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THE QUALITIES OF MERCY: MAXIMIZING THE IMPACT OF U.S. REFUGEE RESETTLEMENT[†]

Daniel J. Steinbock*

Resettlement in the U.S. bestows a life changing benefit on thousands of overseas refugees. Because American refugee acceptance can never reach more than a tiny fraction of the world's millions of persecuted or oppressed, however, allocating this bounty requires the U.S. to choose the lucky few from the worthy many. Since the creation in 1980 of a permanent program of refugee resettlement, three different, and often conflicting, purposes have contended for its trove of immigration-like admissions slots. These are the removal of people from danger or hardship, the furtherance of a cluster of foreign policy objectives, and the facilitation of such traditional immigration aims as family reunion or cultural connection to the U.S.

This Article examines these selection grounds from practical, political, and philosophical perspectives, beginning with a consideration of the kinds of hardship that might warrant removal to the U.S. Given that refugee resettlement can reach only a tiny fraction of the oppressed, endangered, or suffering people in the world, this Article proposes that we concentrate on those whose admission would have the greatest positive impact on U.S. interests, the refugees themselves, or the populations from which they are drawn. This priority includes the most seriously threatened, but also covers those whose admission would provide some other, secondary gains beyond the primary benefit of removing a person from danger or hardship.

In light of the context and process dynamics of refugee resettlement, the Article recommends several ways of maximizing its impact. These include burden-sharing, active acceptance of human rights activists, more selection directly from countries of persecution, and greater geographic concentration. The Article also suggests that the only family reunion grounds for selection be that of spouses or parents and their minor children, that cultural connections to the U.S. generally should not count in refugee resettlement, and that certain foreign policy purposes be eschewed. All of these recommendations are made with the aim of making the most of a valuable and increasingly scarce life-saving resource.

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I. INTRODUCTION

Each year, as it has for more than twenty years, the United States admits tens of thousands of “refugees of special humanitarian concern”¹ from other countries. Those selected are generally allowed to stay here indefinitely, to adjust to permanent residence status, and ultimately to become citizens. They are eligible for most public benefits from the time they arrive.

This relatively little-known program operates in addition to, and largely independent of, both ordinary immigration and the several forms of sanctuary potentially available to foreigners who manage to enter U.S. territory: asylum, withholding of deportation, or Temporary Protected Status. These other forms of relief are available only to applicants who have already reached the U.S. on their own.² By contrast, overseas refugee selection chooses, in theory, from the global universe of those facing persecution or other danger in their present locales. Moreover, the U.S. is barred, in international and domestic law, from returning arriving “refugees”—people with a well-founded fear of persecution—to places where they would be persecuted. There is no corresponding legal obligation to resettle any person from abroad, and none of these refugees has any entitlement to resettlement.

The events of September 11 provide an occasion (or perhaps an excuse) to reconsider overseas refugee selection. After those attacks, refugee resettlement was immediately suspended for two months to be sure that terrorists were not among those being admitted. Admissions resumed quite slowly thereafter, and only about 28,000 places in the 2002 and 2003 fiscal year quotas of 70,000 refugees were filled.³

This federal review of refugee resettlement, however, soon broadened into a thoroughgoing examination of “the underlying

1. Immigration and Nationality Act § 207(a)(3), 8 U.S.C. § 1157(a)(3) (1999).

2. The individual alien comes forward, claiming to fall within the terms of statutes giving “refugees” a right to asylum or withholding of deportation, (or some less commonly used status), and the government “adjudicates” the claim. Although decided on a group basis, even Temporary Protected Status (TPS), a temporary right to remain due to dangers in a particular country, is given to those who have already arrived here. These reactive forms of protection are what usually come to mind when people think of American refugee policy.

3. Christopher Marquis, *Since Attacks, U.S. Admits Fewer Refugees*, N. Y. TIMES, Oct. 30, 2002, at A14 (27,113 refugees resettled in FY 2002). U.S. Dept. of State, 1 *U.S. Refugee Admissions Program News*, No. 2, at 2 (Nov. 7, 2003) (28,455 refugees resettled in FY 2003), at <http://www.state.gov/documents/organization/26158.pdf> (last visited Nov. 24, 2003).

suppositions, purposes and potential of the program.”⁴ This Article aims to contribute to that process. At the least, September 11 will mark a shift in foreign policy priorities that will make itself felt in refugee resettlement.⁵ At best, however, it will prompt a more effective use of a scarce life-saving resource.

In numerical terms, with the exception of 2002 and 2003, overseas refugee selection historically has constituted the largest part of total American refugee reception. In fiscal year 2001, 68,426 people were resettled in the U.S.⁶ By contrast, asylum officers granted some 20,487 asylum cases that year, representing approximately 27,000 people.⁷ From 1985 to 2001 the annual level of refugee admissions ranged from a high of 132,000 in 1992 to a low of 62,000 in 1986.⁸ In total over 2.5 million refugees have been brought here since 1975.⁹ A few other countries have a similar kind of overseas refugee program, but the size and regularity of the United States’ makes it unique. In 2001, for example, of the 92,000 refugees resettled worldwide, the United States took over 68,000 (75%).¹⁰ Canada was the next-largest receiving country, with 10,800.¹¹

Compared with the alternatives available to people who already have been forced to flee, and to others who face daily suffering and hardship in their homelands, American refugee selection is akin to being touched by an angel.¹² This is not to say that coming to the U.S. as a refugee does not bring its own, often overwhelming, stresses, but many of the world’s most disadvantaged would certainly view it as a godsend.¹³ Indeed, millions of people who are

4. Bill Frelick, *Rethinking U.S. Refugee Admissions: Quantity and Quality*, in WORLD REFUGEE SURVEY 2002 28 (U.S. Comm’n for Refugees, 2002).

5. See text accompanying *infra* notes 138–40.

6. U.S. COMM’N FOR REFUGEES, WORLD REFUGEE SURVEY 2002 276 (2002).

7. *Id.* at 275. On average, each case is comprised of 1.33 people, and this factor is used in estimating the number of asylum recipients. In addition, immigration judges awarded asylum in 7800 cases, to about 10,400 people. *Id.* at 276.

8. U.S. Comm’n for Refugees, REFUGEE REPORTS, Dec. 1997, at 9.

9. U.S. Department of State, Bureau of Population, Refugees, and Migration, Fact Sheet (October 17, 2001)(on file with author). As of August 31, 2001 the exact figure was 2,458,015. *Id.*

10. U.N. High Comm’r for Refugees (UNHCR), 2001 UNHCR Population Statistics (Provisional) Table 4, at <http://www.unhcr.ch/cgi/cgi-bin/texis/vtx/home/> (last visited June 11, 2002).

11. *Id.* As a percentage of population, however, both Canada and Australia, with 6,450, resettle more refugees than the United States.

12. Frelick, *supra* note 4, at 28 (characterizing refugee resettlement as “a generous act of enormous benefit to a few fortunate souls”).

13. In some cases, refugees misrepresent their circumstances during refugee processing, or even, at the extreme, attempt to buy their way into the program. See James Astill, *UN Staff Ran Refugee Extortion Racket*, THE GUARDIAN (London), Jan. 26, 2002, at 17.

not in such dire circumstances also dream of emigration to the United States.¹⁴

Who should receive this exceptional bounty? The U.S. is one of the richest and most secure countries in the world, a magnet for the less fortunate, and an example to other nations. Large as the U.S. refugee resettlement program is compared to that of other countries, it still pales in comparison to the need, however defined. After all, there are millions of "refugees" in the world, and hundreds of millions of other oppressed and suffering people. Refugee resettlement requires that the United States "choose the lucky few from the worthy many."¹⁵ This fact raises two basic issues. First, what absolute numbers—or percentage of overall immigration quotas—should be devoted to this program? Second, assuming roughly the same annual number of admissions as in past years, how should the fewer than 100,000 places be allocated among the millions in need?

These questions—particularly the latter—have hovered over refugee resettlement since its institutionalization as a permanent program by the Refugee Act of 1980. Given the fairly vague statutory standard,¹⁶ and the broad Executive branch discretion in administering it, refugee resettlement can legally serve a number of different purposes. One is "rescue," removing persons from situations that put their lives or well being at serious risk. Almost since the Refugee Act of 1980 went into effect, however, observers have complained that the most endangered refugees receive an insufficient portion of refugee admissions.¹⁷ A second purpose is to further U.S. foreign policy goals. As discussed in this Article, this purpose actually encompasses one or more of several distinct for-

14. For example, the FY 2002 diversity visa lottery, *see infra* note 197 and accompanying text, received 8.7 million applications. *Shredding of Losing Entries in Visa Lottery Halted*, WASH. POST, September 13, 2002 at A6.

15. Patricia M. McDonough, *Accept or Reject? What It's About at One University*, N.Y. TIMES, Sept. 27, 2002, at B35 (reviewing JACQUES STEINBERG, *THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE* (2002)). In fact, refugee resettlement bears several resemblances to college admissions at selective colleges: the pool of qualified applicants far exceeds the existing places; the decision makers therefore pursue policies other than academic merit by accepting athletes, legacies, and applicants who bring diversity of various kinds; and the very notion of deciding who is the most "qualified" for acceptance is highly controversial. *Id.*

16. *See infra* notes 46–55 and accompanying text.

17. DENNIS GALLAGHER ET AL., OF SPECIAL HUMANITARIAN CONCERN: U.S. REFUGEE ADMISSIONS SINCE PASSAGE OF THE REFUGEE ACT 9 (1985); Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 699 (1995); Tahl Tyson, Comment, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921 (1990); Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum, and Discretion*, 28 WILLAMETTE L. REV. 751 (1992).

eign policy objectives. Third, refugee resettlement can also facilitate family reunion, recruit skilled labor, or further other traditional immigration purposes. The tension in refugee resettlement comes from the fact that the first two aims—rescue and foreign policy—cannot be satisfied elsewhere in U.S. immigration law. While family reunion or labor skills already dominate normal immigration, their pull is so strong that they spill over into refugee selection as well.

The issue with refugee resettlement is that the annual refugee quota represents a tempting trove of flexible, permanent, immigrant-like admissions unconstrained by the usual immigration requirements. Because the pool of eligible refugees is so large it somehow seems more acceptable to further other agendas while engaging in rescue of sorts. After all, if they are all “refugees,” and the U.S. cannot take them all anyway, why not get a foreign policy or traditional immigration bonus in the selection? In fact, all the uses of refugee resettlement rely, in effect, on “refugee status plus” some other factor: refugees plus the most seriously threatened, or a foreign policy objective, or a traditional immigration concern. It is simply impossible to choose 100,000 people or less from some 20 million refugees (let alone hundreds of millions of other suffering people) without making some hard choices. Accepting even a miniscule percentage of the world’s displaced or oppressed requires conscious decisions about the best use of those admissions—not just the processing of the most bureaucratically or politically convenient.

The Article begins by describing the present process of overseas refugee selection. The next three Parts examine the three most frequent grounds for American refugee selection: rescue, a cluster of foreign policy aims, and family or cultural connection to the U.S. In the final Part, the Article proposes a means for evaluating the various and often-conflicting aims of resettlement: overall maximization of benefits. From the many people who meet the minimum refugee qualifications, the U.S. should concentrate on those whose selection would have the greatest positive impact. This includes the most seriously threatened, but also covers those whose admission would provide some other, secondary gains beyond the primary benefit of removing a person from danger or hardship.

In light of the context and process dynamics of refugee resettlement, the Article recommends several ways of maximizing its impact. These include burden-sharing, active selection of human rights activists, more selection directly from countries of

persecution, and greater geographic concentration in refugee selection. The Article also suggests that the only family reunion grounds for selection be that of spouses or parents and their minor children, that cultural connections to the U.S. generally should not count, and that certain foreign policy objectives be rejected as bases for refugee resettlement. All of these recommendations are made with the aim of making the most of a valuable and life-saving resource—one that seems likely in the immediate future to get even scarcer.

II. REFUGEE RESETTLEMENT AND ITS CONTEXT

A. History

The United States has been resettling refugees as such since 1948, starting with the Displaced Persons Act of that year, which covered postwar European refugees.¹⁸ Later legislation and administrative action during the 1950's allowed persons fleeing Communist regimes to enter, largely from Hungary, Poland, Yugoslavia, and China.¹⁹ In the 1960's and 1970's Cubans were welcomed here. Beginning in 1975, the U.S. accepted large numbers of Vietnamese and then Lao and Cambodian refugees.²⁰ The authority for these resettlement programs came from legislation specific to a particular crisis, group, or time period,²¹ or, on occasion, Presidential use of the immigration parole power.²² Since 1980, resettlement has been conducted under the authority of the Refugee Act.²³ Overall, since 1975 the U.S. has accepted 2.5 million overseas refugees, of whom over 75% have been from Indochina

18. See generally, GIL LOESCHER & JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT* (1986). Of course, persons fleeing conditions in their home countries can enter under other immigration categories if they qualify, and have certainly done so. In fact, one of the reasons for special refugee legislation in the period after World War II was the inadequacy of the then-existing national quotas. *Id.* at 6-7. The Displaced Persons Act borrowed against future national quotas to permit the entry of over 400,000 displaced persons by 1951. Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 GEO. IMMIGR. L.J. 443, 445 (1998).

19. LOESCHER & SCANLAN, *supra* note 18, at 25-67.

20. BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850-1990*, 121-38 (1993).

21. Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 12-17 (1981).

22. *Id.* at 15.

23. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980) (codified as and amended at 8 U.S.C. §§ 1157-59 (2003)).

and the former Soviet Union.²⁴ Under the Refugee Act of 1980, annual admissions have ranged from 27,000 in 2002 to 207,000 in 1980; the ceiling for FY 2004 is 70,000.²⁵

B. Refugee Act of 1980

The Refugee Act of 1980 created a permanent process for refugee resettlement. For each fiscal year, the President determines, after statutorily mandated consultations with Congress, the total number of such refugees to be admitted, subject to upward revision for unforeseen emergencies.²⁶ The initial criteria for selection are set by annual descriptions of groups—not individuals—of “special humanitarian concern” to the United States.²⁷ The annual presidential determination allocates numbers of admissions by region, without specifying which refugees within those regions should be accepted.²⁸ People still within their country of nationality or habitual residence may also qualify as refugees and be resettled if a presidential determination so designates.²⁹

24. U.S. Department of State, Bureau of Population, Refugees, and Migration, *supra* note 9.

25. Presidential Determination No. 2004-06 of Oct. 21, 2003, 68 Fed. Reg. 63,979 (2003) (20,000 places though, are an “unallocated reserve”).

26. Immigration and Nationality Act § 207, 8 U.S.C. § 1157 (2000). For an account of the background of the Refugee Act and a description of the consultation process, see David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT’L LEGAL STUD. 91. See also Anker & Posner, *supra* note 21. A more recent study concludes that “the annual consultations are at present often *pro forma* and occur far too late in the planning process to be effective.” U.S. COMM’N ON IMMIGRATION REFORM, U.S. REFUGEE POLICY: TAKING LEADERSHIP 47 (1997).

27. 8 U.S.C. § 1157(a)(3), (b), (c)(1). In addition, the person must be otherwise admissible. 8 U.S.C. § 1157(c)(1). Admission is made easier by the inapplicability to refugee applicants of certain grounds of exclusion (labor certification, public charge, and required documents) and the Attorney General’s authority to waive others (for example, criminal history, or infectious disease). 8 U.S.C. § 1157(c)(3). Further, an applicant who is firmly resettled in any foreign country may not be admitted as a refugee. 8 U.S.C. § 1157(c)(1); 8 C.F.R. § 207.1(b), (c) (2003).

28. For example, the Presidential Determination for the 2002 fiscal year allocated 70,000 refugee admissions as follows:

Africa	22,000
East Asia	4,000
Eastern Europe	9,000
Former Soviet Union	17,500
Latin America/Caribbean	3,000
Near East/South Asia	15,000

Presidential Determination No. 02-04 of Nov. 21, 2001, 66 Fed. Reg. 63,487 (2001).

29. For fiscal year 2002 these are persons in Vietnam, Cuba and the former Soviet Union. *Id.* Immigration and Nationality Act § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

To be eligible within the designated groups and regions, individuals must come within the refugee definition, which applies to overseas refugee processing as well as to claims for political asylum by those at or within United States borders.³⁰ A “refugee” is defined as a person who is outside his or her country of nationality or habitual residence and is unwilling or unable to return to that country because of “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”³¹ Since there are almost always many more refugees within the designated regions or categories than the numbers allocated in the Presidential designation, further selection is required.³² This process is performed by the Department of State’s Bureau of Population, Refugees, and Migration (PRM), which accepts and screens refugee applications, and the Immigration and Naturalization Service (INS), which makes the actual determination of refugee status.³³ The two departments employ what the State Department calls a “Processing Priority.”³⁴ The priority system specifies which refugees from the eligible multitudes will be considered for admission to the United States. The presidential determinations, by controlling the geographic areas or circumstances from which refugees may be selected, impose some limits on who is chosen, since those outside the designated areas or groups are excluded from any consideration. The crux of the selection process, however, lies in the application of the refugee definition and the ‘Processing Priorities.’

C. Processing Priorities

The Processing Priorities themselves are set every year as part of the annual proposed refugee admissions.³⁵ Priority One (P-1) covers refugees most in need of resettlement who have been referred by the United Nations High Commissioner for Refugees (UNHCR)

30. Immigration and Nationality Act §§ 207–208, 8 U.S.C. §§ 1157–1158.

31. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

32. Martin, *supra* note 26, at 104.

33. U.S. Department of State, Proposed Refugee Admissions for FY 2003—Report to the Congress (Sept. 2002), at <http://www.state.gov/g/prm/refadm/rls/rpts/2002/13892.htm#3> (last visited Mar. 26, 2003).

34. *Id.*

35. See U.S. Comm’n for Refugees, *Processing Priorities and the Overseas “Pipeline”*, WORLDWIDE REFUGEE INFORMATION, available at http://www.refugees.org/world/articles/pipeline_rr00_9.htm (last visited May 4, 2003).

or a U.S. embassy.³⁶ Refugees of all nationalities are eligible for admission under P-1; this priority, unlike the others, is not restricted by regional designation. These are cases of compelling concern, such as torture victims, persons at risk of *refoulement* (expulsion or return to territories where they are likely to suffer persecution) or otherwise in danger in their first asylum country, and persons in urgent need of medical care. UNHCR may refer refugees for P-1 processing when its preferred durable solutions—repatriation and local integration—are unlikely or impossible, usually when there is due to a protection concern in the asylum country. UNHCR often bases U.S. referrals on a refugee's family ties in the United States, but also refers refugees without U.S.-based family or other contacts. In addition, a consular officer at the U.S. embassy may also refer refugees to the U.S. resettlement program, but the norm is to rely on UNHCR referrals.

Priority Two (P-2) is for specific groups within certain nationalities who are of special concern to the United States, as determined by PRM after consultation with nongovernmental organizations (NGOs) and other entities.³⁷

36. The following come within Priority One: persons facing compelling security concerns in countries of first asylum; persons in need of legal protection because of the danger of *refoulement* (return to one's country of origin); those in danger due to threats of armed attack in areas where they are located; persons who have experienced persecution because of their political, religious, or human rights activities; women-at-risk; victims of torture or violence; physically or mentally disabled persons; persons in urgent need of medical attention not available in the first-asylum country; and persons for whom other durable solutions are not feasible and whose status in the place of asylum does not present a satisfactory long-term solution. P-1 referrals must still establish a credible fear of persecution or history of persecution in the country from which they fled.

37. For FY 2002, Priority Two covered: A) AFRICA: Persons belonging to U.S. State Department-identified refugee groups (within specific nationalities) in consultation with nongovernmental organizations (NGOs), UNHCR, the INS, and other area experts. Groups are selected based on their individual circumstances. B) CUBA: In-country (resettled directly from the country of origin), emphasis given to former political prisoners, members of persecuted religious minorities, human rights activists, forced-labor conscripts, persons deprived of their professional credentials or subjected to other disproportionately harsh or discriminatory treatment resulting from their perceived or actual political or religious beliefs or activities, and dissidents. C) IRAN: Members of Iranian religious minorities. D) FORMER SOVIET UNION: In-country, Jews, Evangelical Christians, and certain members of the Ukrainian Catholic or Orthodox Churches. Preference among these groups is accorded to those with close family in the United States. E) VIETNAM: In country, residual cases resulting from established programs: former reeducation camp detainees who spent more than three years in detention camps subsequent to April 1975 because of pre-1975 association with the U.S. government or the former South Vietnamese government; certain former U.S. government employees and other specified individuals or groups of concern; and persons who returned from first-asylum camps on or after October 1, 1995 who qualify for consideration under the Resettlement Opportunities for Vietnamese Returnees (ROVR) criteria. In FY 2002, on a case-by-case basis, other individuals who have experienced recent persecution

Priority Three is family-based, but limited to certain nationalities.³⁸ Priority Three covers spouses, parents, and unmarried sons and daughters of people lawfully in the United States as citizens, resident aliens, refugees, asylees, and parolees.³⁹ In earlier years, other, more distant relatives in certain regions were also considered for resettlement under Priorities Four and Five, but these are not currently used.⁴⁰

After deciding to refer a refugee to the U.S. program, UNHCR sends the case either to a Joint Voluntary Agency (JVA) (a non-profit agency engaged by the U.S. to process refugees), the International Organization for Migration (IOM) (an international organization with a long history of moving refugees), or to the U.S. embassy, which collects biographical and other descriptive data from each person in the refugee's family and prepares the case for an interview by the Department of Homeland Security's Bureau of Citizenship and Immigration Services (DHS/CIS). P-2 cases and P-3 family-reunification cases do not require a UNHCR referral. After PRM designates a specific group as P-2, refugees in that group can simply register through the JVA in charge of processing the cases. Family-reunification cases enter the process at the JVA stage after a relative in the United States has filed an Affidavit of Relationship on the refugee's behalf. Once the JVA (or IOM or embassy) has compiled a sufficient number of cases, a DHS/CIS official conducts refugee status determination interviews. INS-recognized refugees are required to take a medical exam and pass a security screening by the Federal Bureau of Investigation before they can travel to the United States.⁴¹

because of post-1975 political, religious, or human rights activities are eligible for in-country P-1 processing if referred by the U.S. Embassy, members of Congress, or certain nongovernmental organizations and human rights groups. In addition, residual Orderly Departure Program (ODP) cases registered and previously determined eligible for consideration may be processed. U.S. Comm'n for Refugees, *supra* note 35.

38. For FY 2003, these were Burundi and Sudan and Congolese from Congo-Brazzaville and Congo-Kinshasa. *Bush Administration to Reduce Refugee Admissions in FY 2003*, REFUGEE REPORTS, Sept./Oct. 2002, at 3.

39. For FY 2002 Priority Three stated:

Spouses and unmarried children under 21 years of age of U.S. citizens and the parents of U.S. citizens who have attained the age of 21 are required by regulation to be admitted as immigrants rather than as refugees.

REFUGEE REPORTS, Dec. 1999, at 13.

40. U.S. Comm'n for Refugees, *Processing Priorities and the Overseas "Pipeline"*, *supra* note 35.

41. *I.d.* Back in the United States, the Refugee Data Center (RDC) in New York reviews each case and works with the national voluntary agencies to arrange sponsorship for each refugee family. The RDC then confirms sponsorship with the JVA overseas, which signals

Upon arrival in the United States, the local resettlement agency sponsoring the refugee takes over the primary responsibility for the refugee's first few months in the United States. Resettled refugees are eligible for transitional cash assistance, welfare if they have children under eighteen, medical assistance, special social services to support self-sufficiency, and most other generally available social welfare.⁴² One year after admission, refugees may apply for permanent resident status; they are eligible to apply for citizenship after five years of permanent residence.⁴³

D. Summary

Clearly, this process involves a great deal of executive branch discretion in the designation and selection of foreign nationals for American resettlement. To begin, "the President's power to decide the size and shape of each year's refugee class is an exceptionally broad delegation."⁴⁴ Having specified the number and general location of those to be resettled (albeit in consultation with Congress), the Executive branch, through the State Department, gets to set the more detailed criteria for their selection, and then to administer the process by which individuals are approved. Relatively unfettered choice is exercised every step of the way.

The statutory insistence that refugee admissions under the President's directive "shall be allocated among refugees of special humanitarian concern to the United States"⁴⁵ does not impose any meaningful limit on this Executive branch power. Neither the plain meaning of "special humanitarian concern" nor its legislative history is so clear as to impose any real restraint on Executive choice among purposes.⁴⁶ There is some indication in the

IOM to complete travel arrangements to the United States. (This phase of the process—between INS approval and U.S. entry—generally takes three to four months.) U.S. Comm'n for Refugees, *supra* note 35.

42. U.S. Comm'n for Refugees, REFUGEE REPORTS, Feb./Mar. 1999, at 1-7; OFFICE OF REFUGEE RESETTLEMENT, U.S. DEPT. OF HEALTH AND HUMAN SERV., U.S. RESETTLEMENT PROGRAM—AN OVERVIEW, available at <http://www.acf.dhhs.gov/programs/orr/programs/overviewrp.htm> (last visited May 4, 2003).

43. Immigration and Nationality Act § 209 (adjustment of status); Immigration and Nationality Act §§ 209(a)(2), 316(a) (naturalization).

44. Legomsky, *supra* note 17, at 682. Legomsky sees this as the "clearest counterexample" to his thesis that Congress generally dominates United States immigration policy. *Id.*

45. Immigration and Nationality Act § 207(a)(3); 8 U.S.C. § 1157 (a)(3).

46. "Humanitarian concern," while seeming to favor rescue as an aim, is qualified by "special" which implies coupling concern for the refugees with some other purpose. Under

legislative history of "special humanitarian concern" that this phrase was meant to be more attentive to the plight of the refugees themselves than the language of earlier bills, which used the term refugees of "special concern."⁴⁷ This change has been invoked to argue that selection should be based upon the danger to the refugees themselves.⁴⁸ Even this legislative history, however, is not determinative of the factors that may be considered. The very House Report emphasizing that the plight of the refugees shall be "paramount" goes on to mention family, cultural, and historical ties, as well as past connections with American organizations or entities as legitimate criteria.⁴⁹ Moreover, the Report explicitly eschews any attempt to define the phrase "refugees of special humanitarian concern."⁵⁰ Rather, there is a clear delegation of the issue to the President, to be worked out on a case-by-case basis in consultation with Congress.⁵¹

The requirement of refugee status limits the pool of persons eligible for resettlement, but not as much as one might think. The existence of a well-founded fear of persecution on one of the five specified grounds is examined much less stringently in overseas refugee processing than in domestic asylum adjudication.⁵² In the rare instances in which immigration examiners have chosen to

traditional administrative law principles, this ambiguity itself would require judicial deference to the Executive branch. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

47. H.R. 2816, 96th Cong., § 207(a)(1) (1979). This language was described by an Administration representative as requiring a focus on "whether the refugees have cultural, historical, or especially family ties to the United States or [w]hether we have a special responsibility because of previous U.S. political involvement with the refugee or his country of origin." *Hearings on H.R. 2816 Before the Subcomm. on Immigration and International Law of the House Comm. of the Judiciary*, 96th Cong., 1st Sess. 15 (1979), cited in Anker & Posner, *supra* note 21, at 54.

48. GALLAGHER ET AL., *supra* note 17, at 41.

49. H.R. Rep. 96-608, 96th Cong. at 13-14.

50. *Id.* at 13. ("The legislation does not—and cannot—further define this phrase. The Committee believes that any attempt to do so would unnecessarily restrict future public policy decisions. The Committee recognizes that determining which refugees are of "special humanitarian concern" to the United States will be a matter to be considered, debated and decided at the time refugee situations develop.").

51. The thorough review of the legislative history of the Refugee Act of 1980 by Anker & Posner reaches a similar conclusion. Anker & Posner, *supra* note 21, at 84.

52. See Martin, *supra* note 26, at 112 ("As the provisions are actually administered . . . the UN [refugee] definition poses a significantly higher hurdle for asylum applicants. Overseas refugee staffs devote very little attention to the question of likely persecution."); see also NORMAN L. ZUCKER & NAOMI FLINK ZUCKER, *THE GUARDED GATE* 153-56 (1987); John A. Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME L. REV. 618, 633 (1981) ("Refugees applying from abroad are . . . scrutinized less intensively regarding their personal grounds for seeking refuge."); GALLAGHER ET AL., *supra* note 17, at 49 ("In effect, applicants are first asked if they meet the priorities and, only then, are they asked if they meet the refugee definition.").

look carefully for a well-founded fear of persecution, they were either directed to desist,⁵³ the President's parole power was invoked, or Congress enacted legislation to modify the refugee standard.⁵⁴ Some kinds of oppression look more like "persecution" than others, and at some point it would be hard to label people as "refugees," but the boundaries are fairly wide.

Moreover, executive branch designation of groups as being of special humanitarian concern, and of individuals as meeting the refugee criteria, are not questions that could be reviewed by any court,⁵⁵ so the only constraints would be political. To a large degree the pool of eligible people is not only deep, but wide as well. The necessity of choice is not just theoretical.

The following Parts address and analyze the three major criteria that might form the basis of the inevitable choices: rescue, foreign policy, and other more traditional immigration objectives.

III. RESCUE

"Rescue" refers to admitting people to relieve their suffering or oppression or remove them from some imminent danger. This Part addresses three elements of rescue, or "humanitarian" refugee selection, as it is often called. First is identification of the kinds of harm from which we might try to save people. Second is how the prevalence of that harm bears on the number of people we should receive. As will become apparent, for any harm we choose to address, the number of resettlement places will be just a fraction of the need. The third issue, therefore, is assessment of *relative* need among potential candidates for rescue.

This Part considers the principles that should guide the distribution of lifesaving resources when the need is great, the resource is scarce, and no one has an *a priori* claim. This issue is particularly acute when the resource is not money—which can, after all, be divided infinitely among those in need. At bottom, refugee

53. National Security Decision Directive on Refugee Policy and Processing Refugees from Indochina (May 19, 1983), *reprinted in* 133 CONG. REC. 26840 (Oct. 7, 1987).

54. Fitzpatrick & Pauw, *supra* note 17, at 763–64.

55. No one would have standing to challenge either decision. *Cf.* INS v. Chadha, 462 U.S. 919, 957 n.22 (1982) (holding that no justifiable case or controversy existed over Executive branch decision to allow alien to remain in the United States). Further, there is no statutory provision for judicial review of either the finding of refugee status or the designation of groups for resettlement.

resettlement is a question of the distribution of charity, a subject seldom touched upon in legal literature.⁵⁶

A. *Types of Suffering or Danger*

Three assumptions help to identify the types of harm or danger that should trigger possible rescue. First, in contrast to usual immigrants, who are often accepted because of the benefits they will bring to the economy, the society or to particular Americans (or lawful residents), those resettled for humanitarian purposes should be selected primarily to improve their current life conditions by relieving suffering or oppression. Second, removal to the U.S. should in some substantial way alleviate those dangerous conditions. There is little point in admitting people to help them if their acceptance would not improve their conditions, or if in some other way it would make their lives worse.⁵⁷

Third, given the magnitude of the world's problems, resettlement should be employed only when aid to the victims in their own lands is impossible or extremely difficult. Often other means of ameliorating harsh conditions are potentially available, including political and diplomatic pressure on the offending or failing governments, and direct aid to their inhabitants.⁵⁸ In recent years the Western powers have imposed so-called "safe havens" (internationally protected areas within the refugees' country of origin) for refugees in Bosnia (with tragic consequences) and in Northern Iraq after the First Gulf War (with greater—if still temporary—success).⁵⁹ Additionally, humanitarian intervention—armed force to protect the population from their persecutors—has been tried in several places, most notably Iraq, Haiti, and Kosovo. An explicit

56. Cf. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549 (2001) (stating that government distributions of property have been largely ignored in legal scholarship).

57. For a fascinating examination of these issues in the context of an internal American "resettlement," see LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES* (2000). As part of the settlement of a lawsuit charging racial discrimination in Chicago public housing, about 7000 low-income Black families were voluntarily relocated to predominantly white, middle-class suburbs. Overall assessment of the program involved comparing the benefits of improved quality of housing, education, employment and safety to such costs as racial discrimination, social isolation, and distance from family, friends, and churches in their original neighborhoods. *Id.* at 83–192.

58. Stephen R. Perry, *Immigration, Justice, and Culture*, in *JUSTICE IN IMMIGRATION* 94, 103 (Warren F. Schwartz ed., 1995).

59. Bill Frelick, *Safe Havens; Broken Promises*, available at http://www.refugees.org/world/articles/safehavens_98.htm (1998) (last visited Mar. 28, 2003).

reason for such armed interventions has been to forestall refugee flight and/or permit refugee return. Depending on the circumstances, it may be possible to assist victims of war, starvation, human rights violations or other dangers without relocating them, sometimes through armed intervention. It is worth noting, however, that the so-called successes of humanitarian intervention were both expensive and ultimately somewhat mixed, and some interventions have failed outright.⁶⁰ Even if intervention is used occasionally, many of the people who cannot be aided in-place would still benefit from admission.

Even with these three assumptions, numerous conditions in the world might justify such sanctuary. The remainder of this section discusses some of the possibilities.

1. *Lack of Political Freedom*—Political freedom might be measured on a variety of scales. In one well-known effort, Freedom House (a non-profit U.S. based organization) produces an annual assessment of the state of political rights and civil liberties in 191 countries.⁶¹ Freedom House describes its study as “the definitive report on freedom around the globe.” Freedom House’s survey is certainly well respected,⁶² and its broad conclusions provide a reasonable basis for gauging political freedom. In January 2001, Freedom House found 2.151 billion people (35.51% of the world’s 6 billion) living in 47 countries classified “as not free.”⁶³ An additional 2.465 billion (40.69%) resided in “partly free” nations.⁶⁴ By any measure, billions of people are denied political freedom in the world today.

60. The massacre of thousands of Bosnians given United Nations “safe haven” in Srebrenica is the most notorious example. See *id.* See also DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE’S WORST MASSACRE SINCE WORLD WAR II* (1997).

61. “Political freedom” involves a number of variables. Freedom House uses political rights and civil liberties checklists. Freedom House, *Survey Methodology*, at <http://www.freedomhouse.org/research/freeworld/2001/methodology.htm> (last visited May 6, 2003). For an extensive and somewhat wider-ranging effort to measure states’ compliance with and effectiveness of human rights treaties, see Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1965 (2002) (using five areas: genocide, torture, civil liberty, fair and public trials, and political representation of women).

62. Hathaway uses Freedom House’s *Comparative Survey of Freedom* ratings for her civil liberties variable. Hathaway, *supra* note 61, at 1975.

63. Freedom House, *Freedom in the World 1999–2000*, available at <http://www.freedomhouse.org/research/freeworld/2000/essay1b.htm> (last visited May 6, 2003).

64. *Id.* The 2000–01 report on Freedom in the World shows a trend toward greater freedom. Adrian Karatnycky, *The 2000–2001 Freedom House Survey of Freedom*, available at <http://www.freedomhouse.org/research/freeworld/2001/essay1.htm#trend> (last visited May 6, 2003).

It is safe to assume that everyone but the ruling elites in an unfree country is affected by the prevailing political conditions there, if only by the kind of government that results from authoritarian or totalitarian conditions. In this respect, the absence of political freedom differs from such human rights violations as torture and genocide, horrific as they are. Even where the incidence of torture or genocide is relatively high, not all members of the populace will be affected. In fact, a very negative human rights rating can result even where only a small percentage of people are tortured.⁶⁵ Although usually not as threatening to life or well being as torture, denials of political freedoms are much more widespread in their impact.

Moreover, in contrast to hunger and some diseases, discussed below, political oppression cannot be remedied easily by outside intervention. The same is true of other failures of state function, such as breakdowns in public order and the absence of minimal subsistence. Allowing immigration may be the only way the U.S. can meaningfully improve an individual's living conditions.⁶⁶

2. *Hunger*—The UN Food and Agricultural Organization (FAO) estimates that between 1997 and 1999, there were 815 million undernourished people in the world: 777 million in the

65. Thus for example, Hathaway rates torture on a 1 to 5 scale of increasing seriousness, with 4 being:

At least one of the following is true: Torture is "common"; there are "several" reports of torture; there are "many" or "numerous" allegations of torture; torture is "practiced" (without reference to frequency); there is government apathy or ineffective prevention of torture; psychological punishment is "frequently" or "often" used; there are "frequent" beatings or rough handling; mistreatment or beating is "routine"; there are "some" or "occasional" incidents of beatings to death; or there are "several" reports of beatings to death.

Hathaway, *supra* note 61, at 1971.

66. Stephen Perry explains:

It is with respect to . . . a right to permanent residence within a reasonably well-ordered state, that immigration really comes into its own, since the goods to which the right ensures access are nonexportable, public goods. This right will typically be claimed by persons who are persecuted by their own government or whose basic rights are unprotected due to the collapse or complete ineffectiveness of political authority in their home country. It may sometimes be possible to honor this right by helping to create the relevant public goods abroad, either by enabling an existing but ineffective state to become functional again or by assisting a persecuted group to exercise its collective right to national self-determination (assuming it possesses this right). In a great many cases, however, the provision of refuge in the assisting state's own territory is the only practicable means of honoring the right to permanent residence within a well-ordered state.

Perry, *supra* note 58, at 104.

developing countries, 27 million in transition countries and 11 million in the industrialized countries.⁶⁷ Relocation to the U.S. as refugees would most likely eliminate this condition. Aid in the countries of origin can, in theory, address these problems, though probably not in as consistent and secure a manner as would resettlement.

3. *Disease*—The incidence of certain diseases varies widely from country to country, as does life expectancy in general. Cures, or at least the means of alleviation of symptoms, are available in the United States for many diseases that go largely untreated elsewhere because of some combination of poverty and the dearth of health facilities. In addition, societal reaction to certain diseases can be harsher in foreign lands than it is in the US. The case of HIV/AIDS provides an illustrative example, as summarized by the World Health Organization in 2001:

HIV is spreading very rapidly in many parts of the world. At the end of 2000, a total of 36.1 million people were living with HIV/AIDS and 21.8 million had already died (UNAIDS 2000). Of the 5.3 million new infections in 2000, 1 in 10 occurred in children and almost half among women. In 16 countries of sub-Saharan Africa more than 10% of the population of reproductive age is now infected with HIV. The HIV/AIDS epidemics has lowered economic growth and is reducing life expectancy by up to 50% in the hardest hit countries. In many countries HIV/AIDS is now considered a threat to national security.

The mental health consequences of this epidemic are substantial. A proportion of individuals suffer psychological consequences (disorders as well as problems) as a result of their infection. The effects of intense stigma and discrimination against people with HIV/AIDS also play a major role in psychological stress. Disorders range from anxiety or depressive disorders to adjustment disorder. Cognitive deficits are also detected if looked for specifically. In addition, family members also suffer the consequences of stigma . . .⁶⁸

67. UNITED NATIONS FOOD AND AGRICULTURAL ORGANIZATION, STATE OF FOOD INSECURITY IN THE WORLD 2001. The FAO defines "undernourishment" to mean "food intake that is continuously insufficient to meet dietary energy requirements." *Id.*

68. World Health Organization, *The World Health Report* 44 (2001), available at <http://www.who.int/whr/2001/main/en/pdf/chapter2.en.pdf>. At the end of 2001, 40 million

The extent of other health threats, how they vary from country to country, and whether the sufferers could be helped by relocation to the U.S. or another developed country could also be examined. It is not necessary to do so in detail, however, to establish that resettlement would vastly improve the life chances and conditions for many of the world's ill in ways that are not going to happen in their own lands.⁶⁹ Indeed, some diseases, such as parasitic infection, can be fought simply by geographic relocation.

4. *Armed Conflict*—Armed conflict can pose enormous dangers for civilians, but it is very hard to get an accurate estimate of the extent and degree of the threat. Not all civilians face equal exposure, and not everyone in a country at war faces danger or hardship. Furthermore, most military situations are so fluid that conditions are constantly changing. A statistical report is nothing more than a snapshot, and a blurry one at that.

A very rough (and probably high) estimate of the extent of armed conflict and its dangers can be obtained by taking all countries currently at war of some kind. According to the Center for Defense Information, in 2001 there were forty conflicts involving thirty countries.⁷⁰ The population of these countries was 3,332,955,000 (3.3 billion). Not all of these people faced immediate peril, but if even a hundredth did at some time or another, the total is in the tens of millions. While peacemaking efforts could end the threats caused by armed conflict, and assistance of various kinds in the country of origin can certainly give added safety even during the fighting, many people will remain at risk unless relo-

people were living with HIV/AIDS. UNAIDS, *Report on the Global HIV/AIDS Epidemic* 8 (2002), available at <http://www.unaids.org/barcelona/presskit/report.html>. Given the magnitude of the AIDS/HIV epidemic, and at least the theoretical possibility of treating its victims in their countries of origin, the idea of resettling them does not seem to be part of the discussion of the international response. See, e.g., Symposium, *The Global AIDS Crisis: Human Rights, International Pharmaceutical Markets and Intellectual Property*, 17 CONN. J. OF INT'L L. 149 (2002). At present HIV-infected aliens would need a waiver of their general ineligibility for admission under U.S. law. Immigration and Nationality Act § 212(a)(i), 8 U.S.C. § 1182(a)(i). See Immigration and Nationality Act § 207(c)(3), (waiver of inadmissibility ground for humanitarian purposes).

69. For one example, conducted during the Kosovo refugee crisis, see Istvan Szilard et al., *International Organization for Migration: Experience on the Need for Medical Evacuation of Refugees during the Kosovo Crisis in 1999*, 43 CROATIAN MED. J. 195 (2002), available at <http://www.cmj.hr> (reporting the evacuation of over 1000 medical cases to 25 host countries throughout the world, and describing criteria for priority evacuation, including seriousness of condition, likelihood of improvement, and unavailability of treatment in present location).

70. Center for Defense Information, 2001–02 Military Almanac 43–46 (2002), available at <http://www.cdi.org/products/almanac0102.pdf>.

cated. In fact, armed conflict is a primary cause of forced migration, particularly internal displacement.⁷¹

5. *Refugees*—Refugees, persons who are forced to leave their normal places of residence, present a relatively restrictive measure of need but the numbers are still in the millions. At the end of 2001, the U.S. Committee for Refugees reported 14,921,000 asylum-seekers and refugees outside their countries of origin.⁷² This organization also identified at least 22 million “internally displaced persons” (IDP’s)—people who have left their homes for safer locations within their own countries.⁷³ Adding this figure to that for “refugees” brings a total of over 36 million people. Using a different measure that included some IDP’s and returned refugees, UNHCR tallied 19,783,100 refugees and “people of concern” to the agency at the end of 2001.⁷⁴ The accuracy of refugee statistics is always debatable, at least at the margins,⁷⁵ but for the purposes of this Article, they are enough to indicate the dimensions of the problem.⁷⁶

6. *Summary*—However conceived, the global need for shelter from hardship—social suffering—is enormous. Even limiting resettlement’s use with the assumptions above,⁷⁷ relocation is the only realistic solution to the present hardship of tens of millions of people. It is also clear that not more than a small fraction of those facing intolerable living conditions are going to be accommodated, at least not in developed countries such as the U.S., Canada, Western Europe, or Australia.

71. ARISITIDE R. ZOLBERG ET AL., *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 269 (1989).

72. U.S. COMM’N FOR REFUGEES, *supra* note 6, at 3.

73. *Id.* at 6.

74. UNHCR, Estimated Number of Persons of Concern Who Fall Under the Mandate of UNHCR, available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=statistics> (last visited March 29, 2003).

75. U.S. COMM’N FOR REFUGEES, *supra* note 6, at 1 (“Statistics on refugees and other uprooted people are often inexact and controversial.”).

76. Strictly speaking, not all of those displaced within or from their own countries meet the literal U.S. definition of a refugee, so the number eligible under the current U.S. resettlement program would presumably be lower than the above figures. Given past U.S. practice of refugee screening, this is not likely to be a large reduction. Furthermore, since American resettlement is potentially available to those in their own countries with a fear of persecution whether they have relocated or not, the internal displacement figures actually underestimate the number of potential “refugees.” In addition to the numbers reflected in the statistics above, millions more with a well-founded fear of persecution have not left their places of residence.

77. See *supra* text accompanying notes 57–58.

One way to limit the resettlement pool is to set some threshold criteria. The U.S. limits resettlement opportunities to "refugees," people who have suffered past persecution on account of race, religion, nationality, political opinion, or social group membership or who have a well-founded fear of such persecution in the future. The standard is not always rigorously applied,⁷⁸ but it does impose some outer boundaries. Presumably, persons suffering, for example, from a disease curable only in the U.S. would not qualify no matter how severe their need. For this reason, the refugee definition has been criticized as treating morally equivalent threats differently, on the ground that persecution is not the only cause of serious threats to well being.⁷⁹ The point is valid, but it must be remembered that the broader the initial criteria, the more important become the other bases for selection, unless, of course, the number of resettlement slots increases correspondingly.

B. Quantity

The number of refugees accepted each year is set by a political process.⁸⁰ This number bears very little relation to existing need, and, indeed, does not pretend to. In theory, however, the issue of how many persons in need of sanctuary should be taken by the United States—or any country—raises profound moral questions.

Several writers have considered the relationship between those in need, on the one hand, and those with the means to fill those needs, on the other. Philosopher Peter Singer's answer, given in the context of famine relief, is the most radical: "We ought to give until we reach the level of marginal utility—that is, the level at which, by giving more, I would cause as much suffering to myself or my dependents as I would relieve by my gift."⁸¹ Though Singer was speaking in monetary terms in describing his theory of marginal utility, the principle can be applied to refugee admissions as well. In some ways the argument for charity is even stronger in this context. A dollar donated to the hungry is a dollar less for the

78. See *supra* text accompanying notes 52–54.

79. See, e.g., Andrew E. Shacknove, *Who Is a Refugee?*, 95 ETHICS 274, 276–77 (1985); As tri Suhrke, *Global Refugee Movements and Strategies of Response*, in U.S. IMMIGRATION AND REFUGEE POLICY 157, 159–60 (Mary M. Kriz ed., 1983).

80. See *supra* text accompanying notes 26–33.

81. Peter Singer, *Famine, Affluence and Morality*, in PHILOSOPHY, POLITICS AND SOCIETY 21, 33 (Laslett and Fishkin eds., 1992). For a discussion and critique of this argument, see JAMES S. FISHKIN, *THE LIMITS OF OBLIGATION* 70–79 (1982).

donor. In that sense a financial gift is a zero sum process; more for the recipient is less for the donor, at least in absolute terms (though not, as Singer points out, in relative value). But refugee admissions are not a zero-sum process: the benefit to the refugee does not cause a corresponding harm to the society that welcomes him or her.⁸² In fact, there may be no harm at all, at least until the numbers reach some kind of tipping point.⁸³

When directly confronting the ethics of overseas refugee acceptance, Singer does not apply his pure form of marginal utility, but instead proposes a balancing of refugees' interests against those of the receiving country's inhabitants. Only when the harm to the receiving country outweighs, or interferes with, the benefits to the arriving refugees does the balance of interests shift toward non-acceptance. Therefore, "affluent nations should be taking far, far more refugees than they are taking today," and "potential refugee settlement countries should, on the basis of the principle of equal consideration of interests, gradually increase their refugee intakes."⁸⁴ The philosopher and political theorist Michael Walzer has a less expansive view of such obligations.⁸⁵ When the number of refugees is large, he writes, the answer is not necessarily to increase acceptance, but to choose among the victims on the basis of ethnic, religious, or ideological affinity.⁸⁶

Matthew Gibney makes the important point that refugee acceptance (including both resettlement and asylum) represents a relatively small percentage of total immigration in developed

82. MICHAEL WALZER, *SPHERES OF JUSTICE* 49 (1983) ("[A]dmitting refugees doesn't necessarily decrease the amount of liberty the [country's citizens] enjoy within that space."). It does not reduce other societal goods, either, at least not on a one-to-one basis. Thus, while refugees may take jobs, for example, their presence also stimulates the economy, creating additional employment. Cf., GEORGE BORJAS, *HEAVEN'S DOOR—IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 62–67 (1999).

83. Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, in *OPEN BORDERS? CLOSED SOCIETIES?* 111, 127 (Mark Gibney ed., 1988). Cf., MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000). On the other hand, it can be contended that even small numbers can have some effect in depressing wages levels in the domestic economy.

84. Singer & Singer, *supra* note 83, at 128.

85. WALZER, *supra* note 82, at 48–51.

86. *Id.* at 49–50. Walzer does see the possibility of asylum as a safety valve for large numbers of overseas refugees, but seems to assume it would be sought by a relatively small number of persons. *Id.* at 51. For a critique of Walzer's position, see Singer & Singer, *supra* note 83, at 117–21; John A. Scanlan & O.T. Kent, *The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe: The Contemporary American Example*, in *OPEN BORDERS? CLOSED SOCIETIES?* 61, 85–90 (Mark Gibney ed., 1988).

countries.⁸⁷ For example, in fiscal year 2001, only 9% of total US permanent admissions went to refugees and asylees. By contrast, 65% went to the various forms of family reunion.⁸⁸ Gibney applies a principle of humanitarianism: the duty to assist those in great distress when the cost of doing so is low. Countries that would be unwilling to increase the *number* of immigrants, he concludes, ought to at least change the *composition* of their immigrant pool, favoring refugees over relatives who are not members of their citizen's immediate families and over employment-based migrants. Wherever one would draw the line on reordering current immigrant priorities, it is hard to disagree that increasing refugee admissions at the expense of some economic and family entrants is a relatively painless way of expanding refugee relief.⁸⁹

Each additional resettlement slot is clearly valuable in itself, in that more people would share in the material comforts, civil rights, and political security of the receiving country.⁹⁰ While recognizing that the greater the resettlement resource, the less acute the choices, for two reasons this Article concerns mainly the need to allocate those slots that *do* exist, rather than addressing directly the number that *should* be devoted to resettlement. One is that, in the absence of some particularly compelling crisis, refugee admission numbers appear highly unlikely to increase drastically. More importantly, there is no possibility whatsoever of the total number of admissions ever approaching need. Even Peter Singer's argument, at its most extreme, would not reach the point of meeting all refugees' needs for sanctuary.

87. Matthew J. Gibney, *Liberal Democratic States and Responsibilities to Refugees*, 93 AM. POL. SCI. REV., No. 1, 169, 180 (Mar. 1999). Canadian immigration is divided into family, economic, and humanitarian streams, with a planned number of admissions designated for each group. From 1997–99, the humanitarian stream comprised from 11% to 13% of total immigration. Stephen Yale-Loehr & Christopher Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99, 109 (2001).

88. Employment-based categories took up 9% and diversity immigration 4%. Immigration and Naturalization Service, 2001 Statistical Yearbook of the Immigration and Naturalization Service, Table 5 (2003).

89. On the other hand, some contend that "if refugee admissions are placed in competition with those of family members and others eligible for immigrant status, the refugee program would lose its special humanitarian mandate." GALLAGHER ET AL., *supra* note 17, at 35. Interestingly it was an opponent of increased refugee admission numbers, Senator Walter Huddleston, who proposed trading off immigration slots against refugee places under an overall cap. The rationale for this proposal seems to have been that, if forced to choose, the U.S. would not sacrifice immigration aims for humanitarian reasons. Congress defeated the proposal. *Id.* at 34–35.

90. For such reasons, Bill Frelick, then Director of the U.S. Committee for Refugees, laments the failure to use, on average, 11% of the annual refugee admission target numbers over the last ten years—a cumulative total of almost 107,000 places. Frelick, *supra* note 4, at 37.

C. Measuring Relative Need

Even if the eligible population were limited to "refugees," people with a "well-founded fear of persecution" leading to death, serious physical harm, or lengthy imprisonment, judgments about relative need would still be necessary. Some refugees face more serious threats than others, and that difference in risk can, in theory at least, be a valid basis for refugee selection. At present, seriously endangered refugees are handled under Priority One,⁹¹ which receives only about 20% of refugee places.⁹²

How might the relative need for resettlement be measured? The most important factors are the degree and probability of harm.⁹³ The probabilities of harm occurring if the person is not resettled vary widely, and not all harms are equal; death, rape, or torture are far more serious than a brief incarceration or the loss of a job. A lower probability of a more serious harm can thus produce a greater overall risk than a higher chance of less dire consequences. A person facing a 10% threat of death, most would agree, is more at risk than one facing a 50% chance of, say, dismissal from work. This relationship can be expressed as a formula: $p \times H$, where p represents probability and H harm. Obviously, people may disagree about the ranking or degree of different harms, but once assigned a value in theory relative risk may be evaluated by multiplying the degree of harm by its probability.⁹⁴

For people still in the country of persecution, this assessment is very much like that made by adjudicators in potential asylum countries. Some applicants, at least, will have a measurable probability of harm if they remain in their homelands, and resettlement can eliminate that hazard. If resettlement is to be a serious tool to rescue people from persecution, however, we should make more efforts to do so. This means more in-country processing where that is possible and more outreach to individuals at risk before they flee their homelands.⁹⁵

91. See *supra* note 36 and accompanying text.

92. Refugee Data Center, FISCAL YEAR ARRIVALS BY PRIORITY CODE 1996–2000, at 16–18 (on file with author).

93. Legomsky, *supra* note 17, at 699.

94. For a different formula containing these two factors, see Jean-Yves Carlier, *The Geneva Refugee Definition and the "Theory of the Three Scales,"* in REFUGEE RIGHTS AND REALITIES 37 (Frances Nicholson & Patrick Twomey eds., 1999).

95. See text accompanying *infra* notes 204–08.

At present, most resettled refugees come from countries of first asylum. They are already outside the place where they are threatened—their countries of origin—and living in another country, usually a neighboring one. They may be surviving in very harsh conditions, but are at least safe from the original threat.⁹⁶ How then to determine who among them is the most seriously endangered? People who are not completely safe from the original persecution should be the first priority, because, for example, their enemies might manage to reach them in exile or they may face a realistic threat of return to their country of origin. Evaluating these risks, including both the potential harm and its probability, is an uncertain enterprise even in the best of circumstances. As with asylum adjudication, the basic facts of potential persecution are difficult to determine in a refugee camp setting. Applicants have an interest in the outcome, and corroborating witnesses or documents are difficult to locate.⁹⁷ The same is true for predictive judgments about danger if the individual returns to her homeland.⁹⁸ The Americans located in the country of asylum who conduct these interviews inevitably lack all the relevant information. The cross-cultural aspects of the interviews and the need for translators compound the problem. These difficulties mean that separating the seriously endangered from others is a time-consuming and inexact task,⁹⁹ but it can be done in some rough way.

The second category of people at risk is those who are exposed to exceptional danger in their place of refuge. This danger can include starkly inadequate food or medical care, exposure to crimes such as rape or robbery, or forced military recruitment.¹⁰⁰ Women without a male protector and unaccompanied children are

96. GALLAGHER ET AL., *supra* note 17, at 47 ("It is a rare circumstance for people who have already left their country of origin to be in immediate danger of loss of life. . . .").

97. David A. Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247, 1280–82 (1990); see also Cécile Rousseau et al., *The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board*, 15 J. REFUGEE STUD. 43 (2002) ("Deciding upon refugee claims . . . is the single most complex adjudication function in contemporary Western societies.").

98. Martin, *supra* note 97, at 1285 ("This is not a scientific prediction based on regular laws or formulas; it is an assessment that should be based, as much as possible, on conscientious attention to country condition information and individual facts.").

99. Frelick, *supra* note 4, at 36 ("Identifying and processing the higher priorities is labor-intensive, often entailing multiple interviews and much paperwork.").

100. *Id.* at 50. For one of the many illustrative accounts, see Margaret Emery, *Sierra Leonean Refugee Women and the Challenge of Reintegration*, REFUGEE REPORTS Aug. 2002, at 10, 11–12.

often particularly at risk.¹⁰¹ Ironically, it may be easier to make an accurate estimate of these threats than those in the country of origin, because they are taking place currently, not in the past, in places where international aid workers are often present.

A third, related, category of need encompasses so-called long-staying refugees—those who spend years, if not decades, in refugee camps without opportunity for repatriation or local settlement.¹⁰² The most notable example is the Palestinians (who are generally treated as an exception to most refugee law),¹⁰³ but numerous other cases have arisen in recent years.¹⁰⁴ Defining long-term refugees is often much easier than identifying threatened individuals because the duration of stay, a retrospective fact, is not hard to ascertain. Estimating the likelihood of some alternative solution—repatriation or local settlement—requires predicting political developments, but this is probably more certain than estimating degrees of individual risk. The real issue is how to weigh the claims of long-stayers against those more at risk of serious physical harm inside or outside of their present place of asylum. How can a *probability* (or well-founded fear) of imprisonment or death, for example, be balanced against the virtual *certainty* of a miserable existence in an impoverished refugee camp?

Moreover, because many more long-term refugees exist than the U.S. could ever accommodate even if they were given all refugee admission slots, which ones should be resettled? Should there be a “waiting list” with the oldest cases rising to the top? This would

101. SUSAN FORBES MARTIN, REFUGEE WOMEN 16–21 (1992); UNHCR, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN ¶ 3 (1991) (“In addition to these basic needs shared with all refugees, refugee women and girls have special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation, and protection against sexual discrimination in the delivery of goods and services.”).

102. See GIL LOESCHER, BEYOND CHARITY: INTERNATIONAL COOPERATION AND THE GLOBAL REFUGEE CRISIS 200–03 (1993).

103. Convention Relating to the Status of Refugees, July 28, 1951, art. 1(D), 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 156 (entered into force Apr. 22, 1954) (exempting persons then receiving assistance from any United Nations organ or agency from Refugee Convention coverage); LEX TAKKENBERG, THE STATUS OF PALESTINIAN REFUGEES IN INTERNATIONAL LAW 49–67 (1998).

104. Frelick, *supra* note 4, at 35–37. “Millions of refugees worldwide have been relegated to a limbo existence, warehoused in camps or settlements with no prospects for voluntary repatriation or local integration. Children born and raised within the confines of camps often never see normal life outside the fences. These populations often become dependent and despondent, with predictably negative social consequences.” *Id.* at 35. “For persecuted [refugees in camps], the alternative to resettlement is to languish for many years in what amounts to a prison, isolated from normal social intercourse and economic activity and without the amenities of family life.” Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INTL. L. 243, 269 (1997).

mean that the people who are finally chosen would not get relief until after years of wretched exile. Waiting list seniority is common for limited immigration preferences,¹⁰⁵ but the hardships of accumulating sufficient refugee "seniority" are considerably greater than peacefully awaiting an immigrant visa in one's country of origin. On the other hand, with a method other than seniority, how can "prospective" long-term refugee populations be identified early in their tenure? Alternatively, should selection from among long-term refugees be on the basis of "U.S. ties," as Bill Frelick recently recommended, or by lot, his second priority?¹⁰⁶ One approach would be to resettle long-term refugee groups that are somewhat self-contained, so that an entire ethnic group or at least an entire camp population could be given a durable solution without leaving a few behind.¹⁰⁷

How should the plight of persons facing some present danger or hardship be weighed against the claim of those who have suffered past persecution but are not currently at risk? The U.S. refugee definition includes both groups,¹⁰⁸ and for many years the U.S. gave its largest number of refugee visa allocations to refugees who had experienced past persecution rather than those currently in danger.¹⁰⁹ Some observers would put these refugees at the bottom of the hierarchy of need.¹¹⁰ While this is a reasonable position, some people may be so badly traumatized by their experience of persecution that their need for resettlement equals or exceeds some of the other groups considered here, such as long-staying refugees.¹¹¹

IV. FOREIGN POLICY PURPOSES

Most observers of refugee resettlement since World War II conclude, often critically, that the majority of admissions have been distributed on "foreign policy" grounds,¹¹² in contrast to more

105. See UNITED STATES DEPARTMENT OF STATE, VISA BULLETIN, available at http://travel.state.gov/visa_bulletin.html (last visited May 4, 2003) (reporting priority dates for family-based immigrant visas).

106. *Id.* at 36.

107. See text accompanying *infra* notes 210–13.

108. See text accompanying *supra* note 31.

109. Susan Raufer, *In-Country Processing of Refugees*, 9 GEO. IMMIG. L. J. 233, 255 (1995) (citing Soviet Jews and Evangelical Christians as examples).

110. *Id.*

111. Cf. ZUCKER & ZUCKER, *supra* note 52, at 270 (proposing a refugee admission priority based on both degree of past persecution and current risk).

112. Gil Loescher and John Scanlan summarize their comprehensive review:

need-based criteria. For much of that period "foreign policy" was virtually synonymous with anti-Communism. With the waning of Communism as both a presence and a threat, that linkage is obviously obsolete, but, as events since September 11 illustrate, foreign policy is no less an important national concern today.

Refugee resettlement can potentially serve a variety of foreign policy goals and complaints of a foreign policy bias in refugee admissions do not always acknowledge the differences. The following sections separate the various strands and discuss their implications for refugee resettlement as well as their relation to other criteria.

A. Refugees We Have "Created"

Favoring people whose persecution or other danger the U.S. has helped to cause has strong appeal. This connection, as with other relationships, may form the basis for rights and duties that would otherwise not exist.¹¹³ Michael Walzer, who rejects a more universal moral obligation to persecuted persons in general,¹¹⁴ forcefully states this position:

Humanitarians clearly played a role in bringing thousands of refugees to the United States, restrictionists a role in keeping thousands of others out. But over the last four decades, it has become increasingly clear that foreign policy choices ordinarily have played the key role in determining which refugees will be permitted to enter the United States. Thus the Hungarians in 1956, the Cubans who entered between 1960 and 1966, and the Indochinese transported from Saigon in 1975 were the beneficiaries of little lobbying and no legislation, yet were admitted into the United States by the tens of thousands by the Eisenhower, Kennedy, Johnson, and Ford administrations. In each instance, their entry was favored by the Department of State and regarded as an obligation or an opportunity created by the cold war. Conversely, over the last two decades, the United States has closed its borders to virtually every refugee fleeing persecution at the hands of authoritarian regimes.

LOESCHER & SCANLAN, *supra* note 18, at xvii; see also PETER H. KOEHN, REFUGEES FROM REVOLUTION: U.S. POLICY AND THIRD-WORLD MIGRATION 207-13 (1991); Tang Thanh Trai Le, *The Legal Status of the Refugee in the United States*, 42 AM. J. OF COMP. L. 577, 605 (Supp. 1994) (refugee admissions are a "creature of U.S. foreign policy"); Legomsky, *supra* note 17, at 698 ("[T]he central thrust of United States refugee policy has always been the pursuit of national self-interest—in particular, foreign policy goals, and more particularly the battle against Communism."); Tyson, *supra* note 17, at 921 ("In practice, political considerations take priority over humanitarian concerns.").

113. Andrew E. Shacknove, *American Duties to Refugees: Their Scope and Limits*, in OPEN BORDERS? CLOSED SOCIETIES? 131, 141 (Mark Gibney ed., 1988).

114. See *supra* text accompanying note 82.

Toward some refugees, we may well have obligations of the same sort that we have toward fellow nationals. This is obviously the case with regard to any group of people whom we have helped turn into refugees. The injury we had done them makes for an affinity between us: thus Vietnamese refugees had, in a moral sense, been effectively Americanized even before they arrived on these shores.¹¹⁵

Prior connection to their battles with Communist opponents certainly were important to our acceptance of well over 1 million Vietnamese, Cambodian, and Lao refugees from the 1970's to the 1990's. But what does it mean to "help turn" people into refugees, or to "do injury" to them? As Andrew Shacknove aptly states, "[i]n some instances, . . . the causal relationship between state policy and the existence of refugees is clear. In other instances the causal link is more ambiguous and the task of assessing responsibility more problematic."¹¹⁶

Perhaps the strongest case for moral responsibility is where the U.S. has promoted an uprising or other resistance in another country and then fails to follow through with military support. The Hungarian revolution of 1956, for example, was instigated, in part, by CIA-trained agents. Even after the Soviet army restored control, Radio Free Europe repeatedly broadcast, "America will not fail you" to its Hungarian listeners.¹¹⁷ In this atmosphere, a feeling of responsibility—if not guilt—helped build support for large-scale resettlement of the "victims of false expectations about U.S. policy."¹¹⁸ Sadly, a very similar sequence of events took place at the end of the Persian Gulf War, initiated by a statement by then-President Bush which Shi'a in the South and Kurds in the north of Iraq interpreted as a signal to revolt against Saddam Hussein.¹¹⁹ Kosovo

115. WALZER, *supra* note 82, at 49.

116. Shacknove, *supra* note 113, at 131, 141.

117. LOESCHER & SCANLAN, *supra* note 18, at 53.

118. *Id.* at 53–54 ("Eisenhower quickly came under pressure from his supporters to provide refugee relief in lieu of the military aid that had been withheld."). Interestingly, only a fraction of those admitted had actually taken part in the Hungarian uprising. Most others had seized an opportunity to escape a closed, controlled society. *Id.* at 50–51.

119. During a February 15, 1991 speech, President Bush stated, "There's another way for the bloodshed to stop, and that is for the Iraqi military and the Iraqi people to take matters into their own hands, and force Saddam Hussein, the dictator, to step aside." RAMSEY CLARK, *THE FIRE THIS TIME: U.S. WAR CRIMES IN THE GULF* 55 (1992). In addition to President Bush's requests, the U.S. government issued statements on the radio station Voice of Free Iraq (VOFI). *Id.* VOFI was CIA funded and operated with the assistance of Saudi intelligence. *Id.* at 56. These statements, translated into Kurdish and Arabic, directly urged the Kurd people to rebel. *Id.* at 55. "Rise! This is your moment! This time, the allies will not let you down!" *Id.* at 56. "We are with you in every heartbeat, in all your feelings, and in every

presents a different but almost equally compelling case in which a NATO ultimatum to Slobodan Milosevic seems to have provoked Serbia's ethnic cleansing of the province, forcing hundreds of thousands to leave.¹²⁰

Beyond these situations, causal connections become muddled, and moral responsibility less clear, as exemplified by the U.S. experience in Indochina. To summarize broadly the complex events of many years, the U.S. gradually increased its involvement in Vietnam, Laos, and Cambodia from providing logistical and political assistance, to advisers, to, in the case of Vietnam, massive numbers of fighting forces. The U.S. did so at the request of the national governments, but predominantly for its own anti-Communist reasons. Once the U.S. was heavily involved, the fighting with Communist rebels and North Vietnam became more intense. Thousands of Indochinese became "connected" to the U.S. effort as allies, employees, workers with American companies, or friends

move you make. . . . We stand by you in whatever you carry out and whatever step you take." *Id.* In order to incite uprisings throughout Iraq, VOFI promoted the liberation of Baghdad by making a general call out to the "brother Iraqis". "The Iraqi's have never felt such enthusiasm, joy, and desire to take part in the revolution or be martyrs." *Id.*

While VOFI encouraged uprisings and promised military assistance, various media reported that the "dominant assessment among U.S. intelligence officials suggested that neither the Iranian Shi'is in the south nor the Kurds in the north" had any real chance of sustaining a successful rebellion. YITZHAK NAKASH, *THE SHI'IS OF IRAQ* 275 (1994). True to these reports, it took Hussein and his loyalists only a few weeks to crush both insurrections and to regain control. *Id.* On March 26, 1991 the U.S. decided to forego taking any action to intervene or assist the rebels. *Id.* at 276. Some analysts have surmised that the U.S.'s decision to withhold support was made out of fear for the potential fragmentation of Iraq via "a general civil war or the intervention of regional powers, especially Iran." CHARLES TRIPP, *A HISTORY OF IRAQ* 258 (2000). Some have suggested that the post-war refugee crisis was due to the United States government's perceived deceit and lack of support. CLARK, *supra*, at 56. After the failed Shi'ite rebellions in Nasiriya and Basra, over 500,000 Iraqi citizens became refugees. MARK PERRY, *ECLIPSE: THE LAST DAYS OF THE CIA* 398 (1992). The U.S. eventually resettled 29,496 of them. U.S. COMMITTEE FOR REFUGEES, *REFUGEE REPORTS*, Dec. 2000, at 10-11.

120. Many erroneously expected Yugoslavian leader Slobodan Milosevic to sign the Rambouillet Peace Agreement after NATO's ultimatum was issued and its aerial campaign commenced. Agon Demjaha, *The Kosovo Conflict: A Perspective From Inside*, in *KOSOVO AND THE CHALLENGE OF HUMANITARIAN INTERVENTION: SELECTIVE INDIGNATION, COLLECTIVE ACTION, AND INTERNATIONAL CITIZENSHIP* 36 (Albrecht Schnabel & Ramesh Thakur eds., 2000). Instead, what resulted was what has been called has been called the "greatest ethnic cleansing that Europe has seen since the end of the Second World War." *Id.* Although the figures vary from source to source, it is estimated that nearly "one million Albanians were forced from their homes, and many others were massacred, raped, and tortured." *Id.*

NATO's decision to use air attacks on Yugoslavia during the Kosovo Crisis has been hotly debated. Those opposed to the air strikes argue that the strikes vastly increased the ethnic cleansing they were supposed to prevent. Those in favor of the strikes counter that "even if this was true at the beginning of the campaign, afterwards all refugees were able to go back to Kosovo." *Id.* at 43 n.10.

or spouses. When Communist forces claimed victory in 1975, these people often faced special dangers of death, imprisonment, "re-education," or other forms of persecution or discrimination.

The immediate cause of the threats against these people was their involvement with the losing government and its American allies, of course, but did the U.S. "create" these threats? The U.S. had been invited in to help, and many of the people who joined the national armies or governments did so of their own volition. Many had already taken sides before the U.S. participation, and others would have even if there had never been an American presence. Yet for many people association with a hated foreign enemy in a brutal civil war could certainly have exacerbated the consequences of landing on the losing side.

Having come to help but having failed, the U.S., in effect, is often expected to be the guarantor of the people it sought to aid. Can anyone doubt that members of the Northern Alliance and their families would have been resettled if the joint fall 2001 offensive against the Taliban had resulted in defeat? "Victory or resettlement" often seems to be an implicit American promise. While there may be practical reasons to give this kind of guarantee, in that it certainly encourages alliance with U.S. interests,¹²¹ not every "ally" necessarily becomes a refugee "America has created" or whose "injury America has caused" if that common effort does not succeed. Rather, the moral claim very much varies with the circumstances.

B. Rewarding Cooperation with U.S.

Over the years, the U.S. often has accepted refugees who have worked for or with American civil or military authorities, voluntary agencies, or companies. In some cases these refugees may have a strong moral claim to assistance because of American responsibility for the very existence of the threatened harm; in others past association with the U.S. may currently put them in greater danger. Another reason for resettlement, it could be argued, is that past connection also increases their likelihood of successful integration in the U.S. after arrival.

From the point of view of inducing people to work with American agencies, the possibility of resettlement if the American effort meets with failure operates like life insurance or any other em-

121. See discussion *infra* Part IV.B.

ployment benefit by making the job more attractive. While it is true that almost nobody is promised admission to the U.S. *before* the danger of retaliation materializes, some may be aware of the general possibility of resettlement as one more attractive feature of working for a U.S. entity. From the perspective of American agencies, factoring the potential costs of large-scale refugee acceptance following a failed U.S. engagement or intervention could actually deter U.S. involvement in the first place. Interestingly, this consideration hardly ever seems to be taken into account, perhaps because the downside risk of U.S. engagement is generally underplayed.

C. Embarrassing a Disfavored Nation.

A third foreign policy justification for refugee acceptance is to embarrass a disfavored nation or regime, whose citizens are, so to speak, voting with their feet by leaving. Labeling the emigrants as refugees—people with a fear of persecution—further tars the source country.¹²² Cold War refugee acceptance from Communist countries constituted the high-water mark of this use of refugee admissions.¹²³ In the period in which Western and Eastern political and economic systems competed for adherents in the rest of the world, refugee acceptance was a propaganda tool. As Ronald Reagan used to say, “you don’t see people risking their lives to cross the Berlin Wall from west to east.”¹²⁴

This foreign policy tool is not likely to have much of a future.¹²⁵ It flourished during a particular historical period in which there was a perceived clash of ideologies and a desire to “win the hearts and minds” of the world’s peoples. There is no comparable battle

122. See James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INTL. L. J. 129, 145–51 (1990) (arguing that both Western countries and Soviet Union saw development of refugee concept as an attempt to bolster condemnation of Soviet bloc).

123. LOESCHER & SCANLAN, *supra* note 18, at 47–48, 65, 75–76.

124. President Ronald Reagan, Fiftieth Anniversary Banquet of the International Rescue Committee (Nov. 15, 1983).

125. The U.S. Commission on Immigration Reform, on the other hand, believes this to be a worthwhile purpose, stating, “[s]elective resettlement of political dissidents and other victims of serious human rights violations can be an important component of U.S. foreign policy, highlighting the human rights abuses practices by other countries and, thereby, supporting efforts to encourage other countries to respect fundamental human rights and democratic principles.” U.S. COMM’N ON IMMIGRATION REFORM, *supra* note 26, at 39.

today, despite talk of a clash of civilizations.¹²⁶ Moreover, with the many motives that impel people to flee, the message emigration supposedly sends about the country of origin can be highly ambiguous. In a world where information is so much more readily available than during the Cold War, refugee acceptance seems an indirect and inefficient means of conveying negative images. Finally, whatever publicity value might come from encouraging or highlighting emigration from a particular country seems a small payoff compared to other possible uses of refugee admissions. In retrospect, this was probably true even for Cold War era resettlement.

D. Undermining a Disfavored Nation

While embarrassing a source country may undermine its appeal to the rest of the world, refugee acceptance can inflict other, more direct, kinds of damage on the country itself. One is to create a "brain drain" by luring away talented individuals who are needed for economic, military, or other essential functions in the country of origin. If persecution targets the educated classes, or if resistance is concentrated among them, they are likely to be among potential refugees anyway.¹²⁷ The question then becomes whether to favor this group in order to sap their homeland's human capital. As a conscious policy it requires that a relatively small educated population receive a relatively large number of admissions for there to be an appreciable impact, as was the case with Cuba in the 1960's.¹²⁸ For that reason this also seems a very low-priority use of refugee resettlement.¹²⁹

126. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996). Michael Mandelbaum argues that while terrorism poses a security threat, it does not embody any ideological alternative to western values of peace, democracy, and free markets. MICHAEL MANDELBAUM, *THE IDEAS THAT CONQUERED THE WORLD: PEACE, DEMOCRACY, AND FREE MARKETS IN THE TWENTY-FIRST CENTURY* 4 (2002).

127. LOESCHER, *supra* note 102, at 18–19 ("Refugee movements are often made to happen by governments in order to reduce or eliminate selected social classes and ethnic groups within their own borders."). See also ALAN DOWTY, *CLOSED BORDERS: THE TEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* 161–62 (1987).

128. See LOESCHER & SCANLAN, *supra* note 18, at 76 (discussing Fidel Castro's complaints about the loss of skilled workers to the U.S.). On the other hand, their departure reduced the number of dissidents, allowed their property to be redistributed, and facilitated the socialization of the Cuban economy. *Id.*

129. For a thoughtful discussion of the sometimes conflicting effects of such population relocations, see Robert G. Darst, *Plying the Humanitarian Human Trade: The Politics of Facilitative Relocation*, 14 J. REFUGEE STUD. 213, 243–44 (2001).

A second form of de-stabilization through refugee acceptance can come by building opposition to the country of origin among the resettled refugees. Refugee populations adjacent to their countries of origin have long been intertwined with armed resistance movements.¹³⁰ Though less common, resettled refugees can also form the core of attempts to liberate their homelands; witness the Free French, Poles, and others in England during World War II. For American resettlement, again, Cuba is an example, with the ill-fated Bay of Pigs invasion and other attempts by Cuban exiles (with U.S. government help) to overturn the Castro government.¹³¹

Encouraging resistance to an oppressive regime is probably one of the more justifiable foreign policy uses of refugee resettlement (putting aside for the moment the international law issues raised by providing a base for destabilization of another state). Its virtue lies in the fact that it not only gives sanctuary to the victims of persecution, but also involves affirmative steps to end those threats.¹³² Resistance activities need not be military; any form of organized effort for home country reform is included here. If successful, the refugees will not only bring the refugee flow to an end but also lay the groundwork for their own repatriation.

E. Pure Ideology

The anti-Communist admissions of the Cold War involved the two previously mentioned foreign policy purposes of refugee resettlement, but also contained what might be called a "pure" ideological component: a belief, indeed an almost religious conviction, that Communism is evil and that the U.S. should "save" as many of its victims as possible.¹³³ Certainly, something like this faith made it easier to justify the more instrumental measures just discussed, like embarrassing communist countries or attempting to

130. LOESCHER, *supra* note 102, at 116.

131. LOESCHER & SCANLAN, *supra* note 18, at 63–65. See also LOESCHER, *supra* note 102, at 37 (discussing Nicaraguan contras based in Miami).

132. Cf. Daniel J. Steinbock, *Refuge and Resistance: Casablanca's Lessons for Refugee Law*, 7 GEO. IMMIGR. L.J. 649, 696 (1993) ("[W]hile refuge is often the immediate answer to persecution and other forms of oppression, resistance is usually the only ultimate solution to these evils.").

133. See 8 U.S.C. § 1153(a)(7) (1952) (repealed by 8 U.S.C. § 1101(c)(7) (1980)) (establishing a "seventh preference" immigration admission category of up to 10,200 for persons fleeing a communist-dominated country or one within the general area of the Middle East because of fear of persecution).

lure their talented workers. In general, describing part of the world as an "evil empire" makes it harder to deny access to that empire's innocent sufferers.

What should be the role of ideology in the post-Communist era of refugee resettlement?¹³⁴ Are there value-based preferences for resettlement policy that can trump other possible objectives, particularly rescue? Walzer, at least, would say yes, explicitly favoring ideological ties, though not specifying the particular ideology.¹³⁵ One wonders whether ideological resettlement's association with the Cold War has not colored the whole question.

This issue cannot be considered in the abstract. "Ideological" preferences in refugee selection must necessarily arise from a particular geopolitical and social context. Before September 11 the most likely candidate for a favored group of victims probably would have been vulnerable women.¹³⁶ The dimensions of this category are subject to differing views, but might include women with no male protectors in rigidly patriarchal societies, domestic violence victims without effective legal protection, or women objecting to other cultural practices physically harmful or highly restrictive of their life choices.¹³⁷ The parameters of this priority would frankly reflect American views of equality and would be the polar opposite of cultural relativism, sheltering women suffering from practices we abhor and reject. As with a bias towards those escaping Communism, however, such a preference would only reach a fraction of the people who fall within it.

After September 11, it may be said, the U.S. acquired a new ideology: anti-terrorism.¹³⁸ Just what this means, and how the war against terror will continue to unfold, is not clear. At present it is impossible to identify the victims and/or refugees from this war who might be appropriate for U.S. resettlement. Indeed, in the wake of the September 11 attacks, refugee resettlement was essentially stopped for several months, ostensibly to screen better for terrorist infiltration (even though none of the men implicated in the attacks had entered as refugees or had any other discernable

134. Guy Goodwin-Gill, *Refugees and Security*, 11 INT'L. J. OF REFUGEE L. 1, 4 (1999) ("The loss of ideology presents us with its own défi. Can principles and commitment to human rights survive? Will humanitarianism give way entirely to self-interest?").

135. See text accompanying *supra* note 82.

136. Frelick, *supra* note 4.

137. See e.g., UNHCR, Guidelines on the Protection of Refugee Women, *supra* note 101, at ¶ 54; Deborah Anker, *Women Refugees: Forgotten No Longer?*, 32 SAN DIEGO L. REV. 771, 804-05 (1995); *Fatin vs. INS*, 12 F.3d 1233 (3d Cir. 1993).

138. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 29, 2002), in 38 WKLY. COMP. PRES. DOC. 133 (Feb. 1, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.htm>.

connection with refugee resettlement).¹³⁹ A more defensible reason might have been to reassess priorities. Perhaps the U.S. will need to shelter endangered opponents of particular terror groups,¹⁴⁰ persons singled out for their help in fighting terrorism, or those uprooted by operations such as the attack on Iraq. Alternatively, America could focus on the most miserable and oppressed, where terrorism takes root.¹⁴¹ Wars tend to be all-consuming, gathering up all available weapons and creating their own value systems. In a war that demands as much commitment in troops, casualties, foreign relations, and funding as this one already has (and will), it is unrealistic to think that refugee admissions will not also be used as a weapon. If refugee resettlement appears helpful in the war against terrorism it is sure to be called upon, even at the expense of other people in greater need.

F. Burden-Sharing

One reason for the U.S. to accept refugees for resettlement involves refugee burden-sharing: the spreading of the burdens of refugee flows, including the refugees themselves, among many states. The issue arises from three inescapable facts. First, refugees do not move evenly around the globe, both because refugee-producing events are concentrated in particular countries or regions, and because most refugees cannot seek sanctuary far from their countries of origin.¹⁴² Second, despite the benefits individual refugees might ultimately bring, refugee-receiving countries regard refugees as an unwanted burden in just about every way imaginable.¹⁴³ Third, countries vary widely in their abilities to cope with refugees in their territory.

139. Frelick, *supra* note 4, at 28. This explanation is not to be confused with the possibility that terrorists could be among asylum-seekers entering Western countries. *See, e.g.,* Rick Jervis et. al., *Terrorist May be Among Refugees Heading to Europe*, WALL ST.J., July 5, 2002, at A1.

140. *Killing of Doctors in Karachi, Pakistan* (NPR radio broadcast, Mar. 19, 2002) (discussing murders of Shi'ite physicians by Islamic extremists).

141. Stanley Hoffman, *Clash of Globalizations*, FOREIGN AFFAIRS, July-Aug. 2002, at 114.

142. *See* WORLD REFUGEE SURVEY 2002, *supra* note 6, at 2-3, 11.

143. Schuck, *supra* note 104, at 252 ("Each state . . . possesses powerful disincentives to provide relief, especially on its own territory. Such relief is costly to provide; at a minimum, it includes food, clothing, shelter, and information. If the state does not allow the migrants to come and go as they please, it must keep them in custody or under close surveillance. If they remain in custody in close quarters and enforced idleness, the risks of violence, crime, and other social pathologies are correspondingly great.").

For these reasons, receiving countries have attempted to limit their refugee responsibility by either barring entry to asylum-seekers or ejecting those who manage to get inside their borders. In order to preserve the right to asylum and protect against involuntary *refoulement*, both UNHCR and other countries have often attempted to distribute the burden imposed on the host country, through material and financial support and sometimes by third country resettlement of its refugees. Refugee burden-sharing is probably not yet a norm of international law,¹⁴⁴ but it has been undertaken in numerous refugee crises.

Two refugee groups of particular relevance are the Vietnamese in Hong Kong from 1975 to the 1990's and the Kosovo Albanians in Montenegro in 1999. The case of the Vietnamese fleeing their homeland after 1975 illustrates how closely burden-sharing, particularly through resettlement, can bear on host countries' willingness to provide asylum. From the start, countries in South-east Asia receiving the bulk of the "boat people" fleeing Vietnam—Malaysia, Thailand, the Philippines, Hong Kong, and Indonesia—were reluctant to allow them to land, fearing their indefinite stay. Only after receiving assurances of both financial support and the refugees' resettlement abroad did these countries agree to grant even temporary asylum.¹⁴⁵ The U.S., a leader in orchestrating and funding these agreements, had its own foreign policy reasons for participating,¹⁴⁶ in addition to its more general interest in promoting first country asylum. The resulting burden-sharing relationship between the countries of first asylum and the resettlement countries was remarkably direct.¹⁴⁷ If more refugees arrived without a corresponding increase in resettlement departures, the asylum countries quickly became more assertive in refusing entry. In 1989 a Comprehensive Plan of Action (CPA) by host and resettlement countries attempted to bring refugee flight and asylum in Hong Kong to a conclusion by a combination of enhanced resettlement and an end to presumptive refugee status.¹⁴⁸

In the case of the Kosovars fleeing ethnic cleansing in their home province, the immediate refugee crisis was precipitated

144. *Id.* at 272. Peter Schuck calls burden-sharing a "weak norm" of international law.

145. *Id.* at 255–56; James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 143–44 (1997).

146. See text accompanying *supra* note 115.

147. Josh Briggs, Comment, *Sur Place Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U. L. REV. 433, 436–41 (1993).

148. Schuck, *supra* note 104, at 258–59; Arthur C. Helton, *Judicial Review of the Refugee Status Determination Procedure for Vietnamese Asylum Seekers in Hong Kong: The Case of Do Giau*, 17 BROOK. J. INT'L L. 263, 266 (1991).

when these refugees tried to enter neighboring Macedonia. Macedonia, which had serious security concerns about the arrival of thousands of Kosovar refugees,¹⁴⁹ responded by barring their entry, trapping thousands of refugees at the border crossing point for several days without shelter or other assistance. While UNHCR was reluctant to make asylum conditional on international burden-sharing, the U.S. in particular was anxious to break the impasse. Under its impetus, and with its financial, diplomatic, and logistical support, thousands of refugees were evacuated from Macedonia. Ultimately, 92,000 refugees were removed to twenty-nine resettlement countries.¹⁵⁰ After considering and rejecting forms of temporary refuge, such as placement at Guantanamo Bay, the U.S. accepted over 14,000 refugees through regular resettlement channels.¹⁵¹

As with the Vietnamese covered by the CPA, the U.S. acted for a variety of motives. Washington had multiple interests in the Kosovo conflict. One was a humanitarian desire to reduce suffering, particularly among a population for which it felt some special responsibility.¹⁵² Having conducted the air strikes that set off the crisis, the U.S. was obviously anxious to avoid bad publicity about the results. In addition, the U.S. did not want to jeopardize the ongoing placement of NATO troops in Macedonia, a possibility if the refugee influx became a problem for that country.¹⁵³

In short, distributing refugee responsibility can be an important element in securing the reality of asylum in countries of initial refuge. Indeed, burden-sharing is a centerpiece of two recent proposals for the reform of the international refugee regime.¹⁵⁴ Though they differ in how to allocate responsibility among states, both proposals give resettlement a role in ensuring sanctuary for refugees in their own regions.¹⁵⁵ Under the existing refugee relief

149. Michael Barutciski & Astri Suhrke, *Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing*, 14 J. OF REFUGEE STUD. 95, 96 (2001). These included a tipping of the ethnic balance between Slavs and Albanians within the country, the risk of being dragged into the war, and the possibility of being stuck indefinitely with a huge refugee population. *Id.*

150. *Id.* at 101.

151. U.S. COMM'N FOR REFUGEES, *supra* note 6, at 312.

152. See text accompanying *supra* note 120.

153. Barutciski and Suhrke, *supra* note 149, at 101.

154. Hathaway & Neve, *supra* note 145; Schuck, *supra* note 104. These proposals have inspired some comment and critique. See e.g., Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1998); Peter Schuck, *A Response to the Critics*, 12 HARV. HUM. RTS. J. 385 (1999).

155. To summarize briefly, Hathaway & Neve advocate regional "interest-convergence groups" of states that would jointly provide the location and financing for temporary

system, which is certainly more *ad hoc* in how it spreads the refugee burden than these proposals would be, resettlement can be equally critical. Valuable in itself for its positive influence on refugee protection, burden-sharing has also become a U.S. foreign policy means of preserving asylum outside the U.S., particularly for favored groups.

V. TRADITIONAL IMMIGRATION PURPOSES

A. Family Ties to the U.S.

As a selection criterion, family ties to persons in the U.S. are the polar opposite of need. Family ties, however, are the more favored selection ground, with a larger number of admissions. For fiscal years 1996–2000, almost 66,000 people were admitted under Priority One, while 127,000 were taken under family reunion Priorities Three, Four, and Five.¹⁵⁶ Additionally, family reunion probably played some role in Priority Two cases as well, in selection of individual refugees within the designated groups. Moreover, family ties that would not provide the basis for admission to immigrants, or that would only in a much slower timeframe, can be grounds for immediate refugee admission.¹⁵⁷ For this reason, some observers have lamented that “[t]he overseas refugee admissions program

protection of refugees. Hathaway & Neve, *supra* note 154, at 188–90. If the conditions that produced the refugee flight did not resolve within a set period of time, they advocate resettlement for those refugees unable to repatriate. *Id.* at 185, 192. Even countries outside the affected region are expected to offer resettlement opportunities. *Id.* at 192. Schuck proposes the allocation of resettlement needs among states in a region according to their burden-bearing capacity. Schuck, *supra* note 104, at 272. This allocation should, he contends, be based mainly on national wealth. *Id.* at 279–80. Each state could, however, buy its way out of its quota of temporary or permanent resettlement obligations. *Id.* at 283. This market would of course allow richer states like the U.S. to pay poorer ones to fulfill their resettlement duties. *Id.* at 285.

156. Refugee Data Center, *supra* note 92.

157. GALLAGHER ET AL., *supra* note 17, at 34–37. For example, under Priority Three, spouses, unmarried children and parents of refugees, asylees, conditional residents, and certain parolees already in the U.S. are admitted as refugees. They would not qualify as immigrants. Immigration and Nationality Act, 8 U.S.C. § 1153 (2000). Moreover, while permanent residents could sponsor their spouses and unmarried sons and daughters, Immigration and Nationality Act, 8 U.S.C. 1153(a)(2), due to the backlog in applications the ordinary immigration route for these relatives is much slower than admission as a refugee. See John Guendelsberger, *Implementing Family Unification Rights in American Immigration Law: Proposed Amendments*, 25 SAN DIEGO L. REV. 253, 260 (1998) (describing delays in availability of second preference immigrant visas); see also U.S. Department of State, Visa Bulletin, http://travel.state.gov/visa_bulletin.html (last visited May 4, 2003).

often seems to function more as a family-based immigration category . . . than a means of rescuing persons from persecution."¹⁵⁸

There are four possible justifications for this favoritism. One is the communitarian argument that the greatest concern is owed to those most closely connected to Americans, and, relatedly, that in constituting their community Americans are entitled to welcome people who have a direct connection with the current population.¹⁵⁹ Family reunion looms large as a purpose of American immigration law generally,¹⁶⁰ and of international refugee law as well.¹⁶¹ Interestingly, though, the family reunion priorities for refugee resettlement allow the "anchor" relative in the U.S. to be not only a citizen but also a resident alien, refugee, asylee, conditional resident, or a parolee.¹⁶² In other words, many of the people whom the selected refugees are coming to join have a relatively tenuous connection to this society themselves. In these cases the U.S. is not so much continuing its community as relocating a foreign one.

A second, related, reason for favoring family members is as a form of private advantage. Just as some alien admissions are designed to help the country as a whole, some benefit individual Americans or American organizations or constituencies. Such is the case with immigration preferences based on family relationships. Family reunion in refugee resettlement aims to confer a boon on the receiving relatives, who may be relatively recent arrivals themselves for whom reestablishing family connections is very important.

A third possible reason to accept persons with U.S. family ties would be their greater ability to assimilate in American society.

158. Fitzpatrick & Pauw, *supra* note 17, at 763.

159. WALZER, *supra* note 82, at 41, 49.

160. See, e.g., Guendelsberger, *supra* note 157, at 254. Of the 660,477 legal immigrants in FY 1998, 72% came on the basis of family relationships to U.S. citizens or resident permanent aliens.

161. As the Final Act of the U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 28, 1951, IV B, 189 U.N.T.S. 137, 143, states:

Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee. . . .

Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

(1) Ensuring that the unity of the refugee's family is maintained, particularly in cases where the head of the family has fulfilled the necessary conditions for a particular country. . . ."

162. See Priority Three, *supra* note 39.

This of course is a factual question. Studies have shown that unaccompanied children who were resettled without a family member "experienced a greater degree of disturbance than those who were able to establish contact with at least one such relative within the United States."¹⁶³ For refugees in general, the existing literature consistently stresses the importance of the family to adjustment and the extent to which refugees seek to reconstruct family ties.¹⁶⁴ Similarly, the presence of their own ethnic community in the U.S. can ease refugees' transition to America.¹⁶⁵

The fourth justification, to use the term loosely, is that U.S. family ties are relatively easy to administer as a basis for refugee selection. There is no need to investigate country conditions, and the relevant "witnesses" to the underlying facts are in the U.S. While fraud is, of course, possible, it is probably less likely and easier to detect than in ordinary claims of feared persecution.

In some sense, however, the use of family ties in refugee resettlement can be seen as an admission of defeat in efforts to protect the vulnerable—a reversion to traditional immigration predilections when more need-based policies are too troublesome to implement. At the least, family-based refugee selection evinces a very weak commitment to assisting the most threatened.

B. Refugees Most Likely to Contribute

Once the U.S. opens up the possibility of choosing refugees on the basis of their perceived benefit to American society (or individual American residents), as with family and cultural connections, it can consider whether the same principle applies to refugees' prospective economic (or artistic, academic, cultural, etc.) contributions. Defenders of refugee resettlement often point to the achievements of individual refugees, and there certainly have been some remarkable examples, starting with Albert Einstein.¹⁶⁶ This approach has historical precedent. In the period

163. Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL'Y REV. 137, 175 (1989) (citations omitted).

164. David W. Haines, *Patterns of Refugee Resettlement and Adaptation*, in REFUGEES IN AMERICA IN THE 1990S 28, 45 (1996) ("[F]amilies . . . are . . . capable of easing many of the problems of adjustment to the United States.").

165. *Id.* at 47.

166. 2001 *The Year in Review*, REFUGEES, Jan. 2002, at 20. See also Remarks of the President Upon Signing Executive Order 11,860 Establishing the Committee on Refugees From Southeast Asia, 11 WEEKLY COMP. PRES. DOC. 531 (May 19, 1975) (trying to build support for Vietnamese refugees in 1975, President Gerald Ford stated, "[t]hey are people of talent,

after World War II, resettlement countries scrambled to gather refugees with the “proper” skills,¹⁶⁷ leaving behind a “hard core” of the aged, infirm, disabled, and others considered to be economic liabilities.¹⁶⁸

Work skills or experience do not figure in current resettlement priorities, except very indirectly where past employment with U.S. entities is considered. Of course, family connections with U.S. citizens, residents or prior entrants may imply higher than average job skills, as may the kinds of people who are persecuted or are mobile enough to flee their homes.¹⁶⁹ In theory however, there is no reason why refugee applicants could not be screened for education, work experience, English language ability, and other employment-related attributes. Interestingly, today this screening would probably be viewed as unfairly giving precedence to domestic economic considerations in obvious disregard of refugees’ degree of need. Selection based on talent also can damage refugee camps’ social structure.¹⁷⁰ Although based on national interest as well, family or cultural connections are for some reason deemed much more defensible.

C. Cultural Ties

What role should cultural connections (ethnic, religious, or historical) between the refugees and the receiving country play in refugee selection? In other words, should there be a principle favoring the admission of persons, otherwise meeting a threshold level of eligibility, whose cultural background resembles that of large segments of the present U.S. population? As a factual matter,

they are industrious, they are individuals who want freedom and I believe they will make a contribution now and in the future to a better America”); Editorial, *Tougher Policies on Refugees*, N.Y. TIMES, Feb. 19, 2002, at A18 (“[P]rosperous countries like the United States and Australia have found that refugees and their children can become among their most devoted and productive citizens.”).

167. LOESCHER & SCANLAN, *supra* note 18, at 19–21; LOUISE HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION: A SPECIALIZED AGENCY OF THE UNITED NATIONS 366–67 (1956). See Displaced Persons Act of 1948 § 5 (a) (giving priority to “farm laborers, physicians, dentists, medical nurses, household, construction, clothing and garment workers; or aliens possessing educational, scientific or technological qualifications.”).

168. HOLBORN, *supra* note 167, at 481–92.

169. See HAINES, *supra* note 164, at 31 (Generally, “refugees come to the United States with relatively high occupational skills and educational levels as compared with their compatriots in country of origin, if not always with the general American population or other immigrant groups.”).

170. See *supra* text accompanying notes 127–28.

America seems to have taken that tack not only in applying the Refugee Act and other legal devices to favor, for example, Cubans over Haitians,¹⁷¹ but in actually amending the Act to codify certain "cultural" preferences.¹⁷² It must be said, however, that the favored cultural linkages have resulted more from domestic political pressure by members of ethnic/religious communities than from a consideration of the philosophical fine points of cultural continuity.

A fairly large literature examines the relative value of cultural connection in immigration in general.¹⁷³ The question here is whether different considerations apply to refugee resettlement. When forced to choose among people in distress, many Americans may lean towards "people like them" in a kind of conscious or unconscious affinity.¹⁷⁴ Michael Walzer explicitly recommends such partiality.¹⁷⁵ Selection of the culturally similar, it may also be said, maintains cultural continuity (and minimizes cultural discontinuity) in the larger society; such refugees may therefore be easier to assimilate than groups with little or no history in the U.S., reducing the friction that sharp cultural differences can sometimes produce.¹⁷⁶ In addition, even more perhaps than family ties, cultural, ethnic, and religious affiliations are relatively easy to substantiate. On the other hand, cultural connections, like family ties, are unrelated to need *per se*, and in some sense represent an abandonment of the rescue premise of resettlement. Thus, when the Lautenberg Amendment created presumptions of persecution for certain Ukrainian, Soviet, and Vietnamese groups,¹⁷⁷ it was generally con-

171. Melissa Lennox, Note, *Refugees, Racism and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 715-16 (1993).

172. Pub. L. No. 101-167, § 599 (D)(9), 103 Stat. 1195, 1261-62 (1989) amending 8 U.S.C.A § 1157 (1994 & Supp. IV. 1998) to create a presumption of refugee status for Soviet Jews and Pentecostals, active members of the Ukrainian Catholic and Ukrainian Orthodox Churches, and certain groups of Vietnamese. This legislation is commonly known as the Lautenberg Amendment, after its sponsor.

173. WALZER, *supra* note 82. See, e.g., Jules L. Coleman & Sarah K. Harding, *Citizenship, the Demands of Justice, and the Moral Relevance of Political Borders*, in JUSTICE IN IMMIGRATION 18, 18-62 (Warren F. Schwartz ed., 1995); Jean Hampton, *Immigration, Identity, and Justice*, in JUSTICE IN IMMIGRATION 67, 67-93; Stephen R. Perry, *Immigration, Justice, and Culture*, in JUSTICE IN IMMIGRATION 94-135.

174. Louis Michael Seidman, *Fear and Loathing at the Border*, in JUSTICE IN IMMIGRATION, 136, 137-40 (calling this "the problem of bounded caring"). "Membership in a community—be it a family, a cultural grouping, or a nation—does seem to entail a special concern for the welfare of other members." *Id.* at 139.

175. See text accompanying *supra* note 86.

176. For an extreme example, see Sarah Lyall, *Lost in Sweden: A Kurdish Daughter is Sacrificed*, N.Y. TIMES, July 23, 2002, at A3 (father killed daughter who broke with Kurdish traditions to pursue an independent life in Sweden).

177. See *supra* note 172.

sidered to have favored cultural connections over refugees facing greater hardship elsewhere in the world.

Selection by cultural connection also presents a practical problem: just what is culture? Is it national origin or race? The first smacks of the old national origins quota system abandoned in 1965.¹⁷⁸ Explicitly using race as a ground for refugee resettlement is almost inconceivable, and it is hard to imagine a conscious effort to tip the country's racial composition by this means. In any case, what race does not have a link to present-day Americans?

That leaves factors like language, customs, or religion as cultural indicators. English language ability is hard to find in most refugees, though perhaps it could be a positive selection factor. Similarity in customs is difficult to judge and hardly carries much weight by itself. Interestingly, the strongest cultural element might be religion. Congress has already demonstrated its special concern for persecuted Christians and Jews in the Soviet Union through the Lautenberg Amendment,¹⁷⁹ and it is easy to imagine the U.S. refugee program favoring these groups—in preference to others—if they were persecuted elsewhere.

One can make too much of parsing the elements of “culture,” however. There may be times that historical and cultural connections would provide, for most Americans, a satisfactory ground for choosing one group of refugees over another. If the Nazis had occupied Britain in 1940, or Canada was overrun by a foreign power today, it seems likely that citizens of these countries would receive a disproportionate share of our concern. On the other hand, so-called cultural connections can easily become an excuse not to decide who are the most deserving, a convenient default, or a path to a parochial, or even racist, narrowing of compassion.

VI. MAXIMIZING THE IMPACT OF REFUGEE RESETTLEMENT

Choosing among the criteria just discussed involves weighing incommensurate values—comparing apples to oranges one might say. The wide range of public and scholarly opinion on refugee selection illustrates this dilemma. How can the needs of individual refugees be weighed, for example, against the interests of the

178. Select Comm'n on Immigration and Refugee Policy, U.S. Immigration Policy and the Nat'l Interest, Staff Report 161, 163–64 (1981).

179. See *supra* note 172.

nation, or of some of its inhabitants? Phrased this way, these questions have no obvious resolution. Moreover, the balance among them will vary with the circumstances of each refugee crisis and the world politics of the time.

In these circumstances the designation of the decision-maker is quite important, for that person or institution will resolve the competing claims. As described above, refugee selection is now largely an Executive branch responsibility, with non-binding input from Congress and interested voluntary agencies.¹⁸⁰ Through amending legislation, Congress could of course enlarge its role in any number of ways.¹⁸¹ In another variation on decision-making authority, Stephen Legomsky has suggested that an Independent Refugee Board be delegated to set refugee admission numbers and priorities.¹⁸² While acknowledging that such a Board would need to take account of foreign policy and other national interests, Legomsky sees its main advantage as giving greater emphasis to refugee needs and human rights in the selection process.¹⁸³

A second method of sharpening the choices would be to allocate the overall refugee admissions quota among the various purposes of refugee resettlement. Thus a certain percentage or number would be devoted to the neediest refugees, another segment to foreign policy, another to family reunion, and so on. This process could be effected through legislation, or (more sensibly) in each year's refugee determination. Its advantage is the explicit identification of the aims being pursued, as well as the fact that each valid purpose would get at least some admission slots. Separate programs, or allocations, would reduce the sub rosa competition among the uses of refugee admissions, particularly foreign policy and rescue purposes. The disadvantages, however, outweigh these arguments. For one, separating the programs still ultimately requires choice among the several competing uses of refugee resettlement and provides no guiding principle to make that choice. Secondly, it would inhibit flexibility in an area where priorities are constantly shifting.

A third means of identifying criteria for refugee selection would be to recognize some kind of overarching principle. Refugee selec-

180. See text accompanying *supra* notes 26–42.

181. For a thoughtful examination of the pros and cons of more detailed legislative specification of refugee admissions, see Legomsky, *supra* note 17, at 703–08.

182. *Id.* at 708–13. This Board could also administer overseas refugee selection. Anker and Posner proposed a Board for the Determination of Refugee Statues and Asylum that would hold hearings on the appropriate allocation of overseas refugee admissions and report its findings to Congress. Anker & Posner, *supra* note 21, at 79–81.

183. Legomsky, *supra* note 17, at 711.

tion involves a choice among competing goods. In that sense, it can be said that the "wrong" choices do not produce a great loss because, after all, most of the refugees taken will be better off to some degree, even if other people (or the U.S.) might have been "more" better off if those others had been selected instead. The question in overseas resettlement is much less about avoiding negatives than about maximizing positives.

This suggests a principle by which to evaluate the relative value of different criteria and methods for refugee resettlement: maximizing the beneficial impact on the endangered populations and/or to the United States.¹⁸⁴ This suggestion might seem simply another way of stating the issue, because reasonable people can disagree about which consequences to measure and about the relative importance of the ones we choose. This principle does, however, have a normative effect in identifying more and less worthy aims of our overseas resettlement program. For one, it suggests that satisfaction of the refugee definition (however loosely or stringently administered) is not by itself enough to justify selection, even though the individual refugee would benefit from resettlement. Instead, the decision-makers need to assess what secondary gains will flow from choosing a particular individual or—more usually—group. In other words, we need to pay special attention to what is on the "plus" side of the "refugee plus" equation.

A. Low Priority Bases for Refugee Selection

Looking at benefit maximization eliminates or puts at very low priority certain bases for refugee selection. These include family reunion other than between spouses or parents and their minor children, as well as certain foreign policy purposes. In addition, this Section considers, and rejects, the idea of choosing resettlement candidates by lot.

184. One could argue that the benefit to be measured ought only be that received by the endangered population. While this contention is certainly plausible, as discussed earlier, there are two major problems with it. One is that it is an arbitrary resolution of the question of what values ought to predominate, and, indeed, just what the purpose of a resettlement program ought to be. Secondly, even on its own terms it can encompass refugee admission for foreign policy purposes, since, at least arguably, such actions will eventually redound to the freedom or safety of some foreign population. This was one argument in favor of pursuing resettlement from, for example, Cuba and Vietnam.

1. *Family Ties*—Overall benefit maximization dictates that the only family ties that should be used as a basis for refugee selection are those between spouses or parents and their minor children. While it is certainly true that family reunion is an important goal for refugees and their U.S.-based relatives, and that to some unspecified degree it would aid the refugees' adjustment to American society, these advantages pale in comparison to other possible applications of resettlement. These uses simply do not have enough of a multiplier effect. In particular, family ties that would not give rise to normal immigration preference, or that would do so but in a much longer time frame, should not be grounds for selection. Admittedly, this suggestion would conflict with some, if not most, refugees' cultural views of family unity. The main point, though, is that other uses of refugee resettlement outweigh the desires of those who themselves have already been admitted to the U.S.

The degree of family connection that should be recognized in normal U.S. immigration is itself subject to debate, with a trend toward taking only nuclear family members.¹⁸⁵ While constitutional rules do not control this issue, it is worth noting that constitutional protection of family rights to reunion is limited to parent-minor child and spousal relationships.¹⁸⁶ Refugee selection should be at least as restrictive, given that family reunion is well accommodated in general immigration law and that there are other demands on U.S. admissions that can be met only through the refugee quota. Refugee processing should not be the leading edge of family preference in American selection of new residents, as it has sometimes been.¹⁸⁷ Indeed, where it is so employed, it is hard not to conclude that family ties are being used as a default—an easy way to choose among otherwise undifferentiated masses.

Potential refugees generally should not be given preference over other immigrants on family reunion grounds. Their U.S.-based relatives ordinarily should employ the usual immigration preferences in bringing them here. However, when the potential refugee is a spouse or minor child of the U.S.-based relative, the gains in family support justify selection priority. This is particularly true for refugee children, for whom being with a parent is especially crucial.¹⁸⁸ Aside from a parent-minor child or spousal connection,

185. Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 511-13 (1995).

186. Guendelsberger, *supra* note 157, at 266.

187. See *supra* text accompanying note 39.

188. EVERETT M. RESSLER ET AL., UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS, 147-51, 326 (1988). In fact, for unaccompanied children the value of family reunion may be strong enough that more ex-

however, family connections between a potential refugee and a relative in the U.S. should not be a consideration in refugee selection—though they could of course be grounds for a regular immigrant petition if and when those qualifications are met.

2. *Certain Foreign Policy Purposes*—As discussed above, there are a variety of possible foreign policy uses of refugee resettlement.¹⁸⁹ Some certainly meet the standard of benefit maximization, most notably refugee burden-sharing.¹⁹⁰ Acceptance of refugees who have cooperated with or assisted U.S. interests obviously has the effect of not only helping those individuals but encouraging their compatriots, and perhaps other people in other places, to render similar assistance. While taking refugees whom the U.S. has “created” may bring no tangible extra payoff,¹⁹¹ it has the added benefit of satisfying what is widely regarded as an important moral obligation.¹⁹²

On the other hand, certain foreign policy objectives are unworthy of valuable resettlement slots. As discussed above, embarrassing a nation by demonstrating its citizens’ willingness to flee is unnecessary in today’s world, and, in any event, unlikely to be accomplished through refugee resettlement.¹⁹³ The fact is that many millions of people would move to the U.S. if they could, for a host of reasons.¹⁹⁴ Using refugee resettlement to undermine the economic or social structure of a country is also an expensive (in terms of the numbers needed) and probably fruitless task.

3. *Lottery*—Given the difficulty of assessing relative need, and the perceived unfairness of using other grounds, the choice among the qualified could be made by lot. In a variety of contexts, lotteries are receiving increased attention as a fair way to dispense scarce goods.¹⁹⁵ In the immigration field itself, approximately 55,000

tended family connections—for example, grandparents—should be legitimate grounds for refugee acceptance. See e.g., Daniel J. Steinbock, *The Admission of Unaccompanied Children into the United States*, 7 YALE L. & POL’Y REV. 137, 195–96 (1989).

189. See *supra* text accompanying notes 113–155.

190. See *supra* text accompanying notes 142–53 and text accompanying note 202 *infra*.

191. This category tends to overlap with the previous one in that refugees we created are often, though not always, people who have cooperated with U.S. activities.

192. See *supra* text accompanying notes 113–120.

193. See *supra* text accompanying notes 123–24.

194. See *supra* note 13.

195. *Lottery Offers California Teachers Cheap Housing* (CNN television broadcast, June 22, 2001) (discussing distribution of public school subsidized housing to teachers in Silicon Valley); Owen M. Kendler, *Auction Theory Can Complement Competition Law*, 23 U. PA. J. INT’L ECON. L. 153, 158–60 (2002) (FCC lottery to distribute spectrum rights for wireless phone services); Lani Guinier, *Democracy’s Conversation: Beyond Winner Take All*, THE NATION, Jan. 23, 1995, at 88. (proposing admissions lottery among minimally qualified college applicants); 20

diversity visas a year are distributed in a carefully regulated lottery.¹⁹⁶ Diversity visas are designed to enhance the "regional diversity" of immigration, and citizens in countries of high-immigration to the U.S. are ineligible. Visas are allocated by region, but within each region there is a pure lottery among eligible applicants.¹⁹⁷ Applicants for the diversity visa lottery must have a high school education or comparable work experience. Individuals may enter each year's lottery only once.¹⁹⁸

Adapting some of these principles to refugee selection might produce a novel system in which all putative refugees who wanted to be considered for resettlement would submit an application and the designated number would be selected from the global pool.¹⁹⁹ The "winners" would then be screened to see if they met the refugee definition and other qualifications.²⁰⁰ One variation on this proposal would be to direct the lottery at those who were first found to be in a certain level of danger or hardship, producing a more targeted lottery. The more widespread the eligibility, however, the less would be the utility, and temptation, of lobbying for favored groups.

There are several potential logistical problems with a refugee lottery. One is simply distributing application forms. It would be difficult to fairly and comprehensively publicize the lottery, make the applications available, and provide translation and writing services for all who wanted to apply. Some refugees have no effective mailing address, even in refugee camps, and others move. The follow-up determination of refugee status would be logistically even more difficult than it is now, because the winners could come from anywhere in the world. Practical reasons, therefore, may require limits on who may apply, which undercuts the point of a lottery.

More basic objections exist, however. The underlying moral assumption of a lottery is that no refugee is more, or less, deserving or useful than any other, whether it be for reasons of foreign pol-

U.S.C. § 8066 (1998) (admissions lottery for oversubscribed charter school places as a condition of federal funding of states' charter school programs).

196. Immigration and Nationality Act, 8 U.S.C. § 1153(c).

197. For a general description of the diversity visa program and its origin, see THOMAS ALEXANDER ALEINIKOFF ET. AL., *IMMIGRATION AND CITIZENSHIP*, 290-92 (4th ed. 1998); STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 235-41 (3d ed. 2002).

198. 22 C.F.R. 42.33(a)(4).

199. There would be no reason to allocate these slots on a regional basis, as with diversity visas, because this method assumes that refugees from one region are no more deserving than those from any other part of the world.

200. In traditional asset allocation by lot, such as spectrum lotteries, the applicants are first screened for the relevant qualifications and only the eligible ones are allowed to enter. Kendler, *supra* note 195. Because with refugees there are so many potential entrants and eligibility questions are so fact-intensive, this proposal reverses the usual order.

icy, family connection, culture, politics—or even degree of risk.²⁰¹ This is also the strongest objection to a refugee lottery: that it expresses no values whatsoever, other than that some refugees should be resettled. Use of a lottery thus abandons any concern for the neediest, as well as all other instrumental reasons for admitting endangered foreigners. A lottery makes sense only when we have no defensible criteria for choice.

B. High Priority Bases for Refugee Selection

Maximizing the impact of refugee resettlement means consciously trying to leverage its use. Just how this works out in any given year will depend upon developments in both global politics and refugee conditions, but it does imply a more targeted approach. This Section presents four suggestions for maximizing the beneficial impact of overseas refugee resettlement. These would not necessarily account for a year's entire refugee quota when employed.

1. *Burden-Sharing*—The enhancement of asylum opportunities through burden-sharing is the prototypical way to maximize the benefits of refugee resettlement. American resettlement can encourage other countries' resettlement, as well as assure countries of first asylum that they will not bear the refugee influx alone.²⁰² To return to the Kosovo example, U.S. acceptance of some 14,000 Kosovars was an integral part of the total international resettlement of 92,000. Resettlement in the U.S. further ensured local protection of 250,000 other refugees in Macedonia, as well as Macedonian cooperation with NATO military activities.²⁰³ While there is always the danger, as UNHCR recognized in Kosovo, that the possibility of burden-sharing will prompt the host country to make initial asylum for clamoring refugees contingent on resettlement by other states, thereby undermining basic non-*refoulement* obligations, burden-sharing remains a worthy aim of refugee resettlement. By admitting refugees from their first countries of asylum,

201. If, in fact, one of these factors (or others) was deemed of some importance, the lottery could, in theory, be weighted accordingly.

202. U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 26, at 7 ("U.S. pledges of resettlement and support for the protection mandate of UNHCR encourage other nations to provide first asylum to new arrivals and serve as an example to other resettlement nations.")

203. See *supra* text accompanying notes 149–151; Roger P. Winter, *The Year in Review*, in WORLD REFUGEE SURVEY 2000, 14, 17 (2000).

the U.S. can in certain circumstances enhance those nations' willingness to accept and keep other refugees, thus leveraging the benefits of refugee resettlement far beyond the numbers actually taken.

2. *Promoting Democracy and Human Rights*—One way of minimizing refugee crises, not to mention improving conditions for people who have not yet been displaced, is to confront conditions in the country of origin—what have come to be called the “root causes” of refugee flight. This is a complicated endeavor and no doubt is easier said than done.²⁰⁴ The difficulties of one, or even several, countries trying to influence another country's internal policies are many, particularly through the use of overt action.²⁰⁵

One less confrontational approach is to encourage internal advocates working for democracy and human rights. Because such activities can be highly dangerous, human rights workers are often compelled to flee for their safety. Such victims of political persecution are the archetypical refugees, eligible for both asylum and refugee resettlement.²⁰⁶ These remedies, however, are purely reactive. And while quite necessary as life-saving measures, asylum and resettlement have the perverse effect of facilitating the exile (and therefore often the neutralization) of regime opponents. It is true, of course, that self-exiled activists are theoretically free to return, and that some do, but the fact is that their acceptance of foreign sanctuary can relieve political pressure on oppressive states.²⁰⁷

A better use of refugee admission slots for human rights proponents would be to assure these advocates (and their families) refugee resettlement *before* they are compelled to flee. The aim would be to encourage their human rights efforts by giving them some assurance of safety should their situation become too precarious, without requiring them to leave first.

American diplomats, voluntary agency personnel, or even undercover operatives would be responsible for identifying these individuals and informing them of their potential refugee status. Refugee designation would work like an immigrant visa, allowing

204. Schuck, *supra* note 104, at 261–62; Hathaway & Neve, *supra* note 154, at 134 (“[T]here is no evidence to date of an international commitment to intervene against the root causes of refugee flows.”).

205. On the legality of covert and nonviolent intervention in another nation's internal affairs, see generally Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989).

206. See ZOLBERG ET AL., *supra* note 71, at 269 (describing this category of person as “activists”).

207. Darst, *supra* note 129, at 243 (noting danger that “relocation will extend the ‘service life’ of a repressive regime by ridding it of troublesome dissidents.”)

the individual to enter the U.S. and remain, though without the usual time limitations on visa use. If it succeeded, this technique could improve the human rights situation in the country of origin—a good in itself—and potentially decrease the likelihood of forced migration. This use of refugee admission could be accomplished at very little cost (since the slots might never be used) and potentially have a much greater impact than just taking endangered refugees who have already escaped.

This proposal also carries some risks. One is that people would be just active enough to receive their “letters of transit”²⁰⁸ and then quickly depart, which would actually exacerbate the exile phenomenon mentioned above. Secondly, the offending government could accuse its opponents of acting only out of personal desires to emigrate to the U.S., and not for the good of their compatriots. This criticism would be particularly acute if it were known that the particular activist had in fact received a refugee admission promise. Third, this practice might compromise the ability of U.S. diplomats and other Americans to move freely in the country and meet with the political opposition. It also might poison already strained diplomatic relations between the U.S. and the host country. With potential problems of this sort, it would be advisable to try this kind of pre-emptive or proactive refugee selection on a small scale to see how it worked before making it a large part of the overseas refugee program.

One variation of this idea would be to give a promise of resettlement to refugees already in camps outside their countries of origin on the condition that they return to work against the persecution or other conditions that caused them to flee in the first place. If their efforts failed or became too risky, they would have resettlement to fall back on. Promoting return to countries of potential persecution, of course, could be quite dangerous and would not be appropriate for every situation. It is also open to the criticism of being too manipulative—of coercing participation by putting a price on refugee status.²⁰⁹ “Freedom fighters” are often given U.S. incentives, and in circumstances of limited choice it is not so farfetched to favor people who have made the effort to rid their country of the oppression that made them refugees in the first place. To the extent their actions reduce oppression, here

208. This phrase is taken from the film *Casablanca*. See Steinbock, *supra* note 132, at 656–57 (describing the letters of transit, which were essentially exit visas leading to asylum in the U.S., as a “sort of bearer bond for freedom”).

209. Another objection is that directing refugee places to those who take action against oppressive conditions in their homelands would, in effect, favor men over women.

again refugee selection would have a multiplier effect. Given the risks involved, however, this use of refugee resettlement would have to be conducted carefully.

3. *Concentrating the Impact*—As things stand now, most people chosen by the U.S. refugee resettlement program are taken from refugee camps in the designated countries and regions.²¹⁰ Given the way processing is conducted, this may mean that a minority of people—sometimes just a handful—will be taken from any given camp or refugee settlement. Moreover, the impact of the processing priorities tends toward “creaming” off the best and brightest refugee camp inhabitants.²¹¹ The degree to which a refugee camp can ever be a “community” is debatable,²¹² but there is no question that departure of the most talented can undermine its social structure. The author observed this himself while working as education coordinator in Khao I Dang, the largest Cambodian refugee camp in Thailand in 1980–81. With each overseas resettlement selection a segment of teachers and administrators would abruptly but happily depart, leaving disruption in the schools and dismay among the remaining students and teachers. Serious depression among those left behind, survivors of the Pol Pot era, was common in the wake of these events, and camp morale never fully recovered.

To minimize these effects, resettlement opportunities can be concentrated on whole, discrete refugee populations, or at least entire camps. This would not only give these groups whatever benefits refugee resettlement normally provides but would prevent the spillover harms just described. In some cases it could even resolve an entire refugee situation.²¹³ Additionally, concentrated selection would minimize the cost and practical problems of interviewing and choosing those to be taken. The more focused the process is on fewer locales the more efficient it will be.

210. The discussion that follows does not apply to the acceptance of refugees directly from their own countries. See *infra* notes 217–20.

211. Bill Frelick, *Humanitarian Evacuation from Kosovo: a Model for the Future?*, in WORLD-WIDE REFUGEE INFO. (2000) (arguing that this leaves countries of first asylum “with the ‘residuals’—the unskilled, the unhealthy, the uneducated—those most threatening or burdensome to local communities.”).

212. On the controversy over whether refugees living in temporary exile, particularly in camps, form a community in any meaningful sense of the word, compare Gervase Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373 (Gil Loescher & Laila Monahan eds., 1990) with UNHCR *Refugee Children: Guidelines on Protection and Care* 32–34 (1994).

213. For example, prior to the attack on Iraq in spring 2003, Bill Frelick urged resettlement of 5,000 Iraqi refugees living in a squalid camp in Saudi Arabia, the remainder of a group of 33,000 Shi’a Iraqis who fled after their uprising in 1991. Frelick, *supra* note 4, at 31.

It may sound cruel to suggest that some refugee populations or camps be targeted while others are ignored totally, but refugee admissions have never been "fair" or open to all. South American and African refugees, for example, have been slighted since before the Refugee Act of 1980 went into effect, and the regional designations themselves skew admissions. Second, as this Article has consistently tried to demonstrate, wrenching choices inhere in the whole process, and a theoretical wide eligibility coupled with a small number of actual selections is no favor to anyone. The idea of concentrating selection where it will do the most good, and the least harm, is a more rational and no less fair response.

4. *Finding the Most Threatened*—As discussed above, many view rescuing persons currently at greatest risk of persecution or other serious harm as the highest and best use of U.S. refugee resettlement.²¹⁴ While such a priority does not have the secondary benefits of the other suggestions in this Section, it does have the virtue of making the most dramatic changes to the lives of the refugees who are thus accepted. In that sense, it maximizes the direct gains of each refugee slot allocated.

A renewed focus on finding the refugees most in need of resettlement has at least two implications. One is simply a greater effort to identify and process these individuals. At present, the U.S. relies on UNHCR for referrals of Priority One cases. "UNHCR, however, often lacks the resources to devote to resettlement, and agency staff in field offices sometimes feel that their own priorities become distorted by demands from resettlement countries."²¹⁵ As Bill Frelick suggests, UNHCR recommendations could be augmented by those from U.S. diplomatic personnel, who in turn can be advised by nongovernmental organization (NGO) staff.²¹⁶ Indeed, NGO staff working directly with refugees in countries of first asylum seem ideally situated to discover the most pressing cases. Because these relief workers have their regular duties to perform, the U.S. could pay for additional NGO personnel whose main responsibility would be to identify threatened individuals.

If the U.S. is serious about resettling persons most at risk, though, refugee selection should look outside the refugee camps where most processing now takes place. Instead, the U.S. should increase efforts to rescue persons still facing persecution, most of

214. See *supra* text accompanying notes 92–111.

215. Frelick, *supra* note 4, at 30.

216. *Id.* Frelick also suggests that resettlement countries such as the U.S. pay for more UNHCR protection officers, who do the initial refugee status interviews and paperwork.

whom are still in their homelands. In resettlement argot this is called "in-country processing." It has been used in the past, mainly with Vietnamese (Orderly Departure Program) from 1980-94 and Soviet Jews and Evangelical Christians from 1988-98.²¹⁷ Refugees have also been taken directly from Haiti and Cuba.²¹⁸

In-country processing has the advantage, for the refugees, of not requiring dangerous travel (in boats, in the Vietnam, Haiti and Cuba examples) and of assuring, prior to departure, entrance to the U.S. Its main benefit for the U.S. is that it keeps unsuccessful applicants at home, with the attendant social and financial savings. The main disadvantage is that the country of persecution controls access to the escape route and therefore who even gets to apply for processing.²¹⁹ The authorities can thereby learn who applies, possibly exposing refugee applicants to greater danger or otherwise making their lives more difficult.²²⁰ When the home country does not currently see the applicant population as much of a threat, this is not a serious problem, as the Vietnamese and Soviet examples show, but in other circumstances in-country processing would be perilous or inadvisable.

Nevertheless, a resettlement program devoted to rescuing the most desperate should be willing to take some chances beyond what is bureaucratically comfortable. If the U.S. is going to save victims of on-going persecution in their own countries, it may need to reach out in unconventional ways. This might mean using more clandestine methods of identifying and processing applicants than having them publicly present themselves at the doors of the U.S. embassy. If these people are in as much danger as the rescue theory supposes, the U.S. resettlement program should be willing to meet them at least half way. In-country selection will never be a complete substitute for refugee processing in countries of asylum, and certainly not for asylum application in the U.S. itself,²²¹ but as a

217. Raufer, *supra* note 109, at 245-52; Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 IOWA L. REV. 671, 682-84 (1996).

218. Carlos Ortiz Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration and Foreign Policy*, 32 SAN DIEGO L. REV. 673, 718-21 (1995); Bill Frelick, *Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection*, 26 CORNELL INT'L L.J. 675 (1993).

219. U.S. COMM'N ON IMMIGRATION REFORM, *supra* note 26, at 50.

220. *Id.* at 49.

221. The major objection to in-country refugee processing comes when it is imposed as a substitute for allowing access to U.S. asylum adjudication, as was done with Haitians in 1991. See Raufer, *supra* note 109, at 251-61; Frelick, *supra* note 218, at 689-92. This concern is not implicated by the suggestion here to increase its use in ordinary overseas refugee processing, which is generally a supplement to, not a substitute for, asylum application.

means to protect the most vulnerable it could provide a useful adjunct to those routes to refugee status.

VII. CONCLUSION

The admissions slots currently available to “refugees of special humanitarian concern to the United States” can be seen less as a form of refugee relief than as a visa bonanza to be awarded by the Executive branch outside the rigid constraints of normal immigration law. It is therefore understandable that this pool of admissions places would be tugged in several different directions. Foreign policy and rescue can both be legitimate uses of refugee resettlement. The problem is that these potentially conflicting purposes compete for a limited, and largely fixed, pool of admissions. Moreover, though the number of resettled refugees is not small in absolute terms, it pales in comparison to need, however conceived.

This disparity may have the perverse effect of freeing decision-makers from having to pay serious attention to the highest and best uses of overseas resettlement, in the implicit belief that their selection will have no significant effect on the underlying problems anyway. To some degree, this makes it more palatable to give in to bureaucratic or political pressures, and even to allow traditional immigration concerns to work their way into a resettlement program for refugees.

Refugee admissions will never approximate the number of oppressed, endangered, or suffering people in the world, and only separation into several distinct programs would eliminate the competition for existing refugee admissions among the differing purposes it serves. Even such a restructuring would not eliminate the necessity of choice, however.

This Article has proposed a more modest reorientation: a greater emphasis on maximizing the benefits—to the U.S., to the accepted refugees, and to the populations from which they are taken—of refugee selection. Attention to benefit maximization moves beyond rivalry among the various potential aims of refugee resettlement and toward a more practical and flexible focus. For the most part, this approach needs to be worked out year-by-year and situation-by-situation, but some general priorities and methods can be applied on a regular basis.

On the one hand, certain foreign policy purposes of refugee resettlement and most uses of family ties should be rejected as

selection criteria. The Article also dismisses the idea of a refugee lottery. On the other side of the equation, the Article encourages the use of refugee resettlement in two contexts: refugee burden-sharing with other countries and the promotion of democracy and human rights in countries of origin. It also recommends that the impact of refugee selection be concentrated, so that whole camps or communities are resettled rather than dispersing selection widely over populations and regions. Finally, the Article urges more active efforts to rescue the people most immediately and seriously threatened.

Admittedly, these proposals do not always resolve the conflict among the various uses of refugee resettlement. Nor do they completely answer the more profound underlying questions of which of the world's millions suffering, oppressed, or endangered people the U.S. should reach out and receive. They try, instead, to make more rational use of a scarce resource, one that is valuable to both giver and recipient.