

Boat People: Why the Queue Jumping Argument Fails

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Abstract: *In the current debate surrounding asylum seekers coming by boat to Australia, it is alleged that they are “jumping the queue” and therefore are committing illegal acts. This ignores the facts that there is no “queue” for refugees to jump, that they are entitled to sanctuary from war according to the UN Declaration of Human Rights, and that we are obliged on the grounds of both compassion and justice to accept asylum seekers into Australia. The current treatment of asylum seekers by the Australian government is therefore unjustified.*

Key Words: asylum seekers; refugee rights; Australian immigration policy; “queue jumping”

With the continuing deployment of troops in the Middle East in the aftermath of the war with Iraq and the region’s general instability and unrest, not only can it be expected that there be growing casualties, but also that increasingly large numbers of people will be displaced and refugee camps swell in numbers. It is not surprising that many will seek to reach a safe haven, another country where there are better prospects for themselves and their families. In this respect, Australia, despite its notoriously harsh treatment of asylum seekers, is an attractive destination and it is certain that many will be driven by desperation and dire need to chance the voyage to Australia in whatever way and by whatever means they can. They will do so despite the lack of any evident softening of the government’s stance on asylum seekers. Following the second Gulf War, there is no sign that new asylum seekers are being treated any better than they have been in the past and the same lack of compassion may be observed as has been to date.

One of the arguments that has had currency in the debate about asylum seekers has been that people arriving illegally by boat are “queue jumpers.”¹ That is, they have “jumped the queue” of those waiting to enter Australia as legal immigrants and in doing so have acted unfairly. Moreover, it is opined, they have used their superior financial circumstances to gain an advantage over their poorer and equally needy compatriots who are unable to pay to escape from their poverty, despair and oppression. The obvious conclusion we are invited to draw is that such immoral, unjust behaviour should be not only punished, but also discouraged by ensuring that the penalties for acting in this way are sufficiently harsh. Detention camps, surrounded by high fences topped by razor wire and coupled with the daunting prospect of indefinite incarceration, go some considerable way to fulfilling both these criteria.

¹ I will not discuss the obvious response to the “queue jumper” argument that there is in fact no queue for them to jump in Afghanistan, Iran, Pakistan or Indonesia since there is no immigration office in the camps taking applications for entry into Australia. Peter Mares makes this point powerfully through the story of Khalil. See P. Mares, *Borderline: Australia’s Treatment of Refugees and Asylum Seekers* (Sydney: University of New South Wales Press, 2001), 18-19.

In this paper, I want to examine whether asylum seekers have gained an unfair advantage over other migrants by arriving in Australia through illegal 'queue jumping.' I will principally argue that given their circumstances, they have not gained an unfair advantage over others. Queue jumping will be shown to be neither illegal nor immoral in certain circumstances and the superior financial status of some asylum seekers over others is irrelevant in determining how they ought to be treated. Secondly, though more briefly, I will argue that the claim that the harsh measures are justified because they discourage vast numbers of asylum seekers from 'queue jumping' in the same illegal way and so prevent a massive influx of migrants cannot be sustained. Thirdly, the argument that harsh treatment is justified because it will make it difficult for people smugglers to ply their 'queue jumping' trade is simply dismissed as grossly unjust to asylum seekers. It is evident that the view that asylum seekers have used unjust means of reaching Australia and so harmed others who have been waiting patiently in line fails.

I do not intend to argue that asylum seekers are technically not illegal refugees, since under international law they are entitled to seek and enjoy freedom from persecution, according to the *Universal Declaration of Human Rights*.² An asylum seeker is, after all, entitled to seek sanctuary in another country if he is being persecuted in his own country or conditions there are oppressive and he has good reason to believe that remaining in his present country is dangerous for him and his family. It is then up to the government of the country to which he is seeking entry to decide whether to give him sanctuary and the opportunity for a new life. In some cases, entry will be denied, but this does not mean that the asylum seeker has done anything illegal. The scandal of Australia's present treatment of asylum seekers is that they are being treated as criminals. For the sake of argument, however, I will assume that they are illegal immigrants, which is to say that they are intending to enter Australia without going through the normal immigration processes.³ Despite this illegality, I will argue that the queue jumping argument cannot be sustained and they ought not be incarcerated indefinitely in detention centres.

Queue jumpers cannot be condemned for their actions on the grounds that what they have done is immoral. There is a distinction between what is illegal and what is immoral, despite a view in the minds of many that what is illegal is morally wrong and to be condemned. However, what is immoral may not be illegal and vice versa. For example, we regard adultery as morally wrong, but, at least in Western countries, it is not regarded as illegal. There are acts, such as murder which are both illegal and immoral. It is illegal for pedestrians to walk against a red light, but, assuming one does not compromise one's safety in doing so, it is not immoral. Nor is it illegal for salespersons to play on the weaknesses of gullible customers to pressure them into buying goods which the salespersons know they cannot afford, but it would be immoral. Aquinas argues that it may be morally wrong for someone to keep wealth that she does not need, even though it has been justly acquired.⁴ What Aquinas has in mind here is the poor, starving man who

² *Universal Declaration of Human Rights*, Article 14, which reads: (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

³ Information on the categories of migrant accepted by Australia are outlined on the Department of Immigration and Multicultural and Indigenous Affairs website. See http://www.dima.gov.au/allforms/migration_info.htm.

⁴ Thomas Aquinas, *Summa Theologica*, Vols.1-5, Westminster, Maryland: Christian Classics, 1981, II-II, Q.32, Art. 5 Aquinas quoting from St. Basil, says that keeping bread from the hungry man is keeping from him what is his.

has nothing, but who could be helped by someone who has food in abundance. One could in Aquinas's example replace the poor, starving man with an asylum seeker and it requires little imagination to substitute Australia for the person having abundance. Aquinas's conclusion could then easily apply to Australia. This aside, it is clear that there is a tangled connection between what is illegal and what is immoral, with civil law generally based on the moral law, but the essential point is that they are not identical.⁵

Civil laws can be understood as safeguarding the public good and providing a framework within which individuals can exercise their freedom, free from the interference of others. It is clear that living with others requires the curtailment of individual freedoms in order to enable all to enjoy a reasonable and fair share of freedom. It is, of course, difficult to determine what constitutes a fair and reasonable share of freedom, but minimally, we can take it mean that so long as no one is harmed by someone's actions, she is free to do what she likes. A further difficult question to be considered concerns the nature of harm,⁶ but there is some consensus in the community about what the limits of individual freedom are, and it is on the basis of this that laws are enacted. In a liberal democracy, there is broad toleration of a variety of positions concerning individual freedom, but all are required to refrain from breaking the law.

This does not require unthinking obedience, for in any liberal democracy, it is expected that lawgivers will give reasons why a law ought to be obeyed. The idea that lawgivers are to be obeyed simply on the grounds that they have authority, it seems to me, cannot be supported in a liberal democratic society where authority derives from the people. It also fails to accord to human beings the respect to which they are entitled as autonomous human persons. Laws should be obeyed if there are good reasons for doing so and this will generally be if they can be shown to serve the demands of justice. A law which instructs us to treat people harshly and inhumanely is a bad law and, as citizens in democracy, individuals have a responsibility to change bad laws.⁷

It is not only the reasonableness of a law which is important, but also the spirit of the law, which is to say the common good which is sought to be preserved.⁸ That is, it is one thing to observe the letter of the law, but another to discern the underlying principles which the law seeks to enunciate. In many cases, it is sufficient to observe the letter of the law, but in a minority of cases, it will be reasonable to violate the law. Compassion and mercy will in some cases demand a different response from us than what the law expects of us.⁹ There are numerous prosaic examples of situations in which observance of the letter of the law is inhuman and where the common good is better served by turning a blind eye to the infringement of the law. For instance, recently in the local press was an

⁵ Hart says that few would find any contradiction in the claim that a rule of law was valid but conflicted with a binding moral principle. See H.L.A. Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963), 3. But Raz argues that the basis for the authority of law lies in its source in the moral law. See J. Raz, *Ethics in the Public Domain* (Clarendon Press, Oxford, 1994), 210-237.

⁶ For example, it is not at all obvious that the dead cannot be harmed nor that unborn generations cannot.

⁷ Aristotle says that a state exists for the sake of the good life, not for the sake of life only, but the creation of the good life relies on communal action to produce it. Thus he says that political society exists for the sake of noble actions. Aristotle, *The Politics*, trans. T.A. Sinclair (Baltimore, MD: Penguin, 1962), Book III, Ch.9 [1280a-1281a].

⁸ Here we can distinguish two things: 1) the spirit of the particular law and what it seeks to regulate and 2) more generally why it seeks to regulate, which is to somehow enhance the common good.

⁹ Mercy is not often included as an important virtue in discussions of justice. It differs from compassion since it asks us to mitigate what is just, even though recognising that the demand of justice is that a particular course of action be taken. Mercy, for example, forgives a transgression, cancelling what is deserved and allows a person to begin anew.

account of an aged pensioner who had established an attractive garden on his nature strip, contrary to local bylaws. The council had written to inform him that he was in breach of its bylaws and that the garden would have to be removed. Only after considerable local protest, did the council reluctantly back down from their position. In general, the council is right to demand that for the general amenity of those using public footpaths that gardens ought not be cultivated on nature strips.¹⁰ However, in this case, the garden did not constitute a hazard and improved the general appearance of the streetscape and contributed to the overall good of the community. The letter of the law in this case was overridden by the spirit of the law.¹¹

Nussbaum captures something of the importance of being mindful of the spirit of the law, rather than just the letter of the law in her discussion of the compassion in the public culture of liberal democratic states. Just institutions, she says, will have built into them ways in which basic goods can be promoted, but in order to maintain them, we rely on compassionate individuals who are prepared to act in ways which prevent mindless obedience to the letter of the law. Moreover, we will not engender compassionate concern for those who are distressed and in need if our political institutions do not cultivate an understanding of the predicament that such people are in. It is abundantly apparent that in relation to the asylum seekers the Australian government has singularly failed in this respect.¹² A nation which does not temper its law enforcement with compassion is in danger of becoming less than human and more, strongly, come to resemble the harsh and repressive regimes that it condemns.¹³

There are two points that our brief discussion establishes. Firstly, that there are good grounds for claiming that because something is illegal does not mean that it is immoral and secondly, that our compliance with laws depends on their reasonableness, as well as their conforming to the dictates of underlying principles of justice, compassion and mercy. It follows then that entering another country illegally in certain circumstances, determined by these underlying principles, is not *prima facie* against the spirit of immigration laws nor, by any stretch of the imagination, immoral. The conditions under which entering another country illegally could be regarded as immoral would involve harm or damage to one of the basic human goods.¹⁴ This would mean, for example, that illegal immigrants threatened the lives of citizens, but it is not self-evident that they

¹⁰ M. Schulz, "City Keen to Cling to Its Thorny Issue," *Progress Leader*, 3 February 2003, 12-13.

¹¹ Richard Gula says this understanding of the law is called *epikeia* and depends on 1) justice, 2) prudence, 3) discernment and 4) altruistic love. See R. Gula, *Reason Informed by Faith* (Mahwah, NJ: Paulist Press, 1989), p.258.

¹² M. Nussbaum, *Upheavals of Thought* (Cambridge: Cambridge University Press, 2001), 401-405. Nussbaum also urges citizens of liberal democracies (most notably the United States) to have more concern for the fate of those living outside their borders. See pages 420-421.

¹³ Nussbaum says that political systems are humanly fallible and they are only good if they are alive in a human way, which is to say they exhibit compassion and concern for others. Nussbaum, *Upheavals of Thought*, 404. Mares concurs with the assessment of political institutions which behave in a repressive and inhumane way and their effect on the general community, saying that the more Australia seeks to deter asylum seekers through unjust treatment, the more it begins to resemble the totalitarian, repressive regimes that they have sought to flee. Mares, *Borderline*, 202. It is a serious question to ask whether Australia's indifference and even hostility to those who have thrown themselves on our mercy points to a serious breakdown in the sense of community and concern for the other. What becomes of the conceptions of 'mateship' and a 'fair go,' for so long cornerstones in Australians' conception of themselves? Both encompass a concern for the other, particularly for the 'battler.' These are concepts buried deep within the Australian psyche which seem to be fading with the passing of the last Anzacs.

¹⁴ The Natural Law Tradition recognises seven basic human goods – i) life, ii) knowledge and truth, iii) beauty and aesthetic experience, iv) work and creative play, v) integration of the self and harmony of conscience, vi) friendship and intimacy, vii) religion.

threaten the lives of citizens merely by being illegal immigrants. An argument that the government is justified in preventing the entry of boat people solely on the grounds that they are illegal immigrants will fail if it cannot be shown that important principles and values which support the Australian community are suborned. The opposite of the government's position is suggested by the discussion of the importance of compassion in the public institutions of a community. In addition, given the separation of what is illegal from what is immoral, any argument which claims the government is morally justified in preventing the entry of boat people because they are illegal immigrants also fails.¹⁵

Let us assume that it is true that illegal immigrants have jumped the queue ahead of others in the camps waiting to emigrate to Australia.¹⁶ It should be apparent that this in itself is not a compelling argument for their harsh treatment, since it supposes that there are no circumstances in which queue jumping can be justified. There are many circumstances in which it is generally accepted as permissible. Hospitals, for example, operate on the premise that those requiring urgent attention are seen first, whereas those whose illnesses or injuries are not as urgent are required to wait. Someone whose life is in danger has priority over someone who has, say, a broken finger. Anyone who has experienced the interminable wait in the casualty sections of our public hospitals can attest to this, and most would accept that urgent cases have priority, even if one has been waiting for hours. Promotion within businesses and most walks of life increasingly occurs on the basis of merit, not just on seniority or because it is someone's turn to be promoted. At a long check-in queue at the airport, passengers for a flight that is already boarding are given priority over passengers whose flights are not. In general, a demonstrated need to be considered ahead of another in a queue provides justification for someone to "queue jump."

Of course, there are other examples of queue jumping which attract our condemnation and outrage. Standing patiently in a slow bank queue, only to see someone rush up to the teller in front of one is generally sufficient to cause anger and rightly so, for the queue jumper in this situation has directly and deliberately inconvenienced us, but more seriously, signals to us her disregard of us as human beings with concerns and preoccupations who ought to be treated with respect. Those who "mind a spot" in the queue or allow their friends into the queue without so much as a "by your leave" also attracts our condemnation, though perhaps not quite so seriously as in the first case. These are not serious cases of queue jumping for no one is seriously harmed, but they perhaps account for the pejorative overtone which attaches to the term "queue jumper" and why the term has been used by the government to describe asylum seekers.

The question which the examples raise concerns whether queue jumping asylum seekers are to be thought of in terms of the first type of examples of queue jumping or whether they are to be thought of in terms of the second type. That is, we need to ask whether there are justifiable grounds, reasons which take into account justice, compassion and mercy, which enable us to waive the letter of the law or are there insufficient grounds

¹⁵ Of course, the government is legally justified according to the letter of the law in preventing the entry of boat people, but there are convincing arguments for supporting the view that the moral law takes precedence over civil law and so this need not be regarded as decisive. Indeed, there is a strong tradition which says that we are called to civil disobedience where the moral law is transgressed by the civil law.

¹⁶ One can only compare queue jumpers with others in similar circumstances, that is, those in the camps. Others waiting to emigrate will include those coming under the categories of skilled migrants and family reunion categories. Some of the latter category have had to wait for considerable time before being able to emigrate. In relation to those who are in these categories are not facing the dire circumstances that the queue jumpers face in the camps and there is a strong argument that people in great need ought to be given priority – which is what the argument following establishes.

and so the queue jumping falls into the pejorative second category. The evidence in the vast majority of cases points to queue jumping asylum seekers as falling in the first category. No asylum seeker who is prepared to risk his or her life and those of his or her children in leaky, dangerous boats is doing so for frivolous reasons. There is ample documented and first hand evidence of the unspeakably harsh and oppressive conditions in refugee camps in Iran, Pakistan and other places closer to Australia.¹⁷ These circumstances alone are sufficient to place asylum seekers in the first category.

In the medical examples, the “queue jumping” argument can only get a purchase in the case where there are equally urgent cases and a decision is made to treat the person who can, say, show a superior capacity to pay. That is, a patient unfairly uses her financial power or political power to gain an advantage over another patient ahead of her in the queue. In such an instance, we could justifiably argue that financial circumstances or political power ought not be a factor in deciding who is to be treated first. Considerations of this kind perhaps were at the back of an unsubstantiated claim made in the media by Mr. Ruddock that wealthy asylum seekers were flying first class to Indonesia and Malaysia and then getting on rickety boats, presumably to gain sympathy and an easier passage into Australia.¹⁸ If this was true, then it would be rightly scandalous, but there is no evidence at all that any asylum seekers who arrived on such boats did this. Moreover, even if true, this would not affect the need for compassionate treatment of other asylum seekers. It is simply false to generalise from a few particulars to all asylum seekers. In relation to financial considerations, Walzer argues persuasively that justice demands that each sphere of goods has its own criteria of application. In the provision of medical care, the appropriate criteria do not involve either superior economic or political power.¹⁹ If this is so, then using one’s superior economic or political power to get treatment ahead of another requiring the same treatment and who has first claim on it is unjust.

Appropriate criteria in the provision of medical care would include assessment of such matters as:

- i) the urgency or necessity of treatment;
- ii) the seriousness of the condition;
- iii) how life-threatening the condition is;
- iv) the prognosis following treatment; and
- v) likelihood of successful treatment.

The criteria would not include the capacity to pay as an overriding condition.²⁰ Despite the unpopularity of the thought with economic rationalists, health care remains a basic human

¹⁷ Australia’s detention camps seem to be intent on duplicating some of the harshness of these camps.

¹⁸ Quoted in Mares, *Borderline*, 32. The report “Alien Scam” was in the *Herald Sun* (Melbourne) 13 October 1999, according to Mares.

¹⁹ M. Walzer, *Spheres of Justice* (Oxford: Blackwell, 1983), 84-91. Walzer’s brief account of the history of medicine suggests that prior to the development of the welfare state, physicians mainly treated the rich who could afford to pay, though there were some altruistic physicians who also tended the poor. The United States does not have a national welfare system. Nevertheless, a condition of treatment ought not be the size of the fee that one can afford to pay. Walzer says explicitly that needed goods are not commodities.

²⁰ This is not to suggest that there are not difficult problems to be considered in resource allocation, both in health care and in dealing with the welfare of those seeking entry into Australia (by whatever means). For discussion of the issues in health care resource allocation, which also consider conceptions of distributive justice, see the following: E.H. Marreim, “Fiscal Scarcity and the Inevitability of Bedside Budget Balancing” in *Ethical Issues in Modern Medicine*, ed. J.D. Arras and B. Steinbock, 4th ed. (Mountainview, CA: Mayfield, 1995), 119-125; E.H. Marreim, “Saving Lives, Saving Money: Shepherding the Role of Technology” in *Ethical Issues in Health Care on the Frontiers of the Twenty-First Century*, ed. S. Wear (Kluwer, Dordrecht, 2000), 65-112; B.M. Dickens, “Equity and the Health Effects of Urbanisation” in *The Philosophy of Medicine*, ed. H. T., Engelhardt Jr. (Dordrecht: Kluwer, 2000), 184-193.

good and not a commodity to be marketed and sold. Compassionate concern for those in distress who arrive seeking our help is similarly not a commodity to be quantified according to annual budgets and quotas, but an immediate, human response.

Equality, though, is a complex matter and it may be objected that in practice equal treatment is hardly ever the case despite the expectation that medical care will be available in a developed country for everyone who needs it. Even in the United States medical treatment is routinely refused to patients without the capacity to pay.²¹ Moreover, in some instances, private hospitals might choose to treat those patients with illnesses which will return the highest profits. This suggests that financial criteria and not solely need form the basis for deciding who is treated, at least for some providers of medical services. At airports too, business and first class passengers can avoid long queues and are provided with faster service because they have paid more for their tickets. But if we regard such differential treatment as just, then we cannot contrarily quibble about asylum seekers with superior financial power using it to “jump the queue.”

An argument for allowing asylum seekers to enter Australia which is based on drawing analogies with unjust practices in medicine or on differences between the service provided to economy class passengers and business and first class passengers is not completely persuasive, even if it does show that “queue jumping” occurs routinely. This is because we need to be convinced that the analogies hold. What is illustrated, nonetheless, is that a case can be made for justifying “queue jumping” in some situations. This is because we can appeal to the same basic principles of justice underlying these situations which can be applied to the case of asylum seekers.

The principle of distributive justice or fairness usually appealed to is that in like circumstances, like cases should be treated alike. Like circumstances, however, do not include like financial circumstances, otherwise, those who are in unlike financial positions would not be alike in the public health care that they receive. Like financial circumstances are not included because level of income is not a basis for determining access to basic medical care. This does not preclude someone with superior financial means from electing to pay for a standard of care which is more than that provided by the public health service. What is important is that the treatment provided in the public health system is the same for all patients regardless of income. Public health care is a common good and all members of the community should contribute through the taxation system regardless of means or whether they choose to use the system. For asylum seekers, financial circumstances are irrelevant, for the overriding concern is the saving of life and rescuing people in distress. It would be bizarre to administer an income test to a drowning refugee before deciding to save her.

In the case of the asylum seekers, there are clear grounds for justifying the use of financial means to escape their predicament. Asylum seekers, just like every one else, are not precluded from owning property, provided it has been justly gained. If someone's circumstances are such that he has the financial means to try to escape the oppression and misery that he and his family find themselves in and an opportunity presents itself to do so, it would be morally wrong for him not to try. Parents have a first duty to protect their children and their loved ones. Refugees do not have a moral obligation to suffer oppression in their own countries or to die quietly, so that comfortable Western nations don't have to be confronted with their poverty and neediness. Nor do they have an obligation to remain with others in the camp as an expression of solidarity if an

²¹ See Report of 12th July 2001 in *Public Citizen*, also at <http://www.citizen.org/pressroom/release.cfm?ID=172>.

opportunity presents itself for them to escape. Just as prisoners of war are not expected to refrain from trying to escape because not everyone is able to escape, neither should we expect those living in refugee camps to refrain from trying to escape the dire conditions in which they are expected to live.²² Solidarity does not demand that we take no action to save ourselves or our families. As John XXIII reminds us, “*And among man’s personal rights we must include his right to enter a country in which he hopes to be able to provide more fittingly for himself and his dependents. It is therefore the duty of State officials to accept such immigrants and - so far as the good of their own community, rightly understood, permits - to further the aims of those who may wish to integrate themselves into a new society.*”²³ “Queue jumping” to escape the hideousness of life in refugee camps is an obligation that many families have taken seriously and have scraped together the finances necessary so that they can chance their lives in leaky boats. The composition of the boats arriving off Australia’s shores are for the most part families of all ages not just able-bodied young men and women. They are seeking a better life for their children, not just for themselves. What they do is not immoral, but rather, the opposite, even if we grant the government’s claim that it is illegal. It is a bad law which entrenches suffering and urges us to be deaf to the pleas of those calling for our help.

Another reason why the financial argument is not decisive is that it may be that the superior capacity to pay is due to communal self-sacrifice, the whole family contributing to the chance that some of them might be able to survive rather than perish. That is, the asylum seeker has been able to pay for her place on the leaky boat because others, such as her parents, have sacrificed their lives to give her a chance to survive.²⁴ It would not be hard to understand why such individuals would feel a very strong obligation to survive and enter Australia by any means that they could. Should such persons be treated in the same way as those, who, *ex hypothesi*, actually possess sufficient of their own funds to pay and perhaps have selfishly abandoned their families to escape from their country of origin? Intuitively, it seems that it would be unjust to do so. This intuition is based on the idea of justice as desert – we would be inclined to think that those who had sacrificed more or on whose behalf others had sacrificed more are more deserving of our help than those who are able to make their own way or who, as suggested, have acted selfishly and abandoned their families. Indeed, in this latter case we might be quite justifiably indignant at their callousness and would be inclined to think that they deserved to be rejected. Few would disagree with this, quite apart from the thought that those who are willing to betray their own families are not likely to want to contribute anything of themselves to the Australian community, but would be more likely to continue in their self-centred ways. However, the evidence overwhelmingly points to the fact that the vast majority of refugees are not in this category.

It is clear from the foregoing argument that the following conclusions can be drawn in relation to the accusation that queue jumping asylum seekers have acted both illegally and unjustly in trying to enter Australia without following the usual immigration processes. Firstly, conceding that they are illegal migrants, I have shown that a distinction can be drawn between what is illegal and what is immoral. Secondly, it is argued that there are circumstances in which it is more important to obey the spirit of the law and that justice, compassion and mercy take precedence over a narrow adherence to the letter of

²² One could include here trying to escape from Australia’s detention centres also.

²³ John XXIII, *Pacem in Terris*, para.106.

²⁴ Mares provides us with the example of Khalil, whose parents scraped up \$US5000 to send him out of Afghanistan. Mares, *Borderline*, 18-19.

the law. Thirdly, consideration of the moral, human dimension lead us to conclude that it is better to act according to the dictates of justice and compassion rather than a dehumanizing blind obedience to the law. Taken together, these considerations suggest that our response to those in distress ought to be to provide substantial aid and support, irrespective of questions of legality. Fourthly, it is argued that the financial circumstances of asylum seekers are not a relevant consideration in their treatment. Queue jumping in the situation in which asylum seekers find themselves is a fitting moral and practical response.

I turn briefly to two other arguments which are raised in support of harsh treatment of queue jumping asylum seekers. The first, plays on an understandable fear that Australia could be swamped by migration and the Australian way of life destroyed. The second, deserving little discussion, tries to justify the harsh treatment of asylum seekers in terms of its deterrent effect on those seeking the services of people smugglers and so make it difficult for the smugglers to ply their trade. Neither argument stands up to close scrutiny.

The first of these two arguments against allowing queue jumping asylum seekers to land on Australian soil claims that refugees should not be allowed into Australia because this would produce a flood of boat people, so much so that the government would have difficulty in controlling the inflow of migrants. The resulting economic chaos, so it is claimed, would result in harm to every Australian citizen.²⁵ Moreover, undesirable elements, such as terrorists would also find it easy to enter the country. The fear of wholesale invasion from the North has been part of the Australian psyche, almost since the arrival of the First Fleet. After Europeans settled in Australia, they became intensely aware of the vast empty spaces of the continent and of the need to safeguard its borders. The phrase, "populate or perish" struck a chord with successive Australian governments and could be said to have driven, at least in part, Australian immigration policy.²⁶ Arguing that queue jumping immigrants will result in an overwhelming tide of humanity to sweep over the country plays on deeply held fears.

Control of the influx of immigration can be justified for a variety of reasons – for example, ensuring that exotic diseases are not introduced, ensuring that immigration is at a pace which enables successful integration into the community, preventing the creation of ethnic ghettos in Australia's major cities, avoiding increasing the unemployment rate in certain industries and professions, regulation of pressures on such infrastructure as the provision of water, gas and electricity. All of these reasons justify the control of migration.²⁷

²⁵ For example, Helen Hughes uses the language of floods of people and she argues for the need for harsh measures. See H. Hughes, "Immigrants, Refugees and Asylum Seekers: A Global View," *Interface* 5.2 (2002): 106-107.

²⁶ See D. McMaster, *Asylum Seekers: Australia's Response to Refugees*, (Melbourne: Melbourne University Press, 2001), 127-160, for a historical review of Australian attitudes to immigration and successive government policies.

²⁷ There are many arguments that can be put to justify controlling immigration, not all of them necessarily good. Kirshnar, for example, argues that control is justified on the grounds that the character of current institutions, accepted by the present citizens, could be changed in ways they may not want them to. Immigrants also pose a threat to collective property. See S. Kirshnar, "There is No Moral Right to Immigrate to the United States," *Public Affairs Quarterly* 14.2 (2000):141-158. While it is true that immigrants will over time change the nature of the community, such change is not one-sided. Any dialogue leads to change, as new perspectives are developed. Immigrants have added greatly to the richness of Australian society and its institutions. Chapman argues that there are environmental issues that need to be taken into account in any consideration of migration. See R. Chapman, "Immigration and Environment: Settling the Moral Boundaries," *Environmental-Values* 9.2 (2000): 189-209. Gans argues, in a qualified way, that immigration policies which favour groups with cultural and historical ties with a particular state can be justified. See C. Gans, "Nationalism

The question then is whether allowing boat people into Australia would result in a distastefully uncontrollable influx of refugees with the accompanying tragic results for the economic, environmental and social fabric of the nation. There does not seem to be strong evidence that this would occur, given the relative isolation of Australia and the difficulties of the boat journey. Moreover, although mass migrations are not unknown, conditions in a country need to be disastrous for them to occur.²⁸ Australia might have more reason to be worried if it was the case that there were millions of refugees massed on our borders, as is the case on the border between Afghanistan and Pakistan. Pakistan²⁹ has already accepted huge numbers of Afghan refugees, but must also act to protect its own interests.

The facts are these. Since 1989, there have been 13,475 unauthorised boat arrivals, while according to the Department of Immigration and Multicultural and Indigenous Affairs figures, during the same period approximately 900,000 migrants arrived. The number of unauthorised arrivals represents 1.5% of the total number of people seeking residence in Australia. This hardly constitutes a flood. In 1999, there were 75 boats, carrying 4,175 people, in 2000, 54 boats, carrying 4,137 people and 2001, 6 boats carrying 1,212 people. These figures, given the government's commitment to continuing a planned immigration rate of around 100,000-110,000 for the 2002-2003 year, do not represent a vast, ungovernable tide of humanity sweeping into Australia.³⁰

It is clear that draconian measures to protect Australia's borders against queue jumpers cannot be justified on the grounds that to do otherwise will lead to an uncontrolled flood of unwanted refugees. There are good reasons for the government to control immigration, but these are not good reasons not to respond to those desperate enough to undertake a perilous journey by boat seeking a better life in Australia in a more compassionate way. Given a planned immigration rate of 100,000-110,000 people, there is scope for the government to allow a greater number to immigrate on compassionate grounds, rather than largely skills criteria.

The second of the two arguments that are proposed states that we should not allow people smugglers to get away with their exploitation of vulnerable and desperate asylum seekers. For this reason, it is justifiable to stop boat loads of refugees landing in Australia for this makes it impossible for boat smugglers to ply their trade. There is certainly justification in preventing the exploitation of desperate and vulnerable people by unscrupulous smugglers and pirates.³¹ However, these desperate people should not be used as the means whereby the smugglers and pirates are punished. That is, the emphasis should not be on punishing the vulnerable for taking such extreme measures in trying to save their lives, the emphasis should be on preventing smugglers from operating in the first place. We punish the wicked, not the innocent.

and Immigration," *Ethical-Theory-and-Moral-Practice* 1.2 (1998): 159-180. It is certainly true that ethnic tensions can be exacerbated where immigration to country is of groups with vastly different value systems to those of the host nation. These, however, are not insoluble, though prudence dictates control of the numbers in this case.

²⁸ Natural disasters such as earthquakes, floods, volcanic eruptions and droughts may result in mass migration. Other humanly caused disasters such as nuclear accidents, massive pollution of rivers and waterways and deforestation may also result in mass migration.

²⁹ UNHCR figures put the number of refugees in Pakistan at 2 million.

³⁰ DIMIA figures: <http://www.dima.gov.au>, accessed 10 February 2003.

³¹ Recent research estimates that people smuggling from China alone yields profits of between \$US5-7 billion per year. See S. Martin, "Global Migration Trends and Asylum" *New Issues in Refugee Research*, UNHCR, working paper 41 (Washington DC: Georgetown University, 2001), 14.

The argument has some currency in some states as a justification for tough penalties to deter people from committing crimes in which they are the victims – for example, drug takers, prostitutes and, of course, queue jumpers. If drug dealers have no clients, they have no market for their product, if people smugglers have no market for berths on their boats they will cease their activities. The argument can be framed as follows:

- (1) People smuggling exposes the vulnerable to the danger of death;
- (2) To eliminate such behaviour (people smuggling) will discourage vulnerable people from providing a market;
- (3) Discouraging vulnerable people from providing a market requires harsh treatment; and
- (4) Elimination of people smuggling (sadly) implies treating boat people harshly.³²

Demand is undermined by making people worse off in making the hazardous journey to Australia than remaining where they are. It is clear from the fact that no boats arrived in 2002-2003 that the government's policy of harsh treatment has worked.

The argument has questionable moral authority, however, since on any conception of retributive justice, the justification for punishment is in terms of desert. Even when punishment is justified on the grounds of its deterrent effect, the punishment is proportionate and is of the guilty, not the innocent. Asylum seekers are facing death in the camps they are seeking to leave and treating them harshly is a violation of a fundamental obligation to succour those in distress.

One should not underestimate the dangers faced by refugees seeking to enter Australia by means of such unseaworthy craft – several boatloads have sunk, with either no survivors or very few. The most recent such occurrence was on October 19th, 2001, when over 350 refugees drowned off the coast of Indonesia.³³ Moreover, the smugglers themselves have been known to abandon the refugees to their fate once they have been paid or even more seriously, have robbed and killed many of them prior to abandoning them. The journey is fraught with danger. Given these considerations, there are good arguments to be put for bringing people smugglers to justice. None of these, however, imply that the victims of their activities should be punished also. Desperate people will take desperate measures, and, as suggested elsewhere, parents have an obligation to their children to find a better life for them if they can. Harsh treatment of asylum seekers, though effective in ending people smuggling, is inhumane and morally unjustifiable. The end does not justify the means.

The arguments against allowing asylum seekers who travel to Australia by clandestine means the opportunity to take up residence in Australia are weak. They are not illegal immigrants, and even if they are, compassion obliges us to provide them with assistance. The Western world has to accept a large measure of responsibility for the conditions in which refugees and asylum seekers find themselves. Queue jumping, if there is a queue to jump (which there is not) can be justified in cases of need and is not immoral nor need it be considered illegal if we are mindful of the spirit of the law, that is, the common good which the law is meant to serve. While it is admitted that a nation has a right to protect its borders against incursions by those who are not citizens, this right is not absolute. People in extreme need oblige us to act justly towards them by giving them the

³² The idea for framing the argument in this way was suggested by John Quilter.

³³ It has been suggested that the Australian government knew that the unseaworthy boat was on its way to Australia and may have been able to act to prevent the disaster. See *Financial Review*, 21 June 2002.

necessities of life out of our wealth and riches. To do less is to wrong them, for our wealth is created from the riches of the earth that belong to all people. To give of our abundance is to return to them only what is theirs, as Aquinas asserts. Financial considerations have no place in discussions of how queue jumpers ought to be treated. Given the conditions in the camps in their first country of asylum, they have a moral obligation to their families to do all in their power to find a better life. Choosing to take a chance on the high seas in the remote hope that Australia might be prepared to help them speaks volumes about the terrible conditions in which they have been forced to live. Even if they have not adhered to some imaginary queue, a compassionate country would not promulgate even harsher laws to keep them out.

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