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An Alien Minor's Ability To Seek Asylum In The United States Against Parental Wishes

*Give me your tired,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore;
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!*¹

I. INTRODUCTION

In July, 1980, the Immigration and Naturalization Service (INS) decided to grant United States asylum to Walter Polovchak pursuant to the 1980 Refugee Act.² Five years later, on July 17, 1985, the District Court of Illinois declared this grant of asylum void on the ground that the INS's asylum procedure, under which Walter had obtained his grant of asylum, had violated his parents' rights to due process under the fourteenth amendment of the United States Constitution.³

The controversy surrounding Walter's initial grant of asylum and subsequent withdrawal stems from the fact that Walter was only twelve years-old at the time of his request. Walter's young age, along with the asylum procedures followed by the INS in considering his application for asylum, were the circumstances examined by the court in deciding whether the INS had acted properly in granting Walter asylum.⁴ The court concluded that the INS had violated Walter's parents' rights to due process by failing to provide for a preliminary hearing during which the parents could have voiced objection to Walter's application. Therefore, the court declared the corresponding grant of asylum void.⁵

This comment will discuss and analyze the problems with the

1. U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 1 (1980) (quoting E. LAZARRES, *THE NEW COLOSSUS* (1983)). This quotation also appears on the Statue of Liberty—the welcoming figure to thousands of refugees.

2. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)). See *infra* text accompanying notes 87-97.

3. *Polovchak v. Landon*, 614 F. Supp. 900 (N.D. Ill. 1985).

4. *Id.* at 901-03.

5. *Id.* at 903. The government appealed this decision to the United States Court of

INS's current policies and procedures in connection with a minor's petition for asylum. First, however, the conflicting interests which are necessarily involved when a minor seeks asylum will be pointed out and discussed.⁶ Then it will be revealed how extremely difficult it is for a minor to successfully seek and maintain asylum under current law and INS policy. Next, this comment will propose a solution to the present dilemma by suggesting the implementation of a special hearing during which the INS could weigh the competing interests involved and ultimately decide whether the minor's petition for asylum should be granted.

Finally, after defining a set of specific guidelines which should be applied by the INS in such a special hearing, these guidelines will be further explored by applying them to the facts surrounding the case of Walter Polovchak to see whether the INS's initial grant of asylum would have been proper.⁷

II. COMPETING INTERESTS INVOLVED IN GRANTING ASYLUM TO A MINOR

In *Polovchak v. Landon*,⁸ the court recognized the existence of three competing interests which the INS should examine when considering a minor's application for asylum: 1) the interest of the parents; 2) the interest of the minor; and 3) the interest of the government.⁹ Accordingly, each of these interests must be carefully examined in light of existing law to determine what rights parents have over their children, and what rights, if any, children have independent of their parents. Finally, the INS must explore the government's interests in granting an individual asylum. The interests of all the parties involved must be analyzed and balanced against each other before any specific procedure can be adopted by the INS in an effort to successfully grant a minor asylum without violating the due process rights of any of the parties involved.

Appeals in *Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985). The court in *Meese* criticized the lower court for failing to adequately weigh the rights of the child in reaching its decision.

6. The parties whose interests are directly affected by a minor's application for asylum include: 1) the minor's parents; 2) the minor; and 3) the government. The court in *Polovchak v. Landon* placed most of its emphasis upon the interests of the parents; the court hardly mentioned the minor's interests. See *Polovchak v. Landon*, 614 F. Supp. at 902-03.

7. This inquiry is moot as to the actual *Polovchak* case since Walter turned eighteen on October 3, 1985, and may now apply for asylum on his own, regardless of his parents' desires. See *Polovchak v. Meese*, 774 F.2d 731, 731 (7th Cir. 1985).

8. 614 F. Supp. 900 (N.D. Ill. 1985).

9. *Id.* at 902-03 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

A. Parental Rights

One of the basic rights in our country, both historically and in today's society, is the right to bear and raise children with minimal state intervention.¹⁰ Several relatively recent United States Supreme Court cases have reaffirmed the notion that the family's right to be free of unnecessary state intrusion is an intrinsic human right which our country openly recognizes and encourages.¹¹ This fundamental right of parental control is recognized as an interest protected by both the due process clause and by the equal protection clause of the fourteenth amendment.¹²

The constitutional right of parents to make decisions concerning the upbringing of their children was first articulated in a line of cases beginning in 1923 with *Meyer v. Nebraska*.¹³ In *Meyer*, the Court upheld the parents' rights to have their children taught German in a public school. The Court stated broadly that the right "to marry, establish a home and bring up children"¹⁴ was an essential part of the liberty of parents which was protected by the fourteenth amendment.¹⁵

In *Pierce v. Society of Sisters*,¹⁶ the Court relied upon *Meyer* in holding that a state statute, which required every child between the ages of eight and sixteen to attend public school, violated the constitutional liberty of parents "to direct the upbringing and education" of their children.¹⁷ The Court further stressed that the child was not "the mere creature of the state" and that the parents, who nurture and direct a minor's destiny, have the right to prepare him for future responsibilities and obligations.¹⁸

10. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (state could not require a mandatory additional two years of formal education for children against Amish parents' wishes); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state statute which required every child between the ages of eight and sixteen to attend public school violated parents' constitutional right to direct their child's education and upbringing); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (parents had the right to have their children taught German in public schools).

11. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845-46 (1977); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (a state statute forbidding the use of contraceptives violated the marital right of privacy).

12. U.S. CONST. amend. XIV, § 1; see *Smith*, 431 U.S. at 847-91; *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

13. 262 U.S. 390 (1923).

14. *Id.* at 399.

15. *Id.*

16. 268 U.S. 510 (1925).

17. *Id.* at 534-35.

18. *Id.* at 535.

Nearly fifty years later in *Wisconsin v. Yoder*,¹⁹ the Supreme Court held that the state could not constitutionally influence or determine the future of Amish children by requiring an additional two years of formal education.²⁰ The Court stated that "this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children."²¹ Although the holding in *Yoder* was narrowly limited to its facts, Chief Justice Burger announced in broad terms that:

[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.²²

Therefore, it appears that through its decisions in *Meyer*, *Pierce*, and *Yoder*, the Court has recognized that parents have a constitutional right to control and direct the upbringing of their children without government intervention.

B. Minors' Constitutional Rights

In all of the above-mentioned cases, the conflicts raised were between parents and state authorities; the children did not express their own wishes.²³ Therefore, the question arises as to whose rights and liberties should prevail when a direct conflict arises between parents and their children? A recent series of minors' rights decisions by the United States Supreme Court has shed some interesting light on what the answer to this question might be.²⁴

Historically, minors were thought of as mere family "chattels"

19. 406 U.S. 205 (1972).

20. *Id.* at 234.

21. *Id.* at 232.

22. *Id.*

23. Although the majority in *Yoder* expressly concluded that the issue of the children's rights to attend high school contrary to their parents' wishes had not been presented in the case, language in Chief Justice Burger's opinion for the Court suggested that the right of parents to guide the upbringing of their children was considered paramount. *Yoder*, 406 U.S. at 230-31.

24. *In re Gault*, 387 U.S. 1 (1967) (minors are afforded the constitutional rights to due process, notice, counsel, confrontation, cross-examination, and the privilege against self-incrimination); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (constitutional right to free speech is extended to minors participating in an anti-Vietnam display); *Carey v. Population Services Int'l.*, 431 U.S. 678 (1977) (in light of a minor's right to privacy, state may not place a total ban on the distribution of non-medical contraceptives to minors under the age of sixteen); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (statute voided which required

and occupied the lowest rung on the colonial American social ladder.²⁵ In the early history of our country, children were subject to the harshest punishments for relatively trivial offenses.²⁶ They assumed a completely subservient position within the family unit and a parent's right to a minor child's services and wages was deemed absolute.²⁷

It was not until the early 1900's, through a growth in the use of the *parens patriae* principle,²⁸ that the state would, in special circumstances, intervene in family affairs to safeguard the best interests of the child.²⁹ Still, it was not until the 1960's that the rights of children, in and of themselves, were recognized by the Court.³⁰ Today, it is well-established that minors are vested with the constitutional rights to notice,³¹ counsel,³² confrontation,³³ and cross-examination.³⁴ Mi-

parental consent as an absolute condition for an unmarried minor to obtain an abortion as it was anathema to the minor's constitutional right to privacy).

25. See Katz, Schoeder & Sidman, *Emancipating Our Children - Coming of Legal Age in America*, 7 FAM. L.Q. 211, 212 (1973).

26. *Id.* at 212. The death penalty was a possible punishment for any child convicted of violating the early Stubborn Child Law which was enacted in Massachusetts in 1654. The Law punished those children who behaved themselves "too disrespectively, disobediently and disorderly toward their parents, masters and governors." See 3 N. SHURTLEFF, RECORDS OF THE GOVERNOR AND COMPANY OF MASSACHUSETTS BAY COLONY IN NEW ENGLAND 355 (1853-54). This Law, which is still on the books, was recently upheld as being constitutional in *Commonwealth v. Brasher*, 359 Mass. 550 (1971).

27. See, e.g., *Poe v. Gerstein*, 517 F.2d 787, 789 (5th Cir. 1975), *summarily aff'd*, 428 U.S. 901 (1976). The *Poe* court stated: "At common law, minors were charges of the family and state, legally unable to act for themselves. [citations omitted]. The law did not distinguish between the infant and the mature teenager, treating them both as the property of their parents, who could make all decisions affecting them." *Id.* at 789.

28. The doctrine of *parens patriae* originated in the English Court of Chancery, and provided that the Crown had the power to protect those subjects who were unable to protect themselves, such as children and incompetents. See *Eyre v. Shaftsbury*, 24 Eng. Rep. 659, 666 (Ch. 1725); *Johnstone v. Beattie*, 8 Eng. Rep. 657, 687 (H.L. 1843); *Wellesley v. Bequfort*, 38 Eng. Rep. 236, 241 (Ch. 1827). Thereafter, the doctrine was incorporated into the common law of this country. See generally Note, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1056 (1975) (discussion of the history of *parens patriae* doctrine); Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L. J. 195 (1978) (excellent historical discussion of *parens patriae* doctrine).

29. See generally *Prince v. Massachusetts*, 321 U.S. 158 (1944). The Court relied upon the doctrine of *parens patriae* in holding that "the family itself is not beyond regulation in the public interest," and neither are the "rights of parenthood beyond limitation." *Id.* at 166.

30. The landmark case of the so-called children's rights cases was *Meyer v. Nebraska*, 262 U.S. 390 (1923). In dictum, the Court stated that "[t]he protection of the Constitution extends to all." *Id.* at 401.

31. *In re Gault*, 387 U.S. 1, 33-34 (1967).

32. *Id.* at 41.

33. *Id.* at 42-47.

34. *Id.*

nors also enjoy the constitutional right of free speech³⁵ as well as the privileges against self-incrimination³⁶ and double-jeopardy.³⁷ Still other courts have recognized a minor's right to privacy in the area of contraceptives and abortion: both may now be obtained by a minor without having to first acquire parental consent.³⁸

The landmark decision which first affirmatively recognized a minor's right to procedural due process was *In re Gault*.³⁹ In *Gault*, the Supreme Court observed that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁴⁰ *Gault* dealt with the requirements of due process surrounding juvenile delinquency proceedings. The Court held that procedural due process required that notice, the right to counsel, the privilege against self-incrimination, and the right to cross-examination be accorded to juveniles in such proceedings.⁴¹ However, since *Gault* also held that the parents must be notified of the right to counsel, the case may be read as protecting the mutual interests of both parents and children.⁴²

*Tinker v. Des Moines*⁴³ is the United States Supreme Court case which is most often cited as having extended to minors the rights set forth in the first amendment. In *Tinker*, the petitioners, three school children, publicized their objections to the Vietnam War by wearing black armbands to school. School officials subsequently decided to adopt a policy whereby any student wearing an armband to school would be suspended until the armband was removed.

The Supreme Court held such regulation by a school district un-

35. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

36. *Gault*, 387 U.S. at 55.

37. *Breed v. Jones*, 421 U.S. 519, 541 (1975).

38. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). See also *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

39. *Gault*, 387 U.S. at 1.

40. *Id.* at 13.

41. *Id.* at 31-34.

42. *Id.* at 41-42. On the question of whether such rights are waivable by the parents over the wishes of the minor, see *Williams v. Huff*, 142 F.2d 91, 92 (D.C. Cir. 1944) (the competence of a 17-year-old criminal defendant to waive his right to counsel is a question of fact). See Note, *Waiver of Constitutional Rights by Minors: A Question of Law or Fact?*, 19 HASTINGS L. J. 223 (1967); see also *People v. Lara*, 67 Cal. 2d 365, 378-79 (1967) (minor may make an intelligent and knowing waiver of constitutional rights without the consent or approval of a parent, guardian or attorney). Some states, such as California, have made it clear that competent waivers by minors are not to be prohibited. See CAL. CIV. PROC. CODE § 372 (West 1973), which provides "[n]othing in this section. . . is intended by the Legislature to prohibit a minor from exercising an intelligent and knowing waiver of his constitutional rights in any proceedings under the Juvenile Court Law."

43. 393 U.S. 503 (1969).

constitutional.⁴⁴ In support of its conclusion, the Court advanced two arguments: first, that the wearing of an armband for the purpose of expressing certain views was within the free speech clause of the first amendment;⁴⁵ second, that first amendment rights are applicable to students since “[s]tudents in school as well as out of school are ‘persons’ under our Constitution.”⁴⁶ However, in the concurring opinion to *Tinker*, Justice Stewart revealed certain misgivings to the effect that minors might not have adequate capacities to make the sort of choice that the majority was willing to give them.⁴⁷

The Supreme Court has continued to emphasize that children are ‘persons’ under the Constitution and therefore possess certain constitutional rights. In *Planned Parenthood of Central Missouri v. Danforth*,⁴⁸ the Court declared unconstitutional part of a Missouri abortion statute requiring an unmarried minor female to acquire the consent of her parent(s) or guardian(s) in order to have an abortion performed.⁴⁹ Justice Blackmun, delivering the majority opinion, stated that “constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”⁵⁰ Thus, the Court voided the state abortion statute on the ground that it violated a minor’s right to privacy.⁵¹

44. *Id.* at 504-05.

45. *Id.* at 508.

46. *Id.* at 511.

47. *Id.* at 515. Justice Stewart’s concurrence stemmed in part, no doubt, from the Court’s previous decision and rationale set forth in *Ginsberg v. New York*, 390 U.S. 629 (1968). In *Ginsberg*, the Court found that it was constitutionally permissible for New York to accord minors a more restricted right than adults to determine for themselves what sex material they read. *Id.*

48. 428 U.S. 52 (1976).

49. *Id.* at 72-75.

50. *Id.* at 74. While Justice Blackmun acknowledged that minors’ constitutional rights may, in fact, vest before the state-defined age of majority, nowhere in his opinion does he state exactly when or under what conditions such rights should vest. However, in a subsequent case, *Bellotti v. Baird*, 443 U.S. 622 (1979), the Court stated that under a state statute which required parental consent before a minor could seek an abortion, every minor must have the opportunity to go directly to a court without first consulting or notifying her parents. If the minor satisfies the court that she is mature and well enough informed to make an intelligent abortion decision on her own, the court must authorize her to act without parental consent. *Id.* at 643-44. Thus, it appears that a minor’s independent constitutional rights, at least in the area of privacy, vest at that point in time when the minor can demonstrate his or her maturity to the court. As the Court in *Bellotti* stated, “[w]e . . . cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.” *Id.* at 650.

51. 428 U.S. at 72-75.

A minor's right to privacy was again invoked in *Carey v. Population Services International*.⁵² In that case, the Court overturned a New York law which prohibited the distribution of nonprescriptive contraceptives to minors under the age of sixteen. The Court held that the right to privacy, at least in connection with decisions affecting procreation, extended to minors as well as adults.⁵³ Since a state could not impose a prohibition, or even a blanket requirement of parental consent, on a minor's choice to seek an abortion,⁵⁴ "the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed."⁵⁵

While the above cited cases appear to broadly extend constitutional protections to minors, several recent Supreme Court decisions have arguably restricted such rights where strong and compelling state reasons exist for doing so.⁵⁶

C. Governmental Interests

1. In acting as a substitute parent: the doctrine of *parens patriae*

The power of the government to remove a child from the custody of her parents in order to protect the child's best interests has roots deep in American history.⁵⁷ Through the *parens patriae* doctrine,⁵⁸ equity courts in the early nineteenth century exercised their power to remove a child from parental custody and to appoint a suitable person to act as guardian.⁵⁹

Two relatively recent United States Supreme Court decisions which applied the doctrine of *parens patriae* in order to allow state intervention in the area of parental control and direction are *Prince v. Massachusetts*⁶⁰ and *Ginsberg v. New York*.⁶¹ In *Prince*, the Court upheld as constitutional a state statute which prohibited minors from

52. 431 U.S. 678 (1977).

53. *Id.* at 693.

54. *Id.* at 694.

55. *Id.*

56. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state has a strong interest in protecting a minor's welfare and well-being); *Ginsberg v. New York*, 390 U.S. 629 (1968) (state has strong independent grounds for protecting a minor's morals).

57. See generally S. FOX, MODERN JUVENILE JUSTICE 19 (1972) (a good discussion of early attempts to provide treatment for neglected and delinquent minors prior to the development of juvenile courts).

58. See *supra* note 28.

59. *Id.*

60. 321 U.S. 158 (1944).

61. 390 U.S. 629 (1968).

publicly distributing Jehovah's Witnesses literature, even with the consent and under the direction of the minors' parents.⁶² The Court stressed that despite the acknowledged right of parents to control and direct the upbringing of their children, the "state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."⁶³ The Court emphasized that in public activities and in matters of employment, the state has a vested interest in ensuring the healthy and well-rounded growth of its youth into full maturity, as it is the youth who will one day be responsible for running our democratic society.⁶⁴

Similarly, in *Ginsberg*, the Court found it constitutionally permissible for New York to accord minors under the age of seventeen a more restrictive right than adults to judge and determine for themselves what sex material they read.⁶⁵ The Court appeared to rely upon the line of reasoning set forth in *Prince*, which stated that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."⁶⁶

Although the Court in *Ginsberg* appeared to place great reliance upon its earlier decision set forth in *Prince*, it placed a different emphasis upon the state's interest in overriding parental decisions. In *Prince*, the "best interests" and welfare of the minor were the primary focus of the Court's attention.⁶⁷ In *Ginsberg*, however, the Court recognized that the state, as well as the child, had an independent interest in the minor's well-being.⁶⁸

In light of these and several other United States Supreme Court decisions,⁶⁹ it appears that when the state has a legitimate interest⁷⁰ in protecting a minor's welfare and well-being, the state may be able,

62. *Prince*, 321 U.S. at 169-70.

63. *Id.* at 167.

64. *Id.* at 168.

65. *Ginsberg*, 390 U.S. at 638-40.

66. *Prince*, 321 U.S. at 170.

67. *Id.* at 170.

68. *Ginsberg*, 390 U.S. at 640.

69. *Lassiter v. Dep't. of Social Services*, 452 U.S. 18 (1981) (in neglect proceedings, state has an "urgent interest" in the welfare of the child).

70. The underlying principle seems to be that when the state seeks to contravene parental decisions in the area of child rearing with the claimed purpose of benefitting the child, the state must present a strong and convincing case that its intervention will, in fact, serve its professed goal. If a strong and convincing case cannot be made, the state will be unable to usurp contrary parental decisions. See also *Carey v. Population Services*, 431 U.S. 678, 696 (1977) (the Court rejected the Attorney General's argument that the state had a legitimate interest in protecting minors' morality through regulation of contraceptives).

under the doctrine of *parens patriae*, to override parental wishes concerning the upbringing of the minor.

2. In granting an individual's request for asylum

a. prior to 1980

At the very beginning of our country's history, our founding fathers' philosophy included the belief that America should provide sanctuary to those persons fleeing persecution in their native homeland.⁷¹ Asylum would be granted to any alien facing religious, political, or racial persecution if forced to return to his native land.⁷²

The present source of United States asylum law arises from the United States' 1968 ratification of the United Nations Protocol Relating to the Status of Refugees.⁷³ The Protocol was an extension and reaffirmation of the 1951 Convention Relating to the Status of Refugees,⁷⁴ in which the United States did not participate.

The Protocol extended the Convention's protection to any refugee who had a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."⁷⁵ Those refugees qualifying under this definition could claim the protection of Article 33, the Protocol's asylum provision, which provided that "[n]o contracting state shall expel or return a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."⁷⁶

Before the United States joined the Protocol, the chief Federal law providing relief to refugees who would face persecution if returned to their homeland was section 243(h) of the Immigration and Naturalization Act of 1952.⁷⁷ As originally drafted, this section ex-

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

72. D. CARLINER, *supra* note 71, at 53-54.

73. *Opened for signature* Jan. 31, 1967, 19 U.N.T.S. 6260, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol].

74. *Opened for signature* July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention].

75. Convention art. 1, para. 2, at 152 (as adopted by Protocol art. 1, para. 2, 606 U.N.T.S. at 268).

76. Convention art. 33, para. 1, 189 U.N.T.S. at 176 (as adopted by Protocol, *supra* note 73).

77. Pub. L. No. 82-414, § 243, 66 Stat. 163, 212-14 (1952) (codified as amended at 8 U.S.C. § 1253(h) (1981)).

tended protection only to those individuals who would be probable victims of "physical" persecution.⁷⁸ However, section 243(h) was amended in 1965 to read: "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion. . . ."⁷⁹

While section 243(h) provides essentially the same protections as later set forth in Article 33 of the Protocol,⁸⁰ section 243(h) was discretionary, unlike the provisions of Article 33. Thus, section 243(h) did not prevent the immigration judge and the Board of Immigration Appeals from deporting aliens who did, in fact, face actual persecution back home.⁸¹

Prior to the Protocol, the only method whereby an alien could actually seek a grant of asylum, in certain limited circumstances, was under the "conditional entry" procedure of section 203(a)(7) of the Immigration and Naturalization Act.⁸² However, after the Protocol was adopted, its provisions undeniably became part of the supreme law of the land⁸³ and controlled any case in conflict with the prior acts of Congress.⁸⁴ In fact, the 1980 Refugee Act was enacted primarily to conform United States law with its obligations under the Protocol.⁸⁵

b. after 1980

The 1980 Refugee Act amends section 243(h) to conform to the terms of the Protocol and reflects a desire to expand statutory United States asylum law in order to give greater effect to the purposes of the

78. *Id.*

79. Pub. L. No. 89-236, § 11(f), 79 Stat. 918 (1965).

80. There was, however, one major exception: section 243(h) applied only to "deportable aliens", whereby the Protocol applied to all qualified aliens.

81. Section 243(h) "authorized" rather than required the withholding of deportation. See *supra* note 79. Courts interpreted the change of language in 1952 as indicating congressional intent to make relief discretionary. See *U.S. ex rel. Moon v. Shaughnessy*, 107 F. Supp. 607 (S.D.N.Y. 1952); *U.S. ex rel. Dolenz v. Shaughnessy*, 206 F.2d 392, 394 (2d Cir. 1953).

82. 8 U.S.C. § 1153(a)(7) (1976), repealed by Pub. L. No. 96-212, § 203(c)(3), 94 Stat. 102, 107 (1980). To qualify under this section, an alien had to have fled because of a fear of persecution on account of race, religion or political opinion from a communist country or a country in the Middle East and be unable or unwilling to return on account of race, religion, or political opinion.

83. U.S. CONST. art. VI, § 2.

84. See *Matter of Dunar*, 14 I. & N. Dec. 310, 313 (1973); *Cook v. U.S.*, 288 U.S. 102, 118 (1933).

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

Protocol.⁸⁶ Under section 208(a) of the Act,⁸⁷ the Attorney General must establish a procedure for the granting of asylum to aliens who qualify as "refugees" within the meaning of section 101(a)(42)(A).⁸⁸ However, the ultimate determination of an asylum request under section 208(a) is clearly discretionary rather than mandatory; therefore, the Attorney General is free to deny asylum even to qualified individuals.⁸⁹

The persecution standard in Article 33 of the Protocol, as well as section 208(a) of the 1980 Refugee Act, has been defined in terms of a threat to an alien's "life or freedom."⁹⁰ The threat to life or freedom need not be purely physical as was the case prior to the Protocol and 1980 Act; under current case law, "persecution" has been defined as "the infliction of suffering or harm. . . in a way regarded as offensive."⁹¹

The likelihood of future persecution must also be demonstrated by an alien before asylum can be granted.⁹² Thus, a showing of past

86. The Act removed the discretionary language of section 243(h) and replaced "persecution" with "life or freedom would be threatened" and added "nationality" and "membership of a particular social group" to "race, religion, or political opinion." 8 U.S.C. § 1253(h) (1980). See *infra* notes 87-89 and accompanying text.

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

88. *Id.* at § 1101(a)(42)(A). Section 101(a)(42)(A) provides that: the term 'refugee' means . . . any 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 . . .

89. See *supra* note 87. But see *Cardoza - Fonseca v. I.N.S.*, 767 F.2d 1448 (9th Cir. 1985) (although the Attorney General has discretion to grant asylum to qualified refugees, the determination of "refugee" status depends on actual findings).

However, even if a refugee's application for asylum is denied under section 208(a), if the alien faces actual persecution upon returning home, section 243(h) mandates that the alien not be deported until the threat of persecution disappears since after the passage of the 1980 Refugee Act, section 243(h) provides that the "Attorney General shall not deport . . ." 8 U.S.C. § 1253(h) (1980).

90. See *supra* note 76 and accompanying text.

91. *Kovac v. Immigration and Naturalization Serv.*, 407 F.2d 102, 107 (9th Cir. 1969), was the first court opinion to apply the new standard of non-physical persecution. In *Kovac*, a Yugoslav merchant seaman claimed that his government had persecuted him by preventing him from working as a highly skilled chef, forcing him instead to work as an unskilled cook. The Board applied the old "physical persecution" standard, and concluded that *Kovac* had not shown the requisite degree of threatened harm. The court of appeals rejected this conclusion and asserted that a showing of substantial economic disadvantage could be sufficient to meet the amended persecution standard of "offensive" harm or suffering. *Id.* at 107. See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1685 (1965) (defining the word "offensive").

92. Refugee Act of 1980, Pub. L. No. 96-212, § 2d(a)(42), 94 Stat. 102, 102.

harm or suffering might not, in and of itself, support a grant of asylum.⁹³ Courts have interpreted this provision as requiring a “well-founded fear” that must be rational rather than purely subjective.⁹⁴

An alien must also show that his former government is in some way responsible for the harm threatened.⁹⁵ An alien need not show that its government itself will carry out the persecution; an alien’s demonstration that his government is unwilling or unable to prevent the persecution by private individuals or groups is sufficient.⁹⁶

If an alien is able to satisfy all of the above requirements, the United States has demonstrated, through its adoption of the Protocol and 1980 Refugee Act, that it will be willing to grant the alien asylum.

III. CRITICISM OF EXISTING LAW AND ITS IMPACT ON A MINOR’S APPLICATION FOR ASYLUM

When a minor decides to seek asylum against the wishes of his parents, his own interests in choosing where to reside are thrown against the rights of his parents to raise their child in the manner and environment they feel best. While family conflicts are normally resolved at the state level,⁹⁷ the federal government’s statutory obliga-

93. Past persecution might, however, provide the best evidence of the likelihood of future persecution.

94. *Matter of Dunar*, 14 I. & N. Dec. 310, 318-19 (1973) (Immigration Appeals Board found that an alien’s fear of criminal prosecution in Hungary for having departed illegally was not a sufficient showing that the penalty imposed for illegal departure would be so severe as to be considered persecution). The Board stated that “[a] fear which is illusory, neurotic or paranoid, however sincere, does not meet this [well-founded fear of future persecution] requirement.” *Id.* at 319. *See also* *Ishak v. District Director*, 432 F. Supp. 624 (N.D. Ill. 1977). In *Ishak*, the court found newspaper clippings insufficient evidence of persecution, insisting instead that the alien’s testimony be corroborated by independent sources. *Id.* at 626.

95. *See* *Matter of Tan*, 12 I. & N. Dec. 564, 568 (1967) (an ethnic Chinese alien’s petition for asylum was rejected when the alien was unable to show that his Indonesian Government was either unable or unwilling to control the mobs of citizens who were allegedly persecuting the ethnic Chinese).

96. *Id.* at 568. Subsequent decisions have also applied the standard of “unable or unwilling” in deciding when a government should be held responsible for private persecution in order to grant an alien’s request for asylum. *See, e.g., Rosa v. Immigration and Naturalization Serv.*, 440 F.2d 100, 102 (1st Cir. 1971); *Matter of Pierre*, Board of Immigration Appeals Interim Dec. No. 2433 (1975); *see also* *Leung v. Immigration and Naturalization Serv.*, 531 F.2d 166 (3rd Cir. 1976) (remanded case to Board in order to determine if Hong Kong police had known that seamen’s union had threatened petitioner because of his political beliefs, but nonetheless had failed to act).

97. “Family disputes are usually handled at the state level because of the special expertise of local agencies in matters of domestic relations.” *Polovchak v. Meese*, 774 F.2d 731, 734 (7th Cir. 1985).

tion to provide sanctuary to those threatened with religious or other persecution places the burden of mediator on the INS.⁹⁸

In order to protect the constitutional rights of both minor and parents, the INS must provide for a special hearing in which the interests and rights of all the affected parties can be brought out and examined.⁹⁹ It is the INS's present failure in providing any guidelines for such a hearing that seriously undermines the ability of a minor to successfully seek asylum against the wishes of his parents without violating either the minor's or the parents' rights to due process.¹⁰⁰

Under current INS policy, the focus in determining eligibility for asylum is on the individual applicant alone, without inquiry as to whether there are others who are affected by the asylum request. The age of the applicant plays a much smaller role than does the country of origin the applicant is fleeing from or the political ramifications in granting or denying the asylum request.¹⁰¹ Thus, when a minor has tried to apply for asylum, the INS has simply looked to see if the minor, under the provisions of the 1980 Refugee Act, is an individual qualified to receive a grant of asylum. No inquiry is made as to the minor's parents' desires. No questions are asked to determine the mental maturity of the minor in order to see whether he is even capable of making such an important decision in a thoughtful and well-considered manner. Furthermore, even when parents do voice strong objection to a minor's application for asylum, there are no procedures provided for whereby such objections can be carefully examined and weighed.¹⁰² Thus, even if the INS concludes that the minor does qualify for asylum under the provisions set forth in the 1980 Refugee Act, the parents of such a minor would be able to successfully attack the grant on the grounds that their due process rights had been

98. This statutory obligation is found in the Refugee Act of 1980, Pub. L. No. 96-212, § 101(a)(b), 94 Stat. 102, 102 (codified as notes to 8 U.S.C. § 1521 (1982)).

99. *Polovchak v. Meese*, 774 F.2d at 738.

100. The United States Supreme Court has recognized that the due process guarantees of the fifth amendment apply to resident aliens as well as to citizens. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Truax v. Raich*, 239 U.S. 33, 39 (1915).

101. In the *Polovchak* case, even the Supreme Court of Illinois commented that, in its opinion, "we do not doubt that the multiple litigation and controversy surrounding this case have also adversely affected what should otherwise have been a prompt determination regarding Walter's custody." *In re Polovchak*, 97 Ill.2d 212, 216, 454 N.E. 2d 258, 262 (Sup. Ct. Ill. 1983). In addition, the fact that it was the Soviet Union where Walter's parents wanted to take him back was commented on by several newspaper articles which then went on to debate the merits of the *Polovchak* controversy. *E.g.* L.A. Times, Sept. 7, 1981, at 1; The Cleveland Plain Dealer, Jan. 15, 1981, at 1-B, col. 1.

102. This was the court's main criticism in *Polovchak v. Meese*, 774 F.2d at 735.

violated.¹⁰³

Although a grant of asylum to a minor does not always work as a complete termination of parental rights, such is the practical effect where the parents are desirous of returning to their native homeland. Therefore, before the INS can intervene and grant a minor asylum, thereby terminating the parents' constitutional rights to direct and control their child's upbringing, the INS must strictly adhere to the requirements of procedural due process.¹⁰⁴

After a close examination of the *Polovchak* case, it appears that the INS failed to consider all of the ramifications involved in receiving a minor's application for asylum. By failing to provide for a hearing prior to the grant of an asylum request or departure control order,¹⁰⁵ the INS fails to adequately protect the due process rights of all the interested parties. The result is that the INS has made it extremely difficult for a minor to successfully maintain a grant of asylum. Although it might be relatively easy for a minor to obtain the initial grant of asylum, as this would be issued by the INS without a special hearing, such a grant could later be withdrawn at the parents' insistence on the grounds that such a grant violated their rights to procedural due process.

IV. PROPOSAL

In light of the apparent difficulty of a minor to successfully seek and maintain asylum in the United States under existing INS policy and against parental wishes,¹⁰⁶ a new procedure must be adopted by the INS since minors, as well as adults, have certain inalienable rights which have constitutional protection.¹⁰⁷ As mentioned previously, the Supreme Court has recognized that minors do possess certain constitutional rights and protections independent of their parents.¹⁰⁸

103. *Id.* at 736.

104. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Lassiter v. Dep't. of Social Services*, 452 U.S. 18, 27 (1981).

105. A departure control order prevents an alien from leaving the United States. 8 U.S.C. § 1185 (1982). Once an alien becomes the subject of a departure control order, the alien may then, after the order has been issued, request a hearing at which time the order will be reviewed and either finalized or revoked. 8 C.F.R. § 215.4(a) (1985).

106. *See Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985).

107. *See supra* notes 30-55 and accompanying text (discussing the constitutionally recognized rights which minors possess). Further, as the court in *Meese* stated, "[a] minor seeking political asylum, if sufficiently mature, should have his wishes heard and taken into account." *Polovchak v. Meese*, 774 F.2d at 737.

108. *See supra* note 107.

However, as stated earlier, there is a very strong tendency in our country not to allow governmental interference in the manner in which parents decide to raise their children.¹⁰⁹ This tendency heavily favors the denial of a minor's request for asylum if such a request is against his parents' wishes. Accordingly, the real issue is whether a minor's right to seek asylum should take precedence over his parents' constitutional right to control the child's destiny and upbringing.¹¹⁰

One possible solution would be for the INS to conduct a bifurcated hearing during which the conflicting interests of all the parties involved would be brought out and resolved before deciding whether a minor should be granted asylum.

The first stage of the proposed hearing would be conducted in an effort to see whether the minor applying for asylum qualified for such a grant under the current 1980 Refugee Act.¹¹¹ If the minor was unable to meet the qualifications set forth in the Act, any further inquiry into the conflicting interests of the parents would be unnecessary and the minor's application for asylum would be denied.¹¹² However, if the individual qualified for asylum under the requirements of the Act, the second stage of the proposed INS hearing would be conducted. This second stage would identify and examine several specific areas relevant to the question of whether a grant of asylum should be made to the minor, since such a grant would necessitate that the state take custody of the minor away from his parents.

During this second stage of the hearing, the first inquiry would be to see whether the minor would face not only persecution in a manner regarded as "offensive," which would satisfy the requirements of the 1980 Refugee Act, but whether the minor would face actual life-threatening circumstances if forced to return home with his parents. If this were found to be the true state of affairs surrounding the minor's application for asylum, then the INS could stop with any fur-

109. See *supra* notes 10-22 and accompanying text. The court in *Polovchak v. Meese* acknowledged that "[t]he district court may be correct that parents have the right to bring up their children as atheists or Communists." 774 F.2d at 737.

110. See *Polovchak v. Meese*, 774 F.2d at 736. The court stated that "we do not necessarily agree with the district court that the 'private interest of. . . Walter. . . is by its very nature considerably less than that of his parents.'" *Id.*

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

112. Thus a minor would need to show: 1) that he faced actual persecution if forced to return home; 2) that the persecution was due to the alien's religion, membership in a particular social group, race, political opinion, or nationality; and 3) that his government was either unable or unwilling to prevent the persecution. See also *supra* note 2 and notes 87-97 and accompanying text.

ther inquiries and grant asylum under the theory of *parens patriae*.¹¹³ On the other hand, if the persecution facing the minor upon his return home was anything less than life-threatening, the INS would next have to turn to several other areas of concern before it would be able to make an informed decision as to whether to grant the minor's asylum request.

Four specific areas which should be weighed by the INS in ultimately deciding whether a minor's petition for asylum should be granted include:

- 1) the minor's actual age and mental maturity;
- 2) the possible relatives with whom the minor could live in the United States if asylum were granted;
- 3) the overall best interests of the minor which would be served or harmed if the minor were to remain in the United States rather than return to his home country; and
- 4) the parents' substantial interests in raising their child in the manner which they deem appropriate.

As the minor's age approaches the age of majority, greater weight should be given to the minor's desire to remain in the United States. If the minor is between the ages of sixteen and eighteen, a presumption could exist that the minor is mentally capable of deciding what is in his best interests: either returning home where the threat of persecution existed, or remaining in the United States.

On the other hand, if a minor is under the age of sixteen, the INS would need to look at the individual's mental maturity to see whether the minor is, in fact, able to make an intelligent decision to remain in the United States without his or her parents. The younger a minor is, the more difficult it should be for the minor to successfully demonstrate the sufficient mental capacity needed to override his parents's determination of what is in the child's best interests.¹¹⁴

The second consideration which should be looked at by the INS are the circumstances surrounding the minor's home-life here in the United States. For example, are there other relatives in the minor's family with whom he has close contact and with whom he could live if a grant of asylum were issued? Also, are the relatives the ones

113. See generally *supra* note 28 (discussion of *parens patriae* doctrine). See also text at notes 57-59.

114. See *Bellotti v. Baird*, 443 U.S. 622, 647 (1979). In *Bellotti*, the Court goes through a similar analysis in order to determine whether a minor is mentally mature enough to make the decision to obtain an abortion without having to first obtain her parents' permission. *Id.*

pushing the minor in deciding to seek asylum or is it really the decision of the minor himself?¹¹⁵ Lastly, if there are no relatives with whom the minor could remain if asylum were granted, would there be a family willing to take in the minor or would the minor wind up in a juvenile home?

The third consideration focuses upon the overall best interests of the minor. Although it will have already been determined that the minor does in fact face persecution if forced to return home,¹¹⁶ only strong state reasons for protecting the minor's best interests and welfare will enable the state to deprive the parents of their right to control the destiny and upbringing of their child.¹¹⁷ Accordingly, it is at this point when the parents' interests in deciding how to best raise and prepare their child for future responsibilities enters into the analysis. If the parents could somehow make a showing that the child would not be put in a life-threatening situation upon returning home with them, it is possible that the government would defer to the parents' decision in light of the recognized right of parents to raise their children as they see fit. The fact that the child would be returned to a communist country should not, in and of itself, strip away the parents' interests in raising their child. However, since the government has an independent interest in the minor's well-being,¹¹⁸ it might reach the conclusion that the harm facing the minor upon returning home is so great or serious that it outweighs any interests that the parents might have.

Accordingly, if the government felt that the child faced serious harm upon returning home and the parents were unable to advance reasons why their interests should take precedence over the minor's, the INS would be able to permanently grant asylum to the minor so long as the minor's decision to remain was made knowingly, intelligently, and freely.

115. This factor would go toward determining whether the minor was, in fact, mentally mature and capable enough to resist outside pressures and make an independent decision regarding his own best interests.

116. By qualifying under the provisions of the Refugee Act of 1980, *supra* note 2.

117. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *see also* McGough and Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L. J. 209 (1978) (general discussion on the conflicting interests necessarily involved in custody disputes).

118. *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

V. APPLICATION AND RESULT IN APPLYING THE PROPOSED
HEARING PROCEDURE TO A MINOR'S REQUEST
FOR ASYLUM

A. *Facts Surrounding In re Polovchak*

The dilemma of Walter Polovchak and his parents dates back to the beginning of 1980. In January of 1980, Walter's family arrived in the United States from the Soviet Union pursuant to a grant of parole by the United States Attorney General.¹¹⁹ The family subsequently settled down in an Ukrainian-American suburb near Chicago. The parents began working while twelve year-old Walter and his older sister began school. Soon after their arrival, however, a conflict arose between Walter's parents and various relatives who attempted to convert the family from Ukrainian Catholicism to the Ukrainian Baptist Church. As life became more difficult for Walter's parents,¹²⁰ they eventually decided in May of 1980 to return home to the Soviet Union.¹²¹

This decision, however, was not welcomed by the two eldest Polovchak children. Accordingly, seventeen year-old Natalie and her younger brother Walter, picked up their belongings and moved to an apartment to stay with their cousins. Though the parents acknowledged and respected Natalie's decision to stay in the United States, they were determined to have Walter return home with them.¹²²

On July 18, 1980, Walter's parents went to a Chicago police station and reported their son missing. The police quickly found Walter and brought him to the Area Youth Division. Walter, who was quickly provided with an attorney by the Ukrainian-American community, told police that "he had run away from home because he did not want to return to the Ukraine with his family."¹²³ The local police then quickly contacted the INS and the Department of State for a determination of a possible asylum request. At the same time, a spe-

119. Gottlieb, *The Boy With Two Countries*, 11 FAM. RTS. 18, 18 (Summ. 1983). Under 8 U.S.C. 1182(d)(5) (1982), the Attorney General may allow the entrance of foreign nationals for indefinite time periods under "such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." While the parole program is normally invoked to help the alien, as in the *Polovchak* case, the Attorney General has successfully used it for the purpose of prosecuting aliens for smuggling. *Klapholz v. Esperdy*, 201 F. Supp. 294 (S.D.N.Y. 1961), *aff'd*, 302 F.2d 928 (2nd Cir. 1982), *cert. denied*, 371 U.S. 891 (1962).

120. Walter's parents spoke no English; his mother worked all day while his father worked all night. See Gottlieb, *supra* note 116, at 18.

121. *Id.*

122. See *Polovchak v. Meese*, 774 F.2d 731, 732 n.2 (7th Cir. 1985).

123. *In re Polovchak*, 104 Ill. App. 3d 203, 206, 432 N.E.2d 873, 876 (1981).

cial agent told police that the Deputy Secretary of State, Warren Christopher, had ordered that the child not be returned to his parents.¹²⁴ The very next day, a formal application for religious asylum was filed by Walter pursuant to the 1980 Refugee Act.¹²⁵

B. *Determination of Walter Polovchak's Request for Asylum*

Applying the bifurcated hearing procedure proposed above, the INS's first line of inquiry would be to see whether Walter qualified for asylum under the 1980 Refugee Act.¹²⁶ Since a finding contrary to the provisions of the Act would end our analysis, and there would be no need to have a hearing to examine the conflicting interests of Walter and his parents, an assumption will be made that Walter would have qualified for asylum under the 1980 Refugee Act.¹²⁷

Once the INS found that Walter's asylum request qualified under the Act, the second part of the proposed hearing would have weighed the conflicting interests of Walter, his parents, and the government. Since Walter was only twelve years-old at the time of his petition for asylum, the INS would have been unable to invoke any form of presumption that would have made it clear that Walter had the mental

124. The next problem dealt with by the local police was the question of which legal authority could be involved to carry out the federal instructions to keep Walter apart from his parents. Acting on the advice of an associate Circuit Court Judge, the police decided to treat Walter as a runaway under the Illinois Minors in Need of Supervision (MINS) statute. ILL. ANN. STAT. ch. 37 § 702-3(1)(a) (Smith-Hurd Supp. 1986). It was the choice of using MINS in order to keep Walter out of the custody of his parents which became the basis for the litigation surrounding *In re Polovchak*, 104 Ill. App. 3d 203, 432 N.E. 2d 873 (1981).

Warren Christopher's involvement can be explained by Pub. L. No. 82-414 § 104(a) which provides: "[T]he Secretary of State shall be charged with the administration and enforcement of the provisions of this Act [Refugee Act] and all other immigration and nationality laws." *Id.*

125. See Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C. (1982)). Walter's application was based upon the threat of "religious" persecution. Walter's application stated that his religion was Baptist and if he were forced to return to the Soviet Union, he would be "persecuted. . . [.] prevented from higher education, considered suspect [and] restricted in mobility." See *Polovchak v. Meese*, 774 F.2d 731, 733.

126. See *supra* note 112 and accompanying text.

127. It is questionable whether Walter could have qualified for a grant of asylum under the Refugee Act of 1980. Walter's basis for seeking asylum was under a claim that "religious" persecution faced him if he were forced to return to a predominately Catholic, Ukrainian community. Walter alleged in his petition that since he had converted to the Ukrainian Baptist Church, he would be a persecuted minority back in the Soviet Union. It is doubtful, however, whether Walter could have been so quickly and deeply indoctrinated into a new religion, as he had been in the United States for a mere five months at the time of his request for asylum. Therefore, some measure of doubt exists regarding whether he would have faced actual persecution for his conversion back home.

maturity and capacity to decide that his best interests would be served by remaining in the United States. Accordingly, the INS would have had to make a factual determination of whether Walter could have made an intelligent and knowing decision to remain in the United States.

In order to make such a factual determination, Walter's relationship with his relatives and friends would need to be explored. If the pressures from such friends and relatives to remain in the United States were the reasons behind his decision, it would appear questionable whether Walter did in fact make an intelligent and knowing choice. Such a bending to the pressures exerted by peers and relatives would tend to support a factual finding that Walter was not mentally mature and capable enough to decide for himself what was in his best interests. Accordingly, Walter's parents' determination as to how his interests would be best served would enter into the analysis and would tend to tip the balance toward the denial of his application. Assuming, however, that Walter was mature enough to reach the decision that he was better off remaining in the United States, the INS's focus would next shift to the circumstances surrounding Walter's home-life here in the United States.

At the time Walter decided to remain in the United States, he had lived here for just over five months. During this time, Walter had enrolled in a public school and had struck up many friendships among his peers. In addition, Walter had become close to several of his parents' relatives who had been domiciled in the United States for many years. In fact, it was the family relatives who initially exposed Walter to the Baptist religion, which ultimately gave him the basis upon which to seek religious asylum.¹²⁸ It was further apparent that there existed numerous relatives who would have been pleased to take care of Walter if his petition for asylum were granted.

The final inquiry which the INS would have had to make concerns the balancing of the parents' interests with those of both Walter and the government in order to determine how Walter's overall best interests would be served.

According to the facts surrounding the Polovchaks' desire to return to the Soviet Union, it seems they were willing to acknowledge

128. The Refugee Act of 1980 expressly recognizes that a threat of religious persecution is a form of persecution which would enable an alien to successfully apply for asylum. See 8 U.S.C. § 1253(h); see also *supra* note 128.

their daughter Natalie's decision to remain in the United States.¹²⁹ Consequently, if Walter was allowed to stay in the United States pursuant to a grant of asylum, the Polovchaks would have been forced to return home without either of their children to care for and raise. However, in light of all of the relatives with whom Walter could have stayed, coupled with his strong and apparently mature decision that his best interests would be served by remaining in the United States where he would be free to practice his newly adopted religion, the interests of Walter and the government would have outweighed his parents' interests and the INS would have acted properly in granting Walter asylum.

VI. CONCLUSION

On October 3, 1985, Walter Polovchak turned eighteen years-old. As a result, the Illinois District Court's opinion in *Polovchak v. Landon*¹³⁰ became moot. The controversy, however, surrounding the *Polovchak* case, has not yet dissipated. Though Walter's attainment of the age of majority enables him to apply for asylum on his own, irrespective of the desires or concerns of his parents, there will no doubt be future "Walter Polovchaks" who will one day seek asylum here in the United States.¹³¹ Since the INS has yet to take any apparent steps to assure that future parties involved in such a situation will be afforded their guaranteed constitutional rights to procedural due process, the question of whether any minor could successfully receive

129. See *supra* note 122.

130. *Polovchak v. Landon*, 614 F. Supp. 900 (N.D. Ill. 1985).

131. In August of 1983, *Polovchak* was revisited by an apparent asylum request from the son of a Soviet diplomat. On August 10, 1983, the United States Department of State was notified by the Soviet Embassy in Washington that the son of first secretary Valentin M. Berezhkov had taken his parents' car from their suburban home and had not returned. The following day the Embassy reported to the State Department that Berezhkov had returned home on his own.

That same day, the Washington office of the New York Times received a letter signed by "Andy Berezhkov." The letter read, in part, "I hate my country and it's [sic] rules and I love your country. . . . I want to stay here. So I'm running away." N.Y. Times, Aug. 12, 1983, at A1, col. 5. Upon learning of the letters, the State Department issued a request to the Soviet Embassy to interview the youth; the request was denied by the Embassy. At the request of the State Department, the INS issued an order preventing the youth's departure from the United States. Secret Service agents stood guard at the Embassy's compound, and the Berezhkov's home was put under surveillance. Washington Post, Aug. 14, 1983, at A11, col. 2.

On August 18, the stalemate ended when Andy told reporters that he had no desire to stay in the United States, that his drive around the city had been misinterpreted, and that he wished that the United States authorities would let him return to the Soviet Union. N.Y. Times, Aug. 19, 1983, at A1, col. 1.

and maintain a grant of United States asylum is still undecided.¹³²

In light of the recent string of cases recognizing minors' rights to equal protection and due process,¹³³ the INS must implement new procedures for determining asylum requests by minors if such requests are ever to be seriously considered. Without such affirmative action by the INS, it will remain very difficult for the government to take custody of a child away from his parents, even if the alternative would result in the minor being subjected to actual religious or political persecution.¹³⁴

Given the history of the United States' desire to accommodate aliens facing persecution in their country of origin, if an alien faces an actual threat of persecution back home, the mere age of the alien should not, in and of itself, deprive that individual of the opportunity to successfully petition for a grant of United States asylum.

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132. This statement assumes that the applicant for asylum does not use the court system to delay the final determination to a point in time whereby the question of asylum for the minor becomes moot. This is exactly what happened in the *Polovchak* case. The attorneys for both the government and Walter took so much time in their appeals that Walter finally turned eighteen, which necessarily rendered the entire issue of asylum moot since Walter can now apply for asylum as an adult.

133. *In re Gault*, 387 U.S. 1 (1967); see also *supra* notes 34-55 and accompanying text.

134. See *supra* note 132. Accordingly, it seems possible for a minor to successfully apply for asylum under present INS procedure. The only issue would be whether a minor could then maintain the grant of asylum if his parents objected on procedural due process grounds. It appears that if dragged on long enough, most minors could delay any final determination until they reached the age of majority at which point they would be able to maintain the grant irrespective of their parents' wishes.

