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DEMOCRATIC TRANSITIONS AND THE FUTURE OF ASYLUM LAW

PETER MARGULIES*

The United States's commitment to protecting refugees is dying a slow death. Two developments have contributed to its demise. The first, widely heralded, is the United States Congress's evisceration of procedural safeguards such as judicial review.[1] The second development is more insidious: expansion of the asylum law doctrine, which holds that changed country conditions can defeat an otherwise valid asylum claim.[2] In an age in which democracy seems triumphant throughout the world, the combination of severely curtailed judicial review and mechanical application of the changed conditions doctrine relegates refugees, as well as asylum law itself, to an uncertain fu-

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1. *See* 8 U.S.C. § 1252(b)(4)(D) (1994) (allowing judicial review of asylum determinations of the Attorney General only when such determinations are "manifestly contrary to the law and an abuse of discretion"); 8 U.S.C. § 1158(b)(2)(D) (1994 & Supp. III 1997) (barring judicial review of administrative decision that claimant is ineligible for asylum because of suspected terrorist activities); 8 U.S.C. § 1252(a)(2)(C) (1994 & Supp. III 1997) (barring judicial review of administrative decisions to remove persons from the United States because they have committed certain criminal offenses); *see also* Reno v. American-Arab Anti-Discrim. Comm'n, 525 U.S. 471 (1999) (holding that deportation proceedings pending at the effective date of Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, are subject to the 1996 Act's limitations on judicial review, unless otherwise provided for in the Act). For commentary discussing restrictions of judicial review in immigration proceedings, see, for example, David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481 (1998); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998); *cf.* STEPHEN LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA (1987) (discussing history of judicial review in immigration context). Under the abuse of discretion standard in the new judicial review provisions, most asylum decisions will become the virtually exclusive preserve of an agency in the Department of Justice—the Board of Immigration Appeals ("B.I.A.")—operating without effective guidance from the federal courts.

2. *See* DEBORAH ANKER, LAW OF ASYLUM IN THE UNITED STATES (5th ed. 1999); GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 84–87 (1996).

ture.[3] This article argues that the rise of the changed country conditions doctrine stems from judicial and administrative confusion about both the role of both "subjective" and "objective" factors in asylum law and the nature of democratic transitions.

Asylum law traditionally has incorporated both "subjective" and "objective" elements in an uneasy equipoise. Self-styled champions of objectivity, or proponents of what I call here the formalistic view, tend to defer to existing power relations in asylum and foreign policy. Formalists take their cue from the positions of the United States State Department, which historically has been hostile to refugees and has soft-pedaled human rights abuses among United States allies and dependents.[4] Formalists are fond of floodgate arguments, invoking images of "aliens"—people perceived as racially or ethnically "different" from the United States majority—inundating our shores.[5] To send such uninvited guests back as often and

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3. Developments on the ground in countries struggling to emerge from tyranny echo these concerns. *See* Barbara Crossette, *The World Expected Peace. It Found a New Brutality.*, N.Y. TIMES, Jan. 24, 1999, § 4 (Week in Review), at 1 (noting that current events in Eastern Europe, Africa, and Haiti have complicated the vision of the "newer, saner world order confidently anticipated when Communism collapsed a decade ago").

4. *See* MARVIN E. FRANKEL & ELLEN SAIDEMAN, OUT OF THE SHADOWS OF NIGHT: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS 64–65 (1989) (noting that "the American State Department regularly considers military and security interests more important than human rights"); T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 17 (1991) (expressing concern about "reliance upon the characterization of foreign regimes expounded by the U.S. government's foreign policy organs"); David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1331 (1990) (discussing political biases in asylum decision making); *see also* Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2558 (1993) (discussing how foreign policy agendas stifled international focus on human rights in the post-World War II era); *cf.* DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941–1945 189 (1984) (noting that fear that the United States would actually have to take in Jewish refugees if efforts to rescue Jews from the Nazi extermination apparatus were successful was "[b]y far the most important cause for State Department inaction").

5. *See* Tanya K. Hernandez, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731 (1997) (discussing interaction of stereotypes about immigrants and domestic subordinated groups); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1140–41 (1998) (discussing influence of racism and nativism on American refugee policy); Harold H. Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2422 (1994) (arguing that "the archetypal 'good alien' favored by American immigration law is . . . white, European, healthy, heterosexual, [and]

soon as possible, formalists take changes in "law on the books" or the identity of government officials as sufficient proof of changed conditions that obviate the refugee's fear of returning to her country of origin.

The formalists' substantive agenda informs a procedural agenda: formalists are wary of the asylum-seeker's voice. Giving the asylum-seeker's own testimony too much weight in asylum adjudication swings open the floodgates that the formalist has sought mightily to close in substantive asylum doctrine. To contain this subjectivity, the formalistic view seeks to impose two requirements: corroboration for asylum-seeker's testimony and proof that persecution is more probable than not if the asylum-seeker is forced to return.

The formalistic view contrasts with another model, which I call the dynamic view. The dynamic view recognizes that a rigid dichotomy between subjective and objective evidence can obscure more than it illuminates.[6] According to the dynamic

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self-sufficient"); Peter Margulies, *Difference and Distrust in Asylum Law: Haitian and Holocaust Refugee Narratives*, 6 ST. THOMAS L. REV. 135 (1993) (discerning parallels in the treatment of Haitian and Holocaust refugees); Janice D. Villiers, *Closed Borders, Closed Ports: Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841 (1994) (discussing race in Haitian asylum adjudication); *cf.* Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform,"* 71 S. CAL. L. REV. 547 (1998) (applying international law to address immigration and welfare measures with discriminatory impact on persons of color). *But see* Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1966 (1996) (reviewing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995)) (arguing that race is a less important factor in immigration law today than it was in earlier decades).

6. The dynamic view is also much more receptive to encompassing new kinds of asylum claims, like those that view gender-based persecution as fitting within the category of persecution on account of membership in a particular social group. *See* Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521 (1994). In addition, the dynamic view is more willing to find that persecution occurs "on account of" one of the five bases for asylum—race, religion, nationality, political opinion, and membership in a particular social group—when a persecutor's motives are mixed, or are a result of tacit understandings or stereotypes, instead of a specific intent to punish the asylum-seeker. *See* INS v. Elias-Zacarias, 502 U.S. 478 (1992) (holding that a guerilla group's retaliation against an individual who declined to join the group is not persecution based on political opinion, absent more specific proof that the guerillas were motivated by an intent to punish the individual for his political views). For commentary on proof of a more flexible view of intent, see Aleinikoff, *supra* note 4, at 18–23; Carolyn Patty Blum, *A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms*, 15 BERKELEY J. INT'L L. 38 (1997); Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 BERKELEY J. INT'L L. 1 (1997); Margulies, *supra*; Karen

view, State Department reports regarding changed country conditions are no more "objective" than the asylum-seeker's testimony. Each source of information has a bias. The State Department's bias on human rights issues is simply more difficult for an adjudicator to discern behind the veneer of governmental legitimacy, authority, and competence. The formal view takes laws on the books, as well as one-time events such as elections, as proof of changed conditions. In contrast, the dynamic view looks to law "on the ground," taking into account the nature and variety of both formal and informal institutions, and examines how they interact with society as a whole. The dynamic view also has a more flexible view in matters of procedure, resolving uncertainty in the refugee's favor[7] and avoiding rigid corroboration requirements for asylum-seekers' testimony.[8]

Dynamic and formalistic interpretations in the case law are similar, however, in that they both proceed with little or no acknowledgment of the rich empirical and theoretical literature on social and governmental transitions that has developed in the last quarter of the century.[9] Synthesizing the transition

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Musalo, *Irreconcilable Differences: Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT'L L. 1179 (1994); *cf.* Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733 (1998) (arguing for focusing on core purposes of refugee protection, identified as nondiscrimination, condemnation of collective guilt, and freedom of thought and expression).

7. *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that a ten-percent possibility of persecution renders an asylum-seeker's fear of returning to her country of origin objectively "reasonable," because even a ten-percent chance of the grave harm embodied in the concept of persecution would be material for the reasonable person).

8. *See In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987) (holding that, since the individual asylum-seeker's access to information about conditions in her country of origin is often meager, corroboration of an asylum-seeker's testimony is not necessary if the testimony is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear").

9. *See* JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION 7–9 (1996); Juan J. Linz et al., *Democratic Transition and Consolidation in Southern Europe, with Reflections on Latin America and Eastern Europe*, *in* THE POLITICS OF DEMOCRATIC CONSOLIDATION 77 (Richard Gunther et al. eds., 1995); Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, *in* TRANSITIONS TO DEMOCRACY 3 (Geoffrey Pridham ed., 1995); Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998); Guillermo O'Donnell, *Horizontal Accountability in New Democracies*, 9 J. DEMOCRACY, July 1998, at 112; Andreas Schedler, *What is Democratic Consolidation?*, 9 J. DEMOCRACY, Apr. 1998, at 91, 97; *cf.* HANNAH ARENDT, ON REVOLUTION (1963) (discussing transitions in French, Russian, and American revolutions). The issue of legal redress for abuses committed by regimes prior to the transition has re-

scholars' work reveals a focus on three elements. The first is institutional repertoire, characterized as the country's range of institutions, from so-called "civil society" to the executive and legislative branches, and the formal or informal processes that allow these institutions to interact. The second is inclusiveness, defined as the degree to which the country in question treats all of its constituents as full members and minimizes inequity based on factors such as race, religion, ethnicity, class, gender, or sexual orientation. The third element is redress, defined as the access of victims of human rights abuses to legal remedies, and the presence of institutions willing and able to hold human rights abusers legally accountable.

The transition scholars' approach could enhance changed country conditions determinations by requiring adjudicators to take into account more and better sources of evidence. However, judicial and administrative decisions based on the formal model disdain the careful institutional analysis that the transition approach requires. Decisions taking a dynamic perspective often are made on a case-by-case basis, leaving the questions of institutional role and relationship stressed by transition scholars either implicit, or else absent.

This article uses the transition scholars' research to refine the dynamic model of both the substantive changed country conditions doctrine and the procedural elements of asylum adjudication that interact with substantive refugee law. The dynamic model of changed country conditions advanced here addresses conditions "on the ground," concentrating on the transition scholars' criteria of institutional repertoire, inclusiveness, and redress. It also incorporates a more flexible approach to proof and procedure in asylum adjudication. This approach respects the refugee's testimony, and tailors standards of proof and corroboration to acknowledge the asylum seeker's uncertainty, suffering, and lack of control. Fair allocation of the consequences of uncertainty, both in the analysis of democratic transitions and in asylum procedure, is essential to protecting refugees.

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ceived careful examination from legal scholars, again unrewarded by sustained and systematic attention in the cases on changed country conditions. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1997); Orentlicher, *supra* note 4; Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997).

The article consists of four parts. Part I discusses the dialectic between formalistic and dynamic models in asylum adjudication. Part II analyzes the failure of the formalistic model to do justice to the unpredictable nature of democratic transitions. Part III responds to the flaws of formalism by advancing a refined dynamic model for adjudicating changed country conditions issues in asylum cases. Part IV applies this refined dynamic model to three arenas in asylum law—two national and one social—where the extent and impact of change is in dispute. The nations, both of which have spurred significant refugee movement into the United States, are Ethiopia, as a representative of African transitions to democracy, and Romania, representing the uncertainties of transition in Eastern Europe. The social arena is the subjection of women to social and physical oppression in the developing world. These examples demonstrate the careful analysis required to reach reliable determinations based on changed country conditions, and to fulfill the purposes of American asylum law.

I. FORMALISTIC AND DYNAMIC APPROACHES TO ASYLUM ADJUDICATION

The formalistic and dynamic approaches arise from different views of four important factors in asylum adjudication: 1) the significance of official changes in an asylum-seeker's country of origin—such as changes in the heads of government or the text of statutes—for determining whether an individual asylum-seeker has a "well-founded fear of persecution;"[10] 2) the responsibility of refugees or refugees' countries of origin for their own plight; 3) the consequences of uncertain information about both individual asylum claims and country conditions; and 4) the deference owed to United States foreign policymakers. Approaches to each of these questions flow through conceptions of the "objective" and "subjective" in asylum law.

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10. The Refugee Act, 8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. III 1997), defines a refugee as a person who is "unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *In re* Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by In re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

The formalistic and dynamic models of asylum adjudication represent very different approaches to law, politics, and proof of facts. Formalists assert that law, as distinct from politics, is a "set of abstract concepts and principles with rationally governed internal and external relations which mechanically lead to specific answers in particular cases."[11] For formalists, law becomes impermissibly political when it explicitly addresses social, economic, and political inequality, which formalists view as "outside" of law.[12] This mechanical approach, when applied to the realm of asylum adjudication, shifts responsibility for the refugee's protection away from the country granting refugee status. In fixing responsibility, formalists in

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11. BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY 35 (1997).

12. *See* Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW 23, 32 (rev. ed. 1998) ("The message the [formalist] model conveys is that actual power relations in the real world are by definition legitimate."). American jurisprudence of the late nineteenth and early twentieth centuries, with its striking down of economic regulation, fueled by reliance on "freedom of contract" between employer and employee and disregard of inequality of bargaining between these two parties, is usually taken by scholars as the heyday of formalist thought. *Id.* at 18–21. While the middle twentieth century saw a retreat from formalism and an emphasis, courtesy of the legal realists and legal process scholars, on the interaction of law and policy, the last 25 years have seen a re-awakening of formalism in important areas such as statutory interpretation. *Id.* at 21–33. Immigration law, with its foundation of precedent from the late nineteenth century, has remained largely rooted in the parched soil of formalism. *Cf.* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 600–613 (1990) (discussing attempts by courts and advocates to accommodate new conceptions of rights within the formalist model); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (same). The history of immigration law is a useful reminder, however, that formalism is not necessarily about using legal distinctions to frustrate reform, as in *Lochner v. New York*, 198 U.S. 45 (1905), and the other economic regulation cases, but is ultimately about deference to inequality. Consider, for example, the nineteenth century precedents that still dominate immigration law, resisting the fate of *Lochner* and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581 (1889). In those cases, the Supreme Court typically upheld legislation based on prejudice against immigrants perceived as racially "different." *See* Hernandez, *Construction and Race*, *supra* note 5. In any other area of American law, such legislation would be struck down as substantively invidious and procedurally infirm today. *See also Chae Chan Ping*, 130 U.S. at 581 (upholding Chinese Exclusion Act). Congress continues to enact invidious legislation in the immigration arena. For critical interpretations of the Immigration Reform and Control Act of 1986 ("IRCA"), see Gilbert P. Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591 (1994); Michael A. Scaperlanda, *The Paradox of a Title: Discrimination in the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043.

asylum adjudication look to the refugee herself, who is frequently viewed as motivated by economic factors, or look to to the refugee's country of origin, which formalists regard as mistreating its own people in order to manipulate more prosperous countries into easing their immigration controls.[13]

This view influences how formalists define what constitutes "objective" and "subjective" evidence. Starkly put, objective evidence is that which is offered by officials of the United States government, informed by assumptions based on United States experience. Subjective evidence is evidence offered by the refugee. Objective evidence demonstrates that persecution upon an asylum-seeker's deportation to her country of origin is probable, while subjective evidence demonstrates that it is merely possible. In the area of changed country conditions, objective evidence is evidence about changes in the identity of government officials, constitutional structure, or the text of statutes. Subjective evidence is the asylum-seeker's testimony that she fears returning to her country of origin, because for-

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13. In this view, countries of origin lose the incentive to deal with their own political, economic, or ethnic "problems" if developed countries such as the United States protect the refugees that those problems create. *See In re* H—, Interim Dec. No. 3276 at 20 (B.I.A. May 30, 1996) (Heilman, Board Member, dissenting) (characterizing majority's decision, which upheld remand in case involving Somalian refugee persecuted because of clan membership, as a "quixotic attempt to right the wrongs of the world through the asylum process," and arguing against viewing harms occurring to individuals during civil wars as persecution under the Refugee Act). This disclaimer of responsibility was pervasive during the World War II era. *See* IRVING ABELLA & HAROLD TROPER, NONE IS TOO MANY: CANADA AND THE JEWS OF EUROPE, 1933–1948 27 (1983) (quoting Canadian diplomat resisting admission of Jewish refugees during World War II, who asserted that, "[o]ther governments with unwanted minorities must equally not be encouraged to think that harsh treatment at home is the key that will open the doors to immigration abroad . . . . [N]o state should be allowed to throw upon other countries the responsibility of solving its internal difficulties"). Today, concerns about allocation of responsibility for refugees, as well as preservation of the ethnic and cultural identity of countries accepting refugees, have fueled an increasing movement toward repatriation of asylum-seekers. *See* James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997) (arguing that provisions for the repatriation of refugees upon easing of the threat of persecution in their country of origin are necessary to preserve the structure of international refugee protection). In the United States, refugees granted asylum have the opportunity, one year after asylum is granted, to apply for lawful permanent residence. *See* 8 U.S.C. § 1159 (1999). However, one can view increasing use of the changed country conditions doctrine, which allows adjudicators to deny asylum because conditions have changed, as the United States's version of repatriation efforts.

mal changes have not changed underlying patterns of inequality and persecution.

In contrast, the dynamic model views law, politics, and society as inextricably interrelated. Law has a crucial role in remedying inequality. Shirking that role does not mean that law is somehow "neutral" or "autonomous," but only that law reinforces an inequitable status quo.[14] In the asylum law arena, the dynamic model is less prone to view asylum as a scarce resource to be apportioned parsimoniously, and more prone to resolve uncertainty in favor of granting refugees legal protection in the United States. Moreover, the dynamic view recognizes that formal indications of changed conditions, such as changes in government officials or "law on the books," mean little unless they are supported by changes "on the ground."

The dynamic view also has a different, more flexible view of what constitutes subjective and objective evidence. While asylum adjudicators taking a dynamic view still resort to the rhetoric of objectivity and subjectivity,[15] the dynamic view generally gives more weight to refugee testimony. Indeed, the dynamic view recognizes that the testimony of a refugee, even given the refugee's interest in obtaining asylum, can be as reliable as the views of the United States State Department. The State Department, the dynamic model recognizes, is not neutral or autonomous, any more than law is. As it did in World War II, the State Department today has an interest in downplaying human rights problems to avoid rocking the foreign policy boat.[16] For that reason, the dynamic model holds that automatic deference to State Department positions is not appropriate in asylum adjudication.

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14. *See* Mensch, *supra* note 12, at 36–48.

15. Continued use of this rhetoric has some unfortunate results, including maintenance of a vocabulary ready-made for a formalist backlash. *See generally infra* notes 28–39 and accompanying text.

16. *See* Orentlicher, *supra* note 4. It is important to acknowledge that human rights issues are more salient in foreign policy discourse today than they were in earlier eras, driven solely by a "realpolitik" conception of foreign affairs. *See id.* Today, officials in the State Department include, for example, Harold Koh, a prominent human rights scholar and refugee advocate. *See* Koh, *supra* note 5. As the dynamic view holds, however, changing the identity of officials cannot readily transform institutional interests and cultures of decades' duration.

A. *Persecution and Proof in Asylum Law*

Case law, statutes, and regulations have always revealed a dialectic between formalistic and dynamic visions of asylum law. Indeed, the evolution of United States refugee policy in the years since World War II, culminating in the enactment of the Refugee Act, is in many ways a reaction to the rigidity of refugee policy during the war. In the early years of the war, the State Department remained indifferent and even hostile to the plight of refugees.[17] The harrowing narratives of refugees who had escaped the concentration camps were dismissed as fanciful, "subjective" tales.[18] Asylum law since the war has proceeded from the view that wholesale dismissal of refugee testimony risks a repeat performance of the United States' indifference to refugees' plight.

Refugee testimony poses a challenge for the adjudicator that is ubiquitous throughout asylum law: how to deal with uncertainty.[19] Uncertainty in asylum adjudication is both retrospective and prospective. Retrospective uncertainty is inevitable because an asylum adjudicator has only limited information about what has happened to a candidate for asylum. Geographic distance,[20] the passage of time, cultural differences,[21]

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17. This indifference was itself cloaked in the language of foreign policy effectiveness. Specifically, advocates for inaction argued that winning the war was paramount, and other goals, including rescuing refugees, could distract from that objective. *See* WYMAN, *supra* note 4, at 293–94. That rationale does not explain, however, why the State Department went out of its way to deny refugees access to immigration visas that had already been allocated by Congress. *See id.* at 316.

18. *See* Margulies, *supra* note 5, at 148.

19. It may be useful here, as we discuss issues of procedure in asylum adjudication, to briefly outline how an asylum claim is adjudicated. Some cases, involving refugees who come forward to claim asylum, start out in what is called the affirmative stage, with an asylum application filed and a subsequent interview in the Asylum Office of the Immigration and Naturalization Service ("INS"). If the Asylum Office rejects the claim, the asylum-seeker goes into removal proceedings in the Immigration Court of the Department of Justice, along with refugees who have been apprehended or through some other means brought to the attention of INS. The decision of the Immigration Judge ("IJ") in removal proceedings is appealable to the Board of Immigration Appeals. From there, appeals go to the federal courts, either by statute or via habeas corpus. The 1996 legislation restricts review in asylum cases by moving from a substantial evidence standard to an even more deferential "abuse of discretion and manifestly contrary to law" test. *See, e.g.*, Martin, *supra* note 4, at 1316.

20. *See id.* at 1280–81 (noting the high cost of investigating asylum claims with personnel in the refugee's country of origin).

the asylum seeker's ties to the United States,[22] and the effects of trauma[23] render evidence of persecution inaccessible. Prospective uncertainty is also pervasive. Predicting the future is not a strength for most mere mortals, particularly when dealing, as in asylum cases, with the uncertain currents of political change and their consequences for individuals.[24]

Faced with uncertainty, adjudicators must decide individual cases, knowing that the scope and purposes of refugee law will not countenance either extreme of granting asylum to everyone, or turning everyone away.[25] To establish a happy mean between these extremes, both dynamic and formalistic strains

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21. *See id.* at 1286 ("Many asylum seekers come from societies where the population inherently distrusts or fears government officials (and often lawyers). Nothing in their past experience prompts them to open up readily to strangers . . . ."). Cultural differences can also lead adjudicators to misinterpret information that the asylum seeker provides. For example, some time ago the St. Thomas Immigration Clinic represented a Haitian refugee who was asked by the Immigration Judge for his street address in Haiti. Our client responded that in rural Haiti many people did not have street addresses. The IJ was incredulous, and cited our client's answer as a basis for finding that he lacked credibility. In the urban and suburban landscape of South Florida, shaped for the most part in an orderly grid, the IJ's skepticism may have made sense. Yet, given the lack of paved roads, running water, community organization, or literacy in areas of rural Haiti, our client's response was far from incongruous. *See* PAUL FARMER, AIDS AND ACCUSATION: HAITI AND THE GEOGRAPHY OF BLAME 34–35 (1992) (discussing conditions in rural Haiti).

22. Such ties, or an asylum-seeker's desire to create them, clearly provide some incentive to embellish or even fabricate testimony. *See* Martin, *supra* note 4, at 1281–82 (noting such incentives and remarks by adjudicators and INS trial attorneys that "the asylum system is saved from complete collapse largely by the admirable honesty of most of the applicants"); *cf.* Peter H. Schuck & Theodore H. Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979–1990*, 45 STAN. L. REV. 115, 165–66 (1992) (tracing an increase in asylum claims in late 1980's in part to easier availability at that time of work authorization for asylum applicants).

23. *See* Quentin Dignam, *The Burden and the Proof: Torture and Testimony in the Determination of Refugee Status in Australia*, 4 INT'L J. REFUGEE L. 343, 355–56 (1992); Martin, *supra* note 4, at 1286–87.

24. *See* Martin, *supra* note 4, at 1282–85 (noting difficulties both in obtaining information about present country conditions and predicting how those conditions might change over time); *cf.* Guillermo O'Donnell, *On the Fruitful Convergences of Hirschman's Exit, Voice, and Loyalty and Shifting Involvements: Reflections from the Recent Argentine Experience*, *in* DEVELOPMENT, DEMOCRACY, AND THE ART OF TRESPASSING 249, 253 (Alejandro Foxley et al. eds., 1986) (noting that the military coup regime in Argentina applied "severe and cruel repression to many individuals . . . in a decentralized, largely unpredictable, and usually clandestine way. . . . [T]he risks [to individual victims] were as high as they were difficult to gauge").

25. *See* Martin, *supra* note 4, at 1330–34 (discussing costs of erroneous asylum grants, in terms of the credibility and political support available for refugee protection).

in asylum adjudication traditionally have invoked the rhetoric of subjective and objective proof of an asylum seeker's claims. This rhetoric, unfortunately, adds little to precedents following a dynamic model, and serves merely to camouflage the arbitrariness of the formalistic view.[26] The following paragraphs analyze the holding and rhetoric in both dynamic and formalist cases addressing retrospective and prospective uncertainty in asylum adjudication.

A cornerstone of the dynamic model is *INS v. Cardoza-Fonseca*.[27] In *Cardoza-Fonseca*, the Supreme Court ruled that the Refugee Act did not require an asylum applicant to prove that it was more probable than not that she would be persecuted if she returned to her country of origin. Instead, the court held that even a ten-percent chance of persecution would constitute a "reasonable possibility" of persecution within the meaning of the statute. The Court considered the perspective of the applicant, for whom even a ten-percent chance of the grave harm entailed by persecution would be material. Requiring the asylum-seeker to prove that persecution was probable, the Court observed, would violate the purpose of the Refugee Act, by resolving uncertainty against the asylum-seeker. Such an approach to uncertainty, the Court reasoned, would exalt procedural formality, embodied by the conventional preponderance standard, over the substantive predicament of the refugee, hostage to the uncertain future of political change in her country of origin.

Cardoza-Fonseca muddied the waters in its invocation of a subjective/objective dichotomy in asylum adjudication. The Court noted that:

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26. By arguing here that the rhetoric of objectivity in asylum adjudication is flawed, I do not mean to reject the possibility of a more pragmatic conception of objectivity. *See generally* Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996) (deconstructing radical skepticism). Indeed, without such a pragmatic conception, it is difficult to describe a refugee as having a "well-founded" fear of persecution at all, or decide that particular practices like imprisonment or torture constitute persecution. Rather, my purpose here is simply to show that the rhetoric of objectivity in asylum adjudication buttresses elements of the formalist agenda, because tribunals using the rhetoric tend inevitably to cast the State Department, with its mantle of legitimacy, authority, and expertise, as the source of objectivity, and relegate the refugee to the subjective role. With the roles thus cast, the formalist script writes itself.

27. 480 U.S. 421 (1987).

> [T]he reference to "fear" [in the Refugee Act's standard requiring a "well-founded fear of persecution" for a grant of asylum] . . . obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien. "The linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference."[28]

The Court also cites the Board of Immigration Appeals ("B.I.A.") for the proposition that "the term 'fear' [in the Refugee Act] . . . refers to a 'subjective condition, an emotion.'"[29] On the surface, this language seems like a blow against formalism. The problem with this language, however, is twofold. First, the language links emotion to subjectivity, thereby restricting emotion's role in "objective," cognitive processes such as adjudication.[30] Second, the language associates subjectivity solely with the asylum-seeker, leaving the field of objectivity to legitimated, authoritative, and expert institutions like the State Department. The net effect of the rhetoric reinforces the formalist message by marginalizing the asylum claim as a perilous detour from the orderly path of law.

Another cornerstone of the dynamic approach to asylum adjudication reveals the same trend: dynamic in result, but not wholly free from formalism in rhetoric. Shortly after *Cardoza-Fonseca*, the B.I.A. decided In re *Mogharrabi*,[31] holding that an asylum applicant's uncorroborated testimony can support a grant of asylum if the testimony is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear."[32] The B.I.A. based its holding in part on "the difficulties faced by many aliens in obtaining documentary or other corroborative evidence."[33] The rejection of rigid corroboration requirements clearly marks *Mogharrabi*

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28. *Id.* at 430–31 (quoting Guevara-Flores v. INS, 786 F.2d 1242, 1250 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987)).

29. *Id.* at 431 n.11 (quoting *In re* Acosta, 19 I. & N. Dec. 211, 221 (B.I.A. 1985)).

30. *Cf.* Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 62–64 (1998) (noting how stereotypes of women as "emotional," not rational, actors figure in the confusion of subjectivity and objectivity in women's self-defense cases).

31. 19 I. & N. Dec. 439 (B.I.A. 1987).

32. *Id.* at 445.

33. *Id.*

as precedent for a dynamic approach. So does the B.I.A.'s approving citation of the Ninth Circuit's observation in *Cardoza-Fonseca* that the absence of a corroboration requirement does not render the standard for asylum "wholly subjective [because] 'objective facts . . . [can be] established through the credible and persuasive testimony of the applicant.'"[34]

Despite the force of its holding and rationale, however, traces of formalism linger in *Mogharrabi*'s language, ready for resuscitation on a later day. Particularly notable is what the B.I.A. did not say. The B.I.A., having noted that an asylum-seeker's testimony is not "wholly subjective," did not extend its deconstruction of objectivity by acknowledging bias in evidence relied on by the INS, such as State Department reports.[35] Together with its favorable citation of an appellate opinion that distinguished refugee testimony from "corroborative objective evidence,"[36] and its warning that the refugee would be required to produce all obtainable corroboration,[37] the B.I.A.'s failure to expressly acknowledge State Department bias again reinforced the formalist message by marginalizing refugee testimony as a dangerous exception to orderly adjudication.

The lingering pull of formalism in this rhetoric recently has become clear as formalists have staged a counterattack on behalf of rigid corroboration requirements. The formalist push starts with the *Mogharrabi* language requiring corroboration when such corroboration is obtainable.[38] The problem with this

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34. *Id.* at 444 (quoting Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987)).

35. Courts, as well as commentators, have criticized the State Department on this basis. *See, e.g.*, Zamora v. INS, 534 F.2d 1055, 1062–63 (2d Cir. 1976); Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968) (asserting that State Department opinions on particular asylum claims "do not carry the guarantees of reliability which the law demands of admissible evidence. A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations"). For a comprehensive list of critiques of the State Department role in asylum adjudication, see sources cited *supra* note 4, and ANKER, *supra* note 2, at 110 n.128.

36. *See Mogharrabi,* 19 I. & N. Dec. at 443 (quoting Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984)) (declining to preclude use of refugee testimony as sole basis for asylum grant, while noting that generally such testimony "will be insufficient to meet the evidentiary burden").

37. *See id.* at 445.

38. *See, e.g.*, *In re* M-D-, Interim Dec. No. 3339 at 5–6 & n.1 (B.I.A. 1998) (holding that Mauritanian asylum-seeker's failure to produce identity card from refugee camp, despite United Nations' letter stating that cards were frequently unavailable to former camp resident, justified the denial of asylum).

seemingly unexceptionable requirement is that asylum adjudicators tend to view *all* corroboration as "readily obtainable." Evidence in writing from other countries, which *Mogharrabi* recognized can be impossible to procure, is now commonly expected in Immigration Court. The result is that corroboration requirements are swallowing up the space that *Mogharrabi* carved out for refugee narratives.[39]

B. The Jurisprudence of Impatience: Changed Country Conditions and Asylum Adjudication

The trend toward formalism in proof of asylum, with its threat to both *Mogharrabi* and *Cardoza-Fonseca*, parallels the evolving law of changed country conditions. Many recent decisions defer mechanically to State Department conclusions citing the results of single elections or changes in law "on the books" as proof that refugees have nothing to fear.[40] Indeed, recent cases, in a headlong rush to judgment, frequently discount the adverse information about country conditions, which the State Department itself includes in its reports.[41] This hyper-deferential approach, constituting a kind of jurisprudence

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39. *See id.*

40. *See, e.g.*, Marcu v. INS, 147 F.3d 1078 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 1496 (1999). Regulations recently proposed by the Department of Justice on the issues of changed country conditions and countrywide persecution (the requirement that asylum-seekers prove that they face a well-founded fear of persecution not just in their own town, city, or region, but throughout their country of origin), do little to address substantive flaws in the treatment of transitions to democracy under changed conditions doctrine, or the clash between the doctrine and leading cases like *Cardoza-Fonseca* and *Mogharrabi* adopting a flexible approach to asylum procedure. *See* New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945 (1998) (to be codified at 8 C.F.R. pt. 208) (proposed June 11, 1998). These draft regulations do incorporate elements of the dynamic approach in that they allow an Immigration Judge to consider in the exercise of discretion whether the asylum-seeker would undergo substantial hardship if she were forced to return to her country of origin. Hardship can involve factors unrelated to persecution on the basis of the five grounds which render a refugee eligible for asylum: race, religion, nationality, political opinion, and membership in a particular social group. Hardship under the proposed regulations might include, for example, separation from family in the United States. Many refugees without such equities will not be assisted by the new regulations, however, and will continue to be deported because of a formalistic view of changed country conditions that looks to the results of a single election, shifts in government officials, or revisions to law "on the books" as adequate indicia of democratic transition.

41. *See, e.g.*, Gonzalez-Neyra v. INS, 122 F.3d 1293, 1295 (9th Cir. 1997), *amended by* 133 F.3d 726 (9th Cir. 1998).

of impatience, substantially undercuts the protections created by *Cardoza-Fonseca* and *Mogharrabi*.

1. Asylum Procedure and Changed Country Conditions

A simple "road map" of procedure in changed country conditions cases aids understanding of the challenge to values underlying asylum law. Generally, if an asylum-seeker has not suffered what the tribunal deems to be past persecution, the burden of proof remains with him to show he will be persecuted in the future if he returns to his country of origin.[42] This burden encompasses the obligation to show that country conditions have not changed in a manner material to his asylum claim.[43] If an asylum-seeker has proven past persecution,[44] the burden shifts to the government to show that conditions have changed. Finally, if the asylum-seeker demonstrates "severe and atrocious" persecution, she may be granted asylum as a matter of discretion even if there is little risk under the ten-percent *Cardoza-Fonseca* standard that she will be persecuted if she returns.[45] The trend in proof of changed country conditions is to require greater specificity and certainty of the asylum-seeker, and less specificity and certainty of the government. The problem is that this trend ignores the values underlying crucial precedents such as *Cardoza-Fonseca* and *Mogharrabi*.

2. Formalism and the Changed Country Conditions Doctrine

The erosion of *Cardoza-Fonseca* and *Mogharrabi*, and the ascendancy of deference to the State Department are evident in most recent decisions on changed country conditions. These decisions ignore the fact that the State Department follows criteria much less centered on the refugee's circumstances than the ten-percent standard for a well-founded fear of persecution

42. *See, e.g.*, ANKER, *supra* note 2, at 44–47.

43. *See id.*

44. Case law is mixed on exactly what constitutes past persecution, but the standard definition of persecution includes harm to life or liberty, on account of the five enumerated grounds for asylum. *See In re* Acosta, 19 I. & N. Dec. 439 (B.I.A. 1987).

45. *See In re* Chen, 20 I. & N. Dec. 16 (B.I.A. 1989).

set out in *Cardoza-Fonseca*. Moreover, the formalists' deference to the State Department overrules *Mogharrabi sub silentio*. In effect, this deference allows State Department conclusions, even those contradicted by facts within the State Department's own reports, to outweigh all but the most copiously corroborated refugee testimony.[46] The result is a jurisprudence of impatience—one that ignores the complex dynamic of governmental transitions and the persistent power of societal discrimination in favor of quick determinations based on State Department reports.

The force of the formalist trend, as well as a superficial analysis of changed country conditions, emerges clearly in recent decisions on the troubled transition from Communist dictatorship to democracy in Romania.[47] Two cases found substantial evidence supporting B.I.A. denials of asylum on grounds of changed country conditions to asylum-seekers who concededly suffered significant past persecution, including serious beatings.[48] In each case, the court deferred to State De-

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46. The clearest expression of the formalist approach is the view that agencies can take administrative notice of changed country conditions. Administrative notice is appropriate where facts are "commonly acknowledged." *See* Kaczmarczyk v. INS, 933 F.2d 588, 593 (7th Cir. 1991) (upholding administrative notice of changed country conditions in asylum claims). Facts susceptible to administrative notice do not require evidentiary proof through a hearing by a trier of fact. An appellate tribunal can take administrative notice without a remand to a fact finder, even if the facts so noticed defeat an otherwise valid asylum claim. Some courts have gone further, holding that the B.I.A., before taking notice, need not provide the asylum-seeker with an opportunity to argue that notice is inappropriate. *Compare id.* (holding that opportunity after notice has been taken to seek discretionary re-opening of case is sufficient under the Refugee Act and the due process clause) *with* Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992) (requiring greater opportunity for asylum-seeker to be heard prior to notice determination). For analysis of administrative notice in the asylum context, see Katherine J. Strandburg, *Official Notice of Changed Country Conditions in Asylum Adjudication: Lessons from International Refugee Law*, 11 GEO. IMMIGR. L.J. 45; Vincent A. Tome, Note, *Administrative Notice of Changed Country Conditions in Asylum Adjudication*, 27 COLUM. J.L. & SOC. PROBS. 411 (1994). Even if tribunals do not take administrative notice, however, the problem of an adequate substantive standard for finding changed country conditions remains. *See* Lorisme v. INS, 129 F.3d 1441, 1445 (11th Cir. 1997) (finding that B.I.A. did not take administrative notice, but nevertheless upholding on substantial evidence grounds the B.I.A.'s finding of changed conditions in Haiti).

47. For evidence of the continued turbulence in Romania, see *Romanian Miners Clash With Police, Leaving 130 Hurt*, N.Y. TIMES, Jan. 22, 1999, at A3, and discussion *infra* notes 120–31 and accompanying text.

48. *See* Petre v. INS, No. 97-70945, 1999 U.S. App. LEXIS 2005, at *1 (9th Cir. Feb. 3, 1999); Marcu v. INS, 147 F.3d 1078 (9th Cir. 1998). The date of the *Petre* decision suggests that information about the latest symptom of turbulence

partment conclusions on "sweeping changes" in Romania, ignoring contrary evidence that clearly satisfied *Cardoza-Fonseca*'s ten-percent standard.[49]

Boiled down to its essence, the State Department position on Romanian asylum claims consists of two premises unsupportable on the law or facts. First is the formalistic view that conditions have changed materially because the Romanian national government now merely tolerates persecution at the local level, instead of engaging in persecution itself. This view ignores black-letter asylum law, which states that persecution by forces the government is "unable or unwilling to control" meets the statutory standard.[50] Second is the shifting of responsibility to victims of persecution, who are advised by the State Department to protect themselves "'by recourse to the nascent democratic legal structures rather than by recourse to seeking political asylum abroad.'"[51] On this view, Romanian asylum-seekers are apparently indulging in unreasonable fear if they worry that, following decades of dictatorship, "nascent" structures cannot bear the heavy burden of deterring and redressing persecution.[52]

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in Romania was available, but was ignored by the court. *See Romanian Miners Clash With Police, supra* note 47. A third Ninth Circuit case reverses the B.I.A.'s decision on changed country conditions. *See* Misca v. INS, No. 97-70909, 1999 U.S. App. LEXIS 786, at *1 (9th Cir. Jan. 15, 1999). Under the new statutory restrictions on judicial review of B.I.A. asylum decisions, however, the B.I.A.'s denial of asylum in this case may well have been final. The B.I.A. has also ruled for a Romanian refugee in a recent case in which the St. Thomas University School of Law Immigration Clinic provided representation. *See In re* T-P-, No. A74 648 334 (B.I.A. Nov. 3, 1998). A 3-1 record at the B.I.A. against Romanian refugees on basically identical facts suggests, at best, that the B.I.A. must do more to ensure consistency in its changed country conditions analysis.

49. For an example of the circular reasoning at work in these cases, see *Marcu*, 147 F.3d at 1081 (asserting that the State Department is "'the most appropriate and perhaps the best resource' for 'information on political situations in foreign nations.' This makes sense because this inquiry is directly within the expertise of the Department of State" (citation omitted)).

50. *Acosta*, 19 I. & N. Dec. at 222.

51. *Marcu*, 147 F.3d at 1082 n.2 (citing the United States's State Department's annual Country Report on Romania).

52. *Cf.* Gailius v. INS, 147 F.3d 34, 46 (1st Cir. 1998) (citing Gramatikov v. INS, 128 F.3d 619, 620 (7th Cir. 1997)) (finding, in a case involving repeated threats and physical attacks suffered by petitioner because of his opposition to Communist influence in Lithuania, that B.I.A. erred by placing excessive reliance on State Department opinion, particularly given the "perennial concern that the [State] Department softpedals human rights violations by countries that the United States wants to have good relations with").

The new formalism in changed country conditions jurisprudence goes well beyond Eastern Europe. *Cf.* Lorisme v. INS, 129 F.3d 1441, 1444 (11th Cir. 1997)

The analytical approach underlying these formalistic decisions oversimplifies the complex trajectory of transitions from dictatorship to democracy. The flaws of this approach are clear in cases involving countries that endure multiple regime changes, such as Afghanistan. The formalistic view considers such regime changes as discrete events, rather than parts of an ongoing process. Acting on this view in a recent Afghanistan case,[53] the B.I.A. held that an asylum-seeker who has demonstrated a well-founded fear of one regime must shoulder the burden of proving this fear all over again if the regime changes.

At first blush, the B.I.A.'s logic seems impeccable: a new regime will presumably have both new enemies and new friends, and one might suppose that foes of the former regime will be friends of the new. As we discuss in greater depth in the next Part of this article, however, revolution is often a dynamic process that ultimately consumes its own.[54] Those at the forefront of an attack on an old regime, as in the French and Russian Revolutions or even the Russian transition out of Communism, may be the most, not least, likely targets of the new regime.[55] Recent Afghani history has echoed this phe-

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(relying largely on a State Department profile in finding that country conditions in Haiti have changed sufficiently to allow deportation of a Haitian asylum-seeker, based on the United States-led multinational force's intervention in 1994, which displaced the military coup regime that had toppled the democratically elected President, Jean-Bertrand Aristide). For a more dynamic approach, see Fergiste v. INS, 138 F.3d 14, 19 (1st Cir. 1998) (requiring specific findings from immigration judges regarding both petitioner's evidence rebutting State Department report, and effect of possible pro-democratic changes on petitioner's particular fear of persecution).

While the First Circuit in *Fergiste* takes a more dynamic view of the changed conditions doctrine, the drastic curtailing of judicial review under cases started after the effective date of the 1996 Immigration Act will remove this check on the B.I.A. For a hint of the deference that courts will accord the B.I.A. under the new judicial review provisions, see *Marcu*, 147 F.3d at 1082–1083 (in case involving severe, repeated beatings suffered by the petitioner and his family because of their opposition to Romanian dictatorship, the court upheld the B.I.A.'s decision that the beatings were not sufficiently "'severe or atrocious'" to justify humanitarian grant of asylum, reasoning that the B.I.A. "heard the claim, considered the evidence, and decided against Marcu. No more was required").

53. *See In re* N-M-A-, Interim Dec. No. 3368 at 3 (B.I.A. Oct. 21, 1998).

54. *See* JEFFREY C. ISAAC, ARENDT, CAMUS, AND MODERN REBELLION 133 (1992) (noting the propensity of revolutionaries to kill each other with "self-devouring zeal").

55. *See* Adam Michnik, *A Death in St. Petersburg*, N.Y. REV. BOOKS., Jan. 14, 1999, at 4 (describing how, in the former Soviet Union, a "dissident and former political prisoner, chosen as president of Georgia, became an authoritarian despot, who started to put in prison his former friends from the democratic opposition"); *cf.* ARENDT, *supra* note 9, at 51–52 (discussing how Robespierre "liquidated" Dan-

nomenon, veering from Soviet domination contested by a strong Islamic resistance, to warlords fighting each other for control, to an ascending force of Islamic fundamentalists—the Taliban—characterized by an austere patriarchy, intolerance, and fratricidal violence among erstwhile Islamic resistance colleagues. The B.I.A.'s orderly account of discrete regime changes, each accompanied by its own brand-new burden of proof for the refugee, seems at best irrelevant, and at worst downright Kafkaesque.

The new formalism's inability to capture the dialectic of continuity and change in political and social transitions is most glaring in the area of deep-seated ethnic or religious discrimination.[56] The subordination of particular groups often depends less on formal government action than on a complex network of practices and institutions, shaped by "all-pervasive influences and convictions . . . tacitly and inarticulately shared."[57] These practices and institutions perpetuate subordination for decades and even centuries. Yet formalist decisions treat societal discrimination as, at best, a mild irritant for returning refugees, effectively neutralized by changes in official faces, laws, and policy.

The conflict with *Cardoza-Fonseca* and *Mogharrabi* posed by such a view is manifest in *Mikhailevitch v. INS.*[58] In *Mikhailevitch*, the Sixth Circuit upheld a B.I.A. decision finding conditions sufficiently changed in Belarus, a former Soviet Republic,[59] to permit the deportation of Roman Catholics who had been persecuted during the Soviet era because of their religion. The State Department advisory to the Immigration Court regarding the case touted improvements in the climate for Roman Catholics in Belarus. It acknowledged, however, that the

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ton in the French Revolution, creating a template that the Russian Communists chose to follow, because they believed that "a revolution would take its course in a sequence of revolutions, or that the open enemy was followed by the hidden enemy . . . or that a revolution would split into two extreme factions").

56. Here, the new draft regulations compound the problem. *See* Executive Office for Immigration Review, 63 Fed. Reg. 31,945 (1998). They make countrywide persecution harder to prove, paradoxically, for those asylum-seekers whose persecution stems from nongovernmental persecution.

57. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 314 (1973).

58. 146 F.3d 384 (6th Cir. 1998).

59. For a less optimistic perspective on Belarus, see *Risky Business in Belarus*, N.Y. TIMES, Feb. 22, 1999, at A20, describing how Belarus's dictator, "who makes no secret of his admiration for Stalin," persecutes virtually anyone he perceives as a threat, including political opponents, journalists, human rights activists, and entrepreneurs. *Id.*

President of Belarus had questioned the loyalty of Roman Catholics, that the government had placed limits on the activities of foreign Catholic priests, many of whom are from Poland, a historic rival of Belarus, and that these factors "do not contribute to a climate of ethnic and religious tolerance."[60] Given the history of genocide as a sequel to imputations of disloyalty to particular groups,[61] it seems clear, based on the adverse country information in the State Department's own advisory, that the asylum claimant had proven under *Cardoza-Fonseca* that there was at least a one-in-ten chance that he would experience persecution if he was forced to return. Yet, the court did not even address the impact of the adverse country information in its legal analysis.[62] Instead, the court deferred blandly to the State Department's conclusion that the history of persecution in Belarus was exactly that—mere "history"—despite the State Department's own acknowledgment of the uncertain current "climate" for Roman Catholics.[63]

The inadequacy of current approaches to societal discrimination in changed country conditions jurisprudence, particularly at the B.I.A. level, is also manifest in recent decisions on anti-Semitism in the former Soviet republics. The Ninth Circuit, operating under the old judicial review provisions of the Refugee Act, recently reversed the B.I.A. in a case concerning a Ukrainian citizen of Jewish heritage who documented a harrowing history of mental, emotional, and physical torture at the hands of anti-Semitic Ukrainian nationalists.[64] The petitioner had described in detail a chain of frightening encounters, including repeated beatings, anti-Semitic phone calls and notes, and an episode in which she was tied to a chair while her assailants placed a noose around her neck.[65] The B.I.A. fully credited the petitioner's testimony, including testimony that

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60. *Mikhailevitch*, 146 F.3d at 387. The State Department advisory, consistent with the dynamic approach, inquired into the issue of redress for past wrongs, noting that many Church buildings confiscated by the Soviet regime had been returned. This measure of redress is an important positive sign regarding changed conditions. *See infra* notes 93–98 and accompanying text. The question under *Cardoza-Fonseca*, however, is whether this positive sign should cancel out the ominous omens involving questioning the loyalty of Roman Catholics, given the history of persecution of this group.

61. *See* ARENDT, *supra* note 57.

62. *See Mikhailevitch*, 146 F.3d at 390.

63. *See id.* at 387.

64. *See* Korablina v. INS, 158 F.3d 1038 (9th Cir. 1998).

65. *See id.* at 1042.

the Ukrainian police and courts had refused to offer redress for this wrongdoing or hold the wrongdoers accountable in any way.[66] Yet the B.I.A. ruled that the petitioner had not demonstrated either past persecution or a well-founded fear of future persecution.[67] The B.I.A. relied on the State Department's account of formal changes in the Ukraine, including the government's admirable abandonment of anti-Semitism as official policy and its pious pronouncements about the ills of anti-Semitism.[68]

In essence, asylum tribunals' deference to the State Department results in resolving uncertainty *against* the asylum-seeker, thereby creating a *de facto* "likelihood of persecution" standard, in direct contravention of *Cardoza-Fonseca*. The only way for the asylum-seeker to meet this heavier burden is to produce a "smoking gun"—an affidavit from his persecutors

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66. *See id.* at 1045.

67. *See id.* at 1044.

68. *See id.* at 1041; *cf. In re* O-Z & I-Z, Interim Dec. No. 3346 (B.I.A. Apr. 2, 1998) (describing how a B.I.A. panel with two frequent dissenters from B.I.A. *en banc* decisions found a lack of changed conditions in Ukraine case reflecting comparable pattern of beatings and harassment); Michael Wines, *Struggling Ukraine Teeters Between East and West*, N.Y. TIMES, Feb. 26, 1999, at A1 (discussing continued uncertainty in Ukraine). Another case that discounts the continuing impact of anti-Semitism in the former Soviet Union is *Maliavkina v. INS*, No. 97-2366, 1998 U.S. App. LEXIS 4168 (7th Cir. Mar. 6, 1998). In *Maliavkina*, the court affirmed the B.I.A.'s denial of asylum to a Latvian Jew whose knee had been broken by men shouting anti-Semitic slurs. The Court relied on a State Department report that characterized the situation of the Jewish community in Latvia as "generally tranquil." *See id.* at *9. In deferring to the State Department's rosy assessment of post-Communist Latvia, the court discounted both the State Department's own report of "some manifestations of anti-Semitism such as destruction of a synagogue . . . and desecration of cemeteries," and the asylum seeker's submission of news articles that describe continuing anti-Semitism and "some open support for Nazism." *Id.* at *8. The court cited the State Department's view that "official discrimination against Jews . . . ended with the end of Communist rule in 1991." *Id.* at 8. Unfortunately, history reveals that anti-Semitism in Latvia required no Communist coercion. During World War II, for example, as the German invasion of the Soviet Union left the Communists in disarray, Latvians actively embraced the Nazi's genocidal program. The contemporaneous report of a Nazi officer notes that Latvian Jews were, as of December 1941, either forced into work camps "or shot by the Latvians. . . . They [the Latvians] hate the Jews in particular. From the time of liberation [i.e., Nazi occupation] they have participated very amply in the extermination of these parasites." CHRISTOPHER R. BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND 44 (rev. ed. 1998). The experiences during World War II of my mother, a Holocaust survivor, echo this account. *See* Margulies, *supra* note 5, at 138. The court in *Maliavkina*, however, seemed to view history as irrelevant. *Maliavkina*, 1998 U.S. App. LEXIS 4168.

stating what they intend to do to him if he returns. Persecutors are curiously unwilling to produce such corroboration for the refugee, which is why *Mogharrabi* holds that corroboration is not necessarily required. The formalist view thus undermines both *Mogharrabi* and *Cardoza-Fonseca*, and with them, the structure of refugee protection.[69]

II. THE DYNAMIC VIEW OF TRANSITION AND CONSOLIDATION

The formalist model of changed country conditions jurisprudence would be troubling enough if all it did were undermine precedent like *Mogharrabi* and *Cardoza-Fonseca*. Unfortunately, the failings of the model do not end there. The formalism of the changed country conditions doctrine also adopts a conception of democratic transition and consolidation, which is radically at odds with both empirical and theoretical research.[70]

A substantial body of literature has developed to make sense of the transitions throughout the world. Considering changes in regimes in regions as disparate as Eastern and Southern Europe, Latin America, the Caribbean, and Africa, scholars, while conceding the distinctive ethos of each of these areas, have developed dynamic models to identify crucial elements in the transition to democracy.[71] These dynamic models recognize that change is fluid, complex, and unpredictable. As

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69. A measure of the degree to which changed country conditions makes asylum adjudication into an exercise in impatience is the rudeness, hostility, and intimidation that Immigration Judges often display in hearing cases raising these issues. *Cf.* Garrovillas v. INS, 156 F.3d 1010, 1014 (9th Cir. 1998) (observing that, "[t]hroughout the proceedings, the IJ acted with impatience and hostility toward Garrovillas, bullying and haranguing him from the inception of the hearing to its conclusion"); *Mikhailevitch*, 146 F.3d at 392 (acknowledging that the IJ "may have been 'brusque,' and perhaps could have achieved his objective in a more courteous manner"). In my experience with the St. Thomas School of Law Immigration Clinic in Miami, dealing with changed conditions cases involving Haitians, Eastern Europeans, and others, IJs in these cases more than others tend to be peremptory and directive, hindering rather than facilitating the asylum-seeker's testimony.

70. I address empirical and theoretical perspective on regime change in this section, and concrete applications of this literature, as well as current events, to individual countries in the concluding Parts.

71. *See* sources cited *supra* note 9. These models do not necessarily view all the features of United States-style democracy, particularly its tolerance of high degrees of income inequality, as a template for democracy across the globe. *See* Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995) (book review); Chua, *supra* note 9.

one commentator has pointed out, "democratic evolution is [not] a steady process that is homogeneous over time.... Temporal discontinuity... is implicit."[72] Indeed, this literature explicitly borrows from conceptions of regime change developed over the centuries in political philosophy by civic humanist theorists, students of the rise and fall of republics who viewed such change not as an act of God or a result dictated by structural forces, but instead as the "contingent product of human collective action."[73] Regimes can move from despotism to democracy, or just as readily travel in the opposite direction.[74]

The notion of human collective action not only encompasses what is necessary about establishing and maintaining democracy, but also, in broader terms, what is good about it. The transition theorists and the civic humanists believe that human beings fulfill themselves when they express themselves

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72. Dankwart A. Rostow, *Transition to Democracy: Toward a Dynamic Model*, *in* TRANSITIONS TO DEMOCRACY, *supra* note 9, at 67.

73. Philippe C. Schmitter & Terry Lynn Karl, *The Conceptual Travels of Transitologists and Consolidogists: How Far to the East Should They Attempt to Go?*, 53 SLAVIC REV. 173, 174 (1994).

74. *See id.* Schmitter and Karl quote Machiavelli on the uncertainty of change:

> There is nothing more difficult to execute, nor more dubious of success, nor more dangerous to administer than to introduce a new system of things: for he who introduces it has all those who profit from the old system as his enemies and he has only lukewarm allies in all those who might profit from the new system.

Id. (quoting NICCOLO MACHIAVELLI, THE PRINCE, VI). Machiavelli continues his analysis by observing that the "lukewarmness" of allies of change arises "partly from fear of their adversaries, who have the laws in their favour." NICCOLO MACHIAVELLI, THE PRINCE 21 (Modern Library ed., 1950). The importance of the principle of legal redress for abuses perpetrated by the old regime, explored *infra* notes 90–96 and accompanying text, compare MINOW, *supra* note 9, lies in large part in alleviating this paralyzing fear. Students of legal redress for human rights abuse tend to cite the twentieth century's great civic humanist, Hannah Arendt, who authored the most famous study of legal action against perpetrators of crimes against humanity. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963), *cited in, e.g.*, MINOW, *supra* note 9, at 47, 48; OSIEL, *supra* note 9, at 17 n.23. Arendt took as one of her crucial themes the contingency of political change—both movement from oppression toward democracy, and what, after all, in the first half of the twentieth century, seemed a far more salient trend—the transition toward totalitarianism. Some of Arendt's most trenchant analysis was reserved for transitions, such as those in the French and Russian Revolutions, in which action against oppression consumed its own most prominent actors, or led to an even greater source of oppression—another distinguishing mark of the contingency of human action in this realm. *See* ARENDT, ON REVOLUTION, *supra* note 9; *see also* discussion *supra* notes 54–55 and accompanying text (discussing self-consuming character of many revolutions).

in concert on matters regarding the well-being of the community.[75] This expression need not be explicitly political at all times, or even most of the time; expression is found along a continuum that by turns can be cultural, familial, or aesthetic. This expression is itself dynamic, because no mechanical formula—no shorthand of class, race, or economic interest—can conclusively determine how people speak and act as they engage with the speech and action of others. Regimes must provide for this dynamic element by permitting political expression and providing avenues for changing a particular government that incurs popular dissatisfaction. Regimes that preclude such a continuum of expression, or tolerate its preclusion by one group of constituents acting against another, cast doubt on their claims as democracies. For the dynamic to become and remain democratic, therefore, the spontaneity of indignation that galvanizes political action must mingle with memory, particularly the memory of an abiding commitment to respect for *all* groups within society. Preserving that commitment in perilous times, such as the times of revolution and despotism known and feared by all asylum-seekers, must be viewed as a crucial responsibility of government and the people.

While there is no single template for democracy,[76] we can create an operating definition that views democracy as both ensuring input from constituents and offering protections against overreaching by government and by powerful private groups. The three central elements advanced by the transition theorists and the civic humanists for realizing this definition are: 1) Institutional Repertoire; 2) Inclusion; and 3) Redress. I address each in turn in the following paragraphs. The absence of any of these should lend substantial credibility to an asylum seeker's claim of a well-founded fear of persecution.

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75. *Cf.* O'Donnell, *supra* note 9, at 113 (identifying the civic humanist notion that "the discharge of public duties is an ennobling activity" as central to maintenance of democracy, and asserting that "dedication to the public good . . . demands and nurtures the highest virtues").

76. *Cf.* David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545 (cautioning against rigid methodology in international studies).

A. *Institutional Repertoire*

Because both the transition theorists and the civic humanists view change as the product of collective human action, the manner in which humans organize themselves is of crucial concern. What is most crucial from a transition perspective, and therefore important to the asylum-seeker contemplating a return to her country of origin, is the entire repertoire of institutions available in that country. A broad spectrum of organizations and groups, with varying degrees of formality in their composition, structure, and purpose, is the best guarantee of safety for the asylum-seeker, and of success in democratic transitions.

A repertoire of institutions is important because a single dominant institution ultimately will supplant diversity with an oppressive homogeneity.[77] Elections are the institution most readily examined by those of the formalist stripe. They are large-scale events, publicized in the international media, and examined up close by teams of international observers.[78] Without a repertoire of institutions, including an independent judiciary and the array of more or less formalized organizations commonly referred to as "civil society," elections can allow an ambitious leader or cadre of leaders formed into a political party to manipulate mass opinion.[79] That is one recipe for totalitarianism and terror in the twentieth century.

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77. *See* SEYLA BENHABIB, THE RELUCTANT MODERNISM OF HANNAH ARENDT 162 (1996) (arguing that, in the French Revolution, "alliance between the people and the Jacobins led to the replacement of political diversity by national unity, led to an ideology of homogenization whereby the people, the object of compassion and manipulation, became a mythical instance to which ultimate appeal was made . . . . [U]nity dominated over diversity and plurality").

78. *See* Guillermo O'Donnell, *Illusions About Consolidation*, 7 J. DEMOCRACY, Apr. 1996, at 34, 45 ("Fair elections are the main, if not the only, characteristic that certifies countries as democratic before other governments and international opinion."). One can read some transition scholars, such as Samuel Huntington, as insisting, for some purposes at least, on the existence of free and fair elections as the principal criterion for democracy. *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 9 (1991) ("Elections, open, free, and fair, are the essence of democracy, the inescapable sine qua non."). Yet these scholars also readily concede that majority rule, even if embodied in elections, does not necessarily resolve vital questions about the inclusion of minorities. *See* Samuel Huntington, *Democracy's Third Wave*, *in* TRANSITIONS TO DEMOCRACY, *supra* note 9, at 129, 131–32 (discussing the plight of ethnic minorities in the former Soviet Union).

79. *Cf.* O'Donnell, *supra* note 78, at 44 (noting that "a caesaristic, plebiscitarian executive . . . once elected sees itself as empowered to govern the country as

Civil society is a crucial factor in the repertoire of institutions that the formalist view, with its emphasis on elections, neglects. Civil society, which involves associations of persons working to better their community, region, or country, promotes the participation transition theorists and civic humanists view as necessary for democracy.[80] Civil society is useful both in counterbalancing the state and in complementing it. For example, groups can seek to vindicate rights and interests provided for under formal laws, but underenforced by the state. Groups can provide services to constituencies that the state does not serve efficiently or equitably, tempering class conflict and resentment. Groups can also stand fast against state and private overreaching, registering protest through strikes, demonstrations, and support of legal challenges.[81] In this way, associations of civil society can push the state to vindicate the promises of freedom and equality that are formally present in its founding documents, but are frequently absent in practice.[82]

Civil society alone is not the answer, however. This is why a repertoire of institutions that includes more formal, traditional political institutions—such as legislatures and administrative agencies—is vital. Civil society offers a forum for citizens to express their views, but it lacks the overarching deliberative structures necessary for mediating conflicts, such as the role played by the United States Senate when it func-

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it deems fit. Reinforced by the urgencies of severe socioeconomic crises and consonant with old *volkisch* . . . congress, the judiciary, and various state agencies of control are seen as hindrances . . . .").

80. *See* LINZ & STEPAN, *supra* note 9, at 7–9; Gerald Clarke, *Non-Governmental Organizations (NGOs) and Politics in the Developing World*, 46 POL. STUD. 36, 41 (1998); Schmitter & Karl, *supra* note 9, at 7–8.

81. *See* Jan Kubik, *Institutionalization of Protest During Democratic Consolidation in Central Europe*, *in* THE SOCIAL MOVEMENT SOCIETY: CONTENTIOUS POLITICS FOR A NEW CENTURY 131 (David S. Meyer & Sidney Tarrow eds., 1998); *cf.* RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994 11 (1995) ("Ever since the founding of the ACLU and NAACP . . . social movements have mobilized law proactively to challenge the state and, less often, private adversaries.").

82. *Cf.* Clarke, *supra* note 80, at 41–42 (quoting H. Sethi, *Some Notes on Micro-Struggles: NGO's and the State*, ASIAN EXCHANGE 75 (May 1993) (observing that "'formal democracy, where it exists, [is] a necessary but insufficient condition in the long haul to social transformation'")). This stubborn clinging to the promise of a founding narrative of equality, in the face of repeated disappointments in the realm of formal law and politics, was a cardinal theme for Frederick Douglass and the American abolitionists, and a century later for the civil rights movement. *See* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

tions well.[83] Without strong political institutions, civil society dissolves into Babel, or coalesces into a juggernaut that tramples on the rule of law and impinges on the rights of those perceived as different.[84] Civil and political institutions play complementary, not dichotomous, roles in functioning democracies.[85]

Finally, in a related point, a dynamic conception recognizes that institutions must be able to act as a formal or informal check on each others' excesses. For example, separation of powers—or what the transition scholar Guillermo O'Donnell calls "horizontal accountability" among the coordinate branches of government—may be written into the new regime's constitution, but may be impossible to realize in practice because of jockeying among factions within those branches. As a result, laws become "instruments in . . . power plays,"[86] not norms for institutional dialogue. This situation, too, is ripe for demo-

83. *See* LINZ & STEPAN, *supra* note 9, at 10 ("Institutional routinization, intermediaries, and compromise within politics are often spoken of pejoratively [in civil society] . . . [but] each of the above terms refers to an indispensable practice of political society in a consolidated democracy."); *cf.* Siegfried Wiessner, *Federalism: A New Architecture for Freedom*, 1 NEW EUR. L. REV. 129 (1993) (analyzing federalism as a way of introducing checks and balances to curb ethnic strife in democratic transitions).

84. It is sobering to note here that the groups associated with the rise of totalitarianism in this century—Nazis, Fascists, and Communists—all started as associations in civil society. *See* ARENDT, *supra* note 9; *see also* LINZ & STEPAN, *supra* note 9, at 10 (stating that "many civil society leaders view with moral antipathy 'internal conflict' and 'division' within the democratic forces," instead of recognizing these elements as necessary elements of democracy); David Rieff, *The False Dawn of Civil Society*, THE NATION, Feb. 22, 1999, at 11, 14 (arguing that civil society, compared with more traditional political institutions, is "more likely to be wracked by divisions based on region and the self-interest of . . . single issue groups"); *cf.* Aili Mari Tripp, *Expanding 'Civil Society': Women and Political Space in Contemporary Uganda*, 36 COMMONWEALTH & COMP. POL., July 1998, at 84, 85 (1998) (discussing civil society as a traditional male preserve). Similarly, groups' methods of organization and implementation require scrutiny. Non-violent means will often enhance participation and civic discourse. As the Nazis, Fascists, and Communists knew, violence will chill and distort discourse, as well as put pressure on democratic processes. *Cf.* Schmitter & Karl, *supra* note 9, at 7–8 (discussing effects of violence).

85. *See* LINZ & STEPAN, *supra* note 9, at 8–9 ("[T]o consolidate democracy, it is important to stress not only the *distinctiveness* of civil society and political society, but also their *complementarity.*"); Tripp, *supra* note 84, at 105 (noting importance of "complementarity . . . of political reform along many dimensions that range from changes at the national level to changes in people's daily lives").

86. *See* O'Donnell, *supra* note 9, at 120.

cratic erosion,[87] rendering the asylum-seeker's prospects perilous upon her return.

B. Inclusion

As our discussion on the need for diversity in civil society demonstrates, inclusion is also a central value in the consolidation of democracy. Singling out a group for special disadvantages, whether express or tacit, *de jure* or *de facto*, governmentally- or privately-imposed, hollows out democracy at its core of equal membership and participation.[88] Ethnic strife, markedly present in much of Eastern Europe[89] and parts of Africa, for example, is a red flag of caution to asylum-seekers considering return to their countries of origin.[90] Much of this strife, with its genocidal consequences, started not as governmental action but rather as activity by private groups setting up their own bastions of "ethnic purity." In this area, as in others, the quality of action and discourse among private actors is at least as important to the dynamic of democracy as the conduct of public officials according to express public policy.

In addition to ethnic strife, exclusion based on criteria such as socioeconomic status and gender threatens democracy and returning asylum-seekers. Some semblance of socioeconomic equity is important because inequality in this sphere breeds popular resentment, which foments demagoguery and ultimately dictatorship, either by self-styled representatives of the

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87. *See* Schedler, *supra* note 9, at 97 (citing Guillermo O'Donnell, *Transitions, Continuities, and Paradoxes*, *in* ISSUES IN DEMOCRATIC CONSOLIDATION: THE NEW SOUTH AMERICAN DEMOCRACIES IN COMPARATIVE PERSPECTIVE 17, 19, 33 (Scott Mainwaring et al. eds., 1992) (describing causes of the "slow death" of democracy)).

88. Hannah Arendt as usual put the matter starkly. *See* ARENDT, *supra* note 9, at 65 (querying whether "the goodness of [the United States] . . . did not depend to a considerable degree upon black labor and black misery").

89. *Cf.* Huntington, *supra* note 78, at 131–32 ("Democratic development in most of the Soviet republics . . . is greatly complicated by their ethnic heterogeneity and the unwillingness of the dominant nationality to allow equal rights to ethnic minorities. . . . [The issue] may take years if not decades to resolve . . . ."); Terry Lynn Karl & Philippe C. Schmitter, *From an Iron Curtain to a Paper Curtain: Grounding Transitologists or Students of Postcommunism?*, 54 SLAVIC REV. 965, 972 (1995) (discussing centrality of ethnic strife for countries seeking transition out of dictatorship).

90. The oppression of indigenous people throughout the world is another part of this problem. *See* W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350 (1995).

downtrodden, as in discredited Communist totalitarian regimes, or by representatives of the plutocracy, desperate to preserve or expand their power.[91] For asylum-seekers fleeing persecution based on gender, the continuing salience of patriarchal customary practices such as female genital cutting, enforced often extra-governmentally by families, clans, and villages, is a profound concern that changes in "law on the books" do little to alleviate.[92]

C. Redress

Access to power and resources for all groups in the social realm develops in tandem with equality of access to legal institutions.[93] Legal institutions strong enough to uphold the claims of the weak against the powerful are a bulwark of democracy. By the same token, legal institutions that work only when they are not doing any heavy lifting become a weapon for enforcing oppression, ratifying governmental overreaching, and reinforcing socioeconomic inequality.

Asylum-seekers are profoundly concerned about this issue because they wish to have the ability, even if they do not exercise it, to seek redress against their persecutors. The legal system's ability to offer such redress is an acid test for democratic consolidation, and for an asylum-seeker's safety in her country of origin. If human rights abusers act with impunity, a powerful negative message issues about both safety and democracy.

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91. *See* Philippe C. Schmitter, *The Consolidation of Political Democracies: Processes, Rhythms, Sequences and Types*, *in* TRANSITIONS TO DEMOCRACY, *supra* note 9, at 567 (discussing the importance of eliminating "social inequalities" and "concentrations of private economic power"); O'Donnell, *supra* note 78, at 45. Indeed, the dynamic conception reveals that even what constitutes reform may be subject to debate and cross purposes. For example, market reforms undertaken in conjunction with democratization may exacerbate ethnic rivalries, including resentment of ethnic "haves" by ethnic "have-nots", thereby infecting political discourse and threatening democratic institutions. *See* Chua, *supra* note 9.

92. *See* Tripp, *supra* note 84, at 88 (noting informal barriers placed in the way of women's participation in governance, including men at council meetings deciding that "women should not bother attending the meetings since it interrupted their domestic chores").

93. *See* O'Donnell, *supra* note 78, at 45 (noting many states with ostensibly democratic elections still deprive people of rights and participation, citing examples including "[t]he rights of battered women to sue their husbands and of peasants to obtain a fair trial against their landlords, the inviolability of domiciles in poor neighborhoods, and in general the right of the poor and various minorities to decent treatment and fair access to public agencies and courts").

First, the survivor's society learns that it need not respect the survivor of abuse, or accord her membership in the community. Second, for the survivor, as well as all those complicitous in this denial of membership in society, the temporal horizon of democracy—the ability to extend the memory of democratic commitments into the future—shrinks alarmingly.[94] When the preservation of democracy seems like a long shot, incentives to participate shrivel up, and the field is left to eager practitioners of the rhetoric of exclusion.

Since redress is so crucial, it is unfortunate that punishing human rights violators often seems like an arduous task, as the recent examples of Haiti, Argentina, Chile, and present-day Cambodia demonstrate.[95] This is particularly true when countries such as the United States, which are in a position to exert leverage, are lukewarm in their commitments to human rights.[96] Indeed, there is a grim irony in the gap between the picture painted by American foreign policy—namely, that reform is proceeding apace—and the United States's go-slow approach to prosecuting human rights abusers, which frustrates reform. Our foreign policy rationale for this reluctance is that more vigorous prosecution would be destabilizing.[97] This view implicitly acknowledges that forces of reaction still pose a threat. That go-slow stance would be less problematic if it did not contrast so clearly with the willingness of asylum adjudicators, applying the changed conditions doctrine, to deport people to countries where the United States's reluctance to urge

94. *See id.* at 35–36 (noting that democracy must include an "intertemporal dimension: the generalized expectation that . . . freedoms will continue into an indefinite future").

95. *See* Jean Bethke Elshtain, Book Review, 26 POL. THEORY 419, 420 (1998) (reviewing CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996)) (noting that comprehensive punishment of human rights violators "may bring about a less than desirable political outcome . . . may, in fact, destabilize a fragile, nascent constitutional regime").

96. *Cf.* Orentlicher, *supra* note 4, at 2558 (noting that, after a short period focusing on human rights immediately after World War II, states began "to avoid pressing human rights concerns with other governments, in large part because they feared that such actions would actually exacerbate international tensions"); Schmitter & Karl, *supra* note 73, at 182–83 (describing the mixed role played by the United States and other external powers in the transition to democracy around the world).

97. *See* Orentlicher, *supra* note 4, at 2558.

prosecutions of human rights abusers guarantees that abusers will still be at large.[98]

D. *Summary: Transition Scholarship and the Changed Country Conditions Doctrine*

Summarizing the relationship between transition scholarship and the changed country conditions doctrine is simple: there is none. The test for democratic consolidation mentioned above—centering on institutional repertoire, inclusion, and redress—does not appear in the cases in a methodical way, even in those cases that decline to find changed conditions. Although some cases acknowledge one or more of these factors,[99] they rarely display sustained transition analysis, raising these factors only to discount and dismiss them.[100] Transition scholars, whose work constitutes the only comprehensive theoretical and empirical literature on democracy and regime change, are not cited by courts or agencies. Presumably, these tribunals instead look to the State Department for comparable expertise. Yet State Department reports are wholly unsystematic in their approach. At best, these reports amount to a grab bag of facts offering little insight into the risks faced by returning refugees. At worst, they offer an apologia for human rights abuses that is driven by United States foreign policy concerns rather than the safety of refugees. While current officials at the State Department are more knowledgeable about human rights issues than many of their predecessors,[101] it is difficult to overcome the department's institutional culture, which treats human rights as a distraction from core policy concerns. At the State Department, as well as in asylum-seekers' countries of origin, the dynamic view has it right: merely changing the faces of officials

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98. *See* Martin, *supra* note 4, at 1332 (discussing distortions in asylum adjudication introduced by the role of the United States Department of State).

99. *See* Korablina v. INS, 158 F.3d 1038 (9th Cir. 1998).

100. *See* Mikhailevitch v. INS, 146 F.3d 384, 387 (6th Cir. 1998) (holding that the failure of inclusion in Belarus manifested by the President's questioning of the loyalty of Roman Catholics and the limits on the activities of foreign Catholic priests was insufficient to rebut the INS's position that improved conditions for Catholics defeated petitioner's asylum claim, despite the State Department's acknowledgment that such developments "do not contribute to a climate of ethnic and religious tolerance").

101. *See* Orentlicher, *supra* note 4 (noting the presence in the State Department of Harold Koh, a prominent human rights expert and advocate).

does not ensure meaningful change. Asylum tribunals should address this institutional bias in the State Department with an approach to changed country conditions that relies less on deference to State Department positions and more on the insights of transition scholars.

III. A DYNAMIC APPROACH TO CHANGED COUNTRY CONDITIONS

The hallmark of a dynamic approach to changed country conditions adjudication is a careful analysis of conditions "on the ground" in the asylum seeker's country of origin rather than blanket deference to State Department conclusions. This analysis should encompass, not ignore, the insights of the transition scholars. Informing this analysis is a clear message that, pursuant to *Cardoza-Fonseca* and *Mogharrabi*, asylum adjudicators should resolve uncertainty about country conditions and the prospects for consolidation of democracy in favor of the refugee. This approach entails four elements: a) placing the burden of proof on changed country conditions on the INS in all cases, not merely those involving proven instances of past persecution; b) requiring specific findings of fact by adjudicators regarding the crucial elements of institutional repertoire, inclusiveness, and redress; c) requiring independent authority, beyond State Department reports, to justify a finding of changed country conditions; and d) requiring the Immigration Judge conduct the asylum hearing fairly, specifically by allowing the asylum-seeker an opportunity to tell her story.

A. *Burden of Proof*

The INS already bears the burden of proof regarding changed country conditions in cases involving past persecution. The formalistic view would suggest that the refugee should bear the burden when she has not suffered past persecution, on the theory that past persecution makes future persecution more likely. Like most formalistic outcomes, this one has a logical ring. Further examination, however, reveals that the reasoning is hollow. The requirement of past persecution for triggering a shift in the burden of proof penalizes refugees who

have the luck or wit necessary to evade their pursuers.[102] The past persecution suggests, in effect, that prospective asylum-seekers wait to be apprehended by those who wish to kill, confine, or torture them just to establish their refugee *bona fides*. Refugees, in contrast, may reasonably believe that moving early makes more sense than waiting too long. Balancing uncertainty against the gravity of harm here is entirely consistent with the *Cardoza-Fonseca* standard requiring a ten-percent possibility of persecution. If the refugee's testimony is clear, cohesive, and detailed about events that inspired a well-founded fear of persecution at the time of her flight from her country of origin, requiring her to prove that conditions have not changed materially, poses a distinct tension with *Cardoza-Fonseca*. To defuse this tension, the burden of proof should shift to the INS in such cases as well.

B. *Specific Findings*

A dynamic approach recognizes, however, that burdens of proof make little difference if asylum adjudicators are free to defer, without analysis, to State Department conclusions. To promote careful analysis, adjudicators should make specific findings on the three criteria for democratic consolidation identified by the transition scholarship: institutional repertoire, inclusiveness, and redress.[103] These findings should include an

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102. *See* Margulies, *supra* note 5.

103. A substantial concern here is that applying these criteria involves asylum adjudicators in an assessment of the legitimacy of the political system of another sovereign state. *See* Aleinikoff, *supra* note 4, at 17–18 (articulating doubts about such assessments in asylum cases). In other areas of asylum law, such assessments raise two concerns: 1) whether bias, particularly a foreign-policy based bias, will skew the adjudicator's evaluation, and 2) whether the adjudicator has the requisite expertise. *See id.* These concerns are particularly salient in the area discussed by Professor Aleinikoff: the refugee status of persons who seek by violent means to overthrow the government of their country. Generally, governments have the right to punish violent offenses. Exercising that authority is considered "prosecution," not persecution. However, tribunals have indicated, in two much-discussed cases, that where a government has closed off lawful means for regime change, violent rebels may still be viewed as refugees. *See* Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988) (coup plotters in Ghana); *see also In re* Izatula, Interim Dec. No. 3127 (B.I.A. 1990) (Afghan rebels).

Undue stress on whether lawful means for change are available may well skew adjudication in this context. The State Department's view, which would clearly have considerable weight, would most likely stem from its view of foreign policy exigencies, not refugee safety. *Cf.* STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 863–71 (1992) (discussing cases and noting that the B.I.A. de-

analysis of countervailing facts in State Department reports. Consideration of the transition literature also yields more concrete guidance about application of these criteria, which is briefly set out in the following paragraphs.

1. Institutional Repertoire

A judge should be able to point to a spectrum of institutions of varying levels of formality, operating with accountability to other institutions, and carrying on a nonviolent dialogue. In evaluating the institutional repertoire of an asylum-seeker's

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cided *Dwomoh*, involving the United States ally Ghana, against the refugee, only to be reversed in federal court). Adjudicators would defer to the State Department for substantive reasons of their own, and because of confidence in the State Department's expertise—much the same scenario that has shaped the formalist approach critiqued in this article. Rather than court these dangers, most refugee rebel cases can and should be disposed of, as Aleinikoff suggests, based on the nature of the treatment the rebels would have received from the government they oppose. The use of torture, for example, would suggest that the government was punishing rebels for their political beliefs, not for violent criminal activity. *See* Aleinikoff, *supra* note 4, at 16–18.

While acknowledging the merits of this alternative approach to refugee rebel cases, three points are worth making regarding assessments of the legitimacy of other regimes—the first two about such assessments in the refugee rebel context, and the third about such assessments in changed country conditions cases. The first point is that focusing on the nature of the treatment received by the rebel, including the use of torture, does not dispense with assessments of legitimacy. It simply moves those assessments to another realm—the legitimacy of torture—where consensus is greater. Indeed, the fact that this consensus about torture seems so clearly right suggests that assessments of value in law are both inevitable and appropriate. *See* Mensch, *supra* note 12 (discussing critical perspective on law and rejecting view of law as "neutral"). Moreover, it is far from clear that refugee rebels not subject to torture should necessarily be denied asylum. Consider, for example, a hypothetical case involving French resistance fighters who blew up a Nazi supply train during World War II. *See* LEGOMSKY, *supra*, at 862 (raising issue). While we know that the Nazis were not exactly shy about using torture, could an adjudicator deny asylum if it was stipulated that the French resistance fighters would not be tortured, but would merely be "lawfully" tried and almost surely executed for blowing up the train? *See* BROWNING, *supra* note 68. I would argue that an adjudicator who denied asylum in the French resistance case, in the process disclaiming any responsibility for assessing the character of the Nazi regime, would be practicing formalism at the expense of refugee protection.

Finally, arguments about bias and expertise in the refugee rebel case are less compelling in the changed country conditions context. Here, bias is already present, because of reliance on State Department positions. Bringing in the work of transition scholars would act as a counterweight to that bias. Similarly, the transition scholars' work offers a source of expertise for asylum adjudication untroubled by the State Department's agenda. For these reasons, considering the transition scholars' three core elements—institutional repertoire, inclusion, and redress—can inform asylum decision making, without imperiling the structure of asylum adjudication.

country of origin, asylum adjudicators must consider not merely a "snapshot" of country conditions yesterday or today, but in a society over time. Civil society is fragile. It can blossom quickly, as did neighborhood committees in Haiti just prior to the military coup that deposed President Aristide in 1991, or as citizens' committees and workers' councils did in the French and Russian Revolutions, respectively.[104] Civil society can meet its demise just as abruptly.[105] If volatility has been a characteristic of a country's political situation as it has been, for example, in Haiti, much more caution is warranted in making predictions about the consolidation of democracy in the country.[106]

2. Inclusion

Courts should consider here how well countries have kept the promise of equality that animates founding moments in democracies. Commitments often erode under the pressure of demagoguery over economic difficulties or concern about foreign security threats. Sometimes, as in the American founding experience, whole groups of people are vulnerable because they are not viewed by the majority as parties to the original democratic understanding.

Such situations are often reflected in societal structures of subordination that persist after official policy supposedly has changed. In this regard, the draft regulations on changed country conditions advanced by the Justice Department, which leave the burden of proof with the asylum-seeker to disprove changed conditions in all cases involving nongovernmental persecution, are fundamentally misguided.[107] Indeed, such cases,

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104. *See generally* ARENDT, *supra* note 9.

105. Historically, the violent suppression of civil society occurs in two settings: 1) when the forces of reaction assert their power, as in Haiti after the coup in 1991, or 2) when self-styled revolutionaries move to suppress "counter-revolutionary" tendencies, as in the French and Russian Revolutions, or, today in countries such as Afghanistan where Islamic fundamentalist groups like the Taliban have taken power.

106. Moreover, certain kinds of regimes, such as the regimes in Haiti and Romania that are dominated by a "strong man" and denominated by transition scholars as "sultanistic," have a greater tendency toward instability in transition and consolidation. *See* LINZ & STEPAN, *supra* note 9, at 364.

107. *See* New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31945 (1998) (to be codified at 8 C.F.R. pt. 208) (proposed June 11, 1998).

contrary to the presumptions suggested under the draft regulations, should be viewed with greater concern than persecution by governmental actors.[108] In addition, socioeconomic inequity, although in itself not a sufficient basis for an asylum claim, should play a role in considerations of the stability of democracies.

3. Redress

Here the asylum adjudicator should consider the comprehensiveness of internal investigations of human rights, the rate of conviction, and the punishment meted out by courts and other tribunals.[109] Countries such as South Africa and Argentina that have eschewed wide-ranging punishment in favor of truth commissions may well comply with this section, as long as some exemplary punishment has occurred in egregious cases.[110] Countries that have endeavored to sweep the issue of redress and recognition of abuses under the rug should not be destinations for asylum-seekers. Related factors include the depth of interaction between the survivor and persecutor. When institutions are weak, survivors with greater personal knowledge of their persecutor should be deemed at greater risk of retaliation and silencing should they be forced to return.

C. Independent Authority for Findings of Changed Conditions

The dynamic approach also recognizes that a hallmark of the formalistic approach is over-reliance on official sources such as State Department reports.[111] To address this problem, asylum adjudicators should seek out evidence beyond mere rote citation to State Department reports. For example, asylum

108. On occasion, the B.I.A. has recognized this concern. *See In re* O-Z & I-Z, Interim Dec. No. 3346 (B.I.A. Apr. 2, 1998) (discussing depth of anti-Semitism in the Ukraine). In other cases on similar facts, however, the concern has been absent.

109. *Cf.* Martin, *supra* note 4, at 1282–83 (noting that asylum adjudicators should consider whether there has been a "complete revamping of the police forces responsible for the earlier abuses, including reliable disciplining of the violators").

110. *See* MINOW, *supra* note 9 (discussing truth commissions as a substitute for punitive approach); *cf.* Orentlicher, *supra* note 4 (arguing for exemplary punishment of prominent human rights abusers).

111. *See* Martin, *supra* note 4.

adjudicators may be called upon to assess what forces, including the military or paramilitary groups, are active in undermining democracy, and how much power those forces possess. State Department reports indicating that such groups have been disarmed should be compared rigorously with other sources of information.

D. *Conduct of the Hearing*

The respect for the refugee's voice reflected in *Mogharrabi* also counsels for greater scrutiny of the manner in which asylum adjudicators question refugees. Asylum fact-finders have much leeway to probe for inconsistencies in testimony. At some point, however, probing for inconsistencies ceases to be a neutral element of sound adjudication, and becomes a self-fulfilling prophecy. Adjudicators with an inquisitorial bent must consider the heavy baggage borne by many asylum-seekers. For example, many asylum seekers are fearful of authority and have suffered trauma that dims their memories of past events. The need for translation of an asylum-seeker's testimony is also a source of confusion. Adjudicators whose questioning is overly obtrusive, impatient, or laden with ad hominem abuse can effectively silence the asylum-seeker, mocking *Mogharrabi*'s commitment to hearing the refugee's voice. Further, rather than reflecting a concern for accurate testimony, such questioning can also reflect either substantive bias against refugee narratives or simple frustration that the asylum-seeker is taking up the adjudicator's time instead of meekly returning to her country of origin. Appellate adjudicators should carefully consider whether questioning that seems to pre-judge a case in this fashion has unfairly slanted the presentation and analysis of changed country conditions evidence.[112]

IV. THE DYNAMIC APPROACH IN ACTION: EXAMPLES FROM THE FIELD

The virtues of the dynamic approach, particularly in its use of the transitional scholars' criteria of institutional reper-

112. *See* Garrovillas v. INS, 156 F.3d 1010, 1014 (9th Cir. 1998) (remanding case in which judge browbeat refugee throughout hearing).

toire, inclusion, and redress, are evident if one considers examples from the field. This section considers three such examples that have generated a significant flow of refugees into the United States: 1) Ethiopia, as an example of problems in transition in Africa; 2) Romania, as an example of problems in Eastern Europe; and 3) the situation of women in the developing world.

A. *Ethiopia*

Formalist jurisprudence has heralded the success of transition in Ethiopia. For example, the Fourth Circuit recently affirmed a B.I.A. decision viewing conditions in Ethiopia as having changed materially since the oppressive Mengistu regime.[113] The B.I.A. cited the State Department Report, noting that the current regime "has vastly improved the past human rights record . . . . [T]he harsh excesses of the Mengistu regime have ended and [the new regime] has announced explicit guarantees to improve its human rights practices."[114] Looking behind the announcements, however, yields a more pessimistic outlook for Ethiopia. As one commentator puts it, the formalistic approach to Ethiopian politics is captivated by "'veneers,' masking sharply contradictory realities of actual practice."[115]

A more careful look at the tripartite test of the dynamic approach confirms this assessment. Ethiopia's current government, the Ethiopian People's Revolutionary Democratic Front ("EPRDF"), has tolerated only a woefully limited institutional repertoire, with the appearance of elections masking the persistence of despotism. The EPRDF has suppressed the media, nongovernmental organizations, and trade unions.[116] Inclusion seems to be largely a sham. The Tigrean tribe, which makes up only ten percent of the population, dominates the EPRDF, and is extending its hold over other tribes through "satellite parties" that take orders from EPRDF.[117] Redress is

113. *See* Belay v. INS, No. 98-1377, 1998 U.S. App. LEXIS 26737 (4th Cir. Oct. 19, 1998).

114. *Id.* at *7.

115. John W. Harbeson, *Is Ethiopia Democratic? A Bureaucratic, Authoritarian Regime*, 9 J. DEMOCRACY, Oct. 1998, at 64.

116. *See id.* at 68.

117. *See id.* at 66; *see also* Richard Joseph, *Is Ethiopia Democratic? Oldspeak v. Newspeak*, 9 J. DEMOCRACY, Oct. 1998, at 55 (analyzing continued prob-

in short supply, as the new government engages in a "pervasive pattern of violations of due process—including torture—at local levels."[118] Indeed, the much commended elections themselves revealed the seeds of oppression, as the EPRDF, after pledging prior to the election to ensure that no faction would militarily intervene, exempted its own armies and put them in charge of "security."[119] This dynamic picture reveals something far less auspicious than the State Department pieties accorded deference under the formalistic approach. *Cardoza-Fonseca* would seem to mandate resolving such uncertainties in favor of the refugee-seeker.

B. Romania

Romania is a fascinating case study in the uncertainties of transition in the region where transition has been most celebrated, Eastern Europe. Transition has yielded a spectrum of results thus far, ranging from "success stories" like the Czech Republic, Hungary, and Poland, to a nightmare like the former Yugoslavia, with other countries somewhere in between. One such in-between country, Romania, sank into brutal despotism while maintaining its political independence from Moscow. Romania is in some ways the ultimate case study in the pitfalls of the formalistic approach of relying on one public event, such as an election, to stand for the whole complex, dynamic process of democratic consolidation.

The one event experts have pointed to is the election of 1996. In this election, the Democratic Convention of Romania (CDR) Party and a center-right coalition wrested power from Ion Ilescu's Social Democracy Party, a group of holdovers from the tyrannical Ceausescu regime.[120] Before this election, observers were virtually unanimous in the view that Romania

lems in Ethiopia). *But see* Paul B. Henze, *Is Ethiopia Democratic? A Political Success Story*, 9 J. DEMOCRACY, Oct. 1998, at 40 (discussing positive changes in Ethiopia).

118. Harbeson, *supra* note 115, at 68.

119. *See id.* at 67.

120. Ceausescu's rule as a "strong man" is dubbed "sultanistic" by some commentators, who analogize it to Haiti's rule by the Duvalier family. The decay of institutions under a sultanistic regime accounts for many of the difficulties in both Romania and Haiti, countries that in other respects might seem to have little in common. *See* LINZ & STEPAN, *supra* note 9, at 364; *cf.* Jean-Germain Gros, *Haiti's Flagging Transition*, J. DEMOCRACY, Oct. 1997, at 94 (noting continuing instability in Haiti).

had not truly made a transition to democracy, and looked good only in comparison with the genocide occurring in the former Yugoslavia.[121] The truncated trial and summary execution of Ceausescu and his wife led observers to view the change in government as a kind of camouflaged palace coup, in which the powers that be decided to jettison the most visible symbol of their rule so that they could both disclaim any responsibility for past abuses and also continue in power.[122] The new government's underwriting and encouragement of rampages by miners against student dissidents and opposition groups confirmed this assessment.[123] In the wake of the CDR Coalition's victory in the 1996 election, however, pessimistic assessments seemed to melt away.[124] The United States State Department echoed these sentiments, celebrating the belated consolidation to democracy, and recommending that, while some abuses continued, victims could easily correct them by resort to the country's "nascent . . . legal institutions."[125]

Courts and agencies engaged in adjudicating Romanian asylum claims in the United States have, more often than not, bought into the State Department's optimism.[126] This deference is unfortunate because here, too, the formal outlines

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121. *See* LINZ & STEPAN, *supra* note 9, at 345.

> Of the former Warsaw pact countries . . . Romania . . . had the last transition, . . . the most violent regime termination, . . . [and is] where the successor regime committed the most egregious violations of human rights. . . . [T]he democratic opposition has yet to win a national election . . . [and] a former high Communist official was not only elected to the Presidency in the first free election, but re-elected.

Id.

122. *See id.* at 359.

123. *See id.* at 361–62.

124. *See* Michael Shafir, *Romania's Road to "Normalcy,"* J. DEMOCRACY, Apr. 1997, at 144.

125. *See* Marcu v. INS, 147 F.3d 1078, 1082 n.2 (9th Cir. 1998).

126. *See* Petre v. INS, No. 97-70945, 1999 U.S. App. LEXIS 2005, at *3 (9th Cir., Feb. 3, 1999) (affirming B.I.A.'s deference to State Department); *see also Marcu*, 147 F.3d 1078 (same). *But see* Misca v. INS, No. 97-70909, 1999 U.S. App. LEXIS 786 (9th Cir. Jan. 15, 1999) (remanding for further proceedings); *In re* T-P-, No. A74 648 334 (B.I.A. Nov. 3, 1998) (reversing IJ's denial of asylum). The general pattern of deference to the State Department is most apparent if one realizes 1) that most B.I.A. decisions in the future will, because of the restrictive provisions of the 1996 Act, probably not be subject to significant judicial review, and 2) that even a final decision for the refugee at the B.I.A. or federal court level is the product of the refugee's persistence in the face of one or more negative decisions below. *See supra* note 19 (discussing appeal and review of determinations in asylum cases).

traced by one election do not a democracy make. Further examination reveals that institutional repertoire is still notable only by its absence. Coordination between branches of government is nonexistent in Romania, since the Prime Minister rules by bypassing parliament through decrees instead of by proposing legislation.[127] Civil society is undeveloped: the extremist miners, the most powerful group, recently engaged in a bloody march on the capital.[128] Inclusion is also a problem, as rumors percolate to the surface about treasonous machinations by the country's ethnic Hungarian minority,[129] and an extremist party known for its attacks on ethnic Hungarians and Jews has gained standing.[130] Finally, redress is a more difficult burden than the country's "nascent" institutions can bear, as both human rights abusers and corrupt officials enjoy impunity.[131] Despite these concerns, Romania may yet consolidate its democracy. The path to consolidation will, however, almost certainly take many detours not foreseen in the euphoria of the 1996 elections, paths that could be lethal for asylum-seekers forced to return.

C. Change and Women's Rights

A new frontier for the changed country conditions doctrine is also a new frontier for asylum law generally: women's rights and gender issues. The most important new development in asylum law in the past five to ten years has been the expansion of the notion of persecution based on membership in a particu-

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127. *See* Virginia Marsh, *Dissent into the Chaos of Democracy*, FIN. TIMES (London), Sept. 28, 1998, at 2.

128. *See Romanian Miners*, *supra* note 47, at A3.

129. *See, e.g.*, Gabriel Ronay, *Bishop Who Toppled Dictatorship Said to BE* [sic] *Communist Spy*, SCOTLAND ON SUNDAY, July 26, 1998, at 16 (detailing apparently baseless charges by extremist, ultra-nationalist group that ethnic Hungarian Bishop, who sparked revolt against Ceausescu, was a spy and Communist collaborator).

130. *See* Marsh, *supra* note 127. *But see* Ronay, *supra* note 129, at 16 (arguing that extremist parties have muted their anti-Semitic and anti-Hungarian rhetoric as they gained support).

131. *Cf.* Marsh, *supra* note 127 (noting in 1998 that government anti-corruption campaign has "flopped"). *But cf.* Shafir, *supra* note 124, at 157 (expressing optimism about anti-corruption campaign shortly after the 1996 election).

lar social group to include claims of persecution based on gender.[132]

Asylum based on fear of male violence and cultural practices such as female genital cutting are examples of this powerful trend.[133] The threat here is that formal legal reforms in countries around the world, through the changed conditions doctrine, will operate in the future to defeat legitimate gender-based claims for asylum.[134]

This development would be tragic because, on gender issues in particular, there is typically a wide gap between the official changes celebrated by the formalistic view and conditions "on the ground." Governments around the world that have taken the seismic steps of outlawing rape and male violence against intimate partners deserve applause. However, changes in the official climate regarding women's rights still contend with the time-honored relegation of many facets of women's oppression, such as intimate violence, to a non-official, domestic sphere. As one commentator has noted, "[l]egislative and constitutional changes . . . are irrelevant unless they are adhered to and legitimated by people in their day-to-day practices."[135]

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132. *See* Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665 (1998) (discussing strengths and pitfalls of immigration legislation on violence against women). *See generally* Pamela Goldberg & Nancy Kelly, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195 (1993) (analyzing male violence against women as basis for asylum). Immigration remedies for other groups of women, including spouses of abusive United States citizens and residents, have also expanded.

133. *See In re* Kasinga, Interim Dec. No. 3,278 at 15 (B.I.A. June 13, 1996) (holding that female genital mutilation can be basis for asylum claim). *But see In re* R-A-, 1999 WL 424364 (B.I.A. June 11, 1999) (holding that fear of domestic violence generally is not a basis for asylum). *See generally* Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1991–92) (discussing complexities of human rights stance regarding female genital cutting); Peter Margulies, *The Violence of Law and Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 179 (1996) (same).

134. In some recent gender-related asylum claims, the Immigration Clinic at St. Thomas Law School has encountered skepticism from Immigration Judges, who have relied in part on supposedly improved conditions for women.

135. Tripp, *supra* note 84, at 105. In addition, the direction of changes is not necessarily positive. *See* Teemu Ruskola, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2553 (1994) (noting that, with respect to women's equality, "the gap between the letter of the law and legal reality in the area of sex offenses appears in fact to be greater" in Commu-

This suggests that courts should apply the changed conditions doctrine very gingerly in gender-based cases. The institutional repertoire supporting positive changes in the field in the area of women's rights is often sadly lacking. Despite encouraging pronouncements and legislative changes, women throughout the world must struggle daily for the ability to mobilize and participate in both civil society and political institutions.[136] Inclusiveness is also a crucial obstacle to such efforts. For example, class[137] and religious[138] differences among women frustrate mobilization and allow male guardians of privilege to play one group of women against another. Redress is impossible in countries where, despite changes in "law on the books," security forces and police collaborate with entrenched patriarchal interests to suppress women's mobilization.[139]

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nist China than under the Confucian dynasty that ruled China for most of the past three centuries).

136. *See* Gisela Geisler, *Troubled Sisterhood: Women and Politics in Southern Africa*, 94 AFR. AFF. 545, 547 (1995). Geisler cites the frequent use by males in Botswana of the proverb, "cows never lead the bull," as evidence that:

> Ideologies that prescribe the private domestic sphere as the female domain and the public—and political—as a male prerogative are deeply engrained in peoples' minds, and they are backed by recourse to 'tradition' and 'custom' and laws that create barriers for women to deal independently with the world outside the home.

Id.; *see also* Kole A. Shettima, *Engendering Nigeria's Third Republic*, 38 AFR. STUD. REV., Dec. 1995, at 61, 67 (noting in Nigeria, "token women appointed to public offices, . . . the failure of women to be elected and the bureaucratic processes which made a mockery of the enfranchisement of women"); *cf.* Tripp, *supra* note 84, at 101 (discussing how pressure from male council officials led to closing of a women's health clinic in Uganda).

137. *See* Tripp, *supra* note 84, at 100 (noting that wealthier women, dependent on men for their economic status, were afraid to express solidarity with women of less means openly, because of concern about losing their status, although these women collaborated clandestinely).

138. *See id.* at 99 (discussing how Protestant male leaders in Ugandan community attacked women activists for working with Catholic and Muslim women); *cf.* Sara Hossain, *Equality in the Home: Women's Rights and Personal Laws in South Asia*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 465, 474 (Rebecca J. Cook ed., 1994) (discussing how shifts toward religious fundamentalism in South Asia have slowed or halted progress in women's rights); Frances E. Olsen, *Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement*, 106 YALE L.J. 2215 (1997) (arguing that resurgent nationalism and religious traditionalism in post-Communist Eastern Europe have worsened the situation of women).

139. *See* Tripp, *supra* note 84, at 94, 103 (describing how police and security forces intimidated women's group and other residents protesting lack of community input into infrastructural rehabilitation funded by World Bank); *see also id.* at 94, 103 (discussing how male vendors in urban market enlisted governmental aid in evicting women's co-operative from market stalls, and beat women who pro-

CONCLUSION

These studies of human rights "on the ground" demonstrate the fragility of reform and the peril for refugees that persist under the veneer of changed conditions. Careful analysis, as well as sobering stories from the headlines reveal the wisdom of the dynamic approach, which views governmental change as contingent, fluid, and prone to changes in direction. Both analysis and current events reveal the failure of the formalist view, with its focus on law "on the books" and changes in the identity of government officials; its impatience with the admittedly complex interaction of law, politics, society, and history; and its equation of "objectivity" with deference to the State Department.

The dynamic and formalistic models contend throughout the body of asylum law. The dynamic model invokes precedents like *Cardoza-Fonseca* and *Mogharrabi*, which consider the refugee's circumstances as they acknowledge the inevitable uncertainty of information and prediction in the asylum context, and the disproportionate impact of such uncertainty on the refugee. This line of precedent rejects a formalistic notion of objectivity, holding, in *Cardoza-Fonseca*, that a refugee need not prove that persecution in her country of origin is more probable than not to demonstrate a "reasonable" fear, and holding, in *Mogharrabi*, that even without corroboration, a refugee's testimony can be sufficiently "objective" to support a grant of asylum. Unfortunately, the changed conditions doctrine in asylum law revives mechanical approaches to objectivity, and in the process undermines asylum protections.

Ironically, the role of changed conditions doctrine in asylum law is itself a case study supporting the dynamic model. Changed country conditions treat the resolution of uncertainties about information and prediction as the refugee's responsibility. Yet precedents about changed country conditions do not directly challenge either *Mogharrabi* or *Cardoza-Fonseca*; the law on the books remains unchanged. Nevertheless, the logic

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tested their eviction); Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, *in* HUMAN RIGHTS OF WOMEN, *supra* note 138, at 85, 100 (discussing how indifference of police to women's domestic violence complaints constitutes a ratification of male power); Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Reconceptualization of Violence for the 21st Century*, 60 ALB. L. REV. 607 (1997) (deconstructing power relations that obscure violence against women).

of deference to the State Department in matters regarding changed country conditions alters the standard of proof refugees must meet: the ten-percent possibility of persecution deemed material in *Cardoza-Fonseca* changes to a requirement of a clear probability of persecution if the refugee is forced to return. It effects this alteration in the standard by requiring the refugee to come forward with evidence that outweighs, as in a preponderance standard, the State Department's conclusion that conditions have changed. In addition, requiring new evidence from the refugee also effectively undermines *Mogharrabi* by forcing the refugee to produce corroboration from her country of origin, even though both *Cardoza-Fonseca* and *Mogharrabi* recognize that bureaucracy, chaos, and fear can make such evidence extremely difficult for refugees to obtain.

Typically, the formalist invocation of objectivity in changed country conditions cases only flows one way: against the refugee. When, for example, State Department reports include adverse information about a country where conditions allegedly have improved, changed country conditions cases, particularly decisions from the new tribunal of virtual last resort, the B.I.A., skate over that information with barely a mention. This disregard of unfavorable evidence stems not from neutrality or objectivity, but from the deference to the status quo that underlies most legal formalism.

Such deference is particularly inappropriate because the overwhelming body of scholarly research about transitions to democracy embraces a dynamic model. This model focuses on three criteria for successful transitions: 1) institutional repertoire, 2) inclusion, and 3) redress. Analysis of country conditions based on these criteria will offer a meaningful response to the refugee's uncertainty about the treatment she will encounter if she is forced to return to her country of origin. However, the cases reveal at best sporadic attempts to integrate the learning of the transition scholars with asylum law. Case studies such as Romania, Ethiopia, and the condition of women in developing countries, reveal that adjudicators who ignore the framework established in transitional scholarship risk disproof from conditions on the ground and current events.

The rigidity built into changed conditions doctrine, along with the virtual unreviewability of B.I.A. decisions under the 1996 Immigration Act, create the real prospect that asylum law

will die a "slow death."[140] Here, however, refugees, scholars, and advocates can take some comfort from the dynamic model. Because change is fluid and unpredictable, pessimism can turn out to be misplaced. The B.I.A., empowered by its unreviewability, may rise to the occasion by advancing a more dynamic model of changed country conditions doctrine.[141] This article offers some signposts along the way.

140. *See* Schedler, *supra* note 9, at 97 (analyzing the "slow death" of democracy that occurs with the withering of democratic institutions).

141. One recent decision suggests that this scenario is not wholly implausible. *See In re* O-Z & I-Z, Interim Dec. No. 3346, at 2–5 (B.I.A. Apr. 2, 1998) (acknowledging persistence of societal anti-Semitism in the Ukraine).