Persecution Complex:
Justifying Asylum Law’s Preference for
Persecuted People

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The world’s asylum system is in crisis. Over the last fifteen years, unprecedented numbers of people have sought asylum in Western Europe and North America. As the number of asylum seekers has surged, a public backlash against them has intensified, especially in Europe. Increasingly, asylum seekers are seen as opportunists ready to exploit the relatively generous social welfare systems of industrialized states, and as cultural threats whose presence in large numbers may undermine the liberal and secular values of their host countries. The problem has been especially acute in Britain: more than 100,000 people sought asylum there in 2002, up twenty percent from the year before, leading to regular accusations in the tabloids that the government had lost control of its borders. Although the number of new applicants in Britain declined sharply in 2003 and continued to fall through 2005 due to a combination of changed international conditions and draconian measures taken by the British government, asylum seekers continue to be assailed as “economic migrants” who intend to leech off of Britain’s welfare state.

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2. This increase has been attributed variously to the paroxysm of ethnic violence that followed the crumbling of Cold War client states in Africa and Eastern Europe; globalization, which has made it easier and more attractive for migrants to move to the West to better their economic circumstances; and the elimination in Europe of guest-worker programs, leaving asylum as the only avenue for admittance other than family reunification. See UNHCR, The State of the World’s Refugees 1997–98: A Humanitarian Agenda 27 (1998) [hereinafter UNHCR, The State of the World’s Refugees]; David Held et al., Global Transformations: Politics, Economics & Culture 283–326 (1999).

3. See, e.g., One in Five Flock Here; Asylum: We’re Too Damn Soft, DAILY STAR (London), Jan. 23, 2004, at 7; 90 Per Cent Stay Anyway; “Asylum Rejects” Scandal, DAILY STAR (London), Sept. 16, 2002, at 8.


5. In particular, these include regime changes in Iraq and Afghanistan and a ceasefire in Sri Lanka. All three had been major source countries of refugees.

In the United States, and increasingly in Europe as well, the war on terror has also generated suspicion of asylum seekers. Some commentators have expressed concern that the asylum system is a back door through which al-Qaeda operatives may attempt to enter the West. Indeed, one of the 1993 World Trade Center bombers entered the United States as an asylum seeker. Law enforcement authorities also express concern that asylum seekers have become a lucrative source of income for transnational human smuggling and trafficking gangs, which themselves may have ties to terrorists.

Faced with historically high numbers of asylum seekers, as well as increasing domestic pressure to curb asylum, states are erecting barriers to entry; introducing onerous procedural requirements to reduce the number of people eligible for asylum; reducing public benefits available to asylum seekers pending the decision on their applications; detaining asylum seekers pending determination of their status, often in facilities housing common criminals; and expediting the determination process at the cost of giving asylum seekers less time to prepare for their hearings and gather evidence in support of their claims. Even the United Nations High Commissioner for

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from which applications are presumed to be "clearly unfounded"; non-suspensive appeals (i.e., appeals that can only be exercised after the refugee has been removed from the U.K.) for applicants from white list countries; restricted access to social support; and expedited processing of applications.


Refugees ("UNHCR"), by emphasizing refugees' "right to remain" in their countries of origin, has aided in diminishing asylum's importance. Although these methods, together with regime change in Afghanistan and Iraq (two major source countries in the 1990s), have led to a decline in the total number of new applications filed in the West, asylum nonetheless remains a volatile political issue.

At the same time, however, courts have steadily adopted increasingly generous interpretations of the substantive eligibility requirements for asylum, which limit asylum to those who have a "well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion." Courts have recognized for the first time claims made by people fleeing ethnic conflicts, battered women, and victims of female genital mutilation, among others. In part, this widening of the substantive grounds for asylum has been achieved by linking the eligibility requirements for asylum to international human rights law. As Deborah Anker argues, "[t]he international refugee law is coming of age . . . . Over the past decade especially, refugee law has been claiming its international human rights roots and evolving across national borders. As refugee law matures, judicial bodies, including states' highest courts, are reviewing more refugee cases." Commonwealth courts in particular have interpreted "persecution" as "the sustained or systemic violation of human rights demonstrative of a failure of state protection." This interpretation has significantly aided claimants who have been victimized by nonstate actors. Many advocates and academics have urged a further widening of eligibility requirements, to include not only victims of persecution, but other victims of violence as well. They have claimed that limiting asylum to the persecuted draws a morally arbitrary distinction among people who are similarly situated with respect to their need for protection from violence.

The result has been a tug-of-war between the courts and advocacy groups, who push for further substantive liberalization, and elected officials, who...
have responded to a disgruntled public by making it more difficult for applicants to have their claims judged on their merits. As a practical matter, asylum is a "scarce resource," politically speaking. Western publics support asylum as a way to help people who truly need assistance, but only if they feel that control over the borders more generally is being maintained. An influx of asylum seekers invites a backlash because it raises doubts about the effectiveness of border control, unless there is evidence that the sudden spike in demand can be attributed to "a real outbreak of implacable persecution." If the public perceives that the asylum system is being used as a loophole by "ordinary" immigrants, and that "resettlement rights are not being reserved only for those who show the kind of special threat that clearly justifies an exception from the usual rigours of the immigration law," popular support for asylum will quickly erode. Professor David Martin has expressed concern that public backlash against asylum abusers can even undermine support for foreign aid programs more generally.

Given the current state of affairs, a reassessment and articulation of asylum's theoretical underpinnings is especially important. What group of people is asylum meant to assist? What purpose does it serve, and what criteria should determine eligibility for it?

These questions of underlying theory are brought into stark relief by the prevailing framework governing asylum law. Almost every state has followed the 1951 U.N. Convention Relating to the Status of Refugees ("Convention") in embracing what I shall call the "persecution criterion"—the requirement that a recipient of asylum have "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Those who fail to qualify for asylum, but who nonetheless can make a

26. Id. at 35.
27. Id.
28. Id.
29. U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (emphasis added). This is the formulation found in U.S. law in the Immigration and Nationality Act 8 U.S.C. § 1101(a)(42) (2000). Most industrialized states have adopted a version of this definition to determine whether an applicant is eligible for asylum. In the United Kingdom, "the rules adopted for implementation of the 1971 Immigration Act have traditionally referred to the Convention definition in the context of applications for entry, for extensions of stay, and against deportation." GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 23 (2d ed. 1996). The Convention's primacy was made explicit in the subsequent Asylum and Immigration Appeals Act, 1993, c. 23, § 2 (U.K.), available at http://www.opsi.gov.uk/acts/acts1993/Ukgpa_19930023_en_1.htm (last visited Apr. 4, 2006). The 1952 French law that created the Office français de protection des réfugiés et apatrides gave that Office competence over all persons covered by the Convention definition. GOODWIN-GILL, supra, at 22. The Canadian 1976 Immigration Act adopted the Convention definition for use in determining eligibility for asylum. Id. at 22–23. Currently, the Canadian Immigration and Refugee Protection Act does the same. 2001 S.C., ch. 27, § 95(1)(a). Switzerland's municipal asylum law is more loosely based on the Convention, while Norway, Denmark, and the Czech Republic use the Convention as a point of departure for a more generous asylum program that extends protection to individuals who fall outside the ambit of the Convention, but nonetheless are in refugee-like situations. GOODWIN-GILL, supra, at 23–24. The German Constitution extends a right to asylum to all persons who are "persecuted on political grounds."
strong case that they ought not be returned to their respective state of origin, are sometimes eligible for a form of “temporary protection,” a status that typically grants fewer rights and benefits than asylum does, and, unlike asylum, often offers no opportunity for permanent settlement.\textsuperscript{30} In the United States, for example, the Attorney General is authorized to make temporary protection available for those aliens whose return to their home countries would "pose a serious threat to their personal safety" because of an "ongoing armed conflict within the state,"\textsuperscript{31} or who would experience a "substantial but temporary disruption of living conditions" by an "earthquake, flood, drought, epidemic, or other environmental disaster."\textsuperscript{32} Recipients of temporary protection have no opportunity to adjust their status to permanent residence, regardless of how long they stay.\textsuperscript{33}

The result is a two-tiered system of refugee protection. Those who satisfy the persecution criterion receive a potentially permanent place of refuge and relatively generous benefits as a matter of de facto individual right. Others fleeing life-threatening situations are eligible for a temporary place of refuge and relatively less generous benefits as a matter of charity.

Scholars have engaged in little sustained reflection as to asylum’s normative underpinnings. Why might the persecution criterion have normative appeal? The absence of such a discussion is troubling; lives ride on the matter. Among those who have been excluded from asylum by the persecution criterion are people caught in the crossfire of civil war or generalized violence, starving people, people without the economic resources to subsist, people forced to flee their countries due to environmental catastrophe, people forcibly recruited by a rebel militia, and battered women unable to obtain protection from the police. States should be able to justify their reliance on the persecution criterion when they use it to deny asylum to such people.

The persecution criterion has been subject to scathing criticism from scholars and activists. These critics argue that those forced to flee their homelands because they lack protection from generalized violence or severe economic hard-
ship have as strong a moral claim to asylum as people targeted for violence by their state. That is, there is no moral justification for excluding the former and limiting asylum to the latter. I call this view the “humanitarian conception of asylum.” On this view, the Convention refugee definition should be widened to include not only persecuted people, but also those who need protection from serious harm more generally, regardless of the source of the harm. Part I of this Article begins by laying out the humanitarian conception and its critique of the current legal framework for asylum.

The goal of this Article is to articulate and defend a normative theory of asylum that can account for the persecution criterion. In Part II, I offer such a theory of asylum’s purpose and function, which I call the “political conception of asylum.” On this view, asylum’s purpose is to shelter those who are wrongfully harmed by agents acting under the color of state authority and to call the persecuting state to task by expressing condemnation. The political conception does not focus on the mere fact of an asylum seeker’s need for protection; instead, it focuses on the legitimacy of, and the state’s culpability in, the asylum seeker’s exposure to harm. This theory explains why asylum should be narrowly focused on assisting persecuted people, rather than broadly aimed at protecting people from insecurity generally.

Part III offers a normative defense of the political conception. I begin by calling attention to the variety of ways that states can assist refugees. These include not only asylum, but also in situ aid, temporary protection, overseas refugee resettlement programs, and military intervention. Asylum is thus just one tool of many in the refugee policy toolkit, distinguished from the others in that it provides its recipients with a political good: membership in the state of refuge, and not merely protection of recipients’ basic rights. A defensible conception of asylum should account for the distinction between a need for membership and a need for protection. I argue that this distinction is preserved by the political conception, but not by the humanitarian conception. However, my argument should not be read as an apologetic for the move toward restriction among many policymakers today. In many respects, I contend, current policy needs to be substantially liberalized.

Part IV examines the implications of the political conception for asylum law and policy. In particular, I consider the consequences for the interpretation of “persecution.” Over the last decade, refugee advocates have argued that “persecution” should be understood to consist in the “sustained or systemic violation of basic human rights demonstrative of a failure of state protection.” Courts in Canada, the United Kingdom, New Zealand, and Australia have embraced this “human rights approach,” and it is beginning to gain traction in the United States as well. The political conception, however, calls into question the normative defensibility of this interpretation. Like the humanitarian conception, the human rights approach views a person’s need for

34. *Hathaway, supra* note 23, at 104–05.
protection as giving rise to a claim for asylum. It fails to recognize the distinction between a need for protection and a need for membership. The implications of this disagreement between the human rights approach and the political conception are brought into sharp focus when one considers how the law should treat persecution by nonstate actors. Finally, I consider the implications of the political conception for rights of integration. I then conclude in Part V.

I. HUMANITARIANISM AND ASYLUM

Scholars who have considered the normative appeal of the current framework for asylum eligibility have concluded that it is deeply flawed. Their critique consists of two independent but related claims, one historical and one normative. The historical claim is that the persecution criterion was “specifically devised for a particular geographic problem at a particular time”—namely, the post–World War II European refugee problem—and “was not a model for general application.”35 Furthermore, its adoption was politically and ideologically driven: it was designed to call attention to Soviet mistreatment of political dissidents while deflecting attention away from the West’s failure to satisfy its citizens’ “socio-economic human rights.”36 I have elsewhere argued that this historical claim is false and that the persecution criterion is deeply embedded in the way asylum has historically been understood.37

The normative claim is that the framers of the Convention were so focused on the post-war European refugee problem that their solution had a moral blind spot: although “persecution” aptly described the plight of the population with which they were concerned, the phrase has since led to the confusion of a symptom for the disease. Persecution is simply a manifestation of a more basic problem: individuals whose basic needs—including physical security and economic subsistence38—are unmet. By remaining wedded to the persecution criterion, however, the refugee regime became increasingly detached from consideration of human rights problems generally as well as . . . those of justice, peace, or development . . . . Consequently, the refugee problem came to be seen by many as sui generis, to be considered in the light of its own (i.e., arbitrarily determined) pur-
poses and principles and not in relation to more general purposes or principles.39

Today, refugees are just as likely to be fleeing the chaotic violence that accompanies state breakdown as they are to be seeking refuge from persecution. They include not only political “activists” or “targets” of genocide or ethnic cleansing by state agents, but also “victims” caught in the crossfire of generalized violence or crushed in the vise of hunger and economic distress as their state collapses around them due to disorder, corruption, or incompetent governance.40 The criteria for asylum, the normative claim continues, should change accordingly. Zolberg et al. suggest that “[a]n optimal policy would start from the explicit premise of moral equivalence among all three refugee types”41—activists, targets, and victims.

Underlying this critique is what I will call the “humanitarian conception” of asylum. This view, which enjoys widespread support among scholars and advocates, is expressed clearly by Aristide Zolberg et al.:

Whether the individuals are activists or passive bystanders simply caught in [a] conflict is immaterial from the point of view of their immediate security. Their need clearly could be the same regardless of the cause . . . . It follows that in a . . . normative sense, the three types of refugees are equally deserving. The activist, the target, and the victim have an equally valid claim to protection from the international community.42

41. ZOLBERG ET AL., supra note 40, at 270.
42. Id. at 269; see also, e.g., Joseph H. Carens, The Philosopher and the Policymaker: Two Perspectives on the Ethics of Immigration with Special Attention to the Problem of Restricting Asylum, in IMMIGRATION AdMISSIONS: THE SEARCH FOR WORKABLE POLICIES IN GERMANY AND THE UNITED STATES 3, 18 (Kay Hallbronner et al. eds., 1997) [hereinafter Carens, The Philosopher and the Policymaker] (“The convention definition does not establish the proper moral priorities because it includes some people who need the safety provided by asylum less urgently than do some of those it excludes. Some of those admitted under the second definition as humanitarian refugees . . . face greater threats to their most fundamental human rights and hence have stronger moral claims to asylum than do those admitted as convention refugees.”); Joseph H. Carens, Who Should Get In? The Ethics of Immigration Admissions, 17 ETHICS & INT’L AFF. 95, 103 (2003) [hereinafter Carens, Who Should Get In?] (“From a moral perspective, the great weakness of the definition is that it can be construed so narrowly that it excludes people from refugee status who clearly have fled in fear of their lives and need external assistance . . . . [W]hat should matter the most is the seriousness of the danger and the extent of the risk, not the source of the threat or the motivation behind it. So, in principle, the definition should be revised to reflect this wider perspective.”); Michael G. Heyman, Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife, 24 SAN DIEGO L. REV. 449 (1987) (arguing for an expansion of the refugee definition to include victims of civil strife); Adam Roberts, More Refugees, Less Asylum: A Regime in Transformation, 11 J. REFUGEE STUD. 375, 381 (1998) (“It is blindingly obvious that there has long been a case for extending the formal definition of refugee to encompass those fleeing from war, anarchy, economic catastrophe, destitution and famine, as well as from persecution.”); Shacknove, supra note 58, at 281; Astri Suhrke, Global Refugee Movements and Strategies of
In other words, the fact of a foreigner’s need for protection—regardless of whether that need results from persecution, civil war, famine, extreme poverty, or some other cause—grounds a moral claim for protection in the form of asylum. The Convention definition of the refugee, they conclude, should be expanded to encompass all those who have a need—and thus a moral claim—for protection. If it becomes necessary to limit the number of beneficiaries, then “the central ranking principle must be the immediacy and degree of life-threatening violence. Those most exposed must be given preferential access to protection . . . . Farther along in the queue, relief could be given as far as resources and political will permit.” This approach would significantly alter the composition of those given asylum.

This would mean that priority be given to individuals or groups who find themselves in extremely threatening situations: civilians in battle areas, likely targets of death squads and pogroms, political prisoners under threat of torture, members of rebel or dissent groups on “wanted” lists, and the like. Proscription on cultural expressions such as lack of freedom of religion would come much farther down on the list, except when it is associated with life-threatening forms of violence.

The author who is harassed or jailed for criticizing the government would rank much further down the list than victims caught in the crossfire of civil war.

The humanitarian conception of asylum seems compelling. Urgency of need provides a morally appealing yardstick for the strength of one’s asylum claim because it adopts the victim’s viewpoint. Drawing a distinction between various causes of need—e.g., persecution on the one hand, and civil war on the other—intuitively seems morally dubious. Why should our duty to assist someone depend on the reason that she is in distress? Isn’t it the fact of distress that should matter? It is certainly what matters to the victim: it makes no difference to someone starving to death why there is no food.

From a political point of view, as well, the humanitarian conception may be attractive. Sympathy is probably what motivates the limited political support for asylum that exists in the West. A principle of distribution based on need presents refugees as objects of our sympathy: they need our help or they

Response, in U.S. IMMIGRATION AND REFUGEE POLICY 157, 159–60 (Mary Kritz ed., 1983) (“[C]ontemporary population outflows from many Third World countries consist of persons who flee generalized conditions of insecurity and oppression, as well as the economic refugees who seek to escape severe economic deprivation. These people typically cannot count on the protection of their government to provide basic physical, economic, or political security. Their need may be equal to those who are persecuted in the sense of the U.N. definition.”).

43. Zolberg et al. qualify this statement somewhat, maintaining that “victims of economic, that is, structural, violence must be helped first in their own country.” ZOLBERG ET AL., supra note 40, at 271. But if such in situ aid is ineffective, victims of “economic violence” presumably would also possess a moral claim to asylum.

44. Id. at 270.

45. Id.
A famine victim is just as sympathetic as someone who has been jailed for his political beliefs, if not more so. The famine victim’s innocence is apparent; as for the politically persecuted, there is always the chance that perhaps they deserved the treatment they received.

The humanitarian conception is increasingly reflected in international law and practice. At the regional level, the Organization of African Unity (“OAU”), in 1969, extended the Convention definition by adding in a binding declaration that “the term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin and nationality.”

In 1984, Latin American states issued the Cartagena Declaration on Refugees (which, unlike the OAU definition, is not binding on its signatories), which stated that “it is necessary to consider enlarging the concept of a refugee” by including “among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances which have seriously disturbed the public order.”

The UNHCR, prodded by refugee advocates, has followed suit. In the mid-1980s, it adopted the phrase “victims of violence” to advocate for protection for mainly Iranian and Tamil asylum seekers in Europe. In 1994, it noted that individuals’ “need for international protection”—a category broader than “fear of persecution,” since a need for protection can arise due to many causes other than persecution—“most clearly distinguishes refugees from other aliens.” And more recently, the UNHCR has explicitly endorsed the protection of “human security” as its guiding principle, suggesting that aid should be directed not only at those who flee their country because of persecution, but also at those whose basic security and subsistence needs are unmet.

As Sztucki notes, this position marks an important shift for the UNHCR. “It is no longer the quality of ‘refugee,’ however defined, which entitles one to protection. It is the need for protection that entitles one to treatment as a refugee”—that is, to eligibility for asylum.

Finally, beginning in the early 1990s, Commonwealth courts began to interpret the term “persecution” through the lens of humanitarianism. Following scholar James Hathaway, these courts viewed asylum’s purpose as providing

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48. ZOLBERG ET AL., supra note 40, at 269.
52. See infra note 193.
“substitute protection” of human rights to people whose states “fail[ed] to meet [the] standards” of international human rights law. As I shall argue at greater length in Part IV, while these courts have not abandoned the persecution criterion, they have interpreted it in light of a humanitarian view of asylum’s purpose: to provide protection from insecurity to those who need it.

A corollary of the humanitarian conception is the view that asylum is politically neutral. This position is presented most clearly in a 1967 U.N. General Assembly Resolution on Territorial Asylum: “[T]he grant of asylum by a State is a peaceful and humanitarian act and . . . as such, it cannot be regarded as unfriendly by any other state.” Similar sentiments are repeated in other international conventions, and are widely endorsed in the academic literature. For example, Atle Grahl-Madsen, an authoritative commentator on refugee law, writes that “a finding by the authorities of one State to the effect that persecution is taking place in the territory of another State, cannot be construed as a censure on the government of the latter State, and that such a finding does not constitute any interference or intervention in the domestic affairs of that State.” Ben Vermeulen et al. concur that granting asylum is a politically neutral act: “[A]sylum is not in itself an unfriendly act, and should not be construed as a censure of the government of the state of the asylum-seeker.”

And advocates of defining persecution in terms of

57. Ben Vermeulen et al., Persecution by Third Parties 17 (May 1998) (unpublished paper), available at http://jurrit.jur.kun.nl/cmr/docs/thirdparties.pdf; see also Gilbert Jaeger, A Comment on the Distortion of the Palliative Role of Refugee Protection, 8 J. Refugee Stud. 300, 300 (1995) (“The grant of asylum to a person in need of protection is fundamentally an act of assistance, of compassion, of charity to a fellow man. A humanitarian act, in modern English.”); Walter Kälin, Nonstate Agents of Persecution and the Inability of the State to Protect, 15 Geo. Immigr. L.J. 415, 423 (2001) (referring to “the neutral character of the institution of asylum” and arguing that “[i]n international law, the granting of asylum is traditionally regarded not as an unfriendly act vis-à-vis the country of origin, but as an exercise of territorial sovereignty allowing each State to decide freely about the admission of aliens.”); C. Pompe, The Convention of 28 July 1951 and the International Protection of Refugees, at 13, U.N. Doc. HCR/INF/42, May 1958 (describing the Convention definition as “partly stripped of political feeling though not yet raised to the purely humanitarian and politically neutral level where protection is afforded to the legally unprotected human being as such”), cited in Hathaway, supra note 23, at 101 n.13. Jaeger, supra, at 301, further emphasizes that asylum is properly called “territorial asylum” rather than “political asylum” in light of
international human rights law have emphasized that asylum plays a "palliative," non-political role.58

II. A POLITICAL CONCEPTION OF ASYLUM

If asylum’s function is to meet the basic needs of those who most urgently lack them, then the persecution criterion is indeed a morally arbitrary holdover from the Cold War era, at odds with asylum’s animating purpose. The goal of this Article is to present an alternative theory of asylum’s purpose that can make sense of the persecution criterion, and to defend its normative appeal. I shall call this theory the political conception of asylum. According to the political conception, asylum does more than simply provide humanitarian relief or protection against harm. It shelters foreigners from specifically political harms—that is, harm inflicted for illegitimate reasons by state actors or by nonstate actors with the acquiescence or approval of the state—by interfering with another state’s claim to authority over its citizens; and it calls that state to task by expressing condemnation. In Part III, I will argue that people suffering from harms of this sort have a special claim to the distinctive remedy that asylum offers, namely membership and not merely protection.

A. Explaining the Theory

Under international law, states are ordinarily entitled to exercise jurisdiction over their citizens no matter where they are. This principle of jurisdiction—called the nationality principle59—remains in force today. A German citizen who murders a Frenchman in France, for instance, can be tried not only by the French government, but also by the German government. A fortiori, Germany would retain jurisdiction to try and punish one of its citizens who committed murder in Germany and then fled to France. Although international law does not impose any legal duty on France to render the murderer to Germany,60 Germany’s claim to exercise jurisdiction over him nonetheless has moral force. States have traditionally recognized the force of this claim by signing extradition treaties or by rendering fugitives to one another as a matter of comity.

Asylum interferes with the nationality principle. Granting asylum to someone makes him inviolable in relation to his state. Asylum places him beyond the authoritative reach of his sovereign, sheltering him against prosecution or punishment by immunizing him against his sovereign’s claim to exercise jurisdiction over him. When France grants asylum to someone fleeing from Germany, it denies Germany “the opportunity to exercise authority over [the]
individual” by “shielding” him from Germany’s “authoritative processes.”

To immunize a person against her state’s authoritative processes requires justification, because granting such immunity affects the legal interests of her state. Whereas ordinarily Germany could assert a claim to authority over a German citizen abroad, France, by granting her asylum, blocks any such assertion. Germany is disabled from using its coercive power against her. Asylum thus constitutes a kind of intervention in the internal affairs of another regime: by granting asylum to the German, France interferes with Germany’s relationship to its citizen.

When is France justified in so interfering? Only when, in France’s well-considered judgment, Germany’s use of coercion would exceed the bounds of legitimate authority. A state has no moral duty to strengthen the tyrannical grip of another state’s rulers by enabling it to carry out cruel punishments or to convict its citizens for acts that ought not be forbidden. Granting asylum is therefore an expressive practice. Because it reflects a judgment that the asylum seeker was being abused, not merely that she was suffering, asylum communicates condemnation of the asylum seeker’s state of origin.

The political conception offers theoretical underpinnings both for the two-tiered nature of the current legal framework and for the persecution criterion. The political conception reserves asylum for those who are exposed to harm illegitimately inflicted by authoritative agents, while leaving open the possibility of alternative forms of protection—like temporary protection—to aid people whose basic needs are unmet. And the persecution criterion codifies the substantive moral judgment that underlies a decision to grant asylum—namely, the judgment that a state has harmed its citizen illegitimately. The requirement that persecution be “on account of race, religion, nationality, membership in a particular social group, or political opinion” can be read to enunciate five illustrative examples of illegitimate reasons for inflicting harm. The persecution criterion also lends asylum an expressive dimension by capturing the opprobrium that attaches to a state’s mistreatment of its citizens. To say that State A has persecuted Person B is to say that A has wrongfully inflicted harm on B, and it is also to express condemnation of A’s action.

62. See id. at 141–42; Manuel R. Garcia-Mora, International Law and Asylum as a Human Right 45 (1956).
63. On the problem of determining what constitutes “legitimate authority,” see infra text accompanying notes 107–110.
64. For further development of this argument, see infra text accompanying notes 216–219.
The political conception makes an argument about *asylum*, not about refugee policy on the whole. It is consistent with the view that refugee policy ought to be concerned with a broader group of people than those recognized as Convention refugees under the persecution criterion; with the claim that the UNHCR’s mandate ought to be expanded to encompass all persons whose basic needs are unmet; and with the claim that such persons ought to be eligible for refugee policies other than asylum, such as *in situ* aid, temporary protection, military intervention, and overseas resettlement programs. It just denies that asylum is the appropriate instrument to address the needs of this broader group. This is an important point, so let me be clear: one can think that refugee policy on the whole ought to be more oriented toward meeting people's basic needs, but think that *asylum* in particular is the wrong tool for this mission.

**B. Contrasting the Humanitarian and the Political Conceptions**

The political conception of asylum may initially appear counter-intuitive, because we are accustomed to thinking of asylum simply as a kind of immigration admissions policy. The humanitarian conception of asylum follows naturally from this focus: if asylum is a form of preferential admissions—a free pass to generally restrictive admissions policies—then the natural question is, who has the strongest claim to this free pass? The humanitarian answer—those with the most urgent need—seems intuitively plausible. On the political conception, however, asylum is not merely a form of immigration admission; it bears just as much a relationship to international criminal law and international relations as it does to immigration law.

The political conception differs from the humanitarian conception in at least three significant ways. First, the humanitarian conception is *fact-oriented* while the political conception is *norm-oriented*. A humanitarian looks no further than the fact that a foreigner’s basic needs are unfulfilled; the reasons for this state of affairs are entirely irrelevant to the foreigner’s claim to asylum. The

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political conception, by contrast, looks not only at the fact of need, but also evaluates its cause, and grants asylum only to those who fear harm illegitimately inflicted by agents acting under color of state authority. This feature requires receiving states to make a substantive judgment about the legitimacy of another state’s actions. This is a predominantly normative, not factual, inquiry (though of course normative judgments are often highly fact-dependent).66

Second, the two conceptions differ with respect to the importance of agency. For humanitarians, the cause of a refugee’s need is irrelevant. Whether a refugee’s basic needs are unmet because of “market forces,” an “act of God,” or simply bad luck is irrelevant to her claim for asylum. For the political conception, agency is critical. Asylum protects only those whose problems are caused by the wrongdoing of someone acting in an official capacity, or with official sanction or acquiescence.

These features of the two theories together mark out a third important difference: the humanitarian conception is non-political and welfarist, while the political conception endows asylum with a potent, and highly political, expressive dimension. The humanitarian project is to identify those people whose welfare fails to reach the most minimal level, and provide the goods necessary to increase their welfare above that level. Because the humanitarian conception is oriented toward facts rather than normative judgments, agnostic as to the cause of an asylum seeker’s need, and exclusively focused on improving the asylum seeker’s welfare, granting asylum communicates nothing other than that the recipient’s basic needs were unmet. By contrast, because the political conception requires states to make critical judgments about the practices of other states and directs attention at official misconduct, granting asylum communicates condemnation. Asylum is a story of victims and perpetrators, not beggars and benefactors.

**Figure 2: Summary—Contrasting the Humanitarian and the Political Conceptions**

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<thead>
<tr>
<th></th>
<th>What does asylum do?</th>
<th>According to what criterion should asylum be allocated?</th>
<th>Does asylum have an expressive dimension?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Political Conception of Asylum</strong></td>
<td>Grants immunity against harm illegitimately inflicted by official agents</td>
<td>Well-founded fear of persecution</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Humanitarian Conception of Asylum</strong></td>
<td>Meets basic needs</td>
<td>Urgency and gravity of need</td>
<td>No</td>
</tr>
</tbody>
</table>

66. Of course, normative disagreement is also possible over what exactly constitutes “need” or which needs are most serious. Thanks to Ben Friedman for pointing this out.
It remains to be seen, of course, whether the political conception of asylum has any normative appeal. We next need to ask what is gained by a political asylum system, one focused on sheltering those who are wrongfully harmed by authoritative agents; and what would be lost by embracing the humanitarian conception of asylum instead.

III. DEFENDING THE POLITICAL CONCEPTION: MEMBERSHIP AND MORAL PRIORITY

A normative defense of the political conception of asylum begins with the observation that asylum is merely one way among many that states can aid refugees. This fact suggests the possibility that while other tools might be used to promote humanitarian ends, asylum has a different role—a political role—to play. Contextualizing asylum as one refugee policy tool among many generates a powerful moral argument for the political conception. Asylum, unlike most other forms of refugee assistance, gives its recipients membership abroad. I contend that those who suffer political harms—in other words, the persecuted—have moral priority to the political good that asylum offers. In line with the two-tiered structure of our current refugee regime, non-persecuted refugees would be helped in other ways. The political conception of asylum recognizes this moral priority; the humanitarian conception does not.

A. The Refugee Policy Toolkit

Asylum is just one of several tools that policymakers can use in aiding refugees. Asylum and the other tools in the refugee policy toolkit—including in situ aid, temporary protection, and military intervention—all are designed to help refugees, but do so in different ways. Each tool solves a different problem; they are not interchangeable. Once we appreciate the characteristics that distinguish asylum from other tools in the kit, we can better understand why the political conception of asylum is more appealing than the humanitarian conception. The political conception takes account of asylum’s unique characteristics while the humanitarian conception does not.

Consider four forms of refugee assistance other than asylum policy:

- In situ aid in the form of emergency food distribution and the provision of temporary shelters in the refugee’s state of origin or in camps along the border, together with long term development aid;
- Temporary protection of refugees who enter the territory of a state of refuge;

68. See infra Part III.B.
69. See infra Part III.C.
Military intervention to establish a safe haven or security zone amidst conditions of general insecurity or violence, or to overthrow an oppressive government; and

Overseas refugee resettlement programs, which grant immigration visas to refugees who are referred to the program by the UNHCR, nongovernmental organizations ("NGOs"), or an embassy; the programs facilitate the transportation of those accepted to the country of refuge.71

How is asylum different from these other tools? The next two Sections contrast asylum to in situ aid and temporary protection, respectively. I examine military intervention in Part III.E, and reserve refugee resettlement for Part III.F.

B. The In Situ Principle

One way to distinguish among these tools is to ask whether they provide assistance inside or outside a refugee’s country of origin. Asylum, temporary protection, and overseas refugee resettlement all provide protection outside a refugee’s state of origin; in situ aid involves assistance inside a refugee’s state of origin.72 Assuming that it is always better for refugees' needs to be addressed at home than abroad, a refugee’s claim to admittance abroad will be strongest when relief inside is unavailable. This assumption is sound for two reasons. First, viewing protection abroad as a second-best, stop-gap measure recognizes the interest states have in controlling admission to their territory. The presumption in favor of such control should be overcome only when those seeking admission have no other reasonable option. Second, it recognizes that a state is the primary guardian of its citizens; a person has a claim for assistance from the international community only when a state is unable or unwilling to perform that role of guardian, much as public foster care is available to only those children whose parents are unable or unwilling to provide for them.73 What we can call the in situ principle follows straightforwardly: anyone who can receive help in his state of origin, or in camps along the border, ought to be helped there rather than abroad. The appeal of this principle rests in the fact that, as Joseph Carens writes, "it matches the remedy to the problem."74 Protection abroad is reserved for those unable to receive protection at home. The in situ principle is reflected in refugee law by the requirement that, to qualify

71. See infra Part III.F.
72. Military intervention also involves assistance inside a refugee’s state of origin, but I defer discussion of this tool until Part III.E.
as a “refugee,” an applicant must demonstrate that he was unable to avail himself of protection in his country of origin.\footnote{Hathaway, supra note 23, at 133.}

The \textit{in situ} principle is widely endorsed not only by defenders of closed borders like Michael Walzer,\footnote{Michael Walzer, The Distribution of Membership, in Boundaries: National Autonomy and Its Limits 1 (Peter G. Brown & Henry Shue eds., 1981).} but also by humanitarians like Zolberg et al., who acknowledge that it is a “key issue . . . whether the immediate, intense suffering of the victims can be relieved by helping them in their own country—through policies of their own government or combined with favorable external initiatives—or if relief is possible only by enabling them to move abroad.”\footnote{Zolberg et al., supra note 40, at 35; see also Hathaway, supra note 23, at 134; Matthew J. Gibney, The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees 8 (2004); Zolberg et al., supra note 40, at 289.} The \textit{in situ} principle potentially rules out protection abroad—in the form of asylum, temporary protection, or refugee resettlement—for many very needy people. As Zolberg et al. note, “[m]ost victims of malnutrition and slow starvation in the developing world should not be considered as refugees because most of them can be assisted \textit{in situ} in their own countries.”\footnote{Zolberg et al., supra note 40, at 33.}

In addition, those caught in the cross-fire of armed conflict can sometimes remove themselves from battle areas without great risk of physical harm, and those persecuted by regional or local authorities may find adequate protection from the national government elsewhere in their state of origin.\footnote{Of course, on the humanitarian conception, asylum would remain available for those victims of famine who do not have access to international assistance, and for those cross-fire victims unable to find safety within their own countries.}

The \textit{in situ} principle contains an ambiguity which is important to nail down, and upon which Carens seizes. When we speak of people who \textit{can} be helped \textit{in situ}, as Zolberg et al. do, we could mean that aid is currently being distributed in their state of origin, so that they need only remain in place or move a short distance to receive it; or, we could mean that \textit{hypothetically}, aid could be distributed there if the international community decided to do so. Carens emphasizes that only the first reading is normatively defensible:

Why should the hypothetical possibility of available assistance carry any moral weight, if the assistance is not actually available? After all, every refugee claimant could in principle be helped at home if the state officials . . . responsible for the threats altered their behavior . . . . [This] may not be [a] realistic option[, but alternative solutions to nonviolent threats to life may not be realistic either. The crucial question at the level of principle is not whether adequate assistance could be made available in principle but whether it is actually available.\footnote{Carens, The Philosopher and the Policymaker, supra note 42, at 14 (emphasis added).}
Understood properly, then, the in situ principle limits protection abroad to refugees for whom aid in situ is in fact unavailable. An important effect of this principle is that bystander states have an incentive to take seriously their duties to provide foreign aid and emergency relief to those whose basic rights are threatened. If they fail to do so, they become exposed to refugees’ claims for admission.

C. The Membership Principle and Temporary Protection

Next consider the distinction between asylum and another tool in the refugee policy toolkit—temporary protection. They differ with respect to the good they offer their recipients. Asylum confers a political good—membership.81 Recipients of asylum—or “asylees”—are generally encouraged to integrate socially, economically, and politically, and are given rights and benefits to facilitate this process. Most important, after a short time, they are generally eligible to adjust their status to legal permanent residence, and eventually gain citizenship. In the United States, for example, asylees can petition to adjust their status to legal permanent residence after one year.82 In short, then, asylum provides more than just “substitute protection”;83 it also offers political membership.

By contrast, recipients of temporary protection are given permission to remain in the country for a predetermined period of time, which can be extended at the discretion of the executive, and, in most countries, are ineligible to adjust their status to legal permanent residence regardless of their length of stay. In the United States, for example, Temporary Protected Status (“TPS”) is granted for a fixed time period of between six and eighteen months to aliens from a particular country who entered the United States prior to a designated cut-off date.84 When the time period has expired, the Attorney General can decide whether to renew TPS for an additional fixed time period.85 In most European countries, temporary protection, or its equivalent,86 is a status given to refugees upon entry for a fixed time period, subject to discretionary renewal.

By applying the same logic that undergirds the in situ principle—that the remedy should match the problem—we can formulate a criterion for determining under what conditions membership is the appropriate response to refugees’ claim for admission. Call this criterion the “membership principle”: temporary protection should be available for those who simply lack protection of their basic rights, while asylum should be reserved for those exposed to serious harm because they lack political membership.87

81. The same is true of overseas refugee programs. I defer discussion of them to Part III.F.
84. In other words, it is not a status awarded upon entry. See 8 U.S.C. § 1254a(b)(1)–(2) (2000).
86. See Joly, supra note 30.
87. This statement of the membership principle differs in an important way from the membership principle proposed by Walzer. See Michael Walzer, Spheres of Justice 48–49 (1983) (“There is, however,
Many objections can be lodged against the membership principle, and I address several of them below. But first I must say more about what it means to "lack political membership." The distinction drawn by the membership principle—between a need for protection and a need for membership—plays off of Rawls’s distinction in the _Law of Peoples_ between two ideal types: "burdened societies" and "outlaw states." 88 Burdened societies “lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered.” 89 With assistance, however, they can, over time, come to "manage their own affairs reasonably and rationally and eventually to become members of the Society of well-ordered Peoples.” 90 A necessary condition of belonging to this Society is that a state operates a "decent system of social cooperation." 91 A decent system of social cooperation is one in which (a) the state secures human rights, by which Rawls means "a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide" 92 and a right to formal equality; 93 (b) citizens view the duties and obligations imposed by law as "fitting with their common good idea of justice" and not "as mere commands imposed by force"; 94 and (c) officials believe that "the law is indeed guided by a common good idea of justice," not "supported merely by force." 95

Burdened societies aspire to meet these three criteria, but their "historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult if not impossible." 96 They may be too weak to possess a monopoly on violence, and thus are wracked by civil conflict, or they may lack the infrastructure to offset food shortages or the resources to redress severe poverty. On the whole, however, their leaders are motivated by a "common good" idea of justice and a desire to secure decent treatment for their citizens. Such societies are sufficiently worthy of respect as to rule out political sanctions imposed by other states or other external interference with their institutions. 97

"Outlaw states," by contrast, are regimes that "refuse to comply with a reasonable Law of Peoples," 98 by acting aggressively toward other states or, more
important for our purposes, by violating Rawlsian human rights or operating a system of law that is not guided by a common good idea of justice, but is maintained merely by force. While outlaw states possess a monopoly on violence and have the capacity to satisfy the needs of its people, their leaders are "callous about [their citizens'] well-being," and not merely ineffective.99 Of course, not every citizen of an outlaw state is exposed to the kind of treatment that makes the state an outlaw. Often outlaw states reserve such treatment for those who challenge their authority by expressing contrary political opinions, or for those who, by virtue of their different race, religion, or nationality, are made into scapegoats or marginalized in order to generate solidarity among others.

While citizens of burdened societies and citizens of outlaw states may both lack protection of their basic rights, they are differently situated in one important way. Burdened societies recognize that their citizens are entitled to protection, but due to exigencies beyond their control, are unable to provide it. A state acting as an outlaw, by contrast, is able to provide protection of its citizens’ basic rights, but chooses not to. It denies its citizens recognition as persons who are entitled to basic rights by inflicting harm for illegitimate reasons. When I speak of “lacking membership,” I mean this denial of recognition.

Arendt’s concept of the “right to have rights,” 100 which Seyla Benhabib glosses as a right to membership, 101 may be useful here as well. Arendt distinguishes between the deprivation of rights and a deprivation of membership:

No matter how they have once been defined (life, liberty, and the pursuit of happiness, according to the American formula, or as equality before the law, liberty, protection of property, and national sovereignty, according to the French); no matter how one may attempt to improve on an ambiguous formulation like the pursuit of happiness, or an antiquated one like unqualified right to property; the real situation of those

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99. Id. at 109. Rawls himself offers two accounts of the distinction between burdened societies and outlaw states. First, he employs the distinction with regard to states’ conduct toward other states: burdened societies are “not expansive or aggressive” while outlaw states are. Id. at 106. The internal actions of a state would seem to be beside the point. But at an earlier point, he suggests that a state can qualify as an outlaw even if it is “not dangerous and aggressive toward other states.” Id. at 95 n.6. In this passage, internal conduct—the violation of human rights—is what sets outlaw states apart from burdened societies. Along these lines, he argues that outlaw regimes that violate human rights should be refused economic assistance, implying that, by virtue of their internal actions, they are different than burdened societies, to which there is a duty to provide economic assistance. Id. at 93. Finally, he argues that outlaw states are subject to intervention in defense of human rights if they do not respond to economic sanctions, id. at 94 n.6, implying that outlaw states possess the capacity to protect human rights and only lack the will to do so. I have chosen to emphasize an interpretation of Rawls that stresses internal actions as determinative of a state's status as burdened or outlaw.


101. Seyla Benhabib explains that this phrase “invoke[s]... a moral claim to membership and a certain form of treatment compatible with the claim to membership.” Seyla Benhabib, Transformations of Citizenship 16 (2001); see also Frank I. Michelman, Parsing “A Right to Have Rights,” 3 Constellations 200 (1996).
whom the twentieth century has driven outside the pale of the law [i.e.,
refugees] shows that these are rights of citizens whose loss does not en-
tail absolute rightlessness. The soldier during the war is deprived of his
right to life, the criminal of his right to freedom, all citizens during an
emergency of their right to the pursuit of happiness, but nobody would
ever claim that in any of these instances a loss of human rights [i.e., a
denial of membership] has taken place . . . . The calamity of the right-
less is not that they are deprived of life, liberty, and the pursuit of hap-
piness, or of equality before the law and freedom of opinion . . . but that
they no longer belong to any community whatsoever.102

Arendt’s distinction between a loss of rights and a position of rightlessness
tracks Rawls’s distinction between burdened societies and outlaw states. A
state may deprive its citizens of rights or be unable to secure them for any
number of reasons, including national emergencies that require sacrifices of
rights by all citizens, natural disasters like earthquakes or droughts that de-
stroy one’s livelihood, and civil wars that engulf one’s region. Such citizens
nonetheless retain their membership in what Rawls calls a “people” and what
Arendt calls a “community”103: their burdened society recognizes their enti-
tlement to rights, but is unable to deliver what it acknowledges is owed. By
contrast, to have one’s membership repudiated is to have one’s rights go un-
protected because they are unrecognized.

The membership principle contends that refugee policy should recognize
the distinction between a need for protection and a need for membership: those
who have been exposed to serious harm by official agents for illegitimate rea-
sons have a moral priority to the good of membership that asylum provides.
Others whose basic rights are unprotected would be eligible for temporary
protection until their respective state of origin is able to provide the protec-
tion that it acknowledges is owed. At that point, the state of refuge would
encourage repatriation through a combination of financial incentives and the
threat of deportation.

So far, I have written as though the distinction between burdened socie-
ties and outlaw states were always clear—indeed, I have treated them as ideal
types. In the real world, of course, the line between them is often blurred.
For example, outlaw elements may exist within burdened societies. Indeed,
one way a society might be burdened is that, despite its best efforts, it is
unable entirely to control these outlaw elements. For example, a British court
found that the government of Slovakia—despite reasonable diligence—was
unable to reduce a Roma’s exposure to skinhead attack beneath the level of
well-founded fear.104 A state may also be both burdened and outlaw: it may

102. ARENDT, supra note 100, at 295.
103. Id. at 298.
104. See Horvath v. Sec’y of State for the Home Dep’t (2001) 1 A.C. 489 (U.K.). The court nonethe-
less dismissed Horvath’s appeal because it found, notwithstanding Horvath’s well-founded fear of skin-
head violence, that Slovakia had satisfied its duty of protection by providing a sufficiently efficacious
criminal justice system.
be unable to protect some citizens despite its best efforts, and be unwilling to protect others whom it is capable of protecting. Nigeria serves as an example. On the one hand, "[t]he weakness of the Nigerian police force, its apparent inability to maintain law and order, and the lack of public confidence in its effectiveness . . . have given many armed groups the freedom to operate according to their own rules, and to carry out serious human rights abuses with impunity."105 But at the same time, the Nigerian government has carried out politically motivated arbitrary arrests, detentions, and torture.106 Finally, a country might be unable to protect some rights—for example, rights to economic subsistence—and be unwilling to protect other rights—for example, rights to physical security.

When presented with the claim of a particular applicant for asylum, how should an asylum adjudicator determine whether the person is entitled to asylum or temporary protection? First, assuming the applicant has suffered a deprivation of rights, the adjudicator should try to ascertain whether the deprivation in the applicant’s particular case was due to the state of origin’s unwillingness or inability to protect. Did the state target her for harm or refuse to protect her from harm committed by private actors? Or did circumstances beyond the state’s control leave the state unable to protect her from harm? If the former, the adjudicator must then ascertain the reason why the state deprived her of her rights. States sometimes target individuals for harm for legitimate reasons. For instance, they deprive criminals of freedom. But subjecting criminals to punishment does not make a state an outlaw. So the adjudicator must distinguish between a legitimate deprivation of rights and an illegitimate one. Asylum is meant to protect against only the latter.

This is a moral, not a technical, judgment, and requires the decisionmaker to rely on substantive principles of legitimacy. Individuals targeted by the state for serious harm on account of their race, religion, nationality, or some other immutable characteristic would most clearly fall into this category. So too would those harmed on account of their political opinion. One might object that we cannot trust asylum adjudicators to engage responsibly in the question of political theory whether a state’s refusal to protect was “legitimate,” given widespread difference of opinion over what constitutes “legitimate” state action.107 But the discretion of the decisionmaker can be channeled by the administrative rulemaking process or by statute. For example, the 1995 United States INS Gender Guidelines sought to create “uniformity and consistency”

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107. One might also object that we cannot trust asylum adjudicators to assess accurately the factual issue of whether the state was unwilling or merely unable to protect an asylum seeker. For a response, see infra text accompanying notes 230–231.
among asylum adjudicators in their handling of gender-related claims;\textsuperscript{108} and, in the face of legal decisions denying asylum to Chinese applicants forced to undergo involuntary sterilization,\textsuperscript{109} Congress amended the Immigration and Nationality Act to state that such persons “shall be deemed to have been persecuted on account of political opinion.”\textsuperscript{110} The upshot is that while people can reasonably disagree about what constitutes the illegitimate infliction of harm, such disagreements can largely be resolved as a matter of law at the policymaking level, rather than at the level of individual adjudication.

To recapitulate the argument of this Section: the political conception of asylum and the persecution criterion take account of the membership principle, while the humanitarian conception does not. The political conception, focused on state malfeasance, is capable of recognizing the distinction between a lack of protection—which could result from a variety of causes having nothing to do with official misconduct—and a lack of membership, which can result only from official misconduct. The persecution criterion picks out individuals who have been subjected to serious harm by official agents for illegitimate reasons—reasons that exemplify the individuals’ lack of civic standing. By contrast, the humanitarian conception, focused on the urgency and intensity of need for protection, fails to acknowledge the distinction between a lack of protection and a lack of membership. The humanitarian conception thus cannot account for the distinction between temporary protection and asylum.

\textbf{D. Objections to the Membership Principle and Responses}

A number of objections can be made to the membership principle. First, one might contend that the membership principle draws a distinction without a moral difference—a need for protection itself gives rise to a need for membership. Thus, refugees fleeing burdened societies and outlaw states are equally in need of the good that asylum offers.

Second, one might accept the distinction between a need for protection and a need for membership, but object that the persecution criterion fails to make this distinction. Refugees from burdened societies are sometimes unable to return to their country of origin for decades; such people surely need membership abroad. And refugees from outlaw states sometimes can return to their country of origin after only a short sojourn abroad. Why should such people have priority to the right to remain abroad permanently?

Third, one might argue that the membership principle, as I have framed it, trades on an ambiguity in the word “membership.” To be deprived of membership is to have one’s entitlements to the most basic rights unrecognized; but to receive membership as an asylee is to be granted not only this recognition,
but also rights to political participation and, in some societies, welfare and advanced health care. To truly match the remedy to the problem, the objection might continue, the persecuted would be entitled only to recognition as rights-bearing individuals; but such recognition can be granted in Western legal systems without providing full membership.

Fourth, one might object that the argument advanced only provides a reason for preferring persecuted to non-persecuted people with regard to asylum. It does not alone explain why asylum should be limited to persecuted people. I address each of these objections in turn.

1. A Distinction with a Moral Difference?

The most fundamental objection to the membership principle is that it relies upon a distinction that makes no moral difference: those fleeing burdened societies and those fleeing outlaw states equally lack membership. Andrew Shacknove, for example, has argued in an influential article that the “bond of trust, loyalty, protection, and assistance” between state and citizen—upon which membership is premised—is “ruptured” whenever the citizen’s basic needs are unmet.111 Because the “political commonwealth is formed on the premise that people experience a generalized condition of insecurity when outside the protective confines of society,”112 it is “the absence of state protection of the citizen’s basic needs . . . which constitutes the full and complete negation of society.”113 Thus, the persecuted are similarly situated to other individuals whose basic needs—for physical security as well as “unpolluted air and water, adequate food, clothing, and shelter, and minimal preventative health care”114—are unmet. They have an equal need for, and thus an equal claim to, membership through asylum.115

The hard case for Shacknove is one in which basic needs go unmet due to a natural disaster such as a typhoon, earthquake, or draught. A government’s response to such a disaster can of course be more or less competent, but even the best-organized, most well-intentioned state may have trouble immediately meeting the basic needs of all those affected. The logic of Shacknove’s argument would commit him to the view that these victims—if they cannot be helped in their state of origin—are refugees as well, and so similarly situated to persecuted people. But interestingly, Shacknove stops short of embracing this conclusion. Instead, he distinguishes between a threat to basic needs caused by human malice or incompetence on the one hand, and nature

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111. Shacknove, supra note 38, at 278.
112. Id.
113. Id. at 277.
114. Id. at 281 n.18.
115. Shacknove is careful to note that his argument pertains only to the “concept” of the refugee, and stops short of arguing that other states have any particular obligation to refugees. Id. at 277. But if Shacknove is right that the persecuted are similarly situated to other refugees, there is no justification for treating them differently. If we offer asylum to persecuted people, we should offer it to other refugees as well.
on the other, saying that “to the extent that a life-threatening situation occurs because of human actions rather than natural cases, the state has left unfulfilled its basic duty to protect the citizen from the actions of others. All other human rights are meaningless when starvation results from the neglect or malice of the local regime.”116 To what should we attribute Shacknove’s retreat from the logical implications of his argument? Perhaps to the intuition that in fact the distinction between a burdened state and an outlaw state does make a moral difference? Why else would the “neglect or malice” of the regime be relevant?

A less faint-hearted humanitarian may be unwilling to make Shacknove’s concession. The “bond of loyalty” between citizen and state, it may be argued, is dissolved whenever the state is unable to protect a citizen’s basic needs, no matter the reason. But this view errs in equating “the absence of state protection of the citizen’s basic needs” with “the full and complete negation of society.”117 Recall Arendt’s distinction between a deprivation of rights and the position of rightlessness. A person whose state is temporarily unable to provide her with security is differently situated than someone whose state denies her entitlement to security altogether. “Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice.”118 In the former case, a social contract continues to exist, though the state may be in default. By contrast, in the latter case, the law is nothing more than “a scheme of commands imposed by force” that “lacks the idea of social cooperation.”119

2. Reserving Membership for Those Who Need Permanent Protection

A second objection concedes that a morally relevant distinction can be drawn between a need for protection and a need for membership, but denies that the persecution criterion accurately identifies those with the latter. The need for membership, the objection continues, stems not from the reasons for flight—not from whether one flees a burdened society or from the malfeasance that is characteristic of an outlaw state—but instead from the length of time that one requires refuge. When a refugee requires protection for a long time, he should be entitled to membership abroad regardless of his reasons for flight. And when a refugee requires protection for only a short time, he should be entitled to only temporary protection. The persecution criterion would thus appear to rest on a pair of faulty empirical premises: first, the assumption that burdened societies cause only temporary displacement, so that refugees from such societies need only temporary protection; and second, that outlaw states cause permanent displacement, so that the persecuted uniquely require membership.

116. Id. at 280 (emphasis added).
117. Id. at 277.
118. ARENDT, supra note 100, at 296.
119. RAWLS, supra note 88, at 65.
The first premise is clearly false. The case of the tiny Caribbean island of Montserrat provides a good example. In 1995, the island’s volcano erupted, forcing about 7000 people—two-thirds of the island’s inhabitants—to flee, and leaving two-thirds of the seventy-seven-square-mile island under ash. Most fled to Britain or other Caribbean islands, but 292 came to the United States, where they were granted temporary protected status that was extended year after year. Recent scientific estimates, however, indicate that volcanic activity in Montserrat is likely to continue for at least twenty more years, and possibly for centuries, making it impossible for Montserratians to safely return. Surely temporary protection is an unsatisfactory solution for them; their need for protection is anything but temporary. The same could be said of refugees from countries like Somalia, where civil war and chaos have ruled for more than a decade, with no end in sight.

The second premise is also faulty. Refugees fleeing outlaw states do not necessarily need permanent refuge. Governments can be overthrown, or they can choose to liberalize, permitting formerly persecuted people to return to their homes and reclaim their status as members. A better system, the objection concludes, would offer the same type of protection to all refugees. They could be given temporary protection at first, but after residing in the country of refuge for a suitable length of time, they could adjust their status to permanent residence. While this objection has considerable force, it does not justify abandoning the persecution criterion altogether. The objection treats persecuted people and other refugees as identically situated; thus, a refugee has a need for membership only once he has resided for a considerable time in his state of refuge, so that his stay no longer can be considered “temporary.” But persecuted people and other refugees are not identically situated; they stand in a different normative relationship to their state of origin. Persecuted people are in need of protection because their standing as members has been repudiated through an act of official wrongdoing. Other refugees need protection because their state of origin is for the time being unable to provide what is owed. Refugee law ought to recognize this difference by matching the remedy to the problem: it ought to provide persecuted people membership in their states of refuge, and ought to provide temporary protection for other refugees. Those who have been deprived membership in their home countries need surrogate membership now, not five or ten years down the line.

But a persecuted person’s moral priority to membership should be presumptive, not absolute. Political conditions change. Oppressive governments are sometimes overthrown, and sometimes liberalize, so that the repatriation of persecuted people is occasionally possible. For this reason, asylum law does

not provide asylees with *immediate* permanent residence. In the United States, for example, asylees are eligible for permanent residence only after one year. In the meantime, they are subject to a “cessation” clause\(^{122}\) that allows for the termination of their status as asylees if conditions in their state of origin change to permit a safe return.

Until very recently, the U.S. law governing asylees’ adjustment of status was sorely deficient. Until the REAL ID Act, passed in May 2005, the number of asylees who could adjust their status in any given year was capped at 10,000.\(^{123}\) As a result, there was, as of January 2005, a waiting list for legal permanent residence approximately twelve years long: an asylee who filed for an adjustment of status in winter 2005 would have needed to wait until 2016 to receive a green card.\(^{124}\) This made a mockery of the type of relief that asylum is designed to offer. The REAL ID Act removed the 10,000-person cap so that all asylees could adjust their status to legal permanent residence in a timely fashion.\(^{125}\)

Recipients of temporary protection, meanwhile, at some point ought to be able to overcome the presumption that they need protection only temporarily. When refugees from burdened societies are unable to return home after years of protection abroad, they ought to be able to adjust their status and receive permanent residence, lest the notion of “temporary” protection become a cruel fiction. The law might therefore allow adjustment to legal permanent residence after five years of temporary protection (particularly for families with children), if refugees from burdened societies can establish that repatriation continues to be unsafe.\(^{126}\) This policy would recognize the importance of social connections that recipients of temporary protection develop in their place of refuge over many years, so that it would be unfair to ask them to leave. Perhaps even more important, the liberal democratic norms of Western host countries also demand that the possibility of adjustment be made available. Such norms are inconsistent with the continuing disenfranchisement of a group of people who, practically speaking, have become permanent residents.

This is an area in which current U.S. law needs to be revised. A recipient of temporary protection in the United States currently is eligible to adjust his status to legal permanent residence only if he meets a series of onerous re-

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126. Granting permanent residence to recipients of temporary protection who have been resident for five years will not dilute the expressive meaning of asylum, because the adjustment of status stems from an internal commitment to an anti-caste norm, not from a critical judgment about another state’s practices. Preserving the distinction between temporary protection and asylum enables the receiving country to attach different social meanings to the different forms of relief.
quirements. First, he must be continuously present in the United States for a period of ten years;\(^{127}\) second, he must have demonstrated “good moral character” during that time and must not have been convicted of any designated crimes;\(^{128}\) and third, he must show that his removal would cause “exceptional and extremely unusual hardship” to his U.S. citizen or permanent resident spouse, parent, or child.\(^{129}\) The temporary protection statute also forbids the Senate from considering any bill to allow for the adjustment of recipients of temporary protection without the support of a three-fifths supermajority.\(^{130}\)

TheMontserratians provide a good example of the pitfalls of our current approach. In July 2004, after the citizens ofMontserrat had spent seven years in the United States with temporary protected status,\(^{131}\) the Department of Homeland Security told them to pack their bags: their temporary protected status was terminated, even though their island remained uninhabitable.\(^{132}\) The Department of Homeland Security justified the termination with the following logic:

The volcanic activity causing the environmental disaster in Montserrat is not likely to cease in the foreseeable future. Therefore it no longer constitutes a temporary disruption of living conditions that temporarily prevents Montserrat from adequately handling the return of its nationals.\(^{133}\)

In other words, temporary protection was revoked because the need for protection was no longer temporary. This is a travesty. A better approach would have replaced temporary protection with permanent residence, in recognition of the fact thatMontserratians are unlikely to be able to return home, and have nowhere else to go.\(^{134}\) Somalis offer another example. They first received temporary protection in the United States in 1991. Since then, it has been extended fourteen times, for twelve-month periods each time.\(^{135}\) Long ago, the United States should have offered the Somalis the chance to adjust their status to permanent residence.

\[^{130}\] 8 U.S.C. § 1254a(h).
\[^{133}\] Bernstein, supra note 120, at A1.
\[^{134}\] The U.S. government contends that theMontserratians do have somewhere else to go: Britain. Montserrat is a British overseas territory. Indeed, Britain should offer to settle theMontserratians; as sovereign over the island, it has primary responsibility for their well-being. But if Britain refuses to discharge its responsibility, the United States would be wrong to force the islanders to leave.
3. Multiple Meanings of Membership

A critic might level a third objection that runs as follows: although persecuted people may have a better claim to membership abroad than anyone else does, even persecuted people do not have a very strong claim. While they have been deprived of “membership” in their country of origin, “membership” in this context means something different from the “membership” they would receive in their state of refuge. The “membership” of which they have been deprived consists of civic standing in the most minimal sense: recognition as persons entitled to physical security and economic subsistence. The “membership” they would receive consists of much more: rights of political participation, access to social insurance, and in some countries, access to advanced healthcare. The logic of matching a remedy to the problem does not justify providing “full membership” to remedy the absence of “minimal membership.” Instead, persecuted people should receive what they lack—recognition as persons entitled to basic civil rights. This civic status is available in Western countries to all persons within their territory, whether they are members or not.136

One response, inspired by Arendt, is that one’s institutional rights are never secure without membership, and in Western societies, membership means full membership, not second-class status. Using the experience of the twentieth century as her guide, Arendt argues that we can safely count on the continued recognition of our entitlement to rights only as members.137 Although “the Rights of Man . . . had been defined as ‘inalienable’ because they were supposed to be independent of all governments . . . it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them.”138 The importance of membership is especially visible today in the context of the war on terror, which the U.S. government has waged in part by subjecting aliens to scrutiny and regulation that, in some cases, would likely be unconstitutional if applied to citizens.139

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136. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. Its provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”).

137. On this account, there is nothing that conceptually links the right to have rights with a right to membership. The link is made as a matter of practical judgment. “[I]t was much wiser to rely on an ‘entailed inheritance’ of rights which one transmits to one’s children like life itself, and to claim one’s rights to be the ‘rights of an Englishman’ rather than the inalienable rights of man.” ARENDT, supra note 100, at 299 (emphasis added). But if the “rights of man” were genuinely “guaranteed by humanity itself,” rather than by the political communities into which humanity divides itself, the right to have rights would not depend on a right to membership. Arendt is skeptical that this guarantee can be given—“it is by no means certain whether this is possible,” she cautions—but seems open to the possibility in the future, even as she warns of the totalitarian dangers of world government. Id. at 298.

138. Id. at 291–92; see also Michael Ignatieff, Human Rights as Politics and Idolatry 80 (2001) (arguing that “we do not build foundations on human nature but on human history, on what we know is likely to happen when human beings do not have the protection of rights”). Thanks to Dana Villa for drawing this connection.

139. Examples include prolonged administrative detention of immigrants, special registration of im-
A second response appeals to the liberal democratic norms of states of refuge, which cannot tolerate a permanent under-caste. The last two centuries have seen the steady elimination of political statuses other than full citizenship. While the distinction between citizens and aliens still has force, it too has been under pressure, and can be intellectually sustained only because an alien’s presence is assumed to be temporary. One need only look at the fate of guest-worker programs for support of this proposition. Once it became clear that guest workers had no intention to return home, contrary to the terms of their invitation, the programs became ideologically unsustainable. Liberal democracies could not abide by the creation of a disenfranchised laboring caste. The importation of guest-workers was discontinued, and naturalization laws were revised to facilitate the political incorporation of guest workers already present. In light of these trends, the creation of a permanent caste of non-citizen asylees would be a retrograde step.

4. Why Only Persecuted People?

The membership principle explains why persecuted people should have moral priority to asylum. But why should asylum be limited to persecuted people? An answer to this question is found in asylum’s expressive dimension, which would be muffled by a humanitarian conception of asylum. The political conception views asylum as constituting a sanction against other states—a minor sanction, to be sure, but a sanction nonetheless. As Doris Meissner puts it, “[t]oward antagonist nations, political asylum and refugee decisions represent one of many methods for registering disapproval of a nation’s leadership or political system.” It differs from other forms of sanction—such as diplomatic letters of protest, the withdrawal of ambassadors, economic embargo, sponsorship of opposition groups, and direct military intervention—in that it is individuated. While these other forms of sanction follow from a system-wide judgment about the legitimacy of a regime, a grant of asylum follows from a judgment about the legitimacy of a state’s exercise of coercive power in a particular case.

Yet asylum nonetheless resides on a continuum with these other more powerful forms of sanction. Judgments in particular cases are connected to system-wide migrants from designated countries, and the criminalization of “material support”—which may include associational membership—to foreign terrorist organizations. See David Cole, Enemy Aliens 22–39, 47–71 (2003). See generally Karen C. Tumlin, Suspect First: How Terrorism Policy is Reshaping Immigration Policy, 92 CAL. L. REV. 1173 (2004).


141. Guest-worker programs have become unsustainable in Europe because of the recognition that guest workers do not go home, and when they choose to stay, their naturalization is necessary as a matter of political principle. On guest workers in Europe generally, see David Jacobson, Rights Across Borders (1996); Yasemin Soysal, Limits of Citizenship (1994).

142. Germany offers the most compelling example of this phenomenon, but amnesty programs in the United States could be understood to stem from the same egalitarian impulse.

wide judgments insofar as they provide the data points upon which system-wide judgments can be made. It is through many individual acts of persecution that a state becomes an outlaw. And toward outlaw states, a confrontational strategy is appropriate. Such states have violated the minimum conditions of legitimacy, and thus are liable to international interference, and at the extreme, coercive intervention and overthrow.144 If an outlaw state fails to respond to these measures, and “the offenses against human rights are egregious,” forceful “intervention in the defense of human rights would be acceptable and would be called for.”145

It should be obvious that the humanitarian conception cannot take account of asylum as an expressive practice. By granting asylum to victims of misfortune as well as misconduct, the humanitarian conception muffles asylum’s expressive dimension. Asylum no longer would express any particular attitude toward a substantive value; it would merely succor individuals who have been deprived of basic rights without regard to the cause of their deprivation. Outsiders who observe a decision to grant asylum would similarly be unable to infer any expressive element in that decision.

E. Humanitarian Military Intervention

Granting asylum thus expresses to a state not only that its treatment of a particular citizen is unacceptable, but also that it is on probation. Either it changes its ways, or it will be liable to more intrusive, system-wide forms of interference. In most cases, the number of people persecuted by any given government is small enough to be absorbed abroad without much difficulty, and more coercive interference would be grossly disproportionate to the harms that would be prevented. In this majority of cases, asylum is an appropriate method of doing something to protect victims of persecution while registering disapproval and warning to the persecutory regime.146

But if persecution is widespread and cruel enough—as in cases of ethnic cleansing or genocide—then the proportionality calculations must be revised. Coercive interference in the form of military intervention may indeed satisfy the proportionality principle, despite the harm to innocents that would result. In such cases, the third tool in the refugee toolkit—humanitarian military intervention—becomes a viable replacement for asylum. The 1994 U.N. resolution authorizing military force against Haiti offers a prototype for how military intervention can act as a more potent substitute for asylum. The resolu-

144. See Rawls, supra note 88, at 93 (arguing that outsiders “may pressure the outlaw regimes to change their ways” and back this up by “firm[ly denying] economic and other assistance” or by refusing to “admit [them to] mutually beneficial cooperative practices”). Burdened societies, by contrast, still retain a presumptive legitimacy. Their governments must be assisted in their attempts to reform, not thrown out of power.

145. Id. at 94 n.6.

146. For a fuller version of this argument, as well as development of the claim that an expressive asylum policy may in fact impact state behavior, see Matthew E. Price, A Political Conception of Asylum, at ch. 4 (Apr. 2005) (unpublished Ph.D. dissertation, Harvard University) (on file with author).
tion, which expressly listed “violations of civil liberties” and “the desperate plight of Haitian refugees” as justifications for authorizing the use of all necessary means to overthrow the Haitian regime,147 was significant as the first U.N. Security Council Resolution to mandate regime change of a U.N. member state.148 The creation of a Kurdish safe zone in Northern Iraq in 1991 offers another excellent example of a case in which military intervention substituted for asylum. In that case, the U.N. Security Council Resolution cited the “repression of the Iraqi civilian population in many parts of Iraq, including most recently in the Kurdish populated areas which led to a massive flow of refugees towards and across international frontiers” as a threat to international peace justifying military action to create a safe haven.149 In cases of ethnic cleansing, the justification for substituting military intervention for asylum is even stronger, since, as we learned in Bosnia, to grant asylum is often to help facilitate ethnic cleansing.150

As Richard Haass, the former director of Policy Planning at the U.S. State Department, has remarked, “[w]hen states violate minimum standards by committing, permitting, or threatening intolerable acts against their own people or other nations, then some of the privileges of sovereignty are forfeited.”151 The political conception thus views asylum as linked to a particular view of sovereignty’s place in the international system: sovereignty is conditional and cannot serve as a shield of immunity behind which unjustified harm can be inflicted with impunity.

F. Proximity Bias and Overseas Refugee Resettlement

So far, I have examined asylum’s relationship to three of the other tools in the refugee policy toolkit: in situ aid, temporary protection, and humanitarian intervention. Now I wish to consider another tool: overseas refugee resettlement programs. These programs, which are currently operated in significant numbers by the United States, Canada, and Australia,152 permit individuals to apply

147. The preamble states, “(g)ravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission . . . .” S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).
152. Together, these three countries represent ninety percent of overseas resettlement. In addition to New Zealand and the traditional Western European resettlement countries (Norway, Sweden, Denmark, Finland, the Netherlands, and Great Britain), small numbers of referrals were accepted by Belgium, Benin, Burkina Faso, France, Germany, Italy, Pakistan, Spain, and Switzerland. U.S. DEPT OF STATE ET AL., PROPOSED REFUGEE ADMISSIONS FOR FY 2006: REPORT TO THE CONGRESS 2 (2005), http://www.
overseas for a refugee immigration visa. In the United States, the basic eligibility requirement for this program is related to the requirement for asylum: an applicant must be referred to the program by a U.S. Embassy, the UNHCR, or an NGO, and demonstrate a well-founded fear of persecution on account of race, religion, nationality, social group membership, or political opinion. Alternatively, one can demonstrate that he is a member of a group identified by the government as "special humanitarian concern" due to the persecution of its members, or, if from one of twenty countries, he can be the spouse, parent, or unmarried minor child of someone who has already received asylum or been admitted as a refugee.

Overseas refugee programs effectively relocate the asylum application and adjudication process from within a country’s borders to outside it. The possibility of identifying persecuted people in their region of origin and bringing them to the United States raises the question of why states should ever rely on asylum programs rather than overseas resettlement programs to assist refugees. Asylum in Western states is available only to those who can make it out of their own country and travel to the West—often by traversing great distances at considerable expense. This group is only a small subset of all those who are in need of membership abroad, and indeed, may not be the most in need.

What can justify asylum’s proximity bias? As Walzer asks, "[w]hy be concerned only with men and women actually on our territory who ask to remain, and not with men and women oppressed in their own countries who ask to come in? Why mark off the lucky or the aggressive, who have somehow managed to make their way across our borders, from all the others?" Proximity seems to be "a morally arbitrary criterion for determining the responsibilities of states" with regard to refugees. And a proximity bias infects not only asylum, but also temporary protection. Perhaps states should end their asylum and temporary protection programs and instead devote the considerable resources


154. In fiscal year 2005, these groups included Jews, Evangelical Christians, Ukrainian Catholic and Orthodox religious activists in the former Soviet Union, certain Cubans and Vietnamese, Meskhetian Turks in Russia, Burmese in Thailand, Iranian religious minorities (primarily in Austria), Burundians in Tanzania, and Bhutanese in Nepal. U.S. DEP’T OF STATE ET AL., supra note 152, at 8–9.

155. These include: Afghanistan, Burma, Burundi, Congo-Brazzaville, Congo-Kinshasa, Colombia, Cuba, Ethiopia, Eritrea, Haiti, Iran, Iraq, Ivory Coast, Liberia, North Korea, Rwanda, Somalia, Sudan, Togo, and Uzbekistan. Id. at 9–10.

156. Zolberg et al. admit as much when they answer the objection that "resource-rich countries of the North would not want to relieve famine or massive poverty in the South by means of a large-scale relocation of people." The North needn’t worry, they say, because "the most needy victims of economic violence usually do not become intercontinental refugees." ZOLBERG ET AL., supra note 40, at 270–71.


currently expended on these programs\textsuperscript{159} to overseas resettlement programs instead.\textsuperscript{160}

In 2003, for example, Britain spent more than $1.5 billion annually to support 93,000 asylum seekers.\textsuperscript{161} Meanwhile, the entire UNHCR budget, meant to provide relief for over 20 million refugees and internally displaced persons, amounted to \$1.2 billion in that year,\textsuperscript{162} of which the United Kingdom donated about \$46.9 million.\textsuperscript{163} From the perspective of both cosmopolitans trying to treat all people as moral equals, and nationalists trying to meet their mutual aid duty, it might be better for Britain to limit the number of people it receives for asylum every year while donating substantially more money to the UNHCR.

Two argumentative strategies are available in response. One can show that, although asylum’s proximity bias introduces an element of moral arbitrariness, this arbitrariness is \textit{not unfair}; or one can show that bias toward refugees at our border is \textit{not morally arbitrary}.

Consider first an argument that asylum’s proximity bias is arbitrary but not unfair. One can analogize the proximity bias to a lottery. Only some fraction of those who can make a moral claim to asylum will win the lottery by making it across international borders to a country of asylum, but ex ante, all have the same expectation of winning. The lottery does not systematically discriminate against any particular group of refugees. But this argument is flawed: the assumption that the lottery does not systematically discriminate against any particular group of entrants is false. Studies show that women, children, and the poor are systematically disadvantaged by the requirement that they leave their country in order to gain protection abroad.\textsuperscript{164} Women and children are less mobile than men, and the poor are unable to afford smugglers whose services are increasingly necessary if one is to evade ever more stringent border controls in the West.

Next consider an argument that asylum’s proximity bias is not morally arbitrary. To refuse protection to those at our borders, one could contend, “would require us to use force against helpless and desperate people.”\textsuperscript{165} We are thus differently situated with respect to refugees at our borders than we are with

\textsuperscript{159} Currently, these costs are estimated to be \$10 billion annually. \textit{See A Strange Sort of Sanctuary, Economist}, Mar. 15, 2003, at 50.

\textsuperscript{160} Hathaway & Neve, \textit{supra} note 12, recommends something like this course of action.

\textsuperscript{161} Alan Travis, \textit{Asylum Service Criticised, Guardian} (U.K.), July 16, 2003, at 3.

\textsuperscript{162} UNHCR, \textit{UNHCR Global Report 2003}, at 20, \textit{available at} http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=40c6d7470&rtbl=PUBL (last visited Apr. 6, 2006). Figure includes additional supplementary program budgets.

\textsuperscript{163} \textit{Id.} at 40.

\textsuperscript{164} See Morrison & Crosland, \textit{supra} note 10, at 21. Most inhabitants of refugee camps are women and children, but most asylum seekers are men. \textit{See Patricia Tier, Rethinking the Refugee Concept, in Refugee Rights and Realities} 106 (Frances Nicholson & Patrick Twomey eds., 1999).

\textsuperscript{165} Walzer, \textit{supra} note 87, at 51; \textit{see also} Matthew J. Gibney, \textit{Liberal Democratic States and Responsibilities to Refugees}, 93 Am. Pol. Sci. Rev. 169, 176 (1999) (referring to the existence of “a connection between the needy claimant and the state” in cases where “the person in desperate need is inside or at the borders of the state”).
respect to refugees who remain many continents away. To deny admission to
refugees at our border, and force them to return to countries to face serious
harm, violates the injunction to "do no harm," and thus implicates us in having
caus ed their plight.\textsuperscript{166} This argument, however, relies on a distinction be-
tween actions and omissions, a controversial position in the philosophical
literature.\textsuperscript{167} Those who argue in favor of it contend that to deny it would de-
mand too much of human beings, morally speaking, by making every person
responsible for "the consequences of every possible course of action that we
do not pursue."\textsuperscript{168} Those who oppose its use in this context maintain that
"[i]f we take satisfaction in being too humane to deport someone seeking
asylum while we continue to reject all applications from those in similar
situations who have not made it to our shores, we are being hypocritical."\textsuperscript{169}

There is a better reason—an institutional reason—for maintaining asylum
and temporary protection programs despite their proximity bias. The sheer
number of refugees in the world—9.2 million at the end of 2004, in addition
to 5.4 million more internally displaced persons in need of humanitarian
assistance\textsuperscript{170)—means that any overseas resettlement program must be capped.
The United States, for example, currently caps its program at 70,000 recipi-
ents annually.\textsuperscript{171} There are two significant dangers, however, in relying solely
on a capped admission program for refugee assistance.

First, politicians attempting to curry favor with domestic constituencies
may reserve scarce slots for ethnic groups who do not have objectively strong
claims for admission, let alone membership. This sort of hijacking has clearly
been in evidence in U.S. refugee policy. Of the 70,000 available slots in 2006,
15,000 are reserved for applicants from Europe and Central Asia. Many of
these are Jews, Evangelical Christians, and Ukrainian Catholics from former
Soviet republics. While these groups are still selected as refugees in numbers
greatly out of proportion to their need for membership abroad, only eight
years ago the numbers were even more skewed. In 1998, out of a total of
83,000 worldwide refugee admissions slots, over 51,000 were reserved for
people from Europe. Only 7000 were reserved for Africans, by comparison.\textsuperscript{172}

Because Jews from former Soviet republics typically would not meet the
statutory requirements for eligibility as refugees, Congress passed the Lauten-

\textsuperscript{166.} See Carens, \textit{Who Should Get In?}, supra note 42, at 101 ("[W]hat gives asylum seekers a vital moral
claim . . . is the fact that their arrival involves the state directly and immediately in their fate . . . . [I]f
asylum seekers are denied entry and sent back, the state is directly involved in what happens to them.
Those seeking to harm them could not do so if the destination state did not return them. That means
that the moral responsibility for what happens to them is greater.").

\textsuperscript{167.} For a good collection on the act/omission distinction, see \textit{Killing and Letting Die} (Bonnie

\textsuperscript{168.} Carens, \textit{Who Should Get In?}, supra note 42, at 101.

\textsuperscript{169.} Singer & Singer, supra note 157, at 120.


\textsuperscript{171.} U.S. \textsc{Dep't of State et al.}, supra note 152, at tbl. 1.

berg Amendment to benefit them. Initially adopted in 1989 and subsequently extended every year or two, the Lautenberg Amendment was enacted in response to pressure from American Jewish groups concerned about an increase in denial rates from 16% to 37.2% between January and March 1989 for overseas refugee applications from Soviet Jews. The amendment states that, for purposes of eligibility for the overseas refugee program, Jews as well as Evangelical Christians still resident in the former Soviet Union are presumed to face persecution on account of religion, and thus are eligible for overseas refugee visas. A similar presumption exists for active members of the Ukrainian Catholic Church or the Ukrainian Orthodox Church who reside in the former Soviet Union, as well as specified Indochinese groups. An amendment sponsored by Rep. Gerald Klecska, a Democrat from Wisconsin, that overwhelmingly passed the House in 1989 would have extended this presumption to Polish nationals as well. Over 35% of those who have received refugee visas since 1989 have benefitted from the Lautenberg presumption.

The second danger of a capped admissions program is that politicians may try to reduce the caps or pressure refugee programs to let slots go unfilled for reasons of domestic politics. For example, the United States has reduced its refugee admissions cap from 231,700 in 1980 to 142,000 in 1992 to just 70,000 today. And concerns over security since September 2001 have dramatically increased the time required to process refugee applications abroad. As a result, only 28,134 refugees actually arrived in the United States in 2003, substantially below the ceiling.

Asylum, by contrast, is open-ended. Anyone who makes it to our borders can apply, and they can remain in the United States while their application is being processed. It is a striking fact that, despite the increase in asylum applications over the past twenty years, no state has seriously considered placing...
a cap on asylum. Instead, states have chosen to reduce the number of applications in other ways—such as off-shore interdiction, carrier sanctions, and visa requirements—that less obviously run afoul of their rhetorical commitment to the “rights” of asylum seekers and their legal commitment to non-refoulement. The possibility of asylum serves as a guarantee to refugees that there will always be a place in the world to which they can flee.

Asylum thus remains an important refugee policy tool despite its proximity bias. An overseas refugee resettlement program also makes an important contribution to refugee policy, but should not replace asylum entirely. One solution is for a state to continue to offer asylum to any qualified applicant who enters its territory, while also making available overseas resettlement slots to refugees. Persecuted people could be eligible for immigration visas, and other refugees could be eligible for non-immigrant temporary protection visas to be distributed on a humanitarian basis. States could cap their overseas resettlement programs so that the number of expected asylees combined with the number of people admitted under the overseas resettlement cap would fall within the state’s absorptive capacity.

This number is, of course, difficult to fix with any certainty, but among the factors to consider are the density of population in the receiving state, the level of unemployment, the sectoral dislocation expected from admissions, the availability of natural resources in the receiving state, the number of needy foreigners it has already absorbed, the expected cultural and environmental impact of admissions, the fiscal impact of providing for the subsistence needs of admittees, the likelihood of integration of a given group of admittees, and the fragility of political support for admission as well as for other forms of foreign assistance. The costs of refugee admission and integration are also rarely diffused evenly across an entire population. More often, particular localities bear the brunt of the burden, as refugees tend to settle in geographic proximity to co-nationals.

The variables just outlined will obviously fluctuate over time and among refugee groups. For example, some groups of refugees will be better able to integrate, or will impose less of an economic hardship because their skill profile better complements the national economy. Some refugee groups may also enjoy greater political support than others. Gibney has written, for instance, of the remarkable support among Europeans for assistance to Bosnian and Kosovar refugees—the political will existed for the resettlement of over 100,000 refugees from Macedonia, and many Europeans even offered to take

183. However, a cap on asylum has been proposed in Britain by Tory leader Michael Howard. See Q & A: Tory Immigration Plans, BBC News, Jan. 24, 2005, available at http://news.bbc.co.uk/1/hi/uk_politics/4199993.stm.
185. For a discussion of some of these factors, see Gibney, supra note 165, at 176–77.
Kosovars into their homes. When greater-than-usual political support for refugee assistance exists, the duty to provide assistance becomes stronger.

Secondary costs of refugee admission must also be considered. The admission of refugees today can generate even greater demand for admission tomorrow by opening up new channels of chain migration, multiplying the ultimate number of newcomers who result from a single admission. States must be aware that once immigration flows begin, they are often hard to control. As a result, “[f]aced with the real and unremitting uncertainties of practice, no state should risk going right up to the brink of social disharmony, for instance. The poor record of states in controlling entrance flows once they have started suggests that few states can be confident of their ability to halt refugee flows just at the edge of imminent danger.”

Still, it should be evident that the United States can afford to resettle more than 70,000 refugees each year. The number of refugees resident in the United States at the end of 2004 was 420,854, according to the UNHCR. This number is high compared to other countries in absolute terms, but relative to the size of the U.S. population, it is quite low. The United States hosts only about one refugee per 700 Americans, compared to ratios of 1:122 in Sweden, 1:94 in Germany, and 1:82 in Denmark. Developing countries shoulder an even greater burden, despite their limited resources: For example, Iran and Zambia each host one refugee for every sixty-five citizens.

IV. Implications

So far, I have attempted to persuade the reader that the distinction between protection and membership is one of moral significance, and should be reflected in refugee policy. I have further argued that the political conception of asylum, unlike the humanitarian conception, takes account of this distinction. The persecution criterion picks out those refugees who face serious harm because they have been deprived of membership. In this Part, I consider some of the implications of the political conception for current doctrine. In particular, I consider the theory’s implications for the definition of “persecution,” for asylum claims made by victims of nonstate actors, for the doctrine of past persecution, and for rights of integration.

187. Gibney, supra note 165, at 175.
188. UNHCR, supra note 170, at tbl. 2.
189. However, at the end of 2004, Germany hosted 876,622; Pakistan hosted 960,617; and Iran hosted 1,045,976. Id.
A. The Interpretation of “Persecution”

Many challenging questions can be raised regarding how the term “persecution” should be understood in light of the membership principle, since interpretive variations can have far-ranging practical consequences. For example, how should we regard refugees who have fled their countries because of civil war or extreme governmental incompetence? What about asylum applicants who have fled a draconian law of general application? Should such people be regarded as lacking membership or merely protection? How should receiving countries distinguish between legitimate persecution and illegitimate persecution? The answers to these questions have the potential to significantly affect refugee policies and millions of human lives.

While questions of implementation and interpretation at this level of detail are certainly important, a systematic analysis is beyond the scope of this Article. The membership principle does not give determinant answers to these difficult questions of interpretation, though it does serve to anchor one’s thinking by offering a theoretical framework in light of which interpretive difficulties can be addressed. My goal here is simply to present and defend the basic theoretical framework around which asylum law and policy should be oriented. Elsewhere, I analyze its possible implications for particular factual scenarios.191

Nonetheless, the membership principle does have general implications for how “persecution” should be interpreted. Traditionally, states interpret the term “persecution” in very different ways—indeed, so much so that the UNHCR Handbook (first published in 1979), which was meant to provide interpretive guidance to courts and administrative agencies, began its discussion of persecution with a striking disclaimer: “There is no universally accepted definition of ‘persecution,’ and various attempts to formulate such a definition have met with little success.”192

Over the last fifteen years, refugee lawyers, as well as courts in England, Canada, Australia, and New Zealand, have increasingly looked to international human rights as the basis for a coherent and defensible jurisprudence of persecution.193 The purpose of refugee and asylum policy, Hathaway argues, is

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191. See Matthew E. Price, Unwilling or Unable?: Asylum and Nonstate Agents of Persecution, in PASSING LINES 341 (Brad Epps et al. eds., 2005) (addressing the implications of the membership principle for claims of persecution by nonstate actors); Price, supra note 146, at chs. 5–6 (discussing the implications of the membership principle for the interpretation of “persecution”).


to provide “substitute protection” for people facing an “injury that would be inconsistent with the basic duty of protection owed by a state to its own population.”194 This basic duty is met through the respect of core human rights—as defined by the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), and other human rights instruments with widespread support among states—which together provide the “minimum condition[s] of legitimacy.”195 When a state “ignores or is unable to respond to legitimate expectations as defined in international human rights law [by failing] to comply with its most basic duty,” citizens of that state should have the “prospect of legitimate disengagement from that community in favour of surrogate protection elsewhere.”196 Persecution ought to be defined “as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”197

Although the human rights approach purports to interpret (rather than replace) the term “persecution,” it is best understood as a species of the humanitarian conception for four reasons.

First, like the humanitarian conception, it is focused on the asylum seeker’s exposure to harm rather than the state’s culpability in the harm. Under the human rights approach, writes Rodger Haines, an influential New Zealand judge, “‘being persecuted’ is the construct of two separate but essential elements, namely risk of serious harm and a failure of state protection. This can be expressed in the formula that: Persecution = Serious Harm + The Failure of State Protection.”198 It is irrelevant whether the state is unwilling to protect victims against human rights abuses committed by nonstate actors, or whether it is simply unable to do so due to a lack of capacity. What matters is the victim’s need for protection. Like the humanitarian conception, the human rights approach collapses the distinction between membership and protection and misses the characteristics that distinguish asylum from other tools in the refugee policy toolkit, like temporary protection.

Second, like the humanitarian conception, the human rights approach is focused on the fact of an asylum seeker’s exposure to harm rather than the reasons for the harm. This can be seen most clearly in its treatment of the Convention’s “nexus clause,” the requirement that persecution be “on account of race, religion, nationality, membership in a particular social group, or political

197. Hathaway, supra note 23, at 104–05.
If persecution is to be understood as “the sustained or systemic violation of basic human rights demonstrative of a failure of state protection,” and if the purpose of asylum is to provide protection against such a failure, then the nexus clause introduces a morally arbitrary element into the requirements for asylum. Why should the reason for a violation of human rights matter at all? From the victim’s standpoint, it is clearly irrelevant. Violations of human rights are violations of human rights, no matter why they are suffered.

Hathaway offers an attempt at reconciling the nexus clause with the human rights approach. He suggests that persecution motivated by the victim’s “civil or political status,” as he refers to the five Convention reasons, is worthy of special concern:

Refugees are unprotected persons, not just in the sense that their basic liberties or entitlements are in jeopardy, but more fundamentally because it is impossible for them to work within or even to restructure the national community of which they are nominally a part . . . . Their position within the home community is not just precarious; there is also an element of fundamental marginalization which distinguishes them from other persons at risk of serious harm . . . . The rationale for this limitation [that is, the nexus clause] was not that other persons were less at risk, but was rather that, at least in the context of the historical moment, persons affected by these forms of fundamental socio-political disenfranchisement were less likely to be in a position to seek effective redress from the state.

For two reasons, this argument does not satisfactorily explain why the nexus clause should have continued viability.

First, on the terms of Hathaway’s own theory, refugee and asylum law are meant to provide surrogate protection for people who suffer a violation of human rights demonstrative of a lack of state protection. Given this theory, there is no justification for imposing the extra requirement that one be fundamentally marginalized. The need for protection is established by the fact of persecution itself.

Second, even if Hathaway’s theory were concerned specifically with human rights abuses against the “fundamentally marginalized,” the nexus clause is a very poor proxy for picking those people out. It is both under-inclusive and over-inclusive. As an example of under-inclusion, consider a poor, illiterate peasant who is unable to secure effective redress against harm inflicted by state agents for a non-Convention reason (e.g., a personal vendetta). Such a victim surely is fundamentally marginalized, yet for reasons having nothing to do with the five factors listed in the nexus clause. As an example of over-inclusion,
consider Abner Louima. Although his human rights may have been violated on account of his race (he was allegedly beaten by the New York police because he was black),\(^\text{202}\) he was not fundamentally marginalized: he had a channel of redress in the courts, even if the outcome was ultimately not as favorable to him as he might have liked.\(^\text{203}\) If the refugee definition is meant to select for protection the fundamentally marginalized, we would do better to consider directly whether an applicant has access to legal redress, rather than rely on the nexus clause as a proxy for that determination.

For these reasons, the nexus clause lies in serious tension with the human rights approach. It therefore should come as no surprise that, in other writings, Hathaway has argued for the elimination of the nexus clause, arguing, "[u]nder current interpretations, refugee status requires a risk to basic human rights . . . in addition to some differential impact based on civil or political status [i.e., a Convention reason] . . . . The proposal here is that refugee status become the entitlement of all persons whose basic human rights are at risk."\(^\text{204}\) Hathaway acknowledges that the nexus clause's "precise formulation . . . may be unduly anchored in a particular era,"\(^\text{205}\) and he is sympathetic to broadening the refugee definition along the humanitarian lines of the OAU definition\(^\text{206}\) or Cartagena Declaration.\(^\text{207}\)

However, he doubts that such measures could garner much political support in the West. In the meantime, argues Alexander Aleinikoff, another advocate of a human rights approach to persecution, "where targeted persecution has been established . . . adjudicators ought to presume, absent substantial evidence of a non-persecutory reason for the imposition of harm, that the application meets the definition of refugee in U.S. law."\(^\text{208}\) Such a presumption would effectively gut the nexus clause: someone who suffered sustained violations of human rights would be eligible for asylum whether or not those violations were motivated by a Convention reason.


\(^{203}\) See William Glaberson, *News Analysis; Case Closed, Not Resolved*, N.Y. TIMES, Sept. 23, 2002, at A1. One of the prosecuted officers negotiated a lesser sentence for perjury, with no admission of guilt in the beating.

\(^{204}\) Hathaway, *supra* note 53, at 121; *see also id.* at 124 ("[R]efugee status should be the entitlement of any person or community for whom there is no reasonable likelihood of meaningful protection of basic human rights—whether civil, political, economic, social, or cultural—in their own state.").

\(^{205}\) *Hathaway, supra* note 23, at 137.

\(^{206}\) The OAU definition includes not only Convention refugees, but also "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order . . . is compelled to leave his place of habitual residence . . . ." OAU Convention Governing the Specific Aspects of Refugee Problems in Africa art. I, Sept. 10, 1969, 1001 U.N.T.S. 45, 47.

\(^{207}\) The Cartagena Declaration on Refugees adds to the U.N. Convention refugee definition "persons that have fled form [sic] their countries because their life, safety or liberty have been threatened by widespread violence, foreign aggression, domestic conflict, massive violation of human rights or other situations that have seriously disturbed public order." Art. 3, Nov. 22, 1984, OAS/Ser.L/V/II.66, doc. 10, rev. 1, at 179–82 (1985).

The nexus clause creates a difficulty for Hathaway and other advocates of a human rights approach because they claim to be glossing the Convention as it is best understood, rather than proposing an entirely new regime for refugee protection. Hathaway writes, for instance, that "the intention of the drafters was . . . to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population," and that linking refugee and asylum law to human rights law effectuates the drafters’ intention. Given the interpretive goals of Hathaway’s project, the inability to provide a compelling explanation for the nexus clause poses a serious problem for his account.

The third reason that the human rights approach is best understood as a species of humanitarianism is that both view asylum as non-political. By focusing on a failure of state protection, the human rights approach collapses the distinction between a state’s inability to protect human rights and its unwillingness to protect them, dampening asylum’s expressive dimension. The former typifies burdened societies, which ought to be assisted, not condemned; the latter typifies outlaw states, against which an expressive asylum policy acts as a kind of sanction. Because the human rights approach awards asylum to applicants from both burdened societies and outlaw states, it empties asylum of any expressive meaning. As Hathaway makes clear, "[t]he challenge is to recast the notion of ‘persecution’ in a manner which is consonant with modern political realities, and which genuinely enables governments to conceive of refugee protection as a humanitarian act which ought not to be a cause of tension between states." Asylum would maintain a "distinctly palliative orientation." Deborah Anker similarly argues that "refugee law is not aimed at holding states responsible; its function is remedial." It "does not attempt to set a corrective agenda, tell another country how to act, or propose plans for eradicating particular practices."

Finally, neither the humanitarian conception nor the human rights approach can account for the two-tiered structure of refugee protection we have today, in which those satisfying the Convention definition receive asylum, while others receive only temporary protection. On the humanitarian conception, Convention refugees have no stronger moral claim to protection than non-Convention refugees, so there is no reason to accord the former a more favorable status. Like the humanitarian conception, the human rights approach focuses on a failure of state protection as giving rise to a claim for asylum. Because current recipients of temporary protection also lack state protection of their basic needs, the human rights approach has difficulty distinguishing between refugees

210. Id. at 102–04.
211. Id. at 101.
212. Hathaway, supra note 53, at 121.
213. Anker, supra note 22, at 135.
214. Id. at 146.
who have a claim for asylum and those who have a claim for temporary protection. It should therefore be unsurprising that Hathaway also supports eliminating asylum and replacing it with temporary protection for all refugees.\textsuperscript{215}

If the human rights approach is inconsistent with the political conception of asylum, then how should courts define persecution? In other words, what are the implications of the political conception for the way “persecution” is interpreted? I can do no more here than sketch out the very rough outlines of an approach. The main thrust is that “persecution” should be interpreted in light of the membership principle: the term refers to the infliction of serious harm by agents acting under the color of state authority for reasons that deny the victim’s standing as a member. Central to the inquiry whether conduct constitutes persecution, then, is the legitimacy of the state’s reasons for inflicting harm on the victim, or acquiescing in the infliction of harm by others. The definition of persecution adopted by the Seventh Circuit captures this inquiry well. Persecution, according to Judge Posner, is “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.”\textsuperscript{216}

On the political conception, the nexus clause can be understood as illustrative of the sorts of reasons that are illegitimate bases for the infliction of harm and give rise to a repudiation of the victim’s membership. This expansive reading of the nexus clause is consistent with current doctrine, which interprets “persecution on account of membership in a particular social group” to refer to

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership . . . Whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.\textsuperscript{217}

Thus understood, the nexus clause offers a distinctively liberal conception of legitimacy—one occupied with equality, religious toleration, and political accountability. Its specification of race, nationality, and social group membership reflects the view that all citizens must be treated with equal respect and concern.\textsuperscript{218} When state agents perpetrate or tolerate serious harm on account of a citizen’s race, nationality, or other immutable characteristic such as eth-

\textsuperscript{215} See Hathaway & Neve, supra note 12.
\textsuperscript{216} Diallo v. Ashcroft, 381 F.3d 687, 697 (7th Cir. 2004); see also Osaghae v. U.S. I.N.S., 942 F.2d 1160, 1163 (7th Cir. 1991).
\textsuperscript{218} See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1978).
nicity, disability, kinship, sexual orientation, or gender, they violate this equality injunction. The nexus clause's specification of religion reflects the view that while a state need not be neutral with respect to religion, it nonetheless must tolerate minority faiths by allowing them to exercise their beliefs freely. And the nexus clause's specification of political opinion reflects the view that while a state need not be democratic in order to be legitimate, it must nonetheless permit political expression and association to ensure that leaders are held accountable for official misconduct or errors in judgment. 219 In other words, the nexus clause serves to inject some normative specificity into a concept of persecution constituted by "illegitimate harm."

B. Persecution by Nonstate Actors

To concretize the discussion in the preceding Section, consider the implications of the political conception of asylum for persecution by nonstate actors. 220 States have adopted one of two approaches with respect to nonstate actors.

The "protection approach," employed by most signatories to the Convention and Protocol and endorsed by most academic commentators, holds that victims of harm inflicted by nonstate actors are persecuted if their state is unwilling or unable to protect them. 221 The protection approach is "result-driven" and appeals to the victim's perspective: it makes no difference to her whether the state is unwilling or unable to prevent violence against her. 222 The fact of her insecurity, not the source of it, causes her to need "surrogate protection" in the form of asylum. The protection approach thus follows natu-

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219. See, e.g., Immanuel Kant, On the Common Saying: "This May Be True in Theory, But It Does Not Apply in Practice," in POLITICAL WRITINGS 84–85 (Hans Reiss ed., trans., Cambridge Univ. Press 1991) ("[T]he citizen must . . . be entitled to make public his opinion on whatever of the ruler's measures seem to him to constitute an injustice against the commonwealth . . . . [F]reedom of the pen is the only safeguard of the rights of the people . . . .").

220. For a fuller version of the following argument, see Price, supra note 191, at 341.

221. See GOODWIN-GILL, supra note 29, at 70–74; ATLE GRAHL-MADSSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 191 (1966); HATHAWAY, supra note 23, at 124; Steven Edminster, Recklessly Risking Lives: Restrictive Interpretations of "Agents of Persecution" in Germany and France, in WORLD REFUGEE SURVEY 1999 30 (1999); Kälin, supra note 57, at 423; Jennifer Moore, Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection, 13 INT'L J. REFUGEE L. 52, 54 (2001); Vermeulen et al., supra note 57. The protection view is also endorsed by the UNHCR, which states in its Handbook: "Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned . . . . Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection." UNHCR, supra note 192, ¶ 65.

222. The UNHCR has commented, "[i]nability is a result-driven determination, i.e., does the protection exist or not. The efforts of the State to provide protection are largely irrelevant. A government may take numerous 'reasonable steps,' indeed it may take 'extraordinary steps,' to protect its nationals . . . . Yet, if despite these best efforts, its nationals continue to have a well-founded fear of persecution . . . protection should be afforded." Karen Musalo & Stephen Knight, Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States, 13 INT'L J. REFUGEE L. 51, 62–63 (2001).
rally from both the humanitarian conception of asylum and from a human rights-based definition of persecution.

By contrast, the “accountability approach”—which is used in Austria, Switzerland, in a limited form in the Netherlands, and until recently, in Germany\footnote{A new German Immigration Act, which came into force on January 1, 2005, recognized that nonstate actors could be responsible for persecution. See Auswärtiges Amt, The New Immigration Act, http://www.auswaertiges-amt.de/www/en/willkommen/auslaenderrecht/zuwanderung_html (describing Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern [Zuwanderungsgesetz] [Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners [Immigration Act]], July 30, 2004 BGBl. 1 at 1950, art. 1, § 60(1)(c) (F.R.G.). The German law attempts to implement the Directive by the Council of the European Union on asylum qualifications, issued Apr. 29, 2004. See Council Directive 2004/83/EC, art. 6, 2004 O.J. (L 304), available at http://www.ecre.org/eu_developments/procedures/qualdir.pdf (last visited Apr. 10, 2006).} and France\footnote{The 2003 French Asylum Act introduced into French law for the first time the concept of persecution by nonstate actors. See Office français de protection des réfugiés et apatrides, Qui peut demander l’asile?, http://www.ofpra.gouv.fr/index.html?xml_id=75&dcd_id=11 (last visited Apr. 6, 2006).}—maintains that state complicity is a necessary element of persecution. The accountability approach is increasingly disfavored. In part, this is because the humanitarian conception offers a coherent and compelling normative justification for the protection approach,\footnote{Reinhard Marx writes, "[p]erpetrators of serious human rights violations in the context of civil wars and internal strife range from traditional agents of the State to militia, paramilitary groups, warlords, and alike. However, the victims remain largely the same people. A protection-based approach of the Convention . . . follows the assessment of a well-founded fear regardless of where are [sic] the perpetrators." Reinhard Marx, The Notion of Persecution by Nonstate Agents in German Jurisprudence, 15 Geo. IMMIGR. L.J. 447, 454 (2001).} while no one has offered a theoretical defense of the accountability approach. Instead, the accountability approach’s emphasis on state involvement is typically presented as a historical anachronism\footnote{Jean-Yves Carlier et al., Who is a Refugee? 271 (1997).} or a quirk of German legal theory.\footnote{See, e.g., Kälin, supra note 57, at 421–22.}

Under the accountability approach, the state is obligated to “take reasonable steps to prevent [the infliction of serious harm] and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment, and ensure the victims adequate compensation” without discrimination.\footnote{See, e.g., Vermeulen et al., supra note 57, at 15.} Only when the state fails to exercise such due diligence—by failing to make a good faith, non-discriminatory effort to provide its citizens with protection—can private violence be transformed into a state-sanctioned act of persecution. The accountability approach bears an obvious affinity to the political conception of asylum: both view state misconduct as a necessary element for asylum.

In two important sets of cases, the protection approach and the accountability approach diverge in their application. First, the approaches differ in the context of state breakdown or anarchy. While the accountability approach "presupposes that there is effective state authority over the territory"\footnote{Jean-Yves Carlier et al., Who is a Refugee? 271 (1997).} that can
be held accountable for persecution, the protection approach is indifferent to the existence of state authority.

Second, the approaches differ concerning harm inflicted by nonstate actors against which a state is willing but unable—perhaps due to a lack of state capacity—to offer protection. Under the accountability approach, such harm is not persecution: state agents have not sanctioned or acquiesced in the harm. The protection approach, by contrast, deems irrelevant whether a government is unwilling to protect or simply unable.230

The accountability approach is preferable to the protection approach for two reasons—both of which should be familiar by now. First, the accountability approach respects the membership principle by reserving asylum for those who have a moral priority to it. People whose state is unwilling to protect them are, in an important way, differently situated than people whose state is unable to protect them. The former have had their membership in the state repudiated by virtue of the state’s unwillingness to protect them. The latter remain members of a state that, at the moment, is unable to deliver what it acknowledges is owed. Second, the accountability approach preserves asylum’s expressive dimension. A state deserves condemnation for being unwilling to protect its citizens; it does not deserve condemnation for being unable to do so. Instead, outsiders should offer aid and assistance to help build the state’s capacity to enforce its laws. In the meantime, those exposed to violence by nonstate actors have a claim to temporary protection abroad.

Of course, it can be hard for an adjudicator to determine in any particular case whether a state is unable or unwilling to protect. Police resources are limited in every society, and enforcement priorities must be set. In light of the inevitability of resource constraints, how can an adjudicator determine whether a state’s failure to protect a citizen from private violence was due to a good faith misallocation of resources, or due to tacit approval? One might therefore conclude that asylum should be granted prophylactically to any asylum seeker exposed to private violence, without regard to her state’s complicity.

I offer two responses. First, this objection grounds the protection approach in administrative concerns rather than principle. To that extent, it reflects a major concession on the part of humanitarians: it implicitly acknowledges that the political conception is the right theory of asylum but argues that difficulties in implementation force adjudicators to grant asylum to a wider group of applicants than actually have a claim to it.

230. See, e.g., R. (Atkinson) v. Sec’y of State for the Home Dep’t [2004] EWCA (Civ) 846, [33]–[34], [37] (Eng.) (“The issue is not . . . whether the Jamaican authorities have the willingness to deal with the problem but whether they have shown the ability to do so . . . . Criminal networks in Jamaica continue to act with almost complete impunity in inflicting reprisals upon persons like the appellant who have offended them . . . . There is no doubt about willingness to tackle the problem. It is another matter, however, whether effective steps have been taken to achieve the bare minimum required to provide reasonable protection for informers and perceived informers who find themselves in situations such as the appellant.”).
Second, the distinction between state inability and unwillingness is judicially manageable: an assessment of state actors’ motivations is the kind of judgment that courts are accustomed to making. Key factors to be considered by an adjudicator in this context might include whether citizens similarly situated to the applicant—for example, those who share her race, religion, nationality, social group membership, or political opinion—are systematically denied state protection; whether the applicant sought state protection to no avail; whether it would have been reasonable for her to seek state protection; and data regarding the efforts undertaken by the state to protect citizens against the kind of private violence to which the asylum applicant was exposed. Accuracy could be increased by encouraging adjudicators to develop special expertise on particular countries or even sub-national regions.

C. Past Persecution

The political conception of asylum can help to explain another doctrine in asylum law: past persecution. Under current U.S. law, the fact that an applicant has suffered past persecution is relevant to her claim in two ways.

First, a showing of past persecution creates a presumption that the applicant has a well-founded fear of future persecution. Once this presumption is created, the burden shifts to the immigration service to demonstrate by a preponderance of the evidence that “[t]here has been a fundamental change in circumstances [in the country of origin] such that the applicant no longer has a well-founded fear of persecution” or that “[t]he applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality.”

Second, and more important for present purposes, even if conditions have changed or internal relocation is possible, an applicant is still eligible for asylum if she “has demonstrated compelling reasons for being unwilling or unable to return to the country [of origin] arising out of the severity of the past persecution.” That is, the applicant may still be eligible for asylum even if she faces no future risk of persecution whatsoever in her country of origin. For example, in Matter of Chen, the Board of Immigration Appeals granted asylum to a Chinese Christian who suffered unspeakable abuse during the Cultural Revolution, notwithstanding the fact that “conditions in China have changed significantly” since the 1970s—indeed, so much so that the applicant no longer had a “well-founded fear of persecution” were he to return to China. The Board similarly granted asylum to a supporter of the Afghan mujahidin who had suffered ten months of detention and torture by the
KHAD, the Afghani secret police under the Communist regime. Although political conditions had changed since the applicant’s initial hearing—the mujahidin “finally deposed the Communist government in Afghanistan and set up an interim government of their own”238—and the applicant consequently no longer had a well-founded fear of persecution, the Board nonetheless found that “the past persecution suffered by the applicant was so severe that his asylum application should be granted notwithstanding the change of circumstances.”239

This second aspect of the past persecution doctrine is ordinarily defended in humanitarian terms. The UNHCR Handbook, for example, refers to the “general humanitarian principle” that

a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.240

Yet the doctrine should nonetheless appear puzzling on the humanitarian conception of asylum. That conception, after all, views the purpose of refugee law as providing protection against the denial of basic rights. But in cases involving purely past persecution—where there is no prospective risk of persecution whatsoever—there is no need for protection.

The political conception and its membership principle offer a possible justification for the doctrine. Perhaps harm can be of such great severity that it irredeemably repudiates one’s standing as a member; reintegration as a member—even after political transition—becomes impossible. I find this notion convincing; but severity of harm may be only one of two elements to emphasize when trying to identify such cases. Current law tends to focus on the subjective psychological hardship that a victim of severe persecution would undergo were he to return to his country of origin.241 The membership principle would instead call attention to the relationship between the victim of persecution and the society from whose membership he was expelled.

Accordingly, the case for granting asylum purely on grounds of past persecution is strongest when severe persecution stemmed from society at large.

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238. Id. at 71–72.
239. Id. at 72.
240. UNHCR, supra note 192, ¶ 136; see also Baka v. I.N.S., 963 F.2d 1376, 1379 (10th Cir. 1992) (“Eligibility for asylum can be based on the grounds of past persecution alone even though there is ‘no reasonable likelihood of present persecution’ if past persecution is ‘so severe that repatriation would be inhumane.’”); Matter of Chen, 20 I. & N. Dec. 16, 19 (B.I.A. 1989) (“[T]here may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution.”).
241. See, e.g., Skalak v. I.N.S., 944 F.2d 364, 365 (7th Cir. 1991) (“The experience of persecution may so sear a person with distressing associations with his native country that it would be inhumane to force him to return there, even though he is in no danger of further persecution.”).
rather than from the government alone or from a sector of society. For although a political transition may bring to power a new regime that respects its citizens’ basic human rights, a social transition is much more difficult to accomplish—the population itself cannot so easily be replaced. To the extent that one believes Daniel Goldhagen’s thesis that “ordinary Germans” were enthusiastic participants in the Holocaust, the case of a Holocaust survivor offers a prime example of the affinity between the membership principle and the past persecution doctrine. When an entire populace is complicit in the repudiation of a victim’s membership, much more than a regime change is needed to restore that person’s civic standing.

D. Rights of Integration

In Part III, I argued that recipients of temporary protection and asylees should be treated differently in light of their different needs. The former presumptively should be denied the opportunity to adjust their status to legal permanent residence, while the latter presumptively should have the opportunity to do so shortly after arriving. Because asylum provides its recipients membership rather than merely protection, the rights that should be accorded to asylees and recipients of temporary protection differ in other respects as well. Generally speaking, asylees are entitled to rights that foster social, economic, and political integration. Recipients of temporary protection, by contrast, are entitled merely to protection of their basic rights to physical security and subsistence.

This distinction has important implications for how states ought to handle an inevitable trade-off in refugee policy: the more rights and benefits given to refugees, the fewer refugees can be absorbed. This is a matter of simple accounting. Last year, close to $500 million was spent by the U.S. Department of Health and Human Services to assist refugees in their transition to a new life in America; and this sum does not include Medicaid, Transitional Assistance to Needy Families, or Supplemental Security Income assistance. The same sum could have been used to aid more people were the United States to provide less to each person. One can imagine, for instance, government-run camps that maintained conditions barely better than those to which refugees from the developing world were accustomed. Or, as some have suggested, one could imagine the outsourcing of temporary protection to developing countries where basic subsistence and physical security can be provided more cheaply than they can in the West. How should one respond to this trade-off?

Any response must begin with the observation that the answer will differ with respect to asylees and recipients of temporary protection. The two groups are differently situated in an important way: asylees are presumptively on the

243. U.S. Dep’t of State et al., supra note 152, tbl. VIII.
path to membership, but the temporarily protected are not. Asylees will thus be entitled to a wider panoply of rights and benefits than will recipients of temporary protection. This is true for two reasons, one philosophical and one pragmatic. First, denying asylees the basic rights of citizens—like free movement and the right to earn—both offends liberal egalitarianism and frustrates the function of asylum, which is to provide persecuted people the membership of which they have been deprived. Second, to deny asylees basic rights that foster their civic and social integration is foolish, since “many of the rights and programs provided for refugees are simply wise economic investments that pay off in reduced social costs and higher social benefits down the road.” As for the temporarily protected, providing them with a lesser package of rights and benefits does not offend principles of liberal equality because their civic standing is not at stake—they remain members elsewhere. And if their stay is expected to be temporary, the upfront costs of social welfare programs may be a poor investment. Thus Carens is wrong to conclude that “[t]he question of what rights refugees deserve or need to live decent lives in the receiving country would appear to be independent of the relative strength of their eligibility for refugee status.” What is decent when given to a temporary sojourner may be offensive when given to a presumptive member. The question of what rights refugees deserve or need to live decent lives must be answered relative to the kind of relief they can claim from their state of refuge.

The gap between the rights accorded to asylees and to recipients of temporary protection ought to diminish as time passes and the presumption of return for the temporarily protected weakens. The policy in place in the Netherlands until 2002 offers a good example of how integration rights can be phased in over a period of years. For the first two years, the Netherlands provided recipients of temporary protection only limited work authorization and eligibility for limited public relief, and did not recognize a right to family reunification. In the third year, recipients of temporary protection were given full work authorization, and at the beginning of the fourth year, could apply for family reunification.

V. Conclusion

Asylum is a distinctive refugee policy tool in that it offers its recipients membership. This sets it apart from tools like in situ aid and temporary pro-

245. See Judith N. Shklar, American Citizenship: The Quest for Inclusion (1991) (arguing that the right to earn is at the core of what it means to be an American citizen).
247. Id.
tection, which offer their recipients only protection. Applying the logic that the remedy should match the problem, it follows that those facing serious harm because they have been deprived of membership have moral priority to the kind of relief that asylum offers. Other refugees, who need protection but remain members in their states of origin, can be helped either in situ or through temporary protection.

The political conception recognizes asylum’s unique function. The persecution criterion picks out those applicants who face harm because they have been deprived of membership. The humanitarian conception, by contrast, fails to recognize the distinction between protection and membership; it therefore argues for the collapse of asylum and temporary protection. But this view misses the insight that certain forms of refugee protection are best suited to address certain kinds of need.

It is important to emphasize the modesty of this argument. Although persecuted people may have a moral priority to asylum, they may not have the strongest claim to assistance, all things considered. Policymakers, who are confronted with a number of refugee crises and must decide how to allocate scarce relief resources among the various tools in the refugee policy toolkit, ought to choose the mix of tools that saves the greatest number of lives. Because many persecuted refugees are indeed less immediately needy than many non-persecuted refugees, and because asylum is much more expensive than in situ relief or temporary protection due to the cost of individuated determination hearings, this rule may mean that the blend of refugee policies ought to be tilted more toward in situ aid or temporary protection, and away from asylum. This would amount to a radical shift in priorities, since for many states, asylum is the primary commitment to refugee relief.

At the same time, it is important to remember the institutional factors I discussed in Part III.F. It may instead be the case that more lives are saved by an open-ended asylum policy supplemented by other refugee programs than would be saved by the latter alone, given the likelihood for political manipulation and the reality of downward budgetary pressures. Furthermore, it may be dangerous to upset the settled norm of a de facto right of asylum. As Carens observes, “[i]t is easier to dismantle institutions than to create them . . . . In seeking to advance the interests of refugees and other needy people, we should be careful not to undermine the legitimacy of one of the few institutions that offer them any sort of protection and hope, however limited and inadequate it may be in many respects.”

The key point is that an argument for changing priorities within refugee policy—away from asylum, and toward in situ aid, temporary protection, and overseas resettlement—should not be confused with an argument for changing priorities within asylum policy. Humanitarians who contend that the West ought to provide relief to a wider group of refugees than is required by the

Convention refugee definition—or that the West should adopt an interpretation of that definition that collapses the distinction between protection and membership—should argue for a renewed commitment to policy tools other than asylum, rather than hijacking asylum to achieve their goals.