DAVID MARTIN's scholarly work combines his longstanding interests in human rights and the institutional prerequisites for good governance. He has taught and written about international law and constitutional law, with an emphasis on separation of powers. A particular focus is immigration and refugee law, where he is recognized as one of the nation's foremost experts. Government service—most recently as General Counsel of the Immigration and Naturalization Service—has allowed him to test and apply the themes he develops in the classroom and in his writings.

After a period of private practice, Martin joined the State Department's newly formed human rights bureau in 1978. That experience convinced him that human rights observance is closely linked with the structure of government at both the national and local levels. As many came to realize in the 1970s and 1980s, replacing a dictator as head of state does not suffice to guarantee the security of rights. The military may still commit abuses, the courts may still be corrupt or powerless, and well-intentioned decrees from the presidential palace may have no significant effect. Progress comes through using any footholds in the existing landscape to build institutions that promote accountability and stability. Martin concluded that small steps, like the creation of a disciplinary mechanism for the police, may be more important than sweeping initiatives that generate more attention.

"I became skeptical of human rights maximalism, and much more willing to look to trade-offs that promise to end abuses earlier and build a better foundation for future protections," says Martin. He
believes, for example, that the use of truth commissions for societies in transition from dictatorship to democracy, including a carefully designed and limited amnesty for past abusers, will usually be more productive than a quest to prosecute past abusers. International criminal tribunals should also be designed to avoid discouraging humanitarian intervention by outside powers. Intervention has done far more in recent years to bring a swift end to human rights abuses than have international judicial initiatives, as important as those can be in targeted circumstances. Martin believes that these evaluations can (and should) coexist with a deep commitment to the ongoing cause of human rights. These themes figure prominently in Martin's recent article on the international criminal court, *Haste, Gaps, and Some Possible Cures for the ICC*, 41 Va. J. Int'l L. 152 (2000).

Martin had the rare experience of seeing his scholarship make an immediate impact on an important policy issue shortly after joining the Virginia faculty. One of his first articles analyzed the legislative veto, a device that allowed one or both houses of Congress to disapprove administrative action without the President's review and possible veto. Proponents saw the legislative veto as a streamlined mechanism for Congress to establish better accountability for the "fourth branch" in the modern administrative state.

But Martin drew a different conclusion: that the accountability achieved through this device was illusory and would have the perverse effect of discouraging agencies from tackling politically sensitive policy choices. Arguing that the legislative veto allowed Congress to indulge in "the luxury of being negative," Martin provided a functional critique of the device in action, coupled with constitutional analysis, based on separation-of-powers cases and scholarship, and urged the Supreme Court to hold it unconstitutional. *The Legislative Veto and the Responsible Exercise of Congressional Power, 68 Va. L. Rev. 253 (1982).* The Court promptly did so in the 1983 case of *INS v. Chadha*, making prominent reference to Martin's work in the process. The majority opinion noted that the "political wisdom" of the legislative veto "has been vigorously debated and it is instructive to compare the views of the protagonists." It then cited only two works, Martin's critique and an opposing article by former Senator Jacob Javits.

Most of Martin's scholarly work, however, has focused on immigration law. His first encounter with the field came early in his time at the State Department, during immigration crises involving Southeast Asian "boat people," the Mariel boatlift, which brought 125,000 asylum seekers from Cuba in spring 1980, and a steady flow of asylum claimants from Haiti. Martin worked on the initial responses to Mariel, but left the State Department to join the Virginia faculty that summer, where he retained a strong interest in refugee admissions and political asylum. "Mariel had made asylum a hot topic, but almost no one in the law schools then specialized in these areas of the law. I was rather startled to find myself, a rookie law professor, as one of the few U.S. experts on refugee law." A major refugee conference at the University of Michigan provided Martin an opportunity to explain the Refugee Act of 1980 in some detail, pointing out that "the taming of the asylum process remains [its] major unfinished business." *The Refugee Act of 1980: Its Past and Future*, in *Transnational Legal Problems of Refugees, 1982 Mich. Y.B. Int'l L. Stud. 91."

During that year, Martin also gave the keynote address at Columbia's Wolfgang Friedmann Conference on International Law, which was then focusing on refugee questions. He used the occasion to argue that the UN treaty that protects refugees should not be stretched to cover the full range of valid humanitarian concerns. He argued that one could still denounce and struggle to end human rights abuses without concluding that all citizens of the relevant state would have valid refugee claims. *Legal Solutions to Refugee Crises: Tragic Choices*, Proceedings of the 1981 Wolfgang Friedmann Conference on International Law, Columbia University. He later expanded on the theoretical underpinnings for refugee protection in his article *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in *Refugee Policy: Canada and the United States* 30 (H. Adelman ed. 1991).

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**HOME**  
**SWEET HOME:**  
EVERYONE  
DESERVES  
ONE.

**EVERYONE**

**DESERVES**

**HOME**

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**ONE.**

When you're little, things make big impressions. When David Martin was a boy in Indianapolis, Indiana, his church helped resettte a family fleeing the Soviet Union's suppression of the 1956 uprising in Hungary. "I don't think I had ever heard of refugees before, and I had certainly never really thought about what it might mean to be forced to move from your home. I also remember their gratitude at finding a community and a church that helped them settle in."

More than 40 years later, Martin is leaving his impression on the refugee problem too. Last year he was named to the board of directors of the International Rescue Committee, a nonsectarian volunteer organization headquar-

Martin’s writings reflect a distinctive perspective on refugee issues. Like his Virginia colleagues Paul Stephan and Curtis Bradley, Martin attempts to add the rigor of careful institutional analysis to an insular area of international law. Much of the literature on refugees takes an uncritical approach that urges wider refugee protections without acknowledging tradeoffs. Martin’s work, by contrast, recognizes the risk that some migrants will manipulate the asylum protection system and underscores the requirement for sustained political support, which can be lost if the public believes that asylum substantially undercuts immigration control.

Early in Martin’s academic career, he gained another opportunity for hands-on experience with asylum law. He won a highly competitive German Marshall Fund Research Fellowship in 1984-85, as well as funding from the Ford Foundation, to spend a year in Europe examining the political asylum adjudication systems in a half-dozen European countries. This field work proved so valuable that Martin followed it up with similar interviews and observations of asylum proceedings in the United States and Canada after his sabbatical year.

Martin took advantage of this research in putting together the Sokol Colloquium, a biennial international law conference at Virginia, in 1986. Devoted to refugee issues that year, the conference brought leading figures — scholars, practitioners, and government officials — from both sides of the Atlantic to Charlottesville. The resulting volume, which Martin edited, was published as The New Asylum Seekers: Refugee Law in the 1980s (1988). Martin is particularly proud of his introductory essay, which gained wide attention in the refugee field. It explained why the refugee flows to wealthier countries during the 1980s were qualitatively different from earlier cross-border flows in the developing world. After analyzing the possible policy responses, the essay predicted that Western countries would impose greater barriers to entry unless they could make progress in assuring speedy but fair procedures and enforcing negative decisions. The succeeding decade saw modest progress on procedures, but, as Martin anticipated, a major expansion of barriers.

Martin continued to argue for improved asylum procedures that could be expeditious enough to deter abuses, but fair enough to assure full protection for the truly endangered. He was able to perform the final stages of his field research under the auspices of the Administrative Conference of the United States and ultimately published a study with suggestions for reform of the U.S. procedures, suggestions that were formally adopted by the Conference and sent on to the agencies involved. An abbreviated version of the report was also published as Reforming Asylum Adjudication: On Navigating the Coast of Bohemia, 138 U. Pa. L. Rev. 1247 (1990), perhaps Martin’s most influential single work.

The INS decided to reform the asylum system in 1993, at a time when it was overwhelmed with claims, deeply mired in backlogs, and subject to bitter congressional criticism. Martin was chosen as the lead consultant for the reform effort, which ultimately led to significant system redesign. Those changes succeeded in reducing applications by two-thirds by deterring weak or manipulative claims, provided the resources to reach prompt decisions, and generally demonstrated that the INS could both regain control of the asylum process and provide more effective protection to those with meritorious claims. Martin’s role also helped lead to his selection as INS General Counsel in 1995. The administrative reforms to the asylum process have been credited with forestalling Congressional action to cut back on the availability of asylum in connection with the 1996 revisions to the immigration laws. The story is told, with a full account of Martin’s role both as consultant and later as INS General Counsel, in Philip Schrag’s book, A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America (2000). Martin too has written about the regulatory changes, with wider reflections on lessons learned about governmental processes, in Making Asylum Policy: The 1994 Reforms, 70 Wash. L. Rev. 725 (1995).

ded in New York and dedicated to providing protection, relief and new homes for refugees. The IRC was founded in 1933 at the instigation of Albert Einstein to help people escape the Nazis. Its national board includes Henry Kissinger and Daniel Patrick Moynihan. “I had considerable contact with IRC during earlier government service, and I was always impressed with their professionalism and their cool-headed dedication. So I’m doubly pleased to be working with them. It’s a well run operation with a budget above $150 million, and it always ranks among the top charitable organizations in the percentage of contributions actually directed toward operations, over 92 percent,” he said. “They are among the most effective NGOs in emergency response and long-term assistance to displaced persons overseas, and they also resettle several thousand refugees in the United States each year.”

His new role is the latest dis-
Martin also appreciates the chance he has had to help bring immigration law more into the scholarly mainstream. "Immigration is central to the history of America," he observes, "and immigration practice is an under-appreciated source for many of the doctrines and procedures of U.S. administrative law — and indeed of constitutional law." Since returning to Virginia in 1998, Martin has turned much of his attention to issues of citizenship law and policy. His recent article, New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace, 14 Geo. Immig. L. J. 1 (1999), argues that states should accept dual nationality far more readily than traditional rules suggest. But, taking issue with some of the strongest enthusiasts for dual nationality, it goes on to suggest a few modest limitations in order to preserve a sense of national identity in a more globalized world. With Professor Kay Hallbrunner of the University of Konstanz, Germany, he now directs a German Marshall Fund project on dual nationality, and he has participated as a principal rapporteur in a Carnegie Endowment study on a wider range of citizenship issues.

Martin believes that the media frenzy surrounding the Elian Gonzalez case may help draw attention to the daily reality of the administration of immigration laws that affect millions of people. He remains at the forefront of those scholars and policymakers trying to make that reality both humane and effective.

Although Americans (along with most of the Western world) are virtually united in a commitment to protect refugees, they are far from united in a common conception of "refugee." Everyday parlance tends to treat anyone fleeing life-threatening conditions as a refugee, whether the source of the threat be natural disaster, foreign invasion, civil unrest, or deliberate persecution. The legal framework of course employs a narrower concept than this journalistic usage, and the 1951 Convention definition might be expected to provide the basis for a unified common understanding, built around the phrase "well-founded fear of persecution." But this phrase too can also take on a variety of shapes, from highly expansive to narrowly cabined, often depending, it seems, on whether the speaker wishes to include or exclude a particular group of claimants.

Compounding [the problem of agreed interpretation] are the images we (both citizens and government officials) bring to judgments about asylum policy. [Under the case law, the] legal standard looks, in most cases, toward a finely calibrated individualized judgment of the risk of persecution the applicant would face in the homeland. The judgment must be based, to some extent, on general information about human rights conditions in the home country. But the primary reliance on human rights — a big change from this country's foreign policy in the Nixon years — and I jumped at this unexpected opportunity. But I went to the Department totally focused on diplomacy, on ways to use this country's considerable clout to lean on governments that tortured or suppressed dissent or detained prisoners without trial. It turned out that I was able to contribute on that score, but events had a different focus in mind."
will fall, most of the time, on information specific to that individual.

Public debate on asylum policy, however, proceeds in cruder terms. Partisans are often ready to make sweeping judgments, by nationality, about the merit of large groups of asylum seekers.

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**a. The essential problem.** This kind of stereotyping or oversimplification is unfortunately commonplace—and to a significant extent inevitable—in public debate and policy decisions. In a classic work, Walter Lippmann explored comprehensively the influence on policy of these “pictures in our heads.” In explaining how easily policymakers can err by relying on their own misconceptions about foreign lands, he wrote:

> The real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations. And although we have to act in that environment, we have to reconstruct it on a simpler model before we can manage with it. To traverse the world men must have maps of the world. Their persistent difficulty is to secure maps on which their own need, or someone else’s need, has not sketched the coast of Bohemia.

The “coast of Bohemia” problem bedevils both public debate and adjudication in the asylum field. But perhaps the image for our purposes should be shifted from the littoral to the physiographical. Few nations enjoy a political geography characterized by a reliably fertile plain of steady human rights observance. Outcroppings of abuses appear, sometimes intermittent hills, sometimes whole mountain ranges of severe persecution. The partisans in refugee debates—as well as adjudicators and judges under the current system—are too often inclined, in looking at nations to which they are favorably disposed, to mistake mountains for hills—or plains. The same people, in looking at nations to which they are hostile or for whose exiles they have (understandably) developed sympathy, often picture mountains where they should see hills, and then rush to the conclusion that that nation’s exiles are refugees. Whatever the actual geography, it is also easy to forget that many people in those distant nations continue to inhabit the valleys even when the mountains loom large and forbidding.

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**b. Boxes vs. spectrums.** A related and persistent misunderstanding compounds the difficulties in achieving a sensible and widely supported asylum policy, and it also occasionally complicates adjudication. Much of the debate proceeds as though there are two sharply different categories of persons who find their way into the asylum adjudication system in this country: refugees, on the one hand, and economic migrants (or simply “illegal aliens”) on the other. A recent book on U.S. refugee policy (in other respects quite thorough and insightful) reflects this attitude:

> Refugees are neither immigrants nor illegal migrants, although, like immigrants, they have forsaken their homelands for new countries and, like illegal migrants, they may enter those new countries without permission. But a refugee is, in the end, unlike either. Both the immigrant and the illegal migrant are drawn to a country. The refugee is not drawn but driven; he seeks not to better his life but to rebuild it, to regain some part of what he has lost.

Even if this sharply dichotomous view might, at one time, have captured the realities of refugee flows, it does not offer a helpful way to approach today’s asylum caseload. Today’s dilemma is both tragic and surprisingly difficult precisely because, among current asylum applicants, refugees are so much like illegal migrants. Only an indistinct and difficult line separates those who should succeed on their asylum applications from those who should not. That is, most of those applying in the United States today were both drawn and driven, and they chose to come in response to a complex mix of political and economic considerations. Asylum seekers are not so different from the rest of us. We have a hard time deciding, particularly when we make difficult, life-altering decisions, and when we finally do choose a course of action, we act from a mix of motives.

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Between the time Martin accepted the job and the time his security clearance came through, the Indochinese refugee problem had exploded onto the front pages. He arrived in the office during the same week that huge boats began appearing in the South China Sea, bearing as many as 3,000 Vietnamese refugees. Nearby countries resisted landing, and the United States was deeply involved in efforts to secure protection. Before long, 60,000 refugees per month were leaving Vietnam, and the world community was scrambling to cope.

> The State Department had a tiny refugee office to coordinate the diplomatic and material response to the crisis. I had no idea when I took my human rights job that the refugee office was located — at that time — in the human rights bureau. Filling a brand new position, I of course arrived with no set duties and no backlogged projects. I was imme-
[In judging an asylum claim under definitions derived from the UN Convention, we do not need to find that the applicant] was only driven, nor assess what his primary motivation was, nor the immediately precipitating event. The best way to understand asylum adjudication is to focus on the degree of risk he would face when he returns. If the risk of persecution is sufficiently substantial, his fear is well-founded, even if it was his need for funds to feed his children that sent him on the particular boat trip at the particular time. That he stayed home until economic considerations tipped the balance in his decision may be relevant—but only for the light it casts on the separate question concerning the degree of risk he truly faces. His refugee claim is not forever tainted because he thought about jobs in Miami or the need for money to feed his family.

If all asylum applicants did fit neatly into one of two boxes—refugee or economic migrant—the adjudicative task would certainly be simplified. The job would simply be to unmask the impostors, those economic migrants who are base enough to pose as something they are not. Unfortunately some people with authority over asylum decisions in Western countries sometimes speak of adjudications as though they did present such a morality play. They hasten to label as abusive, frivolous, or lawless those claims that simply fall short of the necessary showing.

But the world is not that simple. Asylum adjudication, it must be recognized, is at best a crude and incomplete way to respond to the complex realities that the world presents. Our legal structure, for ultimately sound reasons, demands a simple yes or no answer to the asylum claim. But the dichotomous character of the results should not obscure the complexity onto which that yes-or-no grid is forced. Asylum seekers present a spectrum of situations, with only subtle shadings distinguishing the risk levels they face. Adjudication must draw a line at some point on that spectrum. And it must do so with care, so that it protects those whose risks exceed the threshold, even if they happen to have joined a migration stream made up principally of those less severely threatened, who therefore lack, in this technical sense, a well-founded fear of persecution. —David Martin

MARTIN BIBLIOGRAPHY

BOOKS:
Immigration and Citizenship: Process and Policy (with Thomas Alexander Aleinikoff and (3d

On the government's response to this new crisis, Martin joined the Virginia faculty that summer. "When I began my teaching career, I expected to emphasize constitutional law, in both my teaching and scholarship, but it turned out

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that a lot of law schools were interested just then in holding conferences on refugee issues — for understandable reasons." Because of his extensive experience in government and his role with the new legislation, he received several invitations to speak. "I still thought I might do a couple of conference papers and then leave the refugee issue behind, but the more I worked on these questions, the richer and more challenging they appeared, implicating constitutional law, administrative law, international law, moral philosophy, and a big dose of practical politics. They still hold a fascination for me, and I’m still writing on refugees and immigration."

While Martin was back in Washington in the mid-1990s, serving as General Counsel of the Immigration and Naturalization Service, the IRC opened up a new regional office in Charlottesville, one of 20 IRC offices throughout the country.
the nation that resettle in local communities families chosen by the U.S. refugee program. "Charlottesville is a concerned and supportive community with low unemployment," Martin said. "It turned out to be an inspired choice for a resettlement office. Immigrants can generally find work within just a few days or weeks." Most who have come to Charlottesville are from the Balkans — Bosnia, Croatia and Kosovo — but IRC has also resettled here several from Sudan, Afghanistan, Iran.

Congo and Burma. University students, including many from the School of Law, have become a major source for assistance to these refugee families.

Besides his duties on the IRC's national board, Martin has been working with the Charlottesville office since his return from the INS. In a way, it has brought him full circle to the process of helping people, family by family, resettle in his hometown. 


David Martin