

A Republican Theory of Political Asylum

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Abstract

Political asylum is thought to be a distinctively liberal practice, its scope and limits uniquely justified with respect to the values and institutions of the liberal state. Yet liberal states repeatedly fail to live up to their commitments and there remains deep disagreement about the value and role of asylum in modern liberal societies. What role should the liberal state play in defining international practices of political asylum? How should citizens and governments of liberal states respond to the claims of asylum seekers and refugees? Should they support government efforts to preserve the liberal institutions that safeguard freedoms they currently enjoy or promote new forms of governance capable of meeting the demands and challenges of ever larger numbers and more overtly political asylum-seekers? In this work, I argue that the practices of political asylum should be evaluated and reformed based on their capacity to generate wider democratic effects. Part I explains how practices of asylum can best be guided towards democratic ends by pursuing a political ideal of republican freedom, freedom as non-domination. Part II highlights the institutional implications of the republican approach in the form of associational democratic control of asylum practices. The response of liberal states to the claims of vast numbers of persons displaced or threatened by political persecution should be guided by a radical program of republican reforms that prescribes new institutions of popular assembly and voluntary secondary associations to respond to and represent the interests and political well-being of refugees and citizens alike. The democratic effects of asylum are thus tied to particular forms of political and economic association as well as institutional competencies that refugees enjoy within their host societies. By encouraging mixed forms of associational democratic reform refugees can achieve three dimensions of democratic control within their host societies: control against the arbitrary power of citizens and governments of host societies, control against the arbitrary power of governments of refugees' states of origin, and control against the arbitrary power of other members of exiled communities. Since only democratic states can offer asylum in a way that is fully consistent with freedom as non-domination there is immense pressure on relatively few liberal states to take in ever more refugees and to adapt to increasingly pluralistic forms of governance. The response to refugees should not be to close the doors of the liberal state, but to devolve the powers of state institutions for asylum governance and adjudication to sub-national levels of decision-making and, simultaneously, to incorporate refugees into decision-making agencies based on voluntary, democratic consent and future planning in the midst of great uncertainty and social upheaval.

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My Dad passed away a week before my final Viva. I dedicate my modest efforts to his memory as a teacher and a scholar, and to my Mum, whose life has been a constant lesson in love, curiosity, and careful thinking.

Ambition uses against exterior people that fury which neither the law nor the king consent to using inside; whereof one's own evil almost always ceases; but she is sure to keep disturbing the sheepfolds of others, where that fury of hers puts down the banner.

—Niccolò Machiavelli, *Tercets on Ambition*, 1509.

In certain countries...the *disposition* to persecute, whensoever occasion happens, is not yet at an end: insomuch that if there is no actual persecution, it is only because there are no heretics; and if there are no heretics, it is only because there are no thinkers.

—Jeremy Bentham, *Principles of Morals and Legislation*, 1789.

INTRODUCTION: REPUBLICANISM AND REFUGEES

Political asylum is thought to be a distinctively liberal practice¹ the scope and limits of which are uniquely justified by the values and institutions of the liberal state.² Yet liberal democracies often fail to live up to their commitments and there remains deep disagreement about the value and role of asylum in modern liberal societies. What role should the liberal state play in defining international practices of political asylum? How should citizens and governments of liberal states respond to the claims of asylum seekers and refugees? Should they support government efforts to preserve the liberal institutions that safeguard freedoms they currently enjoy or promote new forms of governance capable of meeting the demands and challenges of ever larger numbers and more overtly political asylum-seekers? In this work, I argue that the practices of political asylum should be evaluated and reformed based on their capacity to generate wider democratic effects. Part I explains how practices of asylum can best be guided towards democratic ends by pursuing a political ideal of republican freedom, freedom as non-domination. Part II highlights the institutional implications of the republican approach in the form of associational democratic control of asylum practices. The response of liberal states to the claims of vast numbers of persons displaced or threatened by political persecution should be

¹ On the “liberal tradition of asylum” see, e.g. Kirchheimer (1959: 993); Frank and Reinisch (2014: 484); Gibney (2004) and Levy (2005). Oxana Shevel claims that “refugee protection is generally recognized as a criterion of a democratic regime” (Shevel 2011: 19). Suhrke and Newland (2001) claim that the Post WWII refugee doctrine initially “embodied the essence of liberalism” but was later lost “once the general demand for entry into prosperous and stable countries vastly outstripped opportunities” (Suhrke and Newland 2001: 285, 291). On the tensions between liberalism and communitarianism in European asylum policy, see especially Ugur (1995); Juss (2005). On the supposed tensions between liberalism and communitarianism and resulting implications for asylum, see, for example, Walzer (1983: 52-61); Ackerman (1994, especially remarks at 377); Habermas (1995); Booth (1997).

² The normative theory of political asylum covers a complicated mixture of currents in history and institutional praxis, both Western and non-Western. While inquiries into Ancient and Early Modern responses to displacement and exile continue to animate discussions in forced migration (e.g., Balogh 1943; Grey 2016), contemporary practices of political asylum are widely viewed as the response by states to more or less immediate Twentieth and Twenty-First century events.

guided by a radical program of republican reforms that prescribes new institutions of popular assembly and voluntary secondary associations to respond to and represent the interests and political well-being of refugees and citizens alike. The democratic effects of asylum are thus tied to particular forms of political and economic association as well as institutional competencies that refugees enjoy within their host societies. By encouraging mixed forms of associational democratic reform refugees can achieve three dimensions of democratic control within their host societies: control against the arbitrary power of private citizens and public authorities of host societies, control against the arbitrary power of persecuting agents, and control against the arbitrary power of other members of exiled communities. Since only democratic states can offer asylum in a way that is fully consistent with freedom as non-domination there is immense pressure on relatively few liberal states to take in ever more refugees and to adapt to increasingly pluralistic forms of governance. The response to refugees should not be to close the doors of the liberal state, but to devolve the powers of state institutions for asylum governance and adjudication to sub-national levels of decision-making and, simultaneously, to incorporate refugees into decision-making agencies based on voluntary, democratic consent and future planning in the midst of great uncertainty and social upheaval.

The republican conception of freedom—freedom as non-domination—is the political ideal to which liberal asylum practices should be answerable in our current era. But the call for freedom is more than a call for institutional design. It is also a heuristic for assessing current and historical liberal asylum practices as well as the political discourse of liberal democratic responses to refugees, its intellectual classes and everyday practitioners. The ability to critically evaluate morally urgent practices is an increasingly important determinate of our shared political future. The worry that liberal states are

becoming dangerously fractured has thrust the status of refugees into the centre of political debate. Refugee are now “a first-order problem” for democracy (Kuttner 2018) and the question of our shared democratic future is inextricably bound to whether and how democracies can accommodate political outsiders. Yet, durable solutions to refugee situations often fall short and disagreements about existing policies are likely to be exacerbated by the challenges still to come (Peruniak 2019). Italy’s populist Five Star Movement (M5S), Greece’s Golden Dawn, Germany’s Christian Social Union and Alternative für Deutschland parties have recently been joined by Spain’s Vox and Citizen’s Party, the Austrian government of Sebastian Kurz, and the anti-refugee alliance states of Poland and Hungary. All have gained in popularity by emphasising the need to retain cohesion and cultural homogeneity from ‘invasive’ outsiders.³ At the same time, the endless wars on terror and drugs have raised suspicions of the very outsiders who would seek security in democratic states. Meanwhile, the effects of climate change have already set in motion a series of events that not only threaten the survival of the human species⁴ but which will also undoubtedly alter the scale and pressures of forced migration throughout the twenty-first century and beyond (Abel et al. 2019). In this context, addressing the demands for new political concessions and political empowerment must be

³ The racist and populist work of John Raspaill (1975 [1973]) has been highly influential among right-wing parties and politicians. On the continued influence of Raspaill’s work in contemporary American politics see, Peter Mass. 7 May 2017. “Birth of a Radical: White Fear in the White House: Young Bannon Disciple Julia Hahn Is a Case Study in Extremism,” *The Intercept*. URL=<<https://theintercept.com/2017/05/07/white-fear-in-the-white-house-young-bannon-disciple-julia-hahn-is-a-case-study-in-extremism/>> For a discussion of the significance of Raspaill’s work in the context of earlier global migration debates see, Zolberg (2006). Raspaill’s racism and xenophobia are reproduced in recent best-selling works, including Brimelow (1995) and Sarrazin (2016). For a review of Sarrazin, see Stefan Wagstyl. 4 July 2016. “A Homage to Germany before the Immigrants,” *Financial Times* (London, England), Monday, July 4, 2016, Issue 39206, p.12. See also, Jack Snyder. March/April 2019. “The Broken Bargain: How Nationalism Came Back,” *Foreign Affairs*. URL=<<https://www.foreignaffairs.com/articles/world/2019-02-12/broken-bargain>>

⁴ See, for example, Brysse, Oreskes, O’Reilly, and Oppenheimer (2013); Ceballo, Ehrlich, and Dirzo (2017); Steffen (et al. 2018).

considered in anticipation of the forms of government and civil society that are increasingly and openly hostile to refugees and which may seek to use the practice of political asylum as a tool of statecraft (Flynn 2006; Mortimer 1997).

A REPUBLICAN RESPONSE TO REFUGEES?

Until recently, debates about the duties of states and the rights of refugees have almost invariably occurred between self-avowed liberals or liberal communitarians. However, after a lengthy and controversial revival, republican political thought has begun to attract the attention of scholars with interests in related areas of immigration, the freedom of movement, and asylum.⁵

Throughout this work I will be concerned with the Italian-Atlantic tradition of republicanism.⁶ The themes and figures of this strand of thought were first identified in the work of John Pocock (1975) and later developed by Quentin Skinner and Phillip Pettit.⁷ The central idea to emerge from this work is the republican conception of freedom—freedom as non-domination—that is irreducible to the positive and negative conceptions of liberty famously devised by Isaiah Berlin. Pettit and Skinner argue that

⁵ See, for example, Taylor (2017) and the articles commissioned for the 2014 Special Issue of *Critical Review of International Social and Political Philosophy*, “Domination, Migration and Non-citizens,” 17(1): 1-143.

⁶ As distinguished from the Franco-German strain of republicanism consistent with the work of Rousseau and Kant whose more recent and notable adherents include Hannah Arendt and Michael Sandel. For a discussion, see Pettit (2012) and Pettit (2013: 170-173). Jonathan Scott (2002: 62) points out that these figures were deeply indebted to Greek moral thought. It is interesting to note that as, Kathryn Lomas has shown, Greek literature frequently associates a penchant for population transfers and forced mass migration with the very persona of the tyrant: “tyranny and demo-graphic mobility (voluntary or enforced) tend[ed] to go together” (Lomas 2012: 104). Machiavelli (1940) draws this link in Chapter XXVI 183-184 of *The Discourses* in his brief discussion of the tyrant Philip of Macedon.

⁷ The first tentative steps towards a republican political theory were sketched in the last section of Pettit (1993). This was later developed into a full-fledged political theory (Pettit 1997; 2012), among other iterations and refinements. See, also Skinner (1998) and Rodgers (1992). It bears emphasizing that the republican tradition I invoke has little to do with the US party that shares its name (Zuckert 2018; cf Gould 2015). See, for example, David Ignatius. ‘Donald Trump is the American Machiavelli’ 10 November 2016. *The Washington Post*. URL=<https://www.washingtonpost.com/opinions/donald-trump-is-the-american-machiavelli/2016/11/10/8ebfae16-a794-11e6-ba59-a7d93165c6d4_story.html?utm_term=.dcbb48221df9>.

negative liberty can be given two distinctive interpretations. Where A has the capacity to intentionally limit B's choice, A is in a position of domination with respect to B. By contrast, to be free is to occupy a social status where one's capacity to exercise choice does not depend on another's will, where there are safeguards against arbitrary interference, and where there are opportunities to meaningfully contest potential mistreatment. As Bellamy notes, domination is "a capacity to intentionally control and diminish an agent's realm of choice, either overtly through various explicit forms of restraint or obstruction, or covertly by more subtle forms of manipulation and influence" (Bellamy and Castiglione 2000: 13).⁸

One of the most important points to emerge from this distinction between liberal and republican conceptions of negative liberty lies precisely in the fact that there can be domination in the absence of interference and interference in the absence of domination. Few would deny that there is an important difference between the liberty of citizens under repressive constraints imposed by a merciless dictator and the liberty of citizens under the authority of a benevolent ruler who, though no-less-powerful, is disposed to allow a great many freedoms. But where freedom as non-interference recognizes conflict and coercion as they occur or where they are very likely to occur, a republican conception of freedom wishes to acknowledge that freedom or its lack can also be conditioned by latent features of our political world. These features do not consist in direct forms of interference, but in the sheer *possibility* of uncontrolled interference, however unlikely or, indeed, regardless of the odds. As we will see, republican freedom does not wear its political implications on its sleeve, and this has hindered its development in application to

⁸ "Democracy, Sovereignty and the Constitution of the Europe Union: The Republican Alternative to Liberalism,"

the theory of political asylum (more on which later). In considering refugees as subjects of political thought, however, republicanism allows us to see that ‘refugee status’ may itself be antithetical to freedom insofar as refugees have no control over the processes through which they are admitted and only few protections (though, again, none they control) against their return to conditions of persecution. On the republican view, without such controls, the best asylum seekers can hope for is to trade one ‘tyrant’ or ‘master’ for another.

Republicanism is chiefly viewed as a theory of political citizenship. As Knud Haakonssen observes, “[t]he great debates about and experiments with republicanism in post-Renaissance Europe were all centrally concerned with who could and should count as the public from which order and governance in the public realm was to be derived” (Haakonssen 1993: 32). It is sometimes said that a more radical republican notion of universal representation that called for “abandoning separate orders or classes of citizens in the republic” had sprung from anti-imperialist sentiments during the American Revolution (Sheps 1975: 25). However, these debates and experiments were influenced less by concerns to accommodate outsiders than with the establishment of new forms of popular sovereignty and the identification of those fit to govern among the already recognizable members of the consortium of shared political and economic life. The view that, prior to 1875, US borders were both ideologically and legally open to all persists nonetheless. Gerald Neuman comments that “[t]he myth of an era of unrestricted immigration to the States is so widespread in the legal literature that authors cited to illustrate it need feel no individual embarrassment” (Neuman 1993: 1835). But legal US border entry requirements did exist while national security issues, including those related to foreign “terrorism” and domestic insurrection, were often paramount in the minds of

restrictionists (Totten 2008, 2017, 2018). These points are important (though perhaps not sufficient) to ward off any pretention that republican thought is naturally allied with the interests of non-citizens demonstrable in the myths of the early Republic.

The ambivalent tone struck by one of republicanism's earliest exponents aptly characterizes the unusual demands that migrants and asylum seekers place on theorists whose traditional stalking grounds concern the political morality of citizens within the state. In *The Discourses*⁹ Machiavelli begins by praising refugees as ideal republican founders and statesmen whose experience of exile is a source of civic *virtù*¹⁰ and effective self-rule.¹¹ He ends with a harsh warning to those who would ignore the

⁹ The reference to 'refugees' appears in Luigi Ricci's (1940) translation revised by E.R.P. Vincent. New York: The Modern Library, 1940. Bondanella and Bondanella (2003: 1, Chapter 1) offer the following translation: "The builders of cities are free when any people, either under a prince or on its own, is forced by disease, famine, or war to abandon its native land and seek a new home...". See also, the translation by Mansfield Jr. (1996).

¹⁰ The term *virtù* has generated a healthy secondary literature. According to Schneidwind (1998: 38): "The term is not really translatable." As a quality adhering to individuals or to groups it is closely associated with the 'independence', 'incorruptibility', or willingness to act in favour of the common good. Skinner claims that *virtù* is rarely a natural quality of persons (Skinner 1998: 32n103). However, as I have already noted, Machiavelli suggests that *virtù* does come naturally to those who flee their own countries: "The founders of cities are independent when they are people who, under the leadership of some prince, or by themselves, have been obliged to fly from pestilence, war, or famine, that was desolating their native country and are seeking a new home" (1940: 107). The thought here might have been that refugees' incorruptibility followed from their disinclination to act on behalf of a foreign power (especially a power that was responsible for their exile). Independence, as the disposition to resist arbitrary interference, may have come 'naturally' to displaced persons who "derived from these conditions of war and struggle an intense passion of solidarity [which, according to some, was] the source of moral personality and moral relationships" (Pocock 1975: 499, 500; cf. Baseler 1998: 148). More recently, J.M. Hoye writes that "insurgent republicans recognized that having struggled against persecution and endured oppression, unjust criminalization, and arduous travels, immigrants were uniquely valuable contributors to the republic" (Hoye 2018: 18). On the relation between virtue as 'independence' and deference to foreign powers, see Pettit (2012: 218-219). On Machiavelli's use of the word *virtù*, see Fischer (2006: Xliv, lxii). Leo Strauss' (1953) review of Leslie J. Walker's *The Discourses of Niccolò Machiavelli* provides a helpful, albeit brief, discussion of Machiavelli's "deliberately ambiguous" use of *virtù*. On Machiavelli's republicanism more generally see, especially, Bock (1990); Viroli (2011); McCormick (2011); Vujadinovic (2014).

¹¹ In describing the successful founding of the fledgling Venetian republic by politically virtuous foreigners he writes: "These refugees of themselves, and without any prince to govern them, began to live under such laws as seemed to them best suited to maintain their new state" (Machiavelli 1940: 106). J.G.A. Pocock includes a brief discussion of the passage noting that "[t]he possibly paradigmatic history of Venice beings with a leaderless swarm of refugees [elsewhere 'immigrants'], whose subsequent ascent in the scale of civic virtue presents a problem of explanation (Pocock 1975: 186-187). The origin story, which describes an instance when citizens are called upon to create their own political order, has its most important modern analogue in the early American colonists who, as early as the 1630s, began to draft codes of conduct and

inherent dangers of granting citizenship to migrants, a practice that, if not strictly controlled, inevitably leads to the corruption of Roman institutions and the “ruin of the state”.¹²

Whether contemporary republican thought can accommodate claims for political asylum depends not only on revisiting core assumptions about the nature of republican political membership and equality within the state but also on whether republicanism can outgrow the ‘older, darker features’ of its past (Goodin 2003b).¹³

Some scholars have cautioned that the imperialist ambitions of early republican figures cannot be dismissed as the reactive attitudes of fledgling democracies in less enlightened times and that the exploitation of foreigners is an inherent feature of the republican tradition. Mark Fischer claims, for example, that on Machiavelli’s view “citizens *must* exploit foreigners to maintain their civil way of life” (Fischer 2006: lvii—

legal rights in response to the very practical needs of transatlantic settlement. These documents, so influential to colonies throughout British North America, were also significant because they contained so much innovation and creativity, adapting, and in some instances, departing from English legal sources (Bailyn 1967: 194-198). See also Kupperman (1989, especially at 18) and Hoye (2018). On the significance of exile to the development of English republican politics and the transmission of republican ideas see, Mahlberg (2016).

¹² Pocock (1975: 469) notes that for many theorists the ‘crucial evil of corruption’ was the disruption of the ‘proper balance’ of constitutional relationships which he cites as being those of the executive, parliament, and propertied classes. On this view, the threat of corruption from foreigners will be slight if they are either too small in number and physical power to force changes to the existing state’s constitution, or too limited in powers of exchange (e.g., property or skills) to pose a serious threat to the optimal balance of constitutional relationships between members of the legislative, executive, and judiciary.

¹³ It is worth noting that the place of political outsiders in earlier republican societies compares favourably to the intellectual origins of the liberal response to refugees which are generally located, not in Machiavelli, but in concepts and principles forged in the Humanist tradition of natural law developed by Hugo Grotius, Samuel von Pufendorf, and Vattel (e.g., Price 2009; Burgess 2008; Orchard 2014; Long 2011; Haddad 2008). Pufendorf, citing Grotius’ rationale for the state’s obligations to political refugees, argues that: “[i]f on the whole, it appears that the persons deserve our favour and pity, and that no restraint lies on us from good reasons of state, it will be an act of humanity to confer such a benefit on them, as we shall neither feel very burthensome at present, nor are likely to repent of hereafter. (Pufendorf III, III, IX).” However, Pufendorf sees Grotius’ claim that refugees should be free to settle on the ‘barrens and wastelands’ of the nation state as an error: “since whatever we bestow on such petitioners, we may justly reckon as a matter of free bounty in us, hence it follows, that they are not presently to lay hands on what they please, nor to fix themselves as it were by some right, in any spot of waste-ground they find among us; but that they ought to rest satisfied with the station and privileges we assign them.” (Pufendorf III, III, X, see also Tuck 2001 142 and 157-158).

my emphasis).¹⁴ Citizens are free only to the extent that they are ready and willing to impose their will on noncitizen outsiders:

Instead of cancelling their efforts by fighting each other, Machiavelli's men are organized by orders and laws to combine their energies in the joint exploitation of others. Thus, the charge that Machiavelli's republic is a tyranny turns out to be true after all. However, it is not a tyranny of the few over the many; it is a tyranny of citizens over foreigners. (Fischer 2006: lx).

Likewise, Edward Andrew paints the early republican thinker James Harrington (1611–1677) as an imperialist whose literary dedications to Oliver Cromwell (1599–1658) and commitments to agrarian reform are primarily modes of “territorial expansion and domination over people not yet integrated or incorporated by the imperial power” (Andrew 2011: 4; x, xxi, 39-45).¹⁵

In his now classic work *Republicanism: A Theory of Freedom and Government* Philip Pettit highlighted the fact that citizens of a republic should be mobilized in support of a conception of republican freedom as a ‘supreme’ political ideal (Pettit 1997: 80). Pettit also claimed, however, that this ideal was to be applied first and foremost within and for a *particular* political community, namely, “all adult and more or less permanent residents of a bounded territory” (Pettit 2010: 142). This claim is consistent with Pettit’s promissory note that “if a state and a society looks after the freedom as non-domination

¹⁴ Honohan (2002: 61) offers a more sympathetic reading of Machiavelli on this point, but she cautions that “one should not downplay the level of imperialist domination that may be entailed in this expansion”.

¹⁵ Indeed, “Harrington commended British imperialism as a religious duty in order to provide a “sanctuary of the afflicted” for “oppressed peoples” (Bainton 1941: 107 quoted in Harrington 1737: 199-200). This imperative was much in line with Harrington’s neo-roman view that territorial expansion was a way of making gains in freedom for others beyond the state (Honohan 2002: 73). But see Kennedy’s (2012: 977-978) criticism of Andrew for failing to properly distinguish imperialism from empire and, subsequently, for suggesting that republicans viewed the expansionism of empire in terms of arbitrary power over non-citizens, rather than acquiring new members of the *res publica*, a view not widely shared among contemporary scholars. Fischer’s insights, however, suggest that there is much room to contest this consensus. McCormick (2015) presents the most convincing counterargument to this view demonstrating Machiavelli’s commitment to freedom over imperial expansion.

of *its* members, then most other desiderata will look after themselves” (Pettit 1997: 7—emphasis added).

Pettit’s claim is not obviously incompatible with the states’ commitments to foreigners and human rights abroad. Yet, when the freedom of citizens and non-citizens conflict, it seems likely that the state will seek to *prioritize* the interests of its own citizens, and that, in so doing, promote domination, not of this community, but of some other. Perhaps this is not inevitable. But it is difficult to overlook the fact that attaining freedom within any particular state seems, thus far, to have come at the direct expense of political outsiders. The achievements of industrial democracies since 1939 have been largely co-extensive with economic and developmental practices that have left the vast majority of human beings under the “continuous acquiescence in alien rule” (Fieldhouse 1999: 227; Chang 2002, 2007; Hahnel 2005; Kolko 1988). Furthermore, it is clear that any attempt to redress these imbalances through democratic means will continue to encounter significant resistance. After all, the state decides which asylum seekers shall enter, how many, and for how long. But should the state be strictly egalitarian in its asylum practices, treating the claims of refugees on par with those of citizens? Can the state acknowledge that refugees and citizens are equally *persons*—that is, morally and constitutionally¹⁶—and yet deny them equal treatment, on other, perhaps *republican* grounds?

My own view is that we can move past the earlier ambiguities of republican foreign policy and its treatment of non-citizens. Just as Kantians need not accept Kant’s

¹⁶ As recently as the late 1980s there have been efforts to deny the constitutional status of illegal entrants as legal persons under Clause 3, Article 1 of the US Constitution. As Neuman relays “the counting of undocumented aliens for apportionment purposes [i.e., taxes and political representation] has been challenged on the theory that undocumented aliens are not “persons” within the meaning of the apportionment clause” (Neuman 1993: 1838).

exceptionless dictate against lying, so too can republicans repudiate the policy prescriptions of earlier exponents in favour of a more democratic republican theory, one that is broadly consistent with the anti-elitist institutional prescriptions more recently attributed to Machiavelli (McCormick 2011).¹⁷

However, if republicanism is to avoid the criticism that it extols an essentially exploitative conception of freedom then it must be directed in support of institutions that meet two general conditions. First, the state's asylum practices must be *reflexive*: states must work to reduce the possibility of domination by public and private power both in the adjudication of claims for asylum and throughout the refugees' tenure in their host society. Reflexive practices refer to sources of domination, the unchecked bureaucratic powers of state officials and potential employers, or similar dynamics that may emerge in private interpersonal relations as a result of differences in socio-economic status, double standards for citizens and non-citizens before the law, and so forth. Second, asylum practices must be *extensive*: the state must design its practices in ways that reduce domination not only at home but also abroad, through its foreign policy and interstate relations. The state must seek to eliminate extra-territorial practices whenever they constitute arbitrary restrictions on access to asylum or refrain from political and economic relations between states that would constitute—either directly or in terms of their actual or expected consequences—valid reasons for individuals to flee their state (e.g., as when State A supports State B's efforts to oppress or persecute B's citizens). A state's asylum practices will be reflexive then insofar as they limit refugees' uncertainty, their need for strategic deference to arbitrary authorities, and the effects of status

¹⁷ McCormick presents a powerful rebuttal to the charge (e.g., in Wolin 2008: 152-153) that Machiavelli's republicanism is incompatible with radical forms of populist, anti-elitist governance.

subordination; in short, by countering the effects of private and public forms of arbitrary power within the host state. Asylum practices will be extensive insofar as they help to limit the (host) state's arbitrary power over citizens and governments outside its borders or to reduce or counter the effects of immoral interstate relations, that is, in ways that are not themselves complicit in those relations. On the republican view, the legitimacy of a policy or practice of asylum depends on how well the practice does in accommodating asylum seekers across these two dimensions.

This raises a question about what role the value of non-domination should play in our asylum practices. Is non-domination merely a standard to which liberal practices of asylum should conform? Or, is non-domination a goal that asylum practices should be used to promote (Pettit 1997: 81)? The question is important since one consequence of making non-domination a goal of asylum practices rather than merely a constraint the practice must abide by is that it would seem to promote the incorporation of larger numbers of refugees who would clearly benefit from asylum, but whose numbers may necessitate a radical redistribution of wealth or power within the state. To make non-domination a goal of asylum practices may be to shift the perception of asylum away from its humanitarian and diplomatic forms towards that of a self-defeating practice that encourages a significant public backlash resulting in even greater restrictions on admissions to desperate non-citizens. Another worry is that to promote non-domination through one's asylum practices is to promote asylum itself, and thus, to adopt a dangerous, if not incendiary, posture towards other sovereign states. As Cindy Holder explains:

to extend refugee status to another state's citizens or allow them entry despite their own government's having refused to grant them travel papers is not only to criticize another state's political system, but to deny in a very profound way the

right of its government to decide how open its borders will be. [...] Actively to aid people fleeing a country...is to go even further and infringe territorial integrity. (Holder 2008: 97).

Calibrating the republican approach to existing inequalities and structures of power is therefore crucial to judgments about the institutions and policies that states should adopt. Republicans have generally sought to address two forms of arbitrary power (Martí and Pettit 2010: 48). Private power (*dominium*) results from differences between individuals or groups within a polity, be they fellow citizens or outsiders. Public power (*imperium*) is arbitrary power exercised by the state or government officials, though it may include power exercised between officials of different states.¹⁸

My view here will be that to make non-domination the goal of asylum practices is to create progressive social transformation that may help to create conditions that give way to more legitimate states (Green 2003) and, thus, fewer asylum seekers overall. These, at least, are preliminary answers to questions that can only be fully addressed in the context of the practice of asylum as it arises in response both to the normative features peculiar to political persecution in general and to the political arrangements that determine its form and intensity in particular contexts.

For our purposes here, I draw largely (though not exclusively) on examples of US asylum practices and their underlying rationales. The reason for this is twofold. First, few liberal states have demonstrated a greater propensity for directly or indirectly contributing to conditions that produce refugees by variously supporting foreign dictatorships,

¹⁸ Economic relations should be included here as well. In the US, as elsewhere, corporations have attained a degree of power such that it is no longer accurate to speak of the state qua *government* as the only source of public power. In some cases, the influence of economic elites in the affairs of government threatens to collapse the very distinction between public (government) and private power. My references to ‘the state’ are meant to allow for a mix of public political and corporate power-holders. On corporate power in America and the theory of ‘elite economic domination’ see, Gilens (2012) and Gilens, Martin and Page (2014), respectively. On the relationship between capital and displacement, see Harvey (2005: 75-78).

interfering in democratic elections, and creating cross-border aid and assistance policies that undermine asylum initiatives or divert funds away from refugee protection goals.¹⁹ At the same time, few liberal states have done more to discourage knowledge or criticism of their actions and policies within their own domestic sphere using a wide range of tactics from the clandestine infiltration of public organizations²⁰ supportive of refugees to the selective denial of facts reported in refugee testimony²¹, to the cultivation of values directly at odds with the human rights-based conception of refugee protection.²² Second, the US continues to have a disproportionate role in setting the terms of future refugee policy and practice around the world, including in Europe (Ignatieff et al. 2016; Dastyari 2007; Welch 2004). It is important to understand that earlier ideologies and goals have also had a profound effect on determining the nature of our institutional inheritance.

¹⁹ For example, all of these actions are repeatedly at play throughout the history of US-Latin America relations. See, e.g., Schoultz (1981a: 138-139; 1981b; 2009: 356ff); McSherry (1999; 2005); Scanlan and Loescher (1983) and Loescher and Scanlan (1984). By the 1970s the US had helped to sponsor counterinsurgency efforts which “enabled the Latin American military states to share intelligence and to hunt down, seize, and execute political opponents in combined operations across borders. Refugees fleeing military coups and repression in their own countries who sought safe havens in neighbouring countries were “disappeared” in combined transnational operations” (McSherry 1999: 144). For a detailed description of the effects of these efforts on the militaries of El Salvador and Guatemala, see McClintock (1985a:209-214) and McClintock (1985b: 54ff), respectively. For an early account of the purposes and effects of US-led civic police force training in Latin America, see Huggins (1987).

²⁰ On efforts to infiltrate the US church sanctuary movement in “Operation Sojourner” see, Campbell (2017). For media coverage of this operation see, e.g., Nat Hentoff. 14 June 1985. ‘Undercover Agents Go to Church’ *The Washington Post*: A27 and Special to the New York Times. 20 November 1985. ‘Church Workers in Trial Defend Aid to Aliens’ *New York Times*: A6.

²¹ Schoultz notes elsewhere that it is entirely reasonable that many US citizens would see the need to prevent “refugee-generating dictatorships” (Schoultz 1998: xiv) as a reason to increase US involvement in Latin America since the end of the Cold War. This is important since the emergence and continued existence of Latin American dictatorships relies not only on support from the US government and policy planners but also, and most crucially, from the ignorance of its public. This is not to deny the considerable efforts of refugees and public activists to bring attention to such issues with mixed results. See for example, Green (2003) on the Brazilian context. On the US rejection of refugee testimony in the case of East Timor see, Simpson (2009).

²² On the promotion of practices that have often qualified as sufficient grounds for asylum in the US see, e.g., Luban (2005). On the designation of torture as the defining characteristic of US human rights policy in Latin America, see Schoultz (1981b: 149).

As Michael McClintock has noted:

The Cold War attitudes and ideology that informed U.S. policy, most comprehensively in the fields of foreign affairs and defense, provided the template on which many “Free World” clients have modelled their societies, their political institutions, and their security systems. (McClintock 1992: 455).²³

My focus on the US should not be taken as an assumption that US or Western state interests are the only causal forces driving refugee politics. Most of the normative accounts of political asylum offered by other scholars emphasise short-term causal factors within states of origin while leaving open the possibility for further analyses of other causal factors and the complexity of global politics. Furthermore, many of these works offer insightful criticisms of liberal states and their role in human rights violations (e.g., Bradley 2013; Gibney 2004, 2012; Levy 2005; Souter 2014a, 2014b; Coen 2018) that complement my own analysis.

Those who live in liberal states who do not feel particularly coerced by the state and for whom the institutions and policies under evaluation represent a significant achievement may be inclined to think that whether particular policies are legitimate turns largely on the question of whether the state that administers them is more or less just, and, equally important, whether the state has in fact tended over time to make progress in these terms.

But there is also something to be said for the view that the legal and moral political context for addressing issues of refugees and persecution is global and that much depends on the achievement of justice *between* states (Gibney 2015). On this view, political asylum is characteristically a transnational phenomenon and asylum policies constitute transnational norms. If the aim of republicanism is to ensure that individuals

²³ On the role of the US in shaping the refugee regime after WWII, see Solomon (1999) and Orchard (2014: Chapter 6).

enjoy freedom across borders then there is reason to think that the scope of republican justice is necessarily transnational (Bohman 2007: 97):

Indeed, even if fellow citizens within a free state could be said to enjoy non-domination in relation to each other, this status cannot be fully attributed to them so long as they stand in relations of domination to other political communities. (Bohman 2008: 190).

I agree that republican principles are a potential source of guidance in resolving the collective action problems entailed by refugee burdensharing arrangements.²⁴ But solutions to refugee issues do not await a comprehensive theory of global justice. On the contrary, whatever global or international justice requires, states must be prepared to work out their obligations quite apart from the expectations that others will fulfil their moral political duties.

PLAN OF THE THESIS

A *theory* of political asylum that is responsive to the politics of the liberal state must account for four related aspects of asylum practices. First, it must explain why, and in what way(s), refugees pose a problem for liberal political theory. Second, it must provide an account of what it means for a state to be a legitimate addressee of moral claims from noncitizens who are political outsiders.²⁵ Third, the theory must account for the value of political asylum as a response to the harms or wrongs of political persecution. Finally, a theory of asylum needs to offer a way forward, a practical account of the basic institutional structure of the state compatible with republican values.

²⁴ On Republicanism's early influence on contemporary international relations theory, including the works of figures such as Vattel and Kant, see Greenwood (1998) and Wood (2015). There is also now a considerable movement to establish republicanism's credentials in the sphere of international and global justice (Bohman 2004, 2007, 2008, 2009, 2011; Laborde 2010; Laborde and Ronzoni 2016; Pettit 2008a; 2010a; 2010b; 2016; Lovett 2010). For a critical take on republicanism's intervention into international theory see, Thomas (2015).

²⁵ Noncitizens are sometimes referred to as "strangers" (e.g., Miller 2016). I avoid this term which is normatively loaded insofar as it suggests one who, by definition, 'does not belong'.

Refugees pose a problem for political theory because there are fundamental disagreements about the nature of the institutional arrangements best suited to addressing the moral claims of persons fleeing persecution and the ideals or values that these institutional arrangements should seek to achieve. To be a refugee is to have a public political or institutional status. For the most part, however, I will treat the concepts asylum seeker and refugee as morally extensional. Asylum seekers are usually distinguished claimants rather than bona fide refugees. Yet, each makes “exactly the same moral claim for entrance” (Gibney 2004: 9). Both asylum seekers and refugees are institutional facts²⁶, facts that exist only in an international setting with particular sets of institutional norms and conventions. The question “who is a refugee?” presupposes an existing institutional normative order, in the absence of which, the status of a refugee and the prospects of refugee protection would be open questions.²⁷ While few people would disagree that asylum should be granted to individuals who face persecution in their country of origin, the nature of persecution has been stubbornly elusive, and there have been few systematic attempts to analyse its content outside of formal legal doctrine. If the practice of asylum is to play a distinctive role in responding to, and defending against, acts of persecution, a clearer explication of the concept of political persecution is needed. The account I develop here tends to support the development of asylum practices

²⁶ On the concept of institutional facts see MacCormick (1998) and (2007).

²⁷ For example, in one of the more recent attempts to revisit the question “Who Are Refugees?” Matthew Lister notes that his approach “assumes that there is no general or basic right to free movement between states” (Lister 2013: 447) on the basis of his observation that “all states currently reject a right to free movement and are likely to do so for the foreseeable future” (Lister 2013 447n5). Lister derives the concept of a refugee from customary legal practice and thus takes the historical process and current institutional realities to be a sufficient guide in defining refugees (Lister 2013: 446n4). Lister therefore starts on the assumption that the present normative system has determined that refugees are institutional legal facts so that the central question is not a matter to be solved by reference to first principles (what he calls “the real issue”) but, rather, how we can defend the institutional facts—the current answer—to his titular question.

consistent with radical forms of democratic political coalition and institutional design that empower citizens and non-citizens together.

Chapter One introduces the main themes and methodological issues raised by a republican approach to political asylum, along with the implications of a republican theory of freedom as non-domination for the ethics and politics of asylum in liberal states. It describes the historical context for republicanism's entrance into debates on issues of forced migration and the limits of any attempt to bring republican political thought to bear on the liberal politics of asylum. It also addresses concerns about the limitations of contemporary republican political theory with an eye to developing a more radical agenda for using asylum policy as a means of promoting democracy within and beyond the state.

Chapter Two questions the idea that offers of political asylum from liberal states are necessarily or generally benign drawing attention to the disparities between theories of legitimacy and historical practice. On the republican view, offers of asylum are coercive insofar as they place asylum seekers in a position of dependency on the state; that is, insofar as the host state fails to empower asylum seekers and refugees within their territories against arbitrary interference, including the arbitrary return of refugees to conditions of persecution. Most normative theorists take it for granted that, to the extent that liberal states are generally or comparatively just, and insofar as their general practices *could* be justified to refugees and receiving-state citizens through hypothetical forms of accountability, the actual asylum policies of liberal states are essentially legitimate. This conflation of justice with legitimacy is especially important given that states have sometimes used asylum policies to further questionable foreign and domestic political goals.

Chapter Three argues that the capacity to resist political repression is constitutive of political well-being and that this capacity depends on the presence of political institutions that are committed and reasonably effective in defending citizens' political autonomy. Claims for protection against persecution draw attention to the absence of effective political institutions, but they also mark the loss of something that has non-instrumental value. On this account, individuals are *politically* persecuted when their fundamental political choices are conditioned by the arbitrary will of private or public authorities in the absence of effective institutions. This raises a question about the extent to which current liberal institutions can be entrusted to promote refugees' political well-being or whether there is a need for new institutional arrangements.

Chapter Four draws on the contemporary traditions of associative democracy (Hirst 1994; Warren 2001) and populist forms of republican governance (McCormick 2011; Holman 2018) in arguing for a variety of radical institutional reforms within liberal asylum states including citizen/non-citizen 'mixed' assemblies, voluntary associations, and other forms of decentralized adjudicatory processes through which refugees and asylum seekers may gain access to the political sphere and for minimizing the influence of elite interests. Under such reforms, refugees and asylum seekers will have sufficient resources and opportunities to contest their exempted status or their treatment as moral persons under the protective authority of the state.

Chapter Five argues that the institutional mechanisms of refugee protection will fall short if they are based on current patterns of movement and present or near-term refugee populations. The republican approach must also consider future refugees, refugees who do not yet exist but who will be greatly affected by the decisions of present persons. The chapter considers the challenge of understanding how to represent the

interests of future persons under conditions of displacement within the context of climate change. It then considers what institutional mechanisms may help to anticipate and provide political representation for future refugees in anticipation of the impacts of climate change. To address the challenges of democratic representation and future refugees, I propose a novel form of citizen-non-citizen assembly—a Refugee Assembly—that is compatible with various forms of constitutional and adjudicative authority and which may encourage a more robust public debate on issues of common concern between constituents of the participants’ respective states.

Chapter Six examines the relationship between republicanism’s account of freedom and its commitment to the rule of law by considering how state practices can be made to serve the (international) goal of maximizing non-domination. To this end, the chapter addresses the relationship between refugee law and politics, focusing, in particular, on the significance of the normativity of refugee law—i.e., its capacity to serve as a guide for action and a means of reducing domination. I argue that refugee law suffers from an important normative defect: it lacks qualities that are necessary for it to be sufficiently action-guiding for refugees and citizens alike. While standard adjudicatory reforms (e.g., a supra-national appellate system) offer some ways of remedying current practices thereby reducing domination between states and non-citizens, these reforms are ultimately limited. One reason for this is that the discretionary elements of adjudication are neither completely eliminable nor is their elimination always desirable. Furthermore, although rights and rights-based principles such as non-refoulement act as important constraints on government action they are not necessarily the only, nor the best, means by which individuals (including asylum seekers and refugees) may protect against arbitrary interference. For one thing, current rights provisions are notoriously vague in that they

are subject to a number of conditions of derogation which ultimately rely on interpretive discretion that may itself constitute a form of domination. Furthermore, these provisions, along with their interpreters, fail to specify the appropriate means by which states can *reliably* identify and act on conditions that exempt particular individuals from a states' protective function. These problems cannot be solved through legal means alone; they require a political solution, one that is attentive to the role of refugee law as a questionable source of guidance that preserves the interests of the state, in part, by preventing citizens and refugees from cooperative ventures that would allow both to realize their shared democratic interests.

PART I

CHAPTER ONE: REUBLICAN POLITICAL ASYLUM

Any theory of asylum must arguably respond to the problems raised in consideration of the distinction between ideal and non-ideal theory, that is, the distinction between the strict (or full) and partial compliance of persons (whether individually or collectively) with ideal norms of asylum understood as the set of social practice(s) comprising liberal states' responses to refugees. For the most part, however, I avoid this rubric for a more straightforward approach to understanding what a normative theory of asylum requires. This approach begins with the thought that all normative theories are presented in the light of particular facts. The careful assembly of data and historical cases is probably the best means of determining what is meant by full and partial compliance within any particular social practice and the best guide to the sorts of problems that a normative theory must be prepared to deal with.

In this chapter, and the next, I suggest that political theorists have not given sufficient attention to the ways in which the historical facts of asylum practices and the doctrines of self-interest and domination can function as key organizing principles of theories of liberal asylum. The chapter opens by identifying some normative antecedents of the refugee regime that do not normally serve as an aid to the political theory of asylum. The cases I present are intentionally selective. They illustrate specific points and patterns that are easily lost among both more circumscribed and more comprehensive accounts of various subfields of forced migration. I then move to challenge the characterization of the fundamental tension in liberal asylum theory that sees liberal states as (tragic) arbiters of the competing interests of asylum seekers and the citizens of host societies. My aim here will be to address some contemporary features of liberal asylum theory—notably the role

of the concepts of freedom, equality and partiality in recent academic debates—with an eye to developing a more radical republican agenda, one that would see asylum policy as a means of promoting democracy within and beyond the state. Along the way, I also challenge the received wisdom that cautions against characterizations of liberalism and republicanism as distinct or opposing traditions. This warning is appropriate in characterizing liberal and republican traditions as a whole, but it works less well in more specialized contexts where political issues may be better served by attempts to divide liberal from republican strategies and institutions. Indeed, while the differences between liberal and republican thought have sometimes been overstated, their conflation may encourage republican thinkers to abandon, rather than develop, the more radical elements of republican thought so desperately needed in our current age. This discussion allows us to cast back, and to recover (in a limited way) the historical context for republicanism's entrance into debates on issues of forced migration leading to a distinction between three forms of asylum: monarchical, liberal, and republican. Many of the issues dealt with here do of course implicitly concern the tensions between ideal and non-ideal theory. To this end, I consider a number of issues that confront the attempt to apply republican political ideals to considerations that may make republicanism unpalatable as an applied normative theory of asylum. To anticipate somewhat the discussions of later chapters, the republican view taken here sees questions of who and how many refugees to accept within the liberal polity as secondary considerations that depend on the forms of political representation that are necessary to ensure their non-domination. Asylum seekers should be treated as political equals by and within their host societies. The point of equality however should not be to make citizens and non-citizens equal in all respects, but to

make everyone equally free from domination. Institutions of asylum governance that reduce domination thereby serve the goal of equality too.

1.1.THE REFUGEE REGIME: SOME NORMATIVE ANTECEDENTS

Many recent studies in the normative political philosophy of asylum have obscured potential continuities between historical (pre-WWII) and contemporary (post-WWII) responses to refugees. Three methodological suppositions, which I will refer to as disassociations, are worth highlighting. One has been to emphasize the *continuities* between historical events that offer the impression of asylum's gradual moral progression as a liberal state and international practice, on the one hand, while de-emphasizing (or ignoring altogether) the historical continuities that link contemporary asylum practice with periods or moments when those practices have functioned more or less overtly as tools of statecraft or as aids to anti-democratic goals, on the other. Thus, we are also told that "the UNHCR's success reflects a historical process of gradual norm development and accumulation", that began with the response to Huguenot persecution in the late Seventeenth Century—an event that 'codified' the 1951 *Convention Relating to the Status of Refugees* by creating a unique category of migrant—culminating in an international moralist protection regime, shepherded into existence largely through US leadership (Orchard 2015: 1, 42).²⁸

²⁸ There is also evidence however of consistent efforts to devise asylum policies for 'reasons of state' as when, during the same period in question, the US "refused to give the UNHCR any substantive support and actively tried to inhibit its ability to raise funds" (Cronin 2003: 176, prevented the International Refugee Organization's involvement in resettlement schemes (Sjoberg 1991), or "opposed unilateral efforts on behalf of refugees" (Maga 1981: 99; 1982: 437).

Evidence of the commitment to a humanitarian international order and the extent to which asylum practices have progressed towards human rights may be sought within larger historical patterns.²⁹

Orchard's reference to the reception of Huguenot refugees is therefore significant and deserves careful attention. Charles II's sympathetic policies for persecuted French minorities in 1681 are well known and widely accepted. But those policies were not continued under his brother and successor James II in 1685 whose "favourable actions [supporting Huguenot refugees in word and letter] were little more than a front to placate English public opinion", and who personally "sought to restrict the number of refugees reaching English shores...[by] prohibit[ing] the captains and officers of English ships from taking French subjects on board unless they had passports" (Gwynn 1977: 826).³⁰

²⁹ It's also worth noting that the discretionary powers inherent to earlier modes of executive refugee protections have sometimes increased under modern treatise and asylum reforms that are generally viewed as watersheds of progressive reform. For example, Article 5 of the Montevideo Treaty on Political Asylum and Refuge signed August 4, 1939 included the provision that "refugees shall not be permitted to commit acts which...may *tend* toward participation in, or influence upon, political activities" (Treaty 1943: 101—emphasis added; cf. Caldwell 1943) thereby imposing on individuals obligations that, in the Treaty of Westphalia (1648), were reserved only for states. Whereas Westphalian doctrine articulates the perpetual right to "make alliances with strangers [i.e., states] for their preservation and safety; provided, nevertheless, such alliances be not against the Emperor, and the Empire, nor against the public peace"²⁹, the Treaty of Montevideo some three hundred years later takes alliances between states largely for granted, but demands the protection of individuals require complete political disenfranchisement to a degree no individual can actually guarantee. Patrice Poutrus has shown how discretionary powers were increased under the 'extraordinarily liberal legal norm' of West Germany's Basic Law (effective from 1949-1993) insofar as "regarding the legal definition of what constituted a victim of political persecution and the nature of the persecution that justified the granting of asylum were left to be decided by executive practice" under procedural amendments in 1953 which "though they had been passed during the Nazi dictatorship did not seem to pose a problem for the German and allied authorities at the time" (Poutrus 2014: 117, 119). Paul Weis, a former legal advisor to the UNHCR, had pointed out that "the granting of preliminary asylum [under the 1953 Asylum Ordinance] are examples only...in spite of the commonness of the practice, states have refused to admit the principle" (Weiss 1954: 196). Poutros questions the optimism of Weis's assessment, pointing out that "[r]ather than leading to the granting of asylum, the provision was used to reject foreign refugees seeking refuge in the Federal Republic" (Poutrus 2014: 120). The move to protection by executive decision was eventually followed by the German Democratic Republic in 1968 (Poutrus 2014: 124).

³⁰ It is important to recall however that in the sixteenth and seventeenth centuries the decision to flee one's state was often understood primarily as an inner or private moral conflict consisting in the tragic choice between self-preservation and a commitment to the natural and spiritual moral order whose author was God. It was not uncommon, then, for Early Modern thinkers, both in their juridical and literary sources, to

Similarly, the liberal practice of political asylum is sometimes said to have emerged from the Cold War period, during which it served ideological goals³¹, into a more progressive—even morally universal—practice developed by the “UNHCR and liberal democratic states to include all people forced to flee their homes even if they have not crossed international boundaries” (Gibney 2004: 6). Christian Joppke, among the most widely cited specialists on immigration, claims that a “liberal norm of racial nondiscrimination born in the aftermath of WWII and slowly transforming from pragmatic foreign policy consideration to moral principle...was a general turn, not specific to the United States but commanded by the exigencies of liberal stateness as such.” (Joppke 2005: 91). Nevertheless, this general normative turn did have some

“refute the common notion of exile as an evil, even examining its advantages, and problematizing the very notion of a fixed, pre-determined *patria* itself as misleading” (Tucker 1996: 37). For Locke, there is no earthly authority external to or independent of the state’s own highest adjudicatory body that can settle conflicts between individual claims for religious autonomy and government action in the public interest (Dunn 1991: 175), so there is no way that members of political societies can have recourse to contest decisions of the state. As Robert Nozick has pointed out, “[i]t is a consequence of Locke’s view that each citizen is in a state of nature with respect to the highest appeal procedure of the state, since there is no further appeal. Hence he is in a state of nature with respect to the state as a whole” (Nozick 1974: 340n6). These views make it difficult to assert the existence of a customary norm of asylum and virtually impossible to claim that the historical events of the Modern era were natural or precursory codifications of today’s asylum practices. Dunn points out that there are still few if any procedures of appeal to intra-state conflict beyond the state’s own institutions (Dunn 1991: 192). Yet, Locke appears to make an exception in cases where government takes the form of an absolute monarchy. On the view commonly attributed to Locke, individuals agree to live under a shared authority to avoid the uncertainties and perpetual strife that constitutes life in the state of nature in which individuals act in accordance with their own conscience without any common arbiter to distinguish between right or wrong, justice or injustice. Absolute monarchy places every person under its authority in a position to flee the state for a form of society that is more consistent with their legitimate consent. Thus Locke notes that “...when [any person] perceive, that any man, in what station soever, is out of the bounds of the civil society which they are of, and that they have no appeal on earth against any harm, they may receive from him, they are apt to think themselves in a state of nature, in respect of him whom they find to be so; and to take care, as soon as they can, to have that *safety and security in civil society*, for which it was first instituted, and for which only they entered into it” (Locke II. 1988 [1698] §94, 50-51).

³¹ On asylum as a form of propaganda and psychological warfare see, Loescher and Scanlan (1986: 33; 38-39; Levy 2005: 36, 43; Totten 2008: 62). US psychological warfare programs and CIA intelligence-gathering operations were conducted under the cover of refugee humanitarian operations in Asia and beyond. See, for example, Barrett (1953: 73); Cook (1984: 57); Lucas (1996: 284, 290, 299); Mark (2007); Needell (1993); Oyen (2015: 164-165). On the US recruitment and training of refugees in military operations see, Loescher and Scanlon (1986, Chapter 2); Brands (1988); Lucas (1996: 284, 290–299). On the general enthusiasm for and ideological roots of psy-ops programs in the Post-WWII period among US state department officials, see Foglesong (1999).

notable exceptions. The norm of racial nondiscrimination was, for example, selectively applied (Lipman 2013) and the normative aspirations of immigration policy did not extend to refugee policies which were neither liberal nor progressive. As Joppke surmises:

In retrospect, it is astonishing that this obvious inconsistency between universalistic legal immigrant and particularistic refugee admission went unnoticed and unopposed at the time—at the height of the Cold War it was probably not thinkable that refugees could be from other than Communist regimes. (Joppke 2005: 71).

Joppke cannot mean that no one could conceive of non-communist refugees. That asylum seekers from other states *were* conceivable is itself necessary to explain the attention and sustained opposition to US refugee policy that Joppke himself describes “throughout the 1980s and 1990s by courts and protest movements, such as the church-led sanctuary movement” (Joppke 2005: 72) in which US citizens who sought to shelter persons fleeing from US-backed terror in Central America were prosecuted under immigration law (Campbell 2017: 488-489). Non-communist refugees were also clearly conceivable to the US government in its early efforts, beginning in 1945, to register the Joint Anti-Fascist Refugee Committee as a “subversive organization” with the US Attorney General thereby making attempts to support Spanish asylum seekers fleeing Franco’s Spain an “un-American” act punishable through various means, including violations of academic freedom (Deery 2010).

To understand Joppke’s claim that non-communist refugees were unthinkable, we must see that this state of disbelief refers not to the commonsense views of ordinary citizens³², but to the ideologies of elite US planners and their international representatives

³² Robert Goldstein refers to “poll data indicating that during the height of McCarthyism few Americans were concerned about the communist ‘menace’” (Goldstein 1978: 573-574). He highlights one survey of

for whom dictatorships favourable to US interests were, in principle, incapable of creating refugees. As former US Ambassador to the United Nations Jeane Kirkpatrick explained:

Traditional autocrats leave in place existing allocations of wealth, power, status, and other resources which in most traditional societies favor an affluent few and maintain masses in poverty. [...] Because the miseries of traditional life are familiar, they are bearable to ordinary people who, growing up in the society, learn to cope, as children born to untouchables in India acquire the skills and attitudes necessary for survival in the miserable roles they are destined to fill. *Such societies create no refugees.* Precisely the opposite is true of revolutionary Communist regimes. They create refugees by the million because they claim jurisdiction over the whole life of the society and make demands for change that so violate internalized values and habits that inhabitants flee by the tens of thousands in the remarkable expectation that their attitudes, values, and goals will “fit” better in a foreign country than in their native land.” (Kirkpatrick 1979—emphasis added; cf. Kirkpatrick 1981/82; see also Gatrell 2013: 108).

Kirkpatrick’s sincerity is undermined only by the fact that, during the initial post-war years, exiled Soviet opposition leaders were viewed as a threat to peace between the US and the Soviet Union and, for this reason, as German sympathizers and “Nazi agents” who were ineligible for asylum. Hence, George Fischer’s observation that “[i]t is part of the tragedy surrounding Soviet opposition that in such circumstances there was simply no place for what has been the proud Western principle of political asylum” (Fischer 1952: 114, quoted in Elliott 1973: 268).

It is important to ask how the “proud Western principle of asylum” could ever come to require US officials to return former Soviet citizens fleeing from communist oppression—at the request of their Soviet oppressors—or how the “exigencies of liberal stateness as such” could command US forces to tear gas Soviet refugees in an effort to prevent them from committing mass suicide after learning of their fate, efforts that met

five thousand Americans who were asked ‘What kinds of things do you worry about?’ and ‘Are there other problems you worry or are concerned about, especially political or world problems?’ which showed that concerns about communist threats represented about 1 and 6 percent of Americans, respectively.

with varying levels of success (Elliot 1973). One answer would be to suggest that the Cold War was a distinctive phase in refugee policy characterized by an ideological orientation that has since been shed for new and morally progressive ideals. This idea has not gone unchallenged (Connelly 2010; Mcsherry 2000; Morales 1994: 86; Go 2011).³³ Some refugee scholars have argued that, while the US adopted an ostensibly neutral UN definition of refugees in 1968 this did not significantly alter US refugee and asylum practices (Reimers 1992: 180, 184; Loescher and Scanlan 1986: 215). Similarly, despite the 1980 US Refugee Act's explicitly neutral stance the ideological prerogatives of the Cold War refugee policy remained more or less unchanged (Loescher and Scanlan 1986: 216; Bon Tempo 2008). Loescher and Scanlan (1986: 213) go so far as to say that the formal repudiation of the explicitly geopolitical refugee program can be viewed as an important step in an "ongoing propaganda campaign" to co-opt the language of human rights in a way that would allow the state to maintain its earlier policy goals under increased discretionary powers.

Yet, Matthew Price claims that "[a]sylum's political origins are unrecognized in academic commentary on today's refugee regime" (Price: 2004/05) and that a conception of asylum as a low-level sanction (a new 'old' account of asylum) is "a needed response to those who criticize the persecution criterion as a Cold War relic designed to advance the ideological interests of the West by directing attention to Soviet deficiencies" as well as to those who would accuse states of applying a "[persecution] standard [as] a matter of ad hoc, contingent partisan invention" (Price 2004: 309). These accusations are moreover a testament to the "growing acceptance of a humanitarian conception of asylum" (Price

³³ Cold War historiography has been usefully interrogated in Isaac Bell (2012: especially Chapters 5 and 6; Cumings 1991: 196-197 and Schoultz 2018).

2009: 103) that views asylum as a means of addressing the needs of asylum seekers rather than the political conditions of their state of origin. Price accounts for this humanitarian trend by citing a shift in the immediate causes of forced migration during and after the Cold War. On Price's view, it is the new "realities" of poverty and indiscriminate or non-targeted violence in the post-Cold War era that are primary drivers of asylum migration and which have "put pressure on the traditional focus of asylum" (Price 2009: 4).

Price's claims will be assessed in more detail in Chapter Three. For our purposes here, however, we cannot fail to notice that the 'new' pressures Price mentions—from severe poverty to indiscriminate violence—were well represented during the period in which the modern asylum regime emerged, both in the aftermath of WWII and throughout the Cold War era. Price's emphasis on the need to practice asylum in a way that signals disapproval of other states sits awkwardly with his reference to practices that are clearly worth condemnation but which fall outside of his analysis. Indeed, Price shows that he is not adverse to defining as indiscriminate practices that experts would regard as discriminate and, furthermore, of revising well known historical facts in way that places certain practices—and the states that support them—beyond the pale. For example, he suggests that death squads emerged as a significant source of violence only after the Cold War and that we can distinguish between the actions of death squads and 'oppressive states' for the purposes of asylum, since individuals who flee from death squads are often "not themselves targets, but merely victims...of anarchic violence". However, as Bruce Campbell and Arthur Brenner have pointed out, not only do death squads operate using clearly defined targets, it is also true that they "are not simply a

product of the Cold War but have, in fact, been active for much longer...” (Campbell and Brenner 2000: viii).³⁴

Indeed, in many cases, liberal states have either been complicit, or played a crucial supporting role in these and other atrocities which cannot be isolated to the Cold War period. Mark Gibney (1988, 1992) conducted a series of studies during and after the late Cold War period in which he graded states according to their level of human rights violations based on Amnesty International and State Department Country reports. In the first study, he compared his “conservative” political terror scale of 1-5 with US recognition rates under the Reagan administration according to each refugee-sending country. He found that the US was least likely to admit individuals from countries with the highest terror levels (Levels 4-5), noting that “individuals from Level 3 countries are virtually the sole beneficiaries of U.S. refugee policy” (Gibney 1988: 117). He notes that “we have evidence that something other than humanitarian concerns is driving U.S. [refugee] policy” (Gibney 1988: 116) since individuals who face the most severe levels of persecution and atrocities are the least likely to receive basic protective status (see also, Dastyari 2007). Similar results are found in a follow-up study which again shows “a rather perverse inverse relationship between levels of human rights violations and refugee determinations” (Gibney, Dalton, and Vockell 1992: 36)³⁵ In a still more recent study

³⁴ As Campbell explains, “Death Squads...just in the last 30 years have been responsible for hundreds of thousands, perhaps millions of deaths [...] against clearly defined individuals or groups of people [...] with the overt support, complicity, or acquiescence of government, or at least some parts of it” (Campbell and Brenner 2000: 2). The emergence of death squads roughly coincides with the “creation of the autonomous citizen as a political actor [and] the invention of mass politics...” (Campbell and Brenner 2000: 15). See also, Howarth and Peterson (2016) and Metelits (2010). On the exchange relations between states and organized crime see, for instance: Wang (2017); Paoli; (2008); Hill (2003); Musto (2017).

³⁵ See David Martin’s criticism in Gibney (1993) where he urges Gibney (et al. 1992) “to redirect some of their fire, away from receiving states and fellow scholars, and more toward the real villains in the piece, the governments whose malevolence, indifference, or incompetence sends people across borders” (Martin 1993: 154). The rebuke entails that “receiving states” such as the US should be excluded from the category

Marc Rosenblum and Idean Salehyan “find no evidence that humanitarian norms are increasingly important *relative* to more traditional instrumental concerns” such as foreign policy (Rosenblum and Salehyan 2004: 693; cf. Coen 2018).³⁶

A second mode of disassociation has been to distance asylum practices from their underlying sources of power. For example, Alexander Betts and Paul Collier have recently declared elite domination in the refugee regime to be a thing of the past since: “[t]he time when the West could impose the moral values of its elite on everyone else is gone for ever...” (Betts and Collier 2017: 99; but see also 209).³⁷ Yet, the practice of asylum today continues to reflect the judgements of elite executive authority with

of “real villains”, in what amounts to a reversal of the facts which show the US to be perhaps the single most important contributor in the creation and maintenance of persecutory regimes abroad in cases involving claims for asylum or refugee status in or beyond its borders. Gibney appears to be at a complete loss to understand Martin’s “desire...to consider human rights concerns, but, strangely enough, to ignore them in actual practice” (ibid.: 157).

³⁶ In a recent *New York Times* report on the historical challenges inherent to the US response to refugees Somini Sengupta notes that during the Cold War “the West scored political points by welcoming people from the Eastern bloc” but that “political rewards for taking refugees have [since] diminished”. One of the “assorted challenges” is to find a suitable replacement for the role played by anti-communist ideology (Scanlon and Loescher 1986: 212-213), a challenge that is partially met by replacing the Cold War justifications for foreign policy interventions on refugee policies with new frameworks including the US wars on drugs and terrorism. The goals of each can be effectively aligned. For example, the goals of fighting terrorism, of disrupting the flow of drugs to the US, and restricting immigration and refugees are usefully combined under the narrative that Central American children fleeing drug cartels have connections with international terrorist organisations such as Al Qaeda. Sonia Nazario (2014) identifies persons fleeing drug wars in Honduras as refugees but declines to mention US support directly and indirectly for drug cartels, obscuring the root causes of the drug trade and regional violence while tacitly supporting continued US intervention in the region. See, Somini Sengupta, 14 January 2016. ‘U.S. Record on Refugees Reflects Assorted Challenges’ *The New York Times*, 10; Sonia Nazario. 11 July 2014. ‘The Children of the Drug Wars: A Refugee Crisis, Not an Immigration Crisis’ *New York Times* and URL=<<https://www.nytimes.com/2014/07/13/opinion/sunday/a-refugee-crisis-not-an-immigration-crisis.html>>. On the relations between Central American drug trade and US intervention and collaboration see, for example, Joseph Goldstein and Benjamin Weiser. ‘After 78 Killings, a Honduran Drug Lord Partners with the U.S.’ 6 October 2017 *The New York Times* URL=<<https://www.nytimes.com/2017/10/06/world/americas/after-78-killings-a-honduran-drug-lord-rivera-partners-with-us.html>> and Reiss (2010). On the highly speculative MS-13/Al Qaeda connection see, Starita (2009). For a critical review, see Wolf (2012). On the general role of the US war on drugs in global US intervention policy see, Reiss (2014). On the relevance of Cold War policy in contemporary US-Honduran relations see, Main (2010).

³⁷ On the enduring practices of elite international planning and control compare, Sklar (1980) with the more recent works of Cummings (1991), Puchala (2005), Wolin (2008; Chapter 10), and Best, Lengyel, and Verzichelli (2012). On the role of elites in domestic affairs see, for example, Harvey (2005) and Wolin (2008).

implications for the manner in which claims for asylum are expressed and receive uptake (Hatton 2009: F199). Michelle Foster asks, for example, whether the Refugee Convention “has been unduly constrained by an inadequate understanding of the equal importance and seriousness of violations of economic, social and cultural rights rather than because it is inherently incapable of responding to some of the changing predicaments” (Foster 2007: 15-16). But she does not question whether this (mis)understanding is merely conceptual or whether it reflects the socio-economic background of those who apply the law. The massive socioeconomic disparities between those who tend to adjudicate claims for asylum and those who will meet asylum seekers as neighbours and co-workers suggest that whether the Convention can overcome its present constraints may depend, in part, on reforms that reflect not only the distribution of goods but also the distribution of public offices and political rights. Citizens and elites in Western democracies diverge on a wide range of major policy issues (in the US for example, see Ferguson and Rogers 1986; Page and Jacobs 2009; Page and Marshall 2006 Rogers 1991: 287). Legal scholars continue to criticize judicial decisions and state oversight in applying asylum law and designing state as well as extra territorial migration policies. Thus, the prospects for a *democratic* response to refugees on any significant scale may depend, in part, on whether we can effectively devolve legislative power and constitutional authority to lower levels of social democratic practice, rather than through modifications of the law itself.

These observations lead to an important point. In Western democracies, citizens and elites diverge on a wide range of policy issues (in the US for example, see Ferguson and Rogers 1986; Page and Jacobs 2009; Page and Marshall 2006). Institutions themselves are an important source of citizens’ interests and opinions (Rogers 1991: 287). There is now a significant body of evidence demonstrating that the news media

plays a crucial role in shaping public opinion and debate in democratic states reinforcing a narrow range of elite views and prescriptions on asylum and refugee policy.³⁸ So there can be no comfortable equivalence of the will of the state with the will of its members (but see n171 below).

For the same reason, elite views, the rationales of earlier state planners, and public intellectuals continue to be crucial sources for understanding contemporary asylum practices and the issues that have shaped their emergence within the current refugee regime. Daniel Gorman has shown that international treaties such as the Versailles settlement “extended the British, French, and Ottoman territories as League mandates” but that, by endorsing a human rights discourse, “internationalism proved corrosive for European empires” who were forced to express “a willingness to act as international citizens provided that their sovereignty remained sacrosanct” (Gorman 2012: 3, 7-8, 203).³⁹ This ‘new internationalism’ wove together what were otherwise intuitively opposing rights, the rights of minorities to self-determination and the right of states to control the movement of populations “thereby legitimating systems of minority rights and forced deportations” (Weitz 2008: 1341; see also Watenpaugh 2010). The new

³⁸ In the first systematic study of UK liberal news media coverage of refugees Ron Kaye finds that “on the evidence presented, public concerns are more likely to be shaped by political elites, with the media playing a largely intermediary role” (Kaye 1998: 178). “The news is framed in terms of the ‘genuineness’ of refugees being a newsworthy question, demanding frequent comment, report and discussion” with “the effect of socializing the reader into using this construct when thinking about refugees.” Samantha Cooper, et al. (2017: 79) argue that national-level coverage of refugees in Australia is “[i]n line with the propaganda model of media, where media reporting is heavily influenced by the state...”. In his study of media responses to Tamil asylum seekers in the Netherlands, Teun van Dijk observes that “the media appear to reproduce a dominant consensus, often pre-formulated by different political, social or academic elites” for a public that “as yet had no knowledge nor specific opinions” on Tamil refugees (van Dijk 1988: 169). See also, Philo, Briant, and Donald (2013); Klocker and Dunn (2003); Lawlor and Tolley (2017).

³⁹ The quote refers specifically to the US, but should be viewed as an articulation of the general principle of explicit international state cooperation. By contrast, the failure to accept the principle of internationalism was not grounds for exclusion from internationalist politics as such. Although not an official member of the League of Nations, the US was the League’s second largest donor between 1920-1928, actively participating in League’s affairs on all issues, including refugee resettlement (Gorman 2012: 183-186, 189).

internationalists' contributions to the politics of asylum was particularly egregious during the 1930s which "saw co-ordination between states to guard *against* refugees: a negative form of international cooperation based on...competitive restrictionism" (Frank and Reinisch 2014: 482—original emphasis; cf. Maga 1981)⁴⁰, a euphemism referring to the exploitation of persecution for political and economic gain.

Indeed, in her 1939 article "European Power Politics and the Refugee Problem", the popular political scientist and then Director of the US Foreign Policy Association⁴¹ Vera Dean argued that it would be legitimate for democratic states to base their response to refugees from fascist regimes and dictators on "purely material considerations of economic advantage and strategic interest...provided it is frankly recognized, and not cloaked with high-sounding moralities" (Dean 1939: 20). She observed that refugees fleeing from Nazi Germany "seem to be taking the place of merchandise exports...[and] may have the effect of gradually levelling international economic conditions" (Dean 1939: 24). Her solution to this 'refugee problem' was to prevent Nazi Germany from extracting economic concessions from liberal states who would be forced to pay for the safe and orderly departure of refugees from the annexed territories. Dean lamented that, "the extermination of 80 million people, *desirable as it might be*, is not within the realm

⁴⁰ As one observant American commentator noted at the time, "the will to make the league work" was endangered not by "Germany, or Japan, any other nation, it is from ourselves...we want our way in everything" (Drake 1919: 348).

⁴¹ The FPA was the first US foreign policy Think Tank which, at the time of Dean's directorship, created "opinion forums for cosmopolitan elites (business and journalistic executives, professionals and their spouses) who saw the need to guide the uninformed general public toward intelligent and responsible opinions" (496) though "[u]ltimate control over the research departments rested with those who financed them" (Raucher 1978: 496-497). Dean (1903-1972) herself was a prominent political scientist commentator. On the evolution of the FPA and Vera Dean's role, see Raucher (1978). Raucher does not mention Dean's comments cited above nor, to my knowledge, has any other commentator of this period of US history.

of practical politics” (Dean 1939: 22—emphasis in original).⁴² As a result, she advised the US to pursue a passive approach, and to refrain from assisting members of the annexed territories who, though they “may yet be unable to resist Germany by force...are in a position to wear it down by a series of guerrilla obstructions.” In this way, the deaths of a largely defenseless people would help to tax the German economy, allowing the US to maintain its economic and strategic advantages.

Dean’s view is perhaps less remarkable for its brutally self-serving attitude towards persecuted minorities than for its resemblance to more recent asylum policies and for its rare departure from the disposition to disguise one’s policy goals behind ‘high sounding moralities’ (Daniels 2006: 109-112; Rayski 2005). Almost two decades later, on December 6, forty days after the start of the 1956 Hungarian uprising against Soviet occupying forces, Vice President Richard Nixon delivered a speech to the Automobile Manufacturers Association in New York. There Nixon explained the US decision to provide political asylum to Hungarians fleeing Soviet persecution, stating that:

The United Nations has no armies that it could send to rescue the heroic freedom fighters of Hungary. There were no treatise that would invoke the armed assistance of the free nations. Our only weapon here was moral condemnation, since the alternative was action on our part which might initiate the third and ultimate world war. (Nixon 1957: 163, quoted in Marchio 2002: 784).

The US response to Hungarian refugees has been widely praised as a watershed moment in refugee policy, not merely for the US, but the world (but see Loescher and Scanlan 1986).⁴³ The US diplomat W.R. Smyser (2003: 80) proclaimed that “humanitarian relief and especially refugee support came of age” with the US response to the Hungarian

⁴² 80 million is the estimated population of Germany, including the annexed territories of Austria, Sudetenland and Memmland as per the 1939 German census.

⁴³ Beginning in the Fall of 1956, around 200, 000 Hungarian citizens crossed into Austria, many of whom would be later settled abroad. Close to 40, 000 settled in the US, the largest intake of any country, though among the lowest of any country per capita or relative to GDP. Media coverage of the event which was relayed throughout the Christmas season was overwhelmingly favourable to the White House plan.

refugee crisis. Even for historians who retain something of Vera Dean's disdain for 'high sounding moralities', the 1956 crisis is accepted as a sufficient test of the liberal democratic (re-)commitment to norms and principles of the refugee regime:

The Hungarian refugee crisis became an international demonstration - in a sort of inverted resemblance to the 1930s - of competitive latitude that did much to expiate the sins of preceding decades and establish the Hungarian case as the normative response to refugee crises, *when it was anything but*. [...] Nonetheless, the Hungarian refugee crisis provided not only a test of international institutions, but also of states' adherence to the rules, regulations and 'spirit' of the international refugee regime to which they had signed. (Frank and Reinisch 2014: 484).

Yet, the US response to Hungarian refugees did not establish the use of political asylum as a new diplomatic strategy or effective form of moral condemnation, nor did it expand the scope of eligibility for asylum. Nixon's claim that asylum was used as a weapon of last resort having exhausted all attempts to secure a military victory short of total nuclear war was not inaccurate.⁴⁴ Two proposals for limited nuclear attacks on Soviet forces in Hungary had been proposed and were rejected only after serious consideration (Marchio 2002). Among government officials, however, the use of asylum was widely considered a tactical failure confirming the need for a wider range of military options against Soviet incursions and providing an "additional justification to develop a full range of military options, including tactical nuclear weapons and larger conventional forces" (Marchio 2002: 810; cf. Kissinger 1956).

A third disassociation has been to suggest that the underlying factors that cause refugees to flee are peripheral to or distinct from an analysis of the moral political response to refugees. As Matthew Gibney (2015: 452) has pointed out, "[r]ather than

⁴⁴ It is interesting to compare this example of the role of refugees as liberal propaganda with Caroline Shaw's observation regarding the Nineteenth Century practice in which refugees were sometimes a "consolation prize" of imperial humanitarianism, "a second-best alternative" of failed attempts to "enforce liberal justice on foreign powers" (Shaw 2015: 6).

emphasising the reasons why an individual's human rights were violated in determining refugeehood, scholars have seen the moral core of refugeehood simply in the need for protection.” Joseph Carens too claims that “[f]rom a moral perspective, what is most important is the severity of the threat to basic human rights and the degree of risk rather than the source of character of the threat” (Carens 2013: 201; cf Miller 2016: 80).

This assumption has an important historical precedent in the institutional frameworks from which the refugee regime originally emerged. Bruce Cronin has demonstrated that the League of Nations was from the outset “politically neutral *vis-à-vis* the conditions that produced refugees” (Cronin 2003: 164). When the High Commissioner of Refugees was initially created the “Allies were not concerned with the political persecution of these individuals *per se*” (Cronin 2003: 159). This indifference to persecution masks the League's active recruitment of fascist states along with its support for military dictatorships⁴⁵ and consolidation of colonial territories (Diggins 1966; Helbich. 1967-68; Migone 2015; Pedersen 2015; Tollardo 2016).

Among the first acts of the League's newest member in 1932⁴⁶ was to plan and carry out an extermination campaign against the resident Assyrian refugee population, many of whom were massacred by British RAF and Iraqi Army forces over the summer months of 1933 (Silverfarb 1986: 42ff; Donabed 2015, Chapter 3). The deliberate

⁴⁵ For example, the League approved a loan to support the beleaguered Portuguese military dictatorship under General Óscar Carmona and António de Oliveira Salazar after Salazar had dissolved Parliament, banned political and manufacturing unions, and killed or exiled many of their political opponents (Araquistain 1928: 44; See also Oliveira 2011). A League delegation in Portugal was met by violent public protests organized, in part, to denounce its economic support for the coup. On this event, see Araquistain (1928).

⁴⁶ Iraq became a League member in October 1932, based on the continuation of policies under previous (but officially expired) parallel military and corporate agreements which gave Britain the right, among other things, to maintain British bases and troops with complete access to the region, to effectively control the Iraqi army, to appoint (on demand) British officials to senior Iraqi government posts at Iraq's expense, and the right to force the Iraqi government to declare martial law under British command (Silverfarb 1986: 9). Britain maintained that its obligations to the League could only be fulfilled if it “regarded the existing military agreement as remaining in force after the date of expiration” (Silverfarb 1986: 19).

targeting Assyrian minorities through political assassination and extra-judicial killings was largely the outward expression of a refusal by the League's members to accommodate Assyrian claims for greater self-determination⁴⁷, often on the explicit assumption that Iraq's minorities were inherently lacking in the dispositional and organizational qualities necessary to legitimate "extravagant claims" for self-rule (Stafford 1934: 159-160; Fisher 2008: 225; Pederson 2015: 279; Donabed 2015: 95-97; Silverfarb 1986: 36-37).

Though much has changed, asylum practices are often used by governments or state officials⁴⁸ in ways reminiscent of their earlier propaganda function, and, not infrequently, in direct violation of human rights and international law.⁴⁹ Efforts such as those used to prevent Haitian refugees fleeing from US-backed military dictator Raoul Cédras (Doyle 1994; Gibney 2004; Jefferies 2001; Morley and McGillion 1997; Pina

⁴⁷ These were conscious policies of repression. The League refused to provide protections for minorities in its Iraqi mandate territory despite expectations that membership in the League would lead to repressive (both military and legislative) actions against minority groups to dissuade their members from seeking greater political autonomy (Pederson 2015, Chapter 9; Silverfarb 1986: 36-37). Donabed's (2015: 108) claim that British reaction to these events was one of "indifference" refers only to their "immediate" reaction, as opposed to the more considered response, to actively contribute to the massacres through, *inter alia*, the supply of weapons and intelligence to Iraqi forces, by convincing Assyrian fighters to surrender their weapons under the false pretence of fair treatment and preventing efficient inquiries into the resulting bloodbaths by blocking official League access to the region (Donabed 2015: 107-108, 122-23).

⁴⁸ The journalist Robert Fisk (2005: 26) reports that the British government sent a letter through their embassy in Khartoum in 1996 rejecting Osama bin Laden's alleged request for asylum which was subsequently published in Saudi newspapers in the hopes of undermining bin Laden's support. The dubious "request" received much attention in the Western press. As Fisk points out, there is little credible evidence that bin Laden sought refuge in Britain, though there is reason to think, aside from bin Laden's own denial, that such a request would be radically inconsistent with his broader goals and ideological commitments, not to mention his well-documented resentment of Britain during the period in question. See, for example, Scheuer (2011: Chapter 4).

⁴⁹ Arulanantham observes that when states violate the law of non refoulement "they do so in covert ways rather than openly admitting it while denying the practice" (Arulanantham 2000: 5, with examples of this practice from numerous countries at: 14-15n39-46). Perhaps the most infamous cases are that of Britain in *M v Home Office* 1992 (Harlow 1994) and the US Supreme Court Decision in *I.N.S v Stevic* (Weinman 1985). On British Foreign Secretary Jack Straw's refusal to grant protection to an Iraqi asylum claimant despite having intimate knowledge of human rights abuses conducted under the auspices of the Iraqi justice system, see, Mark Thomas. 9 December 2002. "Mark Thomas wonders if Saddam's men recycle paper" *New Statesman*. URL=<<http://www.newstatesman.com/node/156766>>. On the view that terrorists should also be protected against deportation where the threat of torture is credible—a view which, if adopted, would radically alter standard practices in Canada, the US and Britain—see, Said (2006).

2007; Walby and Monaghan 2011; Pamphile 2015)⁵⁰ are consistent with the policies and practices of leading liberal states within other regions as well, including Africa⁵¹ and Central America⁵², that have continued under different pretences well into the Twenty-first Century (Stokes 2003; Coen 2018; Schoultz 2018).⁵³

These cases raise serious questions about our reliance on a conception of asylum as a legitimate practice (Levy 2005). Minimally, they suggest that the virtues of the practice of asylum should not preclude an investigation into its legitimacy under particular states at particular moments in time (e.g., Gibney 2004; Bradley 2013). The modes of justification in response to claims for asylum can, in turn, offer clues to the organizing principles of asylum policy, whether they work to support or to undermine institutional arrangements favourable to democracy within and beyond the state.⁵⁴

⁵⁰ William Raspberry notes that “Clinton’s “floating Berlin Wall” intercepts [the refugees] in Haitian waters, thus keeping them out of television’s sight and out of the public mind.” William Raspberry. ‘Clinton’s floating Berlin Wall’ February 14, 1994 *The Washington Post*. See also, Dieck (2015).

⁵¹ On the US tactic of rendering assistance to refugees as a pretext and/or cover for military invasion in the Congo in 1960, see Kalb (1982: 9 and 397n21-24) and Schmitz (2009: 9-35). On the potential for future uses of similar tactics and justifications see Turse (2015).

⁵² See Berger (1997) and Petras (2001). On the US-supported efforts to use forced migration in ‘Plan Colombia’ and its antecedents see, Booth, Wade and Walker (2010) and Stokes (2003, 2005: 94-95). The tactics used in Plan Colombia are similar to those of US strategies in Vietnam which include former US Attorney General Nicholas Katzenbach’s proposal to “stimulate a greater refugee flow [from North to South Vietnam] through psychological inducements to further decrease the enemy’s manpower base”, supported by other high-level state planners such as Robert Komer (quoted in Chomsky 1970: 85-94). Peter Gatrell observes that “population displacement was not a sideshow or a disastrous by-product of war, but a constitutive element in war, a project that states and armies practiced as an integral element of conducting war and mobilizing society” (Gatrell 2007: 420).

⁵³ As Prakash Shah observes, “surveillance, the banning of publications and arrests on political criteria [that target exiles] are increasingly carried out across European states and in consultation with, or at the instigation of, the regimes against which exiles are campaigning” (Shah 1999: 119-120). Asylum detainees have alleged force-feeding by Australian officials (Kenny 2002). We read that “[l]aws are being introduced [in Australia] that may give free rein to guards in private detention centres to beat asylum seekers to death for non-violent protest if they feel justified in doing so” (Berger and Abbasi 2015). See also, Gabrielle Appleby. 8 May 2015. ‘Australia’s rigid immigration barrier’ *The New York Times*.

URL=<<https://www.nytimes.com/2015/05/08/opinion/australias-rigid-immigration-barrier.html>>

⁵⁴ Imperialist motives can sometimes be discerned from moral and institutional justifications for particular asylum policies though asylum policies may only be consistent with imperialist prerogatives. See, for example, Kagan (1998) and Kaplan (2014). For Kaplan’s predictions regarding refugees see Kaplan (1994). also, Max Boot. ‘The Case for American Empire’ 15 October 2001. *The Weekly Standard*.

URL=<<https://www.weeklystandard.com/max-boot/the-case-for-american-empire>>. On imperialism as a

In his essay “the Bent Twig” Isaiah Berlin argued that the attempt to achieve freedom from oppression will often manifest as a kind of ‘antinomianism’, an attempt to overturn the institutions and laws on which society is based:

Antinomianism is nothing new. Mutiny against the life of the barracks, the suffocation of “closed” societies against the laws and institutions that are felt to be unjust or oppressive or corrupt or indifferent to some of the deepest aspirations of human beings occur in the history of every long-lived state and church and social order. (Berlin 1972: 28).

On Berlin’ view, however, attempts to resist oppression can have disastrous results. What begins as a call for freedom may coalesce into a “pathological form of a self-protective resistance” (ibid.: 29) that fetishizes freedom for some at the expense of other values, and other people. Berlin’s observations express a genuine worry about the tendency of societies to turn inward and to resort to dangerous forms of nationalism under various forms of stress and perceived ills. But these worries may themselves be used to argue against serious reforms to existing structures of influence or to prevent even modest devolutions of power from privileged authorities. The accusation of antinomianism is, in this sense, a justification for preserving the status quo, for consolidating power in the face of calls for progressive reform, and for defining problems within the state in such a way that leaves more progressive stones unturned.

1.2 THE ANTINOMIAN STATE

Allen Buchanan has recently noted that the “dominant understanding of the nature of the state and the role of government”, conforms to a discretionary associational view, according to which states are legitimate only to the extent that they act so as to serve the interests of their own citizens (Buchanan 2018: 171). On this view:

justificatory rationale, see Bell (2013); Garnsey and Whittaker (1978: 4); Brunt (1978: 165). On the general absence of imperialism or imperialist critiques in political theory see, Tully (2008: 127).

it is simply a confusion to argue that the people of a very rich and secure state have even a prima facie moral obligation to accept even a small number of refugees from genocide occurring just across the border, even when their acceptance carries no risks to the people of the state (Buchanan 2018: 173-174).

Christopher Wellman holds a similar view in arguing that “legitimate states are entitled to exclude all outsiders, even those who desperately seek to gain admission” (Wellman 2011: 124).

For the most part, however, contemporary liberal debates on refugees tend to acknowledge a fundamental tension between (liberal) states’ competing obligations to outsiders and to their own citizenries (Betts and Collier 2017: 111; Bertram 2018; Gibney 2018; Miller 2016; Wellman 2011). As David Miller (2016: 93) writes, there is “a tragic conflict of values: on the one side, people who are liable to be severely harmed as a result of the persecution they are under-going; on the other, bounded political communities that are able to sustain democracy and achieve a modicum of social justice but need closure to do this.” Similarly, Katy Long observes that “[t]he fundamental obstacle to resolving displacement crises remains...the concern of states to protect national interests and respond to their domestic constituents first” (Long 2014: 22). Yet such claims are notoriously vague. They do not appeal to common normative principles (what *is* a national interest?) or to empirical standards of living that could explain what grounds the liberal citizen’s right to reject others’ moral claims for protection and assistance. In the absence of such details, the justification of entry restrictions for needy outsiders remains specious, and the impulse to defend the rights of affluent citizens to maintain their standing in the face of dire need, avaricious (Singer and Singer 1988).⁵⁵

⁵⁵ “Coveitise is for to coveit swiche things as thou hast not; and avarice is to witholde and kepe swiche things as thou hast, without rightful nede.” (Chaucer Parson’s Tale, quoted in “avarice, n.” OED Online, Oxford University Press, URL=<www.oed.com/view/Entry/13615>).

These comments invite two responses which seem to me unhelpful. One is to deny the tension between citizens and outsiders altogether and to stress the liberal commitment to equality and human rights. Alternatively, we may adopt a pessimistic political morality that rejects the possibility of designing political arrangements to accommodate refugees and, instead, embark on a policy of isolation or irredentism. The first response ignores the fact that individual rights are equally sources of tension and invites the misleading view that liberalism is “an atomistic theory that encourages people to conceive of themselves as rights-bearing individuals who are bent on protecting themselves against the depredations of others while furthering their own interests as best they can” (Dagger 1997: 4). The second encourages us to take a sceptical view of universal moral principles and to adopt a moral conservatism that “arises directly from the sense that one belongs to some continuing, and pre-existing social order” and which sees “this fact is all-important in determining what to do” (Scruton 2001: 10; cf. Kekes 1997: 353).

A more hopeful response attempts to reconcile the opposing commitments of liberal theories and to bring the disparate starting points of liberalism into better alignment. This is Matthew Gibney’s approach. Drawing on the work of Thomas Nagel, Gibney (2004) argues that liberal asylum policies should attempt to balance our partialist commitments to insiders and impartialist commitments to outsiders. He proposes that liberal states satisfy their obligations to refugees by conforming to a moral principle of humanitarianism according to which states are obligated to provide entrance to individuals but only “when the costs of doing so are low” (Gibney 2004: 231). In this way the humanitarian principle strikes the “ideal balance” between the demands of

partialist and impartialist moral commitments⁵⁶ allowing our policies to reflect the urgency and severity of harms of persecution, while acknowledging the rights of liberal citizens to maintain their functioning democracies (Gibney 2004: 83).⁵⁷ I will return to address the limits of adopting Nagel's approach in the context of asylum momentarily. First, however, I want to address some concerns about the humanitarian principle and then show how these criticisms lead us to recast the problem of liberal political asylum in republican terms.

To begin, in a strictly formal sense, the humanitarian principle seems to exert rational pressure on liberal states to maximize their refugee intake by devising an asylum system that treats refugees in a way that is both compatible with democratic institutional stability and which maintains refugees' basic protective status. As Gibney remarks, "[h]umanitarianism asks that we examine whether, under the constraints they currently face, states could do more to boost the protection they offer refugees at a low cost" (Gibney 2004: 236-237). But how should we compare different proposals under these criteria? (After all, there is no agreed method for calculating the stability of liberal institutions, much less the point at which providing entry to refugees would jeopardize a

⁵⁶ "The requirement of dual justification is a moral requirement" (Nagel 1991: 30).

⁵⁷ Caroline Shaw has demonstrated that moral commitments to refugees in Nineteenth Century Britain hinged crucially on the nation's material prosperity (Shaw 2015: 23). "The sweep of the public's moral commitment to refuge thus increased during the period of Britain's waxing fortunes. Conversely, as the nation's relative imperial power began to wane, Britons began to hedge their moral commitments." (Shaw 2015: 238). The decline of British imperialist power signalled a turn to less generous commitments that were codified into law and which effectively removed debates about refugees from the public sphere (Shaw 2015: 240n10). The lagging support for refugees also occurred during a highly articulate anti-imperialist movement (Claeys 2010) that threatened to curb imperialist powers over refugees raising the possibility that refugees could become a significant, independent force in British politics. Refugees also featured importantly in efforts to justify empire, showing that the cruel inferiority of foreign rulership was evidence of the need for British justice in illiberal states for which "[t]he act of providing refuge was a barometer of British difference" (Shaw 2015: 11). However, she also shows that this "triumphant exercise of humanitarian conscience" was often underwritten by social norms and political interests that selected refugees on the basis of imperial and cultural preferences (Shaw 2015: 6).

functioning liberal democracy.⁵⁸ Moreover, it is unclear *which* particular institutions constitute the ‘core’ institutions of liberal states⁵⁹ or, even *what* it means for a state to be a stable institutional democracy in the first place. For our purposes, however, let us set these issues aside and assume that the criteria of democratic stability can be determined.)

One way would be to determine which system met the criteria of democratic stability and protection for refugees against persecution while accommodating the greatest number of refugees. The humanitarian principle advises against a system that compromises on the maximum number of refugees compatible with stability and protection. Presumably, however, the system most likely to provide protection for the greatest number of refugees will also be rather lax in its quality of care. If it is possible to satisfy the criteria of democratic stability and protection against persecution in asylum by offering refugees a relatively weak form of political incorporation and a similarly low standard of living, by warehousing refugees, creating refugee camps, or reducing social services available to refugees to a bare minimum, this is what the humanitarian principle would seem to prescribe. Presumably, however, many members of liberal states would find it difficult to approve of such measures. Grossly unequal (mis)treatment of refugees within liberal states would itself be a source of democratic instability. Even if citizens were not apprised of the inequalities experienced by refugees within their states, it might be argued liberal institutions would nonetheless be required to undergo significant

⁵⁸ The assumption here is that any policy justified on the basis of the humanitarian principle depends on the possibility of empirical determinations about the point(s) at which entry restrictions are needed to preserve or to protect democratic institutions against the potential anti-democratic effects of refugee assistance on liberal (host) states. The predictions are significant because both by critics and proponents of border restrictions appeal to the possible effects of different policies (e.g., Schuster 2003: 267ff; Hayter 2000).

⁵⁹ It is also important to note here that Gibney does not claim that entry restrictions can be mobilized in support of preserving or protecting *any* particular (set of) institutions or that *any* form entry restrictions would be justified by the need to protect the liberal state. David Miller (2016: 59) faces a similar issue in light of his claim that we can intuit what it means for a state to maintain social order “to a sufficiently high degree”.

changes to their mandate and structure in order to accommodate significant numbers of new arrivals. To the extent that those reforms are made in order to accommodate a program in which refugees are treated unequally with respect to liberal citizens the resulting institutions will likely begin to resemble *i*/liberal institutions. This may not encourage democratic instability from a reactionary public. But that is largely irrelevant; the *existence* of illiberal institutions puts into question the state's democratic credentials regardless of whether the public is made aware of this. For these reasons, Gibney might argue that, in fact, the humanitarian principle exerts no pressure on liberal states to maximize support for refugees in ways that would compromise on the quality of their protection since to do so would lead to democratic instability (either in the form of a reactionary public or the transformation of liberal institutions). In this sense, a relatively high quality of life for refugees under the protective apparatus of the liberal state is virtually guaranteed by the goal of maintaining the stability of liberal states and their democratic institutions.

Of course, liberal states can provide protection for refugees outside of their own jurisdictions. They can negotiate with other states (including non-democratic states) to protect refugees and to contribute to their protection abroad through resettlement programmes to third states. The idea is that states could do more to boost the protection they offer refugees at a much lower cost by outsourcing the risks of instability to non-liberal states. In this way, liberal states can help to protect many more refugees against persecution than they would be able to were they to ensure the equal rights or the lowest level of inequality possible between refugees and citizens under their own legal and political jurisdiction. This type of approach will provide an attractive answer to the question posed by the humanitarian principle just so long as it does not carry the further

implication that the relative differences between the protections enjoyed by refugees within and outside the liberal state are inherently unjust. Joseph Carens, for example, appears to deny this implication:

A refugee who settles in a poor state will have many fewer rights and opportunities that one who settles in a rich one, even if both are treated as full members of the society where they have settled. [And] these differences are not unjust (Carens 2013: 204).

Gibney (2004; 2015) too rejects the idea that the humanitarian principle may licence unjust arrangements. This may be so, but the real problem here is that the principle itself licences nothing. The humanitarian principle simply cannot tell us what a state's obligations ought to be and this is largely due to the fact that the conditions under which democracy is threatened by asylum practices—the point at which offers of protection become too costly—remains unspecified.

To understand this criticism, it is important to see that Gibney's attempt to repurpose Nagel's framework for liberal asylum policy marks a significant departure from Nagel's own account. Nagel is clear that his own goal is not to find a balance between these commitments, but, rather, "ideally...to make possible a more complete satisfaction of both of [these demands], by altering the conditions of their expression..." (Nagel 1991: 54). But Nagel does not share Gibney's optimism about the prospects of meeting the dual justificatory demands that his theory prescribes:

[W]here a minority of nations are islands of relative decency in a sea of tyranny and crushing poverty, and the preservation of a high standard of life depends absolutely on strict controls on immigration...the most universal form of that impersonal concern...is left in that case without effective expression (Nagel 1991: 179).

Hence, G.A. Cohen's paraphrase of Nagel's "gloomy conclusion", that "no one could blame [the poor] for swarming toward Western shores, even though no one could blame the rich for putting them back in their boats once they got there" (Cohen 2008: 204, 205). Just as Cohen (2011: 207) worried that Nagel could not reconcile the demands of the rich and the needs of the poor, so too are claims of asylum posed across an unbridgeable "gap": the amount of instability that refugees could reasonably demand as a justifiable risk to their security and the amount of democratic instability that citizens will be willing to allow for the sake of refugees. Thus, for Gibney, like Nagel before him, the worry arises that to address our moral principles to the tensions between mutually un-tenable commitments that are unlikely to be resolved without new institutional arrangements is to grant the political status quo a moral significance that it currently lacks and for which it cannot be made to answer under the partialist/impartialist framework (Cohen 2011).

Nevertheless, Gibney's approach is instructive. It opens a window onto an alternative approach. If the viability of democratic institutions justifies restrictions on refugees then we must have an account of the susceptibilities of democratic institutions to refugee influxes. Such an account should not be restricted to assessments of existing institutions alone. There is also a possibility of more robust institutions that are compatible with the basic tenants of civic democratic life but which would set a new—a higher—threshold for refusing refugees entry and for limiting their political incorporation within the state. The question then is how to ensure that the powers to restrict the freedom of movement and the right to exclude non-citizens issue from the conditions that make freedom possible in public life.⁶⁰ Although my own account does not attempt to develop

⁶⁰ Of course, asylum practices can also be viewed as symptomatic of a political reality (e.g., a system of sovereign states) that is inimical to the kinds and range of freedoms achievable under conditions of greater

Nagel's suggestion to harmonize personal/impersonal moral commitments, I share the spirit of Nagel's endeavour in asking:

whether a more egalitarian set of institutions can be devised which is still liberal in spirit...and uses some type of division of moral labour between social institutions and individual conduct to embody that respect, while at the same time satisfying the demands of impartiality more completely than liberalism does—even in its more egalitarian forms. (Nagel 1991: 58).

This is not to deny that the preservation of liberal institutions cannot justify the exclusion of needy outsiders. Asylum policies that threaten to jeopardize liberal institutions or which forecast the dissolution of the democratic state are reasonably rejected. But any reform will seem reasonable to reject just in case a significant portion of the state (either a minority of elites or a majority of citizens) *believes* (even without evidence) that the proposed reforms *do* pose such a threat. Even if the beliefs are irrational or the product of deceit, the beliefs themselves may be sufficient to bring it about that the reforms *do in fact* pose a threat to the stability of the government and the state. Notice too, that it is also possible for a democratic state to adopt an asylum policy that mistakenly sets the bar for democratic threats too *low* jeopardizing the state by allowing too many refugees in at once or by conferring too much political power to non-citizens. This may happen, not through hysteria or fear, but through reasoned and evidence-based democratic processes. Democracies can make mistakes and their decisions may sometimes come at the expense of existing democratic institutions. The worry in both cases is that the justifications for maintaining a functioning liberal democracy rest on vague and unstable justificatory premises.

global equality and cosmopolitan-styled rights and which denies the possibility of a viable cosmopolitan alternative to contemporary forms of communal life.

It is tempting to say that the limits of liberal asylum practices are constituted by the limits of freedom itself, as Alan Ryan aptly notes:

A viable community is cherished for the sake of the liberty and self-development of the individuals composing that community; yet occasions must arise when the community must be preserved by measures that frustrate the freedom and development for which we value it. (Ryan 2012: 105).

But the preservation of the community cannot come at *any* cost. The limits of self-preservation of the liberal state are also set by the conditions of its freedom and this includes the freedom to decide on new forms of political accountability and decision making. If it is true that the conditions that make it possible to say that citizens are free include the freedom to make choices that might pose a threat to existing institutions then there are limits to what those threats can justify in any policy domain.⁶¹

1.3 TRADITIONS OF ASYLUM: LIBERAL AND REPUBLICAN

Since the publication of Philip Pettit's landmark treatise on republican theory (Pettit 1997; see also Pettit 2012) attempts to contrast liberalism and republicanism as competing comprehensive political doctrines have faced strong and increasingly sophisticated opposition (Larmore 2004; Goodin 2003b; Goodin and Jackson 2007; Waldron 2007; Lang 2012). Some scholars have argued that contrasts between liberal and republican views are so often misconceived that they are best avoided altogether (Laborde and Maynor 2008: 1-2). Critics have focused not only on the difficulties of

⁶¹ Calls for radical popular reform are often met with resistance especially when they threaten existing structures of power. Ian Shapiro argues that the democratic means by which individuals in liberal states pursue their interests should itself be constrained in order to prevent the "intrusiveness" of political reform. We should be "sensitive to the reality that legitimate hierarchies often atrophy into illicit systems of domination" (Shapiro 2012: 334). It is therefore "not worth compromising one's own democracy in hopes of preserving or creating others" (Shapiro 2016: 170). Shapiro is right that changes to existing structures of democracy come with significant risks. But his own goal is not to reduce the risk of creating illicit systems of domination but to undermine democratic efforts that may harm existing hierarchies and positions of power. As David Dyzenhaus (2012: 343) points out, "Shapiro wishes to diminish the checks that already exist" on collective action within existing democratic institutions.

appealing to liberalism or republicanism as distinct ‘traditions’⁶² but also on the difficulty of maintaining an alleged distinction between liberal and republican understandings of freedom (Carter 2008; Kramer 2008). Robert Goodin has argued, for example, that the republican concept of freedom as ‘resilient liberty’ does not differ significantly from liberal conceptions of freedom since the latter’s commitment to freedom just *is* a commitment to ensuring that freedom endures over time: “[a] liberal concern about one’s freedom from interference should logically extend, equally, to a concern with the security of one’s freedom from interference” (Goodin 2003b: 61). For the most part, these criticisms have been well received by republican scholars who tend to agree that republican thought should not be treated as a comprehensive alternative to liberal political doctrine as a whole (Pettit 2012: 11).⁶³

Nonetheless, there are two reasons to resist the equivalence of republican and liberal traditions implied by these critiques within the present study. First, the term ‘tradition’ has both a wide and a narrow sense (Nederman 1985: 347n3). In the wide sense, a tradition of thought can be understood as a series of principles and linguistic conventions traced over time through historical figures and social issues.⁶⁴ But the idea of a tradition can also refer to how members who subscribe to an intellectual tradition have responded to particular social issues in particular periods of time. It is this narrower sense

⁶² Classic thinkers such as Locke and Montesquieu are often claimed as proponents of both liberal and republican doctrine. See, for example, Ryan (2012: Chapter 12); Douglas (2012); Rahe (1992, 2006). On the difficulties of assigning ideologies to republican or liberal traditions see Andrew (2011) and Rosen (1992).

⁶³ Many republican theorists, including Pettit and Skinner, nevertheless maintain that a republican doctrine of freedom, narrowly construed, provides a powerful alternative basis to much liberal theorizing on a wide range of contemporary political issues. These differences are obscured by characterizations of liberalism as an all-encompassing form. See the next footnote.

⁶⁴ J. G. A. Pocock’s (1975) *The Machiavellian Moment* offers an impressive (albeit controversial) vision of the Atlantic republican tradition in this sense. On the reception and significance of Pocock’s important work, see the introduction to Rahe (2006).

that Matthew Gibney identifies as the “liberal democratic” response to refugees, a normative tradition based on common commitments to liberal democratic ideals and institutions. Gibney does not seek to show that there is one overarching comprehensive liberal reaction to political persecution throughout history; rather, his aim is to show that liberal ideals offer a plausible guide to understanding how affluent liberal democracies in the contemporary world ought to respond to the claims of refugees.

Second, we should also be cautious not to pass up important opportunities to reconsider—or to recast—republican ideas in new or otherwise neglected political terrain.⁶⁵ In the rush to disavow “a grand opposition between liberal and republican thought” (Larmore 2004: 110; Pettit 2013: 176; Kalyvas and Katznelson 2008) we may come to accept that republicanism is a mere handmaiden of liberal theory.⁶⁶ Moreover, criticisms of liberal views may evade notice, or be weakened in acknowledgement of the vast ‘internal diversity of liberalism’.

Both problems can be seen in recent efforts to place key issues in forced migration under a republican lens. Sarah Fine (2014) has argued that while republican conceptions of freedom, citizenship, and domination are clearly relevant to urgent issues of statelessness and claims for asylum⁶⁷, they are also relatively uncontroversial. As Fine notes, “potential republican responses to topics in the ethics of migration are at their

⁶⁵ Duncan Bell (2014) has recently argued, efforts to define liberalism’s ‘core’ as a set of uncontroversial principles or doctrines have either failed or remain unconvincing. Accordingly, Bell claims that liberalism is best viewed “as the sum of the arguments that have been classified as liberal, and recognised as such by other self-proclaimed liberals, across time and space” (Bell 2014: 689-90). Bell’s “summative” conception of liberalism makes it difficult to say that a certain policy prescription is liberal, conservative, or republican through and through (Bell 2014: 691).

⁶⁶ As Alan Ryan (2012: 631-32n1) notes, sometimes it may be better “to offer critics a good fat target than to beat a premature retreat.”

⁶⁷ There is considerable overlap between the phenomena of statelessness and refugee status. Statelessness is a condition in which an individual lacks legal recognition as a national in any state (Fripp and Schiemann 2016: 95) which may result from persecution (Fripp and Schiemann 2016: 116; see also chapter 6).

strongest and most compelling when the threat or presence of domination is clear and pressing”; hence, republicanism’s appeal is most likely to be manifest in the face of “the least morally controversial areas in the ethics of migration”, the “urgent, dramatic, or *obviously* morally troubling migration-related issues” (Fine 2014: 17—emphasis in original). Fine is of course correct to think that republicanism will seem most compelling in cases where individuals face a “clear and pressing” danger from domination. She is also careful to note that this is not a criticism of republicanism, *per se*. Nonetheless, her claim suggests that republicanism’s main appeal is its ability to serve as an emporium of intuitively attractive concepts for issues that are relatively uncontroversial from a moral point of view. It follows then that republicanism is unlikely to challenge commonly held assumptions about the moral basis of claims for asylum, the harm of political persecution, or the adequacy of institutional responses to forced migration is misleading. Fine’s sketch also suggests that issues of refugee protection or statelessness will not tend to involve nuanced or complex forms of domination that may be controversial because they are not immediately apparent or because they are difficult to pin down. As a result, republicanism is cast in a weakly supportive role within what is arguably a familiar—and increasingly dominant—liberal response to refugees under ideal conditions:

In principle...presumably...the promotion of non-domination requires that everyone ought to have access to citizenship in a state, and ultimately a free state, somewhere. Since the core problem of statelessness is the problem of lacking citizenship – state membership – in a world made up of states, it is a problem with a clear *theoretical* solution, one that fits nicely within the republican formula of free person in free state. (Fine 2014: 15—emphasis in original).⁶⁸

⁶⁸ I have omitted one footnote from this quote that raises further questions about how republicanism would account for the conditions under which citizenship may and ought to be acquired.

Fine's views do not challenge the self-styled liberal tradition of political asylum or present republicanism as a viable alternative to refugee issues.⁶⁹ They also reinforce the idea that republicanism is unlikely to live up to its own aspirations as a radical theory.

Republicanism specifies a political ideal of non-domination and a category of individuals, or citizens, who bear primary responsibility for creating and sustaining the conditions conducive to the realization of this ideal in public life (Pettit 1997: 207). A state is free in virtue of its institutions. To say that an institution is causally efficacious, helping to prevent domination is to say that the institution is (partially) constitutive of freedom as non-domination. Republicans do not seek to eliminate the chance that others will find reasons to dominate others; they seek only to make such attitudes socially and politically inept. It is the job of citizens then to support those institutions, policies, and decision-making practices that constitute their freedom (Pettit 2012: 75).

Republicanism also specifies a consequentialist theory of value. It is consequentialist in that it takes the promotion of freedom as non-domination to be a *goal* that states have reason to promote through their asylum practices, rather than a side constraint on their actions. However, the consequentialist stance leaves open the question as to which institutions will best serve the value of freedom as non-domination in asylum (Pettit 1997: 99-101) under various conditions of scarcity or political values. (This is just as well, since refugee-receiving states differ markedly in their interests, resources, local laws, ethnic makeup, economic development, and geographical proximity to the root causes of persecution and displacement.) In this sense, as Iseult Honohan has noted,

⁶⁹ To be clear, Fine's aim is not to criticize republican thought; moreover, her wide-ranging survey and detailed sketch of republicanism in the context of migration theory is clearly sympathetic to republican concerns. Given Fine's primary aim here is to canvass a wide range of potential republican responses to "enduring" as well as new and emerging debates in migration theory, her reluctance to countenance the alleged differences between republican and liberal traditions is understandable.

“[r]epublicanism is still a theory under development, rather than one that exists ready-made for application to contemporary issues (Honohan 2002: 145; see also Lovett and Pettit 2009). Thus, aside from questioning the view that republican slogans be amenable to existing frameworks,⁷⁰ it is also important to acknowledge that republicanism as conceived in familiar slogans may require amendments to accommodate contemporary realities of liberal states and the global refugee regime.

Another concern is the way in which historical concepts are used as uncontroversial premises in arguments or explanations of freedom as a political value in debates on asylum. The history of peoples forced to flee from religious and political persecution (as with the history of migration more generally) is full of references to ‘freedom’ and ‘liberty’. Rarely however do refugee and forced migration scholars acknowledge the highly ambiguous language of freedom (Parry 2006: 86, 98-100)⁷¹ or the conflicts that various interpretations of freedom of movement represent in their own times (Baseler 1998; Bailyn 2012; Scott 2011: 78-79). Indeed, in recent discussions, the concept of liberty features as a unifying theme, and an historical constant. For example, in her examination of the intellectual roots of the modern right of freedom of movement Jane McAdam “picks up on the theme of ‘liberty’ in classical, Enlightenment and liberal consciousness *as a linking and consistent ideal*, encapsulated in contemporary thought by the framework of human rights law” (McAdam 2011: 5—emphasis added). Such claims cannot be reconciled with the history of the concept of freedom which has been one of almost unceasing controversy and division (Bobzien 1997; Dragona-Monachou 2007:

⁷⁰For an attempt to apply the republican critique to structural conditions of domination which avoid the criticisms of overextending the concept of domination itself see, Gourevitch (2013).

⁷¹ On the sheer number of purposes the concept of freedom has been made to serve see, Pelczynski and Gray (1984); Williams (1956); Gallie (1955–6); Skinner (2016).

116ff). The next section examines three broad conceptions of freedom that have influenced the modern politics of asylum and highlights their normative significance for the remainder of the study.

1.4 PATRONAGE, NON-INTERFERENCE, AND NON-DOMINATION

The earliest asylum practices arguably began as a form of patronage under absolute or monarchical forms of state power.⁷² Under these conditions “[a]sylum was a personal relationship between the king and the refugee” where “the refugee petitioned [the King] for aid and in doing so submitted to his will” while the King “could grant and withdraw both asylum and financial aid ‘at his pleasure, and need not account for his decisions’” (Burgess 2008: 14,17; cf. Wirszubski 1950: 168). Under patronage, freedom from persecution is contingent on the refugee’s ability to remain in good standing with an unchecked political authority under conditions in which one is constantly exposed to deportation, imprisonment or other punitive measures. Monarchical asylum is therefore clearly at odds with the republican conception of the *liber*, or free person:

In the received republican image, free persons can walk tall, and look others in the eye. They do not depend on anyone’s grace or favour for being able to choose their mode of life. And they relate to one another in a shared, mutually reinforcing consciousness of enjoying this independence [...] [T]hey do not have to bow or scrape, toady or kowtow, fawn or flatter; they do not have to placate others with beguiling smiles or mincing steps. (Pettit 2012: 82; see also Skinner 2010: 97; Cf Porter 1979: 24-25).⁷³

Monarchical protection was reproduced, in effect, under systems of colonial rule that furnished opportunities to escape oppression and persecution abroad under

⁷² Atle Grahl-Madsen observed that the Convention “has its starting point in the custom of kings, princes and potentates, free cities and the church to grant asylum...at will” (Grahl-Madsen 1966: 278)

⁷³ For depictions of refugees as individuals who must pander to the goodwill of sympathetic foreigners, or wheedle governments into accepting their claims for protection on the basis of the latter’s strategic interests see, Hintermaier (2000); Gatrell (2011, 2013); Price (2009: 39). For example, Gatrell (2013: 285) notes that “Hungarians and Vietnamese Catholic refugees trumpeted their anti-communism as a means of turning themselves into (more or less) desirable refugees.”

conditions in which “all offers of asylum could be revoked at will, when they no longer served the mother country” (Baseler 1998: 7).

The view of asylum as a conditional offer by an unchecked political power or authority was challenged throughout the Seventeenth and Eighteenth Centuries during the trans-Atlantic migrations of peoples’ (see especially, Bailyn 1986, 2012; Bailyn and DeWolfe 1988; Bailyn and Denault 2009; Scott 2000, 2011). In this period, the concept of freedom developed in parallel with debates about the free movement of peoples and new expectations regarding the states’ role in managing migration in uncertain times. These anxieties, in turn, provided a practical context in which abstract conceptions of freedom could be articulated and take shape in concrete policy proposals. Questions of who and how many refugees to accept within the liberal state thus became entwined with concerns about the forms of political representation that were necessary to prevent their domination. As a result, public political debates on the freedom of movement became sources of new insight into the conditions of freedom in asylum.

The liberal conception of freedom as non-interference came to prominence in the late Eighteenth Century through the work of influential Utilitarian reformists Jeremy Bentham (1748-1832) and William Paley (1743-1805) (Pettit 2004: 94n1; Pettit 2012: 123; Skinner 1998: 96-99).⁷⁴ It emerged during a period of bitter disagreement over the terms and extent of Britain’s imperial jurisdiction, including the legitimacy and efficiency of its efforts to control the movement of peoples to and from British territories as well as

⁷⁴ Pettit is content to note that Bentham and Paley “shaped the way in which early nineteenth-century liberals thought about freedom and the requirements of freedom” (Pettit 2013: 175). Quentin Skinner has argued that these developments overshadowed previously well-known republican views of freedom and the theory of free states: “With the rise of classical utilitarianism in the eighteenth century, and with the use of utilitarian principles to underpin so much of the liberal state in the century following, the [republican] theory of free states fell increasingly into disrepute, and eventually slipped almost wholly out of sight.” (Skinner 1998: 96).

within its colonies abroad (Bailyn 1986: 52-57; Graham 1956: 90-104, 1996; Hulsebosch 1998: 346, 346n75).

The right of states to restrict emigration and the nature of the relationship between law and political asylum⁷⁵ were particularly important issues during a period when a stable and healthy population was viewed as a necessary condition for a prosperous nation. As the historian Bernard Bailyn points out, “[i]n the eighteenth century it was generally agreed that population in itself was a social and economic good, and should be enlarged for the benefit of the nation” (Bailyn 1986: 52, see also 52n26). A large, dependable population was, moreover, a sign of a free state. States that attracted and maintained healthy populations could reasonably claim that their citizens were both healthy, satisfied with their institutions and political status, and, thus, having little reason to seek opportunity or solace elsewhere. On the question of whether a state was in fact free, size mattered, and radical Whigs were fond of noting that “Countries are generally peopled in proportion as they are free” (Baseler 1998: 127-130).⁷⁶

Population decline was an issue of immense political and economic significance. In his widely read tract *The Principles of Moral and Political Philosophy* (1785), Paley writes that “the decay of population is the greatest evil that a state can suffer; and the improvement of it the object which ought, in all countries, to be aimed at in preference to every other political purpose whatsoever” (Paley 2002 [1785]: 420). On this basis he reasoned that, insofar as emigration threatened to deprive Britain of a sufficiently robust population, government interference would be justified. However, since Paley did not

⁷⁵ For a contrary view based on the implications of the employment of a distinct category of political refugees in the context of the French republic, see Burgess (2008: 113-116)

⁷⁶ cf. Miller (2016: 65-66) regarding his argument that rising population levels and ensuing environmental problems are reasons to reduce immigration to particular countries.

believe that emigration actually posed such a threat he saw no reason for Britain to interfere in the movement of peoples between its territories, whether for reasons of prosperity or as a means of escaping ‘oppression’ at home.⁷⁷

Bentham too was concerned about the state’s response to emigration. Unlike Paley, however, Bentham worked to identify different motivations and probable outcomes of imposing new restrictions on peoples’ movements.⁷⁸ The practical difficulty of preventing emigration in the absence of natural barriers⁷⁹ leads Bentham to concur with Paley’s policy prescription that “[o]n the subject of emigration, the wisest part... is to do nothing.”⁸⁰ “Under the guidance of liberty, the benefit is certain; under the guidance of constraint, it is uncertain” (Bentham 1995).⁸¹ Hence, ‘the guidance of liberty’ is to be respected not for the sake of freedom, but only in the expectation that such laws would be wholly ineffectual. In this sense, Bentham’s oft quote passage that “[a]ll coercive laws...and in particular all laws creative of liberty, are as far as they go,

⁷⁷It is unclear whether Paley’s belief on these matters is propped up by the assumption that Britain was a free state.

⁷⁸ Although Bentham thought it unnatural to ‘exile’ oneself while there was still a possibility of securing a livelihood at home, he admits that “[t]he legislator is not the master of the dispositions of the human heart, he is only their interpreter and their minister” (Bentham 1987: 148).

⁷⁹ When Bentham asks “[c]ould all the frontiers of a great country be guarded?” he does so rhetorically. Practical experience no doubt played a role as well. Bentham was involved with the Greek Independence movement (1821-1832) from an early period until his death during which time he sheltered refugees in his own home. On these interactions, see, O’Sullivan and Fuller (2006: 145ff); Rosen (1992); Bentham (1990). Regarding J.S. Mill’s consultations on assisting refugees, see Reeves (2008: 80-81, 139).

⁸⁰ Bentham was not, however, adverse to keeping track of individuals both within and between states for the just maintenance of law as a system of social control. At several points in his ‘Principles of the Penal Code’ he anticipates these concerns and goes so far as to suggest tattooing individuals’ surnames on their forearms ‘to facilitate the Means of recognizing and finding individuals’ and ‘to increase the difficulty of Escape.’ (Both are title headings from Bentham’s 1987[1931] *The Theory of Legislation*, C.K. Ogden (ed), 416-419.) In the latter work, Bentham refers to a practice already well established in St. Petersburg and Riga, of retaining citizens’ passports until ‘the intention of departure has been several times advertised in gazettes’.

⁸¹ Bentham’s influence on emigration policy was channelled through Robert William Horton the chairman of the House of Commons Select Committee on Emigration. On this influence, see Feldman and Baldwin (2007, Chapter 6). The British Liberal politician Herbert Samuel (1870-1963) was channelling Bentham when he noted that, where political refugees were concerned, “[e]very system of regulation is in its nature an invasion of freedom” (Samuel 1905: 338).

abrogative of liberty” (Bentham 1853: 503, cited in Pettit 2012: 149; cf. Berlin 1969: 3) cannot be taken to mean that interference is *always* a *pro tanto* reason to avoid such laws.⁸² Rather, we must first ask whether (in this case) the state has the practical power to control the freedoms which it might seek to legislate and enforce at a reasonable cost. If it does not, then, and only then, should we should opt for the guidance of freedom.

A similar rationale briefly served British refugee policy in the mid-Nineteenth Century. As Bernard Porter notes, “[l]ike all the best British freedoms, this policy of asylum was maintained, not by law, but by the absence of laws” (Porter 1979: 3). On this view, according to which, “[t]he British government not only did not expel or turn away aliens: it did not allow itself the power to expel them or turn them away...” (Porter 1979: 224).⁸³ While in principle the *laissez faire* attitude towards foreigners is consistent with freedom as non-interference, in practice, it meant something different:

Government ministers in the 1850s generally tried to give the impression that...when they said they could not act arbitrarily against refugees, it was not with any real regret, but with a total acceptance of the moral necessity for not so doing. Yet when they were allowed to act arbitrarily we find them doing so, and not apparently with any great reluctance. Released from the constraints put upon them by the law and the constitution, they showed their true mettle, the hungry despotic wolves under the liberal sheepskins. [...] the principle of asylum been the more precarious, if it had had only governments to defend it. (Porter 1979: 168).

Indeed, in 1855, Britain forcibly removed a group of radical French refugees from the Channel island of Jersey to the British mainland under pressure from French officials (Porter 1979: 163-168). Porter notices that the expulsions were made possible only in the absence of legal provisions and constitutional expressions of the public will, but he fails

⁸² As David Lyons (1972: 74) reminds us, “[Bentham] conceives of law primarily as a system of social control whose special features and whose place in human life provide it with the greatest potential for producing positive good but also the capacity for bringing about great evils.”

⁸³ Porter continues: “nor was [the British government] even prepared to implement against them the very ordinary and mild laws it did possess to prevent or punish criminal actions by them” (Porter 1979: 224).

to draw the conclusion that the precarity of freedom as non-interference is a poor foundation for asylum policy. Instead, he explains the Jersey expulsions as an unfortunate episode that did “not [affect] any of its victims’ liberty in a really material way” (Porter 1979: 168). Porter is adamant that British refugee policy “was a different order of toleration entirely from that afforded by any British government to refugees afterwards, or by any continental government at any time at all” (Porter 1979: 224). Yet, in the wake of the Jersey expulsions, he finds this toleration wanting.

Porter glimpses the distinction between republican freedom and classical liberal conceptions of freedom, but he fails to grasp its significance. For Porter, it is the absence of interference that is constitutive of freedom in asylum. So as long as the laws remain silent or ineffectual tools of the state, refugees will be, *to that extent*, free. Thus, he overlooks the fact that “freedom as non-interference is consistent with insecurity, with lack of status, and with a need to tread a careful path in the neighbourhood of the strong” (Pettit 1997: 132; see also Honohan 2002: 190).⁸⁴

Porter’s analysis is nevertheless useful. For although he retreats from the insight of republican liberty, he identifies two of its core presuppositions. The first is that the institutions and norms that constitute the practice of political asylum must be directed at the common good. The second is that the norms and institutions themselves must be subject to mechanisms of control operated by the people and not, as it were, ‘at the

⁸⁴ Refugees were often “frightened that if they [engaged critically in local politics] their hosts might turn on them” (Porter 1979: 24) knowing that “[England] would deliver them back to their oppressors if she could” (25). Even in the most receptive of European states such as Belgium, “[r]efugees could stay only if they ceased to engage in political activity” (Fahrmeir 2003: 39).

King's grace'.⁸⁵ To quote the English jurist John Fortescue, asylum must be "*politicum* and *regale*" (Scott 2004: 36).

The classic liberal conception of freedom as non-interference is arguably the dominant conception by which asylum practices are measured and critiqued, whether in opposition to bureaucratic authority, border controls, or other obstacles to refugee protection. It is clearly the classic liberal conception of freedom as non-interference that underlies the claim that trends in global asylum practices should be deemed 'illiberal' insofar as individuals are prevented from seeking, accessing, or attaining refugee status. It is this conception that James Hampshire identifies in "the commitment to freedom that virtually all profess to support" (Hampshire 2013: 45) by reducing restrictive policies of admission for refugees. Teresa Hayter too invokes freedom as non-intervention as the basis of radical reform:

Proposals to reform and humanise the asylum system, even supposing they were realistic, would still leave refugees at the mercy of necessarily uncertain decisions on the genuineness of their claims. The only way to ensure that refugees are really protected would be if there were no immigration controls (Hayter 2004: 149; cf. Cohen 2005).

My own view is that freedom as non-interference is ultimately a poor standard for assessing refugee policy and discourse. But it is important to note that freedom as non-interference may also be downright dangerous for reasons that are not always clear from the way it has been applied to refugee issues in the current political era.

To understand this danger, it is worth recalling Charles Taylor's (1985) observation that early debates about liberty tended to be based on "absurd caricatures" of

⁸⁵ An inquiry from the Bavarian Ministry of the Interior about the fate of Bavarian refugees in England interpreted London's response as follows: "Insofar as Bavarian citizens keep quiet, they can reside unhindered in England now as before, and I do not hear of a single one of them who would have fear of deportation" (Fahrmeir 2003: 32).

both positive and negative freedom. Positive theories were lampooned for their association with fascist or utopian forms of collective self-government demanding adherence to a particular (often unsavoury) vision of the good (Berlin 1969; Christman 2005: 81). For their part, negative theorists were castigated for subscribing to the view that freedom requires the absence of all external obstacles whatsoever, be they physical properties or legal sanctions. Importantly, not all of these attacks were sustained by the opposition: “while the extreme variant of positive freedom is usually pinned on its protagonists by their opponents, negative theorists seem prone to embrace the crudest versions of their theory themselves” (Taylor 1979/85: 214).⁸⁶ By ‘crude’ Taylor was referring to the fact that negative theorists failed to acknowledge cases where freedom depends on the absence of certain psychological properties (think of how the presence or absence of fear, self-doubt, or false beliefs affect one’s ability to act). By committing to the view that freedom concerns only *external* constraints, negative liberty theorists failed to consider important psychological (or ‘internal’) constraints on freedom. This omission, Taylor argued, was less of a mistake than a conscious *strategy* aimed at undermining positive notions of freedom that could be used to support political authoritarianism. By defining freedom in terms of the absence of external obstacles alone references to moral psychology were eliminated along with the positive theories of freedom on which totalitarian political views were supposedly based. By adopting this “Maginot line mentality”, as Taylor put it, “[o]ne cuts off the positive theories by the root, as it were, even though one may also pay a price in the atrophy of a wide range of negative theories as well” (Taylor 1979/85: 214).

⁸⁶ Taylor traces this crude version of negative freedom to Hobbes and Bentham. Bentham claims that “[a]ll coercive laws...and in particular all laws creative of liberty, are as far as they go, abrogative of liberty” (Bentham 1853: 503, cited in Pettit 2012: 149; cf. Berlin 1969: 3).

Taylor's insight is relevant here for two reasons. First, it highlights the importance of political motives in definitions of, and commitments to, freedom. Our allegiances to particular concepts or values are not necessarily based on their inability to account for the widest range of social phenomena or their compatibility with other important values such as equality, trust, or the capacity of individuals to determine their own visions of the good; the commitment to a particular concept of freedom may instead depend (sometimes directly, or, at least crucially) on the expected consequences of that commitment in particular political contexts, at a particular moments in time. Second, by identifying the particular political motivations behind competing conceptions of freedom, Taylor gestures towards a plausible explanation of the presence of 'crude versions' of negative liberty within the political discourse on asylum (noted above), as a *reaction* to particular political movements, ideologies, or forms of oppression. The presence of notions of freedom as non-interference are, in part, an attempt to combat a range of practices and principles that serve potentially disastrous political movements, not unlike those that motivated earlier commitments to crude negative liberty (see also §2.5). First, the commitment to negative freedom against external interference is incompatible with the idea that political partisanship based on ideological considerations should determine asylum policy, not an insignificant implication, considering the extent to which these considerations continue to be major factors in determining Northern and Southern states' responses to particular refugee groups (Jacobsen 1996: 665). Second, negative liberty would reject the "redefinition of freedom as a form of surveillance and control in the name of protection and personal safety" (Bigo 2005) through which, "[r]efugee issues have come increasingly to be seen in the light of national foreign policy concerns rather than humanitarian terms" (Kushner and Knox 1999: 11). Finally, a commitment to crude

negative liberty is incompatible with the significance of special attachments that would undermine refugees' claims to protection on the grounds that practices of political asylum may threaten the cultural, civic or associational rights of citizens. Thus, negative liberty removes the moral basis for the claim that:

legitimate state[s] [have] the right to close [their] doors to all potential immigrants, even to refugees seeking asylum from incompetent or corrupt political regimes that are either unable or unwilling to protect their citizens' basic moral rights. (Altman and Wellman 2009: 158).

The danger with the commitment to a crude form of negative liberty, as Taylor noted, is that it may easily backfire. A commitment to open borders on the grounds that border restrictions are a kind of external interference may reinforce nationalists' sense of purpose or drive moderates to accept harshly repressive or xenophobic policies for fear of social or demographic upheaval. Notice also that the idea of refugee status is premised on a distinction between claims that entitle some individuals priority of entry over others (Hathaway and Foster 2014: 108; Grey 2015: 208). The enforcement of a priority entrance policy, regardless of the justification based on different needs or relative severity of harms faced by different would-be entrants, is no less incompatible with non-interference than any other policy which licenses border restrictions. The problem is not simply that, by holding firm to the value of non-interference, it is impossible to maintain the special status attributed to refugees. To accept non-interference as a guiding value in states' admissions policies is also to deny the significance of political persecution as a unique justification for foreign state protection. Ironically, then, the commitment to a crude version of freedom as non-interference leaves the very people on whose behalf it was brought to bear without any effective response.

1.5 MAPPING THE TERRAIN

It is perhaps true that were states to live up to the liberal principles they espouse, no asylum seeker would be subjected to such treatment. Unfortunately, the relatively modest reforms so far proposed by (predominantly) liberal scholars are insufficient to address the future of refugee protection. Liberal asylum policies tend towards one of three general outcomes: temporary protection for individuals who will eventually return to their state of origin; naturalization and, eventually, full citizenship within the refugee-receiving state; or, resettlement in a third state, often in the Global South (Betts and Collier 2017). These policies address asylum seekers' claims as resource-based demands for basic material goods and the satisfaction of psychological needs that are possible to fulfil only in a relatively stable and free society (Goodin 2012). For this reason, the dominant approaches to refugee issues from the perspective of liberal states can be understood more or less as theories of distributive justice. On a distributive approach, questions of who and how many should gain admittance rightly set the terms by which the conditions of political asylum, the rights and responsibilities of refugees, and their political well-being are understood. Distributive considerations also have an obvious role to play in how we understand the limits to asylum reforms. If asylum seekers have few opportunities or resources to contest the authority of receiving states then we should expect this fact to be reflected in state policy. But governments too face significant practical constraints on what can be done for refugees in the 'public interest'.

I want to suggest that a more radical agenda is possible. The claims of asylum seekers will sometimes demand a redistribution of wealth and status within liberal societies. But the basis on which we decide how to interpret what refugees' demands on the state are and how they should be met depends on our interpretation of the limits and

prospects of democracy in its current forms. For this reason, our considered judgements about the moral practices of states must be attentive to the relevance of existing distributions of power and status as well as their sources.

One worry is that the application of republican theory to the realities of political asylum seekers will be insufficiently demanding. Republicans claim that “it is the mere *possibility* of your being subjected with impunity to arbitrary coercion, not the fact of your being coerced, that takes away your liberty and reduces you to the condition of a slave” (Skinner 1998: 72, citing Algernon Sidney 1990: Part I., Sec.10 at 31 and Sec. 18 at 57).⁸⁷ Yet, claims for political asylum pose as urgent moral problems precisely because, at given moment, states and non-state actors are abusing the citizens of foreign state and neglecting to observe their most basic rights. With all of this active interference going on how can we worry about the possibility of arbitrary coercion? The suggestion that we should attend to possible states of affairs amidst ongoing and large-scale suffering seems wildly insensitive, if not criminally negligent. In the face of ongoing harm, potential suffering is a secondary consideration, and a theory that privileges the mere possibility of suffering over *actual* suffering is morally incoherent.

There are three reasons to resist this line of thought against the intuitive plausibility of the republican brand of freedom. First, it is misleading to think of the sheer possibility of interference as inconsequential. Possible interference can itself be understood as a having or constituting serious, measurable, effects in the real world. As a number of republicans have pointed out, the simple awareness of domination will be a

⁸⁷ In advising his friend Sir Robert Honeywood Sydney writes “either you must live in exile, or very privately...and perhaps not safely” (Sidney 1805: 39).

source of harm, or a reason to change one's decisions or habits (Skinner 1998). As Frank Lovett explains:

[I]t is important not to restrict the scope of exploitation to the valued social goods actively coerced from those suffering under domination. This is because...those subject to domination might frequently engage in strategic anticipation—surrendering valued social goods on their own initiative in the hopes of forestalling the unpleasant experience of active coercion. (Lovett 2010: 131).

Second, and more importantly, concerns about the possibility of arbitrary interference should not be taken as any sign of indifference towards or a downgrading of active interference.⁸⁸ The point is rather that we should not reduce all violations of freedom to instances of active interference. We must also look to the conditions that give a helping hand to such actions by making them possible, or unanswerable to justified complaints. Many individuals or groups will flee their homes and lands in order to forestall the experiences of active interference that await those whose departures are delayed. Policies that unfairly or unnecessarily limit access to asylum, that fail to guarantee refugees' safety while in the host country, or which can arbitrarily lead to their forced return to a persecutory state, are significant harms unto themselves (e.g., Hacking 2010). Privileging or attending only to direct forms of coercion may yield an inaccurate picture of the proper scope of harms that we might wish to address in policies or in our assessments of the intensity, experience, and normative disvalue we assign to instances of actual ongoing

⁸⁸ Critics of neo-republicanism sometimes contribute to this misunderstanding. For example, Shnayderman (2012: 45) claims that Pettit's republicanism is concerned with interference "but only in a secondary sense" arguing that, Pettit's view, "entails that situations involving only domination are as inimical to negative freedom as situations involving both domination and dominating interference" (46). Nothing Pettit says commits him to this view and both Pettit and Skinner note that there is more than one kind of negative freedom. Thus, Shnayderman's argument begs the question against Pettit's insistence that in instances where one can suffer from two distinct evils, both active and possible forms of arbitrary interference. Shnayderman quotes Pettit but misleadingly replaces the term "non-domination" with "negative freedom" thereby eliding the distinction in question, that of liberal (negative) and republican (negative) freedoms.

interference. In these ways, an awareness of domination can contribute to our understanding of actual interference.

A third worry is that republican theory will be too demanding. Though he does not adopt a republican view, Charles Beitz (1999) had observed that:

[f]rom the point of view of persons nonvoluntarily subject to a regime, and unable effectively to express or withhold their consent to it, it appears to make little moral difference whether the regime is imposed by other members of their own community or by foreign agents. (Beitz 1999: 119).

Similarly, republicans too will be sceptical about claims that there is any formal distinction between arbitrary interference at the hands of one's state of origin and arbitrary interference the state of asylum. Republicanism will also wish to highlight the fact that freedom relies not only on the ability of asylum seekers to reach the state, or on the mechanisms of acquiring refugee status acquisition—the necessary and sufficient conditions for granting or withholding status—but also on the conditions that define the relationship between states and refugees throughout their tenure. For this reason, an asylum policy that is consistent with non-domination will ultimately require more than verbal reassurances of the State's commitment to human rights; it will require that the relationship between states and refugees be tracked over time. The protection and reinforcement of basic human rights plays an important part in this strategy, but it cannot be the only important feature of asylum practices. For even if an asylum seeker is treated with relative decency by the receiving state, and succeeds in building a life within a community that comes to treat her as one of their own, she may yet be unfree. This will be true just in case her status depends on the discretion of state officials, the outcome of the government's strategic alignment with another state, or a sudden a shift in popular

public sentiment.⁸⁹ Consequently, a state can meet its basic legal or formal obligations to particular refugees and yet fail to satisfy the republican ideal of freedom as non-domination.

The attraction of bringing republicanism to bear on matters of asylum therefore relies on two related claims. The first is that republicanism maintains a crucial distance from the self-serving institutional interests that have given rise to its expression and which, led many to see liberalism as the political theory of the status quo. Pettit is clear that while liberals often worked to maintain institutions, laws, and practice that reflect a certain “sector of interest” republicanism “transcends its origins—it reaches beyond its founding communities” (Pettit 1997: 132) by offering a language that all members of society can endorse at the same time as it gives opportunity for the expression of significant differences between members of society.

Emphasis has therefore fallen on republicanism’s capacity to challenge “the medium in which palpable grievances of different groups can be reasonably articulated” (Pettit 1997: 132). One problem however is that the language of republicanism can be easily co-opted. In his recent study on the concept of liberty in Enlightenment England, Conal Condren notices that:

if perceived insecurity is the likely occasion that stimulates claims about liberty, it indicates that we should be looking more to polemical, opportunistic discursive contexts than to those suggestive of sustained philosophical enquiry. (Condren 2017: 121).

Since claims about legitimacy and domination are susceptible to selection, manipulation, or outright distortion elucidation of the concept of domination must eventually give way

⁸⁹ The story of Ayaan Hirsi Ali is instructive. A member of the Dutch Parliament, Hirsi Ali later resigned amid revelations that she had attained Dutch citizenship under false pretences. Although she ultimately retained her Dutch Citizenship, the fact that she faced the possibility of deportation is a clear reminder of the reach of asylum policies.

to analyses of the ways these concepts are put to use in arguments and claims that shape public and private political discourse.

The means by which grievances may be articulated are, of course, only partially constituted by language or concepts. Language must ultimately translate into political institutions and enforceable norms tasked with removing opportunities for arbitrary interests to hold sway over political decisions and providing the physical and procedural forums for political expression. Thus, the second claim for favouring a republican model of asylum lies in the promise of radical reform (Pettit 1997: 45-46; 2004: 80-81, 94n2). In this respect, Pettit's republicanism offers to mobilizes against support for "right-wing libertarianism" that objects to excessive corporate taxation, market regulation, and social provisions of the welfare state (Pettit 2010: 52). However, his own views often fall short of demands for institutional reforms and radical participatory efforts to curtail and reverse citizens' and non-citizens' dependency on private and public forms of power that coincide with the rapid concentration of wealth, extensive deregulation of environmental protections, debilitating health care and education reforms, anti-unionism, and unprecedented military expenditures, to name only a few (e.g., McCormick 2011; Gourevitch 2013: 599).

The challenge of preventing powerful interests from predetermining the nature of and solutions to issues of political asylum should not be underestimated. As Chandran Kukathas writes:

[t]he history of the development of an institutional framework to deal with the plight of refugees does not suggest that it is even remotely possible to do justice to the people in question (Kukathas 2016: 264).

Liberal states have repeatedly demonstrated that they are willing to aid and abet political persecution abroad and to actively prohibit their own citizens from engaging in efforts to

oppose the actions of their governments. Western state exceptionalism⁹⁰ and aggressive containment policies⁹¹ provide further reasons to doubt the sincerity and dedication of liberal governments to the plight of refugees⁹² and they raise serious questions about the role of liberal states as morally legitimate addressees of asylum claims (Khiabany 2016), issues which are explored in more detail in the next chapter.

⁹⁰ Charles Keely distinguishes between the Northern refugee regime comprised of advanced industrial states and the Southern or “normal refugee regime” predominated by third world states. While the goal of the Northern regime, “was not to help restore stability to the international system but to destabilize governments, cause states to fail, and create domestic support for a policy of opposing and weakening communist governments in constant struggle” (Keely 2001: 308), the Southern regime “generally pursued a policy of protection and assistance, and seeking permanent solutions to refugee displacement” (Keely 2001: 309; see also, Booth, Wade, and Walker 2010: 219).

⁹¹ On the increasing use of ‘containment’ policies see, Barnett (2001); de Frias (2012); Hurwitz (2009).

⁹² Notable exceptions include, Khiabany (2016) and Abrego (2018). On imperialism and its resistance as generally neglected topics, see Tully (2008) and Iveson (2011).

CHAPTER TWO: POLITICAL ASYLUM AND POLITICAL LEGITIMACY

The concept of legitimacy is both an essentially contested concept and a normative ideal within the liberal politics of asylum. So what does it mean to say that asylum is a politically legitimate practice? And what is the *test* of legitimacy on this score? Must liberal states be held to account for their offers of asylum like any other state? Or do the democratic credentials of liberal states suffice to make their practices *inherently* legitimate? In this chapter, I examine how the practices and principles of liberal asylum hold up against the requirements of a republican conception of legitimate political asylum. My goal will be to explain and argue for a republican conception of legitimacy that turns on an often-neglected distinction between justice and legitimacy, a distinction I put to use by examining its implications within the normative debates on asylum as a politically legitimate practice of liberal states. The significance of this distinction can be seen by examining how standard applications of the concept of legitimacy hold up in the context of the liberal politics of asylum. This analysis suggests that the legitimacy of liberal asylum practices cannot be taken for granted. I then shore up this account by considering—and rejecting—two arguments adduced in support of the claim that liberal states' asylum practices should not be required to meet special standards of legitimacy. The co-optation of the language of freedom and concerns about domination further demonstrates the need for a vigilant form of republican scrutiny that must be aligned with new political institutions.

2.1 JUSTICE AND LEGITIMACY

The concept of political legitimacy is essentially contested. But it often plays a dual role in justifying state action: it defines the moral rights of citizens in relation to their

governments and it defines the moral rights of (legitimate) states in relation to other (illegitimate) states and *their* citizens.

Political theorists have made the concept of legitimacy central to their political accounts of the liberal practice of asylum.⁹³ Unfortunately, they have also tended to conflate the idea that a state is generally just with its legitimacy in practice, and, similarly, they have conflated the justifiability of liberal asylum practices with the legitimacy of those practices. My aim in this section then is to demonstrate this claim and to examine, in more general terms, a number of considerations that can be brought to bear in considering how the problem of legitimacy arises in the politics of asylum. This will help to show what reasons we may have for demanding that the test of legitimacy be applied in examining liberal state responses to refugees.

It is useful to begin by considering an uncontroversial claim about the legitimacy of states' duties to refugees. According to Joseph Carens, a state's "duty to admit refugees...derives from their own claim to exercise power legitimately in a world divided into states" (Carens 2013: 196, 205). Similarly, Christopher Wellman argues that only legitimate states—states that both protect the basic individual moral rights of their constituents and respect the self-determination of "qualifying groups" are "morally entitled to unilaterally design and enforce their own immigration policies, even if these policies exclude potential immigrants who desperately want to enter" (Wellman 2011: 14-16, 55n1).⁹⁴

⁹³ I will demonstrate how particular arguments appeal to the concept of legitimacy throughout the chapter.

⁹⁴ Wellman is not alone in taking the state's legitimacy for granted. As Arthur Helton observes, the legitimacy of the US's "new strategy of containment" which is marked by "a willingness to try to address the causes of flight in the home countries of would-be refugees" (Helton 2002: 10) is assured in virtue of the "consensus among political leaders in the US and other democratic states that such peace-enforcing military deployments are workable and supported by their respective electorates" adding that "[e]ven

On Wellman's account, legitimate states are also entitled to intervene in the affairs of non-legitimate states that persecute their own citizens, either to protect those citizens, or to prevent mass migrations across the (legitimate) state's borders. Wellman supports this claim using a hypothetical scenario in which Norway (a presumptively legitimate state) carries out a humanitarian intervention on behalf of Kurdish refugees fleeing persecution from a ruthless Iraqi regime. On Wellman's view, Norway has the right to unilaterally impose a no-fly zone in Iraq to protect the Kurds from the Baathist regime. Norway may also initiate a full-scale military intervention if evidence emerges that the persecution of Kurds has commenced within Iraq.

It is worth comparing Wellman's hypothetical example to its real-world counterpart. As Bill Frelick has argued, the safe havens created by the allied forces of US, Britain and France ostensibly to protect Kurds fleeing Iraqi forces—"Operation Provide Comfort" (1991–996)—were conducted under UN Resolution 688 which "pointedly reaffirms the 'sovereignty, territorial integrity, and political independence of Iraq and all the States in the area.'" Thus, whereas Wellman's hypothetical scenario appeals to an intuition about the humanitarian virtues of intervention, the scenario it abstracts from is one in which the "concern is not primarily about Baghdad's threat to the Kurds of Iraq, but rather the fear of the Kurds themselves—that their flight to other countries will "threaten international peace and security in the region" (Frelick 1992: 26; cf. Weiner and Münz 1997: 37-38; Ofteringer and Bäcker 1994).

My point here is not to deride Wellman's use of a hypothetical experiment to draw out a general principle of procedural justice or the moral justifiability of a general

intellectuals and political leaders in developing countries have largely accepted notions of military interventions relating to genuinely humanitarian concerns" (Helton 2002: 263, 264).

practice that is capable of commanding widespread acceptance. The worry is that “providing refuge” can take many forms. Whoever offers such assistance will inevitably command a more or less exclusive right to impose duties of stringent compliance on foreign citizens. Although it would be dangerously imprudent to forgo aid under conditions of persecution, there is nothing *in principle* which precludes persecuted groups from rejecting Norwegian assistance, or from agreeing only to particular or limited forms of protection, or, from agreeing only to accept assistance under certain conditions of political accountability. Notice then that there can be many different conditions of political legitimacy that could constrain the efforts of liberal states to do good without thereby compromising their overall goals. By seeking to protect refugees in their countries of origin, Norway may well be “exporting justice” (Wellman 2008: 129), but the state has not necessarily acted legitimately. The worry is that even if an asylum practice (the creation of a safe zone or the conferral of temporary protected status) conforms to our general intuitions about what justice requires, it may still fail to be legitimate.

The problem has to do with Wellman’s suggestion that issues of political legitimacy can be dealt with up front (e.g., by invoking legitimate and illegitimate regimes) so that the only remaining issue is a matter of what justice permits or demands. This is easy enough to do in the hypothetical case. (I am not inclined to question Norway’s legitimacy as such. Nor would I contest the dire need of Kurdish asylum seekers.) However, confronted with the real-world case, it becomes much more difficult to accept that so long as the intervention is essentially just—i.e., it is carried out by *prima facie* legitimate actors, serves the humanitarian end of Kurdish self-preservation, and respects their human rights in the process—that we, or the Kurds, should necessarily

support such actions as legitimate and support or comply with the states that impose these social arrangements, *for those reasons alone*. As A. John Simmons has pointed out:

That a state is stable and lawful and refrains from persecution shows that it is good (or, at least, not bad) in certain ways, but it does not obviously show that the state has the kind of special moral relationship with any particular subjects that gives it a right to rule them [...] the mere justifiability of an arrangement need not give us any moral reason at all to support that arrangement. (Simmons 1999: 748, 753-754).

In the case under consideration, the intervening state or states will may fail to be legitimate if their protection serves also to impose a social order on Iraqi Kurds that the Kurds have reasons to reject independent of their reasons for wanting protection against persecution. Kurds may accept that protection is needed but reject the form of protection itself on distinctively political grounds; for example, on the grounds that the order itself has been imposed in a way that is not under Kurdish control. It is possible, then, that the social order that protects Kurds from retribution also dominates them, regardless of whatever *other* positive effects it may have. Notice, too, that there is little in Wellman's narrative to suggest that he is aware of this problem. Nowhere does he claim that those under protection should have the opportunity to contest the protectorate's legitimacy or the moral status of its actions. On Wellman's account, it appears that those who are persecuted under illegitimate regimes cannot assess, even in principle, whether foreign interventions on their behalf are legitimate—were this possible, then it would be incumbent on the intervening state to reassess its stance in the light of the opinions of those it seeks to protect (whenever possible).

It is important to ask by what right a state can impose itself (for better or worse) on a particular group of individuals who have not consented to being ruled (even temporarily) by the intervening force. For if the state's legitimacy gives it the power to

impose a social order on others (even for their own sake) then we will want to know what forms the relationship between states and non-citizen asylum seekers can take. (Can refugees who seek out the protection of foreign states nonetheless decline to accept the state's legitimacy, either by maintaining a right to contest the order it imposes on them, if necessary, by exiting (or fleeing) the host state? Or do refugees owe the state that gives them shelter a duty of loyalty, as long as their protection is needed?)

These questions reflect the concern that the concept of legitimacy relevant to relations of protection is left altogether vague. And the worry that underwrites this concern is that Wellman has confused the justification of the state with the state's legitimacy (cf. Simmonds 1999). We may all agree that it is good that Norway exists; that it serves the interests of its citizens, is generally morally upstanding, and so forth. And we may praise the fact that refugees have escaped cruel persecution. But we do not thereby know if Norway's acts are in anyway legitimate. The justification of the state and the state's legitimacy come apart and each must satisfy an independent set of standards.

It is important to guard against a potentially seductive misinterpretation of this distinction. It might be thought that the argument for distinguishing the just state from its legitimacy as a protectorate lies in the acknowledgement that those who seek asylum have different political goals from those who are in a position to offer protection. In the (real-historical) case at hand, the protection of Kurds within Iraq was not entirely inconsistent with their demands for greater political autonomy and self-determination (Hilterman 2008). As Robert Olson observes, "the US-led coalition war against Iraq in early 1991 provided the Kurds with [one of] their most propitious opportunit[ies] to create an independent state or, at least, gain greater autonomy within the states in which

they live, since the collapse of the Ottoman Empire” (Olson 1992: 479).⁹⁵ The issue here is whether Kurds might demand that humanitarian interventions on their behalf also offer a means to promote their long-standing interest in political self-determination.

Perhaps offers of state protection must also be, at least minimally, consistent with the basic political goals of those whom they seek to protect. However, the significance of holding a practice to standards of legitimacy that are independent of standards of the justified state is not that doing so is a means by which individuals can advance their political goals and interests. The point is that it is possible to view Wellman’s hypothetical example of a no-fly zone as a form of domination, not because it was inconsistent with the Kurds’ fundamental political goal of achieving self-determination, but simply because the Kurds’ lacked control over the extent to which their ability to achieve their aspirations was dependent on the will of the intervening powers (see also, Nabulsi 2003).

2.2 LEGITIMATE POLITICAL ASYLUM

The distinction between justice and legitimacy gives us a hint as to how we should proceed in evaluating state’s asylum policies and practices. It suggests that what matters is not merely whether a policy could be justified to the citizens of the state but also whether the actual relationships between the application of policies and the persons they effect are morally acceptable on their own terms (Simmons 1999: 763). This requires that we go beyond the political status of the state as proof of the legitimacy or illegitimacy of

⁹⁵Iraq has long been a center of organized Kurdish nationalism (Naamani 1966: 287) frequently supported by Western powers for their own imperial interests in the region (Olson 1992). As Olson notes: “The Kurds were to be the cudgel that made Baghdad bow to London” by using “the threat of Kurdish nationalism and/or independence as a threat to Iraq’s government to accept British imperial policies throughout the Middle East” (Olson 1992: 476). Naamani points out that the Iraqi government had also shown support at various times for limited forms of Kurdish independence.

its policies and it means that citizens must go well beyond the words of assurance preferred by state officials, or other interested parties. Some theorists have claimed that the justification of asylum policies requires that both citizens and non-citizens have extensive opportunities to participate more or less directly (through other formal democratic processes) in determining the particular procedures or powers that constitute the effective means by which policies are enacted by governments. Others suggest that the legitimacy of asylum policies turns on whether such policies are indirectly acceptable to citizens vis-à-vis a representative body of elected or expert officials. For example, according to Zolberg (et al. 1989), refugees are “persons whose presence abroad is attributable to a well-founded fear of violence, *as might be established by impartial experts with adequate information*” (ibid.: 33—emphasis added). This effectively excludes the general public who are, by definition, neither impartial nor experts. While such views reflect the fact that the concept of a refugee is shrouded in a complex system of law that is virtually inaccessible to the average citizen, it is not an argument for why either citizens or refugees should accept policies and practices as they currently exist. Since there exists a range of views as to what a test of legitimacy may entail in practice it is important to show why the legal system itself is a legitimate dimension of the practice of asylum. As we will see in Chapters 4 and 5, my own views on such issues tend towards a combination of direct and indirect forms of participation that support the rule of law but not the particular set of rules (including the powers of legal officials) that constitute the current system of refugee law. For the moment, however, I am more concerned with registering the fact that many normative accounts of political asylum have little to say about the extent to which refugees and citizens of receiving states actually do accept the terms and conditions in which asylum policies are pursued by the

state. These accounts seem to fall back on a general presupposition of the liberal (refugee-receiving) state, one in which citizens are sufficiently apprised of the relevant facts that would encourage credible forms of public deliberation in determining particular questions of refugee and asylum policy in a system that allows them to wield significant power over and, thus, to effectively determine the shape and direction those policies actually take.

Yet there is ample evidence to suggest that although the citizens of receiving states do, in principle, carry the democratic burden of determining asylum policies in the long run, in practice they are increasingly marginalized by governing and corporate elites and ineffectual in discharging their democratic will. In Britain, for example, Paul Statham and Andrew Geddes have demonstrated that the public's influence on immigration policy has been greatly exaggerated and that political and economic elites overwhelmingly determine Britain's asylum policies, typically in favour restrictionism (Statham and Geddes 2006). There have also been numerous government initiatives to hamper and erode powers and procedural principles that could be used to constrain elite influences (Hampshire 2009). These government-led efforts further consolidate power among elites and threaten to undermine the public's ability to make discerning judgements about time-sensitive issues over migration and asylum policy in response to emerging crises and political change.

Consider the impressive and long-running efforts to draw attention to apparent relationships between the phenomena of refugees and terrorism, and to combine the legal interpretations of these phenomena so as to make membership in these categories almost indistinguishable, with predictably drastic consequences for public policy and debate, to

say nothing of the consequences for refugees.⁹⁶ For example, under Paragraph (d) of the *Prohibition Against the Training or Support of Terrorist Organizations Act of 1984*, the definition of “international terrorism” includes acts that “transcend national boundaries in terms of the means by which they are accomplished...or the locale in which their perpetrators operate or seek asylum” (Leich 1984: 918n2d; See also Wright 1984). The suggestion, that since seeking political asylum is a potential means of facilitating terrorism it may be understood as terrorist act in its own right was, in effect, given *de facto* support under powers enabling state officials to deem asylum requests as acts of terrorism without public knowledge, since “any finding of fact made in a Secretary of State determination or renewal under subsection (d) shall be conclusive and no question concerning the validity of the determination or renewal may be raised by a defendant at a trial or hearing” (Leich 1984: 925). These powers frequently reach beyond the pretence of a genuine causal connection between asylum seekers and domestic attacks. As Elena Baylis has noted, in the US, there has been a “tendency to conflate domestic attacks with foreign threats”, citing the more recent *Anti-Terrorism and Effective Death Penalty Act of 1996* which “contained numerous measures restricting the rights of immigrants, although

⁹⁶ In late 2015, the editorial board of the New York Times published an article criticising the American Security Against Foreign Enemies (SAFE) Act of 2015 which would require that an alien covered under the act “may not be admitted as a refugee until the FBI certifies to DHS [Department of Homeland Security] and the Director of National Intelligence (DNI) that he or she has received a background investigation sufficient to determine whether the alien is a U.S. security threat; and may only be admitted to the United States after DHS, with the unanimous concurrence of the FBI and the DNI, certifies to Congress that he or she is not such a threat.” URL=<<https://www.congress.gov/bill/114th-congress/house-bill/4038>>. The bill passed with a two thirds majority in the House receiving the support of 43 Democrats. See ‘Refugees from war aren’t the enemy’ 18 November 2015. *New York Times* URL=<<https://www.nytimes.com/2015/11/19/opinion/refugees-from-war-arent-the-enemy.html>>. Compare with Regina Germain’s observation that “the proposal allowing the Attorney General to “certify” non-citizens as suspected terrorists and detain them indefinitely by merely asserting a “reason to believe” they would engage in terrorist acts or otherwise be a threat to national security” (Germain 2002: 506).

the Oklahoma City bombing had no foreign connection” (Baylis 2006: 167).⁹⁷ Similarly, the Foreign Intelligence Surveillance Act was amended in the wake of 9/11 “to enable the bugging and wiretapping of noncitizens [including asylum seekers] even if they aren’t suspected of being agents of a foreign power or group, but instead are “lone wolves”” despite the fact that no asylum seekers were involved and no such recommendations were made by either the Senate or the 9/11 commission (Posner 2005: 54).

In fact, there is very little public or academic discussion as to whether the alleged link between refugees and terrorism is so serious as to warrant a fraction of the attention it has received, much less as a legal justification for endowing the state with sweeping powers that allow state officials to conduct information probes that ordinarily, and without significant evidence, would violate the rights of even the most notorious criminals or known gang affiliates. Yet, for many citizens, “the impression has been created that terrorist and migrant populations significantly overlap and that we are dealing with one and the same problem” (Schmidt 2016; cf. Juss 2005: 772; Said 2006: 872). These circumstances have created something of a self-fulfilling prophesy, as Sam Mullins avers: “Given how closely these issues appear to have become enmeshed in the media and in the minds of politicians, security professionals and the public, it is important to assess the threat of terrorism objectively as it relates to mass migration” (Mullins 2016: 24). On Mullin’s view it is the *perception* that refugees might pose a

⁹⁷ The tendency is not new. In his Gettysburg Address Lincoln claimed that “intense commitment to national defense” is itself “a justification for classifying immigrants as an external threat” (Efford 2015: 213; see also Sa’id 2015).

potential terrorist threat that warrants the sort of ‘public interest’ risk assessments that are now commonplace in policy circles, think tanks, and media commentary.⁹⁸

The connection between refugees and terrorists should be taken seriously, not because there is overwhelming objective evidence that the link is sufficient to justify a shift in policies, but because these beliefs may undermine the practice’s claim to legitimacy. A number of issues contribute to this worry. One is that the practice of asylum will be used to further ends that are not consistent with the public interest, for instance, in the pursuit of foreign policy goals that the general public has little or no awareness of.⁹⁹ Daniel Swanwick has warned, for example, that “the continued exercise of foreign policy in asylum adjudications, even in exceedingly small doses, should be

⁹⁸ See also, Alex Nowrasteh. 2016. “Terrorism and Immigration: A Risk Analysis,” *Policy Analysis*, No. 798. Cato Institute. URL=<<https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis>>. For a response to the Cato study, see Jeff Crisp. 15 June 2017. “Refugees: the Trojan horse of terrorism?” Open Democracy URL=<<https://www.opendemocracy.net/can-europe-make-it/jeff-crisp/refugees-trojan-horse-of-terrorism>>. Crisp notes that “[w]hile supportive of Trump’s policies in other respects, the Cato Institute, a libertarian Think-Tank, concluded that the President’s bid to halt Muslim refugee resettlement on the grounds of terrorism was “a response to a phantom menace.”” But this qualification I think misses the broader point: it is the existence of the assessment itself that functions as a reason to think that the policies reflect a significant risk. See also, Dave Mosher and Skye Gould. 31 January 2017. “How likely are foreign terrorists to kill Americans? The odds may surprise you” URL=<www.businessinsider.com/death-risk-statistics-terrorism-disease-accidents-2017-1> who make the link between refugees and 9/11-style terrorist attacks explicit. For further references, see the bibliography in Alex P. Schmid. 2016. “Links Between Terrorism and Migration: An Exploration,” The International Centre for Counter-Terrorism – The Hague (ICCT). URL=<<https://www.icct.nl/wp-content/uploads/2016/05/Alex-P.-Schmid-Links-between-Terrorism-and-Migration-1.pdf>>

⁹⁹ Ben Barber has drawn attention to a “new hard line” stance on refugee aid adopted by frustrated donors in the 1990s in an attempt to address “the abuse and manipulation of humanitarian aid typified by the plight of the Rwandan refugees” (Barber 1997: 11). According to Barber, “[t]he United States liked to cloak at least some of its military aid to anticommunist insurgents as assistance to refugees. Since the collapse of the Soviet-bloc, attempts have been made to redirect refugee aid back toward purely humanitarian goals...” (Barber 1997: 9; See also, Rosenblatt 1997). On the history of the relationship between military and economic features of American foreign aid policy see, Seitz (2013: especially at 74ff); Baldwin (1963); and Chester (1995). Peter Rose, a long time “admirer, supporter, and student of the IRC” notes that the CIA’s relationship with the IRC (whose board members have included figures such as Henry Kissinger) should not be seen as one of “co-optation”, as Chester claims, but as “mutual accommodation”.

recognized and understood in order to continue to design systems that will limit its operation” (Swanwick 2006/07: 149).¹⁰⁰

The threat to legitimacy may also come from attempts to create public support for policies that are, in fact, rejected by significant sectors (including the majority) of the population. For instance, the headline for a 2015 Gallup poll, conducted just over a week after the November terrorist attacks in Paris, claimed that a majority (60% vs. 37%) of Americans disapproved of the US government proposal to take in 10,000 Syrian refugees, many citing “increased concerns about terrorism in the wake of the terrorist attacks [in France].”¹⁰¹ Gallup analyst Jeffrey Jones notes, however that “Americans are a bit more positive” when asked if “Syrian refugees would be welcomed if they came to their community” (49% vs. 46%). Similarly, a 1979 Gallup poll found that 57% of Americans opposed the idea of loosening US immigration policies to allow entry to Vietnamese “fleeing communist rule in South Vietnam.” By contrast, the polling analysis reveals that “in somewhat paradoxical fashion, 57% said that they thought the boat people would be welcomed if they did come to live in their community. [...and] 47% ...said they would personally like to see some of these people come to live in their community.” No explanation is ventured as to the source of these “positive” and “somewhat paradoxical” results, nor is there any mention of their potential significance for the narrative selected by Gallup and repeated without criticism or question, that Americans are historically and

¹⁰⁰ Swanwick claims that asylum practices have a legitimate role in foreign policy and should be openly acknowledged. See also, Milton, Spencer, and Findley (2013) and Sukenik (2015).

¹⁰¹ Meanwhile, and only days after the attack, France reaffirmed its commitment to take in many thousands of Syrian refugees. Ishaan Tharoor. 18 November 2015. ‘France says it will take 30,000 Syrian refugees, while U.S. Republicans would turn them away’ *The Washington Post*.
URL=<https://www.washingtonpost.com/news/worldviews/wp/2015/11/18/france-says-it-will-take-30000-syrian-refugees-while-u-s-republicans-would-turn-them-away/?utm_term=.fac2751e57e2>

consistently resistant to the idea of accepting refugees.¹⁰² One explanation may be that the curious anomalies of Gallup polling are confirmation of the American public's "[commitment] to the rhetoric of welcome" (Loescher and Scanlan 1986: xiv). Yet, other evidence can be adduced in support of less rhetorical forms of sympathy for the plight of refugees. According to a recent Brookings Institute poll, 59% (VS. 41%) of Americans support the idea of receiving refugees from 'the conflicts in Syria and other Middle Eastern countries *after screening them for security risks*'.¹⁰³ As Washington Post correspondent Ishaan Tharoor points out, the poll suggests that "if removed of security concerns, the majority of Americans have no qualms giving sanctuary to refugees from the Middle East, be they Muslim or any other faith." Equally important is the suggestion (also supported by the Brookings poll) that "majorities of Americans—particularly younger Americans as well as self-declared Democrats—felt a *moral* obligation to accommodate refugees from certain warzones, including Syria and Iraq."

Perhaps the single most important threat to public determinations of legitimate policies is the public's inability to control or to influence the sources of information through which their own determinations on public or foreign policy are fashioned. In their study of US public opinion during the Iraq war, Baum and Groeling (2010: 455n43) observe that a database search of major US newspapers over a five-year period between

¹⁰² Jeffrey M. Jones. 23 November 2015. 'Americans Again Opposed to Taking in Refugees' *Gallup*. URL=<www.gallup.com/poll/186866/americans-again-opposed-taking-refugees.aspx>. Frank Newport. 19 November 2015. 'Historical Review: Americans' Views on Refugees Coming to U.S.' *Gallup*. URL=<www.gallup.com/opinion/polling-matters/186716/historical-review-americans-views-refugees-coming.aspx>; Drew Desilver. 19 November 2015. 'U.S. public seldom has welcomed refugees into country'. *Pew Research Center*. URL=<www.pewresearch.org/fact-tank/2015/11/19/u-s-public-seldom-has-welcomed-refugees-into-country/#comments>.

¹⁰³ Ishaan Tharoor. 14 June 2016. 'New poll finds a majority of Americans welcome Middle Eastern refugees' *The Washington Post*. URL=<https://www.washingtonpost.com/news/worldviews/wp/2016/06/14/new-poll-finds-a-majority-of-americans-welcome-middle-eastern-refugees/?utm_term=.58a0e26f01ef>. For a summary and analysis of the poll, see Brookings Institute. 'American attitudes on refugees from the Middle East' 13 June 2016. URL=<<https://www.brookings.edu/research/american-attitudes-on-refugees-from-the-middle-east/>>.

2004 and 2009 showed that “casualties or fatalities killed” was more than fourteen times more likely than “refugees or displaced” to appear in a headline or lead paragraph (772 compared with 55 articles, respectively). Referring to the core ‘empirical benchmarks’ or “indicators of the overall tenor of events in Iraq” during this period, the authors add that “none are covered nearly as frequently in the media [as casualties], and presumably as a consequence, none consistently approach the influence of casualties on public opinion” although it “is possible that media coverage, such as that from the *New York Times*, might capture important measures of reality other than casualties, and that such metrics could allow a more comprehensive portrayal of reality than one based strictly on casualties” (Baum and Groeling 2010: 455n43).

There is also a perception among leading refugee practitioners and high-level planners that it is the state’s role to assist the public in making the right moral choices.¹⁰⁴ W. R. Smyser, a former White House National Security Advisor, Director of the U.S. State Department Refugee Program, and UN Deputy High Commissioner for Refugees had warned, more than a decade earlier, that “[a] long humanitarian tradition [of assisting refugees] could be in jeopardy” unless certain measures were taken, first and foremost, to “[make] clear to concerned publics and governments how the refugee problem has evolved over the last several years” (Smyser 1985: 166).¹⁰⁵ As Smyser puts it:

Helping public opinion in Western asylum countries to surmount current fears of being overrun by migrants posing as refugees should sustain the readiness of those countries and their people to assist refugees everywhere. (Smyser 1985: 168).

¹⁰⁴ This would be more plausible under the assumption that the public has shifted towards more conservative values and opinions that do not favour humanitarian policies. On the dangers of making this assumption in the US context, see, Ferguson and Rogers (1986).

¹⁰⁵ As Herfried Münkler (2005: 15) points out: “new wars [of the last twenty years] are visible to us mainly through the refugee flows, slum camps and famished populations”.

The view that Western public opinion needs ‘help’ to correct their fears of being overrun is not easy to square with majority public opinion, as we have seen, though it does reinforce the view of the role of the state in offering moral guidance to the ignorant and selfish public. The idea that officials have both the capacity and the moral duty to influence public opinion on issues of refugee policy is well known, but this fact seldom features in discussions of the legitimacy of the policies themselves, as they are actually applied in particular circumstances (Schuck 1992: 86-88; Wong 2006; Mishra, Facchini, and Mayda 2008).

In his article on the US reaction to Haitian refugees Washington Post correspondent and two-time Pulitzer Prize winner Jim Hoagland warns his readers about the ‘scourge of indifference’ (the title of the article)¹⁰⁶ referring not to indifference towards the plight of refugees, but ‘indifference towards US interests’, which are “vital”, as Hoagland explains: “[a] military intervention triggered by political reactions to refugees can be treated no less seriously than a military intervention triggered by a threat to oil reserves or other vital interests.” Referring to an anticipated influx of Haitian refugees fleeing the harsh economic conditions and military dictatorship for sanctuary in the US, Hoagland claims that “[i]f Haiti is not a problem worth fixing with a sustained military presence, it is not a problem worth an invasion.” In this case, the threat of Haitian refugees is “an American problem” demanding nothing less than prolonged military invasion which is the only reasonable means of addressing the scourge of

¹⁰⁶ Jim Hoagland. 21 July 1994. “Refugees and the Scourge of Indifference,” *The Washington Post*. URL=<https://www.washingtonpost.com/archive/opinions/1994/07/21/refugees-and-the-scourge-of-indifference/51277516-9a38-47df-bf9a-f9c11ee63fb4/?utm_term=.ea3aeb8b7cb4> See also, Smyser (1985).

indifference, ignoring over a century of continuous US intervention in that country (Pamphile 2015).¹⁰⁷

Hoagland's position differs only slightly from that of Barry Posen, distinguished political scientist and sometimes military consultant for the RAND corporation, who argues that "full-scale war is the best military answer to refugees produced by cruel occupations or highly repressive indigenous regimes" (Posen 1997: 309). One difference is that Posen does not explicitly cite US interests in such matters. Rather, he envisions intervening forces as "coalitions based on altruism" (Posen 1997: 285) that are ultimately led by the US since "without the participation of the United States, it is not clear that particularly potent threats against critical nodes or leadership can be mounted" (Posen 1997: 292, see also 311-312, 317n34). Posen assures us that although "full-fledged entry into a war that has any number of causes that were previously uninteresting to outside powers, purely to prevent refugees, would seem unlikely" (Posen 1997: 296)¹⁰⁸, smaller operations, such as the imposition of temporary "safe zones" may be a "brutally pragmatic" means of "forestalling a wholesale departure that would produce *legitimate claims* for refugee status in the interested countries" (Posen 1997: 298—emphasis added).

¹⁰⁷ Hoagland claims that by proposing to transfer oversight of Haiti to the UN immediately after an invasion on behalf of Haitian refugees the Clinton administration was "standing two centuries of the Monroe Doctrine on its head." It is worth recalling the Governor of West Virginia William A. MacCorkle's claim that "the first clause and original application of the Monroe doctrine" was to justify the invasion of and transformation of the "menace" state of Haiti into a "a blessing to the world...the greatest ever witnessed since the keels of mankind's ships began to cleave the water in their quest for knowledge and riches throughout the world" (MacCorkle 1914: 37) by explicitly precluding European powers from retaining territorial rights over their former colonies (Kreps 2007; Polyné 2010). The first of many US invasions of Haiti was carried out in 1915.

¹⁰⁸ Henry Kissinger recognizes the point, albeit in a different context, in this case, regarding US military support for West Pakistan against East Pakistan (now Bangladesh) which contributed to one of the worst refugee crises in postwar history: "[the] U.S. fully understands [the] problems created by [Bangladeshi] refugees and the importance of a political solution in Pakistan which would permit their return [to East Pakistan]" (Kissinger quoted in Hanhimaki 2004: 160). Hanhimaki avers that "the hardships of millions of refugees and the repressive practices of the Pakistani army, were of secondary importance when contrasted with [US] geopolitical benefits..." (Hanhimaki 2004: 162; see also Roy 2013).

These views suggest not only that governments may not be serving the moral interests of their publics to the detriment of refugees, but that governments and other liberal elites may, in fact, pose a more serious threat to their own populations than is usually considered in normative political accounts of asylum. This more serious threat is generally precluded under the common assumption that, while liberal governments are generally seeking to balance commitments to members of their own societies with broader humanitarian concerns that may impose costs on host societies (so that these general goals may sometimes be opposed) they are not directly opposed *on principle* or by design (Linklater 1998: 81-84; Gibney 2004; Walzer 1995). However, it is important to question whether this assumption is warranted. We can do so—even if we discount for the fact that Western state practice regularly departs, often dramatically, from the views of its own population in the desired treatment of outsiders—by observing the perspective adopted by actual US policy planners. Arthur Helton offers a capsule summary of the relevant view:

The values associated with promoting human rights and humanitarianism, of course, are in and of themselves critically important. But foreign policy realists appreciate the abiding importance of stability, order, and prosperity. This in a basic sense is why refugees matter as well as the meaning of dealing with them. (Helton 2002: 268).

Gil Loescher observes, not incorrectly, that “[t]he intensity of recent state responses to unwanted or unanticipated migrations... signifies that such population movements are regarded as a threat to security and stability” (Loescher 1992: 59). Whether refugees *actually* pose a threat, in what sense, and, with respect to whose opinions—questions that ought to contribute to our understanding of such matters—seldom feature in ‘realist’ analyses. In the absence of this sort of inquiry, it is easy to suppose that what matters in determining the seriousness and nature of refugee flows is simply how states ‘react’.

Thus, Ronald Reagan’s response to Central American refugees fleeing vicious US-backed regimes in El Salvador, Nicaragua and Guatemala—to increase military support for those regimes while simultaneously deporting asylum seekers back to those countries—is justified on the grounds that refugees pose a threat to ‘stability, order, and prosperity’ (Tempo 2008: 188; Macekura 2011: 358). Michael Teitelbaum adds that “refugee admission policies have been guided in many important cases by the belief that refugee outflows serve to embarrass and discredit adversary nations” (Teitelbaum 1984: 439). Citing a memo from Washington’s Central American Refugee Centre, he notes that opponents of US intervention in El Salvador (and also Haiti) have argued “strangely enough” that the refusal to recognize Salvadorans as legal refugees—a policy unique in the world at that time—was aimed at preventing the influx of “a large sector of voiced opposition to U.S. policy manoeuvres in El Salvador” (Hoffman quoted in Teitelbaum 1984: 439). As the memo makes clear, ‘voiced opposition’ depends on the acquisition of refugee status, without which, “dissent can be kept silent through forcing [Salvadoran asylum seekers] to live underground in fear of deportation to [sic] the threat of persecution and death in their own country” (ibid. 439).¹⁰⁹ From this, Teitelbaum concludes that “both proponents and opponents of U.S. foreign policy see refugee or asylum admissions as important tools” (Teitelbaum 1984: 440). Teitelbaum adds that refugees are also tools of “ideological” critics *opposed* to US policies, including private citizens belonging to nongovernmental organizations who are ready to use the outflows

¹⁰⁹ The elimination of nationality as a criterion for refugee status vis-à-vis the 1980 Refugee Act is often viewed as a legitimate and sincere attempt by the Carter Administration to advance “human rights” and to bring ideologically motivated refugee policy to an end, rather than an attempt to make it easier to advance the same coercive agenda, if not to pursue it on a far more intensive level. Regan made no attempts to repeal Carter’s Act, in part, because it “afforded the State Department the right to adjudicate the validity of refugee claims, which gave the executive branch penultimate power over refugee policy”, a useful device that enabled Reagan to lawfully refuse entry to individuals fleeing from the US backed terror in El Salvador (Macekura 2011: 358). See, also LasRosa and Ingwersen (2007).

of refugees from countries in which the US has intervened militarily as “a weapon to dramatize the reasons for their opposition” (Teitelbaum 1984: 440). This rhetorical move, to equate the manipulation of refugees by small groups of informed citizens and exiles critical of U.S. foreign policy, with the manipulation of refugees by high-level US foreign policy planners and military forces is remarkable, but not unique.

Executive Associate Commissioner of the Immigration and Naturalization Service Dorris Meissner takes a similar approach in her appraisal of American civil disobedience in the wake of US intervention in Central America in the 1980s, specifically in El Salvador and Guatemala. Meissner situates her evaluation in the context of a national debate between government officials and immigrant advocates who were deeply divided as to the central issue raised by Salvadoran and Guatemalan asylum seekers in the US. For government officials, “the issue was the right of a state to limit immigration and to exercise control over its borders”; for immigration advocates, the issue was “United States’ role in Central America, particularly its crucial and ongoing support for ‘political and military violence’” (Meissner 1989: 133). Meissner acknowledges that the “US severely mishandled the Central American migration” through its consistent disregard of the “overwhelming body of evidence [of persecution], some of it flowing from its own reports”, actions which Meissner notes “must be especially harshly judged...” (1989: 139). Michael McConnell concurs, noting that “[r]efugees fleeing El Salvador and Guatemala are not victims of random violence...they are the real targets” and “[t]he creation of refugees is crucial to the U.S. military strategy” (1989: 150).¹¹⁰ McConnell’s claims are supported by John Dower’s recent (2017: 59) study which points out that

¹¹⁰See also, Gibney (1991) and McClintock (1985: 13, 16, 260). For an in-depth study, see Chomsky and Herman (1979, 2 Volumes).

refugees are mentioned as explicit targets in US-Latin American insurgency and torture manuals.¹¹¹ Nora Hamilton and Norma Stoltz Chinchilla argue that although most crimes committed against refugees can be attributed to Central American military forces:¹¹²

when analysing the role of the state, it is difficult to separate the role of domestic regimes from that of the U.S. government, partly because the influence of the latter is often overwhelming and partly because they are generally aligned (Hamilton and Chinchilla 1991: 105).

Nonetheless, Meissner argues that immigration activists' resort to civil disobedience in reaction to US backed terror and subsequent denial of refugee status was, in fact, hypocritical. By providing illegal protection to not more than "a few hundred" Salvadorans and Guatemalans, advocates were "pursuing a political objective in the name of the Refugee Act, *the same crime they charged the government with committing*" (ibid., 134—emphasis added). This constitutes a "fundamental departure from humanitarian activities into politics" and "raises serious credibility questions" about the motivations behind the sanctuary movement (ibid., 138). Thus, she concludes that "[b]oth the government and the advocates allowed political objectives to overshadow humanitarian imperatives" (ibid., 139), effectively equating US sponsorship of Central American terrorism with the largely peaceful and ineffectual attempts to prevent or protest against the government's actions.

Meissner goes on to note that the flaws in INS procedures are in fact mitigated by the fact that the vast majority of asylum seekers were in fact economic migrants and the proper approval rating for Central American asylum seekers was bound to be low, in Meissner's estimate, "probably less than 25 per cent" (ibid., 140). Meissner provides no

¹¹¹ For a general overview with an account of intentional mass killings of refugees by US-trained forces, see McClintock (1985: 305-309).

¹¹² Hamilton and Chinchilla (1991: 105n18) report "occasional disagreements...between the U.S. government and the Salvadoran military...regarding the internationally permissible level of repression".

evidence in support of her estimate. By contrast, William Stanley, using Socorro Juridico and Tutela Legal records on political murder (1979-1984) and *Latin America Weekly Reports*, concludes that “fear of political violence appears to be the dominant motive for Salvadoran migration” between 1979 and 1984 (Stanley 1987: 144), accounting for up to 72 per cent of monthly variants among Salvadorans investigated by the Immigration and Naturalization Service (INS) in the US. To be fair, Meissner’s estimate does not conflict with Stanley’s conclusions, since she concedes that “[t]here is no *right* number” only a “defensible, fair number.” However, her own defence rests not on empirical evidence, but, rather on the fact that offering asylum to a high percentage of Salvadorans “would have conveyed some disapproval behind the vote of confidence being given to [the US] struggle for democracy [in El Salvador]” (ibid., 138).¹¹³

Meissner’s arguments are consistent with her preferred historical “framework” which she claims is necessary to understand the issues under review. This framework assumes at the outset that the US reaction to Salvadorans fleeing violence and oppression was consistent with “the humanitarian ideal to which our nation has been historically committed...the offer of liberty and safety to persons...who are persecuted”; that the Refugee Act of 1980 (which re-defined the rules of refugee admission under which Central American’s were assessed) was an unqualified success whose “improvements have all been to the good”; and, that political developments in regions that have led to refugee influxes to the US, including Cuba, Iran, and Nicaragua, consistently reveal the

¹¹³ David Martin (1993) questions the logic of “numerous incautious critics” such as Angela Delli Sante who claims that “[t]he US government refuses to recognize the refugees [from El Salvador and Guatemala] as *bona fide*; to do so would be to recognize the repressive nature of the government it is supporting, therefore acknowledging the plight of the refugees as a result of its own policies” (106 cited in Martin 1993: 172). According to Martin, “woefully low recognition rates” (4% for Salvadorans and 2.4% for Guatemalans, respectively) can provide no support for the thesis that there is an attempt to hide US-backed support for oppressive regimes because “*any* asylum grant ‘recognizes’ oppression in the home country” (Martin 1993: 172—original emphasis). If such claims were true, he reasons, then “the rate would be zero”.

US's vulnerability to unpredictable events that "the [US] government was helpless to control" (Meissner 1989: 125-127).¹¹⁴

Meissner's analysis helps to shed light on the ways that contemporary debates may help to obscure imperialist dimensions of state practice. For example, by far the dominant picture invoked by the question as to whether a state has a right to control its own borders is either that of a person fleeing an oppressive regime, or of an economic migrant seeking greener pastures in a legitimate (liberal) state (Abizadeh 2008; 2010; Miller 2016; Fine 2015). The debate itself has little application in cases where claims for refugee status cannot be isolated from the receiving state's willing involvement to engage in foreign military interventions, to apply economic sanctions to other states, or to provide crucial economic, military or diplomatic support for repressive regimes. After all, it makes little sense to ask whether a state has the right to defend its borders against *itself*, that is, against the (often predictable) consequences of its own actions, especially where those actions include violating another state's territorial rights. The debate therefore acts as a kind of intuition pump that operates on the assumption that the justification of the (liberal) state can serve as a partial justification of the legitimacy of its policies by assuming ahead of time that the liberal state is already more or less legitimate in the way it exercises its coercive authority; it does so, as I suggest, by abstracting the state from the actual policy outcomes of liberal states and their larger patterns. My point here is that once we begin to question these patterns the hypothetical justification of the state will seem to miss out on an important form of institutional evaluation and, I believe, it will

¹¹⁴ A number of scholars argue that massive refugee flows into neighbouring countries or other regions such as the US are not entirely unpredictable, both in terms of the sorts of causes associated with refugee outflows as well as the likely destinations. See, for example, Apodaca (1998); Davenport, Moore and Poe (2003); Moore and Shellman (2004; 2007).

lose much of its attraction as a method of doing normative political analysis, as a way of evaluating actual policies and institutions.

2.3 ASYLUM AS A COERCIVE OFFER

In this section I want to consider two arguments that might seem to allow us to waive demands for liberal states to demonstrate their legitimacy. The first argument says that only those policies that are inherently coercive or liable to manifest as forms of arbitrary interference should be subject to legitimation demands. Insofar as political asylum comes in the form of an offer to protect and not a threat it is inherently non-coercive and thereby exempt from the test. The second argument says that the asylum policies of liberal states are inherently legitimate since they reflect one of two important channels of consent, the citizens of receiving states and the international community. The first argument trades on the claim that threats are coercive while offers are benign. The second argument says that, as long as practices of asylum *could* be rationally justified to a particular audience (an asylum seeker, domestic population, or international community), they will be *to that extent* legitimate. Both arguments are rejected: the first argument fails to consider the possibility that asylum is a coercive offer; the second fails to consider whether citizens of receiving states have sufficient control over asylum practices as they actually exist. The chapter then turns to examine an alternative republican conception of legitimacy. On this approach, political asylum is a legitimate practice only to the extent that it expresses a substantive commitment to freedom as non-domination. The republican test of legitimacy assumes that asylum seekers will have sufficient resources and opportunities to contest decisions regarding their status and that citizens of receiving states will be afforded reasonable opportunities to assess their government's actual roles and interests in

conferring or denying refugee status to individuals or groups. Correspondingly, the legitimate addressee of claims for political asylum is a “restive state” (Pettit 2012: 225-227)—a state whose population is demonstrably aware of, and responsive to, abuses of power at the hands of its government officials.

The distinction between threats and offers plays an important normative role in distinguishing between policies and practices that are subject to standards of political accountability.¹¹⁵ On the face of it, threats are deemed to trigger special legitimation demands while offers are generally considered non-coercive, and thus, free from such scrutiny. In *The Constitution of Liberty* Friedrich Hayek declares:

Even if the threat of starvation to me and perhaps to my family impels me to accept a distasteful job at a very low wage, even if I am ‘at the mercy’ of the only man willing to employ me, I am not coerced by him or anyone else. So long as the act that has placed me in my predicament is not aimed at making me do or not do specific things, so long as the intent of the act that harms me is not to make me serve another person’s ends, its effect on my freedom is not different from that of any natural certainty – a fire or a flood that destroys my house, or an accident that harms my health. (Hayek 1960: 137, quoted in Plant 2010: 206).

As Raymond Plant notes: “[Hayek’s] approach implies that threats are coercive and offers are not” (Plant 2010: 206). Robert Nozick has also examined the difference between threats and offers and concludes that threats are inherently coercive, while offers are not, since offers, unlike threats, always bring about a positive outcome in the “normal and expected course of events” (Nozick 1972: 112).¹¹⁶

The distinction between threats and offers plays an underappreciated role in the politics of asylum. Perhaps the most intuitive reason for thinking that the practice of asylum is beyond the pale of legitimacy is precisely because it is an offer of protection

¹¹⁵On coercive offers generally, see Held (1972). I develop Held’s account in Chapter 3.

¹¹⁶ Nozick (1972: 115) points out that what we understand ‘the normal course of events’ to be in any given case will, in large part, determine whether an act is interpreted as a threat or an offer.

rather than a coercive threat. As Henry Richardson notes “offering asylum to people overseas because they seem to need exit from where they are, though intended to influence their situation, does not seem to interfere with them or with the nation in which they live” (Richardson 2017: 47).¹¹⁷ Although all governments face a “burden of legitimacy” in view of their capacity to undermine fundamental freedoms either by violating human rights or by (intentionally) imposing duties on individuals (or releasing them from obligations they already have) (Richardson 2002: 34-35)¹¹⁸, not all government practices seem to face this burden to the same extent. The modern state practice of granting protection to persons who face political persecution in their country of origin is widely recognized as an important means by which individuals can achieve many fundamental political liberties, none of them insignificant.¹¹⁹ While asylum seekers are untroubledly coerced into fleeing their state, the practice of asylum itself seems to lack the coercive dimension of practices that ordinarily bear the burden of legitimacy. However, while no one would doubt the value of providing protection to individuals who face persecution, it is a mistake to infer the liberal credentials of asylum practices from their positive contributions to individual well-being. For those may be secondary effects of other goals, a by-product of the “deep attachment to liberal institutions in which their

¹¹⁷ This remark should not be taken as Richardson’s all-things-considered point of view. Nonetheless, Richardson’s claim is representative of a common assumption in political theory that liberal practices of asylum are motivated by essentially moral considerations.

¹¹⁸ Here I will use the terms duty and obligation interchangeably. But see Richardson (2002: 24n).

¹¹⁹ Stefan Heuser (2008: 10) cites a number of rights and freedoms that may be, and commonly are, secured through access to asylum including: “the right to citizenship; the right to life and physical integrity; the right to liberty and security of the person; the right to equal protection before the law; the right to freedom of assembly and association; the right to be free from torture; the right to freedom of expression; occupational freedom; freedom from discrimination; access to the judicial system; participation in political life; freedom of religion, faith and conscience; access to information; property rights; and freedom of movement.” Heuser adds that asylum may be an important aid to freedom of movement, but only if it is properly separated from immigration policy (Heuser 2008: 6).

authority is not conditional on their contribution to the well-being of those they serve” (Gray 2003: 88).

Debates about restricting entry to refugees reinforce the distinction between threats and offers. Restrictions tend to provoke a negative response in view of their coercive character while generous asylum policies are those that make more offers to greater numbers of refugees. Colin Grey suggests that refugees’ “basic liberty to be admitted” is reflected by “our first-order judgments that it is presumptively unjust to exclude refugees...” (Grey 2015: 207). Similarly, Christian Joppke (1998: 292) says that “accepting unwanted immigration is inherent in the liberalness of liberal states.” In such cases, it is only because the state reserves a right to actively *prevent* persons from moving freely across its borders that triggers a demand for legitimation (Abizadeh 2008: 56).

These views match a widely held intuition that political asylum is essentially an offer and not a threat. Since offers do not provoke the same sorts of demands for legitimacy—being essentially non-coercive—asylum insofar as it is an offer and not a threat is not subject to a test of legitimacy, *per se*. On this view, although the practice of asylum operates under the coercive apparatus of the state (with all that this entails) the moral legitimacy of asylum itself raises no special legitimation concerns. This intuition is not insignificant. It helps to obscure an important dimension of the practice of asylum that is worthy of normative scrutiny but which is rarely considered: that asylum may itself be a form of coercion.

In what follows I want to reorient our way of understanding asylum as a kind of coercive offer. Consider the following scenario:

Tenacious Bully

*You are walking home from school with a friend. At some point, still some distance from your neighbourhood, you suddenly notice the local bully following close behind. Over the past few weeks it has become increasingly clear that the bully has a score to settle with you and it appears that he has finally come to make good on his threats. As luck would have it, you are steps away from your friend's house. Being apprised of your situation, and confident that the bully will soon grow bored, your friend invites you inside to wait it out. You quickly agree and enter his house, much to your relief. However, hours later, and true to his reputation, you can still make out the intimidating figure sitting with sadistic patience at the end of the drive...*¹²⁰

Your friend has helped you to escape the bully and would not dream of turning you out before the coast is clear. Nevertheless, just so long as your continued safety depends on his willingness to allow you to remain within the shelter of his home, you are dependent on him to avoid the bully's wrath. If your friend's mood were to suddenly change, were he to grow annoyed of your nervous presence, or suddenly fearful that meddling in the bully's affairs could make *him* a target, you may quickly find yourself out in the street. Alternatively, were he to seize upon your temporary vulnerability in order to force you into accepting a humiliating boyhood dare you will have little choice but to accept, for better or worse.

To say (or to recognize) that you are subject to the arbitrary will of your friend doesn't entail that you question the quality of your friendship or the actual limits of his sympathy. These qualities might determine the extent to which he is willing to keep you

¹²⁰ Like any intuition pump, this thought experiment is subject to any number of caveats, including, for example, the assumption that you would leave your friend's house to face the bully if your friend demanded, that there are no intervening forces (e.g., your friend's parents), that a suburban, middle-class grade-school conception of friendship is a sufficient representative of friendship, and so forth. A more complicated view of friendship can be found in Holtzman (2016).

safe or to refrain from exploiting you. But the *possibility* that your friend could, for example, turn you out should not be confused with the *probability* that he will do so.¹²¹ We need only recognize that your friend is an autonomous person and thus “a free agent, always capable of acting against [his] usual dispositions” (Lovett 2010: 134). To be sure, few would question your choice to take your friend up on his offer to help you. The conviction that your friend would never do you wrong and your desire to avoid the bully’s wrath are both fully rational and mutually reinforcing prudential reasons for acting as you have. All things considered, you have acted prudently. Nonetheless, so long as you occupy a position of dependence on your friend’s continued willingness to assist you then there is an important sense in which you are not free. This has to do with the fact that your friend has the capacity to make things worse for you, given your options, at his pleasure, by limiting your choice options (e.g., about whether to stay or head home, to accept or decline the dare, and so forth), in a situation in which all of this is common knowledge to you both.¹²² Furthermore, all of these points are underwritten by a salient fact: other things being equal, whether, for example, you will be forced to ‘meet your maker’ at the end of your friend’s driveway depends, not on anything you can control, but on whether your friend’s enduring sympathy is a sufficient match against the bully’s cruel

¹²¹ Pettit and Skinner defend this distinction in response to arguments advanced by Kramer (2003) and Carter (1999) who support the ‘pure negative’ conception of freedom. See also Goodin and Jackson (2007).

¹²² One way to undermine the case I am building here would be to argue that, insofar as a ‘true’ friend would not even recognize his power to turn you out or to exploit your bad luck, he has only a “virtual” capacity to interfere with you on an arbitrary basis. Pettit (1997: 54-55) claims that virtual domination is not true domination since it is a power of domination that is ‘not yet ready to be exercised’. Aside from the rather idealistic conception of friendship presupposed by this response, it is still unclear whether the distinction between virtual and actual domination can have any practical force unless we can say with some confidence what the likelihood is that a virtual capacity for interference will be actualized. In any case, we should not rely too much on what constitutes true friendship. A true friend may decide that it would be good for you to face your fears and to stand up to the bully, regardless of the outcome. Perhaps your friend thinks that this is better for you in the long run and the only way for you to avoid future harm. He may kick you out (despite your protests) confident in the belief that this is what true friendship requires.

tenacity.¹²³ The conception of freedom as non-domination rejects the idea then that “there is nothing inherently oppressive about some people having dominating power over others, provided that they do not exercise that power and are not likely to exercise it” (Pettit 1997: 9). To focus narrowly on the bully’s interference is to miss this other important dimension of freedom, or its lack.

Many will find the suggestion that your friend’s offer to protect you from immediate harm comes at the cost of your freedom unattractive, unconvincing, or both. This is in part because while it is clear that the bully is a source of intentional interference, it is far less convincing that the friend could be implicated in this way. Things might be different if your friend had control over the bully’s actions, if the bully had no interest in you, and was *really* after your friend, or if your friend and the bully were ‘in cahoots’. But nothing could be farther from the truth. The fact is that your immediate and overarching concern is to avoid physical injury and, eventually, to return to your house unmolested. So long as you cannot escape the bully unharmed in the more or less immediate future, you are not free. If the salient claim about freedom is a claim about intentional interference with respect to these particular choices then the source of this interference is clearly the bully and no one else.

To respond in this way however ignores the significance of the relation between the bully’s threats and the effects of taking up your friend’s offer of assistance. To maintain that the bully is the most immediate and salient form of interference may have

¹²³ Lena Halldenius (2010: 14) parses domination as “a lack of security that makes me dependent on the lucky chance that things happen to go my way.” However, we needn’t think that your evasion of the bully is merely ‘lucky’. After all, both your friend’s loyalty and the bully’s tenacity are reliable characteristics of their personalities. It is not a matter of sheer luck that your friend is the sort of person who would not turn you out, or that the bully is the kind of kid who enjoys pummeling his peers. Furthermore, luck is closely associated with probability but the concept of domination is meant to be a function of possibility, not probability.

intuitive plausibility given his instigating role, the nature of his intent, and his tireless efforts in pursuit of his goal. But in taking up your friend's offer, the state of affairs has changed; the features that draw our attention to the bully are significant, but their significance hinges on what your friend decides. Notice that it would be wrong to say that the bully is able to interfere in the way he initially intended while you remain in the safety of the house. The bully is naturally tenacious, so he is happy to wait around. But practicing tenacity is not his *goal*. He does not wait because he cares about maintaining his image as a particularly committed practitioner in the art of bullying, but to extract a particular form of satisfaction: to see you squirm under his grasp. At the moment, thankfully, you are not subject to this form of interference. The reason for this marks an important shift in your relationship with your friend. Moments ago you were hanging out on more or less equal terms; now you are under his protection. To be under his protection, however, your friend must have a power *over* the bully that it is beyond the bully's control to address.

Tenacious Bully differs importantly from trademark examples of neo-republican thought such as 'lucky slave' or the 'traditional wife' (Pettit 1997: 57; Lovett 2010; Talisse 2014). These examples aim to show that domination can be present—i.e., that someone can suffer a loss of freedom—even when they do not suffer any *actual* interference with their choices. A slave may avoid interference if, say, his master happens to have a benevolent disposition, but the slave is dominated nonetheless since the master could impose his will on the slave at any time should he so please. In this case, the source of interference and the source of domination are one and the same (the Master).

Tenacious Bully highlights the fact that, although the sources of domination may be causally *diffuse*, we do not need a clear source of domination to make ascriptions of

dominating power. We can accept that your friend has dominating power over you even if this is due in part to your own actions. That you might have preferred to take a beating rather than to be at the will of your friend does not change the fact that he dominates you.

Tenacious Bully also highlights an important assumption about coercion in the context of an offer to avoid or defend against a threat; namely, that a (genuine, non-perverse) offer cannot constitute a form of arbitrary interference. But clearly this cannot be right. For given the nature of the threat, an offer may place you in a position of dependency, circumstances over which you have only more or less control, and thus in a state of domination. To be sure, what makes it possible for your friend to dominate you is the tenacious presence of the bully who prevents you from playing in the street or to returning to your own house unmolested. But this is only to say that the bully is a precondition of your friend's domination, an active source of his dominating power. The bully's interference enables domination, but the bully is neither the one who dominates you *within the safety of your friend's house*, nor is he necessarily *responsible* for your friend's having dominating power over you. The bully does not dominate you so long as you have resources to prevent his arbitrarily interfering in your affairs. If you live in a culture that is appropriately sensitive to bullying—one that includes vigilant parents, teachers, and friends—you will have many means of identifying and preventing bullying behaviour and you will have many opportunities to mitigate or reducing the effects of bullying through education and the like. In such a culture there may be bullies, but they will not be able to acquire dominating power over anyone and the extent of their interference will typically be small or non-existent. Things will be different where bullying is seen as normal, acceptable behaviour, where there are few means of deterring or educating bullies about the error of their ways, or where the idea of a bully is simply

unfamiliar to a particular group or culture. But in the case under consideration the reason that the bully does not dominate you is more straightforward; it is simply not up to him, except in a contingent sense, whether you will be forced to meet him on the street. The real power seems to rest with your friend who may harbour you or give you up. Nor is the bully responsible for your friend's dominating power. Of course, were there no bully your friend would not have the power over you in the way he does now. There is a causal relationship between the interfering presence of the bully and the dominating power of your friend. But the bully is not responsible for your lacking sufficient means to counter the pressure your friend exerts when he forces you to agree to the humiliating dare. Were you to have such countermeasures your friend would be less of a dominating presence, or none at all.

What I want to show here is that potential receiving states must put asylum seekers in a position to exercise a basic range of political choice options and to exert a form of influence over the system of laws that regulate the outcomes of theirs' and others' choices in a way that at least approximates the range and influence over such choices that the citizens of the asylum state already enjoy. These are basic conditions of a legitimate form of political asylum, without which the practice of asylum constitutes a new form of political oppression (cf. Owen 2014).

On the republican view, not only must there be procedural mechanisms in place for monitoring the application of the Refugee Convention. There must also be a role for refugees to access those procedures directly and, where possible, to exert influence independent of the officials responsible for conferring their status.

As Tom Clark has noted:

Justice demands that a person who has been wronged has access to an authoritative body with power to confirm and publish the facts, pronounce on whether a right has been violated or not, and to provide redress. The same should be true if the person is a refugee. (Clark 2004: 605).

While Clark refers to such demands as a matter of justice, they are better understood as legitimation demands of a particular practice. Part of the reason is that when normative theorists talk about justice they rarely have in mind Clark's own use of the term. For many political theorists, questions of access and the like are left behind—or left out—of their discussions in favour of whether the laws and procedures can be justified on more general grounds. But the more important point is that the demands of justice are not equal to those of legitimacy—the legitimacy of asylum practices turns on whether refugees do or have had such access. The impetus behind such questions is twofold. First, we want to know why citizens of receiving states should conform to the refugee policies their governments adopt. Second, we will want to know why refugees should defer to forms of social imposition which, however just or virtuous, do not provide a rationale for why individuals should agree to be governed by the sources of the practice. The concept of legitimacy thus moves us beyond considerations of justice towards considerations about how the practice can satisfy distinctively political criteria of justification.

2.4 JUSTICE AND LEGITIMACY REVISITED

One important consequence of disentangling the concept of legitimacy from the concept of justice is the recognition that distinctly *political* goals and interests have at least some role to play in our evaluations of asylum policies. The virtues of the interventions (whether actual or hypothetical) may of course contribute to the plausibility that a given asylum policy is or is not legitimate, but legitimacy cannot be derived from those virtues,

nor can the test of legitimacy be satisfied in advance of how the practice actually relates to those who are subject to it.

The claim I wish to make here is that the distinction between justice and legitimacy has not generally been observed in normative theories of political asylum. While the concept of legitimacy is viewed as central to the evaluation of liberal asylum policies, the problem of legitimacy—the actual evaluation and justification of practices and policies as they feature in real life—is frequently left behind. This can be seen despite considerable agreement about what legitimacy consists in or the standards it commends in evaluating liberal asylum practices. Matthew Price claims that a state’s asylum practice is legitimate insofar as the government has the backing of its citizens. For Colin Grey (2014: 47), a state’s asylum policy is legitimate to the extent that it does not violate certain basic rights, conditions that could be justified to both refugees and citizens (Grey 2015: 50). On Matthew Gibney’s view, the central question of legitimacy turns on how—or whether—liberal democratic states can adequately justify the exclusive use of their territory in the face of claims of extreme need or potential suffering (Gibney 2004: 36-41).¹²⁴ By contrast, David Miller claims that the legitimacy of our asylum practices depends on prior commitments to broader immigration policies that could be defended “on grounds that are publicly justified” (Miller 2016: 92) as well as through ‘reliable procedures’ for determining the veracity of claims for assistance (Miller 2016: 395-96). These conceptions share two features in common. They are more concerned with establishing the conditions of justice—what it means to act justly—in responding to

¹²⁴ Gibney (2004: 246) also proposes a number of additional legitimacy-enhancing standards, for example, to impress upon the public the need to accept refugees, and to enter into transparent international arrangements for their protection or resettlement, but these are considered as separate from the territorial question.

refugees than with whether particular policies are actually legitimate. And they are therefore concerned with an account of public justifiability—with what *could* be publicly justified.

A similar result can be seen in the appeal to an international conception of legitimacy. On this view, “[t]he legitimacy of any particular state is...derivative of the legitimacy of the system as a whole” (Carens 1991: 25) where “states ought to help refugees because the moral legitimacy of the state system depends on the provision of some safe state membership to everyone” (Carens 1991: 20). This conception of legitimacy gains support from the empirical observation that “a country which forces its people to flee or takes actions which compel them to leave in a manner that threatens regional peace and security has in effect internationalized its internal affairs” (Loescher 1992: 58). Andrew Shacknove holds an indirect version of the internationalist conception of legitimacy. He claims that the legitimacy of an asylum policy is compromised either when refugee status is denied to “worthy claimants” or when it is granted unnecessarily to claimants whose basic needs are already secure (Shacknove 1985: 284). Since determinations of refugee status turn largely on the possibility of rendering international assistance to persons with unmet basic needs (in states unable or unwilling to provide for those needs), the legitimacy of an asylum policy also turns on a prior question about the standing of the refugee-sending state in the international community, and, thus, whether the international community could legitimately intervene on behalf of citizens with unmet basic needs who have no recourse to their own governments.

A related approach claims that an asylum policy derives its legitimacy more or less directly from citizens’ popular moral sentiments. On this view, legitimacy is tied to the willingness of various publics to accommodate political outsiders within naturally

restrictive bounded communities through various sources of moral motivation (Tugendhat 1995; Boswell 2005) including commitment to universalist values that are already embedded in modern human rights institutions (Bohman 2007). This conception of legitimacy is itself motivated by the idea that the international community has replaced governments as the true addressees of human rights claims. As Ernst Tugendhat (1995) argues, prior to WWII human rights were rights of individuals against the state, but this is no longer the case. The true “addressee of human rights”, he claims, is the wider international community as such. Consequently, the response to refugees “depends in the last resort on the attitude of the citizens” since “only their humanitarian attitude can be the appropriate court of appeal” (Tugendhat 1995: 139).¹²⁵

Tugendhat is not alone in arguing that the proper addressee of human rights claims is a universal moral sentiment. James Bohman also claims that the institutions of the human rights regime supply “the normative basis of a political community that constitutes humanity as the addressee of claims to justice” (Bohman 2007: 105-114, 111-112).¹²⁶ These institutions confer a basic membership status on persons within the wider international community of moral concern. For Bohman, refugees are the paradigm case of persons who are without a political status but who nonetheless have basic ‘normative powers’ or rights as members of the international community. As a result, the concept of the legitimate state plays only a secondary normative role since, the “right to membership is no longer determined by sovereignty, by the arbitrary choice of those who are currently

¹²⁵ The “main cause for the current increase in political refugees is a self-understanding of groups in particularistic terms which ultimately implies the denial of universal respect and of human rights altogether” (Tugendhat 1995: 140).

¹²⁶ “In the case of human rights, the community addressed is not the same as the one in which the violated person has de facto membership, but rather the human community as such” (Bohman 2007: 109). Bohman arrives at this conclusion from a different route, vis-à-vis the view that that the goal of realizing freedom as non-domination in the realm of global justice suffers from incoherence when restricted to particular political communities.

members, or by legislative willing whatsoever”; rather, “[i]t is a political obligation of humanity, institutionalized by the United Nations High Commissioner for Refugees (UNHCR) and other parts of the international human rights regime that are concerned not just with crimes of genocide, but also with violations of the normative statuses of persons as members of the human political community” (Bohman 2007: 113).

On these views, the legitimacy of representative governments and the mechanisms of government interference and control are secondary considerations relative to the role played by popular moral sentiment in discharging our moral duties to refugees. However, the idea that popular moral sentiment can serve as the addressee of rights claims raises an important problem, namely, that populations are themselves vulnerable to manipulation by governments who may seek to shift their moral sentiments towards questionable or immoral ends. It is troubling then that there is nothing in Tugendhat’s assessment to suggest that governments or states must explain their role in creating or neglecting the moral sentiments of their populations (Besson 2011). So long as we formulate popular control without an ideal of political legitimacy the fate of refugees will be subject to the vagaries of popular sentiment, as Tugendhat explains:

The idea of rescue turns out to be, as soon as it becomes an international affair, primarily based on a *supererogatory moral attitude*...and this becomes increasingly so as the amount of infractions of human rights and of refugees surpasses our imagination and stands in danger of being considered a normality. Those who try to protect internal and external refugees from the worst calamities...form [a] tiny group of saints. (Tugendhat 1995: 137—emphasis added).

Here it is worth recalling two significant effects of political legitimacy. First, political legitimacy helps to constrain the *sources* of moral motivation, allowing individuals to invest their moral concerns in institutions that can defend against arbitrary encroachments that may otherwise affect popular judgments on controversial issues more

or less at will. Second, it identifies a locus of political responsibility within particular institutional structures and official capacities that can be judged and held to account for their specific roles or actions. By contrast, consider the consequences for the ‘universal addressee of human rights’ who fails to give appropriate uptake to victims of persecution.¹²⁷ For Bohman, failing to recognize a refugee’s “humanity” (i.e., their status as a person deserving equal respect as a member of the community of rational beings) by denying them protection means “denying the humanity in ourselves” (Bohman 2007: 107). For Tugendhat, the price is the lost opportunity cost of realizing a community’s “moral self-understanding”. Unfortunately, these costs have been willingly and repeatedly paid, not only by European and US officials who zealously denied entry to—or forcibly returned—Jews fleeing Nazi persecution (Fleming 2014; Steiner 2000; Wyman 1998)¹²⁸, but also in light of the staggering levels of abuse and devastation in ongoing crises including the case of Syria the “gravity of which, has, unfortunately, been lost on the international community” (Abboud 2016: 192, 191ff).

My suggestion then is that the liberal practice of asylum must always be subject to a test of legitimacy, a demand that is distinctive from the demands of justice in its focus on how practices actually relate to their intended subjects. In the republican tradition with which I am concerned here, the practice of asylum will be legitimate insofar as it is non-dominating; that is, insofar as it does not constitute an arbitrary form of power over asylum seekers and refugees, or (as in the preceding paragraph’s example) insofar as it

¹²⁷ Bohman acknowledges the problem in his response to David Luban’s criticisms (Bohman 2007: 11-112) and later claims that “a democratic community must be open to claims made by anyone on the basis of their human rights, whether or not that person is a citizen” (116). This suggests, however, that the *real* addressees of human rights are, indeed, states and not “humanity as such.”

¹²⁸ Michael Fleming has argued that British and US Allies had knowledge of mass extermination possibly as early as 1942, through officials in the Polish Government in Exile and the BBC. It’s worth noting that among the reasons for censorship at the time was the worry that the exterminations might “stimulate demands from civil society activists for rescue and refuge” (Fleming 2014: 6).

does not place the citizens of refugee-receiving states a position of dominating-over-others.

This brings us to an important question: how should we understand the general parameters of the test of legitimacy when considering what the state's asylum policies should be? I will address this question more fully in Chapters 4 and 5. However, a few points are worth mentioning briefly here. One important association to avoid is the link between hypothetical consent and legitimacy. We can consider asylum policies in which refugees could consent to participate in the political structures imposed by the practice even though the practice affords refugees little or no direct control. The fact that a refugee *could* consent to various modes of protection, and even acquire limited forms of participation within the political structures imposed by the practice, does not mean that the test of legitimacy has been met. Justifications for asylum policies are usually justifications offered to persons who already accept the need for protection by a state and you will not be in control by virtue of consenting to a particular procedure necessary for your survival or well-being (Schink 2013: 215-216). But even if you acquire more substantive rights against the state by consenting to the practice, this will usually mean consenting either to the same set of procedures which failed to generate significant level of control or consenting to a more extensive set of procedures. In either case, the problem has been little changed: if consenting to a set of procedures does not increase one's control, consenting to a more extensive set of procedures cannot make up the difference. A related issue arises from the fact that consenting to various modes of protection (say, in order to naturalize or to acquire full citizenship) will demand that refugees act in ways that suggest an inherent distinction between theirs' and other citizens' normative relationship with the state. For example, processes for achieving citizenship will often

require newcomers to make a voluntary commitment to obey the state's laws and adjudicatory institutions. Yet, as David Copp points out "[t]o commit oneself voluntarily to obey the law would be to do something with the intention to obligate oneself to obey, and very few subjects of any state have done any such thing" (Copp 2000: 12). Thus, asylum seekers or refugees who formalize their commitments thereby agree to terms that differ importantly from other citizens in that they are explicitly deferential to state authority. (I will return to the problems of citizenship in Chapter 4).

Another problem is that to grant even limited powers to refugees in order that they be able to exercise control in the processes or decisions regarding their status would seem to violate a key requirement of *legitimate* government; namely, that the "system of control be shared equally amongst citizens" (Pettit 2012: 153). If allowing refugees to retain even limited controls threatens to undermine the legitimacy of the state then, *a fortiori*, refugees should not be given opportunities to obtain more extensive powers.

Yet it would be more than a little unsatisfying to say that the preservation of conditions necessary for citizens to enjoy equal freedom as non-domination amongst themselves are sufficient, as such, to place them in a position of domination over non-citizen asylum seekers and refugees. If this is true then freedom at home will be at least partially constituted by domination over non-citizens. This is not because some refugees will not be motivated to acquire full citizenship. (It is of course true that every state will harbour at least some resident non-citizens who enjoy fewer rights than others, fewer provisions that would ensure their protection against private or public forms of domination.) The problem is rather that even where citizenship is desirable and achievable, membership will not necessarily suffice to ensure their enjoyment of non-domination.

In the real world, the acquisition of formal citizenship status in liberal democratic states does not guarantee that one will enjoy substantive equality with other citizens. Refugees will often be disadvantaged in terms of material wealth, cultural fluency, or the psychological benefits and capabilities that accrue to long-time members of relatively stable and politically responsive societies. For example, citizenship in the United States does not ensure that one has health coverage and the children of naturalized European citizens do not always enjoy the range of rights and entitlements as the children of non-naturalized citizens (Baker 2007: 205). The formal acquisition of citizenship can, at best, be a useful proxy for determining one's status as an equal member of society if formal citizenship actually ensures equality. In such cases, citizenship ceases to appeal as a basis for satisfying the test of legitimacy.¹²⁹

This raises a worry that legitimacy may be too demanding an ideal. It may set too high a bar for states, governments, and officials to reach in applying their policies. I do not think that this is necessarily the case. My reason is that the test can be met as long as it enables refugees and asylum seekers to *resist* arbitrary impositions by the asylum state, either in the form of onerous political obligations or unnecessary deprivations of basic political liberties. It needn't offer them an extensive or unfeasible set of participatory rights that governments must accommodate in their own decision-making procedures. At the same time, to anticipate the argument in Chapter 4, this is only to say that the test of legitimacy should not be an unnecessary burden on individuals or the state; it should not

¹²⁹ This works out on at least one articulation of the republican view, according to which an individual cannot be free while they are under the dominion of any person or government (Skinner 2002: 9); one is either under another's jurisdiction or they are not; hence, they are *either* free or a slave (Lovett 2010: 237). For those who argue that refugees can only be free of domination insofar as they are fully incorporated into the state as citizens, the inherently dominating position of citizens to outsiders will hardly be satisfying from a republican (especially a consequentialist) point of view. On the whole, and at best, such a system implies a 'domination-neutral' approach, one that would neither add to nor decrease the sum total of global domination.

undermine the everyday functions of government or place unnecessary restrictions on the citizens of the state—but this does not mean that a politically legitimate form of asylum will bar refugees or citizens from participating more directly in the political institutions that shape asylum policies. This may not do much to assuage the worry that the test of legitimacy may still be overly demanding; that it may require an unfeasible level of participation in the governance of social and political affairs. But much of this will depend on one’s views about feasibility or the onerousness of various mechanisms of government and the possibility of institutional reform, a discussion which, as I say, I will defer until later.

But there is at least some reason to think that the test of legitimacy will be to some degree self-limiting. This is because there are no institutions that can easily accommodate everyone’s concerns about how the policies of asylum actually affect the lives of those who are subject to their controls. In the absence of such institutional arrangements for common governance it is likely that, at a certain point, the infeasibility of such a test will lead us back to a hypothetical test of justice. In such cases, we can say that the test has been misapplied, applied inappropriately to certain features or state practices that are not necessarily subject to such a test. Consider Arash Abizadeh’s argument for why states do not have a right to use coercive forms of border control. Abizadeh has clearly grasped the distinction between justification and legitimacy—which he uses to mark a contrast “between liberalism and democratic theory”:

[W]hile [liberalism] engages in a strategy of hypothetical justification to establish the *justness* of institutions and laws through which political power is exercised, [democratic theory] demands *actual participation* in institutionalized practices of discursive justification geared to establishing the *legitimacy* of political institutions and laws. Hence, what counts as a valid justification is different in each context. (Abizadeh 2008: 41—emphasis in original).

However, Abizadeh makes the justification for legitimate rule contingent on its capacity to allow for a form of direct democracy that would empower an “in principle unbounded” *demos* to secure their personal autonomy against the state’s attempts to unilaterally control their borders. As Abizadeh puts it, “the normative significance of state coercion is that it (presumptively) invades autonomy and hence triggers a demand for democratic justification to the very people subject to it [i.e., both citizens and non-citizens whose potential interests are inherently effected by the ability of states to restrict entry to their territories]” (Abizadeh 2010: 125). Thus, Abizadeh’s conception of democratic legitimacy is highly demanding, since it requires that we determine how to respect the personal autonomy of virtually everyone who *might* be affected by states’ coercive powers. Abizadeh claims that “[s]ince the feasibility and effectiveness of any given set of institutions are unpredictable beforehand, and will only be learned through trial and error, the institutional details must be worked out politically” (Abizadeh 2008: 56). This point is unobjectionable as it stands. But the notion of feasibility is contingent not only on the unpredictability of any given scheme to reduce the effects of dominating border controls. It is also contingent on other, related forms of coercion that affect both the possibility of delivering reforms over long and difficult processes of political trial and error as well as the ability of individuals to commit to such processes in the knowledge that, by doing so, their interests will be better served. It is important to ask, then, whether the reforms Abizadeh envisions presuppose the elimination of dominating coercion not only as it exists in the form of border controls between states and foreigners, but more generally between states and their citizenries. The question then is whether Abizadeh’s argument against the unilateral control of borders *presupposes* a world in which individuals already

by and large enjoy a certain level of freedom as non-domination consistent with significant political reform. The problem, as Pettit explains, is that:

[i]t is an unintended precipitate of human history, and in particular of the mutual adjustments of different populations, that the earth is now a state-bound planet: a place where there is no inhabitable area that is free of the rule of some state. The fact that you do not have a choice between living inside a state and living outside a state is not the product of interference or domination on the part of your state. It is a historical necessity on a par with the necessity of living under the laws of physics. You may think that your own state (or some other) could renounce its standing as a state and establish a stateless zone. But states are locked into a pattern where none can resign without exposing its population to the will of its rivals, creating a vacuum where other states will battle for control. You may bemoan the necessity of living in a state-bound world, then, even long for a period in history or prehistory when it did not obtain. But you cannot think that because you are constrained to live in a state, you are dominated by the state under which you live, or indeed by any other state. (Pettit 2012: 161).¹³⁰

Republicans are of course sympathetic to the claim that the mere threat of coercion through border controls is sufficient to raise concerns about the possibility of domination.¹³¹ As Honohan notes, “migration controls in the contemporary world are *prima facie* dominating” and furthermore that “the domination of outsiders through migration controls extends beyond the immediate threat of coercion” (Honohan 2014: 38, 39; cf. Abizadeh 2008). Richard Bellamy likewise argues that republicanism “mandates inclusion as a political equal within the decision-making processes of those powerful bodies capable of exercising domination over our lives” (Bellamy 2013: 263-264) and that states are therefore required to “[bring] all rights-claimants within the city walls”

¹³⁰ For a different account that takes seriously the historical legitimacy of states in matters of borders and border control, see Simmons (2016).

¹³¹ Pettit also suggests that reforms aimed at democratically legitimate border controls are unfeasible on their own terms. On Abizadeh’s view, democratic legitimacy is a *consequence* of (unspecified) processes of democratic participation across borders. However, if this is right, it is unclear how democratic legitimacy will ever come about except through processes that are themselves illegitimate. Any attempt to claim that a state has achieved democratic legitimacy will always face the objection that its decisions, policies and judgements originate from a citizenry that was itself a product of illegitimate border controls, one that would have led to different policies or judgement had its borders been democratically justifiable to citizens and non-citizens alike.

guaranteeing claimants access to the institutions that can process their claims (Bellamy 2013: 263; cf. Forst 2010). However, republicans can deny that these concerns are sufficient on their own to require the types of reforms or processes of justification needed to allow those effected to exert greater control over border control practices. On this view, border controls are merely *contingently* dominating. But they will defend states' unilateral control of their borders insofar as such controls promote freedom as non-domination. This defence will take as its starting point the fact that the state's capacity to interfere in the lives of others by controlling its border will often be necessary to *prevent* domination. If states could not control their borders then they would be unable to provide efficient protection for asylum seekers (Simmons 2016: 217).

Abizadeh cautions his readers not to “saddle [his] application of democratic theory to the unfamiliar terrain of borders with unattractive baggage lifted from implausible versions of the theory that wreak normative havoc on familiar domestic terrains as well” (Abizadeh 2008: 42). But it is clear that the reforms required for democratic legitimacy over border controls can proceed precisely because it does not show how new forms of democratic control over borders can gain purchase in domestic contexts that are radically averse to such control. In this sense, Abizadeh himself ends up suggesting a test of legitimacy that mirrors the hypothetical justificatory stance of liberal theorists who are primarily concerned with giving persons a “participatory standing” (Abizadeh 2008: 39) rather with evaluating how particular border practices have or could affect persons under their control. While Abizadeh's views go beyond the typical liberal parameters of inclusion by giving such a standing to foreigners, he nonetheless favours a hypothetical “deliberative conception of democracy according to which those subject to political power must be able to see their political institutions and laws as the outcome of

their own free and reasoned public deliberation as equal” (Abizadeh 2008: 41). But the ability to “see” one’s influence in political institutions is not the same as having been included in such processes. It is a formal test that can be satisfied regardless of whether anyone *actually* participates in such a process or regardless of whether what one sees is, in fact, a true reflection of the fact that their views are actually being taken into consideration. This leads to a further consideration, to be dealt with in the next section, that since we can sometimes see our views reflected in processes over which we have had little or no control it is important to question what the circumstances are that will shape our understanding of how any test of legitimacy will, or should, be conducted. What we want to know in such cases is how we can come to see our views, if they are in fact *our* views, in institutions that may have purposes or goals that differ importantly from our own.

David Owen (2014) argues that we can determine whether a migrant’s civic status¹³² is consistent with republican concerns to prevent the exercise of arbitrary public or private power on the basis of two distinctive republican tests of legitimacy. The first test (R1) concerns the possibility that the acquisition of a particular civic status may place the status-bearer in a relationship of domination with others. One’s newly acquired status may enable the status bearer to wield arbitrary power over others, or it may expose the status bearer to dominating power by another source, a public institution or private person. The second test (R2) responds to the possibility that the acquisition of a civic

¹³² Owen refers to five types of transnational civic status. For our purposes here, I will restrict the scope of the discussion to refugees. This does not necessarily allow me to skirt the issue of dual civic status unless we can be certain that the sending state does not have sufficient means of exercising arbitrary power over those they consider enemies of the state under foreign protection. The car bomb assassination of the exiled Chilean minister Orlando Letelier in Washington along with his US colleague Ronni Moffitt is a reminder of this possibility. On the assassination and its aftermath, see Freed and Landis (1980) and Nef (2003). See also, Orlando Letelier’s infamous article of 26 August 1976 “‘The Chicago Boys’ in Chile” Economic “Freedom’s” Awful Toll,” *The Nation*, 137-142.

status may be imposed in such a manner as to constitute, by that very act, a product of arbitrary power.¹³³ Think of the promotion to a position of leadership facilitated by the death of its former occupant, a King or Queen or Presidential succession by coup d'état.¹³⁴ One implication of Owen's view is that, where a civic status is the outcome of the state's exercise of *arbitrary* power, the state has, to that extent, failed the test of republican legitimacy. According to Owen, an exercise of power will be non-arbitrary as long as "it supports the agent's autonomy or supports their well-being without either breaching their autonomy or compromising their autonomy in ways that do not also enhance their future or overall autonomy" (Owen 2014: 9). Thus, on Owen's view, the acquisition of a new civic status may yet pass the test of legitimacy under the reasonable expectation that it will contribute to significant gains in the status bearer's autonomy or well-being.

There remains a serious question however about what the relative standard of arbitrariness should be or how exactly we should measure enhancements to future or overall autonomy. If we calculate the expected overall gains in autonomy or well-being provided through status acquisition relative to the expected level of autonomy that the individual would enjoy by remaining in their state of origin then we arguably arrive at a standard of arbitrariness that does not prevent many forms of domination within the host

¹³³ We might consider a third, normatively significant way in which the constitution of civic statuses can stand in relation to the exercise of arbitrary power over subjects. This when a person in a position of authority (e.g., a UNHCR caseworker) ascribes or denies civic statuses to others by faithfully applying morally arbitrary rules in the course of their ordinary duties. Authorities may be exposed to the degrading or traumatizing effects of their own arbitrary power, as when a caseworker is "forced to deny protection to victims of brutal rape and unceasing domestic violence even as [they are] granting asylum to a brothel owner" (Dawes 2004: 252). In discharging one's legal and contractual duties, however, one may also become complicit in or contribute to ongoing atrocities if only because humanitarian agencies are required to accept the dominating authority of the systems of power they work under (e.g., Dawes 2004, especially at 258-259).

¹³⁴ Jonathan Powell and Clayton Thyne document 475 coup attempts in 94 countries from 1950-2010.

state. This standard may still be justified, however, on the grounds that the gains from escaping conditions of persecution will often be massive compared to future worries about the status-bearer's vulnerability to arbitrary power within their new state or compared to other possible losses of autonomy that may result from status acquisition (e.g., loss of one's former nationality). It would also have the implication of allowing more persons to acquire refugee status than would otherwise be allowed under a higher standard. By contrast, it might be argued that the standard of arbitrariness should refer to a calculation of overall autonomy relative to the autonomy enjoyed by the average citizen of the potential host state on the grounds that anything less would justify the exercise of a wide range of arbitrary power over refugees in their host societies which, considered as a whole, would rival the intensity of autonomy deprivation under conditions of persecution. So there are different ways of conceiving of the test of R1 legitimacy under different measurements of arbitrariness and it is unclear how, or in the service of what scheme for reducing non-domination, we are to identify the relevant standard.

It is important to remember here that the standards of R1 legitimacy are not abstract commitments. They require dedicated resources and almost certainly redistributions of wealth and power. For example, the arrangements needed to ensure that asylum seekers can find employment under "conditions governed by rules of health and safety, and of fair remuneration" (Owen 2001: 100) not only place significant constraints on the conditions under which a civic status is compatible with R1 legitimacy. They also place constraints on the number of asylum seekers that the state can accept and on the speed at which receiving states can respond to and accommodate new claimants. One problem then is that every autonomy-enhancing norm that would reduce a migrant's susceptibility to arbitrary power under their newly acquired status requires some

corresponding improvement in the quality of social relations within the host state. The demand that states ensure that their status-conferring practices do not expose asylum seekers to new forms of arbitrary power *in principle*, whatever else it requires, is a demand to redistribute limited resources and power sufficient to meeting the standards of non-arbitrariness *in practice*. Of course, we can increase the standards of legitimacy in principle *without* corresponding adjustments sufficient to meet those standards in practice, but this will only ensure that more states will fall short of the test of R1 legitimacy. If we decide to take the necessary redistributive steps to ensure that the conditions of the state match the desired principles, however, we will encourage the framework that produces Nagel's 'gloomy conclusion' and its corresponding 'gap' (see, Chapter One). That is, we will be returned to the question of whether the citizens of receiving states should be willing to accommodate the material and social distributions entailed by R1 legitimacy for the sake of others. The strategy of preventing the domination of refugees by citizens (or other refugees) within the receiving state by improving the standards of non-arbitrariness has a marginal utility: the contribution that each new or improved standard makes to the goal of non-domination overall is diminished either because each improvement makes it more likely that the receiving states fall short of R1 legitimacy (thus precluding asylum seekers from acquiring a potentially life-saving status) or because the cost of improving the standards invites non-compliance on the grounds that it is reasonable to reject radical redistributions of wealth and power.

If this is right, then, the question of how to measure R1 legitimacy places us on the horns of a dilemma: by setting the bar of arbitrariness too low we will avoid the kinds of appeals to R1 legitimacy that would preclude many desperate asylum seekers from

gaining refugee status but at the cost of increasing domination between citizens and refugees in the host state; by setting the bar too high we may greatly limit domination within the host state, but we will, as a result, also condemn many of those who would otherwise seek to improve their well-being to a ‘tragic’ fate, leaving them in conditions of (at least in some cases) absolute domination in their host societies (Owen 2016: 284n31, citing Miller 2016).¹³⁵

The problem, I think, is that the concept of arbitrariness cannot simply be a measurement of improved well-being as such. It must include reference to the institutional means by which asylum seekers and refugees have some form of control over the sources and mechanisms by which the benefits of the status are conferred and exercised (e.g., Owen 2018: 42-44).

What then of the test of R2 legitimacy? It is an important insight that one may be exposed to arbitrary power merely in virtue of the bureaucratic act of acquiring a civic status that allocates and sets the parameters for defining the rights and duties that the status entails (see also Richardson 2002 and Sager 2017).¹³⁶ For Owen, the problem of

¹³⁵ It might be argued that this argument is premised on a false (zero-sum) dichotomy. Perhaps the receiving state can still pass a less onerous test so as to free up resources that would reduce asylum seekers’ domination though not to the extent they would enjoy as refugees within an R1 legitimate state. Or perhaps marginal utility can be prevented from reaching equilibrium with appropriate forms of burdensharing. Much depends here of course on the number of refugees worldwide, on the extent of their suffering, and the willingness of citizens and states to cooperate to accommodate the claims of refugees. Yet the dilemma of marginal utility seems also to apply in burdensharing cases. The problem is not only that “the fairest arrangements compatible with effective refugee protection” is undecided (Owen 2016bL 142). For “the legitimate ability of the international order of states to protect those who are unable or unwilling to flee an abusing state” (Owen 2016b: 144) is equally contested. Agreement on the standards of non-arbitrariness is therefore predicated on norms of an international world order that lead us inexorably to a humanitarian ‘gap’ which, without new institutions that would radically transform the practice of asylum and the parameters of the status quo, are likely to remain ineffectual overall, and a dangerous liability, under certain conditions of global ecological and political change. The implications of this discussion are fleshed out in what remains of the present work.

¹³⁶ Although Alex Sager raises related concerns about the potential for arbitrary interference under current conditions of immigration and border control he does not demonstrate why his solution to the central problem of bureaucratic domination—to opt for “much more open borders”—will necessarily reduce bureaucratic domination, rather than shift the burdens and opportunities of arbitrary bureaucratic power

bureaucratic or institutional domination in the status regime triggers a distinctive legitimacy test (R2). On this test, whether the conferral of a civic status constitutes an arbitrary exercise of public power will depend on whether those who are governed by the bureaucratic practice are able to effectively participate in determining its character by way of a critical process resembling a form of political reflective equilibrium (Owen 2014 :104-105).¹³⁷ Elsewhere, however, Owen (2016a) seems to apply a different test to the legitimacy of state-led institutions of the global refugee regime. In this case, we “require reference only to basic or minimum conditions of the legitimacy of states and of the international order of states” (Owen 2016a: 270). Owen asks that we:

imagine that we do not recognize that the practical identity of the state is bound up with the wider relations of governance in which it is situated or that states share responsibility for the norms that order global governance. From such a standpoint, sovereign territorial states appear as autochthonous agents whose legitimacy is predicated on protecting the rights of their own citizenry and respecting the sovereignty of other states. Conceived thus, there is no legitimacy-based reason internal to this political order for states to institute the political status of refugee and place themselves under the obligations this entails (though there may be prudential reasons for them to adopt such a practice). Once we introduce the two points I have highlighted however [i.e., that states are essentially committed to the norms of statehood and collectively outcome responsible for the character of these relations of governance and share responsibility with respect to the political legitimacy of these wider relations of governance], such reasons naturally arise. (Owen 2016a: 273).

Owen is right to note that the assumption that states are a kind of moral agent whose main responsibility lies in safeguarding the interests of its citizens presupposes the very moral

elsewhere. Conversely, he does not show why the solution cannot be *more* bureaucracy (i.e., more supervisors to counter unaccountability, more frequent and coordinated cooperation between internal and extraterritorial authorities, more administrative decentralization among mutually interested parties). Either way, a crucial premise is missing here: only under the reasonable expectation that the goal of reducing bureaucratic domination in our border controls will serve the goal of reducing the exercise of arbitrary bureaucratic power overall, across many *other* domains of social life, could we say that “bureaucratic domination of immigrants commits us to more open borders in practice” (Sager 2017: 48). Unfortunately, Sager gives no indication of what our expectations should be.

¹³⁷ On the method of political reflective equilibrium, see Daniels (2003: at §3.2.2) and Nussbaum (2000: 116-124).

dispositions and other-regarding principles of political morality necessary for this task (Owen 2016a: 271-272 and 290n7; cf Gibney 2004: 211). But Owen, too, thinks that the assumption may be warranted if we accept the “widely shared judgement” of a global order that is committed to human rights as well as the evidence of moral progress as reflected in “the trajectory of the transformations of global governance since 1945” (Owen 2016a: 274). I have already cast some doubts on these supporting assumptions (see, Chapters One and Two)¹³⁸ and I will have occasion to do so again in the final section of this Chapter. However, it is worth noting briefly that one might fully accept both assumptions of a moral and morally progressive state system, and yet remain, on a republican approach, opposed to their acceptance as a basis of any test of legitimacy.

One can adopt a more explicitly republican commitment to eternal vigilance within the bounds of civility that manifests as a kind of “expressive distrust” (Pettit 1997: 250-251; 263-265). Consistent with this approach is the assumption that states are motivated by what Bernard Gert terms “*psychological inclinationism*”, a “milder form of egoism...that does not deny benevolent action, only action done because of a moral sense” (Gert 1967: 514). This assumption has three main implications. First, it prevents us from developing important blind-spots that may result from operating on more generous assumptions about the moral basis of the world order (Owen 2016a: cf 282 and

¹³⁸ In *The Persistent Power of Human Rights* (Risse, Ropp and Sikkink 2013) we are treated to a series of examples in support of this view each of which invites numerous counter examples and trends, some with the benefit of hindsight, others with the benefit of a more objective approach to applying the relevant facts. To give just one example, we are told that “private actors such as firms and rebel groups are increasingly committed to complying with international human rights standards” (Risse, Ropp and Sikkink 2013: 3) where “compliance” means “sustained behavior and domestic practices that [merely] conform to international norms” (Jo and Bryant 2013: 241) using data that offers few insights into potential alternative explanations for the groups’ actions, professed dispositions, or reasons for behaviour. It is possible to acknowledge the increasing interest in human rights norms and the proliferation of institutions to support those norms while questioning the history of their effects and contributions. See, for example, Cavallaro and Brewer (2008: 234ff).

284). Second, it is most consistent with the need for institutional participation and self-governance as the most basic tenet of (R2) legitimacy. Third, and more substantively, it will reject the notion that political asylum can be used, in any systematic form, as a way of “repairing” damage to the broader normative order, for example, in reaction to instances of non-compliance and violations of basic norms. Practices of asylum must be equally important sources and contexts for illegitimate action. As such, they are required to meet similar tests of legitimacy prior to any role they might have as a means to establishing legitimate forms of political coalition between states or the international order writ large. This does not mean that we must reject the conception of refugeehood as “a response to a condition of partial compliance to the basic norm of state legitimacy” or as an attempt to observe the commitment to human rights. But it will require that we reject the view that such acts are necessarily evidence of a moral disposition, a basic foundation or reparative element of legitimacy that goes beyond the benevolence of inclination. A fourth implication is that responsibility for effective refugee protection will rest with particular states and not with the international order. The problem with the internationalist stance is that it does not adequately reflect the differences between the internal dispositions of governments and their populations (e.g., Page and Bouton 2001), and it is therefore inadequately attuned to a problem that is essential for an effective order of states, namely, that states be *equally* responsive to their citizens on terms their citizens would accept in full knowledge of how governments operate and their reasons for doing so. Only if this internal *disorder* (or its potential) is considered can we see the significance of Owen’s republican test of legitimacy, requiring that institutions be brought under the control of citizens who participate more closely and more frequently in

their design and their products, the policies, norms and mechanisms for protecting human rights.

To adopt this stance is not to license mistrust or to deny that legitimacy can be predicated on a normative order, suitably defined. What we are trying to determine however just *is* whether particular states act legitimately and we cannot fully embark on this assessment if we define legitimacy on the presupposition of a basic adherence to those commitments or as a milder form of ‘legitimacy repair’ (Owen 2016a). The idea that the system needs repairing rather than replacing or other radical reforms may itself work as a legitimacy cloak, favouring the interests of those who wish to conserve the benefits of the freedoms that exist much as they already are and not as they might be.¹³⁹

2.5 DEFENDING DOMINATION

In the previous sections I argued that the burden of legitimacy arises in virtue of a demand by both citizens and refugees that states justify their asylum policies not on the basis of what citizens or refugees could reasonably endorse under conditions of hypothetical justification, but on the basis of the actual practices that states employ and the degree or extent to which those subject to the practice are able to control, shape, or otherwise resist the practice as it is applied in the real world. This is important since in the real world, justice and legitimacy have tended to come apart in a way that bears directly on our ability to evaluate the legitimacy of particular responses to refugees. Governments routinely use the hypothetical justifiability of a particular response to

¹³⁹ This is not to suggest complicity with such acts. Liberal scholars including Carens (1992a, 1992b), Gibney (2004), Miller (2016), Orchard (2014), Singer and Singer (1988) and Walzer (1983) have all touched on various forms of abuse in asylum practices. My claim is rather that these points of criticism are often meant to emphasize the opportunities for repair on the supposition of generally well-meaning policies and benevolent relations between states.

refugees (e.g., foreign intervention or aid on behalf of desperate non-citizens) as the explanation of the act's legitimacy, ignoring important questions about the actual circumstances in which the act has taken place, its real or intended effects, and its underlying motivations. The conflation of justice with legitimacy entrenches the distinction between threats and offers encouraging us to set aside thorny issues of political legitimacy in favour of hypothetical considerations of justice.

This brings us to an important task. The logic of freedom will often mean the “logic of unfettered greed” (Fox Piven 2001: 29), the “freedom to harm” (McGarity 2013; Butler 2003), or the “liberty of the state of nature” (to quote Locke's phrase for the freedom of dictators). It is crucial then to determine how the terms of freedom promotion are used in particular cases and their relation to relevant facts through which we can accurately determine their meaning or purpose. For our purposes here, the *concept* of domination is of secondary concern. Our main interest lies in understanding attempts to defend domination through (1) the rhetorical legitimization of existing systems of illegitimate governance—that is, the defence of domination as an inevitable institutional reality—in asylum and refugee-related phenomena (e.g., war) and, relatedly, (2) the appeal to state reforms as a means to achieve the goal of non-domination which are anything but, and the resulting implications for liberal asylum practices. Here I will canvas several arguments that demonstrate the defence of domination in a range of cases relevant to recent refugee theory and policies.

Emma Haddad claims that refugees are an “inevitable, if unanticipated by-product of the modern state system” (Haddad 2008, 2003a, 2003b), a system of nation states whose distinctive political identities require the creation of an “other” against whom “national citizens [may] successfully forge their identity” (Haddad 2003b: 299). On her

view, no amount of political will or institutional innovation can prevent the prospect of refugees since “refugees highlight an inherent failure in the system, one way in which the system will always be bound to fail” (Haddad 2003: 297). Haddad goes further, however, claiming that refugees are inevitable *even in a hypothetical world of liberal states*; that is, even “[i]f all states were akin to western Liberal democracies in the context of a wholly peaceful international climate, the number of refugee flows would be reduced” (Haddad 2008: 209; 2003b: 4), but *not* eliminated.¹⁴⁰ On Haddad’s view, then, since no one can be blamed for creating the current system of states and since even a suitably liberal global order will fail to eliminate the problem of refugees we must accept that there are serious limits to the way we identify and attribute responsibility for the protection of refugees. Thus, we should not, she claims, divert energy and resources from smaller more practicable refugee solutions towards impossible ends or unworkable alternatives that require persons or states to be “heroes and saints”, or “completely altruistic” (Haddad 2003b: 23).

Haddad’s views face a number of problems.¹⁴¹ First, although she is correct that large-scale refugee movements occurred during the collapse of empires and the consolidation of nation states along ethnic lines (Haddad 2008; 2003a, 2003b), nationalism does not require ethnic homogeneity nor does it always issue from a common historical community (Mayall 2003: 107).¹⁴² Both prior to and during the early modern

¹⁴⁰ Compare with Jackson-Preece’s claim that: “No general territorial redistribution—assuming one could be done—would completely or finally solve the problem of national minorities in a nation-states system.” (Preece 1998: 34).

¹⁴¹ It is unclear how Haddad can claim that the definition and recognition of refugees is arbitrary (Haddad 2008: 121, 212-213), on the one hand, while refugees themselves are inevitable, on the other, but I leave this point aside in what follows.

¹⁴² For similar reasons, to say that “[s]overeignty attempts to sort all individuals into homogenous territorial spaces” (Haddad 2008: 69) is to conflate a definition of sovereignty (what sovereignty *is*) with one of the potential *consequences* of the exercise of sovereign power.

state period ethnic differences were often tolerated as long as the authority of the dominant ethnic elite was respected (Frank 2017: 99-100; Panayi 2017; Preece 1998; Zolberg 1983: 30). Thus, it is a mistake to suggest that nationalism or nation-building *entail* refugees.

Haddad cites Zolberg who claims, more modestly, that “[t]he generation of refugee flows is not the only possible outcome, but it is a very likely one” (Zolberg et al. 1983: 30). Indeed, it is virtually guaranteed only when political authorities pursue a policy of state consolidation that logically entails refugees and, which pursues this very outcome.¹⁴³ Thus, Eric Hobsbawm records that “[t]he logical implication of trying to create a continent neatly divided into coherent territorial states each inhabited by a separate ethnically and linguistically homogenous population, was the mass expulsion or extermination of minorities” (Hobsbawm 1992: 133).

Refugees are neither a logical consequence of the creation of modern states nor an inevitable result of the end of empires which, lacking effective mechanisms of coercion, could no longer tolerate ethnic diversity. As Zolberg points out, only an analysis of the processes of historical nation state formation could refer us to the causal forces that have tended to create refugees (Zolberg 1983: 30). But Haddad fails to mention that refugees were often a significant causal force in the collapse of empires, rather than a mere effect (Blumi 2012: 87). And she neglects to mention the crucial role played by Euro-American imperial powers and their international representatives in reinforcing the decline of empires that led to refugee outflows (Blumi 2013: 6, 13, 18n22; Bowden; Fieldhouse 2008; Owen 2004; Krasner 1999; Mazower 2009; Travis 2013).

¹⁴³ Jennifer Jackson-Preece notes that the category of national minorities was initially created to distinguish particular political outsider groups from other minority populations, such as refugees (Jackson-Preece 1998: 10, 19).

Her main line of argument against well-intentioned demands to apply new principles of justice or political ideals in the service of radical refugee reforms is made on conceptual grounds. She claims that it is difficult even to conceive of an alternative system of refugee protection without veering off into a completely irrelevant form of idealism.¹⁴⁴ As Haddad puts it, “in an ideal and just world the refugee would not exist, thus such an approach is also irrelevant to the real world problems we face” (Haddad 2003b: 20).

To get a better sense of Haddad’s reasoning here consider the following analogy. Suppose you are interested in preventing cruelty to cows. Given that cow cruelty is inherent to the current system of meat production it is natural that you would wish to bring about some other system of production, one that does away with cruelty. On Haddad’s view, you face the following problem: since cows have been bred in the service of meat consumption it is only in this system that the problem of cow suffering can seriously arise; to conceive of a true alternative to the current system is to invoke a *world without cows*. Thus, if you truly care about ending cruelty to cows, you must accept the current system of production not only as a necessary condition for your initial attempts to address cow cruelty, but as the inevitable condition of any future attempts as well, lest you give up the conceptual basis on which your concerns were originally conceived (!). This does not mean your dream of ending cow suffering is irrational; rather, you must

¹⁴⁴ Myron Weiner (whom Haddad cites approvingly) takes a similar approach. He argues that democratic states that attempt to promote ideals of global justice by reducing restrictions on asylum for persecuted minorities will undercut improvements to the well-being of their own citizens, force community-minded citizens to engage in defensive discrimination against foreigners, and encourage “ethnic cleansing” in nationalist regimes (Weiner 1996b: 176-177, 186). For Weiner, “community”, “nationality” and “the state” are one and the same (Weiner 1996b: 175). By casting opponents of the current state system as opponents of “community” Weiner is able to claim that egalitarians are opponents of states, *per se* whose appeals to “principles of absolute justice” demand the end of the state (hence, a world without borders).

accept that such goals can tell you nothing about how you should act under current conditions of production which are “irrelevant”.

But why, having raised a concern about justice under conditions of injustice, must we accept that those conditions are the relevant starting point for future change. The reason is that Haddad’s entire analysis is underwritten by the idea that states are *inherently* hypocritical and unsusceptible to reform:

The refugee problem is endemic of the fact that state sovereignty is an arrangement of organized hypocrisy, and the solution to the problem must be found within this system of hypocrisy. We have no choice but to accept the hypocritical international arrangement and take action within it. (Haddad 2003b: 15; cf. 2008: 94-95).¹⁴⁵

On Haddad’s view, this inevitability is also the source of our floundering attempts to solve refugee problems once and for all since “[t]he refugee relies on borders for her being...and thus ‘solutions’ are founded on the ‘need’ to maintain the status quo of international society, rather than on a purely humanitarian, altruistic basis of international protection” (Haddad 2008: 202).

It is important to see, however, that these assumptions are directly at odds with the thesis of organized hypocrisy on which Haddad’s account is based (Krasner 1999). Contra Haddad, Krasner argued that hypocrisy is not a feature of states but of particular actors within states whose ambitions are inconsistent with international norms. Organized hypocrisy results from attempts by ruling elites to support their personal ideological and material interests in ways that are unsupported by their espoused principles and

¹⁴⁵ According to the thesis of ‘organized hypocrisy’, the international system of states is a system of “rulers whose violation of, or adherence to, international principles or rules is based on calculations of material and ideational interests” (Krasner 1999: 9).

commitments (Cronin 2001; Krasner 1999: 12-14, 69, 185, 191ff).¹⁴⁶ Organized hypocrisy is an explanation of how elites have tended to conduct themselves in international affairs, not a prediction about how states must always act, or a claim to the effect that international law is inevitably limited by what ‘states’ perceive to be in their self-interest (Krasner 1999: 54, 74, 106, 201; see also Gibney 2004: 237).¹⁴⁷ As Bruce Cronin points out, “Krasner’s world is not a Hobbesian state of nature in which states act according to the necessities produced by international anarchy but, rather, a Machiavellian one, in which leaders act to maintain and expand their own power” (Cronin 2001: 261).¹⁴⁸ Of course, it is possible to imagine a system of states that is not hypocritical, one in which states operate less on the whims of political elites than on the democratic will of the people (Gilbert 1999; Nabulsi 2003). Such a system would require significant reforms, but it would not necessarily demand a cosmopolitan world of open borders, as Haddad suggests.¹⁴⁹ However Haddad seems less interested in addressing the

¹⁴⁶ As Krasner notes “[t]he starting point...the ontological givens, are rulers, specific policy makers, usually but not always the executive heads of state. Rulers, not states—and not the international system—make choices about policies, rules, and institutions” and these “[r]ulers have found that it is in their interest to break the rules” (Krasner 1999: 13; see also the review by Cronin 2001: 261).

¹⁴⁷ Haddad sometimes strikes a more conciliatory tone, claiming that international organizations, such as the UNHCR, ought to “convince states of the need to redefine national interests in line with the humanitarian requirements” using “moral leverage” and “linking protection issues to a state’s material interests” (Haddad 2008: 210-211). Yet such strategies are bound to be weak or ineffective on their own given that organizations such as the UNHRC depend almost entirely on voluntary funding, the vast majority of which comes from a handful of Western industrialized states, notably the US (Whitaker 2008; Vayrynen 2001). The relative contributions of states to different goals give some indication of where their priorities lie. Sanders and Smith (2007: 24) note that the US, which bore primary responsibility for refugees in the Iraq War which began in 2003 spent “just under 200 million on displaced Iraqis during 2007” through UNHCR and World Food programs, while estimates of “the spending bills passed by Congress for the war in Iraq amount to \$280 million per day since the conflict began.”

¹⁴⁸ Cronin’s caricatures of Hobbes and Machiavelli are common in the literature, but should be treated with caution. On the misinterpretation of Hobbes’ views in international relations theory, see Malcolm (2002).

¹⁴⁹ The plausibility of Haddad’s argument is sustained, in part, by assuming that there is but one alternative to current social political arrangements and that it is an extreme cosmopolitical world of open borders (Haddad 2008: 2002). On this assumption, Haddad’s ‘realist’ stance can be viewed as a rejection of a particular approach to political reform and not an endorsement of current conditions of injustice.

possibility of reforms to existing state practices that dismissing them outright or developing a theory that precludes the possibility of serious reform.

Matthew Price's (2009) theory of asylum has also downplayed the possibility of serious state reforms to liberal asylum practices. Price argues that asylum practices should not be grounded on humanitarian principles, but on "political" principles for which the practice was originally designed. Drawing on remarks by enlightenment figures, including Grotius and Pufendorf, he claims that asylum has long been viewed as a practice that allows receiving states to express normative judgements of disapproval towards states that persecute their own citizens and as a means of legitimizing interventionism in the name of reform.¹⁵⁰ On this view, political asylum is a response to "a state of conduct [i.e., persecution] warranting international condemnation and suspending a state's sovereign right to act against external interference" (Price 2009: 104). Unlike humanitarian asylum, political asylum is "connected to a broader political program to reform [persecutory] states" (Price 2009: 7). "The political conception [of asylum] does not focus on the mere *fact* of an asylum seeker's need for protection; instead, it focuses on the *legitimacy* of, and the *state's culpability* in, the asylum seeker's exposure to harm" (Price 2006: 418—original emphasis). Thus, Price supports a form of asylum that "would...act as a low-level sanction against outlaw states, and a warning that if abuse continues, more powerful sanctions, such as sponsorship of opposition groups or even direct military intervention, may be forthcoming" (Price 2004: 310).

¹⁵⁰ Price's emphasis on the opposition between political and humanitarian conceptions of asylum is misleading. On the one hand, it takes for granted that humanitarianism principles of justification are necessarily apolitical and univocal. According to Price, humanitarian asylum is a "politically neutral" act (Price 2009: 7). Yet there are various forms of humanitarianism (Barnett 2013, 2005; Belloni 2007; Leebaw 2007). On the other hand, earlier enlightenment thinkers did not necessarily share the same conceptions of political authority and legitimate government. For example, Price's expressivist theory is committed to a conception of political authority by consent of the governed that Grotius explicitly rejects (Schneedwind 1998: 81).

Price's main worry, is that the new humanitarian spirit is based on a set of assumptions that undermine the political value of asylum and its role in the modern state system. Price rejects three views central to the humanitarian theory: (1) that there is no moral justification for rejecting claims for asylum by individuals who face serious harm abroad¹⁵¹; (2) that there are no non-arbitrary moral concepts that allow us to distinguish between different degrees of serious harm; and, (3) that the act of conferring asylum as a protected status to citizens of foreign states has no discernible political effects on those states, or any other. One difficulty here is that none of the theorists that Price identifies with the humanitarian tradition actually accepts these principles, either in whole or in part.¹⁵² For example, Joseph Carens (who is identified as a prime example of an adherent of the humanitarian view) notes that "from a moral perspective" the eligibility for claims to asylum should reflect the seriousness of the harm faced by the claimant as opposed to the reasons or sources of harm (Carens 2003: 103) and that "those who suffer persecution, sometimes life-threatening persecution, from an oppressive regime" have "the strongest moral claim to asylum" (Carens 2003: 102). However, like Price, he resists the suggestion that such a view should lead to actual changes in the Refugee Convention since "in the current political climate, any change would almost certainly lead to a contraction, not an expansion, of those covered" (Carens 2003: 103). Thus Carens is disqualified as a "humanitarian" in Price's own terms.¹⁵³ Carens claims that there is a moral justification for rejecting claims for asylum—i.e., that expanding the definition would be morally self-defeating, leading to fewer entrants—; he also claims that offering

¹⁵¹ Humanitarians claim that "there is no moral justification" for refusing political asylum to "those forced to flee their homelands because they lack protection from generalized violence or severe economic hardship" (Price 2006: 417-418).

¹⁵² For a list of those Price associates with the humanitarian view see Price (2004/05: 278n4).

¹⁵³ Elsewhere, Carens adds the disclaimer that he is not addressing the legal question of admissibility, but rather liberal moral obligations which "may be wider or narrower than legal obligations" (Carens 1997: 6).

asylum has real discernible political effects, including the effect of inducing states to restrict entry in fear of a political backlash; and he accepts that, within these political constraints, the current Convention definition of a refugee provides conceptual and moral guidance for distinguishing between potential entrants.¹⁵⁴ This last claim is especially important. If humanitarians are committed to the view that persecution does not constitute a distinctive kind of (serious) harm then those who suffer from persecution will not have special grounds for claiming asylum. This would entail a significant expansion in the scope of claims eligible for asylum. Indeed, Price claims that it would include all “foreigners who face serious threats of any kind to their security” (Price 2009: 4).

Some advocates of humanitarian asylum have advanced claims which suggest that their views are not nearly as politically neutral as Price asserts. To take one prominent example, Zolberg (et al. 1989) discuss the “highly politicized situations” during the Cold War in which strategies of enforced poverty and US state-sponsored violence in the service of ideological goals generated massive refugee flows from countries such as Cuba, Vietnam, Nicaragua and Mozambique (ibid., 261). In response, the authors recommend basic reforms including the de-escalation of violence by terminating support for counterinsurgency forces and a reduction in punitive economic sanctions. As the authors point out:

Refugees do not appear simply because they are persecuted by government X or victimized by brutalizing rulers in weak states; such governments and states exist within a necessary structure of international support. (ibid., 264).

Their recommendations and underlying assumptions are therefore inconsistent with Price’s own description of the role of asylum in international affairs in which intervention

¹⁵⁴ Peter Schuck makes a similar point when he notes that “a properly constrained favouritism may even be a legitimate instrument of a sound and moral foreign policy” (Schuck 1992: 90).

by Liberal states is always characterized as a *reaction* to refugee flows—in this case a complete reversal of the facts as reported by Zolberg (*ibid.*)—and for which US, and other Liberal states, are assumed to play a largely innocent and paternalistic role through their attempts to *prevent* refugee flows. Price does not mention Zolberg’s argument for a “forceful humanitarian human rights policy” sanctioning aggressive forms of political interventionism including military intervention consistent with just war theory and “liberal political philosophy” more generally in order to “terminate extremely oppressive regimes” (*ibid.*, 265). This omission is important since it undercuts the distinction between political and humanitarian asylum and raises a question as to what is so objectionable about the humanitarian view.

Part of the problem is that Price is unclear as to whether expanding the scope of eligibility for asylum entails a commitment to humanitarianism or whether expanding the scope of asylum is *constitutive* of humanitarian asylum. The former case allows us to distinguish between humanitarians and those who agree to expand the scope of asylum in order to achieve some other goal. Only in the latter case is the intention to expand the scope of asylum evidence of one’s allegiance to humanitarianism. The distinction is not insignificant. This is because, on Price’s view, asylum is an important means of expressing condemnation towards illegitimate governments or regimes whose citizens suffer persecution defined as “(1) serious harm that is (2) inflicted or tolerated by official agents (3) for illegitimate reasons” (Price 2009: 107). Here I want to focus on the political implications of Price’s definition of persecution which “describes state conduct warranting international condemnation and suspending a state’s sovereign right against external interference” (*ibid.*, 104).

It might be argued that it is reasonable to compare the likely effects of different strategies for condemning persecution abroad. All states have at their disposal a wide range of diplomatic, economic, and military means of reproving other governments (Baldwin 1985; Blackwill and Haris 2016; Kittrie 2016; Nincic 2011). The claim that political asylum is a uniquely suitable means of objecting or responding to foreign state persecution should be based on a comparison with the actual or potential effects of other forms of diplomacy or sanction in addressing political persecution abroad. It would be premature therefore to accept Price's argument that political asylum is the most appropriate response to persecution abroad without considering the range of potential strategies for objecting to foreign state persecution and the relative effectiveness of these strategies in reducing or preventing persecution and its associated harms, including the consequences for asylum seekers.

However, Price's argument in favour of a 'political' conception of persecution is not empirical but *semantic*. It is based on the claim that "political persecution is a distinctive kind of harm that warrants a distinctive kind of response: condemnation and (if the persecution is sufficiently widespread) external interference" (104). Whereas condemnation should be achieved "on a retail level" through the largely symbolic act of granting refugee status, widespread persecution "justif[ies] more intrusive forms of external interference" including "wholesale intervention and [government] overthrow" (106). On this view, "[t]he meaning of "persecution" should be informed by the role of asylum as an international sanction" (Price 2009: 106). The term "informed" is necessary here to accommodate the difficulties of defining "serious harm" for the purposes of identifying genuine cases of persecution. Although instances of torture, imprisonment,

and death “clearly cross the threshold of requisite seriousness” many cases rely on “a judgement call” where “judges might reasonably reach very different answers” (108).

Despite these nuances, Price argues that “legitimacy must remain the primary conceptual framework” for defining persecution (Price 2009: 115). In defining “legitimacy”, Price cites US appellate judge and legal scholar Richard Posner who defines persecution as “punishment or the infliction of harm for political, religious, or other reasons *that this country does not recognize as legitimate*” (Posner quoted in Price 2009: 108—emphasis added).¹⁵⁵ On Posner’s view, persecution is not a moral concept derived from impartial principles of justice; rather its meaning is derived simply from the observation of whatever the US government deems legitimate at the time. This definition can be gleaned from the sources that inform Posner’s definition of persecution which originate in US asylum case law¹⁵⁶ and its implications are readily observed in cases where “the [US] judiciary, though an appeal to the policy prerogatives of the Executive, indirectly gave it imprimatur to a double standard of growing significance” (Gibney

¹⁵⁵ Posner is an exponent of a version of ‘legal pragmatism’ that denies any role for moral theorizing in legal interpretation. Posner’s legal pragmatism is underwritten by a subjectivist moral relativism and a preference for a system of democracy in which carefully selected elites govern over citizens who are discouraged from becoming civic minded or from engaging in deliberation on politico-judicial issues (Posner 1998: 1641; see also Dworkin 1998: 1725, 1733ff and Nussbaum 1998: 1784ff). Posner’s legal adjudication has been harshly criticised precisely for failing to meet any normative criterion of legitimacy (see, Dworkin 1998; for a discussion of Dworkin’s critique see, Sullivan and Solove 2003: 696-697). Elsewhere, Posner has suggested that there are ways of avoiding judicial interpretation of the persecution standard altogether, by adopting protection payment schemes: “For obvious reasons, political refugees and those persecuted in their own countries would be willing to pay a sizable fee to gain admission to a free nation. Such a fee system would automatically avoid time-consuming hearings about whether they are really in physical danger if they were forced to return home” (Becker and Posner 2009: 38). Posner has gone so far as to suggest that the experience of political persecution and the suffering that attends it may have genuinely beneficial effects on certain individuals, notably, liberal academics! (Nussbaum 1998: 1793-1794). For a scathing review of Posner’s approach in the context of constitutional issues and Posner’s staunch defense of Bush-era practices such as the mass wiretapping of US civilians, the FBI practice of sequestering public library reading habits, and torture, see Cole (2007).

¹⁵⁶ Posner cites *Zalega v. INS*, 916 F.2d 1257, 1260 (7th Cir.1990). In the latter we read that “‘Persecution’ is not defined in the Immigration Act”. It therefore directs judges to follow the precedent laid out with respect to three earlier cases: *Berdo v. INS*, 432 F.2d 824, 847 (6th Cir.1970); *Desir v. Ilchert*, 840 F.2d 723, 726 (9th Cir.1988); and, *Blanco-Comarribas v. INS*, 830 F.2d 1039, 1043 (9th Cir.1987).

2004: 163), by deliberately preventing asylum seekers from reaching US borders. Here Price is clear that “the presumption of legitimacy affords states a wide latitude to arrange their affairs as they wish” including “unlawful and unconstitutional” actions (Price 2009: 107).¹⁵⁷

Price claims that the best framework for determining whether condemnation towards a particular state is justified rests on a particular conception of political legitimacy, “the liberal idea that legitimate government must rest upon the consent of the governed” (105). This principle is underwritten by two key assumptions. The first is “the assumption that, as a general matter, governments do indeed exercise power with the consent of their citizens” (105). This “presumption of legitimacy” is supported, in turn, by a second assumption, “that communal self-determination is better served by a rule prohibiting external interference rather than by a rule permitting it” (105). Price claims that the first assumption reflects “related doctrines of state sovereignty and territorial integrity” (105-106) while the second is a “practical judgement”.

But both assumptions may also be understood as empirical claims. It is an empirical question as to whether governments generally abide by the wishes of their citizens or whether self-determination has been served by prohibitions on external interference. To claim otherwise, that is, to claim that these assumptions can be deduced from state doctrine or common-sense judgements, is not only question begging but also unnecessary, given the existence of a significant historical record. Refugees and the internally displaced are further sources of evidence, since citizens who live in states that

¹⁵⁷ It is less clear whether other states share the same right, and thus, whether, for example, a foreign power would have been justified in invading the US and Canada for their continued mass internment of US Japanese and Japanese-Canadian citizens after WWII, actions, which in the case of Canada, occurred until as late as 1949 (Hayashi 2004; Inouye 2016; Wagstaff 2013-42-45). On the oft-cited comparison between US Japanese internment camps—planned prior to the Japanese attack on Pearl Harbour—and Nazi concentration camps, see Stone (2016).

exercise power within the range of their consent will often have fewer reasons to flee their states. For our purposes here, however, it is sufficient to note that there is at least some evidence that might undermine our confidence in Price's claims. For example, between 1945 and 2012 Paul David Miller cites thirty-four US- or UN-led armed state building interventions—part of “the broadest set of cases studied in the literature to date” (Miller 2013: 14). Of these, four are labelled ‘successes’ meaning they are cases “in which a state is at peace, its economy is growing, and its institutions of governance are maturing” though they are also states “that remain poor and ill-governed compared to rich, peaceful states.” The list is not exhaustive. We might also refer to the 558 dictatorships—“regimes in which rulers acquire power by means other than competitive elections” (2008: 171)—recorded by Jennifer Gandhi between 1947 and 2002,¹⁵⁸ whose existence depends on crucial support from many of the world's leading democracies, including the US (Blum 2003; Dávila 2013; Hixson 2008; Litwak 2012; McMahon 1999; Maechling, Jr. 1990; Miller 2013; Morales 1994; Schmitz 1999; Solaún 2005; Weeks 2015).¹⁵⁹

Price's claims about a presumptively legitimate world order that may best promote self-determination through prohibitions on external interference are mutually reinforcing. Together they suggest that liberal states should generally refrain from granting asylum to citizens of illegitimate regimes in the interest of promoting democratic forms of self-determination. On Price's view, then, self-determination is best promoted

¹⁵⁸ Gandhi claims that dictatorships are “regimes in which rulers acquire power by means other than competitive elections...[and which may] be installed by military or foreign powers” (7).

¹⁵⁹ Hixson (2008: 223) identifies Argentina, Bolivia, Brazil, Uruguay and Paraguay, the last of which was ruled by a US backed regime under General Alfredo Stroessner from 1954 until 1989. Dictatorships often receive support from a great number of sources. However, referring to the dictatorships of Argentina, Brazil and Chile, Dávila writes, “At the critical initial moments, the regimes counted on the support of major political parties, banks, businesses, the mainstream media, sectors of the Church, and - crucially - the United States and multinational corporations” (2013: 179).

by assuming that states are generally serving that ideal even when they are not, or cannot. Thus, the aim of promoting self-determination is not to promote democracy, but some vaguer notion of self-determination that includes dictatorships and contemporary forms of absolute monarchy. As Price explains:

Perhaps democracy is the most just method of governance; but a decent monarchy is not liable to external intervention or deserving of international condemnation merely due to the nature of its political system. To award asylum to citizens of a monarchy on such a basis is at odds with the political conception. (Price 2009: 116).

One worry here of course is that, by adopting Price's interventionist stance, dictatorships and authoritarian regimes gain some assurance that violence or oppression below the upper watermark of human rights violations will be openly tolerated. It is not unreasonable to think that this policy will lead to an increased willingness of states to subject their populations to more extensive forms of political oppression and violence, and to increase the chances or the severity of actual human rights violations. Another concern is that, insofar as the toleration of more basic forms of violence can help to raise the base line of oppression, we cannot rule out the possibility that an asylum policy that withholds condemnation against repressive regimes will cause the threshold of tolerable violations of human rights transgressions to increase. A third consequence of limiting asylum's condemnatory scope to particularly egregious political harms is that this will signal to members of repressive states that they will not be supported in attempts to organize viable forms of resistance and political opposition. In this way, progressive forms of social and political organization that might otherwise gain traction lose a vital form of motivation and may be more easily defeated or deterred. At the same time, it is worth registering Price's genuine alarm about the possibility that humanitarian conceptions of asylum will infringe on the state's ability to use asylum policies as a

justification or pretext for foreign military intervention—a prerogative that finds wide support among prominent political theorists as well as government officials (e.g., Greehill 2010; Shapiro 2016; Wellman 2011). This posture of selective indifference towards politically repressive regimes follows from the commitment to a “political” conception of asylum since to use asylum as a form of condemnation against garden-variety dictators would result in a loss of “moral clarity” that Price ascribes to other forms of asylum (Price 2004: 310).

Ian Shapiro’s conception of non-domination offers an important example of how the language of freedom as non-domination may be used in a way that is favourable to dominating agents. Shapiro’s conception of domination appeals to a distinction between ‘vital’ or basic and ‘major’ interests. Basic interests consist in those sources that are crucial to one’s basic physical, cognitive, and social development. “This includes developing the capacities needed to function effectively in the prevailing economic, technological, and institutional system, governed as a democracy, over the course of their lives” (2012: 294; see also, 2016: §1.5). For Shapiro, “[v]ulnerability to domination is operationalized... principally by reference to the notion of basic interests” such that “[i]f I control resources that you need to vindicate your basic interests, that gives me power over you” (Shapiro 2012: 294).

Shapiro gauges the usefulness of non-domination as a practical political ideal by appealing to real world examples which serve as models for putting republican ideals to use. Non-domination is a useful ideal because of the ways it can help us interpret international politics, a world where “nations have no permanent friends or allies, only permanent interests,” and, thus, where, from time to time, it will be necessary to support “military action to resist cross-border domination” under suitably demanding criteria.

Shapiro derives his criteria from Operation Desert Storm, the US-led military response to Saddam Hussein's invasion of Kuwait, which began in January 1991, and which is the "closest thing we have to a viable template" (Shapiro 2016: 146). The criteria—that interventions be sanctioned by the legitimate government, that they receive credible international support, and that they operate in proportionality to the stated objectives (Shapiro 2016: 147)—aim to prevent those who intervene in order to resist domination across borders from engaging in dominating behaviour.

It is worth considering the case that Shapiro invokes to see if it does, in fact, meet the mentioned criteria and, thus, whether the image of US intervention on behalf of a legitimate government is an accurate portrayal of non-dominating intervention. There is no question of the illegality of Iraq's invasion nor is there any moral justification for the occupation of Kuwait's territory. Shapiro's criteria aim to establish legitimate from illegitimate intervention against Iraq, in order prevent illegal actions from serving as a pretext for other forms of illegitimate action.

Shapiro's first criterion, asks, in effect, whether, at the time of Iraq's invasion, Kuwait's government was legitimate. During the relevant period in question, Kuwait's rulers controlled one hundred percent of the state's oil industry, ninety-seven percent of its land base, and employed ninety five percent of its labour force (Alnajjar 2000: 249), in the absence of a functioning parliament which had been unconstitutionally suspended by Emiri decree in 1986, an event which "shattered" democracy (Salih 1991: 62) under laws requiring government censors "assigned to every newspaper and publication" (Ghabra 1991: 211). It goes without saying that if, as Shapiro suggests, legitimate governments can take the form of an absolute monarchy controlling all major aspects of social and political life through political and physical intimidation whose actions are virtually

unchecked by law then the criterion will allow for virtually any form of government. Such a criterion may still have a use in allowing governments to decline the services of even greater powers (and potentially more despotic powers) but they will hardly establish a legitimate check on dominating power.

Shapiro's second and third criteria ask whether the US-led intervention received credible international support and was proportionate. It is important to see that these criteria are not independent. A large number of states, including democratic states, willingly supported US actions and did so through the auspices of the UN Security Council Resolution 678. However, as John Quigley explains:

Resolution 678...exceeded the Council's powers under Chapter VII of the Charter. Invoking Resolution 678, the United States initiated military activity without a showing of need, employed excessive force against Iraq, and then continued military activity after Iraq indicated a readiness to leave Kuwait, and even after it began to withdraw. (Quigley 1992: 48; See also, Tetreault 1991).

Thus, whether Operation Desert Storm meets Shapiro's final criterion of proportionality depends, in part, on meeting the proportionality constraints embedded in UN standards of protocol, standards that were largely ignored as a result of the failure to achieve support for the intervention from all five Security Council member states, an important fact omitted from Shapiro's assessment.

Nonetheless, an evaluation of Shapiro's claim, that the US-led coalition "did not overreach" in enforcing its "proportionately appropriate goals" (Shapiro 2016: 146), is possible to undertake on independent grounds and worth considering. As Stephen Zunes points out, "[b]y attacking road, bridges, factories, irrigation systems, power stations, waterworks, and government offices, the US-led military offensive against Iraq went well beyond what was necessary to drive Iraqi occupation forces from Kuwait" (Zunes 2004: 191-192). Frederick Clairmont writes that "[t]o defeat a country with the GDP of

Portugal required 75 per cent of all US tactical aircraft and 40 per cent of its tanks” (1991). He goes on to cite 60,000 Iraqi civilian casualties in an air war that “surpassed in intensity the bombardment of German targets at the apex of the Normandy invasion” and included the use of an estimated 350 metric tons of Depleted Uranium, 240 of which remain buried.¹⁶⁰

Michael Lewis’ (2003) detailed study of aerial bombing during the Gulf War is generally favorable in its assessment of the proportionate use of force by US Allied forces. However, his assessment raises an important problem for Shapiro’s criteria of proportionality, namely, that while determinations of proportionality are often made in hindsight, decisions of war are conducted in real time amidst great uncertainty. As Lewis attests, “[b]ecause of this uncertainty, decisions like the daily proportionality determinations must be judged in light of the information available to the decision makers at the time” but “uncertainties [also] make condemnation of individual actions very difficult, absent evidence of intentional wrongdoing or gross negligence” (Lewis 2003: 508). The proportionality criterion is meant to help ensure that when an agent interferes to “stop the bully” on behalf of a vulnerable state, that it does so without becoming a bully themselves (2016: 170-171, 180-182). But the criterion is more limited than it may first appear. To characterize the interfering agent as an (initially) defensive force already gives significant latitude to opportunistic states or coalitions who may later claim that any disproportionate actions were unfortunate side effects of decision making in the fog of

¹⁶⁰ The effects of DU on combatants and civilians has generated a secondary literature of its own. On the use of Depleted Uranium in operation Desert Storm that connects its use with significant health effects including its relation to Gulf War Syndrome, see Janulewicz (et al. 2017). For a more sceptical treatment see, Marshall (2008). See also, Zenko, Micah and Jennifer Wilson. January 5, 2017. “How Many Bombs Did the United States Drop in 2016?” *Council of Foreign Relations*. URL=<<https://www.cfr.org/blog/how-many-bombs-did-united-states-drop-2016>>.

war. Given the closeness of fit between all of Shapiro's criteria, once the sanctioning of force by legitimate states and international support are secured, there is little chance that concerns of proportionality will gain traction in the aftermath.

To be clear, nothing in the preceding analysis shows that we should not seek to reduce weaker states' vulnerability to domination where vulnerability to domination is determined by the capacity of others to control access to those basic goods or institutions that foster individual and collective self-development. Furthermore, that Shapiro's real-world model fails on his own criteria does not mean there are no cases in which his views of domination might be better served.

The example of Desert Storm is significant for other reasons. As Shapiro makes clear, it is important that states intervene on behalf of others only in the absence of any vital national interests that might blur their judgement in the use of force and lead them to take the bully's mantle. In an apparent repudiation of the Carter Doctrine¹⁶¹, Shapiro informs us that the US had "no vital national interests...at stake" in Kuwait, only "major interests" (including trillions of dollars in oil, among other benefits). The problem with this assessment is twofold. First, the distinction does not explain what would prevent states with non-vital interests from engaging in illegitimate interventions for those less than vital reasons. Shapiro (2016: 148-151) is clearly aware of this problem, but his discussion leads only to the conclusion that interventions involving large diverse interests are the best guard against illegitimate interventions, though it is unclear why a multitude of states cannot share a vital interest in a course of intervention.

¹⁶¹ "Any attempt by any outside force to gain control of the Persian Gulf regions will be regarded as an assault on the vital interests of the United States of America. And such an assault will be repelled by any means necessary, including military force" (Jimmy Carter, 23 January 1980 quoted in Isenberg, 1993: 433). For a discussion see, (Klare 2006/7: 32).

A second, related problem with the distinction between vital and major interests is the lack of attention to objective and subjective conceptions of vital interests. Arguably what determines whether an interest is vital for any potential third party is not whether those interests can be objectively proven, but what the intervening force *believes* its vital interests are on its own terms. Relevant considerations in assessments of the legitimacy of a US-led intervention on behalf of Kuwait will include the longstanding description of Kuwait and regional control of the Gulf by US planners as a “vital”¹⁶² US interest. It will also include an analysis of how the concept of a ‘vital interest’ is defined by the state in decisions of whether intervention is necessary or permissible. In a highly relevant discussion on US interests in the Middle East Donald Nuechterlein writes that:

The utility of distinguishing between...major and vital national interests is that vital ones imply that the United States ultimately must be willing to engage in armed conflict to protect its interest if other policy tools fail to convince an adversary to alter course. (Nuechterlein 1989: 109-110).

On this view, the willingness to use force is the justification for its use so that Desert Storm constitutes the *evidence* of vital US interests in Kuwait as well as the failure of diplomacy, not the outcome of an independent analysis in light of universal facts

¹⁶² We can hardly fail to notice that Shapiro’s characterization of US interests in the Gulf are blatantly contradicted by US war planners. US State department historian David Painter noted that, in fact, since 1949 the State Department had maintained that there was a “vital United States interest in American-owned foreign oil,” which is explained by the fact that “U.S. security was dependent on availability of oil from foreign sources in an emergency, since U.S. domestic productive capacity was insufficient to meet prospective emergency demands. Oil supplies strategically located outside the United States would be militarily advantageous in the event of a war, and U.S. oil operations abroad added to U.S. prestige and influence. Moreover, oil investments accounted for over 70 per cent of the net foreign investment of nationals and played an important role in economic development. Thus, it was important to protect U.S. holdings in foreign oil from loss through nationalization or competitive displacement by countries” (Painter 1984: 373-374). For similar statements see, Hoskins (1951: 235) and Shibley (2002: 32). On Jan 2 1979, the Washington Post quoted US Secretary of Defense Harold Brown who cited the Persian Gulf as a “main target” and a “vital area” for securing future US “vital interests” (Stork 1980; Wilson 1979). The report reveals long-term, high-level, and dedicated planning efforts for intervention in the Gulf. See, George C. Wilson. ‘Brown Cites Risk for U.S., Soviets in Third World Conflicts’ 02 Jan 1979. *The Washington Post*. A12. See also, Stork and Wenge (1991).

concerning the needs US citizens, the maintenance of legitimate democracy, or the possibility of non-belligerent actions.

One of the most significant effects of Desert Storm was the adoption of UN Security Council Resolution 688 (April 5 1991) “[acknowledging] for the first time that widespread population displacement represents a threat to international peace and security” (Minear and Weiss 1992: 756). The resolution, signed in the wake of the over two million refugees in the aftermath of the conflict¹⁶³, granted international agencies access to Iraqi populations within their own territory, setting the stage for future (legitimate) violations of Shapiro’s criterion of government-sanctioned interventions, either by obviating the need for government consent or through the creation of humanitarian safe zones within otherwise sovereign territories (see my discussion above). Thus, while it is true that the “Security Council Resolution 688 and the efforts to assist Kurdish refugees have blurred considerably the distinction between domestic jurisdiction and international responsibilities” (Weiss and Campbell 1991: 462) they have also blurred the distinction between dominating and non-dominating uses of force. A second notable effect of the Gulf War was to encourage the use of overwhelming airpower in future theatres of conflict vastly increasing the potential for greater numbers of refugees by exposing many more civilians to potential attack (Cohen 1994), to say nothing of the potential civilian death toll and significant damages to essential infrastructure. The Gulf War therefore has the distinction of ushering in both a “new international humanitarian order” (Rogers 1992; Minear and Weiss 1992) and “a fundamental transformation in the

¹⁶³ Hoogland cites as many as five million displaced. For a detailed description see, Hoogland (1991).

nature of warfare” (Cohen 1994: 109).¹⁶⁴ Shapiro’s use of Desert Storm as the ideal template for applying the test of nondomination in the form of a self-justifying resort to force is instructive, and the cascading effects of the war on refugees and internally displaced populations an important reminder of the ways in which the concept of nondomination can be put to use, for better or worse, in political discourse.

The analysis of normative theory is important but can only take us so far. A critical response to problems of legitimacy and the defence of domination must ultimately refer back to a more productive *institutional* critique, and towards proposals for forms of governance and models of policy that can set the ideal of non-domination within a practical system of reforms. Before we can determine what institutional forms a republican conception legitimate asylum ultimately recommends we first need to determine the nature of the harm that the practice of asylum seeks to mitigate or prevent and the role that asylum seekers have in controlling the practice so that it does not become a dominating force in their lives. This is the subject of the next chapter.

¹⁶⁴ It also marks an important departure from US military practice in the region. As James Gelvin (2018: 114) notes “The Gulf War of 1991 lasted one hundred hours. However quickly it was over, the Gulf War marked a subtle, episodic shift in American foreign policy [in the Middle East] to direct intervention.”

CHAPTER THREE: PERSECUTION AND WELL-BEING

In this chapter, I explain and defend an account of political persecution as a unique form of purposive domination, an important effect of which is to prevent the conditions necessary for viable political oppositions. I argue that the wrong of persecution consists primarily in its effects on a specific domain of well-being—political well-being. On this account, to flee from persecution is to flee from a state under which an individual or a group is forced to direct their political choices and actions to suit the will of a private or public political power. Where individuals lack effective state institutions necessary to resist arbitrary incursions into their political lives persecution will manifest as an ‘irresistible’ form of domination. Political asylum is a legitimate response to irresistible state-level domination but it may also serve as the basis for new modes of resistance and political opposition against persecution.

This argument presents a somewhat radical departure from historical contexts of persecution. Indeed, the modern secular state emerges from a social context in which persecution was often held to be morally *required*. In this context, it was the promotion of religious pluralism, and not aversion to it, that demanded justification (Bainton 1941; Christenson 1968; Forst 2013; Grell 1991; Ryan 1988; Schwartzman 2005: 687; Waldron 1988).¹⁶⁵ Though it is perhaps unsurprising that “the essential arguments for more extensive toleration are developed by the victims of persecution and oppression who oppose the existing social order” (Forst 2013: 37), these arguments played only a minor role in ending practices of persecution, which “was a function of *raison d’état* rather than

¹⁶⁵ For an excellent philosophical reconstruction of the arguments involved here, see Duncan (2007).

a matter of principle” (Grell 1991: 1)¹⁶⁶ and could “be revoked at any time” (Forst 2013: 36-37).

Of course, there have always been times when political authorities have thought it useful or necessary to send into exile those individuals who pose a threat to the state (Moore 2000: xi; Mullin 1996: 513; Sabl 2009: 531). But the goal of persecution has not generally been to exile heretics or political adversaries (who may become political, diplomatic or military liabilities) (Martines 1968; Shaw 2000).¹⁶⁷ Rather, policies of persecution are the practical manifestation of a disposition to control the political will of one’s citizenry *within* the state, to bend each citizen’s will to the will of the relevant political authority, and to prevent the formation of a viable political opposition through brutality and surveillance.¹⁶⁸

The state’s demand for political stability has often been expressed as a moral demand: citizens should expose their beliefs and intentions to a political authority for the good of the community and in perpetuity (Mullin 1996).¹⁶⁹ Barrington Moore has argued that during the French Revolution “a society organized around moral purity appears as a goal for an unspecified future and attainable only after a moral and intellectual cleansing—not to mention bloodshed—that today we would call brainwashing” (Moore

¹⁶⁶ “Not only could this toleration be revoked at any time; it was also granted to different religious groups in different degrees depending on whether they were classified as dangerous or there was a prospect of useful alliances” (Forst 2013: 36-37). Similarly, Dunn (1991: 172) writes that, “[t]oleration... is only ever conceded by incumbent political authorities as a matter of practical political judgement” [...] In practice... there is no clear behavioural difference between the absence of persecution and the presence of toleration, or between the cessation of persecution and the commencement of toleration.”

¹⁶⁷ Exile has, in various times and places, been an important strategy for consolidating political power. For example, in Chilean politics has been frequently marked by a resort to widespread campaigns of forced mass expatriation. See, for example, Angell and Susan Carstairs (1987) and Wright and Zúñiga (2007).

¹⁶⁸ On persecution as a disposition to “domineer” over others, see Fiske (1881).

¹⁶⁹ “Impurity is always associated with a breach of order...that threatened community integrity” where “[t]he emphasis on purity of thought was a demand for a transparent community, for members with no guile and no hidden motives” (Mullin 1996: 515, 516). Barrington Moore claims that the concept of moral purity begins to take on a secular role in the Eighteenth Century. I remain agnostic on the secular origins of social forms of purity.

2000: 72). One of goals of moral purification then is to create the social conditions that will align the well-being of the citizenry with the political well-being of the state, and, if possible, to define one in terms of the other. The persecutory state in which citizens willingly and faithfully submit their views to the scrutiny of their political authorities thus ensures that the community is stripped of its value as a *political* community; it is, in Amy Mullin's words, "a community so ordered that it requires no communing" (Mullin 1996: 521).¹⁷⁰ Bentham noted that the disposition to persecute exists in all societies. Indeed, as Mark Warren has pointed out, "[o]ne of the dangers democracy faces today is that its fortunes are perceived as identical with the fortunes of the state" (Warren 1999: 226).¹⁷¹

Religious, political, and economic ideas have long been considered threats to the maintenance of political order and sources of "moral pollution" (Moore 2000; Mullin 1996). Thomas Hobbes thought civil society was so fragile that it could be jeopardized by "any controversy ... contrary to the public good and common peace" including arguments about mathematics (Hobbes *De Cive*, quoted in Popkin 2003: 202). Few issues are as likely to confirm Hobbes' worries about the socially divisive effects of disagreement as disputes about who is a refugee or the criteria for determining what counts as persecution. As Jeff Crisp observes, "in many cases people move from one country and continent to another in response to a complex set of threats, hardships, and opportunities" and "the

¹⁷⁰ Common to early theories of persecution is "[a] corporate image of society...for what matters is the well-being of society (generally defined as its unity), not the well-being of the individual" (Christenson 1968: 421).

¹⁷¹ It is sometimes said that states are unified moral agents whose decisions, actions, and 'character' are appropriate subjects of moral evaluation (e.g., Appiah 2006; Gibney 2004; Goodin 1989; Lane 1999; Stilz 2009; Young 2007). Anna Stilz (2009: n3) notes that both Hobbes and Kant refer to states as civil and moral persons, respectively. Christine Korsgaard has gone so far as to say that unified agency is intrinsic to our basic conception of states: "we have a state only where [citizens living on a shared territory] have constituted themselves into a single agent. They have, that is, adopted a way of resolving conflicts, making decisions, interacting with other states, and planning together for an ongoing future." (Korsgaard 1989: 114).

inability of states to come effectively to terms with the asylum issue has been politically and socially corrosive” (Crisp 2003: 81, 83).¹⁷²

The chapter begins by distinguishing various everyday uses of the term persecution and some preliminary methodological issues. An account of persecution is then developed through a series of iterations that explain the relationship between persecution, domination, and political well-being. This discussion explains the basic thought that you are persecuted just so long as your political well-being is subject to the whims of a private or political power (i.e., a powerful citizen or government) that coercively (or threateningly) ‘tracks’ your interests through your choices. The discussion moves next to a more systematic treatment of this view before examining, in conclusion, how other conceptions of freedom—freedom as non-interference and positive freedom—while failing to capture the wrong of political persecution, may carry insights about the institutional response that is necessary to prevent persecution or diminish its effects.

3.1 PERSECUTION

Persecution is both an inherently imprecise and an essentially contested concept. The concept of persecution generally emphasizes the felt qualities and associated consequences of various forms of interference that are only more or less justified. Artists and intellectuals are commonly said to face persecution for their work¹⁷³; priests may view their legal obligation to break the seal of confession as a form of persecution by the

¹⁷² As recently as 2008, it could be confidently stated that the term “‘asylum seeker’ is not used or defined in a single major treaty and the definition of the phrase, therefore, varies with the laws of each country” (Weissbrodt 2008: 111; see also Hopkins 1996). Indeed, Leboeuf and Tsourdi (2013: 409) point out that “[t]here exists no universal model for determining which human rights violations are serious enough to constitute acts of persecution under Article 1(A)(2) of the Refugee Convention... a margin of appreciation is left to States in interpreting this fundamental term.”

¹⁷³ On the persecution of historians in over 130 countries since 1945, see Baets (2002). On intellectuals more generally, see Jennings and Kemp-Welch (1997). On the association of persecution with the “wanton destruction” of nonhuman species, see, for example Kirkpatrick and Elder (1951).

state; a Black motorist may claim to be persecuted by law enforcement officers under a system of norms that reinforces racial prejudices in policing; and so forth. Within this range of examples, certain forms of persecution stand out because they are conditioned by specific normative properties, properties that allow us to identify, within the range of forms that persecution can plausibly take, particularly obtrusive forms.¹⁷⁴

Political persecution takes place within a complex social background of more or less appropriate forms of influence, interference, and subjection. The features that define who a person is or what matters to them structure the basic choices, actions, and life plans through which we value our lives. It would be difficult to conceive of a person whose vision of the good life did not incorporate categories of race, religion, nationality, political opinion and membership in all manner of social groups as significant components and determinants of a worthwhile life. The choices we make based on our political identities and affiliations are matters of personal reflection and public deliberation. As such they are subject to a wide range of influences, conscious and unconscious, deliberate and accidental.

It is a basic fact of social life that others have the capacity to interfere with the choices we make, to influence our attachments and self-understanding in ways that may dramatically shape our lives. Some forms of interference are more or less appropriate and acceptable. Politicians and political parties have an interest in securing your vote and they may use a wide range of arguments and tactics to persuade you to support their cause. But they may not force you at gunpoint to vote for their candidate or threaten you for supporting their rival. Persecution manifests as a form of ‘imposed guidance’ by one

¹⁷⁴ The latin *sequi* ‘to follow’ forms the basis of persecute ‘to follow with hostility’ Cresswell (2010). See also, Hoad (1993: 113).

agent on another with the aim of shaping or otherwise controlling the latter's political choices. To be dominated in this way is, as Charles Taylor, notes, to be "forcibly led towards some definition of your self-realization by an external authority" (Taylor 1985: 216).

In some cases, it will be more difficult to determine whether influence over our beliefs and choices is appropriate or not. Think of parents who desperately wish for their children to understand the world as the creation of a divine being, and, thus, who order their lives in ways that reflect this fundamental belief. To inculcate this behaviour, parents may consciously or unconsciously withhold certain important social goods (e.g., affection or esteem) unless children meet their expectations. Influence or social pressure of this sort is pervasive, not only in contexts of fundamentalist organizations, but in virtually all aspects of our personal and public lives.

The task of defining political persecution can be taken up in various ways. A legalist approach starts from the observation that the features that make persecution a 'distinctive' harm supervene on legal and contextual facts that cannot be analysed independently so that, in each case, the meaning of persecution "must be divined by a process of judicial interpretation" (Foster 2007: 87; cf. Pirie 1986 and Price 2009).

Another approach aims to demonstrate that persecution can be defined by identifying a set of shared properties that all experiences of persecution share independent of other differences. Jaakko Kuosmanen defines persecution as the combined effect of three distinct elements "an asymmetrical and systemic threat of severe and sustained harm that is inflicted discriminatorily and unjustly" (Kuosmanen 2014: 138; see also, Hathaway 1991 and Price 2009). Kuosmanen claims that persecution can be distinguished from other harms, such as harassment and discrimination, since only in

cases of persecution are all of these elements in play simultaneously. Yet, there is no reason to think that these elements cannot combine in garden-variety cases of extreme harassment or discrimination that would fail to amount to persecution in any distinctive sense. For example, many actions that would be better classified as murder or forcible confinement would be completely compatible with Kuosmanen's account of persecution. The perpetual threat of nuclear or biological weapons aimed at specific targets for 'reasons of nationality' seems also to count as persecution. In order to distinguish persecution from more general harms Kuosmanen must implicitly rely on a set of shared intuitions about the relative severity of various harms, the nature of a sustained threat, asymmetrical relations, and a systemic harm, all of which can be given many different interpretations from which, as Kuosmanen admits, "various more specific conceptions of persecution can be derived" (Kuosmanen 2014: 134).

More important, for our purposes, is Kuosmanen's disregard for the role of political institutions and institutional capacities in accounts of persecution. Kuosmanen admits that persecution results from the fact that "institutions that should protect persons from severe and sustained harm are not functioning adequately." Yet he is adamant that "problems in the protective institutions are not what make persecution something distinctive" (Kuosmanen 2014: 138). By contrast, I want to show how persecution is a function of the relation between the relative institutional capacities of different persons. If this is right then the analysis of persecution will be, to a large extent, the analysis of how political institutions condition relations of domination between various members of particular societies. To explain this view, I propose the following preliminary definition:

Political Persecution: An individual or group is persecuted when (1) their capacity to choose or to act in accordance with their fundamental political interests is (2) conditioned by the arbitrary will of a social authority (an individual, agency, or

state) that (3) tracks the interests of its citizens in ways that undermine their political well-being, that is 'against their will'.

Here I will briefly outline each clause and then examine them in more detail in the sections that follow. The first clause highlights the relationship between political persecution and politically autonomous choice. Our political choices are constitutive of well-being only when the capacity to choose is autonomous; that is, only when our actions (or inactions) are a function of 'undominated choice' (Pettit 2012: 123). The second clause identifies persecution with a particular mode of social dominance, namely, an intentional action and not a form of structural oppression. While structural features of society facilitate or enable persecution, the existence of institutions, laws, or other basic features of a political society do not of themselves constitute persecutory acts (Lovett 2010). The third clause draws attention to the fact that persecution is underwritten by the institutional capacity to surveil, and to keep track of, another's political interests. As Ronald Christenson writes, "the theory of persecution...is the tyranny of private standards (one man's or a group's) elevated to the public world and enforced as the standards of the whole society" (Christenson 1968: 438). But these standards must be imposed through manipulation, propaganda, indoctrination or other forms of political communication that signal the preferences to individuals and groups in order to bring about certain psychological and behavioural changes in a population (Valentino and Yiroyos 2013).¹⁷⁵ This suggests that there are special modes of communication that determine not only whether persecution is successful, but which also indicate the forms or modes of interpersonal interaction that are constitutive of the act of persecution.

¹⁷⁵ The forms of signalling will differ based on cultural norms, leadership personalities and so forth. For a discussion see, Tileagă (2013) and Stenner (1968).

These three elements—a lack of democratic autonomy, social dominance, and political communication—are mutually reinforcing. Where democracy is lacking there will be opportunities for abusive forms of political authority to impose their interests; where guidance can be imposed, democratic expression will be curtailed; where citizens' beliefs and choices can be tracked, authorities can target and control individuals or subsections of a population preventing viable forms of resistance.

3.2 TRACKING INTERESTS

Before we continue, recall the concept of arbitrariness in the now classic formulations of domination developed by Frank Lovett and Philip Pettit. In both cases, arbitrariness connects to constraints on the exercise of power. For Lovett, power is arbitrary “to the extent that its potential exercise is not externally constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned” (Lovett 2010: 95). The mechanisms of political accountability are to ensure that no one can act without reference to others' interests and that no one may appeal to others' interests as reasons in support of their own actions without giving recourse to appeals or effective contestation of those reasons. Similarly, on Pettit's account, to say that an act of interference is arbitrary is to “imply that it is chosen or rejected *without reference* to the interests, or the opinions, of those affected. The choice is not forced to track what the interests of those others require according to their own judgments” (Pettit 1997: 55; cf. Barnett 2006: 95). For Pettit then your interests serve as a potential moral constraint on how I may act in the light of judgements that would be reasonable to you.

Notice that we might track someone's interests for other reasons. I may track your interests in order to build an explanatory framework, detailing how your actions and

decisions are consistent with particular goals, values, and beliefs attributable to you. In this case my tracking serves goals similar to those of persons who track the ‘interests’ of ants, computers, or other non-human entities (Dennett 1987). Alternatively, like a biographer, I may track your interests by following your development over time, your successes and failures, the ups and downs of your life. In these ways, tracking is a thoroughly descriptive enterprise through which I may acquire sophisticated knowledge of your interests without necessarily considering your point of view as something that I must care about beyond the purposes of my descriptive tasks. Descriptive tracking does not (necessarily) give me moral reasons about how I should act in particular circumstances. Indeed, I may learn about your interests with great fascination, deep understanding and even admiration, yet I may ultimately choose to make my choice as if your interests were irrelevant to the way I live my life. Of course, we are constantly learning and considering other peoples’ interests, values, and points of view—often unconsciously—incorporating knowledge gained from tracking into our own decision-making, and adjusting our interests and goals accordingly. (We could hardly do otherwise if we hope to coordinate our actions or achieve even our most basic day-to-day goals.)

Here, however, I want to distinguish descriptive or non-moral tracking from tracking that is inherently normative and then further subdivide normative forms of tracking into moral and immoral. My argument will be that the failure to distinguish between modes of tracking obscures an important fact about what makes some forms of tracking virtuous and others morally suspect.

To track a person’s interests in a moral sense is not merely to consider their point of view, their interests and aspirations, but to do so with the intentional purpose of responding to those interests in acknowledgment of the fact that they may impose moral

constraints on one's own (and others') actions. I track your interests in a *moral* sense then only if I am aware that your interests have the capacity to affect my own choices or patterns of deliberation, and, even then, only if I consider your interests to be *equal* to my own. If my tracking is moral, then your interests will feature as reasons or constraints on my actions and I will apply those constraints insofar as doing so is compatible with the interests of others operating under similar constraints.

It is clearly this moralized form of tracking that Pettit has in mind in his conception of non-domination (Pettit 1997: 55). Now, of course, I may fail to track your interests not because I have any ill-will towards you, but because I am bad at discerning your preferences, because I am lazy, and so on. In these cases, my tracking lacks virtue, even though I may *intend* to act in accordance with what morality requires; that is, my attempts at moral tracking are weak, not ill-disposed.¹⁷⁶

Yet tracking interests can also be an inherently menacing practice. For I can also track others' interests to identify persons who do not share my political views, with the intention of using my knowledge to selectively, and perhaps more easily, impose my will on these persons. So tracking another's interests may be a means of *reducing* the constraints that those interests might otherwise impose on my actions (say, if I am tracking people who fully agree with my political views). Put in slightly different terms, I may track your interests as a means of imposing my interests on you, in a manner that is openly or covertly hostile to you and your interests. When the impulse to track another's interests is driven by a disposition to impose one's will on them (or their associates) then tracking will not only be lacking in virtue, it will also be immoral. The purposive disposition to track another's interests for the sake of immoral ends (ends that may

¹⁷⁶ The characterization of tracking as virtuous or non-virtuous is inspired by Sosa (2011).

nonetheless, if only accidentally, conform to others' interests) is I think an important aspect shared by acts of persecution as forms of arbitrary power.

But notice that the arbitrariness of persecution differs importantly from the concept of arbitrariness at play in Pettit's account of domination. On Pettit's view, domination occurs when decisions or actions are chosen or rejected *without reference* to the interests, or the opinions, of those affected. By contrast, the form of tracking characteristic of persecution makes an *essential reference* to others' interests.

Whereas Pettit wants us to see that other's interests are always reasons to favour actions that accord with the interest-bearer's own judgement, I think we must also allow the category of arbitrary actions to include corrupted versions of this relation. Others' interests may indeed give us reasons to act in the way that Pettit proscribes but it is also true that those same interests will often appear to those disposed to persecute as reasons to inflict pain or suffering. Persecution will nonetheless be an arbitrary form of interference insofar as the persecutor does not track what the interests of others require *according to their own judgments*. The act of interference will thus be chosen or rejected in direct reference to others' interest *as if* those interests do not matter to the persons who hold them. In acts of immoral tracking the interests of others are reasons for action used in the service of ends or goals that do not conform (or conform only accidentally) with the interests or the opinions of those affected. The arbitrariness of persecution consists then in using the advantages and unchecked privilege of public or private power to exploit other's interests for the tracker's own gain. This is different from saying that the tracker ignores others interests: for all intents and purposes, the corrupt tracker makes an essential reference to the relevant political interests, or opinions, of those affected but

turns the knowledge of other's interests against its sources, using their interests to better impose his will.

So far then, persecution involves a morally defective form of tracking interests. However, tracking may also take on a distinctly political role in assisting to bring about certain social arrangements or institutional goals. Here, tracking will be arbitrary insofar as it is motivated by an unchecked desire to undermine a person's ability to make and to act on choices that reflect their political autonomy.¹⁷⁷ With these points in mind, we can offer an intermediate definition:

Political Persecution: Some individual or group, P, persecutes some other individual or group R, when P is in a position to track R's relevant (political) interests, where P's tracking of R's interests imposes arbitrary duties on R, and R is not in a position to resist P.

A person, P, persecutes another person, R, when P tracks what R's interests require according to R's own judgments where this knowledge is a reason to deny what those requirements proscribe. But persecution will only be possible insofar as P can act on their own political interests in the absence of effective institutions and rules that would allow R to contest how R's interests feature as reasons for P's actions. For if R has an institutionally effective means of countering P's actions then P's tracking is inherently limited. P may still engage in unvirtuous and immoral tracking, but the institutions that protect R, will force P to make decisions that conform to R's interests. Institutions and laws thus serve as the political (impersonal) instantiation of virtuous tracking in everyday social interaction and exchange. Persecution is *political* then because it depends on the presence of absence of institutions that ensure the tracking is a virtue and not a vice.

¹⁷⁷ Here I follow Brad Hooker's characterization of autonomy: "if Jack severely constricted Jill's set of important options, or if he controlled her choices by controlling her value judgements, she would lack autonomy" (Hooker 2015: 19).

Furthermore, P *targets* R based on features attributed or attributable to R. But persecution also imposes arbitrary duties on R because persecution inevitably involves an unconditioned (and thus, uncontrolled) demand by a coercer (a state, state agent, or non-state actor) on a coercee (a citizen or citizens) to choose or to refrain from making or exercising autonomous choice. This forces us to confront an important distinction between tracking a person's interests for the purposes of imposing arbitrary duties on them and tracking others' interest to *enforce* duties that do not entail or amount to persecution. There will always be cases where the state will be in a position to track the interests of its citizens for the purposes of identifying and suppressing certain associational values, beliefs, or practices that are deeply harmful or offensive. It is possible then that financial criminals, white supremacists, members of child exploitation rings, human traffickers, or violent fundamentalist organizations may accuse their governments or others of persecution insofar as one's identification with and active affiliations in such groups is susceptible to arbitrary interference. But these accusations will often fall flat insofar as the tracking mechanism is deployed not to force individuals to choose a particular political identity but to preclude actions that are fundamentally inconsistent with the well-being of any member of society (including the members of these very same groups) and only insofar as the views that government seeks to identify are protected within non-arbitrary laws and institutions of a just society.¹⁷⁸

For our purposes, a basic definition of persecution will help to specify two key relations within acts that qualify as persecution. First, it will specify the role of interests

¹⁷⁸ There are many hard cases that I cannot do justice to here. Should liberal states protect foreign members of racist organizations from states that would torture or kill them rather than place them on a path to reform? Should a special form of sanctuary—sanctuary as imprisonment—be reserved for those (e.g., terrorists) whose actions would constitute a crime within the liberal state?

in constituting persecution as a relation of domination. Second, it will specify the role of duties as impositions on the exercise of one's political choices. With these points in mind, let us turn to a more thorough conceptual break down of the concept of persecution:

P persecutes R in matters of political choice (where A is a subset of choices) if and only if:

- 1) P is in a position to track R's political interests and to determine what actions or choice options (α) are broadly consistent with R's interests according to R's own judgments.
- 2) P is also in a position to arbitrarily bring about or have brought about some consequence if R chooses α (and R knows P is in a position to do this).
- 3) The possibility of this consequence renders α substantially less eligible for R than α would otherwise be.
- 4) (Part of) P's reason for deciding to bring about the consequence or have it brought about, if R chooses α is that P believes this consequence worsens R's alternative of choosing α (or that R would believe that it does).
- 5) Part of R's reason for not choosing α is to avoid (or lessen the likelihood of) the consequence which P has threatened to bring about or brought about.
- 6) R knows that P has threatened to do the something mentioned in (2), if she, R, chooses α .
- 7) R believes (and P believes that R believes) that P's threatened consequence would leave R worse off, having chosen α , than if R didn't choose α and P didn't bring about the consequence.
- 8) R lacks the means (within her state) to resist or to constrain P from bringing about the consequence mentioned in (2).¹⁷⁹

Three features of persecution not contained within this definition are worth mentioning here. First, persecution is a scalar concept. Persecution can be more or less intense, continuous or short lived, and it can affect us in more or less central aspects of our political lives. Persecution will also manifest differently between and within different types of states, whether functional authoritarian regimes or forms of social authority that emerge within failed states and prolonged occupations. In some cases, there may be multiple or overlapping forms or subjects of domination. For example, while prolonged

¹⁷⁹ Points 2-7 are adapted from Nozick's (1972) discussion of coercion. Cf. Held (1972: 52).

occupations may entail persecution of the occupied society, both occupied and occupier may be susceptible to persecution in the form of domination by the authorities of the occupying state. Perhaps the occupying force has little choice in whether to participate in military aggression or the occupying state deceives its population by exaggerating the threat posed by the occupied population in order to gain compliance for its actions and their participation.¹⁸⁰ Second, the definition of persecution relies on a distinction between political and personal autonomy. Political autonomy requires investments in and attachments to larger, collective ends or associational goals. (Greater *personal* autonomy may itself be a political goal.) But political autonomy issues from an identification *as* a member of a particular collective organization. When an agent exercises their political autonomy “the agent is letting their personal self go offline, as it were, and is allowing a different identity, a national or religious or corporate political identity—to take over in its place” (Pettit 1997: 258). For this reason, persons may be picked out for harassment or ill-treatment, but the reasons for which they are persecuted will rarely signal their isolation from others. Where one person is persecuted many others will be implicated as well. Third, our definition of persecution does not include an answer to the question of what makes persecution wrong.

As we have seen, it is sometimes thought that what makes persecution significant is the degree or severity of harm it imposes on individuals. My claim will be that persecution picks out a form of domination that is analytically robust but which does not rely on severity of harm as such. I will argue that it is the concern for a particular domain of well-being—political well-being—that arguably underwrites a proper understanding of what is fundamentally wrong with persecution. I will also seek to show why political

¹⁸⁰ For a suggestive discussion see the introduction to Bar-tal and Schnell (2012).

asylum is a reasonable response to combating this particular form of domination, domination that is difficult to resist within the state (more on which below).

3.3 POLITICAL WELL-BEING

So far, I have argued that the concept of freedom plays a fundamental role in debates about liberal states responses to refugees and asylum seekers. However, it would be presumptuous to assume that asylum seekers should or must accept freedom as non-domination as their most fundamental value. The value of freedom presupposes that individuals have particular interests, goals and capacities. It might be argued that it is our interests, not the freedom of the social structures in which we plan our lives that are of primary value. Arthur Ripstein hold this view. As he notes, “the concept of freedom can at most play a secondary role in normative theory, because it requires some prior specification of important interests” (Ripstein 2009: 235ff).¹⁸¹ If this is correct, then we should view freedom as non-domination as an instrumental value (Rostboll 2015).

Political asylum that conforms to the ideal of republican freedom would, on this picture, serve to secure other, more fundamental interests by protecting individual’s ability to exercise choices over a specifiable (though not uncontroversial) set of political liberties. In this section I will argue against this instrumental interpretation of the value of freedom as non-domination. The value that is picked out by the capacity to resist persecution makes a non-instrumental contribution to political well-being. It is good in its own right, regardless of whatever goods or benefits derive from having it.

To understand this point, it is necessary to address what is fundamentally wrong with political persecution. One response is to say that we have already offered a sufficient

¹⁸¹ The view is also held by H.L.A Hart (236n5) Lon Fuller (240n15) among other political theorists.

answer to this question. Since the republican theory of asylum centres on the role and value of foreign state protection as a means by which asylum seekers and refugees can achieve the status of freedom as non-domination, all we needed to do was to show that political persecution is a form of domination, the sort of thing that asylum policies should aim to counteract or reduce. While I think this is basically right, it is ultimately unsatisfying for it does not tell us what is unique about persecution as a form of domination. What is more, it does not tell us why persecution is wrong, or indeed, why it is bad *for* persons.

The concept of persecution developed here consists then of two independent, but related conceptions, of personhood and of normative reasons (reasons or action, or simply, ‘reasons’). The conception of personhood says that humans are essentially cooperative agents deserving of mutual forms of moral regard such that certain actions between individuals can be deemed inconsistent with their moral personhood.

Charles Larmore claims that “the deepest stratum in Pettit’s republican theory” is a conception of respect for the intrinsic value of persons (Larmore 2004: 115). On Larmore’s view, this stratum is captured by Rawls’ (liberal) principle of respect which “requires...that the fundamental terms of political life be such as to meet with the reasonable agreement of all who are to be bound by them” (Larmore 2004: 116). The problem with this view is that, in order to reach this sort of agreement we must already have an account of what is valuable about being bound by fundamental terms of political life—an account, that is, of why it is reasonable to commit to a particular set of norms for common governance. Any agreement on these fundamental norms thus presupposes a more basic account of why particular norms and practices are ultimately valuable or

worth pursuing together.¹⁸² One way to approach this issue is through an account of political well-being. Such an account may, in fact, be required in order to articulate a fundamental conception of respect for persons that lies at the heart of our worries about persecution.

Joseph Raz has argued for what he calls the ‘radical thesis’ in value theory: that “when we care about people, and when we ought to care about people, what we do, or ought to, care about is their well-being” (Raz 2004: 269). My view is similar, but is trained on a more circumscribed context. I wish to claim that what we ought to care about when we care about persons who face persecution is their *political* well-being. A person’s political well-being concerns how well their lives go for them in the domain of their political choices. The philosophical concept of well-being applies paradigmatically to your life taken as a whole (Raz 2004: 270). Your life goes well for you only to the extent that your political choices contribute to your overall well-being. For our purposes, however, I will confine our discussion to judgements about autonomous political choice. But it bears mentioning here that there is a distinction between the *ability* to make political choices and the contributions our choices make to our well-being overall, in ways that are inclusive of our ‘political lives’ but which include other domains of life as well.

Political well-being is a threshold concept. It allows that people whose political well-being falls below the threshold may still make meaningful and significant choices in

¹⁸² I am assuming that an account of moral obligation is not itself a *political* account of the procedure by which individuals agree to base their shared commitments to particular terms will bind them to their agreements about the terms of a common political life. If this is right, we needn’t be concerned that any account of moral obligation offered here will itself be susceptible to the same sort of regression—i.e., that in order to agree on fundamental terms of political life we need prior agreement to the fundamental terms of moral obligation, and, in turn, prior agreement to the terms that govern the procedure for reaching agreement about the terms of moral obligation, and so forth.

other domains (choices that affect their health, life expectancy, level of personal enjoyment, and so on). However, the contributions these choices make to one's life will not be sufficient, on their own, to say that one enjoys political autonomy. There will be a threshold of political well-being below which individuals have a reasonable or warranted claim for foreign state protection against persecution. And there will be some 'distance' between someone's actual well-being overall and the threshold of well-being sufficient to preclude their suffering from persecution.¹⁸³

The wrong of persecution is constituted not by its effects on preference satisfaction, but on political well-being. And it is not the fact that my political preferences go unsatisfied that constitutes the harm to my political well-being. The conflation of well-being and preference satisfaction would force us to concede that, say, if your chosen candidate does not get elected, you are (at least to some extent) politically persecuted. Conversely, it would also force us to accept that you can avoid persecution simply by making political choices that conform to the preferences of a ruling authority. Preference satisfaction can play only a limited role in our understanding of well-being. One can enjoy a high level of political well-being even if one's political preferences are *never* satisfied; conversely, one can suffer a very low level of political-well-being even if their preferences are *always* satisfied. This may seem counter-intuitive, but consider the following: Perhaps it just so happens that, despite living under a severely constricted set of political options and endless attempts to control your political value judgements, you remain (accidentally) autonomous. Perhaps—however hard to conceive—you have miraculously avoided the forms of influence that would have altered your value judgements and that, for this reason, there is still an important sense in which your value

¹⁸³ This formulation is influenced by Roger Crisp (2006: 1-2; 39-40; 61).

judgements are truly your own. Furthermore, suppose that your actual preferences lie well within the otherwise severely constricted option set and that your actual autonomous personal preferences fortuitously and consistently align with the political preferences of the ruling authority. So, you enjoy (accidental) autonomy and your political preferences are always satisfied. Nonetheless, your political well-being suffers more or less to the same extent that it would were you to be fully aware of your political surroundings. The issue in this case is not that, only *if* your views no longer conform to those of the ruling authority, would your life being to go badly for you; on the contrary, it is the very fact that your autonomy is accidental—i.e., that the arbitrary prerogatives of political authority do not undermine your preferences—that constitutes diminished well-being and which ensures that, however much you enjoy the satisfaction of your preferences, your life goes badly for you. In such circumstances you will lack political well-being regardless of your actual choices.

The upshot of this claim is that it is possible for individuals to be persecuted even if no one actually interferes with their political choices. The reason has to do with how my choices relate to my political well-being. Perhaps I live in an unjust state in which I have extremely limited political choices where there are serious consequences for expressing personal political interests that do not conform to pre-authorized choice options. However, as it turns out, I would have made similar political choices under a different, more tolerant political society where the range of choice options is far greater and where I would be encouraged to express my individuality openly and without fear of reprisal. The problem is that my well-being does not condition my choices; rather, my choices are conditioned, regardless of what I chose, by the arbitrary will of the social authority. In the unjust state, then, if my life goes well at all, it is because my political

choices conform to others' expectations of how I should live my life. So, you may be politically persecuted under an authoritarian regime even if your *actual* political views/choices always conform to the regime's own interests, just so long as your political choices are subject to the whims of a private or political power (i.e., a powerful citizen or government) that coercively 'tracks' your interests through your choices. By contrast, in the just society, my interests are tracked by political authorities in a way that is consistent with my political well-being, and thus my choices are constitutive of my well-being. In this sense, to say that I am able to make choices among a sufficient range of choice options under conditions of political tolerance, and to say that my life is going well for me as a political agent, will be virtually one and the same.

My use of the terms 'possible' and 'may be' in the preceding paragraphs are intentional. They leave room for an essential component of persecution that may yet be unfulfilled. The concept of political persecution relies on the conception of persons as political agents; that is, individuals who are both capable of forming and exercising political views in the service of ends or goals and of defending their positions using (legal) institutional means. Thus, an act of persecution depends, in part, on the institutional capacities and institutional mechanisms of defense against immoral tracking, menacing threats, and political punishment.

The role of political institutions is important for distinguishing acts of persecution from similar but ultimately superficial cases. Institutions and institutional norms support citizens' political well-being either because they directly prohibit persecutory acts or because they anticipate such acts and offer avenues of resistance within which to prevent the exercise of arbitrary power. Thus, the victim of vexatious litigation will not be persecuted insofar as she can defend herself within a just and relatively efficient

normative order that affords a rigorous form of resistance and the possibility of punishment for the difficult litigant. Nor can the intensity and persistence of an aggressor be sufficient to qualify an act (or a series of acts) as persecution. In Ridley Scott's film *The Duellists* (1977) an officer in Napoléon's army is forced to fight a relentless series of battles against an opponent of equal rank over a frivolous slight. Yet, despite the furious and ceaseless harassment of the challenger over many years, we find the opponents more or less equally matched, and more or less committed to the norms of honour and mortal combat that constitute dueling as a legitimate practice for addressing grievances among equals in the First French Empire.

Popular forms of political resistance are also undertaken in the expectation of injury, imprisonment, or the like. But the fact that penalties are expected is not itself a reason to suspect persecution is afoot. On the contrary, the willingness to face punishment helps to distinguish acts of political resistance from the mere collection of dues or entitlements that follow from one's status as a rights-holder. This is true, even where we anticipate penalties for resisting *unjust* laws. As Paul Woodruff explains: "The modern principle of civil disobedience is that one should accept penalties for breaking laws even when the laws are bad, and the point of this is to uphold the rule of law while giving people a way to show how bad a bad statute is" (Woodruff 2005: 115-116).

However, as Frank Lovett points out, there is a difference between permissible and obligatory forms of resistance. Violent resistance may be permissible "when there is no reasonable chance of ordinary political action leading to reform" against severe domination (Lovett 2010: 224). But there are important limits on the forms of political resistance that any one person may be obligated to engage in for the sake of reducing

domination, either for one's own sake or for that of others.¹⁸⁴ "On the assumption that we have prudential obligations to ourselves as well as moral obligations to others," Lovett claims, "our obligation to engage in resistance is considerably weaker [than obligations to engage in ordinary political actions that impose few costs on us]" (ibid.: 227). What matters in the context of persecution, I think, is whether there are or are not institutional forms of resistance that would allow one to control the influence or extent of persecution in their lives. There may be a general obligation to fight for the creation of institutions to prevent persecution but it would strain credulity to suggest that such obligations *must* be discharged within the social context of an insufficiently protective institutional setting. This observation is not meant merely as a side constraint on the imposition of onerous duties. It also contributes to an understanding of what persecution *is*, such that it would be reasonable to respond to acts of persecution by fleeing the institutional setting that enables or supports persecutory acts. For our purposes here, then, one is persecuted only when they cannot reasonably be expected to defend themselves against the possibility of arbitrary power within the state, either because the penalties of resisting are too severe, the opportunities to engage in resistance too limited, or the possibility of success too remote.

It will be important then to distinguish between cases where a person who is targeted by an arbitrary power lacks the will power necessary to resist from cases in which resistance is not possible or reasonable. Virginia Held has drawn attention to an important distinction between what, *mutatis mutandis*, we may call 'initial' and 'final'

¹⁸⁴ For an excellent discussion of these limits as applied to the public discussion regarding the merits and demerits of Edward Snowden's choice of asylum over imprisonment see, Pineda (2015).

domination.¹⁸⁵ Initial domination is domination that is subject to resistance. Final domination, by contrast, brooks no challenge: it is irresistible domination. For the same reasons, initial domination will not constitute persecution since it allows that there are significant resources for contesting arbitrary power, arbitrary power that is nonetheless exercised within limits¹⁸⁶ that are possible for the subject of interference to impose, though probably not without considerable effort or courage. Political persecution is an internally *irresistible* form of domination; that is, irresistible from within the state.¹⁸⁷

The concept of persecution as internally irresistible domination dovetails with our account of political well-being, since, if you lack effective means of contesting public or private forms of power within the state over your political choices, you will also lack the means to sustain your political well-being. Now, it is tempting to think that the capacity to resist arbitrary interference with one's political choices is simply a function of this basic provision of requisite goods or capacities (Laborde 2010). As Raz points out:

[t]he provision of the goods necessary for survival and physical comfort is good instrumentally, in that their absence has a disabling effect. In extremes it makes valuable activities impossible altogether, leaving the possibility of vegetative existence only. (Raz 1999: 8).

However, it is the nature of well-being that others cannot provide that which is sufficient to ensure their life goes well for them since “[p]eople’s well-being is—ultimately—up to them and to them alone” (Raz 1999: 9). In order to understand what it means to say that

¹⁸⁵ Here I adapt Virginia Held’s distinction between initial and final coercion. See, Held (1972: 57-58).

¹⁸⁶ We must tread carefully here since to say that there are limits to arbitrary power comes close to saying that power is not (actually) arbitrary or only appears arbitrary. But this line of thought has an important virtue: since the institutional forms that would be necessary to determine whether exercises of power are or are not arbitrary require a very careful consideration and monitoring there is pressure on host states to (morally) track the institutional capacities of foreign citizens within the context of complex institutional settings. The study of persecution is, in this sense, the study of effective modes of legitimate oppositional political institutions and norms. Where these are lacking, persecution becomes more likely and more intense.

¹⁸⁷ For a discussion of different modes of political resistance in the context of a general theory of domination, see Lovett (2010: 221-229).

the capacity to resist persecution is intrinsically valuable we need to refer to the analogue of Raz's claim in political life. Political well-being is constitutive of the capacity to constitute oneself as an autonomous political agent such that it is possible to say that one is politically self-determining, and, by extension, that one's political choices are (within a reasonable range of choice options) 'up to them'. When we say that someone enjoys political well-being we mean that they are able to choose their political identities and to pursue the interests that their choices reflect. To lack this capacity is a harm not because of anything in particular that is lost with the ability *to be* self-determining, not, that is, with anything in particular that self-determination is *good for*.

Personal well-being depends on your having an effective moral status to make demands on others and to hold others accountable in ways that are consistent with that status (Darwall 2006 75n24; 126). Political well-being requires, additionally, that one be incorporated into a social system in which one values their political status for its own sake independent of whatever goods may be derived from it to others (cf. Owen 2014: 99).¹⁸⁸

Of course, my political status can (and frequently does) serve the interests of others in ways that are detrimental to my own political well-being. But the fact that one's well-being could, in theory, be measured *exclusively* by one's contributions to the common good is a reason to highlight its non-instrumental worth. For if your political

¹⁸⁸ A host state can fulfil its duty to refugees *perfectly* or *imperfectly*. A state fulfils its perfect duty to asylum seekers only if asylum is granted for the right reasons, that is, in an effort to secure the asylum seeker's political well-being for its own sake. But political well-being may also be an *unintended* side-effect of state protection, as when asylum seekers are accepted for their propaganda value and to solidify a common political ideology intended to benefit state power. In such cases the host state fulfils its duty to asylum seekers imperfectly. For this reason, a state's refugee 'recognition' rate is not a sufficient indicator whether a state has actually fulfilled its moral obligations to refugees. This distinction was prompted by a discussion in Crisp (2016, 5.1).

well-being has *only* instrumental then there can be no reason to distinguish between your well-being and someone else's.

But a person cannot enjoy their status for its own sake unless they exercise effective control over the extent to which they are beholden to any distinctive content that the basic structure of a common political ideology allows; that is, not unless there are limits to the ways a private or public power can impose itself on one's ability to choose, and, within a suitable range, the choice options they are free to pursue in the political sphere.¹⁸⁹ The non-instrumental value that is constitutive of political well-being is itself predicated on basic institutional competences, notably, the capacity to defend one's political choices or opinions and to effectively contest or deter one's mistreatment at the hands of others in legal and political forums specifically designed for these purposes.

3.4 NEEDS, PRIORITY, FREEDOM

The significance of well-being to issues of political asylum has not gone unnoticed. According to James Hathaway "Refugee law is often thought of as a means of institutionalizing societal concern for the well-being of those forced to flee their countries" (Hathaway 1990: 130). Yet, little has been said about the special relationship between persecution and well-being and scholars of forced migration do not distinguish different forms of well-being. As a result, persecution is often explained in terms of human rights violations, threats to physical survival, or an inability to make life plans (Gibney 2015). Yet, this does not seem to account for the role of asylum in response to a distinctively political harm. Furthermore, critics rightly note that to view political

¹⁸⁹ By the political sphere I mean the sphere social interactions that are relevant to the protection of one's valued status. This sphere may differ radically between otherwise similarly situated persons. For example, think of the difference between those whose social lives are or are not dependent on frequent and direct access to the internet.

persecution in terms of threats to one's life does little to distinguish refugees from other persons who suffer not from persecution but from other threats to life and liberty in the form of poverty or environmental degradation. By contrast, I have argued that the republican conception of asylum as non-domination can be grounded on a conception of *political* well-being, an account that is irreducible to well-being in terms of physical survival or serious human rights violations.

On this account, certain political choices are more fundamental than others, more central or consequential to our lives and the lives of other people. The 1951 Refugee Convention can be understood, in part, as a list of fundamental political categories which ground important choices in our lives, choices about our religion, nationality, membership in particular social group, our political opinions, and so forth. I say that the Convention identifies categories that 'ground' political choices so as to allow for the fact that there are important aspects of our political identities that we do not, strictly speaking, choose (e.g., in most cases, we do not choose our nationality).

The concept of political well-being helps to augment the concept of republican freedom in a practical sense. The liberal politics of asylum confronts us with the task of determining the priority of entrance within a world of global political instability, inequality, and increasing scarcity. Since the claims of political asylum seekers may conflict with the claims of other potential needy entrants (e.g., the very poor, or persons displaced by war or environmental degradation) there is pressure on republicans to show how the *prioritization* of claims for asylum is consistent with the goal of freedom as non-domination. Prioritization assumes i) that the values of various courses of action are suitably commensurable, and ii) that there is an efficient method of assessing or measuring various trade-offs or value contrasts that can generate more or less intuitive

results.¹⁹⁰ A republican approach can support the view that refugees are a distinctive class of persons whose relative exposure to domination, measured both in terms of intensity (i.e., their susceptibility to arbitrary interference) and extent (i.e., the range of choices over which persons fleeing persecution are susceptible to domination), singles them out as members of a special ‘vulnerability class’ thereby justifying special treatment. But the complexity of such determinations should not be underestimated. Domination occurs within vast domains of action under many forms of political authority. There are important differences between forms and degrees of domination, but it is far from clear how we should judge *between* various forms of domination. Republicanism does not itself provide an uncontroversial method for distinguishing between or comparing cases across economic, legal, or political forms of domination. It is unclear then whether, in applying the republican concept of freedom, we can provide a clear rationale for prioritizing the claims of refugees over other needy entrants. For this reason, it may be necessary to draw on other normative concepts (Markell 2008; Lovett and Pettit 2009: 26). The language and conceptual apparatus of philosophical accounts of well-being offer one way of distinguishing between the varieties and relative wrongs of political persecution.

An account of political well-being allows us to say why it is important to resist arbitrary power in a particular—the political—domain of our lived experience, even if our lives may otherwise be going well for us, even if, say, we are otherwise healthy and well-fed. An account of well-being will also help us to derive the features of the corresponding status of freedom that would allow us to say that individuals are no longer

¹⁹⁰ I assume here that a method that frequently generates strongly counter-intuitive results about value trade-offs will fail to gain adequate public support.

at risk of persecution, and that they are in a position to resist arbitrary power in their political life.

Other conceptions of freedom—freedom as non-interference, and positive freedom or freedom as ‘self-mastery’—will have difficulty grasping this effect of persecution. On the “pure” theory of negative freedom, an individual lacks liberty when it is physically *impossible* for them to act or to refrain from acting as they wish (Plant 2010: 195). Determinations of freedom are empirical judgements about an individual’s ability to act given certain internal and external conditions.¹⁹¹ These determinations are made independent of assessments of the moral qualities of an act; that is, regardless of the consequences of acting or of failing to act, and regardless of whether the act is consistent with the actor’s other moral values and commitments. On the pure theory, a person’s desires or interests matter only insofar as they are a means of determining their physical capacity to act (Plant 2010: 210). Since adequate knowledge of the conditions that prevent an individual from acting on her relevant choice are all that is needed to yield a determinate judgment about whether someone is free in regards to particular actions, the main issues that arise in determining whether someone is free on the pure theory are epistemic in nature. The pure theory has few adherents and it has not been widely influential. However, it does provide a useful contrast with more influential accounts of negative freedom, perhaps the best known of which is that offered by Isaiah Berlin (2002 [1969]).

On Berlin’s account, although physical features of our environment may prevent us from exercising our choices, the relevant sources of interference are those which arise directly or indirectly from intentional (human) action. “You lack political liberty or

¹⁹¹ Not surprisingly, the pure theory of freedom seems not to be held by a great many people.

freedom only if you are prevented from attaining a goal by human beings” (Berlin 2002: 169). This account is both narrower and wider than the pure theory. It is narrower because it excludes non-human forms of interference. It is wider because it involves moral prudential considerations that are irrelevant to the pure theory. On Berlin’s view, an individual can suffer interference (and thus a loss of freedom) just so long as there is a high cost of acting or refraining to act as she wishes. The suspicion that you will be prevented from acting as you would like may be sufficient to deter you from undertaking the act. However, Berlin allows that you may be free with respect to some choice even when you are too limited in resources to act on that choice, because you may adapt your preferences accordingly. “If I find that I am able to do little or nothing of what I wish, I need only contract or extinguish my wishes, and I am made free” (Berlin 2002: 186; Pettit 2014: 46). Thus, Berlin’s conception will not recognize the effects of persecution as necessarily wrong or harmful. This is the line of reasoning adopted by the Australia Full Federal Court, the English Court of Appeal, the Federal Court of Canada, and the United States 9th Circuit of Appeals, all according to which an individual does not suffer persecution so long as they can take reasonable steps to conceal those aspects of their identity that offend against their society’s dominant or prevailing social norms. On this view, as long as one practices ‘living discretely’ arbitrary interference can be avoided and the question of freedom from persecution needn’t arise.¹⁹²

Positive conceptions of freedom will also fail to grasp the effects of persecution as domination. Positive freedom is most often identified with those human capacities and

¹⁹² These cases are discussed in Millbank (2012); Webel (2013); Hathaway and Foster (2014: 168 and 168n45). See also, Emma Graham Harrison. 26 February 2017. ‘Deported gay Afghans told to ‘pretend to be straight’,’ *The Guardian* URL=<<https://www.theguardian.com/uk-news/2017/feb/25/afghanistan-gay-asylum-seekers-home-office-illegal-homosexuality>>; Afua Hirsch. 9 May 2010. ‘UK policy on gay and lesbian asylum seekers challenged in supreme court’ *The Guardian* URL=<<https://www.theguardian.com/world/2010/may/09/supreme-court-gay-lesbian-asylum-seekers>>.

faculties that are necessary to lead a fully autonomous life, to pursue one's self-styled vision of the good, or to achieve one's highest potential. The distinction between negative and positive freedom is formally expressed by saying that the conditions which are both necessary and sufficient for negative freedom are *merely* necessary, but not sufficient conditions for the promotion of positive freedom. That is to say, the circumstances under which one's choices or actions are unconstrained by external obstacles or forces do not ensure that one will actually pursue their own vision of the good or achieve their highest potential. One way of understanding this claim is by appealing to John Stuart Mill's discussion of the contrast between higher and lower pleasures.¹⁹³ According to Mill, no amount of any 'lower' pleasure (say, the experience of eating ice-cream) can ever outweigh the value of experiencing a finite amount of some 'higher' pleasure (say, reading Shakespeare). A person who is free in the positive sense will develop their own way¹⁹⁴ of distinguishing between higher and lower pleasures in virtue of an 'informed preference test' (Crisp 1997: 28-31): having experienced a wide range of both lower and higher pleasures they will rationally come to prefer a finite amount of higher pleasures over any amount of lower pleasures and, given suitable conditions, they will be able to act on those preferences in a consistent and coherent manner over their life time. By contrast, a person who enjoys freedom from interference (i.e., in the negative sense *alone*) will be incapable of passing an informed preference test. She may be perfectly capable of distinguishing between higher and lower pleasures. She may even opt for

¹⁹³ Carter (2016) discusses 'higher' and 'lower' selves, but no one to my knowledge has sought to distinguish positive and negative freedom using Mill's distinction between kinds of pleasures.

¹⁹⁴ We needn't have a clear idea of which pleasures fall under which category. This invites the objection that we cannot really say whether someone is free in the positive or negative sense except by reference to their personal judgments of what constitutes a higher or lower pleasure and, thus, that the distinction between negative and positive freedom must either hang on a relativized notion of preferences or a culturally specific values system.

limited portions of the former over the latter from time to time. However, insofar as her capacity for reflecting on and endorsing a commitment to higher over lower pleasures remains latent, immature, or underdeveloped, she will not choose consistently. The implication is that, being unconstrained in her range of choices and lacking self-restraint in her ability to choose within that range, she can neither fulfil her potential nor realize a coherent life plan.

This account makes sense of a number of different elements of positive freedom. To choose (or to consistently choose) higher over lower pleasures one must be able to reflect on and have self-control over those “pathological impulses” (Christman 2005: 83) derided by both Kant and Plato. It also addresses Kant’s insight that to be free one must be able to follow a law one has set for oneself in a way that allows each to see themselves, and to be regarded by others, as “a single unified agent” over time, a self-constituted agent with a particular identity (Korsgaard 2008, 2009). This identity is forged under pressure not only from external obstacles that would prevent an individual’s self-directed development, but also from the sheer number of choices and interests that vie for our attention and the potential identities that we might wish to pursue.

Nonetheless, it remains an important conceptual task to explain why a theory of political asylum should not be guided by a more positive political ideal of freedom, the political freedom to actively participate in government, to develop one’s capacities to the fullest, or to achieve ‘self-mastery’ (Klausen 2007: 768). Even if we take our initial starting point to be a concern about arbitrary interference, why should the practice of asylum under a negative ideal of freedom not give way to a more positive conception of freedom in asylum (e.g., Nelson 2005)? Should we not worry that asylum seekers will be

free from domination but still unable to make something of themselves beyond their undominated status, still unable to pursue their visions of the good as they would prefer?

The challenge posed by the positive account of freedom has its historical basis in the motivations of earlier migrants “who felt stifled intellectually...and sought a freer society where they could emancipate themselves intellectually and spiritually” (Israel 2001: 575; see also Bailyn 2012, 1986). Arguably, however, the challenge has been amplified and given greater prominence in jurisprudence (Harvard LRA 1983: 1292-1293, 1324) and in the work of political theorists who increasingly identify political asylum and immigration with moral criteria of positive freedom (Kuosmanen 2013; Gibney 2015). Moreover, for those who seek sanctuary in a new state, the act of asylum and the goal of seeking greater opportunities (perhaps beyond what was possible in their state of origin) to form lasting relationships with like-minded people in societies with particular political and religious virtues, and a comprehensive set of political rights along with access to legal and political mechanisms for the enforcement of those guarantees are rightly inseparable (Gibney 2015). A positive ideal of freedom may therefore be needed to ensure that states do not impose a political compromise on refugees that is incompatible with their status as persons.

Under a positive theory of freedom, the problem posed by claims for asylum in liberal states will largely turn on the answers to questions concerning the basic set of goods that asylum seekers’ must receive from the state in order to that ensure that they can achieve positive freedom as personal autonomy or the capacity to develop and to carry out a coherent life plan that is at least within range of their vision of the good life. One worry is that, under a positive conception of freedom, states may have reasons to

accept *fewer* refugees since each refugee will require significantly more resources and support than would ordinarily be required.

The value of political asylum derives, I think, not as a remedy for unfulfilled potential or because it allows one to resist arbitrary encroachments on one's choices, *per se*, but from the ability to defend against attacks on those choices that are fundamental to one's political well-being. The problem is that within any given state, individuals may lack the political means to resist or to defend against persecution. Where resistance is either extremely dangerous or likely to be ineffectual then persecution will be *irresistible* and some other form of resistance is required beyond the state.

The effects of political persecution can be traced across two dimensions, one contestatory, the other, participatory. The contestatory dimension consists in the opportunities for individuals within the state to access, evaluate, and publicly challenge the state, its practices, laws, and individual decisions. The participatory dimension refers to the extensiveness of political participation, the range of persons entitled to engage in political contestation (Dahl 1973).¹⁹⁵ This leaves quite a bit of latitude in terms of what might count as resistance to persecution (my stipulation about tracking seems to preclude forced migration due to ecological collapse or war) but here my analysis shifts towards the institutions and persons who are charged with making those decisions and how the state might be arranged to ensure that refugee status is itself non-dominating.

3.5 THE RESTIVE STATE

Here I want to conclude by way of transition into the questions of institutional reform by considering how the members of host states can apply the standard of legitimacy

¹⁹⁵ For a discussion of these oppositional dimensions see, the introduction to Dahl (1973).

developed in Chapter Two in response to concerns about persecution as outlined above. How should citizens hold the state to account in its commitments to legitimate forms of asylum policy? And what is the appropriate response of citizens when their states fall short of legitimacy in their asylum practices?

The answer it seems to me must lie in an articulation of the practical ideal of a ‘restive’ republic, a state whose members form a vigilant public political power. The restive state aims to be effective in contesting arbitrary power. In such a state the actions of government will be widely known and influence and decisionmaking widely dispersed. But the concept of effective contestation is itself a subject of much disagreement. Here I will focus on contestation as exercised through one’s deliberative capacities. I then briefly take up the issue of a much-needed shift in institutional capacities to resist illegitimate state power, foregrounding the forms of voluntary secondary and tertiary¹⁹⁶ associations to be discussed in Chapters 4–5. James Bohman argues that there is an important distinction between republican democratic theories that recognize the intrinsic value of deliberative capacities to “initiate” deliberation and those, like Pettit’s, that recognize only the instrumental value of contestatory powers¹⁹⁷ to constrain government decision-making and to limit arbitrary interference. According to Bohman it is “[t]he

¹⁹⁶ To be clear, by referring to secondary associations, I mean only the form that associations take, not their role in governance of refugee policy for which they have a *primary* role (on this inversion, see Hirst 1994: 26). The division between secondary associations and tertiary is a division between self-organized civic groups based on common interests and more temporary membership in purposive, or goal-oriented institutions and professional organizations (Warren 2001: 39-40). My discussion of secondary associations and their primary effects is largely confined to Chapter 4. I discuss tertiary associations in Chapters Five and Six.

¹⁹⁷ Pettit favours debate-based forms of contestation over bargaining-based decision-making. I do not consider the differences here. However, we should accept Pettit’s distinction only if we also accept that bargaining occurs between persons with predefined interests whose “hearts and minds are closed” at the bargaining table (Pettit 1997: 187). Participants may approach bargaining in this way, but this is no more inherent to bargaining than it is to deliberation. On the conditions for contestatory (deliberative) democracy see Pettit (1997: 186-200). There must be procedures that highlight potential points or terms that citizens may wish to contest or to reinterpret according to their own interests.

capacity to begin deliberation, rather than existing for the achievement of greater or less available liberties [that] provides the basic measure for the statuses of persons required for democratization” (Bohman 2007: 53). Bohman seems to view the distinction between deliberation and contestation as one between the power to make *novel* contributions to democratic decision-making and the power to react to preconceived or existing concepts and patterns of democratic decision-making. Bohman goes so far as to suggest that the capacity to initiate deliberation can be equated with freedom while the (mere) power of contestation is consistent with a condition of slavery since, armed with only the latter, “citizens will merely be consulted, and thus unable to introduce new points of view and new relevant interests and opinions” (Bohman 2007: 52-53; see also 101). Furthermore, this difference is capable of informing opposing and incompatible accounts of republican democratic governance. This is why, for Bohman, “deliberation *replaces* contestation as the proper democratizing activity” (Bohman 2007: 44—emphasis added).

However, the distinction between Pettit’s notion of “effective contestation” and Bohman’s unfettered power to “initiate deliberation” (Bohman 2007: 5, 8 14-15, 55, 91, 73, 107, 178, *passim*) is doubly misleading. First, both Pettit and Bohman appeal to robust forms of democratic deliberation that require institutional respect and *effective* conditions for individuals to continuously reassert their interests in order to influence public decision-making and shape public institutions in their own image. So the idea that effective contestation somehow precludes novel democratic thinking or is necessarily reducible to ‘going along’ with previously iterated norms is incorrect. At the same time, to have a capacity to deliberate does not guarantee that anyone will be in a position to exercise that capacity. The distinction between contestation and deliberation is thus misleading as a sign of, or means by which, individuals achieve freedom as non-

domination since the capacity to deliberate is entirely consistent with the inability to exercise that capacity.

These considerations suggest that Bohman has overstated the differences between his own and Pettit's model. When people contest the terms and policies on a given issue they almost always do so in a way that exposes their preferred moral political aspirations and goals. To contest is to express publically avowable reasons for reform. It is of course difficult to conceive of deliberation without contestation. But contestation will not necessarily be effective simply because it causes representatives or other centralized forms of power to reconsider their terms and stances. And Pettit's interest is not in *mere* contestation, but rather in "effective contestation" (Pettit 1997: 191, *passim*). This is not the *formal* right to contest or dispute public decisions, but an efficient means of exerting political power. Furthermore, there is no moratorium on dissent, no inherent restrictions on time or limited to 'post hoc' rebukes of government decision-making. As Pettit notes, there must be a "permanent possibility of contesting what government decides" (Pettit 1997: 185). This last point makes clear that Bohman's main innovation, the idea of an unrestricted power to initiate deliberation, has already been accounted for in Pettit's model. Bohman and Pettit mainly differ on whether the value of the power of initiating dissent is intrinsic or instrumental to democracy. As far as the practical issue of contestation and deliberation is concerned, then, Bohman offers a distinction without a difference.

The real distinction between Bohman's and Pettit's deliberative modes of self-governance seems to turn on a) whether the power to instigate deliberation (whether contestatory or not) is constitutive of or merely instrumental to non-domination (Bohman 1997: 53), and b) whether transnational modes of deliberation are more consistent with

the ideal of non-domination than deliberation between institutions and publics within particular states. It is important to ask then whether powers that encourage endless deliberation are desirable given the goal of non-domination. My view is that this is extremely doubtful. Effective contestation presupposes that individuals can agree to support common goals and interests and thus forgo potentially endless deliberative re-iterations and costly forms of bargaining (Peruniak 2019). To achieve shared goals in this way means that deliberative capacities must be constrained. Furthermore, the idea of effective contestation suggests that we must guard against fetishizing deliberation or the capacity for deliberation since these do not in themselves offer any means of closure that is so important for progressive reform. Both deliberation and contestation are expressed through the common medium of language. As Pettit (1997: 131) notes, it is crucial for republicanism that our capacity for language “answers to the fact of difference at the same time as it builds on a base of common ideas.” However, unlike Bohman, Pettit’s republicanism does not see the capacity to initiate deliberation as an end in itself, or even a sign of popular democratic control; deliberation is instead instrumentally valuable allowing for the effective expression of shared goals only where deliberative terms and concerns coalesce into organized forms of contestation.

Finally, although emphasis on deliberation as a foundational starting point for democracy is intuitively attractive, it is open to an important objection, since it presupposes conditions that allow for deliberation to take place. As Mark Warren has argued:

Deliberation depends on achieving an important kind of equality, equality as a partner in dialogue...[d]eliberation cannot be a starting point for a democratic theory that, no matter how deliberative in orientation, must attend to the political achievements necessary to transform an issue into a topic of deliberation. (Warren 2001: 81).

This point returns us to the institutional problem of political asylum. It is often assumed that refugees require a surrogate political community in which they can plan their life in accordance with their chosen vision of the good, as opposed to a community that is merely prepared to harbour them temporarily against specific rights violations (Gibney 2004, 2015). But asylum seekers do not lack membership as such; rather, they lack politically *effective* membership. Thus, the claim that asylum seekers require membership in a new state, while correct, is too ambiguous. Asylum seekers have not necessarily lost membership in their states of origin, but they have certainly lost *effective* membership, in the important sense that they have lost the ability to resist authority within their state, without incurring extreme costs. Effective political membership is a practical goal that cannot be achieved merely by receiving citizenship in a new state unless citizenship itself is a shorthand for this sort of guarantee; where this is not the case—and there are few if any states where such a status can be taken for granted—it can only be achieved through more radical political, social, and legal reforms. The upshot of this discussion then is that where there is as yet no clear opportunity for asylum seekers and refugees to play a significant role in the democratic decision-making models of either the leading state-centric or transnational republican models as non-citizens, asylum seekers will be essentially unfree, regardless of whether they enjoy the protections of a host state. This means either that the status of refugees insofar as it is distinguishable from citizens is inherently incompatible with the ideal of non-domination or that new institutions are required to make up for this participatory deficit.

One difference here is that where the republican theory of citizenship is concerned more or less exclusively with principles of justice that govern relations between citizens

of particular states under conditions of moderate scarcity, a theory of asylum concerns the principles of justice that govern *vertical* relations of power between states and non-citizens and *horizontal* relations of power between citizens and non-citizens. Since only citizens of states in which the conditions of justice obtain are likely to achieve the status of equal freedom as non-domination, there is pressure on the republican theory to account for how asylum seekers and refugees can be said to enjoy freedom as non-domination on these terms. This is the task of subsequent chapters. I argue that a republican theory of asylum is consistent with Pettit's state-centred, citizen-oriented theory of republican citizenship. My conservatism however reflects support for the contention—widespread among republicans of a more cosmopolitan bent—that the freedoms achievable by citizens of any particular state require significant investments in the freedoms of noncitizens. On the republican view, the treatment of refugees at the hands of the state will be an important indication to citizens of the limits of their own liberty.

The restive state will also seek to ensure that whether policies of asylum and refugee status determination procedures as they exist now are actually consistent with the state's role in observing the will of the people it governs. The republican approach demands that we base our evaluations of asylum practices not on whether the practices *could* be justified to suitably situated citizens or refugees, but on whether they do so command the voluntary assent of citizens and refugees; that is, on actual (or active), not hypothetical consent, and on a public form of social monitoring. One reason for favouring an active and public form of consent has to do with the history of the practice and its relation to citizens and refugees. Once we learn that the practice of political asylum has been used in the recent past sometimes as a form of humanitarian relief, sometimes as a political rebuke to authoritarian regimes, sometimes as part of a deliberate military

strategy, sometimes as a cover for economic imperialist ambitions, and so forth, we are going to be uneasy with accepting its legitimacy on hypothetical grounds. That is, we will want to look at the practice in its immediate context and, where possible, in real time as a function of particular governments, social conflicts, in effect, its *political* conditions. The appeal of the voluntarist conception of legitimacy is its focus on the practice's historical relation to the citizens and refugees that have encountered it under the direction of a state or states (cf. Simmons 1999: 745; See Chapter Two). Such an approach will also help us to resist the tendency to reduce the problem of asylum to a question of the justification for a state's right to exclude refugees.

The move from hypothetical to actual legitimacy suggests a parallel shift is needed from hypothetical to actual consent, or to a more direct or active form of consent. For many however this latter shift will be too radical. Jeremy Waldron says that “[i]f the lack of actual consent is to be remedied, the first step must be reform of the society so that consent becomes an imaginable option” (Waldron 1987: 141).¹⁹⁸ The state can plausibly take a range of forms, as a minimalist night-watchman or as a more elaborate framework for a utopian society (Nozick 1974). Very different forms of social organization are possible within the state (Pettit 2012: 136; Waldron 1987: 132). In each case, however, the state will be legitimate in its asylum practices only insofar as it serves as an appropriate organizing principle for social arrangements that allow the public to effectively evaluate its authority in this domain.

¹⁹⁸ Although Waldron is attentive to the relationship between hypothetical and actual consent, he is skeptical that the reforms necessary to accommodate the move from the former to the latter are “not very promising.” Thus, he suggests that liberalism gives primacy to a hypothetical form of legitimacy that preserves the institutions more or less as they are (i.e., what Waldron pseudonymously refers to at the end of the article as “the now”), but at the cost of conceding that liberals cannot claim to be entirely ‘neutral’ in accommodating different visions of the good (Waldron 1987: 145-146).

There are numerous ways the state might act as an illegitimate custodian of asylum policy. The state may fail in its commitments to international law, renege on its promises to support particular refugee groups, intentionally sow divisions between citizens and non-citizens, or participate in foreign ventures that either dramatically increase the chances of refugee movements or intentionally cause civilians to flee.

Citizens must have some way of recognizing deviations from the public interest when—not *if*—they occur. And they must also have the will and means to react to transgressions so as to curb or prevent the state from cultivating habits that undermine public trust. The social mechanisms of the restive state must therefore be sufficient to ensure that deviations will be readily noticed and effectively curtailed.

I will conclude, then, by providing a synopsis of the restive state, anticipating somewhat the institutional claims developed in Part II by dealing with one practical and one (pseudo) theoretical criticism of my approach.

Citizens and non-citizens will be best positioned to resist illegitimate authority only if they are independently organized and empowered outside of the structures and immediate influence of state power. These forms of organization will take advantage of internal divisions within the state, namely, the distinctions between the interests of government and the interests of its people, between citizens, and between citizens and non-citizens, allowing that each of these tensions may also be sources of legitimate criticism and tactics of resistance to the illegitimate exercise of power.

The most general practical problem faced by citizens who engage in politics is that their potential opposition to illegitimate authority will lead to increased forms of repression. In his landmark study on *Political Repression in Modern America*, Robert Goldstein remarks that “increased strain and tension in society and increased dissent

(which frequently, but not always, occur together) have been the most important causes of political authorities increasing political repression” (Goldstein 1978: 559). He also points to the availability of “suitable scapegoats” and support for repression from influential political classes (i.e., upper working class and non-government leaders) as significant contributing factors of repressive politics.

Opposition tactics in response to (or in anticipation of) repression should seek, first, to maximize diversity and interdependence, drawing on a wide range of groups with shared goals and interests but taking advantage of different modes and styles of resistance (Cunningham et al. 2017). This requires open communication and coordination between groups and, where possible, an overall division of labour. Hence, shared spaces and logistical deliberations between group representatives will be necessary to create a working division of labour between strategic partners and to coordinate the use of limited resources and informational capacities, and to delegate tasks among individuals and members of different groups.

Second, effective resistance against government authority requires that citizens be able to respond directly to refugees and to build associational relations with non-citizens, not merely as a means of understanding refugee preferences, but to incorporate refugees into associational bureaucracies where preferences can influence policy. The testimony of refugees can be both a source of legitimate resistance or an aid to illegitimate power (historically, it has been both). Thus, independent sources of information, both citizen and non-citizen, must be sought and verified in determining the state’s actions both at home and abroad. In these ways, the restive state can prevent various forms of scapegoating that deter and distract from oppositional movements.

Third, efforts must be made to appeal to non-governmental elites to support movements of resistance and reform. The best way to ensure this support is to enable and incentivise the movement of the middle classes into positions of shared authority and workplace decision-making in associations that will appeal to their interests. It is not within the purview of this work to describe the prospects of membership in asylum-related associations. However, associational politics can take advantage of the fact that immigration and refugee issues are subjects of intense interest. These are rough outlines of the sorts of efforts that comprise the restive state. (Not surprisingly, they share many features in common with others issue-based forms of resistive politics). They will suffice as an indication of the sorts of practical considerations of tactical resistance that are necessary to confront illegitimate authority.

One criticism of this ideal of a vigilant political citizenry is that it is fundamentally incompatible with republican theory. Thomas Simpson (2017) has argued that where the citizens of the state have the power to resist their government they will also have the power to dominate individual citizens. Thus, Simpson claims that republican liberty is “impossible”: “Individual citizens are dominated either by the state or by the people” (ibid.: 27). Simpson says that the traditional republican outlook depends on the possibility of civic virtue but this claim has less to do with the possibility of institutionalizing a non-dominating institutional arrangement and much more to do with an unargued assumption about the possible forms institutions can take in a democracy. Simpson claims that his criticism “is theoretical, not practical” (ibid.: 48) and that “[w]hen one lives among other people, *there is no institutional structure that can ensure that no group has the collective power to invade one*. One must rely on their civic virtue not to do so” (ibid.: 52—emphasis added). Unfortunately, Simpson relies on an unargued

assertion about the nature of democratic institutions as well as a parochial view of the types of institutions compatible with democratic life as the main support for his claim. He does not canvas different institutional arrangements or seek empirical evidence to show that previous institutional structures must always fail. Thus, his argument is built more on assertion than facts about the possibilities of democratic reform or probable models of democratic participation.

He does not consider, for example, whether the major functions of a state can be performed at lower levels of association allowing only as much oversight by the state as is necessary for coordination and the prevention of undemocratic associational types. The associational view I refer to here (to be discussed in Chapter 4) does not rely on deeper forms of civic virtue, sympathy or moral commitment. It requires only that individuals are reasonably self-interested and can be suitably compensated for performing roles of civic governance (Hirst 1994: 62). This does not mean that particular associations cannot try to wrest control from the state or from other associations. But the restive state will endow associations with dominating power over individuals only if they form a collective will that cannot be checked by other individuals, through limited state control and democratic associational governance. Controls are needed to prevent vigilante forms of associational politics, but it is not impossible to prevent such vigilantism from gaining a foothold. If associations are voluntary, then individuals can exercise their rights to exit or to join other associations (*ibid.*: 196, 199). Associations rely on individuals as essential to performing their functions, but citizens do so only insofar as associations fulfil their basic needs and interests. Whether associations can be externally balanced and internally democratic on republican terms remains to be seen. This is the task of Part II.

PART II

CHAPTER FOUR: POLITICAL ASYLUM AND ASSOCIATIVE DEMOCRACY

In this chapter, I argue for new model of associational democracy as the basis of social governance in refugee and asylum policy. The associative republic promotes a new division of political labour within public and private spheres of activity, by redistributing bureaucratic powers and adjudicatory tasks and state functions to lower levels of decision-making. It also offers means by which asylum seekers and refugees can participate in the governing of the state as members of shared voluntary associations. Voluntary associations can provide a much-needed space for decentralized planning and democratic decision-making regarding the needs and interests of present and future refugee populations. Associations do not replace the state; rather they replace state functions in order to redistribute and encourage new institutional capacities among a broader segment of democratic populations. The features that make associational democracy distinctive as a form of social governance can also serve to foster and enhance political asylum's democratic effects. The chapter opens by defining the basic terms of democracy and associationist politics. It shows how the associative reforms are compatible with a functional state and with non-associational institutions. The chapter then traces the roots of associationism to earlier republican instantiations challenging the idea that republicanism is necessarily a theory of citizenship as well as the idea that citizenship (or a path to citizenship) is the instantiation of the ideal of political freedom and the goal of an effective asylum policy.

4.1 ASSOCIATIONS AND ASSOCIATIVE DEMOCRACY

The problem that the politics of asylum seeks to address in response to asylum seekers and refugees is fundamentally a problem of democracy. Liberal and republican accounts

differ as to how this problem is constituted. For empirically minded liberals, refugees threaten the viability of a functioning democracy because the obligations imposed on liberal states by refugees' claims for protection can far outstrip any particular state's capacity to provide for their well-being, even on the most minimal criteria of assistance and temporary protection. For this reason, the solution to the problem of democracy is usually one of co-operative outsourcing; it requires coordination between states with similar duties and similar means and interests in preserving the institutions for which they can claim to be legitimate states of asylum. In this chapter I want to show how the solution may instead be *internalized*.

I argue, counterintuitively, that we can do this by incorporating more refugees into the state and by expanding the capacity to receive refugees through a new politics of associationism. Refugees and political exiles often form or participate in a wide range of voluntary political associations both within their host societies and transnationally. As J.C. Moya has illustrated:

millions of immigrants throughout the world have developed impressive organisational structures with little or no state support other than the granting of associational freedom. [...] It is also evident that government logistical and financial support can, and does, encourage the formation of certain types of service-providing organisations and advocacy groups, and aids political incorporation. (Moya 2005: 857).

Unfortunately, associationist principles and associative democracy rarely feature in debates about the politics of asylum. Theories of associational democracy usually focus on associations as groups whose influence on policy norms is framed by the interests of citizens within particular states. Liberal theories of associationalism have been openly sceptical about the prospects of developing wider forms of associational politics that include non-citizen or 'mixed' associations. Associationists have also tended to view

republican doctrine as incompatible with modern decentralized forms of democratic association. These sticking points set the agenda of the chapter which can be divided into three basic tasks: to re-examine the relationship between republicanism and associationism, to determine the role or roles of non-citizens in democratic associational institutions, and to assess the republican conception of political asylum from the perspective of the institutional goals of associational democratic reform. In response to the first task, I argue that the neo-Roman tradition of republican thought offers fertile ground for developing an account of republican associationist politics and political institutions aimed at maximizing freedom as non-domination. Responding to the second task means attending to the question of whether the benefits and political virtues of associational forms of governance can be leveraged on behalf of non-citizens and, further, whether non-citizens are likely to create or make use of existing associational institutions. The third task leads us to consider how asylum seekers and refugees acquire associational status through which they may form or enter into voluntary political and service-oriented associations in their host societies and what this status amounts to.

Before we begin, a few further preliminary distinctions and qualifications will help to situate my account of associational democracy and its implications for the neo-republican theory of political asylum. An association is a socially organized unit of shared purposive activity (Warren 2001: 39). Associational democracy (hereafter associationism)¹⁹⁹ refers to a means of organizing democracy, of coordinating and distributing the tasks of democratic political governance within the state. The theory of

¹⁹⁹ Throughout the text I will use the terms associative and associational democracy as well as associationism interchangeably. For the most part, I will avoid the term ‘corporatism’ which is sometimes used in associationist literature since corporatism is often either associated with authoritarianism or an attempt to offer a comprehensive alternative to representative democracy (Hirst 1994: 16, 25). However, I do have occasion to refer to guild or corporatist politics, though this usage is largely confined to its historical context.

associations consists of a central descriptive and a central normative claim. The normative claim is that individuals should be free to pursue their visions of the good life through voluntary associations that can appropriately track their interests and concerns. The empirical claim is that distributing power and functionary roles of state governance through voluntary secondary associations is the best means of promoting these freedoms (Hirst 1994: 19). We will return to discuss particular associative functions and their democratic effects below. For now, let us draw out some of the broader outlines of democratic association.

Most important for our purposes here is the tri-partite distinction between republican, communitarian, and liberal modes of association. Communitarians are generally interested in promoting associations among likeminded individuals who share a common moral framework and who are attracted to associational life, in part, as a means of stimulating participatory forms of democracy and gaining greater access to democratic controls. By contrast, the core impulse to republican associationism is not the wish to engage in participatory or populist forms of government, but to increase one's control over arbitrary forms of interference through associational *status*. The view is not unfamiliar in the context of citizen associations, as Walzer points out:

the possibility of citizen activism...at least imposes some restraint upon the rulers, and that is a possibility citizens can keep alive without ever doing anything themselves (though sometimes, surely, they ought to do something). (Walzer 1998: 68).

Where communitarianism promotes freedom as a positive ideal tied to civic engagement, republican associationism is essentially negative and defensive (see Pettit 1997: 27-31).

Liberal and republican forms of association are similar in that they are both concerned with increasing negative freedom. However, they differ in the way that

negative freedom is constituted or secured by associational status. Where liberals are concerned to defend freedom *of* association, and, thus, to emphasize the importance of preventing state interference with or regulation over associational life (Warren 2001: 26), republicans defend freedom *in* association, the view that within a proper regulatory framework associational status will be constitutive of freedom. One of the main roles of government is to maximize the independence of members in their particular associations, especially to enhance individuals' capacities to exit those associations.

Associationist arrangements function best under decentralized power arrangements that allow regional and federal governments to be tasked with different organizational functions and to retain different powers in coordinating and supporting both refugee-specific and other associations that refugees may enter into. However, not all associationist proposals presuppose or aspire to a democratic associational state. Republican associationism does not presuppose a robust or thoroughly associationist polity and I do not argue for an advanced or mature form of the associationist state here. Similarly, the effective operation of refugee associations does not presuppose a robust or thoroughly associationist polity. Instead, the aim is to work within the limits of 'pre-associationist' democracies,²⁰⁰ to show how the incorporation of non-citizens under associationist schemes is compatible with existing democratic frameworks.

This qualification brings us to the second point. The ideal of a purely associational state where rights of exit are inalienable and exit imposes few significant costs on members is too idealistic. In this sense, the state itself is viewed as an essential associational structure without which there could be no basis for other forms of

²⁰⁰Associations play a massive role in the United States serving many crucial civic functions in cultural and economic life (Warren 2001: 10).

associational life. So, although the voluntary nature of associations is crucial to their success as freedom-promoting enterprises, the background society against which associational cooperation and exchange will usually require a certain measure of involuntary commitment and this means that its members will not necessarily enjoy unfettered rights or cost-free modes of exit. Voluntary associations that have a low-cost of exit and high responsiveness are parasitic on a larger *involuntary* association within which these low-cost-exit associations operate, and without which they would not be possible. In the language of republicanism, we would say that the freedoms achievable through voluntary association is parasitic on the freedoms made possible by involuntary associations (Cohen 1999: 216-219). So there is no contradiction in saying that freedom-as-non-domination-through-association requires that there be a state that imposes limits on its members freedom of exit *qua* the state (on this point see, Walzer 1998: 72). The state is a “political opportunity structure” for voluntary associations (Cohen 1999: 223; see also Rawls 1999[1971]: 82; but see the objection by Bohman 2007: 24-25) not an anarchic structure or free-for-all mode of social interaction.

These points relate to the third qualification. The more or less exclusive focus on voluntary associations in this chapter should not be taken to imply that voluntary associations are the be-all and end-all of civic politics and political freedom in asylum (Cohen 1999: 216; Gutmann 1988; Streeck 1992). Many other features of the liberal democratic state—its commitment to human rights norms, the competence of its officials, and its responsiveness to public pressure, to name only a few—play important roles in contributing to or constituting a refugee’s freedom as non-domination as security of tenure. But this worry should not be overstated. Any account of associations that is not inherently inimical to the state will recognize the important—albeit difficult—

relationships between the two. This does not yet tell us what role government should play in associational life if associational membership is to be consistent with non-domination (i.e., a means of preventing arbitrary state interference), but it does leave room for governments to play some role in preventing associations from becoming overly factionalist or internally repressive (Green 1994). Republicans will respect this fact, knowing that associations can become contexts for domination. Insofar as republicans recognize the role of government in protecting associational rights of exit, and internal domination, they will oppose Hayek's claim that "if people are to be free to choose their associates and intimates, the coercion that arises from voluntary association cannot be the concern of government" (Hayek 1960: 138).

4.2 THE REPUBLICAN ROOTS OF ASSOCIATION

Since Pettit first characterized the republican concept of freedom in terms of franchise, or "liberty as franchise" (Pettit 1993: 224, 309ff) the neo-republican notion of political incorporation has become virtually synonymous with full citizenship:

...if freedom is to be something that everyone may have, at least in principle, then it comes to nothing more or less than full citizenship in the sort of society that provides its citizens with protection: it is constituted by full citizenship in a free society. Freedom becomes equivalent to the freedom given by a city, the franchise—in the old, rich sense—given by a state. (Pettit 1993: 311).

Since then, however, a number of scholars have pointed out that full membership in a political society is not a necessary feature of republican freedom (Bohman 2007; Skinner 1998). In his *Termes de la Ley* (1527: f. 167) John Rastell defines 'franchise' as a term expressing corporatist self-government: "[f]ranchise...signifies in our Law an Immunity or exemption from ordinary Jurisdiction, as for a Corporation to hold pleas within themselves to such a value, and the like." But it was also a term used to describe the

“right to live in a place.” In this sense it also meant the freedom granted to asylum seekers: “[f]reedom from arrest, granted to fugitives in certain privileged places; right of asylum or sanctuary; (of a place of refuge) privileged character, inviolability.”²⁰¹

Franchise then connotes a wide spectrum of political incorporation and each form of political enfranchisement corresponds to a form of liberty.

It is possible that full citizenship is the only form of franchise compatible with republican freedom as non-domination, such that anything less than full membership in an appropriately civic-minded state will fall short as a form of freedom. However, there is nothing in the term ‘franchise’ itself to warrant this claim.

The suggestion I want to follow up on here is that republican freedom may be compatible with a wide variety of political associations and forms of enfranchisement. None of these is likely to replace the state as the key to, or guarantor of, freedom as non-domination in its highest form. Nonetheless, as the number and kinds of associational relations increases both within and between states²⁰² and expands there are likely to be important ramifications for how states can contribute to or strategize about how to accommodate its competing obligations to citizens and outsiders. These associational forms of politics may also have important implications for republican theory as well. In his attempt to contrast liberty in its liberal and republican guises, Pettit raised an important question as to how it could be that liberal freedom was so successful in eclipsing the republican ideal in the 19th century.²⁰³ Pettit’s (1993: 314-315) answer was that liberal and republican conceptions of freedom were responses to different social

²⁰¹ “franchise, n.” OED Online. Oxford University Press, August 2016. Web. 11 Aug. 2016, Definitions 1a, 4, and 5.

²⁰² For a discussion see, Fitzgerald (2008).

²⁰³ I do not wish to argue that this is in fact what happened.

contexts, against which they were posed as rhetorically powerful antonyms. Republican freedom was the (Roman-inspired) antonym of vulnerability to corrupt and despotic rulers. Liberal freedom was the antonym of state and legislative interference with the socio-economic interests and prosperity of members of the commercial class. Pettit's idea that conceptions of freedom reflect and resonate with particular challenges and issues of the day is an important one. Earlier republican and liberal theorists may have been concerned exclusively with the freedoms of citizens "as distinct from residents who do not enjoy citizenship" (Pettit 1993: 315), but it is no longer possible to ignore the overwhelming issue of non or semi-citizens.

The relationship between associationist politics and republican principles has not been thoroughly examined. Its absence is particularly noticeable in the context of the so-called 'democratic turn' in Machiavelli scholarship (e.g., MacCormick 2011; Litvin 2015; Holman 2018) which highlights Machiavelli's principled support for populist and anti-elitist forms of governance. This is especially important in the context of the history of the Italian Guild society. The core of Machiavelli's explanation of the infighting among guilds and the eventual downfall of the guild system was that "the guilds produced *disordini* because the corporate system was not sufficiently extended to include the full range of Florentine social and professional categories as equal and independent partners represented through their own guilds" (Najemy 1978: 177). Although there are important signs of a growing interest in associationism among republican scholars²⁰⁴ relatively little attention has been paid to the range or forms political enfranchisement can take. Given the predominance of the much-touted republican adage 'to be free is to be a citizen of a

²⁰⁴ Recent examples include, Bellamy and Castiglione (2000); Southwood (2002); Owen (2014); Fitzgerald (2008).

free state' as well as worries about the conflicts generated by factionalist interest groups, it is not surprisingly that republicans have seldom explored how existing political arrangements could foster republican forms of political incorporation that are distinctive from or even resistant to political incorporation by way of naturalized citizenship (Cohen 2009).

Similarly, although non-citizen associationist politics have not gone unnoticed by immigration and forced migration scholars, the relevance of republican associationist ideals to the politics of refugees and the ethics of asylum has yet to be considered in any detail. One reason for this is that migration scholars do not generally distinguish between liberal, communitarian or republican forms of association (e.g., Moya 2005). As a result, they have not drawn conceptual links between historical forms of associationist politics and republican thought. Here I will try to make those links more explicit. It would be impossible to offer a full survey of the complex phenomena of guild politics or the influence of corporatist principles on the development of republican thought. My immediate aim then will be to highlight the relation between associationist politics and early modern republicanism in order to show the close and important relationship between associationist principles of governance and the neo-republican conception of freedom as non-domination.

The historical roots of republican associationist politics can be traced to the *collegia* of the Classical Roman period, voluntary, self-governing associations organized around the provision of various public and private services (Jones 1999; Perry 2006: 6-7; J. Perry 2016). Non-citizen and mixed citizen-noncitizen associations formed on the basis of overlapping ethnic, religious and professional interests are similarly ancient in origin (Ross 1976; Kloppenborg and Ascough 2011: 2, 57, 63-64, 158). Both early modern and

contemporary republican scholars have tended to obscure or to omit the corporatist influences in Machiavelli's thought.²⁰⁵ The recovery of these influences and their significance to modern associationist politics opens up new possibilities for applying republican thought to contemporary political problems in general. Here however I am mainly concerned with the implications of corporate or associational politics for the republican account of the ethics and politics of asylum. There is ample evidence that Machiavelli believed republican freedom and self-rule to derive from a corporatist vision of politics, a particularly potent (albeit an ultimately flawed) example of which could be found in the historical institutions of Florence's recent political past (Wooton 1994: xxxii). However, I will not speculate on whether Machiavelli subscribed to an extant "corporate republicanism" (Baker 2013: 55)²⁰⁶ or "guild republicanism" (Najemy 1979); instead, I show where and how Machiavelli's conception of political conflict and republican non-domination can help us to understand the significance of associational or corporatist principles for republican political asylum. In a famous and much discussed passage from the *Discourses*, Machiavelli writes:

In every republic there are two different humours, that of the people and that of the greats, and that all legislation favourable to liberty is brought about by the clash between them. (Machiavelli *Discourses*, Book I, Chapter 4).

On Machiavelli's view, civil discord between members of the polity is both a republic's greatest strength and its greatest weakness (Bock 1991: 201).²⁰⁷ On the one hand, civil conflict is an ineliminable feature of human sociality and a political instrument of

²⁰⁵ The reasons for this are complex, though the lack of work on this connection may be partially explained by the short-lived success of the guild republic. As Brucker (1977: 18) points out, "[t]he failure of the guilds to sustain their political authority has led some historians to minimize their role in the political and social life of early Renaissance Florence." On the neglect of guild history see also Najemy (1978; 1979: 67ff). Notable exceptions include, Bock (1991); Winter (2012); Najemy (1978, 1979, 1981); Jurđjević (2001).

²⁰⁶ I use corporate republicanism and guild republicanism interchangeably.

²⁰⁷ On Machiavelli's support for 'factionism' see Rahe (2000).

negotiations and compromise between commoners and elites allowing individuals to prevent their own subjugation. Conflict is therefore necessary for freedom. On the other hand, the clash of interests, if not properly mediated, can swiftly bring about the violent dissolution of society. Thus, a key question for any republican community concerns the institutional arrangements or forms of political representation that can be devised to channel and control conflict in a way that preserves the virtuous features of discord while suppressing its dangerous tendencies. Contemporary scholars have often taken Machiavelli's view of conflict as an early endorsement of modern political party systems (Bock 1991: 184).

In the political turmoil and commercial expansionism of thirteenth century Florence, guilds emerged as loci of socioeconomic and political power and were therefore at the centre of political conflict between members of different social classes and competing interests. This led to a new form of politics, “a kind of confederation of guilds’ [in which] guilds were the political intermediaries between individuals and the state” (Winter 2012: 740). As John Najemy has argued “the guilds...represented...a specific political and constitutional program, based on some definite legal and corporate principles, that carried the potential for a completely contrasting vision of the Florentine republic” (Najemy 1979: 55n6). The corporatist principles presupposed by this form of republicanism were radically—often violently²⁰⁸—opposed to elitist and hereditary forms of government (Brucker 1977: 32; Baker 2013: 17). Although early modern and renaissance exponents of republican theory were unable to observe corporatist

²⁰⁸ The Ciompi rebellion (1378) being the most significant for its effects on the nature of the conflict between aristocratic and corporatist factions as well as for the Ciompi regime that ruled Florence for a brief six-week period, followed by a longer duration (1378-1382) under a divided guild regime that was nonetheless surprisingly proficient in settling disputes among its members through representative negotiations (Brucker 177: 42ff).

government first-hand as a political system the significance of corporatist politics with its themes of decentralization and dissolution of private power were not lost on Machiavelli (Najemy 178; 1981: 315-317; Wooton 1994: xxxii). Indeed, Machiavelli repudiated his compatriot, the humanist historian Leonardo Bruni for obscuring Florence's corporatist legacy and for systematically concealing the pervasiveness and political role of the guilds at the height of their influence in Florentine domestic history (1250-1400). In particular, Bruni's influential work suppressed the relationship between corporate principles and republican doctrine, and, thus, the potential of a federated system of guilds as a means of organizing 'legitimate political conflict within a community' by regulating socio-economic policy and divergent class interests, preventing factionalism, and promoting the common good (Najemy 1978).

In his *History of Florence*, Machiavelli gave the guilds their due in domestic politics. On Machiavelli's view, "[i]f Florence had ever been or might have remained a healthy and free political society, this was at least in part owing to its guilds" (Najemy 1978: 172). Najemy (1979: 64) argues that "[t]he notion of the guild community as a voluntary federation of equal and autonomous members tended, in the nature of things, to be an expansive ideal." Najemy's review of the testimonial and official documentary evidence reveals two types of expansion. First, power within the guilds became more widely and evenly distributed. Second, individuals seeking representation for their interests formed new associations and sought entry into the guild federation. Although, in practice, both kinds of expansion were fraught with conflict and resistance from competing interests (not least from the anti-corporatist elite), expansionist tendencies were generally encouraged both by practical necessity and corporate principles of associational government.

As Najemy explains:

Popular governments often needed support for their constitutional and political programs and were most likely to find it lower down in the social and professional hierarchy among those groups willing to trade such support for recognition of their own corporate and political aspirations. (Najemy 1979: 64; see also Najemy 1981: 25).

These expansionist tendencies should not obscure the fact that, to contemporary observers, guild politics would have appeared distinctly undemocratic (Hirst 1994: 46).

The guild system does not provide a model for modern politics. However, that republican ideals underpinned guild politics suggest that the relation between modern republican theory and new associational forms of governance deserve closer attention.

Unfortunately, both associational and civic republicans are guilty of giving short shrift to the relationship between republican ideals and associational forms of governance. Debates about the democratic potential of associational forms of governance are often couched in terms (liberal or communitarian traditions) that overlook a distinctively republican approach. At the same time, contemporary republican thinkers who are keen to endorse civic associations often fail to specify a role for the ideal of non-domination in their democratic theories.

By contrast, early republican thinkers often recognized the intimate relationship between political domination and civil society as well as the significance of civil associations as a means of generating awareness of arbitrary power in all aspects of individuals' daily affairs.²⁰⁹ Tocqueville (1994, II: 115-120) claimed, for example, that

²⁰⁹ Honohan has interpreted Tocqueville's claim through a distinction between political and (non-political) social associations. Thus, she claims that in "emphasising the value of voluntary social associations" Tocqueville's *Democracy in America* was espousing ideas "less specifically political than earlier republican ideas" (Honohan 2002: 115, 116). Warren (2001: 29-31) has similarly claimed that Tocqueville's approach is overly simplistic and, institutionally, "not in itself remarkable". We should be cautious however not to view *Democracy in America* as too far removed from overtly political forms of association. As Tocqueville himself observed, the significance of civil associations cannot be easily separated from their political

“civil associations...facilitate political association”, an observation amply confirmed (though significantly reversed) by contemporary studies of civic associations in Western democracies as well as totalitarian systems of governance (Almond and Verba 1963; Smith and Freedman 1972; Hanks 1981; Verba, Schlozman and Brady 1995: 61; Welzel and Alvarez 2014).²¹⁰ Non-political associations—from church groups to book clubs—provide opportunities for individuals to develop organizational skills, interpersonal connections, and a host of civic virtues that are crucial for stimulating and sustaining political association (Sandel 1998: 348; Han 2014; Smith and Freedman 1972: 98; McFarland and Thomas 2006; Dalton and Welzel 2014). So, while civil and political associations are distinct, the former are for Tocqueville a *necessary* precursor for political organization. Tocqueville admits that a centralized authority has many advantages over decentralized forms of organized social life. However, as he notes, it is:

the *political* advantages which the Americans derive from their decentralized system induce me to prefer it to the contrary plan. It profits me but little, after all, that a vigilant authority always protects the tranquillity of my pleasures and constantly averts all dangers from my path without my care or concern, if this same authority is the absolute master of my liberty and my life. (Tocqueville 1994, Vol. 1: 92—emphasis in original).

Honohan’s point is well taken if we assume that devolutionary associational reforms will lead to dominant associations whose membership, goals, and interests do not differ significantly from the membership, goals and interests that already control the distribution of wealth and power in virtually all developed nations. It is extremely important then that the massive disparities in wealth and power that currently exist are not replicated or concentrated further under the guise of democratic reform.

instantiations, since: “[i]n all the countries where political associations are prohibited, civil associations are rare” (Tocqueville 1994, II: 115).

²¹⁰ cf. Verba, Schlozman, and Brady (1995: 40) who refer to “the embeddedness of political activity in non-political activity.”

Theorists of associational democracy have inherited a misconception about the alleged incompatibility of neo-republicanism and contemporary associationalist theory. This misconception is due in part to a failure to distinguish republicanism from communitarianism. But it is also a result of associationists' own attempts to define their principles and to align their efforts within a liberal framework that opposes (classical) republican²¹¹ political doctrine. Paul Hirst is explicit that associationalism is incompatible with republicanism, concluding his own study by reminding us of this essential contrast:

The civic culture of an associationalist society will have a different logic from that of democratic republicanism, one closer to liberalism in its giving primacy to the individual's right and capacity to choose. [...] Republicanism claims the larger part of the citizen and demands identification with the state as a community, not just as an association with important but limited functions. Associationalism allows the citizens to choose the communities he or she will create with others, and demands in return the duties of respect for others' rights to choose. (Hirst 1994: 202).

The contrast of associative and republican politics is based on the incompatibility of republicanism and *voluntary* association. One problem is that the voluntary nature of associations, organizations freely chosen by their members whose right to exit from these arrangements will often be fundamentally at odds with the objectives of 'compulsory collectives', patriotism, and the cultivation of culturally specific virtues all of which have featured centrally in the republican tradition's recent revival (Hirst 1994 70; Hindess 1991: 179ff.; Pettit 1997: 260; see also Taylor 1989; Miller 1995; Viroli 1995).

Compulsory collectives require significant group cohesion and commitment to the success of the group over time. Although these forms of association do not preclude the possibility of exit, they make exist extremely costly for individuals and virtually impossible at the larger scale (Warren 199: 22; Lovett 2010: 38-40).

²¹¹ Hirst does not refer here to the idea of republicanism developed by Pettit, but to its more general civic or communitarian rendering. See my comments below.

The implication of Hirst's and others' criticisms of neo-republicanism is that insofar as the latter demands a high level moral and cultural homogeneity or a form of socialization that is anathema to voluntary associationalism, republicanism itself is anti-associationist in a crucial respect. We should have no reason to worry about this sort of complaint. For by now it should be clear that Hirst is speaking of a version of "neo-republicanism" narrowly identified with forms of socialist democracy and culturally insular self-governance. This form of republicanism is identified with the Aristotelian tradition and the emphasis on civic participation (Pocock 1975). By contrast, the form of republican freedom we have been considering—freedom as non-domination—is aligned with the Italian-Atlantic tradition of republican thought that, in its contemporary form, makes a conscious break with the communitarian overtures of the later republican writers. Republicans in this sense are likely to be sceptical of demands for cultural conformity and patriotism.

Jean Cohen raises a second, but related problem for attempts to combine republican and associative principles. While Hirst is concerned about the compatibility of republican politics and the freedom to exit those relationships, Cohen (1999) worries that voluntariness is itself a value only where there is a suitable range of associational forms. Some civic republicans (e.g., Putman 1993) have sought to promote a more restrictive civil society that is primarily invested in restoring traditional forms of associational life to their former prominence, above all, the family. Yet this will only be an issue where the range of associational forms is so anaemic as to preclude interest in joining or creating new associations of interest, a problem that can only be faced by the most restrictive and insular societies, and, even then, only for as long as those societies remain in strict isolation.

A third problem for attempts to combine republican and associative forms of democracy is that associational politics seems to entail a form of civic participation that is incompatible with, or even repudiated by, republicans. However, it is worth recalling that Pettit neither denies the importance of populist democratic participation nor does he repudiate associational forms of participatory democracy. Rather, he claims that there are conceptions of democratic participation that are both *unfeasible* and *unnecessary* (Pettit 1997: 81). That is, there are positive conceptions of freedom associated with forms of democratic participation that place unrealistic participatory demands on members of the public to exert influence over basic decisions which, in practice, are limited by differences in the interests, motivations, and capacities of large numbers of people. Pettit's claim, by contrast—a claim which he did not defend directly—is that democratic forms of participation will arise more or less naturally out of conditions that bar arbitrary interference. Once freedom from arbitrary interference is secured participation can be entrusted to individuals whose individual interests “makes it possible to recruit people to the exercise of civic vigilance on the basis of their concerns and passions” (Pettit 2012: 226-227). In his later work, Pettit emphasises the importance of a division of civic labour in exercising vigilance and maintaining democratic control within the larger apparatus of the state. This account paves the way for an explanation of the emergence of associational forms, the types and modes of association that may be consistent with a non-dominating society, and their democratic effects.

4.3 THE IDEAL OF CITIZENSHIP REVISITED

Before we examine the model of association asylum reform, it's important to deal with the question of whether anything less than full citizenship for refugees (and initially, a

path to citizenship) can meet the goal of non-domination. In Chapter 2, I noted that the acquisition of citizenship is neither a necessary nor a sufficient condition for achieving freedom as non-domination. Granting citizenship to refugees is not inconsistent with the goals of republican theory. And the suggestion that only by allowing refugees to acquire status as equal citizens can liberal governments guarantee their protection against domination is misleading. There are four main reasons why we should be hesitant to hold out for citizenship as the ideal of political asylum.

First, it is important to note that the capacity to participate as an equal member of a democratic society is a pre-condition for achieving and maintaining personal liberty, republicanism is not the view that membership is necessary for, or definitive of, freedom as nondomination (Skinner 1998: 74n38; Bohman 2011: 9). On the contrary, as Pettit has shown, for many key republican figures, the “focus [is] on avoiding interference rather than on achieving participation” (Pettit 1997: 28; 27-30). Republican liberty should therefore not be equated with having a political role in democratic processes of government; rather, liberty is understood as a status (Pettit 1997: 30), which may be aided by the ability to occupy a recognizable role in processes of governance, but which is ultimately independent of any such role.

Individuals may be free from the dominating power of others simply in virtue of public ordinances or laws that, if violated, will result in severe penalties to the transgressor. But it’s important to distinguish between serving a political role that is recognized or accorded by states, and the capacity to wield political ‘influence’ independent of such role recognition. It is an important question whether this capacity, specifically when wielded by non-citizens, is politically legitimate; that is, whether (outside) influence, its effects, and so forth, can be consistent with the political ideal of

freedom as non-domination. We can approach this question by introducing a further (tentative) distinction between legitimate and illegitimate outside influences. (The distinction is tentative because it may be that any political influence from outsiders is either illegitimate, or less legitimate than influence wielded by citizens.) The distinction rests on an assumption that states are not closed systems - no state can operate entirely on its own resources in gathering information, making decisions, or interacting in the broader world. Asylum seekers with valid claims represent legitimate forms of outside political influence. This makes clear the importance of designing institutions of asylum so that they can recognize illegitimate sources of outside influence or knowledge. States or institutions of asylum for which the processes are rigged so as to deny the political legitimacy or influence of outsiders, or which presuppose the illegitimacy of outside political influence, are to this extent inconsistent with the ideal of non-domination.

The protections normally afforded to many foreign workers and tourists are a case in point. It is unnecessary to invoke the status of citizenship in order to make sense of the ways in which an individual can be robustly shielded from arbitrary forms of interference. Conversely, the status of citizenship is often insufficient to prevent one from being subjected to unfair criteria of political incorporation. This is especially true in the case of political shocks and social upheaval. Speaking of the post 9/11 period of US immigration reform, Galya Ruffer explains that:

...the more that certain immigrants—Muslims, in particular—learned the common *liberal* rules of deliberation and accessed liberal rights, the more that the bar kept going up in terms of what a *shared* membership entailed. In other words, the more that certain immigrant groups began to *deliberate* or *contest* in the public sphere...the more of a threat to the *liberal* state they seemed to pose. It began to seem clear that *parallel* societies were preferred as long as they remained, indeed, *parallel* and did not lay claim to the public or *civil association* in any real sense. (Ruffer 2013: 246-247—emphasis in original).

Second, and relatedly, there can be no equating citizenship with freedom from domination without presupposing that to be a citizen is to be in the possession of rights, privileges, and powers sufficient to prevent and control a wide array of arbitrary interferences. As Cécile Laborde has noted, “I am free only if I am recognized by others as enjoying a status that protects me resiliently against arbitrary interference and guarantees my *equal status* as a citizen living in community with others” (Laborde 2008: 2—emphasis added). Yet equal citizenship sets a high bar and perfect equality is unknown in any modern society. Let’s suppose then that equal citizenship is understood not as perfect equality among citizens, but in sufficientarian terms (Shields 2012). On a sufficientarian view of citizenship, all official members of society must secure enough such that questions of equality are directed at addressing material and social inequalities *above* the minimal threshold, and not across that threshold. This is important, since in the absence of basic income or living wage reforms or universal health care, one’s status as a citizen does not tell us whether one has even a minimal chance of being resilient against arbitrary interference.²¹² Furthermore, only if we can establish the minimal threshold of citizen equality can we determine what counts as an arbitrary form of interference sufficient to require *additional* guarantees (guarantees among those we could, above the threshold, call more or less equal citizens).²¹³ In the absence of a threshold arbitrary interference knows no bounds.

Third, while decisions for granting political asylum as part of a pathway to citizenship have often be viewed as a means of creating loyalty to the state, they may also

²¹² It is telling that though you may sit behind Rawls’ veil of ignorance where “no one knows his place in society”, there is nothing that prevents you from knowing that you are a citizen. See, Rawls (1999 [1971]: 118-120).

²¹³ “[O]nce a person has secured enough the relationship between our reasons to benefit her and how well-off she is changes. Whether she has secured enough or not affects the rules that determine the weight of our reasons to benefit her” (Shield 2012: 108).

lend themselves to conservatism and status-quo politics by creating bonds of loyalty not to the abstract ‘state’ but to the institutions and norms that reinforce existing relations of inequality (Aptekar 2015: 133-135; Devetak 2003: 38-40).²¹⁴ Support for the naturalization of immigrants and political refugees has often arisen in response to labour shortages that might increase the power of working class citizens. Thus, for Locke, the ‘problem’ of naturalization was to “convince fellow citizens to accept strangers” (Resnick 1987: 368), though it is clear that those he seeks to convince are not just *any* citizen, but the propertied classes with whom Locke shares an overwhelming concern to counter the most troubling effects of a reduced workforce, namely, the “swelling independence among the working masses, which commonly manifested itself in a refusal to engage wholeheartedly in unremitting toil” (John Hatcher 1998: 64 quoted in Hindle 2013: 255). Robert Miles has shown that government responses to British labour shortages in the late 1940s revealed “a clear preference for the recruitment of alien migrants [largely political refugees] over British subjects from the colonies to fill vacant positions” that was “grounded in the fact that British citizens from the colonies could not be deprived of the freedom to commodify their labour power in the way that aliens could” (Miles 1989: 439-440). As he notes, “it is clear from the evidence that the admission of refugees to Britain in this period was not determined by solely humanitarian considerations, but was also shaped by the perceived economic value of their presence” including the value of

²¹⁴ Resnick overreaches in claiming that Locke’s support for naturalization “...reflects [a] new understanding of citizenship and nationality” or a “reconceptualization of the relationship between subject and sovereign” (Resnick 1987: 378, 379). What Locke fears most is the increasing independence and freedoms of the working classes in response to the declining stimulus of unrelenting poverty. Locke’s solution, which he is confident will also serve as the best insurance against the perceived disloyalties of aliens, is to prevent this decline by encouraging a labour glut. Thus, in response to the criticism that foreigners would “eat the bread out of our own peoples mouths” Locke points out that this “is no father true than it is a confession that they work cheaper or better” (Locke 1693: 389).

applying harsh working “restrictions [that] could be legitimated by the fact that the workers were aliens rather than citizens” (Miles 1989: 437-438).

Finally, there will be considerable pressure on asylum seekers and refugees to accept naturalisation or citizenship, especially if those processes provide the only means to ensure their protected status or their political rights against the host state’s discretionary powers. Migrants may well believe it is in their interests to adopt the habits, sentiments, and ideologies that are culturally or politically approved so as to increase their eligibility for citizenship and thus resilient freedom from return to their persecutory state. So although citizenship may offer many advantages, and although not all forms of social pressure will be equally problematic, if the terms of one’s citizenship are too onerous, requiring conformity to values or social roles, without corresponding opportunities to contest those values or roles, then citizenship may come to be a practiced form of prudence and thus an unacceptable form of domination. Republican non-domination may, in fact, require special protections against cultural assimilation and nationalistic policy insofar as these agendas are pressed on persons whose conformity is more or less assured not by their moral or political convictions, but in virtue of their social status or their need for acceptance.

Even if we could counter these problems with citizenship acquisition, we would still have to contend with the fact that gaining citizenship provides only limited potential for improving the democratic character of liberal asylum states. The average citizen of refugee-receiving states lacks influence over asylum policies and adjudicatory bodies that cannot be not made up in political powers exercised at the voting booth. Electoral rights empower citizens to favour bundles of policies and platform promises that are too diffuse to constitute a significant check on government powers to reform or to apply asylum

policies at their discretion. Luckily, citizenship is not the only form of political incorporation at our disposal.

4.4 POLITICAL ASYLUM UNDER ASSOCIATIVE REFORM

The limits of intra-state reform, the extent to which these reforms can be inclusive of, or encourage effective representational status for, non-citizens has been seen as a major challenge to associative democracy:

[H]ow can [associationsists] be so concerned about problems of entry and exit to associations, when people wait in detention camps at the boundaries of states, live illegally without rights as economic migrants, or simply suffer at home because they are too poor and weak even to get to the borders of the wealthy world. [...] If we accept that all people are equal, if we also accept that wealth is social within our own communities, and that membership confers certain rights to share that wealth, how can we pretend that those arguments stop at a border? (Hirst 1994: 72, 73).

To these questions, Hirst says associationism contains “no ready and effective answers.”

Hirst’s suggestion that associationism is an ineffective response to global conditions of socioeconomic inequality and refugees is likely to be echoed by those who think that “[n]o community, and *especially not* a democratic one, can afford—for both economic and political reasons—to treat more than a few nonmembers as though they were members” (Streek 1992: 519—emphasis in original). But associationism needn’t go so far as to endow asylum seekers with the full array of privileges, rights, and obligations that are constitutive of citizenship or full citizenship. It requires only that asylum seekers and refugees have a state-sanctioned, publicly protected and politically contestatory status within relevant associations.

One means of achieving a system of organized secondary associations relatively cheaply and efficiently would be to institute a publicly funded program that incorporates refugees by entrusting public funds to secondary associations that are capable of

attracting refugees to their associations. On this system, refugees receive vouchers which they distribute to association(s) of their choice. Associations submit these vouchers to access public funds which are then used for organizing and distributing resources and services to their membership (Rogers and Cohen 1996; Schmitter 1992; Bellamy and Castiglione 2000). The associations must, in turn, provide a means of exit and undergo basic tests of internal democratic proceduralism to prevent corruption or undue concentrations of power that would undermine the general ecology of associational life. Refugees could be drafted through deliberative assemblies or meeting halls which would see various associations compete for refugees' vouchers on the promise of expanding services, providing political representation, economic opportunity and so forth. Refugees choose the associations that align most closely with their interests while retaining the power of exit if their membership fails to produce or when refugees find other associative opportunities and allegiances.

The associations themselves correspond to the purposive functions of state management in refugee and asylum affairs divided into federated or regional subsystems of associational control. The goal is to reproduce state functions through dedicated associations that can take on the roles of border control and interstate transportation oversight, integration, overseas diplomatic missions, adjudicatory functions (e.g., claims processing, refugee review boards, appeals processes), integration (workplace management, health care, education, housing, food, clothing), and so forth. These are approximations since we cannot determine ahead of time all of the functions or values around which associations may coalesce in determining regional or confederated needs. Together, the associations form a complex matrix of power sharing and deliberative duties. As Paul Hirst (189-195) has shown, such a system can avoid devolving into petty

fiefdoms by creating specialized associations for interregional and intra-associational governance under a constitutional government that ensures the basic framework for participation within and between associations but without becoming the sole arbiter of disputes or power-conferring body.

Consider the issue of border control. Within the associational state the functions of determining entry and exit can be divided into several distinctive tasks. There are issues of initial health assessments and trauma counselling, credibility assessments, and security protocols, followed by adjudicatory and further needs assessments. Where refugees are admitted they will require temporary integration into the host communities and ongoing care and support. The duties that are divided within a single state bureaucracy can thus be sub-divided into a less concentrated division of labour but with specialized associations for coordinating each associational function. There is no getting around the complexity of border control systems, but there are ways of maintaining a system of power-sharing between functional roles that will not allow any one system of bureaucracy to control all the levers of power or to stall the entire mechanism of control.

Of course, such a system will not be without problems. For example, significant worries may arise regarding material inequalities that can be exacerbated by new associational political arrangements. Honohan voices this concern noting that the proliferation of voluntary associations in the public sphere is likely to generate “material inequalities” that must be countered through accountability mechanisms:

[V]oluntary associations are likely to amplify disparities of resources. [...] Such private concentrations of power endanger freedom as much as public institutions. The republican concern to expand the say of citizens suggests that organizations in public spheres should be accountable in some way, and that the material inequalities they generate need to be countered. (Honohan 2002: 235).

Yet, the problem of material inequality is not itself unique to associationism. Given the extreme levels of inequality that currently characterize global and democratic distributions of wealth, it is reasonable to ask whether associational arrangements would fare worse than other forms of political franchise.

For our purposes, in assessing whether to grant a certain number of asylum seekers refugee status in our society, we will want to establish the marginal utility of accepting more refugees—i.e., the point at which more accommodation into the polity will cease to diminish domination, or even threaten to bring about an increase in domination within the polity. But the question as to when exactly this threshold will be met seems to me simply another issue that associationism cannot provide a concrete answer. This is because the republican cum associational approach for assessing political alternatives to refugee policy is neutral with respect to whether particular institutions of a society ought to be protected or preserved. On the republican account, particular institutions are good or bad only insofar as they are likely to be better or worse at bringing about or maximizing non-domination than a feasible alternative or more or less resilient in the face of mass migration and refugee incorporation. The question then is not straightforward and we must resist the impulse to apply the republican formula within current institutional arrangements alone (Schmitter 1980).

4.5 THE DEMOCRATIC EFFECTS OF ASSOCIATIONAL ASYLUM

Associations make up for three important democratic deficits that contribute to dominating forms of asylum. First, associations can provide forums for determining issues of common concern both among refugees and between citizens and non-citizens which states can use to better track the interests of refugees vis-à-vis the common good.

Second, refugees can use associations as a means of representation and coalition-building in order to gain access to public forums and thus to the realm of public justification where governments and institutional representatives are more likely to be held accountable.

Third, the possibility of entering into voluntary associations provides refugees with a greater range of choice in and means of safeguarding their status while avoiding the more arduous and politically self-effacing aspects of naturalization processes. Republican associationism emphasises individuals' capacity to exit from particular associations that refugees can use to check the internally repressive and politically homogenizing tendencies of associationist politics. At the same time, asylum seekers acquire 'contestatory powers' that attest to their political status. This, in turn, enhances the contestatory powers of the *public*, together with whom refugees and asylum seekers share a common interest in maintaining or improving the legitimate authority of their institutions (Pettit 1997: 68, 70). Associational participation thus helps to fulfil the requirement of mutual political recognition through open, public forums that encourage deliberation, mutual learning, and more diffuse representation. By satisfying this condition, states signal their competence and trustworthiness as epistemic authorities to potential asylum seekers and their willingness to enter into non-dominating relationships. Where these conditions remain unsatisfied, and relations of domination persist, the presumption is that obligations cannot be generated between states and asylum seekers to which each party may be held to account.

As an approach to refugee protection, associationism grants refugees associational status and an equal share in voluntary associations of shared interests over more limited incorporation and protection through the acquisition of citizenship. On the associationist approach, asylum seekers can maintain independence from the states through which they

acquire their protective status, and states can distance themselves from interfering or giving approval to the political identities of those they seek to protect. Furthermore, were the practices and procedures of asylum to become an “associational-governed activity” the state’s role in governing political asylum would be reduced, and its powers and responsibilities redistributed to voluntary associations. The empowerment of voluntary associations to replace the state on key oversight roles in the legislation and administration of state institutions of asylum does not dissolve the state. Instead, the role of the state becomes that of a coordinating and distributive hub for different associations and, within certain limits, an arbiter of associational conflicts.

Associations are known for their various democratic effects in fostering greater public awareness about political affairs, creating institutional forums for debate, and supporting the development of individuals’ capacities in expressing their views and opinions (Warren 2001: 61). However, participation in associations does not require one to achieve a high level of civic interaction. It requires only that the opportunities provided by associations are a means of protecting against arbitrary forms of power. This is necessary in order to avoid the idea that everyone must be involved equally in all decisions (an impossible demand) or that the state must devolve into a “pure” system of associations opening the door to a contemporary form of feudal politics (Hirst 1988: 147).

Whatever else we might say about membership in associations, the immediate significance of associationism for freedom as non-domination is its offer to increase control against arbitrary incursions into one’s political sphere of action: “Greater democratic governance through voluntary associations means greater control over his or her affairs by the citizen” (Hirst 1994: 69). On the latter point, we can observe an optimal

set of democratic inducements towards mixed (citizen/non-citizen) associational relations that aim to devolve control of asylum tenure to regional associations, and to increase the choices given to asylum seekers and refugees, while minimizing the states discretionary powers.²¹⁵ The democratic effects of political asylum can thus be directed both inward and outward. On the domestic level, republican associations can increase refugee access to particular areas of asylum governance and policy norms, augment refugees' contestatory powers, and foster greater citizen and non-citizen trust. At the international level associations can become sites of organized political resistance against abusive forms of government abroad.

The value of associative democracy depends crucially on the freedom to associate within a competitive market of cooperative ventures, political agendas, and representational forms. The freedom to *disassociate*—to exit particular associations—is itself a primary mode of holding associations to account and for ensuring wide and effective representation within the marketplace. Associations will also have other advantages over state-run bureaucracies. One is that “because associations can be distinguished by discrete purposes, they can be judged in terms of their ideals and effects” (Warren 2001: 46). In other words, associations need not reproduce the functions of border control as defined by the state. But they will need to fulfil the basic tasks of administering the needs and interests of their memberships in response to claims for asylum. Unlike the state, however, associations can identify their own stakeholders and recruit those with the necessary skills and aptitudes according to the values of their associational prerogatives. In this way, to use our earlier example, the ‘culture’ of border control will not rest on a single system of control, authority directives, or management

²¹⁵ These goals are described in Hirst (1994: Chapter 7, especially at 186).

personalities. Rather, it will reflect the subsystems of management and independent values of different associational roles and subgroups. Associations will be robust against domination provided that each is democratically governed, that resources are adequately distributed, that communication between associations remains open, and that options for exit from particular associations are allowed.

One of the lessons of the historical sociology of associational design has been that associations co-exist with other forms of representational democracy (Hirst 1994: 116; Nylen 2003). The promotion of associations does not entail replacing all other forms of representational democracy and, in any case, associations are not likely to emerge in a uniform way throughout the state.²¹⁶ The road to associational democracy is paved by a multiplicity of democratic and associational forms within sub-national contexts of reform and political participation (e.g., Avritzer 2009). Some forms will be modifications of existing associations; others associations may emerge in response to new or special problems. Thus, the state may recognize refugees as members of different and uniquely organized political organizations within the state.

²¹⁶ But this does not mean that associational democracy will be slow to emerge. In his study *Participatory Institutions in Democratic Brazil*, Leonardo Avritzer notes that “[t]he rapid growth in the number of associations [after Brazil’s authoritarian regime relocated slums to the edges of major cities] shows that voluntary associations are not simply linked to the process of historical formation, as Almond and Verba, and even Putnam have claimed, but can change relatively quickly in response to political circumstances” (Avritzer 2009: 27).

CHAPTER FIVE: FUTURE REFUGEES

Some associational forms will arise within specific institutional settings (e.g., within specific cities or boroughs) and in response to particular social issues. Not surprisingly, the characteristics and mandates of associations, insofar as they are informed by specific contextual features and goals for which they are created, may vary dramatically. In this chapter I consider a state-level association that differs from the self-governing voluntary associations outlined above designed in response to the problem of future refugees whose reasons for flight are underpinned by the anticipated effects of anthropogenic climate change. The appeal to state-level associations in response to future climate change refugees offers a means of demonstrating one way in which the problem of democratic representation is implicated in far-reaching problems and future political debates over which there will likely remain significant disagreement both in the nature of the problem, and the necessary steps to address the relevant issues, all within a limited time frame.

This problem cannot be solved through legal means alone, say, through the creation of a new category of refugee status; it requires a political solution, one that is attentive to the role of refugee law as a questionable source of guidance in matters during periods of radical social and ecological upheaval, which must therefore give way to new forms of democratic governance, in this case, by allowing citizens and refugees to enter into cooperative ventures that would allow both to realize their shared democratic interests. Building on recent work in the areas of political theory and intergenerational justice, I propose that liberal states create specialized institutions to provide political representation for future refugee populations. I then home in on a particular institution: a special assembly comprised of citizens and non-citizens from refugee-sending and refugee-receiving states tasked with deliberating on, and providing political representation for,

forced migrants in the latter half of the 21st century and beyond. The chapter is divided into three sections. First, I define and briefly discuss the concept of future refugees paying particular attention to the difficult issues of political representation for future persons. I then briefly consider future forced migration as a response of the anticipated effects of climate change. Finally, I discuss the possibility of a one type of political institution, a Citizen–Non-Citizen Assembly for Future Climate Refugees (the Refugee Assembly) in anticipation of widespread and catastrophic social and environmental change.

5.1 FUTURE REFUGEES

International political responses to refugees consist largely of short-term policies aimed primarily, if not exclusively, at assisting present or imminent refugee populations. In this section I examine how states should respond to *future* refugees—temporally distant refugees who do not yet exist, but whose needs and interests are arguably as important as the needs and interests of currently existing refugees. I argue that liberal states have a distinct obligation to future refugees independent of their obligations to current refugees.

It is surely troubling that the most discussed and developed theories of international justice including John Rawls (1993/99) and Charles Beitz (1979) have so little to say about refugees, let alone large numbers of future refugees due to environmental change or other sources (Bell 2004). Derek Bell has tried to fill this gap. He claims that there are three general options to respond to climate refugees. The first is to contribute to the massive and rapid transfer of wealth and/or expertise necessary to mitigate the effects of climate change or to protect communities at risk. The second

option is to allow and even assist environmental refugees to settle in developed (or at least safer, more developed) nations. A third option is to adopt a “Lifeboat ethic” which treats environmental refugees as a security problem for the developed world” (Bell 2004: 136). Although Bell appears to prefer options 1 and 2 over option 3, he believes that “[c]urrent policies...suggest that the developed world has chosen the third option” (Bell 2004: 136). I am more optimistic than Bell, but it is worth asking what, in general terms, such a choice might entail. We do not have a clear picture of the ethics of the lifeboat.

However, Kent Peacock’s assessment regarding its inherent limits is worth considering:

...one does not want to spend an indefinite amount of time in a lifeboat [where] one is almost inevitably forced to practice authoritarianism, rationing, exclusion, and triage (that is, the brutal cutting of losses). The lifeboat regime, and the authoritarian ethic of exclusion and triage that goes with it [...] is sternly consequentialist—focussed exclusively on the survival of *at least some* of the crew of the lifeboat—but definitely not concerned with the maximization of any sort of utility defined in terms of pleasure, happiness, fulfilment or the like.) It is very important to emphasize that the lifeboat is a pathological emergency condition. It is not a state that is either desirable or even *possible* to maintain on an on-going basis. [...]The lifeboat régime tends...to lock into place the very conditions of austerity which brought it about; and thus ultimately is a great threat not merely to sustainability, but even to the survival of the society or even perhaps the species. (Peacock 1999: 3).

This helps to define the first overarching goal of refugee assemblies: to help to prevent the need for adopting a lifeboat ethics. A second, related goal is to achieve a normatively coherent and broadly effective form of political representation for future refugees.

Attempts to represent future persons face a number of difficult challenges. One is that refugees are themselves a heterogeneous group with few if any essential characteristics. This problem is hardly unique to refugees; it is faced by any attempt to promote the rights and interests of persons under general social descriptions. To represent women or the poor is to represent a huge array of interests. However, so long as those persons exist, it is at least possible to determine more specific ranges and preferences to inform policy. A

different problem faced by those who wish to represent future refugees stems from the inability to listen and to respond to reasons from the relevant constituency: future persons themselves. Given this problem, some scholars have argued that in order to represent future persons we must “justify our decisions to future generations *as if they were present today*” (Karnein 2016—original emphasis). We may make mistakes in our choices and actions on behalf of future persons, but by acting in accordance with this principle of presence then “as long as these are sincere mistakes, future generations will not have reason to feel disrespected by us.” I think it can help to visualize those who we seek to represent or critique as being present. However, the idea of a virtual ‘facing up to’ those we are trying to engage in dialogue raises problems since it is much harder to visualize people who do not yet exist and whose world may differ quite radically from our own (Wolf 2012: 470) than people we know or have the possibility of knowing directly. The virtual presence of future persons always presupposes who those persons are and these presuppositions inevitably do a lot of work in determining what it means to satisfy our obligations as representatives. The problem is that we are simply not answerable to those who cannot be present. Of course, these problems do not mean that the representation of future refugees cannot be superior to current forms of representation, not only of refugees who exist now, but also the representation of citizens by their own governments who often act “as if” their constituents did not exist, making important decisions that are openly hostile to professed interests of their respective democratic majorities, often in secret or openly but with a level of insincerity that borders on the pathological (Ferguson and Rogers 1986; Page and Jacobs 2009; Page and Bouton 2006; Shue 2015: 91).²¹⁷

²¹⁷“One of the tricks currently being employed by politicians who have been irresponsible for years about the threats to security posed by climate change is to feign shock at the sudden, surprise discovery that the

There is a concerted effort not only to oppose institutional reforms that might help to mitigate future crises—including the need to protect or otherwise accommodate future refugees—but also to strip existing institutions of their resiliency and adaptive capabilities. Recent work on the applied political theory of future institutions has stressed the need to expose and combat the logic of ‘short-termism’—the prioritization of short-term gains over long-term future benefits (González-Ricoy and Gosseries 2016: 4).

For these reasons, I think we need a stronger principle that could allow that future generations would themselves be held responsible for their actions and for more distant futures as well. Institutions are needed that can help to create the conditions necessary for future refugees to retain a level of discursive control over their world such that they could be held responsible for their actions.²¹⁸ If the goal of discursive representation is to ascribe to future persons our own interests *for* future refugees given our current predicament then we must leave aside the idea of representing persons as if they were present and attempt a form of discursive representation of *our interests* in and for the future. On this self-reflexive approach to discursive representation, we act not as if future refugees were present today, but rather in accordance with the idea that were future refugees in our position they could no better than us. Unfortunately, to act such that we could say that no future refugees could have done better than us may in fact be of little help if we are in a position to do little good ourselves. On the new principle of discursive representation, ‘no better than us’ is consistent with leaving future refugees so limited in

human use of fossil fuel is driving climate change” (Shue 2015: 91). Things are of course much worse that Shue lets on. His words were written before the 2016 US primaries which have demonstrated that such trickery is not necessary and that were Donald Trump to suddenly pronounce his shock having learned about the effects of fossil fuels on climate change this would be a massive improvement with potential widespread Global effects.

²¹⁸ On the idea of freedom as discursive control see, Pettit (2001: Chapter 4).

options that we could not rightly say that they could be fit to be held responsible for their actions. This threatens to make the principle arbitrary. After all, those living now might have acted differently prior to applying the principle of no-better-than-us such that the principle itself could have referred to a much higher standard, one that would have made it possible for future refugees to be fit to be held responsible for their actions either among themselves or towards more distant persons. Since we cannot simply adopt such a principle at any time we wish it must also be an imperative to act now and to hold ourselves accountable for earlier transgressions. As Henry Shue has noted: “Any ignorance about climate change after about 1990 on the part of societal leaders, whose principal role after all is to know about the primary threats to their societies and to respond effectively, is culpable, if not wilful” (Shue 2015: 91).

A different way of understanding discursive representation understands that term to refer not to persons but to the representation of particular discourses (Niemeyer and Jennstål 2016; Dryzek and Niemeyer 2008). On this view, participation in refugee assemblies helps to represent the discourse of future refugees, the term and conditions which will affect future refugees and those around them. By representing discourses rather than persons, assemblies may avoid a potential criticism that they do not represent all refugees or, at least, not all refugees equally. It is unclear which version of discursive representation is best suited to refugee assemblies, but the issue is largely academic since these are not incompatible views and it is plausible—if not likely—that all three may be in play simultaneously. Such is the state of discursive representation in large, and long-term assembly formats.

The third political goal of institutions for future refugees is to generate certain public sphere effects: to increase interest in public deliberation on issues of common concern for

future refugees and their potential impacts on other members of future generations, to represent differences among deliberative parties, and to create or reveal hidden consensus. As one prominent scientist has noted, “[t]he largest uncertainties are not with the science...but with the politics and social responses to climate change” (Griggs 2017: 111). Similarly, as legal scholar Jane McAdam points out, “[t]he problem is not an absence of law, but an absence of political will to implement [existing] law” (McAdam 2016: 533). In general, then, the aim of all institutional reform is to create a sufficient political will directed at either existing or new mechanisms for social change, including possibilities for social organization and political resistance.²¹⁹

The need for a resistance-oriented politics of asylum has been outlined at several stages thought this work. It is worth noting here, however, that very little of the foregoing analysis has dealt specifically with the issue of climate change or its potential effects on political developments in states around the globe. Even modest changes in future global climate are likely to amplify certain illiberal trends in political asylum practices. If this is correct, we must also consider the possibility of a diminishing capacity for collective action and the possibility of a trend toward exclusion and the curtailment of civil political rights. Eric Ormsby has recently argued that there is already a dramatic surge in aggressive refugee deterrence policies which are increasingly “imped[ing] the civil liberties of their own citizens” (Ormsby 2017: 1193). While Ormsby observes that there are a number of national legislative reforms that could effectively undermine the development of illiberal deterrence policies these are likely to be ineffective in

²¹⁹ The term consensus is itself ambiguous. The OED defines consensus as “[a]greement in opinion; the collective unanimous opinion of a number of persons” (OED). Stephen Castles (2002) claims that there is no consensus for extending the refugee regime to include environmental refugees. A New York Times report on the 2010 World Gallup poll found that roughly 12% of the world’s population representing about 500 million people claimed that they would have to move due to environmental changes.

counteracting wider trends, since “states most likely to adopt this type of legislation are also those least likely to ever pursue such refugee deterrence policies” in the first place (Ormsby 2017: 1221). As Ormsby explains:

If, under current conditions, multiple states have concluded that restrictions on domestic civil liberties are necessary to combat refugee inflows, it is reasonable to assume that if future projections come to pass, many more states will follow suit, likely with policies more draconian than those currently in place (Ormsby 2017: 1216).

Ormsby’s call for an immediate coordinated effort by the international community to prevent these deterrence policies from gaining traction is also highly suspect. This is because, as Ormsby himself demonstrates, the policies of deterrence he refers to are not the unilateral acts of a small number of isolated or delinquent nations on whom international pressure could most easily be brought to bear; rather, the trend of refugee deterrence is itself international in scope, implicating a wide range of states including leading liberal democracies such as the US and Australia, often acting in coordination or through proxy with developing nations. According to Ormsby, these actions also reflect an historic pattern of heightened deterrence during times of increased need for protection capacities, using complex principles and protection gaps that are embedded in the very international legal system that Ormsby would have us use in preventing illiberal reforms.

A familiar response to the democratic deficit of particular polities calls for direct democracy, greater political participation, and expansive rights reforms (Goodin 2003a: 2). Yet, not all forms of participation are equal. Deliberation is consistent with a contempt for facts and the proliferation of rights may be a mere prelude to conflict without substantive gains. Both the encouragement of deliberation and the exercise of rights are susceptible to undemocratic effects of distributions of wealth and political power. My knowledge of the mechanisms of government and my ability to engage in sincere

deliberation does not prevent me from deferring to the judgements of an employer.²²⁰

And my willingness to exercise my rights does not prevent others from increasing the costs of my actions (Eliasoph 1998; Gastil 2000). More attention must therefore be given to both the quality and goals of participatory reforms as well as the effects of making those goals explicit within existing distributions of wealth, authority and power.

Who future refugees *might* be depends on relatively uncontroversial predictions as well as highly controversial ones about how the future will unfold. However, even if we have deep disagreements about the forecast, we may still have strong reasons to adopt the sort of institution I'm calling for. In short, the motivation for new political institutions might be grounded not on obligations to future refugees or future persons more generally, but also on the failures of our current institutions to deal with today's issues of refugee protection and related issues of political representation for those who presently exist. Nothing I say here should be taken to deny that possibility. I hasten to add that while many different scenarios should be considered in anticipating future refugees including political persecution, conflicts, and so on, much of what follows reflects a particular concern about refugees or persons in refugee-like situations due to environmental issues and the effects of climate change beyond 2050 (more on which below). The category of 'environmental refugee' is controversial.²²¹ However, this should not prevent us from

²²⁰ These considerations feature in virtually every aspect of contemporary democratic politics, but are readily associated with voter behaviour (Ahmed 2013; Rosenblum 2008: 99-100, 181-182, 277-281), political fundraising (Bussey 2000; Issacharoff 2010; Solimano 2014), and whistleblowing (Lewis 1995), to say nothing of the functions of political enforcement strategies internal to political organizations themselves, including the party 'whip' (Oleszek 1971: 964, 967) and 'coup proofing' strategies (e.g., Gelvin 2015, chapter 4) and Quinlivan (1999). The former allows parties to manage dissent on a case by case basis, the later, by making dissent beyond a very narrow range too risky.

²²¹ Scientists and social scientists alike are repeatedly charged with citing environmental factors as a "cause in isolation" (Betts 2013), the "sole cause" (McAdam 2016), or as factors belonging to "a discrete, independent category" (McAdam 2013), so as to "imply a mono-causal relationship between environmental change and migration" (UK 2011: 34) or "a simple relationship between displacement of people and extreme environmental events" (Black et al. 2013: S33). These claims are as consistent as they are

examining institutional responses to possible future scenarios. Furthermore, we must be open to the possibility that members of the category of person we today call refugees will differ radically in the years ahead. Finally, it's important to note that future refugees are not necessarily future *persons*. Anyone living now could, in principle, become a refugee given the right set of events. For this reason, the problems of achieving a sincere and virtual representation with future generations do not necessarily apply in the case of future refugees. However, for the most part, I will focus on the problem of political representation with refugees in the more distant future, refugees who are also future persons who do not yet exist.

5.2 CLIMATE CHANGE

According to the UN, there will be 50 million climate refugees by 2020. The Environmental Justice Foundation projects 150 million refugees by 2050. These estimates increase dramatically when combined with other sources of forced displacement including war and political instability, with recent estimates ranging from 187 million (Nicholls et al. 2011) to as high as two billion (Geislera and Currens 2017; see also

inaccurate; no scientist or social scientist has ever claimed that environmental changes are the only, or sole, causal factor in migration patterns involving climate or environmental refugees. Yet, some scientists are repeatedly accused of holding beliefs belied by their work. For example, a recent article accused the noted scientist Norman Myers of “positing a mono-causal relationship between environmental degradation and human displacement” (Betts and Pilath 2017: 789). This claim is made in reference to an article written by Myers in 1993 as well as his more famous 1995 co-authored report. Meyers is however acutely aware of the multiple causes of forced migration. For example, in the second paragraph of the 1993 article Myers himself writes that: “It is often difficult to differentiate between refugees driven by environmental factors and those driven by economic factors” before going on to note that, nonetheless, it is often “their environmental plight as much as any other factor that makes them economically impoverished” (Myers 1993: 752). Chapter Two of Myers and Kent’s famous book-length study *Environmental Exodus: An Emergent Crisis in the Global Arena* also contains a section with the heading “Multi Causality” suggesting that Myers has not in fact been misled about the complexity of a phenomena he has studied for well over 20 years. Nonetheless, critics insist that “the dominant narrative on the causal relationship between the environment and migration has [only recently] shifted towards recognition of complex multi-causality” despite the fact that “at the time [2007–2010] it was based on simplistic and often mono-causal claims” (Betts and Pilath 2017: 874).

Hansen et al. 2015) forcibly displaced by 2100.²²² Refugees are often driven *towards* flood prone areas of low-lying coastal cities (Geddes 2015) though projected increases in sea level rise of up to two feet per decade after 2100 would make such movements untenable and adaptation next to impossible (Romm 2018: 100). As one coastal geographer has noted, “[t]he world’s immediate future holds a horde of environmental refugees who must escape as the sea rises: thousands of Inupiat, a million atoll residents, and hundreds of millions of delta inhabitants” (Pilkey, Pilkey-Jarvis, and Pilkey: 1; see also, Biermann and Boas 2008; Pilkey and Young 2009; Taylor 2017; 2018).²²³

It is sometimes argued that “[w]hether someone’s displacement is predominantly attributable to environmental change, state fragility, or livelihoods collapse is unimportant from a human rights perspective. What matters is whether certain sets of

²²² Those who claim that we can attribute particular movements of persons to climate activity are often branded as alarmists (see the subsequent note, below). The UK Government’s 2011 Foresight Report sought to discredit claims that climate change would displace an estimated 150-200 million as early as 2050 by demonstrating that these figures were based on only one or two misleading studies, primarily Norman Myers’ 1995 study. However, the Foresight report does not offer an independent assessment of Myers’ work. Rather it dismisses Myer’s work on the grounds that Myers’ methods have been “criticized” by others. It then presents a chart tracing the lineage of many key reports that reproduce Myers’ estimate, confirming that Myers work is virtually the lone source of these “adventurous predictions”. For example, the Foresight report claims that the earlier and much discussed Government commissioned report, the 2006 *Stern Review on the Economics of Climate Change*, had simply repeated Myers estimates from a 2002 article. However, Nicholas Stern offered a different explanation: “Today, almost as many people are forced to leave their homes because of environmental disasters and natural resource scarcity as flee political oppression, religious persecution and ethnic troubles (25 million compared with 27 million). Norman Myers uses conservative assumptions and calculates that climate change could lead to as many as 150 - 200 million environmental refugees by the middle of the century (2% of projected population). This estimate has not been rigorously tested, *but it remains in line with the evidence presented throughout this chapter that climate change will lead to hundreds of millions more people without sufficient water or food to survive or threatened by dangerous floods and increased disease.* People may also be driven to migrate within a region.” (Stern Review 2007: 77—emphasis added). One of the effects of the Foresight Report in mischaracterizing Stern’s assessment of Myer’s work has been to discourage forced migration scholars from using the term climate refugee at all, even as a non-legal term. As one reviewer has recently noted: “[the] concept of ‘climate refugees’ has been progressively abandoned in academia and policy following the publication of [the] U.K.’s Foresight report (2011) which established that migration was multi-causal and therefore forced displacement cannot solely be attributed to climate change” (Su 2017: 225), a claim which reinforces the inaccurate view of earlier research on the impacts of climate and migration.

²²³ The Oxford English Dictionary, defines an alarmist as: “a person who is sensitive to potential dangers...quick to express fears or concerns publicly; esp. one who exaggerates such a danger and so causes needless worry or panic; a panic monger.” “alarmist, n. and adj.”. OED Online. Oxford University Press. URL=<<https://ezproxy-prd.bodleian.ox.ac.uk:10465/view/Entry/4557?redirectedFrom=alarmist>>

fundamental rights are not available in the country of origin” (Betts 2013: 17; cf. Chapter One on methods of disassociation). However, it is clear that if you care about suffering, you will care about the causes of suffering.²²⁴ Moreover, such claims carry the associated danger of an appeal to impossible epistemic standards of causal knowledge, a tactic that was used with serious repercussions by the Tobacco industry whose managers claimed to “accept an interest in people’s health as a basic responsibility...to remind the public [that there is] no conclusive scientific proof of a link between smoking and cancer and that there are many causes of cancer” (quoted in Brandt 2012). In the case of refugees, we are told that:

It would be a mistake to supplement the existing refugee regime by looking at particular causes of cross-border displacement—whether the environmental or anything else—in isolation. [...] If and when states and international public policymakers consider reforming the global refugee regime, reformers should not make the mistake of focusing on particular causes of displacement such as climate change or environmental migration [lest they] risk replicating the arbitrariness and exclusions of the status quo. (Betts 2013: 182, 196).

Here too, the complexity of a phenomena is reinforced and the attempt to supplement existing knowledge discouraged methods that would Unfortunately, this mistakes arbitrariness for a method of determining the causal effects of displacement. There is nothing arbitrary about isolating significant causal features of our environment to determine their effects; nor is there anything arbitrary about appealing to important causal factors as a means of guiding policy. The exclusions of the status quo are dangerous, in part, because they are exclusions which deny or downplay the risks of important causal factors which, in turn may lead to severe and unnecessary harm. The choice is thus not

²²⁴ To claim that a concept should be abandoned because it does not accurately represent *all* the relevant casual phenomena ignores one very plausible rationale for concept selection, namely, that the concept will bring attention to a highly important, but traditionally neglected cause of the phenomenon. It would be unfortunate if we were to insist that concepts for complex phenomena should always correlate with their exact casual realities, lest we abandon the term refugee.

between two forms of arbitrariness, but between acting on general knowledge of the potential effects of *inaction*. One important rationale for action is precisely that we can isolate a crucial element within a larger set of causal factors, and eliminate or undermine that one element's capacity to combine with other features of the environment in ways that will be ever more unpredictable (Shue 2015, 2018). The uncertainty of how complex factors and events will play out in the long run to effect displacement is a reason to act since, whatever those effects are, we have knowledge that all of them will be adversely affected by climate change. (Note that the success of legislation against Big tobacco depended, far too late, on determining the precise mechanisms of cancer-causing agents and their likely effects.)

To claim that “there is no need to develop new norms through multilateral agreement” for which there is little serious motivation anyways and instead, opt for “non-binding guidelines” for interpreting the international human rights law norms that already exist is itself a form of inaction which presupposes that the status quo will be sufficient to deal with whatever scenario the future brings (Betts 2013: 183). Jane McAdams offers a similar kind of reassurance when she notes that “from the standpoint of international law, most movement will be within countries rather than across borders” (McAdams 2016: 520; citations not included). This may be true, but the historical purview of international law is a poor basis for predicting future change and no serious risk assessment will take such projections on the epistemic authority of the law itself which is completely irrelevant to scientific predictions. It makes little difference what can be predicted within the purview of the law in the face of plausible scenarios where “nearly one third of the earth's terrestrial surface is out of bounds for sustainable resettlement” (Geislera and Ben Currens 2017: 329) or where rapid and extreme mean sea level rises to a level where

“forced migrations and economic collapse might make the planet ungovernable, threatening the fabric of civilization” (Hansen et al. 2015: 20119).

Despite these and other projections, many political theorists maintain that refugee status is essentially a scarce resource and that liberal states’ moral obligations to assist refugees (either through political asylum or *in situ*) are tightly constrained by the availability of means of protection and by countervailing interests, including the preservation of democratic institutions and support for national self-determination (Martin 1990; Gibney 2004; Miller 2016). Yet given that liberal states are commonly thought to have obligations to present and *future* persons within their own states, it is unclear why no parallel obligations should exist towards future refugees.

Other scholars have argued that we should maintain the Convention definition but create a parallel, though separate, refugee regime for climate refugees with a distinct protocol and a tailor-made set of legal provisions under the UN Climate Change framework along with a special resettlement funding apparatus (Biermann and Boas 2008; see also Biermann and Boas 2010).²²⁵ This proposal is underpinned by three assumptions. The first is that the issue of climate refugees is “essentially a development issue” that would be better managed by existing financial institutions such as the World Bank than the UNHCR. A second assumption is that “wealthier countries will be able to support their own affected populations.” This assumption has little empirical basis and much evidence to the contrary. The authors note that hurricanes in major centres like New Orleans would not be covered by the new development protocol but by the US taxpayers. To put such development adaptations in perspective, in order to withstand

²²⁵ “a Protocol on the Recognition, Protection, and Resettlement of Climate Refugees to the United Nations Framework Convention on Climate Change, supported by a separate funding mechanism, the Climate Refugee Protection and Resettlement Fund” (Biermann and Boas 2008).

even the most conservative estimates of sea-level rise over the next century, New York City would need to construct “500 miles of dikes, levees, and massive seawalls” say coastal geographers (Pilkey, Pilkey-Jarvis, and Pilkey 2016: 55; see also, Coch 2015). Scholars have also pointed out that normal cost-benefit analyses of domestic responses to climate adaptation do not apply equally well in all cases. The proposed relocation of culturally important groups such as the Inupiates from the coastal villages to the Alaskan mainland is estimated to cost 300-400,000 USD *per inhabitant* (Pilkey, Pilkey-Jarvis, and Pilkey 2016: 100).²²⁶

The question is: what is to be done? What forms of representation and corresponding institutions are consistent with a democratic response to future refugees under such scenarios? In the next section I sketch one possibility that may partially serve the role of a liberal-republican response to climate refugees.

5.3 THE REFUGEE ASSEMBLY

To respond to the need for political empowerment of many of the world’s most vulnerable populations, I propose the creation of a mixed (Citizen–Non-Citizen) Assembly for Future Refugees (*RA*).²²⁷ This Assembly is loosely based on the idea of a citizens’ assembly but with some important modifications. Citizens’ assemblies are comprised of independent citizens drawn from a semi-random selection process and

²²⁶ For a few thousand persons, this would total more than 600 million, or the majority of the 800 million in annual public funding for 2020 pledged by the US in 2015 for climate “adaptation” measures (Hall 2016: 381). Such costs are a small fraction of US expenditures in other areas. A widely cited Pentagon study claimed that 1,700 bases and outposts will be adversely affected by climate change, roughly half of the 3,500 military US military installations worldwide (Mallo 2018), though the US Department of Defense’s 2014 Climate Change Adaptation Roadmap cites over 7,000 military installations under review (US DOD 2014). As one coastal scientist has pointed out: “the military and national security agencies appear to be at the forefront in the United States in recognizing and planning for the inevitable sea-level rise” (Pilkey, Pilkey-Jarvis, and Pilkey 2016: 120; See also Pilkey and Young 2009).

²²⁷ Although the idea of the mixed assembly involves the incorporation of both citizens and non-citizens, I will refer to it as a ‘Refugee Assembly’ to indicate its central focus.

brought together to make policy recommendations concerning public policy (Grant 2014: 540). They have been used to address issues of electoral reform (in BC, Ontario and the Netherlands), to deal with issues of abortion (Ireland), to respond to inadequate state protection from flooding and the treatment of LGBT people (Poland), with various proposals and pilot assemblies in the UK and elsewhere to tackle issues of corruption, corporate monopolies, and so on. Unlike citizen assemblies, refugee assemblies would bring together citizens and non-citizens (here I consider a proposal of roughly 100 citizens and 69 non-citizens, or 1 citizen or non-citizen for every 2 seats in the House of Commons)²²⁸ directed to deliberate on a specific issue, namely, *how to respond to and plan for the challenges or opportunities brought by future refugee populations on a global scale for a two hundred year time span roughly from 2050 to 2250*, with the priority focus on the period between 2050-2100.

Refugee assemblies would be organized either federally or regionally—that is, within smaller political jurisdictions (including provinces, states, or cities)—and they would be tasked with determining how local governance structures and their representative constituents should respond to the needs and interests of future refugees. These assemblies would occur over roughly a three-year period divided into 3 distinct phases: a Planning, Learning, and a Deliberative Phase each of which would take approximately one year. The Planning phase would be used to design the particular rules of the assembly, the selection of its members, its operating budget, location, public consultation, and compensation packages for assembly members and staff. This period would also be used to select and train auxiliary members of the assembly including translators, counsellors, and persons with special social and cultural knowledge necessary

²²⁸ I refer here to the Canadian context.

to facilitate communication and maximize ‘friendly’ though not dispassionate discursive interaction among participants. The final two years would involve the direct participation of randomly selected members of the assembly for the Learning and Deliberative Phases. During the learning phase members would receive specialized training, attending lectures and workshops on relevant issues including refugee law, climate change, governance, and conflict studies from various experts that members themselves select in cooperation with their auxiliary teams. The deliberative phase would include public forums, debate, and future planning sessions to establish working recommendations for federal or local governments, not excluding other potential, more extensive powers (discussed below).

All 169 members would be chosen by a semi-random selection process that would draw from eligible resident adult citizens over 18 years of age as well as adults who had obtained refugee status within the last 5 years. The initial pool would be screened to exclude socioeconomic and political elites, anyone who has held a municipal, provincial or federal position of office, and anyone with a yearly salary of CAD 225, 000 or higher (the 1 percent according to Stats Can 2015). Potential members would be sent notifications allowing them to voluntarily enter a pool from which members would be selected on the basis of further selection criteria (e.g., sex, age, race, and so forth) designed to create a representative membership. 50 Refugees would be selected prior to citizen members. These 50 refugees would form a preliminary sub-committee (the refugee subcommittee). The refugee committee would design their own selection criteria for a further 19 non-citizens, including persons from anywhere around the world in a refugee or refugee-like situation as determined by the refugee subcommittee. The makeup of refugee assemblies thus differs radically from citizen assemblies in that refugee

assemblies would include non-citizens, such as legal refugees or persons who face refugee-like situations.

Refugee Assemblies are meant to supplement legal and development strategies already proposed or in effect. They may however be endowed with special temporary powers including limited constitutional powers. One possibility would be to endow refugees with powers of oversight and intervention in legislative assemblies under a modified submajority rule model (Ekeli 2009). On this model, the *RA* would occupy a limited number of reserved seats in federal or regional assemblies to represent the interests of future refugees during special sessions on related issues. Alternatively, the *RA* might be granted a consultative status with attendant powers to delay legislation it deems harmful to future refugees. These could include powers similar to those enjoyed by the Knesset Commissioner for Future Generations (Ekeli 2009; Shoham and Lamay 2006) such as the power to:

- Evaluate bills and regulations and/or give opinions regarding bills and regulations.
- Participate in the debates of parliamentary committees
- Initiate bills that can promote the interests of future refugees
- Obtain restricted or classified information from governmental agencies and government corporations.
- Set procedures and agendas for public deliberation and voting.²²⁹

Assemblies may also be granted mandate-specific powers, including the power to call national or regionally based referendums on decisions about, for example, future refugee quotas; whether to include or extend refugee protection status to persons displaced by climate change; or, whether resettlement should be individual, group, or community based (Draper and McKinnon 2018). The power to call referendums on specific proposals

²²⁹ This list is adapted from Ekeli (2009: 448).

would then set in motion a series of public debates, consultation, and education programmes that would take place over a set period of 1-2 years from the time the referendum has been called. For any referendum, the state would mandate regular and prime time media coverage designed to educate and inform the public to mitigate elite and corporate interests which have been directly cited as undermining citizen assemblies in the past (Fournier 2011).

The possibility of endowing political bodies comprised of non-citizens with constitutional rights and powers will strike some as extreme. But they are not necessarily far removed from existing developments including recent legislative proposals to extend voting rights to new immigrant non-citizens in the US by-passing all of the basic learning requirements under federal naturalization law (Renshon 2009; Rodríguez 2010) and refugees (Ziegler 2017), to say nothing of the extension of legal rights to non-humans. Such powers are also in step with numerous proposals to endow future generations with political representation through constitutional amendments (Riley 2015; Thompson 2010; Tremmel 2018) or through specific and far reaching legislative powers held in trust through specialized tribunals or councils.²³⁰ The powers and roles of refugees within the assembly help to define what it means to share responsibility for their plight.

²³⁰ There are many ways in which these political assemblies could be paid for. Approximately two-thirds of the total industrial CO₂ and CH₄ (methane) emissions produced between 1880-2010 which are linked to surface temperature and sea-level rise can be traced to 90 major industrial carbon producers (Ekwurzel et al. 2017). Most of the companies exist today; they include 50 investor-owned, 31 majority state-owned, and nine current or former centrally planned state industries (ibid.: 581). These companies, their investors or the states that run them could be taxed or sued for monies needed to finance the Refugee Assemblies using the model the Tobacco Master Settlement Agreement (MSA) (Wood 2003). Military budget transfers are a second option. For example, the US Navy intends to replace its Ohio-class submarines with new Columbia Class models beginning in the mid 2020s-2030s. The money transferred from a single submarine would free up a minimum of between 7-10 Billion US, before maintenance costs.

Citizens must also gain access to the decision-making processes of state planners and officials to better understand the reasons that inform government decisions and the patterns that might inform expectations of how decision-makers are likely to act in the future. Where citizens are able to track the histories of their states' policies and decision-making—the consequences of the state's actions (or inactions), and the consistency between their representatives' words and deeds—they will create a pool of critical political facts that will serve as a crucial resource for political decision-making. The role of institutions is to create a certain kind of well-informed citizenry, one that is capable not only of exercising their capacities so as to be able to pursue some vision of the good within a reasonably pluralist society, but also to defend against—and to *actively* resist—encroachments by public and private power. This would include efforts within educational systems to ensure that sources of power are primary targets of learning and reform, not merely as objects of philosophical critique or distant goal to aspire to achieve independent of one's own life or one's visions of the good. Such a system could of course be accused of failing the test of liberal neutrality if it were true that the forms of public and private power that exist today were not, left to their own devices, deeply incompatible with virtually all visions of the good, and to a far greater extent.

CHAPTER SIX: REFUGEES AND THE RULE OF LAW

The previous chapter addressed the question as to whether a republican approach can offer alternative sources of legislative power and constitutional authority in the context of the controversial issue of climate-induced migration. The Refugee Assembly suggests one way in which the law can be repurposed through civil society associations designed within existing political systems to address particularly pressing social issues. However, the prospects of a democratic response to refugees on any significant scale depends not only on articulating the institutional forms of associational relations, but also on whether the institutions that currently address refugees can be meaningfully allied with the goal of reducing domination by providing social guidance in those situations where refugees do not necessarily have the benefit of experience with their receiving state or its associational types. This chapter addresses the relationship between Refugee Law and its adherence to the political ideal of the rule of law, focusing, in particular, on the significance of the normativity of Refugee Law—i.e., its capacity to serve as a guide for action and a means of reducing domination. I argue that Refugee Law suffers from an important defect: it lacks qualities that are necessary for it to be sufficiently action-guiding for refugees and citizens alike. This failure threatens to undermine the rule of law, raising the possibility that refugee law will serve as a potential source of domination, and, indeed, jeopardizing its status as law. I divide this problematic into three sections. First, I show how Refugee Law's ability to serve as a normative guide turns on the state's commitment to the rule of law. The challenge of living up to this commitment under current constraints is briefly examined before turning, in section two, to the problem of law's normativity as it relates to those who seek refuge within distant or nearby states. I argue that the justification (i.e., moral-epistemic reasons) that explains why asylum

seekers and would-be refugees are capable of submitting to the authority of the state on non-prudential grounds is underwritten by the modes of communication between states and asylum seekers within reasonable limits of cognitive and resource-based accommodation. Failing this, fidelity to the rule of law, however true to form, will not bear the marks of a legitimate authority and, thus, be unable to justify its own authority to refugees. My goal in the final section stands in contrast to the approach taken in Chapters Four and Five. I will not aim to devise new institutional structures for resolving the problem of the normativity of Refugee Law. Rather, I will explain why I think that the central principle to which republican institutional design should be held accountable in legal settings is the radical alignment of refugees and citizens towards cooperative ventures under limited forms of (largely coordinative) authority. In this way, I provide an explanation of the key norm of institutional design for legal reform, one that is consistent with the elements discussed throughout the work as a whole.

6.1 THE NORMATIVITY OF LAW

Neil MacCormick claims that the purpose of law as a normative order is “the realization of justice and the common good” (MacCormick 2007: 264). My aim here will be to spell out one particularly important consequence of thinking about refugee law as an institutional normative order, namely, that the normativity of refugee law depends on whether it effectively communicates its fidelity to the rule of law to those it seeks to govern. The normativity of law can rest on the state’s monopoly of the use of force or it can appeal to a more democratic account, one that seeks to show how the limits of the law are proscribed by those for whom it is a normative system of guidance (Warren

2008). But only the latter system will meet the conditions necessary for an account of legitimate, non-dominating authority under a system of law.

When we ask what it means to give refugees their due within a system of rights and duties we are often asking what makes our institutions just. Following David Schmidtz we might say that “institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life” (Schmidtz 2006: 8). But how can we determine—without appealing to some pseudo Archimedean point—which distinctions are arbitrary and which are just?

The sources of law and their application in various (often interactive) legal settings can be drawn from the principles that inform the law of refugee status and those that inform more broad-based normative accounts in political theory. Juridical accounts of refugee status focus on normative standards derived from the jurisprudence of refugee case law, human rights principles, and customary practice. These sources overlap with the sources of law described by political theorists who focus on the moral grounds of Refugee Law and the justifications of juridical authority in creating and enforcing refugee policy by reflecting on generalized states of affairs, notably, the deprivation (*de facto*, if not *de jure*) of effective citizenship, the attendant loss of political association, and the resulting exposure to brutal and systematic mistreatment or neglect that demands legal and political mechanisms which can adequately match our reactive moral attitudes to intrinsically damnable human conditions (Costello 2017). Both approaches to asylum can be distinguished insofar as each presupposes different epistemic arbiters or (judges, citizens, the chance of formal lotteries, and so forth) that define what the state’s refugee policies truly are, and thus, the different sources of ultimate political judgement for

clarifying and applying the state's refugee policy. Arguably, refugee and asylum law must draw from both juridical and political accounts of asylum. But whatever their differences both political and legal conceptions of refugee law are parasitic on a wider conception of justice in adjudication as a reflection of the (liberal) state's commitment to the rule of law.

The rule of law is an ideal of political morality and an important means of relating legal and normative political approaches to refugee status that might otherwise be isolated.²³¹ As Rawls notes, the rule of law is constitutive of a system of law "addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation" (Rawls 1999: 207). The status of the rule of law in migration and refugee jurisprudence is largely that of a substantive norm designed as a check on state power, especially in cases of flagrant infidelity to law. Partly, too, the rule of law represents a set of evaluative criteria for adjudicating controversial rulings (Costello 2016: 316; Dauvergne 2004).

If seeking asylum or obtaining refugee status are to be consistent with non-domination, potential receiving states must be committed to the rule of law. Now, it is reasonable to claim that no community has ever fully achieved the ideal of the rule of law in practice (Endicott 1999).²³² However, the fact that the content of the ideal allows for features of legal adjudication such as vagueness (Beatty 2004: 11) raises a serious question as to whether the rule of law may even be unattainable *in principle* (Endicott

²³¹ The rule of law often refers to formal principles, for example, that procedures and standards be transparent, foreseeable, and not subject to rapid change, excessive bias, or arbitrary discretion. The paradigm list of principles is usually attributed to Fuller (1969). For a republican account of the rule of law see, Lovett (2016).

²³² "Perhaps no community has even got very close to the ideal" (Endicott 1999: 1).

1999). Legal scholars have identified numerous obstacles to achieving the ideal of the rule of law in asylum cases:

- competition and incompatibility of legal venues, constitutions, and jurisdictions
- the complexity and proliferation of legal norms, statuses, and rights of migrants
- multiple *sources* of refugee law (i.e., processes to identify valid legal norms)
- resource inequalities between states
- overburdened court systems
- the detrimental effects of fast-track or streamline procedures on judicial reasoning and evidentiary standards
- the potential for political interference in judicial and administrative decision-making
- excessive judicial deference to executive power (i.e., bias towards national or state interests) and administrative agencies
- lack of robust accountability to refugees
- lack of robust accountability to citizens
- dubious methods for conducting credibility tests (e.g., age assessments, biometric technologies, language analysis, etc.)
- unreasonable standards of proof
- the slow pace and inadequacy of legal reforms
- the vagueness of legal concepts (e.g., ‘persecution’; ‘national security’)
- the extensive discretionary powers of judicial authorities
- the outsourcing of discretionary powers of judicial authorities to “expert witnesses”
- lack of judicial expertise on issues pertaining specifically to asylum cases²³³

Any list of this kind is likely to be controversial. One reason has to do with the first two listed items. The complexity of venues, and proliferation of rights, norms, and statuses makes any assessment of the actual functioning of legal systems in terms of their satisfying formal and substantive principles of the rule of law extremely difficult. The problem is not merely one of sheer complexity, but also the fact that legal systems are moving targets. Thus, despite the complaint about slow reforms, legal systems are hardly static. The evaluation of legal systems may also become mired in meta-controversies about what is truly an obstacle to the achievement of the Rule of Law. For example, although discretionary powers may be deemed excessive, some scholars have suggested

²³³ The items on this list are derived from in various works including: Hamlin (2014); Costello (2015); Kneebone (2009); Lawrence and Ruffer (2015); Harvey (2004).

that the standardization of knowledge and reliance on formalistic principles of reasoning in refugee status determination threatens to curtail forms of discretionary judgement that are crucial for determining nuanced cases and for preventing inflexible or reductionist forms of legal reasoning that may be more susceptible to executive encroachment (Lawrence and Ruffer 2015: 10). But nor are challenges with particular rules of law necessarily obstacles to the Rule of Law. It is possible, for example, that concerns about jurisdictional incoherence and incompatibility can be minimized or even obviated through the development of “pluralist” approaches to refugee law, systematic (and thus self-conscious and open) forms of interaction between legal institutions ideally characterized by “a degree of systemic compatibility between the orders, regimes, or systems; institutional awareness of the other regime, and a shared hermeneutic framework” (Costello 2015: 47; see also Besson 2010).

A bigger problem concerns the processes and developments of legal reform. Although international law provides a minimal normative framework for determinations of refugee status, in practice, refugee-receiving states retain the right to interpret and apply these standards at their own discretion (Goodwin-Gill and McAdam 2007: 53-54; 528-551).²³⁴ While legal and policy innovations that seek to harmonize standards between states are often touted as an opportunity to increase the quality and integrity of asylum protection and to reinforce existing state obligations to asylum seekers, they also supply a useful pretext for renegotiating and backsliding on important moral and legal

²³⁴ I say this notwithstanding the importance of the European Asylum Procedures and Qualification Directive in prescribing common minimal standards for RSD that go beyond the Convention. See, e.g., Ascoli (2011); Costello (2005, 2006); Lambert (2006); Lavenex (2001).

commitments.²³⁵ Growing concerns about the legitimacy of current refugee status determination procedures raise further doubts about the underlying motives and long-term viability of internationally integrated asylum policies (Loescher 1989; Lavenex 2001; Gallagher 2002; Costello 2005; Juss 2005; Vedsted-Hansen 1999; Gib and Good 2013).

Liberal states are legally (and some have argued, morally) bound to respect the principle of non-refoulement that prevents their return to dangerous or persecutory states. However, to the extent that states (or other state-affiliated institutions) retain an uncontrolled power of discretion in determining *whether* the principle of non-refoulement is violated or return is warranted in the light of issues of national security, such constraints are not likely to prevent determined forms of arbitrary power from achieving their goals. Two considerations are worth bearing in mind here. First, since individuals do not currently enjoy an absolute right to receive asylum from foreign states the acquisition of refugee status is contingent on the state's willingness to consider claims for refugee status.²³⁶ Second, insofar as refugee status is contingent on the threat of persecution faced by particular individuals (or in some cases, groups) due to conditions in their countries of origin of over time continuous assessments of an individual's risk of persecution provide ample opportunity for return or deportation (Gibney 2012). It is reasonable to conclude then that refugee law does, in point of fact, provide a significant form of guidance to refugees, but that this will often amount to guidance conditioned by domination.

²³⁵ Virtually all the major conventions and treaties relating to the CEAS have attracted criticism for undercutting basic protection mechanisms for refugees and asylum seekers, often at the expense of established legal and human rights norms. See Hathaway (1993); Noll and Vedsted-Hansens (1999); Boccardi (2002: 44); Juss (2005: 752); Mitsilegas (2005); Nicholson (2006); Ramji-Nogales (et al. 2007).

²³⁶ As legal scholars have pointed out: "... a state could avoid its responsibility to protect by the simple expedient of refusing ever to assess a claim – a risk made all the more real given that the Convention imposes no duty formally to adjudicate refugee status" (Hathaway and Foster 2014: Chapter 1.1.1, 462n3).

If refugee law is not *sufficiently* action guiding—that is, if asylum states fail to influence the decisions and choices of asylum seekers before they come under the authority of the law—then this is reason to think that the refugee law is fundamentally flawed as a normative system. Interestingly, few have considered whether, or how, the rule of law functions as a normative ideal for refugees prior to their entrance to the state. This is not unimportant. After all, whether forced migrants can enter into non-dominating relations with foreign states depends, in part, on whether asylum seekers have reasons to deem liberal states reliable in their determinations of refugee status and in their commitment to providing security in the tenure of their status. We needn't suppose that refugees always or ordinarily flee to particular states in light of moral assessments of the latter's commitments to the rule of law. Nevertheless, it is an important question as to what *moral* reasons refugees have, beyond those duties associated with self-preservation, to accept the (host-)state law as a source of normative guidance (either prior to or during their tenure as refugees within host societies). Minimally, refugees will want to know that the host state is not an “unsafe haven” that will return them to the countries from which they have fled and, thus, that their claims for protection will not be premised on the hope of being “honoured in the breach” (e.g., Benoit and Kornhauser 1992; Clark 2004: 590; Durieux and McAdam 2004; Farmer 2008; Gibney and Hansen. 2003; Newmark 1993).²³⁷ Given the reliance on states to act in the best interests of those they have the power to protect, the challenge of justifying the state's legitimate authority is extreme.

²³⁷ All the sources cited offer examples of liberal state violations of non-refoulement. In a recent article, Alise Coen puts these actions context highlighting “[v]iolations of the principle of non-refoulement and efforts to shirk refugee responsibility-sharing in the wake of mass atrocity crimes...as two important realms in which US behaviours undermine the rule of law and weaken international order” (Coen 2018: 1270).

6.2 SIGNALLING AUTHORITY

The normativity of law is largely reflected in the sources of political judgement for determining and applying the state's refugee policy as well as the coherence of legal rules within a system of Refugee Law. As a result, fidelity to the rule of law can be understood first and foremost as the application of law by expert decisionmakers, and, thus, by a small number of elite and highly organized members of society.

Democratic-sounding propositions, such that the “final judgement [on refugee issues] must rest with the members of the receiving state” (Miller 2007: 227; but see also Kneebone 2009: 307) are ambiguous between different modes of citizen control over refugee law and policy. The idea that citizens ought to (or do) have final discretion on refugee and related border issues belies the fact that there are few meaningful alternatives to current forms of governance under which citizens are actually empowered to make decisions on and maintain a robust oversight over refugee law. Proposals that offer to increase the institutional normative capacities of refugees as political agents in regimes of migration governance are almost non-existent (but see, Owen 2018; Peruniak 2019).

We should not lose sight of the fact that the absence of opportunities to participate and shape refugee law, or refugee governance more generally, will have relatively little effect on whether refugees decide to flee. Furthermore, that asylum seekers may have good reasons for accepting the authority of liberal states, in particular, in assessing their claims is clear enough. A refugee may see fit to subject his will to the authority a foreign liberal state as a means of avoiding persecution, regardless of the merits of the host states' legal system, or its fidelity to the rule of law. However, as we have seen, consenting to a system of law that does not itself adhere to the rule of law for purely prudential reasons is itself constitutive of domination, for it will be consent to a system of

dependence and arbitrary control akin to consenting to a new (perhaps more benevolent) ‘master’. Under such a system, an asylum seeker’s or refugee’s status will be inconsistent with republican liberty, even if protection by a foreign state allows individuals to enjoy an extensive range of political choices and more control over the outcomes of their choices than they would have enjoyed in their state of origin. The improvement to one’s relative freedom through the acquisition and tenure of refugee status is nothing to balk at, but insofar as the entitlements brought by this status depend on the arbitrary will or power of the receiving state, they will be an important subject of republican scrutiny and a source constant anxiety for the status bearer (see §2.4).

This concern may be best viewed as a version of the problem of authority. According to a popular definition, the problem of authority is “the possible justification of subjecting one’s will to that of another, and of the normative standing of demands to do so” (Raz 2009: 127). The justification for saying that the refugee has sufficient reason to believe that their claim for protection grounds a moral obligation to submit to the authority of the receiving state on non-prudential grounds is nothing less than that there are reasons for thinking that the refugee could form reliable beliefs that the state is committed to the rule of law by her own lights, and that, in any given scenario, she has the capacities to make such judgements. As Raz explains:

The point of being under an authority is that it opens a way of improving one’s conformity with reason. One achieves that by conforming to the authority’s directives, and (special circumstances apart) one can reliably conform only if one has reliable beliefs regarding who has legitimate authority, and what its directives are. If one cannot have trustworthy beliefs that a certain body meets the conditions for legitimacy, then one’s belief in its authority is haphazard, and cannot (again special circumstances apart) be reliable. Therefore, to fulfil its function, the legitimacy of an authority must be knowable to its subjects. [...] [W]henever one can form reliable beliefs that the conditions for legitimacy are met, one can also have knowledge that they are met. (Raz 2009: 147).

Importantly, then, the problem of authority must take up a practical position between two extremes: first, the normative authority of law cannot be merely a matter of objective fact accessible to ideal observers. It must be *demonstrable* to persons who do not have the luxury of making objective assessments of a state's commitments to the rule of law. Melissa Lane had noted that one problem with Raz's original conception of authority is that it "obscure[d] the need for authority to bear marks which identify it to its subject" (Lane 1999: 211).²³⁸ In the context of refugee law, this problem is exacerbated by the fact that refugees are radically disadvantaged as interested subjects of determinations of law's normativity; refugees must make *remote* determinations of potential asylum state's commitment to the rule of law often under acute stress. One additional stipulation is that any demonstration of laws authority as a legitimate practice must also be undertaken so that the commitment to the Rule of Law is signalled with *sincerity* to potential asylum seekers.²³⁹

Second, the expectations of demonstrability must be reasonable. My claim that we should try to turn the relative disadvantages of refugees into what Lane calls "an artificially enhanced common benefit" or a public good (Lane 1999: 217) faces many practical limitations. These limitations are best met through an understanding of the complex differences and situated experiences that persons face in the lead up to decisions to flee their homes and lands. In her discussion of the legitimate repatriation of refugees in the aftermath of conflict, Katy Long presupposes an ideal epistemic agent, a near-omniscient refugee whose "freedom to *choose* return" is premised on having "full possession of all the relevant information about the prospects for reintegration,

²³⁸ I adjust this quote to account for what appears to be an important amendment in Raz's theory, as demonstrated the preceding quote.

²³⁹ The idea of signalling authority comes from Lane (1999).

reconciliation, restitution of property, etc.” (Long 2013: 161-162). The acquisition of such facts and the competency needed to apply them to decision-making are simply too unlikely and they will remain so for at any semi-complex system of legal adjudication and governance. No one can be expected to learn the legal systems of places to which they might wish to flee. Competence in law is therefore untenable as a principle of signalling the authority of Refugee Law.

Unfortunately, Lane’s own proposals for signalling authority in legal systems are largely confined to procedural markers: “[t]he fact that institutions can bear the marks of their competence and trustworthiness in their procedures and constitution, means that individuals will have reason to trust their judgments” (Lane 1999: 223). Such claims are not unreasonable, but they will provide few comforts to many citizens and fewer still to refugees. The central question thus seems to remain: what politically realizable reforms are consistent with the goal of maximizing refugee non-domination by signalling the legitimate legal authority of liberal states? But this question retreats too quickly behind an important fact. As we have seen, while the scope and procedural biases of refugee law are often questioned, the conception of political judgement that leaves the final decisions to a select handful of elites, is generally left unchallenged. Scholars continue to criticize legal decisions and state oversight in applying asylum law and designing state as well as extra-territorial migration policies. However, unless fidelity to the rule of law is conditioned by institutions that devolve power away from political elites and those in positions of authority, fidelity will likely be another term for benevolence. If we are to take the problem of signalling authority seriously, we should, at least, be prepared to confront the realities out of which it arises in the first place.

6.3 THE MARK OF REPUBLICAN REFORM

The mark of republican reform comes not from any acknowledgement of the inherent value of the rule of law, but primarily from a deep concern with the role of law in the service of state authority and elite power. The problem with the signalling authority is that it is *merely* a signal (Lane 1999). In Chapter One I showed that there are many other signals which have made their mark on the legitimacy and normative authority of states, their refugee policy and their practices. In Chapter Two I followed up with the rhetorical value of the concept of freedom and its sophisticated application. To claim, at last, that the problem these examples represent are sufficiently overcome by a gesture or symbolic mode of good will—a constitutional provision, a treaty, a promise from the highest offices of the state—effectively transmitted across borders would hardly be consistent with this earlier picture. It is entirely plausible for the exercise of arbitrary power to itself be directed through processes that are meant to signal legitimate authority where there is none, as a means increasing domination. Such a view should not be mistaken for cynicism. Rather, the emphasis is on negative forms of political vigilance, those admired by republican thinkers from Machiavelli to Harrington, and which are made manifest in “...those informal public activities that provoke *impediment, surveillance, and judgment* forms of participation by means of which citizens check the work of democratic institutions and peacefully subvert the established order” (Urbinati 2010: 69; cf. Martin 2013), coupled with a healthy “fear of the few”, the tyranny of elite power (Mayville 2015; Appleby 1992).

But the reason for focusing on the problem of signalling authority is not to show that it is either superficial problem to intractable. The point is that if signalling is the means by which refugees are able to “see” the ideal of the rule of law in action, its value

as an indicator of adjudicative legitimacy but also, and in virtue of this very fact, as a reasonably efficient coordinative mechanism for decisionmakers (cf. Lovett 2016: 101ff), then there can only be one true mode of signalling, that of political incorporation. However, to make sense of this claim, we must first recognize two important points. First, that the problem of signalling which we characterized in terms of the remoteness of refugees from the centres of authority and protection cannot be overcome by means of an abstract signal in the form of a pledge or good behaviour. The physical distance of refugees from authoritative roles must be overcome *directly* and, thus, the signals of authority must emanate not from others but through actions (representative or direct) that refugees can count *as their own*. The effort to signal authority must be met then by concerted efforts to match what we might call the institutional principle of republican reform: that the authority of institutions must be built on relations between persons who are capable of starting from positions of non-domination which are ensured only in virtue of how those institutions operate, and, thus, only in virtue of the fact that they exist at all. This latter point is crucial since the key to signalling authority is to be incorporated within an institution that one can see from inside, and which exists, in part, because of one's own participation.

But the mark of republican reform on issues concerning refugees—and this is the second point—must be further matched by schemes which put citizens and non-citizens *together* in joint, cooperative and voluntary ventures through which they may form alliances that reflect their shared aspirations. Put in slightly different terms, the mark republican of reform is one which recognizes that refugees and citizens will often have more in common with one another than each has with their own fellow citizens in positions of authority at the highest levels of representation and legal adjudication.

Indeed, the wealth and influence that separates the average citizen from their political leaders at these higher levels of authority places the average citizen in a position that may sometimes resemble conditions (of poverty, abuse, even persecution) that are more similar to the experiences and challenges of refugees than they are to their representatives. The claim may find more or less support in particular democratic states; that is, in those states in which concerted efforts have been made to reduce the power of those at the highest level of government and judicial oversight. But the problem casts a wide net over today's democratic states and there are no democracies that could not improve their distributions of power, authority, and wealth.²⁴⁰

On this view, the problem of signalling cannot be solved by simply indicating a commitment to the rule of law to refugees from afar. This should not be altogether surprising. As Lovett has noted, the value of the rule of law is an associative value, that of “benefits to be gained from association with others...benefits can only be secured, however, when people manage to coordinate their various efforts, and the mere promise of benefit is not itself always sufficient to ensure that they will do so” (Lovett 2016: 101–102).

The question of the tactics and institutions for signalling must therefore be answered through different modes of associational conduct and integration which can provide a basis for law's normativity. In practice this will mean that there is little way of reducing the anxieties of asylum seekers about the validity of the rule of law in any given

²⁴⁰ Kenneth Nelson finds that that for the social minimum to be met sufficient to reduce poverty, several EU member countries would need to increase their benefits by “at least 20–40 per cent” (Nelson 2013: 397). Interestingly, associational factors are only now beginning to receive attention as sources of poverty and thus as institutional opportunities for reform. As David Brady, (et al 2016: 117) have noted, “[w]hile previously poverty scholars concentrated on demographics and economic performance, scholars are beginning to emphasize, for example, social policy and labor unions”

protectorate, and no way to justify ahead of time the submission to authority, other than through an institutionally constituted status that confers legal powers:

The possibility of establishing arrangements validly within an institutional framework entails the possession of power by persons having appropriate capacity. It endows them with the ability to change the normative situation of themselves and others [...] They are not established by single discrete rules. (MacCormick 2007: 160).

The deeper problem with which we began this section, however, suggests that the means by which one acquires such competencies and powers will be a crucial determinate of their usefulness in guarding against arbitrary forms of power. For the same institutions that confer power will also control the means of restricting it (MacCormick 2007: 166). Hence, MacCormick's view that the rule of law turns on an 'full acknowledgement' of the "conceptual difference...between law as a normative order of right and wrong versus politics as a domain of statecraft guided by considerations of prudence" (MacCormick 2007: 184-185); that is, through an awareness that only under conditions of mutual accommodation in the control of law among similarly situated persons can people truly find value in the rule of law.

CONCLUSION

It is generally agreed that the conditions suitable for individual self-fulfilment and pluralist modes of collective action are incompatible with a persecuting society. But it is not self-evident that the advantages of societies that prohibit persecution, or their closest analogues, the liberal democracies, are possible in their current form without the willingness to support persecution abroad, to obscure points of common interest between citizens and refugees, and to favour ideological policies in pursuit of imperial and anti-democratic ends. Perhaps the main contribution of a theory of asylum lies in its capacity to support a culture of criticism and public discourse that is capable of anticipating and responding to institutions and practices when they fall short of valid moral political ideals.

Three issues in particular prevent the theory of asylum from contributing more effectively to a sustainable and democratic asylum practice. Each of these issues has been touched on in earlier chapters to various degrees, but it is worth recalling them here and, where possible, clarifying their role in future accounts. The first issue is the perception that the decline of the liberal state as a site of protection has made it a less significant subject of study or a secondary source of insight into the nature and future of the global refugee regime. There is little evidence, I think, to show that the widely documented historical patterns of liberal state interference, interest, and influence have diminished enough to support these conclusions. While the general forecast is for only a fraction of those who seek asylum to ever reach or be effectively incorporated into wealthy liberal democracies it is a mistake to think that liberal states are peripheral to the future of refugee protection (Coddington 2017). As long as liberal states continue to exert enormous influence over global political and economic conditions they will remain

primary determinants of global refugee policy and important sources of the conditions from which refugees will continue to flee for the foreseeable future. The problem has been for the most part the inclination to consider transgressions of law and morality either as exceptional cases, temporary ideological alignments, defensive strategies, or tragic dilemmas between the conflicting rights of states to defend their borders (in the interests of their own citizens) and the interests of needy outsiders.

A second, related issue concerns the proper scope of causal analysis in determining the sources and reasons for refugees in particular cases. We are continuously exposed to the idea that states of origin are overwhelmingly responsible for the creation of refugees and, thus, that it is within the political and geographic spheres of origin-states that the solutions to refugee issues must be sought, albeit under different (liberal state) management. Myron Weiner claims that “[t]he fundamental question for governments and international institutions is, what can be done to change the conditions within countries that put people to flight across international borders?”, a question that rhetorically moves potential interventionist states outside of the scope of causal analysis which Weiner confines to the “proximate events and conditions that led to refugee flows in the last quarter of a century” (Weiner 1996a: 6), omitting much longer histories and patterns of less-than-benevolent intervention (e.g., Schoultz 2009). The persistence of this view can be seen in more recent statements by political theorists, even some twenty years later, who conclude that “there would be no refugees in the first place unless *other* states were either actively violating or passively failing to protect the human rights of people living on their territory” (Miller 2016: 92—emphasis added). Such a view has the implication that liberal states’ relation to refugees are essentially responsive and defensive rather than active or contributory. In this way, refugees are, by definition, a

phenomenon *imposed* on the receiving state for reasons largely beyond the host state's control. Thus, Bruce Cronin claims that:

The key component in the conceptualization of a refugee has been...the belief that the root cause of his or her status was the relationship between the state and its citizens. In this sense, the protection of refugees has served to regulate these relations. (Cronin 2003: 156; see also Gorman 2012).²⁴¹

This view is further supported by the dominant normative framework of social contract theory which plays an important supporting role in directing our moral intuitions to the most “proximate” causal sources, by encouraging us to view refugees as victims of a breach contract, and thus, as a conflict of violations by one or other parties to that contract (i.e., the citizen and her government). Thomas Gutmann (2013: 40) observes that “the implicit dimension of a contract is a relationship of mutual recognition between the individuals party to it.” Similarly, Dale Jamieson claims that contractarianism “excludes from primary moral consideration all those who are not parties to the relevant agreements” (Jamieson 2007: 162; see also Murphy 1978). This problem, I think, plays an underappreciated role both in how we frame our moral judgements about who bears responsibility for refugees and in describing the causal explanation relevant to those judgements. This does not mean we should abandon social contract theory. A more appropriate metaphor however would view social contracts as *incomplete* on the assumption that their being so will often be sufficient to account for the failures of the

²⁴¹ Causal analyses to that of local conditions between citizens and their own states is also sometimes a methodological presupposition of empirical research. For example, in their recent survey of projected drivers of migration, Timothy Hatton and Joseph Moloney focus exclusively “on conditions only in the origin and destination countries” (2017: 249) echoing Hatton’s earlier conclusion that “the asylum numbers bear the imprint of the humanitarian tragedies in the source regions. It therefore seems likely that events in the origin countries of Africa, Asia, and Eastern Europe have been key determinants of the long run trends in asylum applications” (Hatton 2009: F187). Elsewhere, we read that “failed states...figure disproportionately as sources of refugees” (Demeny and McNicoll 2006: 277); In each case, questions of causal sources are restricted to the place of departure and the conclusions drawn are reflections of these very same assumptions and are consistent with studies that have excluded the role of liberal states as causal sources of refugee flows for which there is significant evidence (Abrego 2018). Davenport, Moore and Poe (2003)

state. To start our analysis with the idea that social contracts are incomplete would also prompt us ask what is missing from hypothetical or real contractual agreements and the extent of our duties under such agreements, questions which have been neglected by political theorists with interests in forced migration.

A third worry is that otherwise liberal principles will be interpreted in ways that acknowledge the interests of everyone affected by a practice but which are nonetheless addressed to satisfying the whims of political authorities. A wide range of practices and actions may be justified under general principles that are only more or less compatible with what citizens themselves would actually endorse, but which can still be mobilized in defense of state power. Consider Brian Barry's classic principle of moral (or liberal) individualism according to which institutional practices are justified only insofar as they consider the interests of all those affected (Barry 1989: 158-159; cf. Abizadeh 2008).²⁴² Barry points out that this principle is open to various interpretations depending on how the term 'interests' is defined. Ordinarily, the principle of moral individualism "rules out appeals on behalf of God, Nature, History, Culture, the Glorious Dead, the Spirit of the Nation, or any other entity—*unless* that claim can somehow be reduced to terms in which only individual human interests appear" (Barry 1989: 159—emphasis added).

Unfortunately, there is no real difficulty in meeting this challenge.²⁴³ It requires only a slight, and even temporary, shift in focus away from interests themselves to a procedural

²⁴² The general principle of individualism claims that social practices are justified in reference to the interests of all those affected by the practice (Barry 1989b: 158-159) while the Contractarian 'version' of individualism claims, rather differently, that social arrangements are justified by reference to the interests of all participants (160).

²⁴³ Recall that Locke's own conception of freedom is underwritten by a crucial political principle, that "[t]he formation of the body politic transfers the determination and protection of freedom as well as the control of conflicts to the public" where "the rulers are acknowledged to possess the exclusive right to interpret the law of nature through universal positive laws and to compel the members of the community to strict obedience, even with the threat and help of the public force they control" (Polin 1969: 9).

issue about how—or who—is best positioned to determine what those interests actually are.²⁴⁴ The theoretical groundwork for this move has already been laid in theories of governance from Plato's *Republic* to the 'Government House Utilitarianism' of Sidgwick and Mill, according to which the interests of all are best determined by an enlightened elite (Schultz and Varouxakis 2005; Miller 1961; Pitts 2005: 107, 109; Williams 1985).

Importantly, all three issues regarding the ineffectiveness of liberal asylum practices on global refugee protection, the focus on the abuses of power by foreign states, and the principled commitments to justice and humanitarianism have tended to be used to favour policies that *increase* liberal state interference in directing and managing the politics of other nations (e.g., Greenhill 2010; Helton 2002; Von Hippel and Clarke 1999).

Rather than opt for a renewed form of public political engagement with refugee issues that would pressure the state to better discharge its obligations or make up for unwilling or recalcitrant nations, I move for a more radical redistribution of state powers and functions within the liberal state that would empower secondary associations with administrative and political roles. The goal of these reforms is threefold: to take advantage of the democratic effects of refugees' political incorporation, to leverage their relative freedoms and diverse interests in support of significant institutional innovation and constitutional reform, and to anticipate massive and increasingly dire challenges of forced migration within and between host societies.

²⁴⁴ Its recent institutional iteration can be found in that complex machinery of modern government, the managerial classes, professional politicians, and bureaucratic administrators whose expertise largely and effectively excludes the average citizen from an understanding of the affairs of institutions and their relation to the public good (MacIntyre 1981: Chapter 7; Richardson 2002).

The republican theory of asylum thus sought to address two basic questions not adequately parsed in the political theory of refugees. The first concerns how we should understand the moral significance of refugees' political status in their host state. Generally speaking, a person's political status is their capacity to make and to act on political choices where those choices are constitutive of what it means for a person's life to go well for them. The less one suffers from domination in the political sphere the greater their political well-being. The concept of political well-being helps to distinguish between a capacity to make prudential political choices and the capacity to make choices that are consistent with the idea that someone enjoys political freedom. Choices made under conditions of political persecution may be more or less prudential, corresponding to greater or lesser degrees of individual security, prosperity, or the like. This does not mean, however, that one's political choices are morally *good for* that individual. While the persecutory state may promote choices that are good for citizens in an instrumental sense, such a state will "fail to respect the objective and equal importance of a human life" in Ronald Dworkin's admirable phrase (Dworkin 2011: 274).

The second question concerned the *types* of liberal institutions consistent with refugees' immunity to political persecution. The answer was that institutional arrangements must be devised to account for the capacity to resist oppressive or arbitrary forms of political interference. I argued that a state that allows for robust and extensive forms of democratic associationism would most effectively meet this challenge. My aim was not to determine all the forms that democratic association might take, but to outline its basic structure and to offer some (transitional) institutions on the way to longer term reforms. But associational democracy will be ineffective unless it incorporates asylum seekers and refugees as equal stakeholders and allows them to access the political sphere

in a comprehensive way, not as voters in limited democratic forums, but as associational partners in a wider range of secondary roles with effective decisionmaking power.

Liberal theories of asylum have been generally dismissive of—if not openly hostile towards—efforts to develop effective forms of political representation between citizens and non-citizens. And the idea that refugees might provide liberal states with opportunities for advancing its internal democratic ends—that asylum has important *democratic* effects on host states—is seldom remarked. Policies that would allow for the protection of large numbers of refugees within liberal states are often viewed as inherently inimical to democracy and the idea that liberal industrial states provide the most stable political and economic conditions, rights protections, and freedoms of expression and dissent is viewed as a set of conditions to be preserved rather than developed in new or radical ways. Perhaps for similar reasons, liberal theorists who have focused on issues of refugees and asylum have been hesitant to support democratic forms of citizens-non-citizen association.

Relative political gains alone are not a sufficient measure of the value of a refugees' political status. Liberal states cannot accept refugees on the grounds that it is sometimes prudent for individuals to accept one form of political inequality in order to escape another. Likewise, refugees cannot accept the moral condition of potential political servitude in a utilitarian “calculus of social interests” (Rawls [1971]1999: 182). Unless refugees are empowered under an inclusive process of collective decision-making within asylum states access to, or enjoyment of, substantive political goods can justify their political subjugation. This is not to deny that refugees are subject to the rule of law in their host state. However, where the refugee's primary political representative is a democratic government the status of a refugee must include a capacity for self-rule.

A basic prescription of associational democracy is that the state should seek to devolve power to the lowest levels of political organization compatible with the maintenance of effective associational relations among committed individuals. In such a society, government interference will consist largely in coordinating and enforcing compliance between and among more localized forms of voluntary associational governance, associations that will be directly responsible for refugees' well-being. On this picture, the state exists largely as a coordinative and enforcement mechanism with an indirect role in refugee protection; even then, government regulation is imposed only for the sake of maintaining a healthy ecology of voluntary self-governing associations.

The state may also seek to re-distribute some of its powers thereby transferring the role of refugee protection to associations by one of two general strategies. First, the state may seek to directly empower new associations or associational types by funding self-governing institutions that will take on the bureaucratic and executive functions normally reserved by states, and which may include refugees in their governance structures, as board members, shareholders or in bureaucratic roles. Alternatively, the state may seek a more indirect mode of political devolution, offering incentives to existing institutions that would take over important service functions. In this case, the state would impose restrictions on institutions whose economic and political advantages are detrimental to the flourishing or fair distribution of asylum services.

However political powers are distributed, the state cannot intervene in the internal matters of associations except on the grounds that interference is necessary to protect the freedoms and interests in voluntary associations themselves (Warren 2006). The state thus serves a vital role in maintaining the healthy ecology of associations and non-associational representative democratic institutions. In this capacity it exercises extensive

powers in the expectation of compliance for mutual benefit. The result is an associational form of political asylum guided by the republican ideal of freedom as non-domination directed through institutions that empower citizens and refugees by devolving the basic managerial and bureaucratic functions normally tasked to states to competitive voluntary associations.

How self-rule in conditions of exile can move forward in practice is largely an open question. Liberal states are non-ideal societies and there is only a reasonable expectation of achieving more or less consistent and stable approximations of its various ideals. The obstacles to reform in the midst of massive social and climatic upheaval are daunting and the passages that lead to new economies of political deliberation and responsibility are bound have their share of erring steps. It remains to be seen then whether institutions and practices of political asylum can be cast in the mould of republican democracy that takes freedom as its ideal and persecution as its watchword.

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