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“What Justifies Asylum?  
The role of asylum in a flawed system of nation-states”

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What Justifies Asylum?  
The role of asylum in a flawed system of nation-states

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## 0. Intro

This essay extends and adapts the legitimacy-repair view of asylum. The legitimacy-repair view of asylum holds that asylum is justified by its role in repairing the legitimacy of the global system of nation-states (I will hereafter refer to this system as the interstate system). According to legitimacy-repair theorists, asylum does so by ameliorating structural injustices endemic to the interstate system. Proponents of this view have been vague about what these injustices are. I bring together the work of theorists of asylum and theorists of territorial sovereignty to give an account of the injustices that asylum ameliorate. I then argue that asylum is justified by more than its ameliorative role. Situating asylum within a flawed system of nation-states illuminates a second normative grounds for asylum as a limit on the sovereign rule of self-determination.

This essay identifies structural features of the interstate system and shows how these features predictably give rise to injustice. I highlight the following four features: (1) state's unchecked power over people, (2) exclusionary power over territories, (3) states' rights of self-determination, (4) and system monopoly. These are the defining features of the interstate system. They are essential to the functioning of that system, and there is much to recommend them, yet, in concert, these features also give rise to injustice in predictable ways. These injustices include, but are not limited to, domestic human rights abuses, maldistribution of territorial resources, the lack of freedom to exit the state system, and the lack of a substantive freedom to exit one's own state and join another.

The key question is how, and to what extent, asylum can repair the legitimacy of a system with structural injustices of this magnitude. I draw out two ways in which asylum helps to repair the legitimacy of a system such as this. First, as proponents of the legitimacy-repair view argue, asylum ameliorates injustices once they've already happened by allowing a small number of victims to start a new life elsewhere. To this account, I add a second ground for the justification of asylum. Asylum operates on a deeper structural level as a limit on the arbitrary power of states to exclude. An axiom

of international law is that states have the power to determine their own composition. The corollary of this rule of self-determination is the sovereign right to exclude, a right which includes both the power to exclude non-members from entering the state's territorial jurisdiction, and a right to decide who is eligible for membership.

I argue that the rule of asylum should be understood as setting bounds for the rule of self-determination. And, insofar as the rule of self-determination is a key ingredient in the generation of global injustices, asylum helps to prevent and not just ameliorate ongoing injustice. On this view, asylum is more than a post-hoc fix, but part of the deep structure of the system. Put differently, asylum does more than repair the legitimacy of a flawed system; asylum is a key part of the basic structure of the interstate system, one that allows it to function more successfully in the first place.

Roadmap: In section 1 I explicate the legitimacy-repair view, with special attention to the view as developed by Gillian Brock. In section 2 I pose and answer the question: what exactly are the structural injustices endemic to the interstate system? Here I put the work of theorists of asylum in conversation with the work of theorists of states, sovereignty and territorial rights, to point to four structural features that interact to produce predictable injustices. In section 3 I draw out two roles for asylum in reference to these structural problems. First, as proponents of the legitimacy-theory have acknowledged, asylum ameliorates. Second, I show that asylum prevents injustice, by serving as a limit on the rule of self-determination. I conclude by reflecting on the larger problem of repairing the legitimacy of a nation-state system like ours.

## 1. Asylum and the Legitimacy-Repair View

The institution of asylum has been described as “the world’s most powerful international human rights mechanism” (Hathaway and Foster 2014). Most states have signed on to some version of the Refugee Convention, and there is considerable political pressure to comply or at least appear

to comply with its directives. The United Nations High Commissioner for Refugees provides oversight and transparency into individual state compliance, and the combination of international scrutiny and the possibility of public international shaming for non-compliance has been relatively effective in making sure an asylum process is offered to those who request it in those states who have signed on to the Refugee Convention (UNHCR, “U.S. Asylum Resources”).

It is true that wealthy states have conspired with increasing efficacy to prevent asylum-seekers from reaching their borders and requesting asylum. And yet, the lengths that states go to try to keep migrants from reaching their soil is also proof of the power of asylum law. States implement policies like the “remain in Mexico” policy, or “prevention through deterrence” because, once an asylum petition is made, states are bound by international law to offer those claims a hearing, to provide international protection in the interim, and to offer a more durable solution to those who win their case.

The core principle of protection in the case of asylum is non-refoulement, which means that states cannot deport or expel asylum-seekers to a place where they may have reason to fear persecution or other threats to their lives, liberty or security (UNHCR “Access to Territory and Non-Refoulement”). This means asylum-seekers are entitled to stay until their claims can be judged in a process of asylum determination. In practice, states that observe asylum law also offer pathways to citizenship to those who win their asylum cases. Thus, asylum, where observed, represents both a concession on the rule that states may arbitrarily determine who enters their territory, and the rule that states may arbitrarily determine their membership.

In this respect, asylum is a unique institution: it places bounds on the otherwise unfettered sovereign right of states to exclude migrants. Indeed, when it comes to voluntary migrants, states are free to exclude arbitrarily, and may exclude according to invidious distinctions such as race or nationality. Asylum grants cannot be made on such a basis, but must be granted according to

whether the petitioner meets the definition of an asylee. Legal definitions of asylee vary across states, but, in much of the Global North, the Refugee Convention definition of asylum-seeker is operative.

The Convention, combined with the subsequent 1967 protocol, defines an asylum-seeker as someone who...

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>1</sup>

The major elements of this definition include (1) the condition of alienage, or existence outside of one's own country, (2) the condition of having a well-founded fear of persecution, (3) the nexus between the element of persecution and the five protected grounds (race, religion, nationality, social group, and political option), and (4) the condition of lacking state protection.

What justifies the existence of an institution like this one? In my view, the most compelling account of the political morality of asylum is the legitimacy-repair view, most recently developed by Gillian Brock (Brock 2020). The legitimacy-repair view points out that the nation-state system is but one way of organizing territory and distributing the benefits of political membership. At birth, all of us (minus an unlucky few) are assigned membership in a state, becoming eligible for the benefits of state protection, and vulnerable to potential state misconduct. Many states abuse their members, or otherwise fail to live up to their political obligations, and these and other injustices of the state system threaten to compromise the legitimacy of that system. Brock's unique contribution to the legitimacy-repair theory of asylum is to argue that there are three layers of legitimacy constraints:

*LC1: Internal Requirement:* To exercise power legitimately, states must respect their own citizens' human rights.

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<sup>1</sup> Again, asylum-seekers are differentiated from refugees insofar as they are petitioning from within the country from which they would like a grant of asylum, or at a port of entry.

*LC2 System Requirement:* Exercising power legitimately is also conditional on being part of a legitimate state system.

*LC3: Contribution Requirement:* The legitimacy of the state system requires states to participate in the cooperative project needed to sustain a legitimate state system. Individual states have some positive obligations that are generated in virtue of the legitimacy conditions on the state system.

Brock argues that severe injustices which emerge from the state system threaten the legitimacy of that system. She writes, “for the state system to retain its legitimacy, it must include some corrective mechanisms when a large gap opens up between the grounds for endorsing the state system and the reality” (Brock 2020). The contribution requirement is, in part, a requirement on individual states to enact these corrective mechanisms.

Brock is making an unusual move here. She is drawing much needed attention to the way states function together as a system. Theorists of statehood and sovereignty typically aim to justify the existence of states conceived in isolation. But Brock argues that the legitimacy of individual states depends on their role within larger systems of global governance. It is worth drawing out the assumptions behind such a view.

Brock’s account is most plausible if we assume that the functioning of individual states is, to some degree, dependent on the functioning of the state system. In my view, we should accept that background assumption. Individual states are what they are because of laws and structuring ideals that function at the system level. Most notably, the ideal of sovereignty structures how states are permitted to treat their residents, regulate their territories, and interact with each other. This structuring ideal makes possible the existence of the states which abuse the powers of sovereignty. To put this idea in more concrete terms, it is the same laws of sovereignty that allow for the existence of Finland, which allow for the existence of Iran. By endorsing and enforcing those laws at

the system level, states like Finland become responsible, to some degree, for the injustices that arise in places like Iran.

If we accept Brock's claim that individual state legitimacy is conditional on system legitimacy, we should find it plausible that this relation of dependency grounds states' obligation to participate in cooperative efforts to correct systemic injustices. To return to our earlier example, this is the idea that Finland's legitimacy depends on whether it cooperates with other states to address injustices that emerge in places like Iran. If Finland is to be more than a provisionally legitimate state, it must take up part of the burden of creating and maintaining corrective mechanisms. And this is where asylum comes into the picture. Ostensibly, asylum exists to redress or mitigate the injustices endemic to the state system. Asylum and refugeehood serve, according to Brock, as one "excellent example" of such a legitimacy-repair mechanism, since they assign new membership rights to persons fleeing political injustice (Brock 2020).

And yet, whether or not asylum can move the dial on the legitimacy of the state system surely depends on what injustices it is meant to ameliorate. Unfortunately, Brock is vague about what these injustices that emerge from the state system are. Other proponents are not much more specific. David Owen, for example, writes "that social institutions, like human beings, are fallible, and we need to acknowledge that fallibility in the construction of them through also constructing safeguards against their failure and mechanisms for dealing with failure what is happens (sic)" (Owen, 2021). Carens, writing some years earlier, writes "Every social institution will generate problems of one sort or another, but one of the responsibilities we have in constructing an institution is to anticipate the ways in which it might fail and to build in solutions for those failures" (Carens 2013). But what exactly are the predictable failures we should anticipate? All three of these philosophers talk of the problem of state failure, but beyond that little has been said.



In the next section I aim to address this gap. I sketch an account of how structural features of the interstate system give rise to predictable injustices. This account points to problems endemic to the state system that go beyond the problem of state failure. Further, my account indicates that these problems are not the result of mere friction between the system conceived as an ideal and as a reality.<sup>2</sup> Put differently, the problems that emerge in the reality of the state system are, in no small part, the result of flaws in conception. Having drawn out these features of the state system, I turn to the question of asylum's role as a mechanism of legitimacy-repair.

## 2. Injustice in the Age of Nation-States

Which injustices, exactly, is asylum well-suited to address? To answer this question, we must start with facts about the global system of nation-states itself. I will focus on identifying those features plausibly relevant to the international migrant protection regime. In my view, these features are four-fold: (1) power over peoples, (2) power over territories, (3) system monopoly, and (4) the sovereign right of self-determination.

### A. Power over Peoples

States have tremendous power over peoples. States are the ultimate guarantors of their members' human rights. On the conventional view of sovereignty, states have a monopoly over legitimate violence in their territory. State domestic power is, by design, virtually unchecked by any other legitimate power. This feature predictably produces the injustice of internal abuse. States can abuse their members and others that live in their territory, with little consequence. Even when states are not actively abusive, they often fail to guarantee their members' human rights simply because they lack the power to do so.

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<sup>2</sup> I worry that this is what Brock implies when she writes, "for the state system to retain its legitimacy, it must include some corrective mechanisms when a large gap opens up between the grounds for endorsing the state system and the reality" (Brock 2020).

The structuring ideal of global governance is that of sovereignty. The Weberian ideal of sovereignty attributes to states a monopoly over legitimate violence in a given territory. Supposedly, states should have power over their territories that is unlimited, undivided, and unaccountable. As Don Herzog and others have compellingly argued, this ideal has never truly been realized (Herzog 2020). There are recognized impositions to state power. States are checked from below by smaller internal powers, and above, by international law. No state has ever fully succeeded in crowding out other forms of authority within its own jurisdiction, all states, to some degree, are weak in this regard.

Nonetheless, it remains the case that states have great power: power which is both a design feature and a design flaw. International law recognizes that the responsibility to guarantee human rights is vested in states, who have both the power and the obligation to protect and fulfill those rights for those within their jurisdiction. As of yet, we have developed only very rudimentary international legal mechanisms for holding states accountable when they commit abuses or otherwise fail to fulfill their human rights' obligations.<sup>3</sup> Thus, the self-same principle that vests the state of Finland with the powers that have allowed it to protect the human rights of its members, has also vested Iran with the powers that have allowed it to abuse them.

#### B. Power Over Territory: The Problem of Territorial Distribution

Philosophers sometimes talk of states and their members in ways that entirely elide the territoriality of states. But peoples and governments do not exist in virtual one-dimensional space. The state system does not just assign peoples to governments, it assigns these peoples and governments to territories. States' relationship to their territories is not dissimilar to the relationship between a landowner and their land. States have the right to control, regulate and use the land and

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<sup>3</sup> I am thinking here of mechanisms like the International Court of Justice.

natural resources within these territories. As these territorial rights are exclusionary in nature, the assignments of territories to states is the most basic way that goods—material, social, political—are distributed among populations.<sup>4</sup>

Territorial distribution gives rise to the problem of global distributive injustice.<sup>5</sup> There are two ways we might characterize the injustice that arises from territorial distribution. The first way focuses on inequality itself. Division into territorial jurisdictions has allowed for deep material and social inequalities between members of different states. Some might argue that this inequality between populations is itself an injustice, while others have claimed that equality is something members within a state owe to each other (Nagel 2005). Let us bracket this debate. The deeper worry is that, beyond the issue of inequality, there is the issue of objective resource poverty. Some persons are assigned to territories where they cannot access the distinctively territorial goods necessary to meet even their most basic needs.

Anna Stilz offers a particularly compelling account of this kind of injustice. She highlights the following two problems with the distribution of territories among states: (i) There are some individuals “whose basic territorial interests are persistently unfulfilled where they are;” and (ii) there are peoples who “lack a territorial base in which to pursue the social, cultural, economic and political practices that matter to them” (Stilz 2019). I will refer to these two related issues together as the problem of “territorial maldistribution.”

To properly understand what the injustice of territorial maldistribution amounts to, it is necessary to explicate the Stilzian notion of “basic territorial interests.” Stilz understands territorial

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<sup>4</sup> By calling it “distribution” I do not mean to imply that it is strictly analogous to the distribution of commodities among a group. This kind of distribution is a dynamic process: How lines have been drawn and contested between states has shaped the material, social and political world within those territories, for better or worse.

<sup>5</sup> This problem is made worse by the fact that these rights are also understood to be exclusionary: states have the power to deny outsiders access to their land and the resources situated there. Indeed, it is an axiom of international law that states’ territorial rights are exclusionary. I will discuss the problem of exclusion further under the larger heading of “self-determination.”

interests expansively. Territorial interests comprise our material interests, our located-life plans, and also our interest in basic justice, i.e., “a jurisdictional space that is governed by minimally just political institutions,” and last, political self-determination (Stilz 2019). At first blush, the inclusion of social and political goods as the subject of distinctively *territorial* interests may seem counter-intuitive. But place grounds and shapes our political and social projects, as well as our material projects. The places we live in determine what life-plans we can pursue, what institutions we can access, what relationships and social networks we can participate in. This means that the drawing of territorial jurisdictions determines not just what material resources persons can access, but also what social and political goods they can access.

Here Stilz is drawing on a rich tradition of understanding land and territory as a framework for social and political relations.<sup>6</sup> In a similar vein, consider how territorial rights theorist and indigenous philosopher Glenn Coulthard describes “land” or “place.” Coulthard describes the land as “a mode of reciprocal relationship,” an “ontological framework” and “field of ‘relationships of things to each others.’”<sup>7</sup> He writes: “In the Weledeh dialect of Dogrib... “land” (or *dè*) is translated in relational terms as that which encompasses not only the land (understood here as material), but also people and animals, rocks and trees, lakes and rivers, and so on. In this light, we are as much a part of the land as any other element.”<sup>8</sup> On this view, land is not dead matter. When we talk of land or territory

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<sup>6</sup> This idea has been developed recently and prominently by several different theorists of territorial rights. For example, philosopher Avery Kolers understands political peoples as “geographical communities” with ways of life that are bound up with and partly determined by their territories (Kolers 2009). Philosopher Paulina Ochoa Espejo also develops the idea of place as a network of relations with reference to the notion of choreography.<sup>6</sup> According to Ochoa Espejo, choreography refers to the dance of human and non-human relationships in shared space. When many life-plans mesh together in place, spontaneous infrastructure emerges. This infrastructure is part of the dance itself. Importantly, choreography is the product of more than just human agency—it emerges as a consequence of many repeated interactions between people and other sentient and non-sentient actors on the land. This view emphasizes the ways in which land and peoples mutually shape each other (Ochoa Espejo

<sup>7</sup> This is part of an extended exegesis of Vine Deloria and Coulthard attributes this account of “land” or “place” to Deloria (Coulthard 2014).

<sup>8</sup> He further writes, “within this system of relations human beings are not the only constituent believed to embody spirit or agency. Ethically, this meant that humans held certain obligations to the land, animals, plants, and lakes in much the same way that we hold obligations to other people. And if these obligations were met, then the land, animals, plants, and

we refer both to a framework in which life-sustaining relations occur, and to the network of sentient and non-sentient actors who interact within that framework.

With this in mind, we can see how our territorial interests may be violated by a lack of access to material resources, or due to a lack of access to a social or political environment where one can pursue one's most basic interests in peace and safety. In other words, the injustices involved in territorial maldistribution may be material, social, or political in nature.

Having drawn out the problem of territorial maldistribution, let us consider its relationship to the problem earlier specified, that of state abuse. We are now in a position to see that these are not two separate problems. The idea of territorial maldistribution, as conceived of by Stilz, is expansive enough to encompass the issue of state abuse. One way that a person's territorial interests may be unfulfilled is due to state misconduct. Conceptualizing state misconduct as a kind of territorial maldistribution usefully draws our attention to the way geography contributes to the problem of state abuse. State abuse is a problem of such seriousness in large part because we are confined to our geographies by our physical limitations. A victim of state abuse cannot click their shoes together to escape. They must do what it takes to physically remove themselves from that territorial jurisdiction: climb mountains, ford streams, cross oceans, crawl under barbed wire, etc. In sum, states' abuse of their members is an injustice that can only be understood in light of a three-way relation between states, peoples, and territories.

Conceptualizing state misconduct as a kind of territorial maldistribution also draws our attention to the three-way relationship between states, peoples, and territories. As a matter of narrative emphasis I have chosen to focus first on problems that arise from states relations to their peoples, and then problems that arise from state's relations to territory. Now we are in a position to see how

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lakes would reciprocate and meet their obligations to humans, thus ensuring the survival and well-being of all over time," (Coulthard 2014).

considering these relations in isolation is misleading. The three elements of this system—peoples, governance, and territory—interact to produce injustices, including but not limited to the injustice of peoples by their states. Asylum theorists have tended to focus on the two-way relationship between states and their peoples. But the injustices that generate the need for asylum cannot be properly understood in isolation from the third element of territoriality.<sup>9</sup>

### System Monopoly

At this point we have highlighted two dimensions of the state system, each of which predictably give rise to injustices. These injustices are compounded by the fact of state system monopoly. But this, I mean that states have a virtual monopoly over all livable territory. Of course, this means that people who are abused by their states cannot set up alternative political societies outside the pale of the state system; nor can people fulfill their basic territorial interests by accessing lands outside of the state system. There is no exit from the state system, as there is simply no land outside of the state system to be had.

### D. Self-Determination

It is not just that there is no exit from the state system. There is also no substantive right to exit one's own state and join another.<sup>10</sup> This is because of the rule of self-determination. At its simplest, the rule of self-determination expresses the idea that a population has a right to implement its own system of governance. However, it is an axiom of international law that the right to self-determine is partly a right of states to determine their own composition (*Chae Chan Pin v. U.S.*, 1889; *Fong Yue Ting v. U.S.* 1893). This is why the sovereign right to exclude arbitrarily is considered the necessary

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<sup>9</sup> In another work in progress, "Persecution in the context of asylum: beyond state violence," I argue that this matters to the how we should conceive of the scope of asylum, and thus, to how we should define persecution in asylum jurisprudence.

<sup>10</sup> There is a formal right to exit, which is enshrined in article 12 Section 2 of the International Covenant of Civil and Political Rights (ICCPR). There is not a substantive right to exit. In other words, some persons cannot exit because there is nowhere they are permitted and able to go. This is why millions live in refugee camps (ICCPR 1966).

corollary of the right of self-determination. This right to exclude arbitrarily is usually understood to consist of both a right to exclude non-members from the territory of the state, and a right to decide who is eligible for membership (*Chae Chan Pin v. U.S.*, 1889; *Fong Yue Ting v. U.S.* 1893).

Some philosophers have argued that the arbitrary right to exclude generates injustice by its very nature, since the freedom to move, including across borders, is a human right. Let us bracket that consideration. There is a much deeper worry here. What we should be most concerned about is how the arbitrary right to exclude interacts with the kinds of injustices earlier specified. It is the arbitrary right to exclude that permits states to close their borders to migrants who are fleeing injustice. Such a rule prevents individuals from escaping ongoing abuses. It freezes people in the places where they are by blocking the exit.

The rule of arbitrary exclusion does more than block the exit. It facilitates injustice in the first place in several ways. First, the rule of arbitrary exclusion gives rise to the problem of statelessness, as some persons may be unable to obtain membership within any state. Second, this rule allows for the existence of large populations of precarious non-citizen residents within state borders, residents which are often subject to human rights abuses. Last, by freezing populations in place, exclusion can facilitate the domination of non-mobile populations within their home states.<sup>11</sup> As Michael Ball-Blakely has argued, “the threat of a highly-exploited population emigrating can change the incentive structure of their home countries.” By removing this threat, the right of arbitrary exclusion gives rise to captive populations: populations who are highly exploitable due in part to their forced sedentism. Ball-Blakely argues that, in this respect, the state system functions analogously to the feudal system (Ball-Blakely 2021).

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<sup>11</sup> It can, but not always. We should also take seriously the possibility that mass emigration of embittered populations hinders regime-change at home.

### 3. The Role of Asylum

We have surveyed four structural features of the nation-state system that predictably give rise to injustice. We can now properly contextualize the role of asylum in relation to these injustices. The stated purpose of asylum, according to the Refugee Convention is to protect migrants fleeing persecution. But some states have taken on a more expansive understanding of what it means to be a refugee. The OAU (Organization of African Unity) created a binding agreement to expand the definition of refugeehood/asylum from the narrow Convention definition. In 1969, the OAU refugee convention adopted the language of the Refugee Convention and added the following:

The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality (OAU 1969).

The OAU extended refugeehood to include anyone fleeing a major disturbance in public order. This represents a major departure from the Refugee Convention's narrow focus on persecution. But most philosophers of migration who have written on refugeehood would say that it does not go far enough.

Many philosophers think that the definition of refugee should be expanded to include all necessitous and forced migrants, though how this category should be drawn is highly disputed. The most influential defense of the expansion of the category of refugeehood is due to Andrew Shacknove. In his essay, "Who is a Refugee?" Shacknove argued that refugee and asylum eligibility should be granted to anyone whose basic needs are not protected, who have "no remaining recourse other than to seek international restitution of these needs, and who are so situated that international assistance is possible" (Shacknove 1985). This expansive account of asylum has been popular among philosophers of migration, even restrictivists (Gibney and Stohl 1990; Carens 2013; Miller 2016; Parekh 2020).



But even if we adopt an expansive and idealized account of what asylum should do, its capacity to ameliorate the injustices surveyed earlier is obviously limited. Refugee status is only for migrants who have already succeeded in leaving the territories where their rights and interests were threatened. Asylum is still more exclusive: it is open to migrants who have managed to reach the soil of the state where they hope to receive surrogate membership. Even at their best, these institutions save only a lucky few. Indeed, the entire international migrant protection regime can only help a small number of victims of injustice. In general, the extent to which we can ameliorate injustice by moving people from one state to another is limited. This is one reason why it is more plausible to think that legitimacy at the level of the interstate system would require more radical and transformative change to the structure of the system itself. What we need are modifications at the level of the basic structure that would prevent injustices like the problems of state abuse and territorial maldistribution from arising in the first place. It is hard to imagine what these changes might look like. But here the institution of asylum proves instructive.

There is something misleading in Brock's characterization of asylum as a kind of "corrective" mechanism. To say that it is corrective suggests that it is only a kind of post-hoc fix, or band-aid. But asylum operates at a much deeper level. Asylum law imposes a limit on the sovereign right to arbitrarily exclude. States that have bound themselves to observe asylum law cannot refoule asylum-seekers, and must offer a durable resettlement solution to those who win their asylum cases. In these respects, asylum qualifies both a states' right to decide who enters and resides on the territory, and a states' right to decide who becomes a member.

Many have argued otherwise. I have heard refugeehood described as the "exception that proves the rule" of the sovereign right to exclude arbitrarily. And, I have heard it said that asylum does not limit the right to exclude, but is, in fact, an expression of its power, since states exercised their right

to decide who they will admit when voluntarily adopting asylum law.<sup>12</sup> I do not find this argument compelling. As Don Herzog points out in his book, *Sovereignty, R.I.P.*, the question is not whether states bound themselves voluntarily, but whether they can unbind themselves at will (Herzog 2020). If states cannot unbind themselves, then their power truly has been limited in a real way.

Can states unbind themselves at will from the law of asylum? I do not think so. As I noted at the beginning of this essay, I noted that the institution of asylum has been called, by none other than James Hathaway, “the world’s most powerful international human rights mechanism” (Hathaway and Foster 2014). I have argued that we can see the true power of asylum law in the great efforts states expend in attempting to prevent asylum-seekers from reaching their borders in the first place. For example, rather than repudiate the Refugee Convention altogether, the United States has devised a baroque system of laws and policies intended to impede asylum-seekers and the process of asylum itself. The United States may repudiate asylum in spirit, but it has not done so in fact, because such a thing is not so easy to do. This is some evidence that the Refugee Convention is a treaty from which even the most powerful states cannot simply unbind themselves at will. It thus represents a genuine limit on the basic structural rule of a state’s right to exclude.

When we construe asylum this way, the law of asylum appears to us as part and parcel of the rule of self-determination itself. It, along with the law of refugeehood, determines the scope of the exercise of that rule. Asylum law is thus a part of the basic structure of the state system itself, not a mere post-hoc fix. Indeed, there is nothing about asylum that is post-hoc in relation to the rule of self-determination of nation-states. As historian Nandita Sharma has demonstrated, the law of asylum and the law of self-determination of nation-states are coterminous (Sharma 2020). In her book, *Home Rule*, Sharma casts the law of asylum as a foundational element of the nation-state system itself.

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<sup>12</sup> Thank you to Steven Ratner for suggesting this line of thought in conversation.

Sharma's book charts the mid-Twentieth century transformation of states from the model of imperial states to that of nation-states. This moment marked a decisive shift away from imperial states and towards nation-states, as colonized peoples in Africa and Asia won independence and established themselves as nation-states. The coalescence of the nation-state system also meant a reduction in global freedom of movement. As Sharma explains it, empires were characterized by relatively open borders. Indeed, colonial subjects ostensibly had freedom of movement within the empire. Rather than control their borders, imperial states disciplined their workers via forced transportations: imperial states engaged in chattel slavery, indentured servitude, and bonded labor. By contrast, nation-states disciplined their workers via control over the borders and over political membership.

Sharma urges us not to regard the Refugee Convention as having created greater freedom of mobility where before there was less. Rather, the Refugee Convention carved out a domain of freedom of mobility at a moment when this freedom was rapidly disappearing. This contextualizes the role of asylum in relation to the rule of self-determination. It is not that this rule existed and the law of asylum came later as a kind of band-aid. Asylum law emerged alongside the law of self-determination: it sets the scope of the exercise of the power to exclude but does not undermine the spirit of the rule itself.

Nonetheless, there are many defenders of asylum that would respond with discomfort to the idea that asylum impinges in any way on sovereignty. Consider the following statement, released by the International Organization for Migration:

There is a fear that protecting human rights and placing the individual at the forefront of migration issues undermines state sovereignty or that putting migration governance firmly within the existing international legal framework may, in some way, be detrimental to state sovereignty... It needs to be more widely understood that state sovereignty is not undermined when states develop migration management laws and practices that protect the rights of both regular and irregular migrants within their territory (Thompson "Protection of Migrant's Rights and State Sovereignty").

This statement is best understood a response to right wing extremists, who have argued that asylum is a violation of state sovereignty in order to call for its termination. While I appreciate that this is a sensitive issue, I do not think we should concede that a conflict between an inflated conception of sovereignty and the institution of asylum should be decided in favor of sovereignty. In my view, asylum is justified precisely *because*, and not despite of, the fact that it imposes a limit on a sovereign right which would otherwise be an entirely arbitrary power: the right to exclude.

Rather than responding with discomfort to the existence of asylum as a check on self-determination, we should respond with curiosity. The attribution of great power to states is both a design feature and a design flaw. Asylum represents a check to that power, and a check that is unsanctioned by the official ideology of sovereignty. There are many who think that no limits on the rule of self-determination can or should be possible. Asylum proves otherwise. In doing so, this institution has the potential to serve as a beacon, lighting a pathway towards transformative change at the structural level.

#### Conclusion:

Legitimacy-repair theorists are correct that asylum ameliorates injustices endemic to the nation-state system. But asylum does more than ameliorate. I have argued that the law of asylum places a limit on the rule of self-determination, by setting bounds for the exercise of the right of exclusion. Insofar as the arbitrary exercise of the power to exclude is a key ingredient in the generation of global injustices, asylum helps to prevent and not just ameliorate ongoing injustice. On my view, asylum is more than a post-hoc fix, but part of the deep structure of the system. In other words, asylum does more than repair the legitimacy of a flawed system; asylum is a key part of the basic structure of the interstate system, one that allows it to function more successfully in the first place. This essay vindicates the institution of asylum by contextualizing its role in a flawed interstate system.

But this essay does not aim to vindicate the interstate system as it exists today. One way of arguing for the legitimacy-repair view suggests that the nation-state system is near-perfect as an ideal, but the problems emerge when we bring that system into the real world and add a little friction. When we draw out the design-features of the interstate system which give rise to structural injustice, we see that there are deeper problems at the level of conception. There is an old adage about a farmer who puts the fox in charge of the hencoop. When the hen eats the foxes, we should not say that it is because of gaps between the plan in the ideal and the plan in reality. We have deep problems at the level of the ideal. More radical structural change is needed. The law of asylum, and the greater migrant protection regime, represent one minor check on a vast and deeply dysfunctional system. Rather than dismiss the importance of asylum on this basis, we should appreciate the limited good that it can do, and the lesson it can teach us.

In imagining a better world, we must start from the institutional arrangements we have now. Asylum law is an incremental deviation from the norms of sovereignty, but it is nonetheless radically transformative, as it modifies the deepest and most basic structures of world-governance. In these respects, asylum law might serve as a model for other kinds of transformative change at the structural level. Its role as a limit on the rule of self-determination allows it to serve as a beacon, pointing towards one kind of pathway to transforming the interstate system. At the least, contextualizing asylum law as a limit on the right of self-determination teaches us a lesson: the state system does not need to run on the principle that every sovereign right must be unchecked, unlimited, and arbitrary. Limits on sovereignty are compatible with a functioning state system. It is up to us to imagine the institutions that can serve as limits.

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