April 2, 2013

The Case for Mexican Asylum Seekers Fleeing Cartel Violence

Perry B Nava, Barry University

Available at: https://works.bepress.com/perry_nava/1/
The Case for Mexican Asylum Seekers Fleeing Cartel Violence

Perry Nava

Barry University

Refugee and Asylum Law

Professor Birdsong

December 12, 2012
I. Introduction

Violence at the hands of the drug cartels is gradually turning Mexico into a literal war zone. Each day, more news of death and destruction wrought by the feuding drug organizations makes international headlines. Though initially concentrated near the U.S. border, many of Mexico’s largest hubs for tourism and trade are quickly becoming renowned as some of the most violent and dangerous cities in the West. To make matters worse, the violence has started to spill out past the bustling streets of Mexican metropolises, bleeding into smaller and more rural communities with no sign of losing momentum. Seizing trade routes is the main goal of most of the turf war between drug cartels and no regard is given to anyone who might be caught in the crossfire.

In an already ailing economy, cartels push the average worker up against a wall. For many of the working class, the only feasible means of earning enough to support their family is either through employment with cartels or by seeking work in the United States. Unfortunately, the legal hurdles for working legally in the United States prove to be too much for millions of Mexican nationals who wind up working under an undocumented status.

However, even if a person is lucky enough to find work that pays well enough in Mexico, the consistently escalating violence of the cartels puts the lives of that person and his family at a great deal of risk. This circumstance seems to be precisely the situation that asylum law is designed to protect against, but the complexities of American asylum law do not often protect asylum seekers in this predicament.

It is the goal of this research to explore how this perfect storm has developed, what legal provisions are currently applicable, how these provisions are typically applied, what
improvements might be made to extend relief to more people, and the pros and cons of doing so. The topics will be organized thusly: Part II will go over the bodies of law that protect persecuted people; Part III will explore the complex set of tangled conditions that have simultaneously contributed to increased migration to the United States and aggressive expansion by the drug cartels; Part IV will examine how the current laws applicable to asylum seekers translate to results in practice, as well as the benefits and drawbacks of widening the protection of asylum law; Part V will propose amended legislation influenced by a successful model already in place elsewhere; and part VI will review the main points and conclude. In order to properly understand the issues at hand, it will first be essential to examine the law in question.

II. What is Asylum?

The definition of a refugee has its origins in the 1951 Convention Relating to the Status of Refugees. It is here that the framework of what is still used today first appeared. The United States is not a party to the 1951 Convention, but is a party to the subsequent 1967 Protocol Relating to the Status of Refugees. The Protocol incorporates the same definition of refugee as the Convention and its provisions are eventually incorporated into the Immigration and Nationality Act by way of the Refugee Act of 1980. The applicable sections can today be found in two primary places in the Immigration and Nationality Act:

§101(a)(42) The term “refugee” means (A) any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to 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…

and §208(b)(1)(B) The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42). To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.³

The above two statutes each represent half of a two pronged, but multi-faceted test for applicants to fulfill when seeking asylum in the United States. The first prong is to determine whether the applicant fits the definition of a refugee under the statute and the second is to determine whether this refugee is actually persecuted.

With regard to the first prong, first the applicant’s fear of persecution must be well-founded. Second, the grounds for said persecution must fall under one of the protected categories including race, religion, nationality, membership in a particular social group, or political opinion. Last, the applicant must prove to be unwilling or unable to return or avail himself of the protection of his country of origin.⁴

The second prong is perhaps most problematic with regard to the interpretation of persecution. Case law has fleshed out the term to mean “harm or suffering that is inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”⁵ However, even this definition of persecution leaves much to be desired because it seems to vest so much power in the discretion of the courts.⁶

Yet another significant body of law to consider when analyzing cases of American refugee and asylum law is the United Nations Convention Against Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment (CAT). The CAT has a nonrefoulement provision in its Article 3 that reads as follows: “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

The CAT goes on to further define torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.

In Kamalthas v. INS, the court held this to mean that “[T]o be eligible for relief under the Convention, a petitioner must show ‘that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.’” It went on to further state that “coverage [under the Convention] is broader because a petitioner need not show that he or she would be tortured ‘on account of’ a protected ground; it is narrower, however, because the petitioner must show that it is ‘more likely than not’ that he or she will be tortured, and not simply persecuted upon removal to a given country.”

A unique and noteworthy point of the CAT is that its nonrefoulement provision doesn’t exclude anyone. Even terrorists and felons can seek its protection, and the applicant need not be one of the five protected grounds covered in the INA. However, its application to the situation presented by Mexican asylum seekers fleeing cartel violence is that the torture from which an

---

8 Id. at 449.
9 Kamalthas v. INS, 251 F.3d 1279, 1283 (9th Cir. 2001).
10 Id.
applicant is fleeing might not be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” This has the potential to be especially hard to argue because of the Mexican government’s highly publicized war against the drug cartels.

Another factor that makes the outcome of asylum cases in these circumstances is the fact that four different bodies decide the cases. Asylum offices, immigration courts, the Board of Immigration Appeals, and the United States courts of appeals all weigh in when it comes to deciding who is granted asylum. With the broad stroke of authority granted to the discretion of these bodies, it is plain to see how the variable of different people can result in seemingly inconsistent outcomes.

III. The Problems in Practice

Because of the complex sociopolitical and socioeconomic ties between the two subjects, it is impossible to fully understand the issues surrounding Mexican asylum without framing it in the context of Mexican immigration as a whole. The most compelling concern against widening the doorway for asylum is that there will likely be more applicants who file asylum claims even though their circumstances may not have merit. While discourse around the matter in Washington may begin with asylum law exclusively, any discussion eventually leads to American immigration reform. The vast number of individuals crossing the Mexican-American border without documentation makes asylum inherently and inseparably linked to the issue of immigration at the same time. In the words of Adam Isacson, senior associate for regional
security policy at the Washington Office on Latin America,11 “You start the conversation talking about Mexicans under threat, and you end up talking about SB 1070.12”13

Adding in the element of drug cartel cartels further tangles an already convoluted web of problems. The demand in the United States for drugs procured by Mexican cartels is what generates such a tremendous profit for organized crime. Despite the conceivably best intentions of American drug laws, it is ironically the illicit nature of these substances that so greatly increases their value on the black market. Thus, an argument exists for a reconsideration of the current approach to drug legislation; but any such debate would be burdened by the necessary overlap of immigration reform. Peter Katel, a writer for a prominent Hispanic American culture magazine called Poder, puts it thusly: “[N]either the Obama administration nor Republican or Democratic congressional members show interest in challenging the ‘drug war’ paradigm, especially if immigration policy is involved.”14

While the reform of American drug law is beyond the scope of this research, understanding the broader role of those laws in the cartels’ rise to power is quite relevant. If it is cartel violence that causes asylees to flee Mexico for America by any means necessary, then it is worth understanding how cartels have the resources for such large scale violence. Furthermore,

12 SB 1070 refers to the Arizona law that “which requires police to determine the immigration status of someone arrested or detained when there is ‘reasonable suspicion’ they are not in the U.S. legally.” Arizona’s SB 1070, American Civil Liberties Union, http://www.aclu.org/arizonas-sb-1070 (last visited Nov. 15, 2012).
14 Id.
it is important to first consider Mexican immigration as a whole before examining how asylum fits into the equation.\textsuperscript{15}

Undocumented Mexican Immigration into the United States is not a new phenomenon, but relatively recent political developments have led to a gradual increase in numbers of this occurrence.\textsuperscript{16} One significant factor in the economic decline in Mexico and, consequently, some of the ensuing Mexican immigration to America may have been the policies of NAFTA. In 1994, the implementation of NAFTA subsidized American farmers who were in direct competition in the market with Mexican farmers.\textsuperscript{17}

The result and impact of these policies is well documented. In 2000, the United States subsidized the corn sector to the tune of $10.1 billion. Charges of dumping, which destabilized the entire Mexican agricultural industry, soon followed. Dumping is where a country’s agricultural industry produces far in excess of the demand of its economy. In turn, that country sells its excess product to other countries at prices that significantly undercut a buying country’s producers. Mexican farmers and rural communities were financially devastated by the low prices of competing American corn and the entire economy suffered.\textsuperscript{18} The effect of the failing farms in rural areas was twofold: the rate of unemployment in Mexico increased and, consequently, the number of laborers migrating to the United States in search of jobs also increased.\textsuperscript{19}

\textsuperscript{19} \textit{Historical Data Graphs per Year: Unemployment Rate}, Index Mundi, (last visited Nov. 16, 2012).
Estimates by economists state that one-sixth of the Mexican agricultural work force was displaced as a result of NAFTA. The shockwave of such a tremendous impact disrupted the functions of related sectors of the economy as well, further contributing to the rising unemployment rate.\textsuperscript{20} To illustrate this point in practice, Max Correa of the Central Campesina Cardenista, a left-leaning agricultural labor union, claims that “for every five tons of corn bought from foreign producers, one campesino [farmer] becomes a candidate for migration.”\textsuperscript{21}

Perhaps the most disturbing feature of NAFTA is that these ill effects may have been anticipated by the United States prior to their enactment. Before 1994, the Mexican border was relatively open and passing either way was not as much of a challenge as it is today. However, NAFTA took effect in 1994 and President Clinton began the militarization of the Mexican border that same year. While it is up for debate whether these two events are related, the timing of both would seem to suggest that the United States expected an influx of undocumented immigration.\textsuperscript{22} It is upon this backdrop of unemployment, growing poverty, and ensuing exodus that the stage was set for the illicit drug trade to flourish.

Mexico has always been a strategic trade route for illegal drugs and contraband because it connects Central and South American sources with North American buyers. A complex network of transport and trade developed during the 70s and 80s in large part due to Pablo Escobar’s empire of cocaine trade. In the early days, the then fledgling Mexican cartels were hired as independent contractors overseeing transportation and trade of the drugs moving from Columbia to the United States. However, as international (though, primarily American) pressure gradually increased on the Columbian drug cartels, more responsibility with regard to distribution and sale

\begin{itemize}
\item \textsuperscript{20} Noam Chomsky, \textit{Starving the Poor}, Khaleej Times, http://www.chomsky.info/articles/20070515.htm (last visited Nov. 19, 2012).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\end{itemize}
of the product was vested in the Mexican cartels. The Caribbean route into Florida eventually all but closed off and Colombian drugs traveled almost exclusively through Mexico.\textsuperscript{23}

By the late 1980s, the drug trade infrastructure through Mexico was firmly in place. Colombian cartels began to pay Mexican cartels in cocaine out of the sheer convenience it offered over cash. This step in the progression gradually made the Mexican cartels the primary cocaine dealers for the North American drug trade.\textsuperscript{24} With cocaine in hand, the Mexican drug cartels became more powerful and ruthless than their Colombian predecessors. While most of the cocaine still comes from Colombia, it’s the Mexican cartels that now call the shots. The relationship has shifted from that of the Mexican cartels as contractors hired by the Colombian Cartels to one where the Mexican cartels are outsourcing production to their Colombian source.

For supplemental cash and resources to operate the trade of cocaine and more lucrative drugs like heroin and meth, the Mexican cartels rely heavily on marijuana and poppy grown in the void left by the collapsed legitimate agricultural industry. Marijuana production alone increased by about 35\% over the previous year in 2010 and shows no sign of slowing down. Part of the problem is that marijuana sells for just enough more than corn to make it profitable to farmers. This profit margin increases the closer the source gets to the American border.\textsuperscript{25} The main reason for this is the fact that the United States is the largest consumer of drugs procured by the Mexican cartels. The closer the source is to the end user, the less the difficulty of transport. An estimated 90\% of the illegal drug trade is currently controlled by Mexican cartels.\textsuperscript{26}

\textsuperscript{24} Id.
\textsuperscript{26} Colleen W. Cook, \textit{CRS Report For Congress: Mexico’s Drug Cartels} 1 (2007).
The cartels have seized control of strategically located, substantial pieces of land for next to nothing where it has been abandoned or sold by farmers-turned-migrants. To make matters worse, some cartel-related drug farmers have even been able to collect government subsidies for their illicit farms.27 Large plots of land that were once used in legitimate agricultural output are now often peppered with poppies for the production of opiate drugs. These lands are typically run by farmers working for cartels or members of the cartels themselves. Because of the financial yield of organized crime in Mexico, the potential for what seems like a limitless cash flow translates to a potential for limitless corruption of authority. Consequently, these drug fields are usually guarded by either cartels or bribed members of the army.28

With so much profit at stake, Mexican cartels are prepared to fight tooth and nail to protect their share. In the late 1980s when the Institutional Revolutionary Party started to lose its majority in the Mexican government, a breakdown of implied treaties between the lawmakers and the cartels started. The result was a steady escalation in the violence perpetrated by the cartels.29 By the 2000s, the cartels began to commit high profile murders that started receiving significant media attention.

Despite the cartels’ origins reaching so far back, the Mexican Drug War was not officially underway until Mexican president Felipe Calderón took office in December of 2006. A mere 10 days after his inauguration, Calderón launched Operation Michoacan on December 11, 2006. This was an operation that involved both Mexican federal police and the Mexican military striking at known drug plantations and traffic routes. While at least 500 cartel members

were killed in the process, it also cost the lives of over 60 soldiers and 100 police officers.\(^{30}\)

Thus began the bloody war that still rages on today.

When the death toll started to climb, the Mexican people showed concern about this ironic increase in violence in the face of the “war” on the drugs; their president responded saying: "If you see dust, it is because we clean the house."\(^{31}\)

The Mexican government was stating that the increase in violence illustrates that their “war” strategy was forcing gangs to fracture and take on one another, which caused brutal and gruesome consequences. They also claimed that record amounts of drugs had been seized.\(^{32}\)

However, this claim seems to be at odds with the tried and true theory of supply and demand. The cost of cocaine in the United States, 95% of which is brought to the United States by Mexican cartels, is 74 percent cheaper than it was 30 years ago. The drop in market price for heroin and methamphetamine is similar. To further cement the foundation of the problem, the demand for these drugs has not decreased, which is usually what is needed in order for there to be a drop in prices. The usage has remained relatively the same over the last two decades. “This number [74% cheaper cocaine] contains pretty much all you need to evaluate the Mexican and American governments’ ‘war’ to eradicate illegal drugs from the streets of the United States… What it says is that the struggle on which they have spent billions of dollars and lost tens of thousands of lives over the last four decades has failed.”\(^{33}\) In summary, these figures spell out


that the drug demand has been constant, the price of cocaine has decreased, and the only number on the rise is the death toll.

The victims are not just grown men. Actually, no particular regard is given to age or sex. The killers are entirely indiscriminant and without conscience in their crimes. It is not uncommon that entire families turn up dead. Within about a week’s time in August, Reuters reported a rash of violent crimes at the hands of cartels. A family of seven, a family of five, a mayor and his campaign manager, a van of fourteen people outside the state capital, twelve in the neighboring Zacatecas state, five alleged drug dealers, and four federal police officers were all murdered that week. 34

The family of seven included three children whose ages were nine, seven, and three. They were found in their home when the neighbors started to smell their decomposing bodies from the street. 35 The family of five consisted of three women (one of whom was pregnant), a man, and a three year old. Another three year old found on the scene was the only survivor and even she suffered a bullet wound to her left eyebrow. 36 The cartel enforcers operate without any semblance of a conscience in order to further their financial interests at all costs.

Additionally, drug cartels have resorted to unsettlingly barbaric acts of violence in an attempt to intimidate rival drug traffickers as well as law enforcement. 37 For example, in May of 2012, authorities discovered 49 decapitated heads and mutilated body parts thrown along a section of highway in Monterrey, the capital city of the Mexican state of Nuevo León. A nearby


35 Id.


wall was adorned with a message taking credit for and relating the atrocity to the Zetas drug cartel.  

Torture and beheadings have become an almost a daily occurrence, but the level of absurdity to which cartels bring it is almost unbelievable. Another example is where a drug cartel cut up the body of 36-year-old Hugo Hernandez and sewed his face onto a soccer ball. As if this were not disturbing enough, the perpetrators went so far as to attach a note that read, “Happy New Year, because this will be your last.”

Unfortunately, decapitation has become an almost standard approach of the cartels. Five decapitated heads were placed outside of an elementary school when the teachers refused to hand over half of their salaries to drug cartel.

These criminal organizations seem to have adopted tactics from Islamic terrorists. The murders, which mostly always involve decapitation at some point, are videotaped and broadcasted worldwide. The internet allows them to publish their messages of intimidation and brutality. A quick Google internet search yields innumerable links to all kinds of gory, nightmare-inducing propaganda generated by these groups. Government officials say that high-profile revenge tactics like this can have a significant effect on morale and the ability to attract new recruits to crime-fighting efforts.

---

39 Paul Thompson, Mexico drug wars plumb new depths after gang kidnaps man, cuts him in seven pieces... then stitches his face on to a football, Daily Mail, http://www.dailymail.co.uk/news/article-1242243/Murdered-mans-face-stitched-football-warning-rival-drugs-gangs.html (last visited Nov. 16, 2012).
In October of 2012, Mexican officials state that more than 47,500 people have been killed in drug-related violence since the start of the Mexican War on Drugs in December of 2006. However, a CNN report stated that the number may be significantly understated.\(^{43}\) The National Institute of Statistics and Geography of Mexico reported that between 2007 and 2011, the total was closer to 95,632 homicides. On the basis of the trend in recent months, other estimates place the death toll as high as 120,000 homicides during the term of Calderón. This is more than double the number reported.\(^{44}\) To further muddle the facts, even this estimate may fall short of the reality.

The most recent breakdown in causes of death was reported in 2010 by The National Institute of Statistics and Geography of Mexico. Of those deaths, 38,117 were attributed to accidents; 25,757 to assaults; 5,012 to suicide; and 83,664 were categorized as “other causes.” It is worth noting that the category of “other causes” did not include known diseases or “unclassified lab findings.”

As for the 5,012 suicides, 3,847 of these were accomplished by hanging, strangulation, or suffocation. While a fair amount of murders at the hands of drug cartel are done as theatrically as possible (often with mutilated remains staged in macabre exhibitions on view for the public), it is also possible that some cartel hits would be made to appear to be an accident, suicide, or attributed to some “other [more discrete] causes.” Additionally, these numbers do not account for missing people who may have been killed and disposed of in circumstances that left an unsolved case.


\(^{44}\) *Id.*
Careful consideration of the homicide numbers that are reported by Mexican officials reveals significant discrepancies. For example, three years into the Mexican Drug War in 2009, Mexican officials reported the homicide rate at 5.16 per 100,000 people. In what could quite easily be interpreted as more than coincidence, the United States reported a homicide rate of 5.1 per 100,000 people in 2009. If taken at face value, these reports tend to suggest that Mexico, despite being under the siege of a high-profile and ongoing drug war, has the same per capita homicide rate as the United States.

Whether the statistic reported by the Mexican government is some sort of misinterpretation, oversight, or a deliberate effort to distort the actual number is unclear; but surrounding circumstances make it obvious that Mexican authorities seek to downplay the magnitude of the deaths associated with the drug war. “The Calderón administration announced earlier this year that it would not release further figures on estimates of killings related to organized crime (as flawed as they historically have been) until Calderón left office.”

Downplaying the death toll could, rather innocently, be from a debilitated police and military force. Another possibility is that it could be because the police, military, and politicians are in part, both passively and actively, responsible for the deaths. State and local forces, which employ 90% of Mexico's 430,000 officers, find themselves outgunned, overwhelmed and often purchased outright by gangsters. City cops killing their own mayors, state jailers helping

---

inmates escape, and officer assassinations because they work for gangster rivals are all too common in Mexico. 48

One of the surest signals that rivals are going to war over a particular community or smuggling route are the dumped corpses of cops discovered nearby. Many, if not most, of the officers are targeted because they work for one gang or the other. The police are “either unwilling or unable to squelch the lawless terror” that is claiming so many lives and destroying the quality of life for the rest. 49

Héctor Porras, 45, is seeking asylum for himself as well as 19 family members after two of their family members were murdered. “They – the police – are supposed to be here to protect us,” Porras said. “But while the store was being robbed and my brother shot, they were sitting outside and did nothing.”50 El Paso immigration lawyer Carlos Spector stated, “It’s not the Mexican government versus the cartels. It’s not the good versus the bad. It’s the local government versus the state government with their henchmen, it’s elements of the feds in one part of the country against elements of the feds in another. Just when you understand it...it changes.”51

Calderón and his administration, whether due to corruption or simply inadequacy, cannot be the only one blamed for the increase in violence. Phil Jordan, former director of the El Paso Intelligence Center, stated that "Calderón was the first Mexican president to openly declare war on the drug cartels.” Jordan went on to say, that Calderón “led a valiant effort to reign in the

49 Id.
drug-traffickers, with some assistance from the U.S. government, but it was not enough. The help Mexico received from us was piecemeal. We also failed when a botched operation like Fast and Furious allowed assault rifles to enter Mexico that were used to kill many innocents.”52

The Operation Fast and Furious to which Jordan referred was a now infamous stage of a large gun walking program implemented by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Operation Fast and Furious ran from before 2009 to as late as 2011. The idea was to try to flesh out the trade routes that firearms took once they were in the hands of the cartels by passing off specifically identified weapons. The ATF loosened the obstacles for cartels to purchase weapons from licensed arms dealers in the United States in order to get firearms into the black market. Similar to approaches commonly used in drug mapping stings, the ATF intended to track and observe the contraband they helped to procure until it reached the end user.53

The problem was that what worked for catching drug dealers did not necessarily work for catching arms dealers. Through a combination of mismanagement and mistake, the ATF lost track of more than 2,000 firearms that found their way into Mexico. Mexican officials, who were kept in the dark about the operations during their implementation, report finding ATF-supplied weapons at more than 170 crime scenes involving the cartels. However, the blunder did not receive widespread attention in the American media until two of the guns were found at the scene of the murder of a United States Border Patrol agent in Arizona in December of 2010.54

A Congressional investigation into Operation Fast and Furious revealed other similar gun walking programs attempted by the ATF. Unfortunately for Mexico, the damage had already been done. The United States effectively better armed an already uncontrollable criminal element in Mexico and the effects were now spilling back over the border.

Given the role that the United States has played in shaping the economic and, to no small extent, the criminal climate of Mexico, the response that the immigration courts has thus far given Mexican asylum seekers seems at odds with any sense of justice. The next section will examine how the United States has handled Mexican asylum seekers, some of the possible motivations for the policies governing Mexican asylum seekers, and counter arguments to those motivations.

IV. The American Response to Mexican Asylum Seekers

On their face, the statistics seem to make the United States very generous in its acceptance of people from other nations. According to the United Nations’ World Population Policies 2005, the United States accepts more than 20% of the total number of immigrants in the world. This number accounts for about 3 times what the closest competing country, Russia, allows. Among this percentage, the United States also continues each year to accept more asylees than any other nation in the world.56

However, the notion of a country welcoming “huddled masses yearning to breathe free” begins to feel slightly overstated upon closer inspection. While the number of immigrants from Mexico has gone up in the last four decades, so too has the population of the world. Thus, the proportional share of current Mexican immigrants is equal to or less than the influx from Germany and Ireland in the late 1800s. To phrase it another way, roughly the same proportional share of Mexican immigrants are coming into the United States as the proportional shares of previous immigrant groups who proved essential in building the nation. For a country founded by settlers and immigrants, it seems ironic at best to turn foreigners away; at worst, it is downright hypocritical.

Mexico has been the country of origin for the largest group of Hispanic immigrants in the United States, both documented and undocumented, since 1980. Of these immigrants, roughly 3,200 people sought asylum in the United States from drug cartel-related violence in 2010; but a mere 49 of those applications were granted. The number of asylum applicants is on the rise; last year, 6,100 people applied. Again, a meager 104 received relief.

One source of some of the most shocking statistics is the border city of El Paso, Texas. El Paso borders Ciudad Juarez, a Mexican border town in the state of Chihuahua. Because of its prime location on the drug trade route, Juarez is rather infamously in the throes of a turf war between feuding cartels. It has become renowned as one of the most violent cities in a country already burdened by its share of violent cities.

60 Id.
On one hand, the criminal activity would make El Paso a point of particular concern regarding who should be allowed into the country; on the other, the extreme level of violence would also make it a location that would generate a great number of legitimate claims for asylum from said violence. Transactional Records Access Clearinghouse (TRAC) reports on immigration judges covering 2006-2011 lists two judges in El Paso: Judge Thomas C. Roepke, who had a 96.7% rate of denial, and Judge William L. Abbott, who had a 74.6% rate of denial.\textsuperscript{61} Both of these judges’ denial rates seem high to begin with, but the great disparity between their rates is of particular concern. Such a wide difference between two judges in the same city suggests an excessive amount of discretion is vested in immigration judges. A system without a proper measuring stick will not produce consistent results.\textsuperscript{62}

Such broad discretion being left to the immigration judges often produces surprisingly counterintuitive results. One need not look further than the case of José Alfredo Holguín and his family. In 2008, 50 year old Holguín was a family man who ran a bus company in Ciudad Juarez. Despite operating an honest business, Holguín was continually harassed by La Linea, a subdivision of the Juárez Cartel. They extorted Holguín for the Mexican equivalent of about $400 a week.\textsuperscript{63} While it may not seem like much for a bus company to pay, this charge actually amounted to about 40% of Holguín’s revenue.\textsuperscript{64}

At union meetings, Holguín’s colleagues kept pressing for an organized opposition to the extortion charges they were forced to pay. Eventually, word of these discussions spread to La

\textsuperscript{61} Immigration Judge Reports – Asylum, TRAC Immigration, http://trac.syr.edu/immigration/reports/judgereports/ (last visited Nov. 14, 2012).
\textsuperscript{63} Id.
Linea, who quickly responded with death threats against Holguín and his family. The situation continued to escalate when La Linea burned one of the family’s company buses; but the cartel brought it to the next level in 2009 when they gunned down his then 23 year old son while he dined in a restaurant. Afterward, La Linea threatened to kill the rest of his family as well.65

According to Holguín, “The guys from La Línea have federal and local connections…We had to leave.”66 Despite seeking help, the consistent threats and violence against Holguín and his family went relatively unchecked by local authorities. When it became apparent to him that La Linea had officials on their payroll, he understood that it was time to leave Mexico.67

Holguín was aware that the road to asylum relief was a hard one, but as he stated, “We prefer to be jailed in the U.S. than to die in Juárez.”68 He gathered his surviving family members and fled to the United States. However, upon making it across the border, Holguín quickly began to understand that the United States was not so eager to extend asylum to him. He filed a petition for political asylum in El Paso and was denied.69

While the decision is appealable, the outcome remains difficult to predict. The broad judicial discretion involved in the decisions of immigration courts means that a petitioner is expected pitch a rock solid story that will sway the judge. With so many contributing factors

67 Id.
leading to the need for asylum, it can prove challenging to turn “this many-sided war into a coherent narrative that immigration judges accept.”

Even Carlos Spector, the El Paso region’s most experienced asylum law specialist, was taken aback by the denial of Holguín’s claim. Spector states that Holguín should have fallen under the umbrella of one of the protected categories outlined in the aforementioned law: “people who have been persecuted or fear persecution because of race, religion, nationality, political opinion or membership in a particular social group.” While the law on its face seems to be written specifically enough to be clear, the variable that disrupts consistent results is judicial discretion. As managing attorney for Las Americas Advocacy Center in El Paso, Jessica Anna Cabot, states, “The courts have enough discretion that they can exclude people they want to exclude.” In an ideal world, judges would approach each case without any personal bias; but the fact of the matter is that they too are human. A bright-line rule that does not leave so much room for judicial discretion would make case outcome more consistent and may also allow for more claims for asylum to be granted. Meeting the specific criteria of legislation without the interference of discretion seems easier than pleasing the whims of an immigration judge, but ready-made rules may not fit every case for which they are intended.

Perhaps the most common argument for keeping judicial discretion as part of the asylum process is so not to open the flood gates for asylum claims. In addition to the potential to overwhelm immigration courts, the possibility for those truly unworthy of asylum being still legally eligible for asylum rises. In the words of Ira Mehlman, a spokesman for the conservative-leaning Federation for American Immigration Reform, “The history has been once

71 Id.
72 Id.
people realize there is an avenue of getting into the United States, if you say certain magic
words, everyone starts using that.””73

American immigration lawyers along the Mexican border region speculate that “judges
have been reluctant to approve Mexican applications because they fear that granting asylum
could open the floodgates to tens of thousands more applicants.””74 With immigration court
dockets as clogged as they are at present, it is plain to see how such a large torrent of cases could
further burden a system that is stretched thin already.

Another reason that lawmakers may not be so eager to widen the existing protection of
asylum law is because of the political implications of accepting more Mexican applicants.
Mexico is a close American ally who benefits significantly from American contributions in the
drug war. Accepting potentially tens of thousands of refugees that could be inundating the
American immigration courts implicitly acknowledges that not only has the Mexican
government lost control of its country, but that the United States misappropriated resources to
Mexico’s lost cause. Vicki Gaubeca is the director of a legal aid program that operates under the
American Civil Liberties Union in New Mexico who speculates that “There may be concern by
the U.S. government that the minute they start accepting asylum applications as a result of
violence in Mexico that they’re declaring a failed state, and they don’t want to do that.””75

The problem with both the floodgate and the political arguments is that neither one
considers the human element. The cost of increased strain on the immigration system is

---

73 Molly Hennessy-Fiske, More Mexicans seek asylum in U.S. as drug violence rises, Los Angeles Times,
74 Ioan Grillo, Mexico’s Drug-War Refugees Seek Asylum, The Tucson Sentinel,
visited Nov. 16, 2012).
visited Nov. 16, 2012).
unfortunate, but should not be deciding. Likewise, the fallout of political officials swallowing their pride before the international community should not outweigh the value of human life. While 104 of the 6,100 asylum applications in 2011 may have been granted, the possibility that even a handful of legitimate applicants were overlooked suggests that some individuals may have been removed from the United States to meet their demise.76

The possibility that a free rider may sneak by the system if asylum protection is widened may exist; but if the amended law saves lives, then it seems worth the small risk. Besides, how much of a risk is created depends upon how greatly the law is tweaked. Since human rights have expanded so dramatically since the drafting of the 1951 Convention, it logically follows that the standard against which refugees are weighed should also expand.77 As outlined in the next section, it is possible to alter the current law such that help will still be available to those who need it without the potential for others to cheat the system in the way implied by Mehlman.

V. Proposed Amended Legislation

Rather than reinventing the proverbial wheel, it might be more beneficial to reshape modern American refugee and asylum law after a successful international model. One prime example is the Organization of African Unity’s 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (Also known as the OAU Convention). In addition to preserving the applicable parts of the 1951 Convention incorporated into the INA provisions, Article 1 of

the OAU Convention fills in gaps left to judicial discretion by the current standard. The portion that should be added to the current INA provisions protecting asylees reads as follows:

Article 1: …shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.\(^{78}\)

The part about “events seriously disturbing public order” is of particular relevance in the circumstance of Mexican asylum seekers who flee cartel violence.\(^ {79}\) The problem of judicial discretion as applied to the current standard is that applicants must assert their burden with a particularity that satisfies the subjective opinion of a judge. There is no meaningful curb to the discretion vested in these judges. The applicant must prove they will be subject to persecution or the well-founded fear of persecution for race, religion, nationality, membership in a particular social group, or political opinion; but whether the shelter of these categories will be extended to the applicant is almost wholly in the hands of the presiding immigration judge.

The OAU Convention removes some of this responsibility from the hands of individual judges by serving as a catch-all for asylees who are at risk of refoulment under the current interpretation of the law. At the same time, it doesn’t simply open the doors to everyone; the judge still has discretion, but it is simply limited.

Inconsistencies in the outcomes of asylum applications can be attributed to a number of different factors. The wide disparity in results seems to suggest that factors like where the petition is heard or which judge happens to be presiding may also contribute to the outcome.\(^ {80}\) However, even both of these factors seem like mostly irrelevant considerations in evaluating the

\(^{78}\) Id. at 11.  
\(^{79}\) Id. at 12.  
validity of a petition for asylum. If there is to be any uniformity in the decisions of immigration judges, their discretion will need to be checked a provision modeled after the OAU Convention.

VI. Conclusion

A great deal of responsibility accompanies being one of the most powerful nations in the world. The United States has an undeniably profound – even when indirect – influence on circumstances within foreign countries, but it must also learn to better anticipate the fallout that this influence creates. Approaches that, at first blush, seem to deal almost exclusively with domestic issues send ripples across the globe. Unfortunately, by the time those ripples reach some foreign countries, they will have gathered the momentum of tidal waves. It is no longer enough for the United States to merely look before leaping; it must also consider where to go after landing. Peering farther down the road is essential to shaping a body of law that will stand the test of time.

But the way the United States treats other nations is more than a matter of mere self-interest. Contrary to what Ayn Rand novels might have one think, good deeds are not always fueled by self-interest. As long as the United States enjoys its robust political status in the international community, there exists an ethical duty to set a strong example for other nations to follow. International policies that benefit an international community protect the interest of humanity as a whole.

The question of whether to offer asylum to a broader range of people should not hinge on what can be gained; furthermore, asylum should not treated as some sort of political bargaining chip. It may upset politicians from both countries if the United States is to regard Mexico as a
so-called “failed state” by broadening asylum protection. However, sometimes the right path is also the hardest one. Mexico has thus far been unable to reign in the cartel violence. Throwing money and resources into one end of a drug war while simultaneously feeding the other end with demand is contrary to all logical sensibilities. It is comparable to bailing water out of a sinking ship while filling it with a fire hose.

Even if the notion of America as an international role model is dismissed as lofty idealism, a basic understanding of right and wrong is an essential part of what separates people from animals. The United States has had a significant role in contributing to the set of circumstances in Mexico that is causing people to be driven from their homeland. It strikes the conscience as only fair that it should help mitigate the resulting damage. If the United States abandons a value as precious as justice in its dealings with other nations, humanity becomes little more than wolves fighting one another over scraps of meat.

As with any set of laws, there will be those who seek to exploit its loopholes to their own ends. It is likely that widening the doorway for asylum from Mexico will let some possibly undeserving individuals also claim asylum in the United States. This is regrettable and unavoidable; but the foreseeable result of continuing to deny most claims is even more disquieting.

No misconceptions should exist about the gravity of deporting a worthy but overlooked asylum applicant – to do so is undoubtedly refoulment. The American conscience is insulated from the brutal reality that denied asylees face. The rationalization is couched in palatable semantics lifted from the supposed legal standard of the INA provisions, but the real threat that many of these individuals face is certain death.
If lives will be lost because of a refusal to grant asylum to some, then there is an obligation to reexamine the laws that grant asylum. The prospect of innocent blood on American hands brings to mind Sir William Blackstone’s Formulation: “Better that ten guilty persons escape than that one innocent suffer.” Though Blackstone’s Formulation is mostly considered in the context of American Criminal Law, the concept of power’s responsibility to protect the innocent goes back as far as Abraham’s pleas to spare Sodom and Gomorrah in Genesis: “Wilt thou also destroy the righteous with the wicked?” If righteous are among the asylum seekers who are simply fleeing the violence of Mexican cartels, then the United States has a duty to accommodate them.