

WHO ARE REFUGEES?

Author(s): MATTHEW LISTER

Source: *Law and Philosophy*, September 2013, Vol. 32, No. 5 (September 2013), pp. 645-671

Published by: Springer

Stable URL: <https://www.jstor.org/stable/24572417>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



Springer is collaborating with JSTOR to digitize, preserve and extend access to *Law and Philosophy*

JSTOR

MATTHEW LISTER

WHO ARE REFUGEES?

(Accepted 4 December 2012)

ABSTRACT. Hundreds of millions of people around the world are unable to meet their needs on their own, and do not receive adequate protection or support from their home states. These people, if they are to be provided for, need assistance from the international community. If we are to meet our duties to these people, we must have ways of knowing who should be eligible for different forms of relief. One prominent proposal from scholars and activists has been to classify all who are unable to meet their basic needs on their own as ‘refugees’, and to extend to them the sorts of protections established under the United Nations Refugee Convention. Such an approach would expand the traditional refugee definition significantly. Unlike most academic commentators discussing this issue, I reject calls for an expanded refugee definition, and instead defend the core elements of the definition set out in the 1967 Protocol to the United Nations Refugee Convention. Using the tools of moral and political philosophy, I explain in this article how the group picked out by this definition has particular characteristics that make refugee protection distinctly appropriate for it. While many people in need of assistance can be helped ‘in place’, in their home countries, or by providing a form of temporary protected status to them, this is not so, I show, of convention refugees. The group picked out by the UN refugee definition is a normatively distinct group to whom we owe particular duties, duties we can only meet by granting them refuge in a safe country. Additionally, there are further practical reasons why a broader refugee definition may lead to problems. Finally, I argue

* Visiting Assistant Professor, University of Denver, Sturm College of Law; PhD, Philosophy, University of Pennsylvania, 2009; JD, Penn Law, 2006. Earlier versions of this paper we presented at a panel at the AALS Annual Meeting in New York City, ‘New Voices on Human Rights’, to the Philosophy Departments at Washington & Less University, Binghamton University, and San Francisco State University, to faculty workshops at Penn Law, Villanova University School of Law, and the University of Georgia School of Law, and at the ‘Emerging Immigration Law Scholars’ conference at American University, Washington College of Law. My thanks to the organizers, and to the participants, at those events for useful comments. I particularly want to thank Howard Chang, Jaya Ramji-Nogalas, Samuel Freeman, Andrew Koppleman, Colin Grey, Anita Silvers, Kok-Chor Tan, Shelley Wilcox, Tess Wilkinson-Ryan, Mark Wojcik, Stephen Perry, Orin Kerr, Michael Blake, Michele Pistone, Randy Beck, Tim Meyer, and Todd Aagaard for their helpful comments and discussion, and Joseph Carens for sharing some unpublished work with me, as well as for setting the course for normative discussion of immigration law and policy.

that rejecting the call for a broader definition of refugees will better help us meet our duties to those in need than would an expanded definition.

I. INTRODUCTION

The world is awash with people in desperate need of help, people who have little, if any, chance of receiving help from their own states. Sometimes this is so because their states are too weak to protect them, or provide them with even minimal resources for living,¹ and sometimes this is so because the state that ought to be protecting them is instead actively persecuting them.² These people have little choice but to turn to the international community for help. Beyond this first group of people is another, larger still. This group is made up of those who, while meeting certain minimal levels of sustenance and political protection, nonetheless face low economic prospects and a less than free political system, perhaps one that discriminates against them in some ways. These people, too, are in need of help of some sort.³ In this paper I examine how these issues place limits on the immigration policies of liberal states. I shall argue that features of a subsection of those mentioned above, those who fall under the United Nations Refugee Convention definition, on a proper reading,⁴ ground obligations in all states to admit them, and that states have a moral obligation to seek so-called 'durable solutions' (such as permanent resettlement and eventual access to full membership in some safe new state) for this group of people, even if the state in question otherwise allows for no discretionary immigration. The paper proceeds as follows. After a brief discussion

¹ Examples are almost too numerous to note, but a recent one would be Haitians left in dire conditions after the major earthquake in their country, with a government that was unable to provide a decent life even before the disaster.

² In 2009 the United Nations High Commissioner for Refugees recognized more than ten million refugees and more than fifteen million 'internally displaced persons'. See, UN Human Rights Council, *UNHCR Statistical Yearbook (2009)*, <http://www.unhcr.org/4ce5317d9.html>.

³ For example, many hundreds of millions of people survive on the quite low standard of \$2 PPP/day. See world bank country statistics here: *Poverty Headcount Ratio at \$2 a Day (PPP) (% of Population)*, THE WORLD BANK, <http://data.worldbank.org/indicator/SI.POV.2DAY>.

⁴ Of course the real issue is one of moral and political philosophy, not definition. There is no very important reason why the *term* refugee must always be reserved for this group, and it would be possible to craft a new term. But, there is a long history and jurisprudence behind the claim that refugees are a favored group who must be granted admission, and in treating refugee policy as a branch of immigration policy. Therefore, I shall proceed on the basis of the idea that refugees are the group to whom we owe certain duties (to be discussed below) and then attempt to find which group it is that we owe these duties to.

of the scope and nature of my argument, I first address calls for a 'wider' refugee definition, and what wider definitions would amount to. I next show that proposed wider definitions face serious problems, and present advantages of a 'narrower' definition. I then explain why persecution is a normatively important category, and the role played by the so-called 'protected grounds' in the refugee definition. I conclude with some brief remarks on how an appropriately crafted refugee definition can help us better meet our duties to all who need support or protection from the international community.

It is an assumption common to most, perhaps all, parties to this dispute that knowing the nature and scope of our obligations to refugees is an important step in helping us meet our duties. In particular, this is a necessary step before developing a plausible account of burden-sharing. Though I do not attempt to develop a theory of burden-sharing for refugees in this paper, such an account is clearly needed. If I am correct that a properly crafted refugee definition is an important step towards such a system of burden-sharing, then the subject of the paper is of even more importance.

For the sake of this paper I shall assume that there is no general or basic right to free movement between states. My goal here is to see what limits there may be on state discretion in setting immigration policies even if we think that there is no general or basic right to free movement.⁵ And as deciding matters of admission by outsiders is a principle part of the notion of sovereignty, the moral demand that states must take in refugees provides one of the basic limits on state sovereignty.

I shall start with what I take to be a modest answer to the question of who is a refugee – something that most parties to the dispute would accept as a characterization of refugees, even if not a definition. This does not take us very far, but it will be useful in structuring and formulating the rest of the enquiry. To start with, we may say that a refugee is anyone whom a state has a moral duty to admit into itself, despite whatever other immigration policies the state in question may have, where this is a moral duty owed by the state, as a member of the international community, to the person

⁵ My considered opinion is that there is no basic right to free movement though I shall not argue for that here. For an instructive argument to this end, see David Miller, *National Responsibility and Global Justice* (Oxford University Press 2007) pp. 201–230. Though I do not agree completely with Miller, I find his account very useful. I take it that this exercise is worth considering even for those who reject the claim that there is no general right to free movement, since all states currently reject a right to free movement and are likely to do so for the foreseeable future.

seeking to enter, based on the need of the non-citizen.⁶ Much of the burden of this paper is to determine the shape and extent of this moral duty.

This duty to allow entrance is an aspect of the generally accepted duty to refugees, the duty of *non-refoulement*, or the duty to not return a refugee to a country where he or she will face danger. *Non-refoulement* is accepted as a duty owed to refugees by all liberal countries, as well as by many non-liberal ones,⁷ and provides an important core of what states owe to refugees. A comprehensive account of our duties to refugees would explain how, in addition to the core duty of *non-refoulement*, the nature of refugees further gives rise to the duty to seek 'durable solutions' for those in need of refugee protection, where this entails giving refugees full access to regular permanent residency, and eventually full membership, in the community of refuge, though this need not necessarily be the state of first admission. This more detailed argument will have to wait, however. In this paper I can hope at most to determine who is a refugee, and the core duties owed to them.

I shall therefore treat the question of who are refugees as being closely tied to the question of to whom what we owe to refugees (whatever that is) is owed. If this is a plausible way to proceed, then the question of who are refugees is not analytically distinct from the question of what we owe to refugees and how we can help them. We cannot get a clear account of either side of the equation in isolation. We shall have to work back and forth between the two in order to come to a clear answer.⁸ Since, to my mind, much of the confusion in and problems with the academic discussion of this issue comes from attempting to give an account of who are refugees in isolation from the question of what we owe to them and how this duty can be met, it is my hope that my approach can provide a more satisfying and unifying answer.

I will defend what I call a 'wide reading of a narrow definition' of refugees. Essentially, I shall argue that a suitably wide reading of the

⁶ I elsewhere argue that states have a duty to admit certain family members of current citizens, but that duty differs from the one under discussion in this paper in that it is owed not to the would-be immigrant, but to current citizens seeking to bring in family members who are non-citizens. See Matthew Lister, 'Immigration, Association, and the Family', *Law and Philosophy* 29 (2010), 714.

⁷ Guy Goodwin-Gill, *The Refugee in International Law* (Oxford University Press 1996) pp. 117–139, 548–550.

⁸ There is a parallel between the method I propose and 'reflective equilibrium' as developed by Rawls. See, John Rawls, *A Theory of Justice* (Harvard University Press, rev. ed., 1999) pp. 18–19. The parallel is intentional.

United Nations High Commission for Refugees (UNHCR) definition, as set out in the 1967 Protocol relating to the Status of Refugees and detailed in UNHCR *Handbook*,⁹ captures the essential facts about refugees and helps us understand what we owe to these particular people. In so arguing I shall defend the claim that the practices of states following something like the approach I recommend (both Canada and the U.S. come reasonably close to it, though there are still very serious problems with procedure in both countries¹⁰) is superior to the approach offered by more academic authors. In defending this claim I shall argue against at least parts of the accounts of refugees offered by Andrew Shacknove, Joseph Carens, Michael Dummett, Thomas Pogge, and, to a lesser degree, Stephen Perry and Matthew Gibney. I will also argue that the broader definition of refugees found in some regional instruments, such as the Organization of African Unity refugee definition, while perhaps appropriate for the special situation in which African states find themselves, is inappropriate as a general account.¹¹

As I have mentioned, my account gives a 'broad' reading to the UNHCR definition of a refugee. This definition declares a refugee to be one who:

Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.¹²

All of the major terms in this definition are legal terms of art with a significant jurisprudence built up around them by various courts and by the UNHCR. My interest here is not, in the main, to argue

⁹ UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Jan. 1992), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html> [hereinafter UNHC Handbook].

¹⁰ For an extensively documented discussion of some of the procedural problems faced by asylum applicants in the U.S., see Ramji-Nogales, Jaya, Andrew Schoenholtz, Philip Schrag, and Edward Kennedy, *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform* (NYU Press, 2009).

¹¹ Organization of African Unity: 1969 Convention on the Specific Aspects of Refugee Problems in Africa. See Goodwin-Gill, *The Refugee in International Law*, pp. 429–434 for the text of the treaty. The definition of a refugee under this treaty (which I shall discuss below) appears in Article I sections 1 and 2.

¹² 1967 Protocol relating to the Status of Refugees, Article I section 2, incorporating by reference with modifications article 1 A(2) of the 1951 Convention on the Status of Refugees. See Goodwin-Gill, *The Refugee in International Law*, pp. 409–412 for the text of the 1967 Protocol.

about the well-established meanings of these terms. I will argue that we can read them in a broad way so that we both capture much of the traditional jurisprudence and also so that those who need refugee protection get it. While we do not need to go into the arcane legal details of the meaning of these terms it is worth pausing briefly at this time to get a rough idea of what this definition does not include.

First, notice that many of those who we said above needed help from the international community are not covered by this definition. The definition covers only those who have a well-founded fear of persecution on the basis of one of the so-called 'protected grounds'. Those who do not fear persecution, even if they are in quite desperate straits, are not, then, refugees under this definition. People fleeing natural disasters, poverty (even extreme poverty), and at least some types of war are also not refugees on this approach, as they do not have a fear of persecution.¹³ Additionally, someone who does face persecution, but not 'on the basis of' one of the protected grounds, is not counted as a refugee. Finally, even those who face persecution on the basis of a protected ground, but who are not outside their country of citizenship, are not refugees. Most controversially, this is so even for those who have been driven from their homes but who have not crossed international borders, so-called 'Internally Displaced Persons' (IDPs). Such persons have all the characteristics of a refugee except that they have not crossed an international border. The UNHCR has taken an increasing role in relation to such persons in the last thirty or so years, but has still maintained that they are not refugees eligible for the full benefits that come with that status.¹⁴ Much of my burden will be to show that these restrictions have a rational basis, one that can be justified by liberal political principles, and that calls to extend the refugee definition should be resisted.

II. CALLS FOR WIDER REFUGEE DEFINITIONS

The claim that the UNHCR definition of a refugee is at least largely the right one is not very popular among those writing on refugees.

¹³ Of course, 'hybrid' cases, where persecution worsens the impact of 'natural' disasters, are common. I discuss this point further later in the paper.

¹⁴ See Goodwin-Gill, *The Refugee in International Law*, pp. 264–268 for discussion of the UNHCR's changing role in protecting IDPs.

Given that this definition does not cover a significant portion of those who need help from the international community, this is not a surprising fact. Additionally, the call for a wider definition is not just put forward by academics and activists, but has been put into effect (to some degree, at least) by some regional agreements. A prime example is the definition of refugees found in the Organization of African Unity 1969 Convention on the Specific Aspects of refugee Problems in Africa.¹⁵ This agreement first incorporates the UNHCR definition but then goes further, stating that:

The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

This definition obviously extends refugee status to many people not covered, or at least not obviously covered, by the UNHCR definition. Victims of natural disasters, for example, are covered under this account and may be granted refugee status by countries following the OAU definition.

Most academic discussions of refugees also call for a broader definition. Michael Dummett, for example, claims that, while, 'The principles embodied in the 1951 Convention are manifestly correct'¹⁶ nonetheless, 'The qualification laid down by the Convention for being entitled to claim asylum is too restrictive' and that rather than follow the UNHCR account we should take a broader view, Dummett argues, one where 'all conditions that deny someone the ability to live where he is in minimal conditions for a decent human life ought to be grounds for claiming refuge elsewhere'.¹⁷

This is already obviously a call for an extension of the refugee definition. How far this extension would reach is not totally clear without an account of the 'minimal conditions for a decent human life'. We may assume that desperate states of existence are surely in – those where a person faces clear, immediate danger to life or health

¹⁵ Organization of African Unity 1969 Convention on the Specific Aspects of refugee Problems in Africa. See specifically Article I section 2. The text of the treaty may be found in Goodwin-Gill, *The Refugee in International Law*, pp. 429–434.

¹⁶ Michael Dummett, *On Immigration and Refugees* (Routledge, 2001), p. 34.

¹⁷ Dummett, *On Immigration and Refugees*, p. 37.

for any reason – but Dummett seems to be willing to extend his account much further than this. Justice, he claims, requires extending a right to admission to those seeking to escape not just desperate straits where life and limb are under immediate threat but also those fleeing ‘the poverty that afflicts much of the Third World’.¹⁸ Without an account (which Dummett does not give) of how severe poverty must be before it can ground a right to seek refuge in another country, we cannot know for sure how broad his account is. But, even if we apply a fairly stringent rule here this account is a very radical one, implying that hundreds of millions, perhaps billions, of the poor around the world ought to have the right to enter and remain in other countries, despite the objections of those who live in said countries. In this, Dummett goes far beyond the plausible view that we have duties of justice to the global poor, and suggests that one particular response – opening borders to the global poor-is required by justice. Since Dummett also holds that methods used to keep would-be asylum seekers from reaching wealthy western countries – interdiction at sea, visa regimes, carrier sanctions, and the like – are unjust and must be stopped,¹⁹ we can assume that under his account the influx of refugees, on his understanding of the term, would be massively higher than it is now. The only restriction that Dummett would place on this influx is one coming from a people’s ‘right not to be submerged’.²⁰ But, on Dummett’s account, this is a very weak restriction. It exists only where a population is in danger of being ‘rapidly overwhelmed’ by immigrants. This situation rarely exists with large states, he claims, and rarely where there are not other injustices, such a colonial rule.²¹

Dummett’s position here is similar to those put forth by Bruce Ackerman and Joseph Carens. Both Ackerman and Carens argue that restrictions on admission are acceptable only when additional admissions would undermine the very existence of liberal institutions.²² While Carens is most explicit about the point, all three

¹⁸ Dummett, *On Immigration and Refugees*, p. 25.

¹⁹ Dummett, *On Immigration and Refugees*, pp. 42–44.

²⁰ Dummett, *On Immigration and Refugees*, p. 14.

²¹ Dummett, *On Immigration and Refugees*, pp. 50–52.

²² Bruce Ackerman, *Social Justice and the Liberal State* (Yale University Press, 1980), pp. 89–95; Joseph Carens, ‘Migration and Morality: A Liberal Egalitarian Perspective’, in Brian Barry and Robert E. Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (Penn State University Press, 1992), pp. 25, 30, 42.

would require the admission of immigrants even if this strained the institutions of the welfare state to the breaking point.²³

We have, I think, good reason to think this is too extreme of a view even outside of consideration of refugees. However, for my purposes it is enough to note that the actual arguments given by Dummett, Carens, and Ackerman are not actually tied to refugee policy in any deep way at all. Rather, in all three cases their approaches are based on a supposed general right to free movement, so long as this does not cause certain harms – the ‘rapid submersion’ of a culture in the case of Dummett, or the destruction of liberal political institutions in the case of Carens and Ackerman. As Dummett says, ‘The idea that national frontiers should everywhere be open should become far more than a remote aspiration: it should become a principle recognised by all as the norm’.²⁴ This is a norm that may justly be deviated from only in the cases of rapid submersion and massive over-population, cases Dummett rightly thinks are likely to be rare.²⁵ On all of these accounts, there is nothing very special about being a refugee.²⁶

Such ‘impartialist’ accounts, to use Gibey’s terminology, do not recognize a fundamental distinction between being a refugee and other reasons for moving between countries.²⁷ On such accounts, all movement is grounded in a general right to move between countries subject only to a few specific limitations. If refugees get any special treatment at all it would only, perhaps, be in getting a prime place in line for admission before we reach the stopping point for new entrances. Even this, however, is not obviously right because, if free

²³ Carens, ‘Migration and Morality’, pp. 41–42.

²⁴ There are ways to understand this idea that are more plausible than others. That we should make travel, tourism, temporary labor migration, and exchanges easier seems to me to be clearly right. I also, personally, believe that most societies would benefit from increased immigration – that is, movement undertaken with the intent to remain indefinitely. However, with certain exceptions, including the one at issue in this paper, the later question seems to me to be better left to the political process of states.

²⁵ Dummett, *On Immigration and Refugees*, pp. 72–73.

²⁶ Ackerman and Carens, in the works cited, are not specifically trying to give an account of refugees, though Carens does address the point elsewhere. Carens elsewhere accepts, as a practical matter, priority for those making a claim for ‘first asylum’, though on rather different grounds than I give here, and to an indeterminately large group of people. See Carens, ‘Refugees and the Limits of Obligation’, *Public Affairs Quarterly* 6 (1992) p. 31. He makes no attempt in that paper to reconcile his position with his general arguments in favor of open borders. My point here is only that basing an expanded refugee definition on a general right to free movement, such as that argued for by Ackerman and Carens, will not give us an account of refugees and why they are normatively distinct. So, if we think refugees, whoever they are, are normatively distinct, we need something other than a general right to free movement to establish this.

²⁷ Matthew J. Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press, 2004), p. 84.

movement between states is a basic right, as both Carens and Dummett argue it is,²⁸ then it is not at all obvious that preference can be given to the needy. As James Woodward, discussing the point in Rawlsian terms, points out,

If freedom of movement is a fundamental right or liberty, then it falls within the scope of Rawls's first principle, which assigns equal liberty to all and which takes priority over the distributive considerations aimed at improving the conditions of the worst off which figure in the difference principle.²⁹

So, unless we are operating with a covert maximizing principle, if we accept any limits on immigration at all, while accepting it as a basic right, we might have to use some sort of a lottery system if entrance demands exceed supply. While I think there are good reasons to reject the idea of free movement between states as a basic right, the important point to note here is that such accounts cannot very easily justify giving preference to refugees or other needy persons. And, as I shall show below, even if we try to bring in a principle giving lexical priority to the worst off globally, we still will not get Carens' or Dummett's position as a result, as it is not at all clear that admission of the needy would be what was called for by such a principle.

It seems, then, that the 'impartialist' approach of Dummett and Carens cannot be used to ground a *refugee* policy, as their accounts are not, in the end, based on any special features of refugees, but rather on a general argument for a right to free movement between countries. But if we reject the claim of a general right to free movement between states, then we are not left with a satisfactory account of why refugees, whoever they are, should be given a special right to move between countries. Dummett, with his discussion of the right of everyone to what is necessary for a minimally decent life, provides some direction, but, as I shall show through the discussion below, this sort of account is not developed enough, independently of Dummett's claim for a basic right to free movement to do the

²⁸ Dummett, *On Immigration and Refugees*, pp. 49–53, Carens, 'Migration and Morality', p. 26.

²⁹ James Woodward, 'Commentary: Liberalism and Migration', in Brian Barry and Robert E. Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money*, pp. 59, 61. The issue is more complicated than I have presented it because, of course, refugees, and at least some of the global poor, suffer from a serious deprivation of their basic liberties and so might get preference in an approach seeking to provide the largest scheme of equal basic liberties. But, since I think this deprivation is best taken care of in other ways in the case of the poor, as I shall discuss below, and other deprivation may well ground an asylum claim, making the general right redundant, I leave this point for now.

work we need. So, we must search for a more developed theory if we are to find a justification for moving from the UNHCR definition to a broader refugee definition. We find such an account in the work of Andrew Shacknove.³⁰

Schacknove's account is important both because it is among the best worked out arguments for a broader refugee definition and also because his account has been endorsed, at least in part, by several others working on immigration, including Matthew Gibney,³¹ Stephen Perry,³² and Joseph Carens,³³ in his most recent work. Any defense of a narrow definition must meet his arguments.

Shacknove and I agree that a proper definition of refugeehood is of great importance.³⁴ Having access to such a definition will, we may hope, help states and the international community better fulfill their duties and to facilitate cooperation and burden-sharing. We may also hope that a clear definition, accepted by all states, will help discourage the lodging of asylum claims by those who clearly do not meet the definition, thereby putting less stress on often overburdened adjudication systems. Shacknove and I also agree that both overly narrow and overly broad accounts of refugeehood have dangers – the first leading us not to do our duties, leaving many people in situations of dire need, the second likely leading to strained resources, an unwillingness of the populations of host countries to recognize the privileged position of refugees, and a backlash against the asylum process in general.³⁵

The heart of a proper refugee definition, Shacknove claims, is the absence of state protection. To lack state protection, he argues, is to be 'deprived of basic needs'.³⁶ Refugees are 'persons whose basic needs are unprotected by their country of origin, who have no remaining recourse other than to seek international restitution of

³⁰ Andrew E. Shacknove, 'Who is a Refugee?', *Ethics* 95 (1985), p. 274.

³¹ Gibney, *The Ethics and Politics of Asylum*, pp. 7–8. Note that Gibney does not fully accept Schacknove's account.

³² Stephen Perry, 'Immigration, Justice, and Culture', in Warren F. Schwartz (ed.), *Justice in Immigration* (Oxford University Press, 1995), pp. 94–104.

³³ Joseph Carens, 'The Dispossessed: Responsibilities for Refugees' (forthcoming, on file with author).

³⁴ Shacknove, 'Who is a Refugee?' p. 276.

³⁵ *Id.* For an extremely interesting discussion of backlash against refugee programs in Germany, the U.K., Australia, and the U.S. see Gibney, *The Ethics and Politics of Asylum*, chapters 3–6. Note, however, that only Germany's pre 1993 refugee definition could plausibly be thought of as overly broad, and even there the application of the definition had been greatly narrowed before it was actually changed.

³⁶ Shacknove, 'Who is a Refugee?' p. 277.

their needs, and who are so situated that international assistance is possible'.³⁷ As Shacknove notes, his account is closer to the OAU than to the UNHCR definition in that he rejects any conceptual connection between refugeehood and persecution.³⁸ He points out that, because persecution is only one way in which people may be insecure in their basic needs, if refugeehood is about a lack of security for one's basic needs, then persecution cannot be an essential part of the definition.³⁹ Like the OAU account, Shacknove would draw no clear line between insecurity in one's basic needs based on persecution, (severe) economic deprivation, or natural disasters.⁴⁰

Shacknove goes beyond the OAU definition, however, in saying that there is no essential connection between refugeehood and having crossed an international frontier. Recall that on both the OAU and the UNHCR definition one must, in order to be a refugee, be outside one's country of citizenship, nationality, or habitual residence, in the case of those persons without a citizenship or nationality. What is essential to refugeehood, Shacknove claims, is not that one has crossed an international frontier, but rather that one actually have access to aid provided by the international community.⁴¹ Unfortunately, what this means is far from clear. Shacknove wants to include at least some IDPs in his account, though he does not explicitly use this terminology. However, not all of those who otherwise would meet his definition, and not all IDPs, have access to the international community.

For one to have access to the international community, he claims, is for one's state to be willing to allow or unable to prevent international assistance.⁴² This account raises more questions than it answers, since Shacknove does not even attempt to give an account of what it would mean, in the relevant sense, for a state to be 'unable to prevent' aid from being administered. At the very least it might seem that we would be left with the counter-intuitive result that those threatened by weak states would be refugees while those

³⁷ Shacknove, 'Who is a Refugee?' p. 277.

³⁸ Shacknove, 'Who is a Refugee?' p. 276.

³⁹ Shacknove, 'Who is a Refugee?' p. 279.

⁴⁰ Shacknove, 'Who is a Refugee?' p. 278.

⁴¹ Shacknove, 'Who is a Refugee?' p. 283.

⁴² Shacknove, 'Who is a Refugee?' p. 283.

threatened by strong states would not be, since the latter could prevent the international administration of aid while the former could not. We also here lack any suggestion of how easy this aid must be to administer. For example, we would need an account of what sorts of costs the administering state must be willing to undertake, and how far it may morally displace these costs onto the (perhaps largely innocent) population of the offending state.

In order for this account to be of serious practical usage, we would need something that we do not have, namely, a well worked-out and agreed upon account of when and how so-called 'humanitarian intervention' is required.⁴³ Without this, it is not at all clear that Shacknove's account can provide practical guidance for cases where refugees have not crossed international borders. This aspect of Shacknove's account seems to me to be dangerously disconnected from the reality of the situation we find ourselves in. I shall further argue that it is in serious tension with some of his methodological claims as well. However, even if this is so, we might try to separate or revise this aspect of his account to see if we can accept the rest. I shall argue that we cannot, and that the methodological approach that leads Shacknove to his broad definition is mistaken and confused. When we take a sounder methodological approach we shall see that a narrower definition is a preferable one. I turn now to these questions.

III. PROBLEMS WITH EXPANDED REFUGEE DEFINITIONS

Shacknove's basic methodological stance is that we can and should seek to give an account of who is a refugee independently of the question of what we owe to them. In his own terms, 'A conception of refugeehood is prior to a theory and policy of entitlements'.⁴⁴ Similarly, he claims that the 'conceptual issue' of whether 'all persons deprived of their basic needs' are refugees or not is independent

⁴³ Many arguments for humanitarian intervention have been proposed, of course, but it does not seem to me that there is any significant consensus even as to when such interventions are permissible or required, let alone consensus about which actual cases meet the various proposed standards. For helpful discussion of this question, see Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Transnational Publishers, 3rd ed., 2005); Nocolaus Mills and Kira Brunner (eds.), *The New Killing Fields: Massacre and the Politics of Intervention* (Basic Books, 2002); and David Luban, 'Intervention and Civilization: Some Unhappy Lessons from Kosovo', in De Greiff, Pablo and Ciaran Cronin (eds.), *Global Justice and Transnational Politics* (MIT Press, 2002) pp. 79–116.

⁴⁴ Shacknove, 'Who is a Refugee?' p. 277.

of and prior to procedural and institutional issues of what we can and ought do for refugees.⁴⁵ It is this approach that leads Shacknove to his broad definition.

If we are not concerned with what we can or should do for them, then there is no obvious reason to distinguish between those in desperate need because of persecution on the basis of a 'protected ground' – those who fall under the UNHCR definition – and those who are in desperate need because of other forms of insecurity, such as generalized war, natural disasters, or extreme poverty. We would simply need to look the relative levels of welfare of the people in question. Similarly, if we do not concern ourselves with what we can or may do for those our definition covers, then there is much less reason to favor those in need who have crossed an international frontier, as this makes no intrinsic difference to the level or degree of need of the person in question. Given this, there is certainly an attractive element in Shacknove's approach.

Despite this, I hold that there are strong reasons, both practical and theoretical, for rejecting Shacknove's approach. His approach fails to give us any adequate practical guidance and as such cannot serve as a moral principle.⁴⁶ Since it does not help us to meet the needs of those in danger, it fails on one of his own requirements for an adequate definition.⁴⁷ His account also fails to meet a standard methodological requirement, discussed below, and also seems to be in serious conflict with certain aspects of his own definition. When these difficulties are made clear, a more narrow definition, of the sort that I favor, will seem preferable.

I start with the methodological point. In questions of political philosophy, I claim, we must carefully distinguish between basic principles and the obligations that arise under the principle in question in a

⁴⁵ Shacknove, 'Who is a Refugee?' p. 282. In his recent, as yet unpublished work, Carens also seems to accept this position, though I am unsure if his commitment is as categorical as Shacknove's. See Carens, 'The Dispossessed: Responsibilities for Refugees'.

⁴⁶ While there is some debate in philosophy as to whether moral principles must be action guiding in some important sense or not, I am here assuming that they should be. There are deep disputes that I cannot hope to address in this paper. For useful discussion on this point see Gerald Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge University Press, 2011) pp. 174–176. When discussing issues such as providing protection for refugees, that our principles ought to be action guiding seems even more obvious, though Carens, as noted above, seems to reject the point. See also, Joseph Carens, 'Realistic and Idealistic Approaches to the Ethics of Migration', *International Migration Review* 30 (1996) p. 156. If the account I provide here is plausible and useful, then this is some evidence against the 'idealistic' approach favored by Shacknove and Carens.

⁴⁷ Shacknove, 'Who is a Refugee?' p. 276.

particular context or situation. As Stephen Perry puts this point, 'the content and scope of the obligation must be distinguished from the content and scope of the underlying principle that justifies it'.⁴⁸ Shacknove fails to make this distinction and it is this that leads him to his broad definition. I agree that general principles of justice require that we do what we can to help all of those who cannot meet their basic needs. This duty may be grounded in something like Rawls's 'duty of assistance', in a 'principle of humanitarianism',⁴⁹ or in some stronger cosmopolitan account of global justice.⁵⁰ However, these basic principles of justice give rise, I argue, to significantly different duties in different situations. Shacknove's account of refugees not only does not notice, but also obscures, this important point. Given this, we ought to reject his definition as an account of refugeehood.

IV. ADVANTAGES OF A 'NARROWER' DEFINITION

The UNHCR definition has an advantage over Shacknove's account in that it selects out a subgroup of those whose basic needs are not being met whom we can only (or at least best) hope to help through a particular method – by allowing them to enter our (safe) countries and seek refuge there, and by not returning them to a country where they face danger. This is the obligation of *non-refoulement*, the principle of which has traditionally been at the heart of duties to refugees. That Shacknove's account separates refugeehood from *non-refoulement* is in itself a reason to worry about its adequacy, but it is worth making the point explicitly.

Consider the distinction between those whose basic needs are not met because they suffer from severe poverty and those who face persecution on the basis of a protected ground. The needs of these

⁴⁸ Stephen Perry, 'Immigration, Justice, and Culture', p. 100.

⁴⁹ For Rawls's 'duty of assistance' see John Rawls, *The Law of Peoples* (Harvard University Press, 1999), pp. 106–113; on 'humanitarianism', see Gibney, *The Ethics and Politics of Asylum*, pp. 229–244. While not completely equivalent, these principles lead to similar enough duties in this context that we may here ignore the differences between them.

⁵⁰ For just one such account, see Kok-Chor Tan, *Justice Without Borders: Cosmopolitanism, Nationalism, and Patriotism* (Cambridge University Press, 2004), pp. 19–82. Of course, some reject the idea that we have duties of justice to the global poor, either for very strong nationalist reasons, or else as part of a general rejection of principles of distributive justice. I do not find either of these views plausible, but to address their implausibility would take us too far afield here. One who rejected the idea of duties of justice to the global poor might base some degree of duties to refugees on a less stringent principle, though it is likely that such an account would provide less protection for refugees than I argue for here. I will not, however, pursue this alternative line of justification further.

two groups can be met in very different ways, and this difference grounds different obligations in us, even though (or even if) the obligations arise because of the same basic underlying principle. In the case of those who suffer from severe poverty, it is highly plausible that we may best meet their needs not by allowing asylum in other countries, but rather by helping these people 'in place', by providing, first, emergency assistance, and in the long run by promoting both economic and political development.⁵¹

While we could meet the needs of some of those who suffer from extreme poverty by allowing them refuge in wealthy western countries, this option is not, morally speaking, obligatory, as the duty to help those whose basic needs are not met can be met in other ways, via emergency aid and development assistance, as noted above. There is also good reason to think that the aid and development approach is preferable to the refuge approach. The aid and development approach, for one, is more likely to be able to help more people, and more likely to be able to do this without risk of serious political backlash of the sort that has plagued refugee programs in many western countries.⁵²

Furthermore, as Thomas Pogge has pointed out, there are independent reasons to think that aid and development are more likely to help the global poor than would granting refuge to them. This is so for at least two reasons. First, helping the global poor 'in place' is more likely to be cost effective, as it is much cheaper to provide for the poor in their home countries than it would be in the west.⁵³

⁵¹ At first this claim seems counter-intuitive, but it becomes less so, I think, when we consider the huge numbers involved, and the costs, both monetary and humanitarian, of physically relocating hundreds of millions of people. Recall that we are not here considering those who face temporary danger from disasters or the like, but the staggering number of every-day destitute around the world.

⁵² See again Gibney, *The Ethics and Politics of Asylum*, chapters 3–6 on the history of political backlash against even much less permissive refugee programs than that required under Shacknove's account, and pp. 243–249 on ways that a refugee program may attempt to avoid this backlash by using a clearly defined narrow refugee definition.

⁵³ Thomas Pogge, 'Migration and Poverty', in Veit Bader (ed.), *Citizenship and Exclusion* (St. Martin's Press, 1997), pp. 12, 16–17. The situation is more complicated than Pogge's fairly simple story makes it out to be, since, of course, the more aid we provide to the global poor the less far each bit of aid will go. But, the general point is surely right.

Secondly, those most able to get to wealthy countries to seek admission are less likely to be the truly economically destitute, as such trips are costly, no matter how made, and can rarely be made without help or contacts.⁵⁴ So, if our goal is really to help those who are truly suffering from severe poverty, it seems that we have strong reason to do this not, at least primarily, by granting admission to wealthy countries, but rather by helping the poor where they are.

Given that we may meet our obligations to those suffering from severe poverty in ways other than granting them refugee status and asylum in wealthy countries, and given that there is reason to think that the aid and development approach is more likely to achieve our ends than would granting refugee status and asylum to such persons, it follows that we have no obligation as such to grant refugee status and asylum to those suffering from severe poverty, so long as we work to meet our obligations in these other ways.⁵⁵ A somewhat similar account applies to those who need protection due to natural disasters. I shall touch on this point again in more detail a bit later when I discuss the 'wide' reading of the UNHCR definition.

V. WHAT IS SPECIAL ABOUT PERSECUTION?

The case of those who suffer persecution (or who have a well-founded fear of such persecution) on the basis of one of the

⁵⁴ Pogge, 'Migration and Poverty', p. 14. Again, this might be a bit too simple since, if Shacknove is right, we might have some obligation to remove those who wish to leave from their country of nationality. But again, this would greatly limit the number of people who would qualify to be a refugee on Shacknove's account since it unlikely to be feasible in many cases. But, Pogge is again certainly right in his depiction of the present state of the world. In conversation Rand Beck suggested to me that, given the above considerations, a 'refugee' approach to global poverty might have the perverse result of promoting flight of those with skills most needed for development in poor countries, and that this might further support the 'aid and development' approach. I think this is plausible, but that difficult issues arise here given that we do not want to unduly restrict movement between countries, even if it might slow development. The effects of 'brain drain' are also disputed among experts. But, the point is worth further consideration when more space is available.

⁵⁵ I do not mean this as an argument for 'tight' borders. Allowing labor migration, whether temporary or otherwise, can be a useful way to help the global poor, and should be expanded. For useful discussion of this point, including discussions of the limits of this approach, see Stephen Castles and Mark J. Miller, *The Age of Migration: International Population Movements in the Modern World* (Guilford Press, 4th ed., 2009) pp. 50–78. However, this particular method of meeting duties to the global poor should be kept distinct from both the general moral obligation to the global poor, which might be met in many different ways, and the moral obligation to admit refugees, which, I argue, has a different moral structure. Furthermore, my account here does not address the difficult question of what should be done when states do not meet their duties to the global poor. Such cases are of course the most common ones, but what follows in them is, I believe, an extremely difficult question that I cannot address here, except to say that we should rarely, if ever, find those who move to improve their situation, refugees or not, morally blameworthy in a world like ours, where wealthy states routinely fail to meet their duties to the global poor.

protected grounds, however, is different. In the case of such persons, their state⁵⁶ has not just failed to meet their needs but has actively turned against them.⁵⁷ In the large majority of such cases the only plausible solution to the problem is to provide these persons with a new state, and the only plausible way to do this is to allow them to enter and remain in an existing state. Here we see the limits of the approach suggested by Pogge above, since people who face persecution cannot normally be helped via aid and development, at least not in a time-frame that will do them any good. Pogge rightly points out that many who fall under the traditional UNHCR definition are not significantly worse off than many of those suffering from severe poverty, and that many are certainly better off, at least economically.⁵⁸ But, he wrongly concludes from this that we should give no special place to those who are refugees according to the traditional definition. Pogge's position is hard to understand, but I believe it is a type of consequentialism joined to the (perhaps not implausible) view that the best way to maximize over-all utility is by increasing the well-being of those who get the largest increase for each dollar spent. If this is our goal he may be right that we ought not give any special place to refugees as traditionally defined, though I do not think this is obviously right. But, if we have a rights-based or a contractarian view, then his position does not follow, as we may have obligations to undertake actions even if these actions do not result in the greatest over-all utility.

⁵⁶ Many asylum claims involve non-state actors, though these are a minority of cases. I believe that the large majority of non-state actor asylum and refugee claims can be understood as being ones where either the state has, in effect, delegated authority over a portion of the population to certain members (many gender-based claims can be understood this way) or where a group has usurped state authority, often violently. Here my account differs from that of Matthew Price, though there are otherwise some similarities. Price holds that while the actions of non-state actors may, in some instances, ground an asylum claim, this shows that the so-called 'nexus' requirement, that persecution be 'on the basis of' a protected ground, is mistaken. As I will discuss briefly below, I do not think this is correct, though, like Price, I reject (at least some aspects of) what he calls the 'protection' view of asylum law. See Matthew E. Price, 'Unwilling or Unable: Asylum and Non-State Agents of Persecution', in Brad Epps, Keja Valens, and Bill Johnson Gonzalez (eds.), *Passing Lines: Sexuality and Immigration* (David Rockefeller Center for Latin American Studies, 2005) pp. 341, 346–347. Price's later statement of his view comes closer to my own, but still has important differences. See Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press, 2009), pp. 157–158. I hope to provide a unified account of non-state actor asylum claims in a future paper, but for now will put these difficulties aside.

⁵⁷ This 'turning against' may consist in direct action or the removal of protection from 3rd-party harm provided to others. I discuss this point further later in the paper. My thanks to Colin Grey for pointing out the need to make this point more clearly.

⁵⁸ Pogge, 'Migration and Poverty', p. 15.

Consider the right found in the UN Universal Declaration of Human Rights Article 15(1), 'Everyone has the right to a nationality'.⁵⁹ In the context in which the UNHCR developed, in the face of large-scale statelessness and displaced persons, this seems to mean that everyone has the right to the protection of a state. As noted above, if one's own state does not provide this protection, one must seek a new state, and this is exactly the process of seeking asylum. This right implies a duty on the part of states to take in those who need such protection. If the right to the protection of a state is properly a basic right, as I take it to be, then it is not, in the case of those facing persecution, dischargeable by providing more monetary relief to the poor, as Pogge suggests. Once again we see the distinction between those picked out by the UNHCR definition and those who would fall under a broader definition such as that favored by Dummett or Shacknove.

While in a few cases it may make sense to protect those who face persecution by direct intervention into an offending state, in the vast majority of cases this will not be so. While wide-spread killing, enslavement, or genocide most likely justify, and perhaps require, direct intervention into the affairs of the offending state,⁶⁰ in the situation faced by many refugees this is not so. Direct intervention into the offending state to prevent persecution will very often fail a test of proportionality, in that it would either require those seeking to prevent the harm to put themselves unduly at risk,⁶¹ or else would threaten to cause even more harm to the residents of the offending state than would be prevented. Given this, the only morally acceptable way to discharge our duties in the case of those who fear persecution is to allow them refuge in a safe country. The difference, then, between those who fear persecution and those who suffer from severe poverty is clear. As Shacknove himself notes, an inadequate refugee definition threatens to leave those in need of aid

⁵⁹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) at 71 (1948).

⁶⁰ I take this as true, but a theory of humanitarian intervention & just war is beyond the scope of my project. There is, obviously, much dispute about when and what sort of intervention is required, but I take it that not every case of persecution would justify forceful intervention. For discussion, see the works cited in note 43 above, as well as Allen Buchanan, 'The Internal Legitimacy of Humanitarian Intervention', in his *Human Rights, Legitimacy, and the Use of Force* (Oxford University Press, 2010), pp. 201–217.

⁶¹ We may here draw a parallel with a duty to engage in 'easy' rescue, a duty that does not imply a duty to seriously risk oneself, and does not authorize greatly risking innocents in making a rescue. My thanks to Anita Silvers for suggesting this parallel.

without help. That his account cannot make this important distinction is a serious mark against it, one that is not taken care of by an unsupported claim that we can deal with definitional issues without looking at what we owe to those in need.

A similar situation arises with respect to the distinction between those who have or have not crossed an international frontier. Often we are in no position to help those who have not crossed an international frontier. Attempts to do so, in cases where the state in question opposes our actions, will again often fail a proportionality test since, this will very often either impose disproportionate risks on us, or else will require us to displace risk on those members of the population of the state in question who have done no wrong.⁶² However, in the case of those persons who have crossed an international frontier, we are able to meet our duties to them without significant risk to ourselves by granting them asylum, and hence have a duty to do so. Such cases may not exhaust our duties to give refuge, but they are clear cases, and it is useful to have this duty marked out explicitly via an account of refugees.

Shacknove might attempt to deal with this problem by invoking his condition that refugees are only those persons in need of aid who, having crossed an international frontier or not, are 'so situated that international assistance is possible'.⁶³ But, this condition will not help his case, for two reasons. First, as noted above, without giving us an account, at least in outline, of when this condition is satisfied, we have no reason to think his account actually goes beyond that set out by the UNHCR definition. If in fact we are rarely able to provide refuge to those who have not crossed an international border, then Shacknove's definition is not a significant challenge to the UNHCR definition, but has less ability to guide action and provide clarity. That Shacknove's definition might be less clear while not in fact telling us to do much that is very different from the UNHCR definition is even more likely once we take into account the distinction

⁶² For an interesting and ambitious account of how we might better try to help internally displaced persons and others in need who are not refugees, see Michele R. Pistone and John J. Hoeffner, 'Unsettling Developments: Terrorism and the New Case for Enhancing Protection and Humanitarian Assistance for Refugees and Internally Displaced Person, Including Victims of Natural Disasters', *College of Human Right Law Reports* 4 (2011) p. 613. Pistone and Hoeffner do note that differences between these groups may give rise to different rights and obligation, though they disagree with my account to some degree as to what these rights and obligations come to. See *Id.* p. 617.

⁶³ Shacknove, 'Who is a Refugee?' p. 277.

between people facing persecution and those suffering from poverty discussed above.

More importantly, given his own terms, it is not clear that he is entitled to make this qualification. If the definition of refugeehood is to be set out independently of what we can do for refugees, as Shacknove claims, it is not clear why this condition should be an acceptable one, since it is defined in terms of what we can do. We see this when we note that Shacknove glosses this requirement as being met when the state in question either willingly allows international aid or *is unable to prevent it*.⁶⁴ What it means for a state to be 'unable to prevent' the administration of aid is left completely unclear, and itself raises many difficulties. However, the important point to see here is that this is clearly a limitation on the definition of a refugee based on what we can or should do. But this is just what Shacknove claimed we should make no use of in defining refugees.⁶⁵ So, it does not seem that he can coherently make use of this distinction in his account. This again seriously limits the usefulness of his definition. It also gives us reason to think he is wrong on the general methodological claim that we should define refugees independently of the questions of what we can and should do for them. Recall here Perry's point that the content and scope of an obligation must be distinguished from the content and scope of the principles that underlie it. While the basis for our duties to those who lack adequate state protection may arise from the same underlying principle, what our duties are in particular cases will depend heavily on what we can hope to achieve. If 'convention' refugees make up a group that has features that distinguish our duties to them in particular ways, then it is useful to have a rule that notes and tracks this. When we see this, essentially all of the arguments given by Shacknove for his broader refugee definition disappear.

I have argued that Shacknove's positive arguments for a broader refugee definition do not work and so cannot support his claim. But of course this does not, by itself show, that the UNHCR definition is adequate, as it too might not extend protection to all of those who need it and cannot be helped but by granting them asylum in a safe country. If this were so, as argued by Shacknove and to some degree by Perry and Gibney, then we would have to look further to find an

⁶⁴ Shacknove, 'Who is a Refugee?' p. 283.

⁶⁵ Shacknove, 'Who is a Refugee?' p. 277.

adequate account. However, in what follows I shall attempt to show that we can give a 'wide' reading to the provisions in the UNHCR definition in such a way as to capture the cases we must if we are to have an adequate account. Furthermore, this wide reading is not merely an ad hoc extension. Rather, it follows from a consistent and straightforward application of the idea that what refugee protection and asylum are for is to find ways to provide protection to those persons who face grave danger whom we can help without causing disproportionate harm or putting ourselves at disproportionate risk.⁶⁶

Recall the definition of a refugee from the 1967 protocol. Convention refugees are those persons who are outside their country of origin and are unable or unwilling to avail themselves of the protection of their country or to return to it because of a well-founded fear of being persecuted on the basis of one of the 'protected grounds', namely, race, religion, nationality, political opinion, or membership in a particular social group. When we give wide readings to these terms we can extend protection to many of those whom Shacknove, Perry, and others want to make sure we include.

Perry, for example, in the course of at least tacitly endorsing Shacknove's account, claims that,

refuge should be granted much more liberally to persons who do not have effective political protection of their basic rights within their home countries, whether or not they are outside that territory and whether or not they are actually persecuted.⁶⁷

I hope that I have already given some reason to think that we cannot hold that states generally have a duty to provide protection to all those still inside their country of origin who face active persecution. In many cases a supposed duty to aid, at least in any immediate way, those still within their country will fail a proportionality test and so cannot be part of a general duty.⁶⁸ In the case of those who suffer

⁶⁶ Most of the wide readings I will argue for have found at least partial acceptance in the practice of the U.S. and Canada, countries that do among the best in refugee determination and settlement. While this is not a very strong argument for accepting this approach in itself, it does help lend plausibility to the claim that these are reasonable readings of the term in the UNHCR definition.

⁶⁷ Perry, 'Immigration, Justice, and Culture', p. 104.

⁶⁸ Even where we cannot help such people directly we will often have a duty to provide such aid as we can indirectly in several ways; by not limiting travel by such groups of people to western countries, for one, as is often done now, and by using means short of force to encourage the spread and development of human rights in all countries.

from poverty, we can usually best help them in place, and so we do not have a general obligation to offer refuge. This is all recap. But, one way where a wide definition can help meet some of Perry's worries is with regard to the claim that we should help those whose basic rights are not protected whether they are actually persecuted or not.

Recall that the definition of a refugee I have been supporting does not say that, in order to be owed asylum, a would-be refugee must have been actually persecuted or undergoing present persecution. Rather, the requirement is for a 'well-founded fear' of persecution. This has been interpreted in U.S. and Canadian law to mean that there is a 'real chance' or a 'reasonable chance' of persecution but not that this chance be especially high.⁶⁹ The US Supreme Court, for example, has held that 'even a 10% chance' of being persecuted on the basis of a protected ground is enough to establish a well-founded fear.⁷⁰ This numerical formulation is unfortunate as it encourages a belief that greater accuracy in quantifying the probability of persecution is needed or desirable than is probably the case, but the general idea is right – the 'well-founded fear' standard sets only a low threshold, one that does not require actual persecution to have taken place, so long as there is good reason to think that it could take place. Whether this standard is met or not will have to be looked at in a case-by-case way most of the time.⁷¹ But, the proper reading of the UNHCR account does not require the actual persecution of would-be refugees for them to qualify for protection.

A wide reading of the UNHCR definition can also deal with many of the issues that Shacknove discusses under the case of natural disasters. As he notes, the suffering of people during natural disasters is often not uniformly distributed among the population of the country in which the disaster takes place. Often particular groups suffer more direly than others, and sometimes the supposed 'natural' disaster is largely man-made, as when certain groups are refused

⁶⁹ For the U.S., see *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), for Canada see *Yusuf v. Canada* [1992] 1 F.C. 629 at 632.

⁷⁰ *I.N.S.*, 480 U.S. at 431.

⁷¹ So, Germany, for example, is wrong to designate a priori certain countries as 'safe' countries from which all or nearly all refugee claims will be dismissed. See Gibney, *The Ethics and Politics of Asylum*, p. 103. Canada has also recently moved towards such a system, unfortunately threatening to make one of the better asylum systems much worse, though a full list of 'safe' countries has not yet been, to my knowledge, developed at the time of my writing. For the changes to the Canadian seems, see, <http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/c31-e.pdf>, especially pp. 6–7.

relief aid or cut off from food supplies.⁷² But, insofar as certain groups are made to suffer more severely or kept from aid because of their race, religion, nationality, or membership in a particular social group, then they are already suffering persecution that could ground a refugee claim. Most of the cases discussed by Shacknove seem to fall into this category. We have a duty, then, to aid such people – in place, if possible, via force in their home country if the situation is dire enough, or via a grant of asylum, if they can reach us. A similar analysis applies where poverty in a country is not randomly distributed but rather imposed on certain groups for political reasons.

I shall deal only briefly with the case where a natural disaster genuinely affects an entire country or region, causing mass flight. People fleeing such situations are not, properly speaking, refugees under the definition I support. But, they are still obviously owed help under any plausible humanitarian principle or Rawls's duty of assistance. However, we can distinguish their case from that of typical refugees in a straight-forward way. Those fleeing natural disasters are usually fleeing danger that we can expect to be of a limited sort and to exist for limited duration. Furthermore, we can usually expect this danger to apply to everyone in a particular region. Therefore, the personalized determination of status common to refugee processing seems unnecessary and unreasonable. And, the grant of stay we must offer can also be expected to be of limited duration.⁷³ Once the danger has passed we ought to expect those who have fled to return home, at least so long as we are willing to help provide reconstruction relief to help the country in question return to a state where it may meet its citizen's basic needs.

Such a system exists in the US in the form of 'Temporary Protected Status' or TPS.⁷⁴ TPS is granted for a period of 6–18 months, subject to renewal, to citizens from countries suffering from war encompassing the entire country and also to those fleeing

⁷² Shacknove, 'Who is a Refugee?' pp. 279–280.

⁷³ Occasionally a natural disaster renders a country essentially permanently uninhabitable, as happened to the island of Montserrat due to volcanic activity. Perversely, in this case the U.S. revoked the temporary protected status granted to those who had fled the Island but offered no other means to remain, even to those who had been in the U.S. for many years by this point. When the danger caused by a natural disaster is not temporary in nature, a different analysis must apply than that given above. Such cases are, however, rare. For a brief discussion of the situation in Montserrat, see *Regions and Territories: Montserrat*, BBC NEWS (Apr. 29, 2011, 9:38 AM), http://news.bbc.co.uk/2/hi/americas/country_profiles/3666502.stm.

⁷⁴ Immigration and Nationality Act, 8 U.S.C. § 244 (2006).

natural disasters. But, when the danger is over, those who no longer need protection are required to return home. In the case of refugees, however, we cannot usually predict that the danger will be relatively short lived. To some degree this is a consequence of the fact that we have no duty to directly end the root cause of the danger directly or immediately, even if we do have a duty to promote just conditions when possible. Because of this we must suppose that the danger in question is of indefinite duration, and so we must grant similar lengths of protection to refugees. Furthermore, we see here how this leads to the need to provide 'durable solutions' to refugees – reasonable access to full membership in a society of refuge. As we cannot expect refugees, on my account, to return to their home society in a short period of time, and as continued residence in a society is what most plausibly makes one a member of it,⁷⁵ refugees, on my account, unlike those suffering from other forms of deprivation, need access to special forms of aid, and are shown to be a normatively distinct group. Once again we see how refugees picked out by the UNHCR definition are different from others who need aid, and that taking this definition, read broadly, allows us to best aid those who need our help.⁷⁶

One final aspect of the UNHCR definition needs at least a brief discussion, the requirement that the relevant persecution be on the basis of a 'protected ground' – race, religion, nationality, political opinion, or membership in a particular social group.⁷⁷ For fear of persecution to ground an asylum claim, it must not just be 'well-founded', but must be 'on the basis of a protected ground. What justifies this restriction? Several factors are important here, both from a theoretical and normative perspective and also from a practical point of view. First, from a theoretical and normative perspective, these grounds cover aspects of our lives that are, in many ways, central to our identities – they pick out features that we cannot change (our race, for example) or should not have to change (such as

⁷⁵ For discussion of this point see my paper, 'Citizenship, in the Immigration Context', *Maryland Law Review*, 70 (2010), pp. 206–208, 218–229.

⁷⁶ This is not to imply that the TPS system in the U.S. is sufficient, especially when we note that many states lack anything like it. Much more can and should be done for those fleeing, or suffering because of, natural disasters. For helpful discussion, once again see Pistone and Hoeffner, 'Unsettling Developments', p. 61.

⁷⁷ See, UNHC Handbook, *supra* note 9, at 17–21, Goodwin-Gill, *The Refugee in International Law*, pp. 43–49 for useful enumeration and discussion of the protected grounds.

our religion or political opinion).⁷⁸ Persecution on the basis of one of these factors is therefore, in some ways, more serious or threatening to us than would be persecution on the basis of merely contingent or idiosyncratic factors. It would be odd and unjust for a government to persecute owners of Corvettes, for example, but given that such people could, without fundamentally changing their identity, remove themselves from such a group, the weighty remedy of a grant of asylum is not called for. Secondly, this limitation performs an important practical function. Refugee determination is often difficult and, as a grant of asylum is a weighty remedy, states are often reluctant to grant it. The 'protected grounds' requirement helps ensure that the need is a serious one, and not merely the result of a personal or idiosyncratic dispute of no interest to the international community.⁷⁹ As a practical rule this is imperfect, but it at least provides some direction, and limitations on discretion,⁸⁰ to states as to when protection must be given.

Before closing I want to return briefly to the OAU definition of a refugee and show how it can be made to fit into my general scheme. Recall that that OAU definition covers all of those that the UNHCR definition covers, but also extends refugee protection to those fleeing other serious disturbances of public order, including generalized war, natural disaster, and famine. Now, obviously this definition covers more people than that I have defended above. But, I hold that it does not necessarily rely on different principles than I have argued for. Rather, the different level of development and wealth found in rich western states and those states in Africa lead to different answers as to what can be done for those in need. While the rich western states are, as Pogge has argued, better able to help those in serious need by aid in place, the much poorer African states often will not be so able to do so. So, if they are to help those in desperate need they, at least

⁷⁸ Here I intentionally mirror the language in *In re Acosta*, 19 I&N Dec. 211 (B.I.A. 1985), at 234 on 'particular social groups'. My suggestion here might be understood as arguing that 'particular social group' is best thought of as the *general* category, with the more specific categories being seen as *specifications* of it, rather than as the grab-bag as it often taken to be. As far as I know, no one has developed this claim, and I cannot do so here, though I hope to return to it in the future.

⁷⁹ On the idea that certain violations of human rights, narrowly understood, are of 'international concern', see Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) at 161–186. Human rights, on Beitz's account, do not completely over-lap with interests that would ground an asylum claim on my account, but the general framework is useful and suggestive.

⁸⁰ It is always worth keeping in mind that grants of discretion in deciding whether to extend protection or not are at least as likely to be used to limited protection as to extend it. Clear rules are often the friends of those who want broad protections of rights.

more often than western states, will have to do so by offering at least temporary admission to their own state. It seems unfair to require poor states to provide aid in this more expensive (in some sense, at least) way while not requiring this of rich western states. This is a serious problem. One aspect of an approach to this problem would be to recognize the assistance given by African countries to those who fall under the OAU definition but not the UNHCR definition to be emergency aid, akin to TPS, as discussed above. This is only part of an answer, but a more satisfying and complete answer is better dealt with via a discussion of burden-sharing in the refugee context, as well as in a more general discussion of global justice, topics I cannot hope to discuss as needed here.

VI. CONCLUSION

Many important issues remain even once we know who are refugees, such as the exact contours of our duties to them, and how these duties should be distributed between states by means of a system of burden sharing. Though these are pressing problems with significant practical and theoretical importance, they must wait for further work. For now I shall rest with having argued that the question of who is a refugee cannot be answered independently of an account of what we owe to refugees, and that this approach leads us, at least in most ways, not to an expanded refugee definition but rather to a broad reading of the narrow UNHCR definition.

*Sturm College of Law,
University of Denver, Denver, CO, USA
E-mail: mlister@law.du.edu*