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# Refugee Policy in an Age of Migration

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# REFUGEE POLICY IN AN AGE OF MIGRATION

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Commentary on immigration and refugee policy has frequently noticed the difficulty of distinguishing between people who leave countries because they fear persecution and those who leave in order to seek opportunities elsewhere. Indeed, hardly anyone would deny that this difficulty is among the most important problems both in the enforcement of immigration laws and in efforts to protect refugees.

Some of the more forceful recent iterations of this point, however, seem to treat it not as a problem but as a kind of solution. The identification of refugee and asylum policies as an "immigration floodgate" and an "immigration magnet" is treated as a more or less complete proof that these policies are incompatible with the enforcement of immigration laws and must therefore be dramatically curtailed.[1]

Contrary to these iterations, the problem with the current political discourse on asylum and refugee policy is not that we have somehow failed to notice that asylum seekers look a lot like illegal immigrants. Rather, the debate during the last year or so has committed the opposite error of treating immigration policy and refugee policy as though they were one.

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The author edited this essay from a version of the closing address at the Symposium on Refugee and Asylum Law in February 1994. Important developments in United States refugee and asylum policy have occurred since then, particularly with respect to Cuban and Haitian boat people. *Infra* notes 15, 24 and accompanying text. *The American University Journal of International Law and Policy* will publish in Volume 10 an article adapted from this essay. That adaptation includes an analysis of Haitian and Cuban developments.

1. *See, e.g.*, Rosemary Jenks, *The Clinton Administration's Humanitarian Immigration Policy: A Critical Analysis*, *in* IMMIGRATION LAW: UNITED STATES AND INTERNATIONAL PERSPECTIVES ON ASYLUM AND REFUGEE STATUS 185 (AM. U. J. INT'L L. & POL'Y & LOY. L.A. INT'L & COMP. L.J. eds., 1994).

## I. THE RELATIONSHIP BETWEEN IMMIGRATION POLICY AND REFUGEE POLICY

Immigration policy is and should be intertwined with ideas about economics and about culture, and with what might be called "affirmative" questions of political theory, such as the balance to be struck between equality of opportunity and the protection of settled expectations. In contrast, refugee policy arises primarily from "negative" concerns having to do with what may happen to certain people if we return them whence they came.

This is not to say that the same person cannot be a plausible applicant for immigrant status and also for asylum or refugee status. Notice, however, that the question whether we should treat a certain person as a refugee becomes important only if we resolve the immigration-policy questions *against* that person. If it is decided that a person or group of people would make substantial net cultural and/or economic contributions to the existing society, then it hardly seems interesting to analyze whether we should nevertheless forcibly return him, her, or them to some dangerous place. On the contrary, refugee and asylum laws arise precisely from the recognition that there may be people whom we would otherwise decide not to admit as immigrants, but who need protection.

One reason refugee policy has enjoyed this trump-card status is that the central concern from which it derives, unlike most of the reasons for and against admitting immigrants, can fairly be characterized as a widely shared moral precept: that it is wrong to cause foreseeable and avoidable injury to an innocent person. When the injury is a grave one, such as death, torture, or long imprisonment, then the wrong done by putting the person in harm's way is correspondingly grave. Even people who disagree with some aspects or applications of this principle generally share a deep aesthetic aversion to the fact pattern it describes.

In the United States, even those who have long since conquered any aversion they may once have had to mass forcible repatriations—a group that includes many of those charged with developing and implementing official policy toward asylum seekers—once regarded the prevalence of this aversion as an important fact in the domestic political equation. Until quite recently, a government official trying to dampen the enthusiasm of his or her colleagues for a particularly harsh proposed course of action might find it effective to suggest, in the least passionate tone of voice available, that the proposal might have the disadvantage of "bad optics."

In the ongoing controversies having to do with Haitian and Chinese boat people, however, the public debate has focused not so much on what will happen to these people if returned to their countries of origin as on the possible effects of their admission to the United States. Significantly, the predicted effects are more or less identical to the arguments traditionally made against each new wave of non-refugee immigrants: they would take American jobs, contribute to overcrowding, refuse to assimilate, and become criminals, prostitutes, and slave laborers.

This emphasis on the perceived quality of the boat people as immigrants makes sense if it is assumed, or if it is concluded after analysis, that none of them has a well founded fear of persecution upon return. If this were what the debate was about, however, we should expect at least as much emphasis on what was or was not going on in the country of origin as on whether the applicants would be desirable as immigrants. Instead, public discussion of the *Golden Venture* and other Chinese "smuggling ships" typically mentions asylum claims by passengers only as a "tool" for their admission to the United States and devotes no analysis to the substance of these claims.

Indeed, some arguments have seemed to suggest that the very pervasiveness of human rights violations in certain countries should militate *against* generous application of the asylum laws to claimants from such countries. These arguments range from the drily technical—for instance, that the greater the number of people at risk, the lower the likelihood that a particular asylum applicant will be "singled out" for persecution—to the bluntly practical. The response of a former Chinese government official to a suggestion by then-President Carter that dissidents be allowed to leave the country, to the effect that they could send ten million right away,[2] often figures heavily in such discussions.

The overarching meta-argument seems to be a precise inversion of the traditional (and statutory[3]) relationship between immigration policy and refugee policy: case-by-case adjudication and the well-founded-fear test

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2. Don Oberdorfer, *Teng, Tired But Satisfied, Leaves U.S.*, WASH. POST, Feb. 6, 1979, at A12.

3. *See* Immigration and Nationality Act [hereinafter cited as INA] §207, 8 U.S.C. § 1157 (providing for admission of refugees of without respect to whether such persons they would be eligible for immigrant status); *id.* 208(a), 8 U.S.C. § 1158(a) (stating that Attorney General may give asylum to a refugee "regardless of his status"); *id.* § 243(h), 8 U.S.C. § 1253(h) ("withholding of deportation" provision providing that an otherwise deportable alien may not be returned to any country in which his or her "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.").

are fine so long as the numbers are manageable, and so long as the successful claimants are reasonably high-quality immigrants, but high numbers and low quality trump protection. One possible explanation for this inversion is the hypothesis that the American polity never intended or understood the strong distinction I have asserted between refugee policy and immigration policy. Perhaps our traditionally protective attitude toward refugees was no more than a special instance of our traditional openness to immigrants. If the extra dimension to refugee policy, the moral dimension, was never very important in the scheme of things, then a dramatic change in refugee policy would follow more or less automatically from a corresponding change in immigration policy.

Or perhaps the felt moral force of refugee policy varies with the extent to which we identify with the refugee, and perhaps when we look at Chinese and Haitian boat people we cannot see ourselves. The first United States law that explicitly discriminated among prospective immigrants on the basis of nationality was the Chinese Exclusion Act of 1882.[4] An earlier law that may have amounted to an implicit nationality-based distinction was the act of 1803 making it illegal to import free persons of color, then a principal export of Haiti.[5] Michael Walzer has suggested that we may closely identify even with people of different ethnic backgrounds if they share, for instance, our commitment to democracy or our opposition to Communism.[6] The notion that beliefs are thicker than blood, however, may have been more plausible in the Cold War era than in the age of the joint venture and the most favored nation.

Finally, there might be some set of numbers upon which reasonable people would be compelled to conclude that the United States was genuinely full—so full that it must turn everyone away, even people who reasonably fear being killed or tortured upon return to their homes. If, however, "America is full" means something on the order of "way too many aliens for my taste," then it adds little to the analysis. It will trump refugee concerns only if these concerns were given little weight in the first place, and the aesthetic preference it represents is fairly

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4. Act of May 6, 1882, 22 Stat. 58.

5. Act of February 28, 1803, ch. 10, 2 Stat. 205. Gerald Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 Colum. L. Rev. 1833, 1837 n.16, 1869, n.237.

6. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 49-50 (1983).

answerable by reference to the aesthetics of assassination, torture, and the other forms of re-education in store for returned refugees.

As with the closely analogous argument that "the Constitution is not a suicide pact," the argument from fullness is highly susceptible of premature invocation. The speaker usually means not that society will be destroyed if his argument is not accepted, but that some of its members will be inconvenienced. Like the Constitution, however, the refugee and asylum laws are "precisely an inconvenience pact."[7] These laws are designed to protect people whose perceived inconvenience in the country of origin is usually what got them into trouble in the first place, and whose inconvenience in the receiving country makes them inadmissible as immigrants.

## II. INAPPROPRIATE LIMITING AND SORTING STRATEGIES

Although inconvenience may be the defining characteristic of people who are in need of refugee protection, it does not follow that everyone who is inconvenient is a refugee.

There are at least three ways in which people with strong refugee protection claims may be difficult to distinguish from people who are migrating for economic or related reasons. The one most widely noticed—that many economic migrants make false claims to refugee status—is in theory the least difficult to address. A more complicated area of overlap and potential conflict between immigration enforcement and refugee protection involves mixed-motive migrants: people who may reasonably fear persecution in their country of origin, but who leave at least partly (and often primarily) because they perceive that economic opportunity or the general quality of life is better in the country in which they intend to seek asylum. Finally, there is the problem of "displaced persons" or "non-Convention refugees": people who have fled their home countries because of war, endemic violence, or severe human rights violations that may not amount to persecution "on account of" one of the five grounds set forth in the Immigration and Nationality Act (INA).[8]

The argument that these areas of potential conflict require the subordination of refugee policy to immigration policy, like most arguments that

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7. *See* Grover Joseph Rees, *The Treaty Power*, 43 U. MIAMI. L. REV. 123, 135 (1988) ("The Constitution is precisely an inconvenience pact. That is the definition of a constitution.").

8. GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 7-8 (1983).

boil down to the proposition that desperate times call for desperate measures, fails to consider whether less desperate measures might suffice. A commitment to protecting refugees and other people who are in grave danger does not preclude—indeed, it probably requires—the development of strategies to sort these people from economic and quality-of-life migrants, and to limit or discourage recourse by the latter to refugee protection systems. Such a commitment does suggest, however, that not just any strategy will do.

The appropriate sorting and limiting strategies are those which employ criteria strongly related to the most important question underlying refugee protection: how confident are we that this person will not be subjected to severe harm upon return? The inappropriate strategies avoid or finesse this question. A good rule of thumb is the "*St. Louis* test," named for the vessel carrying hundreds of German Jews who were forced to return to Europe in 1939 after unsuccessfully seeking admission to the United States. This test suggests that a proposed limitation is probably not a good one if it would have caused serious difficulties for people trying to escape Nazi Germany.

Thus, for instance, the assertion that recent Chinese boat people do not fit the "refugee profile" because most of them come from a relatively wealthy province, because they paid thousands of dollars for their passage, and because there are millions more where they came from, is uncomfortably reminiscent of the sort of thinking that sent back the *St. Louis*. A few other inappropriate limiting and sorting techniques are as follows:

*Raising the Burden of Proof.* One criticism of current asylum and refugee policy is that the "well-founded fear" standard is too generous. Prior to *INS v. Cardoza-Fonseca*,[9] the Immigration and Naturalization Service (INS) and the Board of Immigration Appeals (BIA) had required asylum applicants to prove a "clear probability" of persecution upon return.[10] In *Cardoza-Fonseca* the Supreme Court held that an applicant has a well-founded fear if (1) he or she subjectively fears persecution, and (2) there is in fact a "reasonable possibility" of such persecution.[11] The Court observed that an applicant's fear could be "well founded" even though the actual likelihood of persecution is well below fifty per

9. 480 U.S. 421 (1987).

10. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985); Cardoza-Fonseca v. INS, 767 F.2d 1448, 1450 (9th Cir. 1985).

11. 480 U.S. at 440.

cent.[12] Indeed, it specifically noted that a reasonable person could fear persecution even if the chances that such persecution would occur were no more than one in ten.[13]

This illustration suggests, to supporters of the old "clear probability" standard, that for every grant of asylum that actually saves someone from persecution, as many as nine other such grants admit an otherwise ineligible alien who would not be persecuted if returned. Although this criticism is not without force, there is an even bigger problem with the "clear probability" standard: on its face, it would require an honest adjudicator to order the repatriation of an applicant who had proved by credible evidence that he or she was quite likely to face torture or death, provided that this likelihood could not be honestly assessed at more than, say, forty-nine percent.

*Territorial sorting.* A second strategy, which has been employed in the cases of Haitian and Chinese boat people, is simply to apprehend vessels in international waters and to repatriate them without refugee or asylum interviews. The Supreme Court rejected a legal challenge to this practice in *Sale v. Haitian Centers Council, Inc.*,[14] holding that neither the Immigration and Nationality Act nor the 1967 Protocol Relating to the Status of Refugees is applicable in international waters. Under *Sale*, people apprehended outside United States territorial waters may be repatriated without refugee interviews because the United States is legally free to return such people even if they are refugees.

As a matter of policy, however, it is difficult to see why *refoulement* is more defensible for refugees interdicted outside the United States than for those apprehended upon arrival. If the obligation not to subject innocent people to death or other grave harm is regarded as a moral and political principle rather than an unfortunate technical consequence of the 1967 Protocol or the INA, then it would seem to apply to anyone whom the United States government takes into its custody. Even if the government has no domestic or international legal obligation to provide and observe a procedure genuinely calculated to prevent the forced repatriation of refugees, it should exercise its discretion to do so.[15]

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12. *Id.* at 461.

13. *Id.*

14. 113 S.Ct. 2549, ___ U.S. ___ (1993).

15. On June 16 1994, the United States discontinued its policy of direct forcible repatriations to Haiti. The government initially reinstated the former policy of pre-asylum interviews. Those who were "screened in" by the interview process—i.e., those deemed to have "credible fear of persecution"—were to be brought to the United States to apply for asylum and those "screened out" were to be returned to Haiti. On

This is not, however, the direction in which the government is proceeding. On the contrary, a recent legal opinion by the Office of Legal Counsel (OLC) of the Department of Justice holds that the government may lawfully repatriate boat people without refugee or asylum interviews even if they are apprehended within the territorial waters of the United States.[16] The OLC opinion achieves this harsh result by rejecting the most straightforward reading of the statutory term "United States": it argues that an alien in United States territorial waters is not "physically present in the United States" within the meaning of the asylum law.[17] Even if the OLC opinion were legally correct in holding that the government may summarily repatriate an asylum seeker who has arrived at the very threshold of safety and freedom, this practice would be at least as objectionable on policy grounds as the summary repatriation of asylum seekers apprehended on the high seas.

*Narrow construction of the "five grounds."* A somewhat more sophisticated limiting strategy is to exclude many applicants on the basis that their claims have an unclear or attenuated relationship to one of the five grounds stated in the Act: race, religion, nationality, political opinion, or membership in a particular social group.[18]

This strategy is often couched in terms of preserving limited refugee-protection resources for "genuine refugees" at the expense of other claimants who are not only more numerous but also presumably less deserving.[19] In practice, however, it operates by subjecting the five grounds and the concept of "persecution" to a series of narrowing constructions. In order to avoid failing the *St. Louis* test, these constructions need some justification other than their tendency to keep the numbers down.

For instance, it is still possible to get a round of applause in a room full of refugee advocates by calling for the repeal of the Cuban Adjust-

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July 5, 1994, in response to a surge in the number of departures from Haiti, the interviews were discontinued and all Haitians apprehended at sea were brought to a "temporary safe havens" at the United States naval station in Guantanamo Bay, Cuba, and in Panama. Ann Devroy & Bradley Graham, *U.S. to Bar Haitians Picked Up at Sea; Other Countries to Provide Temporary Havens*, WASH. POST, July 6, 1994, at A1. This policy remains in force.

16. United States Department of Justice, Office of Legal Counsel, Memorandum for the Attorney General Re: Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters (October 13, 1993).

17. *Id.* at 11.

18. INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

19. Jenks, *supra* note 1.

ment Act,[20] even though the government of Cuba is the one remaining regime in the world which is known to impose severe and routine punishment on returned escapees. The circumstances of this punishment are far more evocative of the political crime often called *Republikflucht*[21] than of routine law enforcement: the Cuban government calls escapees *gusanos* (worms) and frequently imposes substantial prison sentences for such crimes as *peligrosidad* (dangerousness) or being *desafecto al proceso revolucionario* (alienated from the revolutionary process). That a government metes out such punishment more or less consistently to all returned escapees, far from being a satisfying basis on which to deny protection to its victims, is arguably a special circumstance justifying an extraordinary remedy. Yet analysis of the Cuban Adjustment Act rarely goes beyond its denunciation as "special treatment."

Another instance in which a regime has designated a whole class of offenders as political criminals is the coercive population control program of the People's Republic of China. People who resist this program are designated "marital anarchists" and often subjected to unspeakable punishments, including abortions and sterilizations performed under physical compulsion.[22] Some United States refugee advocates have regarded the protection of people fleeing such measures as more "special treatment" attributable to the domestic "pro-life" lobby—although it is not intuitively obvious that the "pro-choice" position on forced abortions is to not worry about them.

This we/they attitude has its roots in dissatisfaction with the bad old days before the Refugee Act of 1980,[23] when escapees from Communist and Middle Eastern countries were routinely admitted as refugees and those from other places were generally not admitted. This dissatisfaction was reinforced during the 1980s, when some factions in the government did in fact provide vigorous protection for Nicaraguans without making a similar effort on behalf of Salvadorans. One of the

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20. Pub. L. No. 89-732, 80 Stat. 1161 (1966), codified as amended at 8 U.S.C. §§ 1255. The Cuban Adjustment Act provides that a national of Cuba who has been lawfully admitted or paroled into the United States may adjust his or her status to that of lawful permanent residence after one year.

21. Goodwin-Gill, *supra* note 8, at 31-32.

22. *See Guo v. INS*, 842 F. Supp. 858 (1994) (holding that where asylum applicant and his wife had refused to comply with sterilization orders and the government had confiscated their property and destroyed their home, applicant was a refugee).

23. Pub. L. No. 96-212, 94 Stat. 102 (1980), amending, adding INA §§ 208-09, 8 U.S.C. §§ 1158-59, and amending, *inter alia*, INA §§ 207 & 243, 8 U.S.C. §§ 1157, 1253.

unhappy results of this polarization was that when the temporary protectors of these groups left the government, persons genuinely in need of protection were left not only without protection but also without advocates.

Ironically, some of the important decisions about refugee protection in the foreseeable future may involve groups that were formerly regarded as having more than their fair share of protection. Many refugee advocates, after a late start, have rallied to the support of the Chinese asylum seekers from the *Golden Venture* and other vessels. The next group to be designated "Alien of the Month" may be Cubans—who really do have special protection in the form of the Cuban Adjustment Act, but who could still be interdicted in international waters and returned to Cuba.

As things get worse in Cuba, more people will leave. Even if one of the things that has gotten worse is political repression, we will begin to hear frequent announcements about the dangerously large number of "migrants" and the threat of "another Mariel boatlift." A massive forced repatriation of people who have risked their lives to escape the Castro regime would be a monstrous measure, but precedents could be cited.[24]

If refugee advocates insist on rigorously equal protection in refugee law, they are likely to get equal protection downward. It would seem far preferable to accept and build upon the relatively generous levels of protection afforded some persons or groups, and to suggest analogous treatment for others whose situation is genuinely similar.

Limiting protection to people whose claims are grounded in "traditional" or "core" applications of the five grounds might be defensible if there were reason to believe that claims tend to be less compelling—e.g., that persecution becomes less likely or less severe, or that victims develop a higher tolerance for pain—as they approach the outer

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24. On August 18, 1994, in response to the departure of about 3000 persons from Cuba by boat and raft during a three-week period, President Clinton announced that Cubans apprehended at sea would no longer be paroled into the United States. Instead they would be detained in the United States or sent to a "temporary safe haven" at the United States naval air station at Guantanamo Bay, Cuba. Daniel Williams & Ann Devroy, *U.S. to Send Cubans Rescued at Sea to Guantanamo; Clinton Decision Upends Three-Decade-Old Policy*, WASH. POST, Aug. 19, 1994, at A-1. This effectively deprived such persons of the benefits of the Cuban Adjustment Act, which only applies to persons who have been either lawfully admitted or paroled. *Supra* 22. On September 9, 1994, the United States concluded an agreement with Cuba whereunder the latter would take unspecified measures to prevent further departures. Grover Joseph Rees, *Clinton's Iron Curtain*, WALL ST. J., Sept. 14, 1994, at A-22.

reaches of defensible interpretation. There is, however, no reason to believe this. Many "traditional" refugees would face harm far less severe than a forced abortion, or even than the prison sentences typically imposed on Cuban escapees. Yet if the moral force of the principles underlying refugee protection—and the closely related deep aesthetic aversion to *refoulement*—vary with any one or more factors, these would seem to be (1) the relative gruesomeness of the fate that may await the applicant upon return and (2) the likelihood that such fate will in fact occur. The clarity of the connection to one of the five grounds would seem distinctly tertiary.

Fortunately, a careful reading of the five grounds in light of their historic purpose does not require the forced repatriation of people who genuinely and reasonably fear forced abortions or prison sentences for alienation from the revolutionary process. Nor, for that matter, does it require the return of a Sikh who has proved he was tortured by government officials seeking "information" about "activists;"[25] or of a Peruvian community organizer who reasonably fears assassination by terrorists seeking to punish him for not supporting them.[26] If the five grounds did require such things, it would be reasonable to suggest that the five grounds are an ass and an idiot,[27] or at least that they are not enough.

## III. APPROPRIATE SORTING STRATEGIES

*Adjudication.* No idea is so good, no program so well devised that it cannot founder on the shoals of personnel. For many years INS asylum decisions were made by officers whose principal function was law enforcement. This system had some advantages: it tended to produce speedy adjudications, and the rate of grants to denials was low enough that the system was rarely criticized as either a floodgate or a magnet. Nevertheless, the creation in 1991 of an independent corps of professional asylum officers, whose duties were limited to asylum adjudication and who were given extensive training in refugee law, is generally acknowledged to have been a step forward.

*Procedural reform.* The biggest problems posed by dramatic increases in the number of people seeking access to a refugee or asylum program

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25. *Matter of R-*, Int. Dec. 3195 (BIA 1992), *remanded sub nom. Rana v. Moshorak*, No. CV 93-0274 (C.D. Cal. July 15, 1993).

26. *See Sotelo-Aquije v. Slattery*, 17 F.3d 33 (1994) (reversing denial of asylum by BIA).

27. "'If the law supposes that,' said Mr. Bumble . . . 'the law is a ass—a idiot.'" CHARLES DICKENS, OLIVER TWIST 461-62 (Peter Fairclough ed., 1966) (1837).

are not so much of policy as of logistics. In theory, the same measures should be applied with respect to a million applicants as to a thousand: a careful interview by an impartial adjudicator; such review of the decision as will minimize the risk of error without causing undue delay; and speedy deportation of applicants who are found to be in no danger and who, but for their asylum claims, would be illegal immigrants.

In practice, a system designed to do all these things for a few thousand applications per year cannot do them when it gets hundreds of thousands. The resulting paralysis, by delaying deportation for anyone whose application is pending, tends to make a dysfunctional system far more attractive than a functional one to applicants for whom delaying deportation is an important objective in itself. These new applications, in turn, generate even more delay, and so forth.

Part of the solution is to employ enough adjudicators to keep up with the applications.[28] It is also important, however, to have as few procedural steps as are consistent with accurate adjudication. The Clinton Administration has proposed procedural reforms that would streamline the asylum application process, both for people attempting to enter the United States and for those who are already here.

Both of these proposals—the "expedited exclusion" bill[29] and the proposal for a streamlined asylum adjudication process[30]—have been controversial among refugee advocates who fear that undue haste will result in the repatriation of refugees. Neither proposal is perfect: the risk of improper repatriation under expedited exclusion procedures could be reduced further, for instance, by clear statutory guarantees about the qualifications and training of the adjudicators and reviewing officials. If, however, further tinkering can produce expedited procedures that would produce at least as few incorrect denials as the current system, then these procedures should be adopted. Not only would an expedited system greatly reduce the incentive for people without strong asylum claims to come to the United States illegally; it would also, by authorizing expeditious proceedings for undocumented aliens who arrive by sea, reduce the government's incentive to resort to inappropriate "territorial

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28. Stephen Legomsky, *Reforming the Asylum Process: An Ambitious Proposal for Adequate Staffing, in* IMMIGRATION LAW: UNITED STATES AND INTERNATIONAL PERSPECTIVES ON ASYLUM AND REFUGEE STATUS 195 (AM. U. J. INT'L L. & POL'Y & LOY. L.A. INT'L & COMP. L.J. eds., 1994).

29. S. 1333, 103d Cong., 1st Sess., 1993.

30. 59 Fed. Reg. 14779, Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization (Mar. 30, 1994) (proposed rule).

sorting" by interdicting vessels and then repatriating the passengers with little or no effort to determine whether any of them are refugees.

*Linkage.* The best way to protect people from persecution is not to afford asylum or third-country resettlement but to arrange for the persecution to stop. A decision to go to war, even over serious offenses against human rights, must always be a difficult one. A decision to withhold foreign aid, trade concessions, and other economic benefits from governments that commit such offenses ought not to be so difficult. That "linkage" of trade and other bilateral relations to human rights remains a controversial practice illustrates both how far we have to go and how many options remain at our disposal. If the absence of official torture, political and religious prisoners, and similar practices—not just "improvement" in such practices—were regarded as an essential prerequisite to whatever it is a government might want from the United States, there would be fewer refugee-generating governments and fewer refugees.

*Protection Rather Than "Benefits."* Finally, it would seem appropriate to change the situation in which, as each crisis arises, our government seems to have at its disposal only the very softest and the very meanest options: letting everyone come to the United States to live forever, and forcing them all back to places like Haiti and China. Other options must be developed for dealing with large numbers of mixed-motive migrants from repressive countries.

The most obvious of these is resettlement in third countries which are civilized and habitable but less economically "magnetic" than the United States. In many cases such resettlement would be feasible in the "country of first asylum," which is generally the first country the person reaches after fleeing the persecuting country.

Even in cases where permanent resettlement in the country of first asylum is not feasible and in which "magnet" considerations militate against resettlement in the United States, forced repatriation is not the only alternative. There are other countries in the world, often including some with longstanding ethnic or cultural connections to the population in question. Even long-term residence in refugee camps or "temporary safe havens" should be preferred to the forced return of people whom we are not confident we can return safely. In cases where such confidence does exist, repatriation should be monitored and followed up to ensure that our confidence was not misplaced.

None of these options is perfect. Adopting any of them would reflect a conscious choice between providing a relatively high level of benefits (such as those traditionally associated with resettlement in the United

States) to a fairly small number of people, and using the same resources to provide a much larger number of people with the one benefit they need above all others: protection from persecution.

Nor would any of these arrangements be easy to negotiate. Most other countries want asylum seekers even less than we do. The United States government is far likelier to undertake such negotiations and to pursue them tenaciously, however, if it eliminates at the outset the options that are easier to implement but harder to reconcile with the premises of refugee protection.

## CONCLUSION

One good word can be said for the bad old days. Of course there was always persecution outside of the Communist world and the Middle East, and of course refugees from such persecution should have been protected. In those days, however, our policy was at least based on a fundamental, and fundamentally true, idea: that refugee protection is a moral obligation having to do with the existence of evil.

The Refugee Act of 1980 was designed to "depoliticize" refugee protection. Yet the most objectionable "political" feature of the old system—the unwillingness to insult "friendly" governments by admitting that they persecuted people—is still present. Now, however, the list of governments we wish to have as friends includes those of a number of refugee-producing countries whose victims used to receive our protection.

We may inadvertently have succeeded not in de-politicizing the system but in de-philosophizing it. This makes the refugee and asylum system look even more like just an alternative immigration system, both to prospective applicants and to the American public. The solution is not to blur the distinction further by subordinating refugee protection to immigration enforcement whenever these two goals collide. Nor will it help to select a small number of "genuine" refugees who are morally indistinguishable from others in need of protection.

Precisely because of the tension between refugee protection and some of the legitimate objectives of immigration policy, arguments for protection are persuasive only when they have moral resonance. The development of refugee and asylum policy, emphatically including the selection of sorting and limiting criteria to deal with large-scale migrations, must recapture and reinforce the connection between refugee protection and the idea that there are some things decent people will not do.