

1 *Recovering Asylum's Political Roots*

Historiography plays an important role in debates over the proper conception of asylum. Critics of the persecution requirement have widely assumed it to be a Cold War artifact without any historical basis – a deviation from a humanitarian tradition that addressed the needs of the asylum seeker without making any judgment about the actions of the origin state. The persecution requirement, it is claimed, is a “product of recent Western history,” framed to cast a spotlight on Soviet deficiencies with regard to political rights, while leaving in the shadows Western deficiencies regarding “socio-economic human rights.”¹ On this view, the persecution requirement distorted asylum into a political instrument to be wielded against the Soviets at the cost of addressing the urgent needs of refugees.

Gervase Coles, for example, says that the persecution requirement was “specifically devised for a particular geographic problem at a particular time” – namely post-war Europe. It was, he writes, “adopted as being the essential characteristic of the new refugee in the belief that this would satisfactorily define European asylum seekers, the majority of whom were from Eastern Europe ... Both in its conception, and in practice, the *ad hoc* and partisan character of this approach was incontrovertible.”² Jerzy Sztucki states that “the Convention with its definition is sometimes described as a Cold War product, ‘Eurocentric’ and, if only for these reasons, obsolete.”³ James Hathaway labels it “incomplete and politically partisan.”⁴ Historian Claudena Skran calls the persecution requirement a “deviation from the humanitarian principles of the early phase of refugee law.”⁵

Before the late nineteenth century, historian Michael Marrus writes, “refugees seldom were a bone of contention among states and ... rarely preoccupied people in positions of authority. Until the second quarter of the nineteenth century there was no mention of refugees in international treaties, and states made no distinction between those fleeing criminal prosecution and those escaping political repression.”⁶ Ben Vermeulen

et al. state that “asylum has always been seen as a matter to be viewed separately from criticism of the state of origin. The granting of asylum is not in itself an unfriendly act, and should not be construed as a censure of the government of the state of the asylum seeker.”⁷

In a post-Cold War world, the critique continues, asylum can be returned to its historically humanitarian purpose. Astri Suhrke bluntly asks: “The [persecution requirement] is vulnerable to attack ... as a product of Western liberal thinking and Western political supremacy in the 1950s [and] reflects particularist notions of needs and rights. Can this be the basis for a definition that aspires to universality?”⁸

In fact, for most of its history, asylum has been viewed in political, rather than humanitarian, terms. The persecution requirement is deeply rooted in, not a departure from, asylum's long history. Asylum's origins lie in international criminal law: a recipient of asylum enjoyed immunity to extradition. Typically, such immunity was granted only when the requesting power was deemed to have abused its authority, for example, by seeking to punish the asylum seeker unjustly (i.e., persecute him). The extension of asylum to protect persecuted people generally, whether sought for extradition or not, occurred as states closed their borders to migrants. In a world of open borders, asylum was needed only by those facing extradition; other persecuted people were admitted as migrants. However, in a world of closed borders, the refusal to admit persecuted people could be functionally equivalent to extradition: it effected the return of those people to their states of origin, where they would be unjustly harmed. Asylum was thus transformed from an element of international criminal law (a defense to extradition) to a subset of immigration policy (a defense to deportation). But the class of intended beneficiaries – persecuted people – remained the same. These origins have largely gone unrecognized by contemporary commentators.

Because asylum historically depended upon a judgment about the rightfulness of another power's exercise of authority, and because granting asylum interfered with that exercise of authority, asylum was enmeshed in the high politics of international relations. Often, asylum produced international tension, which sometimes boiled over into open conflict. In order to dampen conflict, asylum was occasionally framed in humanitarian terms – for example, by those seeking asylum and by weak states granting asylum. But its political resonance was rarely far from the surface.

Thus, the political conception of asylum – as limited in focus to persecuted people, as expressing condemnation of the persecuting regime, and

as linked to a broader strategy to reform that regime – is deeply rooted in asylum’s history. The persecution requirement is not an aberrant product of the Cold War, but rather is inextricably connected with the way in which asylum has historically been understood and practiced.

Asylum and authority in ancient Greece

The word “asylum” is Latin, and comes from the Greek *asylia*, or “inviolability.” In ancient Greece, inviolability was possessed by people whose work necessitated travel outside their own state – such as envoys, merchants, athletes, and others – and was recognized by all states as a matter of comity.⁹ Inviolability was also a characteristic of certain places – namely, temples, altars, and other sanctuaries, called *asylla hiera*.¹⁰ A person in need of protection from a pursuer could enter an *asyllon hieron* and perform the rite of *hiketeia*, or supplication.¹¹ This rite is the ancient origin of what we today would call “seeking asylum.”*

* In addition to its origins in ancient Greece, asylum also had origins in the Biblical cities of refuge. See Numbers 35:9–34; Deuteronomy 4:41–43, 19:1–13; and Joshua 20:1–9. Although the cities of refuge were not meant as havens for asylum seekers from abroad, nonetheless they share what we shall see are the main features of Greek asylums: claiming refuge involved a contest to the authority claimed by a pursuer, it initiated a legal proceeding, and a successful claim immunized the claimant against their pursuer.

The Bible sanctions the revenge killing of a murderer: it gives the “blood redeemer” the privilege to kill the murderer wherever he may find him. Numbers 35:19. But revenge killing was too serious a punishment for someone guilty of involuntary or accidental manslaughter, such as the man who “goes into the forest with his neighbor to cut wood, and his hand swings the axe to cut down a tree, and the head slips from the handle and strikes his neighbor so that he dies.” Deuteronomy 19:5. Therefore, Numbers 35:9–15 commanded the Israelites to establish six cities of refuge scattered throughout the land of Canaan to which those guilty of involuntary manslaughter could flee, so that they would be protected from a blood redeemer.

The Talmud explains that after a killing, whether intentional or accidental, the killer would flee to a city of refuge. The court would send for the killer under guard, and he would be brought “before the assembly for judgment,” Numbers 35:12, to “state his case,” Deuteronomy 20:4, in order to determine the validity of his claim for protection from the blood redeemer. If the death was in fact unintentional, the killer would be brought back to the city of refuge under guard, in case the blood redeemer tried to kill him on the way. Makkot 9b. He would then enjoy immunity from vengeance so long as he stayed within the city of refuge. “But if the murderer will ever leave the border of the city of refuge to which he had fled, and the avenger of the blood shall find him outside ..., and the avenger of the blood will kill the murderer – he has no blood-guilt.” Numbers 35:26.

Hiketeia was initiated when a person entered a temple, sat in an altar, or held on to an image of a god while grasping a broken twig or wool, the signs of a supplicant. By declaring oneself a supplicant, one could claim provisional immunity against one's pursuer. Such a declaration was a public act: "anonymous stay on sacred land was not tolerated."¹² Ulrich Sinn gives the example of the Amphiaraion at Oropos, at which anyone entering would have to post their name on a wooden tablet outside the entrance.¹³

Reaching sacred space alone, however, was not enough for supplicants to secure immunity. They also had to convince the god's priest that they deserved protection, and if they failed to do so, they could be turned away. Kent Rigsby explains, "The god was not obliged to accept and protect every suppliant, only those who had a just claim."¹⁴ There are famous examples in Greek history of supplicants being rejected from asylum. The Athenian statesman Lycurgus approved of the execution of Callistratus, who sought refuge at the Altar of the Twelve Gods in Athens after returning from exile. He was executed, "Justly: for lawful treatment for wrongdoers is punishment, and the god rightly returned the guilty man to those wronged for punishment. It would be a terrible thing if the same signs were manifested to the pious and to evildoers."¹⁵ Lycurgus also thought that Pausanias, a Spartan prince who was accused of Persian sympathies and of conspiring with Sparta's serfs, was rightly starved in Sparta's temple of Athena because "this proves that gods do not help traitors."¹⁶

As one might expect, over time the privilege of asylum came to be abused, encouraging lawlessness and undermining civil authority. Most supplicants were local criminals or slaves who hoped to be spared punishment. Tacitus reported that the number of temples offering asylum multiplied, and "were crowded by the most abandoned slaves; debtors screened themselves from their creditors, and criminals fled from justice. The magistrates were no longer able to control a seditious populace, who carried their crimes, under a mask of piety, to the altar of their gods."¹⁷ When the Romans took over Greece, they curtailed the right of temples to grant asylum in the interest of order. Under the reign of Tiberius in 22 CE, the Roman Senate required temples to produce to the Senate legal proof of their right to grant asylum, which most temples were hard-pressed to do. The majority were stripped of their status as *asylia*.¹⁸

Hiketeia's international political importance, however, stemmed less from the refuge it afforded to local criminals, or to exiles who had been forced to leave their home states, than from the shelter it gave to

fugitives who had fled abroad and were sought for extradition.¹⁹ Just as a temple was considered to be inviolable space with respect to the *polis*, the concept of territorial sovereignty made one *polis*' territory inviolable with respect to others.²⁰ By granting asylum, a ruler was able to make inviolable a foreign supplicant who arrived within his territory (usually at a temple or altar, though not necessarily²¹) seeking protection from the supplicant's city of origin. Asylum acted as a defense to extradition, placing a fugitive beyond the requesting city's authoritative reach.²²

Stories of such supplicants abound in ancient Greek drama. One of the most famous of these is the *Oresteia*, a trilogy written by Aeschylus. The second play in the trilogy, *The Libation Bearers*, ends with Orestes, who had just murdered his mother, Clytemnestra, fleeing to the temple at Delphi pursued by the terrifying Furies.²³ As the third play in the trilogy, the *Eumenides*, begins, Orestes is brought by Hermes from Delphi to the Parthenon, where he wraps himself around Athena's idol and begs to be protected from the Furies. The Furies have a claim of rightful authority on their side: their job is to avenge matricides, and here the facts are uncontested as by all accounts, Orestes did kill his mother.²⁴ Orestes, however, thinks the killing was justified, not a crime – it was in vengeance for Clytemnestra's slaughter of Agamemnon, Orestes' father.

Athena initially agrees to reach a verdict in the matter herself, but then decides to establish a human institution to do so – the Areopagus, the Athenian homicide court, presided over by “the finest men of Athens” who will “decide the issue fairly truly – / bound to our oaths, our spirits bent on justice.” When the legal proceeding begins, the Furies argue for enforcing the letter of the law: matricide is matricide. Apollo, serving as Orestes' lawyer, argues that the killing was just vengeance commanded by Zeus. The judges are split evenly, but a tie vote yields an acquittal. The Furies are wildly angry, and lamenting their “power stripped, cast down,” threaten to destroy the land. But Athena persuades them to put aside their anger and become guardians of Athens.²⁵

The action of the *Oresteia* highlights three characteristics of *hiketia*. First, when one claimed asylum through supplication, one *contested the rightfulness with which authority was exercised* in one's particular case. Thus, while Orestes has no objection to the Furies' mandate on the whole, he objects to its application in his case: his is not the normal case of matricide, he claims. A temple was a natural setting for contesting the rightfulness of authority, because, as Karl Schumacher points out, it is “an intermediary zone between the divine and the human world ...

suitable for communication between both worlds.”²⁶ Grasping an idol dramatized the appeal made by a supplicant to a higher authority.

Second, *hiketeia* initiated a *legal proceeding* in which the supplicant was given the opportunity to make a plea on his own behalf, to put forward an argument as to why the punishment he faced was undeserved. Athena says to Orestes, “Tell us your land, your birth, your fortunes. / Then defend yourself against their charge, / if trust in your rights has brought you here to guard / my hearth and idol ...”²⁷

Third, the result of *hiketeia*, if successful, was that the supplicant was given *immunity* from the authority of those who pursued him. The Furies are helpless to override the decision of the Areopagus and carry out their punishment against Orestes. Instead, they must redirect their complaints to the competing authority – Athens – that granted Orestes’ claim.

These three elements of *hiketeia* are present in plays dealing with asylum from earthly authority as well. In Euripides’ *The Heracleidae*, for example, Iolaus and the children of Heracles enter the temple of Zeus, seeking asylum in Athens from their Argive pursuers. An Argive messenger is caught by the Athenians trying to tear the children of Heracles out of the temple. He defends himself by appealing to the legitimacy of his claim to authority, saying: “I have / Authority for all I do or say; Since, as an Argive, I’m recovering / These Argive nationals who’ve run away, / Though legally condemned to death at home. / We have a perfect right to carry out / The laws we make for our sovereign land.” The Athenians give Iolaus a chance to tell his side of the story, and he contests Argive authority, claiming that “we’re expatriates. / What earthly right has he to drag us all / Back to the town that drove us out, as though / They still had claims on us. We’re aliens now.”²⁸ Demophon, the Athenian king, decides to side with Iolaus, effectively granting him and the children of Heracles immunity against the Argive claim to authority. The Argives are left with no choice but to redirect their grievance to the Athenian protectors, and they do so by unsuccessfully trying to invade Athens.

In Aeschylus’ *The Suppliants*, the daughters of Danaos, fleeing forced marriage to the sons of Aigyptos, ask the Argive ruler Pelasgos to grant them asylum. Otherwise, they say, “The sons of Aigyptos will claim us. Don’t hand us over!” Pelasgos is initially skeptical of the Danaids’ claim for asylum (and no doubt intimidated by the prospect of a military confrontation with the sons of Aigyptos). Why, he asks, have they fled their native land? “Not to be slaves to the sons of Aigyptos.” Pelasgos

presses them: “Because you hate them? Or because it would be unlawful?” In other words, Pelasgos requires that the Danaids frame their claim for asylum as a complaint about the legitimacy with which the Aigyptioi exercise authority over them. He says, “If the sons of Aigyptos claim to rule / you as next of kin, in accord with the law / of your land, how can I oppose them? / You must show that those same laws / give them no power over your lives.”²⁹ Pelasgos eventually agrees to grant asylum to the Danaids (after they threaten to kill themselves upon the altar if he refuses), immunizing them against the authority claimed by the sons of Aigyptos.

When the Aigyptioi arrive to drag off the Danaids forcibly, Pelasgos prevents them from doing so. The Aigyptioi demand to know what could justify such inhospitable behavior. Their Herald asks, “Are my actions unjust? What gives offense? / ... I am just recovering lost property.”³⁰ By framing the issue in this way, the Herald forces Pelasgos to stake a stand on whether the Aigyptioi’s treatment of the women is consistent with the rightful exercise of authority. If the women are indeed “lost property,” what right does Pelasgos have to stand in the way of those who come to collect them? As far as the Aigyptioi are concerned, the decision to grant asylum to the Danaids amounted to an unreasonable rejection of their claim of ownership and an unwarranted interference with their exercise of authority.

Because granting asylum to a supplicant involved interfering with the authoritative processes of the supplicant’s city of origin, asylum had international political significance. When a fugitive on the lam from a foreign city asked for asylum, the leaders of the city of refuge often faced a troublesome dilemma. A decision to shelter a fugitive would be interpreted as an affront to the foreign power and could sometimes precipitate war. However, a refusal to grant asylum was impious, and could be construed as a sign of political weakness.

In real life, leaders seeking to avoid confrontation more often declined to protect supplicants who might bring trouble. A famous example involved Pacytes, wanted by the Persian king Cyrus for having organized a failed revolt. When Pacytes fled to Cyme and sought asylum, the Cymeans were placed in a bind: they wanted neither to surrender the suppliant for fear of divine punishment nor to grant him protection for fear of war with the more powerful Persians. They decided to pass the buck by sending Pacytes to Mytilene, presumably expecting the Mytilenians to offer him protection. But Mytilene agreed to hand Pacytes over to Persia for a ransom. The Cymeans, feeling

responsible for his safety, sent a ship to take him to Chios. The Chians then tore him away from the shrine of Athena and surrendered him to Persia in exchange for territory.³¹

Another method of avoidance, which at least paid lip service to the principle of asylum, was to seek advice from an oracle on whether to protect a supplicant. The oracle would then give an ambiguous answer that could be interpreted to the supplicant's disadvantage.³² Another strategy was interdiction: Athens went so far as to place a police station near the Acropolis so as to intercept "undesirable suppliants" before they could reach the sanctuaries to initiate *hiketeia*.³³

Sanctuary: Rome and the Middle Ages³⁴

In Rome, asylum provided temporary immunity from prosecution until evidence could be gathered and a formal trial could be held.³⁵ Its major function was the protection of slaves. Roman law distinguished between two types of people: those who were *sui juris*, under their own jurisdiction; and those who were *alieni juris*, under the jurisdiction of others. Slaves fell into the latter category – they were in the *potestas*, or authority, of their master, which extended to the "power of life or death over" a slave.³⁶ As a general matter, harboring a runaway slave was considered theft; if one caught a runaway, one had to turn him over to magistrates, who would chain the slave pending his appearance before the city prefect or governor.³⁷

A slave who fled from his master to a temple or to a statue of a caesar, however, was not considered a fugitive, because the intention was not to run away, but rather to seek asylum.³⁸ The prefect of the city was duty-bound to provide him a hearing in which the slave could protest the treatment given by his master.³⁹ The slave could contend, in other words, that the particular treatment inflicted upon him lay outside his master's authority over him, and seek immunity against it. Thus, Antoninus Pius (who ruled from 138–161 CE) decreed that "those who make just complaint be not denied relief against brutality or starvation or intolerable wrongdoing." He charged Aelius Marcianus, the proconsul of Baetica, to:

judicially examine those who have fled the household of Julius Sabinus to take refuge at the statue and if you find it proven that they have been treated more harshly than is fair or have been subjected to infamous wrongdoing, then issue

an order for their sale subject to the condition that they shall not come back under the power of their present master.⁴⁰

If the master disobeyed the order to sell his slaves, Marcianus was to threaten the master with severe retribution.⁴¹

According to Tacitus, however, the privilege of asylum was abused. As mentioned above, Rome curtailed the Greek asylum privileges in 22 CE on the ground that they had become permanent sanctuaries for criminals; and in Rome itself, “[i]t had become a practice for the most abandoned characters to assume the privilege of slandering and maligning good men under the protection of Caesar’s statute, to which they fled as a sanctuary ... Against this abuse it was argued by Caius Sestius a senator ‘that princes were indeed as the gods; but by the gods just petitions only were heard ...’ Others urged similar complaints.”⁴²

After Constantine’s Edict of Toleration in 313 CE, Christian churches became places for asylum. In addition to slaves complaining of mistreatment, churches began to shelter debtors and accused criminals for whom bishops would use their influence to intercede and plead for leniency. “Sanctuary” – the name given to church-based asylum – is first mentioned in Roman law in 392 CE, when Theodosius stipulated that those who sought sanctuary in churches could not be removed by force.⁴³ Although church sanctuary was initially limited, especially in the East, churches in the West became increasingly powerful as the empire’s authority crumbled.⁴⁴

At stake in the struggle between the empire and the Church over control of sanctuaries was the meaning of asylum itself. For the empire, the purpose of asylum was to further earthly justice – it was tolerated within the empire, despite its abuse, because it was a useful avenue of appeal for those who ordinarily would not be able to contest the authority exercised over them. These included most obviously slaves, but also those who had been the victims of error or favoritism at trial. As in Greece, asylum was meant to protect the innocent, not the guilty. Implicit in granting asylum was a judgment that the recipient had been subjected to an abuse of authority and that the punishment he or she faced was unfair.

For the Church, the purpose of asylum was very different. Rather than being an instrument of justice, it was a vehicle for mercy. Clerics pleaded for leniency not only for the wrongly accused, but for anyone who had been sentenced by Roman courts.⁴⁵ Augustine even argued that the more detestable the crime committed by the accused, the more

important sanctuary and intercession became.⁴⁶ A crime was viewed, first and foremost, as an offense against God, and thus could be repaired only through repentance, not through earthly punishment.

This Christian perspective governed the practice of asylum in medieval Europe. Nowhere is this more evident than in the medieval approach to murderers who sought sanctuary. Even though intentional murderers were explicitly excluded from the biblical cities of refuge as well as the sanctuaries of Rome, in 511 the Council of Orléans included “homicides, adulterers, and thieves” as potential recipients of sanctuary. In Germanic law as well, intentional murderers were frequently given immunity inside churches.⁴⁷

At the same time as asylum was expanded to provide protection for people who had traditionally been excluded (like intentional murderers), the number of sites offering asylum proliferated. “The places of asylum were increasingly expanded to include convents, monasteries, cemeteries, places of bishops and Canons, hospitals, such establishments as those of the Knights of Saint-John of Jerusalem and of Templars, and even the crosses placed along the way.”⁴⁸

By the twelfth century, the Christian conception of asylum was under strain. An increase in crime – and in particular, in criminal acts committed by clerics, who were immune to secular authority – had led to the famous showdown over clerical immunity between Henry II and Thomas Becket in 1163. Clerics were tried in ecclesiastical courts before the bishop rather than in secular courts, and if found guilty, received more lenient punishments than they would otherwise have received. In particular, they were not punished by death or mutilation. The King demanded that Thomas, then Archbishop of Canterbury, assent to the Constitutions of Clarendon, which asserted the King’s right to punish clerics. Thomas initially agreed but later revoked his agreement. Ultimately, the disagreement culminated in Thomas’ murder in the cathedral at Canterbury.

Forty years later, Pope Innocent III, responding to inquiries from the Bishop of London about the extent of clerical immunity, declared that “*publicae utilitatis intersit, ne crimina remaneant impunita*” – in the interest of public utility, no crimes remain unpunished – for impunity encourages further wickedness. The pronouncement “became a standard catch-phrase” in the generation following, and issued a sea change in the role of the criminal law.⁴⁹ Hostiensis, among the most influential canonists in the thirteenth century, picked up on Innocent’s statement,

and reformulated it: "It is in everyone's interest that crimes should not remain unpunished." This reformulation had the effect of recognizing a general public interest in the punishment of crime.⁵⁰

These developments had a devastating effect on the Church's sanctuary privileges. In response to a question posed by the King of Scotland as to what should be done with those who flee to churches to evade punishment, Innocent began by quoting the rule that no one should be dragged from a church, no matter how guilty he was. But then he stipulated a striking exception: "That is, unless the fugitive was a public thief or destroyer of fields by night, who often had insidiously and aggressively beset public highways ... [F]or wrongdoing of this magnitude (which both impedes public utility and noxiously molests everyone) the fugitive can be extracted, not succeeding in impunity."⁵¹ This response would have been unintelligible to people just a few generations before, who saw earthly punishment as serving no useful purpose. By the middle of the fifteenth century, "public thieves, nocturnal marauders, sacrilegious persons, armed fugitives, those who commit crimes within churches, Jews, heretics, ravishers of maidens, traitors, blasphemers, murderers, exiles, those who kill clerics, prison escapees, assassins, highway robbers, and anyone convicted before a judge" were all excluded from sanctuary.⁵² In England, the privilege of church asylum was finally removed by an Act of Parliament in 1625.⁵³

On the Continent, Catholic kings tried to persuade the Court of Rome to limit the practice even further, and when Rome was unresponsive, they abolished it themselves. In France, Louis XII cut back on sanctuary in 1515, and in 1547, Henry II decreed that churches would provide no protection against the search and seizure of fugitives.⁵⁴ Elsewhere, kings began to consider the individual's reasons for requesting asylum rather than simply guaranteeing protection to anyone who had managed to enter a sanctuary.⁵⁵

At the same time, religious wars broke out among Protestants and Catholics following the Reformation. They led to large-scale population transfers in Europe, as people fled religious persecution and sought refuge in a place where their religion was dominant. For example, following Sir Thomas Wyatt's unsuccessful Protestant insurrection in 1554, Mary Tudor burned more than 300 Protestants at the stake; more than 30,000 fled to Holland during her reign.⁵⁶ Protestants also began to flee from France in 1585 when Henry III demanded that they convert to Catholicism or leave.⁵⁷ It was against this

background of religious persecution, and the development of an inter-state system founded on territorial sovereignty, that the natural law jurists began to consider what place asylum ought to have in international law.

Grotius: asylum and international criminal law

In *De Jure Belli ac Pacis*, written in 1625, Hugo Grotius (1583–1645) sought to articulate rules to govern an international society of states – rules that dictated when states may and may not resort to force to pursue their ends – so as to reduce conflict.⁵⁸ He began his treatise by noting that his subject had yet to be addressed “in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished.”⁵⁹ Importantly, Grotius signaled asylum as one cause of war: “among the evils that arise from differences between states” is “the fact that ‘It is possible for those who have done wrong to one state to flee for refuge to another.’”⁶⁰ This passage is significant because it suggests that the location of asylum had changed. Churches no longer offered the setting within which asylum was granted. Instead, a ruler granted asylum to fugitives fleeing another jurisdiction under the cover of his territorial sovereignty. And, as in ancient Greece, interfering with another polity’s authoritative processes could create strife.

Grotius sought to minimize the possibility for conflict by arguing for a duty upon states to extradite or punish (*aut dedere aut punire*) fugitives who came within their borders. Failure to perform this duty made one an accessory to the crime and, therefore, liable to punitive war waged by the state seeking extradition.⁶¹ The source of the duty to extradite or punish was found in the law of nature, which included the principle of commutative justice: “it is right for every one to suffer evil proportioned to that which he has done.”⁶² The justifications for that principle included the reform of offenders, the security given to those who are injured by wrongdoing, and “general utility,” which is enhanced by the deterrent effects of punishment.⁶³ We hear echoes here of Innocent’s proclamation several centuries earlier.

The duty to extradite, however, did not encompass *every* fugitive who fled abroad. It was limited by the “so much talked of rights of suppliants, and the inviolable nature of asylums ...” Grotius drew on a number of Greek sources to emphasize that asylum was deserved only by “those whose mind is innocent,” not those “whose life is full of wicked acts.”⁶⁴

It was “for the benefit of those who suffer from undeserved enmity [*immerito odio laborant*], not those who have done something that is injurious to human society or to other men.”⁶⁵ Only those offenders who fell into the former category were sheltered from the state’s duty to “extradite or punish.” In other words, asylum served as a defense against extradition, granted when the requesting state sought to inflict punishment unjustly.⁶⁶

For Grotius, “unjust punishment” largely meant the punishment of people who had not actually committed the crime of which they had been accused. He provided two biblically-inspired examples of fugitives deserving of asylum: the accidental killer whose weapon slipped from his hand; and the slave who escaped from his master. Both were wrongfully accused: the accidental killer was sought for murder even though he did not intend to kill; and the slave had escaped subjugation to a master who could claim no rightful authority over him.

Those two cases, according to Grotius, were examples of the more general principle that asylum was to be available to all innocent people “who are beaten down by the hard and oppressive strokes of ill fortune.”⁶⁷ As the two examples make clear, Grotius meant by this phrase a specific *kind* of “ill fortune” – namely, exposure to “undeserved enmity.” Thus, Grotius gave the example of Nauplius, who received shelter from the Chalcidians once he had “adequately cleared himself from the charges brought by the Achaeans.”⁶⁸

Grotius’ focus on supplicants who were innocent of the charges against them led him to state that “the case must be judged according to the ... law of [the supplicant’s] own country.”⁶⁹ According to that rule, states were to determine only whether a fugitive had in fact violated the criminal law of the requesting state. If so, then extradition was required, no matter how oppressive or noxious that criminal law was.

In other passages, however, Grotius recognized that asylum could be appropriate when a requesting state sought to punish conduct that, according to natural law, could not justly be made criminal. For example, Grotius recognized that “to obstruct the teachers of Christianity by pains and penalties is undoubtedly contrary to natural law and reason,” and added that “[i]t seems unjust to persecute with punishments those who receive the law of Christ as true, but entertain doubts or errors on some external points.”⁷⁰ Religious persecution would seem to fall within the description “undeserved enmity,” warranting asylum. One

might also expect asylum to be made available to those fleeing regimes that “provoke their peoples to despair and resistance by unheard of cruelties, having themselves abandoned all the law of nature.”⁷¹ Such people were innocent victims of tyrants who exercised political power in a manner inconsistent with the constraints imposed by natural law. In a footnote, Grotius cited the example of Frankish King Pepin, who “refused to surrender those who fled to him from Neustria to escape the tyranny.”⁷² Interestingly, Grotius even described himself in the *Prologomena* as “undeservedly forced out from my native land”; he had been sentenced for his involvement in a failed coup in the United Provinces, and sought asylum in France after escaping from prison in 1621 hidden in a trunk of books.⁷³

The Grotian view of asylum was thus strikingly political. Determining whether a fugitive ought to be extradited or protected as a supplicant required the recipient state to make a potentially controversial normative judgment about the practices of the requesting state. Granting asylum expressed the view that the foreign state had exceeded the bounds of rightful authority, so that its claim to punish should not be honored.⁷⁴ Accordingly, asylum interfered with the internal affairs of another state. By granting asylum, a receiving state effectively acted as judge in a dispute between another state and one of its subjects. Having determined that the requesting state had no right to punish its subject, the receiving state provided him or her with immunity.

Asylum consequently bore a family resemblance to more forceful sanctions that could be employed against governments that treated their citizens cruelly. Grotius noted the “rule established by the law of nature and of social order, and ... confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere.” Nonetheless, he argued, regimes can be so barbaric that “they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.”⁷⁵ When regimes violated the natural law, Grotius sanctioned the waging of punitive wars against them.⁷⁶ He reasoned that, although citizens of a repressive government were bound by a pledge of loyalty to the sovereign and, therefore, could not revolt themselves, foreign governments were not bound by any such pledge and thus could intervene to aid the oppressed. Grotius provided the example of Constantine, who “took up arms against Maxentius and Licinius, and other Roman emperors [who] either took, or threatened to

take them up against the Persians, if they did not desist from persecuting the Christians.”⁷⁷

On the Grotian view, asylum and punitive wars followed similar sorts of judgments – that authority was being exercised wrongfully. They differed in the degree of the sanction they imposed. Punitive war, the more severe sanction, should be waged only in cases where another regime’s wrongdoing was so excessive that the regime as a whole had lost its authority to govern. Asylum was an appropriate response to particular instances in which authority was wrongfully exercised. Grotian asylum policy was thus enmeshed with high international politics.

Wrestling with Grotius: Pufendorf, Wolff, Vattel

Later international jurists, such as Samuel von Pufendorf (1632–94),⁷⁸ Christian Wolff (1679–1754),⁷⁹ and Emerich de Vattel (1714–67),⁸⁰ rejected Grotius’ idea that states had the power to enforce the natural law against violators. Pufendorf instead theorized that the power to punish stemmed from sovereignty.⁸¹ Because the international system had no sovereign, states were not fit to punish one another for violations of the natural law committed against third parties. A state was only justified in fighting a war when it had been harmed itself; and even then the state’s motive could not be to punish, but rather to seek reparations for the harm done to it.⁸² Nor were states under any duty to extradite or punish fugitives from another state; punishment was a matter between the criminal and his own sovereign.⁸³ Pufendorf argued that his view would promote a more peaceful international system. “For a person to thrust himself forward as a kind of arbitrator of human affairs,” as Grotius’ theory required, “is opposed even to the equality granted by nature, not to mention the fact that such a thing could easily lead to great abuse, since there is scarcely a man living against whom this could not serve as an excuse for war.”⁸⁴

Pufendorf: underprotecting refugees

Pufendorf’s comparatively pacific view of the international system had important consequences for his treatment of asylum. On Grotius’ account, states were under an obligation to extradite or punish criminals who fled from other states. Asylum was an exception to this obligation, warranted only when the requesting state sought to inflict

an undeserved injury. Grotian asylum policy was thus premised on states “thrusting themselves forward as arbitrators of human affairs.” Pufendorf rejected the proposition that states should make judgments of this kind. But how then should one understand asylum?

Pufendorf’s approach was to collapse asylum into the general duty to “admit ... strangers, as well as ... kindly provid[e] travelers with shelter and hospitality.”⁸⁵ He reached this conclusion by citing several authorities that appeared to equate supplicants and strangers.⁸⁶ Grotius had also argued for a duty of hospitality to strangers, saying that “individual subjects, who wish to remove from the dominions of one power to those of another” should be free to do so. Indeed, Grotius regarded the possibility of such migration as a “principle of natural liberty.”⁸⁷ But for Grotius, asylum was a different matter than hospitality. Supplicants were wanted for extradition by their states of origin; they were not simply sojourners seeking a new home. The relevant duty regarding supplicants was to extradite or punish – unless, of course, the punishment faced by the supplicant was undeserved. Because Pufendorf did not accept the duty to extradite or punish, he saw no need to differentiate between supplicants and other strangers seeking a new home. All should be received with hospitality.

Pufendorf’s duty of hospitality, however, could give way to interests of state. “If the duty of hospitality is to be an obligation of natural law,” Pufendorf wrote, “it is required that the stranger shall have an honourable or necessary reason for being away from his home. Furthermore, he should be an upright man, and one from whom no danger or disgrace will come to our house.”⁸⁸ Thus, he concluded, states merely needed to admit “a few strangers, who have not been driven from their homes for some crime,” and they remained at liberty to restrict entry except to those who were “industrious or wealthy, and will disturb neither our religious faith nor our institutions.”⁸⁹

For Pufendorf, then, whether supplicants would be admitted turned not on justice or desert, as it had for Grotius; instead, admittance turned on the contribution supplicants could make to the receiving state. Will they be productive members of the local economy? Will they help the country grow more powerful? Are they religiously compatible? If the answer was no, admission could be refused – and supplicants would be returned to face unjust punishment. Pufendorf concluded:

Every state may reach a decision, according to its own usage, on the admission of foreigners who come to it for ... reasons [other than temporary passage, a

brief visit, or trade] that are necessary and deserving of sympathy ... [W]hen these people are worthy of our sympathy, and no reasons of state stand in the way, it would certainly be an act of humanity on our part to confer a kindness on them, that will not be too onerous on us, or the cause of later regret. If they are not, our pity should be so restrained that we may not later become an object of pity to others.⁹⁰

Asylum was thus decoupled from the controversial judgments about other states' authority that had been, for Grotius, at asylum's core. From Grotius' standpoint, Pufendorf's approach thus risked the underprotection of supplicants: in pursuit of self-interest, states were free to turn away people deserving of protection.

Wolff: overprotecting refugees

Like Pufendorf, Christian Wolff rejected Grotius' ideas that states could enforce the natural law against one another and that they had a duty to extradite or punish fugitives. "[A] wrongful act committed in one state," Wolff wrote, "does not affect another state ..."⁹¹ Wolff also followed Pufendorf in viewing asylum as linked to the duty of hospitality. But he went to greater lengths than Pufendorf in urging states to take this duty seriously.

Admonishing his readers to "be compassionate toward exiles,"⁹² he wrote that:

exiles do not cease to be men, because they are driven into exile, consequently compelled to depart from the place where they have domicile ... [S]ince by nature all things are common ... the right of living anywhere in the world cannot be absolutely taken away from one, by nature the right belongs to an exile to live anywhere in the world.⁹³

In a reprise of medieval Christian attitudes toward punishment, Wolff even endorsed giving refuge to ordinary criminals as an act of love that recognized the possibility of redemption: "Since the act cannot be undone by us or by them, it is rather incumbent on us that we bring them back to a better moral life, and that, if they should desire to reform of their own accord, we should not stand in the way to prevent it."⁹⁴ From the Grotian standpoint, Wolff thus urged the overprotection of supplicants: asylum was to be granted even to criminals who deserved to be punished.

While Wolff urged states to be open to foreigners, he stopped short of requiring them to be. Permanent residence, Wolff wrote, could not be “denied to exiles by a nation, unless special reasons stand in the way”;⁹⁵ but the list of “special reasons” was long – in effect, states had discretion to deny admittance for any reason related to the public welfare – and in the end, exiles had no recourse but to accept a state’s decision. “[A]n exile is allowed to ask admittance,” Wolff wrote, “but he cannot assuredly according to his liking determine domicile for himself, wherever he shall please, and if admittance is refused, that must be endured.”⁹⁶

Vattel: a middle path

Vattel presented his *Le Droit des Gens* as an explication, expansion, and correction of Wolff’s work. But his view of asylum was much more subtle than Wolff’s. On the one hand, he agreed with Wolff that states should err on the side of overprotecting fugitives. “[N]o Nation,” he wrote, “may, without good reason, refuse even a perpetual residence to a man who has been driven from his country,”⁹⁷ even one who was escaping punishment. Although there was a long list of “good reasons” that could justify exclusion – as there was for Wolff and Pufendorf – at the same time states should not lightly invoke them. The right to asylum, Vattel wrote, was:

in the abstract ... a necessary and perfect one, [but] it must be observed that it is only an imperfect one relative to each individual country; ... By reason of its natural liberty it is for each Nation to decide whether it is or is not in a position to receive an alien. Hence an exile has no absolute right to choose a country at will and settle himself there as he pleases; he must ask permission of the sovereign of the country, and if it be refused, he is bound to submit.⁹⁸

However, “[p]rudence should not take the form of suspicion nor be pushed to the point of refusing an asylum to the outcast on slight grounds and from unreasonable or foolish fears. It should be regulated by never losing sight of the charity and sympathy which are due to the unfortunate.”⁹⁹

Moreover, Vattel emphasized, when asylum seekers could not find a refuge anywhere else, a state was required to take them in without regard to its national interests:

The Nation to which they present themselves should grant them lands in which to dwell, at least for a time, unless it has very serious reasons for

refusing ... But, after all, these fugitives must find an asylum somewhere, and if every Nation refuses to grant it to them, they may justly settle in the first country where they find sufficient land without having to deprive the inhabitants.¹⁰⁰

Vattel thus argued for an even more robust right of asylum than Wolff. It was animated not only by a sense of compassion – which could always be overridden by national interest – but also by a duty of justice, to which national interest sometimes needed to give way. In that sense, Vattel took overprotection one step further than Wolff: not only were states entitled to grant asylum to criminals (who, Grotius argued, should be extradited, not sheltered), they could be *required* to do so.

Certain criminals, however, were so dangerous that no state could reasonably be expected to absorb them. The principle of asylum had its practical limits. Criminals “who by the character and frequency of their crimes are a menace to public security everywhere,” Vattel concluded, ought to be extradited and punished, not sheltered. Such criminals included “poisoners, assassins, [and] incendiaries ...; for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety.” Pirates also fell into this category, as did robbers. The state of refuge, said Vattel, ought to “deliver [such criminals] up to the injured State, so that it may inflict due punishment upon [them]”¹⁰¹ – indeed, they ought to do so even when such criminals were one’s own citizens. We hear strains of Grotius – but only for the worst of criminals. No state should be required to accept criminals who “violate the laws and menace the safety of all Nations alike.”¹⁰²

Confining the duty to “extradite or punish” to crimes that fell within the *delicta majora* – like murder, piracy, and arson¹⁰³ – was quite clever. Asylum could be extended to the vast majority of fugitives, as Wolff had advocated; but at the same time, public safety could be preserved by requiring that the most dangerous of criminals be extradited. And, because everyone agreed on the narrow set of crimes that constituted the *delicta majora*, the decision whether to grant asylum to a criminal or to extradite him would not involve the state of refuge in any controversial judgments about another state’s authority to punish. Extradition could reasonably be demanded only when a supplicant was wanted for a crime that everyone could agree should be punished. In all other cases, asylum was the appropriate response.

In fact, however, Vattel's approach could not entirely avoid controversial judgments about other states. Although states were likely to agree in the abstract about which crimes fell into the *delicta majora*, they might disagree for several reasons about whether a particular asylum seeker was extraditable. First, oppressive countries could have criminal procedures regarded by free states as insufficiently protective of liberty. They might admit secret evidence, presume guilt rather than innocence, or violate due process in some other way. Even someone accused of piracy still had certain due process rights that provided limits on a state's rightful authority. If an oppressive state routinely exceeded those limits, a free state that took due process seriously might wish to grant asylum even to an accused pirate. The extradition of those who "menace the safety of all" thus depended upon a tacit judgment that the requesting state's criminal procedure would accord due process to the accused.

Second, even if due process were guaranteed, a foreign state's punishments might be too harsh to be acceptable. This difficulty could arise even with respect to an extradition treaty between two free states. Thomas Jefferson, for example, objected to a treaty with Britain that would extradite thieves, because "In England, and probably in Canada, to steal a hare is death, the first offence; to steal above the value of 12*d*, death the second offence. All excess of punishment is a *crime*; to remit a fugitive to excessive punishment is to be *accessary* to the crime."¹⁰⁴ Today we see this problem arise in the unwillingness of European states to extradite to the United States a fugitive who will potentially be subject to the death penalty if found guilty. The extradition of serious criminals thus also depended upon a judgment that the punishment faced by a fugitive, if found guilty, would be reasonable.

Finally, states could disagree about what counted as a crime for the purposes of extradition. For example, Britain was reluctant to return to the United States for punishment fugitive slaves who had killed their masters. In 1841, it refused to extradite about 100 slaves who had anchored the American ship *Creole* in the Bahamas after having staged a mutiny. Britain viewed these slaves as having engaged in justified rebellion. The United States, needless to say, disagreed, and viewed the slaves as murderers and mutineers. A decision to extradite, therefore, depended upon a judgment that the requesting government was correct in classifying an act as a crime rather than as an act of justified rebellion.

Vattel's approach – granting asylum to all except those who had committed serious crimes abroad – was thus premised upon a series of potentially controversial judgments about other states' authoritative processes: Would the serious criminal be tried fairly? Would he be punished fairly? And did his act really constitute a serious crime? If not, then asylum was warranted and extradition should be refused.

Vattel seemed to have acknowledged at least the first problem. When a regime made a practice of disregarding the due process rights of fugitives who were extradited to it, Vattel regarded further extraditions to that regime as inappropriate: “[I]f he should find from constant experience that his subjects are being persecuted by the magistrates of the neighboring States when appearing before them, he would doubtless be justified ... in refusing requisitions until satisfaction had been made for the injustice done and its recurrence provided against.”¹⁰⁵ And if a state refused to extradite a criminal when extradition was expected, Vattel maintained that the refusing state needed clearly to express its qualms by “set[ting] forth [its] reasons for taking such action and mak[ing] them perfectly plain.”¹⁰⁶ In other words, if asylum was granted to someone wanted for a serious crime, the state of refuge was required to justify its actions through criticism of the requesting state.

The English tradition

Concerns about the criminal procedure of other states animated the English policy between the seventeenth and nineteenth centuries of granting asylum to virtually every refugee who arrived on its shores, without regard to his reason for flight, and no matter how odious his crime. Even by 1870, Britain had signed only a handful of extradition treaties.¹⁰⁷

Beginning in 1174, England had entered into numerous treaties with Scotland, Ireland, and France providing for the mutual rendition of fugitives who had fled across the border.¹⁰⁸ Writing in the early seventeenth century, Sir Edward Coke (1552–1634) objected strongly to this practice, especially insofar as it involved handing over English subjects to a foreign government for punishment. He wanted to protect England's comparatively demanding requirements of due process against circumvention, and extradition made it possible for English subjects to be tried and convicted for crimes under procedures that would be unacceptable in England. Thus, Coke argued in his comments

on the Magna Carta that English subjects could not be forcibly sent abroad except by Act of Parliament.¹⁰⁹

Coke's objections were not limited to the extradition of English subjects, however. He also favored a rule granting asylum to foreigners who sought refuge in England. "Divided kingdomes under severall kings in league with another," he wrote, "are sanctuaries for servants or subjects flying to safety from one kingdom to another, and upon demand made by them, are not by the laws and liberties of kingdomes to be delivered: and this (some hold) is grounded upon the law in Deuteronomy. *Non trades fervum domino fuo, qui ad te confugerit* [Thou shalt not deliver unto his master the servant which is escaped from his master unto thee]."¹¹⁰

Coke's position was reflected in the Habeas Corpus Act of 1679, which stipulated that an "inhabitant" or "resident" of England could not legally be sent prisoner abroad.¹¹¹ Although this language perhaps left ambiguous the applicability of the Act to foreigners taking refuge in England, it nonetheless prepared the way for an English reluctance to enter into extradition treaties. By 1791, Thomas Jefferson could report to George Washington that "England has no such convention with any nation, and their laws have given no power to their executive to surrender fugitives of any description."¹¹²

Britain at last agreed to extradite murderers and forgers to the United States in 1794 and to France, the Netherlands, and Spain in 1802. Extradition treaties covering a few additional offenses – assault with intent to commit murder, piracy, arson, and robbery – were signed with the United States and France in 1843.¹¹³ But in practice these treaties were ineffectual, since the British were often unwilling to accept warrants issued by French or American magistrates as sufficient for extradition. Contrary to British law, French warrants could be issued based on an accusation without proof; consequently, no criminal was extradited from Britain to France between 1843 and 1863. And it was feared that the Americans would accuse escaped slaves of fictitious crimes to bring about their recapture.¹¹⁴

England's willingness to become, as Jefferson put it, "the asylum of the Paolis, the La Mottes, the Calonnes, in short, of the most atrocious offenders as well as the most innocent victims, who have been able to get there,"¹¹⁵ thus stemmed from its respect for criminal procedure as a basic ingredient of liberty. It had made a categorical judgment that the criminal procedure of other states offered the accused inadequate

protection and permitted the criminal law to be used as an instrument of political repression. Asylum served as a prophylactic measure against the possibility that a fugitive would be treated unjustly if extradited. Other governments – with the limited exceptions of the United States, France, and later Denmark – could not be trusted to observe the procedural protections to which the English thought all accused criminals were entitled, and which ensured that political dissidents would be fairly treated.

The young United States adopted the English approach toward extradition. Thomas Jefferson wrote in 1792 that an extradition treaty between a free government and a despotic government was unworkable:

Two neighboring and free governments, with law equally mild and just, would find no difficulty in forming a convention for the interchange of fugitive criminals. Nor would two neighboring despotic governments, with laws of equal severity. The latter wish that no door should be opened to their subjects flying from the oppression of their laws. The fact is, that most of the governments on the continent of Europe have such conventions; but England, the only free one till lately, has never yet consented either to enter into a convention for this purpose, or to give up a fugitive. The difficulty between a free government and a despotic one is indeed great.¹¹⁶

So long as a gap existed between free countries and despotic regimes in terms of the crimes for which one could be punished, the due process required to convict, and the kind of punishment exacted, Jefferson thought it was better to provide asylum for fugitives and wrongdoers than to return them for prosecution. “The laws of this country,” he explained to Minister Genet of France in 1793:

take no notice of crimes committed out of their jurisdiction; The most atrocious offender, coming within their pale, is received by them as an innocent man, and they have authorized no one to seize or deliver him. The evil of protecting malefactors of every dye is sensibly felt here, as in other countries; but until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices: the former therefore is viewed as the lesser evil.¹¹⁷

Aside from the Jay Treaty of 1794 entered into with Britain, which was allowed to lapse, the United States did not conclude another extradition treaty until 1842 (with Britain) and 1843 (with France).

The Anglo-American approach to asylum shared much with that of Grotius. While Britain and the United States readily extended asylum

without regard to the innocence or guilt of the asylum seeker (unlike Grotius), they did so for a reason that Grotius would have appreciated: a categorical judgment that other states' authoritative processes could not be relied upon to limit punishment to those who deserved it. Jefferson acknowledged that asylum was a second-best solution; that sheltering criminals was an evil; and that in principle extradition ought to be carried out. But, he argued, that principle could not be justly implemented in a world full of despotic governments. Protecting individuals from unjust prosecution was too important a task to entrust to the kangaroo courts of despotic regimes.

Cesare Beccaria, the eighteenth-century Italian penal reformer (1738–94), shared this view. As a general matter, he opposed the existence of sanctuaries within countries, since “[i]mpunity and asylum differ only in degree ... [A]sylums encourage crimes more than punishments deter them.”¹¹⁸ But he was reluctant to endorse an end to asylum, despite its corrosive effect on law and order. Asylum was an unfortunate but necessary policy in a world full of oppressive regimes:

But, whether international agreements for the reciprocal exchange of criminals be useful, I would not dare to decide until laws more in conformity with the needs of humanity, until milder punishments and an end to dependence on arbitrary power and opinion, have provided security for oppressed innocence and hated virtue – until universal reason, which ever tends the more to unite the interests of throne and subjects, has confined tyranny altogether to the vast plains of Asia, though, undoubtedly, the persuasion that there is not a foot of soil upon which real crimes are pardoned would be a most efficacious means of preventing them.¹¹⁹

In other words, if governments could be trusted to exercise their authority rightly, asylum would be a malicious interference with justice. But in a world where many regimes exercise power arbitrarily, asylum was necessary to effectuate justice.

Protecting revolutionaries: the political offense exception

While Britain had a long tradition of hostility toward extradition, the Continent had adopted a different approach. Rulers regularly extradited criminals – including political offenders, who were least likely to receive a fair trial – to their allies. Indeed, the return of fugitives accused of *lèse-majesté* was the main purpose of extradition. Crimes affecting

the “public weal,” as Grotius put it, were considered to be more serious than “private” crimes.¹²⁰

The French Revolution brought about major changes in the way Europeans, both on the Continent and in Britain, approached extradition and asylum. While for Grotius and Coke asylum was aimed largely at protecting innocent people from unfair criminal procedures, by the early nineteenth century the focus of asylum had changed from criminal justice to political morality. On the Continent, and soon afterwards in England and the United States, states began to grant asylum in order to protect those who were wanted abroad for political offenses. At around the same time in England and the United States, extradition courts, wary of creating diplomatic difficulties for the executive, began to embrace the “rule of non-inquiry,” according to which courts refused to inquire into the adequacy of the requesting state’s criminal procedures.¹²¹

The first state to proclaim the principle of asylum for political offenders was revolutionary France, and it had unabashedly political aims in doing so. The French Constitution of 1793 guaranteed asylum to any foreigner forced to flee his land for advancing the cause of liberty.¹²² This principle was often honored in the breach, however, as France continued to extradite political offenders until the 1830s. Treaties with Switzerland in 1798, 1803, and 1828 all called for the extradition of fugitives whose crimes undermined state security.¹²³

In 1833, Belgium became the first state to pass a law barring the extradition of a foreigner wanted for “any political crime antecedent to the extradition, or for any act connected with such a crime.”¹²⁴ By the mid-nineteenth century, the Belgian text had been adopted by most European states. Even autocracies adopted a political offense exception; without it, the liberal states were unwilling to extradite ordinary criminals to them.¹²⁵

The idea that political offenders should be sheltered from extradition resonated in England as well. In 1815, the government was roundly criticized following the Governor of Gibraltar’s surrender of political fugitives to Spain. Sir James Mackintosh appealed on the floor of Parliament to the “venerable principle” of the non-extradition of political offenders.¹²⁶ By the late nineteenth century, political morality had become the main focus of asylum in England as well. Opponents of extradition treaties expressed concern that illiberal states would use the criminal law as a pretext for persecuting political dissidents. In 1847,

the Home Office opposed a proposed extradition treaty with Naples primarily on that ground:

With France & America we have made Treaties of Extradition for many good reasons; having Confidence in the Governments of those Countries, that they would not use the provisions of the Treaty covertly for *political* purposes ... But could we have the same Confidence in the *Neapolitan* Government? ... Besides, a convention of the kind proposed with the Neapolt Govt c^d scarcely ever be carried into effect, on account of the irregularities or looseness w^h w^d probably be found to exist in their Criminal Proceedings. – **But the principle Objection is the danger that such a Convention will be perverted to *political* purposes.**¹²⁷

John Stuart Mill and his Liberal Party, offering a similar argument, were able to block a proposed extradition treaty in 1852 between England and France that would have returned to France anyone who had fled a conviction or an arrest warrant. Mill warned that the French criminal law was too susceptible to political manipulation, so that political dissidents might be punished under the pretense of prosecution for an ordinary crime. “The depositions which are taken preparatory to a criminal trial in France by the *juge d’instruction* are taken in secret,” he argued. “It is ... the easiest thing in the world to get up a false charge against a person, if ... there is the slightest disposition to do so.”¹²⁸

On its face, the political offense exception appeared impartial: it gave asylum to any political offender, regardless of the offender’s ideological goals. The political offender exception was, in its phrasing, indifferent between despotism and democracy, autocracy and liberalism. On at least one account, this seeming neutrality was the major advantage of the political offense exception: it allowed countries to avoid having to determine whether the offender’s crimes had been legitimate resistance to tyranny. Heinrich Lammasch, the last Prime Minister of Imperial Austria, wrote in the mid-1880s that a blanket exception for political offenders was a corollary of the principle of non-intervention, avoiding the need for foreign states to pick sides in the internal disputes of other states.¹²⁹

Despite the appearance of neutrality, the political offense exception was in fact premised upon a categorical judgment about the legitimacy of foreign governments. The political offense exception was first enacted in revolutionary France to support and shelter radical democrats oppressed by neighboring autocracies. It furthered a particular

political aim and was grounded in a particular view about legitimate authority. States sought to protect political offenders whose goals were sympathetic, and deny protection to those whose goals they opposed, by manipulating the definition of “political offense” to encompass only “legitimate” resistance.

One way to define “political offense” was to focus on the elements of the offense itself. Thus, acts such as treason or sedition – which were aimed at the government – were political, while common law offenses – like murder or robbery – were not. But that answer seemed to be unduly narrow, since common law offenses could be politically motivated and connected to an uprising or rebellion. For example, one could murder a political official or rob to obtain funds for a political group.

On the other hand, if an offense could be regarded as “political” due solely to its motivation or objective, the category of “political offenses” would be disturbingly broad: terrorists who indiscriminately harmed innocents in pursuit of a political objective would enjoy protection from extradition. As Sir James Fitzjames Stephen put it in his treatise on English criminal law, such an approach “would have protected the wretch Fieschi, whose offence consisted in shooting down many persons in the streets of Paris in an attempt to murder Louis-Philippe.”¹³⁰

Stephen and John Stuart Mill both preferred a definition centered on the context in which an act was committed. The phrase “political offense,” argued Stephen, “ought to be interpreted” to pertain to crimes that “were incidental to and formed a part of political disturbances.”¹³¹ But that definition was also unsatisfying. It was underinclusive, since it would omit a “legitimate” act, performed with a political purpose, committed prior to the beginning of a political disturbance. It also risked overinclusion because it labeled “political” any criminal act committed in the course of an insurrection. Thus, it too might protect offenders like “the wretch Fieschi,” who showed little regard for innocent human life.

In the end, whether an act of resistance was regarded as a “political offense” depended implicitly on a judgment about whether certain *tactics* could be legitimately employed in carrying out political resistance.¹³² Thus, Mill contended that “in rebellion, as in war, ... a distinction should be made between fair weapons or modes of warfare and foul ones.”¹³³ He therefore argued in favor of extraditing from France two suspects in the 1867 Clerkenwell Prison bombing, which

was carried out to facilitate the escape of two Irish Fenians, but killed fourteen others.¹³⁴

Of course, whether one regarded resistance tactics as “legitimate” often depended in part on one’s view of the regime against which resistance was directed. An act might be regarded as a legitimate tactic of rebellion when carried out by a democratic revolutionary against an autocracy, but not when carried out by a socialist or anarchist against a liberal democracy. Thomas Jefferson drew upon that distinction in explaining his reluctance to extradite Spanish fugitives wanted for treason:

Treason ... when, real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one’s country. They do not distinguish between acts against the *Government* and acts against the *oppressions of the Government*. The latter are virtues, yet have furnished more victims to the executioner than the former: because real treasons are rare, oppressions frequent. The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries. Reformation of government with *our* neighbors is as much wanting now, as reformation of religion is or ever was any where. We should not wish, then, to give up to the executioner the patriot who fails and flees to us.¹³⁵

Jefferson’s argument, of course, turned on implicit substantive criteria that allowed him to distinguish between “real treasons” against legitimate governments, on the one hand, and justified resistance against oppressive governments, on the other hand.

Along similar lines, a British court ruled that Theodule Meunier, an anarchist wanted by France for the 1892 bombings of a barracks and of the Café Véry in Paris, was extraditable. His acts of resistance could not be regarded as “political offenses,” the court held, because anarchism was not a political movement. To be political, the court said, an offense must at least aim at replacing one kind of government with another; but anarchists rejected all governments.¹³⁶

In sum, the definition of “political offense” did not simply fall from the sky. It was rooted in value judgments about what counted as legitimate resistance to government and legitimate punishment by government, and was designed to “get it right,” morally speaking, as often as possible. And the policy of sheltering political offenders not only followed from, and expressed, such value judgments, but also advanced the cause of liberty by sheltering its partisans from punishment.

From extradition to deportation: reconceiving asylum as immigration policy

The historical account offered in the preceding pages recovers asylum's political roots. Asylum's historical function was to immunize fugitives against unjust punishment. It therefore depended upon a potentially controversial judgment about the manner in which another regime exercised its authority. The persecution requirement follows naturally from that historical function. To "persecute" means to "pursue with harassing or oppressive treatment," precisely the kind of treatment that historically gave rise to a valid claim for asylum against extradition. Today, of course, extradition and asylum are separate areas of law, and asylum is usually viewed as a subset of immigration policy rather than international criminal law. But the purpose of asylum – to shelter those exposed to persecution – remains the same.

The recasting of asylum – from a defense against extradition to a defense against deportation – occurred as states began to close their borders. In a world of open borders, asylum was needed only as a defense to extradition; persecuted people who were not sought for extradition could easily find a home elsewhere. But in a world of closed borders, refusing admittance was functionally equivalent to extradition: in either case, the foreigner was returned to his state of origin.¹³⁷ It followed that, if asylum's historical purpose was to be served in a world of closed borders, asylum needed to be made available to all those who were persecuted and who would otherwise be excluded or deported, and not merely those who were actually sought for extradition. The persecution requirement served to distinguish between refugees deserving of asylum on the one hand, and ordinary migrants excluded by the new immigration restrictions on the other hand.

In Britain, for example, immigration controls were first put into place in 1793, partly in response to fears that French spies had infiltrated the country and were organizing a revolt. Britain went to war with France a few weeks later. The 1793 Act excluded "undesirable aliens," required foreigners to arrive at particular ports of entry, and limited their freedom of movement once they were within the country.¹³⁸ But the bill's sponsor, Lord Grenville, stressed that it was not intended to exclude refugees fleeing the Terror; it was aimed only at those "who would pull down church and state, religion and God, morals and happiness."¹³⁹ Notwithstanding the Act, Britain received a large number of refugees

over the next decade – though exact figures are unavailable – and spent in excess of £2.9 million on their support.¹⁴⁰

Nonetheless, as the Napoleonic Wars came to an end, the 1793 Aliens Act came under increasing criticism from those who felt it was insufficiently protective of democrats fleeing Continental autocracies. Asylum seekers were seen as heroic freedom fighters, whose only crime, as John Cam Hobhouse put it on the floor of Parliament in 1822, was “the longing of expatriated friends of liberty to overthrow tyrants at home.”¹⁴¹ England’s policy of sheltering political offenders from extradition enjoyed broad public support; many felt that revolutionary activity was a legitimate response to the pervasive autocracy on the Continent. By 1826, the Act had been repealed and replaced with a less restrictive alien registration provision. Britain’s borders remained effectively open for the next eighty years, and aliens resident there could not be deported.¹⁴²

The 1905 Aliens Act, Britain’s next attempt at regulating immigration, was directed at reducing the large number of Eastern European Jews who had begun to enter Britain in the 1880s. Opponents of the legislation argued that it represented a perversion of Britain’s national traditions. One Liberal MP appealed:

[t]o all who are anxious to preserve the right of asylum, and all who are devoted to that traditional great policy of this country, to vote against a measure which renders it possible that mere officialdom shall be able to exclude the political refugee from this country ... I have inherited traditions which compel me to vote against a measure which I think would tend to impair the world-wide and historical reputation which this country has enjoyed for centuries as being a sanctuary for the politically distressed.¹⁴³

In the end, the 1905 Act barred criminals and those likely to become public charges. But it exempted:

an immigrant who proves that he is seeking admission ... solely to avoid prosecution or punishment on religious or political grounds, or for an offence of a political character or persecution involving danger of imprisonment or danger to life or limb on account of religious belief.¹⁴⁴

Asylum, which historically had sheltered fugitives wanted for extradition, had been reconceived as a defense to exclusion or deportation. Immigration restrictions had the same practical effect as extradition: the return of foreigners to their home state. The traditional rationale for asylum – to protect foreigners from unjust punishment – therefore

applied equally to foreign victims of persecution who were not fugitives, but who merely sought refuge abroad. The persecution requirement served to distinguish among refugees who were deserving of an exemption from the Act's requirements and ordinary immigrants who were not.

A similar pattern unfolded in the United States. Beginning in the late nineteenth century, faced with increasing numbers of immigrants, particularly from Central and Eastern Europe, the United States began for the first time to restrict immigration from Europe. In 1891, Congress passed a measure excluding paupers and other persons likely to become a public charge.¹⁴⁵ This was followed by a nearly twenty-year campaign to enact a statute requiring new immigrants to pass a literacy test. Progressives supported the literacy test on economic grounds, nativists on racialist grounds. Congress first passed a literacy bill in 1895, but it was vetoed by President McKinley; unsuccessful attempts followed in 1906 and 1912 (the latter due to a veto by President Taft).

In 1915, a literacy test was passed yet again, and this time was vetoed by President Wilson on the ground that it "seeks to all but close entirely the gates of asylum which have always been open to those who could find nowhere else the right and opportunity of constitutional agitation for what they conceived to be the natural and inalienable rights of man."¹⁴⁶ Wilson also objected that the literacy requirement excluded people who had been denied the opportunity to become educated, without regard to their natural capacities.

Finally, in 1917, Congress passed a revised version of the bill that exempted from the literacy test victims of religious persecution, "whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against the alien or the race to which he belongs because of his faith."¹⁴⁷ Victims of political persecution, however, received no such exemption; lawmakers feared that the beneficiaries of such an exemption would be radicals whom the United States sought to exclude. And, as pointed out by Jewish groups who supported the exemption for victims of religious persecution, political dissidents were in any event not likely to be illiterate.¹⁴⁸ Interestingly, President Wilson again vetoed the Bill; this time, he *objected* to the exemption for victims of religious persecution on the ground that it forced American officials to perform the "invidious function" of judging other states, thereby risking diplomatic embarrassment or dispute.¹⁴⁹

By the early 1920s, restrictionist sentiments overcame respect for the principle of asylum. Bills enacted in 1921 and 1924 imposed immigration quotas based on national origin; no exception to the quota caps was made for victims of persecution. That policy, together with (until 1935) a strict interpretation of the rule excluding those likely to become public charges, which also had no exception for victims of persecution, tragically limited the number of German Jews accepted by the United States in the years leading up to the Second World War.¹⁵⁰

On the Continent, the story was more complex but the upshot similar: as immigration controls were tightened over the course of the nineteenth century, asylum was reconceived as an exception to those restrictions and was made available to those who would be persecuted were they returned to their countries of origin.

Unlike Britain, countries on the Continent had long policed foreigners within their borders with an eye toward expelling undesirable aliens, such as political dissidents, deserters, peddlers, vagabonds, and beggars. In Austria, a special police division was established in 1794 to register foreigners, and undesirables were expelled if found traveling within the country.¹⁵¹ Similarly, in the German states passport legislation was introduced at the beginning of the nineteenth century and the authorities kept careful track of foreigners' movements in the interior. Travelers staying over night were required to register at the local police station, and police visas were required for onward travel. Deviation from the approved route risked arrest. In larger Prussian cities, any travelers staying longer than a few hours needed to purchase a residence permit to be carried with them at all times.¹⁵² Foreigners could be deported not only for crimes, but also for such offenses as "competing with citizens in overcrowded labour markets, or for becoming a burden on public funds."¹⁵³ Foreign vagrants deported from Bavaria alone between 1836 and 1850 numbered between 5,700 and 12,700 per year.¹⁵⁴

In France, royal decrees dating from the fifteenth century required innkeepers to report the identities of their guests to the authorities, and passports were required of travelers entering and leaving cities.¹⁵⁵ In the 1790s, regulations were strengthened: property owners were required to report the names of foreigners residing or staying in their property; foreigners needed to declare their presence or face expulsion; and passport controls were tightened.¹⁵⁶

However, throughout much of the nineteenth century, the liberal European states – namely, France, the Netherlands, and after 1830,

Belgium – offered aliens subject to expulsion a choice of a border from which to be expelled. As Frank Caestecker has explained, this “provision was the result of a liberal ideology which acknowledged the very different regimes in Europe and the resulting different conceptions of what a crime was.”¹⁵⁷ Because aliens could choose the border from which they would be expelled, the expulsions were not seen as a threat to the principle of asylum: deportees could choose to be expelled to a third country if they would face persecution at home.

In 1849, Prussia began to request that the liberal states expel to it only those foreigners who were either of German origin or who had to pass through the German states to return to their countries of origin and who possessed money for the transit fare. This plea was ignored, and in 1884, the German Reich decided to begin returning all others to the border from which they had entered. This unilateral move forced the liberal states to revise their expulsion policies, since it was no longer possible to offer all expellees the border of their choice. Over the next twenty years, France, Belgium, and the Netherlands entered into bilateral treaties with Germany and with each other providing that third-country nationals could not be expelled into neighboring states without the consent of those states. At the same time, the treaties obligated states to accept their own nationals and to give free passage to others who needed to pass through to reach their countries of origin.¹⁵⁸ Foreigners facing expulsion were now returned to their states of origin.

As Caestecker explains, this change in expulsion policy forced states to reconceive of asylum as a subset of immigration policy. When refugees facing expulsion could choose their border, expulsion did not necessarily expose them to persecution. But “from the 1880s onwards, when unwanted aliens were deported to their country of origin which was for most refugees their country of persecution, this possibility was excluded.”¹⁵⁹ Asylum became the mechanism by which an alien could claim a reprieve from expulsion to his state of origin, and to qualify, he needed to demonstrate a fear of persecution. The liberal regimes, Caestecker reports:

immediately and explicitly forbade the expulsion of refugees ... Special facilities were provided for the (politically) persecuted. All aliens who were to be expelled had to be questioned about whether they were pursued for political reasons. If so, the central authorities had to be informed about those who claimed to be refugees. Their allegations had to be verified and genuine refugees were not to be deported.¹⁶⁰

In one sense, this new arrangement left refugees better off: whereas before they faced expulsion, albeit to a country other than their country of origin, now they could avoid deportation altogether through asylum.¹⁶¹

Conclusion

The historical account put forward in this chapter offers a needed response to those who criticize the persecution requirement as a Cold War creation, designed to advance the ideological interests of the West by directing attention to Soviet deficiencies. While the West undoubtedly viewed the 1951 UN Convention's persecution requirement as to its political advantage, it is mistaken to think that the standard was an ad hoc invention crafted from whole cloth for partisan purposes. The Convention, which was born on the ashes of the Holocaust, did not define into existence a "new" refugee. To the contrary, historically, asylum and persecution were inextricably connected: asylum's function was to protect unfortunates from specifically political harms; granting asylum reflected the judgment that the state of origin had abused its authority; and asylum was connected to other tactics for reforming or challenging abusive regimes (e.g., military intervention for Grotius, support for liberal revolutionaries by the European liberal states in the nineteenth century).

Originally, asylum served this function as a defense to extradition and was focused largely on protecting innocent fugitives from unfair criminal procedures. But beginning in the late eighteenth and early nineteenth centuries, asylum's focus shifted from procedural criminal justice to the promotion of substantive political morality: asylum benefited "political offenders" who had justifiably rebelled against autocratic rule and were sought for extradition; and it no longer benefited ordinary criminals who might be subjected to unfair criminal procedures, because the "rule of non-inquiry" forbade courts from inquiring into the criminal procedure of other states. Asylum's focus on political morality was not altogether novel. It was in harmony with the ancient Greek practice and the theory espoused by Grotius, and it was also consistent with the general historical function of asylum to immunize people who faced unjust punishment. But, nonetheless, it did mark a shift in emphasis: asylum now protected *refugees*, not fugitives.

That trend was reinforced as states began to close their borders over the course of the nineteenth century. As states began to return unwanted foreigners to their countries of origin, asylum was reconceived as a

defense to deportation. But its function remained the same: a reprieve for those who would face unjustified punishment if returned to their respective states of origin. The eventual identification of “persecution” as the essential criterion for refugee status in the Convention thus followed naturally from asylum’s historical purpose (a tradition that was tragically displaced by xenophobia and isolationism during the years leading up to the Second World War). In short, the political conception of asylum has deep historical roots.

Of course, that does not alone provide an argument for retaining a political view of asylum today, as against a humanitarian alternative. But it does invite us to take seriously the question of whether there might be sound moral and practical reasons to do so.

Notes

1. James C. Hathaway, *Law of Refugee Status* (Toronto: Butterworths, 1991), pp. 1, 8.
2. Gervase Coles, “Approaching the Refugee Problem Today” in Gil Loescher and Laila Monahan (eds.), *Refugees and International Relations* (New York: Oxford University Press, 1989), pp. 374–5. See also: Gil Loescher, *Beyond Charity* (New York: Oxford University Press, 1993), p. 57, who claims that the persecution requirement was designed to fit a Western notion of the refugee.
3. Jerzy Sztucki, “Who is a Refugee? The Convention Definition: Universal or Obsolete?” in Frances Nicholson and Patrick Twomey (eds.), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (Cambridge University Press, 1999), p. 55.
4. Hathaway, *Law of Refugee Status*, p. 8.
5. Claudena M. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (New York: Oxford University Press, 1995), p. 112 n. 33.
6. Michael Marrus, *The Unwanted* (New York: Oxford University Press, 2002), pp. 7, 9. See also: Loescher, *Beyond Charity*, p. 33, who claims that refugees are a “distinctly modern problem” and that before the twentieth century, “asylum was a gift of the crown, the church, and municipalities; and fugitive individuals and groups could expect no response to claims of asylum or protection premised on human or political right.”
7. Ben Vermeulen *et al.*, “Persecution by Third Parties,” unpublished paper commissioned by the Research and Documentation Centre of the Ministry of Justice of the Netherlands, May 1998, p. 17. See also: Gilbert Jaeger, “A Comment on the Distortion of the Palliative Role of Refugee Protection,” *Journal of Refugee Studies*, 8 (1995), p. 300, and Walter Kälin, “Non-State

- Agents of Persecution and the Inability of the State to Protect,” *Georgetown Immigration Law Journal*, 15 (2001), p. 423.
8. Astri Suhrke, “Global Refugee Movements and Strategies of Response” in Mary M. Kritz (ed.), *U.S. Immigration and Refugee Policy: Global and Domestic Issues* (Lexington, MA: Lexington Books, 1983), p. 159.
 9. Ulrich Sinn, “Greek Sanctuaries as Places of Refuge” in Nanno Marinatos and Robin Hägg (eds.), *Greek Sanctuaries: New Approaches* (London: Routledge, 1993), p. 90.
 10. After 300 BC, cities also began to declare themselves “inviolable,” although there is considerable scholarly debate over exactly what purpose this served. Some have argued that claims of inviolability resulted from mutual defense agreements between states or non-belligerency agreements between coastal cities and pirates. See Rob W.M. Schumacher, “Three Related Sanctuaries of Poseidon” in Marinatos and Hägg, *Greek Sanctuaries*, p. 69. More recently, Rigsby has called this conventional wisdom into question, arguing that cities declared themselves inviolable for honorific or expressive purposes, in the same way that an American city might declare itself a nuclear free zone. Kent J. Rigsby, *Asyilia: Territorial Inviolability in the Hellenistic World* (Berkeley, CA: University of California Press, 1996), p. 24. In any event, unlike the inviolability of sanctuaries, the inviolability of cities did not correspond to a practice of supplication.
 11. Schumacher, “Three Related Sanctuaries,” pp. 68 et seq.
 12. Sinn, “Greek Sanctuaries,” p. 91.
 13. *Ibid.*
 14. Rigsby, *Asyilia*, p. 10.
 15. Quoted in Rigsby, *Asyilia*, p. 10 n. 33.
 16. Quoted in Rigsby, *Asyilia*. For a full account of the story of Pausanias, see Thucydides, *History of the Peloponnesian War*, trans. Rex Warner (New York: Penguin, 1972), Book 1, paragraphs 128–35.
 17. Tacitus, *Historical Works, Vol. 1: The Annals*, trans. Arthur Murphy (London: J. M. Dent, 1908), p. 168.
 18. S. Prakash Sinha, *Asylum and International Law* (The Hague: Martinus Nijhoff, 1971), p. 9.
 19. Although there was no duty of extradition in ancient Greece, it nonetheless often took place by the consent of both states, particularly in the case of offenses of a public character. See Coleman Phillipson, *International Law and Custom of Ancient Greece and Rome*, vol. 1, 1911 (reprinted Buffalo, NY: William S. Hein, 2001), p. 361; Rigsby, *Asyilia*, p. 11; and Christopher L. Blakesley, “The Practice of Extradition from Antiquity to Modern France and the United States: A Brief History,” *Boston College International and Comparative Law Review*, 4 (1981), pp. 41 et seq.

20. Rigsby explains, “The legal immunity of a Greek temple is a negative fact, the absence of secular jurisdiction; so too the legal immunity of a city with respect to other sovereign states, which had no say about what went on within its boundaries ... In cases of supplication doubtless Zeus Xenios was watching, and the decision was not idle. But no foreign government had a say in the matter.” Rigsby, *Asylia*, pp. 9–10.

A number of ancient Greek plays reflect that principle. In Sophocles’ *Oedipus at Colonus*, for example, the Athenian ruler, Theseus, tells Creon, who has attempted to tear Oedipus away from the altar, “[Y]ou’re plundering me, plundering our gods, / dragging away their helpless supplicants by force. / Never, I tell you, if I’d set foot on your soil, / even if I’d the most just claims on earth – / never without the sanction of your king, / ... I’d never drag and plunder. / I would know how a stranger should conduct himself / in the midst of citizens.” Sophocles, *Oedipus at Colonus*, trans. Robert Fagles as *Three Theban Plays* (New York: Penguin, 1982), lines 1049–56. Similarly, in Euripides’ *Heracleidae*, the supplicant Iolaus tells his foreign pursuer, Copeus, that “I’m well protected by / God’s temple and this free and sovereign state,” and the Chorus rebukes Copeus for trying to rip Iolaus from the altar. “Instead of kidnapping these refugees / So brazenly,” it scolds, “you should have seen the king / And shown respect for Athens’ sovereign rights.” Euripides, *The Heracleidae*, trans. David Grene and Richard Lattimore as *Four Tragedies* (University of Chicago Press, 1955), lines 61–2, 111–13.

21. Rigsby explains that “this act was portable and not restricted to sacred space.” *Asylia*, p. 10.
22. I am indebted to Matthew Stephenson for helpful discussions on this point.
23. Aeschylus, “Libation Bearers,” in *The Oresteia*, trans. Robert Fagles (New York: Penguin Books, 1984), lines 1032–60.
24. Aeschylus, “Eumenides,” in *ibid.*, lines 234, 206–7.
25. *Ibid.*, lines 503–5, 613–14, 620 et seq., 767, 805, 898–900.
26. Schumacher, “Three Related Sanctuaries,” p. 74.
27. Aeschylus, “Eumenides,” lines 451–4.
28. Euripides, *The Heracleidae*, lines 137–43, 186–9.
29. Aeschylus, *The Suppliants*, trans. Peter Burian (Princeton University Press, 1991), lines 326, 320–3, 374–8.
30. *Ibid.*, lines 940–2.
31. Herodotus, *The History*, trans. David Grene (University of Chicago Press, 1987), at I.157–61. For another historical example of such a dilemma, see Thucydides’ account of the flight of Themistocles. Thucydides, *History*, paragraphs 135–8.

32. Sinn, "Greek Sanctuaries," p. 92.
33. Ibid.
34. This section is deeply indebted to Karl Blaine Shoemaker, "Sanctuary Law: Changing Conceptions of Wrongdoing and Punishment in Medieval European Law," unpublished Ph.D. thesis, University of California-Berkeley (2001).
35. The practice of asylum, of course, is part of Rome's founding myth: Romulus supposedly built the population of his city by turning Palatine Hill into an asylum for fugitives.
36. Justinian, *Digest*, trans. Alan Watson as *Digest of Justinian*, vol. 1 (Philadelphia, PA: University of Pennsylvania Press, 1998), at 1.1.6.1.
37. Ibid. at 1.11.4.1.3–8.
38. Ibid. at 1.21.1.17.12.
39. Ibid. at 1.1.12.1.1.
40. Ibid. at 1.1.6.2; see also Gaius, *The Institutes of Gaius*, trans. Francis de Zulueta (Oxford: Clarendon Press, 1946), at 1.53.
41. Justinian, *Code of Justinian*, trans. S.P. Scott as *The Civil Law* (Cincinnati, OH: Central Trust Co., 1932), at 1.6.2.
42. Tacitus, *The Annals*, trans. Henry G. Bohn as *The Works of Tacitus: The Annals*, vol. 1 (Oxford, 1854), at III.36.
43. Ibid. at 1.12.2; see also *Theodosian Code*, 9:45.
44. See Sinha, *Asylum*, pp. 11 et seq., for a discussion of the growth of church sanctuary in the late Roman Empire.
45. Shoemaker, "Sanctuary Law," p. 46.
46. Augustine, "Letter 153," in *Patrologia Latina* 33:653, quoted in Shoemaker, "Sanctuary Law," pp. 48–50.
47. Shoemaker, "Sanctuary Law," p. 116.
48. Sinha, *Asylum*, p. 11.
49. Richard M. Fraher, "Theoretical Justification for the New Criminal Law of the High Middle Ages," *University of Illinois Law Review*, 1984 (1984), p. 580.
50. Ibid.
51. Quoted in Shoemaker, "Sanctuary Law," p. 251.
52. Shoemaker, "Sanctuary Law," p. 253.
53. Sinha, *Asylum*, p. 12.
54. Ibid.
55. M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 3rd edn. (Dobbs Ferry, NY: Oceana Publications, 1996), p. 139.
56. Sinha, *Asylum*, p. 18.
57. Henry IV issued the Edict of Nantes in 1598, which allowed the Protestants and Catholics to both practice their religions freely. The Edict was revoked by Louis XIV in 1685, giving rise to the first

- group to be called “refugees,” Huguenots fleeing renewed Catholic persecution.
58. Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (1625), trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925). On the significance of Grotius, see Hedley Bull, “The Importance of Grotius in the Study of International Relations” in Bull *et al.* (eds.), *Hugo Grotius and International Relations* (New York: Oxford University Press, 1990), pp. 71 et seq. Richard Tuck, *Rights of War and Peace* (New York: Oxford University Press, 1999), was an invaluable reference for this section.
 59. Grotius, *De Jure Belli ac Pacis*, at Prolegomena, paragraph 1.
 60. *Ibid.*, II.21.4.6.
 61. *Ibid.*, II.21.1–4.
 62. Hugo Grotius, *Rights of War and Peace*, trans. A. C. Campbell (Westport, CT: Hyperion Press, 1979), II.20.1.
 63. *Ibid.*, II.20.9.
 64. Grotius, *De Jure Belli ac Pacis*, II.21.5.1.
 65. Grotius, *De Jure Belli ac Pacis*, II.21.5. The Campbell translation, see Grotius, *Rights of War and Peace*, II.21.5, renders “*immerito odio laborant*” as “unmerited persecution,” a translation considerably more favorable from the point of view of my argument. But I have chosen nonetheless to stick to the more literal “undeserved enmity.”
 66. Thanks to Matthew Stephenson for an invaluable and inspirational discussion on this point.
 67. Grotius, *De Jure Belli ac Pacis*, II.21.5.
 68. *Ibid.*
 69. Grotius, *Rights of War and Peace*, II.21.6.2, citing Aeschylus, *The Suppliants*, for support.
 70. *Ibid.*, II.20.49–50.
 71. *Ibid.*, II.25.8.
 72. Grotius, *De Jure Belli ac Pacis*, II.21.5.1.
 73. Grotius, *Rights of War and Peace*, Prolegomena, paragraph 30 (“*Nunc quod mihi indigne e patria ... ejecto ...*”). For details of Grotius’ flight to France, see W. S. M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet and Maxwell, 1925), pp. 161–3.
 74. Two passages could be viewed as inconsistent with the interpretation of Grotius that I have offered. First, Grotius stated, “Nor is it contrary to the relations of amity to receive individual subjects, who wish to remove from the dominions of one power to those of another. For that is not only a principle of natural liberty, but favourable to the general intercourse of mankind. On the same grounds a refuge given to exiles may be justified.” Grotius, *Rights of War and Peace*, III.20.41. Elsewhere, Grotius argued, “To those who pass through a country, by water or by land, it ought to be

permissible to sojourn for a time, for the sake of health, or for any other good reason ... Furthermore a permanent residence ought not to be denied to foreigners who, expelled from their homes, are seeking a refuge, provided that they submit themselves to the established government ...” Grotius, *De Jure Belli ac Pacis*, II.2.15–16.

These passages have been interpreted as endorsing a politically neutral conception of asylum, born of compassion for exiles. Atle Grahl-Madsen, *The Status of Refugees in International Law*, vol. 2 (Leiden: A. W. Sijthoff, 1972), p. 26. But that reading confuses hospitality with asylum. Receiving sojourners and exiles according to a principle of hospitality is not the same as receiving supplicants for asylum. Exiles had been expelled and were no longer counted as members of their states, often for having committed a crime. They needed to find somewhere else to live. But they did not necessarily flee from “unmerited persecution,” since banishment was sometimes viewed as a justified punishment, and they were not wanted for extradition, as refugees or supplicants were. Thus, it was not “contrary to the relations of amity” between states to receive exiles who had been justly banished for crimes they committed, because such exiles were no longer wanted by their state of origin. They had been rightfully excommunicated, as it were. By contrast, receiving *supplicants* wanted for extradition was justified only if the punishment were “unmerited” – a determination that rested upon a controversial judgment about the requesting state’s exercise of authority and implied condemnation of that state.

75. Grotius, *Rights of War and Peace*, II.25.8.
76. This is because in a state of nature, states act as the executors of the natural law: “[K]ings and those who are possessed of sovereign power have a right to exact punishment not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects.” Grotius, *De Jure Belli ac Pacis*, II.20.40.
77. Grotius, *Rights of War and Peace*, II.25.8.
78. Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1672), trans. C. H. Oldfather and W. A. Oldfather (Oxford: Clarendon Press, 1934).
79. Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 edn.), trans. Joseph H. Drake (Oxford: Clarendon Press, 1934).
80. Emer de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), trans. Charles G. Fenwick (Geneva: Slatkine Reprints – Henry Dunant Institute, 1983).
81. Pufendorf, *De Jure Naturae*, VIII.3.7.
82. Pufendorf argued that a state is only justified in going to war when it *itself* has been harmed. See Pufendorf, *De Jure Naturae*, VIII.3.7, VIII.6.5, and

- VIII.6.14. Wolff agreed, as did Vattel. See Wolff, *Jus Gentium*, at sections 169, 256–8, and 636; and Vattel, *Law of Nations*, II.1.7 and II.4.54–5.
83. See Pufendorf, *De Jure Naturae*, VIII.6.14.
84. *Ibid.*
85. *Ibid.*, III.3.9.
86. These sources include the *Odyssey*, from which Pufendorf draws the quotation, “In a brother’s place stands the stranger and the suppliant”; and Lucian’s *De Dea Syria*, which, Pufendorf says, lists “among the sins for which mankind was destroyed in Deucalion’s flood ... ‘They did wicked deeds, for they kept not their oaths, nor harboured strangers, nor received fugitives.’ ” Finally, Pufendorf cites Philo Judaeus, *On the Life of Moses*, who, Pufendorf says, “remarks that ‘strangers, in my opinion, should be looked upon as refugees.’ ” Pufendorf, *De Jure Naturae*, III.3.9.
87. Grotius, *Rights of War and Peace*, III.20.41.
88. Pufendorf, *De Jure Naturae*, III.3.9.
89. *Ibid.*, III.3.10.
90. *Ibid.*
91. Wolff, *Jus Gentium*, section 151.
92. *Ibid.*, section 150. Above I criticized Grahl-Madsen for conflating Grotius’ distinction between supplicants (who flee to escape punishment) and exiles (who are banished). See note 74, above. Wolff, unlike Grotius, used the term “exile” to refer both to a “voluntary” exile, who “for the purpose of escaping a penalty or disaster departs of his own accord from the place where he has domicile,” and to an “involuntary” exile, who is “compelled to depart by the decree of a judge or order of a ruler.” Wolff, *Jus Gentium*, section 145.
93. Wolff, *Jus Gentium*, section 147.
94. *Ibid.*, section 150.
95. *Ibid.*, section 149.
96. *Ibid.*, section 148.
97. Vattel, *Law of Nations*, I.19.230.
98. *Ibid.*, I.19.230; see also *ibid.*, I.19.228, 232.
99. *Ibid.*, I.19.231.
100. *Ibid.*, II.9.125.
101. *Ibid.*, I.19.232–233 and II.6.76. Vattel added, however, that “states which are on more intimate terms of friendship and comity” extradite even those wanted for misdemeanors or civil prosecution. He thought that this “practice is an excellent one, for it enables neighboring States to live together in peace, so that they seem to form but one Republic.” *Ibid.*, II.6.76.
102. *Ibid.*, II.6.76.

103. The *delicta majora* approach to extradition was not merely theoretical: many treaties were designed along these lines. For example, the Webster-Ashburton Treaty between the United States and Britain, enacted in 1842, identified seven offenses which were extraditable: murder; assault; forgery; counterfeiting; piracy; robbery; and arson. These seven were chosen because they were thought to form a *delicta majora*. See Clive Parry (ed.), *British Digest of International Law*, Part VI (London: Stevens and Sons, 1965), pp. 653–4.
104. *American State Papers, Documents, Legislative and Executive, of the Congress of the United States*, vol. 1, 1789–1815 (Washington, DC: Gales and Seaton, 1832), p. 258 (emphasis in original).
105. Vattel, *Law of Nations*, II.6.76. This quote refers to the case where one extradites one's *own* citizens to a foreign state for punishment. But the same argument might be thought to apply to the case where a foreign citizen is returned to his own state for punishment, since Vattel thought that “it is proper that the guilty should be convicted after a trial conducted with due process of law.” *Ibid.*, I.19.233.
106. *Ibid.*, II.6.76.
107. Christopher H. Pyle, *Extradition, Politics, and Human Rights* (Philadelphia, PA: Temple University Press, 2001), pp. 85–6.
108. See Paul O'Higgins, “History of Extradition in British Practice, 1174–1794,” *Indian Yearbook of International Affairs*, Part II (1964), pp. 78–115; Parry, *British Digest*, pp. 444–5; and Blakesley, “Practice of Extradition.”
109. Coke thought that the extradition of English subjects contravened Chapter 29 of the Magna Carta, which guaranteed that “no freeman shall be taken imprisoned or disseised of his freehold ... but by lawful judgment of peers or the law of the land.” Commenting on that clause, Coke wrote, “By the Law of the Land no man can be exiled, or banished out of his native Countrey, but either by authority, or in the case of abjuration for felony by the Common Law ...” Sir Edward Coke, *The Second Part of the Institutes of the Laws of England*, 5th edn. (London: Streater *et al.*, 1671), p. 47. Abjuration was a practice that allowed accused felons who had taken sanctuary in a church to receive safe passage abroad, and immunity from future requests for extradition, by leaving England from the nearest port. For a discussion of these points, see Pyle, *Extradition*, pp. 10 and following.
110. Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: Flesher, 1644), p. 180 (citing Deuteronomy 23:15).
111. Habeas Corpus Act of 1679, 31 Ch. 2 c. 2, section XII.
112. Thomas Jefferson, “Letter to Washington, Nov. 7, 1791,” in Thomas Jefferson Randolph (ed.), *Memoir, Correspondence, and Miscellanies*

- from the *Papers of Thomas Jefferson*, vol. 3, 2nd edn. (Boston, MA: Gray and Bowen, 1830), p. 131.
113. Andreas Fahrmeir, *Citizens and Aliens: Foreigners and the Law in Britain and the German States 1789–1870* (New York: Berghahn Books, 2000), p. 185.
 114. *Ibid.*, p. 186.
 115. Jefferson, “Letter to Washington,” p. 131.
 116. Thomas Jefferson, “Letter to Governor Pinckney, April 1, 1792” in Randolph, (ed.), *Memoir*, vol. 3, p. 160 (emphasis added).
 117. *State Papers and Publick Documents of the United States: 1789–96*, vol. 1 (Boston, MA: T.B. Wait and Sons, 1815), p. 146 (emphasis added).
 118. Cesare Beccaria, *On Crimes and Punishments* (1764), trans. Henry Paolucci (Indianapolis, IN: Bobbs-Merrill, 1963), p. 60.
 119. *Ibid.*, p. 61.
 120. Grotius, *De Jure Belli ac Pacis*, II.21.5. The same point was made by Thomas Hobbes, *Leviathan* (New York: Penguin, 1977), pp. 347, 350–1. For a brief discussion of this issue relating to asylum, see Sinha, *Asylum*, pp. 170–1.
 121. For a discussion of the emergence of the rule of non-inquiry, see Pyle, *Extradition*, pp. 118–29.
 122. “Il donne asile aux étrangers bannis de leur patrie pour la cause de la liberté.” Constitution de l’An I, art. 120 (1793).
 123. Sinha, *Asylum*, pp. 171–2.
 124. *Ibid.*, p. 172.
 125. Pyle, *Extradition*, p. 83.
 126. *Ibid.*, p. 80.
 127. Quoted in Fahrmeir, *Citizens and Aliens*, pp. 185–6 (bold emphasis added).
 128. Pyle, *Extradition*, p. 85
 129. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton University Press, 1961), p. 383; see also: Christine Van den Wijngaert, *The Political Offence Exception to Extradition* (Boston, MA: Kluwer-Deventer, 1980), p. 3.
 130. Sir James Fitzjames Stephens, *History of the Criminal Law of England*, vol. 2 (London: Macmillan, 1883), p. 70.
 131. *Ibid.*, p. 71.
 132. See generally Van den Wijngaert, *The Political Offence Exception*.
 133. Quoted in Pyle, *Extradition*, p. 88.
 134. *Ibid.*
 135. *American State Papers*, vol. 1, p. 258.
 136. *In re Meunier* [1894] 2 Q.B. 415.

137. *Matter of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), offers a modern example of the interrelationship between extradition and asylum. Doherty, an IRA terrorist wanted by Britain for the murder of a British officer during an ambush, was determined by a US court to be non-extraditable; the murder he had committed was regarded as a “political offense” because it was committed amidst a political uprising. But because he had entered the United States illegally, and because he was ineligible for asylum on account of his terrorist activities, he was deported to Ireland, which then extradited him to Britain. See also *INS v. Doherty*, 502 U.S. 314 (1992).
138. Margrit Schulte Beerbühl, “British Nationality Policy During the Napoleonic Wars” in Andreas Fahrmeir *et al.* (eds.), *Migration Control in the North Atlantic World* (New York: Berghahn Books, 2003), p. 57.
139. *Ibid.*, quoting *The Parliamentary History of England, from the Earliest Period to the Year 1803*, vol. 30, p. 188.
140. *Ibid.*, p. 58.
141. *Parliamentary Debates* (2nd series), vol. 7 (1822), p. 1442, quoted in Bernard Porter, *The Refugee Question in Mid-Victorian Politics* (Cambridge University Press, 1979), p. 68.
142. Fahrmeir, *Citizens and Aliens*, p. 194.
143. *Parliamentary Debates* (4th series), vol. 145, p. 793, quoted in David Feldman, “Changes in Nineteenth-Century Immigration Controls” in Fahrmeir *et al.* (eds.), *Migration Control*, at p. 168.
144. 5 Edw. VII c. 13; N. W. Sibley and Alfred Elias, *The Aliens Act and the Right of Asylum* (London: W. Clowes and Son, 1906), p. 85.
145. 26 Stat. 1084.
146. “Veto Message, January 28, 1915,” *Compilation of the Messages and Papers of the Presidents*, vol. 18 (New York: Bureau of National Literature, 1917), p. 8043.
147. 39 Stat. 874.
148. Aristide R. Zolberg, *A Nation By Design: Immigration Policy in the Fashioning of America* (Cambridge, MA: Harvard University Press, 2006), p. 240.
149. Quoted in Zolberg, *A Nation by Design*, p. 240.
150. *Ibid.*, pp. 273, 277.
151. Birgitta Bader-Zaar, “Foreigners and the Law in Austria” in Fahrmeir *et al.* (eds.), *Migration Control*, p. 143.
152. Fahrmeir, *Citizens and Aliens*, pp. 107–8.
153. *Ibid.*, p. 187.
154. *Ibid.*, p. 191.
155. Olivier Faron and Cyril Grange, “Foreigners in Late Eighteenth-Century Paris” in Fahrmeir *et al.* (eds.), *Migration Control*, p. 40.

156. *Ibid.*, p. 41.
157. Frank Caestecker, “The Transformation of Nineteenth-Century West European Expulsion Policy, 1880–1914” in Fahrmeir *et al.* (eds.), *Migration Control*, p. 123.
158. *Ibid.*, pp. 126–7.
159. *Ibid.*, p. 128.
160. *Ibid.*, pp. 128–9.
161. *Ibid.*, p. 127.