated political returnees will be persecuted. Under this redefinition of the change in the probability of persecution, an individual with fear of persecution is still less likely to emigrate than a purely economic emigrant when the prospect of being repatriated and persecuted exceeds the prospect of being persecuted if one remains at home.

Suppose further that the immigration procedures in country T discriminate to some extent between political and economic refugees, so that a person with fear of persecution has a greater chance of acceptance than one without such a fear. P's discounted standard of living difference now exceeds E's, since P has a greater chance of staying in T. This improved chance gives P an added incentive to emigrate, which helps offset the disincentive of the persecution differential when this differential is negative, and reinforces the differential when it is positive. Whether P or E now has a greater incentive to emigrate depends upon the parameters describing country T's policy of exclusion and deportation of emigrants and country A's policy of persecution of repatriated citizens. In any case, a general policy that raises the probability of repatriation equally for economic and political refugees still discourages the latter refugees more than the former.

Finally, suppose that economic refugees also face possible persecution upon repatriation. Then repatriation imposes the cost of an increased probability of persecution upon them too. The rela-
tive incentive to emigrate for E and P now depends upon how the increase in the probability of persecution compares for E and P.\textsuperscript{47}

C. Implications of the Argument

At the outset, we noted that country T’s immigration policy must balance two types of error: wrongful denials and erroneous grants of asylum. Given a fixed group of aliens, increasing the rate of repatriation increases the number of wrongful denials of asylum to those with a legitimate fear of persecution while decreasing the number of erroneous admissions of people with no such fear.

The group of emigrants, however, is not fixed beforehand. As we argued in Section B, the composition of the group of emigrants depends on country T’s immigration policy. As the percentage of emigrants repatriated increases, country T disproportionately discourages those with legitimate fears of persecution from leaving country A. Indeed, if country T uses an unreliable screening mechanism and routinely repatriates large numbers of refugees, then almost no political refugees will emigrate, because they face an increased and disproportionate risk of persecution on return.

Now suppose that country T, under pressure from human rights groups, seeks to justify its claim that few emigrants from A are political refugees. Up to this point T has broadly repatriated refugees, but now it decides carefully to examine the claims of some number of the emigrants. This "survey" will discover, perversely, a low number of wrongful denials. While country T might conclude that few immigrants are political refugees, its own restrictive regime brought about this self-fulfilling prophecy. The flow of emigrants to T contains few people with a legitimate claim to political asylum, not because widespread persecution does not exist in country A, but because those with a legitimate fear of persecution have been discouraged from coming.

Similarly, if country T, in response to charges that country A persecutes those repatriated, seeks to document examples of such persecution, it may find few cases. The reason will not be that political refugees are not subject to persecution; rather, those under threat of persecution will not have risked emigrating.

Again, with a fixed group of refugees, repatriating a large number of them results in many wrongful denials and few errone-

\textsuperscript{47} Formally, if $p_E$ is the probability that $E$ is persecuted upon repatriation (and assuming $q_E = q_P$, for simplicity), then $P$ will be less likely to emigrate than $E$ if:

$$q_P E < q_P F - P_r$$

This assumes that the utility of both $E$ and $P$ fall to $X$ upon persecution.
ous grants of asylum. With refugee groups that are not fixed, however, the opposite occurs. When most emigrants are routinely returned, political refugees do not seek asylum and so they cannot be wrongfully denied admission. In fact, only those without a legitimate claim are granted asylum. T's restrictive repatriation policy can be carried to its logical conclusion: Reject all emigrants. Then there will be neither wrongful denials nor erroneous grants of asylum since no one will emigrate. The only remaining error will be in the policy itself, and policies that tend toward it.

This conclusion suggests that country T’s objective should not simply be the minimization of wrongful denials and erroneous grants of asylum to a fixed population of aliens. Instead, that objective should also include the effects of policy on the flow of immigrants from A. Thus, country T should consider two other, analogous types of error: wrongful discouragements and erroneous promptings. A policy that rejects all immigrants maximizes wrongful discouragements.

To implement a proper policy, then, country T must adopt a screening procedure that adequately differentiates between economic and political refugees. Country T must give those with a legitimate fear of persecution a fair opportunity to present their claims.

One might alternatively interpret government T’s poor screening and mass repatriation as implementing a governmental policy which is at variance with the laws of country T and international law. The evidence of the next Part may be understood as bearing on the United States’ success in implementing a policy that respects domestic and international obligations on the non-refoulement of political refugees or as bearing on the actual aims of the United States government.

Note that the argument of Section B does not have legal implications for the evaluations of particular claims of specific individuals. For simplicity, our model divided the refugee population into two classes, economic and political, with no distinctions within

48 Discouraging a person with a legitimate fear of persecution is a form of type I error, while not discouraging someone without a legitimate fear of persecution is a form of type II error. See note 11.

49 Presumably, because the risks of the different errors have dramatically different consequences for aliens claiming asylum, the screening procedures should weigh wrongful denials more heavily than erroneous grants of asylum. Note that a more extensive screening procedure reduces both types of error.

50 We thank Matthew Spitzer for noting the possibility of these two interpretations of the model.
each class. Reality is, of course, more complex. In particular, different targets of political persecution will face different probabilities of being persecuted at home. Thus, even if large numbers of refugees are being returned, political refugees with a very high likelihood of being persecuted may still emigrate in the (small) hope of being granted asylum or of reaching U.S. shores undetected. The arguments presented say nothing about the claims of any particular refugee.

II. AN EXAMPLE: THE REPATRIATION OF HAITIAN REFUGEES

We now apply the arguments developed in the previous Part to the case of recent U.S. policy toward Haitian refugees. In applying these arguments, we establish, among others, the following four points:

1) the assumptions made about country T's closed-door policy toward immigrants approximate U.S. policy towards Haitian refugees;\(^5\)

2) the emigration behavior of potential Haitian refugees is responsive to U.S. immigration policy;

3) the implementation of U.S. policy towards Haitian refugees is characterized by poor screening procedures and a high repatriation rate;\(^2\) and

4) repatriated political refugees face a higher risk of persecution than they did prior to departure.

The evidence concerning a fifth point is ambiguous: it is not clear to what extent repatriated economic refugees face a risk of persecution. If this risk is small relative to the increase in the risk

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\(^5\) We establish this fact even though it is not crucial to our argument. It suffices that the United States bans *most* immigration of economic refugees. See note 8.

\(^2\) United States policy toward Haitian immigrants has had two distinct phases since the coup. In the first phase, the Coast Guard and the INS implemented Executive Order 12324, 3 CFR § 180 (1981), under which the Coast Guard interdicted vessels on the high seas and the INS interviewed the intercepted Haitians to determine whether they had a plausible claim to asylum. This phase ended with the promulgation of Executive Order 12807, 57 Fed Reg 23133 (1992) on May 24, 1992, under which the Coast Guard returns the interdicted vessels to Haiti without permitting Haitians to assert a claim of asylum. For further discussion, see text accompanying notes 121-139.

In what follows, we concentrate on the quality of the screening procedures in the first phase. In the second phase, no screening occurs and all interdicted Haitians are repatriated. Thus, this second phase is obviously characterized by poor screening procedures and a high repatriation rate.
for a political refugee, the conclusions of Section I.C pertain to the case at hand.⁵³

A. The Structure of United States Immigration Law

The abstract analysis of Part I applies to a country’s immigration policy, that is, the way in which it implements its law. A complete understanding of a policy, however, requires a grasp of the legal framework in which this policy is implemented. Accordingly, we begin our discussion of U.S. policy with an overview of the relevant law.

Three different sources of law bear on U.S. immigration policy. First, and most important, are the immigration statutes, which have been subject to three major revisions since 1980.⁵⁴ Second, the Administrative Procedure Act (APA) imposes additional requirements on the procedures created by the immigration laws.⁵⁵ Finally, international treaties impose specific obligations on the United States with respect to political refugees.⁵⁶ In this Section, we sketch the legal regime created by these various sources of law.

The Immigration and Nationality Act (INA) creates numerous categories of aliens seeking admission to the United States.⁵⁷ We focus on categories that concern permanent immigration or political asylum.⁵⁸

The INA imposes numerical limits on worldwide immigration to the United States. The 1990 amendments increased these limits to roughly 660,000 immigrant visas for fiscal years 1992-94 and to

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⁵³ The model in Section I.B. analyzes the effects of the policies of A and T under various conditions. The arguments apply whether or not the conditions for Section I.C. are met.


⁵⁶ See, for example, 1967 Protocol, 19 UST at 6223-25 (cited in note 1) (forbidding repatriation of refugees). The United States recently persuaded the Eleventh Circuit that these international obligations are not self-executing and hence do not create individual rights. See Haitian Refugee Center v Baker, 949 F2d 1109, 1110 (11th Cir 1991), cert denied, 112 S Ct 1245 (1992).


⁵⁸ We do not discuss various categories of temporary admission that are not relevant to our discussion, such as aliens in transit through the United States to another destination, 8 USC § 1101(a)(15)(B) (1988), temporary agricultural workers, 8 USC § 1161 (1988 & Supp 1990), and aliens pursuing educational programs in the United States, 8 USC § 1101(a)(15)(J) (1988).
These limits cover three classes of immigrants: family-sponsored immigrants, employment-based immigrants, and diversity immigrants.

Several classes of immigrants are not subject to the numerical limitations. For our purposes, four are of particular importance: (a) refugee status, for which aliens outside the United States may apply at selected locations; (b) withholding of deportation, for which aliens within or at the borders of the United States may apply; (c) asylum status, for which aliens within or at the borders of the United States may apply; and (d) temporary protected status, which the Attorney General may designate on a country-by-country basis. These provisions impose different substantive and procedural requirements on applicants; they also offer different benefits. Moreover, the relation of these provisions of domestic law to the provisions of the 1967 Protocol are complex.

Consider first the differences among refugee, asylum, and withholding of deportation status. Most obviously, refugee status imposes three conditions that do not apply to asylum or withholding of deportation status: (a) applicants must be outside the United States; (b) they must be "of special humanitarian concern..."
to the United States; and (c) they must apply for the status at a designated office.

More confusingly, these three statuses do not employ the same basic definition of "refugee." For purposes of refugee and asylum statuses, United States law adopts the "well-founded fear" language used in the 1967 Protocol. Those who seek withholding of deportation status, however, must meet a different standard. They must prove that, upon return to their country, their "life or freedom would be threatened." This language parallels the language of Article I, paragraph 1 of the 1967 Protocol; indeed, Congress amended this section in 1980 specifically to comply with the international obligations of the United States.

Not only the language differs. In a proceeding for withholding of deportation, to prove that one's life or freedom would be threatened, one must meet an objective standard and show that it is "more likely than not" that one will be persecuted. In an asylum proceeding, by contrast, one faces a subjective standard that looks to the applicant's well-founded fear. As a consequence, asy-

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70 Compare the language in the INA:

The term "refugee" means [ ] 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 . . . .


72 The language is quoted in note 1. Note that Article I, paragraph 2 of the 1967 Protocol then defines "refugee" using the "well-founded fear of persecution" language. 1967 Protocol, 19 UST at 6225, 6261 (cited in note 1).

73 INS v Cardoza-Fonseca, 480 US 421, 429, 436 (1987) (one of Congress's primary purposes behind the 1980 Amendments was to bring United States refugee law into conformance with the 1967 Protocol).


75 Under 8 CFR § 208.3(b) (1992), an application for asylum is also considered an application for withholding of deportation. 8 CFR § 208.16(a) (1992) allows the hearing officer to consider both claims in a single hearing even though the criteria differ. An alien within or seeking entry to the United States may apply for either status through affirmative action, 8 CFR § 208.4(a),(b) (1992), or as a defense to a deportation or exclusion hearing. 8 CFR § 208.4(c)(1) (1992).

76 Cardoza-Fonseca, 480 US at 430-31. In each case, one must also prove that the motivation for the persecution is one of the statutorily listed ones. See id at 423; 8 USC §
lum or refugee status may be granted even if the likelihood of persecution is less than fifty percent; indeed, it may be as low as ten percent and possibly lower.\textsuperscript{77}

Thus, those eligible for asylum (and refugee) status constitute a broader class of individuals than those eligible for withholding of deportation.\textsuperscript{78} Furthermore, once attained, asylum and refugee status confer more benefits.\textsuperscript{79} An asylee or refugee will be paroled into the United States and may apply to adjust her status to that of permanent resident.\textsuperscript{80} But withholding of deportation is country-specific; thus, the Attorney General need only withhold deportation to the country in which the alien's life or freedom is threatened, and the alien may still be deported to any other country that will accept her.\textsuperscript{81}

The fourth immigrant category, temporary protected status, is a "collective" status and thus differs from asylum, refugee, and withholding of deportation statuses, which are available only to individuals. The INA authorizes the Attorney General to grant temporary protected status to the nationals of a country that meets one of three criteria that indicate that the country suffers from extraordinary political or social unrest or disorder which prevents the aliens' safe return.\textsuperscript{82} Temporary protected status may be granted from six to eighteen months and is renewable.\textsuperscript{83}

As applied to Haitians, U.S. immigration policy corresponds closely to the closed-door policy posited for country T in Part I.

1253(h) (1988 & Supp 1990). The Supreme Court has interpreted this causality requirement stringently. See, for example, \textit{INS v Elias-Zacarias}, 112 S Ct 812, 816 (1992) (Guatemalan who feared retaliation for refusal to join guerilla organization did not demonstrate a well-founded fear of persecution on account of political opinion).

\textsuperscript{77} \textit{Cardoza-Fonseca}, 480 US at 431, quoting Atle Grahl-Madsen, \textit{1A The Status of Refugees in International Law} 180 (Sijtoff, 1966)("One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place . . . [for example, if] 'every tenth adult male person is either put to death or sent to some remote labor camp.' ").

\textsuperscript{78} On the other hand, the Attorney General has discretion to deny asylum status to individuals eligible for asylum, see 8 USC § 1158(a) (1988), while he \textit{must} withhold deportation if an immigrant meets the relevant standard, see 8 USC § 1253(h)(1) (Supp 1990). \textit{Cardoza-Fonseca}, 480 US at 428 n 5.

\textsuperscript{79} \textit{Cardoza-Fonseca}, 480 US at 428 n 6.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} 8 USC § 1254a(b)(1) (Supp 1990). These conditions include ongoing armed conflict within the state, environmental disaster, and temporary inability of the foreign state to handle return of aliens. Id.

\textsuperscript{83} 8 USC § 1254a(b)(2) and (3)(c) (Supp 1990).
U.S. policy allows for up to 140,000 employment-based visas. Few Haitians are granted these visas.

Haitians remain eligible to apply for refugee, asylum, withholding of deportation, or temporary protected status. However, the Attorney General has refused to grant Haitians temporary protected status; overseas offices at which Haitians may apply for refugee status have been, for all practical purposes, inaccessible; and, as we show below, most Haitians never reach U.S. territory to apply for asylum or withholding of deportation.


On September 30, 1991, a military coup overthrew the democratically elected President of Haiti, Jean-Bertrand Aristide. By October 28, the number of Haitians fleeing their country by boat had dramatically increased. The U.S. government claimed that these Haitians had fled for economic reasons and sought to prevent their arrival in U.S. waters and to deny them entry to the United States.

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84 8 USC § 1151(d)(1)(A) (Supp 1990). Note that the number may be higher in a given year. Id.
85 8 USC § 1153(b) (Supp 1990). For example, in 1989, Haitians were granted 274 employment-based visas out of a total of 52,755. 1989 Statistical Yearbook of the Immigration and Naturalization Service, Table 5 (GPO, 1990).
86 As stated in the text accompanying note 69, applications for refugee status must be made at specified locations. There were no locations in Haiti until sometime after January 30, 1992, when the State Department announced that it would permit applications for refugee status to be filed at the U.S. Embassy in Port-au-Prince. State Dept Briefing, Jan 30, 1992 (Fed News Service), available on NEXIS (EXEC Library, DSTATE File).
It is unclear when the U.S. Embassy first received applications. The text of a state department briefing on February 18, 1992, indicates a later indefinite starting date. Regardless of when such applications were first accepted, it is unlikely that many Haitians who faced persecution were able to file them. Those living in the countryside face a perilous journey to Port-au-Prince. Once in Port-au-Prince, approaching the U.S. Embassy would serve only to alert the military regime to one's presence. Amnesty International, Haiti: Human Rights Held Ransom 31-32 (August 1992).
87 See notes 121-148 and accompanying text. We have not examined data on the number of family-sponsored Haitian immigrant visas, but that avenue of entry has not been at issue in the current debate, probably because these visas must be obtained outside the United States after long delays. Similarly, the terms of the Cuban-Haitian adjustment, which are responsible for the issuance of the largest number of immigrant visas to Haitians, do not apply to the current wave of Haitians seeking entry. Immigration Reform and Control Act, Pub L No 99-603 § 202, as amended by Pub L No 100-525 § 2(i), 102 Stat 2612 (1988), codified at 8 USC 1255a note (Supp 1990).
89 Gelbard Statement at 864 (cited in note 5).
To evaluate U.S. policy in terms of the model of Part I, we must make four factual determinations. First, has the new military regime persecuted its political enemies? Second, do United States screening procedures adequately distinguish between economic and political refugees? Third, do Haitians with a legitimate fear of persecution face, upon repatriation, an increased risk of persecution? Fourth, is this increase in the risk of persecution greater than the risk of persecution for those who fled solely for economic reasons?

Resolution of each of these questions presents difficulties. Specific information about human rights abuses in Haiti is difficult to obtain, particularly for rural areas. Similarly, controversy surrounds the treatment of repatriated Haitians. Finally, Part I demonstrates the difficulty of assessing immigration policy by mere observation of the flow of aliens seeking admittance. 

Despite these difficulties, these questions can be answered sufficiently to apply the discussion of Part I to the case at hand. In what follows, we consider some of the evidence.

1. Political persecution in Haiti.

Widespread violence and persecution, institutionalized by the Duvalier regime, have dominated Haiti’s recent history. The inauguration of Aristide on February 7, 1991, brought a brief respite from this violence. Since the coup, the violence and persecution that typified Haiti under the Duvaliers have returned.

To understand the structure of the current repression, one requires some knowledge of Haiti under the Duvaliers. In 1957, Francois Duvalier took office as President of Haiti. The army, though instrumental in his accession to power, also threatened its

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**See Section I.C.**

**1.** The military sought to justify its September 30th coup by referring to human rights abuses supposedly perpetrated by the Aristide government. Kenneth Roth, *Haiti: The Shadows of Terror*, NY Rev Books 62, 63 (Mar 26, 1991). It alleged, for example, that Aristide’s government had condoned numerous crowd lynchings. Id. In fact, three organizations—Americas Watch, the National Coalition for Haitian Refugees, and Caribbean Rights—documented 25 lynchings during Aristide’s seven-month tenure. Id at 63, citing a report by these groups entitled *Haiti: The Aristide Government’s Human Rights Record*. Aristide’s government, however, did not participate in these acts. Id at 63. Moreover, most were not directed at Aristide’s political enemies but at common criminals. Id at 63, citing *The Aristide Government’s Human Rights Record*. As the following text indicates, this violence by social groups that supported Aristide does not compare in scale, ferocity, or arbitrariness with that perpetrated by the military government.
To counterbalance the threat presented by the army's prominence, Duvalier divided power among several military and paramilitary groups: most prominently the "Tonton macoutes," a civil militia (later combined into the "Service Volontaire Militaire"), and a presidential guard. He thus laid the foundation for "the most oppressive regime in the hemisphere," or "the most ruthless and oppressive regime in the world." These armed forces ruled Haiti through a structure of terror and persecution. In the countryside, local Tonton macoutes served as section chiefs with unrestricted, arbitrary power over the local population. These structures of authority survived Francois Duvalier's death and the succession of his son Jean-Claude to power in 1971. They also survived the ouster of Jean-Claude Duvalier on February 7, 1986. The departure of Baby Doc created a political instability that lasted through the internationally supervised elections of December 16, 1990. In these elections, Aristide received approximately 70% of the vote, with even more massive majorities in the poorest precincts. His victory, however, did not eradicate the Duvalier regime's oppressive structures: the military coup that ousted Aristide on September 30, 1991, and the subsequent violence it has engendered offer the clearest proof that the instruments of oppression remain entrenched.

The violent tenor of the current military regime is not disputed. The U.S. Department of State acknowledges, for instance: "The situation, as we see it, is that there is violence and persecu-

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92 Haitian Refugee Center v Civiletti, 503 F Supp 442, 497 (S D Fla 1980), modified on other grounds, 676 F2d 1023 (11th Cir 1982); Robert D. Crassweller, Darkness in Haiti, 49 Foreign Affairs 315, 317-19 (1971).
93 Haitian Refugee Center, 503 F Supp at 497; Crassweller, 49 Foreign Affairs at 318. These forces plus the army have historically received 60% to 70% of government spending. Crassweller, 49 Foreign Affairs at 317.
94 'Haitian Refugee Center, 503 F Supp at 475. The first judgment represents the opinion of the State Department Country Officer for Haiti in 1980; the second was made by the International Commission of Jurists in 1977. Id.
95 Id at 498, 501; Roth, NY Rev Books at 63 (cited in note 91).
96 Haitian Refugee Center, 503 F Supp at 500; Roth, NY Rev of Books at 63 (cited in note 90).
97 Hogan, Uprooting Duvalierism, Commonweal 518, 518 (Sept 25, 1987).
tion in Haiti." Human rights organizations have estimated that 1000 Haitians were killed in the two weeks after the coup, and that an additional 500 people were killed between mid-October and mid-December. Thousands of people remain in hiding.

The military has directed its violence primarily against Aristide's supporters.

The list of the army's victims reads like a glossary of the many dynamic and outspoken organizations that had come to populate the Haitian political landscape in recent years. The many lively and combative radio stations—the main form of communication with Haiti's dispersed and largely illiterate population—have been silenced, or reduced to innocuous programming. The spirited trade unions and popular organizations have been neutralized, with their leaders arrested or in hiding and their members too terrified to assemble. Entire neighborhoods—especially those poor and populous shantytowns in Port-au-Prince and across the country that voted for Aristide almost unanimously and that have filled the ranks of popular organizations during the past five years—have been targeted for particularly brutal and concentrated attacks.

The persecution and terror have continued since December. In that month, Astrel Charles, a member of the Haitian Chamber of Deputies, was killed. On January 25, plainclothes police "beat several political leaders and gunned down one of their bodyguards." The same day, thugs beat Rene Theodore—who had

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100 Richard Boucher, State Dept Briefing, Feb 14, 1992, (Fed News Serv), available on NEXIS (EXEC library, DSTATE file) 1, 2.
101 Anne Fuller and Amy Wilentz, Return to the Darkest Days: Human Rights in Haiti Since the Coup 2 (Americas Watch, 1991) (on file with U Chi L Rev). Darkest Days explains that the State University Hospital in Port-au-Prince reports most estimates of deaths and other casualties but that few victims of violence, even in Port-au-Prince, are likely to go to the hospital for treatment. Id at 3.
102 Id at 2. Haiti has a population of 6 million. The murder of 1500 individuals amounts to the murder of .025% of the total population in two months. A comparable murder rate in the United States would result in 395,000 murders per year. The actual number of murders in the United States in 1991 was 24,020. Tom Squitieri, Slayings Set Record in '91, USA Today 5A (Jan 7, 1992).
103 Roth, NY Rev Books at 63 (cited in note 91) ("Tens of thousands—by some estimates 200,000—are in hiding."). Two hundred thousand people constitute 3.33% of the entire population. An equivalent percentage of U.S. citizens in hiding would amount to slightly more than 8.33 million people.
104 Fuller and Wilentz, Darkest Days at 1 (cited in note 101).
105 Michael Tarr, Gunman Fires on Haiti Lawmaker as Refugee Repatriation Continues, Reuter Library Rep (Feb 12, 1992), available on NEXIS (OMNI file).
106 Id.
been accepted by both Aristide and representatives of the National Legislature as a compromise prime minister to smooth the way for Aristide's return—and murdered Theodore's bodyguard.\textsuperscript{107} On February 8, during Carnival in Port-au-Prince, armed men fired on a crowd chanting a Protestant song used as code by Aristide supporters.\textsuperscript{108} On February 12, Jean Mandenave, a member of the Chamber of Deputies, reported that gunmen shot at him.\textsuperscript{109} In addition, seventy houses belonging to Mandenave's friends and relatives in his native town in northern Haiti were burned down.\textsuperscript{110} A second deputy to the National Assembly had his house and the houses of forty friends and relatives destroyed by arson.\textsuperscript{111}

In early February, a section chief punished an isolated village in northern Haiti for its support of Aristide.\textsuperscript{112} Around February 11, a National Public Radio (NPR) reporter and a reporter for the Chicago Tribune visited this village “where about 120 houses were burned down and several inhabitants killed for their support of Aristide.”\textsuperscript{113} When they returned to the neighboring village where they had left their car, the local enforcer and twenty armed thugs awaited them.\textsuperscript{114} These men were later joined by Jean-Marie Voltaire, the section chief who had destroyed the village.\textsuperscript{115} Tomlinson, the NPR reporter, stated that “He'd killed people up there, [Voltaire] said, and it was best to kill [Tomlinson and his compan-
ions) too. Voltaire told us he was known as The Robot because the army employs him like an automaton to do its dirty work.”116

Tomlinson also reported, “I found evidence of repression wherever I traveled in Haiti.”117 He observed, for example, of Cap Haitien, Haiti's second largest city:

Soldiers come around these . . . poor neighborhoods every night shooting and warning the women that if they find their menfolk on the street they'll be shot or beaten. Anybody who . . . is an avid supporter of Aristide, who voted for him, who . . . just lives in an area that has been fervent in its support is in danger . . . .118

Violence against Aristide’s grass roots supporters also continues. The Los Angeles Times quoted a human rights monitor on an inspection that included officials of the U.S. Government Accounting Office:

There is an extremely high level of tension and fear caused by an obvious policy of brutality and repression by the army, by section chiefs (local agents of the central government) and by attaches,” he said, referring to local thugs hired by the military to terrorize citizens.119

Taken together, this evidence suggests that Haiti has no shortage of individuals with a legitimate fear of persecution.120

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116 Id.
117 Id.
118 Tomlinson, All Things Considered, Feb 13 at 6 (cited in note 115).
119 The State Department’s position seems to be that the large number of people with legitimate fear of persecution hinders any single individual’s attempt to gain political asylum. The following exchange suggests that the Haitian regime’s targeting of neighborhoods and groups that overwhelmingly supported Aristide makes it more difficult, in the State Department’s view, for an individual to show he has been singled out:

Q: Not to belabor this point, but groups like—human rights groups like Amnesty International and some others described even today again that Haiti is a killing field, essentially that they are getting reports of people being tortured and killed. What explains this dramatic difference between what they’re hearing and what your people apparently are not?

MR. BOUCHER: I don’t think there is that much of a difference, and I think if you look at our human rights report, you’ll see how we report on the very deplorable conditions that do exist in Haiti. And it’s for that reason that we interview people: to examine, based on our law, whether those individuals would face this kind of violence if they were sent back to Haiti. People that we think have a plausible claim to this well-founded fear of persecution are, in fact, the people who are allowed to pursue that claim and who are not sent back. People that don’t have a plausible claim that they
2. U.S. immigration policy toward Haiti prior to the coup.

U.S. immigration policy treats Haitian immigrants differently than immigrants of other nationalities.\(^{121}\) The most significant difference for our purposes results from the policy of interdiction. This policy has had two phases, corresponding to the two executive orders that have implemented it.

The interdiction policy began when, on September 29, 1981, President Reagan issued Executive Order 12324 on the "Interdiction of Illegal Aliens."\(^{122}\) This Order had three components. First, it directed the Secretary of State to enter into "cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea."\(^{123}\) Presumably, these cooperative arrangements would authorize the United States to board ships carrying the flag of the cooperating country. Second, it directed the Coast Guard to intercept illegal aliens on the high seas and thereby prevent their entry to the United States.\(^{124}\) Specifically, the Executive Order directed the Coast Guard to stop and board vessels\(^ {125} \) on the high seas when it had reason to believe that these vessels were "engaged in the irregular transportation of persons" and to return these vessels to their port of embarkation.\(^ {126} \) Third, it required both the Coast Guard and the Attorney General to assure that no "person who is a refugee will be returned without his consent."\(^ {127} \)

Despite the neutral wording of this Executive Order, the United States has, to our knowledge, entered into only one such cooperative agreement. On September 23, 1981, the United States exchanged letters with the government of President-for-life Jean-Claude Duvalier whereby the United States was granted permis-
sion to intercept Haitian flag vessels whenever the United States believed they were involved in the illegal transport of persons coming from Haiti.128

The first phase of U.S. interdiction policy lasted until May 24, 1992, when President Bush issued Executive Order 12807.129 This order directed the Coast Guard to return an interdicted vessel to the country from which it came. In so doing, it also removed the requirement that the Attorney General assure that no political refugee was returned.130 In fact, the Coast Guard now returns all interdicted Haitians directly to Haiti without any interview.131

Interdiction is a unique tool of immigration policy because, according to the United States, it denies aliens intercepted on the high seas the procedural protections of U.S. immigration laws. The United States only affords these protections to those within its borders or applying for entry at a port of entry.132 Thus, though Executive Order 12324 and implementing regulations of the INS

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129 Interdiction of Illegal Aliens, 57 Fed Reg 23133 (1992). President Bush has explained his directive to repatriate all Haitians by claiming that "the vast majority of refugees are economic." Barbara Crossette, U. N. Official Rebukes U.S. on Haitians, NY Times A3 (May 28, 1992) Even if this claim were true, it is not clear how it justifies the return of all aliens. For example, we would not infer from the claim "the vast majority of individuals indicted for a crime are criminals" that we should proceed directly to sentencing.
130 Section 2(c)(3) states that the "Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." Id (emphasis added). The United States has chosen not to determine whether any passengers on interdicted boats have a well-founded fear of persecution. Crossette, NY Times A3 (May 23, 1992) (cited in note 129).
132 The United States makes two distinct claims with respect to its legal obligations: (1) that the INA does not extend to aliens who are outside the borders of the United States or not seeking entry at a port of entry; and (2) that it has no international obligations of non-refoulement of such aliens. We consider these two claims in turn.

The circuits are in conflict over the claim that the non-refoulement provisions of U.S. immigration law apply to aliens outside the United States. In litigation before both the Eleventh and Second Circuits, the United States asserted that these provisions do not extend to persons beyond the borders of the United States. In Haitian Refugee Center v Baker, 953 F2d 1498 (11th Cir 1992), cert denied, 112 S Ct 1245 (1992), the Eleventh Circuit adopted the INS position:

The plain language of the statute is unambiguous and limits the application of the provision to aliens within the United States' borders or ports of entry. The Plaintiffs in this case have been interdicted on the high seas and have not yet reached "a land border" or a "port of entry." Therefore, their claims under the INA must fail. Id at 1510 (citations omitted). The Second Circuit, by contrast, rejected the INS argument and held that Haitians intercepted in international waters benefit from the non-refoulement provisions of U.S. law. Haitian Centers Council v McNary, 969 F2d 1350 (2d Cir 1992), cert granted, 61 USLW 3156, 1992 US App LEXIS 17372.

[T]he command of section 243(h) [of the INA] is absolute: the alien shall not be returned to face persecution. That command cannot be circumvented by seizing the alien
provided interdicted aliens the right to claim asylum, the United States used a more cursory and less accurate screening procedure. In practice, as we discuss at greater length in the next subsection, the United States quickly determined which Haitians should have been permitted to file a claim for asylum and repatriated the rest. Under Executive Order 12807, interdicted Haitians are returned immediately to Haiti without any screening.

The interdiction program has a dramatic effect on the flow of Haitian emigrants to the United States. In early 1981, roughly 1500 Haitians per month, or 18,000 per year, sought refuge in the United States.133 By 1983, with little or no change in economic, social, or political conditions in Haiti, the number of Haitians seeking entry to the United States had fallen to less than 1000 per year.134

as he approaches our border, whether by land or by sea, and returning him to his persecutors.

Id at 1369 (Newman concurring).

Moreover, the executive branch denies that international law imposes an obligation of non-refoulement. In his most recent Executive Order concerning interdiction, President Bush asserted in the preamble:

The international legal obligations of the United States under the [1967] Protocol to apply Article 33 of the [1951] Convention do not extend to persons located outside the territory of the United States.


This claim was disputed by experts in international law. See, for example, Interdiction Hearing at 161 (statement of Professor Goodwin-Gill). The Second Circuit failed to reach the international law issue, having found in the plaintiff's favor under the INA, but stated that the protections afforded by the INA and the 1951 Convention are “coextensive.” McNary, 969 F2d at 1367.


134 Id at 87 (stating that less than 500 Haitians sought entry to the United States in 1983). Those interdicted do not count as individuals seeking entry to the United States. As Table 1 indicates, 511 Haitians were interdicted in fiscal year 1983, and only 358 in 1982.

Note that official statistics tend to overstate the rate of asylum grants to Haitians, because those Haitians on interdicted vessels who were deemed not to have plausible asylum claims were returned without being permitted to assert the claim.
Table 1 illustrates the extent of interdiction of Haitians since the program commenced at the start of fiscal year 1982.\textsuperscript{135} The number of interdictions has varied with the political climate in Haiti. While the establishment of the program stemmed the flow of Haitians, so that few were interdicted at the outset, the number of interdictions rose as political uncertainty grew in Haiti. This uncertainty arose initially as a result of popular demonstrations to overthrow Duvalier and of the attendant repression, and it continued as a result of the political turmoil engendered by Duvalier’s departure and of the struggle of his agents to retain power.\textsuperscript{136} Interdictions fell in fiscal year 1990 (Oct 1989 - Sep 1990) with the approach of the elections of December 16, 1990.\textsuperscript{137} Virtually every interdicted Haitian was repatriated. Others were permitted to file claims for political asylum, but virtually none of these asylum claims were granted. In fact, from the inception of the program through early 1989, only five interdicted Haitians were granted an opportunity to apply for asylum;\textsuperscript{138} a Haitian who fled his country, survived the voyage, but was interdicted thus had a chance of less than 25 in 100,000 of being admitted to the United States.

\textbf{TABLE 1}

\textbf{Haitian Migration Interdiction Program}
\textbf{Fiscal Years 1982-1992}

(a) Frequency of Interdictions by Year

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<tr>
<td>Interdicted</td>
<td>358</td>
<td>511</td>
<td>1,581</td>
<td>3,721</td>
<td>3,422</td>
<td>2,866</td>
<td>4,262</td>
<td>4,902</td>
<td>871</td>
<td>2,067</td>
<td>16,124</td>
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(b) Cumulative Frequency of Interdictions by Year

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<tr>
<td>Interdicted</td>
<td>358</td>
<td>869</td>
<td>2,450</td>
<td>6,171</td>
<td>9,593</td>
<td>12,459</td>
<td>16,721</td>
<td>21,623</td>
<td>22,494</td>
<td>24,561</td>
<td>40,685</td>
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\textit{Source:} The number of interdictions was reported by the U.S. Coast Guard to the National Coalition for Haitian Refugees. (Telecopier communication on file with U Chi L Rev).

\textsuperscript{135} The interdiction figures represent the number of Haitians stopped on the high seas; they do not include Haitians who otherwise entered the United States legally or illegally, or who were excluded at the border. Table 1 was compiled in March, 1992.
\textsuperscript{136} See text accompanying notes 91-98.
\textsuperscript{137} See text accompanying note 97.
\textsuperscript{138} Interdiction Hearing at 117 (cited in note 132) (statement of Jocelyn McCalla, National Coalition for Haitian Refugees). McCalla states that only 5 of 20,530 interdicted individuals were found to have sufficient basis to pursue an asylum claim in the United States. Id. Table 1 provides more recent data on the number of interdictions. The State Department maintains that 28 out of 24,559 individuals interdicted between October 1, 1981 and September 30, 1991 were permitted to pursue their asylum claims. Telecopier communication from Hazel Reitz, Bureau for Refugee Programs, State Department (Dec 9, 1992) (on file with U Chi L Rev).
Of course, some Haitians who fled did reach the United States. These individuals, if stopped at a port of entry or detected later within the United States, had an opportunity to file for asylum with the District Director. Table 2 presents data on the number of applications for asylum filed with INS District Directors and the number of asylum grants for the period 1980-91. As Table 2 indicates, during this period the United States considered over 5900 applications for asylum from Haitians. Fifty-nine such applications were granted. Thus, one percent (or 1 in 100) of those who reached U.S. shores and applied for asylum succeeded.

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<tr>
<td>Grants</td>
<td></td>
<td>2</td>
<td>5</td>
<td>3</td>
<td>8</td>
<td>23</td>
<td>4</td>
<td>2</td>
<td>0</td>
<td>6</td>
<td>3</td>
<td>2</td>
<td>1</td>
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<tr>
<td>Filings</td>
<td>99</td>
<td>503</td>
<td>390</td>
<td>376</td>
<td>2,163</td>
<td>631</td>
<td>178</td>
<td>75</td>
<td>314</td>
<td>678</td>
<td>425</td>
<td>105</td>
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Source: Telephone conversation with INS Statistics Division (202 376 3066).
*July-October.
**October 1990 - March 1991

From the perspective of our analysis in Part I, Haitians base their decision to emigrate on the overall chance of gaining asylum. Allowing for the differences in time periods of the two statistics noted above, the sixty-one asylum applications granted out of roughly 25,500 Haitians who were either interdicted or reached U.S. shores and applied for asylum best indicate this chance. This represents an acceptance rate of less than .25 percent. The dramatic drop in 1981 in the number of people seeking refuge (from 18,000 to less than 1000/year) shows that the Haitians responded to the tightening of enforcement of U.S. immigration policy.

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138 To calculate this number, we added the number of asylum applications through FY 1989 (4,803) to the number of interdictions at the time McCalla testified (21,623). See note 138. We then divided this number into the sum of the five grants of asylum to those interdicted plus the 56 grants of asylum made in hearings (through 1989) before the District Director.
3. U.S. immigration policy toward Haiti since the coup.

The government of Aristide was overthrown toward the end of September, 1991. In the weeks that followed, the Haitian Migration Interdiction Program did not intercept any vessels with Haitian refugees. By November 19, 1991, however, it had intercepted 2,200 Haitians. By February 18, 1992, more than 16,000 Haitians had been intercepted on the high seas, with 6,653 intercepted in the month of January alone. INS officials found, in preliminary screening, that of these 16,124 Haitians, 6,446 had plausible claims to refugee status. They now await full-scale hearings in the United States where success is far from certain.

These increased emigration figures are not inconsistent with our earlier determination that U.S. policy had severely cut off the flow of refugees. Since the fall of Duvalier in 1986 and the elections of 1990, many more people have been politically active and demonstrated a firm opposition to the structures of the old regime. The numbers of Haitians with well-founded fears of persecution may thus have increased. Immediately after the coup, Haitians with such fears might reasonably have expected that now they would qualify for asylum status under U.S. law. After all, the United States had denounced the coup and, in conjunction with the Organization of American States, placed an embargo on trade with Haiti until Aristide's restoration. In the first large flow of Haitians intercepted on the high seas, 16,000 were returned to Haiti without an opportunity to claim asylum. Thus, under current policy, the likelihood is identical for economic and political refugees.

tian emigrants after the coup, then, one might have anticipated a substantial number of political refugees.

The treatment of roughly 6,000 emigrants in November may have served, for those remaining in Haiti, as the best indicator of how accurately the United States distinguished between economic and political refugees. After all, individuals remaining in Haiti would learn of U.S. policy through various channels, including reports from those repatriated in November. The decisions of subsequent emigrants would then be shaped by their new perception of U.S. policy.

Determination of the accuracy of U.S. screening procedures presents obvious difficulties. We have three sources of evidence. First, we report evidence concerning the intentions of the United States and the public expression of these intentions. Second, we report evidence, developed in litigation against the United States, that bears directly on the likely accuracy of this early screening. As this action was brought in mid-November, most of the evidence developed there bears on the treatment of the initial flow of emigrants. Third; we discuss evidence concerning the “improved” screening procedures begun in late December.

a) The intentions of the U.S. policy toward Haitian emigrants. Shortly after the first wave of interdictions following the coup, the United States effectively announced that few Haitians would be granted political asylum. The Voice of America’s Creole language broadcast in Haiti carried the message that, “with very few exceptions, Haitians picked up on the high seas will not be brought to the United States.”

Similarly, the official diplomatic position has been that the letter of agreement of September, 1981, placed the United States with Haiti except for humanitarian trade involving essential foods and medicines. 56 Fed Reg at 55975. This order took effect on November 5, 1991. Id at 55976.

We take as given that United States officials are at least applying the law and rejecting only those refugees who have been designated as economic. Put differently, any rejected referee has essentially been classified as economic.

Roughly 500 Haitians were repatriated in November before a district judge in Miami temporarily restrained the United States from such action. See Petition for Writ of Certiorari in Haitian Refugee Center v Baker, 3 (Dkt No 91-1292, filed Feb 10, 1992) (on file with U Chi L Rev) (“Baker Cert Petition”); Haitian Refugee Center v Baker, 789 F Supp 1552, 1557 (S D Fla 1991), rev’d, 949 F2d 1109 (11th Cir 1991), cert denied, 112 S Ct 1245 (1992).

under an obligation to return Haitians to Haiti\textsuperscript{156} and that it wanted “to avoid any action that would encourage more Haitians to risk their lives by boarding unsafe vessels in the belief that this would ensure them passage to the United States.”\textsuperscript{151}

\textbf{b) Evidence regarding November, 1991 screening procedures.} We now turn to the screening procedures used by the INS in November, 1991. According to INS Guidelines, this screening had two phases. First, an INS officer would “speak” (through an interpreter) with each person aboard the interdicted vessel.\textsuperscript{152} On the basis of this conversation, the INS officer would determine whether “there is any indication of possible qualification for refugee status.”\textsuperscript{153} If so, the INS officer would interview that individual “out of the hearing of other persons” and make a determination concerning the claim for refugee status.\textsuperscript{154} In principle, a log was kept of each initial conversation, as well as records of each individual interview.\textsuperscript{155}

Evidence gathered by attorneys for the plaintiff in Haitian Refugee Center \textit{v} Baker\textsuperscript{158} suggests that actual screening resulted in most Haitians being classified as “economic” rather than “political” refugees and that this classification did not accurately distinguish between political and economic refugees.

In the early stages of the screening, INS officials believed that \textit{no} Haitians would be returned.\textsuperscript{157} Despite this, 538 Haitians with “doubtful” cases who had been screened out were returned on November 18 without any reinterviews.\textsuperscript{158} Several Haitians screened out in this preliminary process, and hence subject to repatriation, testified (credibly, in the opinion of the district court judge) that they had fled Haiti after the murder or incarceration of parents, siblings, or other close relatives.\textsuperscript{159}

\textsuperscript{150} Gelbard Statement, at 864 (cited in note 5).
\textsuperscript{151} Id.
\textsuperscript{153} Guidelines, in \textit{Baker} Cert Petition, Exhibits section at 9.
\textsuperscript{154} Id. The standard for refugee status is that imposed by the 1967 Protocol and the INA.
\textsuperscript{155} Id.
\textsuperscript{156} 953 F2d 1498 (11th Cir 1992), cert denied, 112 S Ct 1245 (1992).
\textsuperscript{157} \textit{Baker} Cert Petition at 3 (cited in note 148).
\textsuperscript{158} Id.
\textsuperscript{159} Id at 6-7 and n 6.
The INS officers conducting the initial conversations and interviews had little or no training or knowledge about Haitian politics. For example, they could not identify various past and contemporary political actors such as Francois Duvalier, Marc Bazin (an American-supported candidate for President in 1990), Roger Lafontant (a prominent Tonton macoute who had attempted a coup prior to Aristide's inauguration in February, 1991), or General Cedras (the current head of the army). Nor did they know the names of national or grassroots organizations of Aristide supporters, members of which the military regime targeted frequently.

Most preliminary screenings occurred on Coast Guard cutters or at the U.S. military base at Guantanamo Bay. On board the Coast Guard vessels, this process was cursory. No adequate records were kept. Often, officers on the Coast Guard cutters failed to note who had been screened in and who had been screened out. Often, Haitians were moved from cutter to cutter and reinterviewed. Initially, the interview forms contained no space for a credibility determination. Finally, the interviews lasted roughly 7.5 minutes per individual. Of course, in this period, both questions and answers had to be translated so that actual interview time was under four minutes. The interview records were reviewed by a supervising INS official, at least one of whom never requested any reinterviews.

The screening procedure at Guantanamo Bay was apparently no better. Testimony indicates that asylum officers did not even know the standard for determining refugee status. Nor did they have greater knowledge of the political situation in Haiti. These interviews, conducted through an interpreter, were estimated to be no longer than eight minutes and more probably lasted less than six minutes per claimant.

The district court, in its order granting a preliminary injunction in Baker, discusses in detail the treatment of five Haitians interviewed. Each individual was a member of a grassroots organi-
zation supporting Aristide, and in each instance, the individual had been "screened out" and not allowed to continue the application process. One, Raymond Edme, "fled Haiti after he learned the military had come to his home searching for him." The second, Roland Providence, "fled Haiti after learning from his brothers that the military shot up his house looking for him." The third, Eric Pierre, "fled . . . based on warnings that the army had previously been to his home and sprayed it with bullets, killing his father." The fourth, Golbert Miracle fled after "Miracle's mother was shot to death by the soldiers. Miracle's aunt and sisters were arrested by the soldiers and their whereabouts are unknown." The fifth, Roland Jean, escaped arrest and fled after the "Haitian police forcibly arrested his father." None of these five was given an opportunity to state his claim in any detail during the brief interviews. One was told by his interviewer that: "Everybody comes here and talks about one thing, politics, politics. Whatever you do, you are going to be sent back. Whatever you do."

c) Evidence regarding later screening procedures. This litigation created political pressure on the Bush Administration to improve the screening process. Though evidence suggests that the process improved, it remained unreliable. Subsequently, with the promulgation of Executive Order 12807, the Bush Administration reverted to the least reliable screening procedure of repatriating all interdicted aliens. For instance, congressional investigators have alleged that twenty-five to thirty Haitians, whom the INS had determined had credible claims for asylum, were nonetheless repatriated. By contrast, roughly fifty Haitians whose asylum claims had been dismissed by the INS were sent to Florida for processing of their asylum claims.
The affidavits of four individuals who served as interpreters at Guantanamo from Christmas, 1991, through mid-January, 1992, offer additional and compelling evidence concerning the unreliability of the later screening procedures. One stated: "In general, the screening in and screening out process is very arbitrary." Another opined: "[M]any [Haitians] were unjustly disqualified and screened out."

More suggestive than these conclusory statements, however, is the detailed description of the process provided by these affidavits. According to the interpreters, interviews to screen the Haitians were often conducted in an atmosphere of intimidation by ill-informed and insensitive officials. In addition, only three training sessions, lasting ninety minutes each, were provided to the INS adjudicators. These sessions were conducted by the two non-Haitian interpreters. Some adjudicators admitted the inadequacy of their training; one interpreter reported:

One adjudicator . . . specifically told me that if he had known at first what he knew now about the current political conditions in Haiti, he would have screened in many more refugees during the first few months when he was not aware of this information.

Moreover, the INS pressed the interpreters to increase their "productivity," setting "quotas" of 2.5 to 3 interviews per hour. These time allotments, however, included the time necessary to transport the refugees and to do paperwork; thus many interviews lasted no more than ten to fifteen minutes. Of course, as in the

179 Affidavit of Jennie Smith, ¶ 16 (Feb 10, 1992), in Haitian Refugee Center, Persecution of Haitian Returnees & Inadequacy of INS Pre-Screening Procedures Appendix 24 (1992) (on file with U Chi L Rev) ("Smith Affidavit").
180 Affidavit of Stanley Urban, Jr., ¶ 5 (Feb 13, 1992), in Haitian Refugee Center, Persecution of Haitian Returnees at Appendix 25 ("Urban Affidavit").
181 Smith Affidavit, ¶¶ 3, 4, 5, 8 and 15; Affidavit of Antoine Eustache, ¶ 4 (Feb 19, 1992), in Haitian Refugee Center, Persecution of Haitian Refugees at Appendix 26 ("Eustache Affidavit"). Smith stated:
A lot of us are wondering whether the Haitians who volunteered to go back to Haiti were really volunteering or not, because there were so many instances of intimidation and humiliation.
Smith Affidavit at ¶ 17 (cited in note 179).
182 Smith Affidavit at ¶¶ 3, 4, 7 and 8; Eustache Affidavit at ¶ 7.
183 Smith Affidavit at ¶ 10.
184 Id.
185 Eustache Affidavit at ¶ 16 (cited in note 181).
186 Smith Affidavit at ¶ 9 (cited in note 179); Urban Affidavit at ¶ 3 (cited in note 180).
187 Smith Affidavit at ¶ 9; Urban Affidavit at ¶ 3.
earlier interviews, both questions and answers had to be translated during this time, so actual interview time was between 5 and 7.5 minutes. Further errors undoubtedly arose because of the exhaustion of the interpreters who worked twelve hours per day, seven days a week.188

In addition, recordkeeping was sloppy; many records were lost or poorly kept.189 Throughout this period, the INS apparently thought the approval rate was too high.190 At one point, the adjudicators barred the interpreters from confirming the accuracy of the final translation and the adjudicator's notes.191

Thus, the screening process in late December and January, though a marked improvement over the process in November and early December, was highly unreliable.

This evidence suggests that the actual process used to screen Haitians intercepted at sea met the two conditions of the argument of Part I that lead to an adverse effect on the flow of political refugees. First, the screening process did not discriminate between economic and political refugees; individuals of each class were equally likely to be repatriated.192 Second, the probability of being repatriated was quite high. In order to determine whether this immigration policy disproportionately deterred political refugees from emigrating, we must evaluate the fate of Haitian emigrants after repatriation.

4. The persecution of repatriated Haitians.

According to the model outlined in Part I, unreliable screening of Haitians by the United States will discourage political refugees more than economic refugees if Haiti's treatment of repatriated citizens meets two conditions. First, political refugees must face an increased threat of persecution upon their return. Second, if economic refugees are persecuted on their return, the increased risk to

188 Urban Affidavit at ¶ 11 (cited in note 180); Smith Affidavit, ¶ 13 (cited in note 179).
189 Urban Affidavit at ¶ 12; Smith Affidavit at ¶ 11 (“There were literally hundreds of records... lost by Immigration.”); Id at ¶ 16 (“Every now and then someone would find a screened in paper misplaced into the screened out pile.”). Affidavit of George Vilson, ¶ 11 (Mar 13, 1992), in Haitian Refugee Center, Persecution of Haitian Returnees at Appendix 27 (cited in note 179) (“Vilson Affidavit”).
190 Smith Affidavit at ¶ 9; Eustache Affidavit at ¶¶ 5, 6 and 8 (cited in note 181); Vilson Affidavit at ¶¶ 2, 5 (cited in note 189).
191 Eustache Affidavit at ¶ 6.
192 Or, at the very least, the screening process appears to have been sufficiently unreliable for the arguments of Section I to apply.
them must be less than the increased risk of persecution to repatriated political refugees.

Unfortunately, the evidence concerning what happens to Haitian emigrants upon their return to Haiti is difficult to interpret. Their treatment immediately upon arrival is easily characterized, but what happens after they have returned to their home districts is less clear. Transportation and communication to areas outside of Port-au-Prince are difficult and unreliable; and human rights organizations within Haiti cannot adequately track the repatriated Haitians.193

When repatriates arrive in Port-au-Prince, the United States turns them over to the Haitian Red Cross, which gives each repatriate fifteen dollars in cash and food vouchers.194 The Haitian Red Cross is neither a member of the International Red Cross nor "independent of government interference and pressure."195 A recent videotape from a hidden camera shows Red Cross workers with handguns poorly concealed on their persons.196

In addition to the Haitian Red Cross, repatriates are met by Haitian immigration officials who interview, fingerprint, and photograph them.197 Armed police patrol the dock where the repatriates arrive.198 On at least one occasion, Colonel Monod Philippe—the head of port security and a prominent figure in the Duvalier regime—greeted the returnees.199 The heavy presence of Haitian security forces when the repatriates arrive suggests that the government seeks to identify its political opponents.

The fate of returnees once they leave the harbor at Port-au-Prince is less clear. Though the United States denies that any of these returnees have been persecuted, strong evidence contradicts this optimistic view. Repatriated Haitians face persecution on their return; whether the victims are persecuted simply because of their

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198 Id.
199 Greg Chamberlain, Duvalier’s Man on the Quayside, Manchester Guardian Wkly 1 (Feb 9, 1992).
status as repatriates or because they are also political opponents of the regime is more difficult to determine.

The evidence for persecution of the earliest emigrants is strongest. At least seventy-six repatriated Haitians have fled a second time.200 Forty-one of these individuals fled the second time as a group and were interdicted (the second time) prior to February 12, 1992.201 They were then temporarily paroled into the United States because the INS believed they had a credible claim.202

In interviews with officials from the United Nations High Commission for Refugees, each of these individuals claimed to have been persecuted on his return.203 They stated that they and other returnees were victims of persecution ranging from arbitrary arrest to torture to killings.204 Newspaper reports have discussed a few of these cases in more detail.

One refugee, Simulus Thomas, reported that, two days after his return, soldiers sought him at his mother’s house but left when told that he was not there.205 Mr. Thomas had initially fled Haiti after his father, active in the Aristide political movement Lavalas, had been shot.206 Mr. Thomas was later arrested and imprisoned but managed to escape.207 Other returnees in his cell had been beaten.208

200 Howard W. French, U.N. Finds Haitians Who Fled Anew, NY Times A3 (Feb 16, 1992). We have no information concerning the INS treatment of the thirty-five other Haitians who have been interdicted twice. They did not arrive together and they come from different parts of Haiti. Id.

201 Id.

202 Id.


204 Telephone interview with Julian Fleet of UNHCR, D.C. office. (“Fleet Conversation”).

Though the United States denies that any of the repatriated Haitians have been persecuted, id, the extent and quality of its investigations are open to criticism. The United States claims to have investigated in detail four of the forty-one claims and found no corroborating evidence. Id. It also claims to have investigated 700 other cases, id, though it has not, to our knowledge, released any details of these investigations.

Our argument in Section I suggests that Haiti was more likely to persecute those returned in November than those returned in February because the later returnees would likely have included a lower proportion of political refugees. See notes 48-50 and accompanying text.


206 Id.

207 Id.

208 Id.
Some of these returnees have alleged that they were persecuted solely on the basis of their status as returnees, but not all of them make this allegation. An examination of the publicly available summaries and newspaper reports suggests that each of them has asserted claims that would sustain a well-founded fear of persecution at the time he or she first left Haiti.

Of seventeen brief summaries of interviews with these returnees published in a human rights newsletter, four give clear indications that their persecution resulted from a combination of their political affiliations and their status as returnees. For example, one summary relates that two days after a repatriate identified as "Pierre" returned to his home in Haiti:

Soldiers barraged his house with bullets, killing Pierre's father within. When the soldiers had arrived, Pierre and his wife had been behind the house and they hid in the brush. After the rampage, a neighbor informed Pierre that, as they were leaving, the soldiers proclaimed that they had come to kill the FNCD delegate who had been returned.

One woman, designated "Michelle" in the summary, returned home only to be beaten and arrested by a judge and then incarcerated for a week:

The military guards in the prison told Michelle that she would be killed because she had been a member of the FNCD and because she had left Haiti. While in prison, Michelle was beaten by the guards. After one week, she was released from prison, without explanation.

When a third repatriate ("Joseph") reached his home in Haiti:

[H]e found that his father and sister had been arrested. According to one of his friends who had witnessed the arrest from afar, Joseph's family had been arrested due to the fact that they were family members of a known Lavalas supporter and repatriate.

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209 Fleet Conversation (cited in note 204).
211 13 Refugee Rep at 2 (Case 3).
212 Id at 3 (Case 5). "Lavalas" is the name of the popular movement supporting Aristide. Hochstader, Wash Post at A16 (Feb 10, 1991) (cited in note 210).
A fourth individual ("Henri"):

[learned from] close friends that the military was searching for 17 persons in his neighborhood who were targeted as Aristide supporters and as repatriates. . . . Three days later, soldiers in a white car came to Henri's house to arrest him. Henri escaped from his house through a back window.213

This evidence supports the claim that political refugees face a greater increase in the risk of persecution on return than economic refugees do. Several of the reports indicate that victims are chosen not only because they were repatriated but also because of their political affiliations. Furthermore, virtually all those interviewed also assert their political connections to Aristide. Though not all of these individuals claim that they were persecuted because of their political connections, we should not draw negative conclusions from this. The interviews presumably sought to determine whether the returnees were persecuted without regard to the motives of the persecutors.

CONCLUSION

Since the overthrow of Haiti's democratically elected President on September 30, 1991, many Haitians have fled their country. The United States has intercepted these emigrants at sea. Early groups of emigrants were granted cursory interviews, after which the United States forcibly returned the overwhelming majority to Haiti. Recent emigrants receive even more summary treatment; the United States returns them to Haiti without any inquiry into claims of political persecution.

The United States justifies these actions by claiming that, despite the high level of political persecution in Haiti, the vast majority of Haitian emigrants are economic, not political, refugees. Given the inadequacy of early screening procedures, and the current total absence of any screening procedures, it is difficult to assess directly the validity of the U.S. government's claim. Moreover, a proper evaluation of U.S. policy involves a subtlety which goes beyond a reliable survey of recent emigrants. Neither the actual number nor the actual proportion of current political refugees indicates anything about the number of potential political refugees who would have sought asylum had the U.S. screening procedures

213 Id at 4 (Case 14).
offered a better chance that genuine political refugees would be identified and granted asylum.

Nonetheless, there would be no harm in applying a little common sense when evaluating the Haitian situation. Immediately prior to the September coup, despite economic hardship, fewer than 200 Haitians per month sought refuge. Immediately after the coup this number jumped to over 3,000 per month (with 6,000 emigrants in November and again in January). In this time the economic conditions of Haiti's poor probably changed little. Although the United States imposed sanctions against Haiti, initially these sanctions simply deprived the regime of weapons and access to Haiti's assets in the United States. A full commercial embargo was not announced until October 28, and it did not take effect until November 5.\textsuperscript{214}

Prior to the coup there was virtually no political violence or persecution. After the coup, the military regime systematically attacked neighborhoods and organizations that had supported Aristide's ousted government. Many leaders and activists in these neighborhoods and organizations have been arrested and tortured, or killed.

Though their economic condition may have changed little after the coup, a large number of Haitians chose to face significant perils at sea to reach the United States. Perhaps they chose to emigrate on a whim. More likely, the perils at home outweighed the perils at sea. Unfortunately, these refugees did not accurately weigh the dangers of U.S. immigration policy. They have been returned to the military regime from whose violence they fled.

\textsuperscript{214} See note 146.