

# University of Michigan Journal of Law Reform

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Volume 17

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1984

## A Commentary on American Legal Scholarship Concerning the Admission of Migrants

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### Recommended Citation

James A. Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. MICH. J. L. REFORM 165 (1984).

Available at: <https://repository.law.umich.edu/mjlr/vol17/iss2/5>

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# A COMMENTARY ON AMERICAN LEGAL SCHOLARSHIP CONCERNING THE ADMISSION OF MIGRANTS

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James A.R. Nafziger\*

Scholarship on immigration law has often overlooked an international legal framework. Consequently, immigration decisions sometimes ignore constraints of international custom. In concrete human terms, the end result is to make it difficult for a prospective migrant to convince immigration authorities that, under normal circumstances, international law protects a freedom of movement which may entitle the petitioner to documented entry.

The following essay will focus attention on American legal scholarship concerning the admission of migrants.<sup>1</sup> This topic is instructive and practical because of its impact on both municipal and global law. An eminent international jurist observed that greater foresight by scholars twenty-five years ago could have averted many current problems of migration.<sup>2</sup> Today, these problems arise from such sources as the population explosion, periodic droughts, the pull factor of opportunities in advanced economies, and massive political unrest in the Horn of Africa, Afghanistan, Southeast Asia, Central America, and elsewhere.<sup>3</sup> Migrants are knocking at the gates of sovereignty, even crashing some of them down. Until recently, every fifth person in

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1. This Article will not focus on issues concerning the welfare of migrants either during or after their international movement. Thus, the issue of labor exploitation through illicit and clandestine trafficking, though it involves the movement and entry of laborers, lies beyond the scope of these comments. See Warzazi, *Exploitation of Labour through Illicit and Clandestine Trafficking*, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (Report of the Special Rapporteur), U.N. Doc. E/CN.4/Sub.2/L.640 (1975). Also, this Article will not specifically examine such related issues as emigration or voluntary return. See Inglés, *Study of Discrimination in respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Own Country*, Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights (Report of the Special Rapporteur), U.N. Doc. E/CN.4/Sub.2/220/Rev. 1 (1963).

2. Ferguson, *Introduction, Refugees: A New Dimension in International Human Rights*, 70 *PROC. AM. SOC'Y INT'L L.* 58 (1976).

3. See generally Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, 3 *MICH. Y.B. INT'L LEGAL STUD.*, *TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES* 3, 12-21 (1982); Fuchs, *Immigration Policy and the Rule of Law*, 44 *U. PITT. L. REV.* 433, 436 (1983).

Somalia and every tenth person in Djibouti was a refugee.<sup>4</sup> Even under less extreme circumstances, migration provokes sensitive issues in the domestic politics of recipient countries.<sup>5</sup> International legal scholars need more than ever to respond creatively and systematically to the serious problems that result from the basic human need of migration.

Unfortunately, American legal scholarship concerning the admission of migrants has two questionable tendencies. First, some writers assume that the state has a sovereign right to deny entry to any or all aliens. Second, there is a tendency to limit the status of "refugees" to victims of specific forms of governmental persecution. This Article explains these tendencies and suggests alternatives. Part I examines the international legal framework within which American legal scholarship can be of some help. Part II explores the tendencies of American legal scholars to assume that states may deny admission to all aliens and to view narrowly the definition of refugees. Part III posits a tentative explanation for these tendencies. Part IV concludes that international legal scholars can and should have a more significant role in shaping immigration policy.

## I. INTERNATIONAL LEGAL FRAMEWORK

### A. *The General Admission of Aliens*

The general admission of all aliens — victims of natural disasters, persecution, serious breakdowns of public order and armed conflict; economic refugees; and persons simply in search of a better life — is subject to international law. Even those writers who have acknowledged broad sovereign competence to exclude aliens have also insisted upon a rightful exercise of that power, "tempered by the facts of modern civilization" and principles of international law and comity.<sup>6</sup> For example, racial, geographical, and other forms of discrimination have long been regarded even by exclusionists as "tokens of arrogance."<sup>7</sup>

A state has no "right" to exclude aliens unless, individually or collectively, they pose a serious threat to the safety, security, welfare, or essential institutions of the state.<sup>8</sup> The exclusionary proposition that

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4. Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449, 450 (1981) (citing reports of the United Nations High Commissioner for Refugees).

5. Vincent, *Human Rights and Foreign Policy*, 36 AUSTRALIAN OUTLOOK, Dec. 1982, at 1, 3.

6. W. HALL, A TREATISE ON INTERNATIONAL LAW 265 (8th ed. 1924).

7. I C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 218 (2d rev. ed. 1951).

8. See SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, STAFF REPORT, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 762 (1981) ("Any government [may exclude aliens] when entry would be likely to endanger the public health, welfare and safety or threaten national

a state has a right to exclude all aliens is questionable for several reasons. Writings used to support the proposition require legitimate reasons for exclusion in individual cases, such as necessity or self-preservation of a state. Also, states have customarily admitted aliens and have at times considered themselves bound to justify exclusion on grounds of public safety, security, welfare, or threat to essential institutions.<sup>9</sup>

Although some courts may have characterized the practice of admitting aliens as a voluntary waiver of the right to exclude or a self-imposed limit on the exercise of the right, it is reasonable to regard state practice and the accompanying justification as recognition of a qualified duty to admit some aliens in normal circumstances. Moreover, commonly cited judicial opinions and related authority, at least in English language sources, are unconvincing; they often misinterpret other authority, contradict contemporaneous statements of *opinio juris*, and rest on questionable, often racist, presumptions. The international significance of migration and the interdependence of states lend support to the argument that the general admission of aliens should not be regarded as an untrammelled discretionary power within the exclusive domestic jurisdiction of states.

Thus, although a state certainly has no duty to admit all aliens who might seek to enter its territory, it has a qualified duty to admit aliens when they pose no threat to the public safety, security, public welfare, or essential institutions of a recipient state. Admittedly, this formulation is so broad as to permit expansive discretion by states, but affirming it encourages states, in their mutual interest, to develop more precise and humane rules, principles, and procedures to govern the general admission of aliens.

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security."); *cf. id.* at 723 (ambiguous criterion of undesirability in exclusionary statement). See also J. BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIÉ* 228-29 (5e ed. revue et augmentée 1895) ("L'exclusion de certains étrangers doit être motivée par l'ordre, la sûreté ou le bien publics sinon elle serait en contradiction, avec le principe de la liberté des relations internationales."); L. CAVARÉ, *I LE DROIT INTERNATIONAL PUBLIC POSITIF* 275 n.88 (2d ed. 1961) ("[The state freedom to regulate the admission of aliens is a power] dont l'exercice peut être critiqué par les organes internationaux."); (citing G. SCHELLE, *PRECIS DE DROIT DES GENS* 80 (2d ed. 1932-1934)); E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 37 (1915) ("At the present day the right of admission and sojourn on the part of the unobjectionable aliens is almost universally recognized. Qualifications of the right, which are to be found in the possibilities of exclusion, expulsion and the fixing of conditions of sojourn by the state, must in practice be based upon reasonable grounds."); see also Hucker, *Migration and Resettlement Under International Law*, in *THE INTERNATIONAL LAW AND POLICY OF HUMAN WELFARE* 327 (R. MacDonald, D. Johnston & G. Morris eds. 1978); D. O'CONNEL, *II INTERNATIONAL LAW* 695 (1970) ("Considering the universal restrictions placed on immigration in this century, and the almost total exclusion of aliens by some countries, it is surprising to discover that there is a widespread consensus of opinion, particularly on the Continent, favouring a general duty in international law to receive aliens.").

9. For a more detailed development of these points, see Nafziger, *The General Admission of Aliens Under International Law*, 77 *AM. J. INT'L L.* 804 (1983). In addition to the qualified duty of states to admit *some* aliens, positive international law explicitly protects several rights

The moral duty of states to admit aliens under certain circumstances is even more specific. Short of massive programs for resettling unemployed workers and refugees, "it remains the duty of each country to open its own borders as widely as possible, without looking for excuses or waiting for others to act."<sup>10</sup> Specifically, "there is a moral duty of host states not simply to get rid of the foreign work force when a recession hits, nor to apply retroactive measures in order to thin its ranks."<sup>11</sup>

Within this legal and ethical framework, states are entitled to a wide margin of discretion in admitting aliens, but they should not close the door completely on grounds of sovereignty or a unilateral determination that immigration decisions lie wholly within domestic jurisdiction. Thus, a country such as Nigeria, in the throes of an economic crisis, may be entitled to expel large numbers of undocumented Ghanaian workers. A country such as Malaysia may be entitled to maintain its delicate balance between ethnic-racial groups through the use of relatively strict immigration controls, in order to preserve its social order. A country such as Mexico, with massive unemployment and underemployment, need not bear the same burden of international responsibility to admit aliens from Guatemala as the United States. Countries such as Pakistan or Somalia, with populations already swollen by large numbers of refugees from neighboring countries, cannot be expected to accept still greater numbers. Ironically, in recent years several developing countries least able to absorb immigrants have borne the greatest alien burdens.<sup>12</sup>

### B. *The Admission of Refugees*

Refugees are persons who seek and urgently need foreign refuge, for whatever reason. One class of refugees is defined by treaty law. Under Article 1 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, a "refugee" is any person who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to

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of migration. These include the right to leave and to return to one's country of origin or nationality, the right to family unity which entitles members of a family to rejoin another member already admitted into a foreign state, the right to be free from exclusion on racial grounds, and other entitlements under bilateral and multilateral conventions. G. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 196-97 (1978).

10. S. HOFFMANN, *DUTIES BEYOND BORDERS* 224-25 (1981).

11. *Id.* at 225.

12. Carlin, *supra* note 3, at 12-21; Fallows, *Immigration: How it's affecting us*, 252 *ATL. MONTHLY*, Nov. 1983, at 45, 48.

avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>13</sup>

This definition is clearly inadequate as a comprehensive definition of refugees. The 1951 Convention was designed to respond to the post-World War II crisis of displaced persons in Europe and not to arrest the development of a customary, more comprehensive regime of refugee law. Unfortunately, the Convention ignores economic refugees, victims of war, victims of natural disasters, and persons fearing persecution after a breakdown of public order in just one part of a single country. These latter categories of refugees would seem to be within the scope of the average person's definition of a refugee. By excluding them, however, the treaty definition has led governments to ignore the plight of many migrants or prospective migrants whom the layperson might expect to be treated as refugees. Moreover, a narrow definition of "refugee" makes it difficult to apply the legal consequences of that classification to specific cases where, for example, it is necessary to know something about socio-economic circumstances in order to evaluate a refugee's claim of governmental persecution. Finally, the 1951 Convention does not address the issue of whether a state may reject prospective refugees who apply for that status at the frontier, that is, upon entry into the country of refuge. That gap in the Convention is understandable because, in post-World War II Europe, most applicants for refugee status were already in foreign territory, after having been displaced by the war and its aftermath.

A more functional definition of "refugee," based on urgent human need, would include all migrants in critical need of refuge in a foreign state, regardless of their specific motivation for seeking refuge. Fortunately, municipal and regional norms may, and occasionally do, expand the definition of a "refugee." Recently, for example, a federal court acknowledged the importance of economic and other factors in reviewing an administrative determination on the admissibility of de facto refugees already present in this country. In *Haitian Refugee Center v. Smith*,<sup>14</sup> the Fifth Circuit Court of Appeals held that a petitioner

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13. Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter cited as Convention]. Parties to a 1967 Protocol have agreed to apply the Convention without limitation to "events occurring before 1 January 1951." Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as Protocol]. Some writers have questioned whether there is any universally accepted definition of "refugee" under international law. A. GRAHLMADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 73 (1966); Weis, *The Concept of Refugee in International Law*, U.N. Doc. HCR/INF. 49, at 32 (1960).

14. 676 F.2d 1022 (5th Cir. 1982).

for asylum under the treaty definition should be allowed, as a matter of due process, to produce evidence of living conditions in the country of departure. These conditions might include "the power structure, prisons, legal systems, politics, society, and economics."<sup>15</sup>

### C. *Academic Neglect*

American scholarship concerning most topics of international law generally keeps ahead of official decisions. Leading writers have influenced municipal decision makers to adopt a broader vision of the national interest and have informed the process of codifying and progressively developing international law.

It is puzzling, therefore, that American legal scholarship has lagged behind in the process of developing and implementing the international law of migrant movement and entry. Few American scholars have addressed fundamental problems of immigration in more general studies of international law. The "invisible college" of international lawyers<sup>16</sup> has usually been just that — invisible — in the policy-planning process. Too often, apocalyptic or panicky assumptions of economists and demographers have gone unchallenged.

A good example of the invisibility of international lawyers in planning immigration law and policy is the highly publicized work of the Select Commission on Immigration and Refugee Policy. The Select Commission was established in 1978 "to study and evaluate . . . existing laws, policies, and procedures governing the admission of immigrants and refugees to the United States and to make such administrative and legislative recommendations to the President and the Congress as are appropriate."<sup>17</sup> According to the Final Report of the Commission,<sup>18</sup> although prominent immigration and labor specialists were involved, international legal scholars were not. Not one recognizable academic specialist in international law appears in the list of some fifty staff members, not one is listed among the fifty research grantees, and not one among hundreds of participants in formal 'consultations' initiated by the Commission. It should be no surprise, then, that the Final Report of the Commission overlooks international law in its discussion and recommendations pertaining to immigration policy and law.

International lawyers are invisible not only in high-level policy planning, but also in the sessions of their own "invisible college." For example, not a single teacher-scholar of international law appeared as a speaker on either of two recent panels concerning undocumented

15. *Id.* at 1042.

16. Schachter, *The Invisible College of International Lawyers*, 72 Nw. U.L. REV. 217 (1977).

17. Immigration and Nationality Act, Pub. L. No. 95-412, § 4(c), 92 Stat. 907, 908 (1978).

18. JT. COMM. ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (Comm. Print 1981).

aliens at annual meetings of the American Society of International Law.<sup>19</sup> Given the dearth of international legal scholarship on the subject of immigration, it is not surprising that Congress, not academia, has initiated discussions about such options as the use of international financial institutions to extend grants and loans to developing states experiencing serious burdens of mass migrations, as part of the developmental programs of those states.<sup>20</sup>

## II. TWO TENDENCIES IN AMERICAN SCHOLARSHIP

### A. *An Assumption that a State May Deny Admission to Any and All Aliens: The Result of Undocumented Scholarship*

Although state practice, regional obligations, and universal norms disclose a practice of states to admit at least some aliens, it is still useful to examine the tendency of American legal scholars to assume that a state has a right to deny admission to any and all aliens. This tendency has been instrumental in shaping exclusionary provisions of municipal law and policy, in influencing interpretations of state duties toward refugees, and in delaying the emergence of human migration as a comprehensive topic on the international legal agenda.<sup>21</sup> Migrant labor would benefit from a multilateral convention to govern the admission of aliens by states. Short of that, it is essential for the world community, in accordance with emerging international law, to insist that states be accountable for denials of entry to aliens on the basis of an objective threat to the safety, security, welfare, or essential institutions of a state. The invisible college of international legal scholars ought to be more active in formulating and further developing such standards.

Instead, one too often finds references, often without authority, to the notion that a state may legitimately exclude any or all aliens.<sup>22</sup> A significant example involves the writings of a thoughtful specialist in human rights, Richard Lillich. Professor Lillich defends the proposition that states possess an absolute right, in the absence of a treaty, to exclude aliens. In reviewing a book on immigration law,<sup>23</sup> Lillich

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19. 73 PROC. AM. SOC. INT'L L. 119 (1979); 76 PROC. AM. SOC. INT'L L. \_\_\_\_ (1982).

20. See Nanda, *supra* note 4, at 472.

21. For a rather polemical example of this effect, see Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 447-48, 450-51, 458 (1983).

22. See, e.g., C. FENWICK, INTERNATIONAL LAW 319 (4th ed. 1965); H. Kelsen, PRINCIPLES OF INTERNATIONAL LAW 372-73 (2d ed. 1966); W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 176 (1979); G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 205 (4th ed. 1981); Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 968-69 (1982).

23. Lillich, Book Review, 76 AM. J. INT'L L. 670, 670-72 (1982) (reviewing G. GOODWIN-GILL, *supra* note 9).

devotes a substantial portion of his comments to this theme — by no means unique among scholars — even though the book under review says that states claim only a “very wide margin of discretion”<sup>24</sup> in controlling the entry of aliens.

A preponderant view, though not a rule, is that matters of alien entry belong within the reserved domain of domestic jurisdiction. Thus, the book reviewed by Professor Lillich realistically and correctly notes that because states seek freedom to control entry, it is “not easy to bring matters of entry and exclusion within the bounds of international law.”<sup>25</sup> This is not to say, however, that it has not been done. In his commentary on the exclusionary statement, Lillich intriguingly inserts his own word, “customary,” in brackets to qualify the general term “international law.”<sup>26</sup> He thereby questions the customary hospitality of states to some alien entry and suggests that it is jurisprudentially, rather than technically, difficult to bring international law to bear on issues of alien entry. Actually, the book under review generally demonstrates that international law governs the entry and exclusion of aliens, though it may be *technically* difficult to articulate comprehensively.

Authority for Professor Lillich’s position is questionable. In his Hague Lectures, Professor Lillich put it very simply: “Under customary international law, *of course*, a State is under no duty to admit aliens into its territory.”<sup>27</sup> As authority, he refers only to a book published in 1915 by Professor Edwin Borchard, *Diplomatic Protection of Citizens Abroad*.<sup>28</sup> Although Borchard recognizes that there may be an ultimate power of exclusion, upon which a right is based to exclude undesirable aliens, he is careful to summarize opposing arguments and to attribute the exclusionist position to “[c]ourts in the United States and Great Britain.”<sup>29</sup> He also writes that an “ultimate power” to exclude aliens “would violate the spirit of international law.” Thus, although the “grounds of exclusion are fixed by the public interests of each state,” they are limited to “dangerous or undesirable” aliens. Moreover, an “arbitrary or unjust exclusion” gives rise to a political, though not a legal pecuniary claim.<sup>30</sup> Although he refers to the recognized inherent power of a state to exclude foreigners, Borchard nevertheless concludes that “the right of admission and sojourn on the part of unobjectionable aliens is almost universally recognized. Qualifications of the right, which

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24. G. GOODWIN-GILL, *supra* note 9, at 94.

25. *Id.*

26. Lillich, *supra* note 23, at 671.

27. Lillich, *Duties of States regarding the Civil Rights of Aliens*, III RECUEIL DES COURS 1978, at 329, 339 (1980) (emphasis added) (footnote omitted).

28. E. BORCHARD, *supra* note 8.

29. *Id.* at 45.

30. *Id.* at 46-48.

are to be found in the possibilities of exclusion, expulsion and the fixing of conditions of sojourn by the state, must in practice be based upon reasonable grounds."<sup>31</sup>

The tendency to assume that states may deny entry to all aliens seems to be premised on a form of positivism which relies very heavily on treaties for the progressive development of migration law.<sup>32</sup> Such a bias, which often fails to respond to human needs and realities, is unnecessary. Even the highly positivistic dictum in *The Case of the S.S. "Lotus"* established only that "[r]estrictions upon the independence of states cannot . . . be presumed,"<sup>33</sup> not that they must take the form of positive pronouncements. Instead, it is important to take fuller account of the principles and evidence of custom that impose a duty upon states to share the burden of admitting aliens and thereby to contribute significantly to global solidarity.

A Canadian specialist has observed that although states may exclude persons whose presence is inimical to the national interest, it is misleading and unproductive to suggest that states are free to do as they please; that is, to assume exclusive national competence to govern the admission of aliens.<sup>34</sup> American scholarship should take fuller account of the governing principles of international law, the spirit of existing state behavior and decisions, the expectations they elicit, and the extension of their coverage, by analogical reasoning, to issues of immigration.

### *B. The View that Treaties Define the International Law of Refugees: The Result of Overdocumented Scholarship*

The law of refugees presents other examples of the conservatism of United States legal scholarship in addressing issues of migrant movement and entry. When, however, one moves from the general admission of aliens to the admission of specifically protected groups of aliens, particularly refugees, one moves from undocumented to overdocumented scholarship.

Although the international law of refugees is moving steadily beyond the confines of the definition of a refugee found in Article 1 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,<sup>35</sup> American legal scholarship is often wedded to that definition.<sup>36</sup> It is as if the law of refugees were a kind of gloss on

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31. *Id.* at 37.

32. Lillich, *supra* note 23, at 671.

33. The S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 9, at 18 (Judgment of Sept. 7).

34. Hucker, *supra* note 8, at 327, 329.

35. See *supra* note 13 and accompanying text.

36. See, e.g., Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 11 (1981); Le & Esser, *The Vietnamese Refugee and*

that definition. As a consequence, American jurists have had surprisingly little to say about broader and more functional definitions of a refugee. These include the definitions of the United Nations High Commissioner for Refugees<sup>37</sup> and such regional instruments as the Convention on Governing the Specific Aspects of Refugee Problems in Africa of the Organization of African Unity.<sup>38</sup> By contrast to the conservatism of American scholarship, a recently published collection of essays<sup>39</sup> evidences a greater inclination of European scholars to define the term "refugee" broadly.<sup>40</sup> Similarly, the 1982 Session on Refugee

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*U.S. Law*, 56 NOTRE DAME LAW. 656, 666 (1981); Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539 (1981); Note, *Those Who Stand at the Door: Assessing Immigration Claims Based on Fear of Persecution*, 18 NEW ENG. L. REV. 395, 396 n.3 (1983); Comment, *Basing Asylum Claims on a Fear of Persecution Arising from a Prior Asylum Case*, 56 NOTRE DAME LAW. 719, 721 (1981). But see Young, *Between Sovereigns: A Reexamination of the Refugee's Status*, 3 MICH. Y.B. INT'L LEGAL STUD., TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 339, 348 (1982). Most recent writings by United States scholars have centered on federal laws, with little attempt to consider definitions of "refugee" broader than that in the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), which reiterates the definition in Article 1 of the 1951 Convention and 1967 Protocol, see *supra* note 13 and accompanying text. The Le & Esser article, however, contains an interesting discussion of the capacity of United States law, under the Refugee Act of 1980, to take account of economic as well as political circumstances in interpreting the "persecution" requirement.

37. Article 6 of the Statute of the Office of the High Commissioner for Refugees generally reiterates the definition of a refugee found in the 1951 Convention and 1967 Protocol, see *supra* note 13 and accompanying text. 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A 1775 (1950). Even so, the High Commissioner, in practice and by special delegation, assumes much broader jurisdiction over displaced persons within their country of nationality or origin, persons generally in need of the good offices of the High Commissioner, victims of natural disasters, and other persons who, for whatever reason, cannot avail themselves of the protection of their government. In broad language, the United Nations General Assembly delegated the High Commissioner in 1979 "to continue to promote . . . solutions to problems of refugees and displaced persons wherever they occur." G.A. Res. 34/60, para. 2, 34 U.N. GAOR Supp. (No. 46) at 173, U.N. Doc. 34/724 (1979).

38. Article I of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa defines the term "refugee" to include not only persons covered by the 1951 Convention and its 1967 Protocol, see *supra* note 13 and accompanying text, but also any person compelled to leave his home country "owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality." OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art. I, ¶ 2, done Sept. 10, 1969, 1001 U.N.T.S. 45, 47 [hereinafter cited as OAU Convention]; see also Hyndman, *Asylum and Non-Refoulement—Are These Obligations Owed to Refugees Under International Law?*:

The definition of "refugee" in the OAU Convention is wider than that in the 1951 Convention. It is a pragmatic one related to the problems of the African continent. From the late 1950's onwards there have been, largely as a result of the presence or after effects of colonial regimes, troubles and wars resulting in massive displacements of peoples not always fitting easily into the 1951 Convention definition, even as extended by the 1967 Protocol, and the definition of the OAU Convention was drafted with these factors in mind.

57 PHILIPPINE L.J. 43, 55 (1982).

39. 3 MICH. Y.B. INT'L LEGAL STUD., TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES (1982).

40. See, e.g., Grahl-Madsen, *Refugees and Refugee Law in a World in Transition*, 3 MICH. Y.B. INT'L LEGAL STUD., TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 65 (1982); Melander, *Nordic Refugee Law and Policy*, 3 MICH. Y.B. INT'L LEGAL STUD., TRANSNATIONAL LEGAL PROB-

Law at the Institute of Public International Law and International Relations in Greece reflected an inclination of European and British Commonwealth scholars to define "refugee" under both the 1951 Convention 1967 Protocol and customary practices of states and organizations.<sup>41</sup> Such practices include the admission of de facto refugees,<sup>42</sup> Class B refugees,<sup>43</sup> refugees in orbit,<sup>44</sup> victims of natural disasters, and other categories of refugees outside the scope of Article 1 of the 1951 Convention 1967 Protocol.<sup>45</sup>

The emerging concept of temporary refuge has become a particularly prominent international concept. In an era of political and economic turbulence, temporary refuge has become a significant alternative to all-or-nothing responses to petitions for refuge. Mass migration has discouraged neighboring recipient states from granting permanent refuge, but has encouraged them to grant or consider granting temporary refuge until a permanent refuge in another country can be found. Moreover, one characteristic of contemporary mass migration is that, breaking with tradition, contemporary refugees often expect to return to their country of origin. Therefore, many refugees today consider their status only temporary and are therefore unwilling to integrate themselves effectively into the society and culture of recipient states.

International law also recognizes the benefit of cooperation in easing short-term misallocations that may accompany large-scale migrations. A study of the status of refugee law would be incomplete without considering the impact of this cooperation. The concept of temporary refuge has its roots in Article 31 of the 1951 Convention, which pro-

LEMS OF REFUGEES 229 (1982); Nobel, *Refugees, Law, and Development in Africa*, 3 MICH. Y.B. INT'L LEGAL STUD., TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 255 (1982).

41. Papers and proceedings of the Session may be found in XII THESAURUS ACROASUM (1983).

42. De facto refugees are refugees receiving status without qualifying as 1951 Convention/1967 Protocol refugees. The following are the most common categories of de facto refugees:

- (i) persons who have passed through the eligibility procedure in their country of residence and whose applications have been rejected or eliminated but who are unable or . . . unwilling to return to their country of origin (political dissidents); (ii) stateless persons not recognized as refugees who are unable or . . . unwilling to return to the country of their habitual residence; (iii) political offenders who are not extradited to their country of origin; (iv) persons who fulfil the other conditions of the definition of refugees in the 1951 convention as amended by the protocol but who still avail themselves of their national passports; . . . (v) 'exiles' and/or 'crypto-refugees';] . . . (vi) [p]ersons whose passports have expired and who have been told that their passports will be extended or renewed only on the condition that they return to their country of origin but who are unwilling to do so[;] . . . (vii) draft evaders . . . draft resisters . . . and deserters . . . .

Hucker, *supra* note 8, at 335-36 (citing P. WEIS, 2 REPORT ON PROBLEMS OF REFUGEES AND EXILES IN EUROPE (Legal Report) 5 (1974)).

43. Class B refugees are persons who, not being political refugees, are outside their country of origin because of political reasons or who upon return will face political sanctions.

44. Refugees in orbit are persons who are shuttled from one country of refuge to another, with a consequent status approaching statelessness.

45. See *supra* note 13 and accompanying text.

vides that “[t]he Contracting States shall allow [unlawfully residing] refugees a reasonable period and all the necessary facilities to obtain admission into another country . . . .”<sup>46</sup> Article 32 provides that contracting states may not expel a refugee in their territories except for reasons of national security or public order. Article 32 also provides that “[t]he Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country.”<sup>47</sup> Article 3(3) of the UN Declaration on Territorial Asylum provides that “[s]hould a State decide in any case that exception to the principle of [non-refoulement] would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.”<sup>48</sup> In the concise words of an Australian writer:

[A]lthough states are still resisting binding obligations to grant asylum in the sense of granting a right of permanent settlement, state practice . . . does indicate an acceptance of humanitarian obligations — an acceptance that refugees who arrive at foreign borders seeking admission should not be rejected, whether such rejection would mean a return across the border to the country fled, or the sending of the refugees upon a further dangerous journey to seek admission at another frontier, and that they should be given temporary refuge at least, provided that this is placed within a wider context of international cooperation. As well, the necessity for this assumption of responsibility at an international level seems to be gaining increasing acceptance.<sup>49</sup>

Principles of international cooperation, solidarity, and burden sharing have their roots in the preamble to the 1951 Convention, which reads as follows: “Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of [the] problem . . . cannot be achieved without international cooperation . . . .”<sup>50</sup> In order to give effect to these observations, Article 2(2) of the UN Declaration on Territorial Asylum provides that “[w]here a State finds difficulty in granting or continuing to grant

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46. Convention, *supra* note 13, at art. 31.

47. *Id.* at art. 32.

48. G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16 at 81, U.N. Doc. A/6912 (1967).

49. Hyndman, *supra* note 38, at 77; *see also* Conclusions on International Protection Adopted by the Executive Committee, in Report of the 28th Session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/32/12/Add.1, at 12-16 (1977).

50. Convention, *supra* note 13, at preamble.

asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.”<sup>51</sup> The December 1981 Report of the United Nations High Commissioner for Refugees “[c]alls upon the international community to share the burden of assisting refugees and displaced persons the world over, taking into account the economic and demographic absorptive capacity of the countries concerned . . . .”<sup>52</sup> On the regional level, a treaty among members of the Organization of African Unity entitled the Convention Governing the Specific Aspects of Refugee Problems in Africa requires that all contracting states cooperate “in the spirit of African solidarity”<sup>53</sup> with any others experiencing a burden as a recipient state. The steady development of these principles testifies to the willingness of the international community to extend the definition of a refugee beyond Article 1 of the 1951 Convention, as amended by the 1967 Protocol. Even though states may have been reluctant to accept obligations of temporary refuge and international cooperation explicitly as *opinio juris*, the general practice “does indicate that these concepts are being accepted in fact.”<sup>54</sup> In sum, the progressive development of refugee law seems to transcend the narrow scope of current treaty law. A new body of customary law and general principles on the admission of refugees is emerging from several sources. These sources include norm-creating provisions of the treaty definition of a refugee as far as it goes, United Nations General Assembly Resolutions, norms to which the United Nations High Commissioner for Refugees adheres, the recommendations of international conferences, state practice, emergent concepts such as that of temporary refuge, and such general principles as those of international cooperation, solidarity, and burden sharing.<sup>55</sup> These developments merit greater attention by American legal scholars.

### III. A TENTATIVE EXPLANATION FOR THE TWO TENDENCIES

A tentative explanation for these two significant tendencies of American legal scholarship may be a jurisprudential bias in favor of common law precedent and black letter pronouncements. For example, the notion that a state has a right to exclude any and all aliens rests “almost exclusively”<sup>56</sup> on interpretations and misinterpretations of antiquated common law precedents. These precedents are principally

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51. G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6912 (1967).

52. 36 U.N. GAOR Annex 725 (agenda item 83) at 13, U.N. Doc. A/36/725 (1981).

53. OAU Convention, *supra* note 38, art. II(4). Sub-paragraph five defines the status of a temporary refugee.

54. Hyndman, *supra* note 38, at 73, 77.

55. *Id.* at 67.

56. M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 18 n.53 (1946).

*The Chinese Exclusion Case*<sup>57</sup> and *Musgrove v. Chun Teeong Toy*,<sup>58</sup> both of which have racist underpinnings and are nearly a century old. Little attention is paid to general principles of interdependence, cooperation, and good faith, nor to the state practice of hospitality, historically and geographically, toward aliens seeking entry.

The effect of positivism on American scholarship has been summarized as follows:

Everyone likes categories, and legal philosophers like them very much. So we spend a good deal of time, not all of it profitably, labeling ourselves and the theories of law we defend. One label, however, is particularly dreaded: no one wants to be called a natural lawyer. Natural law insists that what the law is depends in some way on what the law should be. This seems metaphysical or at least vaguely religious. In any case it seems plainly wrong. If some theory of law is shown to be a natural law theory, therefore, people can be excused if they do not attend to it much further.<sup>59</sup>

Even worse, perhaps, than admitting a weakness for natural law is questioning positivistic assumptions about the conclusiveness of treaties in defining international law. Nevertheless, the penchant of positivists to regard the reality of natural rights as nothing more than spooky, pious-sounding abstraction is misplaced. It is simply incorrect to argue "that human rights are rights legally only because they have been granted by positive law" and misleading to assert that natural law "is not law."<sup>60</sup> As Marcus Aurelius, John Locke, Eleanor Roosevelt, Mahatma Gandhi, and Martin Luther King, Jr. would surely remind us, human rights are derived from principles of natural law.<sup>61</sup> Positive law, on the other hand, serves the vital function of articulating and formalizing consensus on legal duties based upon these natural rights.<sup>62</sup> Thus, natural law and positive law have a symbiotic relationship. They are mutually necessary in establishing human rights; it is difficult to have one without the other.

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57. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

58. [1891] A.C. 272.

59. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982).

60. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 316, 319 (1949).

61. M. CRANSTON, WHAT ARE HUMAN RIGHTS? 1-17 (1973); Castberg, *Natural law and human rights; An idea-historical survey*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 13-24 (A. Eide & A. Schou eds. 1968); Tanaka, *Some Observations on Peace, Law, and Human Rights*, in TRANSNATIONAL LAW IN A CHANGING SOCIETY 242, 250 (W. Friedmann, L. Henkin & O. Lissitzyn eds. 1972).

62. M. MANELI, JURIDICAL POSITIVISM AND HUMAN RIGHTS (1981).

## IV. AN IMPORTANT ROLE FOR INTERNATIONAL LEGAL SCHOLARSHIP

A tentative explanation for the conservatism of American scholarship on migration law may therefore be its positivistic preoccupation with explicitly formulated and formalized prescriptions. Instead, legal scholars ought to broaden, not simply adapt themselves to, rigid analytical frameworks such as that of the 1951 Refugee Convention and 1967 Protocol. In addressing issues associated with the natural process of human migration, scholars should examine all relevant values, norms, and practices in the light of natural rights theory, most especially the basic human need of migration. The presumptions need to be reversed. A leading British scholar has observed that

[t]here are some grounds for thinking of the right to freedom of movement as the first and most fundamental of man's liberties . . . . One of the things that is meant by saying that men have a natural right to freedom of movement is to assert that the desire to move is a natural, universal, and reasonable one; *and hence that it is not so much a man's desire to move that needs to be justified as any attempt to frustrate the satisfaction of that desire.*<sup>63</sup>

A failure to take account of the dynamics of human aspirations to migrate or a preoccupation with positive pronouncements is irresponsible. One is reminded of President Millard Fillmore's chillingly stoic comment about the abolition of slavery: "God knows that I detest Slavery, but it is an existing evil, for which we are not responsible, and we must endure it, and give it such protection as is guaranteed by the Constitution, till we can get rid of it without destroying the last hope of free government in the world."<sup>64</sup> Today, a xenophobic climate inhibits the path of justice for migrants. We are reminded that

in a world in which the principle of nationality is the foundation of domestic and of international legitimacy, large numbers of refugees tend to dilute the national community which they join, and to be resented as alien intruders. But they deserve a chance to become part of this community. What is ethically imperative is an international, or failing that, a national guarantee not just of assistance but of settlement and integration in other countries.<sup>65</sup>

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63. CRANSTON, *supra* note 61, at 31 (emphasis added).

64. BUFFALO HISTORICAL SOCIETY, I MILLARD FILLMORE PAPERS 335 (F. Severance ed. 1970).

65. S. HOFFMANN, *supra* note 10, at 225.

International legal scholarship has the difficult task of helping to reconcile certain ideals of human aspiration with popular and sovereign concerns that a state's reputation for hospitality to aliens may encourage an unmanageable influx of them.<sup>66</sup> International institutions, including the Office of the United Nations High Commissioner for Refugees, the Sixth Committee of the United Nations General Assembly, and the International Law Commission, offer an appropriate initial framework for systematically clarifying and articulating the details of international immigration law.<sup>67</sup> Comparative legal analysis also helps disclose emergent custom.

A recent decision of the New Zealand Supreme Court offers a cogent comparative perspective. In *Chandra v. Minister of Immigration*,<sup>68</sup> an alien from Fiji applied for review of an administrative order denying him permanent residence in New Zealand and ordering him to leave within fourteen days. The applicant for review sought (1) a review of the decision of the Minister of Immigration refusing to grant the application for permanent residence in New Zealand; (2) an order directing the Minister to grant the applicant permanent residence in New Zealand; and (3) such other orders as might appear just.<sup>69</sup> The Minister of Immigration filed a motion for an order striking out the application for review. In dismissing the Minister's motion, the New Zealand Supreme Court observed as follows:

Even if the law is that there is now no valid distinction between the duty to act fairly and the duty to act *in accordance with the rules of natural justice*, then there is a duty on the Minister to act *in accordance with the rules of natural justice* as that expression has been extended and as it is understood by recent decisions to which reference has been made in this judgment.<sup>70</sup>

In applying this formula, the Supreme Court specifically rejected "the somewhat xenophobic view" of Lord Denning in *Schmidt v. Secretary of State for Home Affairs*: "I have always held the view that at common law no alien has any right to enter this country except by leave of the Crown: and the Crown can refuse leave without giving any

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66. See Martin, *Large-Scale Migrations of Asylum Seekers*, 76 AM. J. INT'L L. 598, 609 (1982). Martin's article also provides an excellent commentary on recent developments in refugee law.

67. See, e.g., the guidelines on refugee admissions in OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979).

68. [1978] 2 N.Z.L.R. 559.

69. *Id.* at 560-61.

70. *Id.* at 576 (emphasis added).

reason.”<sup>71</sup> Abandoning the “xenophobic” view of Lord Denning, the Court recognized “that the old concept of the Royal prerogative to keep foreigners at bay has been superseded by the modern transportation and the mass population movements of the twentieth century.”<sup>72</sup>

#### CONCLUSION

The global community needs a comprehensive international law of migration. So far, the contributions of American legal scholars to the development of a new legal regime have been modest. If international lawyers are to perform a more prominent role, they will need to be both visionary and realistic. They must help make the law explicit; hard law, including international agreements, is indispensable. Nevertheless, the hard law can only develop in response to the natural exigencies of migration. These exigencies contradict two fundamental tendencies of American legal scholarship: to assume that a state may deny entry to all aliens and to view the definition of a refugee largely within the narrow framework of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. It is time for scholars and decision makers to overcome these tendencies and to develop and codify international agreements which are uninhibited by them.

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71. *Id.* at 568.

72. *Id.*

