

# A Response to the Critics

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To the Editor:

My article on refugee burden-sharing (“Refugee Burden-Sharing: A Modest Proposal,” 22 *YALE J. INT’L. L.* 243 (1997)) advances a novel approach to an appalling problem that desperately needs all the fresh thinking it can get. Unfortunately, the critique by Deborah Anker, Joan Fitzpatrick, and Andrew Shacknove, “Crisis and Cure: A Reply to Hathaway/Neve and Schuck,” 11 *HARV. HUM. RTS. J.* 295 (1998), while both serious and respectful, misrepresents my proposal in a number of significant respects—misrepresentations that I pointed out to them when they sent me a draft of their critique only days before this draft was to go to the printer. I shall briefly address each of those misrepresentations in the order in which they appear in their critique.

1. Anker *et al.*, say that I “capitulate” to the North’s lack of political will to comply with refugee law. Anker *et al.* at 297. In fact, I devote *all of Part II* of my article (pp. 250–54) to a dissection and denunciation of the North’s non-compliance with refugee law. And I have “adequately emphasized” the “responsibility of Northern states”, Anker *et al.* at 297; indeed, in Part III, notes 83–85, I cite to, summarize, and adopt Fitzpatrick’s earlier analysis of this problem and then use the bulk of my article to develop the arguments for my proposed remedy.

2. Anker *et al.* fail to distinguish between “anti-immigrant forces” and anti-refugee ones. As I explained recently in “The Open Society,” *NEW REPUBLIC*, April 13, 1998, at 16, these are different phenomena (although they often overlap). Both my article in the *Yale Journal of International Law* and Anker *et al.*’s critique are concerned with the latter.

3. Although this does not implicate my article, Anker *et al.* write that “the United States is also a relatively desirable destination because of the presence of many immigrant communities and its strong economy.” Anker *et al.* at 299. As I pointed out to them, but they seem reluctant to acknowledge, America’s political, economic, and social freedoms, and not merely its immigrants and wealth, are also important reasons.

4. Anker *et al.* write that my proposal is not viable “if states retain the high degree of sovereignty suggested by [my article].” Anker *et al.* at 299. Although this critique is false (see immediately below), it clearly implies that they think that overcoming state sovereignty is somehow more viable, although everything we know indicates that this is woefully unrealistic. In fact, my article squarely confronts and discusses the problem of state sovereignty (pp. 246–47). The whole point of my article—and the value of my approach—is to see how improved refugee protection might be achieved within this enormous but inescapable constraint. I think that this effort de-

serves support, not censure. Simply wishing sovereignty away, as Anker *et al.* do, is a familiar theme today but it adds nothing to the difficult quest for practical solutions.

5. Anker *et al.* write as if I believed, naively, that "Northern states would relax their border control vigilance." Anker *et al.* at 301. I neither think nor implied any such thing; quite the contrary.

6. Under my proposal, states could, in principle, induce other states to provide refugee protection with anything that the transferee state values, including credit, commodities, development assistance, technical advice, goods, weapons, political support, etc. Anker *et al.* fear that weapons may be "refugee-generating, by raising the level of violence in the asylum state." Anker *et al.* at 301. This is certainly possible but, alas, the question is far more complex. As Barry Posen has demonstrated in a chapter in a book to which Fitzpatrick contributed, weapons can sometimes deter violence and hence eliminate a major cause of refugee flight. Barry Posen, *Can Military Intervention Limit Refugee Flows?*, in *MIGRANTS, REFUGEES, AND FOREIGN POLICY: U.S. AND GERMAN POLICIES TOWARD COUNTRIES OF ORIGIN* (Rainer Munz & Myron Weiner eds., 1997), chapter 9.

7. It is true, as Anker *et al.* write, that "The poorer states in the South provide refugee protection," Anker *et al.* at 305, but the reasons that they give are incomplete (poor states also receive political and material inducements to do so from the wealthier states) and they fail to note the many serious violations of refugee rights by Southern states.

8. Anker *et al.* write that under my proposal, "asylum-seekers would largely be removed from the realm of law and consigned to the realm of political bargaining." Anker *et al.* at 305. In fact, I am at pains to insist that the system I propose, including political bargaining, must observe all human rights principles (p. 271) and I suggest several practical ways in which this goal might be advanced (pp. 281-82; 288-89, 294). Similarly, Anker *et al.* write that my proposal "will result in a diminished level of refugee protection unless all parts of the bargain are respected." Anker *et al.* at 305. In fact, my proposal is expressly designed to maximize the number of refugees receiving protection (p. 295) and to maximize the resources available for that protection (p. 270). I am candid enough to acknowledge the reality that *any* reform that seeks to broaden refugee burden-sharing must face the tragic choice between the total amount of protection and the quality of protection (in the sense of resources spent on each refugee). Ignoring this reality does not advance the cause of real refugee protection but actually retards it.

9. Anker *et al.* condemn my proposal as a "commodification" of refugees. Anker *et al.* at 306. In fact, I devote the last section of my article (pp. 296-97) to what I call "the commodification objection" and I give reasons why my proposal should increase the number of refugees who would receive protection and why "commodification" and "placing a price upon the fate of refugees" are simplistic, unhelpful labels that avoid the tragic choice that I just mentioned. These are epithets designed to end this debate rather than

mentioned. These are epithets designed to end this debate rather than enrich it. Anker *et al.* simply refuse to confront my argument on this point.

10. Anker *et al.* write that my proposal “shift[s] to a group-based concept of protection.” Anker *et al.* at 306. This is emphatically false. I neither suggest nor believe that the individuality of refugees should be compromised or that their individualized claim to protection should not be based on their particular circumstances. Again, however, any effort to improve refugee protection must face the agonizing choice, which Anker *et al.* refuse to face, between devoting tragically limited resources to more individualized adjudication procedures, and using those resources to increase the number and/or quality of refugee protection.

11. Anker *et al.* suggest that I believe “that claims to protection by future groups of refugees should be subject to denial based on extension of protection to earlier groups . . .” Anker *et al.* at 306. I neither suggest nor believe this, and frankly do not understand what the authors mean by it.

12. Anker *et al.* doubt that there are limits on asylum states’ “absorptive capacity” for refugees. Anker *et al.* at 306. Unfortunately, examples of severe strains on such capacity abound: Palestinian refugees in Jordan; Afghani refugees in Pakistan; Indochinese refugees in tiny Hong Kong and politically unstable Thailand and Cambodia; Rwandan refugees in Zaire; and many, many others. To deny the burdens that refugees sometimes impose on first asylum states is to blink reality and put one’s head in the sand. Opponents of refugee protection may indeed exaggerate or manipulate those burdens, but the authors are equally wrong to dismiss or minimize them—and do not advance the debate by doing so.

13. Anker *et al.* suggest that I believe “that temporary protection in regions of origin and the preservation of existing social and political structures of refugee communities are *always* the optimal solution . . .” Anker *et al.* at 306, emphasis supplied. In fact, I say precisely the opposite, explaining my position at length (pp. 264–68).

14. Anker *et al.* imply that I am not “insisting upon rigorous respect for non-refoulement for every person entitled to international protection.” Anker *et al.* at 308. As noted at several points above, this is patently false. I do not know how my article could have been clearer about this. Their objection seems to be that I do not simply content myself with denouncing state denials of protection and of other human rights but go on to propose how we might actually deal with that reality.

15. Anker *et al.* write that I anachronistically “stress the role of states” in refugee protection. Anker *et al.* at 308. I do indeed, as anyone who wants to make actual headway on this problem must—but I also stress the role of regional groupings and of UNHCR (pp. 288–89).

16. With all due respect for the authors’ dedicated, admirable work on behalf of refugees (and I really mean that), their final section (“Alternatives”) is simply a repetition of the familiar pieties and exhortations for states to be better than they are and for scholars to remind them *ad nauseam* of their ob-

ligations. I am all for reiterating these pieties and exhortations (I really am), even though governments have consistently ignored them ever since the Flood. But the authors could at least have the candor to admit that it is hardly an "alternative" to do so once again, and that I (and Hathaway/Neve) have undertaken the more difficult and easily criticized task of first reiterating the familiar indictment and then attempting to devise an approach that assumes (surely accurately) that states' attitudes and conduct will not change simply because we want and urge them to change. For change to occur in the short run, their incentives must either be altered or be mobilized on behalf of refugee protection. My article discusses both but, like Lola in "Damn Yankees," puts the emphasis on the latter. This is my article's distinctive contribution.

At the end of my introduction (p. 250), I clearly state that my proposal entails many problems, virtually all of which "already exist, sometimes to an even greater degree, in the current system," and I "urge the reader to keep the 'compared to what?' question firmly in mind as she ponders these problems." I believe that Anker *et al.* have not taken up this challenge.

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