

# Rethinking Membership: Statelessness, Domination, and the Limits of Contemporary Citizenship

by

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Department of Political Science  
University of Toronto

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## Abstract

This dissertation examines the politics and ethics of forced migration from both a conceptual and normative perspective. The dissertation does so by focusing on the phenomenon of what Hannah Arendt referred to as ‘statelessness’—a term which is deployed in this project in an extended sense that includes all persons who might be in need of international protection because their own state is unable or unwilling to effectively secure their human rights. In approaching statelessness from the perspective of political theory, the primary task of my dissertation is to offer a novel conceptual account of the harm that is done by statelessness or the *de facto* loss of membership within a political community and what this entails for how we ought to respond to the global reality of forced displacement. In doing so, this project challenges conventional approaches and intuitions regarding our ethical responsibilities to refugees and others categories of displaced persons. The goal of this critical reconstruction is to recast the nature of our responsibilities as obligations of justice, as opposed to those of humanitarian assistance. At the same time, this account also foregrounds the importance of constructing fair and effective responses to these forms of exclusion that attend to the role of agency in remedying the loss of membership.

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## Chapter 1 Introduction

As I write this there are over 65 Million people designated as ‘Persons of Concern’ by the United Nations High Commission for Refugees. This total, now amounting to almost twice the population of Canada, includes individuals who are internally displaced, formally recognized as under the UNHCR statelessness mandate, or in refugee-like situations. Individuals who have found themselves within these situations are widely viewed as having a claim to ‘international protection’ because their own state of origin is either unable or unwilling to secure their basic human rights. Yet realizing this claim in an effective and durable fashion has proved increasingly elusive for the vast majority of people caught outside the normative order presumed by a world of states, in which states themselves are largely assumed to be the main agents responsible for securing such rights for their members.

In approaching this situation from the perspective of political theory, the primary task of my dissertation is to offer a novel conceptual account of the harm that is done by statelessness or the *de facto* loss of membership within a political community and what this entails for how we ought to respond to the global reality of forced displacement. In doing so, this project challenges conventional approaches and intuitions regarding our ethical responsibilities to refugees and others categories of displaced persons. The goal of this critical reconstruction is to recast the nature of our responsibilities as obligations of justice, as opposed to those of humanitarian assistance. At the same time, this account also foregrounds the importance of constructing fair and effective responses to these forms of exclusion that attend to the role of agency in remedying the loss of membership.

As I examine from both a historical and institutional perspective in this project, the widespread emergence of such forms of political exclusion first took place in the early twentieth century. At the time, this loss of membership was broadly captured by the idea of ‘statelessness’—a concept that I will argue still best represents the experiences of refugees, internally displaced persons, and the *de jure* stateless. While initially understood as an at most fleeting phenomenon, statelessness and forced migration have become tragically permanent elements of our modern context. Indeed, we have witnessed the unanticipated persistence and proliferation of these forms of precariousness and political exclusion across the globe. To put the matter in perspective, if the total population of people in need of international protection were a nation, they would be the 21st largest country in the world.<sup>1</sup> What is more, in this time, intergeneration refugee populations have now become a reality in many parts of the globe with roughly two thirds of the world’s refugees in what the UNHCR calls ‘protracted situations’ where the average time spent in a refugee camp can be 25 years.<sup>2</sup> We now live in a world in which people are born refugees and die as refugees, entering the world already excluded and leaving it without ever having found a home where they are recognized as political agents and citizens.

Complicating and intensifying the oppressions faced by the displaced and stateless have been a number of more recent developments. These changes have in many ways been driven by the decisions and policies of powerful western liberal democracies. Despite both their central role in the creation of the post-war international refugee regime and the contradiction between the

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<sup>1</sup> United Nations High Commissioner for Refugees, “UNHCR Global Trends 2015.” *UNHCR*. Accessed June 4, 2016. <http://www.unhcr.org/statistics/country/576408cd7/unhcr-global-trends-2015.html>.

<sup>2</sup> Such protracted refugee situations, defined as cases in which “25,000 or more refugees of the same nationality have been in exile for five years or longer in a given asylum country” are reported to include 41% of all refugees under UNHCR’s mandate by the end of 2015. [Ibid.]

currently avowed normative principles of liberal democracies and such behavior, many of these states have engaged in actions that severely compromised the efficaciousness of international responses to forced migration in a manner that intensifies the danger and domination that the displaced and dispossessed already confront. But equally troubling, such shifts have also occurred as a result of the institutional dynamics of the very international organizations entrusted with the protection and care of refugees.<sup>3</sup> Indeed, a worrying dimension of our current situation concerns the implication of the institutions of the refugee regime in undermining norms meant to guide practices of international refugee protection and aid. The result of such developments has been a general eroding of even the limited pre-existing measures intended to offer humanitarian assistance to those most excluded from the protections of the global citizenship regime.

## 1 Rethinking Membership

These stark realities illustrate the centrality of statelessness as an enduring concern of our contemporary world. The political theorist Hannah Arendt once presciently noted that the stateless, and those who find themselves in a similar situation of political exclusion, formed the “most symptomatic group in contemporary politics.”<sup>4</sup> However, despite Arendt’s early insight into this reality, political theorists more broadly have only recently begun to appreciate the complexity of statelessness and the associated questions of justice raised by claims to membership. But of even greater importance, the development of robust political institutions,

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<sup>3</sup> For a discussion of the institutional dynamics that have driven this process, see Alexander Betts, “The refugee regime complex.” *Refugee Survey Quarterly* 29.1 (2010): 12-37. For critiques of the UNHCR’s institutional complicity in the erosion of international protection, see Jacob Stevens, “Prisons of the stateless: the derelictions of UNHCR”, *New Left Review*, 42 (2006): 276, 53–67; Michael Barnett, “Humanitarianism with a sovereign face: UNHCR in the global undertow.” *International Migration Review* (2001): 244-277, Bhupinder Singh Chimni, “The meaning of words and the role of UNHCR in voluntary repatriation.” *International Journal of Refugee Law* 5.3 (1993): 442-460.

<sup>4</sup> Hannah Arendt, *The Origins of Totalitarianism*, 277.

both domestic and global, to effectively and equitably deal with mass statelessness have remained largely elusive. By theorizing statelessness from both a normative and historical perspective, the aim of this project is both to help encourage this reorientation of political theorists to the importance of the set of normative questions raised by statelessness and to begin to provide the grounds for understanding how our global order ought to be reformed in light of the claims to justice of those subject to this extreme form of political exclusion. In this sense, the historical and normative dimensions of the project are interlinked. By foregrounding the contingent, and indeed very recent, emergence of the conditions of possibility for statelessness, it should become clear that these forms of exclusion are far from immutable. Moreover, this account shows that statelessness is best understood as the product of an emergent state system that both constitutes and sustains the conditions for such exclusions. This historical diagnosis should in turn shift our normative framing of statelessness. By coming to see statelessness as a product of states acting in concert, we are compelled to confront the fact that responding to statelessness is not merely about the provision of humanitarian assistance, but about the obligation to prevent domination.

However, while it is evident that statelessness constitutes a serious and pervasive harm, the nature and origins of this form of exclusion are less apparent. The work of Arendt remains central for the growing number of scholars who have begun to turn to the normative dimensions of statelessness. Accordingly, this project begins by offering a critical engagement with Arendt's account because of its important insights and lasting influence. Written in the wake of the Second World War and the series of unprecedented refugee flows and forced displacements that had preceded that global conflict and intensified during and after it, these observations derive their lasting import not only from Arendt's remarkable capacity as thinker, but also from her own

proximity to the emergence of widespread statelessness in Europe and indeed her lived experience as a stateless refugee. Her analysis of these issues provides a compelling philosophical account of the origins of statelessness and offers an enduring characterization of the precise injustice such forms of exclusion represent.

The core of Arendt's engagement with the emergence of statelessness—which I treat more systematically in Chapter 2—is that it was the direct consequence of deep contradictions and paradoxes in our contemporary normative orders. On the one hand, modern discourses of universal human rights had attempted to ground entitlements to equality and dignity in an abstract conception of the human, shorn of any reliance on the context of community. For Arendt, this paradigm of human rights ignored the fragility and dependency of such rights on having the standing of one who counts—of being recognized as one whose actions and words matter—which always must take place within a particular political community. Thus it was precisely as bare human beings that the stateless had appeared, and it was exactly this negative status of being excluded from citizenship that was the source of the domination and oppression they confronted and endured. The stateless were thus denied the *right to have rights*. On the other hand, according to Arendt, statelessness was also a result of the particular form of community—the modern nation state—that had come to dominate the globe. The nation state was itself built on a deep tension, one that had remained obscure till the emergence of the virulent and violent nationalisms of the nineteenth and twentieth century. The source of this tension, according to Arendt, lay in the contradiction between the normative demands of the legal regime of the constitutional state, and the apparently unbounded nature of claims to self-determination grounded in the will of the people or nation—that is, in the tension between the normative commitments of liberalism and nationalism. Here too Arendt perceived a latent crisis

which the early twentieth century would bring to the fore, first with regard to the status of minority populations in newly created states, and then later in the form of the spread of mass statelessness.

Arendt's analysis reveals the conceptual tensions that both contributed to and were revealed by statelessness. There are some important limitations to her presentation, however. She did not pay sufficient attention to the material or technological features of this historical moment that were necessary to make statelessness a permanent feature of our world and to the crucial role of an emerging interstate system in constituting statelessness. In a sense, the central difficulty that Arendt's account leaves inadequately addressed was the contingent origins of statelessness. What features of the historical context of the inter-war era were necessary to transform statelessness into a mass phenomenon? Why did statelessness emerge at that time? And why in Europe? In this regard, Arendt's analysis fails to acknowledge how the inter-war era was a very peculiar moment. This was a period in which a constellation of institutions and technologies necessary for the production of mass statelessness came into being for the first time. Because of this, the Arendtian account also does not sufficiently consider how the norms, practices, and institutions of an emerging interstate system played a decisive role in the constitution of statelessness. This in turn had important implications for Arendt's assessment of what could be done to address the increasingly widespread nature of statelessness. Indeed, by not sufficiently historicizing the origins of statelessness, Arendt's approach leads her to the tragic conclusion that such exclusions are simply the unavoidable entailment of a world divided into states.

These aspects of Arendt's theorizing of statelessness have important normative implications for this project. Indeed, a major difficulty of Arendt's analysis—and consequently of the enduring influence of the Arendtian account on subsequent normative engagements with



her work by political theorists—lies in her articulation of the genesis of statelessness. By missing the constitutive role of an emergent state system in the formation of mass statelessness, Arendt's analysis deflects attention from the global structural dimensions of the denial of membership and how such forces of exclusion are necessarily dependent on the practices of states acting in concert. Put more sharply, despite Arendt's critical view of the ideal of sovereignty, her analysis actually tends to reinforce rather than question the assumptions that underlie this ideal, in part by remaining implicated in the dominant 'social imaginary' of methodological nationalism. Such an approach toward statelessness necessarily downplays the role of coordinated state action and shared practices in helping activity produce the conditions that enable statelessness as an enduring feature of our present, as well as the resulting transnational social connections of responsibility that extend across borders in our enmeshed world. In the context of this project, the Arendtian account thus risks unintentionally supporting the dominant framing of our responsibilities toward refugees as one of humanitarian assistance, rather than one of justice, by obscuring *our* broader implication in the experiences of domination and oppression that refugees confront.

To address these issues, a central part of this project is providing an account of the developments that were necessary to make statelessness an enduring feature of our present. The starting point for this analysis of statelessness is a critical examination of the history of our current order of borders. For instance, we must carefully assess and question the origins of the presumed right of states to regulate migration and immigration, naturalization and nationality. In the Arendtian account this apparently permanent reality of sovereignty formed the core of the problem of statelessness. Yet the norms and practices of membership that we now take for granted in fact emerged far later than either the early-modern state or the so-called Westphalian

state system. In fact, these rules of membership are very recent. European states were neither capable of, nor particularly interested in, regulating entrance and membership based on our contemporary notion of nationality until recently. In fact, as I show in the next chapter of this project, controlling immigration had long been viewed as falling beyond the ambit of effective state interests. What is more, a series of further institutional innovations were necessary for mass statelessness to emerge as a permanent feature of our world. In particular, for mass statelessness to occur, it was not sufficient for the notion of nationality as a mechanism of control and a marker of identity to become salient and important. It was also necessary for it to have become actively institutionalized through bureaucratic and administrative means. In highlighting these dimensions of the origins of statelessness my project draws on existing historical scholarship on these developments in order to recast our conventional understanding of the normative implications of this form of exclusion.

## 2 Statelessness as Domination

But how should we understand the nature of the injustice that the spread and apparent permanence of statelessness entails? Addressing this is of crucial importance given that my central aim is to theorize the contemporary normative implications of statelessness. Consequently, at the outset, we must address the question of how statelessness is to be conceptualized. Yet this remains no easy task. How should the stateless be understood in relation to the refugee or the internally displaced person? In their contemporary legal specification such categories can overlap, but do not necessarily do so—though all of them fall within the mandate of the UNHCR as ‘persons of concern’ suggesting a broader linkage between

the concepts.<sup>5</sup> Moreover, what should be made of the distinction between *de facto* and *de jure* stateless persons? While the latter clearly fall within the formal legal definition of statelessness, the former category proves more elusive. Yet as one contributor to the draft convention on the elimination of statelessness noted, the situation of the *de facto* stateless was “frequently more tragic than those of *de jure* stateless persons.”<sup>6</sup> Too many writers have taken these categories for granted, with consequences that are undesirable for both philosophy and politics.

Accordingly, here and throughout this project I proceed in taking up and applying the idea of statelessness in an extended and more inclusive sense that addresses all persons who might be in need of international protection because their own state has failed to effectively secure their human rights. This broader usage is intended to capture and represent a spectrum of ways in which the enjoyment of ‘effective’ nationality can be denied, one that addresses all persons with a claim to international protection because their own state is unable or unwilling to maintain even their most basic human rights.<sup>7</sup> In taking this approach, my definition of statelessness maps onto the way the United Nations High Commission for Refugees identifies “Persons of Concern”—a category that includes millions of individuals who are broadly in refugee-like situations and seeking international protection. My deployment of the term statelessness also follows that of Hannah Arendt, who argued that the distinctions between refugee and internally displaced persons and between *de facto* and *de jure* statelessness were in

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<sup>5</sup> This link is to be found in the idea that all individuals within these groups have a valid claim to international protection, which is in turn ground in the fact that they have been denied their human rights by their own states.

<sup>6</sup> United Nations, “Volume I: Summary records of the sixth session 3 June - 28 July 1954” in *Yearbook of the International Law Commission* (United Nations, 1954): 9.§12. For an account of the developments that drove this expanded mandate, see Alexander Betts, *Protection by persuasion: international cooperation in the refugee regime* (Ithaca, NY: Cornell University Press, 2009).

<sup>7</sup> To anticipate later discussion, by effective nationality I mean a condition in which the minimum requirements for realizing non-domination are secured. Effective nationality entails enjoyment of the *right to have rights*.

fact blurred in the realities that individuals often confronted.<sup>8</sup> What is more, I adopt this usage for a critical purpose. We ought to question, rather than acquiesce in or even implicitly endorse, the ends or purposes served by this proliferation of categories.

Perhaps my usage of the term ‘stateless’ to refer to what is by now a diverse set of analytic categories will seem anachronistic or unhelpful. But this decision is deliberate. While Arendt’s employment of the term ‘statelessness’ to embrace a number of contexts reflected the lack of the institutionalized status of these distinctions in the inter-war era she was describing, my return to this usage aims to suggest the potential problems produced by our contemporary proliferation of categories, which often contribute to undermining individuals access to effective international protection.<sup>9</sup> Instead, in this project I proceed with a broader application of the term of ‘statelessness’ which is meant to express a host of injustices related to the loss of effective membership within a political community, and which is intended to capture the experiences of individuals who lack citizenship, are formally refugees, or who are internally displaced.<sup>10</sup>

This broader re-definition of statelessness rests on the core idea that such forms of exclusion rests on the denial of effective membership status, which leaves individuals vulnerable

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<sup>8</sup> Hannah Arendt, *The Origins of Totalitarianism*, 279.

<sup>9</sup> For a broader analysis of this, see: Roger Zetter, “More labels, fewer refugees: Remaking the refugee label in an era of globalization” *Journal of Refugee Studies* 20.2 (2007). More specifically, there is reason to view the formal definition of statelessness as conceptually too narrow. For instance, the 1954 Convention defines a “stateless person” as someone “who is not considered as a national by any State under operation of its law.” However, this definition only captures cases of *de jure* stateliness, while international refugee policy has increasingly come to recognize the existence and urgency of *de facto* statelessness. See: *Convention relating to the Status of Stateless Persons*, article 1(1).

<sup>10</sup> My turn to more inclusive usage of the term of statelessness mirrors a similar strategy proposed by Matthew Gibney in his suggestion of broadening the category of refugee to embrace a range of situations that go beyond the strictures of the 1951 Refugee Convention definition. See Matthew Gibney, “Liberal Democratic States and Responsibilities to Refugees” *American Political Science Review*. Vol. 93, No. 1:170 (1999). Additional reasons for adopting usage include the increasing prominence in protection responses of emphasizing ‘internal flight options’ for individuals in ‘refugee like’ situations by the UNHCR; see: Cecile Dubernet, “The international containment of displaced persons: humanitarian spaces without exit.” *Refugee Survey Quarterly* 21.3 (2002).

to domination, or arbitrary power. As I discuss in more detail in Chapter 3, this characterization of statelessness as subjection to domination builds on but also modifies Arendt's account. In her interventions Arendt argued that the true injustice stateless persons suffered was the denial of the *right to have rights*. This formulation remains helpful, but it has been assigned variety of interpretations over the years. I argue that Arendt's idea is most adequately understood as entailing subjection to domination or arbitrary power. Characterized in these terms, such domination is constituted through the refusal of political agency.<sup>11</sup> For Arendt, the general or unqualified right to belong to a community—a right to membership—was the architectonic right upon which the enjoyment of all particular rights depended. To securely hold the 'right to have rights' means having the status and standing of one "who counts" in the eyes of others, of having one's actions and opinions taken into account. Conversely, the denial of this status leaves a vulnerable person in the institutionally constituted position of being subject to arbitrary power, a position exemplified by the experiences of the stateless. This philosophical characterization of the harm that is done by statelessness and the loss of membership provides the normative core of the project: by arguing that we need to understand the demands of justice raised by statelessness in political terms, I provide grounds for re-conceptualizing the contours of our obligations toward the forcibly displaced and the nature of the remedy required. On these grounds, I subsequently argue that this characterization of statelessness as subjection to domination should lead us to question the normative framework constituted by our current ideas of citizenship. Ultimately, my questioning of this framework points to the need for a critique of the contemporary global order. The call for the institutional conditions necessary to secure

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<sup>11</sup> By of political agency I mean the standing to participate in practices of shared self-determination that are legitimated through ongoing and reflexive practices of justification. This interpretation of Arendt's notion of the *right to have rights* and the normative implications of its denial is more fully unpacked in Chapter 3.

conditions of non-domination for all at the global level forms the larger normative goal of this project.

### 3 Approach and Overview

From a methodological perspective, this project may be best characterized as developing a ‘critical-cosmopolitan’ account of global justice. As part of this critical intent, the initial stages of the project engage with the historical origins of mass statelessness, drawing inspiration from a broadly genealogical approach. The theoretical aperture I employ here aims to unearth and unmask the contingent beginnings of statelessness, to highlight the mutable nature of such forms of exclusion while recasting such phenomena as the result of an emergent state system produced and sustained by the coordinated practices of states acting in concert. In doing so, one of the major tasks of this part of the dissertation is to challenge and subvert the larger assumptions of what Ulrich Beck and other scholars have identified as “methodological nationalism”—an outlook that that often dominates the thinking of both social theorists and ordinary citizens when turning to the issues that form the core of my project.<sup>12</sup> According to Beck, this national outlook implicitly presupposes a ‘container model’ of exclusively bounded national communities, one that finds expression in the implicit claim “that ‘modern society’ and ‘modern politics’ can only be organized in the form of national states.”<sup>13</sup> In doing so, methodological nationalism tends to assume the naturalness of a world of “mutually delimiting national societies”—largely neglecting both the historical contingency of such conditions or how this model remains at odds

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<sup>12</sup> In his introduction of this concept, Beck points to John Rawls as exemplifying methodological nationalism. However, as will become apparent later in this project, elements of this outlook are to be found across a range of perspectives in political theory, from (Rawlsian inspired) liberal nationalists such as David Miller, to Habermasian cosmopolitans like Seyla Benhabib, to even neo-republican thinkers such as Philip Pettit.

<sup>13</sup> Ulrich Beck, *Cosmopolitan vision* (Cambridge: Polity, 2006), 27, 24.

with the realities of our globalized and transnational present.<sup>14</sup> Like Beck, Andreas Wimmer and Nina Glick Schiller have focused on methodological nationalism as a conceptual tendency grounded in the naturalization of the global regime of nation-states by the social sciences.<sup>15</sup> However, their presentation additionally helps us see how methodological nationalism also constitutes a “nationalist imaginary” or outlook—evoking the sense of Charles Taylor’s notion of social imaginaries.<sup>16</sup> Casting methodological nationalism in the broader terms of a social imaginary is particularly helpful because it highlights the way in which this background framework or outlook shapes our perception of the world and with that our “deeper normative notions and images.”<sup>17</sup> It is precisely for this reason that offering a historical counter-narrative that upsets the assumptions of the national social imaginary plays a fundamental role in the context of this project; indeed, it is by historicizing the ‘national’ outlook that we can break its power on our normative imagination.<sup>18</sup> Thus the historical aspects of this project tries to take its inspiration from thinkers such as Foucault and Rousseau (of the *Second Discourse*) in rendering

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<sup>14</sup> Ulrich Beck, *Cosmopolitan Vision*, 27.

<sup>15</sup> Although the account developed here draws primarily on the work of Beck, Wimmer and Schiller, I am indebted to the work of Melissa Williams for originally suggesting the idea of focusing on the salience of social imaginaries to normative political theory. Admittedly, however, I apply this insight in a somewhat different manner than Williams. See Melissa S. Williams, “Citizenship as Agency within Communities of Shared Fate.” In *Unsettled Legitimacy: Political Community, Power, and Authority in a Global Era*, edited by Steven Bernstein and William D. Coleman. UBC Press, 2010.

<sup>16</sup> Andreas Wimmer and Nina Glick Schiller, “Methodological Nationalism and beyond: Nation-State Building, Migration and the Social Sciences.” *Global Networks* 2, no. 4 (October 2002). For Taylor, social imaginaries shape “the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underline these expectations.” [Charles Taylor, *Modern Social Imaginaries*, (Durham: Duke University Press, 2004), 23.]

<sup>17</sup> Manfred Steger, “Globalisation and Social Imaginaries: The Changing Ideological Landscape of the Twenty-First Century.” *Journal of Critical Globalisation Studies* 1, no. 1 (2009).

<sup>18</sup> “What we discover in this twilight is how transnational the modern world has always been, even in the high days when the nation-state bounded and bundled most social processes. Rather than a recent offspring of globalization, transnationalism appears as a constant of modern life, hidden from a view that was captured by methodological nationalism.” Andreas Wimmer and Nina Glick Schiller, “Methodological Nationalism and Beyond,” 302.

the taken-for-granted aspects of our present social world as unfamiliar, and indeed, deeply contingent. In doing so, it tries to accomplish a shift in aspect with regard to the nature of claims to membership and why we should eschew a humanitarian approach toward the ethical questions raised by forced migration in favor of a justice-based framework aimed at redressing relations of domination.<sup>19</sup>

However, the aims of this project are not merely critical: this recasting of the origins and nature of statelessness is meant to provide the basis for more or less concrete claims about what justice requires to remedy this form of domination. On this normative side of this project, I draw considerably on the insights and approaches that have been developed by global republicans, employing an account of non-domination that takes its inspiration from this emerging perspective in contemporary political theory. However, this engagement is itself attuned to the

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<sup>19</sup> I should acknowledge that my approach differs from one that might be developed within the tradition of analytic philosophy and ideally would complement interventions from that perspective. To draw on Rawls to explain my different strategy, Rawls follows Rousseau of the *Social Contract*, and in doing so, enjoins us to take “men as they are and laws as they might be” as our starting point for theorizing justice. [Rousseau, cited in Rawls, *The Law of Peoples* (Harvard University Press, 2001), 13] In contrast, I follow Rousseau of the *Second Discourse*, who in focusing on the question of injustice, provides us with what could be characterized as a critical genealogy of the present. This is by no means to suggest that Rousseau’s proposals in the *Social Contract* are not radical, as Rawls’ employment of the idea of a realistic utopia as the basis for his own account in *The Law of Peoples* might suggest. Although Rousseau himself says that he takes *men as they are*, it is worth stressing (as has been helpfully pointed out to me) that arguably the whole project of the *Social Contract* is to *transform them*. Yet for Rousseau, this project of moral-political transformation is importantly prefaced by an investigation of the historical conditions that inform the present. This investigation in the *Second Discourse* is necessary to expose the contingency and mutability of our current circumstances, which opens up the space for articulating the normative contours and possibilities of a just society. Put otherwise, Rousseau must first expose the contingent origins of the ‘fraudulent social contract’ of his own day—which supports and legitimates relations of inequality and domination—before turning to the question of what justice would require. Under my reading, doing so serves two distinct but crucial purposes. First, it helps us see our world as in fact a context of injustice; by critically re-describing the present, the *Second Discourse* jarringly awakes us to this reality and activates our sense of indignation toward the hypocrisies of our society. And second, it helps us avoid despair by seeing that moral transformation is in fact feasible, that our current circumstances are not ordained by god or nature, but in fact products of history and subject to critical scrutiny and normative critique. This in turn provides insight into how we might approach the task of normative transformation. This being said, I should emphasize that I do not view ‘analytic’ and ‘continental’ or ‘critical’ approaches toward political theory as fundamental opposed or incompatible, but as representing different styles of theorizing or “practices of reasoning” as David Owen has put it. Moreover, like Owen I believe these approaches are perhaps most promisingly characterized as complementary. See David Owen, “Reasons and practices of reasoning: On the analytic/Continental distinction in political philosophy.” *European Journal of Political Theory* (2015).



potential limitations to the republican approach for theorizing questions of global justice and therefore far from uncritical. In turning to the work of leading neo-republican scholars, such as Philip Pettit, I challenge and reject a number of key assumptions that have characterized the global-turn in neo-republican thought. These corrections and innovations to the republican approach to securing non-domination at the global level are derived from the insights developed in the historical engagements of the project. They provide the basis for a refashioned global republicanism that is transnational in scope, while also placing questions of political justice and agency at the fore of its conception of the ideal of non-domination.

To orient the reader, I offer this brief and necessarily schematic breakdown of chapters. Chapter Two critically engages with Arendt's account of statelessness. While accepting certain elements of Arendt's framework, I point to some important limitations in her account, which my subsequent excavation of the historical roots of statelessness addresses. In Chapter Three this analysis of the origins of statelessness is extended up to the present, accounting for the proliferation of such displacements and exclusions as well as gradual international attempts to respond to an increasingly permanent and global issue. In addition to tracing the emergence of the international refugee regime, here we also see why statelessness and related forms of exclusion are best characterized as forms of domination. In the subsequent fourth chapter, I assess two alternative normative frameworks for addressing these questions—agonistic democracy and discourse ethics—and show why they are insufficient. In the wake of my critique of these approaches, I turn in Chapter Five to neo-republican theory, which provides the most promising framework for addressing these concerns. The final chapter of the project draws out some of the potential practical implications of these normative claims. It does so by turning to the normative questions raised by the contemporary 'migration crisis' in order to apply the

insights of this project to our current circumstances. This chapter closes by taking up the issue of how even the more modest reforms enjoined by this project might become practically possible to implement.

While the conclusion of this project aims to more fully address such questions, it is important even at the outset to provide some sense of the aims of this argument and analysis. Now, it may be true that the normative aspirations of philosophers and political theorists often seem to exceed the bounds of the pragmatically possible. To a certain degree, this is understandable. Redressing injustice may demand more than we are willing to expect the powerful and well-placed to easily concede or allow when immediately confronted with such facts. But this does not diminish the force of these demands. Indeed if we confine our normative accounts to the expedient and immediately possible, we would run the risk of merely supporting the *status quo*, rather than more fully attending to the perspective and experiences of the dominated, excluded, and oppressed.

Yet while the full practical implementation of the normative implications of this project may remain elusive for now, I do aim to offer more immediate and concrete guidance about how our global institutions ought to be reformed. That is, this project seeks to offer insight into how we might critically approach the current institutional elements of our global order and move toward more equitable practices of membership and inclusion. On this more modest goal, the historical and normative dimensions of the project converge, and perhaps provide grounds to hope for potential progress toward addressing the ethical questions raised by this dissertation. By looking at the history and recent origins of statelessness, nationality, and border control, I aim to highlight what might be possible, if only by showing that different orders of borders, migration, and identity have indeed existed in the (recent) past. If what morality may demand is constrained

by what the world can allow, then surely denaturalizing and drawing attention to the recent and contingent nature of our current situation should expand our sense of what our global context could and should be like in the future.

Equally, however, this project seeks to reconfigure and transform our understanding of the nature of our obligations and to contest dominant social imaginaries that allow us to distance ourselves from forms of injustice that are in fact rooted in the practices of an international order that our own states participate in supporting, sustaining, and legitimating. From this prevalent perspective, we tend to view the tragedies experienced by the stateless, refugees, and those subject to forced migration as the responsibility of despotic and dictatorial regimes, or in some cases, as the product of no clear agent at all, resulting from a situation of protracted conflict in which the existence of a state or government is more an assertion than a reality. Consequently, the dominant framework for understanding the claims of refugees, asylum seekers, and stateless persons has been to view them as matters of humanitarian assistance. Accordingly, for the most part assistance—no matter how well-meaning or far-reaching—has generally been understood as an act of beneficence or generosity. But one of my central arguments is that this view is mistaken. These forms of exclusion, oppression, and domination are made possible only through the practices of states—including liberal democracies—acting in concert. They are the product of a state system that coordinates, and indeed helps produce, such phenomena. Consequently, we need to come to see the claims of the stateless in terms of a demand to justice. Under such a revised normative framework we are compelled to confront the fact that questions of justice regarding statelessness are not about the mere offering of aid. Rather, they are fundamentally about the obligation to provide redress to an injustice, an injustice produced by the institutions

and practices of our state system. In this sense, a central aspiration of this project is to encourage us to rethink the nature of our obligations toward the dispossessed, the oppressed and excluded.

## Chapter 2

### The Origins of Statelessness

Looking back over the twentieth and early twenty-first century it is tragically clear that the phenomenon of statelessness has become an enduring feature of our world. Contemporary observers of the appearance of mass statelessness expected that the widespread dislocations, displacements and exclusions that had attended the refugee flows of the interwar era would be at most a transient and temporary event. A poignant illustration of this perspective is revealed by the limited mandate proposed for the High Commission for Refugees. As the precursor institution to our modern refugee regime, it was expected that the Commission “would gradually phase itself out of existence as the postwar refugee crisis diminished”—a process that was anticipated to take no more than a decade.<sup>20</sup> But from our vantage point, their optimism seems at best misplaced. Indeed, despite the continual legal innovations of international lawyers, as well as the proliferation of organizations charged with addressing such concerns, statelessness has remained a lasting issue in international politics. The persistence of statelessness at the very least ought to compel us to take seriously the normative implications of this extreme form of political exclusion. But of equal importance, understanding the historical context of statelessness reveals the contingent nature of this form of political exclusion, while also allowing us to denaturalize our contemporary notions of citizenship and community. Therefore, as a preliminary to developing a normative approach to statelessness we must first attend to the context and conditions of its appearance.

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<sup>20</sup> Michael R. Marrus, *The Unwanted: European Refugees from the First World War Through the Cold War* (Oxford: Oxford University Press, 2001), 111.

To this end, I want to resist the temptation to reduce the causes of statelessness to the emergence of the nation state, citizenship, and sovereignty, but instead understand it as a distinctively modern phenomenon. To be sure, the rise in early modernity of national citizenship “introduced a new type of privilege that was protected for some by excluding others” essentially shifting “exclusion from class to nation, the modern formal line of belonging.”<sup>21</sup> But it would be a mistake to presume that states simply produce statelessness and that the emergence of modern citizenship in its national republican form marks the inception of the extreme forms of exclusion that have become pervasive in the twentieth and twenty-first centuries. Rather, nation, state, and citizenship are necessary, but not sufficient, conditions for the emergence of statelessness as a mass phenomenon. Accordingly, part of my intent in historicizing statelessness is to indicate that the particular constellation of factors that have made this form of exclusion a seemingly permanent feature of our world is fairly recent.

In this chapter I develop a history or genealogy of the construction of statelessness within the context of early twentieth-century Europe in order to shed light on why widespread statelessness appears for the first time at this particular historical moment. The task is therefore in part to isolate the particular practices, institutions, and norms that at this juncture suddenly re-define the significance and salience of nationality and territorial boundaries in order to show how these developments form the conditions of possibility for the specifically modern emergence of mass refugee flows and population displacements. Such a historical excavation of the roots of statelessness is necessary because it is only once we have properly come to terms with the genesis of this form of political exclusion as a relatively recent phenomenon that we will be

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<sup>21</sup> Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge, 2007), 45.

adequately prepared to take up the broader normative challenges that the claims of stateless persons present to our contemporary international order.

What is more, attending to this dimension remains crucial because of a number of quandaries raised by the context of the inter-war era. For instance, if statelessness is best explained as a product of the modern state's claims to absolute territorial sovereignty, why is it that statelessness emerges historically so late, given that the notion of Westphalian sovereignty had appeared centuries earlier? Moreover, how is it that the sudden transformation in the importance of nationality to both interstate migration and fundamental wellbeing was almost directly preceded by one of the most liberal regimes of border control in Western history, in which individuals experienced a level of free movement across national borders previously unparalleled in modern Europe? Finally, if statelessness is best explained by reference to the particularities of the inter-war European context, what explains the persistence and indeed worldwide spread of statelessness?

This schematic history of statelessness aims to address these questions to provide an account of the origins of statelessness that ought to inform our understanding of the precise injustice statelessness represents and of the normative considerations it demands we address. My claim in this chapter is that the emergence of statelessness within this particular timeframe cannot be reduced to a singular cause or factor, but can only be explained by attending to a constellation of developments. The central features my account identifies and subsequently interrogates are the coalescence of an institutionalized state system that would rapidly transform the significance of the concepts of state sovereignty, territoriality, and national citizenship, as well as the emergence of techniques and practices that would give concrete substance to the aspirations of states to realize border control and regulate membership. What is more, I wish to

suggest that the rapid spread of these features of an emerging global state system are what precipitate the lasting challenge of statelessness in world politics.

I begin by taking Hannah Arendt's now classic account of the crisis of statelessness in *The Origins of Totalitarianism* as a point of departure for asking why and how statelessness emerges as modern crisis. While Arendt's philosophical account has proved an important and influential touchstone for contemporary political theorists concerned with the dilemmas posed by statelessness, I argue that Arendt's account does not go far enough in explaining precisely why inter-war Europe became a site of mass statelessness. By turning to resources from the history and sociology of immigration, migration, and border control, I suggest that a missing aspect of Arendt's account concerns the place of an increasingly complete and organized state system that introduces the mechanisms necessary to enable statelessness as a global crisis. From here I turn to developing this subsequent historical account of the genesis of statelessness. To this end I argue that we should link the phenomena of mass statelessness with a particular configuration of the European state system, emerging technologies of population regulation and to the proliferation of these features within the international order. This moment represented historically novel "coupling of state sovereignty and nationalism with border control" which, beginning in the context of inter-war Europe, gave the state "the power and the institutional legitimacy to exclude refugees from civil society."<sup>22</sup> Having sketched the contours of the norms, practices, and institutions that constitute statelessness as a modern phenomena and tracing the conditions of its global proliferation, the final section of the chapter turns to how this historical context informs our contemporary situation.

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<sup>22</sup> Saskia Sassen, *Guests and Aliens*, (The New Press, 2000), 78.



# 1 Arendt on Statelessness

Arendt situates her account of the eruption of statelessness in the European context as part of a broader narrative of the crisis of modernity. She links this moment of near collapse of the Western political order to a constellation of factors related to the appearance of modern anti-Semitism, the spread of European imperialism, and the rise of totalitarian movements. Although this discussion of statelessness appears late in Arendt's overall account, arguably the emergence of mass statelessness plays a central role in her broader analysis. Indeed, Arendt presciently calls the stateless the "most symptomatic group in contemporary politics" suggesting that the production of statelessness ought to be understood as both a catalytic factor in the emergence of totalitarianism and as a lasting crisis of the post-totalitarian world.<sup>23</sup> As will become apparent, Arendt attributed particular importance to the development of mass statelessness precisely because of the fissures in our modern normative order that its sudden manifestation revealed.

Arendt points to two developments as conditions for the appearance of widespread statelessness in early twentieth century Europe. The first of these concerned a deep conceptual tension that Arendt identified in the development of the nation-state as a form of political community. This fundamental contradiction implicit in the principles of the nation-state system initially revealed itself in the context of the post-World War One minorities treaties that attempted to restructure Europe's political landscape in the wake of the sudden implosion of the Ottoman, Austro-Hungarian, German, and Russian empires. The challenge that beset Europe's peacemakers arose from their vain attempts to impose the "old trinity of state-people-territory"

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<sup>23</sup> Hannah Arendt, *The Origins of Totalitarianism*, 277.

upon these newly constituted communities in the name of realizing the principle of national self-determination.<sup>24</sup>

The unavoidable presence of sizable minorities within these successor states left the application of the principle of national self-determination near impossible insofar as this required establishing territorial states in congruence with preexisting national or ethnic populations. The non-contiguous nature of national groupings within southern and eastern Europe simply proved too scattered to be easily accommodated by such a model. In order to remedy the difficulties raised by the introduction of the architecture of the nation-state into a context seemingly at odds with its fundamental principles, postwar leaders had recourse to special minority rights protections—to be enforced by the emerging League of Nations—in order to isolate or protect the interests of non-majority nationalities within the newly fashioned states. However, as Arendt points out, this very solution paradoxically revealed the deep contradictions and limitations of the nation-state model. As she notes,

[t]he Minority Treaties said in plain language what until then had been only implied in the working system of nation-states, namely, that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin.<sup>25</sup>

The deeper implication of the Minority Treaties was thus the open admission that the assertion of national sovereignty expressed in the notion of self-determination was in sharp tension with the claim of the state to provide secure legal status and standing to all individuals residing within its

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<sup>24</sup> Hannah Arendt, *The Origins of Totalitarianism*, 282.

<sup>25</sup> Hannah Arendt, *The Origins of Totalitarianism*, 275.

territory. For Arendt, this moment therefore symbolized the conquest of the nation over the state, meaning that it indicated that the legal and institutional structures of the modern state were revealed to be subservient to the demands and fundamental interests of the will of the nation.

However, the full implications of this development would only become apparent with the appearance and rapid proliferation of statelessness across the European continent. Triggered by the till-then unheard of policy of mass denationalizations on the part of governments wishing to rid themselves of undesirable populations, the appearance of ever-increasing numbers of stateless persons quickly eroded or overwhelmed the early responses to this heretofore exceptional status. The traditional remedies of asylum and naturalization were quickly discarded in the face of unprecedented mass migrations of refugees. Moreover, governments feared that any attempts to integrate or settle stateless persons would only encourage further denationalizations on the part of illiberal regimes. Thus the precarious condition of the stateless was only rendered more fraught under the perverse logic that this was necessary to stymie further denationalizations. But attempts to mitigate the flow of stateless persons through deportation or repatriation proved equally problematic for there was simply no legal or institutional framework for dealing with individuals who had been stripped of the status of citizenship. The consequence of this was that the proliferation of statelessness rapidly triggered a turn to extra-legal means, as states sought to mobilize police powers to deal with large and increasingly unwelcomed flows of refugees across their borders. For Arendt this moment marked a critical juncture insofar as it symbolized the open privileging of national interests over the constraints of legality and with that the erosion of the rule of law within the context of even avowedly liberal-democratic constitutional states.

This outcome was the result of the unstable balance that had always remained between the legal framework of the modern state and the idea of the nation that grounded the legitimacy

of ostensibly self-determining political communities. However, according to Arendt, the tension between nation and state was capable of remaining obscured until this later historical moment, only becoming apparent in the interwar context. This was because the formation of the nation-state had coincided with the development of constitutional government and the rule of law, which had gradually displaced the despotic governance and ‘personal’ rule of the absolutist state.<sup>26</sup> As the minority treaties and then mass statelessness placed stress upon the ability of states to maintain their claim to effective sovereignty in matters of political membership and immigration in a manner consistent with legality, states increasingly turned to the exercise of arbitrary police power that was increasingly unfettered from procedural protections. Statelessness thus represented the eventual preeminence of the nation over the constraints imposed by the modern legal-bureaucratic state, while also acting as a visible catalyst in the continued erosion of the rule of law. Crucially, the implications of this outcome were by no means confined to the situation of refugees. According to Arendt, the introduction of a rule of exception—as states increasingly began to differentiate the legal status and protections of citizens and aliens—could only more broadly compromise the notion of equality before the law central to the institutions of the modern state.<sup>27</sup> Thus the parting of ways of order and legitimacy triggered by the spread of statelessness paved the way for the broader extension of arbitrary power.

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<sup>26</sup> The implicit assumption of Arendt’s account is that the modern state as a form of political community must operate through the medium of positive law, which in turn places constraints on, or at least importantly shapes, the exercise of state power.

<sup>27</sup> As Arendt notes, the “nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality, which originally was destined to replace the older laws and orders of the feudal society, the nation dissolves into an anarchic mass of over- and underprivileged individuals. Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of nation-states. The clearer the proof of their inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police.” [Hannah Arendt, *The Origins of Totalitarianism*, 290.]

Arendt's analysis of the emergence of widespread statelessness also focuses on a second development of even greater importance for her account. This was the conceptual rupture exposed by the apparent instability and paradox of human rights. Indeed, the difficulties posed by what Arendt termed the 'perplexities of the rights of man' rapidly became apparent as individuals unprotected by any political community and excluded from full standing in civil society became widespread across the European continent. In this sense, it was the experience of stateless persons that first revealed the deeply contingent nature of human rights. Although proclaimed in the name of humanity and grounded in the fundament of human nature, the purportedly inalienable rights of man turned out to be dependent upon membership within a particular community. According to Arendt, it came to be that individuals who found themselves expelled from membership within any particular community were rendered fundamentally rightless.

However, to fully understand the relationship between statelessness and the apparent conceptual implosion of human rights, we must briefly attend to Arendt's understanding of the normative foundations of the latter. Within this narrative, the modern discourse of human rights can be traced to the context of the Atlantic revolutions of the late 18th century, in particular the French Revolution's *Declaration of the Rights of Man and Citizen*, which Arendt takes as the paradigmatic formulation of our contemporary understanding of human rights.

According to Arendt it is in this notion of inalienable human rights that we see the dramatic and historically unprecedented attempt to re-locate the legitimacy of positive law and authority of government in man himself. In this sense the emergence of the modern conception of human rights represented a decisive rejection of the stratified feudal hierarchies of privilege rooted in tradition and history in favor of a re-founding of politics in human nature itself. But this

relocation of human rights in a conception of man's fundamental nature should also be understood as a response to the sudden erosion of past structures of traditional authority. For Arendt, the early modern emergence of human rights represented an attempt to provide foundations for claims of human dignity and equal status in a context in which prior transcendental grounds for authority were rapidly being eroded or vanishing all together.

In her discussion of the problematic nature of human rights Arendt draws our attention to the basis on which these rights were declared—namely an abstract conception of the individual generalized beyond her situation within a political community. This reliance on an abstract, isolated notion of man as the fundamental bearer of rights was thoroughly entwined with the assumption that these rights derive from no other source than man's inherent nature. By restricting human rights to this basis, the authors of the *Declaration* sought to provide a secure foundation for these rights that protected them from being revoked by the state. Any valid political system presupposed these rights, and thus needed to recognize them in order to govern legitimately. But within a political system, the sole guarantor of these rights was the political sovereign itself. A contradiction arose: the very rights set forth as natural and thus prior to the sovereign, relied upon the sovereign for their protection within the political community.

Accordingly, Arendt argues that the optimism and hope that attended the emergence of our modern paradigm of human rights was fatally misplaced, for it concealed the fact that these so-called inalienable rights could only be realized in the context of belonging to a political community. The rights of man were paradoxically dependent on our status as citizens and the experience of the stateless therefore provided a powerful indictment of this understanding of human rights. Put otherwise, it was as individuals apparently 'unencumbered' by membership in

a particular community that the stateless appeared, and yet it was this very exclusion that rendered them fundamentally rightless and subject to domination. As Arendt put it,

We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.<sup>28</sup>

What the stateless were denied in their exclusion from membership was the “right to have rights”—the right to belong to a community upon which the enjoyment of all particular rights depended, the status and standing of one “who counts” in the eyes of others. For Arendt, what this flawed conception of human rights missed was the fundamentally relational quality of rights claims and their dependence on a political context and institutional structure for their realization. Only by rejecting the image of human rights as natural and thus inalienable can we appreciate their fragile and contingent nature; only by acknowledging that we hold human rights as institutionally and politically enabled agents can we begin to take notice of how they might be constituted and secured. Yet these dimensions of the dependent relationship of our capacity to enjoy equal standing and dignity as human beings only came to the fore in the context of masses of individuals who found themselves bereft of this very status.

Arendt's discussion of the emergence of statelessness provides us with a compelling portrait of the conceptual tensions that both contribute to and were revealed by statelessness. However, there remain a number of limitations to her presentation.<sup>29</sup> Approaching modern mass

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<sup>28</sup> Hannah Arendt, *The Origins of Totalitarianism*, 296.

<sup>29</sup> These limitations are understandable considering the fact that Arendt's discussion of statelessness appears only as one facet of a broader narrative concerned primarily with the near collapse of western civilization and the rise of

statelessness in part through the vantage point of the history of ideas, Arendt provides us with a rich account of the philosophical and ideological roots of the phenomenon. Yet this very focus on the conceptual roots of statelessness is not without its shortcomings. In particular, Arendt's discussion lacks sufficient attention to the institutional context of the interwar era as well as the broader historical experience of the development of the modern state. What the Arendtian account of statelessness lacks is an analysis of the material or technological features of this historical moment that allowed mass statelessness to come about as well as the central role of an emerging interstate system in constituting this form of exclusion

In this sense the central difficulty that Arendt's presentation does not sufficiently address concerns the temporalization and genesis of statelessness. How does statelessness fit into a larger history of state development within Europe, and what features of the historical context of the inter-war era were necessary to transform statelessness into a mass phenomena? Attending to a broader historical horizon than Arendt's account helps us place the dislocations and displacements of the inter-war era within a larger history of European state formation. This earlier historical era was an important moment in the framing of the legitimate aspirations of the modern nation state that enabled statelessness to become an enduring feature of our world. Accordingly we need to interrogate how a certain "self-understanding" of the state came into play that would subsequently enable the emergence of statelessness.

More centrally to the question at hand, Arendt's account fails to acknowledge how the inter-war era was a moment in which a constellation of disparate institutions and technologies

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totalitarianism. However, given the aims of this project we must turn to a more robust account to supplement Arendt's insights.



necessary for the production of mass statelessness suddenly coalesced. These developments included the earlier emergence of new modes of managing and monitoring populations that resulted from the increased bureaucratic capacity of the state, the emergence and collapse of economic liberalism as the dominant model of market governance, and the sudden re-introduction of techniques of border control. Arendt also does not adequately consider how the norms, practices, and institutions of an emerging interstate system played a decisive role in legitimating the category of nationality as a condition for regulating border crossings. To correct this deficiency, I provide an account of these developments.

## 2 The Institutional and Ideational Antecedents of Statelessness

The genesis of statelessness is a complex story, involving the convergence of a number of historical moments and the coming together of a contingent constellation of material and organizational conditions. These include the far earlier emergence of norms of territoriality and sovereignty, the transformation of the relationship of the state to its subjects captured by the rise of novel techniques of population control and the process of bureaucratic rationalization, as well as the more recent re-introduction of practices of border coercion in the context of war-time security, the shift away from classical liberal economic ideology, and coalescing of an emerging interstate system. These factors created the conditions for statelessness in the interwar era precisely because modern European states were able to bring to bear their expanded scope of institutional and regulative capacity to exercise in concert an unprecedented degree of effective control over nationality, membership rights, and migration.

The purposes of drawing out these elements of the emergence of statelessness are manifold. For one, by situating statelessness as the product of specific and recent historical

developments, we can denaturalize the related categories of nationality and citizenship as contingent and thus open them to deeper normative interrogation and questioning. Far from taking the category of national citizenship as a given, we can see how statelessness and the salience of nationality are in fact coeval and entwined. Additionally, by drawing attention to the organizational and technological conditions which produce statelessness, this account will highlight how the domination (understood as subjection to arbitrary power) experienced by the stateless is institutionally enabled by our current international order. By recognizing the implication of our norms and practices in the production of domination, we will also come to see the solution to statelessness as a matter of reforming our institutions. Finally, by reconstructing the context in which statelessness emerges, we can draw important continuities with the present and begin to trace a broader trajectory of institutional development and coalescence that continues to intensify to this day.

## 2.1 Precursors to statelessness

It has been customary for some time to view the right and capacity to regulate migration and immigration, naturalization and nationality as essential components of state sovereignty. This apparently immutable reality formed the core of the dilemma identified by Arendt that we engaged with above. According to that account, the ‘right to have rights’ upon which all other rights claims depend is itself contingent upon the status of membership in a community. Citing the eminent international lawyer Lawrence Preuss, Arendt thus asserts that “it had always been true that sovereignty is nowhere more absolute than in matters of ‘emigration, naturalization, nationality, and expulsion’.”<sup>30</sup> For Arendt, the dilemma of statelessness therefore derived from

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<sup>30</sup> Hannah Arendt, *The Origins of Totalitarianism*, 278.

the fact that the lack of membership entailed by the denial of the status of citizenship lies at the expansive and largely unconstrained discretion of states. The implication of this was that in a world organized into states, the dilemmas of statelessness would remain tragically permanent.<sup>31</sup>

The notion that the state had always exercised control over territorial admission and membership status as entailments of sovereignty was by no means an isolated view at the time Arendt was writing. A number of influential turn-of-the-century legal scholars echoed this sentiment, treating the state's power to regulate entrance and admission to territory and membership as entirely within the domain of internal jurisdiction.<sup>32</sup> Nor has this perspective lost much of its force over time, with post-war legal scholars largely affirming such a view of sovereign prerogative and the limited role of international law in constraining state action. Paul Weiss echoes this sentiment in noting that the “right of a State to determine who are, and who are not, its nationals is an essential element of sovereignty.”<sup>33</sup> Similarly, with regard to the rights of expulsion and immigration, Guy Goodwin-Gill notes with regret that it is “common to find expressed the view that such matters are for the local State alone to decide, in the plenitude of its sovereignty.”<sup>34</sup> These apparent realities seem to confirm Arendt's far from sanguine assessment that statelessness would be a permanent and enduring feature of our contemporary world.<sup>35</sup>

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<sup>31</sup> As Arendt puts it, “Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether.” [Hannah Arendt, *The Origins of Totalitarianism*, 297.]

<sup>32</sup> See discussion at Richard Plender, *International Migration Law* (Martinus Nijhoff Publishers, 1988), 2.

<sup>33</sup> Paul Weiss, *Nationality and Statelessness in International Law* (28. Brill, 1979), 65. Indeed, it is worth noting that even in the case of the EU—often heralded as indicative of the eclipse of sovereignty—to this day the right of naturalization and to determine the terms of naturalization remains a jealously guarded prerogative of states. See Demitri Kochencov, “Double Nationality in the EU : An Argument for Tolerance” *European Law Journal* 17, no. 3 (2011): 323-343.

<sup>34</sup> Guy S. Goodwin-Gill, *International Law and the movement of persons between states* (Clarendon Press, 1978), 51.

<sup>35</sup> Some subsequent readers of Arendt have radicalized this claim to arguably problematic proportions; consider here Agamen's suggestion that the refugee is merely the mirror of the permanent relation of exclusionary inclusion

My aim moving forward in this chapter is to contest and unravel a number of the key assumptions that inform this predominate perspective. Indeed, despite their apparent entrenchment in the principle of state sovereignty, it would be a mistake to assume that the norms and practices of membership that we now take for granted in fact emerged with either the early-modern state or the so-called Westphalian state system. The reason for this is that European states were neither capable nor particularly interested in regulating entrance and membership based on our contemporary notion of nationality until fairly recently and immigration was largely viewed as beyond the ambit of state interests.<sup>36</sup> Indeed, it is a striking fact that this lack of both principle and practice was equally reflected in the thought of early modern theorists of the state and of international law, who, in contrast to the views canvassed above, saw the right of individual free movement as taking precedence over any state's claim to territorial jurisdiction.<sup>37</sup> Thus the absolute right of states to exclude individuals was relatively absent from both theory and practice until a much later historical date than would be suggested by accounts that treat such a right as coeval with the emergence of the ideal of Westphalian

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between the sovereign power and bare life in modern politics: “the refugee causes the secret presupposition of the political domain—bare life—to appear for an instant within that domain.” [Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Meridian, 1998).]

<sup>36</sup> As Sahlins notes, the nineteenth century state for the most part withheld from intervening in the social sphere, and with that, with the regulation of migration. Peter Sahlins. “The Eighteenth Century Citizenship Revolution in France” in Fahrmeir, Andreas, Olivier Faron, and Patrick Weil, eds. *Migration control in the North Atlantic world: The evolution of state practices in Europe and the United States from the French Revolution to the Inter-War Period*, (Berghahn Books, 2005): 151. Sassen echoes this sentiment, noting that prior to the Twentieth century, “the notion of state control over borders was not really established.” [Sassen, Saskia. *Guests and Aliens* (The New Press, 2000)]

<sup>37</sup> Consider here the work of Vitoria, Pufendorf, and especially Kant. All of these influential theorists shared (with varying degrees of colonial and imperial inflection) the early modern suspicion against mobility restrictions in which the state's right to unilaterally constrain or limit migration was taken as far from self-evident. Indeed, in *Perpetual Peace* Kant goes so far as to argue for a cosmopolitan right to hospitality: that is, the “right of a stranger not to be treated with hostility when he arrives on someone else's territory.” [Immanuel Kant, *Kant: Political Writings*, ed. Hans Siegbert Reiss, (Cambridge University Press, 1991), 105.]

sovereignty.

To be sure, both sovereignty and state were important to the development of exclusionary forms of membership grounded in the notion of nationality. The claim of supreme jurisdiction over territory anticipates the subsequent interest of states in exercising increasingly greater degrees of control over their population as well as the emergence of national citizenship as the basic form of membership of individuals within the international system. Moreover, the norms implicit in the international principle of sovereignty would provide the presumptive justification of states' claims to unilateral authority over entrance and membership, while also producing the basis for the forms of coordination states would increasingly be compelled to take up in order to control migration, immigration, and access to citizenship. However, these features cannot sufficiently explain why statelessness emerged at this particular historical juncture. The reason for this is that in order for statelessness to exist on a permanent and widespread basis, the notion of nationality as a mechanism of control and marker of identity must not only have become salient, but must actively be institutionalized through bureaucratic and administrative means. This is because nationality and national belonging are both historical artifacts that were produced by a shift in concern of the state with regard to those it claims authority over and the historically contingent institutionalization of those concerns into a state system.

Therefore three important developments, under-appreciated by Arendt's account are necessary to explain the emergence of statelessness First, the period between the Peace of Westphalia and the First World War was one in which the relationship between the state, territory, and those subject to political authority went through an important shift driven in part by changing economic and social circumstances, but most importantly, as a result of a shift within the mentalities or imaginaries that frame the question of rule. Second, these ideational and

material developments were accompanied by a remarkable increase in state capacity and bureaucratic rationalization that allowed states to more effectively realize their sovereign aspirations and to actually produce the notion of nationality. Together these coeval and mutually reinforcing developments provided the rationale and the ability for states to introduce the mechanisms of border control and boundaries on membership—the necessary preconditions for statelessness to emerge. The third and final element concerns the mutual integration of norms of membership and exclusion into an organized state system. It was only in this final stage that norms of nationality, immigration control and deportation came to take form at the level of a nascent international society, paving the way for the emergence of mass statelessness in the context of interwar Europe

## 2.2 The Birth of Population

As noted above, a crucial condition of statelessness that Arendt's account misses is the transformation of the relationship between the state and those subject to its political authority. The possibility of the exclusions of statelessness resulted partly from the development of a novel form of governmental rationality—one that shifted beyond the traditional conception of sovereign power traditionally associated with the state. This new mode of power—theorized most directly in the work of Foucault under the designation 'governmentality'—is important because one needs a form of power directed at governing a population rather than ruling subjects as a precondition of the developments that would enable statelessness. Such transformations constituted a fundamental change within the broader "domain of social epistemes" to use John Ruggie phrase—a shift in the collective mentality of societies that would introduce novel

imperatives and rationalities into the behavior of state actors.<sup>38</sup> Following Ruggie’s emphasis on the importance of broader socio-cultural shifts, my suggestion is that the rise of governmentality was concurrent with a decisive modification in the “mental equipment that people drew upon in imagining and symbolizing forms of political community.”<sup>39</sup> Thus the emergence of a new “art of government” helped constitute a crucial transformation in the nature of the state that remains important to understanding the distinctively modern quality of statelessness. This development was located on the level of modes of thought; it concerns the distinctive way the modern state came to see the ‘population’ as an object of study and the ‘populace’ as a subject of intervention.<sup>40</sup> Although there were important material dimensions to this process, here it is crucial to foreground important dimensions of this social epistemic shift that brought about a transformation in relations of government and rule.<sup>41</sup>

This social-epistemic shift would prove pivotal to the subsequent emergence of statelessness in the modern era and helps us place Arendt’s account in a broader historical context. But what makes this concern with population particularly modern? As much of the state

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<sup>38</sup> John Ruggie, “Territoriality and beyond: problematizing modernity in international relations.” *International Organization* 47 (1993): 171.

<sup>39</sup> *Ibid.* While following Ruggie’s emphasis on the role of social epistemes to changing material conditions, it is worth noting that his narrative of the formation of the modern state system has been contested by other international relations theorists; such scholars have found Ruggie’s account problematic insofar as it collapses the dynastic-absolutist and modern state as different stages in the development of the international system. See: Benno Teschke, *The Myth of 1648: class, geopolitics, and the making of modern international relations* (Verso, 2003).

<sup>40</sup> However, it is worth noting that in a number of important ways Arendt’s account of the rise of the “social” and the consequent colonization of different modalities of the human condition—for instance, within the domain of action such that “politics” is increasingly reduced to “administration”—anticipates and tracks many of the concerns raised by Foucault’s analysis.

<sup>41</sup> More fundamentally, it could be argued that these social epistemic shifts would help eventually constitute the new social imaginary represented by the predominance of would come to be described by Beck under the rubrics of the “national outlook” and “methodological nationalism”—that is, the set of framing assumptions that support the view that modern politics and modern societies can only be organized into nationally and territorially delimited states. For a broader discussion of this, see: Ulrich Beck, *Cosmopolitan vision*, 25-33.

formation literature reminds us, states, or rather the rulers of states, have long been interested in the effective extraction of resources from those subject to their jurisdiction. Charles Tilly's telling image of the early modern European state as a 'protection racket' does much to capture the rationale of this imperative in which the goal of establishing consolidated, centralized, and exclusive authority over a territory was driven by the demands of effective war-making.<sup>42</sup> This relationship between the state and its subjects is also central to Hendrik Spruyt's neo-evolutionary study of the rise of the modern state, insofar as he argues that the state was able to more effectively 'penetrate' society for the purposes of successfully pursuing international conflict.<sup>43</sup> Yet as John Torpey has noted, such accounts do not sufficiently address how states actually accomplished this assertion of control over society.<sup>44</sup> In order to explain this feature of the development of the state, Torpey argues we must recognize that the remarkable power and robustness of the modern state lies in its infrastructural capacity. This capacity is grounded in the state's emergent imperative to render the social world "legible" as James C. Scott has famously put it. Such legibility is the condition of possibility for the modern states consequent capacity to "embrace" its population through the deployment of techniques of identification. Rather than the mere brute exercise of coercive force, it was through a series of "humble modalities, minor procedures" that the modern state would become capable of enacting exclusionary forms of membership and border control.<sup>45</sup> This processes was grounded in the transformation of social

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<sup>42</sup> Charles Tilly, *Coercion, capital, and European states, AD 990-1992* (Oxford: Blackwell, 1992).

<sup>43</sup> Hendrik Spruyt, *The sovereign state and its competitors* (Princeton: Princeton University Press, 1994).

<sup>44</sup> John Torpey, *The invention of the passport: surveillance, citizenship and the state* (Cambridge University Press, 2000), 10-11. Michel Foucault also points to the difficulty of such accounts, which rely upon a "circular ontology of the state asserting itself and growing like a huge monster or automatic machine." [Michel Foucault, and François Ewald, "*Society Must Be Defended*": *Lectures at the Collège de France, 1975-1976* (Macmillan, 2003), 354]

<sup>45</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Random House, 1977), 170; quoted in John Torpey, *The invention of the passport*, 3.



epistemes and the consequent development of apparently mundane bureaucratic practice that would subsequently provide the grounding and apparent legitimacy for the broader state system's capacity to produce statelessness.

Both Scott and Torpey's work are important to understand the manufacturing of nationality by the state, but their respective projects do not sufficiently foreground the fundamental question of how and why the state came to take an interest in its populace as a population. This is key to understanding the historical dimensions of statelessness given that this form of exclusion is a distinctly modern phenomenon. Why did states come to envision those subject to state power through the category of population? Although legibility may be an enduring preoccupation of statecraft, the rationale underlying this project may not be continuous over time.<sup>46</sup> Thus while the pre-modern absolutist and dynastic state may have concerned itself with "arranging the population to simplify the classical state functions of taxation, conscription, and prevention of rebellion" the modern state's aspirations rest on a decisive shift in modes of social regulation and intervention on behalf of the welfare of the population. To push Scott's visual metaphor, if a decisive feature of the state concerns its imperative to render the social world legible to its synoptic vision, the rise of governmentality was a crucial transformation in the nature of that gaze. In doing so, governmentality as a form of power helped bring into focus a new domain of study and concern known as society and constituted novel forms of state intervention for that terrain. Preceding the project of differentiating nationals from non-nationals, the state first had to develop a rationale for identifying its population as such, a project

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<sup>46</sup> Although Scott and Torpey both evoke Foucault as an important influence on their approaches—as is apparent in the constitutive relationship they draw between power and knowledge—both scholars do not sufficiently stress that for Foucault modes of power shift over time. Consider here that Scott's model of the synoptic state maps well onto the classical "sovereign" conception of power, but it fails to capture entirely the new mode of "governmentality" that Foucault identifies as the hallmark of the modern and contemporary state.

predicated on a shift from ruling over subjects to governing a populace. Before addressing the material conditions of the state's capacity to identify its populace as nationals and citizens, we must briefly consider the conceptual shifts that made this enduring project possible.<sup>47</sup> By doing so we can come to understand the novelty of the arrangements that enabled statelessness to emerge and thereby address the limitations of the Arendtian account.

## 2.3 Governmentality

To reconstruct these conceptual developments I rely upon the notion of governmentality employed in Michel Foucault's "genealogy of the modern state."<sup>48</sup> Foucault defines governmentality as "guiding the possibility of conduct" or as a mode of acting on the actions of individuals. As Tania Li puts it, governmentality thus concerns the "attempt to shape human conduct through calculated means."<sup>49</sup> However governmentality is a distinctive mode of shaping human conduct across an entire population and not just for particular 'deviant' or recalcitrant groups in the specific institutionalized contexts that Foucault had focused on in earlier works.<sup>50</sup> This concept is important for understanding statelessness because the rise of governmentality tracks a number of social epistemic shifts that shaped and transformed the development of state

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<sup>47</sup> This engagement with Foucault's analysis of power may strike some readers as potentially at odds with the appeal to the idea of non-domination this project turns to subsequently. Indeed, given the widely prevalent view that Foucault does not attend to the normative dimensions of his analysis, it may seem paradoxical to draw on his work as part of a project aimed at advancing relations of non-domination. However, following James Tully, I read the normative dimension of Foucault's approach as fundamentally concerned with practices of freedom in relation to power, although Foucault does so "without positing a utopian position, procedure or subject free of power." [James Tully, *Public Philosophy in a New Key*. Vol. 1. (Cambridge University Press, 2008), 127]

<sup>48</sup> Michel Foucault, Michel Senellart, François Ewald, and Alessandro Fontana, eds. *Security, Territory, Population: Lectures at the Collège de France 1977--1978*. Vol. 4. (Macmillan, 2009), 354.

<sup>49</sup> This expression of Foucault is from *The Subject and Power*, reproduced in Hubert L. Dreyfus and Paul Rabinow. *Michel Foucault: Beyond Structuralism and Hermeneutics*. (University of Chicago Press, 2014), 221; Tania Li Murray. "Governmentality." *Anthropologica* (2007): 275.

<sup>50</sup> This is what differentiates the notion of governmentality from the idea of discipline developed in Foucault's earlier works, such as *Discipline and Punish* (1977).

capacity in relation to those subject to its authority. A focus on governmentality helps us see the implication of generative forms of power in this process.

Foucault's analysis of governmentality has received increased attention since the publication of his lectures at the *College De France* in the 1970s and has become the subject of a wide-ranging literature both elaborating Foucault's account and deploying the notion of governmentality in novel contexts.<sup>51</sup> However, I wish to stress two implications of Foucault's approach to theorizing the distinctively *modern* state through the study of governmentality. First, Foucault's approach emphasizes the "reciprocal constitution of power techniques and forms of knowledge and of regimes of representation and modes of intervention"—that is, the way in which social epistemes and power relations are mutually conditioning.<sup>52</sup> The larger insight, that knowledge claims are inextricably linked to relations of power, has gained broader currency with the post-positivist turn.<sup>53</sup> However, Foucault pushes this observation further—he suggests that new forms of knowledge can themselves call into being novel modalities of power, with the modern 'art of government' oriented towards the welfare of the population being a central example.<sup>54</sup> Indeed, Foucault's broader claim—grounded in what Ian Hacking has referred to as

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<sup>51</sup> While interest in governmentality in the Anglo-American world was initially nourished by the release of *The Foucault Effect: Studies in Governmentality* (1991), the subsequent release and translation of Foucault's lectures in their entirety has significantly contemporary engagements with his work, as well as provided grounds for criticizing earlier appropriations of his thought. My reading of Foucault draws considerably on the interpretive work of Thomas Lemke. See: "Foucault, Governmentality, and Critique" (2010); "'The birth of bio-politics': Michel Foucault's lecture at the Collège de France on neo-liberal governmentality" (2010); "An indigestible meal? Foucault, governmentality and state theory" (2011).

<sup>52</sup> Thomas Lemke. "An indigestible meal? Foucault, governmentality and state theory." *Distinktion: Scandinavian Journal of Social Theory* 8, no. 2 (2007): 44.

<sup>53</sup> This post-positivist view is well captured by Robert Cox's observation that "[t]heory is always for someone, and for some purpose." [Robert W. Cox. "Social forces, states and world orders: beyond international relations theory." *Millennium: journal of international studies* 10, no. 2 (1981): 128]

<sup>54</sup> I follow Lemke in stressing these elements in my use of Foucault's approach; see Thomas Lemke. "Foucault, governmentality, and critique." *Rethinking Marxism* 14.3 (2002): 49-64. As Foucault himself puts it in one formulation, "by 'governmentality' I understand the ensemble formed by institutions, procedures, analyses and

‘dynamic nominalism’ —is that through the very creation of categories constituted by knowledge claims, new modes of action and possible ways of being are themselves brought into existence. Knowledge is thus not only implicated in structures of power, but is part of the constitution of subjects through the descriptive categories it brings into being.<sup>55</sup> The upshot of this, as one commentator has put it, is that within the framework of governmentality it is “not possible to study the technologies of power without an analysis of the political rationality underpinning them.”<sup>56</sup>

The second implication of Foucault’s analysis of governmentality is a distinctive characterization of the nature of power. Starting with his turn to the study of discipline as a mode of social control, Foucault called attention to the need to “abandon the juridical model of sovereignty” as the sole model for conceptualizing relations of power, especially in its modern and contemporary forms.<sup>57</sup> For Foucault the methodological decapitation of “cutting off the king’s head” as part of re-conceiving the nature of power required two important reorientations. On the one hand, Foucault’s account of power avoids the assumption that the “macro perspective of the state” should be the only focal point of analysis or that coercive law is the primary mechanism through which power is exercised. As noted above, by stressing the mutual

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reflections, calculations, and tactics that allow for the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and security as its essential technical instrument.” [Michel Foucault, Michel Senellart, François Ewald, and Alessandro Fontana, eds. *Security, Territory, Population: Lectures at the College de France 1977--1978*. Vol. 4. (Macmillan, 2009), 108]

<sup>55</sup> See Ian Hacking. *Historical Ontology* (Harvard University Press; 2004), 161-71. The upshot of dynamic nominalism is that the conditions of possibility for various actions, identities and ways of being are themselves constituted and dissolved through the invention or deployment of new modes of classification and categorization.

<sup>56</sup> Thomas Lemke, “An indigestible meal? Foucault, governmentality and state theory.” *Distinktion: Scandinavian Journal of Social Theory* 8, no. 2 (2007): 2.

<sup>57</sup> Michel Foucault and François Ewald, “*Society Must Be Defended*”: *Lectures at the Collège de France, 1975-1976*. Vol. 3. (Macmillan, 2003), 265.

implication of power and knowledge, Foucault draws our attention to how power is constituted by disciplinary practices on the micro-level and by diffuse discourses seemingly distant from state authority. The other reorientation is that Foucault counters the merely ‘negative’ or ‘repressive’ view of power implicit in the juridical model by emphasizing the productive, creative, and generative possibilities of power relations. This importantly captures that exercises of power do not merely forbid or constrain the possible actions of agents—as is implied within the juridical model epitomized by the Hobbesian characterization of the state where law and freedom are counterpoised.<sup>58</sup> This does not mean that Foucault rejects the idea that power is exercised through coercion and violence, but that this represents only one aspect of power relations. For Foucault another fundamentally important dimension of power is its positive role in the production of new possibilities of action and forms of subjectivity, often through the discursive creation of new classifications and categorizations.

Foucault’s perspective enables us to see how it was because of the emergence of an ‘art of government’ concerned with measuring a population whose welfare the government sought to promote that the state could come to both produce, and then render salient, the category of nationality. In explaining the relevance of governmentality to producing the conditions of possibility for statelessness I will focus on three important events that precipitated this:

1. the emergence of society as a distinct domain and object of study,
2. the development of a stochastic worldview or social episteme, and
3. the understanding of ‘population’ that these developments engendered.<sup>59</sup>

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<sup>58</sup> Notably Foucault’s critique of juridical power arguably shares some important affinities with the criticisms of ‘gothic’ freedom as non-interference developed by neo-republican theorists. While this has yet to be sufficiently explored, Clarissa Hayward has herself noted the affinity between a Foucaultian concern with the “relation between freedom and power relations” and the notion of freedom as non-domination developed by Philip Pettit; for this point see: Clarissa Rile Hayward, *De-facing Power*, (Cambridge University Press, 2000), 166.

<sup>59</sup> The focus on these elements is far from arbitrary, but an attempt expand on Foucault’s own suggestion that it was the conjunction of these developments that was necessary to “unblocking the art of government” and the emergence

By focusing on these elements I hope to explain what John Torpey refers to as the “documentary revolution” that occurred in the late nineteenth century as the state sought to supplement its newfound interests through the deployment of material technologies and techniques of identification. This in turn allows us to see how the broader context necessary for the emergence of statelessness initially become possible.

## 2.4 Uncovering Society

The first major shift that would reconfigure the relationship of the state to those subject to its authority is the early modern establishment of society as a distinct domain governed by its own logic and rules. This novel conceptualization of an area neither fully within the public power of the state, nor entirely within the private sphere, was related to shifting social and economic relations—most obviously the ascendance of commercial society and capitalistic market relations as well as their theorization through the nascent project of political economy.<sup>60</sup> Here I can only offer a terse sketch of this far-reaching development, so carefully analyzed by Karl Polanyi in *The Great Transformation*, in order to highlight the notion of society that accompanies the novel form of power discussed in Foucault’s work on governmentality.<sup>61</sup> Polanyi’s study is more

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of governmentality. [Michel Foucault, Michel Senellart, François Ewald, and Alessandro Fontana, eds. *Security, Territory, Population: Lectures at the College de France 1977–1978*, Vol. 4. (Macmillan, 2009), 104]

<sup>60</sup> One of the most influential early modern theorists to argue for the notion of society as an autonomous domain was the Dutch born Bernard Mandeville—whose thought serves as a useful exemplar of this new notion. Though denying Mandeville status as an insightful social theorist, Polanyi’s credits him for hitting on “the basic elements of the new political economy” that would help engender the discovery of society. [Karl Polanyi, *The Great Transformation*, (Beacon Press, 1944), 114]

<sup>61</sup> Polanyi may seem like an odd interlocutor in a discussion of governmentality. But Polanyi’s analysis clearly anticipates aspects of Foucault’s account, although the latter seems to not draw on *The Great Transformation* in his lectures on governmentality. I cannot discuss these connections in full here but Polanyi clearly expresses the insight that the rise of economic liberalism and the early twentieth century state-economy relation was not constituted by a withdrawal of state power, but reconfiguration of how that power was exercised. Indeed, Polanyi’s account tracks how the state took up a non-judicial and ‘productive’ model of power; this is well captured by the shift from a

broadly concerned with the catalysts and conditions of the rise of modern market society and the subsequent colonization of social relations by the logic of the market. Here I draw on his account of what he refers to as the ‘discovery of society’ to highlight the relationship between society and state that preceded the emergence of statelessness.<sup>62</sup>

Polanyi’s groundbreaking analysis of the rise of modern market society tracks and unpacks the contradictory logics expressed by classical liberal doctrine—the dominant ideology in both political and economic relations in the era preceding mass statelessness. His account helps shed light on one of the paradoxes of the emergence of statelessness in the interwar period noted at the outset of this chapter—that it was preceded by an era in which Europe had witnessed one of the most open and unconstrained border regimes amidst a broader disengagement of the state in social and economic relations. Part of this puzzle is the product of the apparent shift from the interventionist cameral or mercantile policies that had dominated state-society relations to the doctrine of *laissez faire* liberalism, with its emphasis on the freeing up of market relations as well as supporting cross border movement. In Polanyi’s account we can see that far from a period of state disengagement from society and the market, the era of classical liberalism was in

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mercantile logic of intervening to “enabling” the logic of classical liberalism, focused on “freeing up” the market. Yet the intensification of state capacity could be concurrent with an ideology of non-intervention, as Polanyi’s notes, “There was nothing natural about laissez-faire; free markets could never have come into being merely by allowing things to take their course. [Karl Polanyi, *The Great Transformation*, 145] Moreover, on a broader methodological level Polanyi’s approach shares some affinities with the ‘genealogical’ method that characterizes Foucault’s work on governmentality, insofar as Polanyi’s account of the emergence of the market shows market society as a contingent and historical development linked up with the emergence of political economy as a form of knowledge. Indeed, a central task of Polanyi’s project, contra liberal economic theory, is to thoroughly denaturalize the market and thus critique the rise of market society.

<sup>62</sup> Polanyi’s project seems to be implicitly concerned with the colonization of the ‘life-world’ with market logic; that is, the advent of market society “means no less than the running of society as an adjunct to the market: instead of economy being embedded in social relations (as in the past), social relations are embedded in the economic system.” [Karl Polanyi, *The Great Transformation*, 57]

fact a dramatic reconfiguration of these relationships. The catalyst for this transformation was the ‘discovery’ by the nascent discipline of political economy of the “the existence of society that was not subject to the laws of the state, but, on the contrary, subjected the state to its own laws.”<sup>63</sup> The uncovering of this apparently autonomous domain would precipitate an important shift in the way the state would relate to those subject to its authority.

Although Polanyi’s account is more far ranging, it is enough to stress that this discovery led to the inauguration of the classical liberal paradigm with the concomitant goals of ‘freeing’ the self-regulating market from legislative constraints and the related intensification of attempts to erode restrictions on labor mobility, both within and beyond national borders. Indeed, as Polanyi notes, the shift toward the creation of a novel market system and the introduction of hitherto unheard of labor mobility were linked projects. As he observes, the uncovering of society as an autonomous domain meant that:

[t]he self-regulating market was now believed to follow from the inexorable laws of nature, and the unshackling of the market to be an ineluctable necessity. The creation of a labor market was an act of vivisection performed on the body of society by such as were steeled to their task by the assurance which only science can provide.<sup>64</sup>

Yet contrary to the presentations of classical political economy, and indeed of contemporary neo-liberalism, the rise of laissez-faire policies constituted the obverse of a withdrawal of the state. To be sure, economic policies under classical liberalism were characterized by the apparent rejection of the principles and practices that had characterized mercantile and cameralist policies aimed at protectionism and the steering of national economies through explicit state intervention.

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<sup>63</sup> Karl Polanyi, *The Great Transformation*, 116.

<sup>64</sup> Karl Polanyi, *The Great Transformation*, 132.



But as Polanyi's project demonstrates, state policies in the mid-nineteenth century were directly implicated in the forceful implementation of a new social order—indeed, “[e]conomic liberalism was the organizing principle of society engaged in creating a market system.”<sup>65</sup> For reasons Polanyi details in his account, this enterprise combined the abolition of certain modes of regulation with the unprecedented development and deployment of novel forms of state intervention.<sup>66</sup> As he writes,

the introduction of free markets, far from doing away with the need for control, regulation, and intervention, enormously increased their range. Administrators had to be constantly on the watch to ensure the free working of the system.<sup>67</sup>

Thus the moment of economic liberalization of the long nineteenth century described by Polanyi was an era in which the state, far from withdrawing, intensified interventions within both economic and social relations, albeit through different means than before. The result was a rapid growth in the state's control of society. Indeed, the idea of a market that had to be ‘freed’ and allowed to operate according its ‘natural’ logic emerged as state policymakers began to understand themselves as bound to intervene in ‘society’—that distinct body that had suddenly emerged as a unique domain of study—through novel means that account for the newly discovered social laws.

Concurrent with the institutionalization of market society, there emerged a distinctively modern view of human behavior as characterized by statistical regularities. This view introduced

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<sup>65</sup> Karl Polanyi, *The Great Transformation*, 141.

<sup>66</sup> As Polanyi writes of the nineteenth century, the “thirties and forties saw not only an outburst of legislation repealing restrict regulations, but also an enormous increase in the administrative functions of the state, which was now being endowed with a central bureaucracy able to fulfill the tasks set by the adherents of liberalism” (Karl Polanyi, *The Great Transformation*, 145)

<sup>67</sup> Karl Polanyi, *The Great Transformation*, 147.

the novel idea of “laws of society” operating on the level of the population and subsequently reoriented the state’s concern with its citizens *qua* members of that body.<sup>68</sup> Here I follow Foucault in seeing the ‘birth of population’ as an important aspect of this change. For Foucault, this tracks the shift toward distinctively modern forms of power that are not grounded in the relationship of coercive rule of the sovereign to subjects, which could still be said to characterize of the mercantile and cameralist state, to a more differentiated concern with the production of the welfare of the population.<sup>69</sup> As Foucault puts it:

...population is not, then, a collection of juridical subjects in an individual or collective relationship with a sovereign will. It is a set of elements in which we can note constants and regularities even in accidents, in which we can identify the universal of desire regularly producing the benefit of all, and with regard to which we can identify a number of modifiable variables on which it depends.<sup>70</sup>

Following Foucault, I suggest that the development of a specific concern with population was necessary for the emergence of governmentality as a distinctively modern form of power. This shift—coeval with the discovery of society outlined by Polanyi—would prove the catalyst for the state’s growing interest with documenting and categorizing its subjects, as well as for the creation of institutions capable of realizing these ends. The unique investment and growth of the infrastructural power of modern governments resulted in this shift in the interests and capacities of states. By emphasizing this connection, I suggest that a state that governs its population—rather than ruling its subjects—is a precondition for the forms of exclusion characteristic of

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<sup>68</sup> The erosion of a mechanistic and deterministic worldview arguably might be tied to shifting views in the operation of political authority. Here we might think of the role of a mechanistic worldview in the work of Hobbes; such a view of causality seems entirely appropriate for the forms of social control embodied by this traditional view of sovereignty.

<sup>69</sup> Michel Foucault, *Security, Territory, Population*, 70.

<sup>70</sup> Michel Foucault, *Security, Territory, Population*, 74.

statelessness that only gradually emerges fully at the cusp of the twentieth century.

Of course, it is true that states have long been interested in rendering those subject to their jurisdictional claims “legible” to state authorities, thereby forcibly ordering their populations in order to facilitate the tasks of taxation, conscription, and the maintenance of order.<sup>71</sup> Yet the European state of the nineteenth century went through an important transformation that is hard to understand as continuous with earlier processes of state formation, primarily because this tracks a shift in the concern of state officials not merely with the extraction of resources but with the welfare of the population. As James Scott notes, the nineteenth century was marked by a fundamental transformation of the state’s role in relation to society:

Before then, the state’s activities had been largely confined to those that contributed to the wealth and power of the sovereign... The idea that one of the central purposes of the state was the improvement of all the members of society—their health, skills and education, longevity, productivity, morals, and family life—was quite novel. There was, of course, a direct connection between the old conception of the state and this new one. A state that improved its population's skills, vigor, civic morals, and work habits would increase its tax base and field better armies; it was a policy that any enlightened sovereign might pursue. And yet, in the nineteenth century, the welfare of the population came increasingly to be seen, not merely as a means to national strength, but as an end in itself.<sup>72</sup>

An important factor for this development concerns what Ian Hacking has called “the taming of chance”—that is, a wider social epistemic turn to a stochastic worldview through which “society

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<sup>71</sup> James C. Scott, *Seeing like a state: How certain schemes to improve the human condition have failed*, (Yale University Press, 1998), 2.

<sup>72</sup> James C. Scott, *Seeing like a state*, 91.

became statistical.”<sup>73</sup> This could be viewed as analogous to the related discovery of society outlined above, but is broader insofar as it concerns how the uncovering of statistical laws in social phenomena inaugurated a larger conceptual shift away from the faith in determinism that had characterized much of post-enlightenment thought, while also making available new modes of social control. As Hacking points out, the gradual embrace of a decisively non-deterministic universe was paradoxically compatible with far greater degrees of state intervention, as it became possible to conceptualize social phenomena across populations as both expressing ‘natural’ statistical trends but also amenable to transformation.

This implication of statistics as a novel epistemic framework and the transformation of state power is revealed by the terminological root of the term ‘statistics’ itself, which is derived from the word for state. Indeed, Gottfried Achenwall, the individual who first coined the term, defined statistics as a collection of “remarkable facts about the state.”<sup>74</sup> Thus while many within the social sciences continue to understand the quantitative approaches enabled by the development of statistics as the pinnacle of objective and neutral analysis, the origins of this seemingly normatively neutral discipline reveal its early implication in state formation and statecraft. As Dipesh Charabarty notes in this regard, “[t]he systematic collection of statistics in detail and in specific categories for the purposes of ruling seems to be intimately tied to modern ideas of government.”<sup>75</sup> Far from representing a normatively inert project, the statistical revolution in the first half of the 1800’s triggered by what Hacking describes as an “avalanche of numbers” helped bring into being new interests in controlling and attending to the welfare of

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<sup>73</sup> Ian Hacking, *The Taming of Chance*, (Cambridge University Press, 1990), 2.

<sup>74</sup> Ian Hacking, *The Taming of Chance*, 24.

<sup>75</sup> Dipesh Charabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, (Princeton: Princeton University Press, 2009), 84.

individuals now understood as part of a population.<sup>76</sup> Thus the increased role of statistics in state practice developed along two dimensions. On the one hand, statistical knowledge, and with it the capacity of the state to intervene within society, represented a novel tool of social control. The body of data that the statistical turn helped to assemble facilitated forms of control that simply did not exist before. But on the other hand, the compiling of huge bodies of data about populations also drove the development of state policy, as the existence of increasingly large bodies of data made metric-driven approaches toward a population all the more attractive, simply because such information exists.

Together this constellation of factors—the discovery of society, the birth of population, and the invention of statistics—helps explain the fundamental shift toward governmentality as a form of power characteristic of the modern state. As Foucault tells us,

thanks to the perception of the specific problems of the population, and thanks to the isolation of the level of reality we call the economy. . . it was possible to think, reflect, and calculate the problem of government outside the juridical framework of sovereignty. And the same statistics, which, within the framework of mercantilism, had only ever been able to function within, and in a way, for the benefit of a monarchical administration that itself functioned according to the form of sovereignty, now become the main technical factor, or one of the main technical factors, in unblocking the art of government.<sup>77</sup>

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<sup>76</sup> Here Hacking's insight into the notably modern notion of 'normal' is helpful; see chapter six: *Ian Hacking, Historical Ontology*, (Cambridge: Harvard University Press, 2004). In this account, the broad and intensified collection of demographic details by state officials continued to reveal the apparent presence of statistic regularities or laws that governed social phenomena across a population of individuals. This apparently objective observation thereby provided a rubric of 'normal' behavior grounded in the observation of a statistical average. Yet the distinction between description and proscription is unstable—for the idea of such statistical laws also enabled the conceptualization of normal in the proscriptive sense, and with that, of the notion of deviant populations potentially capable of reform or regeneration.

<sup>77</sup> Michel Foucault, Michel Senellart, François Ewald, and Alessandro Fontana, eds. *Security, Territory, Population: Lectures at the Collège de France 1977–1978*, Vol. 4. (Macmillan, 2009), 104.

This point is echoed by Scott who connects the emergence of statistics with the rapid broadening of the scope of intervention and subsequent aspirations of engineering whole societies:

One essential precondition of this transformation was the discovery of society as a reified object that was separate from the state and that could be scientifically described. In this respect, the production of statistics about the population—its age profiles, occupations, fertility, literacy, property ownership...allowed state officials to characterize the population in elaborate new ways.<sup>78</sup>

The conjunction of the discovery of society as a separate domain subject to its own laws, the emergence of statistics, and the shift to a concern with the welfare of the population, together led to emergence of governmentality as a mode of relating individuals to political authority. The constellation of these factors provides part of the explanation of the distance between early European state formation and the much later appearance of mass statelessness. In the next section, I will turn to another factor in the emergence of statelessness at the particular historical moment in which it appeared.

### 3 The Advent of the Age of Documents: Inscribing Nationality

The final key to understanding the appearance of statelessness in the period between the two World Wars lies in the internationalization of documentary controls among states. Only with the institutionalization on an *interstate* level of the distinction between citizen and other could statelessness coalesce in what I argue is a distinctly modern form. In this section I trace the emergence and consequences of the events leading up to this development. The salience of this story is manifold, for such proceedings constitute an important part of the conditions of

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<sup>78</sup> James C. Scott, *Seeing like a state: How certain schemes to improve the human condition have failed*, (Yale University Press, 1998), 91.

possibility of modern statelessness. The context of these developments also provide the originally unintended framework for the beginnings of international refugee law and our contemporary refugee regime as well as legitimating the prerogative of states to control entrance and membership in the name of sovereignty.

Before unpacking the structure of these events, it is important to briefly stress the unprecedented nature of the practices that suddenly appear at this juncture. This novelty can be located on two levels. First, we need to appreciate the difficulty and with that the array of material and institutional conditions necessary to produce and sustain the very category of nationality as a legal status and identity. In doing so we can come to appreciate the degree to which nationality was historically institutionalized by state practices through the process which John Torpey has appropriately called the “*révolution identifiatoire*” of the late nineteenth and early twentieth century.<sup>79</sup> The point is not merely to recognize that the notions of nation and co-national are relatively recent historical formations, but that the stabilization of a distinction between citizens and foreigners requires considerable bureaucratic and institutional investment. Second, I want to emphasize the historical uniqueness of this conjunction of border control, nationality and state sovereignty. Far from forming a timelessly self-evident triad, these three elements only recently came to take on their current appearance at the end of the nineteenth century, spreading and taking concrete form shortly thereafter. We can come to appreciate this by observing just how inchoate and under-defined these practices were at their inception.

The challenge of instituting our modern notion of nationality rests on its thoroughly socially constructed and institutionally constituted character. This feature of nationality can

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<sup>79</sup> John Torpey, *The invention of the passport: surveillance, citizenship and the state* (Cambridge: Cambridge University Press, 2000), 121.

sometimes be obscured by the apparent grounding of such claims in a primordial conception of the ethnos, nation, or peoplehood. Indeed, the coeval development of national identity and nationalism as a powerful ideology led contemporary observers, whether liberal defenders of Wilsonian self-determination or authoritarian state builders, to present the former as merely the natural extension of the latter. But as we shall see, distinctions of national identity must be thoroughly institutionalized to be constituted and sustained. It is true that a number of social theorists of nationalism have drawn important attention to the material and historical developments that contributed to the rise of nationalist ideology in the nineteenth and twentieth century.<sup>80</sup> But while such accounts provide much potential insight into the conditions that enabled and encourage the rise of nationalism as an ideology, they do less to help us understand nationality as an institutionalized practice of individuated identity. This is important because, as John Torpey has noted, “a person’s nationality simply cannot be determined without recourse to documents. As an ascribed status, it cannot be read off a person’s appearance.”<sup>81</sup> Nationality in this sense must and only can be produced through the introduction by states of documentary controls in conjunction with the demanding creation of a bureaucratic machinery capable of sustaining such distinctions. Thus “beyond communicating definitions and categories concerning identity, states must implement these distinctions and require documents to do so.”<sup>82</sup> The status

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<sup>80</sup> Consider here the work of Karl Deutsch on the role of intensified communication to processes of assimilation and mobilization that helped constitute a sense of national identity; Karl Deutsch, *Nationalism and Social Communication*, (MIT Press, 1953). More recently Benedict Anderson has pointed to the role of print-capitalism to enabling the imagined community of the nation to come into being and helping stabilize a new sense of simultaneity necessary to support the perceived commonalities of such communities; Benedict Anderson, *Imagined Communities* (Verso, 1983).

<sup>81</sup> John Torpey, *The invention of the passport*, 121

<sup>82</sup> John Torpey, *The invention of the passport*, 12.



of national citizenship therefore had to be effectively institutionalized in order to have the exclusionary role we associate with it today.

The claim that national identity is a historically constituted project or socially constructed artifact, while important to emphasize, should strike most readers as far from radical. Such an insight is anticipated by broader interventions—undertaken by social theorists such as Karl Deutsch, Benedict Anderson, and others—that have intended to offer an anti-essentialist and historicist account of nationalism. Moreover, over the course of the past several decades such a perspective has become generally accepted within the social sciences.<sup>83</sup> Yet what is perhaps more striking is how relatively recent the role of documentary controls of nationality have played in the transversing of state boundaries and membership.

On the one hand, the very idea of states possessing a prerogative to control migration across borders is a relative recent development. As noted at the onset of this chapter, the early modern European state simply did not view migration control as within the ambit of its interests. As John Torpey tells us,

Most familiar to and accepted by people today is the right of states to control entry, a prerogative that has come to be understood as one of the quintessential features of sovereignty. It is important to note, however, that the widespread recognition of this prerogative is a fairly recent development.<sup>84</sup>

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<sup>83</sup> However the degree to which this historicist perspective on nationalism has indeed lead to a questioning of the predominance of methodological nationalism in the social sciences is another matter entirely. See discussion of this in the earlier chapter, as well as the work of theorists such as Beck, or Wimmer and Schiller.

<sup>84</sup> John Torpey, *The invention of the passport*, 159.

Prior to the late nineteenth century various forms of seasonal labor migration as well as permanent migration flows took place across Europe with little regard for national borders.<sup>85</sup> In this not too distant context of the nineteenth century, large numbers of migrants regularly crossed national frontiers without requisite documents.<sup>86</sup> These patterns of migration, emigration and migration were not only largely unregulated by states, but also constituted the largest historical movements of people both within and out of Europe. As one commentator has put it, “the close association between citizenship and identity papers that we take for granted today was not enforced until the twentieth century.”<sup>87</sup> Border control therefore represents a distinctly modern phenomenon that only came into being following the First World War. Striking evidence of this fact is to be found in the relatively late articulation of a juridical basis of state control over immigration policy, which in fact did not emerge on the European continent, but across the Atlantic in the colonial settler states of the United States and Canada.<sup>88</sup> Not only do these legal rulings take place in the setting of the ‘new world’ but they rely on largely fictitious claims about the history of migration control exercised by European states. Despite their somewhat dubious foundations, these court rulings have played an important role within international law in helping stabilize and legitimate contemporary border-control practices.<sup>89</sup>

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<sup>85</sup> Leslie Page Moch, *Moving Europeans: Migration in Western Europe since 1650* (Indiana University Press, 2003).

<sup>86</sup> Valentin Groebner, *Who Are You? Identification, Deception, and Surveillance in Early Modern Europe*. Trans Mark Kyburz and John Peck. (New York, Zone books, 2007), 234.

<sup>87</sup> Valentin Groebner, *Who Are You?*, 237.

<sup>88</sup> *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892), cited in James Nafziger, “The general admission of aliens under international law.” *American Journal of International Law* (1983).

<sup>89</sup> As Nafziger notes, “In quick succession after *The Chinese Exclusion Case*, the Supreme Court delivered two further opinions, *Nishimura Ekiu v. United States* and *Fong Yue Ting v. United States*, which largely completed the elaboration of judicial doctrine, not only for the United States but for much of the modern world.” [James Nafziger. “The general admission of aliens under international law.” *American Journal of International Law* (1983): 826]

On the other hand, the fusion of state sovereignty, documentary controls, and nationality also remains a recent event. As noted above, states need to first develop elaborate institutional arrangements—grounded in a more general concern with their populations—in order become capable of drawing distinctions between nationals and foreigners. This process of bureaucratic rationalization remained uneven and its implications for norms of border control considerably underdetermined. This is illustrated in the inchoate nature of both early ‘passport’ measures and deportation practices. Although rudimentary documentary controls did exist in early modern Europe—these largely descended from older traditions of safe passage documents. Rather than vouchsafing the nationality of individuals, such documents originally attested to a claim to the king’s protection, acting as a deterrent to the actions of both non-state and state sanctioned predatory actors.<sup>90</sup> The difference between such documents and modern passport controls is captured by their mode of issuance, as well as their consequent ineffectiveness in substantiating either identity or nationality.

When implemented, passport practices of the late-nineteenth century frequently relied upon the issuance of travel documents of the country of entry, rather than of that of one’s nationality.<sup>91</sup> The divergence from contemporary practice—where a right to a passport is premised on the possession of national citizenship and grounds the basis of entitlements to diplomatic and consular protection while abroad—are manifest: the pre-modern passport established only a tenuous relationship between the bearer and their state of origin. Such rudimentary documents were also decentralized in their administration and poorly enforced, leading to their relatively

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<sup>90</sup> Mark B. Salter, *Rights of passage: The passport in international relations* (Lynne Rienner Publishers, 2003), 12-13.

<sup>91</sup> Valentin Groebner, *Who Are You?*, 234.

easy illicit duplication and circumvention.<sup>92</sup> Moreover, the non-existent and subsequently limited access to photography made these early documents ineffective as mechanisms for substantiating the identity of their possessors. Indeed, far from tracking nationality such documents provided a far greater constraint on mobility on class-based grounds, facilitating relatively ad-hoc and arbitrary movement restrictions on those identified as potential members of the mobile poor. Arguably then, the so-called passport of the eighteenth century was not a national identity document in any conventional sense, but a rank or social status document that distinguished the nobility from their subjects.<sup>93</sup> This connection with social station rather than nationality in part explains the frequent association of mobility restrictions and documentary controls in this era with the injustices of the *ancien regime* feudal order.<sup>94</sup> The association of mobility restrictions and feudal domination also helps explain the waning enforcement of passport controls during the nineteenth century, given their negative associations in a period of prevailing liberal sentiment.

The absence of a consistent linkage between nationality and border control can also be seen in the expulsion policies of states in the period preceding the development of modern passport controls. A central dimension of such policies concerned the ability of expellees to choose their border of expulsion. Under such procedures, individuals were generally provided with the option of what frontier they would be deported across, in part as a result of the influence of a dominant liberal ideology stressing individual freedom. From such evidence Frank Caestecker concludes that this widespread phenomenon “demonstrates the lack of importance

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<sup>92</sup> Ibid., 234.

<sup>93</sup> Ibid., 227.

<sup>94</sup> Thus Torpey tells us “Passport controls, in particular, had been a vital mechanism of domination under the old regime in France, and were clearly regarded as such by those who made the revolution there in the late Eighteenth century.” John Torpey, *The invention of the passport*, 21; see also Valentin Groebner, *Who Are You?*, 228.

attached to nationality in the nineteenth century” insofar as the import of being returned to ones country of origin was far from a self-evident dimension of exclusion policy.<sup>95</sup> Indeed, concerted efforts to subsequently rationalize such removal procedures on the basis of nationality were only undertaken through diplomatic agreements as late as the last decade of the nineteenth century.<sup>96</sup> However, the development of consistent deportation policies was, ironically, hampered by the limited capacity of states to identify the nationality of individuals. Without the further development of a coordinated and international passport regime, determining the citizenship of individuals remained an elusive task. As Caestecker notes,

The main difficulty in implementing these new deportation procedures was that the nationality of the expellee had to be clearly established in order to determine where they had to be expelled to. The mere attribution of nationality turned out to be extremely troublesome. During the sometimes long diplomatic negotiations to determine the nationality of undesirable aliens, they remained in the charge of the state which wanted to expel them.<sup>97</sup>

These features suggest that the association that we take for granted between territorial sovereignty, nationality and border control would only come to take concrete form with the expansion of the state’s desire and capacity to regulate migration. This in turn would require intensified coordination between states, paradoxically suggesting that realizing the unilateral claims we now associate with sovereignty in fact depend upon a recognition of the limits of

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<sup>95</sup> Frank Caestecker, “The Transformation of Nineteenth Century” in Fahrmeir, A., Faron, O., & Weil, P. (Eds.), *Migration control in the North Atlantic world: The evolution of state practices in Europe and the United States from the French Revolution to the Inter-War Period*. (Berghahn Books, 2005), 123.

<sup>96</sup> *Ibid.*, 127.

<sup>97</sup> *Ibid.*, 128. Compare this with the somewhat anachronistic account of Paul Weiss, which seems to not consider that it was precisely the nascent and uncoordinated status of such norms that would require a state to employ internment prior to negotiating the terms of expulsion. Paul Weiss, *Nationality and Statelessness in International Law*. (28. Brill, 1979): 46.

individual states to assert control of their borders. In this respect, the deployment of border coercion along national frontiers is a collective enterprise of the state system, a theme that we will return to in the final section of this chapter.

### 3.1 Inventing the Modern Passport and Border Controls

To understand the growing ability of states to regulate movement on the basis of nationality we must turn to the technology most important to this innovation—the modern passport system. John Torpey, the chief scholar of these developments has emphasized the centrality of passport controls, going so far as to suggest that they form an essential dimension of the ‘stateness’ of contemporary states.<sup>98</sup> Here I draw primarily on Torpey largely unrivaled scholarship on the emergence of the modern passport system in order to offer a brief but necessary account of these developments.

The aim of Torpey’s intervention is to explain the state monopolization of the legitimate means of movement—that is, how states came to distinguish between citizens and outsiders and consequently regulate the movements of both subjects and foreigners. This process has been central to the formation of the modern state. This is because, according to Torpey, states must be capable of “embracing” their populations in order to effectively extract resources—whether in the form of revenue, labor, or conscripts—in order to reproduce themselves over time. Identity documents and the organizational mechanisms necessary to implement them proved to be a central part of this project. However, Torpey notes that only recently have states gained the capacity to monopolize the authority to regulate movement, a process dependent on the development of elaborate bureaucracies, modern technologies of data, and the deployment of

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<sup>98</sup> John Torpey, *The invention of the passport*, 3.

effective documentary controls. The earliest parts of this processes can be traced back to the age of absolutism, leading up to an important juncture following the First World War, where the contemporary passport regime became a permanent reality.

Torpey's account of the drive of the modern state to monopolize the power to authorize movement is in part also an account of the stripping of private entities and agencies of their means of control over mobility, through such mechanisms as slavery or serfdom. According to Torpey, the distant origins of current passport controls lie in absolutist Europe. But importantly, these earlier attempts to restrict movement were generally viewed as an internal matter of specific states and tended to track distinctions of class or status, allowing authorities to distinguish between the nobility and their subjects, while allowing for the curtailment of the movements of the latter.<sup>99</sup> More crucially, such assertions to regulate the movements of subjects frequently represented more an aspiration or claim of state agents than an expression of concrete capacity. There was thus a sharp disjuncture between the aspirations of ancient regime polices that claimed to submit the movements of subjects to the sight of a omnipotent and centralized absolutist administration and the more complicated reality of matters during the period running from the sixteenth to the early nineteenth century. Groebner notes that during this time the absolutist state's "all embracing claim to control" coexisted alongside "patchy and contradictory policies" that left such aims in reality largely unrealized.<sup>100</sup> In Torpey's presentation, the French Revolution represents an important though complex and ambivalent juncture in the development of passport controls. On the one hand, it was in the context of the French Revolution that prior movement restrictions, associated with the domination and arbitrary power of the ancient regime,

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<sup>99</sup> Valentin Groebner, *Who Are You?*, 227.

<sup>100</sup> Valentin Groebner, *Who Are You?*, 227.

were abolished. Indeed, freedom of movement was enshrined as primary “natural and civil right” in the Constitution of 1791—a right that was on principle extended not only to citizens of the republic, but to foreigners and émigré alike.<sup>101</sup> However the tumultuous context of the revolution left these freedoms short-lived; as Torpey tells us, a degree of passport control was soon reintroduced at the departmental level and not long after policing forces were given the bureaucratic task of implementing passport and documentation checks, with the requirement for those entering France to hold or acquire a passport on arrival entering force the year after.<sup>102</sup> Yet the Revolution’s radical emphasis on freedom of movement did in fact anticipate larger transformations across Europe that would come to develop in the wake of the ebbing of French expansionism.

Indeed, following the Congress of Vienna and the conclusion of the continental hostilities of the Napoleonic wars, an era of unprecedented mobility and free movement began to unfold. During this period of relative peace a broad relaxation of intra-continental controls over movement was supported by the prevailing spirit of economic liberalism that began to take hold across much of Western Europe. While capitalist industrialization and technological innovations in transportation played an important role, Torpey’s account stresses the centrality of classical liberal ideology in driving these developments. On the one hand, this vision contributed to the gradual dismantling of internal mobility restrictions associated with the ancient regime orders, in part because of the dynamics unleashed by the creation of national labor markets as well as the by now morally untenable notion of tethering individuals to land. On the other, the liberal

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<sup>101</sup> John Torpey, *The invention of the passport*, 29.

<sup>102</sup> John Torpey, *The invention of the passport*, 30-31.



emphasis on the mobility of goods and individuals went further than merely dismantling feudal restrictions, leading to a broader age of free movement within Europe. As Torpey notes,

These developments came together under the ideological aegis of economic liberalism, which however held no strong brief for the sanctity of national borders. The result of this extraordinary conjuncture was that passport requirements fell away throughout Western Europe, useless paper barriers to a world in prosperous motion.<sup>103</sup>

Yet this was an ambivalent moment—for while the salience of nationality and of national borders for the movement of individuals was greatly diminished this did not in fact represent a withdrawal of the state. Indeed, as we have noted above, the era of liberalism was one of increased state interventions. In Torpey’s account part of this shift was constituted by a turn away from attempts to manage controls on movement toward the documentary substantiation of identity.<sup>104</sup> The point here is not that state investment in the bureaucratic mechanisms necessary for surveying populations and monitoring individuals diminished during this time, but that such mechanisms did not hinge on matters of nationality or national citizenship. Indeed, under the sway of economic liberalism and confronted with unprecedented innovations in the speed and accessibility of the means of mobility, much of the continent embraced a spirit of ‘laissez-faire’ labor migration, going so far as to dismantle or let fall into neglect earlier passport mechanisms.<sup>105</sup> An unprecedented degree of mobility both within and between states thus took hold over late nineteenth century Europe, one perhaps without parallel until the implementation of the contemporary Schengen area of the European Union almost a hundred years later.

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<sup>103</sup> John Torpey, *The invention of the passport*, 92.

<sup>104</sup> As Torpey tells us, “states’ insistence that they be able to embrace mobile populations resulted in a heightened preoccupation with identification documents that allowed governments and police forces to establish who (and ‘what’) a person was when they wished to do so.” (*The invention of the passport*, 92)

<sup>105</sup> John Torpey, *The invention of the passport*, 77.

This period of relatively free immigration and mobility came to an abrupt halt at the end of the long nineteenth century. The decades that followed witnessed the rapid and permanent emergence of highly restrictive practices of border control and migration. As Leo Lucassen tells us, “1914 is generally considered as the end of the free labor migration regime” which had allowed for the free movement of both people and capital across national borders. There were some important omens of this momentous shift. Notably, the two *fin de siècle* North American legal precedents mentioned earlier in this chapter signaled a notable change in the perception of state authority to regulate migration and entrance.<sup>106</sup> These judicial rulings heralded an end to an era of relatively unrestricted North American immigration, particularly in the case of the United States, and anticipated the implementation of thoroughly racist policies aimed at curbing unwanted immigration from China on the basis of ethnic quotas, policies that would remain in place in some form until the 1940s. More importantly, the turn of the century also saw the emergence of nascent ‘offshore’ visa procedures administered by consular officials at an emigrant’s point of departure, a development that would soon become a ubiquitous feature of twentieth century migration controls.<sup>107</sup> Indeed, while an era of free movement, this was also the age in which state interest in and capacity to deploy documentary identifications greatly expanded. However, the most noteworthy catalyst for the rise in the salience of national identity to individual mobility and well-being was the sudden outbreak of the First World War. Thus while there are antecedent phenomenon, “the ‘Great’ War’ generally stands out as the major

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<sup>106</sup> For further discussion, see James Nafziger, “The general admission of aliens under international law.” *American Journal of International Law* (1983).

<sup>107</sup> John Torpey, *The invention of the passport*, 99. Aristide Zolberg has written extensively of the development and emergence of these systems of what he calls ‘remote control’ which allowed states to “select immigrants by projecting [their] boundaries into immigrant-source countries.” [Aristide Zolberg, *A Nation by Design : Immigration policy in the fashioning of America*. (Harvard University Press, 2009), 5.]

watershed” among scholars of migration, marking a critical turning point in state involvement in cross-border movement.<sup>108</sup>

As hostilities within Europe rapidly unfolded, so too did the deployment of passport controls and documentary surveillance more broadly. Whether aimed at discouraging desertions or preventing enemy infiltration, European states brought their by-now consolidated and comparatively vast bureaucratic capacity to bear on the control of movement within their territories, understood initially as a temporary wartime measure. Yet the implications of this documentary identification regime were perhaps most pronounced with regard to the distinction between citizen and foreigner, helping give enduring effect to the perception of non-nations as a suspect group. As Torpey tells us, the war “brought to a sudden close the era during which governments viewed foreigners without ‘suspicion and mistrust’ and they were free to traverse borders relatively unmolested.”<sup>109</sup> Thus in France, Germany, and Great Britain, passport controls were put into force, either through reviving long un-enforced regulations that had otherwise been neglected since the revolutionary era, by the introducing of emergency laws necessitating passport restrictions, or through the passing of legislation that made national status central to territorial admission.<sup>110</sup> Notably, reflecting the dominant perspective that such movement restrictions could only be justifiably maintained in times of armed conflict, these controls were viewed as at most provisional.<sup>111</sup> Indeed, Leo Lucassen has gone so far as to suggest that even in

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<sup>108</sup> Leo Lucassen, “The Great War and the Origins of Migration Control in Western Europe and the United States” in *Regulation of Migration: International Experiences*, ed. Anita Böcker (Aksant, 1998), 45.

<sup>109</sup> John Torpey, *The invention of the passport*, 111.

<sup>110</sup> John Torpey, “Passports and the Development of Immigration Controls in the North Atlantic World during the Long Nineteenth Century” in Olivier Faron and Patrick Weil (eds.), *Migration Control in the North Atlantic World* (New York: Bergahn Books, 2003), 84.

<sup>111</sup> Salter (2003) indicates that the passport regime was not anticipated to last more than five years.

the context of the war, the permanent end of nineteenth century's age of free movement would have been far from evident to most contemporary observers.<sup>112</sup> Yet the emerging 'emergency' mobility restrictions did indeed persist. According to one commentator, the upshot of the introduction and persistence of these documentary controls on transnational movement was that within a decade of the end of the war the "laissez-faire era of international migration had come to a close."<sup>113</sup> With this decisive break, nationality and national belonging would come to matter as never before.

While the central role of the First World War as a catalyst for the shift away from norms of free movement is generally recognized, the reasons underlying the eventual permanence of such arrangements is the subject of greater debate.<sup>114</sup> Without intervening directly into that discussion, we can still identify a number of mutually reinforcing factors or trends that contributed to the growing concreteness and eventual permanence of the modern passport system. As already noted above, an important development preceding this more dramatic shift lies in the introduction of immigration restrictions and the deployment of mechanisms of 'remote control' among North American states. Such developments changed the dynamics of global migration flows by greatly restricting cross-Atlantic movement, with eventually knock-off effects for intra-European migration flows as well.<sup>115</sup> Yet at the same time as these shifts were occurring, major European states had also begun, at least in a preliminary manner, to create and

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<sup>112</sup> Leo Lucassen, "The Great War and the Origins of Migration Control in Western Europe and the United States." in *Regulation of Migration: International Experiences*, ed. Anita Böcker (Aksant, 1998).

<sup>113</sup> Alan Dowty, *Closed borders: the contemporary assault on freedom of movement* (Yale University Press, 1989), 83.

<sup>114</sup> Leo Lucassen, "The Great War and the Origins of Migration Control in Western Europe and the United States" in *Regulation of Migration: International Experiences*, ed. Anita Böcker (Aksant, 1998), 45.

<sup>115</sup> John Torpey, "Passports and the Development of Immigration Controls in the North Atlantic World during the Long Nineteenth Century," 86; John Torpey, *The invention of the passport*, 117.

implement national welfare systems and in some cases began to provide a greater political voice to the emerging labor movement. A consequence of this was that subsequent discussion of welfare provisions increasingly came to touch on the question of nationality in relation to the distribution of benefits.<sup>116</sup> Additionally, the rise in political prominence of labor movements also introduced a nationalist tinge to issues of labor migration. As Lucassen tells us, “[f]or the first time in history, states started to monitor migrants and to devise rules and regulations in order to protect the national labor market”—a development that could only have been exacerbated by the conditions of worldwide economic depression that would shortly follow.<sup>117</sup>

Indeed, another undeniable factor lies in the dramatic shift away from laissez faire economic ideology and policies, which had enjoyed unrivaled influence during the prior era of prevailing liberal sentiment. As documented in the work of Polanyi, “protectionism was everywhere producing the hard shell of the emerging unit of social life” as the end of the long nineteenth century bore witness to the appearance of a “new crustacean type of nation” that was inward-looking in both policy and practice.<sup>118</sup> Torpey links the persistence of constraints on cross-border movement to these “economic policies that dramatically reversed the economic liberalism that had underwritten the late nineteenth century period of unencumbered movement.”<sup>119</sup> The rapid end of free trade and rise of protectionism however only helped bring about the Great Depression, which imposed a world-wide state of acute economic crisis and

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<sup>116</sup> John Torpey, *The invention of the passport*, 121

<sup>117</sup> Leo Lucassen, “The Great War and the Origins of Migration Control in Western Europe and the United States” in *Regulation of Migration: International Experiences*, ed. Anita Böcker (Aksant, 1998), 45.

<sup>118</sup> Karl Polanyi, *The Great Transformation: The political and economic origins of our time* (Beacon Press, 1944.), 211.

<sup>119</sup> The possibility of this dynamic is hinted to in the work of Torpey, but remains a matter of some conjecture. See: John Torpey, *The invention of the passport*, 129.

instability throughout the 1930s.<sup>120</sup> What is more, the shifting economic circumstances themselves arguably soon became an intervening cause in reinforcing this very trend toward hardening national borders, as states that were now facing soaring unemployment levels sought to deflect unwanted labor migrants.

A more complex dynamic which likely contributed to the ossifying of passport controls, lies in a probable shift in perception regarding the nature of state capacity.<sup>121</sup> Prior to the introduction of passport controls during the First World War, the ability of states to regulate the movement of citizens and effectively police their borders remained largely untested. Yet the First World War, which witnessed the mass mobilizations of hitherto unimaginably large industrial armies, the deployment of highly planned rationing, centralized economic management, as well as other unprecedented state interventions, must have enabled quite a reappraisal of the state's bureaucratic and infrastructural power. Indeed, as we noted, prior to the war policymakers seemed to have at times viewed the radical technological innovations of the end of the nineteenth century as forever foreclosing the capacity of states to control their borders. The wartime restrictions on border crossings revealed these challenges to be far from insurmountable, a development that surely must have contributed to their persistence.

A final factor most pertinent to this project lies in the explosion and spread of mass refugee flows, beginning in the context of closing years of the First World War and persisting

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<sup>120</sup> It is worth noting that the economic depression cannot be treated as an exhaustive cause, given that prior economic crises had provoked no such parallel responses. [Leo Lucassen, "The Great War and the Origins of Migration Control in Western Europe and the United States" in *Regulation of Migration: International Experiences*, ed. Anita Böcker (Aksant, 1998), 46]

<sup>121</sup> John Torpey, "Passports and the Development of Immigration Controls in the North Atlantic World during the Long Nineteenth Century" in Olivier Faron and Patrick Weil (eds.), *Migration Control in the North Atlantic World* (New York: Bergahn Books, 2003), 87.

throughout the interwar era itself. Starting with the growing number of Russian émigrés fleeing the turmoil of the Russian revolution, the early twentieth century thus saw the proliferation of statelessness across the European continent. The various causes of these flows have already been canvassed at the opening of this chapter. These include the rapid and violent collapse of the multiethnic Russian, Ottoman, and Austro-Hungarian empires, the creation of a series of successor states in the wake of the end of hostilities, as well as the mass denationalizations and forced population transfers that accompanied these state-building projects. As noted by Aristide Zolberg, this was not the first time that the European continent had born witness to forced migration on a large scale.<sup>122</sup> However, what was distinct is that these displacements were increasingly framed and justified in terms of claims of national belonging. What is more, this period also bore witness to the novel combination of massive refugee flows alongside the till then unprecedented involvement of states in the identification of refugees as such. Indeed, prior to the twentieth century the state had not been an active participant in the identification and resettlement of displaced populations.<sup>123</sup> In this context passport controls were seen and actively employed as mechanisms to both deflect, as well as identify and intern, refugees and asylum seekers. Indeed, though thought of as temporary, “the development of immigration restrictions worldwide erected a new obstacle to the resolution of refugee problems.”<sup>124</sup> There was therefore a perverse feedback effect between the institution of passport controls and the proliferation and permanence of statelessness as a phenomenon, a subject we will return to in the next chapter.

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<sup>122</sup> Aristide R. Zolberg, “The formation of new states as a refugee-generating process.” *The Annals of the American Academy of Political and Social Science* 467, no. 1 (1983): 24-38.

<sup>123</sup> Saskia Sassen, *Guests and Aliens* (The New Press, 2000).

<sup>124</sup> Claudena M. Skran, *Refugees in Inter-war Europe: the Emergence of a Regime*. (Oxford, UK: Clarendon Press, 1995), 21.

### 3.2 Coordinating Citizenship: Nationality in the Inter-state System

The period surrounding the First World War represents a tipping point in the development and deployment of passport controls by European states, one that would for the first time place nationality at the center of border crossings. The radical reversal of Europe's age of free movement would be both permanent and long-lasting in its effects on the matter of statelessness. Yet a focus on the changing practices of individual state actors tells only part of the story, for equally important was the institutionalization of mechanisms of documentary control and border coercion at the inter-state level. Only through practices constituted through "states acting in concert" could the salience of nationality come to take on its current form.

A necessary dimension of the permanence of documentary controls and their enduring effect upon statelessness thus rests on the coming into being of novel interstate norms. We can help see how this is the case by considering the recent project of a number of scholars to understand the practice of state sovereignty itself as a socially constructed activity. Pace realist international relations theorists who have tended to naturalize the idea of state sovereignty as a timeless entailment of the logic of the system of states itself, constructivist theorists have attempted to delineate sovereignty as the outcome of historically situated and inter-subjectively constituted norms that came to structure the actions of state actors.<sup>125</sup> In a parallel fashion, the process of giving nationality concrete form also relied upon the development of shared state practices that began to take shape in the early twentieth century. Scholars have drawn attention to the crucial role of coordinate state action in this process. Thus Torpey tell us that,

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<sup>125</sup> Thomas J. Biersteker and Cynthia Weber, eds. *State sovereignty as social construct*. Cambridge University Press, 1996.



Ultimately authority to regulate movement came to be primarily a property of the international system as a whole, that is, of nation states acting in concert to enforce their interests in controlling who comes and goes.<sup>126</sup>

Thus the broader state system and increasingly more developed condition of international society were directly implicated in stabilizing the emerging regime of passport controls.

The clearest indication of the central role of coordinated state action in the consolidation of effective documentary controls and the subsequent salience of nationality can be identified by considering the functions implicit in the complex logic of the modern passport. While as individuals the more fortunate among us tend to experience the passport as a document authorizing—indeed, guaranteeing—entrance to our country of citizenship, from the standpoint of international law the passport governs relationships between states. In this context, the passport functions in conjunction with the doctrine of restricted returnability, under which a state is obligated to admit their own citizens to prevent situations in which the state of which the individual is a national might frustrate or undermine the legitimate efforts of another expelling or deporting an unwanted alien.<sup>127</sup> As Torpey puts it,

the fundamental purpose of passports from the point of view of international law is to provide to the admitting state a *prima facie* guarantee that another state is prepared to accept an alien that the destination state may choose not to admit or to expel.<sup>128</sup>

Yet the accomplishment of this end and the successful implementation of modern documentary controls centered on nationality is only possible through the cooperative practices of states. This

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<sup>126</sup> John Torpey, *The invention of the passport: surveillance, citizenship and the state*, (Cambridge University Press, 2000), 9.

<sup>127</sup> See Guy S. Goodwin-Gill, *International law and the movement of persons between states*, 44-46.

<sup>128</sup> John Torpey, *The invention of the passport*, 163.

is because with a shift to more rationalized and regularized passport controls, documents came to be issued by only a single state only to those able to assert their nationality.<sup>129</sup> However, in order to be effective as a mean to regulate cross border movement such documents must possess ‘interoperability’ within a broader international society.<sup>130</sup> They must be reasonably consistent and uniform, helping support and form a system of shared practices and regularly fulfilled expectations among states. Passport controls must come to constitute a regime of sorts.<sup>131</sup> Without doing so, they simply cannot fulfill their modern function in international relations.

Accordingly, a crucial dimension of the growing salience of nationality lies in the increasingly concrete interstate system that was coming into being. This process went far beyond the question of documentary controls, and yet the importance of state coordination in this matter remains particularly vivid. The necessity of such conditions is unavoidable, for as Salter has noted, in order to be effective mechanisms of control, passports must be standardized in international society.<sup>132</sup> The consequences of this necessity are only confirmed by the fact that the emergence of the modern international passport system as a complement to the developing mobility regime was soon accompanied by the international codification of passport practices.<sup>133</sup> The 1920 Paris Conference on passport controls essentially standardized such documentary controls for the first time, fixing them in both form and function to the present day. Subsequent

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<sup>129</sup> See Torpey (*The invention of the passport*, 83) for an account of the shift to state of origin as the sole issuer of passports.

<sup>130</sup> David Lyon, *Identifying citizens: ID cards as surveillance* (Polity, 2009), 99.

<sup>131</sup> Here I follow Krasner in understanding a regime as the “implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.” Steven Krasner. “Structural Causes and Regime Consequences: regimes as intervening variables.” *International Organization*. 36 no. 2. (1982).

<sup>132</sup> Mark B. Salter, *Rights of passage: The passport in international relations* (Lynne Rienner Publishers, 2003), 93.

<sup>133</sup> Mark B. Salter, *Rights of passage*, 77.

innovations also have relied on the development of shared international standards in order to realistically be implemented.<sup>134</sup> But the beginnings this necessary coordination—a clear indication that documentary controls of nationality must be collectively implemented by states—were already well underway shortly after the First World War.

Even the idea of the exclusivity of nationality—the notion each individual in principle belonging to no more than one country—can only be produced through the active coordination of states. This is simply the case because in the absence of such coordination the divergent nationality laws of different states may very well produce cases of multiple nationalities. The centrality of exclusive nationality to the emerging state system—and the apparent abhorrence of states of the possibility of multiple and thus conflicting loyalties—led to the subsequent development of international cooperation aimed precisely at eliminating such ‘anomalies’ of citizenship.<sup>135</sup> But such examples of the necessary recourse to joint-action on the part of states only further reveals the inter-subjectively constituted nature of national citizenship. For while states might claim to hold ultimate and exclusive authority over the distribution of nationality and granting of naturalization, without coordination among national authorities the realization of such prerogatives prove to be more than elusive.

## 4 Towards a History of the Present

In the above account I have attempted to sketch out the major shifts and historical developments necessary for the emergence of mass statelessness in the early twentieth century.

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<sup>134</sup> Consider for instance machine readable passport technology, introduced in 1985. [Mark B. Salter, *Rights of passage*, 94]

<sup>135</sup> Here we might consider the notable examples of the *1930 Hague Convention on Nationality*, which attempted to enable the coordination of nationality policies as well as the subsequent *1963 European Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*.

An important goal of this engagement has been to provide a needed supplement to some of the limitations present in Hannah Arendt's analysis, in part because of the powerful and enduring influence of the Arendtian story for our thinking about statelessness. In offering this intervention, I hoped to both draw attention to the material and institutional developments that explain why statelessness first emerged in the interwar era and stress how the institution of coercive border controls must be understood as a product of the state system. These insights help us understand the historical contingency and thus mutability of statelessness, while also broadening the scope of moral responsibility beyond the often narrow framing of such matters as the result of particular 'bad' states deviating from the otherwise functional norms of international society.

Equally important, a major aim of this account has been to draw attention to the contingent conditions that helped constitute statelessness as a permanent and enduring phenomenon as well as to begin to draw attention to the ad-hoc, and in many ways arbitrary, decisions and institutional responses, that formed the antecedent basis of our contemporary refugee system. More striking, much like the modern system of passport controls itself, the mechanisms put in place to deal with mass statelessness were understood as exceptional and far from permanent arrangements by their architects—who viewed such challenges as inherently temporary and limited in scope. Yet the decisions and institutional innovations of this period did indeed persist, deeply influencing down to the present day both our current refugee regime and international refugee law. Far from representing a normatively coherent framework, our present arrangements reveal deep marks from these contingencies.

In the next chapter, we turn to the contemporary state of statelessness as it has taken form in the period leading up from the inter-war era. The task of our discussion there will be two-fold. The chapter begins by offering an account of why statelessness remains a pressing problem today

and how it should be understood as a systematic pathology of our modern international order. In this account, the legacies of the early twentieth century discussed above are related to our contemporary circumstances, through a brief sketch of the emergence of the post-war refugee regime. The purpose of this historical reconstruction is to highlight how the subsequent development of the international refugee regime should be viewed with skepticism and concern. From here, the chapter turns to another important dimension of contemporary statelessness—the way in which even the limited normative constraints of the global refugee regime have recently been put under strain and systematically undermined by the actions of states. There I point to a growing number of state practices—from safe-third country agreements, to extra-territorial processing, to refugee interdiction—to highlight how important dimensions of this regime are becoming increasingly emptied of their normative content. This sets up the dissertation’s turn to developing a new framework for thinking of the claims of justice of stateless persons and refugees.

## Chapter 3

# The Contemporary Order of Borders: Statelessness as Domination

The last chapter began by turning to the origins of statelessness by way of a critical engagement with the work of Hannah Arendt. The analysis offered by Arendt has provided an important point of departure for much of contemporary political theory engaged with the normative questions raised by political membership and exclusion. However, there are some crucial limitations to Arendt's account, which remains insufficiently attentive to the particular historical circumstances that made mass statelessness possible in the interwar era.

In engaging with and expanding Arendt's account, I have tried to show why normative theorists interested in the questions raised by statelessness should engage with the constellation of contingencies that accompanied the emergence of statelessness. Such a perspective helps us appreciate the novelty and subsequent mutability of the modern form of exclusionary national membership as well as loosen the hold of methodological nationalism on our normative imagination. But of equal import, it allows us to reframe the problem of statelessness as the outcome of the state system itself, not merely as the effect of deviant states. Statelessness is the product of the practices of states acting in concert.

This chapter continues to pursue these critical objectives in a historical vein, but also moves toward more normative terrain. In the first part of the chapter I provide an account of the recent transformations that followed the interwar era and which gave rise to our contemporary international refugee regime, as it has taken form in both international law and global institutions. The task of this account is not only to provide context for the current politics of

statelessness and refugees, but also to shed light on the broader normative questions raised by the institutionalization of a global refugee regime in the twentieth century. My aim here is twofold. On the one hand I want to bring to the fore the deep imbrications of the international refugee regime in the interests of states. Itself born in the guise of stop-gap measures intended to expire with the predicted resolution of the refugee ‘problem’, the international refugee regime is as much a tool of powerful states as it is a system for the protection of individuals who have found themselves ejected from the normative order of the interstate system. While laudable in its broad aims, the regime is thus far from a merely neutral humanitarian mechanism. On the other hand, I draw attention to the ensemble of recent state practices that have helped gradually erode the normative core and practical effectiveness of the regime itself. Indeed, the very liberal states responsible for the post-war emergence and consolidation of this global regime have increasingly engaged in actions that severely undermine the capacity of the international regime to pursue its ostensive goals.

But the aspirations of this chapter are not merely historical. Having offered an account of the current state of statelessness, we can now turn to the normative implications of our contemporary context. In the final part of this chapter I argue that we ought to construe the situation of refugees and the stateless as a form of structurally constituted subjection to arbitrary power. Accordingly, I connect the forgoing historical analysis with a reframing of the situation of the statelessness as a condition of *domination*. This in turn is intended to provide grounds for re-conceptualizing our implication in, and responsibility for addressing, this form of injustice.

## 1 The Spread of Statelessness

As we have seen, coeval with the emergence of an increasingly global order of border control, the period following the outbreak of the First World War up through the Second World War saw

an explosion of statelessness and forced migrations across the European continent. The formation of new nation states grounded on the principle of self-determination in the wake of the collapse of the large land empires of Europe was a major initial source of these displacements, as these newly constituted polities attempted to force their populations to resemble the ideal of a homogenous populace. But political upheaval, fascist persecution, and the unprecedented brutalities of the Second World War rapidly increased the proliferation of statelessness across Europe, whether in the form of political *émigrés* fleeing authoritarian regimes, Jewish refugees in flight from Nazi-controlled Europe, or the more generalized displacements produced by armed conflict. By the war's end there were some 40 million refugees in Europe.<sup>136</sup>

The ramifications of these displacements and dispossessions were momentous. For the individuals who lived through these experiences, the departure from their homeland was a product of violence and coercion, but their flight and potential resettlement was often an equally precarious and traumatic experience. This was because liberal democratic states, both in Europe and beyond, were frequently willing to coercively block refugees or would-be asylum seekers from entering their borders.<sup>137</sup> Equally stunning was the proliferation of internment camps for containing refugees across the European continent, a practice that ostensibly liberal states did not hesitate to adopt despite the chilling parallels it suggested with the behavior of their ideological foes. Indeed, even at the conclusion of the Second World War, forced repatriation was a

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<sup>136</sup> Matjaž Klemenčič, "Migrations in History" in *Immigration and Emigration in Historical Perspective*, ed. Ann Katherine Isaacs, (Praeger, 2003), 42.

<sup>137</sup> One need only recall the example of the MS St. Louis—a ship carrying Jewish refugees to the shores of north America in 1939—being turned away at sea, thus effectively sending many of those on board to their deaths. I owe this reference to the discussion in: Joseph Carens. *The Ethics of Immigration*. (Oxford: Oxford University Press, 2014), 92-93.



widespread practice among the postwar authorities seeking to quickly and decisively resolve the refugee 'problem' that had emerged on the continent.<sup>138</sup>

Yet this was only the prelude to the globalization of these forms of displacement and exclusion. This spread of statelessness was in no small part predicated on the proliferation of the very institutional, technological, and ideational mechanisms that had unleashed this possibility on the European continent. A major driver of this phenomenon was the rapid spread of the nation state as virtually the singular model of a legitimate political community that accompanied decolonization.

The process of rapidly reconfiguring the relations of power that had existed between western states under formal imperialism and their former colonies created hitherto unheard of displacements of people across the globe. As with the state-creating and refugee-generating activities unleashed by the interwar redrawing of the borders of Eastern Europe, these refugee flows and forced migrations were undertaken under the prerogative of securing the ostensive conditions for national self-determination. The effects were staggering, the examples too numerous and ongoing to reference except in an exemplary manner. The partition of India and Pakistan resulted in the movement of 14.5 million persons across the newly drawn state borders. The war and ongoing conflict accompanying the creation of Israel resulted in over a million Jewish and Palestinian Arab refugees. Decolonization projects and civil war in Angola led to the forced displacement of over 1.5 million people. The Vietnam War and the subsequent defeat of the Saigon government led to more than one million refugees fleeing the country. But these

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<sup>138</sup> See Michael Marrus on the forced repatriation of soviet citizens; Michael Marrus, *The Unwanted: European Refugees in the Twentieth Century*. (Oxford, UK: Oxford University Press, 1985), 315. Other examples would include the postwar Bleiburg repatriations to Yugoslavia, as well as the repatriation of Cossacks to the USSR.

examples of the post-war period only represent a fraction of the cases of forced displacement and denationalization that have continued well into the twenty-first century.

The contours of the global refugee situation were deeply shaped by ideological contingencies. In particular, the Cold War had a notable impact on the way western liberal democratic states initially responded to those who arrived at their borders and in shaping support for resettlement. But technological and institutional developments, as well as their rapid spread to newly emerging states had a pervasive impact as well, allowing states to increasingly monitor and control the movement of people across the globe. However, this part of the post-war era also saw the emergence of what could be termed a global refugee system, intended to formalize and coordinate the protection of the growing number of individuals with no home within the increasingly concrete norms of membership of the state system. To understand the dynamics of our current context, in which an unprecedented expansion in international cooperation and organization is starkly coupled with the greatest number of displaced persons on record, it is crucial to trace the emergence of this regime and consider why it has fallen so short of its normative purpose.

## 2 A Brief History of a Regime: The Global Refugee System

I follow a number of scholars in understanding the contemporary global refugee system that has emerged over the latter half of the twentieth century as a well-established and institutionalized regime that shapes and informs current state practices. By regime, I mean a set of “implicit or explicit principles, norms, rules and decision-making procedures around which actors’

expectations converge in a given area of international relations”.<sup>139</sup> In contrast to more self-contained or distinct global governance regime, the imbrications of the current refugee system with a number of newer regimes may make it more appropriate to speak of a ‘refugee regime complex’ interlinked with various issue-areas, such as the regulation of travel and labor migration.<sup>140</sup> However, for purposes of this historical discussion I focus on the core institutions of the refugee system understood as a semi-distinct regime.

The aim of this section is to offer a brief history of the international refugee regime, in order to draw attention to the emergence of the substantive norms that underpin the regime as it has developed. Today the current regime is composed of a myriad of phenomena, including peremptory norms, international institutions such as the Office of the United Nations High Commissioner for Refugees, international conventions and agreements, such as the 1951 Refugee Convention and 1967 Protocol, as well as regional instruments. Together these norms, practices and institutions, inform and in some ways constrain the behavior of states with regard to the treatment of refugee claimants and asylum seekers.

These dimensions of the refugee regime did not merely spontaneously appear with the signing of the 1951 Convention. Rather, the 1951 Convention codified and legitimated preexisting norms that had begun to more formally emerge in the context of the various displacements of the early twentieth century and the ongoing necessity of dealing with large forced migration flows. The origins of the modern refugee regime can thus be traced to the context of interwar Europe, where unprecedented population flows and forced migrations

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<sup>139</sup> Steven Krasner, “Structural Causes and Regime Consequences: regimes as intervening variables.” *International Organization*. 36 no. 2. (1982): 185-205.

<sup>140</sup> Alex Betts, “The refugee regime complex.” *Refugee Survey Quarterly*, 29 no. 1 (2010): 12-37; Claudena Skran, *Refugees in Inter-war Europe: the Emergence of a Regime*, (Oxford, UK: Clarendon Press, 1995).

necessitated state cooperation and triggered the development of intergovernmental institutions. Moreover, the background principles that informed this emerging order did not arise from nowhere: the customary right to asylum and sanctuary have antecedents in practices dating back to the Middle Ages, with early international lawyers and political theorists defending a right of hospitality or refuge of refugees.<sup>141</sup> However, these practices were largely reserved for exceptional and infrequent occasions and did not significantly rely upon state cooperation; they did not, in other words, constitute anything close to a regime of global governance. Rather, it was only with the large movements of refugees unleashed by events at the opening of the twentieth century would states for the first time become active participants in the identification and resettlement of refugee populations, thereby precipitating the development of the interstate institutions and practices that would come to become the international refugee regime.<sup>142</sup>

While a turning point for the development of international coordination on responses to forced displacement and statelessness, the interwar era was by no means the first time the European continent had been the site of mass population transfers and expulsion.<sup>143</sup> As we have seen, what altered the situation and led to a growing perception of a ‘refugee crisis’ was the rapid implementation of passport documents and border controls in the decades just prior, which for the first time enabled states to effectively regulate the movement of people across borders.<sup>144</sup> The series of political upheavals across Europe triggered by the end of the First World War—in

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<sup>141</sup> See for instance: Hugo Grotius. *The Rights of War and Peace*, trans. Richard Tuck. (Indianapolis, Ind: Liberty Fund, 2005); Immanuel Kant. *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, trans. David L. Colclasure (New Haven, Yale, 2006).

<sup>142</sup> Saskia Sassen, *Guests and Aliens*, (New York, USA: New Press, 2000), 84.

<sup>143</sup> Aristide Zolberg, “The formation of new states as a refugee-generating process.” *The Annals of the American Academy of Political and Social Science* 467, no. 1 (1983): 24-38; Klaus J Bade, *Migration in European History*, (Oxford, UK: Blackwell Publishing, 2003).

<sup>144</sup> John Torpey, *The invention of the passport: surveillance, citizenship and the state*, (Cambridge: Cambridge University Press, 2000).

particular the implosion of the Ottoman, Austro-Hungarian, and Russian empires—initiated immense movements of people, beginning first with Russian émigrés fleeing the revolution and continuing through the interwar era. The newly erected border controls for the first time allowed states to attempt to repulse unwanted arrivals and actively exclude refugees from civil society.<sup>145</sup> As Skran notes, “the development of immigration restrictions worldwide erected a new obstacle to the resolution of refugee problems.”<sup>146</sup> This in turn would lead to a growing perception that such issues could only be addressed through international coordination.

The immediate response was the creation of a number of add-hoc institutional mechanisms. Chief among these was the Nansen International Office for Refugees, established by the League of Nations, and the ‘Nansen passport’, the first internationally recognized refugee travel document, which enabled refugees to transverse what by now were significantly more concrete state boundaries.<sup>147</sup> The International Office for Refugees—the ancestor of the current UNHCR—was crucial in developing and implementing international refugee policy. Indeed the organization was instrumental in securing agreement among states to accept the Nansen passport for the purposes of entrance. Relatively inchoate in institutional structure, the regime consisted of a number of agencies operating under the mandate of the League of Nations, which were only combined into a single organizational authority of the High Commissioner of Refugees in 1939. Alongside these official agencies, numerous private volunteer organizations participated in the regime, often providing a considerable degree of financial resources to the official agencies. Yet

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<sup>145</sup> Saskia Sassen, *Guests and Aliens*, 78.

<sup>146</sup> Claudena Skran, *Refugees in Inter-war Europe*, 21.

<sup>147</sup> The original organization, of which the Nansen office was itself a rapid descendent was the ‘High commissioner on behalf of the league in connection with the problem of Russian refugees in Europe’—an agency originally intended to specifically address the situation of Russian emigres fleeing the revolution. (Michael Marrus, *The Unwanted*, 89)

despite a decidedly ad-hoc formation—with agencies often arising in response to and restricted by their mandate to particular refugee populations—the nascent refugee regime was not merely functional in character. I follow Skran in suggesting that the emerging regime of the interwar era was characterized by three norms:

1. the preexisting norm of asylum which granted states and other political units the right to offer sanctuary within their territory;
2. a norm of assistance recognizing refugees' distinctly precarious status relative to other migrants; and
3. a presumption of burden-sharing, which entailed that all countries within the ambit of the regime were obliged to contribute to refugee assistance, regardless of whether they hosted refugee populations<sup>148</sup>

These institutional arrangements were complemented by legal instruments further elaborating state obligations. These included the 1933 and 1938 Refugee Conventions, both of which contributed to the definition of refugees under international law and in the explicit codification of the principle of non-*réfoulement*, prohibiting states from forcibly returning refugees to a country of persecution. These documents also helped specify the procedures and rules of the Nansen transit documents allowing refugees to travel, while also enumerating the rights of refugees including access to employment, welfare, and relief in their country of refuge.

While the nascent refugee regime increasingly gained legitimacy and support from states, it is important to stress that this was by no means a smooth process. Indeed, the fragmented and highly specified mandate of early agencies—such as the 'High Commissioner on behalf of the League in connection with the problems of Russian refugees in Europe'—likely reflected not

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<sup>148</sup> Claudena Skran, *Refugees in Inter-war Europe*, 70.

only the perception that refugee issues would be merely transient, but also the attempts of states to constrain and limit their institutional obligations. Likewise, Fridtjof Nansen had to devote considerable energy to lobby states for the distribution of his eponymous passport beyond Russian émigrés. Indeed, even the legal instruments that first formalized the preemptory norm of *non-réfoulement* contained an important escape-clause for states, allowing them to violate the rule if “national security or public order” required it.<sup>149</sup> More generally, “states were not pleased” about Nansen’s goal of expanding a body of rights for all refugees, and were generally resistant to sponsoring or hosting refugee populations.<sup>150</sup> However, the rapid and unprecedented developments that would soon follow would shift these perceptions, as states grudgingly came to see the necessity of instituting a refugee protection regime, if only to address their own interests.

As noted earlier, the Second World War led to the largest population movements in European history, resulting in a historically unprecedented number of refugees and internally displaced persons in the wake of the conflict. The populations uprooted by the war would not be fully re-settled until 1960, when the last refugee camps in Europe would finally be closed.<sup>151</sup> These realities of the post-war European context contributed to sustain investment in organizational coordination around refugee matters. A succession of international bodies—the United Nations Relief and Rehabilitation Administration in 1943, the International Refugee Organization in 1946, and finally, the United Nations High Commissioner for Refugees in 1950—were organized to oversee refugee protection and resettlement, with a number of private volunteer organizations and NGOS playing a role as well. Increased normative support of these

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<sup>149</sup> Claudena Skran, *Refugees in Inter-war Europe*, 72.

<sup>150</sup> Michael Barnett and Martha Finnemore, *Rules for the world: International Organizations in Global Politics*, (Ithaca: Cornell University Press, 2004), 78.

<sup>151</sup> UNHCR, *The State of The World’s Refugees 2006: Human Displacement in the New Millennium*, (Oxford, UK: Oxford University Press, 2006), 119.

features of the refugee regime was given first by the Universal Declaration of Human Rights of 1948, which recast the right of asylum as a human right. More concrete legal reinforcement of these norms was provided by the 1951 Convention Relating to the Status of Refugees, which again enshrined the definition of the refugee in international law, enumerating the rights of refugees, while also prohibiting the practice of *réfoulement*.

It should be remembered that the post-war Refugee Convention was originally limited to Europe, and to events occurring before January 1951. The reasons for these geographical and temporal limitations were not altogether cynical. The drafters of the 1951 Convention, like their optimistic predecessors in the interwar era, had viewed the refugee situation of post-conflict Europe as a temporary and transient phenomenon. Indeed, the core institution of the contemporary refugee regime—the UNHCR—was originally limited to a five-year mandate, with the ‘refugee problem’ expected to be fully resolved within a short window.<sup>152</sup> However, the worldwide proliferation and persistence of refugee flows ensuing from decolonization resulted in the entrenchment of these institutional arrangements and the introduction of additional legal instruments. The 1967 Protocol Relating to the Status of Refugees eliminated the temporal and geographic constraints of the 1951 Convention, providing a broader framework for the international refugee regime. These international agreements have been further supported and extended by regional instruments aimed at improving the protection offered to refugees. These include the 1969 OAU Convention on Refugee Problems in Africa, the 1954 Caracas Convention on Territorial Asylum, the relatively expansive 1984 Cartagena Declaration, and more recently and ambiguously, the Common European Asylum System initiated by the Dublin Convention in 1990. These institutional arrangements and legal instruments to some degree reinforced the

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<sup>152</sup> Remarkably, the UNHCR would continue to operate on a temporary five-year mandate up until 2003.



central normative principles of the nascent refugee system of the interwar era, giving concrete form to the contemporary refugee regime complex.

The post-war era also saw a more general consolidation of international human rights norms, with states increasingly incorporating human rights discourse into a number of areas such as minority rights, humanitarian intervention, and immigration policy. These developments reinforced the core normative framework of the refugee system that originated under the aegis of liberal states in the interwar era. With a growing operational budget and expanded mandate, the UNHCR increasingly came to coordinate the humanitarian efforts of the evolving refugee system, while also providing a partial mechanism of burden sharing across states.<sup>153</sup> These developments helped reinforce the normative principles that had first emerged in the context of the interwar era. The norm of assistance, recognizing the claim of refugees to special consideration in light of their precarious status, was further stabilized by the inscription and formalization of the definition of the refugee in the 1951 Refugee Convention as well as 1967 Protocol, and by the widespread endorsement of these instruments by state actors. The burden-sharing norm—which admittedly had only been rather imperfectly implemented in the interwar context—was greatly strengthened by the growth and development of the UNHCR, which by the 1970s was a robust and influential organization, with considerable operating resources.<sup>154</sup> Unlike its pre-war predecessors, the UNHCR was no longer primarily funded through volunteer private organizations, but received resources as part of the official UN budget. Combined with a mandate expanded beyond its original European focus, these arrangements amounted to the *de*

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<sup>153</sup> Gil Loescher, Alex Betts, & James Milner (eds). *The UNHCR: The Politics and Practice of Refugee Protection into the Twenty-First Century* (London: Taylor & Francis, 2008), Chapter 2.

<sup>154</sup> Michael Barnett and Martha Finnemore, *Rules for the world*, 93; See also: Gil Loescher, Alex Betts, & James Milner (eds). *The UNHCR: The Politics and Practice of Refugee Protection into the Twenty-First Century* (London: Taylor & Francis, 2008).

*facto* implementation of burden-sharing arrangements, especially given the relative willingness of Western states to participate in refugee re-settlement arrangements up through the 1970s. Finally, the norm of non-*réfoulement* gained further support from the policy-bias of UNHCR toward resettlement and third-country asylum more generally. This was primarily a product of the Cold-War situation, where the possibility of repatriation was widely dismissed in the 1950s as simply not viable.<sup>155</sup> More broadly, the “the foundation stone of international protection,” the principle of non-*réfoulement*, continued to play a central place in the development of the international refugee regime, guiding both the formation of treaty law as well as the incorporation of refugee protection into the municipal law of states.<sup>156</sup> Together such developments lead to an increasingly progressive expansion of the refugee regime and a general strengthening of protection mechanisms up through the end of the Cold War era.

### 3 From Coalescence to Erosion

The emergence and subsequent development of a global refugee system in the twentieth century undeniably represents a noteworthy accomplishment of international organization, both with regard to state cooperation and the provision of humanitarian assistance. Indeed, the refugee system is arguably among the most developed international regimes to have emerged at the global level. However, a number of factors call into question both the normative coherence and continued effectiveness of this system.

Postwar refugee politics underwent a transformation, at first gradual and then increasingly rapid, following the period of consolidation and institutionalization considered

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<sup>155</sup> Barnett and Finnemore note, “[i]n keeping with the times, UNHCR quickly established an exilic bias: the only conceivable solution for refugees was to reside permanently outside their homeland.” (*Rules for the world*, 83)

<sup>156</sup> Guy Goodwin-Gill, *The Refugee in International Law*, (Oxford: Clarendon Press, 1996), 30. Also see *Ibid.*, 20-25, for discussion of both regional and municipal incorporation.

above. Arguably the Cold War ideological context did much to encourage Western states during this earlier period to strengthen the refugee regime and support the exilic or resettlement bias of the UNHCR. In this sense, notable Western support for refugee and asylum policies might be read as part of a broader political project to undermine the legitimacy of their Soviet adversaries, especially with regard to offering sanctuary to individuals wishing to flee the confines of the Iron Curtain.<sup>157</sup> Yet at the same time, broader changes in the nature of refugee flows were triggering shifts that would severely mitigate the significance of these developments in the long term. The decolonization processes alluded to above and the resulting proliferation of mass refugee flows was changing the points of origin of refugees and asylum seekers. No longer appearing only in the visage of the displaced European fleeing fascist or communist rule, refugees were increasingly arriving from beyond the continent, whether from former colonial possessions or elsewhere. Moreover, the rapid introduction of comparatively affordable air travel increasingly made the shores—or rather the airports—of Western states a possible place of arrival for refugee claimants from across the globe as never before. These developments might plausibly explain the rapid shifts in the nature of the refugee regime following the peak of its consolidation, changes which we shall turn to shortly.

However, before turning to the effects of emerging state practices that would subsequently erode core elements of the refugee system, it is important to address the normatively problematic deficits internal to the system itself. Here it is helpful to keep in mind the largely ad-hoc development of the regime. While we may be tempted to think of the refugee system as representing a coherent system of norms designed to provide both international

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<sup>157</sup> For a compelling account of the expressive and political nature of asylum policy and refugee politics, see: Matthew E. Price, “Politics or Humanitarianism? Recovering the Political Roots of Asylum,” *Georgetown Immigration Law Journal*, 19 (2004).

protection and humanitarian assistance, the development of this regime was shot through with contingency, representing pragmatic policy responses made under the mistaken presumption that large refugee flows would be a passing phenomenon. Here it may be useful to canvass some examples that illustrate this uneven and unplanned development. As noted earlier, the most enduring international response for refugee assistance—the UNHCR—was founded under a five-year temporary mandate, originally intended to have rendered itself obsolete after that time. The 1951 convention—arguably the legal backbone of international refugee law—was initially restricted in its applicability to the European continent and to refugees from before 1951. Indeed, even the narrow definition of the refugee that came to be enshrined in International Law can be understood as an artifice of the political context in which it was developed.<sup>158</sup> These realities at least provide *prima facie* reasons to harbor doubts regarding the normative consistency of the regime with regard to the interests of refugees, asylum seekers, and stateless persons.

A study of the normative deficits of the international refugee system even at its most expansive and robust state cannot be undertaken here. But before turning to the role of state practices in undermining the regime, I want to briefly flag two shifts internal to the regime itself that would have important long-term implications for the efficaciousness of international refugee protection. The first transformation was from group-based to individual-based refugee status

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<sup>158</sup> Consider here the language defining a refugee in the 1951 convention: “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” (*1951 Convention Relating to the Status of Refugees*)

determinations.<sup>159</sup> In the founding inter-war years of the regime under the leadership of Nansen, refugees were treated in terms of a group-based definition.<sup>160</sup> The significance of this was that the determination of refugee status and access to the protection mechanisms and travel documents of the regime was based not on an assessment of the individual, but ascribed to all persons fleeing from a particular context of conflict.<sup>161</sup> However, the policies of the post-war refugee system increasingly moved away from this model to an individuated approach to assessment. The turning point of this shift began in 1938 with the terms of reference issued by the Intergovernmental Committee on Refugees, which “focused on personalized criteria of political opinion, religious belief and racial origin to evaluate the merits of claims to refugee status.”<sup>162</sup> The change from group-based to individuated assessments would subsequently inform the post-war international refugee regime based around the UNHCR. This shift arguably had its merits at the time of its inception. Providing a generalized definition of the refugee as an individual would offer a concept of refugeehood that could travel, allowing the designation to function globally rather than being linked to particular locations and events declared. Yet at the same time, this shift in the nature of the regime also opened up opportunities for states to

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<sup>159</sup> For an extensive discussion of these shifts, see: James C. Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950,” *The International and Comparative Law Quarterly*, Vol. 33, No. 2 (Apr., 1984): 348-380.

<sup>160</sup> Consider the following definitions from attempts at regularizing the system of identity certificates for refugees, dating from interwar era: “Russian: Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality”; “Armenian: Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.” (League of Nations. “Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees,” 12 May 1926, *League of Nations Treaty Series* 48.)

<sup>161</sup> As Hathaway notes of such arrangements, “The individualist view of refugee status, that is, the approach which seeks to accord protection to persons who find continued residence in their country either impossible or intolerable, was of no appreciable influence. Refugee status was defined strictly on the basis of group as opposed to individual characteristics.” [“The Evolution of Refugee Status in International Law: 1920-1950,” 361]

<sup>162</sup> James Hathaway, “The Evolution of Refugee Status in International Law: 1920-1950,” 327.

strategically limit their responsibilities toward refugees. The primary way this has happened is by opening up the capacity of states to exercise wider discretion in the assessment of claims to refugee status, one that has had profound implications for the increasingly de-humanizing treatment asylum seekers face and in the precipitous fall in the number of refugees who are actually granted status. While the group based approach possessed limitations, it did have the merit of establishing refugee claims on grounds of international consensus and through a general and public conferral of the status to those fleeing known areas of conflict. In contrast, the individuated model has increasingly empowered states to discriminate between those it deems ‘real’ refugees and apparent ‘impostors’ attempting to evade immigration controls. This in turn arguably has had a number of far reaching effects. First, the shift toward the individuated model opened the path for states to be able to manipulate their responsibilities in contributing to the collective aims for global refugee protection. The adjudication of status takes place on a case-by-case basis, generally operating within a quasi-judicial framework in which an individual’s claims are assessed for veracity and sincerity. Yet this framework has been seen to be highly susceptible to shifts in the public perception of asylum seekers, allowing states to quite sharply reduce the number of refugees they accept, while at the same time preserving the image of an objective, politically neutral process.<sup>163</sup> As Didier Fassin has demonstrated in his studies of changes in French asylum policy, there has been a radical shift in the proportion of successful claims. While official narratives that dominate the media tend to explain this by way of emphasizing the rise of

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<sup>163</sup> As Fassin notes, “The most remarkable change in the politics of asylum over the past few decades has been the reversal of trust into mistrust. Confidence dominated in the mid-1970s, when more than nine out of 10 claimants in France were granted asylum. By contrast, doubt appears to have taken firm hold in the mid-2000s, when barely two out of 10 claimants obtained refugee status. The comparison between a criminal court and an asylum court is instructive: Whereas in the former those accused of a crime are deemed innocent until proven guilty, in the latter those who are allegedly victims of persecution are suspected of lying until their trustworthiness is established. In criminal court, the judge and the prosecutor have clearly separate functions; in asylum court, the magistrates are prosecutors during the hearing and judges during the deliberation. Forty years ago, almost all claimants were granted asylum in France; today, most of them are rejected.” Didier Fassin, “From Right to Favor.” *The Nation*, April 2016.

asylum fraud, Fassin notes that “changes in the liberality of the institutions in charge of granting asylum do not correlate with fluctuations in the number of claimants. Despite irregular variations in the latter, the initial admission rate has regularly decreased in France since 1976.”<sup>164</sup> The overall outcome of this trend in France has meant a shift from an asylum acceptance rate of 90% in the mid-1970s to the situation of the mid-2000s in which barely 20% of claimants are granted refugee status. These findings are striking, for they suggest that even in the context of an increasing global refugee population, there has been a linear decline in the proportion of ‘successful’ asylum claims; a development no doubt enabled by the discretionary power opened up by the individuated model.

While the individuated model has allowed for the de-politicized gradual closure of access to asylum, it is also lead to the rise of an increasingly objectifying and dehumanizing institutional apparatus for adjudicating such claims. As Chandran Kukathas notes,

Over the years the legal and bureaucratic obstacles to presenting a case for asylum have increased and applicants have been turned into objects of suspicion, dehumanized not only by their subjection to a bewildering array of scrutinizing procedures but by the reduction of their life histories to a series of objective statements on certificates that will be used to determine whether or not the candidate merits selection. The subjective experience of the refugee is played down, discarded, or never inquired into as the emphasis is placed on whether clinical evidence is available to corroborate claims of torture or abuse that led to flight or escape.<sup>165</sup>

Moreover, by creating this dichotomy between real and false refugees, states have been far more able to justify the implementation of quasi-punitive policies, such as mandatory detention, and with that the emergence of an extensive array of prisons that often hold ‘failed’ asylum applicants who are also recognized to be ‘un-deportable’ to their country of origin on the very

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<sup>164</sup> Didier Fassin, “From Right to Favor.”

<sup>165</sup> Chandran Kukathas, “Are Refugees Special” in Sarah Fine & Lea Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership*. (Oxford University Press. 2016), p. 262.

grounds that doing so would pose a threat to their safety. Additionally, questions of ‘authentic’ refugees have made hostility or suspicion a pervasive reaction among the publics of Western democracies, with citizens increasingly wary of letting ‘bogus’ refugees into their country. Finally, the individuated model has also imposed the imperative that individuals seeking refuge and safety conduct themselves appropriately so as to appear as legitimate refugees. Indeed, precisely because of the great discretionary power open to states in making such decisions, individuals seeking refugee status feel compelled to conduct themselves in the manner of victimhood, even after having escaped oppression.<sup>166</sup>

The second important transformation in the regime is the gradual reversal of the exilic bias supporting resettlement that had come to characterize the post-war refugee regime centered on the UNHCR. As noted earlier, in part due to the political context of the Cold War, for a number of decades following the establishment of the UNHCR a broad consensus existed that return was not a viable policy option for refugees. Indeed, this exilic bias also informed the context in which the legal core of the refugee regime was established, for the 1951 Convention “was drafted at a time when voluntary repatriation was effectively obsolete.”<sup>167</sup> Consequently, refugee protection centered on third-country settlement, an approach appropriately referred to as implementing “permanent solutions” to refugee displacements. Yet concurrent with the shift in the nature of refugee flows noted earlier, the exilic bias of the regime gradually gave way to a policy preference centered on eventual voluntary repatriation, with local integration or

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<sup>166</sup> There is an interesting analysis yet to be written on the compulsion to act like a refugee that the individuated model introduces, by connecting this with governmentality and the conduct of conduct. Within such a framework the individuated model thus represents an exercise in ‘productive’ power. However I cannot pursue this line of argument further within this project and so Foucault must be relegated to the footnotes.

<sup>167</sup> Guy S. Goodwin-Gill, “Asylum: The Law and Politics of Change”, *International Journal of Refugee Law*, Vol. 7, No. 1, (1995): 8.



resettlement operating as less preferred alternatives. The shift to a framework of “durable solutions” is difficult not to view as a concession to pressure from Western states now no longer interested in accepting significant numbers of refugees. Although the three durable solutions were formally supposed to provide a permanent resolution to the precarious situation of refugees, offering them some way to regain full membership, the withdrawal of serious support for resettlement increasingly made repatriation and local resettlement the only viable options, with the latter now placing the responsibility and costs of often indefinitely hosting refugees largely on the developing world.<sup>168</sup> This point is put succinctly by Chimni: “Shorn of euphemistic verbiage the new approach stated that since refugees from the South were now making their way to the North, and since there was at present no shortage of labour, it was time to rethink the solution of resettlement in other than the limited Cold War context.”<sup>169</sup> The implications of these developments are considerable. Most disturbingly, the durable solutions framework has led to a proliferation of cases of forced repatriation, thereby implicating the regime itself in violations of its fundamental norm of *non-refoulement*.<sup>170</sup> Beyond this, the shift to durable solutions has also greatly increased the ambit of state discretion. The reason for this is that states increasingly appealed to ‘objective’ conditions in deciding when refugee status might be revoked. But as Chimni astutely notes, “what objectivism tends to do is to substitute the subjective perceptions of

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<sup>168</sup> Indeed, it is hard not to see a connection between the radical reduction in support for third country resettlement by rich western states and the resistance of developing nations to seriously engage in local integration. Only about 1% of the global refugee population is voluntarily resettled in third countries. This means that most refugees remain in countries in their region of origin, often in bordering states in the developing world. Because these states often are compelled to take in enormous numbers of refugees, and as developing nations, are often least prepared to handle such situations, they are often unable or unwilling to make local integration a viable option, perhaps because they simply lack the capacity or infrastructure.

<sup>169</sup> Bupinder S. Chimni, *From resettlement to involuntary repatriation: towards a critical history of durable solutions to refugee problems* (Geneva: UNHCR, 1999), 58.

<sup>170</sup> Bupinder S. Chimni, *From resettlement to involuntary repatriation*, 58-60.

the State authorities for the experience of the refugee.”<sup>171</sup> This largely evacuates the normative content of the requirement that repatriation be voluntary, as the consent or even perception of the refugee is rendered insignificant.<sup>172</sup> This produces a situation in which the protections granted by the refugee regime are increasingly arbitrary, rendering the situation of individuals dependent upon the regime fundamentally precarious. Indeed, the effective collapse of three durable solutions helps explain why intergeneration refugee populations confined to camps have now become a reality in many parts of the globe, creating a situation in which there are now significant numbers of individuals who are born refugees and die as refugees.

A final issue arising from this shift within the regime is the visible distortions it had produced in the burden-sharing arrangements of the refugee system. The gradual withdrawal of support for settlement options within western states has meant that the burden of hosting increasingly long-term refugee populations fleeing from protracted conflicts has largely come to fall on states in neighboring regions. These states are frequently far from prepared to host large influxes of refugees; indeed several host countries that have offered “refuge to thousands and thousands of refugees are among the poorest in the world”.<sup>173</sup> The outcome of this is that refugee populations are often subject to long-term confinement in camps suffering from both overcrowding and pervasive material deprivations.

Yet these changes internal to the regime itself only represent one dimension of the undermining of the global refugee system. The actions of powerful states that have done even

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<sup>171</sup> Bupinder S. Chimni, *From resettlement to involuntary repatriation*, 62.

<sup>172</sup> As Chimni notes, “once refugee determination authorities began to rely on objective factors, as opposed to a combination of subjective and objective factors, to determine refugee status, the standard of voluntary repatriation was undermined.” (*From resettlement to involuntary repatriation*, 61)

<sup>173</sup> Bupinder S. Chimni, *From resettlement to involuntary repatriation*, 67.

more to subsequently compromise the effectiveness of the global refugee system. The range of these practices is broad, including increasingly militarized border controls, the extensive use of interdiction policies to intercept potential claimants, and the use of territorial excision to avoid the invoking refugee protection mechanisms, as well as other activities. A fully adequate discussion of these developments is beyond the scope of this chapter, and so I will confine myself to discussing one important state practice in an exemplary fashion: Safe Third Country Agreements.<sup>174</sup> I focus on this specific case because, as we shall see in the final chapter, it has played a significant role in the contemporary response of the European Union to the current migration crisis and in this context has clearly implicated European states in undermining the most fundamental norm of the refugee regime, insofar as it results in documented cases of chain refoulement.<sup>175</sup>

So called ‘protection elsewhere’ policies or ‘Safe Third Country Agreements’ are an increasingly prevalent practice among liberal states attempting to further limit refugee claims. These practices are constituted through either multilateral or bilateral treaties, and thus are clearly a product of inter-state coordination, albeit for perverse ends. Such policies in essence enable states to minimize the obligations of refugee protection usually entailed by an asylum seeker entering the jurisdiction of a state. The apparent logic underlying ‘protection elsewhere’ policies is that potential asylum claimants can be compelled to apply for refugee status determination in ‘safe’ countries they have transited en route to their intended destination,

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<sup>174</sup> For further discussion, see Craig Damian Smith and Kiran Banerjee “States Behaving Badly: State Practice and ‘Bad Norms’ in the International Refugee Regime” (forthcoming).

<sup>175</sup> For the UNHCR’s earlier expressions of concern regarding the outcome of ‘pushbacks’ to Turkey, see: UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v Italy and Greece (Application No. 16643/09)*. These earlier concerns notwithstanding, our current situation has seen this arrangement formalized under a bilateral agreement between the EU and Turkey.

thereby permitting a state to avoid the obligation of assessing the asylum claim of the individual. These policies have been enacted by many liberal states, such as the US and Canada through the bilateral arrangements of the Safe Third Country Agreement, or effectively across the entirety of the European Union under the Dublin Regulation II, which assigns asylum processing to the state of first entry. As Foster notes, such policies of ‘protection elsewhere’ are now “well entrenched in state practice, and ostensibly approved by the UNHCR” although their compatibility with international refugee law is far more ambiguous.<sup>176</sup> Although problematic in their own right, these policies have been further expanded through Designated Countries of Origin (DCO) policies, which aims to reduce or minimize the ability of individuals to even claim refugee status if they are deemed to have arrived from a country considered to not normally produce refugees. This last policy trend in some ways represents a perverse return of the group-based mode of refugee status determination, except instead of being exercised by international public bodies to extend refugee protection, here it is used unilaterally by liberal states to categorically deny protection.

The practice of Safe Third Country agreements represents only one dimension of a much larger set of emergent state behavior that has greatly compromised the core norms and general efficacious of the international refugee system. What is most striking about this phenomenon is that the very states who have increasingly implemented such policies are the liberal states most directly responsible for the emergence of the regime. Strikingly it has been many of the liberal states that were the core actors in the creation of the regime that have contributed most directly to gutting its normative core. Yet such behavior raises a puzzle of its own—if powerful liberal

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<sup>176</sup> Michelle Foster, “Responsibility Sharing or Shifting? ‘Safe’ Third Countries and International Law. *Refugee*. Vol 25, No 2 (2008): 65.

states are doing so much to compromise the refugee system, why have they remained reticent to totally dismantle the regime? The reason may lie in the fact that allowing the regime to persist, albeit in a rather weakened form, serves the interests of rich and powerful liberal states. Rather than representing a merely humanitarian response to increasingly widespread and permanent dislocations, the regime itself allows western states to legitimize this state of affairs—insofar as there does in fact remain an international protection regime—while also largely insulating themselves from the direct effects of refugee flows.<sup>177</sup>

The emergence of the international refugee system was itself a result of states begrudgingly recognizing the need for some coordinated interstate response to mass displacements and forced migrations. These developments were reinforced by a postwar context in which refugee policy formed a part of a broader Cold War ideological landscape, which led to a general strengthening of the refugee system. While states have done much to gut the regime subsequently, a reason they have refrained from collapsing it may lie in the fact that doing so would require remaking it, perhaps on terms not so favorable to rich liberal states, given that such institutions would be reinvented in a context in which a far broader range of stakeholders might have a voice. Thus perpetuating the regime while undermining its effectiveness is the most advantageous strategy for liberal democratic states wishing to minimize their exposure to mass refugee flows.

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<sup>177</sup> Consider the example of Western criticisms regarding reported cases of pushbacks by Turkey of Syrian refugees. While this criticism is certainly necessary, it is striking that Western states seemingly see little contradiction between such critiques and the fact that only 1% of the world refugee population have access to third-country resettlement. Nor do they seemingly see the development of bilateral mechanisms, such as third-country agreements, as representative of an attempt to further strategically exploit the current regime to insulate their exposure to persons in need of international protection.

## 4 Statelessness as Domination

Having concluded a historical analysis of both the origins and the contemporary circumstances of statelessness, we are now prepared to address the conceptual implications of the forgoing account. This final part of chapter begins to develop the novel conceptual framework to approaching statelessness that informs the normative dimension of this project. Drawing on Hannah Arendt's influential rendering of statelessness in *The Origins of Totalitarianism*, I suggest that we understand the central injustice suffered by the stateless as a form of *domination*. This characterization of statelessness as the denial of a fundamental status necessary to secure one from subjection to arbitrary rule motivates my subsequent turn to the neo-republican notion of non-domination as a way of understanding how we might redress the harms faced by the stateless. Thus in chapter Five I draw on the work of a number of neo-republican theorists who have begun to turn to the global context, arguing that the notion of *freedom as non-domination* provides a useful framework for challenging the injustices created by our contemporary international order. But here I start by explaining why we ought to understand statelessness in terms of domination in the first place.

Despite my call to supplement the historical dimensions of Arendt's account of the origins of statelessness, my characterization of statelessness as domination takes its inspiration from her attempt to understand the significance of the experience of stateless persons. In this regard, I understand Arendt's notion of the "right to have rights" and the significance of its loss for an individual as a way of conceptualizing the injustice of statelessness. In her reflections on the plight of the refugee, Arendt emphasized that the fundamental harm stateless individuals face arises from their loss of citizenship status. Thus, while Arendt acknowledged the material deprivations and denial of legal status that the stateless suffered as important, it was above all

this absence of political status that rendered their position precarious. This is because what the loss of citizenship foreclosed was the context in which particular rights could have any substantive meaning. Thus, while the stateless might contingently be granted the ‘right’ of freedom of movement or freedom of opinion, they could still remain fundamentally rightless according to Arendt. The reason for this was that with their exclusion from political community and concomitant loss of political status the stateless became rightless, for they suffered the absence of the *standing* that enabled all other rights. As Arendt writes, “[p]rivileges in some cases, injustices in most, blessings and doom are meted out to them *according to accident and without any relation whatsoever to what they do, did, or might do.*”<sup>178</sup> I take Arendt to be suggesting that the stateless were rendered fundamentally rightless precisely because they lost the political membership of citizenship within a community that secured these rights and, with that, the standing with which to claim them. Thus the ‘right to have rights’ is the status that enables one to be treated as a rights holder, and with that, to demand that one’s actions and words be taken into account. In this sense, without access to the standing of citizenship the stateless are made to suffer a form of domination. What entitlements they are allowed are contingent on the decisions of others they cannot hold answerable and with whom they hold no sway. They are therefore subjected to arbitrary power.<sup>179</sup>

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<sup>178</sup> Hannah Arendt, *The Origins of Totalitarianism*, 296. Italics mine.

<sup>179</sup> Arendt’s critique of human rights sheds light on how we might begin to think about addressing statelessness, albeit in negative form. In her discussion of the problematic nature of human rights Arendt draws our attention to the basis on which these rights were declared—namely an abstract conception of the individual generalized beyond her situation within a political community. According to Arendt, the experience of the stateless thus provided a powerful indictment of this understanding of human rights. Indeed, it was precisely as individuals apparently ‘unencumbered’ by membership in a particular community that the stateless appeared, and yet it was this very exclusion that rendered them fundamentally rightless and subject to domination. What this flawed conception of human rights missed was the fundamentally relational quality of rights claims and their dependence on a political context and institutional structure for their realization. Only by rejecting the image of human rights as natural and thus inalienable can we appreciate their fragile and contingent nature; only by acknowledging that we hold human rights as institutionally and politically enabled agents can we begin to take notice of how they might be constituted and secured. This

What is more, while Arendt frames the plight of the stateless in terms of a lack of status and denial of standing, it is crucial that we recognize that this is an institutionally constituted condition. Domination—and as we shall see freedom as non-domination—are equally relational and structural in their formation and conditionality. It is precisely because of the historical transformations that we have examined above—institutional, technological, and ideational—that statelessness became possible and has endured, bearing the grave consequences for individuals who have suffered the fate of being denied the status of one who counts. This is precisely what I take Arendt to be gesturing toward in her suggestion that the calamity of statelessness arose,

not from any lack of civilization, backwardness, or mere tyranny, but, on the contrary, that it could not be repaired, because there was no longer any ‘uncivilized’ spot on earth, because whether we like it or not we have really started to live in One World. *Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity altogether.*<sup>180</sup>

Thus for Arendt stateless persons are rendered rightless because they are denied the political status of citizenship within a community that secures these rights—they are in effect denied the status of one who ‘counts’ as an agent. But this denial of status is itself a product of institutions and not merely their lack. It is the collective actions of modern states that have radically transformed the significance of nationality over the last century.

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reading of Arendt unsurprisingly prefigures a republican concern with civic-institutional freedom as non-domination. For an anticipation of this connection of Arendt’s notion of the right to have rights with non-domination see: Duncan Ivison “Republican human rights?.” *European journal of political theory* 9.1 (2010): 31-47.

<sup>180</sup> Hannah Arendt, *The Origins of Totalitarianism*, 297. Italics mine.



This is a crucial point to recognize. Bereft of full membership status in a community the stateless are not in a sort of crude Hobbesian state of nature amongst a world of states. Rather they occupy a structurally conditioned position of subjection that has been constituted by the historical processes outlined above, and which is actively maintained and reproduced by states through the practices of the state system. The injustice the stateless face is at its core a matter of distorted intersubjective social relations. This has important implications for how we address the normative claims of the stateless and for how we theorize the *injustice* suffered by refugees.

To appreciate this, it is helpful to reflect on the important distinction drawn by Rainer Forst between different conceptualizations or ‘pictures’ of the question of justice. As Forst notes, much of contemporary political theory has been dominated by two alternative models for understanding justice. The ‘distributive paradigm’ tends to conceptualize justice in terms of the allocation of goods that individuals ought to justly receive. In contrast, Forst defends the primacy of a political account of justice, understood “as a relational virtue”, that aims at combating arbitrariness as domination.<sup>181</sup> Building on the work of Iris Marion Young, Forst suggests that the problem with the distributive view—whether concerned with the allocation of basic goods or even the good of membership itself—is that it obscures the essentially political nature of claims to justice.<sup>182</sup> According to Forst, justice “does not first inquire into subjective or objective states of affairs, but into relations between human beings”.<sup>183</sup> Put otherwise, justice is not simply about who gets what, but about the relations in which we live with one another. In stressing this, Forst

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<sup>181</sup> Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Polity, 2014), 26.

<sup>182</sup> For Young’s pioneering analysis, see: Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 2011), 15-38.

<sup>183</sup> Rainer Forst, “Radical Justice: On Iris Marion Young’s Critique of the ‘Distributive Paradigm’” *Constellations* 14, no. 2 (2007): 24.

shows that the distributive paradigm suffers from a number of crucial shortcomings that lead to a deeply distorted picture of justice. Chief among these is the distributive paradigm's inability to properly conceptualize the nature of injustice. Because of its "recipient side orientation" the distributive perspective is largely oblivious to power; concerned as it is with allocative patterns, it fails to emphasize the *political* question of "how the structures of production and allocation of goods are decided in the first place".<sup>184</sup> Consequently, this perspective cannot capture the fact that the core of injustice lies in the presence of unjustifiable and arbitrary relations of social rule.

To see how this is the case, we might consider how such a perspective cannot capture the salient difference between the material privations resulting from a natural catastrophe and the deprivations resulting from exploitation, expropriation, or coercion. As Forst points out, we miss something both about the phenomena at hand and the remedy demanded when we elide this difference:

Although it is correct that help is required in both cases, according to my understanding of the grammar of justice it is required in the one case as an act of moral solidarity, in the other as an act of justice conditioned by the nature of ones involvement in relations of exploitation and injustice and the specific wrong in question.<sup>185</sup>

The point is not that the suffering which results from natural misfortunes fails to generate moral claims on behalf of those suffering tragedy and catastrophe. Rather, it is that we miss something important when we do not distinguish these moral claims from the claims to justice that arise as a

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<sup>184</sup> Rainer Forst, *Justification and Critique*, 35.

<sup>185</sup> Rainer Forst, *Justification and Critique*, 19.

result of arbitrary and unjustified social and political relations. Both contexts make moral claims on us, but the latter is appropriately understood as doing so within the grammar of justice.<sup>186</sup>

The distinction that Forst brings to the fore has important implications. Given the forgoing analysis of the historically contingent, and indeed relatively recent, nature of statelessness, we know that such exclusions are far from an immutable phenomenon. Nor is statelessness even a logical entailment of the presence of states. Indeed, statelessness is best understood as the product of an emergent state system that both constitutes and sustains the conditions for such exclusions.

This should shift our normative framing of the question of statelessness. The dominant paradigm for understanding the claims of refugees, asylum seekers, and stateless persons has been to view them as matters of humanitarian assistance rather than matters of political justice. The implication of this is that refugee assistance—no matter how well-meaning or far-reaching—has generally been understood as an act of beneficence or generosity, rather than a matter of right.<sup>187</sup> What is more, it would seem that state actions to both indirectly and directly deflect the undesired ‘burden’ of forced migrants are seen as legitimate to at least the majority of citizens within major liberal democratic states, although perversely, these actions have recently

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<sup>186</sup> To put this difference in more concrete terms, there is an important distinction to be made in terms of both the wrong and remedy between the suffering caused by an earthquake, and the injustice and domination present in a situation of societal inequalities and poverty. To be sure, forms of domination and oppression resulting from arbitrary social and political relations often appear in the guise of forces of nature, such as the natural cycle of markets to which we must merely acquiesce. But this only further highlights why it is so crucial that we avoid such confluences.

<sup>187</sup> Consider here the position developed by David Miller in *National responsibility and global justice*, which seemingly reflects the prevalent view in popular discourse that our responsibilities to refugees are not duties of justice but ‘humanitarian’ in nature. This leads Miller to conclude that “states have to be given considerable autonomy to decide on how to respond to particular asylum application... The final judgement must rest with the members of the receiving state, who may decide that they have already done their fair share of refugee resettlement.” [David Miller, *National responsibility and global justice* (Oxford University Press, 2007), 226-7.] We will return to Miller’s position subsequently.

come to be framed in terms of supporting the safety of forced migrants themselves.<sup>188</sup> Yet if we come to see the claims of refugees in terms of a claim to justice, we are forced to confront a different, political, grammar of claims. Under such a framework we are compelled to confront the fact that questions of justice regarding statelessness are not about the provision of aid, but about the obligation to prevent domination.<sup>189</sup>

The framework Forst offers also helps to show important implications of the structural and intersubjective dimensions of statelessness. As noted above, a crucial entailment of the historical account that we have been considering is that statelessness is a product not merely of the actions of oppressive and deviant states, but of the state system itself. Statelessness has emerged precisely as a result of the coordinated and institutionalized practices of modern states, many of which have become increasingly reticent in their support of the international refugee regime that subsequently emerged to partially address the dislocations and suffering caused by forced migration and political exclusion. This means that *all* states are implicated in the perpetuation of statelessness, though citizens of rich and powerful liberal states may bear even greater responsibility because of their role in and the benefits they reap from perpetuating such arrangements. The latter is the case because, as we have seen, liberal states frequently pay mere lip-service to the principles and values of the international refugee regime which insulating themselves from the effects of mass forced migration. What is more, while the traditional mode

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<sup>188</sup> For a philosophical engagement with this issue see David Miller's "The Duty to Rescue Boat People" (unpublished manuscript). While Miller does not go so far as to endorse the legitimation of direct techniques of exclusion, I find Miller's account deeply unpersuasive insofar as it largely neglects that it is precisely the foreclosing of legal route to migration that have led to this situation. If refugees in fact had access to legitimate and safe routes of escape, it is unclear why they would turn to unscrupulous smugglers offering transit on unseaworthy boats.

<sup>189</sup> We have helped constitute and sustain a world in which citizenship is fundamental to overall well-being, insofar as the lack of a robust form of this status exposes individuals to domination, yet at the same time access to citizenship remains contingent on the membership practices of states.

for addressing such claims to aid on the part of refugees and the stateless has been humanitarianism, this distorts the true nature of such claims as expressing a demand for justice. Finally, once we see that statelessness implicates all actors in the state system in a structure of injustice, we ought to recognize the radical consequences of addressing such claims. This is important because it helps us see that improving the current refugee system will simply not do. Whether in the form of more robust burden sharing arrangements or increased humanitarian assistance, merely enhancing or expanding the refugee regime remains insufficient. Only a wider transformation of the international order could address this claim of justice.<sup>190</sup> While such a transformation is certainly unlikely, it is important for us to at least acknowledge both what justice requires and the enduring implication of current arrangements in structures of domination and oppression.

A final aspect of Forst's analysis that we ought to note is that it helps us see why the question of membership and the claims to justice of stateless persons ought to be conceptualized in political terms, rather than through the distributive paradigm. This point is of particular importance as a number of normative theorists of citizenship have in effect called upon the latter as the appropriate lens for understanding the claim to community. In her work on cosmopolitanism and global justice, which I examine more extensively in the following chapter, Seyla Benhabib has called for us to conceptualize claims to membership precisely as a problem of distributive justice.<sup>191</sup> More recently, in *The Birthright Lottery* Ayelet Shachar has similarly

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<sup>190</sup> I owe the anticipation of this objection to thoughtful and sympathetic interlocutors who have pushed me to consider whether a reformed refugee regime might be sympathetic. However, I hope I have shown that it would be exceedingly difficult, or even impossible, to address these issues without radically transforming our global order in a way that would all but require the rejection of state sovereignty in any familiar sense, as well as radical shifts in the norms undergirding our contemporary membership regimes. For this account, see the final chapter.

<sup>191</sup> Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004), 23.

provided a sustained argument for conceptualizing birthright citizenship itself as a type of property or inheritance, the unfair allocation of which should be the subject of scrutiny and critique. Shachar's account emphasizes the global-distributive aspects of citizenship that are revealed when we conceptualize affluent national membership as a type of property, which in turn suggests the need for a redistributive remedy.<sup>192</sup> Yet if we are persuaded by Forst's criticisms of the distributive paradigm it should be clear why these approaches take us down the wrong path when considering the normative dimensions of citizenship. In particular, they misdirect us toward considering issues of membership as primarily concerned with the goods, or lack thereof, that come with the possession of a particular national citizenship, rather than encouraging us to think about such exclusions as the result of arbitrary exercises of power. The normative issues raised by statelessness are not merely about the distribution of membership, but about unjust and unjustified social and political relations.

This last point enables us to clarify what exactly is at issue in terms of the harm of statelessness. The deprivations and poverty, as well as material insecurity, which stateless persons confront are by no means unimportant. Indeed, those acquainted with even the most 'established' and long-running refugee camps are well aware of the harsh conditions endured by individuals confined to these locations. Yet fundamentally the *injustice* stateless persons and refugees face is not foremost a question of inequitable distributions but of domination.

To see why this is the case, it is helpful for us to reflect on one of the most powerful critiques of the inequities enabled and sustained by contemporary practices of national citizenship. In a project spanning over twenty-five years, Joseph Carens has argued for a global

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<sup>192</sup> Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009).

open borders regime as a requirement of justice.<sup>193</sup> The deeply compelling master metaphor of this project has been the analogy between our practices of national citizenship to the arbitrary distribution of life-chances and opportunities that took place under the stratified and static hierarchies of feudalism. Appealing to our liberal-democratic sentiments and values, Carens suggests that we ought to find the un-justified distribution of life chances on the basis of the arbitrary feature of where and under what rules of citizenship we happen to be born unjust for the same reasons that we view feudalism as an unjust social order.

Carens' initial invocation of the imagery of feudalism is telling, but can be further radicalized for our purposes.<sup>194</sup> The fundamental evil of feudalism is not merely that it gave some individuals a birthright claim within a class that drastically expanded their life choices and wellbeing, while denying others such goods. Rather, the core injustice of feudalism lies in the arbitrary social and political relations of oppression that it sustained. These relations of domination made some count less than others because of their caste or class, and frequently denied individuals the standing of one who counts at all, by imposing the status of property upon them under the designation of serf or slave. Feudalism robbed human beings of their claim to humanity. This is precisely why those who rose up to destroy the feudal order—whether successfully in the context of the French Revolution, or unsuccessfully in the context of the

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<sup>193</sup> Joseph Carens, "Aliens and Citizens: the case for open borders," *The Review of Politics* 49, no. 02 (1987): 251-273; Joseph Carens, *The Ethics of Immigration*.

<sup>194</sup> Joseph Carens, "Aliens and Citizens: the case for open borders," 251-273. Carens' aim to render his account compatible with the position of global egalitarians at times seems to suggest that membership ought to be considered a subset of the problem of distributive justice. This line of engagement is understandable given that the "distributive paradigm" has dominated much of (international) normative political theory. However, while operating within this terrain, Carens' defense is framed by a commitment to the claim, both then and now, that "our social institutions and public policies must respect all human beings as moral persons and that this respect entails recognition, in some form, of the freedom and equality of every human being." (Ibid., 265) Matthew Gibney has recently hinted toward the radical implications of statelessness for thinking through the normative deficits of citizenship more broadly; see: "Statelessness and citizenship in ethical and political perspective" in Alice Edwards and Laura Van Waas, eds. *Nationality and Statelessness Under International Law* (Cambridge University Press, 2014), 62.

agitations of the Leveller factions in the English Civil War—so often framed their claims in terms of status or rights.<sup>195</sup> What motivated these emancipatory projects was the demand to be free from relations of domination. So too, I argue, is the core of the claim to justice of stateless persons.<sup>196</sup>

Under current structures of global power, stateless persons, refugees, and many other individuals who fall outside these formal categories, are subject to arbitrary relations of social rule. In the case of the stateless, these forms of domination are produced at multiple levels. On the one hand, as the forgoing historical account has emphasized, the emergence of statelessness is the direct result of relatively recent transformations in the nature of the state system, and such exclusions are maintained by the practices of states acting in concert. On the other hand, the international refugee system, originally developed in order to offer humanitarian aid to those excluded from the global order, is arguably also a source of domination insofar as it now has come to consign millions of persons to the liminal status of non-members in any community. As I have tried to show in my account of the international refugee regime, the development of the regime was a process fraught with contingency and chance. Not only did such arrangements arise in an *ad-hoc* manner, therefore producing a far from normatively coherent system, but the refugee system also gives little voice and weight to those who are the direct subjects of its decisions and interventions. Indeed, rather than answering to the experiences of the excluded and dominated themselves, the international refugee regime is considerably more responsive to the whims of powerful states. What is worse still, as we have seen, these same powerful states that

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<sup>195</sup> For these articulations consult, for instance, the Leveller's articulation of their position in the context of the Putney debates, or the French revolutionaries pronouncements in the *Declaration of the Rights of Man and Citizen*.

<sup>196</sup> This in turn should condition how we interpret the acts of agency of the stateless that they undertake in order to find places of citizenship in a world of states.



helped constitute the regime have increasingly acted to undermine the effectiveness of its central norms. Given these realities of the situation of stateless persons and refugees, the current state system is implicated a structure of domination.

If the injustice the stateless face is grounded in unjustified relations of arbitrary rule, how ought we to address such claims? As I have shown in this chapter a humanitarian response will not be adequate, no matter how robust or expansive, as claims to justice demand a *political* remedy. However, this does not tell us what a political response to the claim to community ought to resemble. Accordingly, in the next chapter I turn to two prominent approaches to the issue of membership that have been applied within the field of global justice: discursive democratic theory and agonistic democratic theory. Both approaches provide insight into how the claims of the stateless might be taken into account, and indeed, both have been applied to the issues of citizenship and membership. However, while each perspective does shed light on important aspects of what a normative approach to statelessness will have to attend to, neither provides us with a satisfactory framework.

## Chapter 4

### Dilemmas of Membership: Approaches and Challenges to Theorizing Statelessness

In the previous two chapters I have attempted to reconstruct the normative problems raised by the position of stateless persons. Beginning with a critical engagement with Arendt's account of the genesis of statelessness, I addressed some of the conundrums raised by her approach in order to explain why statelessness only emerged in the context of the inter-war Era. This was necessary to supplement Arendt's emphasis on the tensions between nation and state as well as human rights and sovereignty, given that these concepts far precede the development of persisting refugee flows. My reconstruction also helps us see statelessness as the result not merely of deviant or 'bad' states, but as a product of the state system that coalesced in the early twentieth century.

I then turned to the contemporary context to stress how statelessness continues to be a pressing issue of global justice and how characterizing statelessness as an institutionally constituted form of domination helps us grasp the normative problems it raises. While our categories for describing the stateless have become more nuanced since Arendt's time, our progress in addressing her concerns has remained rather limited. Indeed, alongside the equally pressing international issues of immigration and humanitarian intervention, the questions posed by the phenomena of widespread statelessness have only intensified the clash between our commitment to universal human rights and the sovereign claims of political communities. Indeed, for our modern paradigm of human rights advanced on universalistic grounds, yet linked to the incorporation of such rights into national institutions and law, the refugee appears most vulnerable under present international arrangements.

Despite the apparent challenges the refugee poses to our contemporary understandings of citizenship and human rights, the issue of statelessness has until recently received relatively limited sustained attention as a central normative issue within discussions of international justice.<sup>197</sup> It is because of this trend that this chapter attempts in part to reorient normative political theory to the particular quandaries and issues raised by statelessness. This is because an inattentiveness to the position of the refugee often distorts or clouds discussions of international obligations and human rights, allowing us to gloss over the underlying inconsistencies in our prevailing understandings of international order and global justice.

An exemplar of this blind spot in contemporary political theory is found in the later work of the seminal political theorist John Rawls. In his *The Law of Peoples*, Rawls largely elides the ethical and political issues raised by immigration and membership while problematically articulating a vision of interstate relations that puts the imperatives of self-determination and a substantive conception of human rights in stark conflict. In doing so, Rawls neglects the possibility that migration, immigration and claims to membership might have a central role in any viable theory of international justice—indeed, he believes that the “problem of immigration” would simply be “eliminated as a serious problem in a realistic utopia.”<sup>198</sup> In this way, Rawls’ inattentiveness to the contingencies of citizenship is emblematic of the refusal to recognize the articulation of the basis and bounds of community membership as a central political question. Instead, Rawls seems to carry over the theoretical presumption of social closure present in his

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<sup>197</sup> For an important and early exception, see: Matthew J. Gibney. *The ethics and politics of asylum: liberal democracy and the response to refugees* (Cambridge University Press, 2004). More recently, both Joseph Carens and David Miller have provided important engagements with the issues of justice raised by forced displacement; see respectively: Joseph Carens, *The ethics of immigration*; David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration*.

<sup>198</sup> John Rawls. *The law of peoples: with, the idea of public reason revisited* (Harvard University Press, 2001), 9.

earlier work—assuming away the undeniable reality of international migration that renders such a vision of society anachronistic.<sup>199</sup> It is these assumptions within Rawls’s approach which have lead theorists such as Ulrich Beck to identify Rawls’ approach as a paradigmatic case of methodological nationalism; the Rawlsian assumptions of social closure exemplifies the ‘container’ model of society and precludes serious consideration of ongoing transnational relations as relevant to the question of justice.<sup>200</sup> Moreover, as much of the critical reception of *The Law of Peoples* has suggested, the problems raised by such issues can only be neglected at the cost of considerable conceptual poverty.<sup>201</sup>

Despite the shortcomings in Rawls’ approach and his apparent elision of the normative dimensions of claims to membership, there have been two prominent alternative perspectives within contemporary political theory that offer resources for taking up these issues: deliberative democrats writing in the Habermassian tradition and proponents of agonistic democratic theory. This potential has been reflected in the work of theorists writing within these respective

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<sup>199</sup> Consider here Rawls account of the first special feature of the fundamental political relationship of citizenship in *Political Liberalism*, that “it is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death.” [John Rawls. *Political Liberalism, Expanded Edition* (New York, Columbia University Press: 2005), xlv] Recall again that *The Law of Peoples* proposes a strategy of building a normative framework of international justice as an *extension* of a liberal theory that itself assumes social closure as its starting point. This makes it far from surprising that such an account would almost entirely neglect the contemporary realities of immigration or the normative quandaries raised by migration.

<sup>200</sup> As Beck writes, this “axiomatic system may be found in unadulterated form in the social theories of Emile Durkheim or Talcott Parsons, for example, but also in the John Rawls.” As he notes, this “conception of a nationally closes society and democracy axiomatically excludes all the increasingly explosive questions generated by the uncoupling of nation, state and society.” [Ulrich Beck, *Cosmopolitan Vision*, 27]

<sup>201</sup> For a compelling critique of Rawls’ strange and puzzling reticence to consider migration as relevant to both social and global justice, see Joseph Carens, *The ethics of immigration*, 262-70. Indeed, even David Miller, writing from the liberal nationalist perspective, notes that in the *Law of Peoples* Rawls “continued to ignore the issue of immigration, arguing that the causes that produce large-scale immigration in the world today would no longer exist in a world that complied with the principles he was setting out: ‘the problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic utopia.’...Rawls wrote from within the state-centric tradition of political philosophy.” [*Strangers in Our Midst: The Political Philosophy of Immigration*, forthcoming.] However, as we will see in the final chapter Miller’s position also confronts some of the difficulties raised by methodological nationalism, leading him to articulate a problematic account of our duties to refugees.

traditions who have attempted to seriously interrogate the tensions between democratic citizenship and human rights, and with that, have given sustained attention to how the boundaries of community and membership are to be justified. Yet, as I will indicate subsequently, despite being more open to the issues raised by statelessness I contend that these perspectives fall short of providing us with a satisfying normative framework, thereby indicating the need for a new approach.

With the above considerations in mind, this chapter will engage with the issues raised by the position of the refugee and suggest how and why the questions raised by statelessness should occupy a far more central place in normative political theory. While acknowledging that Habermassians and Agonistic Democrats have attempted to provide insight into how we might negotiate questions of inclusion, my aim is also to show why these two prominent engagements with the normative dimensions of citizenship and human rights fail to address the difficulties raised by statelessness, in order to point the way to an alternative approach for theorizing membership. In doing so, the aim will be to diagnostically explore how conceptions of community and citizenship should be transfigured on account of the theoretical and ethical concerns raised by statelessness.

The first section briefly revisits Arendt's account of the problematic status of the refugee for international political theory to indicate how the phenomena of statelessness reveals deep tensions in our conceptions of political membership and universal human rights. Arendt's analysis highlights the precarious position of the refugee as located out of the bounds of community, while also revealing the particular dilemmas that any approach to statelessness will have to address. The second section shifts from a diagnostic to a prescriptive focus, by turning to two broader normative traditions that have inspired recent attempts to address claims to

membership as part of the domain of global justice. We begin by taking up the framework represented by Jurgen Habermas' discourse ethics as a potential means to theorize statelessness and the question of the right to community. As will become clear, Habermas' approach suggests novel ways of transforming our understanding of political membership toward a more normatively justified conception. However, while discourse ethics provides a promising framework, this approach needs a supplementary orientation toward openness, given that the question of statelessness has at its very core the problem of inclusion. In addressing this more fundamental dimension of the question of inclusion, we will engage with the insights of contemporary theorists of agonistic democracy. The focus of agonists on the contestability of terms and the fundamentally unsettled nature of the political provide resources for conceptualizing more open notions of political membership. However, agonistic democratic theory also proves to be a problematic and incomplete approach for addressing the normative demands posed by statelessness.

The purpose of this critical engagement is to indicate how background assumptions implicit in the normative traditions of both Habermassians and agonistic theorists prevent either approach from providing the appropriate starting point for developing a framework capable of addresses statelessness as a matter of global justice. While these theoretical perspectives help us identify some of the issues that a normative approach toward inclusion and belonging will have to engage with, both discourse ethics and agonistic democracy remain insufficient to the problem at hand. To demonstrate this, in the final section of the chapter I take up two prominent applications of both the Habermassian and Agonist perspective to global justice that explicitly engage with matters of membership, democratic citizenship, and human rights. Drawing on the work of Seyla Benhabib I reconstruct her Habermassian approach toward cosmopolitanism as developed in both *The Rights of Others* and *Another Cosmopolitanism*, in order to show how it

continues to be limited by a set of conceptual challenges. From here I turn to the recent work of Paulina Tambakaki, who in her *Human Rights, or Citizenship* offers a critical defense of agonistic democracy as means of addressing political exclusion. Interrogating Tambakaki's work shows how the agonistic perspective remains substantially limited in its ability to address the exclusions the stateless face. This is in part because the agonistic approach to issues of inclusion is not sufficiently attentive to the crucial role of institutions in both foreclosing and enabling such possibilities and therefore misses how forms of contestation are structurally determined.

The chapter concludes by reiterating how the approaches of discourse ethics and agnostic theory can be used as a useful starting point to imagine formations of community that eschew the types of exclusion central to the production of statelessness. In this regard, they provide a more compelling starting point than that of liberal nationalist approaches that follow from the work of Rawls insofar as they forefront the need to deeply question the justificatory grounds of such forms of exclusion. Yet at the same time, the respective limitations of these two prominent perspectives point to the need for a new normative framework for addressing such concerns, while also shedding light on what that framework will have to take into account. The subsequent chapter develops this framework through a critical engagement with neo-republicanism and the work of Philip Pettit. Taking its point of departure from this analysis of the approaches of Habermassians and Agonistic Democrats, the next chapter offers a reconstructed account of neo-republicanism that: puts the experience of domination first by theorizing from the position of the excluded and oppressed, remains attentive to the ways in which freedom and domination are conditioned by institutions, while also insisting on the need for a robustly 'political' and contestatory conception of non-domination.

# 1 The Problematic of Statelessness: Sovereignty and Human Rights

Having established the trajectory of our analysis, we must briefly return to the work of Hannah Arendt to orient our interrogation of potential normative frameworks for addressing statelessness. As we saw in Chapter One, Arendt's account of the crisis of modern statelessness, as precipitated by the exclusionary logic of what had been thought to be 'human rights,' rests on the underlying tension between the state and the nation, as well as that between universal rights and civil rights. Arendt's analysis suggests that the phenomena of statelessness is not merely coeval with the rise of the nation-state system, but a direct extension of the logic of sovereignty that such forms of community are predicated upon. A crucial observation of Arendt's analysis regarding the position of the refugee is the way in which de-nationalization and the loss of membership relate to the conditions that underwrite the human ability to act inhumanely to others. Indeed implicit in Arendt's account is the claim that the situation of the refugee is tantamount to the loss of the inter-subjective "modes in which human beings appear to each other, not indeed as physical objects, but qua men."<sup>202</sup> This is why the loss of the 'rights to have rights' equates to a loss of humanity for Arendt, as one can no longer appear in a distinctively human way. Instead, what takes place is the differentiation of individuals on the basis of qualities that are part of their mere givenness, so that ultimately one is treated as if they were "a specimen of an animal species, called man."<sup>203</sup> What I take Arendt to be gesturing toward is that interrelation and dependency between so-called 'human rights' and membership rights within a polity suggest that the loss of

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<sup>202</sup> Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958), 176.

<sup>203</sup> Hannah Arendt, *The Origins of Totalitarianism*, 292, 302. It would seem that for Arendt the phenomena of statelessness is not only symptomatic of contemporary exclusionary modes of community and the concomitant tensions between human rights and state sovereignty, but actually constitutive of modalities of relatedness that allow derogations from human rights to take place. See also Arendt's discussion in "We refugees" *Menorah Journal* 31.1 (1943): 69-77.



the status of citizen is what allows the claims of the stateless to be discounted not as political demands to justice but as a mere humanitarian concern.

But most centrally for Arendt's account, the phenomena of statelessness is tied to the tension we find between the universalizing impulse of human rights discourse and the limitations imposed by our current understandings of citizenship and the state.<sup>204</sup> This project's revised account of the origins of statelessness complements Arendt's account by drawing attention to the ideational and institutional factors that needed to coalesce for statelessness to become a widespread and permanent feature of our world, emphasizing the central role of an emerging state system.<sup>205</sup> Yet, despite Arendt's tendency to embed the emergence of statelessness largely within the problematic of sovereignty and the unilateral claim of individual states to regulated membership, perhaps what is most remarkable about her insights is how pertinent they remain for our contemporary situation. The primary international response to the issues posed by statelessness has been the constitution of intergovernmental organizations responsible for overseeing the condition of refugees—but these institutions are themselves symptomatic of the only intensified pervasiveness of statelessness within the world. Moreover, despite the presence of emerging norms concerning the question of humanitarian intervention, in which sovereignty

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<sup>204</sup> Arendt's critique of human rights sheds light on how we might begin to think about addressing statelessness, albeit in negative form. In her discussion of the problematic nature of human rights Arendt draws our attention to the basis on which these rights were declared—namely an abstract conception of the individual generalized beyond her situation within a political community. According to Arendt, the experience of the stateless thus provided a powerful indictment of this understanding of human rights. Indeed, it was precisely as individuals apparently 'unencumbered' by membership in a particular community that the stateless appeared, and yet it was this very exclusion that rendered them fundamentally rightless and subject to domination. For Arendt, what this flawed conception of human rights missed was the fundamentally relational quality of rights claims and their dependence on a political context and institutional structure for their realization. Only by rejecting the image of human rights as natural and thus inalienable can we appreciate their fragile and contingent nature; only by acknowledging that we hold human rights as institutionally and politically enabled agents can we begin to take notice of how they might be constituted and secured.

<sup>205</sup> As the sociologist Saskia Sassen has noted of the developments of the inter-war era, "the emergent interstate system was the key to the creation of the stateless person, the identification of refugees as such, and their regulation or control." Saskia Sassen, *Guests and Aliens* (New York: New Press, 2000), 84.

has become understood as contingent upon the state's responsibility to protect,<sup>206</sup> norms regarding the position of refugees and asylum seekers have become only more ambiguous in relation to the prerogatives of *raison d'etat*. Indeed, as we saw in the last chapter, despite the continued development of global organizations and the international refugee regime, the situation of stateless persons remains fundamentally precarious. What protections they are afforded are the product of highly limited institutional arrangements originally developed under duress to address what was perceived as a momentary crisis that was imagined to last years rather than decades.

Arendt was correct to observe that one of the underlying source of our contemporary inability to manage the pathologies of the nation state system lie in the exclusionary nature of our current forms of citizenship and our inability to recognize the fundamental nature of the right to belong to a community. Indeed, what is perhaps most remarkable about our current era of globalization is that, with supposedly growing mobility and interconnectedness across the world, the ability of human persons to move across borders would pale in comparison to that of international trade and monetary exchange. The costs of this contradictory logic are of course born heavily by those who find themselves on the outside of states, or as the 'others' of the citizens within nations. But while Arendt's work brings to the fore the untenable nature of our current conceptions of community and the fundamental limitations of human rights discourse, her insightful analysis provides us with only a problematization of the issues at hand.

## 2 Discourse Ethics and the Right to Belong

The salience of Habermas' thought for addressing the conceptual problems of statelessness raised initially by Arendt is suggested by the critical edge discourse ethics

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<sup>206</sup> Thomas Weiss, *Humanitarian Intervention* (Cambridge: Polity, 2007), 116.

potentially offers for interrogating and dislodging the presuppositions that currently underpin our exclusionary conceptions of ‘belonging’ necessary to the production of statelessness. Indeed, in the way they are entwined with the ideas of community, citizenship and human rights, the broader issues of inclusion raised by statelessness seem to be intimately tied to “questions having to do with the grammar of forms of life” in our late modern era.<sup>207</sup> Moreover the broader focus of his larger project of the theory of communicative action, with its focus on intersubjective engagement and attentiveness to the distorting effects of power relations, further confirm the promise of appealing to his work within the context of our present discussion.<sup>208</sup>

In taking up Habermas’ approach of discourse ethics for the issue of statelessness, I will interpret Habermas as a post-metaphysical, non-foundationalist theorist.<sup>209</sup> Based on this reading, I suggest the promise of his approach lies in providing a conceptualization of the issues raised by statelessness and citizenship without having to rely upon problematic philosophical or metaphysical assumptions that often seem to underpin our understanding of human rights. Given the cautionary warning that Arendt’s analysis offers regarding the fragility of such premises, a theoretical commitment to non-foundationalism in our conceptual approach seems most prudent and promising.<sup>210</sup> Moreover, the appropriation of an approach said to be rooted in the emergence

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<sup>207</sup> Jürgen Habermas, *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason*, trans. T. McCarthy (Boston: Beacon Press, 1985), 392.

<sup>208</sup> Such *de-centered* and inter-subjective features of Habermas’ approach are in marked contrast to the conceptual lineage we find in the work of John Rawls, whose subject-centered approach clearly has its roots in Kantian moral philosophy. Given the marked inattentiveness of Rawls’ work on global justice to the questions raised by statelessness, such divergences are suggestive of the potential of discourse ethics.

<sup>209</sup> Jürgen Habermas, *The Theory of Communicative Action, Volume 2*, 387-8.

<sup>210</sup> Granted, this reading of Habermas as eschewing foundationalism in his approach to communicative action is somewhat complicated by his apparent essentialism regarding the nature of language as having as its “inherent telos” the reaching of mutual understanding. [Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society*, trans. T. McCarthy (Boston: Beacon Press, 1985), 287] However the apparent import of such accusations of a hidden foundationalism are themselves seemingly overstated given his claim to be

of modernity itself seems entirely appropriate for interrogating the distinctively modern forms of community and collective identity that are implicated in the production of statelessness.<sup>211</sup>

In turning to Habermas' framework, we should begin by recognizing that the approach of discourse ethics is best understood as an extension of the conception of communicative 'rationality' presented in *The Theory of Communicative Action*. The conception of communicative rationality, according to Habermas, "carries with it connotations based ultimately on the central experience of the unconstrained, unifying, consensus bringing force of argumentative speech."<sup>212</sup> Appealing to our everyday intuitions, Habermas points to the basis of this conception of rationality in our ability to give reasons or justifications for certain modes of action or statements about our social world, a tendency that Habermas explicitly links up with the redeeming of normative claims.<sup>213</sup> In reconstructing a moral theory from the suppositions of unconstrained argumentative discourse, Habermas begins with the constrained assumption that normative claims can be redeemed in a way analogous to truth claims.<sup>214</sup> The weakening of the cognitivist commitments of Habermas' approach and the consequent limiting of the transcendental scope of discourse ethics to "give up any claim to 'ultimate justification'" is itself

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adopting the position of someone "operating without metaphysical support and is also no longer confident that a rigorous transcendental-pragmatic program, claiming to provide ultimate grounds, can be carried out." (*Theory of Communicative Action, Volume 1*, 137). See also: Simone Chambers, *Reasonable Democracy*, 111-16, for a related discussion of the "hypothetical and fallible" universalism of Habermas' approach.

<sup>211</sup> The relation between the approach of discourse ethics as an extension of communicative action to the conditions of modernity is clear from its dependency on the world differentiation that Habermas attributes to shift to modernity. See Jürgen Habermas, *Theory of Communicative Action, Volume 1*, 52.

<sup>212</sup> Jürgen Habermas, *The Theory of Communicative Action, Volume 1*, 10.

<sup>213</sup> Jürgen Habermas, *The Theory of Communicative Action, Volume 1*, 8.

<sup>214</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. C. Lenhardt and S. Nicholsen. (Cambridge: The MIT Press, 2001), 76.

consistent with understanding of norms that Habermas attributes to the post-conventional era of modernity.<sup>215</sup> The approach of discourse ethics is therefore best understood as the working out of implications of his conception of communicative rationality in relation to claims of normative validity and moral legitimacy. As Thomas McCarthy notes, for Habermas the elaboration of the principles of ethics justification “begins with a reflective turn, for these principles are built into the very structure of practical discourse itself.”<sup>216</sup> Therefore it is the model of argumentative discourse that provides the principle of discourse ethics, that “only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.”<sup>217</sup> The principle of discourse ethics therefore stipulates the intersubjective condition under which a norm can be justified as expressing the common will of the plurality of those who will be effected.

Before shifting to the application of discourse ethics within our current context, it is important to note the relation of Habermas’ approach to the tradition of Kantian moral theory. This is not only important to acknowledge in order to stress its crucial divergences, but also to allow us to anticipate some of the challenges intrinsic to Habermas’ framework for addressing questions of membership and inclusion. As a deontological approach, Kant’s monistic oriented moral theory attempts to avoid the issue of conflicting obligations by claiming to show that the categorical imperative itself is adequate as a moral standard for validating norms or maxims. In this way the Habermasian approach can be seen as an extension of the Kantian tradition with notable modifications: the rejection of the metaphysical division of the world into the nominal

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<sup>215</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, 77.

<sup>216</sup> Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (Cambridge: The MIT Press, 1981), 324.

<sup>217</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, 66.

and the phenomenal realm, and the insistence on a dialogical basis for moral consciousness. For Habermas the criteria is, contra Kant, not what the individual can will without contradiction, but what all affected parties can agree to within rationally grounded discourse.<sup>218</sup> Key to Habermas' approach is the way he construes the universalizing dimension of moral discourse in a de-centered fashion. Hence the criteria of impartiality for discourse ethics, taken from the suppositions of everyday communication, is captured in the principle of universalism for the validity of every norm, such that: "All affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests."<sup>219</sup> This is because Habermas identifies the fault in Kantian approaches to the principle of universalization as lying in the reliance on the orientation of a subject-centered perspective. Such approaches fail to fully acknowledge that "valid norms must *deserve* recognition from *all* concerned" and instead presents a conception of moral norms in which the "process of judging is relative to the vantage point and perspective of *some* and not *all* concerned."<sup>220</sup> Moreover, Habermas' approach openly acknowledges the situated nature of the participants to discourse, and therefore attempts to avoid the monological and transcendental dimensions of the Kantian tradition. As Habermas writes: "Discourses take place in particular social contexts and are subject to the limitations of time and space...their participants are not Kant's intelligible characters but real human beings."<sup>221</sup> In alternatively proposing a principle that "constrains all affected to adopt the perspectives of all others in the balance of interests" one can read Habermas

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<sup>218</sup> And indeed, this is precisely why discourse ethics raises the problems of scope captured in the idea of the democratic paradox, for how are we to determined the contours of what is to count as all affected in a democratic or itself inclusive way without running into the issue of a regress.

<sup>219</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, 65. Original Emphasis.

<sup>220</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, 65. Original Emphasis.

<sup>221</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, 92.

as following up on the Hegelian critique of the ‘abstract universal’ of Kantian morality that had initially suggested an attentiveness to the inter-subjective dimension of interaction so central to the overall project of communicative action.<sup>222</sup> Within the domain of our concerns over the question of inclusion, this aspect of Habermas’ theory importantly tethers the approach of discourse ethics and grounds the criteria of the inter-subjective validation of norms in the situated nature of participants.

In turning to the evaluation of the norms underlying the prerogatives of national territory and state sovereignty, we should begin by briefly drawing attention to the implicit forms of ethical justification that underwrite our contemporary understandings of citizenship and national communities. The claims of modern states to exercise control over their borders and define the limits of community membership extend from the logic of self-determination—itsself rooted in the idea of democratic legitimacy and popular sovereignty.<sup>223</sup> The basis of this understanding of self-determination is put succinctly by Michael Walzer in his description of the state as “constituted by the union of people and government, and it is the state that claims against all other states the twin rights of territorial integrity and political sovereignty.”<sup>224</sup> Under this mode of justification, the prerogatives of territorial control and the demarcation of citizenship stem from the right of a nation or people to determine the structure and form of their mode of collective life. In this sense, it is by appeal to the claim of self-determination that the potential exclusion of migrants and the conditional inclusion of the asylum seeker and refugee are

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<sup>222</sup> Jürgen Habermas, *Theory and Practice*, trans. J. Viertel (Boston: Beacon Press, 1988), 144-46.

Jürgen Habermas, *Moral Consciousness and Communicative Action*, 65.

<sup>223</sup> Such norms are woven into our current structures of international order in the form of the central role respect for state sovereignty occupies in the UN Charter.

<sup>224</sup> Michael Walzer, “The Moral Standing of States: A Response to Four Critics,” *Philosophy and Public Affairs*, Vol. 9, No. 3 (1980): 212.

purportedly legitimated by the traditional norms of national sovereignty.<sup>225</sup> Moreover, from the standpoint of citizenship, one might infer that part of the moral justification of the bounded nature of states would have to be tied up with the claim of all to membership. In this sense, the claim to community, which must clearly imply the exclusion of those outside the boundaries of such a group, is supposedly redeemed by the expectation that those without have recourse to their own forms of self-determining political membership.<sup>226</sup> However, in this context it is crucial to note that in understanding the claim to community as both a normative and a moral demand, we need to recognize that the universalizing dimension of such an appeal must be directed both to those within and those outside particular polities. But as we have seen in our earlier interrogation of the relation of citizenship to the state and international state system, the production of refugees seems to be inherent in the logic of our contemporary forms of community. How are we to reconcile the status of the modern state as an underlying source of the crisis of statelessness, and as the only means by which a ‘right to have rights’ may be secured?

Having laid out in broad outline the current structure of presumptions that underwrite our contemporary understanding of citizenship and polity, it should be apparent that the framework of discourse ethics forces us to re-evaluate the legitimacy of such norms. From the impartial and

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<sup>225</sup> Although it is worth emphasizing that Walzer himself concedes that the claim of refugees seeking asylum is virtually absolute; see Walzer, *Spheres of Justice*, 51. This is in striking contrast to the more recent position articulated by David Miller, who has suggest that states—and specifically *liberal* states, may justifiably limit themselves to taking their “fair share” of refugees—means that the “net effect, nonetheless, may be that there are some refugees for whom no state is willing to take responsibility: each receiving state sincerely and reasonably believes it has done enough, taking into account the cost of accepting refugees, to discharge its fair share of the burden.” [David Miller, *Strangers in Our Midst*, forthcoming.] We will return to some of the issues raised by this fairly expansive degree of discretion that Miller grants to states in the last chapter.

<sup>226</sup> At least as much seems to be implied in the contemporary euphemistic usage of ‘migrant’ to apply to individuals forcibly displaced as part of the current refugee crisis, as if the issues posed by statelessness were merely the products of irregularities in the interstate system, rather than symptomatic of deeper problems. On an earlier form of such terminological displacement, see Goodwin-Gill’s discussion of the postwar re-emergence of the term displaced person, and its initial use as a surrogate for what were essentially refugees of the conflict in Indo-china. Guy Goodwin-Gill, *The Refugee in International Law* (Oxford: Oxford University Press, 1998), 11-13.



inclusive perspective suggested by discourse ethics, the normative privileging of the position of the citizen cannot simply be presumed, while the sovereign prerogatives of the state to control entrance and limit citizenship are now in need of substantial justification. In asking us to consider whether our current norms of citizenship and sovereignty would be accepted by all those effected by such norms, we must clearly take into consideration the position of those who are most disadvantaged by such institutions and who find themselves asymmetrically located in relation to citizens—that is, at the periphery or outside the bounds of inclusion. In this appropriation of discourse ethics, normative justification cannot be merely circumscribed to the concerns of those within political communities, but must come to account for those without. Moreover, while our earlier engagement with Arendt brought to the fore the factors producing statelessness at its emergence as a mass phenomenon, at our current historical juncture the claims to validity of such norms have only become more problematic as the idea and integrity of the nation state has itself become conceptually dubious. The question that discourse ethics asks us to raise is whether the norms of sovereignty and self-determination that allow individual states to set the criteria of entrance and control the distribution of citizenship can be fully justified when the perspective of the refugee is taken into account. In a sense, the issue of whether the number of claimants who fulfill the qualifications for the status of asylum seekers or refugees are actually admitted by states that claim to adhere to and uphold human rights is actually secondary for our current considerations. From the perspective of discourse ethics, the real question is whether such stringent and exclusionary criteria can be justified at all.

When taking into consideration the perspective of those caught in between communities or who find themselves admitted under a precarious or illicit status— asylum seekers, refugees, irregular migrants—we have good reason to doubt the acceptability of contemporary norms of citizenship and territorial sovereignty. Indeed, if the foregoing analysis is correct in suggesting a

fundamental relation between our current modalities of community and citizenship with the practices of exclusion that produce stateless, we have good reason to believe that a moral imperative exists for weakening the boundaries of states and liberalizing the means of gaining membership within communities. While still allowing for the values of cultural integrity and communal life, a consideration of the question of inclusion from the position of *all* those affected by the exclusionary norms of membership will clearly push us to take up a more cosmopolitan perspective. One form this might take is in the recognition of a fundamental right to claim citizenship within a polity—with the burden of proof against such a claim lying on the part of the state. The development and articulation of such a right to belong would not necessarily be incompatible with some forms of communal integrity. However such claims will have to be justified in relation to the claims of those outside of a particular state, and not simply decided in advance by the presumptive bias of the national interest.

At first blush it would seem that the approach of discourse ethic—when universally applied to the realm of those affected by our contemporary norms of citizenship and sovereignty—forces us to reconsider the contours of our current practices. However, the formal dimensions of discourse ethics raise certain issues for our attempt to address the particular concerns brought to the fore by statelessness and point to the limitations that such an engagement will have to overcome. As Habermas himself notes of his approach, the principle of discourse ethics is procedural rather than substantive in form, making reference to the discursive process of the evaluation of normative claims to validity. As he writes:

To this extent discourse ethics can properly be characterized as formal...Practical discourse is not a procedure for generating justified norms but a procedure for testing the validity of norms that are being proposed and hypothetically considered for adoption.

That means that practical discourses depend on content brought to them from the outside.<sup>227</sup>

Thus, much like the Kantian conception of morality based on the categorical imperative that it aims to supercede, discourse ethics itself is not aimed at the generation of moral norms, but rather offers a way of evaluating and potentially legitimating norms that are brought into question. However as we have noted above, unlike the monological dimension of the Kantian approach, Habermas explicitly constructs discourse ethics around a communicative model, thereby explicitly emphasizing the dimension of inter-subjective agreement between a community of participants.<sup>228</sup> Yet the very virtue of discourse ethics in attempting to base the validation of norms in the actual participation of concrete agents in practical discourse itself raises questions about how the realm of participants is constituted. As Habermas notes, the very idea of practical discourse is dependent on a “horizon provided by the lifeworld of a specific social group...” and thereby tied to particularized conceptions of community.<sup>229</sup> Moreover, the very means in which the norm in question is itself conceptualized—a matter of economics, of immigration, of human rights—seems to radically shift our sense of the scope of relevant participants, and indeed points to the question of how those bounds are themselves politically constituted. An instructive example of this referenced in the prior chapter is the gradual shift we have seen in the past few decades in the refugee policies of many Western industrial democracies. Arguably, there has been a widespread move in public perceptions and policy away

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<sup>227</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, 103.

<sup>228</sup> Despite the claims of critics this is a far cry from a mere empty formalism. See Jürgen Habermas, “Labor and Interaction: Remarks on Hegel’s Jena Philosophy of Mind During 1803-1804 and 1805-1806” in *Theory and Practice*, and also “Morality and ethical life: Does Hegel’s critique of Kant apply to discourse ethics?” in *Kant and Political Philosophy: The Contemporary Legacy*, eds. Ronald Beiner, William James Booth. (New Haven: Yale University Press, 1996).

<sup>229</sup> Jürgen Habermas, *Moral Consciousness and Communicative Action*, 103.

from framing such issues as concerning human rights, and toward treating the claims of refugees and asylum seekers primarily as a question of immigration, thereby subsuming refugee protection into migration controls. Such trends are exemplified in the emergence of policies designed to deflect claimants without violating international obligations, such as the Safe Third Country Agreement between the United States and Canada, the enactment of Dublin II which has introduced similar measures across the European Union, and most recently, in the controversial signing of an agreement between the EU and Turkey designed to address the European migration crisis by blocking spontaneous arrivals.<sup>230</sup> These developments of course imply the normative privileging of the position of citizens by more fully excluding potential claimants themselves from the realm of parties whose views and positions are fully relevant to the formulation of policy. Such issues only highlight the possible difficulties in addressing what it would mean to have stateless persons play a role in the adjudication of the norms that would secure their inclusion in the first place. The potentiality of discourse ethics to validate new and intrinsically open forms of community is clear from our earlier discussion, but from our contemporary standpoint we seem quite far from having adopted the “enlarged mentality” that the implementation of such considerations would seem to demand. Moreover, the rootedness of our fundamental conceptions of democratic legitimacy in the idea of bounded communities makes the leap to the standpoint of ‘citizen of the world,’ or even to a post-national consciousness, seemingly rather distant. This suggests that addressing the issue of statelessness in the present requires that we direct our attention toward problematizing the very notions of citizen and ‘people’ that seemingly necessitate political closure.

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<sup>230</sup> The implications of the EU-Turkey agreement are discussed in more detail in the final chapter. For the official EU position, see: *European Commission. Communication from the Commission to the European Parliament and the Council: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*. EC, Brussels. 2016.

### 3 Theorizing the Contingency and Contestability of Community

Having drawn attention to the potential and limits of discourse ethics to point the way toward more inclusive understandings of community and citizenship, we will now engage with the more recent perspective of agonistic democratic theorists in order to suggest ways in which the idea of a ‘people’ itself can be understood as intrinsically open. As indicated above, the central dilemma facing our attempt to overcome the issues posed by statelessness is that the position of the refugee is itself one of exclusion and in a sense constitutes a form of identity which seemingly eludes solidarity. Therefore any attempt to overcome the particular challenges posed by statelessness and the attempt to articulate a fundamental right to belong to community will crucially have to underwrite the modes of inclusion necessary to bring those who fall outside of the community within the threshold of the relevant. It is with this aim in mind that we turn to writers such as William Connolly and Chantal Mouffe, who have helped develop and articulate the agonistic approach toward democratic theory that places the issues of conflict and contestation at the center of the political. Using their insights we can further develop our engagement with the issue of statelessness along three dimensions: the unsettled nature of our concepts of citizen and ‘people,’ the constitutive tension between liberalism and democracy, and the potentiality for more inclusive and open notions of community that the agonistic vision of politics suggests. These considerations bring to light how we should understand the basis and bounds of community as always inherently contingent and contested, and therefore help cultivate the orientation necessary to be attentive to the needs of those excluded.<sup>231</sup>

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<sup>231</sup> In placing these two perspectives in critical dialog, my aim is to show how addressing the concerns of this project requires us to acknowledge the need for structures of justification with universalistic aspirations, while also securing the conditions for ongoing processes of agonistic contestation, understood in political terms. In the next

To those familiar with the perspective of agonistic democracy putting this tradition in conversation with Habermas' work may seem puzzling. Given the often emphasized challenge that the agonistic conception of democratic politics claims to pose as a radical alternative to Habermas' approach to political theory, the attempt to supplement our understanding of the issue of statelessness by turning to both traditions is therefore in need of some explanation. Chantal Mouffe in particular has continually emphasized the divergences between the agonistic orientation toward the political and the understanding of politics expressed in the work of deliberative democrats that follow Habermas, with their emphasis on rationalism and consensus.<sup>232</sup> However, the claims of Mouffe and others of an extreme divergence between the two approaches are greatly overstated—at least insofar as such claims suggest that we deny the fruitfulness of an engagement between the perspectives. As Simone Chambers has importantly noted:

Discourse ethics does not project the ideal of a dispute-free world, nor does it devalue contestation. Not only is such a world unattainable, it is also undesirable. Diversity and difference lead to criticism, and criticism leads to well founded norms.<sup>233</sup>

Positing a radical opposition between the two perspectives and their respective emphasis on the values of political contestation/conflict and consensus obscures how they can be brought together creatively. Moreover, Mouffe's tendency to criticize the consensus-oriented dimension of discourse ethics shows a failure to appreciate the central role of the contestation of norms to

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chapter I transpose these lessons onto the neo-republican tradition in order to show how it might serve as an important normative framework for theorizing statelessness.

<sup>232</sup> Chantal Mouffe, *On the Political* (New York: Routledge, 2005), 12-13.

<sup>233</sup> Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Ithaca: Cornell University Press, 1996), 162.

Habermas' approach. Such an understanding of his project is echoed in Patchen Markell's reading of Habermas' project as understanding "democratic politics as an unending process of contestation" in which there is a clear recognition that "no actually existing settlement can constitute a satisfactory embodiment of the regulative idea of agreement."<sup>234</sup> More recently Stephen White and Evan Farr have offered a compelling defense of the central place of 'no-saying' or dissent in the Habermasian project by drawing attention to the place of civil disobedience in Habermas' account of democratic theory.<sup>235</sup> While this is not the place to develop a full response to Habermas' detractors, the notions of *disagreement* and dissent play important roles in Habermas' theory which are often obscured by readings that tend to mistakenly classify his work along with that of Rawls.<sup>236</sup> However, such commentators are right insofar as they contend that the agonistic approach does provide us with a critical purchase on particular elements of political practice by distinctively emphasizing a model of politics centered around conflict, and it is precisely this focus we should engage with to supplement our developing approach toward statelessness.

We can gain an important point of entry to the insights of the agonistic tradition by turning to William Connolly's analysis of the inherently contested nature of our central political concepts in *The Terms of Political Discourse*. One of Connolly's central aims in this work is to challenge the prevalent assumption within the social sciences that the language of politics is somehow a neutral medium that merely conveys meaning and to "focus attention on the locus of

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<sup>234</sup> Patchen Markell, "Contesting Consensus: Rereading Habermas on the Public Sphere," *Constellations*, Vol. 3, No. 3 (1997): 379.

<sup>235</sup> Stephen K. White and Evan Robert Farr, "No-Saying" in Habermas," *Political Theory* 40.1 (2012): 32-57.

<sup>236</sup> The role of conflict in his thought is perhaps most pronounced in his theorizing of the public sphere as domain of contestation or "medium for permanent criticism" (*Theory of Communicative Action, Volume 2*, 341). Indeed, reading the public sphere as the domain where the domination of public debate by organized political and economic interest is *challenged* and *contested* by citizens further emphasizes this connection.

space for contestation” that exists within “the fine meshes of social and political vocabularies themselves.”<sup>237</sup> Taking an expressivist perspective on language, Connolly draws our attention to the fact that discussions over the “correct use of partly shared appraisal concepts are themselves an intrinsic part of politics” and employs the idea of ‘essentially contested concepts’ to denote such terms.<sup>238</sup> In this way, he carefully frames his analysis of political discourse in opposition to what he calls ‘empiricist’ or ‘rationalist’ tendencies within political science in order to highlight the deeply political valence of our arguments over the use of such words as democracy, power and freedom. Connolly’s emphasis on the potentialities of contestation and the internal discord within our political language emphasizes a certain vision of the political as essentially open. As he writes:

Politics is, at its best, simultaneously a medium in which *unsettled* dimensions of a common life find expression and a mode by which a temporary or permanent settlement is sometimes achieved.<sup>239</sup>

Thus, perhaps most importantly for our purposes, Connolly’s work highlights the political dimension of language itself in ways that enable us to track potential opportunities for political innovation by allowing us to “expose conceptual closure when it has been imposed artificially.”<sup>240</sup> In this way, what Connolly’s analysis forces us to confront is the continually partial and incomplete nature of our core political concepts. This suggests that the extension and

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<sup>237</sup> William Connolly, *The Terms of Political Discourse*, 231.

<sup>238</sup> William Connolly, *The Terms of Political Discourse*, 39.

The phrase ‘essentially contest concept’ is used to refer to case in which “the concept involved is appraisive in that the state of affairs it describes is a valued achievement, when the practice internally complex in that it’s characterization involves reference to several dimensions, and when the agreed and contested rules of application are relatively open, enabling parties to interpret even those shared rules differently as new and unforeseen situations arise.” Connolly, *The Terms of Political Discourse*, 10.

<sup>239</sup> William Connolly, *The Terms of Political Discourse*, 227.

<sup>240</sup> William Connolly, *The Terms of Political Discourse*, 231.



meaning of such concepts as community and citizenship can never be said to be fully decided, while our understandings of such central ideas as ‘justice’ at any specific moment are to be understood as always the conception of a particular group and therefore always open to contestation and further negotiation. In this way, distancing ourselves from the approach toward our social world that treats such questions as static and ‘operationalizable’ allows us to see that our central concepts are not anymore settled than the actual communities within which we live.

Connolly’s insights on the inherent contestability of our central political concepts has a central import for our discussion of how we might overcome the forms of exclusion that produce the situation of statelessness. In particular, the very idea of the bounds of a ‘people’ and the notion of citizenship are revealed as themselves highly contested in the very way Connolly’s analysis suggests. In no context attuned to the complexities of our political landscape can we truly speak of the category of citizen as having a fixed nature, or of a particular marker—whether of language, ethnicity, race, nationality, gender or class—that defines the bounds of political membership once and for all. This disputed and variable status of the idea of the citizen has been emphasized by Judith Shklar who has pointed out that “there is no notion more central in politics than citizenship, and none more variable in history or contested in theory.”<sup>241</sup> While on some level citizenship can be understood as a particular relationship between the individual and the state, the contours of that membership and the status it confers have varied widely through the tradition of western thought. Such sentiments regarding the contingent and potential variability of our social practices of inclusion and exclusion are brought to mind in Chantal Mouffe’s statement that:

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<sup>241</sup> Judith Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge: Harvard Press, 1991), 1.

What is at a given moment considered the ‘natural order’—jointly with the ‘common sense’ which accompanies it—is the result of sedimented practices; it is never the manifestation of a deeper objectivity exterior to the practices that bring it into being.<sup>242</sup>

Placing this dimension of contestability at the center of our thinking about citizenship therefore helps us keep in mind the inherent contingency to any idea of a ‘people’ and allows us to cultivate a sense of solidarity with those outside our particular form of community by viewing them always as potential citizens with legitimate claims to our concern.

Having offered an account of how the valence of contestability can begin to orient us toward intrinsically more open conceptions of community, I would like to now attend to the elements of the tradition of agonistic theory that emphasize the central role of conflict and antagonism to the realm of the political more generally. Much like Connolly, the work of Mouffe also centers around the radical potentiality of a conception of politics that emphasizes the value of contestation for forestalling the threat of closure that seemingly haunts our democratic practices. However, Mouffe in particular carries the thematic of contestation to the extreme in order to argue for the irreducibility and ineliminability of the potential for antagonism within the domain of the political. Mouffe’s antagonistic conception of politics is in part indebted to a tempered engagement with the work of Carl Schmitt that draws off his insistence on the fundamentally “conflictual nature of politics” and the importance of recognizing the antagonistic and relational basis of identity, while rejecting his insistence on the “existence of a homogenous demos.”<sup>243</sup> According to Mouffe, this revised vision of politics centered around the ever-present

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<sup>242</sup> Chantal Mouffe, *On the Political*, 18.

<sup>243</sup> Chantal Mouffe, *On the Political*, 13-14.

possibility of conflict is both more in tune with the oppositional foundation of identity and more open to the potentials for radical challenge and transformation that democracy allows.

Within Mouffe's interpretation of modern democracy, our fundamental framework of political activity is structured by the paradoxical tension between democracy as a form of rule and the symbolic framework of legalism, rights, and equality, that characterizes liberalism.<sup>244</sup> Drawing off the insights of Schmitt's critique of the liberal understanding of politics while rejecting his dismissal of liberalism, Mouffe emphasizes how this 'democratic paradox' between the two components of our modern framework of politics leads to a permanent site of tension, for "no final resolution between these two conflicting logics is possible" with our options limited to only precarious and temporary negotiations of this divide.<sup>245</sup> More fundamentally, we can read Mouffe's identification of the conflicting logic of liberal democracy as part of the deeper tension between legality and the sovereign will of the demos.<sup>246</sup> For our present context, Mouffe does helpfully flag how this tension is itself deepened by the advent of liberalism and its emphasis on equality and rights discourse. As Mouffe notes:

By constantly challenging the relations of inclusion-exclusion implied by the political constitution of the 'people'—required by the exercise of democracy—the liberal discourse of universal human rights plays an important role in maintaining the democratic contestation alive. On the other side, it is only thanks to the democratic logics of

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<sup>244</sup> Chantal Mouffe, *The Democratic Paradox* (New York: Verso, 2000), 2.

<sup>245</sup> Chantal Mouffe, *The Democratic Paradox*, 45.

<sup>246</sup> The signature of this larger conflict runs like a red thread through the history of political theory. Emblematic of this are Aristotle's discussions in the *Politics* of the tension between the will of the people and the laws of the polity, as well as Rousseau's opaque considerations on how to resolve that tension in a period at which liberalism was more a nascent theory than an established tradition. Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1985), 1292a1. Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses*, trans. Susan Dunn (New Haven: Yale University Press, 2002), 80-3.

equivalence that frontiers can be created and a demos established without which no real exercise of rights would be possible.<sup>247</sup>

By dramatizing the site of liberal democracy as contingent and unstable, her analysis brings to the fore the radically precarious and problematic dimension of any attempt to permanently articulate more inclusive and open conceptions of community. Moreover, Mouffe's warning regarding the fragility of any particular political configuration is exceedingly apt in our current age of the 'war on terror' when the civil rights of citizens, let alone those of resident aliens and non-nationals, have been notably eroded under more or less democratic institutions by the apparent return of policies of denationalization. As she notes of political negotiations in general, "every order is the temporary and precarious articulation of contingent practices"—a point that emphasizes the provisional and limited character of any political 'solution.'<sup>248</sup> Such observations speak directly to the concerns at hand by asking us to temper the cosmopolitan aspirations and pretensions of any project with the recognition that the negotiation of the terms of political membership is always inherently an ongoing political project and can never be considered a *fait accompli*. Recognizing that the universalizing tendencies of liberalism and human rights discourse exist in tension with the potentialities of democratic sovereignty brings to light the ever present potential to reconstitute more open notions of community membership necessary to secure a 'right to belong,' while also stressing the precariousness of such arrangements.

This reading of theorists from within the agonistic tradition of radical democracy has attempted to illustrate how an understanding of the political centered around conflict and contestation can be put to the uses of overcoming the conditions that produces statelessness in

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<sup>247</sup> Chantal Mouffe, *The Democratic Paradox*, 10.

<sup>248</sup> Chantal Mouffe, *On the Political*, 18.

our contemporary world. Such an engagement arguably provides a needed supplement to the Habermassian approach toward statelessness by positing new modalities for understanding citizenship as intrinsically open, and therefore provides a basis for including those presently excluded from our forms of community in our realm of moral concern. However, while our discussion of agonism has highlighted the essentially contestable nature of claims to collective identity, it is crucial to emphasize that such contestability is not equally open to all. This is an important insight emphasized by Lawrie Balfour who notes the limitations of the tradition of agonistic theory to diagnose the pathologies of exclusionary citizenship practices. As Balfour saliently points out:

Even if all identities are ultimately unstable or contestable, even if they are all produced through rather than revealing foundational truths about individuals or communities, they are neither produced in the same way or contestable to the same degree. To assume that they are is to overlook crucial asymmetries between members of different identity groups.<sup>249</sup>

Within the context of our current discussion, such considerations draw attention to the fact that it is just those who are most disadvantaged by our current practices of citizenship who shall also be least able to challenge the norms that produce contemporary forms of exclusion. While the agonistic lens provides a powerful perspective for destabilizing and challenging our conceptions of community, we must also remain attentive to how the potentiality for contestation is often structurally determined. What is more, the emphasis of agonistic theory on contingency runs the risk of collapsing into a brashly optimistic historicism, by failing to appreciate that while identities and affiliations may be historically and socially constructed, they can still remain

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<sup>249</sup> Lawrie Balfour, “Act and Fact: Slavery Reparations as a Democratic Politics of Reconciliation,” in *The Politics of Reconciliation in Multicultural Societies*, ed. W. Kymlicka and B. Bashir (Oxford: Oxford University Press, 2008), 99.

incredibly difficult to transform or challenge, as well as fatally real in their effects. Indeed, while the account I offered of the recent development of the conditions of possibility for statelessness was meant to denaturalize aspects of our international order that we take for granted as immutable, this was not to suggest that such institutions and practices will be at all easy to dislodge. It is one thing to stress the contingency of our institutions in order to render them open to normative interrogation, and quite another to suggest that such historical contingency makes these arrangements any less palpably real.

## 4 Resolving the Tension Between Citizenship and Human Rights?

As noted at the outset of this chapter, I engage with the Habermasian and agonistic approaches in recognition of the critical resources both perspectives offer for theorizing issues of exclusion. To further confirm this, theorists in both traditions have directly taken up the question of membership in the relationship between democratic citizenship and human rights. Here I engage with two prominent contributions from each perspective. First I turn to Seyla Benhabib's attempts to articulate a cosmopolitan approach to questions of global justice that attempts to balance the particularistic claims of self-determination against the universalist and context transcending demands of human rights in *The Rights of Others* and *Another Cosmopolitanism*. I then shift to the recent work of Paulina Tambakaki in *Human Rights, or Citizenship?*, where she attempts to direct the agonistic tradition toward revitalizing a conception of citizenship adequate to our increasingly post-national and globalized present. While both Benhabib and Tambakaki share a notable appreciation for the centrality of the claim to membership to a robust account of global justice, their respective accounts remain incomplete and ultimately insufficient for addressing the normative questions raised by statelessness.

## 4.1 Habermassian Approaches to Membership

Spanning two volumes, the work of Seyla Benhabib represents the most sustained attempt to apply the insights and implications of Habermassian discourse ethics, as well as the account of deliberative democracy that extends from that approach, to questions of membership on the international level. Benhabib frames her intervention as responding to contemporary transformations relating to the cross-border movement of people, the rise of transnational political and economic relations, as well as the emergence of post-national forms of identity and status. Because of this Benhabib understands her project to be addressing a number of pressing themes often neglected by political theorists, despite their growing salience to both global and domestic politics.

Benhabib's interventions into contemporary debates of global justice begin with the insight that one of the key tensions that have structured discussions as they have predominantly played out between global egalitarians and liberal nationalists, as well as communitarians, is the apparently irreconcilable conflict between the values of democratic self-determination and cosmopolitan human rights. Yet what these approaches all fail to fully appreciate is the normative importance of membership—with the former neglecting the claims of community and democratic rule, and the latter largely reifying boundaries and institutions that seems increasingly anachronistic and outdated under the circumstances of our globalized world. To recast our perspective and move beyond this apparent impasse, Benhabib suggests theorizing the bounds of community by focusing on political membership—a subject that remains under-theorized by both global egalitarians and their critics.

Benhabib takes up the insights of Habermas' discourse theory in order to develop an account that can address the claims of democratic self-determination and the universalist

aspirations of context-transcending human rights. However, Benhabib astutely notes that addressing questions of inclusion and exclusion from within the traditional framework of democratic theory raises daunting difficulties.<sup>250</sup> According to Benhabib, democracy requires borders and therefore democratic politics necessitates closure. Yet this points to an internal tension, a ‘paradox of democratic legitimacy’ within the logic of democracy itself.<sup>251</sup> For if the core principle of democratic rule is that those subject to political authority ought to be included in the project of collective self-rule, the most fundamental question of inclusion and access to membership must ultimately rest on non-democratic grounds—for the question of who shall constitute the demos cannot be answered democratically. Moreover, as we have already seen from our engagement with Habermas, a discourse theoretic approach faces a notable challenge of its own in attempting to address the claims of community and membership: the problem of scope. Confronting this dilemma head on, Benhabib notes that:

either a discourse theory is simply irrelevant to membership practices in that it cannot articulate any justifiable criteria of exclusion, or it simply accepts existing practices of exclusion as morally neutral historical contingencies that require no further validation. But this would suggest that discourse theory of democracy is itself chimerical insofar as democracy would seem to require a morally justifiable closure which discourse ethics cannot deliver.<sup>252</sup>

Thus Benhabib acknowledges that approaching the issue of political membership from the perspective of discourse theory and a normative theory of deliberative democracy will have to

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<sup>250</sup> In forefronting this Benhabib seemingly acknowledges the insights of agonistic theorists such as Chantal Mouffe who have made the paradox of democratic rule central to their project. For an excellent survey that brings out these affinities, see Alan Keenan, *Democracy in Question: Democratic Openness in a time of Political Closure* (Stanford: Stanford University Press, 2003), 25-75.

<sup>251</sup> Seyla Benhabib, *The Rights of Others*, 43-48.

<sup>252</sup> Seyla Benhabib, *The Rights of Others*, 15.



address both the tensions internal to democratic theory as well as provide some means of adjudicating the question of scope.

Benhabib's path to resolving the above dilemmas and providing a way to negotiate the claims of ethical particularism and moral universalism rests on the notion of 'democratic iterations' that she derives from the thought of Jacques Derrida. While it may be true that democratic rule requires closure and thus is always implicated in exclusion, the people of liberal-democratic polities also continually engage in a reflective process of reconstitution, and thus the iterative nature of democratic politics enables the constant renegotiation of the bounds of the demos itself. Thus Benhabib tells us:

the unity of the demos ought not be understood as if it were a harmonious given, but rather as a process of self-constitution, through more or less conscious struggles of inclusion and exclusion.<sup>253</sup>

At the same time, contemporary liberal democracies are increasingly committed to context-transcending constitutional and international norms, thus embedding cosmopolitan norms within the context of the legal and political cultures of these polities. This lends an inclusive pull to the 'juris-generative politics' of such iterative processes, as liberal democracies come to increasingly negotiate the bounds of community by interpreting cosmopolitan norms through the particularistic context of their specific histories and shared identities.

Benhabib's attempt to develop 'another cosmopolitanism' represents an important early intervention into the often neglected terrain of this undertaking and is noteworthy in its receptiveness to many of the insights of the agonistic perspective. Yet despite the merits of her

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<sup>253</sup> Seyla Benhabib, *The Rights of Others*, 216.

account, Benhabib's discourse-theoretic approach toward membership and global justice faces a number of challenges. These difficulties are for the most part endemic to Habermas' own attempt to transpose the insights of his approach to the level of post-national politics, and therefore represent broader limitations of the discourse-theoretic approach when applied to the issues of community and membership. To show this, I indicate how Benhabib's project suffers from two major theoretical tensions, insofar as it smuggles in conceptual pre-suppositions the account was precisely supposed to supersede or reject.

The first difficulty is that below the cosmopolitan surface of Benhabib's work lies a thoroughgoing statist perspective that runs through the project. This comes through in the premises that structure Benhabib's account of democratic legitimacy—that democracy must have borders and that such self-determining communities can be clearly delimited, for the “demos, as the popular sovereign, must assert control over a specific territorial domain”—both of which I interpret as artifacts of methodological nationalism.<sup>254</sup> In this way, Benhabib's understanding of the conditions necessary for the exercise of self-determination appear to be parasitic on the traditional 'container' model of the state. To be sure, Benhabib (like Habermas) remains hopeful that post-national forms of community—most notably the European Union—might provide a context for democratic politics beyond the traditional confines of the nation state. Indeed, given the limited steering capacity of particular states, from this standpoint, such regional blocs may be the only way to combat the disruptive effects of globalization. However, rather than transcending statist assumptions, this move appears to merely replicate them at a higher level. The EU and other future supra-national organizations are simply conceptualized isomorphically as the

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<sup>254</sup> Seyla Benhabib, *The Rights of Others*, 48.

institutional architecture of the nation-state writ-large.<sup>255</sup> Such a line of argument is unpersuasive on Benhabib’s own grounds, for it was precisely the novel challenges of our present that were supposed to motivate her intervention. Indeed, if we are now confronting qualitatively new problems then surely relying on old wine in new bottles does not seem a promising approach for developing novel solutions. But there is a more serious problem: Benhabib’s reliance on the institutional architecture suggests that the problem of scope that her project sought to overcome in fact remains—after all, the persistence of such traditional statist assumptions serves the function of providing a stable, delimited context for ethical discourse and democratic will-formation.<sup>256</sup> In the context of this project, the difficulty runs far deeper, for by essentially endorsing a largely status quo statist understanding of global relations, Benhabib’s approach forecloses a broader questioning of the presuppositions of the nation-state system itself.<sup>257</sup>

The second conceptual difficulty within Benhabib’s account concerns the notion of democratic iterations that forms the core of her normative framework. As noted above, Benhabib argues that the iterative nature of democratic politics in modern liberal polities allows for the constant re-negotiation and reinterpretation of the identity and bounds of the demos itself. This is because, for Benhabib, human rights norms have become part of the self-understanding of liberal

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<sup>255</sup> John P. McCormick raises this very criticism against Habermas’ post-nation writings, suggesting that Habermas conceptualizes the European Union essentially in terms of the structures and institutions of the nation-state “merely extended up to and expanded across the continental level.” [John P. McCormick, *Weber, Habermas, and Transformations of the European State: Constitutional, Social and Supranational Democracy* (Cambridge University Press, 2007), 19. See also, Chapter 5, in passim.]

<sup>256</sup> Thus Benhabib tellingly asserts, democracies “require closure precisely because democratic representation must be accountable to a specific people” (*The Rights of Others*, 219). But it is worth asking, *does* democracy require borders, mapped onto a particular people? Need these be stable and exclusive, or territorially delimited? If current global processes exceed the traditional framework of the state, might they also exceed the traditional framework of democracy, calling for a rethinking of the latter as well?

<sup>257</sup> As we have seen in the account provided in earlier chapters the contemporary structures of the now-global state system represents a contingent, and indeed relatively recent, historical formation.

democratic communities. Thus the reiteration and reaffirmation of human rights norms within the context of particular self-determining communities assures that such exclusions are never rendered stable or permanent. Indeed, there is always a constant renegotiation of the boundaries of communities as the context-transcending quality of human rights norms pushes toward a more inclusive order.

However, for this account to be persuasive, some rather implausible assumptions must be made. Put briefly, Benhabib's normative framework must presume that such iterations will always and inevitably be oriented toward more cosmopolitan configurations, but her account does not explain why this must be the case. Benhabib therefore seems to place undue faith in the teleological unfolding of a more inclusive world order stabilized by the inevitable logic of human rights, yet such optimism seems both theoretically and empirically unwarranted.<sup>258</sup> On the one hand, without presuming an inherent logic to history, there is no conceptual reason why such iterations must propel us toward more inclusive and cosmopolitan norms of membership.<sup>259</sup> On the other hand, contemporary developments would suggest that such optimism is not only conceptually unwarranted but at odds with the far more ambivalent dynamic at work in both Europe and across the world. We need only consider the account in the last chapter of the undermining of norms governing our international refugee regime as well as the troubling practices undertaken by many liberal democratic states in the name of arresting irregular

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<sup>258</sup> Indeed, on a theoretical level the problem of scope identified in our earlier discussion of discourse ethics remains, for how such issues are interpreted within a deliberative public sphere— a matter of economics, of maintaining cultural integrity, a claim of human right—cannot be determined and vouchsafed in advance.

<sup>259</sup> Raising a similar doubt with regard to Habermas' account of an unfolding post-national constellation, John McCormick asks: "Why will elites confronted with the integration deficiencies of supranational politics in Europe not be tempted to appeal to substantive and exclusionary identities, as did their counterparts in the earlier history of the nation state?" (*Weber, Habermas, and Transformations of the European State*, 225) Contemporary developments in European states provide ample grounds for taking this concern very seriously indeed.

migration. Indeed, Benhabib's most promising example—the European Union—is far from a clear-cut case. 'Fortress Europe' appears to dubiously reconcile post-national forms of membership and borderless movement for privileged EU citizens alongside an intensified and often deeply problematic pan-European border control project meant to deflect asylum seekers and economic migrants from ever arriving on European soil. Taken together, such developments ought to leave us skeptical of a critical theory of membership that places so much emphasis on the promise of a more inclusive future.

## 4.2 Agonistic Approaches to Citizenship

If Benhabib's approach seems unable to address dilemmas outlined above, it is worth considering whether agonistic democratic theorists who have taken up these issues have fared better. The recent work of Paulina Tambakaki represents the most prominent contribution from the agonistic tradition to the normative dimensions of citizenship in a global context. While much of the work of agonists has focused explicitly on theorizing the nature of democracy at the domestic level, Tambakaki importantly insists on the relevance of the agonistic perspective for our understanding of politics in an age of globalization, cross-border movement, and increased interconnectedness. Like Benhabib, Tambakaki's interventions thus begin from the insight that questions of membership ought to occupy a far more central place in contemporary political theory given the current global circumstances of politics and the challenges posed to our conventional conceptions of citizenship and democratic community.

Yet despite this common starting point, much of Tambakaki's account is framed through a critique of deliberative approaches emerging from the Habermasian tradition. These are presented as deeply flawed as a result of the privileging of a legalistic conception of human rights over a properly political vision of citizenship, and with that of a seemingly de-politicized

proceduralism over democratic practice, tendencies that Tambakaki identifies as endemic to thinkers such as Benhabib. Echoing the criticisms of earlier agonistic theorists, Tambakaki therefore takes issue with what she identifies as fundamental shortcomings in the deliberative democratic project as an approach for conceptualizing the politics of membership. These range from a mistaken emphasis on consensus that misses the inherently contestatory and conflictual nature of the political, an overly rationalist conception of politics that neglects the role of passion and substantive forms of identity, and a failure to acknowledge the constitutive tension between citizenship and human rights characteristic of liberal democracy.<sup>260</sup> According to Tambakaki, these difficulties severely compromise the capacity of deliberative democrats to offer insights to our contemporary global challenges.

Building on the work of Chantal Mouffe, Tambakaki instead champions an agonistic perspective that emphasizes the irreducibly contestatory dimension of the political. Like Benhabib, this intervention is cast as an attempt to grapple with the tension between the claims of citizenship and human rights in an increasingly de-territorialized and post-national global context. However, Tambakaki takes issue with what she sees as the pervasive tendency of Habermassians to ultimately privilege human rights over citizenship, leading her to accuse these theorists of defending a deeply problematic “anti-politics” grounded in an implicit emphasis on liberal legalism over democratic politics.<sup>261</sup> Tambakaki consequently argues for sustaining and

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<sup>260</sup> There is arguably a tendency of authors within the agonistic tradition to frequently overstate their divergences from the Habermassian perspective by presenting an exaggerated portrait of the latter, as noted earlier in this chapter. Tambakaki unfortunately is no exception and tends to overemphasize the consensus-oriented dimension of Habermassian approaches, while also accusing them of an untenable rationalism that is inattentive to affect or the role of passion in politics. I do not discuss these objections in detail despite their forming a significant component of Tambakaki’s critique because they seem largely unconvincing.

<sup>261</sup> Paulina Tambakaki, *Human Rights, or Citizenship?* (Abingdon: Birkbeck Law Press, 2011), 78.

embracing the tension between the contradictory logics of liberalism and democracy.<sup>262</sup> To do so, she suggests articulating an agonistic conception of citizenship capable of responding to contemporary developments. This account of a globalist agonism is grounded in four claims about the nature of political life, which should be familiar from our broader discussion above: the deep implication of democratic life in incompleteness and uncertainty, a commitment to contestation rooted in expressions of difference and the consolidation of pluralism, an emphasis on the role of affective identities and common projects in democratic contestations, and understanding of democracy not merely as a procedural framework, but as an ethos or way of life. By grounding our conception of politics in these presuppositions, Tambakaki argues for a revised conception of citizenship in agonistic terms appropriate for negotiating transnational and global processes. This conception of citizenship is fundamentally non-essentialist—emphasizing the open ended and contingent status of citizenship as an identity, which is always “precariously constituted” and therefore open to transformation. This in turn is meant to inform an equally open-ended conception of the demos or people, which need not operate merely at the level of the state or only take national expression.

Yet despite an important attentiveness to the normative significance of membership, Tambakaki’s attempt to transpose the agonistic vision of politics to the global level remain largely unpersuasive and unsatisfying. Her development of the substantive implications of the agonist perspective remain unsettlingly vague, limited to the invocation of a de-centered “federalism from the bottom up” alongside reinforcing the autonomy of a plurality of “regions,

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<sup>262</sup> For Tambakaki, Habermas’ co-originality thesis—that a liberal rights regime and a framework of democratic politics are mutually constitutive—is to be understood as merely a masked privileging of liberalism over democracy. (Paulina Tambakaki, *Human Rights or Citizenship*, 28; c.f. 31-32) However, Habermas’ position appears quite amenable to the perspective that Tambakaki herself wishes to defend, especially when the negotiation of these two frameworks is understood as a normative ideal rather than accomplished reality.

sub-regions, and municipalities” to support a multileveled contestatory politics.<sup>263</sup> The effects of these proposals remain unclear both because of Tambakaki’s cursory exploration of these proposal and the apparent optimism underwriting such suggestions. This last point is critical given the strikingly limited steering capacity of entire regional blocs, such as the EU, to manage our contemporary globalized context.<sup>264</sup>

But more problematically, Tambakaki’s account also reveals systemic limitations within the broader agonistic perspective for approaching questions of membership at the global level. First, like other agonistic theorists, Tambakaki’s approach remains insufficiently attentive to the constitutive role of institutions in structuring relations of both freedom and domination. Such an admission need not precipitate a collapse into a depoliticized proceduralism that agonists sometimes accuse deliberative democrats of supporting; rather it is simply to recognize the substantive conditions that structure the grammar of contestation. This seems to be an issue for the agonistic perspective more generally, but it is especially problematic in the case of statelessness, where institutions are deeply implicated in the systematic production of political exclusion.<sup>265</sup> Second, the basis on which Tambakaki criticizes and rejects rights as a viable vantage point for approaching questions of inclusion reveals a fundamentally one-sided

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<sup>263</sup> Paulina Tambakaki, *Human Rights or Citizenship*, 131. As she writes, “in order to deal with the pressures that the nation state faces from the inside, regionalist and tribalist movements, and from the outside, supranationalism and transnationalism, we need to differentiate between the different regions, sub-regions and cities in order to reinforce their autonomy but also to multiply, in effect, their relations of exchange. In this way, we would be in a position to combine unity, because each region or city would be considered unified and autonomous, with a conflictual diversity, as there would be multiple and inevitable conflictual relations of exchange among the different autonomous regions.” (Ibid.)

<sup>264</sup> If even the European Union is often only barely capable of responding to transnational challenges it is unclear why the forms of political associations gestured toward by Tambakaki would be more effective.

<sup>265</sup> As Tambakaki tellingly writes, “Democratic politics involves therefore a struggle about defining the people...it also involves a confrontation, an agonistic debate, among the different terms of citizenship.” (*Human Rights or Citizenship*, 130) Yet this formulation, as well as Tambakaki’s entire discussion, leaves largely unanswered how asymmetries of power and structures of domination can themselves be prevented from intervening in and distorting the terms of such debate.



conception of human rights. For Tambakaki human rights remain essentially legalistic in nature, leading her to conclude that approaches that emphasize human rights are fundamentally “antipolitical” through elevating law over democratic politics.<sup>266</sup> Yet this need not be the case. As we shall see in the next chapter, the neo-republican perspective can be transformed to offer us a compelling “political” conception of human rights, which emphasizes their deep implication in claims to non-domination. This allows us to move beyond the apparent citizenship-rights dilemma without simply privileging one over the other. What is more, in doing so we can avail ourselves of respective insights of both Habermasian deliberative democrats and agonistic democratic theorists when trying to address the normative dilemmas entailed by statelessness.

## 5 The need for a new approach: Statelessness and Non-domination

As I have indicated in this chapter, despite a more general neglect within contemporary political theory, writers from within both the deliberative and agonistic democratic traditions have provided resources for taking up the normative questions raised by the claims of community and to membership. Despite the often emphasized divergences between these two perspectives, both agonistics and deliberative democrats have shed light on what such an approach will have to attend to in order to provide a satisfying framework. More specifically, the recent contributions of Benhabib and Tambakaki have attempted to apply these insights directly to the issues of democratic citizenship and human rights in a contemporary context increasingly characterized by intensified transnational relations and increasingly post-national forms of membership.

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<sup>266</sup> Paulina Tambakaki, *Human Rights or Citizenship*, 13. Also, see *Ibid.*, 5.

However, despite the promise of both the Habermasian and agonistic traditions, their respective approaches fall short of providing a satisfying framework for interrogating membership, and by extension, for theorizing statelessness. To be sure, both accounts prove superior to normative approaches that either presuppose rather than problematize both the container-model of the nation state and the status of national citizenship, treating such constructions as neutral starting points for theorizing, or to global egalitarian accounts that simply elide the normative importance of citizenship and membership. However, as I have indicated above, these perspectives do not ultimately provide us with sufficient critical purchase to address the normative claims raised by statelessness. Regardless of this drawback, both approaches shed light on what resources will be needed in order to develop a satisfying framework. From our engagement with Benhabib it should be clear that we need a normative framework that moves beyond statism and which challenges, as well as reconfigures, our understanding of democracy as dependent upon borders. In contrast, our interrogation of Tambakaki's account brought to light the value of developing a political conception of human rights that is capable of both attending to and contesting relations of exclusion and domination. In the next chapter I attempt to develop a normative approach that addresses these requirements by way of a critical engagement with the neo-republican tradition.

## Chapter 5

# Statelessness and Non-domination: Toward a Critical Theory of Republicanism

This project has up till now remained primarily diagnostic and expository in nature. We began with a critical engagement with the now classic account of statelessness developed by Hannah Arendt. This provided a point of departure for a historical reconstruction of the emergence of statelessness—one that focused on the novel institutional, ideational, and technological developments that brought statelessness into being and sustain it to this day. Though primarily descriptive in aim, the normative payoff of this reconstruction of the origins of statelessness was two-fold.

On the one hand, we saw how a proper perspective on the historical conditions of statelessness helps us appreciate its distinctively modern nature as a form of political exclusion. This account also stressed the central—and indeed necessary—role of shared and coordinated state practices in generating statelessness, as well as the normative deficits of the current refugee system in addressing such concerns. An important implication of this discussion was that since statelessness is a product of the coalescence of the organized state system, attempts to attend to the claims of those ejected from this normative order must go beyond merely restoring or reforming the international refugee system. Indeed, they call for a more fundamental transformation of the principles of international relations—a subject that will be taken up in the final chapter of this project.

On the other hand, I suggested that this reconstruction helps us reframe the injustice of statelessness as constituting a form of domination. This requires us to conceptualize the claims of stateless persons as fundamentally grounded in the lack of the status or standing of one who

‘counts’ within a normative order, which in turn indicates the fundamentally political nature of such claims to justice. The justificatory demands of the stateless ought to be conceptualized as a political claim to recognition and standing, rather than merely expressing a moral claim to humanitarian assistance and aid. This characterization of statelessness as grounded in the denial of the status necessary to secure one from subjection to arbitrary rule motivates my turn in this chapter to the neo-republican notion of non-domination as a way of understanding how we might redress the harms of statelessness.

In light of this characterization of statelessness as a condition of domination, this project takes up the perspective developed by contemporary neo-republican theorists as a means of conceptualizing the conditions of redress for the injustice stateless persons suffer. Though initially pioneered and advanced by Philip Pettit<sup>267</sup> as a normative approach, this perspective has come to consist of an increasingly diverse group of scholars. Put very concisely, the basic insight of the republican approach lies in the notion of *freedom as non-domination* that it advances as a normative ideal and basis of social criticism.<sup>268</sup> Freedom as non-domination involves a condition or state where an agent is not exposed to, or threatened by, the capacity of others to interfere in ways that do not track her interests. Importantly republican theorists thus add a “modal aspect” to our understanding of freedom as entailing a particular status and security; as one commentator notes, non-domination “requires not merely the enjoyment of specific liberties...but the claimable and secure enjoyment of them.”<sup>269</sup> Extending from this understanding of freedom as

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<sup>267</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government: A Theory of Freedom and Government*. Oxford University Press, 1997.

<sup>268</sup> See Cécile Laborde, *Critical Republicanism* (Oxford: Oxford University Press, 2008); “Republicanism and Global Justice: A Sketch” for an account of republicanism as a specifically critical project.

<sup>269</sup> Lena Halldenius, “Building Blocks of a Republican Cosmopolitanism: The Modality of Being Free” *European Journal of Political Theory*, 9 (1): 13.

non-domination are two novel insights of particular relevance to this project. First, republicans defend a fundamentally *relational* conception of liberty; to enjoy non-domination is to possess a certain institutional or civil status amongst others that secures one from the arbitrary exercise of power. In this sense, republicans are careful to emphasize that freedom as non-domination is “a function of social relations, a concept for the social world.”<sup>270</sup> The second insight comes from the way neo-republicans understand the relationship between freedom and interference or constraint. Indeed, the presence of some constraints, most paradigmatically laws made to track the interests of non-dominated individuals, are necessary conditions of the republican conception of freedom. Therefore, of utmost importance to the republican vision of non-domination as a political ideal is an emphasis on the freedom-*constitutive* dimension of institutions that stress the central role of these structures in enabling and securing liberty.

As I will demonstrate subsequently these features of the neo-republican perspective provide us with a promising framework not only for diagnosing the injustice confronted by the stateless, but also with the resources to theorize the proper mode of redress. Indeed, unlike the rival approaches that we engaged with in the prior chapter, such a framework provides us with a far more robust and coherent approach for understanding the concrete normative implications of addressing statelessness today.

However, on first appearance the turn to neo-republicanism as part of my approach to statelessness might initially strike readers as problematic. For after all, isn't the historical tradition that informs the contemporary republican turn explicitly concerned with the status of citizens within bound communities? Indeed, in his more recent work applying neo-republicanism

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<sup>270</sup> Lena Halldenius, “Building Blocks of a Republican Cosmopolitanism,” 7.

to questions of international justice, Philip Pettit has given his account of a global republicanism an explicitly statist orientation.<sup>271</sup> This might suggest that such a framework seems ill-suited for considering the claims of those who fall outside community or inappropriate for interrogating the justice of global institutions.

I will argue that, *pace* the drawbacks of Pettit's articulation, these difficulties are by no means intrinsic to the neo-republican approach. Indeed, I would contend that it is specifically because neo-republicans are concerned with the nature of citizenship and the robust un-dominated standing it enables that this framework is able to provide us with critical purchase for understanding the position of those who have been denied or have lost this status. Thus it is precisely by drawing on the rich account of the good of the status of membership that theorists of non-domination offer that we are able to deepen our understanding of the harm of political exclusion entailed by statelessness. What is more, despite the statist tendencies of Pettit's own commitments, the potential for a truly global and transnational neo-republican perspective has been demonstrated by the emerging literature of global republicanism, the insights of which I build upon in this chapter.<sup>272</sup>

However, beyond these initial concerns, there are a number of subtler, and yet in some ways more intractable and problematic, issues in the dominant interpretation of neo-republicanism that has been put forward in the work of Pettit and which persist in the work of writers who have moved beyond such statist assumptions. Because of this, in what follows I

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<sup>271</sup> See: Philip Pettit, "A republican law of peoples." *European journal of political theory* 9, no. 1 (2010): 70-94, and more recently, Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: WW Norton & Company, 2015), 150-188.

<sup>272</sup> For an early and persuasive articulation of a non-statist global republicanism, see Laborde. "Republicanism and Global Justice," 48-69.

suggest developing an alternative to Pettit's approach suitable for considering global and transitional claims of justice that center around the claim to membership and inclusion. I propose doing so through reconstructing the insights of a number of scholars who have begun to theorize non-domination in what I call 'political' terms and who, in contrast to Pettit, root their approaches first and foremost in the experience of injustice, rather than attempting to construct an *a priori* conception of the just society *ex ante*.

But before turning to this critical reconstruction of neo-republicanism we must first interrogate the dominant paradigm as it has been developed by Pettit. Accordingly in the first part of the paper I begin by sketching Pettit's account of neo-republicanism in his seminal *Republicanism: A Theory of Freedom and Government* which offers the most comprehensive account of his views, the central aspects of which he has largely affirmed in subsequent work.<sup>273</sup> From here, I point to a number of difficulties contained in Pettit's account, which I suggest raise serious problems for his interpretation of neo-republicanism, and which my own account will seek to avoid. In this critical engagement with Pettit's perspective, my hope is to also anticipate a number of objections that might be raised against my proposal to use republicanism as a framework to address statelessness. Having problematized aspects of the dominant neo-republican framework, in the remainder of the chapter I turn to the development of my own reconstruction of neo-republicanism. This account builds on the work of a dyad of theorists—Rainer Forst and James Bohman—who have made a concern with addressing relations of domination central to their work. While approaching the issue of domination from distinct perspectives, I suggest that the shared insights of these writers provide us with the resources for a

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<sup>273</sup> Although in my reconstruction I focus on Pettit's presentation in *Republicanism*, this engagement also takes into account subsequent work by Pettit where relevant. The critiques I raise of Pettit's account therefore apply to his framework as it has developed over time.

critical reconstruction of republicanism that is more effectively capable of addressing the claims to justice of stateless persons.

## 1 The Neo-Republican Turn

As the originator and chief contributor to the normative project of neo-republicanism, Pettit has taken on the task of articulating and defending what he contends is a unique account of political liberty that draws upon the lessons and insights of republican thought. Identifying and articulating what he views as the salient concerns of a historical tradition centered on the conception of freedom as ‘non-domination,’ Pettit has argued that the republican ideal offers a coherent and far-reaching model for both approaching and reforming our contemporary political landscape.<sup>274</sup>

At the heart of Pettit’s reconstruction and revival of the republican vision of political life is the notion of civil freedom that he identifies as the conceptual core of that tradition. Put most succinctly, the republican ideal of freedom as non-domination concerns the absence of the potential for arbitrary interference by another. That is, freedom as non-domination involves a condition or state where an agent is not exposed to, or threatened by, the capacity of others to interfere in ways that do not track her interests. Pettit views republican liberty as a distinct and notably under-theorized conception of freedom that has in part been obscured by the preeminence of Isaiah Berlin’s well-known distinction between negative and positive liberty, and indeed emphasizes how the republican conception falls outside Berlin’s schema.

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<sup>274</sup> This engagement is primarily concerned with neo-republicanism as a normative framework. Some have questioned the persuasiveness of the account of the history of political thought out of which Pettit claims to reconstruct his neo-republican framework. While very sympathetic to these concerns regarding the liberties taken in Pettit’s presentation of the historical roots of freedom as non-domination, I fully bracket these considerations here.



To appreciate the distinctiveness of the republican approach it is helpful to revisit Berlin's famous distinction. According to Berlin's account, negative liberty may be best understood as freedom from interference or coercion in one's choices or decisions, and has played a prominent role in the development of liberalism as the basis upon which rights-claims and the private sphere are grounded. Positive liberty, on the other hand, is most easily identified with the idea of self-mastery or rational self-direction, often associated with popular rule and populist strains of civic republicanism.<sup>275</sup> However, according to Pettit the dichotomous account of liberty that Berlin helped proliferate has led to a level of conceptual distortion that obscures a void in our understanding of the potential modalities of political freedom. As a result, this dyadic image of liberty has problematically narrowed our theoretical field of vision—both hiding the conceptual possibility of a third account of liberty, while also concealing the neo-roman republican tradition's concern with freedom as non-domination. The main impetus for Pettit's turn to the republican tradition is to resuscitate this distinctive conception of freedom and to explicate the implications of adopting non-domination as a central political ideal.

In emphasizing the *absence* of arbitrary interference, the republican conception clearly differs from Berlin's depiction of positive liberty—for one can well imagine an individual in a non-dominated condition failing to possess self-mastery. Thus in Pettit's original account, republican liberty does not directly entail democratic self-rule, though Pettit does note that some such institutions may be instrumentally necessary to maintain relations of non-domination.<sup>276</sup>

Moreover, Pettit insists that the republican ideal of freedom resists assimilation to the notion of

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<sup>275</sup> It is important to note that Berlin's account is best understood as descriptive rather than normative: in acknowledging a conceptual distinction between two notions of freedom Berlin is not arguing that we need choose between them, but believes that with such discernment we can better grasp significant conceptual strands in the western tradition of political thought.

<sup>276</sup> Philip Pettit, *Republicanism*, 30.

negative liberty that he characterizes as the central concern of liberal theorists. First, the republican account does not assume that liberty is only compromised by actual acts of intentional interference, but insists on identifying the condition of being exposed to arbitrary forms of potential interference as a detriment to freedom. Because of this central concern with combating relationships of domination, the republican tradition is sensitive to the fact that “it is possible for liberty to be lost without interference.”<sup>277</sup> This crucial distinction between domination and interference is brought out by reference to the way in which conditions of freedom are compromised in the hypothetical situation of slavery or servitude under a non-interfering master: while the benevolent disposition of the dominator may result in a potentially low degree of actual interference, the very fact that the dominated agent lives at the mercy and arbitrary whim of another occludes the enjoyment of liberty. While the above scenario clearly illustrates a coercive abridgment of freedom, Pettit suggests that the proponent of liberty as non-interference is ill-equipped to criticize injustices arising from such relations of domination, regardless of their obviously oppressive nature. Because of his depiction of “liberals as those who embrace non-interference” and the concomitant association he sees between liberal thought and a commitment to negative liberty, Pettit suggests that liberalism is on the whole problematically tolerant of the very sorts of relations “the republican must denounce as paradigms of domination and unfreedom.”<sup>278</sup> In contrast to this, the republican commitment to freedom as non-domination is not constrained to recognizing only actual cases of interference, but can acknowledge the oppressive and pernicious effects of being subject to potential acts of arbitrary interference from other agents.

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<sup>277</sup> Philip Pettit, *Republicanism*, 35.

<sup>278</sup> Philip Pettit, *Republicanism*, 9.

Second, in contrast to the standpoint of negative liberty, Pettit observes that the republican notion of liberty does not necessarily view all instances of interference as curtailments of freedom. Indeed, the presence of some constraints, most paradigmatically laws made to track the interests of non-dominated individuals, are necessary conditions of the republican conception of freedom. Therefore, of utmost importance to the republican vision of non-domination as a political ideal is an emphasis on the freedom-*constitutive* dimension of law that stresses the central role of institutions in securing liberty. As Pettit writes, “interference occurs without any loss of liberty when this interference is not arbitrary and does not represent a form of domination.”<sup>279</sup> The supposed advantage of the republican tradition therefore lies in being able to distinguish between freedom-constraining and freedom-enabling forms of interference. Thus, in contrast to the concern with non-interference that Pettit associates with the liberal tradition, the republican approach need not view legal regulation and legislation as merely a source of imposition. Rather, the latter account highlights the emancipating potential of the state and the rule of law through acknowledging the necessity of institutions in realizing or enabling conditions of freedom.

By contrasting freedom as non-domination against the purportedly liberal preoccupation with non-interference, Pettit believes that a strong case can be made for the superiority of the republican framework. On the one hand, Pettit views the republican ideal of non-domination as preferable to a circumscribed concern with interference; in asking us to be attentive to situations of domination, we are guided by a more comprehensive notion of political justice. That is, we are able to better recognize that suffering “the reality or expectation of arbitrary interference is to

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<sup>279</sup> Philip Pettit, *Republicanism*, 35.

suffer an extra malaise over and beyond that of having your choices intentionally curtailed.”<sup>280</sup>

This in turn positions the republican theorist to be attuned to a host of evils arising from relations of subordination and subjection which remain invisible to those exclusively concerned with non-interference. On the other hand, the republican capacity to distinguish between arbitrary and non-arbitrary forms of interference allows us to recognize the freedom enabling dimensions of a system of law and institutions, while also capturing the particular sorts of intentional interference we ought to find objectionable. As Pettit writes,

Freedom as non-domination promises, not exemption from intentional interference, but exemption only from intentional interference on an arbitrary basis: specifically, exemption from a capacity on the part of others for arbitrary interference.<sup>281</sup>

Therefore, rather than viewing law and state as evils of convenience that must necessarily constitute infringements of liberty, by distinguishing between different forms of interference we can understand the aforementioned institutions as central to the maintenance and expansion of our political freedom.

However, in addition to providing us with greater analytic clarity regarding the nature of liberty, Pettit also believes that the republican approach is well-suited to provide a systematic framework for political reform and governance. The major promise of Pettit’s recovery therefore lies in his claim that republicanism offers a singular and paramount ideal of political justice through its commitment to non-domination. As we have noted above, Pettit believes that republicanism provides a more salient account of social injustice than liberal approaches—for a concern with domination provides a better means for identifying social injustice than merely

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<sup>280</sup> Philip Pettit, *Republicanism*, 85.

<sup>281</sup> Philip Pettit, *Republicanism*, 84.

attending to instances of interference. In addition to addressing the relevant scope of injustices within a society, Pettit believes that non-domination as a paramount value has “a distinctive claim to the role of yardstick for our institutions.”<sup>282</sup> This is because as a consequentialist theory that focuses on the maximization of freedom as non-domination, republicanism not only entails a commitment to reducing the intensity of domination suffered by agents, but to increasing the range or domain of un-dominated choice enjoyed by individuals. This dualistic rendering of the republican ideal is meant to indicate how a commitment to the maximization of non-domination supersedes the narrow liberal concern with reducing interference—for the maximizing of non-interference is quite compatible with the presence of a host of well-recognized social injustices.<sup>283</sup> Because his conception of republicanism explicitly attends to both these dimensions of non-domination, Pettit believes that the republican ideal can “serve as a unified goal” for political reform and governance.<sup>284</sup>

To further highlight the advantages of the republican approach, Pettit contrasts the apparent robustness and expansiveness of the non-domination ideal with the commitments he associates with the liberal tradition, which either narrowly focus on non-interference or are less unified in their account of relevant political values. According to Pettit, the latter approaches are only able to attend to a wider scope of injustices by importing concerns that are not entailed by a commitment to non-interference. Therefore, even at their best, liberals can only provide an account of the scope of political justice by appealing to a number of independent values. According to Pettit, not only is republicanism able to attend to a larger variety of relevant

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<sup>282</sup> Philip Pettit, *Republicanism*, 80.

<sup>283</sup> Philip Pettit, *Republicanism*, 111.

<sup>284</sup> Philip Pettit, *Republicanism*, 103.

complaints of injustice, but in positing non-domination as its central ideal, republicanism entails or has an inbuilt commitment to egalitarianism, equal respect, and public assistance.<sup>285</sup> For these reasons, Pettit believes that non-domination is well suited to the role of a singular and “supreme political value” and that the unified focus and parsimony of the republican framework constitutes an additional advantage over liberal accounts.<sup>286</sup>

## 2 Republican Dilemmas

Pettit’s articulation of the republican approach has much to recommend it—his conception of freedom as non-domination undoubtedly enriches our understanding of the different facets of political liberty. Indeed, since his initial development of the neo-republican framework as a normative approach a number of scholars have taken up neo-republicanism such that it now forms a prominent and influential perspective in contemporary political theory.<sup>287</sup> However, despite the insights of Pettit’s account of neo-republicanism, there are a number of drawbacks to his presentation that undermine its efficaciousness as a normative framework and which render it a problematic approach for addressing the phenomenon of statelessness. Yet as I hope to demonstrate, it remains possible to *rescue* the neo-republican approach from these difficulties while still preserving the key insights of this perspective.

Accordingly, in this section I offer a critical engagement with Pettit’s account of neo-republicanism in order to identify a number of conceptual weaknesses of his approach. First, I

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<sup>285</sup> See: Philip Pettit, “The Domination Complaint,” in Melissa Williams and Stephen Macedo, eds., *Political Exclusion and Domination: NOMOS XLVI* (New York, NY: NYU Press, 2005): 91.

<sup>286</sup> Philip Pettit, *Republicanism*, 80.

<sup>287</sup> For a defense of the broad conceptual import of the republican perspective, see: Frank Lovett and Philip Pettit, “Neorepublicanism: A Normative and Institutional Research Program,” *Annual Review of Political Science* 12, no. 1 (2009): 11.

turn to the *ad-hoc* statism implicit in Pettit's original presentation and which emerges explicitly in his most recent attempts to apply neo-republicanism to the global level. Second, I turn to weaknesses in Pettit's understanding of the structurally constituted nature of domination. While later formulations in his work in part address this weakness, I suggest that it is precisely Pettit's general focus on the need for an agent of domination that continue to make his approach insufficient for capturing salient forms of oppression and injustice at the global level. Thus, while Pettit has given increased attention to the problem of social power, there remains a tendency in his work to elide forms of structural domination, such as those generated by the state-system, that his account of global justice mistakenly accepts as unproblematic. Third, I turn to the limitations of Pettit's articulation of freedom as non-domination itself, which, in contrast to his account of domination, is insufficiently attentive to the centrality of agency and *involvement* to the constitution of liberty. To use Rainer Forst's formulation, Pettit's ideal of non-domination results in a "negative republicanism"—it fails to appreciate that merely being secure from the possibility of subjection is insufficient to realize freedom.<sup>288</sup> This leads to the final weakness of the dominant neo-republican approach that must be corrected: a perspective that seeks to effectively address the manifold injustices present in the social world must, *pace* Pettit, begin with the experience of oppression, domination, and subjection, rather than attempting to articulate a singular *ex-ante* principle of justice. Only a *reflexive* and *political* conception of non-domination can fully address such concerns.

This sustained engagement and critique will pave the way for my own reconstruction in the latter part of the chapter of a critical neo-republicanism that both addresses the broader deficiencies of Pettit's account and which is capable of serving as a more effective framework

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<sup>288</sup> Rainer Forst, *Justification and Critique*, 155.

for addressing the injustice of domination experienced by the stateless. Following an insight suggested by Judith Shklar's classic recasting of the normative core of liberalism, I argue that what is needed is an account of neo-republicanism that puts the experience of domination first when theorizing the issues of membership and inclusion raised by statelessness.<sup>289</sup>

## 2.1 Statism

Although Pettit's original articulation of the republican framework largely neglected the question of global justice, in more recent work he has sought to defend the international implications of republican theory.<sup>290</sup> This is important because a theory of justice that simply presumes that questions of domestic justice and global justice are entirely distinct contradicts important aspects of the republican tradition that stress their mutual implication.<sup>291</sup> But of equal import for our contemporary situation, such a presumption also flies in the face of present day realities that make such a bifurcation analytically implausible and normatively dubious.

Despite extending his neo-republican perspective to the international level, Pettit's account exhibits a strikingly anachronistic commitment to statist ontology, while seemingly

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<sup>289</sup> For Shklar's account, see: Judith N. Shklar and Stanley Hoffmann, "The Liberalism of Fear" in *Political thought and political thinkers* (University of Chicago Press, 1998). Shklar's formulation of liberalism as an anti-perfectionist project, committed above all to the prevention of the *summum malum* of "cruelty and the fear it inspires" thus provides the inspiration for what we might call a "Neo-republicanism of fear" that puts a concern with identifying and addressing relations of domination at the forefront of its normative aspirations. Put otherwise, it begins not by theorizing in idealized terms from the position of the free citizen, but by attending first to the experiences of the excluded and oppressed. (See *Ibid.*, 29)

<sup>290</sup> Thus while *Republicanism* (1997) is notably silent about the global dimensions of a commitment to non-domination, both "A Republican Law of Peoples" (2010) and the more recent *Just Freedom* (2014) offer Pettit's explicit views on the international dimensions of republican theory.

<sup>291</sup> Immanuel Kant, who Pettit cites (*Just Freedom*, 48) approvingly as a republican forerunner, makes this connection explicit. When read in light of the republican tradition, both Kant's *Doctrine of Right* and *Perpetual Peace* are clearly concerned with the mutual implication of domestic and global justice in securing the conditions of freedom as non-domination. Consider Kant's categorical statement that the "problem of establishing a perfect civil constitution is dependent upon the problem of a law-governed external relation between states and cannot be solved without having first solved the latter." Immanuel Kant, et al. *Toward perpetual peace and other writings on politics, peace, and history* (New Haven: Yale University Press, 2006), 9.



neglecting the increasingly transnational dimension of our contemporary world. Beginning with “A Republican Law of Peoples” Pettit, following Rawls, offered his own version of a global republicanism meant to articulate the just relations of ‘free peoples’ at the international level. Adopting such a Rawlsian framework signaled Pettit’s rejection of a more strictly cosmopolitan approach as expressed in the works of global egalitarians committed to treating individual persons as the appropriate subjects of global justice.<sup>292</sup> Indeed, the opening premise of Pettit’s initial turn to a global application of republican principles is to take “states as they are” in order to articulate an account of global arrangements “for coordinating and organizing the behavior of national states, as they currently exist.”<sup>293</sup> This commitment to a world of ‘peoples’ organized into a state-system has been affirmed in his most recent work, which articulates a republican defense of what Pettit call’s “globalized sovereignty” focused first and foremost on securing “externally undominated relations” between all ‘peoples’.<sup>294</sup> The justification for this republican concern with relations between states is that the freedom from domination of individual citizens within particular political communities can only be fully realized if they are effectively shielded from the possibility of arbitrary forms of interference from external actors.<sup>295</sup>

While Pettit is surely right to recognize the global implications of republican theory, it is not entirely convincing that he takes the state system as it currently exists as an unproblematic

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<sup>292</sup> Consider here the work of Charles Beitz (1979) who has argued for transposing Rawlsian principles of justice directly to the global level. Pettit makes his opposition to this perspective explicit in more recent work (*Just freedom*, 159).

<sup>293</sup> Philip Pettit, “A Republican Law of Peoples,” 70.

<sup>294</sup> Philip Pettit, *Just freedom*, 151.

<sup>295</sup> Pettit’s reasoning here seems to rest on an account of collective agency grounded in some notion of a macro-subject, such that in order for individuals constituting a political community to fully realize the ideal of domination their state or ‘people’ must be secure from the possibility of domination by other states. As he writes, the “ideal of the free person or citizen requires that the state that protects people against private domination ought to be, only internally undominating, but externally undominated as well.” (Pettit, *Just freedom*, 151) See Philip Pettit, *Just freedom*, 154, for further equally unpersuasive discussion.

starting point and limits the application of neo-republican principles merely to relations between states. Here Pettit's statist approach exemplifies a commitment to the assumptions of methodological nationalism and the social imaginary that it represents.<sup>296</sup> Like Rawls, whom Ulrich Beck had identified as an archetype of this orientation, Pettit's framework implicitly presupposes a 'container model' of political community and society. In doing so, his approach assumes the quasi-naturalness of a world of "mutually delimiting national societies" largely neglecting how such a model remains deeply at odds with the realities of our increasingly globalized and transnational present.<sup>297</sup> Even if we bracket the historically contingent quality of such forms of political organization, it seems undeniable that in our contemporary context social, political, and economic relations, not only cross borders, but also defy the clear-cut demarcations and dichotomies presumed by this perspective.<sup>298</sup> Consider the present realities of increasingly mobile capital and labor flows, of multinational firms and global markets, and the fact that we have at least one case of an already-existing super-national legal regime granting legal, social, and political rights to the 'citizens' of the European Union, and the limits of such an approach become immediately evident.<sup>299</sup>

Unsurprisingly, such a commitment seems to produce a number of blind-spots in Pettit's attempt to adapt neo-republican principles to a global context, difficulties similar to those found

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<sup>296</sup> Ulrich Beck, *The Cosmopolitan Vision*, 24-33. As we may recall from earlier, for Beck methodological nationalism "finds expression in the claim that 'modern society' and 'modern politics' can only be organized in the form of national states." (Ibid., 24). This is of course essentially Pettit's starting premise for his attempt to apply republican principles to the global level.

<sup>297</sup> Ulrich Beck, *The Cosmopolitan Vision*, 27.

<sup>298</sup> Importantly, Wimmer and Schiller take Beck's perspective one step further in questioning whether the conditions underlying methodological nationalism *ever* really obtained. Wimmer and Schiller, "Methodological nationalism and beyond," 302.

<sup>299</sup> Indeed, as we have seen rather directly in the previous chapters, the very process of introducing effective border controls and exclusionary forms of membership was an explicitly transnational process.

in the Rawlsian framework that Pettit takes in part as his ostensive inspiration. For our purposes, it is sufficient to consider here the limited attention in Pettit's account to the question of claims to membership, and with that to the increasingly pressing normative issues raised by immigration and migration. In this way, Pettit's inattentiveness to the contingencies of citizenship is emblematic of the refusal to recognize the articulation of the basis and bounds of community membership as a proper subject of normative interrogation and assessment. Thus Pettit's *ad-hoc* statism focused on realizing the collective agency of already constituted and presumably static people has little to say about the norms that should govern both immigration and forced migration, let alone the central questions of this project. I therefore follow James Bohman in seeking a "republican argument for transnationalism" that refuses the strictures of an outdated statist model for understanding questions of global justice.<sup>300</sup> Such a transnational republicanism therefore extends its concern with addressing relations of domination that arise beyond—and indeed because of—the borders of particular states.

## 2.2 Structural Domination

Having assessed the problematic statist dimension of Pettit's attempt to adapt neo-republicanism to the global level, we may turn to a related line of criticism with deeper theoretical implications: that Pettit's broader republican framework is insufficiently attentive to structural forms of domination and oppression. This difficulty is more fundamental because it represents a consistent conceptual tendency in his neo-republican project that in part explains

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<sup>300</sup> James Bohman, *Democracy across borders* (Cambridge: MIT Press, 2007), 129. It may be that Pettit adopts his statist orientation because of the supposed lack of recognition the cosmopolitan liberal perspective gives to the claims of community and the good of self-determination. However, we need not necessarily forgo a commitment to self-determination, properly understood. (See Iris Marion Young, *Global Challenges: War, self-determination and responsibility for justice* (Polity, 2007), 39-76, for the inspiration for the approach I will pursue.) But a properly critical transnational approach to such questions problematizes rather than presumes that the dominate institutional structures that historically have attempted to realize such goods are indeed the most adequate mode for doing so in our contemporary world.

why Pettit is unable to see the contemporary state system as deeply problematic. Accordingly, the framework I develop in the latter half of this chapter will have to move beyond these shortcomings in Pettit's approach.

But before proceeding, we need to address what precisely is meant by structural domination. Here I rely on Iris Young's notion of domination and her pluralistic concept of 'oppression' as developed in *Justice and the Politics of Difference*. There Young insists on conceptualizing oppression in systemic and structural terms—a suggestion that challenges our conventional understandings of the mechanisms of subordination and domination that form the focus of traditional liberal theory. Young's explicit focus on the members of social collectivities as the victims of injustice leads her to introduce the notion of oppression as a structural concept which "refers to systemic constraints on groups" often arising from "causes embedded in [the] unquestioned norms, habits, and symbols" of contemporary society.<sup>301</sup> Therefore, in her account oppression is not just to be understood on the model of the intentional domination of a tyrant, or even "the result of a few people's choices or policies" but as a family of phenomena that may arise from more de-centered and diffuse sources within a society.<sup>302</sup> Crucially, she suggests that "the systemic character of oppression implies that an oppressed group need not have a correlate oppressing group."<sup>303</sup> Rather than merely understanding oppression solely on the model of a dyadic relationship, Young asks us to focus on how relations of subordination and exploitation can be sustained by the contours of our social arrangements.

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<sup>301</sup> Iris Marion Young, *Justice and the Politics of Difference*, (Princeton: Princeton University Press, 1990), 41. Young's definition of domination importantly anticipates the 'political' emphasis on the denial of agency that is central to this project; as she writes, "[b]y domination I mean structural or systemic phenomena which exclude people from participating in determining their actions or the conditions of their actions. (Ibid., 31)

<sup>302</sup> Iris Marion Young, *Justice and the Politics of Difference*, 41.

<sup>303</sup> Iris Marion Young, *Justice and the Politics of Difference*, 41.

A clear blindness to precisely these structural forms of oppression was built into Pettit's original formulation in *Republicanism* because his framework for conceptualizing domination was explicitly agent-centric. This is evident in Pettit's elaboration on his republican definition of domination, where he tell us that an "agent dominates another if and only if they have a certain power over that other, in particular a power of interference on an arbitrary basis."<sup>304</sup> As Pettit tells us, the understanding of power that underlies his account of domination is essentially dyadic in nature—"it requires an agent as bearer and an agent as victim."<sup>305</sup> Thus while Pettit does not foreclose the possibility of domination between groups—such as in the case of the tyranny of the majority—he insists that "a dominating party will always be an agent—it cannot just be a system or network or whatever."<sup>306</sup> What is more, in a move that ought to have struck readers as deeply puzzling and counter-intuitive, the sort of arbitrary interference that Pettit's account of domination is meant to capture must be both malignant and intentional, or willed, by the dominating agent.<sup>307</sup> As he tells us, "when I interfere I make things worse for you, not better. And the worsening that interference involves always has to be more or less intentional in

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<sup>304</sup> Philp Pettit, *Republicanism*, 52.

<sup>305</sup> Philp Pettit, *Republicanism*, 79.

<sup>306</sup> Philip Pettit, *Republicanism*, 52.

<sup>307</sup> Why do I suggest that reader should find this puzzling? Because the central metaphor of the republican tradition that Pettit himself extensively draws on—the relation of master and slave—seems to provide compelling reasons to suspect that a focus only on intentional acts of interference is insufficient. Consider Pettit's own example of the master of a 'kindly and non-interfering disposition' who eschews any attempt to intervene on the actions of her slave; indeed, imagine that the 'agent' of domination in this case abhors the asymmetric relationship of power she is implicated within given the nature of her society. As Pettit himself notes, regardless of the disposition of the well-meaning master, this still constitutes a relationship of domination. (Philip Pettit, *Republicanism*, 22) This suggests that what is at issue here is not the intention or will of the master, but the larger social, cultural, and political system in which these relations are embedded. See Cecil Laborde for a sympathetic reading of Pettit that also makes this point: "Even kind and benign masters, who did not interfere with their slaves and bore them no ill will, could be said to dominate them. They did so, not in virtue of their personal, agent-relative resources, but in virtue of the systemic features of slavery as a deeply entrenched, institutionalized set of rules and conventions." ("Republicanism and Global Justice," 57.)

character.”<sup>308</sup> Therefore Pettit insisted that domination is grounded in the capacity to exercise an “intentional sort of power” and that enactments of domination can always be identified with a particular individual or collective agent.<sup>309</sup>

As should be evident, Young’s account of social oppression poses a notable challenge to Pettit’s original account of republican freedom by positing forms of injustice, often tantamount to domination, which seemingly fall outside the purview of republican concern. Thus despite the promise that a republican approach would prove to be sensitive to a host of injustices that other approaches could not capture, Pettit’s approach effectively screened out crucial forms of structural or systemic domination. Not only are such enactments of injustice not necessarily the product of intentional acts, it is often unclear to what degree they are the product of particular agents, though there may be a group that benefits or is privileged by such arrangements. Indeed, many of these forms of injustice often seem to have their core in what we might call the social imaginaries or ‘ideational’ dimensions of a community—the structures of a society’s values and cultural meanings—and therefore are linked to more complex instances of oppression than threatened interference. Moreover, these forms of injustice are particularly challenging to Pettit’s theory because they will often elude the status of being ‘common knowledge’ to all parties involved, and therefore would be seemingly less “prominent and detectable” under Pettit’s rubric

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<sup>308</sup> Philip Pettit, *Republicanism*, 52.

<sup>309</sup> Why does Pettit insist on restricting his account of domination to intentional acts of interference? It may be because an implicit agent-centric conception of responsibility seems to underlie his project. As he tell us, domination is an intentional sort of power “because the things which the bearer can do are things the bearer can be blamed or praised for doing: they are not beyond the agents’ control.” (*Republicanism*, 79) This emphasis on responsibility re-emerges in Pettit’s more recent work, and in particular, in his account of the state as purposive agent, capable of making “avowals of attitude and promises of action to which, on pain of failing as a state, it allows itself to be held.” (*On the People’s Terms*, 133). This ‘backward looking’ notion of responsibility might be fruitfully compared with Young (2007).

of evaluation.<sup>310</sup> Indeed, an account that restricts itself to a focus on intentional acts of interference performed by clearly identifiable agents cannot capture the role of social-political normalized structures in sustaining relations of domination.

This blind-spot to systemic forms of domination was deeply embedded in Pettit's original articulation of his republican framework, a shortcoming that motivated a number of critiques that suggested the republican conception of domination was far too narrow to do justice to the multifaceted forms of oppression and subjection present in contemporary society.<sup>311</sup> As a result of these criticisms, Pettit has conceded in his more recent reformulations of neo-republicanism that "there is nothing impossible about unwilled domination."<sup>312</sup> In doing so, Pettit's suggests that what is at issue is not merely a matter of intentional acts of interference, but rather also of the social, cultural, and institutional structures that condition relations between individuals.<sup>313</sup> Moreover, in these more recent works he has gone further, acknowledging that "we should recognize an indirect or structural form of domination as well as the direct or personal kind."<sup>314</sup> In doing so, Pettit appears to concede the need to move beyond an agent-focused notion of the nature of subjection and oppression.

These revisions to his original account in *Republicanism* would seem to correct for a number of the weaknesses in his earlier conception of domination. However, as I will demonstrate, Pettit's attempt to transpose republicanism to the global level is fraught with a

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<sup>310</sup> Philip Pettit, *Republicanism*, 59, 70

<sup>311</sup> Consider here the concerns raised by Clarissa Hayward (2000), and Patchen Markell (2008).

<sup>312</sup> Philip Pettit, *On the People's Terms*, 62

<sup>313</sup> As he admits, "It is usually because of the ways a society is organized, culturally, economically or legally, that some people have such power in relation to others that they dominate them directly, and dominate them without necessarily wishing for domination or even approving of it." (Ibid., 63)

<sup>314</sup> Philip Pettit, *On the People's Terms*, 63. See also, *Just Freedom*, 53.

number of the same limitations in recognizing structural domination that beset his earlier articulation. In particular, Pettit's unproblematic treatment of a world of states and the state system indicates the persistence of an agent-focused conception of domination. To see how, we need to turn to Pettit's more recent formulations of the republican conception of political legitimacy, specifically as they relate to the domain of control citizens ought to have over the state. Pettit's aim here is to define and indeed delimit, the scope of popular control in relation to the state. This account in part explains why the republican conception of legitimacy does not apply to the decision to live within a state as such or to whether individuals have an option to live in our current state or another.<sup>315</sup> According to Pettit, these constraints would raise a relevant issue of legitimacy for his republican account of popular control "only if they are imposed by the state itself and represent subjection to an alien will" rather than merely being the outcome of an apparently unwilling necessity.<sup>316</sup>

As a result of this, Pettit suggests that the question of being subject to the authority of the modern state, and to reside in the particular state we happen to find ourselves within, need not be subject to conditions of democratic control.<sup>317</sup> This is because, as Pettit claims, "it turns out that

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<sup>315</sup> Philip Pettit, *On the People's Terms*, 160. While Pettit's discussion extends beyond these conditions I limit my discussion here out of considerations of space.

<sup>316</sup> Philip Pettit, *On the People's Terms*, 160.

<sup>317</sup> Pettit also argues that the choice as to whether we as citizens must all equally live under coercive laws also remains beyond democratic control because of functional necessity. But again contemporary realities arising out of the facts of mobility and migration in which states' unilaterally control conditions of membership might lead us to question whether this can presently obtain. Consider how the reality of multiple-nationality erodes the possibility of Pettit's last condition of equal subjection to coercive law because some individuals possess greater rights of exit than others and have access to multiple regimes of membership that might afford differential rights and obligations. This means that the equal subjection to coercive law among citizens should not be seen as a mere necessity, for it cannot quite be realized. And since Pettit insists on the persisting reality—and indeed desirability—of a world of separate sovereign states, this is also an irresolvable situation, for each individual state remains entitled to determine who its nationals will be. Indeed, perversely the only direct way such a situation could be resolved under our current state system would be for states to strip dual nationalities of the citizenship the state itself confers—but such a policy of denationalization has been the hallmark not of democracies but of tyrannies. Another alternative, but one grounded in transcending the very commitments Pettit defends, would be to create a supranational legal status. Thus far from



they are not imposed by your state—or indeed any other state—in the manner of a decision to interfere rather than not interfere; they materialize on an independent, unwilled basis.”<sup>318</sup> Under this account, because these constraints do not represent choices on the part of the state—that is, they cannot be interpreted as intentional or willed forms of interference—they do not raise any issues of legitimacy. The reason for this is that such constraints are not a product of the voluntary preference of an agent, but the product of historical and political *necessity* and therefore cannot be understood as constituting a dominating imposition on individuals. In order to understand what Pettit means by suggesting that the state is a historical necessity, it is worth quoting his account at length:

It is an unintended precipitate of human history, and in particular of the mutual adjustments of different populations, that the earth is now a state-bound planet...The fact that you do not have a choice between living inside a state and living outside a state is not the product of interference or domination on the part of your state. It is *a historical necessity on a par with the necessity of living under the laws of physics*...you cannot think that because you are constrained to live in a state, you are dominated by the state under which you live, or indeed by any other state.<sup>319</sup>

Thus Pettit suggests that our lack of choice to live within a state cannot be understood as a form of domination, for in virtue of being a product of *historical necessity*, it is a ‘will-independent constraint,’ being neither a willed imposition by our particular state, or even of any other state. But what does it mean for Pettit to claim the historical necessity of the state? Evidently this

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being preferable for democratic reasons, such an insistence on a world of separate sovereign states imperils a fundamental aspect of Pettit's account of legitimacy.

<sup>318</sup> Philip Pettit, *On the People's Terms*, 161.

<sup>319</sup> Philip Pettit, *On the People's Terms*, 161. Emphasis added.

cannot mean that the state represents the only possible form of political organization, for as we well know the state itself is a historically contingent, and indeed in its contemporary form, rather historical recent, institution.<sup>320</sup> Pettit therefore seems to suggest that the current realities of our state-bound globe impose a limit equivalent to the fundamental forces of physics; to complain of the necessity of the world of states would be equivalent to bemoaning the existence of gravity.<sup>321</sup> While Pettit explains the necessity of the state by reference to the historical reality of our state-bound globe, he defends the right of other states to limit entrance and restrict migration by appealing to political necessity. This line of argument leads him to conclude that contemporary states therefore have the right to unilaterally control their borders. While Pettit insists that non-dominating states ought to grant individuals a right to emigrate, this does not entail any correlative right to enter another.<sup>322</sup> This is a remarkably strong claim, as it would seem to legitimate the use of coercive force on the part of states to prevent migrants from entering, while also insisting that this ought not to be characterized as a form of domination. The reason for this, according to Pettit, is that such restrictions are independently necessitated and should not count

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<sup>320</sup> As we saw earlier, not only is the contemporary state quite different from the early modern state in terms of its capacity and claims, but nation states in general are only one of a variety of different forms of political organization that have existed well into the modern era. Indeed, the very republican tradition that Pettit roots his account in took its inspiration not from the early modern state but from ancient Rome and the city-republics of the Renaissance era. It is a striking, though perhaps tangential fact that these city-republics contrasted quite radically with the hierarchical, monarchical, and essentially feudal, polities that would come to develop into the modern state Pettit defends from a neo-republican standpoint. By some accounts it was precisely the bellicose character of the modern state that allowed the state to outcompete these alternative polities out of existence. See for instance, Hendrik Spruyt, *The sovereign state and its competitors: an analysis of systems change*, (Princeton: Princeton University Press, 1996).

<sup>321</sup> As Pettit has put it more recently, the “arrangement is the result of the state-bound history of the planet, and the complex of constraints to which every state is subject; it is not imposed at the voluntary will of the state or any other agency...Like gravity, it is certainly restrictive, but it does not impose the voluntary preference of another agent or agency.” (Philip Pettit, *Just Freedom*, 120)

<sup>322</sup> As Pettit puts it, “[a]ssume that your state allows you a right of emigration and does not confine you within its boundaries; if it did, it would certainly dominate you. It is still going to be the case that other states cannot guarantee you entry, given the political necessity for states to maintain their borders and disallow open access. The fact that you have no choice over whether to live under another state is not going to be a product of domination by your own state, then, only a result of how other states behave.” (*On the People’s Terms*, 161)

as “fully voluntary interference”.<sup>323</sup> Therefore such actions cannot be understood as the result of the dominating power of any state. This is because, as he tells us:

[n]o state can open its borders to non-residents in general, on pain of internal malfunction or collapse; as a matter of political necessity, every state has to place limits on who can enter and in what numbers.<sup>324</sup>

As with Pettit’s broader defense of the state in general, the right of states to arrest migration and control membership is grounded in constraints of necessity produced by our existing world order. Pettit’s argument seems to suggest that because states must enact restrictive border controls and thus deny individuals the ability to freely cross borders on the basis of necessity, such actions cannot be understood as intentionally willed by any particular state. As he puts it elsewhere, states are “functionally committed” to act in this way, and therefore the imposition of coercive immigration controls does not represent a “voluntary preference” on the part of any state.<sup>325</sup> Arising from such ‘political’ or ‘functional’ necessity, the interference arising from such arrangements is not willed by any particular state and therefore cannot be dominating.

Pettit’s arguments for the historical necessity of a world of states and the political necessity of a right of states to control admission and membership appear problematic on a number of grounds. As should be clear from our earlier discussion, these commitments are in

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<sup>323</sup> Philip Pettit, *On the People’s Terms*, 162.

<sup>324</sup> Philip Pettit, *On the People’s Terms*, 161.

<sup>325</sup> Philip Pettit, *Just Freedom*, 118. In *Just Freedom* Pettit appeals to “received” or “accepted” standards as imposing these restrictions on states. (118-9) However, as we saw in earlier chapters, such standards granting states unilateral discretion to control their borders are of a rather recent origin. What is more, it’s not entirely clear why the fact that “received” standards might support such policies is a sufficient reason to either legitimate coercive border controls or to construe such policies as non-dominating. Indeed, it does not take much historical knowledge to find examples of (now) unquestionably unjust practices that converged with received standards of earlier periods. For an example particular salient to republicans, consider: Aristotle, *The Politics*, ed. Carnes Lord, (University of Chicago, 1984) 1253b33-40.

line with the apparently arbitrary commitment to methodological nationalism that had characterized Pettit's initial articulation of a republican vision for global justice. Indeed, Pettit not only affirms the state as the singular mode of political organization, but also defends the right of states to repel unwanted migrants and exercise unilateral discretion over immigration. Granted, in his more recent works Pettit attempts to justify these commitments by appealing to historical and political necessity, in order to suggest that the fundamental commitments of our international order cannot be characterized as sources of domination and therefore are not properly the object of republican criticism. However, Pettit's arguments for this position fails for a number of reasons, revealing the limitations of his attempts to incorporate a structural account of domination into his approach.

As we have seen, in a revision of his views in *Republicanism*, Pettit's later works attempt to jettison the agent-centric account of domination that characterized his earlier project. But despite this, Pettit's arguments here clearly depend upon such a model, though now the agent is not an individual but the collective state-actors that comprise the contemporary international system. To see how this is the case recall that Pettit's appeal to necessity is central to justifying his defense of both a state-bound globe and the practices of the existing world order. According to Pettit, it is not a dominating imposition that we are obliged to reside in states, nor do states exercise domination when they coercively police their borders, because these policies are not expressions of the will or preferences of particular states.

Pettit attempts to underwrite his claim that these constraints are non-voluntary and unwilling by appealing to historical and political necessity. But this move appears to problematically naturalize contingent social phenomenon. In doing so, it dubiously treats institutions and practices as immutable facts that govern our world in a way akin, to use his

example, to the laws of physics. But these arguments are far from convincing. For his argument for the necessity of the state as a political form to be plausible, alternative models would not only have to be challenging to imagine, but nearly inconceivable, a claim that seems difficult to sustain for obvious reasons given the widely acknowledged historicity of the state as a political form.<sup>326</sup>

Pettit's defense of the political necessity of a right of states to exercise border coercion is equally problematic. While it may be political expedient for powerful states to attempt to enforce migration controls, this by no means indicates that such practices are functionally necessary to the survival of the state as such. As we saw earlier in this project, the actualization of effective border controls by modern states is a comparatively recent phenomenon and indeed necessarily bound up in the emergence of a regime of coordinated state practices.<sup>327</sup> But that no particular state may be specifically responsible for the persistence of such practices is insufficient to deny that the coordinated practices of contemporary states constitute a structure of domination. For if it is possible for a natural person to be implicated in domination, independent of their will, it is not at all clear why an artificial collective agent cannot be similarly implicated. Thus we might accept that the coercion practices of border control that both produce and sustain forms of political exclusion are not 'intentionally willed by any particular state' or rather the

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<sup>326</sup> Indeed not only is the historicity of the state beyond doubt but the spread of the modern state as the primary form of political organization is itself arguable a *very* recent development related to post-war decolonization.

<sup>327</sup> Perhaps even more problematically for Pettit's assertion, in our contemporary context we have at least one case of an open-borders regime between states—the European Union—albeit within a territorially delimited area. This would seem to provide *prima facie* grounds for rejecting the claim that control over migration is either a political or functional necessity for the existence of states as such. The hard borders on the frontiers of the EU do not undercut this point, but rather suggest that the 'necessity' that Pettit defends is deeply connected to the realities of gross global inequalities. But to argue that border controls are functionally necessary to maintain such inequities would seem to only support the claim that such institutions are indeed implicated in domination.

product of the singular actions of a particular state, while also insisting that they are fundamentally implicated in forms of systematic domination.

As I have aimed to show, despite his attempt to incorporate an attentiveness to structural and systemic forms of domination, Pettit's approach remains caught within what Clarissa Hayward has called the framework of "power-with-a-face."<sup>328</sup> While present explicitly throughout Pettit's early work, the persistence of this perspective comes across most clearly in his treatment of the global implications of republican theory. Here Pettit's account of domination remains tethered to the presumptions that it requires a clearly identifiable agent, capable of engaging in international acts of arbitrary interference, although the agent in this context is no longer an individual but the corporate person of the state. Yet as we have seen both in this chapter and in the critical genealogy of statelessness presented earlier in this project, such a perspective ignores the role of a coordinate international system in producing structural forms of domination through the concerted actions of states. A normative framework adequate to address questions of injustice as they emerge at the global level must incorporate a greater sensitivity to precisely the forms of structural domination obscured by Pettit's account. Accordingly, the account I develop subsequently brings to the forefront such 'subject de-centered' or systemic forms of oppression and subjection that are produced by the institutions of our current international order.

### 2.3 The Displacement of Agency

The final area of Pettit's republicanism that we turn to concerns the conception of freedom at the core of his account of non-domination itself. In addressing this dimension of

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<sup>328</sup> Clarissa Rile Hayward, *De-facing power* (Cambridge University Press, 2000), 166.

Pettit's project I wish to suggest that, despite his later revisions, his account remains insufficiently attentive to the centrality of agency and *involvement* to the constitution of liberty, properly understood. While this concern is entwined with aspects of the above discussion of the limits of Pettit's account of domination, addressing this difficulty turns out to be fundamental to the purposes of this project. This is because only by properly grappling with the truly demanding conditions necessary to realize non-domination can we begin to see the practical normative implications of a neo-republican approach for reforming our international order. Accordingly, in the final part of this chapter I begin to articulate the key dimensions of an alternative republican paradigm to that of Pettit's by engaging with a number of perspectives that provide a more robust account of the nature and conditions necessary for realizing freedom as non-domination.

As we saw at the start of this chapter, in *Republicanism* Pettit's account of non-domination conceptualizes freedom as realized through securing individuals from the possibility of the arbitrary exercise of coercive power. Importantly in this original formulation, which as we saw was introduced as a species of negative liberty, Pettit empathized that republican freedom did not *necessarily* entail a conceptual commitment to populism or popular control.<sup>329</sup> While representation and popular control may prove instrumentally necessary to securing republican liberty, the realization of democratic control is not presented as internally constitutive of freedom as non-domination as such. As Pettit writes:

Democratic participation may be essential to the republic, but that is because it is necessary for promoting the enjoyment of freedom as non-domination, not because of its

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<sup>329</sup> In fact, the danger of populism and the threat of the tyranny of the majority loom large as concerns in Pettit's early work. As he tells us, of the republican perspective on popular control, "direct democracy may often be a very bad thing, since it may ensure the ultimate form of arbitrariness: the tyranny of a majority." (*Republicanism*, 8)

independent attractions: not because freedom, as a positive conception would suggest, is nothing more or less than the right of democratic participation.

This, of course, is not surprising, give that Pettit wished to portray the strand of republican thought that inspired his project in distinct opposition to the populist traditions of civic republicanism associated with thinkers such as Rousseau or Arendt.<sup>330</sup> Following Berlin's analytic classification, as a form of negative freedom republican liberty is conceptually distinct from the idea of popular control or democratic self-rule. In opposition to the positive conception of liberty espoused by 'civic' republicans, the tradition of thinking that Pettit's project builds upon thus takes:

liberty to be defined by a status in which the evils associated with interference are avoided rather than by access to the instruments of democratic control, participatory or representative. Democratic control is certainly important in the tradition, but its importance comes, *not from any definitional connection with liberty*, but from the fact that *it is a means* of furthering liberty.<sup>331</sup>

Thus while it would be unfair to suggest that mechanisms of democratic participation have no place in Pettit's notion of republicanism, the role played by such inlets of popular influence is essentially instrumental toward the ideal of freedom as non-domination. Put otherwise, Pettit's republican conception of non-domination is 'negative' in focus insofar as it concerns first and foremost the *absence* of potential arbitrary acts of interference. Consequently, republican liberty can in principle be conceptualized as distinct from any commitment to the exercise of democratic agency or involvement that are central to the notion of positive freedom. Arguably it is because

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<sup>330</sup> For Pettit's explicit contrast of his position with the popular 'communitarian' republicanism he attributes to both Arendt and Rousseau, see *Republicanism*, 8, 30.

<sup>331</sup> Philip Pettit, *Republicanism*, 30. Emphasis added.



of this, and the fact that under Pettit's conception popular rule itself poses a notable threat to the realization of non-domination, that his incorporation of democratic mechanisms in *Republicanism* is markedly thin and limited. Rather than ongoing and active participation on the part of citizens, Pettit suggests that appropriately robust institutions, supplemented by mechanisms of representation and contestation, are sufficient to assist in securing the conditions or situation where agents are not exposed to, or threatened by, the capacity of others to interfere in ways that do not track their interests.<sup>332</sup>

This aspect of *Republicanism* was the subject of critical attention by commentators worried that Pettit's account under-appreciated the role of participatory democracy and agency in constituting freedom. Regarding the former, John McCormick claims that Pettit problematically "accentuates contestation over participation" due to ultimately misplaced and exaggerated concerns regarding majoritarian tyranny in the context of contemporary democracies where elites enjoy a preponderance of influence.<sup>333</sup> While Pettit's image of contestatory democracy clearly recognizes the limitations of a merely electoral conception of democratic governance, McCormick claims that we ought to remain doubtful about the efficaciousness of contestation in the absence of robust and active participation.<sup>334</sup> On a more fundamental level, in an engagement

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<sup>332</sup> In a telling passage, Pettit tells us that the "self-ruling demos or people may ... often run on automatic pilot, allowing public decision-making to materialize under more or less unexamined routines. What makes them self-ruling or democratic is the fact that they are not exposed willy-nilly to that pattern of decision-making: they are able to contest decisions at will and, if the contestation establishes a mismatch with their relevant interests or opinions, able to force an amendment." (*Republicanism*, 187)

<sup>333</sup> John P. McCormick, "Machiavelli Against Republicanism: On the Cambridge School's 'Guicciardinian Moments,'" *Political Theory* 31, no. 5 (October 1, 2003): 634.

<sup>334</sup> John P. McCormick, "Machiavelli Against Republicanism," 634. McCormick notes that the republican framework's hostility toward populism and democracy can only seem misplaced at best in our contemporary context in which much of political decision has been usurped by societal elites, and at worst, as potentially reinforcing the oligarchic tendencies of contemporary liberal democracies. For McCormick, rather than counseling the combination of mechanisms of contestation with otherwise depoliticized processes of elite and expert-driven policy formation, such developments suggest the need to move toward a more radically popular understanding of political legitimacy.

with the conceptual architecture of Pettit's broader philosophical views on freedom, Patchen Markell has pointed to tensions and difficulties regarding the place of agency in Pettit's notion of republican liberty. According to Markell, these difficulties arise from the ambiguous role 'arbitrariness' plays in Pettit's account of domination, an ambiguity that initially emerges in Pettit's broader philosophical account of freedom in *A Theory of Freedom*.<sup>335</sup> For Markell, the notion of non-arbitrariness that undergirds Pettit's account of freedom as non-domination is too narrow in its concern with merely tracking the interests of non-dominated agents. Pettit's account therefore fails to capture injustices marked by forms of what Markell calls 'usurpation' that results in the displacement of an agent's involvement and participation in "existing uses and forms of political activity."<sup>336</sup> In doing so, such a perspective fails to fully capture the depth of the injustice that characterize particular forms of unfreedom and thus misses a crucial dimension of what is at stake in complaints against injustice and subjection. Consequently Pettit's account of freedom as non-domination is insufficient insofar as it eschews the central importance of *involvement* in the realization of freedom.

Pettit's recent work has focused on putting forward a republican account of legitimacy that responds to these worries regarding the limitations of his conception of non-arbitrariness and the narrowness of his notion of democratic contestation. This revised account attempts to shift

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Here I limit my discussion to McCormick's critical interventions, bracketing the question as to whether his account of 'Machiavellian' solutions prove more persuasive than those of Pettit. For McCormick's positive account, see John P. McCormick, *Machiavelli Democracy* (Cambridge: Cambridge University Press, 2011).

<sup>335</sup> Patchen Markell, "The Insufficiency of Non-Domination," *Political Theory* 36, no. 1 (February 1, 2008): 13-24

<sup>336</sup> Patchen Markell, "The Insufficiency of Non-Domination," 25-6. As Markell tells us, "the mechanisms that guard against arbitrariness and subject decisions to control can also displace involvement, leaving people subject to relatively predictable and perhaps even beneficial forms of power that nevertheless 'stifle' and 'stultify'" (Ibid., 12).

the grounds of non-domination away from non-arbitrariness and toward an idea of democratic control constituted through electoral and contestatory institutions. As part of this revised approach, Pettit has argued that such democratic institutions are necessary to realize the forms of popular control demanded by a republican account of political legitimacy. However, this appreciation for democracy still remains merely instrumental rather than constitutive of non-domination; indeed, in Pettit's framework democracy and justice are fundamentally *distinct* given his continued emphasis on negative freedom as primarily concerned with securing a domain of liberty against arbitrary interference.

Arguing in the same vein as Markell, Alan M. S. J. Coffee has critically engaged with Pettit's more recent contributions to draw attention to the continued shortcomings of a neo-republican framework grounded in a purely negative account of freedom.<sup>337</sup> While remaining committed to the republican understanding of freedom as preventing the misuse of power, Coffee insists that this need not collapse into defining freedom in merely negative terms. As he writes, the "involvement of the citizens in the process of creating or revising the norms by which they will live together is an integral part of their freedom."<sup>338</sup> For these reasons a sufficiently capacious conception of freedom as non-domination must incorporate the involvement of agents in a robust manner that goes beyond a narrow emphasis on contestation. In this regard, Pettit's approach falls short of a more reflexive and political conception of justice, which views democratic mechanism as internal to a sufficiently robust account of neo-republican *justice* itself,

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<sup>337</sup> Alan MSJ Coffee, "Two spheres of domination: Republican theory, social norms and the insufficiency of negative freedom," *Contemporary Political Theory* 14.1 (2015): 45-62.

<sup>338</sup> Alan MSJ Coffee, "Two spheres of domination," 13.

and not merely to legitimacy.<sup>339</sup> Consequently, in order to address the concerns central to this project we will need to develop a more radically democratic and political account of justice than that available within Pettit's approach.

### 3 Toward a Transnational and Critical Republicanism

Given the extensive issues in Pettit's approach, it may seem counterintuitive, or indeed misguided, to take up the neo-republican perspective as a framework for addressing the normative quandaries raised by statelessness. However the neo-republican framework still captures a number of important insights for addressing the central concerns of this project. What is required is to re-conceptualize the neo-republican approach in *transnational* and *political* terms that move beyond the strictures of Pettit's own account.

This possibility is suggested by a number of scholars who have recently argued for the idea of a global republicanism. Though admittedly provisional, these contributions suggest an approach that transcends the limitations considered above. In a manner consistent with the approach I develop here, Cecil Laborde has pointed toward the need for what she terms a *critical republicanism*, inspired in part by the insights of the Frankfurt school. As she puts it,

Critical republicans borrow from Frankfurt-style critical theory an interest in social critique and in social change: they start from existing institutions and relationships, identify their dominating and oppressive features, and advocate their transformation. Their primary concern is with resistance to concrete forms of unjust power.<sup>340</sup>

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<sup>339</sup> In this regard the normative powers associated with the status of citizenship and the structures that produce community should themselves be open to democratic contestation and transformation; that is, to be undominated requires us to have a say in the formation of our normative status.

<sup>340</sup> Cécile Laborde, "Republicanism and Global Justice: A Sketch," 50.

Moreover, as a critical approach primarily concerned with unmasking and upending unjust relations of domination and oppression, Larborde identifies an affinity between this perspective and the ‘Liberalism of Fear’ of Shklar. In her influential account of liberalism, Shklar counterpoised her interpretation of that tradition with the idealizing approaches dominant among liberal political theorists.<sup>341</sup> For Shklar, liberalism’s origins lie in a fundamental concern not with the promotion of the good, but in combating the *summum malum* of “cruelty and the fear it inspires, and the very fear of fear itself.”<sup>342</sup> While clearly responding to work of late-twentieth century liberal theorists, as I interpret it, this emphasis also contrasts with Pettit’s republican approach, which begins by articulating *ex-ante* a singular ideal of justice with which to structure legitimate social and political institutions. Proceeding in such a fashion may inadvertently build in assumptions about the way society should be ordered that perpetuate various forms of injustice or lead to the development of an account that inadvertently remains inattentive to the experiences of the subjected and oppressed.<sup>343</sup> In doing so, we run the risk of naturalizing structures of power, a problem I suggested is present in Pettit’s account of international republicanism. Because Pettit begins with the experiences of free citizens within free states, he is unable to attend to those who may be systematically excluded and harmed by the institutional arrangements that such an approach leave unproblematicized.

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<sup>341</sup> Amy Gutman neatly formulates this anti-utopian reading of Shklar’s *Liberalism of Fear* as being “a liberalism that is concerned above all with damage control” and of committed to a political order that is able to “protect people from cruelty, whatever the source.” (“How Limited Is Liberal Government?” in *Liberalism without Illusions* (University of Chicago Press, 1996), 67, 68.

<sup>342</sup> Judith Shklar, “The Liberalism of Fear” in *Political thought and political thinkers* (University of Chicago Press, 1998), 29.

<sup>343</sup> See James Ingram, *Radical cosmopolitanism: The ethics and politics of democratic universalism* (Columbia University Press, 2013), 96.

Rather than starting with an *a priori* model or account of the just society, an appropriately attuned critical republicanism begins by attending to actual examples of exclusion, oppression, and subjection. Such a perspective reverses the mode of ideal theory that has dominated much of liberal, and neo-republican theory. It does so by prioritizing the importance of theorizing from the position of the dominated and subjected, as opposed to placing emphasis on the articulation of a model of the well-ordered society or free republican state as the starting point for assessing considerations of global justice in order to pursue remedial reforms.<sup>344</sup> As we saw in earlier chapters, this project follows these insights in taking its critical orientation from such a ‘republicanism of fear.’<sup>345</sup> This entails a normative approach that is oriented by the imperative of ‘putting domination first’ as a fundamental concern to be addressed by the requirements of justice on a transnational level. It does so not by merely taking “states as they are” as a starting point, but by focusing on the position of the stateless in order to develop a socially and historically situated analysis of the structures of membership that characterizes our contemporary world.

In addition to providing a notably more critical edge, writers identifying as global republicans have also pointed to a number of further supplements that move us beyond the limits of Pettit’s account and provide a starting point for the normative framework that informs this project. In particular, such writers have questioned both the statist commitments of Pettit’s approach as well as called for a more careful analysis of structurally constituted forms of

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<sup>344</sup> Here I in part take my lead from Young’s suggestion that our thinking about justice should begin by turning to experiences of oppression and domination, and not from the often mythically universal figure of the citizen. See Iris Marion Young, *Justice and the Politics of Difference*, 33-66.

<sup>345</sup> This term is used by Rainer Forst to describe Hannah Arendt’s work, motivated as it was by the dark times of the twentieth century. However, my usage here is more general from that of Forst’s, which rests on a very particular interpretation of Arendt.

domination. In her proposal of a republican cosmopolitanism, Lena Halldenius has suggested that a proper concern with non-domination must extend to the global level, for to “the extent that power and institutions affect us globally, to the same extent will the republican inevitably have to be a cosmopolitan.”<sup>346</sup> Importantly, Halldenius notes that in order to be effective as a framework for the global context, such an approach needs to attend to the systemic and often ‘unwilled’ relations of domination at the global level that are produced by institutional arrangements and collective practices, rather than by a clearly identifiable agent. Bereft of this “it will not be able to account for the complex dynamics of power and oppression in human societies where power often attaches to a position or category rather than an individual.”<sup>347</sup> This view is echoed in the work of Laborde, who suggests that what is therefore called for is a more structurally attentive neo-republican perspective capable of capturing the less visible and agent-de-centered forms of systemic domination present in a global context.<sup>348</sup>

While insightful and important, the contributions of these writers remain somewhat under-developed and provisional, even by the admission of Laborde and Halldenius. They provide only a sketch of the direction a more robust global republicanism ought to take rather than a substantive account of the full implications of such commitments. For this reason I turn to the recent works of James Bohman and Rainer Forst. While not explicitly identifying as global republicans, these authors have developed projects that provide novel ways of addressing the

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<sup>346</sup> Lena Halldenius, “Building Blocks of a Republican Cosmopolitanism,” 27.

<sup>347</sup> Lena Halldenius, “Building Blocks of a Republican Cosmopolitanism,” 16.

<sup>348</sup> To this end, Laborde explicitly draws attention to the limitations of Pettit’s account of global republicanism, which “is exclusively focused on agent-relative rather than systemic domination” thereby screening out various forms of global domination that arise as a result of relations of “structural asymmetry [that] cannot be accounted for in purely agent-relative terms.” (Laborde, “Republicanism and Global Justice,” 57)

concerns of statelessness.<sup>349</sup> Both Bohman and Forst share a common vision of a political response to the problem of transnational domination and in doing so provide insights into an adequate normative response to statelessness.

### 3.1 Transnational Claims of Justice

As we saw earlier, Pettit's neo-republican approach toward questions of global justice remains locked within a statist framework that is both empirically and normatively problematic. In contrast, both Forst and Bohman have argued that we need an approach that is sensitive to the novel and new circumstances of global politics that we confront today. To do so, what is needed is a "critical theory of (in)justice" that is capable of critiquing false justifications that obscure social contractions and relations of domination.<sup>350</sup> Such an approach cannot simply take the given social relations of our international order as justified and immutable, as the assumptions of methodological nationalism found in Pettit's account suggests. To this end, Forst and Bohman provide complementary analyses of contemporary social relations that show the need to adopt a transnational framework for addressing claims of justice.

Bohman has argued that a transnational approach is necessitated by the new global 'circumstances of politics' that we presently confront, arising from increasingly intensified relations of global connectedness. These novel circumstances entailed by globalization have created the potential for new forms of systemic domination at the transnational level and thereby call for a broader rethinking of our principles of political authority. While some cosmopolitan theorists of globalization have argued that these intensified relations of cooperation and

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<sup>349</sup> Indeed, both Bohman and Forst have stressed their own affinities with the concerns of neo-republicanism, whilst also stressing their departures from Pettit's approach.

<sup>350</sup> Rainer Forst, *The Right to Justification*, 258.



interconnectedness mean that we have come to inhabit a shared social space, Bohman suggests that this ‘convergence hypothesis’ simplifies and obscures the unevenness of the effects of such relationships of inter-dependency. Against the convergence view, Bohman argues that the outcomes of the unfolding processes of globalization are differentially experienced. As he notes “even if globalization enlarges the ways in which we live together in political space and time, it does not follow that we all share the same fate within it.”<sup>351</sup> Indeed, as Bohman notes, not only are the effects of globalization differentially experienced, but the sorts of transnational interactions and activities that we now confront affect “indefinite others” across a multitude of contexts.<sup>352</sup> What Bohman means by this is that such transnational processes implicate spatially and temporally dispersed groups in profound ways, and while such groups can be specified, the persons affected cannot necessarily be clearly individuated in a manner sufficient to claim that they are freely involved in such structures of cooperation. As Bohman notes,

If social actions are indefinite in this way, then we cannot choose those with whom we must cooperate... Interdependence via indefinite social activity thus establishes the scope of political obligation precisely because the circumstances of global politics emerge through nonvoluntary inclusion in indefinite cooperative schemes. Inclusion in such schemes... is itself a form of domination.<sup>353</sup>

Precisely because various forms of global interconnectedness have profound cross-border and transnational impacts, tantamount to structures of forced cooperation, for this project we need to widen our account of neo-republicanism to move beyond the outdated statist assumptions that

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<sup>351</sup> James Bohman, *Democracy Across Borders*, 24.

<sup>352</sup> As he puts it, “the sort of social activities in question affect an *indefinite* number of people.” (Bohman, “Republican Cosmopolitanism,” 339)

<sup>353</sup> James Bohman, *Democracy Across Borders*, 25.

characterize Pettit's framework.<sup>354</sup> What is more, according to Bohman these shifts demand that we significantly revise the republican account of domination. While the iconic image of the dominated person in the classical republican tradition was the figure of the slave, our new contemporary circumstances of politics have introduced a new contrast figure to that of the free citizen. As Bohman tells us:

Those who lack this status are not slaves, but rather rightless persons who lack even the right to have rights. Besides producing rising numbers of stateless persons, the current distribution of global political authority produces situations in which many people lack the very minimum of normative powers and control over their own rights and duties: they lack the capacity to make claims of justice and to initiate deliberation, and in lacking this power are subject to normatively arbitrary political authority.<sup>355</sup>

For Bohman, this suggests a need to revisit the republican understanding to capture forms of domination that emerge in transitional contexts. In this regard, he notes that Pettit's presentation conflates the problem of ancient tyranny with the distinct challenge of modern domination that contemporary democracies have the potential to find themselves implicated within given these new global circumstances of politics.<sup>356</sup> While the 'ancient' problem of tyranny has by no means

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<sup>354</sup> Indeed, although Bohman does not draw this connection himself, we can apply such insights directly to this project's account of our current international membership regime. While constituted, and indeed only possible, through the coordinated practices of an increasingly concrete state system, the effects of this regime are markedly uneven, imprisoning some in failed states characterized by authoritarian violence or crippling poverty, while leaving others bereft of membership claims. What is more, while practices of membership and citizenship are only possible through the coordinated actions of states, it is unclear how the rules and norms that structure this regime could be said to be freely accepted by all those who find themselves implicated within such structures. Because of this, it seems plausible to characterize the international membership regime as constituting a form of non-voluntary inclusion in an indefinite scheme of cooperation.

<sup>355</sup> James Bohman, *Democracy Across Borders*, 8.

<sup>356</sup> James Bohman, *Democracy Across Borders*, 9. Iris Marion Young's work on the social connection model of justice provides the earliest persuasive account I know of to systematically address the challenges posed by such structural social processes which Bohman sees as generating new relations of justice. See Iris Marion Young, "Responsibility and global justice: A social connection model," *Social Philosophy and Policy* 23.01 (2006): 102-130.

been rendered irrelevant, Bohman's point is that this narrow focus is unable to capture the various forms of subjection, domination and oppression that characterized our current global system.<sup>357</sup> In this regard, my own criticisms regarding the structurally-blind dimensions of Pettit's analysis of domination at the global level can be read as complementing Bohman's argument for a revised republicanism more appropriate to our present context.

In a similar vein, Rainer Forst has also argued for a transnational approach to questions of justice. His point of intervention into such debates begins by challenging the stalemate between statist and globalist that has characterized much of the global justice literature until fairly recently.<sup>358</sup> As Forst notes, the main hinge-point of this debate—focused for the most part on the issue of the scope of claims to distributive justice—centers on the question of to “what extent the world as a whole is a *context of justice*”.<sup>359</sup> Those who defend limiting obligations of justice primarily to the confines of bounded political communities point to the fact that legitimate claims of justice appear to rest on the existence of a shared and institutionalized context of mutually beneficial cooperation, and that such a robust context is simply lacking at the global level. What is more, proponents of this perspective broadly suggest that such contexts already exist at the national level, and that attempts to impose globalist standards of distributive justice violate or fail to respect the claims of community and political autonomy that underwrite these particular contexts of justification. For their part, proponents of global justice have responded either by

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<sup>357</sup> For a more thoroughgoing critique of the insufficiency of Pettit's approach to the challenges of domination in the modern world, see: Michael J. Thompson, “Reconstructing republican freedom: A critique of the neo-republican concept of freedom as non-domination,” *Philosophy & Social Criticism* (2013).

<sup>358</sup> In some ways aspects of Forst's anti-globalist critique are anticipated by Benhabib, who in her challenge to global egalitarians suggests that there are claims of community that represent particular contexts of justification. However, as we have seen earlier, her account ultimately ends up endorsing a statist position.

<sup>359</sup> Rainer Forst, *The Right to Justification*, 251.

suggesting that a system of cooperation does exist at the global level comparable to the domestic level, or alternatively, that due to globalization and interdependence, some type of global basic structure does exist. Given the existence of a global context of justice, the priority of domestic justice cannot be simply presumed; rather such relations of cooperation suggest the need of global principles of justice.

In defending a transnational alternative to either the globalist and statist positions, Forst acknowledges that both perspectives have claims worth attending to, but fall short of addressing all relevant contexts of justification. For their part, statist are right to be concerned about the lack of attention to political autonomy and agency that often characterizes global egalitarian accounts of distributive justice—for these approaches fail to acknowledge the fundamentally political nature of justice. Yet the statist perspective is also problematic in reifying national borders as the appropriate boundaries for such claims. This is because even though the domestic context—due to the presence of a shared ‘basic structure’—clearly constitutes a context of justice, the lack of an equally robust global basic structure does not foreclose claims of justice across political communities. The reason for this is that our contemporary world is characterized by various forms and structures of forced cooperation—or domination—that cross state boundaries; indeed, as we have seen, it is a world in which borders themselves play a constitutive role in various forms of domination. Thus rather than foreclosing claims of justice beyond the state, such a situation demands that we create the very social and political institutions that can realize conditions of non-domination transnationally.<sup>360</sup> As Forst notes,

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<sup>360</sup> This critique of statist positions—exemplified by the work of Rawls and Nagel—is anticipated by the arguments of both Arash Abizadeh and Iris Young. The former in particular has argued that the question of the existence of a global basic structure not determinative of scope of justice; rather structures of forced cooperation or coercion entail the need to create a global basic structure that can redeem and redress what are otherwise relations of domination. In a manner of speaking, this argument is somewhat like state of nature arguments for the state. See Arash Abizadeh.

a ‘transnational’ approach differs from a globalist view in considering particular political contexts as contexts of justice in their own right and in constructing principles of justice for the establishment of just relations between autonomous political communities. It differs from statist views by starting from a universal individual right and by considering the global context as an essential context of justice. Given the central aim of the realization of the right to justification within and between states in order to end the vicious circle of internal and external domination, a theory of transnational justice has to combine the various contexts of justice in the right way.<sup>361</sup>

Thus in attempting to approach the question of global standards of legitimacy, multiple levels of transnational justice must be grappled with as valid contexts of justification. Forst’s conception of transnational justice thus emphasizes the interlocking relationship of domestic and international justice, which should not be conceptually divorced, while also encouraging us to move beyond the statist—globalist dichotomy that characterized the disagreement between Rawls as well as other liberal nationalists and their cosmopolitan critics.

### 3.2 Beyond a ‘Negative’ Republicanism

Of equal importance to this project, both Forst and Bohman also provide us with reasons to question the soundness of Pettit’s attempt to develop an inherently non-normative notion of domination. Following Henry Richardson’s earlier critique of Pettit’s objectivist account of arbitrary power, they have emphasized that domination cannot be reduced merely to a negative concern with interference; ultimately domination concerns the imposition of *duties and obligations* on an arbitrarily justified basis. Both domination, and as we shall see, non-

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“Cooperation, pervasive impact, and coercion: on the scope (not site) of distributive justice.” *Philosophy & Public Affairs* 35.4 (2007): 318-358.

<sup>361</sup> Rainer Forst, “Towards a Critical Theory of Transnational Justice,” 170.

domination, are inherently normative concepts grounded in the nature of intersubjective social relations. As Richardson has put it, the “purported exercise of normative power—the power to modify the rights and duties of others” is in this sense “essential to the idea of domination.”<sup>362</sup> Thus while Forst also links his account of injustice as domination to a notion of arbitrariness he understands arbitrariness in a broader, essentially normative sense, where the concern is with *unjustified* relations of *rule*. Arbitrariness, as Forst puts it, is to be

understood in a social sense, whether it assumes the form of arbitrary rule by individuals or by part of the community (for example, a class) over others, or of the acceptance of social contingencies which lead to asymmetrical positions or relations of domination and are defended and accepted as an unalterable fate, even though they are nothing of the sort.<sup>363</sup>

Following Richardson’s earlier critique of Pettit’s notion of arbitrariness, this indicates the need for a more normatively rich concept of domination. For Forst, this has led him to broadly question Pettit’s emphasis on a ‘negative republicanism’ as sufficient to counteract relations of injustice. In this regard, Forst has noted Pettit’s republicanism is mainly a mechanism for sheltering “the ‘negative’ realm of freedom of choice of persons against arbitrary interference.”<sup>364</sup> Yet this renders such a concept of domination highly limited.

While Pettit has continued to insist on the objective status of his account of domination, like Alan Coffee, Bohman has also raised concerns as to whether such an account is ultimately coherent. As we saw above, for Coffee the challenge of such an enterprise lies in the fact that any notion of arbitrariness must be defined against a background of understandings and conventions

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<sup>362</sup> Henry Richardson, 34.

<sup>363</sup> Rainer Forst, “Transnational Justice and Democracy,” 4.

<sup>364</sup> Rainer Forst, “A Kantian Republican Conception of Justice as Non-domination,” 161.

embedded within a particular community or context, elements of which may themselves be implicated in the perpetuation of forms of domination.<sup>365</sup> But this suggests that the notion of arbitrariness that Pettit's account must rely upon to identify 'objective' cases of domination is itself parasitic on the prevailing social norms and values of that context and community, which means that Pettit's non-normative conception of domination is a mirage.<sup>366</sup> More problematically, if our concept of non-domination is limited to providing individuals with *post-hoc* mechanisms of contestation, the fact that such complaints are judged against a purportedly objective standard of arbitrariness that is in fact derived from existing conventions and norms can render invisible many forms of injustice. Building on this insight, Bohman suggests that Pettit's "non-normative conception of domination concedes too much to the notion of negative freedom it is meant to replace."<sup>367</sup> As he argues,

Arbitrariness as a predicate makes sense only on the normative background of rights, duties, roles, and institutions that actors take for granted in their social action, including various legal and political rights.<sup>368</sup>

These criticisms are persuasive. After all, neo-republicanism is fundamentally concerned with freedom in the context of a social world constituted by inter-subjective relations. Unlike the

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<sup>365</sup> Indeed, here Pettit's defense of a world of separate states comes close to serving as an ideal example of this potential danger. For Pettit the demand that we live in states and remain restricted in our membership claims is not a form of domination or alien control because it is simply assumed to be necessary as the laws of physics and thus not arbitrary.

<sup>366</sup> Therefore, the sort of implicit appeal to 'common standards' that Pettit's account relies upon misses that such claims are themselves value-laden and therefore should be open to demands for justification. As Alan Coffee puts it, "what is arbitrary is determined by a society's norms as reflected in its beliefs, values, and traditions." (12)

<sup>367</sup> James Bohman, *Democracy Across Borders*, 8.

<sup>368</sup> James Bohman, *Democracy Across Borders*, 94. As Bohman puts it, "Domination is thus not just the capacity to interfere arbitrarily in one's life, but also the capacity to make use of distinctly normative power that operates against this institutionalized background of legitimate norms; it is the ability to impose obligations and duties arbitrarily. The key here is then to recast the important term 'arbitrary' in terms of the use of normative powers to purport to impose duties on others." (94-95)

notion of liberty as non-interference which confounds natural freedom and political freedom, republicanism thus aspires to understand freedom as a function of our social and political arrangements.<sup>369</sup> This means that adopting an explicitly normative account of domination would be more true to the fundamental insights of the republican framework: domination and non-domination alike are thus properly understood as inherently normative concepts. Yet if this is the case, Pettit's framework of a negative republicanism simply remains insufficient. If the measure of domination—or subjection to the possibility of arbitrary rule—is not objectively given, but rooted in the dynamics of inter-subjective social relations, then a reactive and merely contestatory framework remains inadequately open to fundamental modification and reflexive change. The reason for this is that a purely negative model, which does not see the exercise of normative powers to transform structures of justification themselves as necessary to freedom as non-domination, means that individuals “are merely consulted on terms they cannot alter.”<sup>370</sup> Under such conditions the liberty of agents can be compromised, for the very terms under which their agency is permitted to be exercised remain beyond their control. Consequently, as we shall see, a sufficiently robust conception of non-dominion must therefore be understood in *political* terms.

### 3.3 A Political Conception of Non-Domination

In insisting on taking up a conception of non-domination that is fundamentally political in form, I want to briefly return to the account of statelessness as domination that motivates this framework. As I argued earlier, following Hannah Arendt, the experiences of stateless persons

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<sup>369</sup>As Halldenus notes: “[Republican] Liberty is a function of social relations, a concept for the social world...the circumstances of liberty as non-interference transgress the distinction between the natural and the civil condition, while the circumstances of republican liberty are inherently civil.” (“Building Blocks of a Republican Cosmopolitanism,” 17-18)

<sup>370</sup>James Bohman, *Democracy Across Borders*, 52.



are best characterized as the denial of the ‘right to have rights’ understood as the status necessary to secure one from subjection to arbitrary rule. In her reflections on the plight of the refugee, Arendt emphasized that the fundamental harm stateless individuals faced ultimately arose from their loss of citizenship status. This is why for Arendt the injustice of statelessness did not lie merely in the material deprivations or loss of legal status that refugees and stateless persons endured. Rather, for Arendt the stateless are rendered rightless precisely because they are denied the political agency and involvement enabled by citizenship within a community that secures these rights—they are in effect denied the status of one who ‘counts’ as an agent. With their exclusion from any political community and their loss of political status the stateless became rightless, for they suffered the absence of the standing that enabled all other rights. Thus as I argued in my reconstruction of Arendt’s position, without access to the standing of citizenship the stateless are therefore made to suffer a form of domination: what entitlements they are allowed are contingent on the decisions of others they cannot hold answerable and for whom they thus hold no normative sway. They are therefore subjected to arbitrary power.

Arendt’s account of statelessness as characterized by the foreclosing of access to the status or standing of one who ‘counts’ orients us toward the centrality of the denial of agency and involvement to this form of injustice. This insight into the nature of domination was essential to a number of the critiques of Pettit’s framework outlined above, but has also been gestured toward in a more positive fashion by theorists of global republicanism such as Duncan Ivison. In his own Arendtian inspired reflections on the neo-republican tradition Ivison notes that such a conception ought to imply a fairly robust account of agency that goes beyond merely the opportunity to contest and check potentially arbitrary forms of interference. As he puts it, “I am un-free not only when others can arbitrarily interfere with me, but also in lacking a certain kind

of involvement in the formation of the rules of the game that govern me.”<sup>371</sup> According to Ivison, this commitment points to a fundamentally expansive republican concern with the “right to have rights” as the foundation of any account of non-domination. The injustice the dominated suffer is above all a product of their loss of the status of the “citizen”—understood as the robust standing of political agency necessary to transform the very institutional and political structures that structure our relations of others. Put otherwise, as I have argued above, domination is constituted by this denial of our capacity as agents who may claim normative authority over ourselves among others. A republican commitment to securing non-domination should therefore entail institutional recognition of our capacity to exercise our normative powers on the very institutions and procedures that condition and enable our freedom.

In drawing on an explicitly normative account of non-domination his project continues to build on the recent work of James Bohman and Rainer Forst.<sup>372</sup> Operating within the tradition of critical theory and fusing a concern with the domination as a fundamental form of injustice with a Habermassian discourse-theoretic framework of justification, these writers represent a new normative-discursive turn regarding the basis of freedom as non-domination that extends beyond the limitations in Pettit’s approach identified earlier. In this sense, both Forst and Bohman view such a perspective as integral to moving beyond a merely negative account of non-domination, toward one which understands the exercise of ones normative powers or right to justification as fundamental to realizing this condition. I therefore take up this political perspective due to the limitations of an *objective* or post-facto account of non-domination. As we have seen, this is necessary because conditions of domination are ultimately grounded in an inter-subjective

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<sup>371</sup> Duncan Ivison. “Republican human rights?,” *European journal of political theory* 9.1 (2010), 41.

<sup>372</sup> See James Bohman (2007) and Rainer Forst (2011, 2014).

context that cannot be specified without reference to the agency and involvement of those affected. As Forst, puts it, this demands the creation of political and social arrangements that enable a *reflexive* process of justification, such that structures of power and authority that secure an agents non-dominated status are themselves always open to transformation. The fundamental conditions for this are what Bohman and Forst respectively refer to as the ‘democratic minimum’ and the ‘basic right to justification’. The core of this approach is that to be un-dominated means to hold the status of one ‘who counts’—that is, to be an “an agent of justice, not just a recipient of justice.”<sup>373</sup> Such a status thus entails for Bohman the capacity to exercise our normative powers to not only contest but initiate action, or in Forst’s, words to make reflexive claims for the justification of an existing social order.

Taken together, as we have seen in the forgoing discussion, both Forst and Bohman develop accounts of non-domination that converge on a number of shared commitments that move their overall approaches beyond the limitations we canvassed in the work of Pettit. Their frameworks highlight the need for an inherently *political* inflection to our understanding of the conditions necessary to realize non-domination, while simultaneously drawing our attention to the *systemic* and *structural* features that both condition and enable non-domination, as well as the inherently *transnational* context in which such an account must be embedded. In the final chapter I apply the insights of what I have referred to as a political neo-republicanism to the subject of our existing modes of regulating political membership as well as to the international refugee regime itself.

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<sup>373</sup> Rainer Forst, *The Right to Justification*, 245.

## Chapter 6

### Towards Transnational Justice and the Reform of Membership

In the last chapter we turned to a critical reconstruction of the notion of freedom as non-domination that forms the normative core of this project. This approach is based in an Arendtian inspired account of statelessness as domination that characterized the fundamental injustice of statelessness as ultimately grounded in the refusal of the status of one who ‘counts’ as an agent. That is, the loss of the “right to have rights” that statelessness entails is the denial of the standing necessary to secure one from subjection to arbitrary rule. Moreover, in the historical reconstruction of the origins of statelessness developed in the first half of this project, I attempted to show that this form of exclusion is a product of the collective norms, practices and institutions of our contemporary state system as it has taken concrete form over the twentieth century. This in turn provided the basis for taking up the contributions of scholars working generally within the ‘neo-republican’ tradition to interrogate what accounting for the claims to justice of the stateless would entail. However, while engaging with the work of Philip Pettit as a point of departure, I argued that a properly formulated account of non-domination must move beyond Pettit’s approach in a number of ways. Through a broad, and largely critical, appraisal of the shortcomings of Pettit’s own account of neo-republicanism, I showed that only a political, transnational, and explicitly normative, conception of non-domination would prove sufficient to fully realize the potential of this ideal on a global level.

Having developed the case for a critical theory of republicanism that is attentive to these concerns, this chapter aims to unpack and apply these theoretical insights within our contemporary context in to order rethink our current practices of membership and international protection. In doing so, my argument proceeds in two stages. In the first part of the chapter, I aim

to show that the account of non-domination I have defended would require a significant—and indeed radical—reform of contemporary responses to forced migration. To show how this is the case, I interrogate the ongoing ‘migration crisis’ to indicate how current responses fail to address the claims to justice of the forcibly displaced. Indeed, far from merely requiring a re-adjustment of current ‘burden’ sharing restrictions in the international refugee regime, achieving justice would demand a restructuring of our understanding of the rights of states to arrest the movement of forced migrants, refugees, asylum seekers, and other categories of displaced people. To help develop this case, I critically engage with the work of David Miller, arguably one of the most prominent political theorists to defend the normative assumptions that could be said to underlie contemporary state responses. Through this assessment of Miller’s perspective, I show why operating within the existent parameters of the international state system cannot fully address the normative concerns raised by statelessness and forced migration. Rather, to do so would require a general reconsideration of the background assumptions of the current state system and the broader reform of our norms of membership.

Yet at the same time this chapter seeks to acknowledge that such a transformation may be unlikely to occur under current circumstances. Indeed, as we saw in Chapter Three, over the past several decades there has been a gradual erosion of the norms and principles of the international protection regime that came into being in the wake of the Second World War and that liberal democratic states have been central actors in the process of undermining the regime. What is more, the realities of international protection under the contemporary refugee regime are presently dominated by official policies that have resulted in the more or less intergenerational containment of millions of persons in refugee camps, a phenomenon aptly described as ‘refugee warehousing’ by many observers. Not only do such arrangements subject individuals to conditions of aid-dependency under the auspices of technocratic humanitarian authority, but they

have also largely precluded any political involvement of refugees themselves in the governance of these now *de-facto* permanent communities of exile. Given these pressing realities, the latter part of the chapter therefore switches perspective from the demands of what full justice would require to addressing the question of what might be possible under current circumstances to enable more immediate domination-reducing reforms as well as a more gradual transformation in the treatment of the stateless or forcibly displaced. It does so because of the pragmatic observation that we are unlikely to see a significant reform of the fundamental structure of the international refugee regime in the short term. While the current global dynamics of forced migration undeniably raise profound moral concerns, there is a clear lack of political motivation among states to increase their legal responsibilities toward refugees.<sup>374</sup> Moreover, a number of scholars have warned that attempting to entirely remake the global refugee system anew under current political circumstances could even weaken extant obligations and standards of protection.<sup>375</sup> What is worse, the current circumstances of our dysfunctional refugee regime even point toward a structure of perverse incentives that may in fact have encouraged a race-to-the-bottom in state responses to forced migration. Indeed, it seems that the very states with perhaps the greatest capacity to take in refugees are precisely those states that have attempted to mobilize resources and geo-political power to divert refugee flows from their territory.<sup>376</sup> This poses a fundamental dilemma for political theorists of forced migration: How can we practically address the ethical claims of refugees, given the unwillingness of states to effect moral change?

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<sup>374</sup> Joseph Carens, *The Ethics of Immigration*; Guy S. Goodwin-Gill, "Asylum: The Law and Politics of Change," *International Journal of Refugee Law* 7 (1995): 1-18.

<sup>375</sup> Joan Fitzpatrick, "Revitalizing the 1951 Refugee Convention," *Harvard Human Rights Journal* 9 (1996): 229-53; Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001); Alexander Betts, "Towards a 'soft law' framework for the protection of vulnerable irregular migrants," *International Journal of Refugee Law* 22.2 (2010): 209-236.

<sup>376</sup> Here it is worth recalling that developing countries currently host 86 % of the world's postulation of (convention) refugees, while the least developed counties host 25 %. [UNHCR, "Global Trends, 2015"]

The final part of the chapter attempts to very tentatively provide some possible paths forward in addressing these issues. It does so by both looking at ways in which the current structures of the international refugee system can be comported to support, rather than undermine, the agency of refugees, and by examining the potential role of sub-state actors as agents of moral change in helping enable a broader reform of refugee protection responses. In looking at the reform of international protection, I suggest that one way in which to decrease or mitigate the implication of the refugee regime in institutionally producing domination is by prioritizing the value of the political agency of refugees. Here I engage with recent work within the refugee livelihoods literature that has focused on the economic empowerment and local integration of refugees. While acknowledging the value of this perspective for providing realistic and important interventions into contemporary refugee protection, I suggest that such an approach needs to recognize the centrality of involving refugees in the governance of these arrangements. Yet while a reform of the refugee regimes humanitarian institutions that mitigates the implication of refugee camps in domination is certainly of immediate necessity, this cannot be disconnected from a broader transformation of international protection. Such an approach would have to reject the turn to encampment as a *de facto* permanent solution to forced displacement and, in doing so, address the conditions needed to greatly increase access to resettlement. In addressing the challenges posed to realizing this more expansive reform in our responses to refugees I take inspiration from the ‘*avant-garde*’ approach toward normative political theory that attempts to bridge the ideal—non-ideal divide that has dominated broader debates in global justice.<sup>377</sup> In doing so, I close this chapter by offering a sketch of how we might begin to move beyond the impasse represented by what justice would seem to require and

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<sup>377</sup> Lea Ypi, *Global Justice and Avant-Garde Political Agency*, (Oxford: Oxford University Press, 2012).

what our current circumstances would seem to permit, without distorting the former to simply fit the latter. This argument aims to show how we can begin to move toward a broader transformation, focused on gradually securing the means to realize global justice with regard to claims to membership. In doing so, this argument builds on the insights of the ‘*avant-garde*’ approach that recognizes the need to attend to the institutional conditions necessary to mobilize the motivational resources for generating meaningful change.

## 1 Displacement and Domination in the Current ‘Migration’ Crisis

Although forced migration has become a lasting feature of global politics, recently there has been increased recognition—both within the humanitarian community and the general public—that we are currently at a moment of acute crisis. The most immediate cause of this situation according to humanitarian agencies is the sheer number of individuals forcibly displaced across the globe, a total which now exceeds anything recorded by the UNHCR. But perhaps of greater importance for shifts in public perception has been the rapid increase in ‘spontaneous arrivals’ on the borders of many Western liberal democratic states in Europe. Indeed, the current mixed-migration flows into Europe during the month of October 2015 were reported<sup>378</sup> to roughly approximate the total number for the entirety of 2014, and while these figures are now known to have been greatly inflated, it was such perceptions that helped suddenly frame public

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<sup>378</sup> CBC. “Europe migrant crisis: October flow roughly matched whole of 2014, UN says” [CBC News](#). November 02, 2015. For the source of these figures, see: FrontEx, *710 000 migrants entered EU in first nine months of 2015*, October 2015. This report includes the subtle admission that double counting occurred and may have distorted figures. Recent adjusted estimations of Frontex’s figures suggest that these numbers were in fact considerably inflated, with Didier Fassin noting that the actual figures were likely between 500,000-600,000, meaning that the total number of persons that “entered the European Union during the first nine months of 2015 represent barely more than one person per 1,000 of the total EU population.” Didier Fassin, “From Right to Favor”



perspectives on a ‘migration’ crisis.<sup>379</sup> More broadly, especially within the international humanitarian community, there is a deeper realization that the dominant paradigms and approaches that have shaped global responses to forced migration for the past several decades are no longer viable. This has particularly been the case with regard to camp-based responses to large-scale displacement.<sup>380</sup> This failure of ‘encampment’—that is, the reliance of the refugee regime on the creation of *de-facto* permanent refugee camps, with largely aid-dependent and often coercively confined populations—is now viewed as both problematic in principle as well as practically unviable.<sup>381</sup> Yet, even given the increased recognition of the urgency of the current refugee situation, state involvement still remain deeply limited with regard to helping develop effective responses, while considerable policy resources have remained devoted to deflecting possible refugee claimants. To shed light on the normative deficiencies in ongoing reactions, here I focus on the behavior of European states in particular. In doing so, I intend to show how a number of state practices are directly implicated in sustaining and intensifying the situation of domination experienced by these effectively stateless populations. I begin by focusing on the actions pursued by European states and the institutions of the EU that affect forced migrants outside Europe, before turning to the problematic policies that these states have engaged in with regard to asylum seekers that have entered their territory.

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<sup>379</sup> This seems all the more important to note given that UNHCR’s official figures recording the highest levels of global displacement on record had been released since June of 2015, and yet provoked little reaction.

<sup>380</sup> This has been recognized not only by the UNHCR, but also by donor governments such as the United States. See the UNHCR’s “Policy on Refugee Protection and Solutions in Urban Areas” (2009) and “Policy on Alternatives to Camps” (2014), as well as the United States Bureau of Population, Refugees, and Migration’s “Principles for Refugee Protection in Urban Areas” (2011).

<sup>381</sup> As Kukathas notes, “refugee camps have become, in effect, one of the four solutions to the refugee problem adopted by the UNHCR.” [Chandran Kukathas, “Are Refugees Special?,” in Sarah Fine & Lea Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership*, (Oxford University Press, 2016), 261.] The urgent need to respond to this reality been driven by the increasingly non-camp and urban nature of refugee populations, with 58% of refugees now residing outside of camps, and in the limited capacity of current humanitarian frameworks to respond to the needs of these populations.

## 1.1 Domination Beyond Borders and After Admission: The case of EU States

As noted earlier, the current refugee crisis is characterized by the incredible number of displaced persons driven from their homes by conflict and the threat of violence, with resulting levels of forced migration not seen since the Second World War. The national origin of individuals within the global population of forced migrants vary, including large numbers of persons from Afghanistan and Somalia, though the largest number of persons that have been forced into movement as a result of the ongoing conflict in Syria.<sup>382</sup> Now in its sixth year, the Syrian civil war has led to the flight of over 4,591,939 million refugees<sup>383</sup> as of December 2015, with up to 50% of the entire population now displaced by conflict.<sup>384</sup> The vast majority of Syrian refugees remain hosted in the neighboring states of Lebanon, Turkey and Jordan, which now respectively host 1,065,812, 2,503,549, and 633,541 refugees.<sup>385</sup> To put these figures in perspective, the total number of Syrian refugees settled globally by countries outside the region for the entire duration of the conflict amounts to only 160,628 as of April 2016.<sup>386</sup>

However, recently growing numbers of refugees have become part of an ongoing process of ‘secondary’ or onward migration toward destination states in Europe. One way of interpreting these migratory movements is as an expression of the agency of displaced persons. This might be

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<sup>382</sup> While I shall focus my attention on the Syrian case, it is worth noting that more than half of all refugees worldwide come from these three countries.

<sup>383</sup> *Regional Refugee and Resilience Plan, 2015-16: 2015 Annual Report*. UNHCR; UNHCR, *Global Trends 2014*, p 4. The number of refugees originating from Syria would likely be even higher given that Lebanon and Jordan have effectively closed their borders, with Turkey seemingly following suit. See Amnesty International, *The global refugee crisis: a conspiracy of neglect*, 2015.

<sup>384</sup> Amnesty International, *Syria's refugee crisis in numbers*, 3 February 2016.

<sup>385</sup> UNHCR, *Regional Refugee and Resilience Plan, 2015-16: 2015 Annual Report*, 4.

<sup>386</sup> UNHCR, *Resettlement and Other Admission Pathways for Syrian Refugees*, 2016.

explained by the way the perceived limits of camp-based approaches to international protection and the rapid growth of urban, non-camp refugee populations can be linked to the decisions of refugees to avoid sites of containment increasingly associated with stagnation, dependence, and limbo.<sup>387</sup> Indeed, despite representing the epicenter for an increasingly acknowledged global migration crisis, the UNHCR reported considerable funding shortfalls for its Syrian refugee assistance efforts for 2015, which remained 38% below the requests made in its' humanitarian appeals to donor states,<sup>388</sup> while only a tiny fraction of Syrian refugees have been offered opportunities for third country resettlement, representing about 3.6 % of the overall population of Syrian refugees in the region.<sup>389</sup> Confronting an already protracted and seemingly irresolvable situation of conflict, alongside insufficient international humanitarian assistance and the overwhelmed capacity of leading host states, larger and larger numbers of individuals have decided to pursue the possibility of more promising resettlement opportunities outside the region, with Europe proving to be a major point of destination.

How have European states responded to this dramatic shift in the nature of contemporary forced migration flows? While recent months have seen *ad hoc* exceptions, the overall strategy of these states to the growing number of displaced persons has been one of restoring their capacity for deflection and deterrence. The primary mechanism of deflection has been the already long-established system of 'remote control' that has been used by states to externalize

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<sup>387</sup> For accounts of the processes that have led to the emergence of this situation, see: Jacob Stevens. "Prisons of the Stateless: The Derelictions of UNHCR"; Michael Barnett. "Humanitarianism with a sovereign face: UNHCR in the global undertow." *International Migration Review* (2001): 244-277. It should be noted that Stevens' account has been contested by the UNHCR.

<sup>388</sup> UNHCR. *Regional Refugee and Resilience Plan, 2015-16: 2015 Annual Report*, 8.

<sup>389</sup> Amnesty International, *Syria's refugee crisis in numbers*.

their capacity to manage migration beyond their borders.<sup>390</sup> Rudimentary forms of remote migration controls have formed a part of state practices for over a century—but they have become increasingly expanded in scope and play a central role in arresting the potential arrival of asylum seekers in Europe. Such mechanisms include the usage of visa policies to control the ability of individuals to undertake travel to European states, as well as the usage of carrier sanctions to compel private transport companies—such as airlines—to screen passengers prior to departure for proper authorization to enter their state of destination. As Scholten and Minderhoud observe of these techniques:

By preventing migration at the source and therefore making sure that would-be asylum-seekers do not reach the territory of receiving countries, governments no longer have to refuse possible asylum-seekers and other migrants at the border. They no longer need to expel failed asylum claimants with the risk of violating the prohibition against refoulement—they simply make sure they cannot reach the border.<sup>391</sup>

The latter policy of carrier sanctions is particularly problematic, as it nearly amounts to the ‘privatization’ of migration control and asylum policy. By imposing massive financial liabilities on carriers, states have virtually transformed ticket counter agents into delegated first-line immigration officials. Such private actors are in effect compelled to operate as gate-keepers in states of origin, with little oversight and insufficient training to act as adjudicators of potential asylum claims. Moreover, it is important to keep in mind that this blocking off of safe and legal routes to affect an asylum claims takes place in a context of increasingly protracted refugee situations and declining humanitarian aid, where formal third-country resettlement has become an increasingly remote possibility for the majority of refugees. The consequence of this is that

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<sup>390</sup> Aristide Zolberg. “The archaeology of ‘remote control’” in *Migration control in the North Atlantic World: The evolution of state practices in Europe and the United States from the French Revolution to the Inter-War Period*, 195-222.

<sup>391</sup> Scholten and Minderhoud, “Regulating Immigration Control: Carrier Sanctions in the Netherlands.” *European Journal of Migration and Law* 10, no. 2 (2008): 129.

the only way to realistically make claims of asylum against European states is through irregular means of migration, and that this outcome is a direct result of state policy.

Complementing the off-shoring of migration controls, European states have also invested considerable political and financial resources into interdiction mechanisms and fortified borders intended to prevent refugees from entering their territory or restricting their capacity to effect an application for asylum. These mechanisms have ranged from bilateral readmission agreements with neighboring states, to the implementation of militarized border controls, whether in the form of fences, walls, or land and maritime patrols. The former strategy has seen increased usage by the European Union via bi-lateral agreements, in effect creating a buffer of ‘safe’ transit states that provide a means to insulate the continent from asylum claims without explicitly running afoul of international law. Indeed, in October of 2015 the EU officially began negotiations for expediting the application of an already concluded readmission agreement with Turkey.<sup>392</sup> This agreement—which has now come into effect—prevents asylum claims from being made by individuals who crossed through Turkey before entering the EU; all irregular migrants who arrive via Greece having crossed the Turkish border will be forcibly returned from the EU, regardless of the legitimacy of their claims to asylum. This represents a pivotal moment in the erosion of international protection in the European context, where such practices were first historically formalized as binding norms on states. As Fassin notes,

this externalization of the asylum procedure is unprecedented in Europe. By preempting the possibility of refugee status being claimed by people from the Middle East fleeing persecution, the joint-action plan counts as the ultimate renunciation of the international right to protection established after World War II.<sup>393</sup>

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<sup>392</sup> Alex Barker et al. “Merkel backs multibillion-euro refugee package for Turkey.” *The Financial Times*. October 16, 2015.

<sup>393</sup> Didier Fassin, “From Right to Favor.”

Given that there are already documented cases of Turkey openly forcibly returning refugees en masse, as well as other grounds now openly acknowledged by the EU to be worried about Turkey's human rights record, the ostensive justification of the agreement to support disincentives to irregular migration in the interests of migrants themselves seems cynical at best.<sup>394</sup> Indeed, the planning for this agreement with Turkey far predates claims of a European migration crisis, with this only representing the most radical measure of a broader attempt to increasingly foreclose the possibility of individuals from making asylum claims within in the EU. As part of this strategy, the European Commission has recently expressed its intention to formalize a EU list of Safe Countries that would encompass Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro, Serbia and Turkey.<sup>395</sup> Given that these states are among the main countries of transit for refugees from Syria, Afghanistan, and Iraq, the foreseeable long-term effects of such a policy on the number of refugees capable of making claims to asylum in the EU would be considerable. Moreover, the above policies have been further supplemented by the rapidly escalating fortification of European borders.<sup>396</sup> Whether in the form of razor-wire fences or the application of militarized force, these interventions have often pushed migratory flows toward more perilous or circuitous paths, with a resulting increase in mortality rates of those in movement. Of crucial importance, these practices have had the overall effect of eroding the norm of distinguishing between refugees and 'mere' migrants, for the physical and

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<sup>394</sup> See: Amnesty International. *Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal*. April 2016. While much emphasis was placed by the EU commission on the fact that the agreement stipulates that for every Syrian refugee deported on these grounds another from the refugee camps in Turkey will be offered resettlement it should be noted that this arrangement is explicitly capped at 72,000 people. Moreover, given the contours of the agreement, this concessions likely represents an outcome of the EU's comparatively weaker bargaining position with Turkey given the EU's urgent desire to 'solve' the migration crisis as quickly as possible.

<sup>395</sup> European Commission, "Refugee Crisis: European Commission takes decisive action - Questions and answers" European Commission. Strasbourg, 9 September 2015.

<sup>396</sup> Sarah Almkhatar et. al., "Closing the Back Door to Europe," *New York Times*. October 16, 2015.

militarized fortifications of contemporary Europe can only be viewed as deeply inadequate mechanisms for assessing refugee status.

The effectiveness of these methods at blocking potential asylum seekers from making claims for refuge has led to the growing role of smugglers and traffickers in mediating forced migration flows. That is, with virtually no safe and legal means for presenting their claims, individuals have increasingly had to turn to dubious and unregulated private actors to facilitate their movement. In the case of migrants who may depend on smugglers, the process remains fraught with danger due to the usage of often unseaworthy and overcrowded boats that are implicitly expected to rely on the activation of search and rescue mechanisms to avoid the loss of life. For the privilege of such transit opportunities, refugees must pay exorbitant fees and are often left unaware until the last moment about perilous nature of the journey ahead. Yet this can frequently represent the less dangerous path. Already operating outside of legal channels, smuggling operations can easily slip into trafficking situations. As has been widely documented, trafficking is frequently associated with a wide range of human rights abuses, and yet the rise of such incidences can be directly tied to EU policies designed to deflect migration flows.

Taken together, the actions of European states outline above are directly implicated in subjecting forced migrants to various forms of domination in both direct and indirect ways. The off-shoring of migration controls is responsible for compelling would-be-asylum claimants to take up increasingly risky and dangerous journey's in order to effect their claims for refuge within Europe, especially given that global resettlement opportunities remain very limited to the point of being virtually negligible. What is more, by employing carrier sanctions as a means to prevent migrants from arriving on their territory, these states have in effect relegated responsibility to assess asylum claims to private sector actors. In doing so, such policies greatly

increase the arbitrariness to which individuals are subject to in seeking refuge. Indeed, it is hard to imagine how such conditions can conform to appropriate standards for the evaluation of an asylum request. What is more, by blocking access to safe and direct modes of transit, ‘remote control’ diverts migration flowing toward more dangerous and unsafe routes. This outcome is further encouraged by interdiction mechanisms—whether in the form of safe-country lists or physical fortifications and militarized borders—which further compel asylum seekers to undertake these alternative migration paths. Finally, although not a directly intended effect, the outcome of these policies ultimately encourages dependency on smugglers, which places forced migrants increasingly at the mercy of smugglers, leaving them exposed to private sources of domination or exploitation and vulnerable to becoming trafficked.

While European states have invested considerable resources in actions that are implicated in domination abroad, they have also engaged in a series of practices that have increased the precariousness and insecurity of asylum seekers following their arrival in EU states. A central mechanism for doing so has been the expanding usage of detention facilities as part of the treatment of asylum seekers. This policy is particularly striking because of the heavy financial burdens it entails for states that have adopted such measures. Given this cost, it remains hard to perceive such measures as unconnected with punitive mechanisms of deterrence—which remain in principle generally prohibited under the asylum standards of international law. Yet the logic of classifying detention measures not only serves to legitimate such policies, but also actually justifies bracketing procedural safeguards. As Majcher writes:



The classification of immigration detention as administrative benefits states because it allows them to avoid providing immigration detainees with costly and time-consuming procedural guarantees that people receive during criminal proceedings.<sup>397</sup>

Perhaps the most problematic aspect of these mechanisms remains their arbitrariness in application—an extension of the general inclusion of immigration regulations within the ambit of administrative law. As part of this broad sectioning off of the domain of border control and immigration from the procedural protections of the rule of law, detention mechanisms remain remarkably discretionary in their application—both with regard to the scope and duration of their employment. Immigration officials are provided with large amounts of latitude regarding who should be detained and for how long. Despite the fact that detention often officially remains a mechanism of last resort, even before the emergence of the current migration crisis, Europe was populated by scores of detention centers.<sup>398</sup> Yet at the same time, regulations regarding the duration of detention exhibit a similar degree of capaciousness. Although EU standards permit an overall interval of duration of up to 6 months, the application of such standards remains quite open and indeed flexible.<sup>399</sup> More problematically, it is worth noting that re-detention is permitted in a number of states, thereby undermining the limits imposed by the EU Return Directive.<sup>400</sup> Given that many of those detained may indeed have recently fled from contexts of considerable violence and coercion, as well as have endured perilous journeys, the psychological

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<sup>397</sup> Izabella Majcher. ‘*Crimmigration*’ in *the European Union through the Lens of Immigration Detention*. Global Detention Project, Working Paper No. 6. (2013), 5.

<sup>398</sup> See the Global Detention Project for active monitoring of detention policy across the EU; [www.globaldetentionproject.org/countries/europe](http://www.globaldetentionproject.org/countries/europe)

<sup>399</sup> This limit is imposed by the Return Directive adopted by the EU Parliament in 2008, which established a maximum period of custody of six months, with the possibility of a 12-month extension.

<sup>400</sup> European Union Agency for Fundamental Rights, “Detention of Third Country Nationals in Return Procedures,” (November 2010), 34.

effects of essentially indeterminate—though upwardly limited—extended detainment seems considerable in its long-term consequences.

Moreover, even if detention is avoided, stable status can remain very elusive across a range of EU states, where we have seen the proliferation of subsidiary and temporary categories develop. Rather than being able to access even a secure transitional resettlement status, an increasing number of persons must endure limited and conditional alternatives, which often remain uncertain in duration or must be continually renewed. The usage of such secondary categories mechanisms have become crucial in the context of the contemporary migration crisis, given the recent announcement of the German government that it intends to only grant subsidiary status to the considerable number of recent arrivals within its borders.<sup>401</sup> That tens of thousands of asylum seekers must now remain within discretionary limbo, unsure of for how long they can remain within Europe only intensifies the degree of precariousness migrants must endure, having often only recently concluded dangerous journeys in search of a stable home.

Finally there are the various ways in which the EU's Dublin regulations on asylum intersect with the Schengen area in ways that affect the mobility and life opportunities of Europe's internal refugee populations. The Dublin regulations were originally conceived as a mechanism for creating a coordinated asylum policy across the EU, ostensibly in order to introduce regularity and fair burden sharing arrangements across European states. However, the actual outcome has been the creation of a mechanism for arresting the movement of asylum seekers and, by extension, of perpetuating their displacement and precariousness. The reason for this outcome rests in part on the fact that the implicit assumptions of the Dublin system—that

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<sup>401</sup> Ian Traynor, "Confusion as Germany announces curbs on Syrian refugees," *The Guardian*. 6 November 2015.

equal access to protection exist across all member states and that equal access to all member states would mean an equal distribution of responsibility across Europe—simply does not reflect reality. Instead, access to labor markets and social support, as well as procedural outcomes effecting status determinations, vary widely across European states. The result of this is the considerable onward migration of asylum seekers within the EU, as an expression of their desire to live lives that are not merely a product of bureaucratic regulation, but as well as potentially informed by familial ties, or access to more promising work opportunities. Yet because the Dublin regulations in practice entail enforcing the criteria of responsibility to the state of first entry, such individuals are subject to expulsion to the EU state where their initial asylum claim was made, a process supported in part by the vast biometric database that now exists. Thus asylum seekers and refugees who decide to cross Europe's internal frontiers with the intent to take up residence find themselves both 'within' Europe, while constantly remaining subject to the threat of exclusion and deportation. Consequently, the Dublin Regulation can be said to both constitute and shape various forms of illegality and displacement that continue to deeply affect the lives of asylum seekers even after they have entered the EU.

The above practices toward asylum seekers and refugees within the borders of the EU constitute and sustain various forms of domination that are imposed on forced migrants even after they have entered European states. As noted above, the increased detention of migrants does so in a two-fold manner, both by treating such interventions as merely administrative actions that remain beyond the usual procedural protections of the rule of law, and by allowing immigration officials wide latitude in determining who is detained and the duration of detention. Even those fortunate enough to avoid detention are often placed in precarious situations due to the increased introduction of a variety of secondary status categories—which leave asylum seekers unsure as to whether and for how long they may remain in the European Union. Finally,

the effects of the Dublin regulations increasingly compel asylum seekers to become irregular migrants within the EU, while simultaneously leaving them subject to the constant threat of deportation. By encouraging and indeed producing such forms of illegality within the EU, these policies leave asylum seekers increasingly open to the private forms of domination associated with lacking full legal status. Together these policies constitute species of what James Bohman has described as the domination of non-citizens by citizens.<sup>402</sup> This takes place most directly through the denial of access to procedural protections of the rule of law and effectively imposing punitive measures on asylum seekers who present themselves as ‘spontaneous’ arrivals, but also through the increased use of secondary protection status and the mobility restrictions of the Dublin regulations, which take together introduce various forms of both public and private domination. Such outcomes are far from incidental and point to the implication of citizens in various forms of injustice, which extend, as we have seen, both within and outside the borders of their community.

## 2 Moving Beyond Domination

The broad goal of the historical dimensions of this project has been to highlight the long-term coalescence of the conditions of possibility of statelessness, showing how such forms of exclusion are deeply bounded up by the practices of an increasingly concrete and coordinated state system. In doing so, I have tried to show the ways in which forced migration and refugee flows are in fact deeply bounded up with the practices of states acting in concert, and that these measures have helped constitute and sustain globalized structures of domination. Indeed, these ongoing practices have only been supplemented and intensified in their effects in the

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<sup>402</sup> James Bohman, “Living without Freedom: Cosmopolitanism at Home and the Rule of Law,” *Political Theory* 37.4 (2009).

contemporary context of Europe and the ongoing ‘migration crisis’ through the policies outlined above.

## 2.1 Philosophical Defenses of the Conventional View

How should we respond to this ongoing reality from the standpoint of normative political theory? While the earlier aspects of this chapter should perhaps give us reason to view our current situation as deeply problematic, here I wish to turn to the work of David Miller to try to illuminate some of these ethical issues by way of engagement with a contrasting approach.<sup>403</sup> Writing from the liberal nationalist tradition, Miller’s *National Responsibility and Global Justice* offers a sustained philosophical defense of the normative assumptions that could be said to underlie the conventional view of state responses toward refugees.<sup>404</sup> Taking up his argument therefore provides an opportunity to interrogate a conceptually sophisticated defense of the moral predilections that many citizens of liberal democratic citizens seem to share with regard to the ethical implications of forced migration.

Miller’s earlier engagement with the normative questions raised by refugee protection is introduced in the context of his broader discussion of immigration in *National Responsibility and Global Justice*. While Miller’s overall perspective on migration emphasizes the right of states to control entrance, it is important to note that he does not suggest we lack any obligations toward

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<sup>403</sup> Miller’s work is also particularly interesting because—while he escapes the cozy confines entailed by Rawls’ assumption of social closure as a basis for theorizing social justice—his account in *National Responsibility and Global Justice* is still powerfully shaped by the assumptions of methodological nationalism that I have argued lead to a normatively problematic account of these matters. This is apparent in his implicit formulation of the issue of refugee assistance not as a matter of the claims to justice of refugees, but ultimately as a matter of justice between states.

<sup>404</sup> Indeed, his most recent reflections on these matters were written as the peak of the ‘migration’ crisis for Europe unfolded. (*Strangers in Our Midst*, forthcoming) I acknowledge here that I engage only with Miller’s earlier work here, both out of considerations of purpose and space. In fairness to Miller, I believe his revised account would provide grounds to be rather critical of much that has transpired which exceed the bounds of anything that could be considered just.

forcibly displaced outsiders. Nor does he follow Rawls in implying that such obligations do not require some serious philosophical consideration as part of an account of global justice.<sup>405</sup> Indeed, Miller endorses a broad definition of refugeehood, including the denial of basic rights, and asserts that when “a refugee applies to be admitted to a state that is able to guarantee her such rights, then *prima facie* the state in question has an obligation to let her in.”<sup>406</sup> Although qualifying this obligation initially to one of sanctuary, Miller acknowledges that immediate interim responses—whether in the form of subsidiary protection, safe havens, or refugee camps—cannot be justly allowed to become permanent answers to refugee situations. As he notes:

there is a danger that the temporary solution becomes semipermanent, and this is unacceptable because refugees are owed more than the immediate protection of their basic rights—they are owed the opportunity to make a decent life for themselves in the place that they live.<sup>407</sup>

Thus the position Miller initially endorses supports a more inclusive definition of the refugee than that offered by the 1951 Convention, while also acknowledging that the claims of refugees extend beyond merely the immediate protection of basic rights.

Yet while Miller’s account of our obligations toward refugees begins as expansive—or indeed, as even seemingly progressive—he introduces a number of qualifications that

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<sup>405</sup> Perhaps it should not be surprising that there is no mention of refugees and forced migration as a concern of global justice in Rawls’ *The Law of Peoples* given his effective neglect of migration more broadly; as he writes, the “problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic Utopia.” (*The Law of Peoples*, 9)

<sup>406</sup> David Miller, *National Responsibility and Global Justice*, 225. As Mill puts it: “In current international law, refugees are defined as people who have fled their home country as a result of a well-founded fear of persecution or violence, but there is clearly a good case for broadening the definition to include people who are being deprived of rights to subsistence, basic health care, etc.” (Ibid.)

<sup>407</sup> David Miller, *National Responsibility and Global Justice*, 225

significantly alter his position. While recognizing the special claims of refugees relative to other categories of migrants, he notes that as the number of refugees increase, matters become more complicated with regard to the distribution of responsibility for refugees. Although Miller recognizes that the current territorialized model of protection provides a problematically arbitrary approach, and concedes that in an ideal world we could imagine a more formalized model for distributing this shared obligation of states, he raises a number of difficulties that would make such a consensus unlikely, if not impossible. This leads Miller to conclude that: “Realistically, therefore, states have to be given considerable autonomy to decide on how to respond to particular asylum applications.”<sup>408</sup> While Miller does allude to the possibility that conventions for distributing responsibilities for international protection may emerge, he does not place any emphasis on what obligations particular states have to support or positively pursue the creation of such conditions. Nor does he in this account specify what positive duties the emergence of these postulated conventions would impose on particular states if such demands conflicted with the judgment of a state regarding whether it has fulfilled its appropriate responsibilities. He therefore concludes that:

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<sup>408</sup> David Miller, *National Responsibility and Global Justice*, 226. Miller goes on to elaborate the conditions states may take into account: “besides the refugee’s own choice, they are entitled to consider the overall number of applications they face, the demands that temporary or longer-term accommodation of refugees will place on existing citizens, and whether there exists any special link between the refugee and the host community—for instance, similarities of language or culture, or a sense of historical responsibility on the part of the receiving state (which might see itself as somehow implicated among the causes of the crisis that has produced the refugees).” Miller’s list of considerations is conspicuous for what it includes and what it leaves out; apparently states are entitled to consider cultural affinity, but not obliged to take into account vulnerability. Thus (I presume from Miller’s argument) a particular state is entitled to favor a refugee from a Christian background over a refugee from a Muslim background, even if *ex hypothesi*, the latter is in a significantly more vulnerable position. We need only look to contemporary debates in Europe and the United States to see why appeals to such distinctions are not merely of theoretical interest. To his credit, I believe Miller subsequently rejects this particular condition of cultural kinship in his more recent work; see for instance his critique of the application of such criteria to immigration more broadly in, “Immigration: The Case for Limits” in Andrew Cohen and Christopher Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005), 204.

There can be no guarantee, however, that every bona fide refugee will find a state willing to take her in. The final judgment must rest with the members of the receiving state, who may decide that they have already done their fair share of refugee resettlement.<sup>409</sup>

Therefore, while Miller begins his analysis by emphasizing the distinct moral claims that refugees impose on states, relative to other groups of migrants, his analysis concludes by providing states with unilateral authority with regard to adjudicating claims to refuge. What special moral consideration Miller allows refugees in principle appears to disappear once we enter the “realistic” domain of actual practice.

There are a number of problematic aspects of Miller’s account. For one, Miller does not address the distinction that could be made between indirect applications for resettlement and ‘spontaneous’ asylum claims made by individuals who present themselves at the border of a particular state. This may be because Miller considers the distinction morally irrelevant, but it remains a striking omission, given that even contemporary state practice recognizes the (theoretical) inviolability of the 1951 Convention’s *grundnorm* of *non-refoulement*.<sup>410</sup> Additionally, as I alluded to in my gloss of his position, despite insisting on the special moral claims that refugees make on states relative to ‘normal’ migrants, the qualifications he subsequently introduces seem to functionally collapse this distinction.<sup>411</sup> Moreover, in couching

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<sup>409</sup> David Miller, *National Responsibility and Global Justice*, 227.

<sup>410</sup> The distinction is of no small importance because it leaves the question of whether refugees who present their claims directly to a particular state can be forcibly turned away, or even deported to their state of origin, presuming the unwillingness of any other state to let them in. If this is the case under Miller’s account, then his position in *National Responsibility and Global Justice* is significantly more conservative than the actual principles of refugee protection “now widely recognized in both law and political practice” at the time he was writing. (David Miller, *National Responsibility and Global Justice*, 227)

<sup>411</sup> That is, whether we are dealing with the case of forced migration or ‘mere’ immigration, the state remains the sole and legitimate arbiter with regard to entrance. We will return to this issue of conceptual collapse below.



such judgments of sufficient action toward refugee protection in terms of states doing their fair share, Miller is implicitly recasting refugee protection largely through the lens of claims of distributive justice between states. Thus recast, the actual claims to justice of refugees now playing a somewhat marginal role to such consideration, regardless of the remarkably high costs such outcomes may impose on their ‘life chances’ in the most literal sense.<sup>412</sup>

Yet what is perhaps most striking about Miller’s account is the manner in which he interprets the lack of actual consensus among (presumably self-interested) state actors as implying that a *just* response toward the claims of refugees can therefore be unilaterally decreed by particular states. Not only is it implausible to suggest that the criteria for fair ‘burden sharing’ arrangements is functionally indeterminate<sup>413</sup> and beyond reasonable consensus, but in making each state the rightful and sole adjudicator of its obligations toward refugees—whether that imply generosity or ‘none is too many’—any real *moral* obligation toward refugees appears to be largely eviscerated. Indeed, in this account we have not a hint of the idea that there might be external grounds of justification outside of the particular predilections of a state toward refugee claimants, and with that little basis to even claim that the actions of states to grant or deny refugees entrance or resettlement are either just or unjust, for under Miller’s account each state is *rightly* its own judge in each case.<sup>414</sup>

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<sup>412</sup> In this way, despite his attempt to move beyond Rawls’ limitations, Miller’s argument seems to return to the Rawlsian assumption that global justice is a matter of justice between peoples; even on the refugee question, the fundamental matter is not about the claims to justice of refugees, but of fair relations between states.

<sup>413</sup> See Joseph Carens, *The Ethics of Immigration*, 218-20. For a real world example of what this could consist of consider the European Union’s European schemes for relocation and resettlement, more colloquially known as the EU distribution key, which aims to supersede the Dublin agreements concerning asylum.

<sup>414</sup> This critique of Miller’s position is similar to that advanced by Carens. (*The Ethics of Immigration*, 219) While sympathetic, I think Carens’ engagement misses the implicit link in Miller’s argument regarding a lack of institutionalized consensus on what justice would require regarding the distribution of responsibilities toward refugees and his consequent appeal to unilateral state discretion. I don’t think it is simply that Miller is claiming that whatever the *demos* or majority propounds is justice, but the more Hobbesian view that the absence of consensus on

The problem is that Miller fails to treat the context in which forced migration takes place as in part the product of the very institutionalized state system that he implicitly defends. As we have seen, the construction of a territorialized international order of border controls is not some natural state, but the explicit product of state coordination itself. Given the dire and desperate position that forced migrants find themselves in, it seems hard to see how a largely unspecified cutoff point, left to the unilateral judgment of particular states, could be justified to those who suffer its consequences. From the perspective of refugees, such practices can only be conceptualized as arbitrary; broadly licensing the coercive use of force on those who are making a Hobson's choice appears tantamount to domination.

## 2.2 Reframing the Debate: 'Mere' migrants or 'Real' Refugees?

In the context of this project the most fundamental problem of the conventional outlook, which we have used Miller's account to illustrate in philosophical form, is the manner in which it tends to dissipate our sense of responsibility for and distort our implication in the realities of forced migration in our contemporary world. This perspective is problematic because it presents our responsibilities toward refugees merely as reparative actions undertaken by morally innocent third-parties, who are represented as simply intervening to account for the failures of lawless or failed states that have proved unwilling to effectively realize the human rights of their nationals. By recasting our duties to refugees as only remedial in relation to the (more or less intentional)

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conventions rightly makes each state the appropriate judge of what justice requires. That is why Miller is able to allow that there are decisions the *demos* may take—say in the domain of what Miller calls 'social justice'—that would rightly be called unjust. In this version of Miller's argument his vaguely stipulated 'fair share' could be (very roughly) compared to Hobbes' *lex naturalis*; we may be able to rationally stipulate what might be fair and desirable, but these lack any binding moral force. I think this reading helps us make sense of the evolution of Miller's position, aspects of which I turn to below.

actions of recalcitrant or unlawful states, we are directed away from considering our implication in the domination the stateless face that arises from the way membership and migration is structured in the state system.<sup>415</sup> Nor are we forced to fully confront the ways in which our ostensibly legitimate migration controls are deeply entwined in this larger structural process. What is more, in his rendering of our responsibilities toward refugees, Miller frames these obligations as a collective duty of all states, but, as we have seen, empowers each particular state to determine when it has sufficiently done its part, after which the state in question may consider its duties toward the displaced exhausted. But since under Miller's account, we in fact have no direct moral responsibility for addressing an injustice in which we are actually implicated, this collectively held and vaguely apportioned duty seems to have a rather weak hold, while the implications and actual outcomes of a state's decision to have done its fair share and consequently withdraw access to refuge, remain obscure. That is, the conventional perspective provides a highly selective and sanitized picture of our relationship to the injustices that force migrants experience. We are encouraged to downplay or ignore what possible role we might have in the thousands of deaths that take place as a result of the dangerous treks and sea-voyages that asylum seekers are compelled to take because regular channels of transit have been closed to them.<sup>416</sup> Nor are we compelled to reflect on the potential implication of the lack of any substantial support for global resettlement in sustaining the pervasive realities of

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<sup>415</sup> Even if we bracket the stronger claims that the formation of our contemporary interstate system is deeply tied to the production of refugees as such, I hope the historical account offered in earlier chapters shows how statelessness is the product of the actions of states acting in concert, and that even the activities of so-called unlawful states take place against structures of border coercion and exclusion that have been legitimated by the state system as a whole.

<sup>416</sup> These deaths generally remain invisible. Or if seen, are perhaps acknowledged as tragic but ultimately blamed on unscrupulous smugglers or on the misguided decisions of migrants themselves. Rarely do we consider the connection between these deaths, and the fact that smuggler's fees can run into the thousands of dollars, while a one-way trip from Marrakech to Malaga can be purchased by me for under a hundred. Rarely do we acknowledge that these are the actions of individuals who have had all other options of escape foreclosed to them; as the poet Warsan Shire has recently written, "that no one puts their children in a boat / unless the water is safer than the land[.]"

intergenerational refugee camps, where millions of individuals remain confined and rendered dependent upon increasingly dwindling humanitarian assistance.

This suggests that the notion of responsibility that underlies Miller's account is problematic because it screens out or renders invisible morally relevant questions regarding our implication in the experiences of the stateless. What is needed is an approach that allows us to see this situation through a different aspect. Here the work of Iris Marion Young on the relation of social connection and political responsibility is instructive. Young builds upon the analysis of structural and systemic forms of oppression and domination developed in her earlier work that emphasizes how such dynamics need not arise as a result of the international acts of a particular oppressing group, but may emerge and be sustained by the contours of our social arrangements. Given the challenges that such systemic phenomenon pose to our conventional understandings of oppression, injustice, and responsibility, there is a need to offer an alternative account of justice and political responsibility that allows us to both recognize and respond to our implication in these situations. What Young stresses is that relationships of justice between persons are actively constituted by the social processes that connect us. Counterpoising her account to statist understandings of social justice that insist on mapping such relations to the boundaries of existing political communities, Young indicates that:

The social connection model of responsibility says that all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices.<sup>417</sup>

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<sup>417</sup> Iris Marion Young, *Global challenges*, 159-160.

Although Young takes up the example of transnational relationships of production, consumption, and marketing, her framework can appropriately be extended to the practices and institutions of our current membership regime and their bearing on the contemporary dynamics of forced migration. Just as we may benefit from exploitative transnational relationships enabled by a globalized capital order, so too should we question the way in which our current order of borders allows us to deflect and deter those in desperate need from reaching the very refuge which we profess to offer. When recognized properly forms of structural injustice demand that agents share responsibility for their complicity in the ongoing processes that sustain these asymmetric relationships, that they “challenge one another and call one another to account for what they are doing and not doing.”<sup>418</sup> Ultimately such interventions should lead to the creation of political institutions and relationships that actually provide the conditions for addressing such forms of injustice, though what shape such institutions will take cannot be entirely posited in advance since they should take into account the actual perspectives and voices of those who we have till now excluded from consideration.

Following Young’s insights into how we ought to approach questions of global justice, I suggest that we should reconsider our relationship toward the experiences of the forcibly displaced through a similar lens. By helping us understand our common implication in sustaining what are in essence structures of domination, we can recognize the need for a shift in how we relate to ongoing processes of forced migration. Indeed, when viewed politically, we can properly see why our current international order of territorial borders and national membership in fact constitutes a global order of injustice.

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<sup>418</sup> Iris Marion Young, *Global challenges*, 186.

To return to Miller's account, these considerations help us see why it is problematic to both acknowledge the rightful claims of refuge the displaced make upon us while simultaneously defending the unilateral right of states to control their borders through migration controls, which makes realizing this claim under current conditions increasingly difficult and challenging. Miller's argument is particularly valuable in this regard because it illustrates how the conventional view can both in principle admit the special status of refugees, while at the same time invariably collapsing or effacing this distinction in practice. This point has recently been explored by Chandran Kukathas. In "Are Refugees Special" Kukathas directs our attention to a series of dilemmas that confront our attempts to address the ethics of forced migration within the conventional framework that accepts the unilateral right of states to control entrance and regulate membership as normatively justified, while at the same time carving out an exception with regard to the treatment of refugees. The perspective that Kukathas takes up for critical assessment coheres with the general starting point for Miller's arguments, and reflects the assumptions that broadly inform contemporary practices of international protection, as shared by states, international humanitarian actors, immigration activists, and many political theorists. However, Kukathas suggests that this premise in fact "depends upon distinctions that cannot be sustained and upon the establishment of institutions that cannot do what they proclaim."<sup>419</sup> Regarding the former, Kukathas argues that the category of the refugee is itself conceptually unstable, and thus incapable of upholding the normative burden it claims to carry. The difficulty here is that insofar as we try to anchor the special status of the category of refugee in a commitment to protecting individuals whose lives are at risk, it will remain hard to keep the concept from either being arbitrarily narrowed, or from expanding to include individuals who

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<sup>419</sup> Chandran Kukathas, "Are Refugees Special?," 215.

have not conventionally been accorded this status.<sup>420</sup> There is no naturalistic standard for making such determinations of vulnerability and risk, which in part explains the exceptional amount of scholarly ink that has been spilt trying to correct, refine, and rearticulate the proper scope of refugeehood, given the obvious shortcomings of the Convention definition. Thus Kukathas suggests that:

Any attempt to show empirically that refugees, or displaced persons more generally, suffer in ways that economic migrants do not, will founder on the rocks of this dilemma. The root of the problem is that the source of injustice or human suffering, is not always easy to locate.<sup>421</sup>

The point that Kukathas wishes to bring home is that from an ethical point of view our ability to draw the line between ‘real’ refugees and ‘mere’ migrants will always be fraught with moral difficulty. Or put otherwise, the categories of refugee and migrant represent essentially contested concepts that remain hard to anchor in a fully morally persuasive way.

Yet while we may wish to take refuge in the formalism of the admittedly limited category offered by the Convention, arguing that any definition—regardless of its inability to escape a degree of arbitrariness—is better than none, this strategy too runs into considerable challenges. The reason for this is that the difficulties that confront the institutionalization of this distinction in practice are equally—if not more—formidable. As Kukathas points out, and as contemporary state practices appears to vindicate, the category of refugee is invariably collapsed into that of ‘mere’ migrant, thereby calling into question the relevance and salience of maintaining this

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<sup>420</sup> As Kukathas notes, there “are many refugees whose plight is more serious than that of most economic migrants; yet there are also many would-be economic migrants who face greater threats to their well-being than do some refugees. Not all economic migrants are in the same boat; nor are all refugees.” (Ibid., 258)

<sup>421</sup> Ibid., 258.

distinction. According to Kukathas, this tendency is far from incidental. It arises from the fact that the category of refugee was developed not simply to address the dire position of the displaced and dispossessed. Rather its emergence was deeply implicated in state interests, and arguably plays a central role in allowing states to evade or minimize their responsibilities to desperate non-citizens in dire need. In this sense, what the distinction ultimately supports is an exception that legitimates the broader rule: that states ought to have a general right to exclude migrants.

However, even this achievement is of doubtful value to ‘real’ refugees, for in practice the structures of the international refugee regime are easily made to bend to the interests of states. As Kukathas notes,

states have effectively eluded the distinction between refugees and economic migrants by treating all asylum seekers with suspicion. Even as they have maintained the centrality of the distinction between refugees and migrants to their policies, they have weakened it by treating asylum seekers as undocumented would-be immigrants unless they can show otherwise—while making it even more difficult for refugee claims to be established.<sup>422</sup>

The clearest manner in which this has been accomplished has been through the application of migration controls and methods of exclusion to foreclose the opportunity for forced migrants to even seek asylum. Although Kukathas does not emphasize this in his account, the analysis provided throughout this project has emphasized how many of these techniques—ranging from carrier sanctions and visa procedures, to the development of safe-third country agreements - rely upon coordinated state action. These mechanisms imbricate with more direct and tangible tools of deflection and deterrence, including increasingly fortified borders, maritime interdiction, as

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<sup>422</sup> Chandran Kukathas. “Are Refugees Special?,” 260.



well as the use of mandatory detention and granting of limited forms of subsidiary protection status. Taken together, these structures clearly undermine the purported distinction between asylum seekers and those who may supposedly be legitimately excluded from entrance. Yet perhaps the most damning evidence in support of the claim that the refugee-migrant distinction is unsustainable come from the very instance in which states claim to uphold the special status of the refugee itself. This is because we may have good reason to believe that within the refugee status determination procedures of western states asylum seekers have gradually been assimilated into the category of unwanted migrants.<sup>423</sup> In such circumstances, the very “institution guaranteeing the rights of refugees appears to be the one making asylum status inaccessible.”<sup>424</sup> Thus contemporary state practices in effect collapse the category of the ‘real’ refugee’ into that of the ‘mere’ migrant.

Kukathas’s arguments are striking and provocative in what they imply about what it would take to realize non-domination with regard to forced migration. This is because Kukathas gives us reason to be suspicious that simply reforming the existing international protection regime could ever really prove sufficient. This is both because of the difficulties in sustaining the category of the refugee, which practically and invariably has been collapsed into the category of mere migrant, and because of the realities of the refugee regime itself. But what is perhaps most striking about Kukathas’s analysis is the radical conclusion they lead us to confront. Because the refugee-migrant distinction is elusive in theory and largely untenable in practice, Kukathas suggest that,

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<sup>423</sup> Didier Fassin. “From Right to Favor.”

<sup>424</sup> Didier Fassin. “From Right to Favor,” see Chapter 3 of this project for further discussion.

If the fate of the wretched of the world is something we cannot ignore, however, this means, more concretely, that we should open borders to immigrants of all kinds, thus removing the barriers to the free movement of asylum seekers and other kinds of immigrants alike.<sup>425</sup>

This entails that if we in fact take seriously our obligations to refugees this would demand a far wider shift in our global institutional order.<sup>426</sup> From this vantage point, addressing questions of justice with regard to forced migration must lead us to confront the broader issue of how migration and membership are structured in our contemporary world.

## 2.3 Transnationalizing Membership

What would it take to realize the ideal of non-domination within the field of forced migration flows? Full justice requires a transformation of our current order of borders and structures of membership—a change that would entail a considerable shift in the norms of the state system. Indeed, what this would need is the creation of a structure of justification, as part of a fully justified basic structure, for the current membership regimes of states.<sup>427</sup> We can see why this is the case by turning to the work of Arash Abizadeh and Rainer Forst, whose arguments dovetail in demonstrating the need for a larger scale and radical restructuring of our current international order in order to accommodate the requirements of full justice.

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<sup>425</sup> Chandran Kukathas, “Are Refugees Special?,” 265.

<sup>426</sup> A similar point is perhaps made by Matthew Gibney in his discussion of the issue of *de jure* and *de facto* statelessness, where he obliquely suggests that the proper consideration of the claims to justice of the stateless should lead us to more broadly assess the legitimacy of our international citizenship regime. As Gibney writes: “For the time being, statelessness is likely to remain a devastating and precarious plight that we have good reason to strive to eliminate. But, ironically, it might be that the very same principles of equality and security that impel us to put an end to statelessness also require us to start imagining a world beyond states.” [Matthew Gibney, “Statelessness and citizenship in ethical and political perspective” in Alice Edwards and Laura Van Waas, eds. *Nationality and Statelessness Under International Law*, (Cambridge: Cambridge University Press, 2014), 61-62.]

<sup>427</sup> Rainer Forst, *The Right to Justification*, 2012.

As Abizadeh has argued, insofar as we presuppose the value of democratic conditions of legitimation, the justificatory basis for coercive border control requires the consideration and inclusion not only of the existent *demos* or people, but also of those who lie outside the bounds of the community in question.<sup>428</sup> As Abizadeh puts it, “the democratic justification for a regime of border control is ultimately owed to both members and nonmembers” whom are equally entitled to be included in the democratic institutions that impose those controls.<sup>429</sup> The issue Abizadeh isolates here is precisely the dilemma we confronted back in Chapter Three, when we looked at competing frameworks for theorizing the ethics of membership. Borders and boundaries deeply affect those who find themselves on either side of a demarcation. For some theorists, this dilemma represents a paradox of democratic legitimacy, for it appears that the normative foundations of democracy are by necessity undemocratic.<sup>430</sup> However, this dilemma remains more apparent than real once we distance ourselves from the assumptions of methodological nationalism that underlie a statist bias which envisions democracy as only possible through a national ‘container model’ of society. Indeed, if we change standpoints, taking up this issue prospectively in terms of what a fidelity to robust democratic legitimacy and non-domination requires us to enact, as opposed to retrospectively with regard to the mysterious, or simply conjectured, foundations of a democratic order, our quandary dissolves. Rather than

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<sup>428</sup> It should be noted that there are compelling and more well-established critiques of unilaterally closed borders advanced on liberal grounds, most notably that of Joseph Carens (1992, 2013). While sympathetic to Carens arguments, my reconstruction of the non-domination ideal is conceptually closer to the commitments expressed in Abizadeh’s democratic account because of his emphasis on actual participation in institutionalized structures of justification.

<sup>429</sup> Arash Abizadeh. “Democratic Theory and Border Coercion No Right to Unilaterally Control Your Own Borders.” *Political Theory* 36.1 (2008): 44. Italics original.

<sup>430</sup> See, for instance: Seyla Benhabib. *The rights of others*; Bonnie Honig. “Between decision and deliberation: political paradox in democratic theory,” *American political science review* 101.01 (2007).

democracy necessarily requiring or necessitating close borders, it may be that borders require a democratic justification.

Abizadeh's critique of the claims of liberal democratic states to unilaterally control their borders is particularly important for our discussion because it is precisely by appealing to the values of democratic rule and popular sovereignty that defenders of closed borders have often sought to resist liberal arguments—egalitarian or otherwise—for open borders. Far from presupposing the privileging of citizens, according to Abizadeh the core principles underlying the value of democracy imply the need to legitimate borders to both those within and without. This can be seen by briefly reconstructing a set of arguments offered by Abizadeh. In his interventions concerning the relationship between democratic theory and borders he asks us to entertain two (hopefully) uncontroversial premises: that the core principle of democratic legitimation demands that the political exercise of coercive power requires that it be justified to all over whom it is exercised; and, that a coercive regime of border controls effects those both within and without. This leads to the conclusion that the justification of *any* regime of border controls is owed not only to members, but to nonmembers as well. But what does this mean, exactly? As Abizadeh holds, the implication of such a conclusion, if taken at its full potential, is that the unilateral control of borders by citizens cannot be justified.<sup>431</sup> Rather, a true commitment

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<sup>431</sup> It is worth noting that David Miller has critiqued Abizadeh's position from the liberal nationalist perspective by denying that border control is necessarily coercive, and therefore in need of democratic justification to both members and nonmembers alike. He does so by distinguishing between coercion and hypothetical coercion or 'prevention' and claims that the latter forms of interference need not undermine autonomy. Because border controls are not coercive in Miller's sense, but merely preventive, he claims they need not be legitimated to outsiders. However, Miller's rejoinder to Abizadeh seems problematic on at least two grounds in the context of this project. First, even if we grant Miller's argument with regard to migration broadly, it is unclear whether it can plausibly apply to forced migrants. After all, the forcibly displaced have certainly had their options severely narrowed in the country they have been forced to flee and make particularly strong claims to entry, where 'prevention' of entrance may be a matter of life and death. Miller seems to concede as much in admitting that "It might be said that this caricatures the position of excluded immigrants, who very often do not have an adequate range of alternatives to being admitted. If they are sent back to their countries of origin, they may face political violence or starvation, for example. But while

to democratic justification grounded in respect for the fundamental freedom and equality of all persons would require creating institutions that take into account the claims of both citizens and non-citizens. That is, for a regime of border control to be legitimate, any regime of borders must be subject to the shared authority of both citizens and foreigners, or controlled by cosmopolitan institutions that formalize this joint-democratic governance at a global level.

Although Abizadeh does not pursue this fully in his critique of unilaterally controlled borders, the upshot of his position is that democratic principles, far from simply necessitating closure, require that we create a global basic structure of justification to regulate the terms of membership in our contemporary world. To develop this further, I turn to the arguments offered by Abizadeh and Forst regarding the scope and impact of questions of justice and what they demand of us, here and now, help us see why this is the case. These considerations suggest that what may be required is the creation of transnational structures of justification to negotiate claims to membership.

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this is clearly true of a certain category of immigrants—those we would class as refugees—it is not true of all, and Abizadeh’s argument is supposed to apply to immigrants generally, not just to those who try to migrate to avoid desperate circumstances.” [David Miller, “Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh,” *Political Theory* 38. 1 (2010), 117] However, as we saw above in our discussion of Miller’s views on refugees, he explicitly empowers national communities to judge when they have sufficiently discharged their duties of refugee protection, without suggesting that any proper justification is owed to refugees who may be excluded as a result, an outcome that seems implausible even on the grounds of his argument against Abizadeh. But secondly, when we recast Abizadeh’s argument through the neo-republican perspective developed in the last chapter, we can see why Miller’s critique seems problematic even beyond the case of forced migration. This is because neo-republicans insist that it not merely coercion or interference that is problematic, but the potential for arbitrary interference, which diminishes our freedom regardless of whether any actual interference transpires. Moreover, while Miller’s account rests on his insistence that coercion requires an intentionally coercing agent, unlike Pettit, the structural account of domination I developed in the last chapter does not assume such conditions. Miller insists that even “if all states close their borders to a particular would-be immigrant or class of immigrant... this cannot be counted as coercion” (Ibid., 117-118). However, under the critical republican perspective I have constructed it is clear that this can only be construed as a form of domination. That said, it is also important to acknowledge that when recast from the neo-republican perspective, we can see that it isn’t that borders *per se* that are illegitimate—rather, the problem lies in if they remain arbitrary and imposed in a unilateral manner.

Intervening on the different—though not unrelated—terrain of debates over global redistributive justice, Abizadeh has noted that the idea of the scope (rather than site) of our principles of justice can be read as implying far more radical demands than might be first assumed.<sup>432</sup> The reason for this is that far from constraining our obligations to the fiction of the self-contained nation state, a full consideration of the question of scope entails that we reground our structures of legitimation to include a more global consideration of such issues. As Abizadeh argues, the “Rawlsian idea that the basic structure is the primary subject of justice implies that justice is today global in scope.”<sup>433</sup> Indeed, rather than seeing the existence of a basic structure as constraining and indeed limiting the bounds of justice, Abizadeh helps us see that the current effects of cross-border interaction or cooperation, conditions of pervasive impact on persons life chances, and the fact of inter-state border coercion, mean that justice requires the *creation* of a global basic structure. Rather than proving to be a condition of possibility of claims of justice, generating a basic structure is itself necessitated by morality, for only within such a context can our ongoing relationships be regulated by appropriate norms and principles.<sup>434</sup>

Paralleling Abizadeh’s account, Rainer Forst has argued in favor of a transnational account of justice grounded in a similarly radicalized interpretation of the idea of the basic structure. As Forst notes, when we look at the multiple and multi-leveled relations that constitute our global situation with a critical gaze, “what emerges is a system of one-sided and largely

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<sup>432</sup> Arash Abizadeh. “Cooperation, pervasive impact, and coercion: on the scope (not site) of distributive justice.” *Philosophy & Public Affairs* 35.4 (2007).

<sup>433</sup> Arash Abizadeh, “Cooperation, pervasive impact, and coercion,” 357.

<sup>434</sup> I take Abizadeh’s argument to be something of a globalized form of Hobbes’ argument for the creation of the commonwealth in *Leviathan*; put very roughly, absent the structure of the state, our relationships are governed merely by force and claims to justice cannot be realized. However, this does not entail inaction. Indeed, Hobbes seems to argue that we are under a moral imperative to create an institutional context in which justice can be realized; we are morally required “to seek peace, and follow it,” as indicated by the first and fundamental law of nature, and this can only be done within the commonwealth. (*Leviathan*, Chapter XIV)

coerced cooperation and dependency rather than independence”—or put otherwise, “one sees a context of force and domination” writ large upon the world.<sup>435</sup> While in this work Forst refers primarily to the institutions and relations that perpetuate global inequality and drastic forms of material deprivation, such an analysis is equally applicable to our current regime of border controls, which can be said to constitute a global context of injustice in its own right.<sup>436</sup> As we saw in the last chapter, the remedy to such a condition is the establishment of the fundamental right to justification for all persons, an end that can only be realized through pursuing the common goal “to establish and maintain a just(ifiable) basic structure.”<sup>437</sup> To understand what this would entail, it is helpful to unpack Forst’s distinction between minimal and maximal justice, as well as the parallel, chiefly institutional, concepts of a basic structure of justification and a fully justified basic structure.<sup>438</sup> According to Forst, achieving full ‘maximal’ justice relies upon the prior establishment of the (essentially threshold, and in fact quite demanding) conditions of ‘minimal’ justice. Such criteria entail the creation of a “minimally just basic structure” that secures the basic conditions to ensure that all are able to exercise the right to

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<sup>435</sup> Rainer Forst, *The Right to Justification*, 256.

<sup>436</sup> Indeed, Abizadeh importantly notes that, “as is obvious to any migrant worker, the coercive regulation of membership and cross-border movement are important components of the state-imposed regime regulating the terms of economic production, exchange, and distribution.” (*Cooperation, pervasive impact, and coercion*, 356)

<sup>437</sup> Rainer Forst, *The Right to Justification*, 262.

<sup>438</sup> We find a parallel to Forst’s line of argument in Kant regarding our moral obligation to create justice instituting institutions. As Kant suggests in the *Doctrine of Right*, we possess a moral duty to bring about a rightful condition, for this is the only context in which we can possibly realize our innate right “be our own master”—that is, our innate right to freedom, which in this passage is strikingly characterized as non-domination. However, the pre-suppositions of a rightful condition point toward the regulative ideal of the idea of the original contract, under which all legal and institutional arrangements would be (hypothetically) fully justified to all. (AK 8; 297-302) Kant of course also famously pushed the implications of this argument beyond the state, showing us the relationship between domination within and domination without in *Perpetual Peace*: “If the principle that limits external freedom by means of laws is lacking in only one of three possible forms of juridical condition [Public Right, International Right, and Cosmopolitan Right] then the artifice of all others is inevitably undermined and must ultimately collapse.” (AK 6; 312)

justification.<sup>439</sup> Maximal justice, by contrast, represents the ongoing, reflexive realization of the normative ideal opened up by this institutional context. For Forst, this analysis “points toward the necessity of an international basic structure”—a conclusion that echoes those of Abizadeh’s position.<sup>440</sup> Far from proving to be a presupposition of the boundaries of justice, working toward the realization of a global basic structure is precisely what justice demands. In the context of this project, this would require the creation of a just basic structure of membership.

Realizing a fully justified basic structure of membership entail creating the institutions and norms necessary to realize every person’s right to belong. Moreover, this would require doing so in a manner that respects and takes into account the autonomy and choices of migrants themselves—whether they be asylum seekers or not. Although I believe we can look to already existing practices of our contemporary world in order to imagine what this may resemble, I will not focus here on the institutional specifics that such a world would entail.<sup>441</sup> This is largely because, as we shall see in the next section, the conditions for realizing the demands of full justice seem rather remote. Yet, as I argue by way of conclusion, recognizing this pragmatic reality does not entail exhausting the moral possibilities of our current non-ideal circumstances. Rather, it points us toward the need for an *avant-garde* approach to the ethics of forced migration.

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<sup>439</sup> Rainer Forst, *The Right to Justification*, 262.

<sup>440</sup> Rainer Forst, *The Right to Justification*, 222.

<sup>441</sup> A potential model—vastly imperfect, but suggestive—of what a fully justified basic structure of membership could resemble might be found in the internal structure of the EU with regard to citizens of member states. This complex institutional architecture grants EU citizens largely unfettered inter-state mobility, alongside access to a robust legal status, a wide range of entitlements that match or in some cases exceed those of nationals, and the ability to acquire the full rights of resident nationals with comparative ease. While there are very valid concerns regarding the democratic deficits of the EU as it currently exists, these may represent more contingent, rather than intrinsically unsurmountable, challenges of institutional design. For a discussion of the potentially deep problems (in relation to non-European third-country nationals) of EU citizenship, see Banerjee 2014.



### 3 Challenges to the Ethics of Protection in the Present

As noted earlier, our contemporary context is not one that makes the realization of the requirements of full justice, or even minimal justice, likely in the near future. Indeed, even a more modest reform of refugee protection within the context of the existing state-system seems largely elusive. As Joseph Carens has pointed out, this is because, even with regard to the widely recognized ethical claims of refugees to special consideration, the gap between the perceived interests of powerful state actors and what morality requires seem tragically vast.<sup>442</sup> It is worth noting that the moral demand to address the claims of refugees transcends justifications rooted in either a particular state's causal role in generating a particular refugee situation or a commitment to humanitarian concern rooted in the identity of liberal-democratic communities; as Carens' emphasizes in his account, even the implicit morality of the existing state-system dictates a strong ethical responsibility to offer refuge to those in dire need. As he puts it, "states have a duty to admit refugees that derives from their own claim to exercise power legitimately in a world divided into states".<sup>443</sup> Indeed, if the moral purpose of the state-system presupposes the value of states precisely because of the fact that states offer a context in which individuals can best enjoy the goods of membership, then this entails a duty to respond to those who have been denied this status.<sup>444</sup> Under this characterization, international refugee protection represents a remedial response to the failures and limits of the state-system on its own normative terms. Yet contemporary state behavior—including that of many, relatively powerful, liberal democratic

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<sup>442</sup> Joseph Carens, *The Ethics of Immigration*, 222-24.

<sup>443</sup> Joseph Carens, *The Ethics of Immigration*, 195-6.

<sup>444</sup> Such a position is widely endorsed even by avowedly communitarian theorists. Take for instance Michael Walzer's claim that "it is only as members somewhere that men and women can hope to share in all the other social goods—security, wealth, honor, office, and power—that communal life makes possible." [Michael Walzer, *Spheres of Justice*, 63.] More importantly the fact that states, at least officially, recognize the special status of refugees as a distinct category of migrants suggests the implicit normative recognition of this claim.

states—remains vastly at odds with fulfilling such obligations, and as we have seen, is actually frequently complicit in intensifying the domination asylum seekers, stateless persons, and refugees endure. Moreover, the direness of our present situation has led some scholars to suggest that attempting to entirely remake the global refugee system anew under current political circumstances could prove disastrous from a normative standpoint, likely resulting in a serious weakening of extant obligations and standards of protection.<sup>445</sup>

Compounding this issue is the need to overcome the collective action problem that movement toward such a transformation would seem to require. Indeed, even the more modest task of reforming the contemporary regime to accord with the ethical demands implicit in the existing state-system confronts this difficulty. This is because from the standpoint of state actors international refugee protection can perhaps best be conceptualized as a global public good, and therefore is subject to the dilemmas raised by the logic of collective action.<sup>446</sup> In the absence of institutionally supported coordination, there are structural incentives for individual actors to defect from their obligations or otherwise eschew the costs associated with supporting the public good of international protection. That is, even if we assume broad recognition of what justice requires, the implementation of such conditions may still seem to present seemingly insurmountable obstacles, as each individual actor has powerful structural incentives to defect or free-ride in the absence of institutions capable of compelling coordinated action.

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<sup>445</sup> Michael Dummett, *On Immigration and Refugees*; Joan Fitzpatrick, “Revitalizing the 1951 Refugee Convention,” *Harvard Human Rights Journal* 9 (1996).

<sup>446</sup> Indeed, as we saw in Chapter Two, even the origins of the refugee regime that we have today did in part rely upon the gradual convergence in what states perceived to be in their interests. See for instance Skran (1995); Barnett and Finnemore (2004).

Confronted with the above practical dilemmas and the reality of the current treatment of forced migration by states outlined throughout this chapter, attempting to accomplish even modest reforms of meaningful value may seem foolhardy. Yet in the final sections of this chapter I want to tentatively propose two possible ways to move beyond this impasse. On the one hand, we should examine how we may be able to mobilize the latent normative possibilities of the existing refugee regime in order to reform existing practices of international protection. On the other hand, we may show how we can begin to move toward a broader transformation by drawing on the normative resources that can be mobilized by focusing on the cosmopolitan possibilities of the ‘domestic’ institutions of liberal democratic states and the moral agency of every-day citizens.

### 3.1 Refugee Agency: Democratizing International Protection

In looking at the reform of international protection, a crucial way in which to mitigate the implication of the refugee regime in institutionally producing domination is by prioritizing the value of the political agency of refugees. Here the most urgent and realistic site for normative intervention is the institution of the refugee camp. This is especially the case because, as mechanisms for addressing the needs of those who have *de facto* lost the effective status of citizenship, refugee camps have evolved into largely agency-denying institutions. As Kukathas puts it,

For many victims of forced displacement, the search for asylum begins in refugee camps where they exist on the edge of the social world in conditions which are often little better than prison.<sup>447</sup>

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<sup>447</sup> Chandran Kukathas, “Are Refugee’s Special?,” 261

Part of the reason for this situation no doubt arises from fact that encampment was at first never intended as more than a temporary humanitarian measure. But in practice, it has now become a ‘durable solution’ for millions of forced migrants due to the realities of increasingly protracted displacement and the breakdown of international cooperation with regard to resettlement.

These features of encampment have received increased attention over the past decade through the turn in toward ‘refugee livelihoods’ as a means to enable local integration through ‘self-reliance’ initiatives. Contrasting the situation of extreme aid-dependency created by encampment, such approaches have insisted on the importance of creating conditions of ‘autonomy’ for refugees. As one recent account advocating the creation of special economic zones to enable such conditions has put it, refugees “need autonomy and opportunity, which only integration into the global economy can provide.”<sup>448</sup> However, even the most recent policy proposals within this literature have tended to give little attention to the importance of incorporating the political agency of refugees themselves into such interventions. Within the context of this project, attending to the structural conditions for addressing the subjection of refugees to dependency and arbitrary power in a more substantive manner is of central importance. Indeed, even within the ‘development’ inspired framework of the livelihoods approach there is good reason to suspect that democratic voice and so-called resilience initiatives

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<sup>448</sup> Alexander Betts and Paul Collier, “Help Refugees Help Themselves” *Foreign Affairs* 94.6 (2015): 92. Responding to the ongoing migration crisis these authors have recently advocated for the need to develop an approach that emphasizes refugee livelihoods in light of the realities of protracted refugee situations. Yet their account seems problematic for providing no participatory role for refugees in the governance of such initiatives and neglecting the involvement of their agency. The importance of integrating forms of democratic control for refugees within any proposed livelihoods initiative of the scope proposed by Betts and Collier cannot be underestimated. This is because firm-based business enterprises are hierarchical associations directed primarily by the pursuit of efficiency and profit. The importance of representing refugees within the governance of such projects seems particularly crucial given that the authors cast this proposal as rather dependent upon the role of private sector firms. Attending to the ‘voice’ of refugees in these contexts seems particularly crucial given their *de facto* diminished options for exit, relative to employees with the legal status of citizenship. Consider here the account provided in Albert Hirschman’s now classic volume: *Exit, voice, and loyalty* (Cambridge: Cambridge University Press, 1970).

cannot be severed without undermining the effectiveness of the latter, for as Amartya Sen has emphasized, “strengthening a democratic system is an essential component of the process of development” itself.<sup>449</sup> This suggests that enabling and supporting the political agency of refugees should be far from a secondary concern.

But given the current state of international protection, the idea of insisting on the importance of involving refugees in governance through creating inlets of representation and democratic control might seem misguided or naïve at best. The operations of the refugee regime are often presented as a technocratic enterprise necessarily conducted by specialized foreign aid-workers and complex international humanitarian agencies. Indeed, the virtual absence (as far as I know) of any contemporary policy initiatives within the UNHCR that serious and substantially integrate refugee participation and inclusion might lead us to believe that such involvement is both impractical and unnecessary given the urgent humanitarian imperatives that drive refugee assistance.

However such skepticism is misplaced. Though certainly not a prominent component of contemporary policy discussions surrounding refugee protection, there are historical cases of the institutional inclusion of refugees in multiple levels of governance, largely dating from the early years of the international regime. As Easton-Calabria’s recent work on the largely neglected ‘pre-history’ of the livelihoods approach shows, refugee assistance in the interwar era provides numerous examples of refugee’s direct and integral involvement in ‘bottom up’ approaches toward refugee assistance. This model represented a fundamentally different framework than the

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<sup>449</sup> Amartya Sen, *Development as freedom*, (New York: Random House, 1999), 157. This instrumental connection between development and political freedom has been articulated by Sen most famously in his analysis of the relationship between political representation and famine.

now pervasive ‘top down’ approach that dominates contemporary practice. However in this earlier period of refugee assistance, rather than being viewed as merely passive beneficiaries of humanitarian aid, refugees were treated as active and valued participants in their own resettlement. Thus the ‘bottom up’ model of the interwar era provides an object lesson of refugee “relief and development efforts built out of and upon the self-defined needs and interests of affected populations, which thus directly engages them in decision making capacities.”<sup>450</sup> Moreover, a more expansive look at this period suggests that refugee involvement in the nascent protection regime went far beyond the local and immediate context of the refugee camps. As Skran notes of the early regime, “Refugees also had a formal place in the decision-making process through the refugee agencies of the League of Nations” and were a far from marginal presence in the operations of the High Commissioner for Refugees and Nansen Office.<sup>451</sup> In fact, the early history of international protection appears to offer numerous examples that stand in sharp contrast to the limited voice and marginal inclusion of refugees in the contemporary refugee regime.

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<sup>450</sup> Evan Elise Easton-Calabria. “From Bottom-Up to Top-Down: The ‘Pre-History’ of Refugee Livelihoods Assistance from 1919 to 1979” *Journal of Refugee Studies* (2015): 6. Recent archival work by Evan Taparata in the University of Minnesota’s Social Welfare History Archives has also turned up potential evidence of refugee camps in this ‘pre-history’ period before the post-war formation of the UNHCR, where refugees were encouraged to participate in self-government through the formation of small democratic councils. See Evan Taparata and Kuang Keng Kuek Ser, “During WWII, European refugees fled to Syria. Here’s what the camps were like,” *Public Radio International*, April 26, 2016.

<sup>451</sup> Skran, *Refugees in Inter-war Europe*, 84. Elaborating on this involvement, Skran tells us that in fact a “number of delegates sent to host countries by the High Commissioner for Refugees and the Nansen office were refugees or naturalized refugees. In 1934, for instance, four of the thirteen delegates for the Nansen office were refugees, as were four of the five correspondents. In addition, representatives from leading Russian and Armenian refugee organization filled two of the twelve places on the Governing Body of the Nansen Office. Although refugees were in a minority on the Governing Body, they had additional influence because one of them always served on the Managing Committee, a group of three that actually supervised the operations of the Nansen Office. In addition, five of the nine technical advisers to the Nansen Office represented refugee organizations. The presence of these refugee delegates within the League of Nations itself helped to shape the form of refugee assistance.” (Ibid.,)

Indeed, when viewed against this background an institutional response to the normative demand to democratize international protection by attending to the agency of refugees seem far less implausible. Reframed historically, it is our contemporary humanitarian model—in which refugees are treated as mere aid beneficiaries under the auspices of technocratic experts—that should seem anomalous and misguided.<sup>452</sup> When combined with the reality of protracted refugee situations in which individuals find themselves confined to permanent camps, the case for developing mechanisms that support refugee representation and democratic agency becomes even stronger. Admittedly, the design of the specific institutional structures for enabling the inclusion of refugees is not a simple matter and will have to carefully take into account the need to counter—rather than mask or intensify—unjust and oppressive relations of power that might exist both within and without particular refugee populations. However, a strong case can be made that such institutional innovations are not only possible but also necessary from the standpoint of supporting refugee agency. It is true that the development of such arrangements would at the very least confront the usual array of obstacles to fairly and effectively institutionalize voice, participation and representation that form perennial challenges in any practical attempt to convert the ideals of democratic theory into practice. However, even an imperfect attempt at enabling and including the agency of refugees would be an improvement over our current approach that largely ignores the value of such concerns.

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<sup>452</sup> Indeed, Easton-Calabria connects the demise of the ‘bottom up’ model to the post-war emergence of a far more authoritarian and technocratic approach focused on humanitarian assistance and development, in which foreign aid workers or international ‘experts’ (often largely unfamiliar with local conditions and constraints) came to dominate refugee protection and rehabilitation efforts. As he notes, this “top-down authority and lack of expertise were accompanied by an absence of communication with refugees and locals and the virtual suppression of refugee agency from decision-making and implementation roles. Refugees were not employees or delegates of organizations such as UNHCR but instead mere ‘beneficiaries.’” (14-15)

Yet while a reform of the refugee regime's humanitarian institutions that reduces the implication of refugee camps in domination is certainly of immediate necessity, this cannot be disconnected from a broader transformation of international protection. Such an approach would have to reject any implicit return to encampment as a *de facto* permanent solution to forced displacement, and in doing so addresses the conditions needed to significantly reform and improve the obligations of states toward the stateless under the refugee regime itself. This task however, unlike the democratization of international protection practices in refugee camps, lacks any clear historical precedent and is significantly more daunting. Accordingly, the analysis that follows should be taken as providing a set of provisional and speculative reflections on how we might conceive of the conditions necessary to enable such a transformation.

### 3.2 Reforming Refuge Through 'Statist Cosmpolitanism'

This chapter began by acknowledging the broad set of obstacles that confront the larger normative aspirations of this project. In these final sections we have bracketed consideration of the transformations in accepted norms of membership that fully realizing justice would require in order to focus on deeply urgent reforms demanded by our immediate present. I believe that the proposals advanced above for democratizing elements of our current international protection regime are not only necessary but also relatively straightforward to realize under our current circumstances. Yet present realities suggest that we may face potentially intractable obstacles in bringing states to more fully act on the ethic commitments of refuge they hold toward the displaced and dispossessed, even when these obligations are framed under the narrower moral presuppositions of the existing state system.

The reason for this is that such actions would require a substantial shift in contemporary state behavior with regard to resettlement and the acceptance of asylum seekers. This is a



dilemma that seems more than necessary to confront in this project given that we live in a world in which states remain the most salient political agents at the global level. Regardless of assertions—whether fearful or hopeful—regarding the waning of sovereignty, it seems largely indisputable that states remain the uncontested primary actors in international politics under our current circumstances. For this reason it is clear that many of the major states that are implicated in practices and actions that result in the domination of forced migrants are necessarily also the very institutional agents needed to carry out urgently needed reforms in the context of the existing refugee regime.

The full force of what we may call the ‘realist’ challenge to normative theorists of forced migration has been most carefully expressed by Matthew Gibney in his own groundbreaking work on the political ethics of asylum. While a clear advocate of realizing a considerable practical expansion in the provision of refuge toward the displaced and dispossessed, Gibney poignantly articulates the dilemma we confront in pursuing such projects in a world of states:

Above all else ... the state is fundamentally an answer to the question of who is responsible to whom in the modern world: states are responsible to their own citizens. The survival of the state as an entity over time rests, moreover, on its ability to portray itself convincingly as an answer to such a question. As a consequence, the claims of outsiders are assessed by states, including liberal democratic ones, through a logic that deprecates the interests and needs of outsiders—a logic that is exceedingly sensitive to the potential damage to its own authority involved in forcing its citizens to incur costs for the sake of strangers.<sup>453</sup>

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<sup>453</sup> Gibney, *The Ethics and Politics of Asylum*, 211. This observation leads Gibney to suggest that “states could not be the kind of cosmopolitan moral agents” demanded by ideal theorists who defend an impartialist perspective toward issues of membership and migration. (Ibid. 211-12). A similar pessimism is shared by Kukathas: “The very point of the state is to protect interests; the problem is how to widen its purview so that it serves the interests of all its members rather than the interests of those who can capture it. To turn the state into an institution that takes

When read into the realities of our contemporary context Gibney's observations would appear to make the prospects of positive reform gloomy at best. At present, the vast majority of liberal democratic states have decided to forgo attempting to fulfill their ethical commitment to offer refuge to refugees in any substantial manner. Indeed, as documented throughout this project, many of these states have continued to employ, and indeed bolster, a large array of mechanisms to deflect and deter potential asylum seekers from ever reaching their borders. Yet the fact that our present has also provided exceptions to these troubling trends at least provides grounds for speculating about a contrary account of our future possibilities. To this end, here I wish to consider an alternative perspective on the moral potentialities of the state that might offer us a path forward and through that provide grounds for us to have reasonable hope in meaningful change.

The approach I tentatively sketch below draws inspiration from the recent work of Lea Ypi on issues of global distributive justice. In her *Global Justice and Avant-Garde Political Agency*, Ypi aims to address one of the larger debates that has dominated the domain of international ethics: the divide between statist liberal nationalists and cosmopolitan global egalitarians.<sup>454</sup> Here I can only schematize Ypi's arguments. Proponents of the global egalitarian perspective defend ambitious redistributive obligations which, while well-founded on the level of principle, are largely inattentive to the institutional conditions necessary to motivate adherence to the values and subsequent policies they espouse. In contrast, liberal nationalists

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seriously the interests of those who are not even its members might be more difficult still." (Kukathas, "Are Refugee's Special?," 266)

<sup>454</sup> Lea Ypi, *Global Justice and Avant-Garde Political Agency* (Oxford: Oxford University Press, 2012). The account here provides a very simplified, albeit strategically focused, account of the important methodological and normative contributions of this volume.

remain keenly aware of the conditions of agency necessary to support acts of solidarity and sacrifice within the context of community; however, they are muddled about the scope of our moral duties because their assumption that the state is the solely relevant political association is largely arbitrary, insofar as it ignores other normatively important relations.<sup>455</sup> To mediate this tension, Ypi proposes to theorize the relationship between principles and agency, an approach that allows us to potentially bridge the gap between the ideals justice demands we realize and the non-ideal circumstances of our present. This argument rests on seeing the cultivation of cosmopolitan commitments not merely as a moral task, but as a political project. As Ypi puts it,

Cosmopolitanism becomes politically effective by taking advantage of political mechanisms that allow citizens to transform collective institutions by putting constraints on each other's action. It may hope to be stably maintained by appealing to familiar learning processes, a particular sense of justice, and cultural resources that motivate existing moral agents.<sup>456</sup>

The inspiration for this *politicized* cosmopolitanism comes from the late political works of Kant.<sup>457</sup> In these works, Kant re-conceptualizes the nature of our cosmopolitanism duties as a matter of right, rather than of philanthropy, and in doing so suggests connecting the realization of these demands of justice with an interpretation of the role of existing political institutions in orienting action in the world. The tension between cosmopolitanism and patriotism, between the rights of others and the claims of community is therefore resolved “not by opposing the former to

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<sup>455</sup> I bracket substantive discussion of Ypi's critique of the liberal nationalist perspective, presuming that the account I offer based on the work of Forst and Abizadeh (above) is sufficient to support this conclusion, at least with regard to the normative questions raised by membership that concern us here.

<sup>456</sup> Lea Ypi, *Global Justice and Avant-Garde Political Agency*, 7

<sup>457</sup> This is developed chiefly across the *Doctrine of Right*, the *Idea for a Universal History and Perpetual Peace*.

the latter but by rendering the cosmopolitan union an internal political end of states.”<sup>458</sup> Drawing on Kant’s approach, Ypi proposes a novel framework for accomplishing ethical change at the global level: *statist cosmopolitanism*. Such a perspective acknowledges that the most effective site for accomplishing the reforms demanded by morality remains within already existing polities, while also recognizing the global scope of claims of justice. By harnessing the resources of already existing communities of solidarity through projects of civic education that enable and further moral learning, the citizens of particular states can play a role in driving ethical reform. The imperative and means to realize cosmopolitan justice can therefore be grounded within the already existing political life of states and takes the institutional resources of those communities and processes of moral learning as central mechanisms for driving ethical change at the global level.

While Ypi’s arguments intervene largely into debates concerning distributive justice and global poverty, there are important insights from her framework that can be applied to the ethics of forced migration. Indeed, Ypi account provides us with an approach to theorize a set of actors often overlooked by political theorists concerned with forced migration. In doing so such an account can help us theorize the conditions of possibility for meaningful change and public mobilization, driven by activist-citizens acting in concert. Indeed, the now well-established literature on norm-diffusion in international relations has highlighted the fundamental role of domestic ‘norm entrepreneurs’ in originating and propagating changes in state behavior.<sup>459</sup> Given that a widely accepted factor in explaining the deficiencies of current international refugee

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<sup>458</sup> Lea Ypi, *Global Justice and Avant-Garde Political Agency*, 27

<sup>459</sup> Martha Finnemore and Kathryn Sikkink. “International norm dynamics and political change.” *International Organization* 52 (1998); Margeret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

policy lies in the limited appetite of domestic audiences for extensive refugee resettlement and the sensitivity of policymakers to public opposition, it is striking that political theorists of forced migration have not paid more attention to this level of analysis or to the moral motivations underlying transformations in public sentiment.

Framed in this way, the task we confront may be one of cultivating and supporting processes of moral learning. This is because, while the avowed normative principles and actual practices liberal democratic states are deeply in tension, this conflict between our ideals and actions needs to be concretely translated into a form of cognitive dissonance in order to enable ethical insight and practical action. Although even our everyday political morality often confirms our sense of duty toward the stateless, we rarely acknowledge how the very state practices authorized in our name actually hollow out the realization of this obligation and indeed implicate us in the domination of those we profess to sympathize with in virtue of our common humanity. This is because we are often prevented from fully confronting the implications of our underlying sense of ethical responsibility to the forcibly displaced and dispossessed by the dominant social imaginary of ‘methodological nationalism’ that has captured and thus limited the scope of our normative vision. This outlook or framing mechanism effectively blinds us to our role in social processes and practices of transnational significance that are implicated in perpetuating various forms of domination. We can thus, for example, approve of the fact that our political leaders publically decry the open *refoulement* of refugees by a third country, while permitting these same leaders to simultaneously participate in the negotiation of arrangements that allow for asylum seekers to be summarily deported to that same state. Yet, while our ethical intuitions and normative presuppositions often remain in the thrall of the assumptions that come with the national outlook, there are instances in which these normative blinders are unsettled and

disrupted.<sup>460</sup> In such moments we are able to reconceived and reconstruct our sense of moral obligation in ways that take into account the claims to justice of the stateless. It is this *possibility* of moral learning and its potential translation into concrete action that provides the basis for hoping that normative transformation might be possible.

The starting point for an *avant-garde* approach to the ethics of forced migration thus lies in recasting our understanding of our moral responsibility toward the stateless. Much of this project has focused on this task, albeit at a fairly high level of abstraction. The purpose of the historical reconstruction of the origins of statelessness that we began with aimed to do so in a two-fold manner, at both a diagnostic and normative level. First, by exposing the contingent and mutable nature of our current order of borders, we sought to denaturalize this order and in doing so present the current state-system as a potential object of moral criticism and critique. Second, this approach sought to re-describe the injustice of statelessness as constituting a form of domination that is systematically produced by our current state-system. Such an intervention was meant to help us shift our understanding about our responsibility toward the stateless. Rather than representing their claims as requiring merely a humanitarian response, we sought to recognize them as demanding “an act of justice conditioned by the nature of one’s involvement in relations of exploitation and injustice and the specific wrong in question.”<sup>461</sup> It is precisely such a *gestalt* or aspect shift in the nature of understanding our moral responsibilities toward the

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<sup>460</sup> As a palpable example of this possibility here we might recall that it was the image of a drowned child—Alan Kurdi—whose family had reportedly been trying to reach Canada, which galvanized the Canadian public and immediately made the migration crisis an issue of national concern. Obviously this moment did not represent the Canadian public’s first awareness of the fact that a global humanitarian crisis was underway. But what this moment did seem to represent was the *gestalt* shift in our collective perception of these factual circumstances. Moreover, part of what seems to have motivated our immediate affective responses and consequent calls for action was not only a feeling of sympathy, but also a latent sense of implication and responsibility. As early news coverage framed the story, *this* family had been driven to such desperate means in an effort to get to *Canada*.

<sup>461</sup> Rainer Forst, *Justification and Critique*, 19.

forcibly displaced that ought to undergird an *avant-garde* perspective that aims to intervene in and contribute to effecting global change within and through our already existing political communities.

What can the political theorist *qua* political theorist offer to sustain this project and further the recognition of the demands of justice in the community in which he or she lives? Here I can only gesture toward the sorts of interventions that might support the actions of activist-citizens concerned with accomplishing ethical reform. The key to such strategies is recognition of the fact that the ‘preferences’ or perspectives of members of democratic communities are not fixed or pre-given. They are thus amenable to transformation and modification, amendment and reform. This suggests the need to invest in interventions that enable and further moral learning as a means of driving political change. An important point for grounding such a task is looking at the actual emergence of ethical change in concrete cases. How do norm entrepreneurs or *avant-garde* activist-citizens succeed in shifting the views of their fellow citizens in ways that not only change their domestic context, but often can also lead to global transformations? What allows certain norms or values to cascade or coalesce? What role can projects of civil education play in stabilizing and maintaining such achievements?

Such an account of moral learning should be supplemented by an investigation and understanding of the affective economies that drive ordinary citizens to come to care about the rights of others, to see the foreigner or forced migrant as a fellow human being in need. This is particularly important because moral *action* is fundamentally grounded in sentiments of solidarity, in an affectively informed sense of justice. An account of what moves us to act morally would have to undergird any successful project of civic education, insofar as the sentiments play a role in allowing us to *see* the claims of others as salient and meaningful, as

claims upon *us*. But more crucially, such insights would importantly help support the strategies of activist-citizens as they engage in projects aimed at accomplishing moral transformation. They would equip us to mobilize the necessary forms of rhetoric and representation necessary to overcome the distortions that allow us to displace or screen-out our obligations to distant others.

## 4 Conclusion

Even the more modest aims of this project may appear overly optimistic in their own right. After all, in the ongoing context of our so-called “migration crisis” both the EU and the United States have seen the troubling politicization of refugee protection, alongside populist discourses promoting the xenophobic demonization of migrants. Given that the realities of the current situation—which have frequently been treated more as a crisis for citizens of rich liberal democratic states themselves, rather than an ongoing catastrophe for those who are displaced and dispossessed—we may have reason for deep concern. If liberal democratic states are unwilling to respect their moral obligations to refugees even in these times of relative regional stability, compared to the postwar context that saw the emergence of the refugee regime, we may find ourselves deeply troubled by what an future of even greater displacement, perhaps driven by larger forces beyond our control, might possibly bring.

These are not reassuring thoughts. And yet, rather than leading us to pessimism and resignation, they perhaps ought to provide us with a more vivid sense of urgency and necessity to develop robust and effective mechanisms to collectively respond to the claims of stateless persons. Moreover, in our current time we may have the capacity to invest in the creation of better institutional responses, if only we can generate a sense of common will and obligation among citizens to support such projects. For as much as narratives of fear and exclusion have characterized this political moment, it has also witnessed a striking outpouring of humanity and



concern. This suggests that if properly furnished with an understanding of the pragmatic possibilities of our current institutions, faith in our fellow citizens sense of justice, and a clear-sighted view of what morality requires, we may still retain grounds for reasonable hope. It is this hope that makes the exercise of our moral agency in the present both possible and necessary.

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