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### In re Polovchak: Guidelines for the Grant of Asylum to a Minor

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# IN RE POLOVCHAK: GUIDELINES FOR THE GRANT OF ASYLUM TO A MINOR

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## I. INTRODUCTION

The family unit has traditionally been recognized as a basic foundation of our society.<sup>1</sup> Few liberties deserve as much protection as the fun-

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<sup>1</sup> See *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (foster parents afforded procedural protection before removal of children in foster care); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (housing ordinance permitting only a few categories of related individuals to live together as "family" violates due process); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state cannot constitutionally compel Amish parents to send their chil-

damental right to family autonomy. However, family integrity may be disrupted when the interests of the parent, child, and state conflict. Where parents fail to act in their children's best interests, the state has empowered itself to protect the welfare of these children.<sup>2</sup> All states have enacted laws which permit the state to intervene where a threat to the child's well-being is indicated.<sup>3</sup> These state statutes generally allow interference, and even, in extreme situations, termination of parental rights, upon proof of neglect, abuse, or dependency.<sup>4</sup> In view of the severity and finality of a termination decision, courts and legislatures in recent years have afforded parents greater protections prior to such termination.<sup>5</sup>

The long-standing American philosophy of providing a sanctuary to persons fleeing persecution in their native lands<sup>6</sup> parallels the family's right to integrity and privacy. Asylum may be granted to an alien on his showing of a fear of racial, religious, or political persecution upon return to his country of origin.<sup>7</sup> Until recently, these two equally-important traditional values have not been considered within the same context.

The *Polouchak*<sup>8</sup> controversy recently accentuated the absence of clear guidelines applicable to the grant of asylum to a minor. This Note will commence with an exploration of the competing interests which would be

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dren to formal high school); *Stanley v. Illinois*, 405 U.S. 645 (1972) (state law under which children of unwed fathers become wards of the state upon death of the mother held unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (statute forbidding use of contraceptives intrudes on right to marital privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (mandatory sterilization of habitual criminals violates basic right to marry and procreate); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting teaching in any language other than English deprives parents of right to exercise choice concerning their children's instruction).

<sup>2</sup> Note, *The Termination of Parental Rights: Lassiter and the New Illinois Termination Law*, 13 LOY. U. CHI. L.J. 135, 135 (1981).

<sup>3</sup> For a collection of such state statutes see Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 75-362 (1975).

<sup>4</sup> *Id.* See generally Bell, *Termination of Parental Rights: Recent Judicial and Legislative Trends*, 30 EMORY L.J. 1065 (1981) (overview of typical termination statutes and recent legislative and judicial trends affecting termination proceedings); Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) (exploration of standards for intervention).

<sup>5</sup> Bell, *supra* note 4, at 1065; see, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (burden of proof in termination proceedings increased to "clear and convincing evidence"); see also Wald, *supra* note 4 (advocating minimal state intervention). For an analysis which concludes that the standard of proof for the permanent termination of parental rights should be evidence beyond a reasonable doubt, see Note, *Standards of Proof in Proceedings to Terminate Parental Rights*, 31 CLEV. ST. L. REV. 679 (1982).

<sup>6</sup> D. CARLINER, *THE RIGHTS OF ALIENS* 53 (1977); Evans, *The Political Refugee in United States Immigration Law and Practice*, 3 INT'L LAW. 204, 204 (1969); Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539, 539 (1981).

<sup>7</sup> D. CARLINER, *supra* note 6, at 53-54.

<sup>8</sup> 104 Ill. App. 3d 203, 432 N.E.2d 873 (1981), *aff'd*, Nos. 56552, 56572 (Ill. May 27, 1983).

affected by the grant of asylum to a minor, including the parents' interest, the minor's interest, and the interest of the state. An analysis of the historical and current federal asylum procedure will follow. After examining *In re Polouchak*, this Note will recommend that a revision of the current asylum process is necessary to protect individual interests from arbitrary and unjustified decisions. Such a revision would establish strict procedural safeguards for parents whose children petition for asylum.

## II. BACKGROUND CONSIDERATIONS FOR GRANTING ASYLUM TO A MINOR

### A. *Competing Family Interests*

#### 1. Parents' Interest

The feebleness of infancy demands a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual facilities is still slower. At a certain age, it has already strength and passions, without experience enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws.<sup>9</sup>

The Supreme Court has recognized that the right to conceive and raise children is undeniably one of the most fundamental and traditional of our liberties.<sup>10</sup> This parental right is acknowledged as predating the existence of the state.<sup>11</sup> Moreover, deference to the family unit and protection of family autonomy<sup>12</sup> are among the strongest traditions of our

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<sup>9</sup> J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 7 (1979) (footnote omitted) (quoting J. BENTHAM, *THEORY OF LEGISLATION* 248 (1840)) [hereinafter cited as J. GOLDSTEIN].

<sup>10</sup> See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state may not compel Amish parents to send their children to formal high school); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (fundamental right of privacy contained within the term "liberty" protects married persons in making decisions about contraception); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents may not be deprived of right to select public or private school education for their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) ("liberty" includes right of parents to engage teacher to instruct their children in German).

<sup>11</sup> *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (the family's right to be free from unnecessary state intrusion is an intrinsic human right founded in our nation's history and traditions); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (family relation is as old and as fundamental as our entire civilization).

<sup>12</sup> The child's need for safety within the confines of the family must allow recognition of family privacy as a barrier to state intrusion upon parental autonomy in child-rearing. "These rights—parental autonomy, a child's entitlement to autonomous parents, and privacy—are essential ingredients of family integrity." J. GOLDSTEIN, *supra* note 9, at 9. Another justification exists, quite apart from the biological and psychological reasons, for recognizing that the stable family unit is the most effective means of providing the child with

society.<sup>13</sup> Courts and legislatures have historically permitted parents to control, care for, and discipline their children without state interference.<sup>14</sup> The courts have acknowledged that there exists a "private realm of family life which the state cannot enter."<sup>15</sup> The right of parents to control the upbringing of their children was acknowledged at common law<sup>16</sup> and is now recognized as a liberty interest protected by the due process<sup>17</sup> and equal protection<sup>18</sup> clauses of the fourteenth amendment. Parents generally enjoy the right to exercise custody over their child (which includes determining the place the child shall live), as well as the right to discipline their child, to determine his religious and educational training, and

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the care necessary for his development:

The law does not have the capacity to supervise the fragile, complex, interpersonal bonds between child and parent. As *parens patriae* the state is too crude an instrument to become an adequate substitute for flesh and blood parents. The legal system has neither the resources nor the sensitivity to respond to a growing child's everchanging needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decisions, or to act with the deliberate speed that is required by a child's sense of time. Similarly, the child lacks the capacity to respond to the rulings of an impersonal court or social service agencies as he responds to the demands of personal parental figures.

*Id.* at 11-12 (footnote omitted).

<sup>13</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (the sanctity of the family "is deeply rooted in this Nation's history and tradition").

<sup>14</sup> Areen, *Intervening Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 891 (1975); see also Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause*, 4 SUFFOLK U.L. REV. 631, 640 (1970) (only when the natural family is unable to provide a child with the necessary care and protection will the state intervene; the parental home should be preserved whenever possible).

<sup>15</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for the obligations the state can neither supply nor hinder." *Id.* at 166.

<sup>16</sup> See *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, 428 U.S. 901 (1976). The *Poe* court stated: "At common law, minors were charges of the family and state, legally unable to act for themselves. The law did not distinguish between the infant and the mature teenager, treating them both as the property of their parents, who could make all decisions affecting them." *Id.* at 789 (citation omitted); see also Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605. "The common law has long recognized parental rights as a key concept, not only for the specific purposes of domestic relations law, but as a fundamental cultural assumption about the family as a basic social, economic, and political unit." *Id.* at 615.

<sup>17</sup> *Smith v. Organization of Foster Families*, 431 U.S. 816, 847-49 (1977); *Moore v. City of East Cleveland*, 431 U.S. 494, 500-02 (1976); *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1924); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>18</sup> *Stanley v. Illinois*, 405 U.S. 645, 658 (1972). In *Stanley*, the Court reasoned that the private interest "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Id.* at 651.

to determine his overall lifestyle.<sup>19</sup>

Society's recognition of the importance of parental rights is reflected in four critical Supreme Court decisions which preserve parental autonomy through constitutional protection. In *Meyer v. Nebraska*,<sup>20</sup> the Court recognized the right of parents to have their children instructed in German within a private school setting.<sup>21</sup> The Court broadly defined the liberty interest protected by the fourteenth amendment, stating that:

[I]t denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuits of happiness by free men.<sup>22</sup>

*Pierce v. Society of Sisters*<sup>23</sup> was more explicit in regard to parents' rights. The *Pierce* Court held that a state statute which required children between the ages of eight and sixteen years to attend public school "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education"<sup>24</sup> of their children. The Court further recognized that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."<sup>25</sup> The parents in *Meyer* and *Pierce* were permitted to assert an "interest" which has been classified in two ways. The first, building on the concept of living one's life through one's children, may be characterized as the parent's right to exercise his religion through the child and to extend through the child ideas, language and customs which the parent believes to be important.<sup>26</sup> The second, which recognizes at least some element of disinterested love of parent for child, can be characterized as the parent's right to impart to the child beliefs and ideas which the parent has found rewarding and important, and which he believes will contribute to his child's future morality and happiness.<sup>27</sup>

The Court focused exclusively on the right of parents to custody of

<sup>19</sup> A. SUSSMAN, *THE RIGHTS OF YOUNG PEOPLE* 16-17 (1977).

<sup>20</sup> 262 U.S. 390 (1923).

<sup>21</sup> Although the *Meyer* decision concerned the prosecution of a schoolteacher, the Court not only recognized the teacher's right to teach German, but also emphasized the parents' right to choose such instruction for their child. *Id.* at 402-03.

<sup>22</sup> *Id.* at 399.

<sup>23</sup> 268 U.S. 510 (1925).

<sup>24</sup> *Id.* at 534-35.

<sup>25</sup> *Id.* at 535.

<sup>26</sup> Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 806-07 (1978).

<sup>27</sup> *Id.*

their children and found that due process protected that right in *Stanley v. Illinois*.<sup>28</sup> In *Stanley*, the Court invalidated an Illinois statute under which the children of unwed fathers became wards of the state upon the death of the mother. Concluding that the father had a due process right to a hearing before being deprived of custody, the Court determined that the right at stake was "the interest of a parent in the companionship, care, custody, and management of his or her children."<sup>29</sup>

In the Supreme Court case of *Wisconsin v. Yoder*,<sup>30</sup> constitutional protection for parental authority was strengthened. *Yoder* addressed a Wisconsin statute requiring children to attend public or private school until the age of sixteen. The respondents, Amish parents, believed "that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life . . . [and would] . . . endanger their own salvation and that of their children."<sup>31</sup> Although the Court acknowledged the importance of the state's interest in educating its citizens, it balanced that interest against the parents' first amendment right to freedom of religion and the fourteenth amendment liberty right of parents to direct the upbringing and education of their children.<sup>32</sup> The Court concluded that the state could not constitutionally compel the Amish parents to impose the educational requirement upon their children.<sup>33</sup> Relying upon the decision in *Pierce v. Society of Sisters*,<sup>34</sup> the Court interpreted the parental duty to prepare the child for "additional obligations"<sup>35</sup> as inclusive of "moral standards, religious beliefs, and elements of good citizenship."<sup>36</sup> The Court in *Yoder* read the *Pierce* decision to stand "as a charter of the rights of parents to direct the religious upbringing of their children."<sup>37</sup> Chief Justice Burger explicitly declared that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."<sup>38</sup>

## 2. Minor's Interest<sup>39</sup>

The term "minor's rights" would have been a non sequitur in 18th cen-

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<sup>28</sup> 405 U.S. 645 (1972).

<sup>29</sup> *Id.* at 651.

<sup>30</sup> 406 U.S. 205 (1972).

<sup>31</sup> *Id.* at 209.

<sup>32</sup> *Id.* at 213-14.

<sup>33</sup> *Id.* at 232-33.

<sup>34</sup> 268 U.S. 510 (1925).

<sup>35</sup> *Id.* at 535.

<sup>36</sup> 406 U.S. at 233.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 232.

<sup>39</sup> "Minor" is defined as an infant or person who is under the age of legal competence.

tury English common law. Minors were recognized as chattels of the family, owing strict obedience to their parents.<sup>40</sup> They were afforded no political power and few legal rights.<sup>41</sup> The law's major concern with children was confined to those situations where the state sought to limit parental control in the name of some overriding state interest.<sup>42</sup> Even today, minors possess far fewer rights than adults.<sup>43</sup> Historically, the minor's special legal status has been justified as protecting him from the results of his own immaturity and lack of sophistication.<sup>44</sup> Minors have benefited from legislation protecting them from hard labor and economic exploitation, but many laws which purport to protect young people have in practice rendered them subject to arbitrary and excessive authority exercised by parents, custodians, and the state.<sup>45</sup>

In recent years the legal status of minors has been considered frequently by the courts, and minors have gained constitutional victories in several contexts. The landmark case that recognized the constitutional rights of minors was *Tinker v. Des Moines School District*,<sup>46</sup> where the Supreme Court proclaimed that "[s]tudents in school as well as out of school are 'persons' under our Constitution . . . possessed of fundamental rights which the State must respect."<sup>47</sup> This decision arose out of the suspension of students for wearing black armbands to protest the Vietnam War. The Court determined that the school administrators had no constitutional authority to prohibit students from wearing the armbands when no reason existed to believe that the armbands would cause "substantial

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BLACK'S LAW DICTIONARY 889 (5th ed. 1979). The terms "children," "infants," "minors," "juveniles," or "young persons" are used interchangeably to denote those who have not yet attained the age of majority or adulthood. Although each state determines its own age of majority, 18 is most often denominated as the legal age of adulthood. A. SUSSMAN, *supra* note 19, at 15.

<sup>40</sup> See Katz, Schoeder & Sidman, *Emancipating Our Children—Coming of Legal Age in America*, 7 FAM. L.Q. 211, 212 (1973) (colonial American children occupied the lowest rungs of the social ladder).

<sup>41</sup> See generally Kleinfeld, *Balance of Power Among Infants, Their Parents and the State*, 4 FAM. L.Q. 409 (1970) (analysis of the status and rights of children).

<sup>42</sup> See generally Note, *State Intrusion Into Family Affairs: Justification and Limitations*, 26 STAN. L. REV. 1383, 1387 (1974) (state may intervene when parental conduct threatens such collective interests of the state as its security; its political, social, and economic institutions; or its moral quality).

<sup>43</sup> See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968). The Court held that a state may differentiate between minors and adults with regard to sexually explicit publications. The Court recognized the state's interest in reinforcing parental authority as justification for the New York statute: "The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Id.* at 639.

<sup>44</sup> A. SUSSMAN, *supra*, note 19, at 13.

<sup>45</sup> *Id.*

<sup>46</sup> 393 U.S. 503 (1969).

<sup>47</sup> *Id.* at 511.



disruption of or material interference with school activities.”<sup>48</sup> The Court equated the students’ behavior with “pure speech”<sup>49</sup> and reasoned that neither students nor teachers “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>50</sup> Similarly, a minor’s constitutional right to freedom of expression has been held to encompass abstention from participation in a flag salute ceremony.<sup>51</sup>

The constitutional rights of minors were further advanced by the Supreme Court’s decision in *In re Gault*,<sup>52</sup> which recognized that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”<sup>53</sup> The Court held that juveniles must be accorded procedural due process in the context of a juvenile court proceeding, including notice of charges,<sup>54</sup> right to counsel,<sup>55</sup> privilege against self-incrimination, and the right to confrontation and cross-examination of witnesses.<sup>56</sup> *Gault* ultimately in-

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<sup>48</sup> *Id.* at 514.

<sup>49</sup> The students’ act of wearing armbands was entirely divorced from actual or potential disruptive conduct by those participating in it; hence, it comprised “pure speech.” *Id.* at 505.

<sup>50</sup> *Id.* at 506. Although *Tinker* is generally referred to as a children’s rights case, it should be noted that the parents of the children were directly involved in the decision to wear the armbands to school and in the initiation of the litigation. Thus, some commentators state that the effect of this decision on minors’ rights is lessened because: 1) the case can be viewed as merely reaffirming the constitutional right of parents to teach and influence their children; and 2) the case is not so much a children’s rights case as it is a students’ rights case. Freytag & Wingo, *Decisions Within the Family: A Clash of Constitutional Rights*, 67 IOWA L. REV. 401, 414 (1982).

<sup>51</sup> *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Although *Barnette* was brought by Jehovah’s Witnesses who alleged that saluting the flag violated their religious beliefs, Justice Jackson’s opinion for the Court relied primarily upon principles of freedom of expression.

<sup>52</sup> 387 U.S. 1 (1967).

<sup>53</sup> *Id.* at 13. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court had upheld a state’s denial of the right to a jury trial in the adjudicative stage of a juvenile delinquency proceeding. This decision, however, was based not so much on the difference between the constitutional rights of children and adults as it was on the differences between criminal and delinquency proceedings. See also *Goss v. Lopez*, 419 U.S. 565 (1975) (the student has a right to notice and a hearing in connection with suspension from school). But see *Ingraham v. Wright*, 430 U.S. 651 (1977) (corporal punishment in public schools need not be preceded by notice and hearing). See generally Rosenberg, *The Constitutional Rights of Children Charged With Crime: Proposal for a Return to the Not So Distant Past*, 27 U.C.L.A. L. REV. 656 (1980) (standard should be employed to determine both applicability and content of constitutional rights that could be used to maximize protection afforded juvenile delinquents).

<sup>54</sup> 387 U.S. at 31-34.

<sup>55</sup> *Id.* at 34-42.

<sup>56</sup> *Id.* at 42-47. The *Gault* Court explained that some procedural rights, specifically the right to bail and to a public trial, traditionally have been denied the minor because the adult accused of crime was subject to punishment, whereas the minor was subject only to a civil proceeding under which he would be rehabilitated. *Id.* at 14-16. Nevertheless, the Court examined the state’s rationale for the denial of the minor’s procedural due process rights and found it to be lacking. *Id.* at 21-31. See also *In re Winship*, 397 U.S. 358 (1970) (proof

volved the question of whether a different process is "due" the juvenile because "liberty"<sup>57</sup> means something different for him than it does for an adult. The Court refused to conclude that a minor occupies an inferior position under the Constitution, stating "the condition of being a boy does not justify a kangaroo court."<sup>58</sup>

Minors possess privacy rights<sup>59</sup> under the Constitution encompassing the right to choose to obtain an abortion.<sup>60</sup> Thus, the Supreme Court has recognized that "[c]onstitutional rights do not mature and come into being magically *only* when one attains the state-defined age of majority."<sup>61</sup> In the context of child custody, most American courts follow the rule that the child's preference is not conclusive, but may or should be considered, since the custody determination so vitally affects the child's future.<sup>62</sup> If a child is determined to be of sufficient intelligence and age (usually twelve or fourteen and above), the courts may give considerable weight to the child's wishes.<sup>63</sup> Children, by virtue of their special status, are also granted certain rights which are not advanced to those over the age of

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beyond a reasonable doubt is required when a juvenile is charged with an act that would be criminal if committed by an adult).

<sup>57</sup> See generally Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977) (analysis of the nature of interests secured by the due process clause).

<sup>58</sup> 387 U.S. at 28. It should be noted that the Court indicated that proper notice should be given to minors, not only for their own protection, but also because their parents' right to custody is at stake. *Id.* at 34. Similarly, the parents must also be notified of the right to counsel, because it is a right that belongs to both parents and child. *Id.* at 41-42. Therefore, *Gault* may be read as a case not "strictly" recognizing children's rights but protecting mutual interests of parents and child.

<sup>59</sup> See *Carey v. Population Serv. Int'l.* 431 U.S. 678 (1977) (invalidating New York statute imposing criminal penalties for selling or distributing contraceptives to minors under the age of 16, holding that the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults).

<sup>60</sup> See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (blanket parental consent requirement for minor obtaining abortion held unconstitutional); see also *Bellotti v. Baird*, 443 U.S. 622 (1979) (parental or judicial consent not required prior to a minor's abortion decision). But see *H.L. v. Matheson*, 450 U.S. 398 (1981) (parental notice may be required prior to an abortion decision made by an unemancipated minor).

<sup>61</sup> 428 U.S. 52, 74 (1976) (emphasis added).

<sup>62</sup> A. SUSSMAN, *supra* note 19, at 157. See also *Bergstrom v. Bergstrom*, 296 N.W.2d 490 (N.D. 1980) (intelligent 10-year-old was capable of exercising rational choice as to whether she wished to reside in North Dakota with her father or Norway with her mother); *In re Clair*, 219 Pa. Super. 436, 281 A.2d 726 (1971) (decisions of 13-year-old boy and 14-year-old girl as to whether they wished to remain with their mother in a Philadelphia apartment or with their father in a family home in Pennsylvania was entitled to consideration by the trial court in determining custody); *Seley v. Seley*, 13 Misc.2d 914, 178 N.Y.S.2d 988 (1958) (17-year-old's preference to live in New York with her father rather than in a small town in Canada with her mother was granted because of the minor's desire for better educational and social contacts); *Bridges v. Matthews*, 276 Ky. 59, 122 S.W.2d 1021 (1938) (court placed considerable weight on 12-year-old's preference to remain with his grandmother rather than live with his father).

<sup>63</sup> A. SUSSMAN, *supra* note 19, at 157.

majority. These "special" rights include the right to support, education, and the right to be free from neglect or abuse.<sup>64</sup>

### 3. State's Interest

Under the doctrine of *parens patriae*,<sup>65</sup> the state is empowered to intervene in family matters to safeguard such personal interests of the child as health, educational development, and emotional well-being.<sup>66</sup> The power to protect children and act for their welfare was acknowledged to be part of English equity jurisdiction as early as the 17th century.<sup>67</sup> Such power was derived from the Crown's prerogative as *parens patriae* to protect those subjects who were unable to protect themselves.<sup>68</sup> This jurisdiction has likewise been recognized from earliest times in the United States and now is largely covered by local statutes.<sup>69</sup>

The state possesses interests other than those inherent in its role as *parens patriae*. One such interest is the state's strong desire to maintain family autonomy.<sup>70</sup> Justification for this interest lies not merely in tradition but also in the recognition of the family's effectiveness as a social institution.<sup>71</sup> Autonomous families provide the conditions needed for the physical and emotional development of children and also make possible a religious and cultural diversity that might disappear if the state extensively regulated or controlled child-rearing.<sup>72</sup>

*Parens patriae* is not the state's exclusive power for acting in the "child's best interests."<sup>73</sup> The Supreme Court has acknowledged that authority for intervention also rests on the state's general police power. This power has been invoked both to prevent the public selling and distributing of religious periodicals by a minor<sup>74</sup> and to restrict a minor's freedom of expression regarding sexual publications.<sup>75</sup> These decisions recognize

<sup>64</sup> *Id.* at 17.

<sup>65</sup> "Parens patriae" is defined literally as parent of the country. It traditionally refers to the role of the state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). For a history of the development of the doctrine of *parens patriae*, see Areen, *supra* note 14, at 893-917.

<sup>66</sup> Note, *supra* note 42, at 1391-92; Note, *Constitutional Law—The Minor, Parent, State Triangle and the Requirement of Parental Notification*, 25 How. L.J. 299, 303-04 (1982).

<sup>67</sup> H. CLARK, LAW OF DOMESTIC RELATIONS 572 (1968).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Areen, *supra* note 14, at 893.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Little agreement exists on the meaning of the phrase "best interests of the child." J. GOLDSTEIN, *supra* note 9, at 133.

<sup>74</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state statute prohibiting public distribution of religious materials by minors upheld).

<sup>75</sup> *Ginsberg v. New York*, 390 U.S. 629 (1968) The state may constitutionally subject minors to "a more restricted right than that assured to adults to judge and determine for

that "[t]he state's authority over children's activities is broader than over like actions of adults."<sup>76</sup> The restrictions imposed have been justified on two grounds: 1) the state's interest in protecting and promoting the guiding role of parents in their children's moral welfare; and 2) the state's independent interest in the well-being of its youth.<sup>77</sup> Legislative enactments concerned with child labor, compulsory education, and immunization provide parents with notice of their responsibilities and of the extent of the state's power to infringe their autonomy.<sup>78</sup>

However, neglect and abuse statutes, another form of state intervention, set relatively vague and imprecise limits on the state's authority to intrude and fail to provide parents with adequate warning as to what constitutes improper conduct.<sup>79</sup> When a parent abuses or neglects a child, the interest of the state shifts from the protection of the parent's right to the protection of the child.<sup>80</sup> As a result of various reform movements<sup>81</sup> and a growing awareness of the need for state intervention on behalf of abused or neglected children, every state permits, pursuant to statute,<sup>82</sup> the initiation of neglect proceedings against parents. If the statutory grounds for neglect are met, the court may order temporary removal of the child from the custody of his parents.<sup>83</sup> The most drastic form of state intervention is the judicial procedure in which parental rights are permanently terminated. Termination completely severs the parent's legal rights, duties, and obligations with respect to the child.<sup>84</sup> Following a termination order, the parent has no right to contact the child or to be notified of the child's location, welfare, or adoption by a third party.<sup>85</sup> Thus, a delicate balance must be struck among parental autonomy, the state's *parens patriae*

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themselves what sex material they may read or see." *Id.* at 637.

<sup>76</sup> 321 U.S. at 168.

<sup>77</sup> 390 U.S. at 639-40. The state possesses the power to set age qualifications for the following activities of minors: voting; serving on a jury; marrying without parental consent; buying, possessing, and drinking alcoholic beverages; working for wages; using the courts to sue another person or one's parents; making a contract, drawing up a will, and inheriting money; attending school; obtaining a license to operate a motor vehicle; receiving juvenile court treatment for illegal or criminal conduct; and receiving medical care without parental consent. A. SUSSMAN, *supra* note 19, at 17.

<sup>78</sup> J. GOLDSTEIN, *supra* note 9, at 16.

<sup>79</sup> *Id.*

<sup>80</sup> Bell, *supra* note 4, at 1066.

<sup>81</sup> It was not until the early part of this century that systematic efforts were made to provide a legal forum for state intervention to protect children. The 1899 legislation establishing the Chicago juvenile court system became the model for juvenile court statutes that were rapidly adopted throughout the United States. Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C.L. REV. 293, 327 (1972).

<sup>82</sup> For a collection of such statutes, see Katz, Howe & McGrath, *supra* note 3, at 75-362.

<sup>83</sup> Bell, *supra* note 4, at 1067.

<sup>84</sup> *Id.* at 1068.

<sup>85</sup> *Id.*

power, and the "best interests of the child," in view of the severity of a termination order.

Except in those cases where the abuse or neglect is serious or continuing, the decision to intervene is often based on subjective grounds.<sup>86</sup> Most state statutes define parental neglect, abuse, or dependency in broad, vague language which allows almost unlimited intervention.<sup>87</sup> Phrases such as "adequate parental care," "denial of proper care," or "best interests of the child" provide courts with great discretion, since little agreement exists as to the meaning of these terms.<sup>88</sup> Additionally, the majority of these statutes define neglect primarily in terms of parental conduct or home conditions, rather than requiring a showing of actual harm to the child.<sup>89</sup> Most statutes do not even specify the types of harm that are of concern.<sup>90</sup> Statutes which focus on parental conduct usually consider whether the parents provided adequate care under the existing community standards.<sup>91</sup> This focus is inadequate because the parent's behavior may be "unfit" by community standards, yet cause little or no detriment to the child. In contrast, parents may meet the required community standards (providing adequate food, clothing, and shelter), yet cause severe detriment or emotional problems to the child through parental upbringing or disciplinary procedures. Little connection has been demonstrated between parental behavior and specific long-term detriment to the child.<sup>92</sup> The only proper focus of child neglect and abuse statutes is on prevention of harm to the child.<sup>93</sup> This standard would limit unnecessary intervention.<sup>94</sup>

Vague statutes with a focus on parental conduct increase the likelihood that children may be harmed by the decision to intervene. When statutes fail to reflect a careful analysis of the types of harm that justify intervention, decision-making is left to ad hoc determinations by social workers and judges.<sup>95</sup> Substantial evidence exists to show that these decisions often reflect personal opinions about child-rearing, unsupported by scientific evidence.<sup>96</sup> The result is that children are often removed from envi-

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<sup>86</sup> See Wald, *supra* note 4, at 1001; Note, *H.B. 695: Updating Ohio's Temporary and Permanent Custody Procedures for Child Abuse, Neglect and Dependency*, 7 U. DAYTON L. REV. 293, 303 (1981).

<sup>87</sup> Wald, *supra* note 4, at 1000.

<sup>88</sup> Note, *supra* note 86, at 304. See also *supra*, note 73.

<sup>89</sup> Wald, *supra* note 4, at 1000-01; Note, *supra* note 86, at 305-06.

<sup>90</sup> Wald, *supra* note 4, at 1001.

<sup>91</sup> Note, *supra* note 86, at 305.

<sup>92</sup> *Id.* at 305-06.

<sup>93</sup> Wald, *supra* note 4, at 1002; Note, *supra* note 86, at 306.

<sup>94</sup> Wald, *supra* note 4, at 1002. For another advocate of minimal state intervention, see J. GOLDSTEIN, *supra* note 9, at 15-29.

<sup>95</sup> Wald, *supra* note 4, at 1001.

<sup>96</sup> *Id.* The personal child-rearing preferences of judges and social workers have involved discrimination against poor, minority, and other disfavored families. J. GOLDSTEIN, *supra*

ronments in which they are treated adequately. Foster-care homes furnish temporary care and are ill-equipped to handle what often become long-term situations.<sup>97</sup> Many psychiatrists stress the importance of a continuing parent-child relationship and are in agreement that intervention can have a detrimental emotional impact on the child, even if the parent is "unfit."<sup>98</sup>

If judges and social workers need not justify their intervention decision on the basis of specific harms, sound decisions are not likely to be made.<sup>99</sup> Moreover, it is extremely difficult for the decision-maker or others later to evaluate the efficacy of the intervention, since the appropriate criteria by which to measure success or failure are unknown.<sup>100</sup>

## B. Grant of Asylum

### 1. Historical Background

Give me your tired, your poor,  
Your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore;  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!<sup>101</sup>

Traditionally, the United States has provided a haven for persons fleeing persecution in their native lands.<sup>102</sup> For many, passage through the golden door has meant an escape from religious persecution, political tyranny, or economic hardship.<sup>103</sup> As an expression of its "fundamental commitment to humanitarian principles,"<sup>104</sup> the United States in 1968 acceded to the United Nations Protocol Relating to the Status of Refugees<sup>105</sup> (U.N. Protocol or Protocol). The U.N. Protocol is an international agreement which seeks to advance basic human rights of refugees

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note 9, at 17.

<sup>97</sup> Note, *supra* note 86, at 303.

<sup>98</sup> *Id.* at 305.

<sup>99</sup> Wald, *supra* note 4, at 1002.

<sup>100</sup> *Id.*

<sup>101</sup> U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 1 (1980) quoting E. LAZARUS, *THE NEW COLOSSUS* (1883).

<sup>102</sup> Note, *supra* note 6, at 539. See also D. CARLINER, *supra* note 6, at 53 (historically the United States has provided a sanctuary to persons fleeing from religious and political persecution); Evans, *supra* note 6, at 204 (tradition of United States as humanitarian sanctuary is woven into fabric of American history); Note, *Those Who Stand at the Door: Assessing Immigration Claims Based on Fear of Persecution*, 18 NEW ENG. L. REV. 395, 398 (1982) (policy of United States has traditionally been one of "welcome to the homeless") [hereinafter cited as *Assessing Immigration Claims*].

<sup>103</sup> U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 1 (1980).

<sup>104</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 398.

<sup>105</sup> Adopted Jan. 31, 1967, entered into force Oct. 4, 1967. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as U.N. Protocol].

by limiting the possibility of mass expulsion and persecution.<sup>106</sup>

The provisions of the U.N. Protocol incorporate virtually all of the 1951 Convention Relating to the Status of Refugees,<sup>107</sup> which was an earlier attempt to codify basic refugee rights.<sup>108</sup> Under the terms of the Protocol, the eligibility of those aliens who come under the protection of the United Nations High Commissioner for Refugees is broadened, nondiscriminatory treatment of refugees is required, and the temporal and geographical limitations of the terms of the 1951 Convention are eliminated.<sup>109</sup> Additionally, the U.N. Protocol adopts the 1951 Convention definition of "refugee" as any person who:

[o]wing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular group, or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or unwilling to return to it.<sup>110</sup>

Qualification as a refugee within the United Nations definition affords the refugee the right of non-refoulement.<sup>111</sup> The principle of non-refoulement established by article 33 of the U.N. Protocol involves an express commitment<sup>112</sup> not to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>113</sup> The obligations of nations arising under the U.N. Protocol are moral rather than legal obligations, and although its signatories have agreed not to return a refugee to persecution, they still maintain their right to refuse asylum.<sup>114</sup>

## 2. Refugee Programs in the United States Prior to 1980

Entry into the United States was virtually unrestricted until nearly the 20th century.<sup>115</sup> In the absence of restrictions on immigration, laws assuring the right of entrance into the United States for religious, political, or

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<sup>106</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 399.

<sup>107</sup> Martin, *Non-Refoulement of Refugees: United States Compliance with International Obligations*, 23 HARV. INT'L L.J. 357, 362 (1983).

<sup>108</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 319.

<sup>109</sup> *Id.*

<sup>110</sup> U.N. Protocol, *supra* note 105, at art. I § 1.

<sup>111</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 400.

<sup>112</sup> *Id.*

<sup>113</sup> U.N. Protocol, *supra* note 105, at art. 33 § 1.

<sup>114</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 400.

<sup>115</sup> Note, *supra* note 6, at 540.

other refugees were unnecessary.<sup>116</sup> Regulatory laws became necessary only when controls were placed upon immigration.<sup>117</sup> The sovereign power of the United States to prevent the entrance of aliens into this country or to expel them once here dates back to the first Chinese Exclusion Act of 1875.<sup>118</sup> Under the Immigration and Nationality Act of 1917, immigration was limited by requiring proof of literacy.<sup>119</sup> Even though persons fleeing persecution were not forced to meet the literacy requirement, refugees during this period were generally treated indistinguishably from other immigrants.<sup>120</sup>

The Immigration and Nationality Act of 1952<sup>121</sup> is the basic law governing refugee programs in the United States.<sup>122</sup> However, because the 1952 Act provided no formal method for admission of refugees into the United States, those persons entering the country prior to 1965 generally did so by one of two methods.<sup>123</sup> First, the Attorney General was granted a parole power by Congress to admit aliens into the United States on a case-by-case emergency basis.<sup>124</sup> Second, special legislation was enacted to provide for admission of refugees into the United States.<sup>125</sup> The great number of persons uprooted by World War II prompted Congress to enact a series of acts intended to supplement already-existing immigration law.<sup>126</sup> The Displaced Persons Act of 1948<sup>127</sup> provided 15,000 displaced persons living in the United States a status adjustment to permanent resident, but these aliens were required to demonstrate prospective persecution on account of race, religion, or political opinion if returned to their native land.<sup>128</sup>

The Internal Security Act of 1950<sup>129</sup> was passed two years later. This act required the Attorney General to withhold the deportation of any alien he believed would be subject to *physical* persecution in his native

<sup>116</sup> D. CARLINER, *supra* note 6, at 53.

<sup>117</sup> *Id.* See generally, Evans, *supra* note 6, at 204 (study of 16 years of practice of territorial asylum under § 243(h) of the Immigration and Nationality Act of 1952).

<sup>118</sup> Act of March 3, 1875, ch. 141, 18 Stat. 477 (repealed 1943).

<sup>119</sup> Ch. 29, § 3, 39 Stat. 874, 877 (repealed 1952).

<sup>120</sup> Note, *supra* note 6, at 541.

<sup>121</sup> Pub. L. No. 414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (1982)).

<sup>122</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 400.

<sup>123</sup> *Id.* at 400-01.

<sup>124</sup> *Id.* See Immigration Nationality Act of 1952, Pub. L. No. 414, § 212(d)(5), 66 Stat. 163, 188 (codified as amended at 8 U.S.C. § 1182(d)(5) (1982)).

<sup>125</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 401.

<sup>126</sup> Note, *supra* note 6, at 541.

<sup>127</sup> Pub. L. No. 774, § 4(a)(3), 62 Stat. 1009, 1011 (amended by Act of June 16, 1950, Pub. L. No. 555, § 5(a), 64 Stat. 219, 224).

<sup>128</sup> Note, *supra* note 6, at 541. See Displaced Persons Act of 1948, Pub. L. No. 774, § 2(c), 62 Stat. 1009, 1009 (amended by Act of June 16, 1950, Pub. L. No. 555, § 2(d), 64 Stat. 219, 219).

<sup>129</sup> Pub. L. No. 831, 64 Stat. 987.



country.<sup>130</sup> The burden of proving likelihood of persecution under the 1950 Act was borne by the alien.<sup>131</sup> Additionally, the Act of 1951<sup>132</sup> provided 341,000 displaced orphans entrance into the United States,<sup>133</sup> and Iron Curtain refugees gained admission into the United States by means of the Refugee Relief Act of 1953.<sup>134</sup>

Congress passed the Immigration and Nationality Act of 1952<sup>135</sup> as an attempt to consolidate previous immigration laws and practices.<sup>136</sup> In addition to the Attorney General's parole power and the special legislation enacted, section 243(h) of the 1952 Act provided the Attorney General with the discretionary authority to withhold deportation of an alien to any country where he would face *physical* persecution.<sup>137</sup> An individualized form of relief was provided by section 243(h) which was not originally available to excludable aliens.<sup>138</sup> In 1965, Congress amended the Immigration and Nationality Act in response to criticism that the term "physical persecution" was unduly narrow.<sup>139</sup> This term was replaced by the phrase "persecution on account of race, religion or political opinion."<sup>140</sup> A limited number of refugees from Communist and Middle Eastern countries were additionally admitted into the United States under the 1965 amendment's conditional entry provisions.<sup>141</sup> Although these limitations were repealed by the Refugee Act of 1980, their ideological and geographical bias continues to be reflected in administrative decisions.<sup>142</sup>

The ratification of the U.N. Protocol by the United States in 1968 expanded section 243(h) in three ways. First, it provided a definition of the term "refugee."<sup>143</sup> Second, included within the class of refugees were those who would be subject to persecution on account of nationality or membership in a particular social group.<sup>144</sup> Third, the discretionary authority of the Attorney General regarding deportation of this class of ref-

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<sup>130</sup> Note, *supra* note 6, at 541. See Internal Security Act of 1950, Pub. L. No. 831, § 23, 64 Stat. 987, 1010 (current version at 8 U.S.C. § 1253(h) (1982)).

<sup>131</sup> Note, *supra* note 6, at 541.

<sup>132</sup> Pub. L. No. 60, 65 Stat. 96.

<sup>133</sup> *Id.* § 3(b), 65 Stat. at 96.

<sup>134</sup> Pub. L. No. 203, 67 Stat. 400 (amended by Act of Aug. 31, 1954, Pub. L. No. 751, 68 Stat. 1044).

<sup>135</sup> Pub. L. No. 414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C. (1982)).

<sup>136</sup> Note, *supra* note 6, at 541.

<sup>137</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 401.

<sup>138</sup> *Id.*

<sup>139</sup> Note, *supra* note 6, at 543. See Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (codified at 8 U.S.C. § 1253(h) (1982)).

<sup>140</sup> Note, *supra* note 6, at 543.

<sup>141</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 402.

<sup>142</sup> *Id.*

<sup>143</sup> Note, *supra* note 6, at 544.

<sup>144</sup> *Id.*

ugees was removed.<sup>145</sup> However, despite these changes, the Board of Immigration Appeals (BIA) and the courts refused to recognize modification of United States asylum law by the U.N. Protocol.<sup>146</sup>

### 3. Present Asylum Practice Under the 1980 Refugee Act

The Refugee Act of 1980<sup>147</sup> reflected an attempt by Congress to replace the ad hoc admission procedures of the past with a comprehensive and procedurally uniform refugee program applicable to all refugees equally.<sup>148</sup> This act was additionally intended to liberalize refugee admission procedures and to give statutory meaning to humanitarian concerns which failed to be reflected in past acts.<sup>149</sup> Several major reforms are reflected in the Refugee Act of 1980. First, the 1980 Act adopted a statutory definition of "refugee" which corresponded closely to the language of the U.N. Protocol.<sup>150</sup> "Refugee" is defined in section 201 of the Refugee Act as:

(A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable 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. . . .<sup>151</sup>

Although the language of the U.N. Protocol replaces prior biases favoring refugees fleeing Communism, some Congressmen have expressed concern that the double standard may continue to operate.<sup>152</sup> Most commentators, however, applaud the new definition of "refugee" as a response to the international tradition of human rights.<sup>153</sup>

Second, the addition of section 207 to the Refugee Act of 1980 provides for the annual admission of 50,000 refugees.<sup>154</sup> Consultation between the

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* The reason the BIA and courts refused to acknowledge that the U.N. Protocol modified asylum law is that "at the time of ratification neither Congress nor the administration believed that the U.N. Protocol required any change in current immigration law." *Id.* at 544-45.

<sup>147</sup> Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)).

<sup>148</sup> Note, *supra* note 6, at 545.

<sup>149</sup> *Id.* See generally Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91 (1981) (critical analysis of present and proposed asylum procedures).

<sup>150</sup> Note, *supra* note 6, at 546.

<sup>151</sup> Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102 (codified at 8 U.S.C. § 1101(a)(42) (1982)).

<sup>152</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 406.

<sup>153</sup> *Id.*

<sup>154</sup> See Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103 (codified at

Executive branch and Congress is required under this section to allow admission of additional refugees in an emergency situation.<sup>155</sup> Section 207 also requires the Attorney General to show "compelling reasons" before exercising his parole powers.<sup>156</sup> Third, pursuant to the new section 208 of the Refugee Act of 1980, the Attorney General or his delegate, the District Director of Immigration and Naturalization, is authorized to grant asylum to any alien within the United States who meets the newly-adopted U.N. Protocol definition of "refugee."<sup>157</sup> This section further established a separate asylum procedure which is independent of an exclusion or deportation hearing, providing all aliens physically present within the United States an opportunity to apply for asylum regardless of their immigration status.<sup>158</sup> Finally, the discretionary authority of the Attorney General to withhold deportation is removed.<sup>159</sup> The Refugee Act of 1980 provides that upon a finding that the "alien's life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion," the Attorney General *must* withhold deportation of the alien.<sup>160</sup>

#### 4. Factors Supporting a Finding of Probable Persecution

Qualification for asylum under section 243(h) or article 33 of the U.N. Protocol requires that an alien establish his status as a refugee.<sup>161</sup> The burden of proof therefore rests upon the alien to establish that persecution is probable if he were returned to his native country.<sup>162</sup> Requests for political asylum are initially made to the District Director of Immigration and Naturalization, whose decisions are not appealable.<sup>163</sup> However, if exclusion or deportation proceedings have begun, application may additionally be made to an immigration judge.<sup>164</sup> The BIA, a quasi-judicial body responsible only to the Attorney General, exercises appellate jurisdiction over the decision of the immigration judge.<sup>165</sup> The task of the BIA in de-

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8 U.S.C. § 1157 (1982)).

<sup>155</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 407.

<sup>156</sup> *Id.*

<sup>157</sup> Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (codified at 8 U.S.C. § 1158 (1982)).

<sup>158</sup> Note, *supra* note 6, at 546.

<sup>159</sup> Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (codified at 8 U.S.C. § 1253(h) (1982)).

<sup>160</sup> *Id.*

<sup>161</sup> Note, *supra* note 6, at 547.

<sup>162</sup> The burden of proof is upon the alien. 8 C.F.R. § 242.17(c) (1983) (alien must submit an application setting forth reasons in support of request to withhold deportation and has burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion, or political opinion).

<sup>163</sup> Note, *Assessing Immigration Claims*, *supra*, note 102, at 408.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

termining the type of evidence which is sufficient to constitute a prima facie case of persecution is complicated by the lack of guidelines for establishing the likely occurrence of persecution and by the BIA's policy that asylum applications must be decided individually.<sup>166</sup> However, the following factors have been held to be significant in determining whether probable persecution is established: the extent of the prior political activity of the applicant in his native country and his political activity after entering the United States;<sup>167</sup> the motivation of the applicant in fleeing his native country;<sup>168</sup> the circumstances under which the applicant left his native country;<sup>169</sup> the history of personal political persecution of the applicant by the native government;<sup>170</sup> the commission of a serious non-political crime by the applicant in his native country;<sup>171</sup> and the probable consequences that would face the applicant upon return to his native country.<sup>172</sup> Although these factors tend to establish evidence of persecution, they are often inconsistently applied because of unspoken foreign policy considerations.<sup>173</sup>

<sup>166</sup> Note, *supra* note 6, at 547.

<sup>167</sup> *Id.* See, e.g., *Hammad v. I.N.S.*, 420 F.2d 645, 647 (D.C. Cir. 1969) (petitioner criticized King Hussein in a conversation with a Jordanian army major while in America and was threatened with arrest upon return to Jordan); *Hosseinnardi v. I.N.S.*, 405 F.2d 25, 26-27 (9th Cir. 1968) (Iranian alleged that if he were deported to Iran he would face persecution because of his political beliefs and activities in America in opposition to the Shah); *Chi Sheng Liu v. Holton*, 297 F.2d 740, 742 (9th Cir. 1961) (appellant contended that Nationalist Government of China would subject him to oppression because of earlier declaration that he would prefer to live in Communist China).

<sup>168</sup> Note, *supra* note 6, at 548. See, e.g., *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715, 717-20 (2d Cir. 1955) (court stayed deportation order where alien had engaged in political conduct against government of Communist China and reasonable certainty existed that he would be executed upon return).

<sup>169</sup> Note, *supra* note 6, at 548. See, e.g., *Asghari v. I.N.S.*, 396 F.2d 391, 392 (9th Cir. 1968) (petitioner, native and citizen of Iran, was admitted to America as a temporary visitor); *Hyppolite v. I.N.S.*, 382 F.2d 98, 99 (7th Cir. 1967) (petitioner, a citizen and native of Haiti, entered the United States as a "visitor for pleasure").

<sup>170</sup> Note, *supra* note 6, at 547-48. See, e.g., *Lena v. I.N.S.*, 379 F.2d 536, 537-38 (7th Cir. 1967) (clear probability of persecution of particular individual required since Greeks living in Turkey are permitted to practice their religion and discrimination which exists is against Greek Orthodox Church itself rather than individuals).

<sup>171</sup> Note, *supra* note 6, at 548. See, e.g., *MacCaud v. I.N.S.*, 500 F.2d 355, 359 (2d Cir. 1974) (charges involving escape from prison while serving a counterfeiting sentence in Canada which were pending against appellant were not sufficient to stay deportation order).

<sup>172</sup> Note, *supra* note 6, at 548. See, e.g., *In re Shirinian*, 12 I. & N. Dec. 392, 394-95 (1967) (no evidence presented to show that applicant would be subject to persecution upon return to the United Arab Republic).

<sup>173</sup> Note, *supra* note 6, at 548. See also *In re Janus & Janek*, 12 I. & N. Dec. 866, 876 (1968) (BIA accepted argument that leaving a Communist country could itself provide reason for government to persecute a returning alien). See generally Note, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107 (1978) (the United States has traditionally accepted refugees from Communist countries, yet refugees from right-wing dictatorships have more difficulty proving their claims); Note, *The*

### 5. Burden of Proof Required to Establish Persecution

Prior to the Refugee Act of 1980, an alien was required to establish that he would be subject to "persecution on account of race, religion, or political opinion" in order to avoid deportation.<sup>174</sup> This language was interpreted by the BIA and the courts as placing the burden on the alien to prove a "clear probability of future persecution" aimed at that particular individual.<sup>175</sup> Aliens have experienced difficulty in meeting this heavy evidentiary burden for two reasons. First, the BIA has generally required the applicant to establish objective evidence of persecution.<sup>176</sup> As a result of the difficulty in complying with this standard of proof, applicants began turning to article 33, the non-refoulement provision of the U.N. Protocol.<sup>177</sup> An alien must justify only a "well-founded fear" of persecution under article 33, rather than present objective evidence of persecution.<sup>178</sup>

Relying upon article 33, the applicant in *In re Dunar*<sup>179</sup> alleged that he need only prove a subjective "well-founded fear" of persecution.<sup>180</sup> However, the BIA refused to adopt the applicant's reasoning that a "well-founded fear" of persecution under article 33 establishes a lesser burden of proof than section 243(h) had traditionally required.<sup>181</sup> The BIA insisted on the need for objective evidence indicating a "realistic likelihood"<sup>182</sup> of persecution. Therefore, the BIA essentially interpreted the U.N. Protocol's "well-founded fear" standard as virtually co-extensive with the "clear probability" test of section 243(h).<sup>183</sup>

After passage of the Refugee Act of 1980, the BIA's position regarding the standard of proof for persecution remained essentially unchanged.<sup>184</sup> In accord with the language of the U.N. Protocol, the Refugee Act of 1980 provided that the alien's fear of persecution must be "well-founded."<sup>185</sup> Under the 1980 Act, two additional grounds for persecution were established: nationality and membership in a particular social group.<sup>186</sup> However, the BIA continued to apply the "clear probability" standard and

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*Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*, 32 CLEV. ST. L. REV. 117 (1983-84).

<sup>174</sup> Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918 (current version at 8 U.S.C. § 1253(h) (1982)).

<sup>175</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 408-09.

<sup>176</sup> Note, *supra* note 6, at 556.

<sup>177</sup> *Id.* at 557.

<sup>178</sup> *Id.*

<sup>179</sup> 14 I. & N. Dec. 310 (1973).

<sup>180</sup> *Id.* at 319.

<sup>181</sup> Note, *supra* note 6, at 558. See *In re Dunar*, 14 I. & N. Dec. at 319-23.

<sup>182</sup> 14 I. & N. Dec. at 319.

<sup>183</sup> Note, *supra* note 6, at 558.

<sup>184</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 411.

<sup>185</sup> The Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102 (codified at 8 U.S.C. § 1101(a)(42) (1982)).

<sup>186</sup> *Id.*

required objective evidence of persecution.<sup>187</sup> Regardless of the two additional grounds for persecution, the BIA roughly categorized nationality with race, and generally considered only social groups that were political in nature.<sup>188</sup> The presumption of political activity in favor of refugees from Communist countries continued to apply, resulting in an inconsistent treatment of applicants.<sup>189</sup>

A second reason aliens have experienced difficulty in complying with the standard of "a clear probability of persecution" is that it was necessary for each alien to demonstrate that *he* personally would be singled out for persecution if returned to his native land.<sup>190</sup> A general state of persecution in the alien's homeland usually has not been deemed sufficient to satisfy the burden of proof.<sup>191</sup> However, a more favorable view toward the alien was expressed in *Coriolan v. I.N.S.*,<sup>192</sup> where the court ruled that the immigration judge erred in failing to take sufficient notice of the political conditions in Haiti; the *Coriolan* court remanded the alien's claim for reconsideration in light of an Amnesty International report on human rights in Haiti. The political conditions in the applicant's homeland were similarly considered in *Haitian Refugee Center v. Civiletti*,<sup>193</sup> where the court recognized that an understanding of the political situation in the alien's native land was critical to the adequate examination of a claim for asylum.

It has been suggested that the 1980 Refugee Act, by amending the language of section 243(h) to conform to that of the U.N. Protocol, expresses a congressional intent to adopt a lower burden of proof than the traditional "clear probability" test.<sup>194</sup> Application of such a lower burden of proof is supported by the intent of the Refugee Act of 1980 to provide statutory meaning to the United States' commitment to humanitarian concerns.<sup>195</sup> One commentator has proposed that a "reasonable basis" test would provide a standard of proof consistent with the "well-founded fear" language of the U.N. Protocol and section 243(h).<sup>196</sup> This standard would allow a grant of asylum upon a court's finding that "a reasonable basis" for the alien's fear of persecution exists.<sup>197</sup>

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<sup>187</sup> Note, *Assessing Immigration Claims*, *supra* note 102, at 412.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Note, *supra* note 6, at 556.

<sup>191</sup> *Id.*

<sup>192</sup> 559 F.2d 993, 1002-04 (5th Cir. 1977). *See also* United States *ex rel.* Mercer v. Esperdy, 234 F. Supp. 611, 616 (S.D.N.Y. 1964) (judicial notice taken of the general political conditions in Haiti).

<sup>193</sup> 503 F. Supp. 442, 475 (S.D. Fla. 1980), *aff'd*, 676 F.2d 1023, 1042 (5th Cir. 1982).

<sup>194</sup> Note, *supra* note 6, at 559.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

## 6. Judicial Review

### a. Standard for Review

Traditionally, the courts of appeal have exercised only limited judicial review of decisions of the BIA.<sup>198</sup> Such limited review has been attributable to the discretionary nature of the BIA's decisions.<sup>199</sup> Prior standards established that appellate courts could review section 243(h) claims for abuse of discretion and arbitrary and capricious action, yet would refuse to upset BIA orders if they were supported by a "reasonable foundation,"<sup>200</sup> or "substantial evidence in the record considered as a whole."<sup>201</sup> However, in *McMullen v. I.N.S.*,<sup>202</sup> the Ninth Circuit determined that the new mandatory language of section 243(h) which requires that the Attorney General *shall not* deport an alien who might be subject to persecution justifies replacing the abuse-of-discretion standard with the substantial-evidence standard. The conclusion of the *McMullen* court represents a dramatic change from prior case law, and if followed by other courts

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<sup>198</sup> *Id.* at 560.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 561. See, e.g., *Khalil v. I.N.S.*, 457 F.2d 1276, 1277-78 (9th Cir. 1972) (evidence reasonably supported finding that visitor had not proved deportation would cause her to be persecuted because of her political belief despite contrary evidence by alien and her employer); *Chi Sheng Liu v. Holton*, 297 F.2d 740, 742 (9th Cir. 1961) (decision of District Director not to suspend deportation order of alien to Formosa had reasonable foundation).

<sup>201</sup> Note, *supra* note 6, at 561. See, e.g., *Gena v. I.N.S.*, 424 F.2d 227, 232-33 (5th Cir. 1970) (BIA's denial of alien's motion to reopen was not abuse of discretion where alien failed to set forth in motion any new facts or evidence); *Jarecha v. I.N.S.*, 417 F.2d 220, 225 (5th Cir. 1969) ("denial of discretionary adjustment of status because alien, a citizen of India, was married and had a wife residing in India was not an abuse of discretion"); *Hypolite v. I.N.S.*, 382 F.2d 98, 100 (7th Cir. 1967) (Attorney General found no evidence that alien would be persecuted for her political opinions upon return to Haiti, and denial of petition to withhold deportation was not arbitrary); *Lena v. I.N.S.*, 379 F.2d 536, 537 (7th Cir. 1967) (refusal of Attorney General to stay deportation order was not arbitrary where special inquiry officer found that Greeks are permitted to practice their religion in Turkey); *Kam Ng v. Pilliod*, 279 F.2d 207, 210 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961) (INS decision must stand if it is sufficient on its face). But see *Berdo v. I.N.S.*, 432 F.2d 824, 848-49 (6th Cir. 1970) (finding of special inquiry officer that alien had consciously committed himself to the Communist party through political affiliation was not established by substantial evidence); *Kovac v. I.N.S.*, 407 F.2d 102, 105-07 (9th Cir. 1969) (reversal of Board deportation order, which had been based on finding that deportation would not subject alien to deprivation of means to earn livelihood, since the proper standard had been whether alien would have been subjected to "deliberate imposition of substantial economic disadvantage"); *United States ex rel. Fong Foo v. Shaughnessy*, 234 F.2d 715, 717-19 (2d Cir. 1955) (Board's refusal to stay deportation based on office memorandum of Acting Assistant Commissioner stating that he did not believe petitioner would be subjected to physical persecution if deported to Communist China was arbitrary and capricious); *United States ex rel. Mercer v. Esperdy*, 234 F. Supp. 611, 616-17 (S.D.N.Y. 1964) (special inquiry officer's refusal to reopen alien's deportation proceeding was arbitrary and capricious since it failed to take into consideration the change in circumstances in Haiti).

<sup>202</sup> 658 F.2d 1312, 1316 (9th Cir. 1981).

will have great impact on attempts by refugees to prevent refoulement.<sup>203</sup> Following *McMullen*, a refugee may avoid deportation by showing a likelihood that he would face persecution upon return to the country of his nationality and he may insist that the Attorney General produce substantial evidence to the contrary.<sup>204</sup>

In *Stevic v. Sava*,<sup>205</sup> recently decided in the Second Circuit, the court similarly held that the new language of section 243(h) mandates increased protection for refugees seeking to contest deportation rulings of the Attorney General which were previously discretionary.<sup>206</sup> Reflecting upon the intention of the Refugee Act of 1980 to broaden the protection from deportation afforded refugees, the *Stevic* court reasoned that "the clear probability test is no longer the applicable guide for administrative practice under section 243(h)."<sup>207</sup> Although the court did not establish an applicable legal test,<sup>208</sup> it emphasized that "the fear of the applicant as well as the reasonableness of that fear"<sup>209</sup> must be considered.

### b. Due Process

Courts will also review section 243(h) cases to ensure that the alien has been afforded due process.<sup>210</sup> The focus has traditionally been on whether a fair hearing, fair consideration of his claim, and the right to present evidence have been afforded the alien.<sup>211</sup> Due process challenges have recently centered around the admissibility of State Department recommendations.<sup>212</sup> The immigration judge has traditionally requested an advisory opinion from the State Department concerning the merits of the applicant's asylum claim.<sup>213</sup> Unfortunately, the State Department's letters of

<sup>203</sup> Martin, *supra* note 107, at 375.

<sup>204</sup> *Id.*

<sup>205</sup> 678 F.2d 401 (2d Cir. 1982) *cert. granted*, 51 U.S.L.W. 627 (U.S. Feb. 28, 1983) (No. 82-973).

<sup>206</sup> *Id.* at 410.

<sup>207</sup> *Id.* at 409.

<sup>208</sup> Martin, *supra* note 107, at 376.

<sup>209</sup> 678 F.2d at 410.

<sup>210</sup> Note, *supra* note 6, at 561. See *Fleurinor v. I.N.S.*, 585 F.2d 129, 133-34 (5th Cir. 1978); *Aalund v. Marshall*, 461 F.2d 710, 711-13 (5th Cir. 1972); *Jarecha v. I.N.S.*, 417 F.2d 220, 224 (5th Cir. 1969); *Kasravi v. I.N.S.*, 400 F.2d 675, 677 (9th Cir. 1968).

<sup>211</sup> Note, *supra*, note 6, at 561.

<sup>212</sup> *Id.* See, e.g., *Zamora v. I.N.S.*, 534 F.2d 1055, 1059-63 (2d Cir. 1976) (receipt of letters from State Department recommending denial of petitioners' applications for political asylum did not require reversal absent showing that they probably influenced the result); *Cisternas-Estay v. I.N.S.*, 531 F.2d 155, 160 (3d Cir.), *cert. denied*, 429 U.S. 853 (1976) (no abuse of discretion in considering a letter from the State Department noting that the government from which petitioners sought asylum was no longer in power); *Paul v. I.N.S.*, 521 F.2d 194, 199-200 (5th Cir. 1975) (admission of nonresponsive and potentially unreliable telegram from State Department officer did not deprive aliens of fair hearing when denial of applications was based upon insufficiency of aliens' own statements).

<sup>213</sup> Note, *supra* note 6, 562 n.177.



recommendation often interfere with determination of a case on the merits by introducing political and foreign policy issues into the asylum proceedings.<sup>214</sup>

This correspondence often has a detrimental effect on the alien's asylum claim. Since the State Department is not required to disclose its recommendation to the applicant,<sup>215</sup> the applicant is deprived of an opportunity to refute the State Department's conclusions.<sup>216</sup> Although the recommendations are not binding and the decision-maker is prohibited from affording them substantial weight, their impact is inevitable.<sup>217</sup> Moreover, the applicant is forced to assume an unreasonable burden by the requirement that he prove that the decision-maker was actually influenced by the recommendations.<sup>218</sup>

### III. A LACK OF CLEAR GUIDELINES: THE POLOVCHAK CONTROVERSY

#### A. *History and Facts*

The interwoven family interests of parent, minor and state, and the further competing interest involved in the request for a grant of asylum had not been considered within the context of the same case until *In re Polovchak*.<sup>219</sup> This case provided the courts with the opportunity to resolve the critical issues inherent in the grant of asylum to a minor. The failure of the courts to address these imperative considerations appropri-

<sup>214</sup> *Id.* at 562. See E. TOMASI, IN DEFENSE OF THE ALIEN 23-30 (1983).

<sup>215</sup> "In exercising discretionary power when considering an application or petition, the district director or officer in charge . . . may consider and base his decision on information not contained in the record and not made available for inspection by the applicant. . . ." 8 C.F.R. § 103.2(b)(2) (1983). See also *Aamora v. I.N.S.*, 534 F.2d 1055, 1062-63 (2d Cir. 1976) (such letters may be accorded undue weight); *Paul v. I.N.S.*, 521 F.2d 194, 199-200 (5th Cir. 1975) (although State Department recommendation was found to be erroneous, court rejected alien's claim that admission of recommendation violated due process); *Hosseinmardi v. I.N.S.*, 405 F.2d 25, 28 (9th Cir. 1968) (court conceded the potential unreliability of letters yet found the BIA had not afforded them substantial weight); *Kasravi v. I.N.S.*, 400 F.2d 675, 677 n.1 (9th Cir. 1968) (court recognized unreliability of State Department letters). But c.f. *Asghaki v. I.N.S.*, 396 F.2d 391, 392 (9th Cir. 1968) (State Department report came from "knowledgeable and competent source").

<sup>216</sup> Note, *supra* note 6, at 562. One commentator asserts that since the Board may be improperly influenced by the recommendations, they should be prohibited altogether. Alternatively, he suggests "the applicant should be fully apprised of all the information given to the Board by the State [Department] and provided with the opportunity to cross-examine and present interrogatories to the author of such correspondence." *Id.* at 563.

<sup>217</sup> *Id.* at 563.

<sup>218</sup> *Id.* The great deference that the courts have afforded INS decisions may no longer be necessary. Since the Refugee Act of 1980 amends § 243(h) to conform to the U.N. Protocol, it appears to eliminate the discretionary authority of the Attorney General to deport a refugee meeting the requirement of the statute. *Id.*

<sup>219</sup> 104 Ill. App.3d 203, 432 N.E.2d 873 (1981), *aff'd*, Nos. 56552, 56572 (Ill. May 27, 1983).

ately, resulted in an unnecessary and lengthy international custody dispute. Yet, beyond the tragic and unbridled abuse which occurred in this individual situation, there exists the unfortunate possibility that such an incident could recur in the future without the existence of clear guidelines to protect the injured parties.<sup>220</sup> Before providing an analysis of the weaknesses in the *Polovchak* decisions, it is necessary to explore the history and factual circumstances of this unusual controversy.

In January 1980, the Polovchak parents, Michael and Anna, and their three children arrived in the United States from the Soviet Ukraine.<sup>221</sup> The parents experienced great difficulty in adjusting to their new environment and decided the best solution would be for their entire family to return to the U.S.S.R.<sup>222</sup> Upon learning of their parents' decision to return to the Soviet Ukraine, Walter (then age twelve) and his sister, Natalie (then age seventeen), on July 14, 1980, removed their belongings to the home of their older cousin without their parents' knowledge or consent.<sup>223</sup> Four days later, on July 18, 1980, Michael Polovchak enlisted the help of the Chicago police in locating his children.<sup>224</sup> Walter and Natalie were found by youth officers at the home of their cousin.<sup>225</sup> The two chil-

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<sup>220</sup> On August 17, 1983, *In re Polovchak* was revisited. Andrei Berezhkov, the 17-year-old son of a Soviet diplomat ran away from the apartment of his parents in a Maryland suburb. At the same time, President Reagan and the New York Times received letters signed by the minor stating his hatred for his country and his wish to remain in the United States. However, since the minor subsequently returned to his parents voluntarily, the issue of whether a minor can apply for asylum over his parents' objections was not addressed. The legal questions begging consideration exist in a

shadowy area where domestic law conflicts with international law, where some domestic laws conflict with others and where legal questions themselves conflict with political considerations. . . . [These] legal questions, which combine diplomatic immunity, asylum and the rights of parents, are complicated, and legal authorities both inside and outside the Government agree that there is little precedent to guide their deliberations.

Shribman, *Soviet Youth: Cloudy Case*, N.Y. Times, Aug. 18, 1983, at A11, col. 1.

<sup>221</sup> 104 Ill. App.3d at 204, 432 N.E.2d at 875.

<sup>222</sup> American Civil Liberties Union's statement from Michael Polovchak (no date provided) [on file in the CLEV. ST. L. REV. office].

<sup>223</sup> 104 Ill. App.3d at 205, 432 N.E.2d at 875. Anna Polovchak's testimony related: [O]n Monday, July 14, 1980, she returned home from work at approximately 4:00 p.m. and saw her nephew . . . all of her children [sic], a man named George and another man. She saw her children removing their belongings and asked her nephew . . . "What are you doing? Where are you taking them?" . . . Her nephew then said to her daughter "What [sic] are you listening to her? Lets [sic] go." Her children left with their cousin and the other adults. [The cousin's] friends . . . helped to move her [children's] belongings out of the Polovchak home. The children did not spend any nights in the family home after that date.

Respondent-Appellant's Brief at xiv-xv, *In re Polovchak*, 104 Ill. App.3d 203, 432 N.E.2d 873 (1981), *aff'd*, Nos. 56552, 56572 (Ill. May 27, 1983) (transcript pages omitted) [hereinafter cited as Appellant's Brief].

<sup>224</sup> 104 Ill. App.3d at 204, 432 N.E.2d at 875.

<sup>225</sup> *Id.*

dren were not returned to their parents, but were held in custody that evening following consultations by police with the Department of State and a juvenile court judge.<sup>226</sup> The following morning the Polovchaks appeared in juvenile court.<sup>227</sup> Petitions were filed for adjudication of wardship, in which Walter and Natalie<sup>228</sup> were alleged to be "beyond the control of their parents and thus minors in need of supervision."<sup>229</sup>

Temporary custody of Walter Polovchak was procured by the court despite the following circumstances:

1) Anna and Michael Polovchak (the parents), unable to speak English, were without court-appointed counsel;<sup>230</sup>

2) the minor, Walter Polovchak, was provided with two court-appointed attorneys (one acting as guardian ad litem);<sup>231</sup>

3) following a conference between the state's attorney and the guardian ad litem, agreement was reached over the parents' objections to an order of temporary custody;<sup>232</sup> and

4) no testimony<sup>233</sup> was taken prior to the trial judge's ruling<sup>234</sup>

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<sup>226</sup> Appellant's Brief, *supra* note 223, at xi. Sergeant Leo Rojek, the youth officer assigned to the case, provided the following report:

Upon arriving at Area 5 Youth Division, Walter Polovchak was processed as an unreported runaway . . . . During the processing the youth stated that his father is attempting to return to Russia, but he refused to return and wished to remain in this country. At that point, Special Agent Patrick O'Hanlon, U.S. Department of State . . . was contacted and informed of the circumstances. He informed the undersigned that he would get in touch with the Office in Washington and request advice on what to do with the case. Mr. O'Hanlon returned the call and informed the undersigned that as per orders of Mr. Warren Christopher, Deputy Secretary of State . . . the child is not to be returned to the family and this was also confirmed with Mr. William Farand, Chief of the Soviet Desk . . . . Contact as [sic] made with Judge Peter Costa who recommended the child be detained overnight as a runaway. . . .

*Id.* at xi-xii.

<sup>227</sup> *Id.* at xii.

<sup>228</sup> Natalie is no longer a minor under state law; therefore, the appeal is not concerned with the finding adjudicating her a ward of the court. 104 Ill. App.3d at 204, 432 N.E.2d at 875 n.2.

<sup>229</sup> The petition alleged that:

Walter Polovchak, being a minor under 18 years of age, to wit: 12, is beyond the control of his parents in that he did on or about July 14, 1980, at 9:00 a.m. at Cook County, Illinois, absent himself from his home without the expressed consent of his parents in violation of [the Illinois Juvenile Court Act].

Appellant's Brief, *supra* note 223, at xii.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> The parents were not included in the conference nor was their objection that they "wanted to take their child home with them" heeded. *Id.* at xii-xiii.

<sup>233</sup> *Id.* at xiii. The guardian ad litem informed the court that the minor had been out of the custody of his parents since July 14, 1980. He did not inform the court that the minor had been staying with his cousin. *Id.*

<sup>234</sup> The trial judge granted temporary custody stating that the order was "by agreement."

removing the minor from the custody of his parents.<sup>235</sup>

An adjudicatory hearing<sup>236</sup> was held on July 30, 1980, at which time the parents were represented by counsel. Two motions were filed by the parents' counsel: 1) a motion to vacate the temporary custody order<sup>237</sup> of

*Id.* at xiii.

<sup>235</sup> Although one of the pre-printed findings of the court stated that "the minor respondent has in open court stated that he will not remain with his parents, guardian or custodian if this court released him, the only statement that Walter Polovchak actually made to the court on July 19, 1980, was that he understood English 'a little bit.'" *Id.*

<sup>236</sup> Four sections of the Illinois Juvenile Court Act which were in effect at the time of the *Polovchak* proceedings are relevant to an understanding of the decisions: 1) A minor otherwise in need of supervision is defined as: "any minor under 18 years of age who is beyond the control of his parents, guardian, or other custodian." ILL. ANN. STAT. ch. 37, § 702-3(a) (Smith-Hurd 1972) (amended 1983). The 1983 amendment provides in part that a minor requiring authoritative intervention includes "any minor under 18 years of age . . . who is . . . beyond the control of his or her parents, guardian or custodian, in circumstances which constitute a substantial or immediate danger to the minor's physical safety. . . ." *Id.* § 702-3(c) (Smith-Hurd Supp. 1983). 2) Allegations that a minor is otherwise in need of supervision must be supported by a preponderance of the evidence at an adjudicatory hearing. *Id.* § 701-4 (amended 1983); *Id.* § 704-6 (amended 1982). 3) If the court finds that the minor is a person in need of supervision and "that it is in the best interests of the minor and the public that he be made a ward of the court, the court shall adjudge him a ward of the court and proceed . . . to a dispositional hearing." *Id.* § 704-8(2) (amended 1983). 4) Under the Act, the minor and the parents have the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files and records, and to be represented by counsel. *Id.* § 701-20 (amended 1982).

The Polovchaks contended that "they were denied their right to a trial to contest the issue of whether Walter was beyond their control" because the trial judge, in "reliance on Walter's admission that he was beyond his parents' control, conducted a summary proceeding limited to the issue of whether there was a factual basis for the admission." 104 Ill. App.3d at 208, 432 N.E.2d at 877. The parents' objection to the guardian ad litem's admission for Walter that he was a minor in need of supervision was overruled. When the court, through an interpreter, questioned whether the minor understood this action the interpreter replied that the child understood. Appellant's Brief, *supra* note 223, at xiv. The parents argued that if the preponderance-of-the-evidence standard had been utilized, the court would not have concluded that Walter was beyond their control. 104 Ill. App.3d at 208, 432 N.E.2d at 877.

After the court heard the minor's admissions and the parents' objection to the continuance of the matter for a dispositional hearing, it determined to hold a hearing limited only to the question of whether there existed "a factual basis for the plea and if the plea was valid." Appellant's Brief, *supra* note 223, at xiv. The appellate court reasoned that although a review of the record shows that the trial judge did state that he was going to conduct a hearing to determine whether a factual basis for the plea existed . . . [and] the the judge preceded this remark with a statement that the hearing was an adjudicatory hearing . . . the state did in fact proceed with the presentation of evidence.

104 Ill. App.3d at 208, 432 N.E.2d at 877-78. The court reasoned that the "judicial comments highlighted by the Polovchaks should not be taken out of context." *Id.* at 208, 432 N.E.2d at 878.

<sup>237</sup> This motion stated that the parents had not been represented by counsel at the July 19, 1980 hearing and had been unable to present testimony. Appellant's Brief, *supra*

July 19, 1980 along with a request for a rehearing; and 2) a motion to dismiss the proceedings based on constitutional grounds.<sup>238</sup> The court declined to rule on the motion to dismiss and denied the motion to vacate.<sup>239</sup> Following oral argument, the court adjudged Walter a ward of the court.<sup>240</sup> The parents' motion to dismiss was argued and denied on September 3, 1980.<sup>241</sup> On November 5, 1980, the parents filed a notice of appeal from the adjudication of wardship, pursuant to Rule 662 of the Illinois Supreme Court.<sup>242</sup>

The Appellate Court of Illinois reversed the judgment of the Circuit Court of Cook County, holding that:

1) the Polovchak parents had received a full, fair and proper hearing;<sup>243</sup>

2) "the trial court's determination that [the minor] was beyond the control of his parents was against the manifest weight of the evidence";<sup>244</sup>

3) "the minor's single act of leaving the family residence after learning of his parents' decision to return to their homeland . . . was not sufficient to bring him within the jurisdiction of the court";<sup>245</sup>

4) because the minor had been living with his cousin and his sister, he was not placed in a situation of such grave danger that he required care and guidance from the state;<sup>246</sup> and

5) "Whether the minor may be entitled to political asylum in this country is an issue that should be decided by another forum."<sup>247</sup>

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note 223, at xiii-xiv.

<sup>238</sup> *Id.* at xiii. The constitutional violations alleged were: 1) the adjudication of wardship was an "unconstitutional interference by the State into the sanctity and privacy of the family"; 2) the Illinois minor-in-need-of-supervision statute was unconstitutionally vague; 3) the adjudication of wardship proceedings violated the parent's constitutional and statutory rights to a trial; and 4) the evidence adduced at trial was insufficient to adjudicate Walter a ward of the court. 104 Ill. App.3d at 204, 432 N.E.2d at 874-75.

<sup>239</sup> Appellant's Brief, *supra* note 223, at xiv.

<sup>240</sup> *Id.* at xxx.

<sup>241</sup> *Id.*

<sup>242</sup> The Illinois Supreme Court Rule 662 provides in part: "(a) Adjudication of Wardship. An appeal may be taken to the Appellate Court from an adjudication of wardship in the event that an order of disposition has not been entered within 90 days of the adjudication of wardship." ILL. ANN. STAT. ch. 110A, § 662 (Smith-Hurd 1976).

<sup>243</sup> 104 Ill. App.3d at 208-09, 432 N.E.2d at 878.

<sup>244</sup> *Id.* at 210, 432 N.E.2d at 879.

<sup>245</sup> *Id.* Under the Illinois statute a single act can be sufficient to establish that a minor is beyond the control of his parents if the act causes serious harm or points to grave danger. However, the appellate court found that Walter's behavior was not sufficiently serious to warrant a finding that he was beyond his parents' control. *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

On March 23, 1982, rehearing was denied and a notice of appeal to the Illinois Supreme Court was filed by the Cook County State Attorney's Office.<sup>248</sup> On May 27, 1983, the Supreme Court of Illinois affirmed the judgment of the court of appeals,<sup>249</sup> basing its decision on several grounds. First, the original order removing Walter from the custody of his parents, which included a finding that the matter was of immediate and urgent necessity for Walter's protection, was not supported by evidence in the record.<sup>250</sup> The minor,<sup>251</sup> the parents, and any of the witnesses who were able to give relevant testimony were not examined.<sup>252</sup> It was also unclear from the record whether the court had been aware at the initial hearing that Walter had been staying with his cousin and older sister rather than at large in the city of Chicago.<sup>253</sup> Second, the court noted that it had not previously construed the phrase "beyond the control" of one's parents and that the legislature had not further defined or explained that term in the Juvenile Court Act. Thus, to the court, it seemed "manifest that the legislature could not have intended that phrase to include an isolated act by a 12-year-old minor which poses no hazard to him or anyone else."<sup>254</sup> Finally, the court concluded that Walter's actions, which could not be characterized as those of a runaway, failed to show that he was beyond parental control.<sup>255</sup>

Although the Supreme Court of Illinois determined that Walter should be released to the custody of his parents, this controversy was not thereby resolved. On July 19, 1980, the District Director of the INS, with the advice of the Department of State, granted Walter Polovchak's petition for asylum.<sup>256</sup> Additionally, on January 5, 1982, the INS entered a departure control order which prohibited Walter's departure from the United

<sup>248</sup> American Civil Liberties Union's Chronological Fact Summary at 8 (Jan. 20, 1982) [hereinafter cited as ACLU Summary] [on file in the CLEV. ST. L. REV. office].

<sup>249</sup> Nos. 56552, 56572 (Ill. May 27, 1983).

<sup>250</sup> *Id.* slip op. at 7-8. The purpose of the Juvenile Court Act "is to secure for each minor . . . such care and guidance, preferably in his own home, as will serve the moral, emotional, mental, and physical welfare of the minor and the best interests of the community; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal." *Id.* slip op. at 7 (quoting ILL. REV. STAT. ch. 37, § 701-2(1) (1979)) (emphasis added by court).

<sup>251</sup> Walter did not state, as the findings would seem to indicate, that he would not remain with his parents if released. Walter's obstinacy stemmed not from his opposition to being reunited with his parents, but rather from his desire not to return to the U.S.S.R. *Id.* slip op. at 8.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* slip op. at 8-9. In 1983, the relevant sections of the statute were amended. See *supra* note 236.

<sup>255</sup> Nos. 56552, 56572, slip op. at 10.

<sup>256</sup> *Id.* slip op. at 6. "Walter's status was subsequently changed to permanent resident alien." *Id.*

States.<sup>257</sup> According to the United States Attorney, any decision regarding the final custody of Walter will be determined by "the supremacy of the obligations of the United States under the Refugee Act of 1980 . . . and the international obligations of the United States under the United Nations Protocol Relating to Status of Refugees."<sup>258</sup>

A second court proceeding, *Polovchak v. Landon*,<sup>259</sup> was initiated on October 20, 1980, in the United States District Court for the Northern District of Illinois, by the plaintiff-parents against the defendant-District Director of the INS. The claim alleged unconstitutional conduct by the defendant in granting "religious" asylum to the minor Walter Polovchak.<sup>260</sup> The plaintiff-parents objected to the grant of asylum on several grounds: 1) Anna and Michael Polovchak, as natural parents of the minor, were entitled to notice of the application for asylum and an opportunity to object and be heard prior to a decision on the application;<sup>261</sup> 2) the unlawful grant of asylum violated the Polovchak parents' family integrity rights;<sup>262</sup> and 3) the grant of asylum was made solely be-

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<sup>257</sup> ACLU Summary, *supra* note 248, at 8. Originally, the Carter Administration publicly stated that its grant of asylum would not prevent the parents from leaving the country with Walter if they regained custody in the pending state court proceedings. *Id.* at 3. The Justice Department's position was seen as

a reflection of the traditional division of concerns between the state and federal government. Domestic issues, including parental custody and the general welfare of children, long have been left to the state courts, even when the issues arise in the context of an alien family. The INS, the Justice Department, the State Department and the federal court system are not designated by law, trained or supported by the professional resources required to deal with family problems.

*Id.* at 4. The decision of the Carter Administration indicated "its respect for the state court system's expertise to determine whether there were problems severe enough to warrant governmental intrusion affecting parental custody." *Id.*

On August 4, 1981, the United States Justice Department, under the Reagan Administration, also indicated that it would not interfere with the parents' right to leave the United States with their child if the state appellate court granted the parents custody. *Id.* at 6. However, the Reagan Administration reversed its decision on August 28, 1981, and decided to prohibit the possible return of Walter to his parents. The Justice Department pledged to intervene in the case and request that the court deny the parents custody of their son. *Id.* at 7. The Reagan Administration stated that "asylum bars the return of the child to the Soviet Union even if the state court returns custody to the parents." *Id.*

On October 16, 1981, the Justice Department granted Walter "permanent residency status" in the United States. *Id.* The INS issued the departure control order on January 5, 1982. *Id.* at 8.

<sup>258</sup> Nos. 56552, 56572, slip op. at 6.

<sup>259</sup> No. 80 Civ. 5595 (N.D. Ill. filed Oct. 20, 1980).

<sup>260</sup> ACLU Summary, *supra* note 248, at 3. Walter was not appointed a guardian at the asylum proceeding. "The U.N. Handbook on Procedures and Criteria for Determining Refugee Status states that a minor under 16 is presumed not to be competent to engage in an asylum procedure without the appointment of a guardian." *Id.*

<sup>261</sup> Plaintiff-parents' Complaint at 1-2, *Polovchak v. Landon*, No. 80 Civ. 5595 (N.D. Ill. filed Oct. 20, 1980) [hereinafter cited as Complaint].

<sup>262</sup> *Id.*

cause of the plaintiffs' intention to return with their children to the U.S.S.R.<sup>263</sup> Litigation regarding the asylum and departure control order is still pending in the federal court.<sup>264</sup>

### B. A Critique of the Polovchak Decisions

#### 1. Adjudication of Wardship: *In re Polovchak*<sup>265</sup>

Several factors undermine the *In re Polovchak*<sup>266</sup> decisions. First, the trial court's adjudication of wardship of the minor constituted a violation of the traditionally recognized right to sanctity and privacy within the family.<sup>267</sup> This fundamental right to family integrity has been held to encompass the rights to privacy and custody, as well as the right to make major family decisions such as the determination of the family's place of residence.<sup>268</sup> This broad body of rights has been characterized as being "as old and as fundamental as our entire civilization,"<sup>269</sup> as "essential,"<sup>270</sup> as "[r]ights far more precious . . . than property rights,"<sup>271</sup> and as being among the "basic civil rights of man."<sup>272</sup> The trial court's actions severely trespassed upon the family's right to privacy and autonomy. The Polovchak parents have been deprived of their child since July 19, 1980, and have lost the ability to make decisions affecting their son's future.

Second, the vagueness of the Illinois minor-in-need-of-supervision statute allows the state unlimited ability to intervene in the parent-child relationship.<sup>273</sup> This statutory vagueness allows state officials to exercise discretion arbitrarily.<sup>274</sup> The Illinois statute defines minors in need of supervision as those who are "beyond the control of their parents,"<sup>275</sup> yet fails to define the scope of the term or to set standards for its application. The Supreme Court in *Grayned v. City of Rockford*<sup>276</sup> outlined three dan-

<sup>263</sup> *Id.*

<sup>264</sup> Nos. 56552, 56572, slip op. at 10-11; telephone interview with Richard Mandel, attorney for plaintiff-parents (Mar. 2, 1983).

<sup>265</sup> 104 Ill. App.3d 203, 432 N.E.2d 873 (1981), *aff'd*, Nos. 56552, 56572 (Ill. May 27, 1983).

<sup>266</sup> *Id.*

<sup>267</sup> See *supra* notes 11-39 and accompanying text.

<sup>268</sup> Respondent-Appellant's Reply Brief at 10, *In re Polovchak*, 104 Ill. App.3d 203, 432 N.E.2d 873 (1981), *aff'd*, Nos. 56552, 56572 (Ill. May 27, 1983) [hereinafter cited as Reply Brief].

<sup>269</sup> *Griswold v. Connecticut*, 381 U.S. 479, 496 (1976) (Goldberg, J., concurring).

<sup>270</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>271</sup> *May v. Anderson*, 345 U.S. 528, 533 (1953).

<sup>272</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). "Marriage and procreation are fundamental to the very existence and survival of the race." *Id.*

<sup>273</sup> The Illinois statute has recently been amended; however, the amendment provides parents only slightly more protection. See *supra* note 236.

<sup>274</sup> See *supra* notes 86-100 and accompanying text.

<sup>275</sup> ILL. ANN. STAT. ch. 37, § 702-3(a) (Smith-Hurd 1972) (amended 1983).

<sup>276</sup> 408 U.S. 104 (1972).



gers inherent in vague statutes:

First, . . . vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. . . . Third, . . . where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms."<sup>277</sup>

This reasoning was followed in the catalyst decision of *Alsager v. District Court*,<sup>278</sup> which invalidated an Iowa statute on vagueness grounds. The court recognized that subjective judicial determinations could lead to arbitrary and discriminatory practices.<sup>279</sup>

The Illinois statutory language—"beyond the control of his parents"—has no common law meaning, no statutory definition, and no prior judicial construction which could have apprised the Polovchak parents as to the nature of the control which was allegedly lacking.<sup>280</sup> The trial court's determination that the minor fit within the Illinois supervision statute evidences the arbitrary application of a vague statute. Walter Polovchak was not a runaway, never lacked food, shelter or appropriate care, and was never harmed or in any danger. At most, twelve-year-old Walter disagreed with his parents' desire to return to the Ukraine, and then traveled only a few blocks away to stay with his cousin and sister for five days. Yet, despite this isolated incident of a minor's leaving his home without parental consent, the trial court found a sufficient basis for obtaining temporary custody.

Third, the Illinois trial court failed to provide the Polovchak parents with the procedural safeguards of a civil trial as required by the Illinois Juvenile Court Act.<sup>281</sup> The adjudication of wardship was procured merely upon the minor's admission that he was "beyond the control of his parents."<sup>282</sup> The trial judge accepted the minor's admission over the parents' objections and proceeded to conduct a hearing limited to the consideration of whether a "factual basis for the plea" existed.<sup>283</sup> This specific

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<sup>277</sup> *Id.* at 108-09 (footnotes omitted) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Board of Pub. Instr.*, 368 U.S. 278, 287 (1961)).

<sup>278</sup> 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd in part per curiam*, 545 F.2d 1137 (8th Cir. 1976).

<sup>279</sup> *Id.* at 17-21.

<sup>280</sup> Reply Brief, *supra* note 268, at 26.

<sup>281</sup> ILL. ANN. STAT. ch. 37, § 701-4 (Smith-Hurd 1972) (amended 1983); *id.* § 704-6 (amended 1982) (providing that evidence must be supported by a preponderance of the evidence). See also ILL. ANN. STAT. ch. 37, § 701-20 (Smith-Hurd 1972) (amended 1982) (providing that parents have the right to be present, to be heard, to present evidence material to the proceedings, to cross-examine witnesses, to examine pertinent court files, and to be represented by counsel).

<sup>282</sup> Reply Brief, *supra* note 268, at 28.

<sup>283</sup> *Id.* at 30.

standard does not require a weighing of the evidence.<sup>284</sup> The use of a factual-basis standard for the plea rather than that of "evidence which will sustain a conviction" could be determinative of the outcome of the litigation.<sup>285</sup> The Illinois Juvenile Court Act expressly provides that allegations that a minor is otherwise in need of supervision must be supported by a preponderance of the evidence at an adjudicatory hearing.<sup>286</sup>

The appellate court and Supreme Court of Illinois failed to acknowledge the procedural deprivations experienced by the Polovchak parents and instead reached the erroneous conclusion that a "full and complete evidentiary hearing was conducted."<sup>287</sup> The appellate court indicated that after the minor's admission was entered, "[a]ll of the parties testified and were allowed to present witnesses and conduct thorough cross-examinations."<sup>288</sup> However, voluminous testimony at a lengthy hearing does not correct the inherent inadequacies in the procedure. Although the trial court heard a sufficient amount of testimony, it was still limited to a determination of whether a "factual basis for [the] plea" existed. Therefore, the minor was adjudged in need of supervision simply because the court could have reasonably concluded that a connection existed between the minor's conduct and the allegations of the petition.<sup>289</sup> This limited hearing allowed the institution of wardship "without the court actually considering the parents' ability to control their child."<sup>290</sup> This summary procedure deprived the Polovchak parents of the right to contest the factual issue of whether the child was beyond their control. Had the trial judge not employed this summary procedure, he would have been forced to consider the evidence which absolutely disproved this proposition. The minor left home only on one occasion, was always in the care of relatives, and his safety was not in jeopardy.

Recent amendments to custody termination statutes in a number of states reflect an increasing concern for the rights of parents in such proceedings.<sup>291</sup> Placing a more stringent burden of proof upon the state provides an additional safeguard for the parents' interest.<sup>292</sup> Moreover, a higher standard of proof protects the interest that both the child and the state share with the parents in maintaining a viable family unit and pre-

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<sup>284</sup> See *People v. Quick*, 24 Ill. App.3d 286, 289-90, 320 N.E.2d 335, 338 (1974).

<sup>285</sup> *Id.*

<sup>286</sup> ILL. ANN. STAT. ch. 37, § 701-4 (Smith-Hurd 1972) (amended 1983); *id.* § 704-6 (amended 1982).

<sup>287</sup> 104 Ill. App.3d at 208, 432 N.E.2d at 878.

<sup>288</sup> *Id.* The Supreme Court of Illinois determined that "neither the State nor Walter was prevented from presenting any evidence relevant to the determination of whether Walter was beyond his parents' control." Nos. 56552, 56572, slip op. at 10.

<sup>289</sup> See *People v. Ginder*, 26 Ill. App.3d 295, 299, 324 N.E.2d 703, 706-07 (1975).

<sup>290</sup> Reply Brief, *supra* note 268, at 34.

<sup>291</sup> Bell, *supra* note 4, at 1065. See *supra* note 236 (current amendment to Illinois termination statute).

<sup>292</sup> Bell, *supra* note 4, at 1083; see Note, *supra* note 5 at 694.

vents an erroneous decision from terminating parental rights.<sup>293</sup>

In *Santosky v. Kramer*,<sup>294</sup> the Supreme Court recognized the vital nature of parents' interests in termination proceedings and provided them increased procedural protection. *Santosky* held that due process requires the proof of allegations supporting termination of parental rights by at least clear and convincing evidence.<sup>295</sup> This new standard increased the burden which previously could be met by a fair preponderance of the evidence.<sup>296</sup> The Court reasoned that a higher burden of proof would serve to reduce the possibility of erroneous terminations and could only serve to further the interests of all parties concerned.<sup>297</sup>

Finally, the evidence adduced at trial was not sufficient to adjudicate Walter Polovchak a ward of the court. The Illinois Juvenile Court Act requires that two findings be made prior to such an adjudication: 1) the child is beyond the control of his parents;<sup>298</sup> and 2) it is in the best interests of the child and of the public that he be made a ward of the court.<sup>299</sup> Although "beyond the control" is not defined within the statute, the phrase most likely was intended to mean more than temporary disobedience. Most state statutes seem to require significant, habitual, or related behavior,<sup>300</sup> not merely one isolated act. Furthermore, the testimony of an expert witness substantiated the fact that Walter was not beyond his parents' control. Dr. Littner testified that the child's actions indicated "defiance and rebellion, rather than independent judgment."<sup>301</sup> He contended that Walter's actions were not those of the usual runaway, who disappears without parental knowledge of the child's whereabouts.<sup>302</sup> Walter's actions were instead characterized by Littner as a provocation "of the parents in order to elicit some kind of response."<sup>303</sup>

Furthermore, the evidence was insufficient to establish that adjudication of wardship was in the best interests of the minor or of the public. Dr. Littner testified that the minor's conduct was not a danger to the

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<sup>293</sup> *Id.* at 1106.

<sup>294</sup> 455 U.S. 745 (1982).

<sup>295</sup> *Id.* at 769.

<sup>296</sup> *Id.* at 749 (35 states, the District of Columbia, and the Virgin Islands currently specify a standard of proof higher than a "fair preponderance of the evidence").

<sup>297</sup> *Id.* at 755-58.

<sup>298</sup> ILL. ANN. STAT. ch. 37, § 702-3(a) (Smith-Hurd 1972) (amended 1983).

<sup>299</sup> *Id.* ch. 37, § 704-8(2) (amended 1983).

<sup>300</sup> See *In re D.J.B.*, 18 Cal. App. 3d 782, 96 Cal. Rptr. 146 (1971) (a single incident is not sufficient to prove child is beyond parents' control); *In re Price*, 94 Misc. 2d 345, 404 N.Y.S.2d 821 (1978) (child who ran away from home to stay with her grandparents for six months was not beyond her parents' control); *In re Reyaldo R.*, 73 Misc. 2d 390, 341 N.Y.S.2d 998 (1976) (isolated incident is not sufficient; petition must allege specific acts, terms, dates and frequency).

<sup>301</sup> Appellant's Brief, *supra* note 223, at xxvii.

<sup>302</sup> *Id.* at xxviii.

<sup>303</sup> *Id.*

public, but that the separation of the child from his parents could result in psychologically irreversible harm to the child.<sup>304</sup> He further asserted that a twelve-year-old child does not possess the intellectual or emotional capacity to determine whether he should reside with his parents.<sup>305</sup>

The parents' intention to return to their homeland should not be used to support an adjudication of wardship. Few families provide an "ideal environment."<sup>306</sup> The fact that parents are less than perfect should not justify intervention. In the celebrated case of *In re Kozmin*,<sup>307</sup> the court considered the child's best interests and supported the view that absent a showing of "unfitness," parents should not be deprived of the custody of their children. The four Kozmin children were declared dependent and placed in foster homes after both parents had been committed to a state mental hospital. Upon successful treatment and release, the parents petitioned the court to regain custody of their children so that the family could return to its native country, the U.S.S.R.<sup>308</sup> In awarding custody to the parents, the court stated:

As we respect race and creed, so under our principles of democracy we respect the creed of the individual. Creed is defined as belief, faith, religion, philosophy. If natural parents are to have their children, then they must have the right to care, educate and train them. We cannot, therefore, substitute our beliefs or restrict their limits of education and training so as to fit our standards.

. . .  
The mere fact that somewhere else greater opportunities may be available to the children does not appeal to the law. The divine injunction to multiply and replenish was not confined to the rich . . . . to recognize such a doctrine would be little less than monstrous and would be in utter disregard of the natural instincts of love, care and interest found in the breast of the parent  
. . . .<sup>309</sup>

## 2. Grant of Asylum: *Polovchak v. Landon*<sup>310</sup>

For several reasons, the grant of asylum to the minor, Walter Polovchak, constituted an abuse of discretion. First, granting asylum to the minor infringed upon the parents' constitutional right to family unity.<sup>311</sup> The Polovchaks, as natural parents of the minor, were entitled

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Wald, *supra* note 4, at 1004.

<sup>307</sup> No. 220638 (Ill. Fam. Ct. 1959) (Decretal order).

<sup>308</sup> *Id.* slip op. at 6.

<sup>309</sup> *Id.* slip op. at 8.

<sup>310</sup> No. 80 Civ. 5595 (N.D. Ill. filed Oct. 20, 1980).

<sup>311</sup> See *supra* notes 11-39 and accompanying text.

to notice of the application for asylum and an opportunity to be heard prior to a decision on the application.<sup>312</sup> Failure to provide these procedural safeguards deprived the Polovchak parents of their right to due process of law. This basic right of due process includes the opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>313</sup> The greater the magnitude of the right at stake, the more stringent must be the procedural safeguards surrounding that right.<sup>314</sup>

The highly improper grant of asylum by the District Director of the INS violated the integrity of the Polovchak family and deprived the parents of their child and of the concomitant responsibility for making and participating in the major decisions affecting their child's life. There exists "a presumption that the parental right to care and custody of children is good as against all the world unless that right is forfeited. . . . [If we] deprive worthy parents of their natural right to the custody of their children, where they have not forfeited that right, [then] . . . [we have] undermine[d] the home."<sup>315</sup> Absent parental unfitness, the family unit must be kept intact. From the time of Walter's birth to the date of the asylum application, the Polovchak parents had fully provided for the health and well-being of their son.<sup>316</sup> As a result of the action of the District Director, the Polovchaks have unjustifiably suffered the alienation of their child and the disintegration of their family.<sup>317</sup>

Second, the grant of asylum to the minor reflected a discriminatory attitude toward the Polovchak parents solely because of their desire to return with their son to the U.S.S.R. This discrimination was evidenced by the tremendous publicity<sup>318</sup> and public outrage created since the initiation of *In re Polovchak*.<sup>319</sup> The petition for asylum alleged that the minor was a Baptist and that on return to his home country he would be subject to "persecution"; prevented from obtaining higher education; considered

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<sup>312</sup> Complaint, *supra* note 261, at 1.

<sup>313</sup> *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (failure of mother and her successor husband to notify divorced father of pendency of proceedings to adopt daughter deprived father of due process).

<sup>314</sup> *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958).

<sup>315</sup> *In re Kozmin*, No. 220638, slip op. at 4 (Ill. Fam. Ct. 1959) (Decretal order).

<sup>316</sup> Complaint, *supra* note 261, at 4.

<sup>317</sup> Presently, Michael and Anna Polovchak have returned to the Ukraine. They are living in Lvov and communicating with A.C.L.U. attorneys on a weekly basis, trying to regain custody of their son. Walter is now 15 years old and is living with foster parents. ACLU Summary, *supra* note 248, at 8.

<sup>318</sup> Numerous newspaper articles and editorials have debated the merits of this controversy. *E.g.*, L.A. Times, Sept. 7, 1981, at 1; The Cleveland Plain Dealer, Jan. 15, 1981, at 1-B, col. 1. Additionally, the Supreme Court of Illinois indicated in its opinions that "we do not doubt that the multiple litigation and controversy surrounding this case have also adversely affected what should otherwise have been a prompt determination regarding Walter's custody." Nos. 56552, 56572, slip op. at 7.

<sup>319</sup> 104 Ill. App.3d 203, 432 N.E.2d 873, *aff'd*, Nos. 56552, 56572 (Ill. May 27, 1983).

suspect; restricted in mobility; and denied his freedom of worship.<sup>320</sup> Although documented evidence demonstrated that Baptists in the Soviet Union are persecuted for practicing their religious beliefs,<sup>321</sup> the sincerity of the state's application for "religious" asylum on behalf of the minor is highly questionable. The facts indicated that the minor was raised as a Ukrainian Catholic and did not begin to attend a Baptist church until after he was removed from his parents' custody.<sup>322</sup> Additionally, the minor, due to his emotional and intellectual development, was not capable of understanding the issues raised in requesting a grant of asylum.

Third, a double standard based on foreign policy considerations has substantially affected immigration practice.<sup>323</sup> A traditional Cold War bias "automatically characterizes aliens fleeing communist nations as bona fide refugees."<sup>324</sup>

Finally, the courts have considered the related issue of whether a citizen-minor has the right to a stay of a deportation order against his alien parents based on grounds of the minor's right to remain in the United States. The minor's contention that denial of the deportation stay deprives him of constitutional rights has consistently been rejected.<sup>325</sup> It has been held that the minor-citizen's due process rights are not violated by his failure to be made a party to the proceedings.<sup>326</sup> The contention that a child of deported aliens is deprived of equal protection of the laws because he is denied a standard of living and education afforded other citizens has been equally rejected.<sup>327</sup> Furthermore, deportation of the parents

<sup>320</sup> Amicus Curiae Brief at 3, *Polovchak v. Landon*, No. 80 Civ. 5595 (N.D. Ill. 1980).

<sup>321</sup> *Id.* at 3-4.

<sup>322</sup> ACLU Summary, *supra* note 248, at 2.

<sup>323</sup> Note, *supra* note 6, at 551. See generally Note, *supra* note 173, at 107.

<sup>324</sup> Note, *supra* note 6, at 551.

<sup>325</sup> See, e.g., *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (deportation of alien parents has little effect on a minor citizen since child may exercise right of choice of residence upon reaching age of discretion); *Gonzalez Cuevas v. I.N.S.*, 515 F.2d 1222, 1224 (5th Cir. 1975) (alien parents who illegally remain in this country for birth of their child do not thereby obtain any extraordinary rights); *Cervantes v. I.N.S.*, 510 F.2d 89, 91 (10th Cir. 1975) (deportation of alien parents had only incidental impact on minor); *Cortez-Flores v. I.N.S.*, 500 F.2d 178, 180 (5th Cir. 1974) (allegation that aliens are parents of children born here is alone insufficient to save them from deportation); *Enciso-Cardozo v. I.N.S.*, 504 F.2d 1252, 1253 (2d Cir. 1974) (an infant's status as a citizen and his dependence on his alien parents does not prevent deportation of the alien parent); *Perdido v. I.N.S.*, 420 F.2d 1179, 1181 (5th Cir. 1969) (minor child born fortuitously in United States to his parents' decision to reside in this country has not exercised a deliberate decision to make this country his home); *Martinez v. Bell*, 468 F. Supp. 719, 727 (S.D.N.Y. 1979) (deportation of minor citizen does not deprive child of any constitutional right despite fact that such action may result in de facto departure of the child).

<sup>326</sup> *In re Armoury*, 307 F. Supp. 213, 216 (S.D.N.Y. 1969) (minor citizen was not entitled to notice or hearing regarding deportation order of parents).

<sup>327</sup> *Id.* at 216. Another equal protection argument, that the detriment suffered by the child on account of the alien status of his parents amounts to discrimination based on alienage, was rejected in *Acosta v. Gaffney*, 413 F. Supp. 827, 830 (D.C.N.J. 1976), *rev'd on other*

does not result in de facto deportation of the citizen-minor, since the right to exercise a choice of residence is purely theoretical, and upon reaching the age of majority, the minor may if he chooses, return to the United States to live.<sup>328</sup> These decisions recognize that the minor's interest in remaining in the United States is afforded a lesser protection than that of a similarly-situated adult. The decisions support the tendency toward placing a high value on the parental right to care and custody of the child, wherever the parent resides.

#### IV. RECOMMENDATIONS

The *Polouchak* controversy accentuates the lack of existing guidelines applicable to minors within the asylum process. When the vital and interwoven interests of parent,<sup>329</sup> minor,<sup>330</sup> and state<sup>331</sup> clash with the further competing interests in asylum,<sup>332</sup> the lack of clear guidelines make possible the discriminatory and abusive application of the law. Within the family context, vague intervention statutes with a focus on parental conduct rather than on harm to the child allow unnecessary state interference within the protected family unit.<sup>333</sup> This statutory vagueness permits arbitrary and ad hoc intervention decisions by state officials. Similarly, the absence of explicit asylum standards designating the type of evidence sufficient to constitute "persecution,"<sup>334</sup> coupled with the limited review<sup>335</sup> afforded decisions of the INS permits the imposition of selective determinations based upon foreign policy.<sup>336</sup>

When subjectivity, inherent in both the family and asylum contexts, permeates the decision-making process in a context where both interests are present, the potential for abuse and arbitrary application of the law is unlimited. To correct this structural defect, the present asylum process should be strengthened to provide procedural safeguards for the parents of a child who has petitioned for asylum. The fundamental right to the care and custody of one's children<sup>337</sup> should not be violated absent strict procedural protections. Procedural safeguards must be at their greatest when the interest at stake is so extremely significant.<sup>338</sup> An amendment

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grounds, 558 F.2d 1153 (3d Cir. 1977).

<sup>328</sup> 413 F. Supp. at 830.

<sup>329</sup> See *supra* notes 11-39 and accompanying text.

<sup>330</sup> See *supra* notes 40-64 and accompanying text.

<sup>331</sup> See *supra* notes 65-100 and accompanying text.

<sup>332</sup> See *supra* notes 101-218 and accompanying text.

<sup>333</sup> See *supra* notes 86-100 and accompanying text.

<sup>334</sup> Note, *supra* note 6, at 547.

<sup>335</sup> *Id.* at 560.

<sup>336</sup> See generally Note, *supra* note 6; Note, *supra* note 173.

<sup>337</sup> See *supra* notes 11-39 and accompanying text.

<sup>338</sup> See *Speiser v. Randall*, 357 U.S. 513, 520-21 (1958) (recognizing that the more important are the rights at stake, the greater must be the procedural protections surrounding

to current asylum law would ensure that the following safeguards were accorded the parents of a minor petitioning for asylum: 1) notice of the minor's petition; 2) a hearing providing an opportunity to present evidence material to the proceedings and to object to the allegations *prior* to a decision upon the application; and 3) representation by counsel.<sup>339</sup> Absent these procedural protections, considerations other than the immediate welfare of the family may enter into the decision-making process.

## V. CONCLUSION

The grant of asylum to a minor requires consideration of the various interests concerned. Of equal importance are the interconnected interests of the parent, minor, and state, and the competing interest of freedom from "persecution." When clear guidelines do not exist, arbitrary application of the existing law is possible. The *Polouchak* controversy illustrates that abuse can occur in the absence of precise standards. To prevent the future occurrence of a similar incident, revision of the current asylum process is necessary.<sup>340</sup> A provision establishing strict procedural safeguards for parents whose children petition for asylum would serve to correct the present structural deficiency and further protect the essential interests of all parties concerned.

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those rights).

<sup>339</sup> Although the Supreme Court in *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 31-34 (1981), recently determined that counsel need not be provided to indigent parents in termination proceedings, this author believes that because of the serious consequences of a termination decision, counsel is a necessity. An unrepresented parent lacks the skill necessary to cross-examine witnesses, present evidence on his behalf, and utilize the rules of evidence and procedure applicable to the hearing. See Bell, *supra* note 4, at 1096-97.

<sup>340</sup> There exists the possibility that the issue of the grant of asylum will be moot if Walter reaches the age of 18 before the federal court proceedings are resolved.



