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Beyond Exceptions and Humanitarianism:
Agency, Obligation, and Ethics in the Law of Asylum

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J.D., Emory University, 2011

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Abstract

Beyond Exceptions and Humanitarianism:
Agency, Obligation, and Ethics in the Law of Asylum

By Silas Webster Allard

There is an ethical lapse in the United States' asylum system resulting from how U.S. asylum policy contemplates what it means to be a refugee. U.S. asylum policy rests on the notion that refugee subjects are passive objects of external forces. Such a notion of refugee subjectivity leads to an asylum policy anchored in humanitarianism and, therefore, unable to recognize the moral demand made by the refugee Other. This thesis seeks to challenge the approach of U.S. asylum policy and the notion of refugee subjectivity that informs it, arguing that the asylum seeker should be recognized as a moral agent whose flight from persecution is a purposive moral act. Such recognition requires, in turn, that the asylum system respond to the demands that a moral agent makes.

The argument is developed in three chapters. Chapter One investigates how statehood and citizenship have become the norms of political community resulting in a paradigm that can only contemplate the refugee as an exceptional subject. Chapter Two examines how U.S. asylum policy responds to the refugee as exceptional subject. Employing philosopher Judith Butler's work on narrative subjectivity, Chapter Two explores how the norms and conditions imposed on the asylum seeker's narrative by asylum law limits the possibility of agency for asylum seekers. Without moral agency, asylum seekers are unrecognizable as the moral Other to whom we must be accountable, and asylum and protection for those fleeing persecution is only charity to be offered at the discretion of the receiving state rather than a moral duty. Chapter Three seeks to disrupt this set of norms by examining alternative understandings of the moral agency of flight found in the theological narratives of the Exodus and the *hijra*. Working from philosopher Emmanuel Lévinas's concept of the Other that embodies a moral obligation, Chapter Three reimagines the possibility of refugees' moral agency through these theological narratives and argues that recognizing the moral agency of flight opens the way for responding to the moral demand of the Other. Finally, the conclusion will explore suggestions for how U.S. asylum policy can respond to the moral demand of the Other.

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INTRODUCTION

"The world found nothing sacred in the abstract nakedness of being human."[1]
-Hannah Arendt, The Origins of Totalitarianism

When, in 1951, Hannah Arendt wrote of the fate of the stateless, that "[t]he world found nothing sacred in the abstract nakedness of being human," she was pointing to the international community's inability to take account of persons as such. The international community had cognizance only for persons with a politico-legal identity; the nation-states of the world knew only how to account for citizens. By failing to recognize anything sacred in persons stripped of their citizenship and left in the "abstract nakedness of being human," the international community's indifference abandoned the stateless, who would later assume the moniker of refugees,[2] to the state of "bare humanity."[3]

This is, seemingly, the very moment envisioned by Emmanuel Lévinas's ethics of the face.[4] Exposed in her bare humanity—the abstract nakedness of being human—the refugee would seem to epitomize the conditions of the Lévinasian face:

> Stripped of its form, the face is chilled to the bone in its nakedness. It is a desolation. The nakedness of the face is destitution and already supplication in the rectitude that sights me. But this supplication is an obligation. . . . [T]he face imposes on me and I cannot stay deaf to its

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[1] Hannah Arendt, *Imperialism: Part Two of The Origins of Totalitarianism* (San Diego: Harcourt Brace Jovanovich, 1968), 179.

[2] Arendt preferred the term stateless because it "at least acknowledged the fact that these persons had lost the protection of their government and required international agreements for safeguarding their legal status." Ibid., 159.

[3] This term, bare humanity, comes from the work of anthropologist Liisa Malkki. Liisa Helena Malkki, "Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization," in *Genocide: An Anthropological Reader*, ed. Alexander Laban Hinton (Malden, MA: Blackwell Publishers, Inc., 2002), 355. See also Liisa Helena Malkki, *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania* (Chicago: University of Chicago Press, 1995). The "bareness" of refugee identity is a theme that appears with some frequency among writers on refugee issues. See, e.g., Giorgio Agamben, "We Refugees," trans. Michael Rocke, *Symposium* 49, no. 2 (Summer 1995): 114-19; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).

[4] See, e.g., Emmanuel Lévinas, *Humanism of the Other*, trans. Nidra Poller (Urbana, IL: University of Illinois Press, 2006).

> appeal, or forget it, what I mean is I cannot stop being responsible for its desolation.[5]

In the Lévinasian model, the Other creates a moral obligation on the self; the Other, in the form of the face, by reason of its nakedness and desolation, interrupts the formation of the self with a pre-condition of moral obligation. The Lévinas commentator and philosopher Richard Cohen offers a helpful summary of the Lévinasian encounter with the face:

> [T]he expression of the other, what Levinas calls the 'face' (*visage*), as originating in the unreachable and nonthematizable transcendence of the other—beyond being and "before culture"—puts the self into question, moral question. The other disturbs, upsets, and overwhelms the self-relation of the self with a moral obligation to respond that cuts deeper—is more important—than cultural formations or the ontological configuration of being. . . . Symbolic forms are interrupted, overcharged, and broken by moral imperative. . . . Morality short-circuits the symbol forming function of consciousness.[6]

This moral obligation to the Other precedes, influences, and forms our approach to "justice, culture, history, organized religion, the state, science, philosophy" and other human institutions and expressions. [7] But, in order to respond to the demand of the face, we must be able to see and recognize it. The state of bare humanity challenges Lévinas's ethics by obscuring or obfuscating the Other's face. It is the very inability of states to take cognizance of refugees that leaves them in the position of bare humanity. Something terribly wrong from a Lévinasian perspective. The nakedness of the face is not the beginning of ethics; rather, refugees are thrown back on their bare humanity by being excepted from the web of obligations in the international arena.

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[5] Ibid., 32.
[6] Richard A. Cohen, "Introduction: Humanism and Anti-humanism—Levinas, Cassirer, and Heidegger," in *Humanism of the Other*, by Emmanuel Lévinas, trans. Nidra Poller (Urbana, IL: University of Illinois Press, 2006), xxx-xxxi.
[7] See Ibid., xxvii-xxviii.

I agree with Paul Ricoeur that Lévinas has taught us to recognize the face in a strong sense, a sense that carries an obligation.[8] Though we may quarrel with aspects of Lévinasian ethics, his argument is itself a powerful critique asserting that when the face of the Other is obscured or unrecognizable, something is ethically wrong. It is to the evanescence of the refugee face in the United States' asylum process that this thesis is dedicated, querying: "How should the United States as a receiving state treat asylum seekers during the process of admission?" In order to offer, admittedly only a partial, answer to this question I take as my object of concern the legal norms that render and respond to asylum seekers' bare humanity.

These legal norms are not independent of the moral import of the asylum seeker's bare humanity; rather, the legal norms implicate and are implicated in the moral norms. Peter Nyers has argued that "[l]egal definitions of refugees, while of immense significance, are not sufficient to understand the politics of refugees. The politics of being a refugee has as much to do with the cultural expectation of certain qualities and behaviors that are demonstrative of 'authentic' refugeeness (e.g., silence, passivity, victimhood) as it does with legal definitions and regulations."[9] I agree with Nyers both that legal definitions are insufficient for the total picture and that "authentic refugeeness" is measured in terms of silence, passivity, and victimhood. I would qualify Nyers argument, by noting that the cultural expectations (what I refer to as moral norms) he identifies are reified in the legal definitions.

To explain how the moral norms are reified in the legal definitions, I will employ

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[8] Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992), 202.
[9] Peter Nyers, *Rethinking Refugees Beyond States of Emergency* (New York: Routledge, 2006), xv.

two different modes of subjectivity in my discussion. At times I will speak of moral subjectivity, by which I mean the role of a person in a web of moral relations. Moral subjectivity can describe both the self as moral actor and the Other that makes a moral demand. Both the self and the Other have a moral subjectivity that describes the moral nature of their relationship—demands, obligations, duties, and acts.[10] When I speak of legal subjectivity, I am speaking of another web of relations, relations of self to others and the state that is enacted through legal regimes. My concept of legal subjectivity is similar to that described by Kathryn Abrams when she writes, "[b]y 'legal subject,' I mean courts' paradigmatic accounts of who human beings are and how they are connected to the social world around them"; except that my scope of inquiry extends to accounts of the legal subject beyond the opinions of court's, such as those found in legislation, treaty, and the like.[11]

While moral and legal subjectivity are neither coextensive nor parallel, they do intersect. I am particularly interested in two points of intersection that occur in the refugee subject. At one point, legal subjectivity constructs a moral subjectivity. This is the point at which the law is constitutive of bare humanity—the inability of states to take legal cognizance of persons without citizenship delimits the possibility of their moral subjectivity. At the other point, moral subjectivity constructs a legal subjectivity. This is

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[10] I am borrowing here from the work of Judith Butler in her book, *Giving an Account of Oneself*, where she writes, "[T]he 'I' has no story of its own that is not also the story of a relation—or set of relations—to a set of norms. Although many contemporary critics worry that this means there is no concept of the subject that can serve as the ground for moral agency and moral accountability, that conclusion does not follow. The 'I' is always to some extent dispossessed by the social conditions of its emergence. This dispossession does not mean that we have lost the subjective ground for ethics. On the contrary, it may well be the condition for moral inquiry, the condition under which morality itself emerges." Judith Butler, *Giving an Account of Oneself* (New York: Fordham University Press, 2005), 8.

[11] Kathryn Abrams, "The Legal Subject in Exile," *Duke Law Journal* 51, no. 1 (2001): 27.

the point at which law is constituted by bare humanity—an ethic of humanitarianism[12] delimits who is recognized as a refugee. At both points there is a failure to recognize the Lévinasian Other in the refugee subject.

What is lacking at these points of intersection is any recognition of the refugee as a moral agent. Agency is the province of citizens, who have identities and rights. Citizenship is a face that can be recognized and make a moral demand. Refugees, without citizenship, are a "merely biological or demographic presence,"[13]—silent, passive, victims.[14] To understand how refugee agency is undermined, I look in particular at U.S. asylum policy through Judith Butler's narrative account of morality in *Giving an Account of Oneself*. Butler frames the possibility for ethics and ethical action in terms of narrative to emphasize the prior interrelationality of all ethical action.[15] For Butler, there is no "I" with the agency for moral action that is not constructed as an "I" through the narrative act of giving an account of oneself—which account is always given to another.[16] Therefore, to be a self who acts morally is always to be a self that is already enmeshed in webs of

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[12] Liisa Malkki gives a compelling account of how such a humanitarianism can function, drawing on her work around the ways refugees are visually represented. "The visual conventions for representing refugees and the language of raw human needs both have the effect of constructing refugees as a bare humanity – even as a merely biological or demographic presence. This mode of humanitarianism acts to trivialize and silence history and politics – a silencing that can legitimately be described as dehumanizing in most contexts. And yet . . . one might argue that what these representational practices do is not strictly to dehumanize, but to humanize in a particular mode. A mere, bare, naked, or minimal humanity is set up." Malkki, "Speechless Emissaries," 355. The critique of the ethic of humanitarianism I present in this thesis is intended as a critique of such an ethic as I see it operative in U.S. asylum policy. I am not critiquing the sort of positive, duty driven humanitarianism that some scholars, notably Matthew Gibney, have proposed in the area of asylum. See Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press, 2004). Rather, like Malkki, I am concerned about a humanitarianism that evades duty by rendering the refugee an uncompelling presence. I use the term humanitarianism, despite the possibility of confusion, because it is the term most often employed in the official discourse to describe the purpose and guiding principle of asylum policy.

[13] Malkki, "Speechless Emissaries," 355.

[14] Nyers, *Rethinking Refugees*, xv.

[15] Butler, *Giving an Account of Oneself*, 7-8.

[16] Ibid., 6-9.

relation that condition moral action.

I engage Butler's narrative account of morality in order to focus on how the conditions of narration, what Butler refers to as the social norms,[17] can limit the possibility of agency for asylum seekers. The demand to narrate a particular account of the self as a refugee is conditioned by the forms of legal subjectivity and moral subjectivity available to the refugee. Bare humanity, both as a legal exception and the moral object of humanitarianism, occludes the face that can make a demand; bare humanity denies agency by pre-conditioning the possible narratives a refugee subject can tell. Without moral agency, asylum seekers are unrecognizable as moral others to whom we must be accountable. In the end asylum and protection for those fleeing persecution is a *charity* to be *offered* at the discretion of the host state. There is no accounting for obligations.

There is something of an uneasy tension in this thesis on account of the various conversation partners I have brought together here. Conversants from law, philosophical ethics, theology, and critical theory will appear at different points in this thesis. While these conversations are not always easy in light of the independent, and sometimes antithetical development of the various discourses, I bring them together under the auspices of what Charles Taylor has termed the social imaginary.

> By social imaginary, I mean something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking, rather, of 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 underlie these expectations.[18]

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[17] Ibid., 23.
[18] Charles Taylor, *Modern Social Imaginaries* (Durham, NC: Duke University Press, 2004), 23.

My project here may appear to comport more with Taylor's notion of social theory—an elite, normative project that may influence the social imaginary[19]—but I want to resist such a move to social theory for two reasons. First, my project is not solely disengaged theorizing. I want to maintain well within the horizon of this project particular persons and their interaction with particular laws. Second, I do not rely here on theory alone but make recourse to "images, stories, and legends."[20]

It is in the context of the social imaginary that the various trajectories in this thesis can interact to challenge the extant expectations of asylum seekers and refugees and to reimagine the "notions and images that underlie these expectations."[21] The imaginative aspect of the social imaginary is essential, and I concur with Graham Ward who argues that the imagination "enables us to fashion different social imaginaries," and that "these imaginaries might develop critically, constructively and sometimes incommensurately alongside each other . . . ."[22] The importance of imagination is, perhaps, best exemplified in Chapter Three where I invoke theological narratives to support a reimagining of asylum seekers' moral subjectivity for the purpose of legal reform. Insofar as I do not conflate theology and law (argue for legal reform on the basis of theological authority), it requires an imaginative move to consider how a theologically derived, alternative conception of asylum seekers' moral subjectivity warrants an alternative legal structure. My proposal, in this regard, has something of an analogy to the advent in U.S. jurisprudence of legal realism. In the way that legal realism perforated the authority of

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[19] Ibid., 23-24.
[20] Ibid., 23.
[21] Ibid.
[22] Graham Ward, *Cultural Transformation and Religious Practice* (Cambridge: Cambridge University Press, 2005), 132.

legal formalism, I argue that a legal imaginary is needed to perforate the authority of legal positivism. The law does not rest solely upon itself; rather, it also emerges from the social imaginary contoured by the forces operating therein. It is subject to critique from within the social imaginary and open to transformation. As Ward says, "The questioning of the social imaginary is always already under way for the imaginary already actively contains the possibilities for its own transformation."[23] For the project of this thesis, alternative narratives of moral subjectivity are extant in the social imaginary through theological narratives. The goal is, first, to show how the current legal regime already rests upon an unsatisfactory narrative and then to bring to the fore the alternative narratives. Thus, I hope to move in the direction of what Ward calls the "twofold work for those projects involved in developing transformative practices of hope: the work of generating new imaginary significations and the work of forming institutions that mark such significations."[24]

What follows will proceed along these lines. The analysis is divided into three parts. In Chapter One, "The Exceptional Subject in International Law," I examine the development of refugee subjectivity as it emerges in international law through the 1951 Convention Relating to the Status of Refugees. Chapter One examines international law as a parallel development alongside the rise of the nation-state and modern notions of citizenship, arriving at the conclusion that the interwoven nature of these phenomena results in a state-centric international legal regime where legal subjectivity is defined by citizenship. The refugee subject can only be an exceptional legal subject under such a scheme and remains inscribed within the power of the state most clearly through the

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[23] Ibid., 140.
[24] Ibid.

process of refugee status recognition.

In Chapter Two, "Encountering the Refugee Other in Asylum," I examine one process of recognition, the United States' asylum system. In Chapter Two, the moral subjectivity of both the asylum seeker and the state comes to the fore, as I examine the process of recognizing and granting the exceptional legal subjectivity that is refugee status. Using the work of Judith Butler, I examine the sort of moral subjectivity that is demanded of the asylum seeker by the state. In Chapter Two, I also examine the ethic of asylum, arguing that the state assumes a moral subjectivity marked by "humanitarianism" in its approach to asylum seekers. This humanitarianism denies asylum seekers agency as moral subjects, which places them outside notions of obligation. Without obligation, the granting of refugee status through asylum is an optional matter that hinges on notions of charity.

Having examined the ethical presuppositions of the asylum process, I turn in Chapter Three to consideration of "new imaginary significations."[25] Drawing on theological traditions, I look to the religious narratives of the Exodus and the *hijra*, where asylum seekers are reimagined as moral agents who have engaged in a moral act by fleeing from persecution. I argue that by constructing moral subjectivity in an agentive mode, the asylum seeker can become a face in the Lévinasian sense making a demand for protection rather than a passive recipient of charity.

I engage with these two narratives as examples of alternative ways of imagining asylum seeker subjectivity. However, they are exemplary in other ways as well. The Exodus narrative has long informed the American experience both constructing and

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[25] Ibid.

challenging the United States' idea of itself and its moral commitments. Exodus appears prominently among the early American settlers fleeing persecution of various sorts in Europe but also in slave narratives challenging the persecution that was woven into the very fabric of the early nation, and it appears again in the civil rights movement to name only a few instances. The Exodus narrative is already a deeply ingrained element of the American social imaginary. I engage with the *hijra* narrative because it is outside the American social imaginary—as that imaginary is traditionally conceived—but informs a large a growing element within American society. Furthermore, many of those who seek asylum in the United States bring their own social imaginaries informed by this tradition, so to engage the *hijra* narrative is to recognize the possibility of being transformed by the refugee Other—a transformation at the heart of both Butler and Lévinas's arguments. These two narratives do not exhaust the possibilities of the American social imaginary as it emerges from the breadth of American religious and moral pluralism, but engaging with these two narratives is a practice of reinterpreting, expanding, and transforming that social imaginary.

Finally, in the conclusion I take up the question of what obligation is created by the demand of the moral agent. In particular, I look at what sort of institutions are necessary to respond to the new social imaginary where asylum seekers are moral agents engaged in a moral act of flight. I offer some initial proposals for reforming the institution of asylum to respond to this new social imaginary.

CHAPTER ONE: THE EXCEPTIONAL SUBJECT IN INTERNATIONAL LAW

> *"Nobody had been aware that mankind, for so long a time considered under the image of a family of nations, had reached the state where whoever was thrown out of one of these tightly organized closed communities found himself thrown out of the family of nations altogether."*
>
> *Hannah Arendt, The Origins of Totalitarianism*[26]

It was 1951 when Hannah Arendt published *The Origins of Totalitarianism*. Six years previously the Charter of the United Nations had been signed at San Francisco.[27] Three years earlier the General Assembly of that newly formed body had adopted the Universal Declaration of Human Rights.[28] Yet, despite both of these developments, the refugee remained as unrecognizable as ever. For Arendt, the refugee continued to point up the hollowness of a human rights paradigm that could not account for bare humanity. In an indictment of the burgeoning human rights movement, Arendt wrote in the essay "The Decline of the Nation-State and the End of the Rights of Man" that "[t]he conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were confronted for the first time with people who had indeed lost all other qualities and specific relationships—except that they were still human.[29] In her conclusion to that essay, Arendt went on to explain why bare humanity was insufficient as a marker of identity even in a system premised on the "inherent dignity"[30] of the human.

> The great danger arising from the existence of people forced to live outside the common world is that they are thrown back, in the midst of civilization, on their natural givenness, on their mere differentiation. . . . The paradox involved in the loss of human rights is that such loss

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[26] Arendt, *Imperialism*, 174.
[27] U.N. Charter, art. 111.
[28] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[29] Arendt, *Imperialism*, 179.
[30] G.A. Res. 217 (III) A, *supra* note 28, pmbl.

> coincides with the instant when a person becomes a human being in general—without a profession, without a citizenship, without an opinion, without a deed by which to identify and specify himself—*and* different in general, representing nothing but his own absolutely unique individuality which, deprived of expression within and action upon a common world, loses all significance.[31]

Humanness when it is bare is an empty signifier; the human becomes recognizable only when she is mediated through another identity.

That same year, 1951, the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons meeting in Geneva adopted the Convention Relating to the Status of Refugees,[32] which laid the foundation for the emergence of the refugee as a category in international law. Perhaps this new Convention, responding to the same *Zeitgeist* that had moved Arendt to such scathing critique, could also move the refugee beyond bare humanity. The Convention was, after all, self-declaredly an attempt to bring some of the stateless back into the common world, to reinscribe them with a legal subjectivity and to provide for their basic human rights.[33] Alas, the Convention could not create from whole cloth a new, transnational legal personality. While refugees might be able to claim a legal status under the Convention, they remained anomalous—an exception in an international order built on notions of statehood and citizenship. A refugee might be a refugee, but even as a refugee she remained a stateless non-citizen. While a citizen has a claim to rights, the refugee, at best, has the right to a claim. Until her claim is recognized, she remains outside the international legal regime. So the refugee as bare legal subject remains caught in the paradox that Arendt identifies—still bare humanity.

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[31] Arendt, *Imperialism*, 182.
[32] Convention Relating to the Status of Refguees, July 28, 1951, 189 U.N.T.S. 137.
[33] *Id*. pmbl.

What follows in Chapter One is an explication of the exceptionality of refugees. In the first section, I explore the parallel, entwined development of the citizen, the nation-state,[34] and international law in Europe. I then look at the geographic expansion of this model via European colonialism, and the effect it has had on instituting citizen-state models of political community around the globe. In section two, I take up the nature of the refugee exception. I examine the refugee as an exceptional subject contrasted with the normative subject of the citizen. Finally, in the third section, I examine the attempt to inscribe the exception in international law and what affect that has on routinizing the exceptionality and otherness of refugee subjects.

The Rise of the Nation-state, the Citizen, and International Law

The category of refugee is today a function of international law; this has not always been the case. If we take the broadest possible conception of the category, something along the lines of *a person who leaves her political community under duress*, then the concept has been with us, in many cultures, for a very long time. Banishment and exile were common practices in many pre-modern societies, often in the context of criminal punishment, religious ritual, or military conquest.

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[34] Nation-state is not an uncontested term. Some scholars reject the term because it continues to reflect the idea of an ethno-state or cultural-state (exemplified, though problematically, by certain European nation-states of the early modern period such as France and England). In these formulations, the state simply reflects the geographic distribution of a naturally coherent people bound by blood or custom. As this formulation cannot adequately describe a modern state, nor arguably has it ever described any state anywhere, some scholars are inclined to reject the term altogether. For example, Abdullahi An-Na'im writes, "I prefer to use the term 'territorial state' to identify citizenship with territory, instead of 'nation-state,' as that can be misleading, if not oppressive to minorities." Abdullahi Ahmed An-Naim, *Islam and the Secular State: Negotiating the Future of Sharia* (Cambridge, MA: Harvard University Press, 2010), 33. I employ the term nation-state in this thesis because I believe that it remains a relevant self-conception for many states even if they no longer consider the nation as an ethnic or cultural distinction. Correlating the state and a "nation" in the sense of the political community has important implications for inclusivity and exclusivity, and therefore for refugees and asylum seekers. Thus, while I concur with An-Na'im's normative turn away from the nation-state, I also believe that identifying the concept as it continues to be used tells an important truth about fate of asylum in the contemporary world.

Despite the long history of political displacement[35]—one might reasonably assume that such displacement has existed as long as political community—there are two aspects of political displacement in the modern age that distinguish it: scale and space. Edward Said writes in his essay, "Reflections on Exile," that "the difference between earlier exiles and those of our own time is, it bears stressing, scale: our age—with its modern warfare, imperialism, and the quasi-theological ambitions of totalitarian rulers—is indeed the age of the refugee, the displaced person, mass immigration."[36] This is not to say that mass displacements, such as the Babylonian exile, did not occur in the pre-modern world, but the relative scale is different. Perhaps more important, however, is the redefinition of space under modernity. Modern mass displacements do not occur among the fragmented political communities of pre-modernity; rather, the nation-state has established itself as the dominant model of territorial and political community in Europe and subsequently extended its reach around the globe through European colonialism. As Arendt argued powerfully, the new mass migration of the displaced—the *stateless*—was an unresolvable challenge to the nation-*state*.[37]

The stateless posed such a difficulty because they undermined the very political order that had come to define Europe (and would through colonization, decolonization,

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[35] Contemporary usage often employs the terms forced displacement or forced migration in this context, where I have chosen to use political displacement. See, for example, the UN High Commissioner for Refugees' "Mission Statement," in its 2009 Global Report, which states "[UNHCR] seeks to reduce situations of forced displacement by encouraging states and other institutions to create conditions which are conducive to the protection of human rights and the peaceful resolution of disputes." United Nations High Commissioner for Refugees, *Global Report 2009: New Threats, New Challenges* (Geneva: United Nations High Commissioner for Refugees, 2009), 2, http://www.unhcr.org/gr09/index.html. I choose to use the term political displacement as an alternative for two reasons. First, I want to emphasize the nature of the displacement as an *exclusion* from a *political community*. Second, I am trying to avoid the obscuring of refugee agency that accompanies descriptions of refugees as passive objects of persecution.

[36] Edward W. Said, *Reflections on Exile and Other Essays* (Cambridge, MA: Harvard University Press, 2000), 174.

[37] Arendt, *Imperialism*, 156-57.

and colonial hegemony come to define the rest of the world). This order was premised on states and citizens with a defined relationship existing between the two. States defined political community; citizens defined political actors. The state*less* challenged both of these categories. They were non-citizen political actors who existed outside of a state. They were the ultimate exception.

The Westphalian Revolution and the Norm of Citizenship

There is a rich body of scholarship on citizenship describing models of citizenship, critiquing existing models, and proposing new, normative models.[38] I do not intend to offer a theory or comprehensive definition of citizenship here. My concern is to describe the nexus of interdependence that exists between citizenship, the nation-state, and international law.[39]

Citizenship is an ancient category whose modern formulation is drawn from the examples of the Greek city-states and Rome.[40] Despite this ancient genealogy, the modern citizen inscribed in a context of international law constitutes a particular formulation. As I have already alluded to in my conversation with Arendt, this formulation is itself born of another modern institution, the nation-state.[41] The nation-state—particularly the "state" half of this formulation—redefined political community

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[38] See, e.g., Engin F. Isin and Bryan S. Turner, *Handbook of Citizenship Studies* (London: SAGE, 2002).

[39] I am in agreement here with Theodora Kostakopoulou that "it may be argued that citizenship is what it is and does what it does, not because it contains certain core elements, but because of the way in which its constituent parts are organised, interwoven in various discourses and sedimented in institutions." Theodora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008), 13. There is a certain notion of citizenship that organizes international law, and that is the object of my critical inquiry in this first Chapter.

[40] For a brief history of citizenship, see Derek Benjamin Heater, *A Brief History of Citizenship* (Edinburgh: Edinburgh University Press, 2004).

[41] Isin and Turner, *Handbook of Citizenship Studies*, 3.

and political relationship.[42] Thus, Derek Heater offers the following definition of citizenship distinguishing it from other forms of political subjectivity that existed in older models of political community:

> And so we come to citizenship. This defines the relationship of the individual not to another individual (as is the case with the feudal, monarchical and tyrannical systems) or a group (as with nationhood), but essentially to the idea of the state. The civic identity is enshrined in the rights conveyed by the state and the duties performed by the individual citizens, who are all autonomous persons, equal in status.[43]

Heater acknowledges, in the last line of his definition, that there is a normative element generally imputed to the notion of citizenship. The normative aspect of citizenship is more fully explicated by Ediberto Román when he says,

> citizenship is a broad concept that not only signifies the rights afforded in the Constitution but also guarantees an individual's membership in a political community. This guarantee yields an allegiance and protection that binds the citizen and the state . . . . Thus, citizenship signifies an individual's full membership in a political community in a non-subordinate condition. Citizenship refers not only to delineated rights but also to a broad concept of full membership or incorporation into the body politic. A correlative of this concept is a sense of belonging and participation in a community that is the nation.[44]

This is, of course, an idealized concept of citizenship with an intellectual history rooted in liberalism with its emphasis on autonomous persons who are equal in status. This definition is increasingly under attack, including by Román, both for its descriptive failure—not all citizens are equal *in fact*—and because of the presuppositions it embeds

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[42] Connie L. McNeely, *Constructing the Nation-State: International Organization and Prescriptive Action* (Westport, CT: Greenwood Publishing Group, 1995), 3-7.

[43] Heater, *A Brief History of Citizenship*, 2. Heater offers a five-part typology of political identity, in which political subjectivity is determined by the nature of the political community and the sorts of relationships that each particular political community constructs. His five-part typology includes: 1) feudal, 2) monarchical, 3) tyrannical, 4) national, and 5) citizenship systems. Ibid., 1-2.

[44] Ediberto Román, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique* (New York: New York University Press, 2010), 6.

by making a commitment to liberalism.[45] For now, however, it remains the animating concept of modern citizenship. While efforts to redefine and invigorate the notion of citizenship are to be applauded, those very efforts point to the reigning notion. Engin Insin and Patricia Wood write in their book *Citizenship and Identity*,

> We approach the relationship between citizenship and identity from a perspective that sees modern citizenship not only as a legal and political membership in a nation-state but also as an articulating principle for the recognition of group rights. . . . We seek *a new conception* of citizenship (and thus the state), with an emphasis on the practice of democracy, that would meet the needs of a diverse citizenry facing the challenges of advanced capitalism.[46]

Citizenship is a site of contest in modern scholarship precisely because it is so firmly located and rooted in particular notions of liberalism, sovereignty, and the nation-state. Furthermore, along with the nation-state, citizenship orients and anchors the possibilities of political community in the modern world.

It is not sufficient at this juncture to simply point out that there are nation-states and citizens in the world, and that they are in some capacity related to one another. Rather, it is worthwhile to investigate the development of these concepts along with the parallel development of international law to better understand the interrelation and interdependence of the three concepts. I take as my starting point the Treaty of Westphalia in 1648. Westphalia is a common and convenient marker for the emergence of two critical concepts: the modern nation-state and international law.[47] To be sure, the Treaty of Westphalia marks neither the temporal nor the geographical advent of

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[45] Take, for example, Román's critique: "This book's central thesis is essentially straightforward: Western societies have uniformly accepted the aspects of citizenship discourse that have championed equality and inclusion; but at the same time, these same societies have repeatedly denied disfavored groups full social, civil, and political citizenship rights." Ibid., 12 (citation omitted).

[46] Engin F. Isin and Patricia K. Wood, *Citizenship and Identity* (London: SAGE, 1999).

[47] McNeely, *Constructing the Nation-State*, 3.

international law.[48] However, insofar as we talk about international law as being, in English, inter-national—among nations—we are speaking of a body of law that, according to David Bederman, owes two foundational suppositions to the Treaty of Westphalia and the events that preceded it. The first supposition that Bederman identifies is "that international law needs States in order to grow and develop."[49] International law depends upon discrete political communities that can recognize and engage with one another. However, not all types of political communities can support such a legal regime, which leads to Bederman's second supposition: "[International law] needs States with strong internal institutions and a profound self-awareness that we would today call nationalism."[50] What Bederman identifies in his two Westphalian suppositions is not an intrinsic element of a phenomenon we might call "international law," but the particular context that shapes international law as we know it, which is built upon a particular type of state that emerged in 16th and 17th century Europe.

Given the growth of international law from the Westphalian nation-state, that concept deserves some attention. Anouar Majid places the embryo of the nation-state even earlier than Westphalia in the *Reconquista* and expulsion of the Moors from the Iberian Peninsula.[51] This act of total exclusion sets the stage for the concept of a political community defined on the basis of a nation, understood as a citizenry of "common heritage."[52] Majid reminds us that the formation of nation-states in Europe was not a

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[48] David J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001); Mark W. Janis and Carolyn Evans, eds., *Religion and International Law* (The Hague: Martinus Nijhoff Publishers, 1999).
[49] David J. Bederman, *International Law Frameworks* (New York: Foundation Press, 2006), 2.
[50] Ibid.
[51] Anouar Majid, *We Are All Moors: Ending Centuries of Crusades against Muslims and Other Minorities* (Minneapolis: University Of Minnesota Press, 2009), 43-45.
[52] Ibid., 44.

matter of drawing boundaries around existing political communities. [53] Rather, the European states identified or invented a "common heritage," drew boundaries, and expelled or assimilated those who were rendered outsiders during state formation but found themselves inside the new political boundaries—a process Heather Rae refers to as the "pathological homogenization" of state formation.[54] Rae describes the "bounded political community of the modern state" as coextensive with a nation, or "an exclusive moral community from which outsiders must be expelled."[55] These bounded political community's also developed particular institutional frameworks, which Connie McNeely identifies as "consolidation of territorial control, centralization, coordination among divisions, differentiation of government from other organizations, and acquisition and mutual recognition of autonomy by some governments."[56]

Over time, the nation-state gradually emerged as the dominant form of European political community, consolidating its hold after the year 1500.[57] The 1648 Peace of Westphalia cemented the nation-state's dominance in a number of ways. First, many of the emerging states were routinized as the established political powers of the time, thereby establishing many of Europe's modern nation-states including Great Britain, France, Spain, Portugal, Sweden, and Russia.[58] Second, the Peace of Westphalia launched the concept of mutual recognition in international law.[59] According to the concept of mutual recognition, states gain legitimacy—which means autonomy and sovereignty—in

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[53] Ibid., 45.
[54] Heather Rae, *State Identities and the Homogenisation of Peoples* (Cambridge: Cambridge University Press, 2002), 3.
[55] Ibid.
[56] McNeely, *Constructing the Nation-State*, 3 (citation omitted).
[57] Ibid.
[58] Bederman, *International Law Frameworks*, 2.
[59] Ibid., 2-3, 57.

part by being recognized as legitimate by other states, making the state a delightfully tautological justification of its own existence. Finally, and most importantly, "[t]he Thirty Years War [which precipitated the Peace of Westphalia], also provided the ultimate intellectual and political justification for nation-States: States needed to be *sovereign* in order to confront the challenges that war and domestic upheaval brought."[60]

The role of sovereignty cannot be understated. The advent of state sovereignty marks off the state as an inviolable zone of control.[61] Sovereignty bespeaks the state as both a space and an authority: a space with borders to be respected and an authority not to be challenged from the outside. While debates were had over the proper source of the state's sovereignty,[62] that the state was a sovereign was quickly and effectively entrenched. Sovereignty is vastly important for the discussion at hand because it defines the limit of the concept of citizenship that also emerges in the wake of Westphalia. Though I will discuss sovereigns and refugees in further detail below, it is worth noting here that in the context of the modern state, the citizen is fully contained and inscribed within the scope of the sovereign. As Giorgio Agamben has noted, "The fiction implicit here is that *birth* immediately becomes *nation*, such that there can be no distinction between the two moments. Rights, that is, are attributable to *man* only in the degree to which he is the immediately vanishing presupposition (indeed, he must never appear

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[60] Ibid., 2.

[61] "Sovereignty became the linchpin of the notion that States are independent and autonomous . . . . States thus owed no allegiance to a higher authority---not to God, nor a moral order or ideological ideal." Ibid. It is worth noting that this notion of sovereignty also provides part of the justification for European colonialism throughout the world. Where there is no state there is no political community to challenge European control. In effect a territory without a state is *res nullius*, ready for "civilizing." David J. Bederman, *The Spirit of International Law* (Athens, GA: University of Georgia Press, 2002), 132.

[62] See, e.g., Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1904); John Locke, *Two Treatises on Government* (London, 1821); Niccolò Machiavelli, *The Prince* (London: Grant Richards, 1903).

simply as man) of the *citizen*."[63]

The nation-state that emerges with the Peace of Westphalia remains largely confined to Western Europe, with the notable exceptions of the Holy Roman and Hapsburg Empires, for the next 250 years. It was the aftermath of the two world wars that led to the eventual expansion of the nation-state model to virtually all the territories of the world, though not through conquest. Prior to the 20th century, European colonialism had already spread European dominance and hegemony around the globe. It was the post-war collapse of these empires that created the fertile ground for the spread of the nation-state.

World War I ended with the collapse of what remained of the Hapsburg (Austro-Hungarian) Empire in Western Europe, along with the Russian and Ottoman Empires, covering much of Eastern Europe, the Mediterranean, and the Middle East. Much of the territory formerly under imperial control was now divided into new nation-states under the auspices of the Peace Treaties.[64] Where new nation-states were not created in the wake of World War I, territory, such as former Ottoman holdings in the Middle East, came under the control of the European colonial powers. These colonial empires differed from older imperial models in that the seat of power was concentrated in a European nation-state, and the colonial holdings were, among other things, civilizing projects of the metropole. Much has been written about the impact of the metropolitan sense of civilizational superiority and its impact on the colonies, which I will not rehearse here except to note that the colonizing ("civilizing") project of the European nation-states was bound up with their self-perception as an exclusive moral community. Thus, these new territorial holdings, like the already extant colonial holdings of the European powers,

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[63] Agamben, "We Refugees," 5.
[64] Arendt, *Imperialism*, 150.

became proto-nation-states as the Europeans exported their "civilization" including concepts of political community and governance—but not sovereignty.

The subsequent devastation of World War II so morally and materially weakened the European colonial powers that the beginnings of decolonization followed closely on the heels of its conclusion.[65] Though decolonization would continue for over thirty years, the process quickly and continually brought new political communities on the model of European nation-states into existence, as the proto-states of the colonial period gained sovereignty through political and military revolution. However, many of these new states, even those born in violent revolution, came into existence on the drawing board of European statesmen, either following established colonial borders or according to the drafting pen of the metropole where "independence" was "granted."[66] In the creation of new states from the former empires of pre-World War I Europe and the former colonies, the European statesmen who assumed the task of drawing new boundaries were often less concerned with socio-political cohesion among the populace than had been their predecessors who conceived the state on the basis of an ethno-nation.[67] As a result, the modern state ceased, empirically, to be a *nation*-state at all.

Thus, where citizenship had once been correlated to nationality and state membership,[68] the conditions for such a "trinity of state/nation/territory"[69] seem increasingly untenable. Which is not to say that citizenship has been delinked from

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[65] For a history of decolonization, see Raymond F. Betts, *Decolonization* (New York: Routledge, 1998), in particular, pages 102-03 contain a useful timeline.
[66] Robert J. C. Young, *Postcolonialism: A Very Short Introduction* (Oxford: Oxford University Press, 2003), 35.
[67] Guyora Binder, "Cultural Relativism and Cultural Imperialism in Human Rights Law," *Buffalo Human Rights Law Review* 5 (1999): 219-20; Young, *Postcolonialism*, 35.
[68] Heater, *A Brief History of Citizenship*, 3.
[69] Agamben, "We Refugees," 7.

nationality, ethnicity, religion or a host of other categories in many states.[70] However, the expectation that has arisen in international law is that citizenship will correspond to the fully normative definition of citizenship offered by Heater.[71] In the colonial period, the state may have differentiated between citizens and colonial subjects, but the spread of the state model has led to a world in which all territory is state territory and all persons are citizens. The "nation" in nation-state has now become a territorially defined concept, though notions of cohesion, community, and allegiance also remain operative.

A Definition of Citizenship in an Era of International Law and Human Rights

The preceding section addressed the development and spread of the nation-state as the dominant form of political community. This development sets the nation-state at the center of politico-legal reality, meaning that the nation-state is the point of orientation for both the supra-state (international) and the sub-state (personal) spheres. The personal and the international interact only through the prism of the nation-state. I turn now to the negotiations through that prism—the concept of citizenship in international law.

The early routinization of sovereignty in the modern state meant that in the burgeoning field of modern international law, persons were mediated through the state. Thus, Lassa Oppenhein could write in his 1905 treatise on international law,

> Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. . . . Therefore, all rights which might necessarily be granted to an individual human being according to the Law of Nations are not international rights, but rights granted by Municipal Law in accordance with a duty imposed upon the respective State by International Law.[72]

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[70] See Román, *Citizenship and Its Exclusions.*
[71] For Heater's definition refer back to the text accompanying note 43.
[72] Lassa Oppenheim, *International Law: A Treatise,* vol. 1 (New York: Longmans, Green, & Co., 1905), 18-19.

The possibility of legal subjectivity outside of the state did not exist in international law because nothing existed outside the state—neither persons nor territory. Persons could be legal subjects under international law only by first being legal subjects of states, which meant citizens. That is, international law with its focus on sovereign states understood persons only as subjects with rights and duties vis-à-vis the state. Citizenship here is stripped of any normative content excepting what states might agree to in the way of obligations towards their citizens under international law.[73] This is exemplified by the early international agreement on freedom of religion that was part of the Peace of Westphalia; in the same breath that those early European states established sovereignty over their people they also agreed to certain limitations to allow for a limited freedom of religion.[74]

Through the process of decolonization after the Second World War, the overbroad definition of citizenship in international law eventually came to reflect more functional, state understandings of citizenship. In the colonial period, international law saw citizens of the metropole and colonial subjects as citizens despite the vast inequalities that existed between these two groups because they were both subject to the sovereignty of the colonial states. After decolonization, a far greater number of the world's people became citizens in fact and not just citizens in theory.

Also in the wake of World War II there emerged a challenge to the dominant

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[73] "States answered to nothing but themselves, and to the extent that a rule of law was possible between States, it was only because States had specifically consented to be bound by such rules." Bederman, *International Law Frameworks*, 2.

[74] Particularly enlightening here is the continuance of the Peace of Augsburg's principle that the state sets the religion for its territory, and the agreement to allow limited freedom for dissenters from the state religion. Leo Gross, "The Peace of Westphalia, 1648-1948," *The American Journal of International Law* 42, no. 1 (1948): 22.

notions of state sovereignty and state citizenship.[75] Profoundly disturbed by the National Socialist government in Germany's sovereign freedom to terrorize its own citizens, the doctrine of human rights came to the forefront of international law discourse.[76] Radically, the doctrine of human rights asserted that there was a constraint on the sovereign authority of the state over its citizens beyond whatever constraints a state self-imposed. In the end, however, unable or unwilling to actually challenge state sovereignty, human rights doctrine came to rely on states as the only effective actors of protection even insofar as they were perceived to be the primary violators. Thus, while human rights doctrine purports to establish standards of conduct that emerge outside of state sovereignty, in the inherent dignity of persons, the doctrine actually reifies the citizen-state relationship. Human rights obligations are created by states, either through treaty or customary international law. Human rights obligations are observed, or broken, by states. State sovereignty continues to define the possibility of human rights.[77]

It is possible that the continued development of human rights is moving the notion of the person in international law beyond that of the citizen of a state, and thereby placing some sort of constraint on state sovereignty. The most concrete example of this is the current debate over "humanitarian intervention" as a method of human rights enforcement. The notion of humanitarian intervention makes concrete the notion that there exists a relationship between the international community and persons that

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[75] Bederman, *International Law Frameworks*, 99-100.

[76] Nazi atrocities were not the only factor in the development of human rights doctrine, but it was the catalyst for the introduction of human rights discourse into the realm of international law. Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2003), 2-3.

[77] I am not arguing that the human rights movement has achieved nothing. Quite to the contrary, it has achieved a great deal. What I am arguing is that it has not moved persons as legal subjects outside the realm of states, and therefore, human rights does not reach to those who are, in fact, outside the state. On the whole, rights still require citizenship—even human rights.

transcends the citizen-state relationship. However, humanitarian intervention is by no means an accepted principle in international law, nor is it uncontroversial. I do not offer judgments on humanitarian intervention here except to note that there are many valid misgivings. I raise the issue to note that, if there is a move in international law beyond the state-citizen relationship, it has not yet occurred.

Thus, there are two conclusions to draw regarding the citizen under international law. First, international law understands persons only as inscribed in the sovereignty of a state. Second, as international law is effected through the sovereign state, the person understood through the lens of the state—the citizen—is the norm. Thus, Bederman notes, "it is crucial to realize that States still remain the vehicle by which most individuals on the planet aspire to a legal ordering of their rights in various kinds of status relationships and transactions."[78]

When Citizenship Is Interrupted: The Refugee Exception under International Law

In his preface to the second edition of *The Refugee in International Law*, Guy S. Goodwin-Gill writes: "Refugee law nevertheless remains an incomplete regime of protection, imperfectly covering what ought to be a situation of *exception*."[79] Goodwin-Gill's statement drives at the causative element of refugee identity; there is no refugee

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[78] Bederman, *International Law Frameworks*, 72. The right of individual petition to the European Court of Human Rights, whereby an individual can make a direct petition to the ECHR, whose ruling will be binding on the state against whom the complaint is filed, is an interesting exception that proves the rule. First, individual petition only functions for those states that voluntary agree to submit their sovereignty to the ECHR. Second, individual petition is only possible a petitioner exhausts domestic remedies. Thus, for an individual to petition the ECHR her state must voluntarily abdicate part of its sovereignty to the ECHR, and to seek relief she must exercise all her options as a state citizen before she can exercise any rights as a supra-state (or EU) citizen. For an overview of human rights protection under European regional institutions, including the ECHR, see Dinah Shelton, "The Boundaries of Human Rights Jurisdiction in Europe," *Duke Journal of Comparative and International Law* 13 (2003): 96.

[79] Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed. (New York: Oxford University Press, 1996), v (emphasis added).

without a wrong or fear of a wrong and a state failure of its duty to its own citizens.[80] These conditions ought to be exceptional. However, because the international legal system is premised on the citizen-state relationship, what should be an exceptional normative failure of a state in its duty to its citizen results in refugees themselves becoming exceptional subjects. It is in light of the two norms noted in the conclusion of the prior section that the refugee is exceptional. The refugee is an exception in an international legal framework built around citizenship, and the refugee is an exception to a topography mapped by states.

It will be remembered that I previously defined citizenship as the relationship of an individual to the state with duties and rights running in both directions. Let me now clarify that as a relationship, citizenship has a dynamic, interrelational element. Citizenship is not a formalistic category; a social security number and passport do not make a citizen. If the rights that characterize citizenship are violated and know no vindication, then citizenship is ineffective and undermined. This is the notion of citizenship that forms the core of international law after the human rights revolution. It is important to understand citizenship as an effective relationship because this is the notion that is undermined in the case of refugees. A refugee may very well maintain her technical citizenship, but without effective citizenship the refugee is effectively stateless.

It is this notion of statelessness that marks the earliest attempts to reconcile refugees in international law. The refugee became a category of international concern at the same time, and not coincidentally, that the nation-state was beginning its march

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[80] "With fundamental human rights at issue, the key remains violence, or the risk or threat of violence, but only in certain cases; those who move because of pure economic motivation, pure personal convenience or criminal intent are excluded." Ibid., 29.

toward global dominance as a model of political community. Though asylum had long functioned as a legal protection, first against extradition and later against deportation,[81] it was not until the mass migrations following the reshaping of the European political map in the aftermath of World War I that the issue of refugees became a matter of international legal concern.[82] Arendt argues that this new phenomenon, intimately tied to the nation-state and its capacity to render persons stateless both *de jure* and *de facto*, led to the denigration of the venerable legal institution of asylum; a millennia-old institution[83] collapsed under the weight of the new mass refugee movements.[84] What no one nation could cure through asylum became the concern of the "family of nations."

What is particularly important here is that these early attempts to meet the new challenge of refugees were predicated on effective notions of citizenship. This notion appears in Guy Goodwin-Gill and Jane McAdams' description of early attempts to define refugees. "In treaties and arrangements concluded under the auspices of the League of Nations, a group or category approach was adopted. That someone was (a) outside their country of origin and (b) without the protection of the government of that State, were sufficient and necessary conditions."[85] Goodwin-Gill and McAdams view these earlier, post-World War I definitions as based in "flexible or open groups and categories," and they see a move after World War II to "more closed and legalistic" definitions that culminated with the 1951 Convention.[86] However, what is consistent across the flexible,

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[81] Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009), 1. I will treat asylum law in greater detail in Chapter Two.
[82] Agamben, "We Refugees," 2.
[83] See the discussion of asylum in the ancient Near East in Chapter Three below.
[84] Arendt, *Imperialism*, 160-61.
[85] Guy S. Goodwin-Gill and Jane McAdams, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007), 16.
[86] Ibid., 19.

open categories and the closed, legalistic categories is the notion that the refugee is no longer effectively a citizen of her state, insofar as she has lost the protection of her state.

As a result of losing her citizenship, the refugee fell into an international legal void. Arendt characterized the problem as such:

> The second loss which the rightless suffered was the loss of government protection, and this did not imply just the loss of legal status in their own, but in all countries. Treaties of reciprocity and international agreements have woven a web around the earth that makes it possible for the citizen of every country to take his legal status with him no matter where he goes . . . . Yet, whoever is no longer caught in it finds himself out of legality altogether.[87]

Thus, it comes as no surprise that Bederman characterizes the effectiveness of international law in citizen-centric terms: "As already intimated, even in modern international law it is necessary to have an affiliation with a State. . . . [M]ost of the mechanisms for protecting and vindicating the rights of individuals under international law typically depend on a person having nationality."[88]

The emergence of the refugee also occurred in an era when the phenomenon of open borders was rapidly coming to an end.[89] In this context, stateless meant not only without citizenship but also without territory. The refugee was caught in politico-spatial liminality in a world in which citizenship and territory were mapped upon one another by the nation-state.

The consequence of being an exception to citizenship is that the refugee was stripped of legal subjectivity under international law and left only with her moral subjectivity. But, as Agamben points out, the international legal order had no place for

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[87] Arendt, *Imperialism*, 174.
[88] Bederman, *International Law Frameworks*, 73.
[89] Price, *Rethinking Asylum*, 52.

solely moral subjects:

> That there is no autonomous space within the political order of the nation-state for something like the pure man in himself is evident at least in the fact that, even in the best of cases, the status of the refugee is always considered a temporary condition that should lead either to naturalization or to repatriation. A permanent status of man in himself is inconceivable for the law of the nation-state.[90]

Though Agamben's quote points out one of the difficulties of accommodating bare humanity under the international legal regime, the fragility of such legal subjectivity, the next section will treat the attempts to create a legal subjectivity for refugees.

The Possibility of Moving from Exception to Subjectivity

The formulation of an international legal regime for refugees had to contend with the extant reality: state sovereignty reigned supreme and refugees as non-citizens (stateless) were in the world unprotected. What has gone unmentioned up to now, but cannot be ignored or forgotten, is that these problems of legal status and protection carry with them very material consequences. As usual, Arendt addresses the matter with perspicacity, arguing that "[t]he prolongation of their lives is due to charity and not to right, for no law exists which could force the nations to feed them; their freedom of movement, if they have it at all, gives them no right to residence which even the jailed criminal enjoys as a matter of course; and their freedom of opinion is a fool's freedom, for nothing they think matters anyhow."[91] The impulse to tackle the refugee "problem"[92]

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[90] Agamben, "We Refugees," 4.
[91] Arendt, *Imperialism*, 176.
[92] Though the language of a "refugee problem" is often deployed, I agree with Malkki that identifying the situation as a "problem" is insufficient and potentially harmful. Malkki argues that refugees "are not ordinary people but represent, rather, an anomaly requiring specialized correctives and therapeutic interventions. It is striking how often the abundant literature claiming refugees as its object of study locates 'the problem' not in the political conditions or processes that produce massive displacements of people but within the bodies and minds (and even souls) of people categorized as refugees." Liisa Helena Malkki, "National Geographic: The Rooting of Peoples and the Territorialization of National

is a humanitarian impulse. Thus, Goodwin-Gil and McAdams summarize the refugee's legal standing by noting that "[t]he refugee in international law occupies a legal space characterized, on the one hand, by the principle of State *sovereignty* and the related principles of territorial supremacy and self-preservation; and, on the other hand, by competing *humanitarian* principles deriving from general international law (including the purposes and principles of the United Nations) and from treaty."[93] Because they are not citizens, and vulnerable as such, there is an impulse to make of refugees some form of legal subject. This subjectivity is a category unto itself: refugee subjectivity. However, it is characterized by two important principles: the principle of *non-refoulement* and the principle of non-discrimination. These principles provide the refugee some place in international law: a thin right to remain in the territory where they have sought asylum and a handful of basic human rights.

It will be remembered that the primary characteristic of citizenship is the relationship of the citizen to her state, and that this relationship in international law is oriented around the state's duty of protection to its citizens. The refugee is without protection in the international arena as she is effectively, if not technically, stateless. Bare humanity is legally invisible. The goal then became to provide some modicum of protection.

The principal of *non-refoulement* is perhaps the most important achievement of the Convention Relating to the Status of Refugees.[94] The principal of *non-refoulement*

Identity among Scholars and Refugees," in *Culture, Power, Place: Explorations in Critical Anthropology*, ed. Akhil Gupta and James Ferguson (Durham, NC: Duke University Press, 1997), 63.

[93] Goodwin-Gill, *The Refugee in International Law*, v (emphasis added).

[94] The Convention Relating to the Status of Refugees was signed at Geneva in 1951, see note 32 above. The Convention was subsequently amended in 1967 by a Protocol negotiated in New York. Protocol

holds "that no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture."[95] It is contained in Article 33 of the Convention.[96] The principle of *non-refoulement* is key to refugee protection because it creates a notional right to be outside of one's country—not a right to be somewhere but at least the right not to be sent back to persecution.

The Convention Relating to the Status of Refugees also contains a series of non-discrimination provisions. The non-discrimination provisions make up a significant portion of the Convention (Articles 12–24), and provide that host states should not discriminate against refugees in matters of basic human rights including, *inter alia*, access to courts, access to employment, and the right to association.[97] Refugees are to be treated by states in a manner equivalent to that of either nationals or resident aliens depending on the provision at issue. Thus, the non-discrimination provisions provide for a certain legal and moral subjectivity—the capacity to engage in various relationships—beyond a bare right not to be expelled.

So we might imagine that after the Convention, refugees have a place in the international legal regime and are now one among a cast of subjects on the international scene. However, even after the 1967 Protocol it remains that legal subjectivity for

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Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6233, 606 U.N.T.S 267. The 1967 Protocol removed temporal and geographical limitations contained within the definition of a refugee that limited the 1951 Convention to persons displaced in Europe prior to 1951. Convention Relating to the Status of Refugees, *supra* note 32, art. 1; Protocol Relating to the Status of Refugees, *supra* note 94, art. 1. The current Convention definition of a refugee is available in note 128 below. From this point forward references to the Convention Relating to the Status of Refugees will mean the 1951 Convention as amended by the 1967 Protocol. However, note that not all parties to the 1951 Convention have acceded to the 1967 Protocol, so there are situations where the 1951 Convention definition remains valid.

[95] Goodwin-Gill and McAdams, *The Refugee in International Law*, 201.

[96] Convention Relating to the Status of Refugees, *supra* note 32, art. 33.

[97] *Id*. arts. 12-24.

refugees is only conferred through recognition.[98] Citizens acquire citizenship at birth, either by being born in the territory of the state, *jus soli*, or by being born of a citizen, *jus sanguinis*, or some combination of the two.[99] Furthermore, citizens may exchange or add onto their citizenship through naturalization. For refugees, however, legal status is acquired only by designation. Citizenship remains the default, which most of us, with the exception of the few *de jure* stateless in the world, are entitled to the moment we come into this world. Thus, we are possessed both of our moral and legal subjectivities by default and garner recognition as legal subjects under international law by default. Refugees in contrast are possessed only of their bare humanity, and to *again* become legal subjects they must be recognized. This leads to two problems. First, the refugee subject is inevitably underinclusive encompassing only a part of the bare humanity that has been stripped of its legal subjectivity. Guy Goodwin-Gill summarizes this difficulty well in discussing the difficulty of defining a "refugee":

> The term "refugee" is a term of art, that is, a term with a content verifiable according to the principles of general international law. . . . Implicit in the ordinary meaning of the word "refugee" lies an assumption that the person

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[98] Goodwin-Gill and McAdams argue that the principal of *non-refoulement* is prior to recognition, and therefore, states cannot return persons who status is undetermined or determined not to be that of a refugee to a situation of persecution. Goodwin-Gill and McAdams, *The Refugee in International Law*, 205-08. I agree with Goodwin-Gill and McAdams on two accounts: 1) some states may respect the principal of *non-refoulement* for persons whose status is undetermined, particularly in mass movements, and 2) *non-refoulement* can function in the alternative to recognition of refugees. However, I maintain that recognition is key because once undetermined persons have their status determined, finding that they are not refugees is premised on the assumption that they *do not* have a well-founded fear of persecution on one of the Convention grounds. While a person could have a fear of persecution but not be a refugee, such a situation is likely to be met by a higher threshold. At least this is the case in the U.S., where a person denied asylum may seek "withholding of removal," which means they are not a refugee but can have their deportation stayed. 8 U.S.C. § 1231(b)(3)(A) (2006). However, the burden of proof for withholding of removal is higher than that for asylum, and the individual must prove that there is a *clear probability* that she *will* be persecuted. Regina Germain, *Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure*, 6th ed. (Washington, D.C.: American Immigration Lawyers Association, 2010), 90. This burden is incredibly difficult to meet. The withholding of removal grant rate in 2010 hit a five year high of 16%. Office of Planning, Analysis & Tech., Exec. Office of Immigration Review, U.S. Dept. of Justice, FY 2010 Statistical Yearbook K4 (2010).

[99] Bederman, *International Law Frameworks*, 72.

> concerned is worthy of being, and ought to be, assisted, and, if necessary, protected from the causes and consequences of flight. . . . Defining refugees may appear an unworthy exercise in legalism and semantics, obstructing a prompt response to the needs of people in distress. States have nevertheless insisted on fairly restrictive criteria for identifying those who benefit from refugee status and asylum or local protection."[100]

Second, because refugees, even after having a status created to address their predicament, remain enmeshed in a world marked by the legal relations of citizens and states, their recognition comes only from states.[101]

Refugees, Sovereigns, and Admission: The Thin Protection of International Law and the Necessity of Recognition

In his book *The Ethics and Politics of Asylum*, Matthew Gibney writes, regarding what he characterizes as the schizophrenic Western response to refugees and asylum seekers, that "great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the state where they could receive its protection."[102] Part of what Gibney describes as the "schizophrenic approach" is the refugee's predicament of recognition. As Regina Germain notes, in theory refugee status is not conferred: "A person is a refugee as soon as he or she fulfills the criteria contained in the definition and not when he or she is declared or determined to be a refugee by a particular country."[103] In theory, a refugee is inherently such. "[A] person does not become a refugee when he or she is recognized, but

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[100] Goodwin-Gill and McAdams, *The Refugee in International Law*, 15.
[101] UNHCR is also empowered under its statute to recognize refugees, thereby conferring upon them refugee status. Ibid., 51-52. However, for this recognition to have any meaning, either a state must be willing to accept UNHCR recognition on face or willing to review and adopt UNHCR recognition on a case-by-case basis. Both models occur in practice, but the key point is to recognize that UNHCR recognition is not effective without the imprimatur of a state.
[102] Gibney, *The Ethics and Politics of Asylum*, 2.
[103] Germain, *Asylum Primer*, 4.

is recognized because he or she is a refugee."[104] However, this distinction becomes highly unstable in the move from theory to practice. In practice, a "refugee" receives no protection (*non-refoulement*,[105] access to resources, resettlement, etc.) until she is recognized as a refugee. A person whose claim fails for illegitimate reasons only remains a refugee in theory, but without the protection that is the *raison d'être* for the status, it is meaningless. Thus, in the context of an international legal regime built on the sovereignty of states, a refugee is a refugee only at the pleasure of the nation-state.

This is brought into clearest relief with regard to asylum seekers. Asylum seekers are those persons who in attempting to flee persecution seek refuge in another country without a prior refugee status determination. Gibney offers the following, useful explanation of the relationship between the categories of "asylum seeker" and "refugee":

> [T]he category of the asylum seeker is at the same time a more *expansive* one than that of the refugee; unlike refugees in camps and those who gain entry through resettlement programmes (most of whom have received the UN's imprimatur or are obviously escaping life-threatening situations like war), the status of an asylum seeker as an endangered person is typically undetermined. To be an asylum seeker an individual merely has to *claim* to be a refugee. It is perhaps unsurprising, then, that the politics of asylum in Western countries is dominated by concerns that bogus asylum seekers are exploiting the generosity of the host country.[106]

Gibney makes the point very clearly that an asylum seeker is not already a refugee waiting to be recognized as such, but is an individual making a claim for a status. The determination of that claim is then in the hands of the sovereign nation-state to whom that individual is applying.

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[104] Ibid. See also United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), ¶ 28.

[105] Note the alternative reading of *non-refoulement* put forward by Goodwin-Gill and McAdams, discussed above at note 98.

[106] Gibney, *The Ethics and Politics of Asylum*, 10.

Furthermore, a claim is not a right. There is no right to asylum. As Arendt wrote in 1951, "Theoretically, in the sphere of international law, it had always been true that sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion . . . ."[107] There is a right to seek and enjoy asylum in the Universal Declaration of Human Rights,[108] but as Jane McAdam has noted,

> it was not accidental that article 14 [of the UDHR] did not contain a right to asylum. As eminent international lawyer Hersch Lauterpacht observed at the time, "States were unwilling to assume a moral obligation to grant asylum, let alone a legal one. The original draft text, which provided for a right to seek 'and be granted' asylum from persecution, was rejected so as to limit the extent of States' obligations."[109]

This state of affairs is unaltered by the Convention Relating to the Status of Refugees, which contains no obligation to admit refugees to state territory, though some limits are established by the principle of *non-refoulement*.[110] But, to enjoy the protection of *non-refoulement*, one must get through the proverbial door, and a denial of asylum is, in the U.S., usually an order for deportation.[111]

In 1952, the Supreme Court echoed Arendt's statement in its decision in *Harisiades v. Shaughnessy*, saying,

> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.[112]

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[107] Arendt, *Imperialism*, 158.
[108] G.A. Res. 217 (III) A, *supra* note 28.
[109] Jane McAdam, "Introduction," *Refugee Survey Quarterly* 27, no. 3 (2008): 4 (citations omitted).
[110] "The incorporation of the Refugee Convention's Protocol into the 1980 Refugee Act bound the US to an obligation not to *refoule* any person at or within its borders with a legitimate claim to refugee status. While this is not an obligation to grant asylum *per se*, the difficulties of gaining protection for refugees in other countries usually makes it a *de facto* duty." Gibney, *The Ethics and Politics of Asylum*, 161.
[111] See note 98 above.
[112] 342 U.S. 580, 587-88 (1952).

Thus, Congress has the sovereign power to establish a right of asylum[113] for persons seeking admittance to the U.S. The principle of *non-refoulement* stands in international law, but the act of recognizing the claim of an asylum seeker to refuge—a claim to refugee status—is entirely within the discretion of the state. Thus, refugees and asylum seekers continue to face the predicament of being bare humanity. While the Convention Relating to the Status of Refugees establishes the possibility of legal subjectivity and protection, refugees and asylum seekers must be recognized. Not only must they be recognized as meeting the definition of a refugee, they must be recognized as a moral subject worthy of protection. Assessing how U.S. asylum policy fails to recognize the asylum seeker as a moral subject is the focus of Chapter Two.

While the primary focus of this thesis is the ethics of U.S. asylum policy, the foregoing analysis is critical for understanding the foundational norms that establish the possibility of asylum. What is most important to take away from the foregoing analysis as we move forward is the inevitable reliance of refugees on states for their very legal identity

[113] A right of asylum should not be confused with a right to asylum. There is no right to asylum under U.S. law. The U.S. Congress has made the granting of asylum a discretionary act and the power to exercise that discretion is delegated to the Attorney General and The Secretary of Homeland Security. 8 U.S.C. 1158(b)(1)(A) (2006). The discretionary nature of asylum will be discussed in greater detail below.

CHAPTER TWO: ENCOUNTERING THE REFUGEE OTHER IN ASYLUM

> *"The successful asylum story is one that fits into the framework of credibility and truth telling; the successful lawyer is the one who is best able to get her clients to tell a story that is perceived as 'true' (credible, plausible). Credibility is often measured by coherence. That is, being who you say you are is a matter of presenting a consistent identity . . . ."*
>
> *-Carol Bohmer and Amy Shuman, Rejecting Refugees*[114]

In *Giving an Account of Oneself*, Judith Butler takes up the question of the moral subject, arguing that "[t]he 'I' is always to some extent dispossessed by the social conditions of its emergence. This dispossession does not mean that we have lost the subjective ground for ethics. On the contrary, it may well be the condition for moral inquiry, the condition under which morality itself emerges."[115] Through the course of her work, Butler describes a moral subject that is neither solely an autonomous individual nor solely a social construction. Rather, the moral subject is the product of self-narration, relationality, and social norms. The moral subject emerges in the process of giving an account of oneself to another[116]—a relationship that is conditioned by social norms:

> The "I" does not stand apart from the prevailing matrix of ethical norms and conflicting moral frameworks. In an important sense, this matrix is also the condition for the emergence of the "I," even though the "I" is not causally induced by those norms. We cannot conclude that the "I" is simply the effect or the instrument of some prior ethos or some field of conflicting or discontinuous norms. When the "I" seeks to give an account of itself, it can start with itself, but it will find that this self is already implicated in a social temporality that exceeds its own capacities for narration . . . .[117]

I take up Butler's work here precisely because she draws out the vital importance of

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[114] Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (London: Routledge, 2008), 169-70.

[115] Butler, *Giving an Account of Oneself*, 8.

[116] "Nietzsche did well to understand that I begin my story of myself only in the face of a 'you' who asks me to give an account. Only in the face of such a query or attribution from an other—'Was it you?'—do any of us start to narrate ourselves, or find that, for urgent reasons, we must become self-narrating beings." Butler, *Giving an Account of Oneself*, 11.

[117] Ibid., 7-8.

interrelationality and social norms in the formation of the moral subject. However, I approach this set of concerns from a slightly different perspective. While Butler's primary concern in *Giving and Account of Oneself* is what it means for the self to become a moral subject, my concern is with the possibility of moral subjectivity within the constraints of a given set of norms—U.S. asylum law.

Butler, invoking the work of Michel Foucault, points out that both the norms and the Other to whom a subject addresses herself set the condition for the emergence of the moral subject. She poses the following questions as necessary inquiries for an ethical philosophy: "First, what are these norms, to which my very being is given over, which have the power to install me or, indeed, to disinstall me as a recognizable subject? Second, where and who is this other, and can the notion of the other comprise the frame of reference and normative horizon that hold and confer my potential for becoming a recognizable subject?"[118]

These two questions are critical inquiries for a moral subject making ethical determinations, but they ring equally as true in determining what sort of moral subjectivity is possible under a given set of social norms. Recalling the discussion of legal and moral subjectivity from the introduction, we can see in Butler's interrogatories the points of intersection between these two forms of subjectivity. The legal subjectivity of refugee status governs the recognizability of the asylum seeker. However, the interrelationality of the state and the asylum seeker, the ethical frame of this relationship, sets a normative horizon that constrains the process of recognition. This is what I will refer to later as the ethic of humanitarianism in asylum.

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[118] Ibid., 23.

The asylum process is not determinative of the asylum seeker's identity; as Butler says, "the I is not causally induced by those norms." But, the asylum seeker's account of herself in the context of seeking asylum is affected by the norms, both legal and moral, of the system. To seek asylum is to provide a narrative that satisfies the criteria enumerated in the definition of a refugee. That there is a specific, a defined, identity that the asylum seeker is expected to have lived in order to be(come) a refugee establishes a definitive set of norms that "set the stage for the subject's self-crafting, which always takes place in relation to an imposed set of norms."[119] It is important to note that this is a socially, historically, and politically determined set of norms, which is to say that the definition of a refugee, the expected narrative identity of the asylum seeker, is not stable. A brief discursus into the history of U.S. asylum law helps to make this point clear.

A Brief History of U.S. Asylum Law

The U.S. is in many ways a latecomer to the international consensus on refugees. A non-signatory to the 1951 Convention Relating to the Status of Refugees, the U.S. finally adopted the 1951 Convention through incorporation when it ratified the 1967 Protocol Relating to the Status of Refugees.[120] However, the U.S. did not bring its domestic law into conformity with its obligations under the Refugee Convention until the passage of the Refugee Act of 1980.[121] Prior to the Refugee Act of 1980, the U.S. Congress enacted a number of statutory schemes relating to refugees. In 1948, the U.S.

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[119] Ibid., 19.

[120] U.S. Dept. of State, Treaties in Force: *A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010* 443 (2010). The U.S. ratified the 1967 Protocol in 1968. *Id.*

[121] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); see also Germain, *Asylum Primer*, 10. The U.S. subscribes to what has often been referred to as a dualist understanding of international law, whereby many international agreements are not self-executing and have no legal effect until the requirements of the agreement are enacted into domestic legislation. See Bederman, *International Law Frameworks*, 159-61.

passed the Displaced Persons Act, which provided for a limited number of visas to be provided to a very restricted group of persons displaced into the former Axis powers.[122] The Immigration and Nationality Act ("INA") of 1952,[123] which laid the foundation of modern immigration law in the U.S, incorporated the Displaced Persons Act of 1948 and adopted Article 33 of the 1951 Convention placing the principle of *non-refoulement* into U.S. law through the mechanism of withholding of removal.[124] However, when the INA was first passed in 1952, the U.S. had not adopted the Refugee Convention, and the statute lacked not only the Convention definition, it lacked any definition of "refugee."

Congress enacted a series of statutory definitions between the adoption of the INA in 1952 and the Refugee Act of 1980, but they were all limited in scope. It was not until the 1965 amendments to the INA (the Hart-Cellar Act) that a definition of refugee was written into U.S. statutory law rather than offered on an ad hoc basis.[125] However, this definition limited refugees to persons fleeing the Middle East and Communist regimes.[126] It was in light of this history that the Refugee Act of 1980 represented a major change of U.S. policy by conforming U.S. law to the extant international standards. As the Supreme Court noted in *INS v. Cardosa-Fonseca*, "If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, to which the

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[122] Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948).
[123] Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).
[124] *Id.*
[125] Hart-Cellar Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).
[126] *Id.*

United States acceded in 1968."[127]

The 1980 Refugee Act adopted a definition of "refugee," which is modeled on and mirrors the substance of the definition found in the Convention Relating to the Status of Refugees. According to the Refugee Act, a refugee is

> any person who is outside any county of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[128]

Having brought the definition of a refugee into conformity with international standards, the U.S. greatly expanded the category beyond the narrowly political (fleeing communist regimes) and geographical (Middle Eastern countries) that had previously limited its applicability.

However, we are reminded from Chapter One that the international refugee regime marks the refugee as an exceptional subject dependent upon the sovereign power of state recognition. What is most important in this brief history of U.S. asylum law is the total power of the state in the relationship between the asylum seeker and the state. The Other that Butler refers to—the one to whom the self gives its account—is, in this case, the state itself. The narrative demand and the sovereign power of exclusion are bound up

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[127] 480 U.S. 421, 436-37 (1987) (citations omitted).

[128] Germain, *Asylum Primer*, 11. The definition contained in the Convention Relating to the Status of Refugees is included here for comparison. According to the Convention, a refugee is any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership or a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who not having a nationality and being outside the country of his [or her] former habitual residence . . . , is unable or, owing to such fear, is unwilling to return to it." Convention Relating to the Status of Refugees, *supra* note 32, art. 1, *amended by* Protocol Relating to the Status of Refugees, *supra* note 94, art. 1.

in the Other that the asylum seeker gives her account to; the state is the frame of reference for her potential to become a recognized subject.

Butler describes the more-than-dependency that characterizes the relationship between the "I" and the "Other" when an account is given as essentially non-narratable because there is no narrative of the I that is independent or self-contained:

> [I]f, at the beginning . . . I am only in the address to you, then the "I" that I am is nothing without this "you," and cannot even begin to refer to itself outside the relation to the other by which its capacity for self-reference emerges. I am mired, given over, and even the word dependency cannot do the job here. This means that I am also formed in ways that precede and enable my self-forming; this particular kind of transitivity is difficult, if not impossible, to narrate.[129]

For Butler, this non-narratability is a site of ethical possibility because it is a site of risk for both the "I" and the "Other" who cannot narrate a self-contained identity and, therefore, must be open to being conditioned by the encounter with one another.[130] But this ethical possibility is foreclosed in the face of the sovereign power of the state. The state has the power—through establishing the norms that govern the encounter—to construct a particlar identity and demand that such identity in fact be narrated. There is no space for mutual reconditioning.

Perhaps the best example of the asylum seeker's moral bind is the problem she encounters in resisting the narrative demand of the state. Butler articulates a mode of resistance to the demand for a narrative account of oneself—resistance through silence. To refuse to answer the demand for a narrative account is a rejection of the norms carried through the questioning, thus "[o]f course, it is always possible to remain silent in the face of such a question, where the silence articulates a resistance to the question: 'You

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[129] Ibid., 82.
[130] Butler, *Giving an Account of Oneself*, 135-36.

have no right to ask such a question,' or 'I will not dignify this allegation with a response,' or 'Even if it was me, this is not for you to know.'[131] However, with regard to asylum seekers, to refuse the question may permit the questioner to construct a narrative for you and to act toward you on the basis of that narrative. An asylum seeker who refuses to answer will be determined to be ineligible (not a refugee) and asylum will be denied. The next section expands on this discussion of how the asylum seeker's moral subjectivity is constrained by examining the process of narrating a claim itself.

Narrating a Claim for Asylum

U.S. asylum law establishes a series of fora where asylum seekers go through status determination. Ostensibly, this status determination is a measure of whether the asylum seeker meets the definition of a refugee, in which case they are determined to be refugees and are therefore eligible for asylum. However, given the construction of the asylum seeker's moral subjectivity, these fora are in fact stages for the performance of refugee identity. As Bohmer and Shuman note, "[W]e quiz asylum applicants endlessly, to convince ourselves that they are really fleeing persecution and not lying to us so they can slip into a safer country in search of a better life."[132] This sort of adjudicatory interrogation parallels Butler's imagined theater of ethical violence:

> To hold a person accountable for his or her life in narrative form may even be to require a falsification of that life in order to satisfy the criterion of a certain kind of ethics, one that tends to break with relationality. One could perhaps satisfy the burden of proof that another imposes upon an account, but what sort of interlocutory scene would be produced in consequence? The relation between the interlocutors is established as one between a judge who reviews evidence and a supplicant trying to measure up to an indecipherable burden of proof.[133]

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[131] Ibid., 12.
[132] Bohmer and Shuman, *Rejecting Refugees*, 11.
[133] Ibid., 64.

What sort of interlocutory scene is produced, even if the one could satisfy the burden of proof? It is a scene in which the conditions for subjectivity are set by another. This is not the narrative account that is a possibility of ethics premised on interrelationality. In this context, the Other overdetermines the self that is narrating. The self must meet a set of a priori expectations as to form, content, consistency, and veracity. The result for asylum seekers is that the asylum seekers' personal account is very likely to narrate an insufficient account.[134] In short, the possibility of emerging as a moral subject depends on what burden of proof must be met, and the measure of satisfying such burden lies outside the supplicant's moral capacity. I turn now to section 208 of the INA to examine the sort of interlocutory scene that is produced in an application for asylum.

Whether and how a person meets the definition of a refugee, and is therefore eligible for asylum and admitted to the U.S., is the focus of Section 208 of the INA.[135] Under INA § 208(b)(1)(A):

> The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section *if* the Secretary of Homeland Security or the Attorney General *determines* that such alien is a refugee within the meaning of section 101(a)(42)(A).[136]

It is important to note two aspects of the text quoted above. First, the grant of asylum is entirely discretionary. The Secretary of Homeland Security and the Attorney General *may* grant asylum, but there is no positive obligation upon them to do so. Second, eligibility is determined by either the Secretary or Attorney General, which means that an asylum

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[134] For a detailed account of the various difficulties asylum seekers face in relating their stories to ajudicators see Bohmer and Shuman, *Rejecting Refugees*, chap. 3 & 4.
[135] 8 U.S.C. § 1158 (2006).
[136] § 1158(b)(1)(A).

seeker is evaluated for a status determination. Flipping the order of these two points we realize that there are two critical questions facing every asylum seeker to the U.S.: 1) Are you really a refugee? and 2) Are you worthy of admission to the U.S.?

Are you really a refugee? The process and practicalities of how this question is answered will be explored in further detail in the next section where I will explore the performance of refugee identity. However, the question itself is framed in skepticism. Because the asylum seeker is an object of sympathy as a moral subject, there is a manifest concern that only the "truly needy" should be assisted.[137] The moral demand placed on us by asylum seekers is only to provide protection for the *most* vulnerable. Thus, the asylum process must be vigilantly policed for fraud and merit.[138]

This concern results in a presumption against the asylum seeker; the asylum seeker is presumed not to be a refugee. The burden of proof that an individual meets the definition of a refugee is placed upon the asylum seeker.[139] The asylum seeker's testimony alone may be sufficient if "the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[140] Thus, it can be assumed that the asylum seeker has a burden of credibility, a burden of persuasion, and a burden of fact. It is important to understand the implications created by the presumption that places the burden of proof on the asylum seeker. Unless the asylum seeker can meet the burdens of

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[137] Bohmer and Shuman's extensive treatment of which types of claims are recognized and which are excluded lead them to conclude, "Part of the problem with the system for granting asylum is that we're ambivalent about our moral obligation to the people who make claims. Increasingly, we go to greater and greater lengths to strengthen the barriers to entry and to make sure that only a few people slip through the net. . . . We let in people whose experiences are so horrifying that we're shocked; others don't get in." Bohmer and Shuman, *Rejecting Refugees*, 263.

[138] Ibid., 264-65.

[139] § 1158(b)(1)(B)(i).

[140] § 1158(b)(1)(B)(ii).

credibility, persuasion, and fact her asylum claim will be denied.

The asylum seeker does not, however, receive a presumption of credibility.[141] Rather, the trier of fact is free to determine that an asylum seeker is not credible based on any such indication or inconsistency.[142] Any lapse in an asylum seeker's credibility, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim," can be the basis for an adverse credibility determination.[143] The trier of fact may also demand evidence that the trier of fact determines is necessary to corroborate otherwise credible testimony, which evidence *must* be provided "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."[144]

Thus, it can be seen how the burden of proof establishes a certain moral subjectivity of the asylum seeker. By placing the burden on the asylum seeker, and denying a presumption of credibility only certain narratives will be able to meet the established standard. The most clear-cut, sympathetic cases of unambiguous persecution will be both the most persuasive and the easiest to prove. By placing such an overwhelming emphasis on credibility, and denying the asylum seeker a presumption of credibility, the statute assumes that any inconsistency is the mark of attempted fraud and "true" victim narratives are marked by consistency and accuracy. In the next section I

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[141] § 1158(b)(1)(B)(iii).

[142] *Id.* ("Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or *any other relevant factor*.").

[143] *Id.*

[144] § 1158(b)(1)(B)(ii).

discuss how these legal burdens are part of the moral subjectivity that denies moral agency to asylum seekers.

Moral Agency Denied

Most Americans are familiar with the famous lines of Emma Lazarus's sonnet, *The New Colossus*, affixed to the Statue of Liberty in 1903:

> Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tossed to me,
> I lift my lamp beside the golden door!

Lazarus's poem was originally penned in 1883, one year after the golden door had begun to close on the huddled masses with the passage of the Chinese Exclusion Act in 1882—affecting the first large scale restriction on an otherwise open immigration system. While the era of U.S. immigration policy that could give rise to the sentiment of *The New Colossus*, which Paul Auster has described as transforming "Bartholdi's gigantic effigy" from "a monument to the principles of international republicanism . . . into a welcoming mother, a symbol of hope to the outcasts and downtrodden of the world,"[145] has long since ended, one might expect the sentiment to remain alive in U.S. asylum policy. Yet, Carol Bohman and Amy Shumer writing over 100 years after Lazarus criticize the U.S. for its failure to meet this ideal.

> [W]e have a category [of asylum], but we are frightened to use it except in the most obvious and sympathetic cases. We fear that if we use it too enthusiastically, we will open the floodgates to all the miserable, needy, people fleeing war or crisis, so common in our current world. . . . The whole process is riddled with fallout from this fear. . . . Asylum seekers are guilty until proven innocent.[146]

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[145] Paul Auster, *Collected Prose: Autobiographical Writings, True Stories, Critical Essays, Prefaces, and Collaborations with Artists* (New York: Picador, 2005), 508.
[146] Bohmer and Shuman, *Rejecting Refugees*, 11.

It is, as Bohman and Shumer aptly describe, the very misery and need of asylum seekers that undermines their claim. The very huddledness of the masses has closed the door. It is not, however, simply the fear of a flood of human misery washing upon our shores; rather, it is the characterization of asylum seekers as the miserable needy and asylum as charitable relief that is inscribed directly into the asylum laws themselves, which makes rejecting refugees a cognizable option. Recall Liisa Malkki's conflation of humanitarianism and bare humanity from the introduction.[147] The asylum seeker is viewed as voiceless and without moral agency, so when times are tough (as they will always be) what is generously given can, in good conscience, be denied. Peter Nyers writes of the refugee,

> Refugee identity is a limit-concept of modern accounts of the political and is constituted through an exceptional logic: whatever qualities are present for the citizen are notably absent for the refugee. The visibility, agency, and rational speech of the citizen is lacking in the prevailing representations of the refugee. Instead, qualities of invisibility, voicelessness, and victimage are allocated with the effect of effacing the political subjectivity of the refugee.[148]

Political agency is the prerogative of citizens, and refugees as non-citizens are expected to be free of political agency.[149] This conception of moral subjectivity characterizes asylum seekers as well; they are viewed as passive objects for the receipt of a generous asylum.

Returning to Butler, we realize that the demand for asylum seekers to narrate an identity is a denial of their moral subjectivity. By setting the definition of their identity, the conditions of their performance, and placing upon them the burden of proof, we take

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[147] See footnote 12 above.
[148] Nyers, *Rethinking Refugees*, xiv-xv.
[149] Ibid., xviii.

no risks in the encounter and are unchanged by their otherness. Instead, we construct a set of norms that renders asylum seekers passive, silent victims (except when we demand they tell us exactly what we want to hear, which for all intents and purposes remains silence) to whom our generosity can be bestowed—or not.

Rejecting this model for what I see as its ethical failings, I turn in Chapter Three to an alternative imaginary of the refugee's moral subjectivity. Looking to the theological traditions of the Exodus and the *hijra*, I argue that asylum seekers are not passive moral subjects, but active moral agents, whose very flight is a moral act, which makes a demand upon receiving societies.

CHAPTER THREE: AN ETHIC OF REFUGEE MORAL AGENCY

"The cry of the Israelites has now come to me; I have also seen how the Egyptians oppress them. So come, I will send you to Pharaoh to bring my people, the Israelites, out of Egypt."

-Exodus, 3:9–10

He who forsakes his home in the cause of God, finds in the earth many a refuge, wide and spacious: Should he die as a refugee from home for God and His Apostle, his reward becomes due and sure with God: And God is oft-forgiving, most merciful.

-Qur'an, 4:100

In light of the foregoing analysis, I conclude that the social norms embedded in our asylum policy are not only insufficient, but by denying moral agency to asylum seekers and by relegating them to a passive, narrative existence these norms are in fact an act of ethical violence. As Butler notes,

> Prior to judging an other, we must be in relation to him or her. This relation will ground and inform the ethical judgments we finally do make. We will, in some way, have to ask the question "Who are you?" If we forget that we are related to those we condemn, even those we *must* condemn, then we lose the chance to be ethically educated or "addressed" by a consideration of who they are and what their personhood says about the range of human possibility that exists, even to prepare ourselves for or against such possibilities.[150]

If norms that deny moral capacity to refugees create an ethical violence, then we need norms that, in Butler's words, allow us to "be in relation to him or her." We need conditions in which the Other can make a moral demand upon us. So, before proceeding to the theological resources of moral agency, I make a brief detour back through the work of Emmanuel Lévinas.

Lévinas and The Demand of the Other as a Moral Subject

In light of the foregoing analysis, we can begin to see that the Lévinasian Other

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[150] Butler, *Giving an Account of Oneself*, 45.

who orients ethical relations cannot be a face only. Given that we live in a world where social norms set the context and conditions for both our subjectivity and the subjectivity of the Other, the face may or may not have the capacity to make the demand for moral obligation. Even accepting that the Lévinasian moral demand of the Other could be preontological, when we reside here in the ontological world social norms can function to obscure the demand of the face.[151] Perhaps this is the trace that Lévinas understands as the possibility of returning from our ontological world to the "supreme presence of the face."[152] The trace interrupts and "disturbs the world's order."[153] The interruption of the trace is the opportunity to return to the ethical demand of the face by allowing it to emerge as the ultimate signifier. But, this remains only an opportunity—and only a *trace*. I might accede to the ethic of humanitarianism in asylum as acknowledging a sense of the trace, but it has allowed the interruption of the trace to pass and missed the signified face.

Judith Butler has deftly appropriated and conditioned Lévinas to offer a better understanding of how the trace interrupts and disturbs the world's order. Butler says of Lévinas, "The 'inauguration' of the subject takes place through the impingement [the trace] by which an infinite ethical demand is communicated. But this scene cannot be narrated in time; it recurs throughout time and belongs to an order other than that of time."[154] Acknowledging the trace only happens in the context in which the trace emerges, a context that is conditioned by normativity and power. Thus, Butler poses the problem of the encounter with the Other this way:

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[151] Lévinas, *Humanism of the Other*, 62; Cohen, "Introduction: Humanism and Anti-humanism—Levinas, Cassirer, and Heidegger," xxx.
[152] Lévinas, *Humanism of the Other*, 41.
[153] Ibid.
[154] Butler, *Giving an Account of Oneself*, 96.

> In asking the ethical question "How ought I to treat another?" I am immediately caught up in a realm of social normativity, since the other only appears to me, only functions as an other for me, if there is a frame within which I can see and apprehend the other in her separateness and exteriority. . . . I am caught up not only in the sphere of normativity but in the problematic of power when I pose the ethical question in its directness and simplicity: "How ought I to treat you?"[155]

The question of how we ought to treat asylum seekers is, at least in part, the question of what our laws of asylum are. These laws, however, also depend on what sort of encounter we have with the Other. We should aspire to an ethics in which the Other makes demands that inform our actions and laws, but to arrive there we must first rethink the norms that govern the interaction itself. To arrive at an Other that makes a demand, we must be able to recognize the faces of asylum seekers as more than bare humanity, when in their bare humanity they too often become just bodies that are sites of the world's violence.

So, I want to argue here that the face of the asylum seeker should and can make a demand upon us, and it is a demand that is relational and requires the reconceiving of our legal norms of asylum. In order to respond to the ethical demand that is made by the asylum seeker, we must acknowledge the moral agency of flight. To explore the moral agency of flight I will look in the remainder of Chapter Three at two theological traditions: the Exodus and the *hijra*.

A Theological Ethics of Flight

An alternative social imaginary is possible. What if, instead of faceless bare humanity and passive object of sympathy, the asylum seeker was a moral agent fulfilling an ethical imperative to flee persecution? This is the nature of the moral subjects that fled Pharaoh's Egypt under Moses' guidance and those early Muslims who with the Prophet

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[155] Ibid., 25.

Muhammad fled the persecution of Mecca for the oasis of Medina. An ethic of flight holds that persecution is an affront to our anthropology, and the flight from persecution is a righteous act to preserve the integrity of what Christians might refer to as the *imago dei* or what one Muslim commentator has termed the "human dignity . . . graciously conferred by God."[156] Humanity is tasked to protect its dignity, and therefore, flight from persecution is an act of moral agency to do just that.[157] As Abd al-Rahim notes, "One of the greatest blessings that God has graciously conferred on humanity in addition, and one that is certainly more germaine [*sic*] to the dignity which He conferred on the children of Adam entire, is that of moral autonomy or freedom of choice and conscience."[158]

The Exodus

The Exodus story is usually read as an account of God's delivery of Israel from slavery in Egypt. However, accepting that liberation motif, it is worth examining the flight aspect and what it reveals about the moral agency of the Israelites. Jonathan Burnside argues in an article on the relation between the Exodus narrative and Biblical laws of asylum that the Exodus "story should be understood as an example of large-scale asylum-seeking."[159] Burnside is concerned with a much more narrow notion of asylum than I am discussing—asylum as a sanctuary from retribution for persons wrongly accused of homicide, which is how the concept was originally developed in the ancient

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[156] Muddathir 'Abd al-Rahim, "Asylum: A Moral and Legal Right in Islam," *Refugee Survey Quarterly* 27, no. 2 (2008): 16.

[157] Both Christianity and Islam, which draw on the narratives at issue here, also have traditions of martyrdom that might seem to contradict my assertion that the human is tasked to protect her dignity. While it is beyond the scope of this thesis to treat martyrdom, I will note that such an expression could be theologically justified as a protection of dignity, particularly given the eschatological claims of both traditions. However, in both traditions the justification and merit for martyrdom are highly contested.

[158] 'Abd al-Rahim, "Asylum," 17.

[159] Jonathan P. Burnside, "Exodus and Asylum: Uncovering the Relationship between Biblical Law and Narrative," *Journal for the Study of the Old Testament* 34, no. 3 (2010): 254.

world. He reads the Exodus story as a narrative of asylum-seeking based on the Israelites flight from Egypt following the death of the first born at Passover; their pursuit by a vengeful Pharaoh; and their sanctuary in a holy space at Mt. Sinai.[160] While Burnside and I focus on different conceptions of asylum and different impetuses for flight, his reading of Exodus as an asylum narrative supports my notion that the Exodus was a decision to flee Egypt by the Israelites.

However, the element of God's delivery is not to be discounted. The second chapter of Exodus closes with God taking notice of the suffering of the Israelites in Egypt. "The Israelites groaned under their slavery, and cried out. Out of the slavery their cry for help rose up to God. God heard their groaning, and God remembered his covenant with Abraham, Isaac, and Jacob. God looked upon the Israelites, and God took notice of them."[161] Chapter three then narrates God's first intercession with Moses. It is here that God announces God's plan for the Israelites: justice for Israel and freedom from persecution will come by way of a migration. Thus, God's command to Moses: "[C]ome, I will send you to Pharaoh to bring my people, the Israelites, out of Egypt."[162] God's delivery from Egypt is fulfillment of the covenant as was already foretold to Abraham many generations before,[163] but it is a fulfillment of the covenant that comes in response to Israel's cries under the persecution of Pharaoh and relies upon the Israelite's action in

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[160] Ibid., 252-54. Asylum in the ancient world was generally available at the site of an altar or other sacred space. Price, *Rethinking Asylum*, 3, 31.
[161] Exodus 2:23-25 (NSRV).
[162] Exodus 3:10 (NSRV).
[163] Genesis 15:12-21 (NSRV). By accepting that the flight from Egypt is part of the covenant that promises the Israelites a particular geographical area to reside in, the Israelite devastation of Canaan and its consequences for the Canaanites are implicated in the flight. It is not my purpose to excuse the devastation of Canaan as morally excusable as the consequence of an act of flight. Though it is beyond my scope to treat the issue extensively here, I note briefly that persons are complex as moral subjects and the commission of a moral act does not preclude subsequent or concurrent immoral acts.

concert with God. God establishes the conditions in which the Israelites can flee, but it is up to the Israelites to make that moral choice. The Israelites' capacity for moral agency is reflected in their initial rejection of Moses: "Moses told [what God had said] to the Israelites; but they would not listen to Moses, because of their broken sprit and their cruel slavery."[164] God does not usurp the Israelites' agency; rather, God creates a possibility, which the Israelites must realize through their own action.

The moral agency of the Israelites' flight is exemplified in the persons of Moses and Aaron, who are God's agents before Pharaoh. As leaders of the community and moral exemplars, Moses and Aaron's charge to Pharaoh is reflective of the narrative's moral commitment. When God sends Moses and Aaron before Pharaoh, their edict is clear: "Let my people go."[165] God enjoins Pharaoh through his agents, Moses and Aaron, to allow the Israelites to do their moral duty and flee the slavery and persecution of Egypt for the land of Canaan that God had promised to Abraham, Isaac, and Jacob.

The Exodus narrative is massively influential in the Jewish tradition and in the Christian tradition that adopts the earlier Hebrew scriptures. Though there are numerous examples of the importance of the tradition, perhaps one of the simplest and yet most explicit is that the Passover/flight mark a new era in a very literal sense. The Judaic calendar is reset with the Exodus from Egypt. "The LORD said to Moses and Aaron in the land of Egypt: This month shall mark for you the beginning of months; it shall be the first

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[164] Exodus 6:9 (NSRV). See also, the following passage from Exodus 14:10-12 (NSRV), "As Pharaoh drew near, the Israelites looked back, and there were the Egyptians advancing on them. In great fear the Israelites cried out to the LORD. They said to Moses, 'Was it because there were no graves in Egypt that you have taken us away to die in the wilderness? What have you done to us, bringing us out of Egypt? Is this not the very thing we told you in Egypt, "Let us alone and let us serve the Egyptians"? For it would have been better for us to serve the Egyptians than to die in the wilderness.'"

[165] Exodus 5:1 (NSRV).

month of the year for you."[166] The instruction for the new priestly calendar is given as part of the instructions for the Passover, the final plague in which the first born of the Egyptians were killed, and so it is that the Passover celebration marks the new year in the ritual calendar of Judaism. However, the purpose, the teleology, of the Passover is the Exodus. "At the end of four hundred thirty years, on that very day [Passover], all the companies of the LORD went out from the land of Egypt."[167]

The Hijra

An act of flight also marks the beginning of the Islamic calendar. As Abd al-Rahim notes, "the day of the Prophet's hijrah to Medina – neither his birthday, nor the commencement of the revelation of the Quran, nor his entry in due course into Mecca as the magnanimous conqueror – was adopted, only a few years after his departure from this world in 632 C.E., as the beginning of the Muslim calendar and the Islamic way of reckoning of time across the ages."[168] Thus, as in Judaism, a foundational event that comes to orient the tradition temporally and theologically is an act of flight from persecution.

The nascent Islamic religion began in the Arabian city of Mecca as the Prophet Muhammad spread his message and recruited followers. However, perceiving the new religion as a threat to its power and influence, the *Quraysh*, the tribes that controlled Mecca, and in particular the Kaabah, began to persecute the Muslim community. Sharifah Nazneen Agha describes the persecution that early Muslims faced in Mecca, noting that

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[166] Exodus 12:1-2 (NSRV). The editors of The New Oxford Annotated Bible note that the older agricultural calendar of the Israelites marked the new year in Autumn, and the new priestly calendar supplants the older calendar moving the beginning of the year to the month of *Nisan* occurring in March/April of the Gregorian calendar. Michael D. Coogan et al., eds., *The New Oxford Annotated Bible*, 3rd ed. (New York: Oxford University Press, 2001), HB 98.

[167] Exodus 12:41 (NSRV).

[168] 'Abd al-Rahim, "Asylum," 19.

> [m]uslims of low social status were freely tortured by the Quraysh to force a renunciation of the new faith, whilst other persecutory measures were imposed to effect a complete marginalization of the entire Muslim community. The prohibition of trade in essential goods and provisions was particularly oppressive, and resulted in a 3-year period of starvation, acute depravation and certain death.[169]

In the face of such persecution, the Prophet initially sent seventy Muslims to seek asylum in the territory of King Negus, an Abyssinian Christian who welcomed the band of Muslims and offered them protection in the face of diplomatic and political pressure from the Meccans.[170] However, the persecution of Muslims in Mecca continued. In the interim, the oasis of Medina to the north had grown increasingly sympathetic to Islam and begun to accept Muslim refugees from Mecca. Finally, in 622 C.E., the Prophet Muhammad made the, as Abd al-Rahim describes it, epoch-making migration to Medina that is known as the *hijra*.[171]

I have already noted the way in which the *hijra* marks the turning point in early Islamic history; however, it is worth noting that this turning point is the active flight from persecution by the early Muslim community. Agha puts it well when she says, "The hijrah event is extraordinary for Muslims as it marks the birth of the Islamic age, the onset of which was made possible only by *decisive action* of the *muhajirun* to mobilize and seek refuge in foreign territory."[172] The *muhajirun*, meaning emigrants in Arabic and used to describe those early Muslims who undertook the *hijra* to Medina,[173] are moral agents both in their flight from persecution and in their action to create the conditions to

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[169] Sharifah Nazneen Agha, "The Ethics of Asylum in Early Muslim Society," *Refugee Survey Quarterly* 27, no. 2 (2008): 33.
[170] 'Abd al-Rahim, "Asylum," 19.
[171] Ibid.
[172] Agha, "The Ethics of Asylum in Early Muslim Society," 30 (emphasis added).
[173] See Ibid., 36-37. Elmadmad also uses the term *muhajirun* as a translation for "forced migrants" in the contemporary sense. See, e.g., Khadija Elmadmad, "Asylum in Islam and in Modern Refugee Law," *Refugee Survey Quarterly* 27, no. 2 (2008): 57.

preserve their new religion. It is also worth noting the importance of the Prophet Muhammad's participation in the *hijra* and identity as a *muhajirun*. The teachings and example of the Prophet (*sunnah*) are second only to the Qur'an in terms of authority in the Islamic tradition.[174] Thus, the Prophet's decision to flee the persecution of Mecca and to establish his new religious community through asylum lends credence to the moral agency of fleeing persecution.

In the Islamic tradition, however, the support for a moral agency of flight does not come only from the example of the *hijra*. As Khadija Elmadmad notes, "In a sense, seeking asylum is a duty. Muslims are not obliged to live in places where there is injustice and persecution and they are urged by Islam to leave these places and seek protection elsewhere."[175] The directive to flee in the face of persecution appears in the Qur'anic text both as an injunction and as an act worthy of reward. Surah IV, verse 97 contains the genesis of the command to flee: "When angels take the souls of those who die in sin against their souls, they say: 'In what (plight) were ye?' They reply: 'Weak and oppressed were we in the earth.' They say: 'Was not the earth of God spacious enough for you to move yourselves away (from evil)?'"[176] Abd al-Rahim, in his discussion of the duty to seek asylum, notes that the Qur'an places a heavy importance on the believers' obligation to struggle against evil—including tyranny, oppression, and persecution.[177] However, when the struggle is futile, the believer should not submit to evil and persecution. Thus, Abd al-Rahim comments on Surah 4:100, that

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[174] Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), 16.
[175] Elmadmad, "Asylum in Islam and in Modern Refugee Law," 54.
[176] Qur'an 4:97 (trans. Abdullah Yusuf Ali).
[177] 'Abd al-Rahim, "Asylum," 17-18.

> the Quran then describes those who resign themselves to passive acceptance of oppression and humiliation as people "who have wronged themselves". For, the argument continues, if they happened to be too weak to put up effective resistance to tyranny and injustice, they should leave those lands (or homes) in which they would otherwise be deprived of the dignity and freedom which define their very existence as humans.[178]

The Qur'an makes the point rather pointedly here that persons are responsible for guarding their God-given dignity, and that if flight is the way to do so, then one has a duty to seek asylum.

The Qur'an also speaks of seeking asylum as an action worthy of reward. In Surah IV, verse 100, the Qur'an says: "He who forsakes his home in the cause of God, finds in the earth many a refuge, wide and spacious: Should he die as a refugee from home for God and His Apostle, his reward becomes due and sure with God: and God is Oft-giving, Most Merciful."[179] There is a notion of creation inherent in this verse that dovetails with the notion of human dignity given by God. The creation is a place, created by God, where the dignity of persons should be able to flourish. This is God's intention. As Abd al-Rahim says, "all those who strive in conscious devotion to God and with intent to abide by divine guidance will be able to find other lands (or homes) in which they can then live in dignity and freedom – as they were meant to do by their Creator and Sustainer from the very beginning."[180] It is good to find in the creation a place where

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[178] Ibid., 18.
[179] Qur'an 4:100 (trans. Abdullah Yusuf Ali).
[180] 'Abd al-Rahim, "Asylum," 18. 'Abd al-Rahim also quotes two further Qur'anic verses to support this point.

> As for those who migrated in God's cause after being wronged, we shall give them a good home in this world, but the reward of the hereafter will be far greater, if they only knew it. They are the ones who are steadfast and put their trust in their Lord. Qur'an 16:40.
>
> As for those who migrate (and strive) in God's sake, and are then killed or die – God will

one's dignity can flourish; to do so is an action worthy of reward.

The Demand of a Moral Agent

Thus, we find in the Exodus and *hijra* narratives, the story of individuals exercising their moral agency. They are moral agents as persons exercising the capacity of moral choice, and as guardians of their dignity. The children of God, made in the image of God and imbued with dignity by God, have an obligation to protect that dignity. God has provided for a bountiful creation that enables the possibility of flight. Thus, it is a moral choice by a moral agent to flee persecution.

Asylum seekers are making a demand by their flight. In the social imaginary of asylum informed by these narratives, it is one's duty to flee persecution. Not only is it one's duty, but the world is a place where the opportunity to escape persecution exists. However, for flight to be effective, we must acknowledge the interrelational nature of that moral act. The asylum seeker commits a moral act by fleeing persecution, but only in the context of a relationship with those in the place where she seeks asylum. Flight is a relationship, a priori, and the host state is not an independent self that can act towards the asylum seeker outside of that relationship or overdetermine the asylum seeker's narrative.

In this light, the asylum seeker is a face that makes a demand. The asylum seeker is not passive or silent. She is active and voicing her demand in the act of her flight. Humanitarianism then fails as insufficient because the asylum seekers demand and the a priori relationship of asylum seeker and host state is an obligation in the strong

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> most certainly provide for them a goodly sustenance [in the life to come] for, verily, God – He alone – is the Best Provider. He will most certainly admit them to a state [of being] that will please them well." Qur'an 22:57-58

Ibid. For the translators of these verses see, Ibid., 16 n.3.

Lévinasian sense, which will note abide an asylum of optional charity.

Before proceeding to the conclusion, I must make a very important aside. I am not arguing that only flight fulfills the duty of protecting ones dignity or that every instance of persecution necessitates flight. Nor am I arguing that those who do not flee are not moral agents. There are clearly other ways of vindicating ones dignity, and if we take seriously the stories of the martyrs, some vindications of dignity may appear antonymous to flight. I must also note that acknowledging the moral agency of flight does not excuse persecution nor denigrate the need to end persecution. As Said goes to pains to point out, exile is devastating even if it is necessary.[181]

Furthermore, to seek asylum requires the capacity to negotiate a host of power dynamics (economic, political, and social) that I have not raised here. Particularly when we are discussing asylum in a state like the U.S., those who are able to reach American shores to apply for asylum are likely to have had some social, economic, or political capital in their country of origin. To say that the failure to seek asylum when oppression or persecution flatly denies such an opportunity is a moral failing or lack of moral agency would itself be uncritical and immoral.[182] Persons who do not flee persecution are also moral agents, and what it means to recognize them as such is the subject of another study. For my purposes here, I emphasize that amongst the ways that an individual may protect her dignity, the decision to flee persecution should be seen as the choice of a moral agent. And, in the dynamic of asylum, that moral agency should be recognized.

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[181] Said, *Reflections on Exile*, 173-75.

[182] The Qur'an makes note of this particular problem with the duty to seek asylum. In Surah 4:98-99, following the command to seek asylum when persecuted in 4:97, the Qur'an says, "Except those who are (really) weak and oppressed—men, women, children—who have no means in their power, nor (a guide-post) to direct their way. For these, there is hope that God will forgive: For God doth blot out (sins) and forgive again and again." Qur'an 4:98-99 (trans. Abdullah Yusuf Ali).

CONCLUSION

> *The customs officers said: "Where do you come from?" We said: "From the sea." "Your destination?" "The sea." "Your address?" A woman in our group said: "My bundle is my village!" At Athens Airport we waited for years. A young couple got married and looked for a room in a hurry. The groom said: "Where can I deflower her?" We laughed and told him: "There's no room here for such a wish, young man." An analyst with us said: "They die so the may not die. They die overlooked." A writer said: "Our camp will inevitably fall. What do they want from us?" Athens Airport changes its people every day. But we have stayed put, seats upon seats, waiting for the sea. For how many years, Athens Airport?*
>
> *-Mahmoud Darwish, "Athens Airport"*[183]

Here, in the end, the abstract nakedness of the face, its destitution, is the abstraction that functions like a mask. The alterity of bare humanity is so alien as to be unrecognizable. There is nothing sacred here.[184] There is only waitinginside of borderlands—Athens Airport, Ellis Island, Hartsfield-Jackson—that are spaces without being places. There is only waiting for recognition. The world has been mapped by the sovereign power of the nation-state, such that "[t]reaties of reciprocity and international agreements have woven a web around the earth that makes it possible for the *citizen* of every country to take his legal status with him no matter where he goes . . . ."[185] The asylum seeker, excepted from citizenship by her dislocation, can occupy only the exceptional spaces—the borderlands. "[W]hoever is no longer caught in [the web] finds himself out of legality altogether."[186]

How does an asylum seeker get out of Athens Airport and back into the web of legality? There is the Convention with its guarantees of *non-refoulement* and non-

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[183] Mahmoud Darwish, "Athens Airport," in *Tablet & Pen: Literary Landscapes from the Modern Middle East*, ed. Reza Aslan (New York: W. W. Norton & Company, 2010), 182 (This poem translated by Abdullah al-Udhari).

[184] There is nothing sacred according to Arendt's conception, which parallels Lévinas's understanding of the Other. But, Agamben reminds us that there is a double valence to the sacred person. "When the rights of man are no longer the rights of the citizen, then he is truly *sacred*, in the sense that this term had in archaic Roman law: destined to die." Agamben, "We Refugees," 5; see also, Agamben, *Homo Sacer*.

[185] Arendt, *Imperialism*, 174 (emphasis added).

[186] Ibid.

discrimination—a status and protection. But, this path runs only and always through the customs office, that is back through the sovereign power of the state that effected the exclusion. Standing before the state as judge, the asylum seeker as non-citizen has no citizen's right to subjectivity. The asylum seeker is thrown back upon her bare humanity. Again, the naked face of the asylum seeker is not the site of obligation, but clothed instead in the valence of humanitarianism it is a sight of pity and charity. But, this valence works against the asylum seeker unless she can give an account of herself as the most obviously pitiable. Overcoming the state's presumption of skepticism and imploring the state's sympathetic discretion, then the asylum seeker is recognizable and recognized as a subject.

An alternative social imaginary of asylum is necessary: an imaginary that can recognize the face of the asylum seeker and account for the obligation her demand makes upon the host state; an imaginary beyond humanitarianism. In a conversation with the radio program America Abroad, Imam Johari Abdul Malik, outreach director for the Dar al Hijari Islamic Center in Falls Church, Virginia described the *zakat*, what is commonly understood to be the obligation to give a fixed percentage of one's yearly wealth to charity, as not charity at all. Imam Malik said in the interview, "That amount is not something that I'm giving in charity. It is actually a part of what belongs to someone else that I am the agent to distribute. It belongs to the homeless person, it belongs to the widow, it is their money . . . . It is a debt that I owe."[187] As every Muslim is a trustee of the wealth of the economically vulnerable, we are all trustees of the abundant creation and therefore in relationship with those in flight. The moral agent who flees persecution

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[187] America Abroad, *Alms in the Name of Allah*, radio broadcast, streaming online, transcript, 2011, http://www.americaabroadmedia.org/programs/view/id/156/sf_highlight.

makes a demand upon us that her moral act be recognized and honored in reception. In light of such a demand, asylum can no longer be discretionary; it is no longer a thing we offer or grant at our pleasure but the ethical act of meeting the moral demand of the Other.

Our asylum policies must change to recognize moral agency. To allow ourselves as a receiving state, as Butler says, "to be addressed, claimed, bound to what is not me, but also to be moved, to be prompted to act."[188] By creating a set of procedures that allow the moral agent to address rather than speak in the silence of a predetermined narrative we can, perhaps, "[suspend] the demand for self-identity or, more particularly, for complete coherence," which "seems to me to counter a certain ethical violence, which demands that we manifest and maintain self-identity at all times and require that others do the same."[189]

First, asylum should not be discretionary. The principle of *non-refoulement* in international law demands more than that. Furthermore, the maintenance of a discretionary asylum is the ultimate assertion of the sovereign states power over the asylum seeker. So long as asylum remains discretionary, the asylum seeker cannot escape being constructed as bare humanity because there is no place for her moral agency; she cannot be other than the recipient of sovereign state benevolence. Second, the burden of proof in asylum proceedings must shift to the state. As a moral agent fleeing persecution, the asylum seeker should have a rebuttable presumption that she is a refugee. The state should be compelled to prove otherwise. Reversing the burden takes seriously the asylum seekers part in the Butlerian conversation and allows her to speak as a Lévinasian face, to

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[188] Butler, *Giving an Account of Oneself*, 136.
[189] Ibid., 42.

assert her demand. When freighted with the burden of proof, the asylum seeker is presumed to be a fraud unless she can prove otherwise. Particularly when combined with a discretionary grant, placing the burden on the asylum seeker puts her in a position of being required to tell a story she doesn't know; a story the adjudicator wants to hear; and narrating from a non-narratable position.

These two policy reforms can only be a beginning, and even this is an uphill political battle. As Bohmer and Shuman point out, asylum is caught in a complex web of fear and confusion over matters of security and migration,[190] which fire the imagination of many politicians, bureaucrats, and U.S. citizens to the detriment of asylum seekers. However, any real reform to the asylum system can only start from a new social imaginary of asylum. The current imaginary is poisoned by pity and fear. To this end, the preceding analysis is only a partial reimagining, and it must dovetail with the work of scholars such as Susie Snyder,[191] who are exposing and deconstructing the culture of fear around migration and asylum, while offering new social imaginaries of hope and faith.

What would it mean to fully take account of moral agency in our asylum policy, beyond the limited recommendations made here? Probably a complete overhaul of the system. I will not argue here that is principled or practical to argue for the admission of every person who seeks asylum. While cogent and persuasive arguments for open borders have been put forward, they have clearly not carried the day, nor do I intend to endorse such a position, which would require more than what the foregoing pages have, I hope, accomplished. It remains that admission will be limited by state sovereignty and that it

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[190] Bohmer and Shuman, *Rejecting Refugees*, 257-68.

[191] Susanna Snyder, "Encountering Asylum Seekers: An Ethic of Fear or Faith?," *Studies in Christian Ethics* 24, no. 3 (forthcoming, August 2011); Susanna Snyder, *Asylum-Seeking, Migration and Church*, (Aldershot: Ashgate, forthcoming).

may be necessary to police asylum procedures for fraud and abuse. However, even in light of such pragmatic considerations, it remains that the moral agency of the asylum seeker demands certain turns in our perspectives, positions, and policies.

There are many authors who now argue for a critical turn to the categories of exile and refugee for thinking through the modern political landscape.[192] It may be that only by reorienting away from state-centeredness to exile-centeredness can we hope to address the refugee reality, both in terms of the persons who present themselves and the conditions that make refugees a permanent fixture of the modern landscape.[193] To the latter Agamben counsels, "inasmuch as the refugee unhinges the old trinity of state/nation/territory - this apparently marginal figure deserves rather to be considered the central figure of our political history."[194] With regard to the former, it may well require an exile-centered perspective to generate the sort of sympathy Paul Ricoeur discusses in *Oneself as Another*. [195] This sympathy, which calls oneself to responsibility for another, rises above what I have previously referred to as the optional charity of asylum. It is a sympathy that recognizes in the Other our own vulnerability and is of a kind with a moral obligation from the Other.[196] This exile-centeredness, however, is a process. It is a process that may challenge but cannot forego the current state-centric reality. Furthermore, it is a process that must include as a starting point the moral agency of refugees.

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[192] See, e.g., Agamben, "We Refugees," 5; Said, *Reflections on Exile*, 184-86; Daniel L. Smith-Christopher, *A Biblical Theology of Exile* (Minneapolis: Fortress Press, 2002), 189-203.
[193] Such orientation must, however, take as a caution Said's reminder not to romanticize exile. "Exile is strangely compelling to think about but terrible to experience." Said, *Reflections on Exile*, 173.
[194] Agamben, "We Refugees," 5.
[195] Ricoeur, *Oneself as Another*, 192.
[196] Ibid.

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