

NOT DUTIES BUT NEEDS RETHINKING REFUGEEHOOD

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THERE IS AN ONGOING DEBATE in political philosophy about the question who is a refugee. Disagreement persists, for instance, on whether only persecuted individuals are refugees, or whether also individuals fleeing famine are included. Nevertheless, there is a consensus among most authors that refugees have a special need for protection that is not addressed by their home states: refugees are threatened and lack state protection of their most basic needs and rights, and since this lack is morally relevant, they must be distinguished from other groups of migrants.¹ However, in the ethical literature on refugees, this thought has been developed in two directions and two disparate approaches to refugeehood have been advanced.

The first approach that I have in mind is wide insofar as it gives criteria of refugeehood that are meant to cover all *who ought to be protected* by foreign states, even if threatened by famine, although famine could in principle be addressed without admission.² This view is typically inspired by Andrew Shacknove's work.³ As I said, there is a consensus that refugees have a special *need* for protection. Since they do not find protection by their own government, this need gives rise to a duty to protect that falls on foreign states. The wide approach that I will discuss characterizes refugeehood by this resulting *duty* to protect, which may include foreign aid.

The second approach I have in mind is narrower, although its proponents aim to develop the same core idea about needs. According to this narrower approach, refugees are characterized as individuals who ought to be *admitted* to a foreign state, which may not apply to victims of famine. On this view, refugee-

1 E.g., Shacknove, "Who Is a Refugee?"; Grey, "The Rights of Migration," 42; Wellman, "Freedom of Association and the Right to Exclude," 119.

2 E.g., Dummett, *On Immigration and Refugees*; Gibney, *The Ethics and Politics of Asylum* and "Refugees and Justice between States"; and Betts, *Survival Migration*.

3 Shacknove, "Who Is a Refugee?"

hood is defined by criteria that indicate that an individual can be protected by admission and only by admission.⁴

I argue primarily against the latter, but ultimately against both approaches, insofar as both turn away from the need for protection and toward *duties* that arise from this need: the duty of foreign states to protect individuals and the duty to admit them to foreign territory. A third definition, one that focuses on the *need* for protection alone and not on the duties that arise from that need, is superior to either of the common definitions. Although this definition is popular in ordinary thought, so far it has not received much attention in the philosophical debate.

My main argument against the wide and the narrow approach is that turning to duties brings up various factors that are inadequate criteria for refugeehood. Consider duties to admit for the sake of protection. These depend on various factors external to the threatened individual, and external to the way in which he or she is threatened. Suppose we want to say that someone is a refugee when there is a *prima facie* case to be made for protecting her by admission rather than for protecting her without admission (by military intervention or foreign aid, for instance). However, this *prima facie* case for admission is often influenced by factors such as moral duties toward third parties, e.g., not to use military force, as well as by decisions of receiving states, e.g., when foreign aid is far more costly than admission.⁵ By contrast, refugeehood seems to be independent of the claims of third parties, as well as of the decisions of foreign states (or of the international community). Generally, refugeehood cannot be characterized by reference to a duty since duties are always relative to capable states or collectives that may bear them. This last consideration speaks not only against defining refugeehood via duties to admit, but also against definitions based on the duty to protect or on the international community's capacity to protect.⁶

My argument relies on a protection-centered understanding of refugeehood. It puts to work the intuition that refugeehood stems from factors internal to threats and threatened individuals, such that two people who flee threats of a certain common type will be categorized alike. My argument thus employs a commonsense intuition, but it does so not merely for the sake of common sense itself. A philosophical account of refugeehood must pick out a group of migrants who are of *ethical concern*, and it should do so in a way that facilitates both *public and political discussion*. This requires exactly what common sense presupposes, namely that two people who flee threats of a common type are categorized alike.

4 E.g., Lister, "Who Are Refugees?"; arguably also Cherem, "Refugee Rights."

5 Cf. Oberman, "Immigration, Global Poverty and the Right to Stay," 262.

6 E.g., Shacknove, "Who Is a Refugee?"

This background will be introduced in section 1. I argue that this protection-centered understanding of refugeehood must not be characterized by reference to duties to admit for the sake of protection (sections 2 and 3), nor by reference to duties to protect (section 4). Much more plausibly, a refugee is defined simply as a person whose basic needs and rights are threatened and who migrates with the aim to find protection (section 5). Finally, I address objections (section 6).

1. THE PROTECTION-CENTERED PERSPECTIVE AND A DESIDERATUM

Let us assume that when people's basic rights and needs are threatened in ways that are not being addressed by their home governments, there are *prima facie* duties of foreign states to provide protection—regardless of whether threats consist in violations of basic rights, as by persecution, or in the lack of means to fulfill basic needs, as in case of famine.⁷ The difference between persecution and famine may become relevant later when defining refugeehood, but I assume that it does not matter for the general duty to protect.⁸ In an international system in which the duty to protect the basic needs and rights of certain individuals is assigned via citizenship to certain governments, foreign governments need to provide a substitute when these duties are not met by the state of nationality.

On the protection-centered view, refugeehood is ultimately grounded in the need for basic protection by a foreign government in this broad sense.⁹ This view can be contrasted with the political conception of refugeehood defended by Matthew Price, in which refugeehood is grounded in the expression of condemnation for persecuting governments, as well as with views according to which duties toward refugees are merely negative and compensatory.¹⁰ I take the pro-

7 E.g., Shacknove, "Who Is a Refugee?"; Miller, "Immigration"; Wellman, "Immigration and Freedom of Association" and "Freedom of Association and the Right to Exclude"; Kuosmanen, "Global Protection of the Right to Asylum and Partial Compliance"; Lister, "Who Are Refugees?" Protection is here meant to have a positive component; compare Hathaway and Storey, "What Is the Meaning of State Protection in Refugee Law?" For a discussion of a human rights framework versus a security framework, see Odutayo, "Human Security and the International Refugee Crisis."

8 Surprisingly, perhaps, the distinction between socioeconomic threats and persecution is often vague and difficult to draw (e.g., Foster, *International Refugee Law and Socio-Economic Rights*, 4), but of course there are clear cases as well.

9 This view has been criticized for not establishing "claims against" particular agents (Cherem, "Refugee Rights," 184–87). It is unclear whether this criticism applies when migrants come to the border, however, and if "leaving one's country and attempting to enter another" seems to assert a "claim against specific authorities" (Cherem, "Refugee Rights," 186).

10 Price, *Rethinking Asylum*. For a discussion of compensatory duties and admission, see Carens, "Who Should Get In?" Reparation is an important moral ground for asylum, but

tection-centered view for granted and explore its consequences: if foreign states ought to help *protect* the basic rights and needs of the unprotected, do resulting duties, or the underlying need for protection, define refugeehood?

When speaking of admission, what I have in mind is primarily admission to territory and to institutions delivering basic protection such as basic health care. This is the form of admission required to fulfill basic needs and rights when protection on foreign ground is not an option. However, it seems that being excluded from full membership for too long constitutes itself a violation of rights, and I assume that admission to full citizenship is mandatory for those who have been admitted to a territory for a certain time (and who foreseeably require permanent admission to that territory).

I hope to simplify matters without oversimplifying them by focusing on migrants at the borders of rights-protecting states.¹¹ The question then is, who of them should count as a refugee, and why? One may hold that having reached an international frontier is an independent necessary condition on refugeehood (as laid down in the 1951 Convention Relating to the Status of Refugees, henceforth “Refugee Convention”), and I want to leave this question to the side for now. My view is that the most convincing strategy is to examine, first, how refugeehood is connected to needs and duties, and then to see whether this understanding of refugeehood implies that a migrant’s location at a border is of relevance or not.¹²

A central assumption in my argument is that it is a desideratum for any definition of refugeehood that the definition help categorize different individuals consistently as refugees or non-refugees based on the threats they face, where

arguably not the only one (Souter, “Towards a Theory of Asylum as Reparation for Past Injustice”). Blake (“Immigration, Jurisdiction, and Exclusion”) takes the duty of admission to concern mainly the negative duty not to exclude by the use of force, but he acknowledges that admission results in the duty to provide certain forms of basic protection. On my view, the duty to provide basic protection is prior and calls for admission to territory, including legal permission to enter territory and to participate in the state’s basic protective institutions.

- 11 I will use the short expression “rights-protecting” to refer to states and groups of states that protect the basic *needs and rights* of their citizen and may be hoped to do so also for (some) foreigners. This is a simplification: many states protect only some needs and rights and do so with varying reliability (see also note 38).
- 12 If refugeehood presupposes duties to protect, these duties might be sensitive to distance (with respect to duties of assistance, cf. Kamm, “Does Distance Matter Morally to the Duty to Rescue?”), or might not apply on foreign ground, since one might hesitate to infringe on state sovereignty for the sake of refugee protection, e.g., Cherem, “Refugee Rights,” 188; *pace* Wellman, “Immigration and Freedom of Association.” See also Gibney, “Caring at a Distance.”

these are described in terms such as “persecution,” “war,” “famine,” “chaos,” or “inhabitableness or loss of land” (e.g., due to rise of sea level).

The Desideratum: It is possible to list, in plausible, sufficiently descriptive terms, the types of threats that determine refugeehood, such that two individuals who face threats of a common type at home and are fleeing from these are categorized alike.

The Desideratum is neutral regarding the scope of the list. The thesis is neither wedded to wide definitions nor to narrow ones. Many different lists would fulfill the desideratum, whether they include famine and war or merely certain forms of persecution, as laid out in the Refugee Convention.¹³

The Desideratum can be defended by reference to common sense, to moral philosophy, and to politics. It may be a desideratum for legal contexts as well, but my focus is mainly on the philosophical and political domain.

Common sense: Intuitively, migrants fleeing the same kinds of threats are categorized alike, no matter where they come from. Threats to basic rights or needs consist in phenomena described by non-gerrymandered descriptive criteria such as “persecution” or “hunger.” This is what ordinary people suspect and it is expressed by The Desideratum. Furthermore, this idea seems to have tacit consensus among authors who participate in the debate about refugeehood (although it will turn out that their duty-based approaches are actually ill suited to accommodate this intuition).

Moral philosophy: From the perspective of morality, conformity to common sense is welcome, but it is not of primary concern. Philosophical accounts are not merely meant to report the assumptions of ordinary people but to fulfill certain purposes within given debates. A philosophical account of refugeehood has the primary purpose of identifying migrants who merit special *moral concern* that arises from the threats they try to evade. Importantly, we are looking for a group that is of special moral concern *per se*, not only for certain states or collectives but not for others. This concern would seem to arise from features intrinsic to the individuals and the threats they flee, not, for instance, from the preferences or capacities of foreign states and third parties. Therefore, if the moral concept “refugee” picks out migrants who merit moral concern *per se* that is derived from *threats*, this concept must categorize those who face threats of a common type at home alike, just as The Desideratum asserts.

13 Some legal extensions and interpretations of the convention definition and regional definitions diverge from this narrow understanding, e.g., Sztucki, “Who Is a Refugee?” and Grey, “The Rights of Migration,” n51. For a human rights framework for interpreting the convention, see Foster, *International Refugee Law and Socio-Economic Rights*.

Politics: The political adequacy of a definition of refugeehood is partly shaped by moral considerations. Political discussion needs conceptual tools that track individuals who are of moral concern. A desideratum for the philosophical account of refugeehood therefore holds for the political domain as well. However, there are further pragmatic desiderata of discourse and policy making, such as to facilitate political discussion between parties with different backgrounds and nationalities. This, too, calls for descriptive, non-gerrymandered criteria of refugeehood that are the same for all migrants, no matter where they come from or where they turn in their search for help—just as The Desideratum claims. The concept of refugeehood must not invite confusion in international political discussion, which it might do if it implied that some individuals are refugees with respect to one state but not with respect to another. Similarly, whether someone is a refugee must not depend on the present size or military strength of an international community, such that any withdrawal of a previous member state from that international community calls for a completely new assessment of who is a refugee.

Law: The legal domain is structured by special pragmatic considerations. It aims to track moral and political concerns by distinguishing refugees from other migrants, but whereas a philosophical account must be maximally accurate in tracking moral concern, a legal procedure may make use of simplified criteria and presumptions in order to arrive at a reasonable trade-off between moral adequacy and practicality. Legal practice requires criteria that are easy to verify, even if they may not always track moral concern accurately, such as the legal presumption of death when a person has been missing for seven years without further evidence. Similarly, in admission procedures practicality may in some cases justify the use of criteria that diverge from the philosophical definition. It is therefore important to note that my arguments concern a philosophical definition, not (or only indirectly) practicable legal criteria (see section 6). For this reason, I mainly focus on definitions provided by political philosophers, not on the legal definition stated in the Refugee Convention.¹⁴

To summarize, I am not searching for a legal but for a *philosophical* account that captures the *moral* purpose of the concept of refugeehood with maximum accuracy. It is furthermore desirable that this philosophical account conforms to common sense and facilitates international discussion and policy making. All

14 Lister might be interpreted as primarily concerned with the question of which *legal* definition to accept, but he also argues that his approach captures important *moral* distinctions and argues against other philosophical accounts. I will only engage with his position from the philosophical perspective and see whether his view meets philosophical demands, not whether it is acceptable *for legal purposes*.

these concerns provide independent reasons to accept The Desideratum. In section 6 I will briefly discuss how the philosophical definition relates to the use of criteria in legal contexts.

2. DEFINING REFUGEEHOOD VIA DUTIES OF ADMISSION

Initially, it might seem plausible to characterize a refugee as a person who ought to be admitted to a foreign state for the sake of basic protection. More precisely, this characterization might seem *plausible* when the relevant duty to admit is a *prima facie* duty, not an all-things-considered duty. When there are too many refugees, overdemandingness and threats to a community's stability may rule out an all-things-considered duty to admit.¹⁵ In some scenarios, the state or even the entire international community seems to be justified in excluding (some) refugees, but the fact that there is no duty to admit, all things considered, does not imply that those who are being excluded are not refugees. I take it that this is sufficient to reject an all-things-considered interpretation.

On a more charitable interpretation, the view put forward is concerned with *prima facie* duties to admit, i.e., with a *prima facie* case for protecting an individual by admission rather than by other forms of protection—even if, all things considered, it would be overdemanding to admit all for whom admission is *prima facie* preferable. A refugee would then be someone who should be admitted for the sake of protection—rather than protected by foreign aid or by military intervention on foreign ground, etc.—unless admission turns out to be overdemanding.

One of the clearest statements of such a characterization is given by Matthew Lister, which is why I will focus my discussion on his view.¹⁶ Lister stresses that the notion of a refugee should reflect a deontic distinction: “the question of who is a refugee cannot be answered independently of an account of *what we owe* to refugees.”¹⁷ On his view, what we owe to refugees is not only protection but *admission*. He therefore characterizes a refugee by saying that “a refugee is anyone whom a state has a moral duty to admit into itself . . . based on the need of the non-citizen.”¹⁸ From this characterization he derives a more concrete definition.

¹⁵ E.g., Carens, “Aliens and Citizens.”

¹⁶ Another example is Cherem (“Refugee Rights,” 189): “only certain kinds of violations (or creditable fears) ground refugee status. This is appropriate because refugee status entitles one to a very specific durable remedy—membership in a new state—that may not be sensible for everyone with unfulfilled basic needs.”

¹⁷ Lister, “Who Are Refugees?” 671, emphasis added.

¹⁸ Lister, “Who Are Refugees?” 647–48.

On his view, certain criteria define refugeehood *because they give rise to the duty to admit*. I will therefore refer to his account as a duty-based account, since his definition relies on criteria that are ultimately defended by reference to the *prima facie* duty to admit. Throughout this paper, when speaking of a duty to admit, what I have in mind is the duty to admit for the sake of basic protection, similarly to Lister's use of the term.

The consequences of a definition based on the duty to admit depend on two points: (1) the general content of the duty to admit, and (2) the implications that this duty has with respect to certain concrete types of threats.

Concerning 1, Lister's statement of the duty to admit refers to only one central condition for admission, namely the *impossibility* of other forms of protection: states ought to admit all those whose dire need is caused such that it cannot be remedied without admission.¹⁹ The definition of refugeehood therefore must "distinguish between harms that call for asylum as a remedy and other harms which could be responded to in other ways."²⁰

Concerning point 2, it might be assumed that the types of threats that call for admission coincide only with persecution. Since persecution at least typically can only be addressed by admission but not by foreign aid, some authors conclude that the persecuted is the unique or, at least, the paradigmatic refugee.²¹ Lister notes, however, that some other threats require admission as well.²² Thus, "forms of harm other than persecution may also give rise to the need for the same remedies, if these harms, too, can only, or only plausibly, be remedied by not returning the person to a place where she fears harms and providing her with new membership. Certain environmental catastrophes ... might fit this paradigm."²³ Lister's view can be summarized by distinguishing a general characterization of refugeehood, a general duty to admit, and a definition of refugeehood by concrete criteria, as follows:

Duty of Admission-Based Characterization: A refugee is anyone whom a state has a moral duty to admit, based on the need of the noncitizen.²⁴

19 Lister, "Who Are Refugees?" 645, 662, 669. Brief statements of duties of admission, as well as of the right to asylum, often use a similar formulation, e.g., Kuosmanen, "Global Protection of the Right to Asylum and Partial Compliance," 46.

20 Lister, "The Place of Persecution and Non-State Action in Refugee Protection," 48.

21 E.g., Lister, "The Place of Persecution and Non-State Action in Refugee Protection," 48; Cherem, "Refugee Rights," 185–87; also Hathaway, "Is Refugee Status Really Elitist?"

22 Lister, "The Place of Persecution and Non-State Action in Refugee Protection." Similarly, e.g., Gibney, *The Ethics and Politics of Asylum* and "Refugees and Justice between States."

23 Lister, "The Place of Persecution and Non-State Action in Refugee Protection," 50.

24 Alternatively, one may say that a refugee is anyone whom the international collective of

*General Duty of Admission*_{Lister}: Foreign states ought to admit all those whose dire need is caused such that it cannot be remedied without admission.

*Definition by Concrete Criteria*_{Lister}: At least when a dire need results from persecution or from certain environmental catastrophes, it cannot be remedied without admission and therefore constitutes refugeehood.

One may of course wonder whether the list of concrete criteria is complete, but before addressing criteria (section 3), I want to focus on the duty to admit. The duty to admit is more complex than Lister's statement suggests. It is not enough to consider whether a harm or threat can plausibly be remedied without admission. If "a refugee is *anyone* whom a state has a moral duty to admit into itself," the complexity of duties of admission needs to be considered.²⁵ I argue elsewhere that *impossibility* to protect without admission is only one determinant of the duty to admit, while other determinants are *impermissibility* to protect without admission and the *choice* not to do so.²⁶ Duties of admission may result from moral side constraints that flow from duties toward affected non-refugees or may be self-imposed by choice. They apply often even when, in principle, the causes of dire need can be remedied in other ways. A more accurate statement of the general duty to admit, on my view, reads as follows:

*General Duty of Admission*_{Complex}: States or collectives of states ought (*prima facie*) to admit an individual when it is impossible, morally impermissible, or precluded by that state's or collective's choice to protect the individual without admission.

In other words, threats that *cannot, must not, or would not* be remedied without admission give rise to a *prima facie* duty of admission. If refugeehood is tied to the *prima facie* duty of admission, these threats thereby constitute refugeehood.

Let me briefly explicate "preclusion by choice." When deciding whether to admit, potentially protecting states often have already adopted (or will foreseeably adopt) the policy not to use certain alternative means such as foreign aid, although these would be necessary to protect the individual without admission. Their decision against, for instance, foreign aid precludes protection without admission: when these states decide not to admit, the individual will be left without protection by foreign aid, although this form of protection is possible. The relevant question, therefore, is not whether there is any possible world in which

rights-protecting states has a moral duty to admit. This interpretation will turn up later.

25 Lister, "Who Are Refugees?" 647, emphasis added.

26 Mantel, "Admission as Protection."

a threat is averted without admission. Since help in a distant possible world is a shallow consolation, admission is required when it has been *precluded* to avert the threat without admission.

Imagine that someone managed to flee from a devastating famine to a rich country in a boat he had found.²⁷ It might be determined that he is not a refugee since the famine *could* be remedied without admission (by contrast to the irreversible environmental catastrophes that Lister has in mind). However, no sufficient action is being taken to change the situation in his home country. There seems to be a disjunctive duty to protect with or without admission, but this duty *would not* be met without admission—and thus the duty to protect is incompatible with sending him home under these circumstances—even if, in principle, that duty *could* be met without admission.²⁸ Returning the migrant would be a violation of “the duty to refrain from returning people to their persecutors or *places where their lives or freedoms are threatened*,” even if, in this case, precisely the omissions of potentially protecting states are what renders returning home perilous to the migrant, and exclusion impermissible.²⁹

To sum up: if refugeehood were tied to (*prima facie*) duties of admission, as Lister suggests, a more precise statement would be that a refugee is a person who ought to be admitted because protection without admission is impossible, impermissible, or precluded by choice—only this formula comprises all three determinants of duties to admit.

3. PROBLEMS FOR THE DUTY OF ADMISSION-BASED CHARACTERIZATION

The Duty of Admission-Based Characterization leads to several implausible criteria for refugeehood. If we plug in my formulation of the duty to admit, these implausible criteria derive from each of the three determinants of the complex duty to admit. (On Lister’s formulation, they derive merely from impossibility,

27 A slightly different case is presented by Ferracioli, “The Appeal and Danger of a New Refugee Convention,” 124, and discussed in Mantel, “Admission as Protection.”

28 For discussion of this disjunctive duty, cf., Wellman, “Immigration and Freedom of Association” and “Freedom of Association and the Right to Exclude.” It might seem unrealistic to even consider that foreign states have two options for protecting a migrant who comes to their border, one of which is financial aid (either for this individual alone or even aid aimed at ending famine in the entire home state). This option is rarely chosen. Nevertheless, I consider all options that arise according to the logic of a protection-based duty to admit, no matter how popular they are. Moreover, if a state already wanted to tackle famine for reasons other than protecting this particular migrant, or expected high numbers of future migrants, the state might choose to protect the migrant at home.

29 Cherem, “Refugee Rights,” 184, emphasis added.

which will be discussed below.) According to The Desideratum, two people fleeing threats of a common kind either both count as a refugee or both do not count as a refugee. A duty of admission-based definition in terms of criteria would account for this intuition if there were plausible, non-gerrymandered criteria (such as persecution and persistent environmental catastrophes) that can be singled out by reference to the duty of admission. But each of the three determinants of the complex duty to admit clashes with the intuition that underlies The Desideratum. I will discuss the three determinants in reverse order.

Choice: Imagine that two refugees, *A* and *B*, flee from two different home states to the border of a foreign state (or a collection of states) from a threat from which they can be protected either with or without admission. That state decides not to protect *A* without admission, but to do so for *B* (because doing so for *A* would be more expensive, or even without good reason). The foreign state thereby places itself under an obligation to admit *A*, such that *A* would be a refugee although *B* is not.

We may think of the example in two ways. The foreign state is either generally permitted to choose either mode of protection, but it must pick at least one.³⁰ Or, on an alternative view, *A* and *B* have a (non-absolute) human right to stay that usually results in the more specific duty to protect them at home.³¹ Circumstances including the high costs and risks of protection at home and, arguably, a refugee's preference for migration may in some cases defeat the right to stay.³²

We assumed that a state chose not to protect individual *A* at home. If the protecting state is entitled to choose, it would seem to place itself under the duty to admit by an autonomous decision that it is perfectly free to make. By contrast, if protection at home is obligatory, the duty is self-imposed in the sense that it results from a wrongdoing, such as when my unauthorized trip with your car places me under the duty to treat it properly while I am using it.³³

Either way, the state's decision against protecting migrant *A* in her home state, but for protecting migrant *B* in this way, is not driven by those features of the threat that, intuitively, we are inclined to consider as relevant for refugeehood. Is *A* a refugee while *B* is not because the famine in *A*'s home state is *more expensive to address* than the famine in *B*'s home state? Is *A* a refugee while *B* is not because

30 E.g., Walzer, *Spheres of Justice*; Blake, "Discretionary Immigration"; Miller, "Immigration"; Wellman, "Immigration and Freedom of Association."

31 Oberman, "Immigration, Global Poverty and the Right to Stay."

32 Oberman, "Immigration, Global Poverty and the Right to Stay," 262–63. On the (ir-)relevance of preferences of refugees concerning admission to particular states, see, e.g., Kuosmanen, "What (if Anything) Is Wrong with Trading Refugee Quotas?" 108–9.

33 See Prakken and Sergot, "Contrary-to-Duty Obligations."

potentially receiving states *decide without good reasons* not to address the famine in A's home state? It is rather implausible that among the concrete criteria for refugeehood we may list types of threats such as "famines that foreign states prefer to ignore." The concept of a refugee has the purpose to pick out individuals who merit special moral concern when they migrate, and they do so because the threats that they flee have not yet been sufficiently addressed by anyone, including the states where they seek help. But this moral concern is of interest because it should *play a role in a decision* for or against future modes of protection, not *result from such a decision*.

This intuition is strongest, of course, when foreign states have no good reasons to decide against foreign aid. It seems more plausible to say that, in the intuitively relevant sense in *The Desideratum*, two individuals, A and B, still face a common type of threat when they both flee from famine. Therefore, duties to admit that arise from choice are ill suited to define refugeehood.

Before I proceed, I want to address a possible misunderstanding and draw a preliminary conclusion. The question I am concerned with is not whether a decision ends refugeehood, but whether there has been refugeehood at all. Of course, individuals would eventually *cease to be* refugees if foreign aid would eventually end the threat they used to face. This is not the point, since admission may eventually end refugeehood just as well (and so would both modes of protection end the alternative status of being a "forced migrant"). The point is rather that according to the Duty of Admission–Based Characterization the decision against foreign aid gives rise to a different categorization until a form of protection is fully implemented that ends the threat.

A preliminary conclusion might be to reject the Duty of Admission–Based Characterization, since it leads to implausible criteria for refugeehood if duties of admission are self-imposed. But one might want to defend a modified version that excludes these problems by saying that refugeehood arises only from a duty to admit *that is not self-imposed by choice of a mode of protection*, and thus suggest:

Modified Duty of Admission–Based Characterization: A refugee is anyone whom a state has a moral duty to admit, based on the need of the non-citizen, where this duty is not self-imposed by the choice of a mode of protection.

The plausibility of this modified characterization must be judged by considering whether at least the remaining two sources of duties of admission, i.e., impermissibility and impossibility, harmonize with *The Desideratum*. However, in the remainder of this section it will turn out that they do not.

Impermissibility: Duties to admit partly depend on which remedies are per-

missible. In other words, they often depend on normative theory's verdict on intervention, which may in turn depend on the moral claims of third parties. Consequently, two people fleeing threats of a common kind may be categorized differently—not due to their own situation at home but due to the different numbers of civilians who would be affected by military intervention.

Similar situations may arise even when foreign aid is provided. Suppose two individuals, *A* and *B*, flee droughts and ask for protection in a foreign state. Both could be protected either by admission or by redirecting rivers from neighboring countries. However, in *A*'s case such a redirection of the river would deprive other communities in a neighboring country of water and is therefore impermissible. In terms of concrete criteria for the duty to admit, the list of types of threats would have to be extended to "droughts that cannot be ended without depriving others of water," etc., although ordinarily two individuals who are fleeing severe droughts are said to flee threats that are in the relevant sense "of a common kind." It seems implausible that facts about third parties determine that *A* is a refugee and *B* is not. The concept of refugeehood has the moral purpose to pick out migrants who are of moral concern *themselves* because *their* basic needs are threatened. If it picked out migrants who must not be protected at home for the sake of third parties, it would seem to track a moral concern that primarily applies to other, non-migrating individuals. By contrast, it does seem plausible that facts about third parties determine that *A* ought to be admitted while *B* might be sent back with a program for redirecting the river. Therefore, being a refugee must not be defined as being a person who ought to be admitted for the sake of protection, not even when self-imposed duties are excluded.

Impermissibility raises even deeper problems when normative theory prescribes applying a mixed strategy. Imagine that a great number of individuals who do not differ in any relevant descriptive features flee from a large state that is withered due to overpopulation. They ask the collective of rights-protecting states for help. Suppose the only permissible way to solve the problem is to admit 50 percent, so that overuse of the land will no longer be a problem, and to send the other 50 percent back with financial aid to refertilize the land. Admitting more than 50 percent might be unnecessary for protection, but sending more than 50 percent back would make future hunger inevitable and require more financial aid in the long run than the collective of states is able to give. This scenario is not implausible since poverty and overpopulation often go hand in hand and may be fostered by climate change when certain regions of a state become inhabitable, such that other regions become more crowded.³⁴

34 On climate change and refugeehood, see, e.g., Alexander and Simon, "'Unable to Return' in the 1951 Refugee Convention"; Lister, "Climate Change Refugees."

It seems that there is no truth of the matter such that some particular individuals are owed admission who constitute 50 percent of those who flee. Rather, there seems to be an undetermined duty to admit 50 percent, no matter which individuals (or, maybe, to admit everyone with a chance of 50 percent by using a lottery). If being a refugee is tied to the duty to admit, it is undetermined who is a refugee and who is not. There simply is not any descriptive criterion, plausible or not, for distinguishing refugees from non-refugees in a specification of a Definition by Concrete Criteria. One might use a lottery to decide whom to admit, but it does not sound right to say that the lottery decides who is a refugee and who is not. Nor does it sound right to say that each is half a refugee. At any rate, when all migrants face the same threat and only 50 percent ought to be admitted, it would obviously violate The Desideratum to say that only 50 percent are refugees, since all flee the same type of threat.

The problem is not simply that the collective of states may admit some but not all affected individuals when their capacity for admission comes to an end.³⁵ If taking all were merely overdemanding, states would not be obliged, *all things considered*, to admit all, but they might nevertheless have a *prima facie* duty toward each individual to admit them rather than to protect them at home. In this way, all may count as refugees. Instead, the case is one in which states do not have even a *prima facie* duty to admit each individual: they *ought* to administer a mixed strategy anyway.

The current state of the dialectic is that refugeehood on behalf of a foreign state's self-imposed duties of admission does not harmonize well with The Desideratum. The same holds for refugeehood on behalf of duties of admission arising from impermissibility. If we wanted to avoid these problems, we would have to restrict the Duty of Admission–Based Characterization further to duties of admission that arise from impossibility. However, even the duties grounded in this feature do not harmonize with The Desideratum.

Impossibility: Impossibility is a widely accepted determinant of duties of admission.³⁶ If protection without admission is impossible, there is a *prima facie* duty to admit (unless this is impossible as well). Impossibility does not only figure in the General Duty of Admission_{Complex}, but also in General Duty of Admission_{Lister}, which refers to “causes of need which cannot be remedied without admission.” While the General Duty of Admission_{Complex} clashes with The Desideratum in especially obvious and manifold ways, the discussion of impossi-

35 E.g., Carens, “Aliens and Citizens.”

36 E.g., Lister, “Who Are Refugees?”; Kuosmanen, “Global Protection of the Right to Asylum and Partial Compliance,” 46; Gibney, “Refugees and Justice between States,” 452–53.

bility will show that related but more subtle problems arise for any formulation of duties of admission.

The role of impossibility depends on *who* the relevant duty bearer is. We might either choose the “individual state interpretation” or the “collective interpretation.”

Individual state: Whether it is possible to protect an individual without admission depends on the capacities of the state providing protection. Putting self-imposed duties and additional moral duties to the side and assuming that the protecting state has a right to choose among all available modes of protection, a powerful protecting state need not admit individuals from a failed state drowning in chaos if it is able to restore order instantly by sending in its military. By contrast, a less powerful state must *prima facie* admit when it is incapable of ending the chaotic situation abroad.

This would make refugeehood implausibly depend on the current balance of powers: when an individual flees a state and seeks help in another, it would depend on the proportion of the military power of these two states whether that individual is a refugee. Lister himself notes in his criticism of other authors that it would be a “counter-intuitive result that those threatened by weak states would be refugees while those threatened by strong states would not be.”³⁷ However, Lister’s Duty of Admission–Based Characterization implies that the current power of the refugee’s home state determines refugeehood on the individual state interpretation. *Only migrants who are threatened by states that are stronger than those they seek protection in* would be refugees but those who are threatened by weaker states would not be, because there is a military capacity to protect them at home.

It seems that Lister and Cherem overlook this implication because they assume that forcible intervention is not appropriate. This view, however, seems to bring in another factor, namely impermissibility (which may either be grounded in the value of sovereignty or in the unacceptability of collateral harm). My point is that this reasoning in itself shows that impossibility is not the only determinant of refugeehood. Moreover, in cases in which state sovereignty is morally irrelevant and collateral harm can be prevented, the relative strength of the states at issue would be the decisive determinant of refugeehood, which is implausible.

Collective: A more plausible view might be to say that a refugee is a person who ought to be admitted by the entire collective of rights-protecting states to

37 Lister, “Who Are Refugees?” 656–57; similarly, Cherem, “Refugee Rights,” 188. This is part of Lister’s criticism of the Duty of Protection–Based Characterization to which we will come in the next two sections.

one of its member states.³⁸ Focusing on impossibility, the relevant question is whether it is possible for the collective of rights-protecting states to protect an individual without admission. But also on this collective interpretation of impossibility, a similar problem looms: individuals fleeing sufficiently strong states count as refugees, whereas individuals fleeing weaker states do not. Suppose there are strong rights-violating states, strong enough to prevent intervention by the entire collective of rights-protecting states, but they do not attack the collective of rights-protecting states for admitting refugees. In this scenario, an individual must flee a sufficiently strong state in order to count as a refugee, because protection by admission is possible and protection by intervention is not.

The tension with The Desideratum is that, intuitively, different types of threats seem to yield refugee status independently of a comparison between the military strength of the home state and the military strength of the collective of rights-protecting states. Moreover, the concept of refugeehood would unnecessarily complicate political discourse if every change concerning the military strength of the collective of rights-protecting states affected which migrants are to be counted as refugees (namely, those persecuted by stronger regimes).

If what I have argued is right, the Duty of Admission–Based Characterization of refugeehood yields criteria for defining refugeehood that do not harmonize with The Desideratum, regardless of whether we accept General Duty of Admission_{Complex} or General Duty of Admission_{Lister}. In the first case, this can be shown with respect to duties arising from choice, impermissibility, and impossibility. In the second case, it results from duties arising from impossibility alone. The Duty of Admission–Based Characterization does not justify any intuitively plausible, non-gerrymandered list of criteria, neither the narrow one provided by the Refugee Convention, nor a more encompassing one. This is an especially serious problem for definitions by narrow lists of threats. Since these are typically defended by their alleged match with a duty to admit, this raises the worry that these definitions do not capture any morally relevant distinction with the precision required by philosophical analysis.

Furthermore, even if a definition switched to gerrymandered lists of threats to match the duty to admit, this duty seems an inadequate basis for a definition. The duty of admission does not sufficiently fit the moral purpose of the concept of refugeehood (section 1). Although this duty obviously marks a moral distinction, it does not single out the special moral concern for refugees *per se*.

38 E.g., Kuosmanen, “Perfecting Imperfect Duties,” 25; Gibney, “Refugees and Justice between States,” 459; Ferracioli, “The Appeal and Danger of a New Refugee Convention.” For the view that it might be inadequate and even harmful to speak of “the” collective of rights-protecting states, see Ibhawoh, “Defining Persecution and Protection.”

The gerrymandered criteria that flow from the duty of admission do not identify a concern that is intrinsic to the migrant's situation but one that is sensitive to all sorts of external interests. These criteria are contrary to common sense, do not fulfill the moral purpose of the concept of refugeehood, and raise pragmatic difficulties in political discourse.

4. DEFINING REFUGEEHOOD VIA DUTIES OF PROTECTION

If it is problematic to tie refugeehood to the *duty to admit*, one might instead tie refugeehood to the *duty to protect*, more precisely to the duty to offer substitute state protection for basic needs and rights. This alternative duty-based approach would, I believe, take a similar shape as the definitions suggested by Shacknove and Gibney.³⁹ I will argue that a duty of protection-based approach does not harmonize with The Desideratum either, although it does not clash with it to the same extent as the duty of admission-based approach.

A duty of protection-based approach may be characterized in a similar form as a duty of admission-based approach by distinguishing the general characterization of refugeehood, the general duty of protection, and a definition by concrete criteria.

Duty of Protection-Based Characterization: A refugee is anyone whom a foreign state (or a collection of foreign states) has a moral duty to offer basic protection to.

General Duty of Protection: Foreign states and collectives of these (*prima facie*) ought to protect all those who are threatened and lack protection of their basic rights and needs from their home states if they can permissibly be protected by the international community.

Definition by Concrete Criteria_{Protection}: Any threats to basic rights and needs, such as persecution, famine, drought, war, and environmental catastrophe, give rise to the duty of protection and thus to refugeehood—at least when they are such that the international collective of rights-protecting states has the capacity to deliver a permissible form of basic protection.

The Definition by Concrete Criteria_{Protection} displays some interesting overlap with Shacknove's view. On his influential humanitarian definition of a refugee, a refugee is "a person whose government fails to protect his basic needs, who has no remaining recourse than to seek international restitution of these needs, and

39 Shacknove, "Who Is a Refugee?"; Gibney, "Refugees and Justice between States," 452.

who is so situated that international assistance is possible.”⁴⁰ This is a curious result, since Shacknove emphasizes that his definition is given independently of the question of whether “states and international agencies are obligated to assist refugees.”⁴¹ He thus seems to deny any form of duty-based reasoning for his definition of refugeehood, which would seem to include a duty of protection-based reasoning just as much as a duty of admission-based reasoning.

However, even though it makes perfect sense that his definition is unrelated to the duty to admit, the definition does not seem very plausible without an implicit connection to the duty to protect. As Lister notes, the fact that Shacknove’s definition is not based on the duty to admit might explain why he assigns no special role to the fact that the refugee crossed the border of his home state and to persecution—that is, on features that either render admission easily possible or render protection without admission especially difficult and problematic, and in fact impossible when the home state is of sufficient military strength.⁴² The role Shacknove assigns to the possibility of international assistance, however, is harder to understand.⁴³ This role would make sense if Shacknove based his definition on the duty to provide substitute state protection, because impossibility is a determinant not only of the duty to admit, but also of the duty to protect.⁴⁴ In fact, impossibility is a basic determinant of any duty, commonly expressed in the slogan “ought implies can.” At any rate, Shacknove’s definition strikingly coincides with the Definition by Concrete Criteria_{Protection}, which would result from the Duty of Protection-Based Characterization, since such a characterization would plausibly state that, when basic needs are threatened but international assistance is possible (and there is no recourse to the home government), the collective of rights-protecting states has a *prima facie* duty to offer protection.

However, it is not necessary to determine whether Shacknove’s allegedly nonnormative definition is implicitly influenced by the idea that refugees are owed protection (contrary to his methodological claims). My aim is not to provide an exegesis, but to evaluate the Duty of Protection-Based Characterization. For this purpose the relevant upshot is that it delivers criteria that coincide with Shacknove’s definition (no matter why this may be so). Consequently, both definitions face similar problems if these criteria do not harmonize with The Desideratum.

First of all, it must be noted that the duty of protection-based approach rais-

40 Shacknove, “Who Is a Refugee?” 282.

41 Shacknove, “Who Is a Refugee?” 277.

42 Lister, “Who Are Refugees?” 658.

43 For a critical view, see Cherem, “Refugee Rights,” 188–89.

44 Lister, “The Place of Persecution and Non-State Action in Refugee Protection,” 665.

es considerably fewer problems than the duty of admission-based approach. It does not share the problems that stemmed from the fact that the duty to admit partly depends on a protecting state's *choice* and on the *impermissibility of protection without admission*. The Duty of Protection-Based Characterization instead groups individuals in the same category, namely that of a refugee, independently of whether the protecting state decides on a certain mode of protection, and independently of whether moral considerations with respect to third parties prescribe protection with or without admission. For instance, two individuals who are fleeing the same threat both count as refugees even if the right response is the mixed strategy to send home one with foreign aid and admit the other.

However, the view is duty based and this alone creates certain problems that stem from the determinant of *impossibility*. In some form or another, this determinant applies to any duty. Just as the Duty of Admission-Based Characterization of refugeehood yields implausible consequences when protection without admission is impossible, the Duty of Protection-Based Characterization does so as well when protection is itself impossible. The Duty of Protection-Based Characterization must specify a duty bearer, who, again, might be identified as the individual state in which a migrant seeks protection or, more plausibly, as the collective of rights-protecting states. The problems with the individual state interpretation came up in the last section with Lister's observation that it would be counterintuitive that "those threatened by weak states would be refugees while those threatened by strong states would not be."⁴⁵ This is precisely what results from the Duty of Protection-Based Characterization, however, if no individual state is able to protect those threatened by strong states. More precisely, the problem appears in two versions. The version that Lister seems to have in mind applies to individuals fleeing within the territory of their home states (whom Shacknove explicitly includes in his definition). The second version applies to migrants who reach the border of a receiving state (who are the individuals I mainly focus on for the purposes of this paper).

Here is the first version of the problem. If two individuals flee threats of the same kind within the territory of their respective home states, the military strength of their different home states might entail that the strongest foreign state is able to protect one of them by forcible intervention but unable to protect the other, such that the first counts as a refugee while the second does not. This problem reappears on the collective interpretation if the entire collection of rights-protecting states is able to protect one but not the other by intervention.

The second version of the problem arises in an even more pessimistic scenario in which two migrants are already at the border of the strongest foreign state,

45 Lister, "Who Are Refugees?" 656–57.

or simply at the border of one of the member states of the rights-protecting collective, but that state or collective is nevertheless unable to protect the second individual from the stronger home state by admission because her home state is strong enough, and willing, to persecute her successfully even outside its territory, while the weaker home state of the first migrant is unable to prevent protection by admission. Here, what counts is not the potentially protecting state's (or collective's) *capacity to intervene* in the refugee's home, but its *capacity to prevent intervention* on its own territory (as well as the home state's decision to persecute certain individuals even on foreign ground).

Such cases might arise, for instance, if some governments are in possession of technology to successfully persecute certain individuals even outside their territory. Furthermore, even two individuals fleeing the same state might differ. Suppose *A* and *B* seek admission, but the chances for successfully protecting *A* by admission are miniscule because she is a prominent opponent and therefore especially targeted by the persecuting government and suppose that therefore admission is not obligatory because it does not seem to amount to protection. Maybe admission will likely lead to an even more cruel treatment of *A*, or risks that citizens of the receiving states will be killed in the military intervention undertaken to persecute *A*. In this case, (the attempt to provide) protection by admission may even be impermissible. Does this scenario entail that *A* is not a refugee because there is no duty to protect *A*? It seems more plausible to say that *A* is a refugee, since *A* is fleeing a threat to her basic needs, even though there is only a low chance, or maybe no chance, that *A* may be successfully protected by anyone. In other words, the most troubling problem for the Duty of Protection-Based Characterization consists in the counterintuitive ways in which this notion of refugeehood is dependent on the strength of responding states or collectives and on the strength of home states.

One may think even one step further. Intuitively, there might be refugees even if no rights-protecting state or collective exists at all. There may be truly "hopeless refugees" who are fleeing and are entitled to substitute state protection, but who are out of reach of helping states. The most extreme case would be people in a world state that threatened them, when there is no other state that might or might not reach them. They would seem to be refugees as long as they run and hide from their own state's institutions. One consequence of this view may, again, be formulated in terms of a comparison of individuals living at different times: if *A* and *B* flee threats that, intuitively, seem to be of a common kind, it is counterintuitive to assume that *A* is not a refugee just because he lives at a time when there is no rights-protecting state, while *B*, living at a slightly gentler time in which there still are rights-protecting states, counts as a refugee.

Duty-based accounts of refugeehood run into problems of this kind for principled reasons: duties depend on what the duty bearer is capable of or can possibly achieve. According to The Desideratum, refugeehood is either independent of such facts, or these facts would have to be introduced by categorizing relevant types of threats in terms of the competences to address them, as “threats which the collection of rights-protecting states, existent at the time of threat, is able to handle” versus threats that are not of this kind. However, these characterizations of threats neither intuitively seem to be the relevant types of threats for refugeehood, nor do they track a moral concern internal to the refugee’s situation. Moreover, they complicate political discourse, when any change of powers can affect which forced migrants count as refugees. The intuitions expressed by The Desideratum can be accommodated in plausible ways only if duty-based accounts are left behind. Duties themselves depend on threats that do not exceed the duty-bearer’s capacities, but the definition of refugeehood must not be made to depend on criteria that are sensitive to the capabilities of others, but merely on the situation of the threatened individuals and on the more general type of threat they are facing.

5. THE COMMONSENSE DEFINITION OF REFUGEEHOOD

Since duty-based accounts do not harmonize with The Desideratum, it seems that we must give up on a definition of refugeehood that focuses on (actual) *prima facie* duties. One might define refugeehood via hypothetical duties instead—duties that sufficiently capable rights-protecting states or collectives *would* have *if they existed*—but such a hypothetical construction seems unnecessarily complicated. Hypothetical duties correspond to the need for protection, and this need is the real core of refugeehood: duties do not make refugees, needs do. A simple and straightforward alternative (that is arguably co-extensional with the more complicated hypothetical construction) directly comes to mind, since it is deeply entrenched in ordinary thinking about refugees.

On the commonsense understanding of the term, which has gained strikingly little attention in the academic debate, refugeehood is characterized by the concurrence of the need for basic protection by a new state with the descriptive feature of flight aiming to remedy this condition.⁴⁶ This definition focuses entirely on the refugee, namely on basic needs and rights and on flight. This intuitive understanding of the word “refugee” is mentioned by Shacknove but then set aside: “A refugee, we might say, is a person fleeing life-threatening conditions.

46 E.g., Goodwin-Gill, *The Refugee in International Law*, 3–4; Tuitt, “Rethinking the Refugee Concept,” 108.

In daily parlance and for journalistic purposes this is roughly the meaning of refugeehood."⁴⁷

The commonsense definition yields criteria that are completely independent of the capabilities, decisions, and needs of potentially protecting states and third parties. It cannot be characterized fully in parallel with previous definitions, since there is no underlying duty. Instead, it may be characterized simply by identifying a characterization and a definition by concrete criteria.

Needs-Based Commonsense Characterization: A refugee is anyone who migrates with the aim of finding protection from a threat to basic rights or needs.

Definition by Concrete Criteria_{Needs}: Any threats that concern basic rights and needs count for refugeehood, e.g., persecution, famine, droughts, war, or environmental catastrophes.

The commonsense definition views migration and threat to basic rights and needs as two distinct conceptual conditions for refugeehood, of which migration is in some sense prior. The idea is not to distinguish between threats that cause individuals to migrate and those that do not, but to distinguish people who are already migrating according to the threats that do or do not underlie their migration. Thereby, the definition is in perfect harmony with The Desideratum. Two migrants who face a common type of threat such as persecution, famine, or other sufficiently severe threats are categorized alike, namely as refugees. Because threats are categorized in terms that highlight their relation to basic rights and needs, the standard commonsense types of threats that come to mind need no further specification. Only threats that might or might not concern basic rights and needs must be specified further, but the further specification concerns their potential of causing severe harm to the migrant, which means that these finer categories of threats would not seem to be distinguished in intuitively arbitrary or irrelevant ways.

To make the scope of the commonsense definition clear, let me highlight two important implications. The definition is in a certain respect broader and in another narrower than Shacknove's definition. It is broader insofar as an individual may count as a refugee even if the international community has no access to this individual such as to protect them. This is because the individual may migrate within her own state with the aim to find basic protection: these conditions do not imply that the individual has crossed a border. If this were deemed undesirable, one might supplement the definition with the extra condition that a bor-

47 Shacknove, "Who Is a Refugee?" 274.

der be crossed, but I do not see what the rationale for this move might be. The needs-based idea behind the definition is developed most consistently without any further supplement, such that the definition covers internally displaced people. Migration, in the sense at issue, consists in leaving one's home and hiding from threats elsewhere, but flight does not require leaving one's country.⁴⁸

Second, despite its wide scope, the commonsense definition does not cover all who are in need of protection. People not only refrain from fleeing when they are safe. To the contrary: even more desperately in need of protection than a refugee is someone who is deprived of even any reasonable option of fleeing, e.g., by a natural disaster or by her persecutor. Moreover, flight is often prevented by those who ought to help, namely by potential receiving states. Many individuals are stopped on their way to the border of a foreign state (and would still count as refugees since they have left their homes), but others are deterred from the option of fleeing by the known dangers of measures to prevent their arrival, as well as by the threat of detention.⁴⁹ If they stay home because flight seems more dangerous than the threats they face at home, they are not refugees on the commonsense definition. In order to express the affinity of this group to actual refugees, they might quite tragically be referred to as "latent refugees," but being a latent refugee does, of course, not entail being an actual refugee—rather, it entails not being an actual refugee (yet).⁵⁰ This is a conceptual implication of defining refugees as migrants, an implication that excludes individuals who are not excluded from Shacknove's definition. However, I think that this consequence is acceptable precisely because the definition is not based on the duty to protect—which seems to be a duty we have toward many individuals who do not migrate.

I find the commonsense definition entirely plausible. However, my defense of the commonsense definition is comparative: of the three protection-centered views under consideration (namely, the concrete definition that would be derived from a duty of admission-based characterization, the concrete definition that would be derived from a duty of protection-based characterization, and the commonsense definition), the commonsense definition is the most plausible because it meets The Desideratum. Of course, a narrower definition might be given that meets The Desideratum as well, but it could not be defended by reference to a duty. So far, I do not know which moral concern might be accurately tracked by

48 Whether the obligation to assist a refugee arises for another state only, or strongest, when the refugee has made it to that state's borders is a question that I cannot answer here (but see, e.g., Walzer, *Spheres of Justice*, 51).

49 E.g., Gibney, *The Ethics and Politics of Asylum*; Grey, "The Rights of Migration," 46.

50 Possibly, Shacknove refrained from excluding this group from his definition of refugees precisely to highlight their unrestricted moral importance.

such a definition. My aim is to identify the most plausible protection-centered account of refugeehood, and it is unclear why a protection-centered account should focus on certain kinds of needs and rights at the outset. However, maybe all I have shown is that such a narrow definition would have to be defended without recourse to a conceptual tie between refugeehood and duties.

My argument thus did not presuppose that we must follow common sense *tout court* and adopt precisely the wide, needs-centered commonsense notion of refugeehood, but that we should stick, at least, to the core intuition expressed by The Desideratum. The Desideratum has been defended not merely by intuition, but also by reference to the purposes of moral and political discourse. As such, this core intuition is neither biased toward a humanitarian-needs-centered view, nor toward a restrictive-persecution-centered view. I even suppose that my premises are implicitly accepted by the authors I argue against. Proponents of duty-based views commonly seem to assume that their definitions help distinguish between plausible types of threat that do and do not give rise to refugeehood. I argue that this is not true. Duty of admission-based approaches fail in this respect, as we see especially clearly when a proper understanding of the complex nature of duties of admission is applied, i.e., if we attend to impermissibility and preclusion by choice. But even duty of protection-based approaches fail, as we see when considering that duties in general presuppose duty bearers with sufficient capacities. Therefore, a definition like Shacknove's clashes with The Desideratum, although this might easily be overlooked when no pessimistic counterfactual scenarios of feeble rights-protecting collectives are taken into view.

Because my argument has been complex, it may be worthwhile to summarize it before I turn to objections.

- P1. On Lister's Duty of Admission-Based Characterization, refugeehood is to be defined by criteria that ground (a) a duty of an actual state or collective toward refugees and (b) the relevant duty is a duty to admit.
- P2. A *prima facie* duty to admit arises whenever protection without admission is impossible, impermissible, or precluded by choice (as specified above).
- C1. *Choice*: Due to (b), when two individuals, A and B, flee a common kind of threat that concerns basic needs and rights, A may count as a refugee (because of a foreign state's *choice* not to respond to A's needs without admission) while B does not count as a refugee.
- C2. *Impermissibility*: Due to (b), when A and B flee a common kind of threat that concerns basic needs and rights but a mixed strategy is

called for, *A* may count as a refugee depending on the outcome of a lottery while *B* does not (or refugeehood would apply only to a degree).

- C3. *Impossibility*: Due to (b), when *A* and *B* flee a common kind of threat that concerns basic needs and rights, *A* may count as a refugee if *A* flees from a stronger state to a weaker state (or collective) while *B* does not.
- C4. Due to (a), on all duty-based accounts (including definitions resembling Shacknove's), when *A* and *B* flee a common kind of threat that concerns basic needs and rights, *A* may count as a refugee if *A* lives at a time when there is a strong rights-protecting collective, while *B* does not if she lives at a time when there is no such collective.

But:

- P3. The Desideratum: It is possible to list, in plausible, sufficiently descriptive terms, the types of threats that determine refugeehood, such that two individuals who face threats of a common type at home, and are fleeing from these, are categorized alike. (This does not harmonize with the observation that *A* and *B* end up in different categories in C1 to C4.)
- P4. On the commonsense definition, a refugee is anyone who migrates with the aim of finding protection from a threat to basic rights or needs. On this view, *A* and *B* from C1 to C4 would be categorized alike, because they flee types of threats concerning basic needs and rights.
- C5. Therefore, the commonsense definition is the most plausible definition of refugeehood.

6. OBJECTIONS

It might be objected that a Duty of Admission–Based Characterization of refugeehood is preferable to both the Duty of Protection–Based Characterization and the Needs-Based Commonsense Characterization I advocate because both of these would have harmful consequences: they would result in using our capacity of admission ineffectively, filling states with those who should be protected in other ways, and not reserving enough slots for those who can only be helped through asylum.⁵¹ Admittedly, both *would* have harmful consequences when combined with the assumption that all refugees must be granted asylum, since they would then preclude other forms of protection even when these are

51 E.g., Cherem, "Refugee Rights," esp. 192–96.

morally preferable. But this assumption is reminiscent of the idea that refugee-hood is tied to the duty to admit. Since neither Shacknove's definition nor the commonsense definition conceptually ties refugeehood to duties of admission, this combination would be misguided. A wide definition of a refugee should instead be combined with a separate principle for when to admit a refugee and when to protect them without admission, such as the tripartite principle of admission I defended.

The objection most commonly raised against Shacknove's definition of a refugee, and the strongest objection against the commonsense definition, is that these definitions as such offer little assistance in determining the required mode of protection. This fact, it might be said, leads to more complicated procedures of admission.⁵² It is true that these definitions offer little assistance for a decision on asylum. Shacknove remarks that "the refugee is eligible for many forms of international assistance."⁵³ Likewise, the commonsense definition does not prescribe admission as the only instrument of refugee protection. However, this does not imply that these definitions lead to more complicated procedures of assigning asylum when they are combined with an admission principle.

Quite generally, this "practicality objection" has little bite because it is hard to see how any *definition* of refugeehood, and thus a statement about the use of words, might make it easier than any other to decide whom to admit. On Lister's Duty of Admission-Based Characterization, refugees are understood as people who *prima facie* ought to be admitted. On his view, the most defensible formulation of a duty of admission will thus help determine criteria that do *both*: define refugeehood and ideally guide admission. On my view, these are criteria that indicate that protection cannot, must not, or would not be provided without admission. These criteria would plausibly include some rather traditional criteria, e.g., persecution and war, and (as noted by Lister) also irreversible environmental catastrophes. However, many items on the list would be relative to certain circumstances, such as "famine which helping states choose not to address" and "environmental catastrophes which it would be impermissible to address (because doing so would infringe on the rights of third parties)" (see section 3). Although it is possible to offer some guidance by providing such a list, any actual list would arguably be incomplete. For instance, when some criteria are relative to the moral rights of third parties, these rights may become relevant in various ways that cannot be pinned down easily. To sum up, although the same criteria are used for defining refugeehood and for deciding who ought, ideally, to

52 E.g., Lister, "Who Are Refugees?"

53 Shacknove, "Who Is a Refugee?" 276.

be admitted, we would be confronted with a complicated list of criteria simply because the duty of admission is complex.

If, by contrast, refugees are defined according to the commonsense definition as individuals fleeing threats to basic needs and rights, the complicated list of criteria applies only for ideal admission procedures. Refugeehood would be a separate matter and easier to detect, namely by detecting types of threats that concern basic needs and rights, which are independent of the capacities of helping states and the needs of third parties. No matter which definition we pick, if ideal admission decisions are complicated, this does not depend on the definition of refugeehood (which may be simpler) but on the complexity of the duty to admit.

So far, the focus has been on ideal theory, namely on criteria for admission that are meant to cohere perfectly to moral duties. Of course it may be debated when and to what extent the law may simplify the complex moral criteria for admission such as to arrive at less complex *legal* criteria based on a reasonable trade-off between morality and institutional efficiency. Importantly, the simplification required would be the same on both approaches to refugeehood, since the moral criteria for admission that these approaches deliver are of the same complexity.

What exactly that simplification may consist in is a question to be addressed in another paper, but it is plausible to hold that the criteria of the Refugee Convention do not deliver the best trade-off. After all, it may often be determined without difficulty or cost that certain instances of famine would not be addressed without admission or that certain droughts cannot be addressed or must not be addressed (e.g., by redirecting a river) for the sake of third parties. In other words, many conditions can easily be categorized as threats that require admission—even when they do not consist in persecution. It is often more difficult to determine whether an individual has been persecuted than whether an individual flees a famine that will not be addressed, or a drought that cannot be addressed without harming others.

7. CONCLUSION

I have argued that refugees are neither to be characterized as individuals to whom admission is owed by foreign states, nor as individuals to whom protection is owed, but as individuals who are fleeing threats to their basic needs and rights. Both the Duty of Admission–Based Characterization of refugeehood, as well as the Duty of Protection–Based Characterization, are sensitive to circumstances that ordinarily we would not deem relevant for refugeehood, such

as the capacities of the rights-protecting community and moral duties toward third parties. When two individuals flee threats that we would intuitively refer to as “of a common type,” these duty-based characterizations imply that only one individual may be a refugee depending on the military strength of her home state, for instance. Thus, they clash with an intuitive understanding of criteria of refugeehood, they fail to track a moral concern with the migrant’s situation, and they complicate political discourse. By contrast, the commonsense view that refugees are people who flee threats to their basic needs and rights enables us to list intuitively relevant types of threats as criteria for refugeehood.

A consequence of the commonsense definition of refugeehood is that morally underpinned admission policies need to apply a separate principle of admission that determines how to protect each individual by the most suitable means. Complex circumstances, including the abilities and choices of the helping state or of a collective of helping states, determine whether protection requires admission.⁵⁴

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