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## The ethics of refugee prioritization: reframing the debate

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Faced with the worst displacement crisis since the second world war, many states are unlikely to accept as many refugees as they ought, and very few are likely to accept more than they are required. Accordingly, though some refugees will be admitted, many with sound claims will thus be wrongfully rejected. Are some ways of wrongfully rejecting refugees less objectionable than others? If ‘yes’, is it then morally justifiable to give priority to refugees who flee from worse forms discrimination or persecution of minority groups than refugees who flee less severe forms of discrimination? In the abstract, this might seem like a reasonable position. Yet, many have found it objectionable to give priority to Christian refugees from the Middle East – especially without a similar scheme for Muslim refugees from countries where they experience comparable forms of discrimination. Furthermore, giving priority to refugees on the basis of the degree to which they experience discrimination and persecution in the countries from which they flee might involve drastic divergences from present patterns of asylum admittances. For instance, given the widespread and severe discrimination women and homosexuals face in many parts of the world, should such refugees be given priority, considering fewer men and heterosexuals would then be admitted? Some might reject the very idea of sorting refugees who all merit asylum into different groups – triage for refugees as it were. And some may instead reject the particular principle of risk of persecution for the distribution of asylum, on the basis of this principle’s implications. If so, which alternative or additional principles should regulate the admission of refugees? This symposium aims to tackle such issues by addressing the question: What role ought minority protection play, and, more generally, what are the right principles of admitting and rejecting refugees when asylum, whether permanent or temporary, is under-supplied in a non-ideal world? What are the implications for the present situation given the correct answer to the previous questions? And should we at all consider prioritizing among refugees? If not, why not?<sup>1</sup>

Each paper in this symposium addresses one or more of the issues above. Before presenting the content of the symposium, let us briefly explain how we conceptualize the prioritization of refugees in the non-ideal context of a world that does not give asylum to all refugees who should, morally speaking, receive it.

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<sup>1</sup>This paragraph is the call for papers that we circulated for a conference entitled ‘Refugees and Minority Rights: acceptable and unacceptable criteria for accepting/rejecting refugees in a non-ideal world’ held at UiT – The Arctic University of Norway, Tromsø, June 2018. The papers in this symposium are all descendants of papers presented at that conference.

First, it is important to note that in asking about ‘priority setting’, we do not have a narrow legal framework in mind. That is, we are not primarily concerned with refugees arriving in recipient states and then formally applying for asylum. If that were the primary context with which we were concerned then the question about ‘priorities’ would become a question about reforming the principles that determine who is granted the legal status of a refugee and who should receive asylum. At present, if a state grants someone the legal status of a refugee under international conventions then it would be illegal to deny the person asylum based on any extra considerations of prioritization. Thinking about the issue in this narrow way can be seriously misleading in light of the fact that for most actual and potential refugees, the main barrier to asylum (or some other equivalent legal status in receiving states) is not legal but, as several contributors point out, the sheer physical ability to move to a place where one can legally claim (and, for qualifying cases, reliably obtain) asylum. Once the issue is understood in this light it is obvious that far from everyone who should be granted asylum receives it.

Second, even though many refugees are currently denied the asylum they ought to receive this doesn’t mean that all questions of ‘priority setting’ within this non-ideal context would necessarily deny refugees’ basic human rights. The existing international refugee system operates on two levels. On the one hand, there are issues regarding the initial access to asylum – including the barriers placed in the way of refugees en route to a place where they can seek asylum. We think that denying or otherwise obstructing access to asylum would straightforwardly constitute a violation of refugees’ basic human rights. On the other hand, the international refugee regime also engages in refugee relocation and resettlement (though, the resettlement numbers are appallingly small). At this level it is less clear to what extent (if any) prioritizing certain refugees within the resettlement process would entail that other refugees are either denied asylum or the right to seek and find asylum. Naturally, it might turn out that prioritizing certain (groups of) refugees within the resettlement process is problematic for other reasons, or that the states which engage in such priority setting are already failing to discharge their moral duties towards refugees in the first place. Nevertheless, it is clear that questions of prioritization need to be asked against the relevant background context of discussion (either initial access to asylum or the resettlement process).

Third, we asked a question of a certain general form: ‘Given that X is acting wrongly by doing Y are there ways of doing Y that are less (or more) morally objectionable than others?’ Our question does not say, imply, or otherwise convey that doing Y is not wrong at all (or that it is not seriously wrong) if it is done in the least morally objectionable way. For instance, in saying that a country that already admits far too few refugees would act *even more* unjustly if it were to admit those that it does on racist grounds, one is not saying, implying, or otherwise conveying that, after all, racist admissions are not unjust, or that it is perfectly fine that a certain state only admits a very limited number of refugees albeit on non-racist grounds. We believe that philosophers are alert to the invalidity of these sorts of inferences in other areas of non-ideal, applied ethics. For instance, no one in the ethics of war would infer from (or read into) the question ‘Are some ways of engaging in an unjust war morally more objectionable than others?’ the view that unjust wars are not that morally objectionable or perhaps not even unjust after all. Moreover, in asking the symposium’s main question we are not suggesting that this is the only (or, for that matter, the most important) question one can ask in relation to the refugee situation. Specifically, we are not suggesting that one should not ask questions about why asylum is in undersupply;

who has a duty to address this problem; and what sanction agents that fail to fulfil their duty in this respect become liable to.

Fourth, we are aware that in politically charged contexts people misunderstand – or worse, deliberately distort – what others say or write, e.g., answers to questions such as those we ask above are likely to be misunderstood or misused if offered in a televised debate among politicians rather than in an academic journal. We also think that one has a responsibility for the predictable bad consequences that follow from asking questions that, on their own, are perfectly legitimate. If one had good reason to suspect that asking or answering a certain question would result in sufficiently bad consequences – e.g., a significant reduction in the number of refugees being given asylum – then one would have a moral duty to abstain from asking or answering that question (or to at least refrain from asking it in contexts where doing so would predictably have these bad consequences). Nevertheless, we think the burden of proof is on people who think that certain questions should not be answered to provide evidence suggesting that symposia such as this one will noticeably affect the world for the worse. In so doing, one should also be alert to the danger that, by simply not asking or engaging with the main question of this symposium, countries could unreflectively act even more wrongfully in relation to refugee admission process than they would otherwise.

Fifth, in asking the symposium's main question – 'Given that some refugees with sound claims will be wrongfully rejected, are some ways of wrongfully rejecting refugees less objectionable than others?' – we are not presupposing any assumptions about why huge numbers of refugees are currently not receiving asylum. Similarly, even if someone will act unjustly and not rescue everyone he ought to or could rescue, one can nevertheless ask whom someone should rescue from drowning without assuming anything about whether he is responsible for the fact that these people are drowning in the first place – e.g., whether he unjustifiably sunk their ship, whether these people brought their situation upon themselves by sailing out in rough seas despite warnings, or whether their predicament was imposed on them by a third-party villain.

Finally, it matters, not just what one asks, but also who asks – even if it is the very same question. One distinctive feature of the philosophy of refugees is that most contributors to the literature are people who face little risk of becoming refugees themselves. Indeed, this dynamic itself may strike some as slightly repugnant: philosophers in (metaphorical, if not real) arm-chairs discussing principles for selectively aiding people in desperate situations – often with a preference for tricky intellectual puzzles. This is a problem that besets many other areas of applied ethics. For instance, philosophers writing on the (im)permissibility of capital punishment are quite unlikely to end up on the death row. Nevertheless, this dynamic gives rise to the suspicion that most contributions to the literature manifest certain biases and blind spots. We agree that this is a reasonable suspicion (not only here but also in relation to other issues within applied philosophy). The best remedy is to show how the relevant biases and blind spots have manifested themselves in the views being defended and the arguments put forward.

The six contributions to our symposium fall into two main categories: those that try to answer the symposium's main question and those that raise doubts about whether we should do so. The contributions of Sarah Fine, Serena Parekh and Max Cherem are in this second category.

In her article Fine offers a number of different reasons why philosophers should refrain from taking up the question: 'Where asylum is in short supply, whose claims to

asylum should we prioritize over others?' First, it is at least possible that any way of setting priorities is 'equally bad and impermissible'. If this were so, it would be a waste of time for philosophers to try to identify principles of prioritization. Second, even if not all ways of setting priorities are 'equally bad and impermissible', it might be that one needs to rely on empirical evidence or experience – say, of being in the shoes of a refugee – in order to identify the ways of setting priorities that are better than others and permissible. Yet, philosophers possess none of these qualifications and thereof one is not qualified to speak, one should remain silent. Third, even if philosophers could somehow manage to overcome the first two limitations it might be that, in certain political contexts, the very fact that philosophers discuss issues of prioritization among refugees will be misunderstood or misused. For instance, politicians might ignore the assumption the present symposium's main question takes for granted – that not all refugees that deserve asylum actually receive it – or they might construe this assumption as signalling or implying that this state of affairs is not all that objectionable.

Serena Parekh's article attacks what she submits to be an assumption behind the symposium's main question and an assumption made by many philosophers who write on refugees: that in failing to grant asylum to non-Western refugees, Western states merely fail to help these people. The operative assumption is that the West has not and does not actively harm refugees and that this is why it is permissible for the West to set priorities among them. Parekh argues that the present refugee problem is a problem largely created by Western states and that Western states are complicit in the severe harms experienced by the vast majority of refugees once they leave their home countries. More specifically, because of Western policies around immigration and border security, Western states have more or less ensured that the vast majority of refugees will not be able to access the conditions that would allow them to lead a minimally decent life. Once the relevant false assumption behind the symposium's main question is refuted, we see that it is not morally permissible to, say, give certain minority refugees preference in resettlement.

Max Cherem adopts a different critical stance on the symposium's main question. He agrees that it could be morally permissible to use some types of group identity to prioritize certain refugees for resettlement over others. This permissibility, however, assumes an ideally run refugee admissions system. This is not what we have today – and here Cherem takes up some of the themes about access that Parekh discusses at length – because of how Western states have increasingly resorted to 'extraterritorial migration controls' or 'non-arrival' tactics. Cherem argues that these strategies often amount to *either* illicitly avoiding an obligation *or* benefitting by sustaining a wrong (the characterizations are offered as lenses for analysing how certain states may act wrongly in relation to certain refugee crises by limiting asylum access). Accordingly, asking whether some ways of setting priorities among refugees are less objectionable than others asks the wrong sort of question – it misses the 'nub of the problem', so to speak. Instead, it would be much more efficacious to ask why we should take the undersupply of asylum as a given. In the course of doing so, we should explore how background institutions can be reformed so as to both incentivize good behaviour and deal with collective action problems between states that relate to refugees.

Turning to the three contributions that try to provide at least partial answers to the symposium's main question, Zsolt Kapelner's article addresses a procedural aspect of the main question: how principles of refugee prioritization should be decided upon if

they are to be democratically legitimate. On a common view, democratic legitimacy is achieved if citizens in the recipient country democratically decide upon such principles. Kapelner, however, thinks this view is false, since this procedure involves the exclusion of those who are most affected by the principles selected: would-be-asylum seekers. On Kapelner's view, receiving states have a duty to protect the basic rights of refugees and asylum seekers, and this requires ensuring the ability of would-be refugees and asylum seekers to participate in the recipient country's decision-making process about principles for priority setting among refugees on equal footing with citizens. Specifically, this duty might involve special measures to ensure the effective inclusion of vulnerable minorities among would-be refugees.

The two remaining contributions both discuss substantive answers to the symposium's main question. Annamari Vitikainen argues that the issues of refugee admission and the possible principles of prioritizing some (groups of) refugees over others have to do not only with the questions of who deserves and who is able to provide asylum, but also with the ability and willingness of potential refugee receiving countries to protect refugees against other injustices that are bad but which do not in and of themselves ground asylum. Vitikainen discusses the case of refugees who are LGBT, and shows how the LGBT status of a refugee subjects them to a variety of non-asylum-grounding injustices in countries that provide asylum for LGBT persons from persecution (this is so regardless of whether being LGBT is a ground for their refugee claim). The persistence of LGBT discrimination and disadvantage, combined with the relatively low number of states that are both able and willing to protect LGBT persons against such injustices gives particular states – typically Western liberal democracies – strong moral reasons to prioritize LGBT persons in refugee admissions – for, refraining from doing so would subject these refugees to a variety of (non-asylum-grounding) injustices elsewhere.

Turning, finally, to Kasper Lippert-Rasmussen and Sune Lægaard's contribution, they start from the assumption that, there seems to be some moral reason to give priority to minority over majority refugees, when not everyone will be granted asylum. At least in many other contexts, e.g., multiculturalism and discrimination, many theorists assume that there is a special concern for protection of minorities. This assumption, however, immediately raises the question of what exactly constitutes a minority. One natural conception of minorities is a purely numerical one. However, it is more complicated than it may initially seem to define a satisfactory numerical notion of minorities and, in any case, a purely numerical notion of minorities does not align well with the moral concerns that lie behind the assumption that minorities should be given priority. Hence, Lægaard and Lippert-Rasmussen propose a vulnerability-focused notion of what it is to constitute a minority. They then proceed to show that even if that notion does capture the relevant concerns, there are important exceptions to the principle that minority refugees should be given preference.

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