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T. Alexander Aleinkoff

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FROM "REFUGEE LAW" TO THE "LAW OF COERCED MIGRATION"

T. Alexander Aleinikoff*

Increasingly, conferences, law journals, law school classes, and clinics are devoted to "refugee law," evidencing the apparent arrival of a new sub-specialty in legal scholarship and practice. Is "refugee law" the appropriate label for this field of inquiry? The choice is not without a rational basis. The term is grounded in an international convention regarding "the status of refugees" and a domestic statute entitled the "Refugee Act of 1980." Just as there exists a field of inquiry called "immigration law" because of the Immigration and Nationality Act (or "bankruptcy law" because of the Bankruptcy Act), one tends to think of the protection of people who flee their countries of origin as a question of "refugee" status.

Reconsideration of the scope of this new field of inquiry is necessary. The international "refugee" model starts with a person outside his or her state of origin. This notion, of course, represents the traditional (and now out-dated) view that international law could offer protection only to someone beyond the territorial borders—and therefore outside the "sovereignty"—of his or her home country. But it is not at all clear what distinguishes classic refugees from persons who have fled to safety within their country, a group of people usually described as the "internally displaced." Nor is the distinction clear—at least in human rights terms—between those two categories of persons and those who, unable to flee serious harm, suffer at home.

Our field of scholarly inquiry should start with the phenomena scholars wish to describe and analyze. Scholars should seek to provide theoretical justifications for such inquiry that are not simply based on the happenstance of a particular international Convention that mentions "refugees" in its title. I can imagine at least three conceptions of the field, all of which would go beyond the narrow definition of "refugee." These models are: the statelessness model, the human rights model, and the coerced migration model.

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* General Counsel, Immigration and Naturalization Service, Department of Justice. On leave from the University of Michigan Law School.

The statelessness model begins with a world of nation states and is premised on the idea of a state for everyone and everyone in a state. From this perspective, persons who are outside their state of origin and cannot look to their home states for protection need international protection. That is, refugee status responds to an anomaly in the state system. But this conception of the field of inquiry need not stop with Convention refugees. There are millions of displaced persons, outside their countries of origin, who do not meet the Convention definition of refugee and yet cannot rely upon their countries of origin for protection. It is unclear why these persons are not the concern of scholarly endeavors. Furthermore, the statelessness model excludes from consideration the internally displaced. This exclusion follows from the model's premises, but it does not seem to respond to the humanitarian interests at stake.

The second model, the human rights model, conceptualizes the field of inquiry in terms of providing remedies for those fleeing violations of human rights. James Hathaway, for example, in a series of important studies, has proposed that we understand "persecution" under the rubric of international human rights law.[1] A robust human rights approach, however, would focus on the internally displaced and the non-fleers as well, which are groups clearly at risk of serious human rights abuse. Furthermore, many victims of human rights violations—whether they have crossed international boundaries or not—do not readily fit into the five "on account of" grounds included in the Convention and statutory definitions of refugee. Those of us laboring in "refugee law" have begun to construct novel legal arguments that would stretch existing categories to offer protection to such individuals; but would the arguments flow more easily if we shifted the terms of reference?

Under the third model, the coerced migration model, the key idea is flight from harm. As such, it should embrace the internally displaced as well as border crossers. This model also recognizes that there are reasons for flight that merit protection beyond those identified in the five "on account of" grounds, including civil wars, natural disasters, and general social disorder. It is not easily to see, for example, why a person fleeing bullets in a civil war situation is not entitled to some kind of protection and some kind of consideration in our scholarly inquiries. Thus, the coerced migration model, like the other two approaches, goes

1. James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. Refugee Stud. 113 (1991); JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS (1991).

beyond the Convention "refugee" definition, and therefore, beyond current conceptualization of the "refugee law" field.

Is one of these three models to be preferred? I am inclined toward the coerced migration perspective. The statelessness model, to my mind, places too much stock in older models of state sovereignty which are fast disappearing from international law scholarship. The human rights model, by making refugee law a subset of human rights law, runs the risk of focussing too much on the country of origin. Under a human rights model, simply granting individuals safe haven in a third country would perfect relief, since such protection would end the offending abuse of human rights. Thus, the human rights model does not prompt consideration of resettlement and policies of integration in the receiving countries (even though these are primary concerns of the international Convention on refugees). Indeed, rather sophisticated arguments are necessary in order to defend the idea of permanent asylum from a pure human rights perspective.

In contrast, the coerced migration model recognizes and directly addresses the multifaceted nature of the pheenomena under investigation. It identifies loss of community as the fundamental harm.[2] The solution, therefore, is conceptualized not simply as protection, but rather as restoration of community either through return (when conditions permit) or the creation of community elsewhere. In this way, the coerced migration approach offers support for resettlement policies not easily encompassed within the human rights model.[3] Furthermore, a coerced migration perspective brings into focus the diverse of forms of relief currently provided to involuntary migrants, as Professor Abriel's contribution to this Symposium[4] ably describes: asylum, withholding of deportation, extended voluntary departure, deferred enforced departure, temporary protected status, parole, and safe haven. These provisions and policies exist not simply to satisfy the legal mind's craving for categories, but because the U.S. legal system appropriately recognizes the numerous causes of involuntary flight and the need for forms of relief crafted to meet the human

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2. *Cf.* COLES, THE HUMAN RIGHTS APPROACH TO THE SOLUTION OF THE REFUGEE PROBLEM: A THEORETICAL AND PRACTICAL ENQUIRY, IN HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW (A. Nash ed., 1988).

3. Unless one simply characterizes the absence of community as a violation of human rights. *See, e.g.*, COLES, *supra* note 2.

4. Evangeline G. Abriel, *The Diversification of Protection Laws in the United States, in* IMMIGRATION LAW: UNITED STATES AND INTERNATIONAL PERSPECTIVES ON ASYLUM AND REFUGEE STATUS 1 (AM. U. J. INT'L L. & POL'Y & LOY. L.A. INT'L & COMP. L.J. eds., 1994).

complexity—a complexity the definition and status of "refugee" do not adequately capture.

There are advantages to refocussing scholarship on coerced migration. First, scholars currently devote an extraordinary amount of effort to exegeses of the definition of "refugee" and the "on account of" grounds.[5] Of course, much of this scholarship remains important work to the extent it aids courts, adjudicators, and lawyers in the understanding and application of the terms one finds in our law. The cost for such narrow attention, however, is the under-investigation of other more flexible forms of relief. As David Martin has noted,[6] refugee status is a privileged category vis-a-vis other classes of coerced migrants. By focussing our attention on helping a small number of the world's involuntarily displaced obtain this potent form of relief, we miss opportunities to propose and analyze policies that might benefit millions more.

Second, the privileging of the status of refugee tends to depreciate the legitimate claims for relief of other coerced migrants, whose attempts to flee serious harm are frequently referred to as "irregular movements" or "mass flows." Every day language reflects these differences: the term "displaced person" invokes less urgency, less of a sense of concern, than "refugee."[7]

I propose that we level the field of analysis by understanding the phenomenon under investigation as the involuntary migration of persons from their homes and by asking what form of relief—temporary protection, resettlement, parole, safe haven—best responds to the humanitarian interests at stake. From this perspective, "refugeehood" would no longer exist as the shining status, the ultimate goal, casting shadows on other policies protecting groups designated for "illegal migrants." It would, rather, be one (very important) measure among many creative and flexible policies for accomplishing the goal that motivates most scholars in the field: the alleviation of the human misery of coerced migration.

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5. I admit that I have contributed to this overwriting. T. Alexander Aleinikoff, *The Meaning of "Persecution" in United States Asylum Law*, 3 Int'l J. Refugee Law 5 (1991).

6. David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, *in* REFUGEE POLICY: CANADA AND THE UNITED STATES, 30, 30-34 (H. Adelman ed., 1991).

7. Note that in common parlance, in contrast to legal terminology, "refugee" generally refers to most coerced migrants. Thus, the press and the public tend to refer to all Haitian boatpeople or all persons fleeing famine in Somalia as "refugees."