Remote Controls: Pushing the Boundaries of Asylum

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David Scott FitzGerald, **Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers** (2019).

A general consensus has formed that the status quo approach to the current refugee crisis isn't working, even if there is little agreement on an alternative. UC San Diego sociologist David Scott FitzGerald's excellent new book, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers,* is the latest academic press book by a social scientist (following, for example, Alexander Betts and Paul Collier's *Refuge*) to explain what's wrong with the global institutional framework for refugees and to propose a better way.

Over eleven chapters, FitzGerald presents a trove of evidence showing how many Western states use law and policy to deter (or simply shut out) would-be asylum seekers. These legal policies creatively flout the spirit of international law, even as they walk a fine line between formal compliance and violation. FitzGerald argues that, whatever their legality under international or domestic law, these *non-entrée* policies, what he calls *remote controls*, violate principles of humanitarianism. He therefore argues that civil society—including NGOs, journalists, lawyers, academics, and other citizens—should mobilize to end them. *Refuge Beyond Reach* is an important contribution to the ongoing conversation about how the existing global international and domestic framework is addressing (and is perhaps responsible for) the current crisis.

Perhaps the book's primary contribution is identifying and analyzing a typology of these migration remote controls. Refugee-destination states use remote controls to prevent migrants from legally claiming asylum by preventing them from reaching their ports, shores, or other borders. FitzGerald uses medieval-era architecture metaphors for these five methods of remote control: *cages* (techniques, such as camps or military force, which keep migrants in a certain place); *domes* (restrictive visa policies that keep migrants from flying into the country without prior permission); *moats* (maritime zones in which the military intercepts approaching vessels before they reach the shore, or even territorial waters); *buffers* (adjacent countries or territories that agree to hold migrants to prevent them from reaching the border); and *barbicans* (special legal zones on the perimeters of a country that limit asylum rights). Each of these devices is designed in a way that flouts the spirit of international migration law—the 1961 Refugee Convention and its 1967 Protocol—while arguably meeting most or all of its formal requirements.

One mark of a good analytical framework is how well it explains future events. FitzGerald's framework has already proved useful for analyzing policy developments since the book's publication. The remote control now making the biggest headlines in North America is the so-called "Migration Protection Protocols" (MPP) (also known as "Remain in Mexico"). *Refuge Beyond Reach* does not address that program, as the book was published shortly after the MPP was rolled out in early 2019. (FitzGerald does briefly cover a similar, ad hoc practice from the 1980s. He also examines how Canada implemented a "Remain in the U.S." program in 1987; the threat to waiting asylum-seekers there was not violence from gangs, but deportation to their home countries by U.S. officials.) MPP requires asylum-seekers who appear at southern border ports-of-entry to wait for their hearing dates in Mexican border cities, rather than entering and waiting in the United States.

"Remain in" policies are not a perfect fit for any of FitzGerald's five remote controls, but I would categorize the policies as a kind of "buffer-lite." In other words, they don't physically or legally prevent migrants from initially reaching the territory and filing a claim for asylum (as cages, moats, and domes can). Instead, they act as both a time-delay "gate" and a deterrent. As a time-delay gate, they actually reduce the population of asylum-seekers by temporarily preventing asylum seekers from residing in the country, thereby preventing them from either joining the general population or relieving the state of the obligation to house (incarcerate) them. But the stronger effect is probably deterrence; migrants who have to wait for longer periods in uncertain or dangerous conditions may give up while waiting, or just not try in the first place.

Though some of them have been struck down by courts, the MPP and many of FitzGerald's five remote controls are often carried out in ways that are formally consistent with international or domestic migration law. (See the recent litigation over whether the MPP violates the [U.S. Refugee Act.](#)) Indeed, Fitzgerald argues that "questioning [the controls'] legality is necessary but not sufficient," because "[t]he question should not just be whether a policy is legal, but also whether it is good." And humanitarianism, he says, "provides a moral framework for measuring whether a policy is good."

Despite this emphasis away from legality, political scientists, lawyers, and policy-makers may want to learn more about the tradeoffs that FitzGerald's humanitarian-driven proposals necessarily raise. One of the key challenges of treaty drafting and negotiations is the tension between robust regulation and enticing a large number of participants (the so-called "broader vs. deeper" tradeoff). Of course, as with other treaty obligations, the Refugee Convention and Protocol require states' consent to bind them. (Some argue that the principle of non-refoulement is now customary international law, binding most or all states, but that point is controversial.) There is some evidence that the Refugee Convention and Protocol have caused some key states to develop and implement domestic refugee/asylum systems which wouldn't exist but for the Convention.

Had international refugee law banned some or all of the five sets of remote-control strategies, surely many fewer states would have ratified or acceded. In fact, in 2015 the prime minister of [Denmark](#) (one of the first states to ratify the Convention), called on states to renegotiate the Convention entirely unless European Union officials stemmed the flow of refugees resulting from the Schengen area's open migration system. Likewise, if there were serious claims that the MPP program violated international refugee law, it's easy to imagine [President Trump](#) pulling the United States out of the regime entirely (an act likely within his sole discretion). Dismantling the U.S. Refugee Act, the federal legislation implementing the Convention, would be politically and institutionally trickier, but weakening it around the margins would likelier be easier without its underlying international mandate.

For refugee advocates then, the optimal strategy might not be to push for the strictest possible rules, but for the most protective rules that can be attained without driving states away from the global refuge regime entirely. Like other international regimes, it's unclear where exactly that tipping point lies. FitzGerald implicitly raises this issue but leaves a full discussion for others.

As with many important contributions to current policy debates, *Refuge Beyond Reach* raises several new questions that it cannot fully address. It doesn't need to; the book is a detailed, meticulously researched, and generally compelling account of a central flaw in the global response to the current crisis. *Refuge Beyond Reach* will surely inspire new research and more conversations among legal scholars, empirical social scientists, and policy-makers about the problems FitzGerald exposes and the solutions he suggests.

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